

**THE LEGAL FRAMEWORK OF CONCESSION AGREEMENTS IN  
NIGERIAN PORTS**

**by**

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## DECLARATION

I, TAJUDEEN SANNI with student number s213202654, hereby declare that the thesis for LL D (Public Law) to be awarded is my own work and that it has not previously been submitted for assessment or completion of any post graduate qualification to another University or for another qualification.



.....  
TAJUDEEN SANNI

.....  
DATE

## **DEDICATION**

To God, the Most High.

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## LIST OF ABBREVIATIONS

AAMA	Association of African Maritime Administrations.
ABTL	Apapa Bulk Terminal Ltd.
ACA	African Union Constitutive Act.
AG	Attorney General.
AIMS	Africa Integrated Maritime Strategy.
AMTC	African Maritime Transport Charter.
APMT	AP Moller Terminal Ltd.
AU	African Union.
B-L-T	Build-Lease-Transfer.
B-O-O-T	Build-Own-Operate-Transfer.
BOT	Build Operate and Transfer.
BPE	Bureau of Public Enterprises.
B-T-O	Build-Transfer- Operate.
CAMA	Company and Allied Matters Act.
DBOT	Design Build Operate and Transfer.
ECOWAS	Economic Community of West African States.
EEZ	Exclusive Economic Zone.
EIMS	ECOWAS Integrated Maritime Strategy.
EPRA	Electricity Power Reform Act.
EU	European Union.
FLT	Federal Lighter Terminal.
FOT	Federal Ocean Terminal.
FPZ	Free Port Zone .
FRA	Fiscal Responsibility Act.
FRA	Fiscal Responsibility Act.
GATT	General Agreement on Trade and Tariff.
GM	General Manager.
GNDL	Green view Development Nigeria Ltd.
ICRC	Infrastructure Concession Regulatory Commission.

ICRCA	Infrastructure Concession Regulatory Commission Act.
IMO	International Maritime Organization.
INEC	Independent National Electoral Commission.
ISPS	International Ship and Port Security Code.
ISS	Institute of Security Studies.
JSC	Justice of the Supreme Court.
LFN	Law of Federation of Nigeria .
LOP	Lease- Operate –and- Transfer.
LOSC	Law of the Sea Convention.
LOT	Lease-Operate-Transfer.
MFN	Most Favoured Nations.
NAFCON	National Fertilizers Company of Nigeria.
NCP	National Council on Privatization.
NEED	National Economic Empowerment and Development.
NIIM	National Integrated Infrastructure Master plan.
NIMASA	Nigerian Maritime Administration and Safety Agency.
NOTAP	National Office for Technology Acquisition.
NPA	Nigerian Ports Authority.
NPAA	Nigeria Ports Authority Act.
NPHA	Nigerian Ports and Harbour Authority.
NPHAA	Nigeria Ports and Harbours Authority Act.
NPHB	Nigerian Ports and Harbours Authority Bill.
NPPP	National Policy on Public Private Partnerships.
NSC	Nigerian Shippers Council.
NTCB	National Transport Commission Bill.
NWLR	Nigeria Weekly Law Report.
OBC	Outline Business Case.
OECD	Organization of Economic Cooperation and Development.
PCA	Privatisation and Commercialisation Act.



PHAB	Ports and Harbours Authorities Bill.
PMAWCA	Port Management Association of West and Central Africa.
PNPHA	Proposed National Ports and Harbour Authority.
PNTC	Proposed National Transport Commission.
PPA	Public Procurement Act.
PPP	Public-Private Partnership.
PTML	Port and Terminal Multiservice Limited.
RORO	Roll on Roll off.
R-O-T	Rehabilitate–Operate-Transfer.
SAN	Shipping Association of Nigeria.
SOLAS	International Convention for the Safety of Life at Sea.
TCIP	Tin Can sand Port.
TEAEC	Treaty Establishing African Economic Community.
TSC	Territorial Sea Convention.
UCRC	Utilities Charges Regulatory Commission.
UN	United Nations.
UNCITRAL	United Nations Conference on International Trade Law.
UNCTAD	United Nations Convention on Trade and Development.
URCA	Utilities Charges Regulatory Commission Act.
WACA	West African Court of Appeal.
WTO	World Trade Organization.

## SUMMARY

The thesis examines the legal framework for concession agreements in Nigerian ports. The principal question is whether the legal framework for concession in ports is adequate. In order to answer this question, a number of related questions are raised and answered by analysis of laws and proposed laws related to ports.

One question relates to what laws regulate concession in Nigeria. The thesis submits that a number of laws governs concession, the principal one being the Infrastructure Concession Regulatory Act (ICRCA). The Act provides that Federal Government agencies may grant the private sector concession for the financing, construction and maintenance of their infrastructure. In order to examine what this means for the port sector, the thesis examines how concession is being currently implemented in the ports. It is pointed out that under concession policy, a whole lot of operational duties which used to be carried out by the Nigerian Ports Authority (NPA) were being transferred to private sector in the new port governance paradigm. For this purpose, the possession of key NPA assets such as terminals for handling cargos were being transferred to the private sector vide concession agreements. The official position is that provisions in the Nigeria Ports Authority Act (NPAA) which allow the NPA to grant leases provide justification for the concession agreement. The concession policy also appoints the Nigeria Shippers Council (NSC) as the economic regulator of the ports to regulate economic activities such as tariff charged in the port.

The thesis proceeds to examine the question whether port concession as it is being implemented is actually consistent with NPAA and other relevant laws. The thesis submits that stripping the NPA of a whole string of operational duties on the basis of concession is inconsistent with the provisions of NPAA which establishes the NPA as a regulator, operator and landlord of the port. The thesis posits that the ICRCA does not mandate the NPA to grant concession but rather leaves the decision to do so to the relevant government agencies such as the NPA. It is further submitted that the provision allowing the NPA to lease out its asset must be read with another provision restricting such leases to assets that are not necessary for the performance of NPA's statutory

duties. The thesis argues that this is based on the canon of statutory interpretation that one section of the law must be read holistically with the other sections. It is further argued that designation of NSC as economic regulator not only runs contrary to the Nigeria Shippers Council Act but also Utilities Charges Regulatory Commission Act (UCRCA) which regulates ports tariff and appoints UCRC as the relevant agency for this purpose.

The thesis proceeds to examine the question whether the proposed laws, Nigeria Port and Harbour Authority Bill (NPHB) which establishes the port authority as the landlord cum regulator of port and the National Transport Commission Bill (NTCB) which establishes port economic regulator provide adequate legal provisions for port concession. The thesis posits that both bills legalize concession for the performance of core port functions by the private sector. However both contain some clauses that run contrary to the objectives stated therein. NPHB, for example, requires that the bill must be read in the context of the specific objective of separating landlord and regulatory duty from cargo-handling functions in the port. In contrast to this, the bill grants the NPA the duty to carry out port business and the powers to run cargo-handling business in addition to its landlord and regulatory functions.

It is proposed that there should be a provision in the port bill providing a separate public company to compete with concessionaires for port businesses while the port authority concentrates on its technical regulatory and landlord duty that will allow it to enter into concession agreements as an independent entity. The thesis makes other proposals for the improvement of the aspects of the bills relating to port concession including inclusion of an outline of terms of concession agreement in the bill, public access to concession agreement, among others. It is recommended that the proposals are considered when the bills are passed into laws and concession agreements renegotiated on the basis of the bills when they become laws.

**Key words: Concession, concession agreements, ports, port governance, Nigeria.**

# CHAPTER ONE

## INTRODUCTION

### 1 Introduction

Ports are vital to global and national economies due largely to their role in both domestic and foreign trade.<sup>1</sup> According to one estimate, about eighty percent of global trade by volume is transported by means of sea.<sup>2</sup> According to the 2050 Africa Integrated Maritime Strategy (AIMS), ninety percent of African trade is conducted by sea.<sup>3</sup> The ports constitute an essential point where transportation vessels can take shelter and be handled.<sup>4</sup> They are the vital links between the sea and the land territory of a state.<sup>5</sup>

A seaport system provides a string of interrelated activities including: ship-harbour interface involving activities such as pilotage, dredging, provision of berth; ship-port interface involving activities such as loading and unloading of goods; and port-land interface with services such as delivering cargo to and from hinterland.<sup>6</sup> State authorities around the world have, over time, played important roles in rendering, supervising, controlling and driving these port activities and services.<sup>7</sup> However in recent times, there has been phenomenal private sector involvement in the performance of many more of the services around the world than had previously been the case. The trend emerged globally in the 1980s, and

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<sup>1</sup> Alexander "Administrative Shortcomings and their Legal Implication in the Context of Safe Ports" 2009 23 *Australian and New Zealand Maritime Law Journal* 11 86.

<sup>2</sup> United Nations Conference on Trade and Development Review of *Maritime Transport* (2012). See also UN Conference on Trade and Development (4<sup>th</sup> Quarter 2007/ 1<sup>st</sup> Quarter 2008) *Transport Newsletter* No 38.

<sup>3</sup> (2013) par 2.

<sup>4</sup> Hercules and Alair "Port Pricing" in Costas (ed) *Handbook of Maritime Economics and Business* (2006) 78.

<sup>5</sup> Johnson *Coastal State Regulation of International Shipping* (2004) 35- 36.

<sup>6</sup> Draft Nigeria National Transport Policy 2010 19.

<sup>7</sup> Vincent "European Union Port Law: The General Principles of European Union Law" in Hooydonk (ed) *European Seaports Law: EU Law of Ports and Port Services and the Port Packages* (2003) 79.

more rampantly, in the 1990s when many governments devolved responsibilities such as operation of terminals to the private sector believing that social and economic welfare would be improved.<sup>8</sup>

Accordingly the roles of the traditional actors in a port are changed and new actors emerged.<sup>9</sup> Port authorities have thus transformed into intermediaries and facilitators of development driven by trade, international terminal operators and global shipping in view of enhanced private participation.<sup>10</sup> Concessioneering of port services is one way through which this is achieved in many countries (including Nigeria).<sup>11</sup> The trend has been graphically described as follows:

“The observed revival in many countries of the concession contract as a legal basis for the private financing of port infrastructure and superstructure is quite remarkable”.<sup>12</sup>

## 2 Background

In 2004, the Nigerian Government, following global trend, decided to embark on one of the most ambitious infrastructures concession programmes ever attempted.<sup>13</sup> By 2006, many long term port concessions had been awarded after the promulgation of Infrastructure Concession Act 2005 ,which “provides for the participation of private sector in financing the construction, development,

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<sup>8</sup> Mary “Port Governance as a Tool of Economic Development :Revisiting the Question” in Tabwoolee and Cullinane 2016 2 *Dynamic Shipping and Port Development in the Globalised Economy* 128 - 129.

<sup>9</sup> Wilmsemeier and Jason “Container Ports in Latin America: Challenges in a Changing Global Economy” in Tab-woolee P and Cullinane K (eds) 2016 2 *Dynamic Shipping and Port Development in the Globalised Economy* 12.  
<sup>10</sup> *Ibid.*

<sup>11</sup> Maria *Port Management and Operations* (2015) 23.

<sup>12</sup> Hooydonk *On the Anomalies of Port Law* 18.

<sup>13</sup> Nigeria started the process of extensive privatization in the economy in 1986. The Technical Committee for Privatization and Commercialisation, which was created later to oversee the process, had been in charge of privatization and commercialization in the Nigerian economy in general as per the powers conferred on it by section 3 of Privatisation and Commercialisation Decree No 25 of 1988 (Cap 369 Laws of Federation of Nigeria, 1990) ,a law repealed by Bureau of Public Enterprises Decree No 78 of 1993 which created the then Bureau of Public Enterprise. This last Decree has been amended to Public Enterprise(Privatisation and Commercialisation) Act 28 of 1999(cap P38 Law of Federation of Nigeria(LFN)2004). See further Oghojafor , Kuye and Alaneme “Concession As a Strategic Tool for Ports Efficiency: An Assessment of Nigerian Ports” 2012 2 *American Journal of Business and Management* 130.

operation, or maintenance of infrastructure or development projects of the Federal Government through concession or contractual arrangements; and the establishment of the Infrastructure Concession Regulatory Commission to regulate, monitor and supervise the contracts on infrastructure or development projects".<sup>14</sup> New legislative bills governing the port sector were placed before the National Assembly.<sup>15</sup> This was the result of an inquiry commissioned by the government.<sup>16</sup> The inquiry report noted that the Port Authority was responsible for both daily operations and regulation of the ports.<sup>17</sup> The report further noted that ministerial authority was required in the Port Act for virtually all major decisions.<sup>18</sup> The implication of this, according to the report, is that key decisions were slowed down by bureaucratic delay.<sup>19</sup> One of the report recommendations was for Nigerian government to move the ports-many of which were based on public service port governance model and a few others tool port model - to landlord port

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<sup>14</sup> See the Explanatory memorandum to the Infrastructure Concession Regulatory Commission Act 2005.

<sup>15</sup> Examples of such bill which are of major interest in this thesis are the following Bills National Transport Commission Bill, 2016 and Nigerian Ports and Harbours Authority Bill, 2015. See National Assembly: <http://www.nassnig.org/document/download/8313> (Accessed on 17-7-2017); National Assembly; <http://www.nassnig.org/document/download/8345> (Accessed on 17-7-2017).

The older version of the Bills are the National Transport Commission Bill,2008 and Ports and Harbour Bill,2006.); National Assembly National Transport Commission Bill 2008 [www.nass.gov.ng/document/download/79](http://www.nass.gov.ng/document/download/79)(accessed 5-7 See National Assembly Port and Harbour Bill 2006 [www.nassnig.org/document/download/953](http://www.nassnig.org/document/download/953)(accessed on 5-7-2016-2016).

<sup>16</sup> Dutch Royal Haskoning was commissioned to carry out an inquiry. Sarumi *Port Concessioning: Legal Framework and Challenges* Paper presented at Conference on Maritime Law for Judges (July 2008) 3 9.A similar inquiry was commissioned in 2003 by Bureau of Public Enterprise which employed CPCS Transcom International for the same purpose of Port Reform.

<sup>17</sup> *Ibid.*

<sup>18</sup> S 7 NPA Act outlines the functions of NPA In the exercise of these functions, the minister as per s 124 of the NPA "may give to the Authority directives of a general nature or relating generally to matters to matters of policy with regard to the exercise by the authority of its functions and it shall be the duty of the Authority to comply with the directives". It is in view of provisions like this that the Haskoning report take the position that the minister is given a lot of power; it is debatable whether this is the correct view. See further fn 18 below.

<sup>19</sup> See for example ss 30, 41 and 44 NPA Act .The requirements, as provided by these sections and many others to seek ministerial approval and authority, is believed to cause delay and contributes to standstill in decision making .In fact the minister is seen as being granted so much powers that in terms of s 51 NPA Act, the decision of the Minister on pilotage offences is final and goes beyond judicial oversight. The argument is that saddling a single office with lots of powers and functions could cause delay and logjam in the port system, though this is a problematic point and needs deeper elucidation.

model.<sup>20</sup> Following the recommendation the Nigerian government adopted the landlord model by way of concessioning port terminals, *albeit* without amending the Nigerian Port Authority Act.<sup>21</sup>

## 2.1 Port governance models

The search for an adequate balance between public and private interests, between monopolies and competitive enterprise as well as between the interests of port operators, regulators, owners and users in the management of the ports, is an age-old political and legal issue.<sup>22</sup> Port governance models are the management models adopted to govern these interests especially between public authorities and the private sector.<sup>23</sup> The governance models are based on whether the private or public sector handles management of port services and to what extent.<sup>24</sup> Landlord port model, recommended for Nigeria,<sup>25</sup> is one of the four renowned models normally provided for in policy and legal framework for

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<sup>20</sup> It has been argued that reform is needed to beat down administrative burdens on the port system. See Obed *Essentials of Port Reform* (2010) 92.

<sup>21</sup> All Africa “Nigeria: 14 Years after Concessioning, Local Ports Yield No Profit”(undated) <http://allAfrica.com/stories/20170208190277/html> (accessed on 3/8/2013). The Draft Nigeria Transport Policy recommends, for a start, adoption of Landlord Model for Federal Lighter Terminal One, Federal Ocean Terminal One, Kirikiri Lighter Terminal and Public Service Model for Apapa, Lagos Tincan Island Port= Container Terminal Apapa, Roro Terminal, Calaber Port Complex, Port Harcourt Port Complex .See the Draft Transport Policy (12) In practice, there is an overall shift to the landlord model based on the recommendation of the report.

<sup>22</sup> Hooydonk “The Regime of Port Authorities Under European Union Law Including the Analysis of Port Services Directives in” in Hooydonk *et al* (ed)*European Seaports Law: European Law of Ports and Port Services and the Port Packages* 79 83.

<sup>23</sup> An (integrated) coastal management(or governance) paradigm (port system inclusive) comprises three basic interrelated aspects to wit: An array of public goods or policies (and laws); secondly, framework procedures for carrying out and implementing those policies and laws; and thirdly a structure of organizations or agencies which implement and enforce the procedure. James “Coastal Zone Management: A Comprehensive Analysis of National Programmes” 1982 3 *Oceans* 1 252.Port governance (model) organizes these aspects of a port and it is important this is clearly provided in the relevant port instruments without ambiguity. Whatever the models of port governance adopted by a country, clarity in the institutional and legal regime is essential. Port reforms or transformation, like other kind of reforms and changes, bring about adjustments, which change the method of investment and ports operations. This may cause changes in the regime for the sharing of risks among the stakeholders as well as changes in the role and governance structure of relevant medium or agency established for securing public interest oversight and control. There should, therefore, be no room for legal uncertainties in these issues.

<sup>24</sup> Yang *Introduction to Port Management* (2010) 6.

<sup>25</sup> By Haskoning as earlier stated .See footnote 19 above.

management of ports world over.<sup>26</sup> The other three are public service, tool port and private service models.<sup>27</sup> The institutional framework in Central and West Africa, depended primarily on adoption of either the French model (of landlord) or the British model (of public service or tool port),<sup>28</sup> depending on which country colonized a particular port-nation, with the difference between the two models being the level of participation of the public port authority. The four models are briefly discussed.

In a Tool Port model, the authority owns, develops and maintains the port infrastructure as well as the superstructure, including possibly handling port equipment such as cranes and forklifts while the private operators carry out such functions as cargo-handling.<sup>29</sup> In other words, the port authority makes land and superstructure such as buildings available to private service providers particularly, cargo-handling companies.

Public Service Port is where the port authority chooses to provide all the services and facilities for ship and cargoes in the port.<sup>30</sup> This means the port authority owns, maintains and operates every available asset while cargo-handling are carried out through labour employed by the port authorities. The public service port is quite similar to tool port, the difference being that in the latter, cargo-handling, which is the function of a public port authority in a service port, is carried out by private companies.<sup>31</sup> Where the private sector controls infrastructure, the superstructure, port labour and performs much of other Port

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<sup>26</sup> Sarumi *The Role of Nigeria Port Authority in the Present Port Order in challenges of the Nigeria Ports Environment* (2007) 30.

<sup>27</sup> Yang *Introduction to Port Management* (2010) 6.

<sup>28</sup> Harding, Passon and Rabbalard "Port and Maritime Transport in West and Central Africa Subsaharan Africa" in Transport Policy Programme Working Paper 84(2007) 21.

<sup>29</sup> Charles, Kingsley and Ijeoma *The Policy Trajectory of Nigerian Transports: Ports Policy and Administration* (2011) 6. See also Alderton *Port Management and Operation* (1999) 96.

<sup>30</sup> Alderton *Port Management* 96 97.

<sup>31</sup> World Bank "Alternative Port Management Structure and ownership Models" .(undated) [www.ppiaf.org/sites/ppiaf.org/files/documents/toolkits/Porttoolkit/Toolkit/module3/index.html](http://www.ppiaf.org/sites/ppiaf.org/files/documents/toolkits/Porttoolkit/Toolkit/module3/index.html) (accessed 8-8-2015).



functions, it is known as a private service port,<sup>32</sup> focusing on shareholders interest.

Landlord port mainly focuses on the realization of public interest. Landlord ports have a mixed character and aims at striking a balance between the public (port authority) and private port industry interests. Under this arrangement, the port authority acts as the regulator and the landlord while port services are carried out by private companies. <sup>33</sup>The port authority in this model serves as an independent and neutral authority, safeguarding the allocation of sites.<sup>34</sup> The operational and regulatory aspects are separated between public and private sector under the landlord model unlike in the Public Service Port and Tool Port models.

Hence, the different governance models revolve around the role of port authority which is a body with juridical status in charge of management of the port to the extent defined by the rules of its constitution.<sup>35</sup> At one end, total public control over operations, planning and regulation constitutes a public service port and on the other side of the divide, the almost absolute lack of public control and ownership constitutes a fully privatised service port.

Explaining the different port model helps in appreciating the shift in Nigeria from the Public Service and Tool Port models to the Landlord Model by way of concessioning of the port terminals and services. With the concessioning of port services, the Nigerian Ports Authority operates a port governance system

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<sup>32</sup> *Ibid.*

<sup>33</sup> Alderton *Port Management and Operations* 94 . See also Hofras "Public Private Roles in Port Management"(undated)  
[http://peoplehotstra.edu/geotrans/eng/ch4en/conc4en/tbl\\_public\\_private\\_roles\\_ports.html](http://peoplehotstra.edu/geotrans/eng/ch4en/conc4en/tbl_public_private_roles_ports.html)  
(assessed 3-8-2013) which gives another category of port called Corporatized Ports having almost been entirely privatised with the exception that their ownership remains in public hands which assumed a majority shareholders ,a kind of balance between pressure of landlord port and shareholder value of private service ports.

<sup>34</sup> Valkeniers "Is the Cargo Hnadling Market in Europe Competitive?" in Hooydonk *European Seaports Law :EU Law of Ports and the Ports Package*" 309 314.

<sup>35</sup> *Ibid.*

wherein it is today mainly saddled with regulatory activities in the ports statutorily under its control.<sup>36</sup>

## 2.2 The legal regime

The Nigerian ports are primarily governed by the 1999 Constitution of the Federal Republic of Nigeria, the Nigerian Ports Authority Act and related legislations such as regulations and byelaws made thereunder,<sup>37</sup> as well as International Law.

### 2.2.1 International context

Ports operate in an international context.<sup>38</sup> This means developments and activities in Nigerian ports can not only be viewed in terms of Nigerian domestic laws but also in terms of their international legal context. The 1999 Constitution of Nigeria provides that Nigeria respects its international obligations as a Fundamental Objective and Directive Principle of Nigerian Foreign Policy.<sup>39</sup> However, Nigeria's international conventional obligations are required to be domesticated by parliamentary Act before having force of Law locally.<sup>40</sup>

In the case of *Attorney General Federation vs. Attorney General Abia State*,<sup>41</sup> the Nigerian Supreme Court stressed the preeminent place of continental and

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<sup>36</sup> Schedule 2 to the NPA Act lists the ports under NPA as follows : Lagos Port Complex, Tinian Island Port, Lagos, Calabar Port, Delta Port, River Port, Port Harcourt and One Port .See also Nigeria Port Authority (undated) [www.nigeriaports.org/home.aspx](http://www.nigeriaports.org/home.aspx) (accessed 2-10-2015).

<sup>37</sup> An example of such byelaws is Nigeria Ports Authority Docks and Premise LN 135 of 1955 Byelaws which provides for prohibited activities within the port premises.

<sup>38</sup> Power "European Union Ports Law: The General Principles of European Union Law" in Hooydonk et al (eds) *EU Seaports Law* 75. One international aspect is that many ships, ship-owners, ship crews duck in foreign ports or engages in business of import and export. See Cassese *International Law* 86.

<sup>39</sup> See sec 19. Fundamental Objective and Directive Principles of State Policy are non-justiciable sign-post for state policy See chapter 2 1999 Constitution. In deference to this provision Nigeria, for example faithfully implemented the International Court of Justice (1CJ) decision in *Cameroon v Nigeria* (2002)1CJ No 94 in which decided maritime and land boundaries dispute between Nigeria and Cameroon in favour of Cameroon.

<sup>40</sup> Sec 12. See also the case of *Ibidapo v Lufthansa Airlines* (1997) 4NWLR (part 48).

<sup>41</sup> (2001)1 ALLFWLR 1 300. In that case the Nigerian Supreme Court did a prognosis of Law of the Sea Convention (LOSC) 1982, Exclusive Economic Zone Act No 28 of 1978 (Cap 116 Law of Federation of Nigeria(LFN) 2004), Territorial Jurisdiction Act No 123 of 1998 (Cap R5 LFN 2004) Fisheries Act No 71 of 1972(cap C13 LFN 2004) and other instruments while deciding on the littoral boundaries of Nigerian states. See also the case of *Attorney General River States v Attorney General Akwa Ibom* (2011) All FWLR 1063.

global instruments such as the Law of the Sea Convention (LOSC) in the country's relationship with the sea.

### **2 2 1 1 Global**

In terms of the of 1982 UN Convention on the Law of the Sea (LOSC),<sup>42</sup> “the outermost permanent harbour works which form an integral part of harbour system are regarded as forming part of the coast”.<sup>43</sup> The part comprising harbour works such as jetties, quays, wharves, piers and others is what constitute the seaports.<sup>44</sup> It is part of internal waters which is the landward side of the baseline from which the territorial sea is measured.<sup>45</sup> Under International Law of the Sea, a coastal state exercises full sovereignty in its internal waters,<sup>46</sup> of which ports are a part. Further to that, the Convention and Statute on International Regime of Maritime Ports, to which Nigeria is a party, states that “the treaty in no way restricts the liberty of the competent Port authorities to take such measures as they deem expedient for the proper conduct of the business of the port...”.<sup>47</sup> The import of this provision is that the Convention is essentially an agreement on member states' seaports and there was need to make it clear that parties were not deprived of the right to management decisions on their ports. The port reforms above explained were carried out in expression of the right to exercise jurisdiction on internal waters including ports under customary and conventional international law.

### **2 2 1 2 Continental**

At the continental level, Nigeria is a State party to the 2010 Revised African Maritime Transport Charter (AMTC) in which States parties “undertake to

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<sup>42</sup> 1833 UNTS 3, (1982) 21 ILM 1245.

<sup>43</sup> Art 11 LOSC.

<sup>44</sup> Walker (ed) *Definitions for the Law of the Sea* (2012)216.

<sup>45</sup> LOSC Art.8

<sup>46</sup> Dugard *International Law:A South Africa Perspective* (2005) 15 cited in Vrancken *South Africa and the Law of the Sea*(2011)15; See also Churchill and Lowe *Law of the Sea* 2ed(1999) 61. See further the case of *Anglo-norwegian Fisheries Case (UK V Norway)* ICJ Report 1951, 116) and *Qatar V Bahrain* ICJ Report 2001.

<sup>47</sup> See art 3 58 LNTS 285 Adopted 10-12-1923;EIT:26-07-1926.ratified in 1965. See also “Treaties” (undated ) <http://www.austlii.edu.au/au/other/dfat/treaties/1926/14.html> ( accessed 30-3-2015).

cooperate towards the reform and efficiency of port services and promotion of competitiveness of African ports”.<sup>48</sup> In this connection, the state parties shall strive to promote “private sector participation in ports operations”.<sup>49</sup> The Africa Charter on Maritime Security, Safety and Development (ACMSSD) also requires Member States to encourage Public Private Partnership to facilitate modernisation of African maritime industries.<sup>50</sup> This is further reinforced by the 2050 Africa’s Integrated Maritime Strategy (AIMS), which provides for collaboration with the private maritime sector for improved maritime conditions.<sup>51</sup> AIMS’ approach is to have the African Union (AU) “ encourage Member States to develop legal framework for coordinated state interventions at sea and inland waterways..”.<sup>52</sup> In so doing the strategy describes ports and harbour management as a (key) part of African maritime sector,<sup>53</sup> and stresses the importance African maritime infrastructure development.<sup>54</sup>

### 2 2 1 3 Regional

Economic Community of West Africa states undertakes to “evolve common transport and communication policies”<sup>55</sup> and commits to “the adoption of measures for the integration of private sector particularly the creation of an enabling environment for small and medium enterprises”.<sup>56</sup> The Economic Community of West African States (ECOWAS) Integrated Maritime Strategy,

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<sup>48</sup> Art 22(1)(a).The charter is yet to come into force . See also Africa Union “Treaties” (undated) <http://www.au.int/en/treaties> (accessed 11-8-2015).

<sup>49</sup> Art 22(1)(b):article 22(1)(b) provides for promotion of private participation which in addition to commitment to support port administrations(as provided for in art 3(6) could lead to a more efficient port systems(envisaged in art 22(1)(h).

<sup>50</sup> Sec 24(2) ACMSSD 2016.The convention ,adopted on 15<sup>th</sup> October ,2016 under the African Union,is yet to come into force. See [https://au.int/sites/default/files/treaties/33128-treaty-0060\\_-\\_lome\\_charter\\_e.pdf](https://au.int/sites/default/files/treaties/33128-treaty-0060_-_lome_charter_e.pdf) (Accessed on 30-10-2017) Nigeria became a signatory on 15-October,2016. See [https://au.int/sites/default/files/treaties/33128-sl-african\\_charter\\_on\\_maritime\\_security\\_and\\_safety\\_and\\_development\\_in\\_africa\\_lome\\_charter.pdf](https://au.int/sites/default/files/treaties/33128-sl-african_charter_on_maritime_security_and_safety_and_development_in_africa_lome_charter.pdf) (Accessed on 30-10-2017)

<sup>51</sup> Par [24].

<sup>52</sup> Par [ 60].This also includes seaports :see fn 47 below.

<sup>53</sup> Par [85].

<sup>54</sup> Par [27]] See also Article 3(c) Africa Maritime Transport Charter which provides for global competitiveness of African port infrastructure and operations to promote economic and social development.

<sup>55</sup> Treaty of Economic Community of West Africa States Art 32(a). 1010 UNTS 17, 14 ILM 1200. 12.Adopted 28-5-1978;EIF;1-8-1995.

<sup>56</sup> ECOWAS Treaty Art 3(g).

which created the ECOWAS Maritime Domain to which Nigerian ports belong, also has the objective of coordinating and strengthening practical co-operation on maritime issues generally at national, bilateral and multilateral levels.<sup>57</sup>

### 2.3 National

A port cannot perform its functions properly without an adequate (national) legal framework.<sup>58</sup> In many countries, the legal framework revolves around port authorities, which regulate uses and users of ports.<sup>59</sup> In Nigeria, the relevant authority is the Nigerian Ports Authority (NPA). The NPA was first established as an independent parastatal with the enactment of the Ports Act of 1954 and conceived as both the regulator and operator of the Nigerian seaports.<sup>60</sup> Under the Nigeria Ports Decree,<sup>61</sup> the NPA was commercialised using the Company and Allied Matters Decree,<sup>62</sup> the legal instrument for registration of companies in Nigeria. Thus the NPA had its name changed into the Nigerian Ports Public Liability Company to reflect its then status as a more commercialised profit-making entity, though its control remained in the hands of the Federal government.<sup>63</sup> In 1996, the Authority reverted back to its former status and named as an entity under the Federal Ministry of Transport. This reversion was only formalised in 1999 with Nigeria Port Authority Decree which transferred the

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<sup>57</sup> Institute of Security Studies (ISS) "The ECOWAS Integrated Maritime Strategy (EIS)"(undated) [http://www.aa-partnerships.org/activity\\_briefs/activity\\_brief\\_0192.pdf](http://www.aa-partnerships.org/activity_briefs/activity_brief_0192.pdf) (accessed 23-3-15); United Nations Security Council "Coordinating Acts of Piracy Armed Robbery Around Gulf of Guinea" (2011). [www.un.org/press/en/sc10430.doc.html](http://www.un.org/press/en/sc10430.doc.html) (accessed on 10-8-2015). The EIM was promulgated pursuant to UN Security Council Resolution 2018 of 2011. The UN Security Council Resolution 2018 urges ECOWAS to come up with an integrated maritime strategy. Par 2 S/RES/2018/(2011). The subsequent Security Council Resolution 2039 of 2012 notes, in its preamble with satisfaction "the preparatory steps taken by ECOWAS towards developing a maritime security approach through an Integrated Maritime Security Strategy and an Integrated Maritime Plan." S/RES/2039(2012).

<sup>58</sup> Hooydonk *On the Anomalies of Port Law* 7.

<sup>59</sup> Hooydonk *On the Anomalies of Port Law* 7 8 34.

<sup>60</sup> NPA Act 1954 cap 361 LFN 1990. See also Charles, Kingsley and Ijeoma *The Policy Trajectory of Nigeria Transportation: Ports Policy and Administration* (2011) 38-39.

<sup>61</sup> Decree No 74 of 1993.

<sup>62</sup> Cap 59 LFN, 1990.

<sup>63</sup> The authority for commercialization was the Bureau of Public Enterprises Decree 1993 which repealed Public Enterprises (Privatisation and Commercialisation) Decree No 25 of 1988 (cap 369 LFN 1990). The later defined commercialization as "the reorganization of enterprises wholly and partly owned by the government in which such commercialized enterprises shall operate as profit-making ventures and without subvention from government". (See sec 14).

assets of Nigeria Ports Public Liability Company to the NPA.<sup>64</sup> NPA Act declared that the Nigerian Ports Decree has been “repealed and the company known as the Nigeria Ports PLC registered under the Companies and Allied Matters Decree 1990, and its board of directors are hereby dissolved”.<sup>65</sup>

As earlier stated the institutional and regulatory system of the port revolves around the NPA. The regulatory role is carried out under the overall control of the Federal Ministry of Transport and in conjunction with the Nigerian Shippers Council (NSC) designated as economic regulator after concession.<sup>66</sup> The former is the transport-sector oversight body established under the powers conferred by the Constitution of the Federal Republic of Nigeria, 1999 (as amended).<sup>67</sup> The NPA and NSC are accountable and answerable to the Ministry of Transport headed by the minister who wields authority and exercises control over the two bodies in the running of the ports.<sup>68</sup> The Nigeria Shippers Council, is created by the NSC Act.<sup>69</sup> As per section 3(a) of NSC Act, the functions of the Nigeria Shippers Council includes serving as a forum for consultation for port users. The Council is to “provide a forum for consultation between Conference and non-Conference Lines, tramp-owners, the Nigerian Ports Authority and the Government of the Federation on matters of common interest”.<sup>70</sup> It is also to “advise the Government of the Federation through the Minister on matters

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<sup>64</sup> Decree No 28 of 1988.

<sup>65</sup> See s 125 of NPA Act No 38 of 1999.

<sup>66</sup> See fn 28 above.

<sup>67</sup> See s 5(1) of the Constitution. The subsection reads in full : 5. (1) Subject to the provisions of this Constitution, the executive powers of the Federation:

(a) shall be vested in the President and may subject as aforesaid and to the provisions of any law made by the National Assembly, be exercised by him either directly or through the Vice-President and Ministers of the Government of the Federation or officers in the public service of the Federation; and

(b) shall extend to the execution and maintenance of this Constitution, all laws made by the National Assembly and to all matters with respect to which the National”. The executive power is exercised in different ways including to create ministerial offices or ministries such as the office of the Minister of Transport as provided by the constitution in s147 (1) “There shall be such offices of Ministers of the Government of the Federation as may be established by the President”

<sup>68</sup> See for example sec 30 NPA Act , See also sec 4 Nigerian Shippers Council Act No 13 of 1978.

<sup>69</sup> See generally NSC Act.

<sup>70</sup> S 3(b) NSC Act.

relating to the structure of freight rates, availability and adequacy of shipping space, frequency of sailings, terms of shipment, class and quality of vessels, port charges and facilities and other related matters”.<sup>71</sup>

The NPA and NSC are not the only public entities directly or indirectly involved in the port governance system in Nigeria. There is also the Nigerian Maritime Administration and Safety Agency (NIMASA) created by the NIMASA Act,<sup>72</sup> formerly known as National Maritime Authority. NIMASA is responsible for regulating coastal waters, shipping, maritime labour as well as undertaking a number of services such as inspection, search and rescue.<sup>73</sup> In terms of NIMASA Act, the duties of NIMASA include “pursuing the development of shipping and regulating matters relating to merchant shipping and seafarers”.<sup>74</sup> NIMASA operates in Nigerian Waters which includes ports described by NIMASA Act to include “any place in Nigeria, navigable river or channel leading into such place having facilities for ships to moor and load or discharge including offshore cargo handling facilities, inland dry ports, harbour, berths, jetties, pontoons or buoys and wharves within the limits of the ports and includes any place declared to be a port under this Act”.<sup>75</sup> In addition to NIMASA Act, the mandate of the Agency is derived from the Merchant Shipping Act and Coastal and Inland Shipping (Cabotage) Act.<sup>76</sup> Complementary to the National Ports Authority Act and several regulations/byelaws made pursuant to it,<sup>77</sup> these aforementioned Acts constitute substantial corpus of the legal framework for ports in Nigeria.

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<sup>71</sup> S 3(e) NSC Act.

<sup>72</sup> Act No 7 of 2007 .Sec (1) of the Act created the Agency; the Act applies to “any person, ship, aircrafts, or any other craft or object in the internal and territorial waters of Nigeria and not to warship or military patrol ships.

<sup>73</sup> See generally s 22 NIMASA Act. It is noteworthy that the Nigerian Port Authority as it was originally constituted used to carry out the works now carried out by Maritime Safety and Administration Agency Charles, Kingsley and Ijeoma *The Policy Trajectory of Nigeria Transportation: Maritime Policy and Administration* 57.

<sup>74</sup> See s 22(1) NIMASA Act.

<sup>75</sup> S64 NIMASA Act.

<sup>76</sup> The Merchant Shipping Act No 30 of 1962 regulates shipping matters such as registration while the Cabotage Act Cap c 51 of 2003 provides for cabotage in ship ownership to promote indigenous ownership of ship. See Nimasa About us (undated) <http://nimasa.org.ng/about.php?id> (last accessed (3/3/2013).

<sup>77</sup> An example of such Bylaws is Nigeria Port Authority Docks and Premises Bylaw LN No 135 of 1955.

## 2 3 1 Port operations and regulation

The NPA Act covers both the operational and regulatory aspects of Nigerian ports and grants the NPA functions to be involved in both operational and regulatory capacities. In terms of the NPA Act, the port authority has the functions to “provide, operate in the ports, such facilities as appear to it best calculated to serve the interest of Nigeria;<sup>78</sup> maintain, improve and regulate the use of the port;<sup>79</sup> ensure the efficient management of port operations, optimal allocations and use of resources, diversification of source of revenue and guaranteeing adequate returns on its investment in order to contribute effectively to the well being of Nigerian society”.<sup>80</sup> The authority is also to “provide for the approach to all the ports and the territorial waters of Nigeria, such pilotage services and light marks and other navigational services and aids, including clearing, dredging and improving all waterways”,<sup>81</sup> supply water to shipping vessels;<sup>82</sup> control pollution arising from oil or any other substance from ships using the port limits or their approaches;<sup>83</sup> provide and operate such other services as the Minister may, from time to time, require;<sup>84</sup> and carry out such other activities which are connected with or incidental to its other functions under this Act,<sup>85</sup> among other functions.

In executing its functions, the Authority has been granted some powers which include the powers to “construct, execute, carry out, equip, improve, work and develop ports, docks, harbours, piers, wharves, canals, water courses, embankments and jetties;<sup>86</sup> erect, construct, lay down, enlarge, maintain and alter any building, erect works which may seem directly or indirectly necessary or convenient for any of its purposes;<sup>87</sup> carry on the business of carrier by land or sea, stevedore, wharfinger, ware-houseman or lighterman or any other business

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<sup>78</sup> S 7(a) NPA Act.

<sup>79</sup> S 7(b).

<sup>80</sup> S 7(c).

<sup>81</sup> S 7(d).

<sup>82</sup> S 7(h).

<sup>83</sup> S 7(i).

<sup>84</sup> S 7(j).

<sup>85</sup> S 7(k).

<sup>86</sup> S 8(a).

<sup>87</sup> S 8(c).



desirable for the functions of the Authority;<sup>88</sup> acquire any undertaking of any registered business that affords facilities for the loading, unloading or warehousing of any goods in any port in Nigeria;<sup>89</sup> appoint, license and manage pilots of vessels;<sup>90</sup> enter into agreement with any person for the operation or the provision of any of the port facilities which may be operated or provided by the Authority;<sup>91</sup> provide, appoint, license and regulate weighers and meters for measuring goods in any port in Nigeria”,<sup>92</sup> among other powers.

The operational aspects of the powers and functions above include the function of providing and operating port facilities, supplying water to shipping vessels, carrying on the business of carrier by land or sea, stevedore, wharfinger, warehouseman, among others. The omnibus regulatory provision requires the port authority to “regulate the use of the port”.<sup>93</sup> This is done in many ways including through controlling pollution, licencing of pilots, licencing and regulating weighers and meters for measuring goods, among others. It also includes the power to charge dues and rates in the port, for example on ships.<sup>94</sup> This shows that operational and regulatory aspects are fused by the NPA Act and primarily vested in the NPA. The fusion of a package of operational and regulatory aspects of the ports appears to be presented in the NPA Act as the very essence of the Act as the preamble to the law provides for “an Act to establish the Nigerian Ports Authority with the functions of providing and operating necessary facilities in ports and maintaining, improving and regulating the use of the ports; and to provide for matters connected therewith”.<sup>95</sup>

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<sup>88</sup> S 8(e).

<sup>89</sup> S 8(f).

<sup>90</sup> S 8(g).

<sup>91</sup> S 8(l).

<sup>92</sup> S 8(m).

<sup>93</sup> See s 7(b).

<sup>94</sup> See s 56.

<sup>95</sup> See the Preamble to the NPA Act. Hence, it appears from the preamble that where the NPA delegates or carries out its function through a third person, it is statutorily within the framework of the fusion of a package operational port services and regulatory function in section 7 and 8 and in the context of the overarching purpose of the Act as expressed in the preamble.

## 2 3 2 Concession

Concession under the Infrastructure Concession Act means

“contractual arrangement whereby the project proponent or contractor undertakes the construction, including financing of any infrastructure facility and the operation and maintainance thereof and shall include supply of any equipment and machinery for any infrastructure facility and the operation and maintainance thereof and shall include supply of any equipment and machinery for any infrastructure and the provision of any services”.<sup>96</sup>

Concession aims at delegating a public function to a private investor which entails the transfer of operations and activities formerly carried out by a government authority to a private investor, for example operation of a harbour.<sup>97</sup> The meaning of this is that concession is a series of contracts that define the relationship between a government and the private sector by way of Public-Private Partnership (PPP). It is about private participation in the economy particularly in an area of the economy that used to be public sector monopoly by way of partnership with public authorities.

In general, the constitutional foundation for private participation in Nigerian economy is enshrined in the right of natural and corporate persons to property whether personal or business property.<sup>98</sup> Furthermore, in terms of section 16(1) of the constitution, the state shall.

(c) without prejudice to its right to operate or participate in areas of the economy, other than the major sectors of the economy, manage and operate the major sectors of the economy;

(d) without prejudice to the right of any person to participate in areas of the economy within the major sector of the economy, protect the right of

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<sup>96</sup> S 36 Infrastructure Regulatory Commission Act.

<sup>97</sup> Christopher “Concession” in *Max Plank Encyclopaedia of Public International Law* (2011) par 3(12). According to Christopher it is more about municipal law with relevance of International law seen in form of regulatory system for the protection of private investors of foreign origin. See Christopher “Concession” par 1.

<sup>98</sup> S 43 of the 1999 constitution. Subject to the provisions of this Constitution, every citizen of Nigeria shall have the right to acquire and own immovable property anywhere in Nigeria”. Sec 44 further provides 44. (1) No moveable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law that, among other things - (a) requires the prompt payment of compensation therefor ..”.

every citizen to engage in any economic activities outside the major sectors of the economy.<sup>99</sup>

Though the word privatisation or concession does not appear anywhere in the Constitution, it is important to state at this point that the above provision of the Constitution allows, in general, not only government but also private participation and investment in the Nigerian economic activities, including through concession, being a form of private sector participation.<sup>100</sup>

One general law for private participation in Nigerian economy is the Public Enterprises (Privatisation and Commercialisation) Act which creates National Council on Privatisation and the Bureau of Public Enterprise. The functions of National Council on Privatisation include to “determine the political, economic and social objectives of privatisation and commercialisation of public enterprises”;<sup>101</sup> and “approve policies on privatisation and commercialisation”.<sup>102</sup> The Bureau of Public Enterprise is to “implement the (National Council of Privatisation) policies on privatisation”,<sup>103</sup> as well as on commercialisation.<sup>104</sup> The Act lists NPA as one of the agencies to be commercialised.<sup>105</sup> However, as previously noted the NPA Act reversed and clearly disallows the commercialisation of NPA.<sup>106</sup>

For the purpose of private investment by way of concession, the Infrastructure Concession Regulatory Commission (ICRC) is established by the Infrastructure

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<sup>99</sup> See s 16(1)(c)(d). This provision is the economic principle in chapter 2 of the constitution generally titled “Fundamental Objectives and Directive Principles of State Policy”.

<sup>100</sup> The constitution defines in subsections 16(4)(b) and (c) “economic activities” and “participate” as follows: (b) “economic activities” includes activities directly concerned with the production, distribution and exchange of goods and services; and (c) “participate” includes the rendering of services and supplying of goods.

<sup>101</sup> S11(a) Public Enterprises (Privatisation and Commercialisation) Act 1999 (Cap P30 LFN 2004)

<sup>102</sup> S11(b).

<sup>103</sup> S14(a) Privatisation, not defined in this Act, as defined by its predecessor Act is the ‘relinquishing of part of the equity and other interest held by the Federal government or its agency in enterprises either wholly or partly owned by the Federal Government or its agency’ See sec 14 Privatisation and Commercialisation Act cap 369 1990.

<sup>104</sup> S14(b) See fn 62 above.

<sup>105</sup> Second Schedule Public Enterprise (Privatisation and Commercialisation Act 1999

<sup>106</sup> S125 NPA Act. See footnotes 62 and 63 above.

Regulatory Concession Act.<sup>107</sup> The functions of ICRC include to “take custody of every concession agreement made under this Act and monitor compliance with the terms and conditions of such agreement”<sup>108</sup> and to “ensure efficient execution of any concession agreement or contract entered into by the Government”.<sup>109</sup>

The ICRC Act mandates every Federal Government Ministry and body to prioritize infrastructure projects which may be qualified for concession but does not expansiate what makes a particular federal government agency’s infrastructural projects qualify for concession. The relevant section of the Act is to the effect that “every Federal Government Ministry, Agency, Corporation or body shall prioritize its infrastructure projects and such priority projects may be qualified for concession under this Act”.<sup>110</sup>

### **3 Proposed port legislations**

The Federal Government proposed to enact Nigeria Ports and Harbours Authority and National Transport Commission Acts both of which are still in bill forms before the Nigerian National House of Assembly.<sup>111</sup> The Nigerian Port and Harbour Authority Bill (PHAB) creates the Nigeria Port and Harbour Authority (NPHA) which shall own, manage and control ports and harbours and provide for their operations on behalf of the Federal Government of Nigeria..<sup>112</sup>. The bill

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<sup>107</sup> See s 14(1) which provides as follows “Here is established a body to be known as the Infrastructure Concession Regulatory Commission (in this Act referred to as “the Commission)”. For private participation in the economy in general the overall institution is the Bureau of Public Enterprise and the associated National Council for Privatisation established by Public Enterprises (Privatization and Commercialization) Act (see secs 9 and 12 establishing the Bureau of Public Enterprises and National Council for Privatisation respectively).

<sup>108</sup> S 20(a).

<sup>109</sup> S 20(b).

<sup>110</sup> S 2(1).

<sup>111</sup> See fn 15 above.

<sup>112</sup> See clause 3 of the Port and Harbour Authority Bill (PHAB) 2015. The Second Schedule to the Bill lists the ports under each authority as follows: The Ports under Lagos Port and Harbour Authority are listed as follows: Part 1 I. Lagos Port Complex, Apapa; II. Tin Can Island Port; Roro Port; IV. Container Terminal Port; V. Kirikiri Lighter Terminal (I & II); VI. Ikorodu Lighter Terminal. Part II — The Ports under Nigerian Delta Ports and Harbour Authority are: I. Port Harcourt; II. Onne Ports; III. Federal Ocean Terminal; IV. Federal Lighter Terminal; V. Warri; VI. Calabar; VII. Burutu; VIII. Akassa; IX. Bonny; X. Degema; XI. Forcados; XII. Escravos; XIII. Koko Town; XIV. Sapele.

repeals NPAA and the Nigeria Port and Harbour Authority NPHA will replace the NPA.<sup>113</sup> It vests technical regulatory of ports and harbours in NPHA.<sup>114</sup>One of the functions of the NPHA is to provide landlord services in ports and harbours”.<sup>115</sup> This is consistent with one of the purposes of the bill namely “to separate operations from the landlord and regulatory functions within ports and foster greater operating efficiency, accountability and transparency in the management and operation of ports”.<sup>116</sup> However,it also grants the function to “engage in any business activity”<sup>117</sup> and the power to carry out the business of stevedoring.<sup>118</sup> This appears to be inconsistent with the objective of separating landlord and regulatory function from cargo-handling.

The PHAB is also intended to “encourage and facilitate private sector investment and participation in the provision of port services and port infrastructure”.<sup>119</sup> To that effect the authority has the powers to grant a concession to provide any port services or operate any port facility.<sup>120</sup> It describes ‘concession’ as “an arrangement between an Authority and a third party pursuant to which such third party shall be authorized to provide a port service or operate a port facility in accordance with the Bill.<sup>121</sup>

The National Transport Commission Bill (NTCB) “establishes the National Transport Commission”,<sup>122</sup> and provides for “an economic regulatory framework for the transport sector or regulated transport”<sup>123</sup> The Bill specifically applies to the provision or use of transport services in marine,rail and road transport.<sup>124</sup> The NTCB applies to ports and other transport subsectors such as rail and

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<sup>113</sup> See Preamble to the Bill.

<sup>114</sup> Clause 1 (2)(b).

<sup>115</sup> See clause 9(l).

<sup>116</sup> Clause 1 (3)(a).

<sup>117</sup> Clause 9 (s).

<sup>118</sup> Clause 10 (j)

<sup>119</sup> See clause 1(1)(c).

<sup>120</sup> Clause 34 (1).

<sup>121</sup> Clause 124.

<sup>122</sup> Clause 4(1)NTCB.

<sup>123</sup> Clause 1(c) NTCB.

<sup>124</sup> Clause 2 NTCB.

inlandwater ways,<sup>125</sup> and and makes NTC the economic regulator of these transport subsectors.<sup>126</sup> The NTCB also intends to “create an enabling environment for private sector participation in the provision of services in the transport sector”<sup>127</sup> The Bill provides that no person shall operate transport services without registration with NTC.<sup>128</sup> It charges the NTC with regulation of tariffs charged by service providers in the regulated transport sector.”<sup>129</sup> Hence while the PHAB makes the port authorities technical regulator to ensure proper technical operations by actors in the ports ,the NTCB makes NTC economic regulator to ensure proper economic behaviour for example in respect of port service charges.

#### **4 Port Law: pre-eminent but less researched**

One crucial issue is whether there is sufficient and coordinated literature relating to ports law in general and Nigerian ports law in particular which comprehensively analyse the primary sources .The book, *On the Anomalies of Port Law*, for example, bemoans the scarcity of research and books on port law.<sup>130</sup> It describes Port Law as pre-eminent realm of *lex specialis*.<sup>131</sup> Accordingly, Port Law is “simply the whole of the rules pertaining to the ports”.<sup>132</sup> *Port State Jurisdiction* dwells essentially on port state control and jurisdiction with references to relevant international instruments such as those of international maritime organizations.<sup>133</sup>

As a preamble to this, the author touches on the power of States to grant or deny access to their ports and to prescribe the conditions for entry.<sup>134</sup> He does not dwell on how a State does this with particular reference to port governance nor

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<sup>125</sup> Clause 2.

<sup>126</sup> Clause 5(1).

<sup>127</sup> Clause 1(g).

<sup>128</sup> Clause 31h.

<sup>129</sup> See Clauses 26 27).

<sup>130</sup> Hooydonk *On the Anomalies of Ports Law* 22 42.

<sup>131</sup> Hooydonk *On the Anomalies of Port Law* 35.

<sup>132</sup> Hooydonk *On the Anomalies Port Law* 7.

<sup>133</sup> Molenar “Ports State Jurisdiction:Towards Mandatory and Comprehensive Use” in David and Richard (eds) *Law of the Sea: Progress and Prospects* (2006) 47.

<sup>134</sup> *Ibid.*

any specific State in general, let alone Nigeria, in particular. It is noteworthy here that Nigeria Port Authority still retains the power to allow or disallow entry into port under the landlord system.<sup>135</sup> *Elements of Transportation: Policy Thrust of Port Policy and Administration in Nigeria* dwells on the evolution of ports administration in Nigeria, highlighting recent developments in line with the scope of the book as indicated in the title and introduction.<sup>136</sup> This work helps in explaining how poor performance in ports galvanised reforms, explaining how concession is practised but not with extensive explanatory reference to the law. Another important work, *The Policy Trajectory of Transportation: Port Policy and Administration in Nigeria*, neither dwells on the details of operational and regulatory contexts of a port or on the legal issues arising from these or from the concession of the ports.<sup>137</sup> *European Seaports Law: EU Law of Ports and Port Services and the Port Packages* is a collection on liberalisation of port services in the context of European Union.<sup>138</sup> The authors contribute on aspects of the then proposed 2001 European Union Directive on Port Services.

This work will be an addition to the pre-eminent but less researched area of Port Law especially in the context of concessioning of port services in Nigeria, filling the gap in existing literatures. This is significant considering the lack or paucity of literature that comprehensively examines the legal framework of the Nigerian ports (or ports in general) in this context. In view of the strategic importance of ports as the second largest earner of foreign exchange for Nigeria, Africa largest economy, it is hoped this will be an important contribution not only to Nigeria but also to Nigerian trade and investment partners especially in Africa.

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<sup>135</sup> The management model is relevant to the decision to allow or disallow entry into ports and prescribe conditions for stay in the port. In a fully privatized port, the private port authority plays a role in decision for the entry and exit of ship into ports. In a fully privatized port, there may be a self-regulating private port authority with lots of regulatory powers. See Patrick Port Management 93.

<sup>136</sup> Obed *Elements of Transportation: Policy Thrust of Ports Policy* 34.

<sup>137</sup> Charles, Ijeoma and Kingsely *The Policy Trajectory of Nigeria Transportation: Ports Policy and Administration* (2011) 22.

<sup>138</sup> Hooydonk *et al* (2003).

## 5 Statement of problem

Since 2006, when the last port terminal got transferred from the NPA to the concessionaires, the Nigerian Port Authority Act has not been amended to directly and unequivocally provide for the new regime of concession.<sup>139</sup> The protracted delay in the passage of the PHBA Bill and NTC Bill blamed by some industry players for what has been termed the underperformance of the maritime sector and particularly the ports sub-sector.<sup>140</sup> In terms of clause 3(1) of the PHBA Bill, a port authority is established: the “the Nigerian Ports and Harbours Authority”.<sup>141</sup>

As earlier stated the PHBA Bill provides for private sector participation and investment in ports services and makes the port authority the technical regulator as per clause 1(c) while the NTC Bill makes the Transport Commission the commercial and economic regulator as per clause 1(c) including by way of preventing abuse of market power”.<sup>142</sup> The purpose of PHBA Bill is to encourage private investment and promote private sector participation in port services”.<sup>143</sup> The Bill shall be construed as providing for the objective of “separation of cargo handling from the landlord and technical regulatory functions within the port”.<sup>144</sup> Pending the passage of the two proposed legislations into law, the NPA Act remains the law primarily applicable to ports.

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<sup>139</sup> Business Law “Lack of Legal Framework Threatens Investment” (March 2013) [www.businessdayonline.com/2013/03/lack\\_of\\_legal\\_framework\\_threaten\\_investment](http://www.businessdayonline.com/2013/03/lack_of_legal_framework_threaten_investment) (last accessed 21-9-2013).

<sup>140</sup> *Ibid.* See Akanbi “Why National Assembly is Graveyard of Maritime Bills”( August 2015 ) [www.tribuneonline.com/why\\_national\\_assembly\\_graveyard\\_maritime\\_bills](http://www.tribuneonline.com/why_national_assembly_graveyard_maritime_bills) ”(assessed 10-8-2015).

<sup>141</sup> According to the First Schedule to the Port and Harbour Bill 2006 the following are the ports under the proposed authority .1 Lagos Port Complex II. Tin Can Island Port Container Terminal Port; Roro Port;IV. Lagos Port Complex, Apapa;V. Kirikiri Lighter Terminal (I & II);VI. Ikorodu Lighter Terminal I, Port Harcourt;II. Onne Ports;III. Federal Ocean Terminal;IV. Federal Lighter Terminal;V. Warrin;VI. Calabar;VII. Burutu;VIII. Akassa;IX. Bonny;X. Degema;XI. Forcados;XII. Escravos;XIII. Koko own;XIV. Sapele.

<sup>142</sup> Clause 1(d).

<sup>143</sup> Clause 1(c).

<sup>144</sup> Clause 1(3)(a).



The fallout from this is that uncertainties have been created as to the application of the existing ports Act creating fear among private investors, many of them foreign, about risks to their investments.<sup>145</sup> The uncertainties arise from the fact that the NPA Act has not been amended to provide for operation of the landlord port governance model being practised now by way of concessioning, concession being a regime in which a private “project proponent or contractor undertakes the construction, including financing of any infrastructure, facility and the operation and maintenance thereof..”as earlier cited.<sup>146</sup> The reason for this position is that section 7 of the NPA Act essentially appears to conceive NPA as both operator and regulator as if it excludes the possibility of NPA acting only essentially as regulator, a point which requires a research to prove or disprove. For the avoidance of doubt it is helpful to requote sub-section 7(a) and 7(b) which read:

“The functions of the authority shall be a) provide and operate in the ports such facilities as appear to it best calculated to serve the interest of Nigeria b) maintain, improve and regulate the use of ports”.

The above appears to simultaneously establish the NPA as both an operating and a regulating body as obtainable in service port and tool port models more so when the sub-sections are placed in the context of the preamble to the NPA Act. The preamble, as earlier cited, provides that the NPA Act is “an Act to establish the Nigerian Ports Authority with the functions of providing and operating necessary facilities in ports and maintaining, improving and regulating the use of the ports; and to provide for matters connected therewith”.<sup>147</sup> In terms of section 1(1) of the Concession Act, the Federal government agencies and corporations may enter into concession agreements with private operators for the operation and maintenance of infrastructure. The issue has been whether this Act can apply to federal government agencies such as NPA without a direct provision in their constituent Acts clearly providing or allowing for concession.

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<sup>145</sup> See fn 59 above.

<sup>146</sup> S 36 Infrastructure Regulatory Commission Act.

<sup>147</sup> See the Preamble to NPA Act.

Another issue relates to the institutional framework for regulating the ports. Ports are multi-layered and complex organizations in which institutions and functions often interact at different levels<sup>148</sup>. This well applies to Nigerian ports described as having complex institutional management structure with tight bureaucratic organisation.<sup>149</sup> The institutional paradigm suffers duplication of functions among various parastatals of the Federal Ministry of Transport such as NPA and NIMASA.<sup>150</sup> At the beginning of 2011, some seven years after the Federal Government of Nigeria came up with a Presidential Task Force on Port Reforms, there were more than a dozen government agencies situated and operating at Lagos Ports, Tincan Island and Apapa.<sup>151</sup> By the end of 2011, the number had been cut down to four by the task force.<sup>152</sup> Of the four agencies, the primary agency is the Nigeria Ports Authority, created as earlier stated by the Nigerian Ports Authority Act.<sup>153</sup> The Nigerian Maritime Administration and Safety Agency also operates in the port as per its mandate to carry out functions under its constituent Act.<sup>154</sup> Such functions, *inter alia*, include pursuit of development of shipping, regulating matters relating to merchant shipping and seafarers, licensing of ships, formulating maritime safety standards, establishing procedures for implementing international conventions.<sup>155</sup>

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<sup>148</sup> Bichou and Gray “A Logistic and Supply Chain Management Approach to Port Performance Measurement 2004 31 *Maritime Policy and Management* 46 67.

<sup>149</sup> Ogojafor *et al* “Concession As Strategic Tool for Port Efficiency: An Assessment of the Nigeria Port” *American Journal of Business and Management* 2012 215.

<sup>150</sup> See Thisday “Stakeholders”(undated).  
[www.thisdaylive.com/articles/stakeholders\\_seek\\_end\\_to\\_instability\\_in\\_NIMASA](http://www.thisdaylive.com/articles/stakeholders_seek_end_to_instability_in_NIMASA) (assessed 22-3-2015) .

<sup>151</sup> At a point in time, there were no less than 32 government agencies including National Law Enforcement Agency, Nigerian Customs Service, Federal Environment Protection Agency(now defunct) , among others all claiming to be acting under the law and causing avoidable delays in clearing goods and rendering of port services. This has been described by Igbowku as toll gate economy or if you like toll gate port governance system) which means many agencies positioned themselves at an entry point of the country to make money without considering whether they statutorily empowered to do so.Igbowku Problems Associated with Nigerian Ports(undated) [www.mikeigbowku.com/major-problems-associated-with-the-nigerian-port-system-and-suggested-solution](http://www.mikeigbowku.com/major-problems-associated-with-the-nigerian-port-system-and-suggested-solution) (accessed on 22-6-2013).

<sup>152</sup> Tolu “Infrastructure Reform Charge Along, Sometimes Stall” in The Africa Report ( April 2013) Africa Report 61

<sup>153</sup> Sec 1, NPA Act. See further Africa Infrastructure Country Diagnostic Background Paper 8: “Beyond the Bottlenecks of Ports in Africa” par[ XIV].

<sup>154</sup> S 22(6), NIMASA Act.

<sup>155</sup> S 22 NIMASA Act.

NIMASA is mandated to exercise port state control under the Act.<sup>156</sup> The extent to which it exercises this mandate in the ports makes it stand in an overlapping position with the statutory duties of the Nigeria Ports Authority. The functions of the Nigeria Port Authority include controlling pollution arising from oil or any other ship using the ports or their approaches.<sup>157</sup> In terms of Sec 7 (g), the Authority also ensures safety of life and property, which duties can equally be found in NIMASA Act.<sup>158</sup> In fact the function of NPA includes salvaging of life and property “on the high sea”.<sup>159</sup> Hence, coordination between the Authority and Agency is an important issue particularly after concession.<sup>160</sup> The issue is, if concession which was carried out under the ICRC Act without a new Port Act in place, results in substantial separation of regulatory and commercial/operational aspects of ports operation, clarity is essential in the distinctive functions of the ports-related regulatory institutions, which is currently not the case. As far as concession is concerned, PHAB has the powers to grant concessions in cooperation with NTC but it is silent on how this power is to be coordinated with ICRC raising question on NTCB purpose of “consolidation, streamlining and removing of multiplicity and duplicity of functions among government and its agencies”<sup>161</sup>, at least in the aspect of concession.

## 6 Research questions

The primary question is what is the legal framework for concession in Nigerian port operations?

Specific questions are as follows:

- a) What is the legal regime for concession in Nigeria?

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<sup>156</sup> See generally part 1V of NIMASA Act.

<sup>157</sup> S 7( l) NPA Act.

<sup>158</sup> S 40 NIMASA Act.

<sup>159</sup> S 7(g)NPA Act

<sup>160</sup> Neither of the two Acts or their predecessor Acts expressly provide for co-ordination with the other albeit there are provisions relating to coordination with other government agencies in the NIMASA Act Sec24 but neither Act expressly mentions the other .In comparison the NPA Act(Sec 39) refers to Nigeria Customs and Excise Service .Sec 3of the Merchant Shipping Act (MSA) requires NPA and other agencies to forward reports relating to merchant shiping to the relevant ministers.Hence,the NTCB provides for coordination between the agencies in the transport.See fn 125 above

<sup>161</sup> Clause 1(d) NTCB.

- b) What are the port governance models and what constitute port model and system in Nigeria?
- c) To what extent is the concession agreement consistent with the existing port related legislations?
- d) To what extent do the proposed port legislations address the issue dealt with in question 3 above?

## **7 Aims**

The aim of this study is to examine the legal framework of concession agreement in ports operations in Nigeria highlighting the regulatory, commercial and operational aspects. Specific aims are:

- To examine the legal framework for concession in Nigeria.
- To describe the port governance models and in particular the current governance model in the context of the port system in Nigeria.
- To investigate the extent to which the concessioning of port operations is consistent with existing port legislations.
- To examine the proposed port legislations in the context of the third aim stated above.

## **8 Research method**

Research method refers to the procedure and manner that will be followed in conducting a study.<sup>162</sup> Method is broader than procedure as it encompasses all aspects of the study including the logic of the design and steps for carrying out the procedure, which in effect, is actually about translating the design into action.<sup>163</sup> The method of this research is essentially doctrinal and library-based, drawing on both primary and secondary sources. The primary sources include the relevant laws such as statutes, case laws and conventions.<sup>164</sup> Secondary sources

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<sup>162</sup> Olivem and Abel *Research Methods: Qualitative and Quantitative Approaches*, 45.

<sup>163</sup> Donald and Burney *Research Methods Wadsworth* (2002) 288.

<sup>164</sup> Frank and Irving *Element of Legal Writing: A Guide to the Principles of Writing Clear, Concise and Precise Legal Documents* (2004) 176.

such as journals and text books will also be relied on. The specific procedure to be employed is explanation, exploration and examination of the identified sources of the law.<sup>165</sup> In legal research, one conventional approach is investigation including explanation of the law, which will be employed in this study.<sup>166</sup>

This work will analyse the primary sources of port law particularly the Nigerian Port Authority Act and investigate if the concession of Nigerian ports can be accommodated in the existing port law, examining in the process the legal framework for commercial, operational and regulatory aspects of the Nigerian port system.

## **9 Limitation of studies**

This study dwells on the legal framework of ports with specific focus on the legal and institutional framework of ports governance model and the related port operations particularly in view of the uncertainties created after the concessioning of Nigerian ports. The study dwells on the legal framework of concession agreements in Nigerian port system. The study, therefore, does not cover all aspects of port legal framework, though the confusion created by the concessioning of ports affected the whole legal framework. Hence this work does not, for example, deal with the legal regime for environmental sustainability of ports, except in so far as it relates to the main focus of the work. It also does not specifically deal with maritime safety and security in ports; though reference may be made to same where these affect the main focus of the work, for example, in establishing areas of overlap between the agencies.

Furthermore, this work does not specifically deal with all kinds of ports, it focuses only on seaports. It does not deal with dry ports and river ports, though it may make recommendation on or even passing reference to such other ports as it

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<sup>165</sup> Ram *the Research Methods* (2000) 70.

<sup>166</sup> Explanation normally becomes imperative in Legal research due to the often cumber some and technical languages of the law. See Frank and Irving *Element of Legal Writing* (2004) 149.

affects the seaports. Materials on Port Law are quite few, more so the aspect of port law being dealt with particularly on Nigeria. However, this limitation is assuaged by the availability of necessary statutes relating to the subject matter.

## **10 Structure and arrangement of the thesis**

The thesis will be divided into six chapters. The first chapter is the general introduction to the thesis, consisting of Introduction and Background, Statement of Problems, Research Methodology, Research Questions and Objectives.

The second chapter titled Concession: The Legal Regime describes concession. It examines the different types of concession and explains the concession process. It also explains the players and stakeholders as well as institutions in the concession process. The chapter further highlights the legal and regulatory regime in Nigeria for concession with reference to all relevant legislations and laws. The practice of public-private partnership in the management of undertakings by way of concessional agreement between private sector and the government and the use of such instruments as joint ventures are described in their legal contexts. This chapter establishes the legal framework of concession in Nigeria as a way of laying foundation for the examination of its use in port operations.

The third chapter titled Port Governance: It dwells on port models in general and the Port System in Nigeria in particular describing the different aspects of port governance system vis-à-vis port institutions particularly Nigeria Port Authority as a landlord in the port system. It describes different port governance models: landlord port, service port, tool-port and private port models in particular. It dwells on the international, continental and regional, legal and institutional aspects of ports and port governance. It includes a detailed discussion of what legally constitutes a port in Nigeria and how the ports are currently managed.

Chapter Four is titled Legality of Concession in Port Operations: This chapter is about the legality of concession in port operations in view of the existing port legislations particularly the Nigerian Port Authority Act. This explains whether the description of port model effected by concession and the port system described in chapter three can be situated in the port law and to what extent. It examines whether separation of regulatory and operational aspects of port system can be supported by the existing port legislation particularly the NPA Act. The extent to which the land lord model of port governance and the existing institutional and regulatory framework is consistent with the relevant port legislation is explained. It analyses the post- concession regime of port service as well as that of infrastructure and superstructure in the context of the NPA Act and other relevant laws. Analysis of these laws reveals the extent to which the current practice of concession and the resultant landlord model described in chapter three is consistent with existing port legal regime.

Chapter five titled Analyses of Proposed Legislations is essentially about examining the Port and Harbour Bill and National Transport Commission Bills. This will reveal whether the proposed legislations address the issues raised in chapter four. The analyses will lay foundation for proposals that may aid in improving the Laws.

Chapter six is the Conclusion consisting of summary of findings and, recommendations and general conclusion.

## CHAPTER TWO

### THE LEGAL FRAMEWORK OF CONCESSION

#### 1 Introduction

This chapter examines the legal framework of concession in Nigeria. This is in view of the fact that concessional relationships are a phenomenon which requires a legal regime to be initiated, implemented or executed and end. In fact, by nature concession is essentially a legal act by which a State transfers the exercise of rights or functions previously carried out by itself to a private person, either a national or a foreigner, who, in turn, participates in the performance of such public functions.

The aim of this chapter is to highlight the law relating to concession for the purpose of appreciating the legal framework underlining the use of concession agreements in the Nigerian seaports. The different sources of concession law are identified and discussed in the larger context of the constitutional provision relating to private sector participation in areas of the economy. The legal objectives and principles of concession as provided for in relevant legal instruments are examined in the light of the declared objectives and principles of concession in the National Policy on Public Private Partnership. This would allow easy alignment of the public interest-driven objective of the public authority with the profit-driven objective of the private sector.

The underlining objectives and guiding principles of concession are to be kept in view from the beginning of the concession process to the end, and so underlines the chapter's examination of sundry issues including features and forms of concession. The chapter also discusses the concession processes and the institutional and regulatory regime driving them in this context. With this in the background, it is aimed that concession in the ports, which is a contract between the public sector and private sector for the financing, construction, operation or



maintenance of ports facilities can be, placed in the context of the legal framework for concession and the relevant port law particularly the Nigeria Port Authority Act in subsequent chapters.

## **2 Meaning of concession**

Concession is a variety of Public –Private –Partnership, adopted by the Federal Government of Nigeria purportedly to tackle the problem of infrastructure decay and deficit in Nigeria, among other reasons.<sup>167</sup>The word Public Private Partnership is not directly defined in relevant concession-related legislations in Nigeria. The National Policy on Public Private Partnership describes it as “a wide range of contractual arrangements between the public and private sectors’.<sup>168</sup>

The public –private contractual element of Public Private Partnership by way of concession is captured in the Explanatory Memorandum to the Infrastructure Concession Regulatory Commission Act (ICRCA). According to the Explanatory Memorandum, ICRCA is an Act that “provides for the participation of private sector in financing the construction, development, operation, or maintenance of infrastructure or development projects of the Federal Government through concession or contractual arrangements; and the establishment of the infrastructure Concession Regulatory Commission to regulate, monitor and supervise the contracts on infrastructure or development projects”. This means that concession provided for by the ICRCA is a relationship or partnership between Federal Government and private sector on the financing, construction, development, operation and maintenance by the later (the private sector)of infrastructure projects owned by the former (Federal Government). What, in essence, constitutes concession?

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<sup>167</sup> See Par 5.4 National Integrated Infrastructure Action Plan (NIIM) 2014;Par 1 National Policy On Public Private Partnership (NPPP) 2009.For more information on NIIM and NPPP ,see par 3 21 and 3 1 respectively.

<sup>168</sup> Par [7] National Policy on Public Private Partnership.

In terms of ICRC, concession" means a contractual arrangement whereby the project proponent or contractor undertakes the construction, including financing of any infrastructure, facility and the operation and maintenance thereof and shall include the supply of any equipment and machinery for any infrastructure and the provision of any services.<sup>169</sup> This simply translates to mean that concession is about construction works or projects and related services and supplies executed by the private sector. While this statutory definition does not mention that the private sector undertakes the project at the instance of public authority, this is amply and extensively provided for elsewhere in the Act to the effect that concession, under the Act, is granted by "Federal Government agency, corporation or body".<sup>170</sup>In general, concessions entail that a private entity, called the concessionaire runs, as per contract, an economic utility.<sup>171</sup> Thus they are contracts for pecuniary interest through which one or more contracting public authorities grant or entrust the execution of works, or the provision and the management of services, to one or more economic operators.<sup>172</sup>

A public entity concessional relationship with the private sector entails a grant to a private firm of the right to construct or operate a defined infrastructure service and to receive revenues deriving from it whereby the concessionaire generally takes possession of the relevant public assets (but ownership remains with or at least will revert back, to the government) and uses them to provide the relevant product or service according to the terms of the contract.<sup>173</sup> A typical concession places many of the operational and financial risks on the concessionaire. Construction and operation of infrastructural project such as airports, seaports

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<sup>169</sup> S 36.

<sup>170</sup> See for example S 1. See also the Explanatory Memorandum to the ICRC. The implication of the definition provided in S36 is that it does not adequately reflect the context of the Act as far as the meaning of concession is concerned. For example it does not the state or government as the granting authority as reflected in S1(1).

<sup>171</sup> Ismail *Globalization and New International Public Works Agreement in Developing Countries* (2011) 45.

<sup>172</sup> Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts Par11.

<sup>173</sup> Organisation of Economic Cooperation and Development (2007) cited in United Nations Conference on Trade and Development (UNCTAD) *Public Monopolies, Concession and Competition Law and Policies* (2009) [par] 6.

and roads are common instances where concession is used. Often, the private investor either partly or entirely finances the infrastructure, which the concession will entitle him to use and collect fees from subsequently.<sup>174</sup> Where the concession initiates the construction of a new project, it is called Greenfield concessional contract.<sup>175</sup> In the alternative, the concessionaire may take over the operation of an existing infrastructure such as a harbour.<sup>176</sup> This is called Brownfield concessional contract, involving revamping and operating of a facility such as port terminals that are already in existence.<sup>177</sup>

### 3 Sources of concession law in Nigeria

Concession, in Nigeria, is governed essentially by the constitution, as the national grundnorm, Infrastructure Concession Regulatory Commission Act (ICRCA), as the subject-matter specific legislation and Public Procurement Act (PPA), which regulates the procurement component of the concession process. There are also a number of other legislations with tangential impact on the concession procedures or which may have effect on the conduct of concession such as the Fiscal Responsibility Act (FRA), which deals with public sector financial prudence

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<sup>174</sup> UNCTAD par 7. United Nations Commission on Trade and Development was established by the UN General Assembly in 1964 to help developing countries developmental agenda in terms of economic diversification, trade, innovation among others. See UNCTAD <http://unctad.org/en/Pages/aboutus.aspx> (accessed 14-8-2016).

<sup>175</sup> Obed *Essentials of Transport Management: Policy Thrust of Ports Administration in Nigeria* (2008) 30.

<sup>176</sup> UNCTAD [par] 6.

<sup>177</sup> The ICRCA appears to apply to both Greenfield and Brownfield concessional projects but this is not made abundantly clear. For example the definition of concession, in section 36 of ICRCA reproduced here for the avoidance of doubt, as “contractual arrangement whereby the project proponent or contractor undertakes the construction, including financing of any infrastructure, facility and the operation and maintenance thereof and shall include the supply of any equipment and machinery for any infrastructure and the provision of any services”, gives the impression that it applies to only Greenfield concessional project particularly in view of the fact that it is not expressly mentioned that the Act applies to both new and existing infrastructure projects. In the self-same section 36, which is the interpretation part for terms used in the Act, it only defines New Development and investment project to include-(a) any project involving any infrastructure, not existing at the time the concession is being made, that will require the injection of substantial funds or resources to design, construct, build, maintain or operate such infrastructure, or (b) any project involving any infrastructure, existing at the time the concession is being made, that will require the injection of substantial funds or resources to repair, service, overhaul, improve, maintain or sustain such infrastructure.” Strangely this word appears in no part of the substantive Act.

and Privatisation and Commercialisation Act (PCA), which provides-though arguably inappropriately including concession- for privatization and commercialisation, among others. A combined reading of relevant provisions of these laws as well as regulations made thereunder, reveal the nature and meaning of concession, the processes involved, relevant institutions as well as the policy contexts such as is embodied in National Policy on Public Private Partnership.<sup>178</sup>

### 3 1 *The Constitution*

The Constitution provides the general basis for all activities in Nigeria and “ its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria”,<sup>179</sup> providing that If any other law is inconsistent with its provisions , “the Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void”.<sup>180</sup> Therefore, it goes further, “the Federal Republic of Nigeria shall not be governed, nor shall any persons or group of persons take control of the Government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution”.<sup>181</sup> This means that all persons, sectors, agencies, bodies and entities are mandated to be governed by the provisions of the Constitution.

The Constitution provides for the right to property,<sup>182</sup>which is one of the cornerstones of private participation in an economy. It also requires that it shall be the duty of the state to “provide adequate facilities for and encourage free mobility of people, goods and services throughout the Federation”.<sup>183</sup> This

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<sup>178</sup> See fn 27 below for more on National Policy on Public Private Partnership.

<sup>179</sup> S1(1) of the Constitution.

<sup>180</sup> S 1(3) of the Constitution.

<sup>181</sup> S 1(2).

<sup>182</sup> S 43 and 44(1) which reads as follows: 43 “Subject to the provisions of this Constitution, every citizen of Nigeria shall have the right to acquire and own immovable property anywhere in Nigeria.44.(1) No moveable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law that, among other things.”

<sup>183</sup> S 15(3)(a) of the Constitution which reads in full: “For the purpose of promoting national integration, it shall be the duty of the State to: (a) provide adequate facilities for and

provision at once combines the duty to provide infrastructural facilities and the responsibility to facilitate the associated delivery of services and goods. Does the Constitution allow private participation in the discharge of this duty whether by way of concession or other means and methods of private participation? The Constitution provides a basis to answer that question. It says: The state shall:

- (c) without prejudice to its right to operate or participate in areas of the economy, other than the major sectors of the economy, manage and operate the major sectors of the economy;
- (d) without prejudice to the right of any person to participate in areas of the economy within the major sector of the economy, protect the right of every citizen to engage in any economic activities outside the major sectors of the economy.<sup>184</sup>

In terms of the above provisions, the Constitution mandates the government to manage the “major area of the economy”, while retaining the right to “participate” in other areas of the economy too. It also allows “any person” to participate “within” the major areas of the economy while mandating the state to protect the right to “engage” in “economic activities” outside the “major sectors of the economy”. These provisions are quite clear in their implications, made even clearer by the definitions, in the Constitution, of the wordings used. However, they need to be put in context for their legal implications.

The first implication is that the Constitution allows the private sector to participate within major areas of the economy, describing, “to participate” as including “the rendering of services and supplying of goods”.<sup>185</sup> This means that, in general, the private sector can carry on business in any part of the economy. However, where the business requires managing and operating-not merely rendering of services and supplying of goods-the major sector of the economy as defined-this will be for the government, not the private sector .This leads to the second implication namely that the government is generally, subject to qualification or conditions,

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encourage free mobility of people, goods and services throughout the Federation” This is consistent with the National Policy on Public Private Partnership.

<sup>184</sup> S16(1) ( c ) (d).

<sup>185</sup> S16(4) ( c ) .

mandated to manage/operate and continue to manage and operate, the major areas or sectors of the economy. The conditions are provided in the description of what constitutes a major area or sector of the economy.

As per the Constitution, a major sector of the economy

“shall be construed as a reference to such economic activities as may, from time to time, be declared by a resolution of each House of the National Assembly to be managed and operated exclusively by the Government of the Federation, and until a resolution to the contrary is made by the National Assembly, economic activities being operated exclusively by the Government of the Federation on the date immediately preceding the day when this section comes into force, whether directly or through the agencies of a statutory or other corporation or company, shall be deemed to be major sectors of the economy.”<sup>186</sup>

This means if a particular sector was exclusively managed and operated by the government as at the time the constitution came to force, there must be a resolution of the National Assembly to transfer, from government management and operation, that particular sector’s economic activities, being “activities directly concerned with the production, distribution and exchange of wealth or of goods and services.”<sup>187</sup>

The Constitution, therefore, provides two objective criteria for allowing private sector to manage and operate the ‘major areas of the economy’. Was the area of the economy managed and operated by government when the constitution came

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<sup>186</sup> S16 (4)(a).It is submitted that an Act of parliament allowing private participation in a particular sector by amendment of an existing statute or enactment of a new one would meet this criteria. An example is in the road sector. Section 8 of the Federal Road Maintenance Agency (Establishment, etc.) Act 2002 provides: ‘without prejudice to the generality of the following, the Agency shall- a enter into road concession contracts for the purpose of executing relevant projects. “The essence of S16(1) is therefore to ensure that private sector can participate in all areas of the economy but can manage and operate the major areas of the economy after the right legislative steps have been taken. It should be noted that privatization and concession as has been practiced in Nigeria are not only about ordinary participation in the economy, they entail ‘managing’ and ‘operating’ including in major areas of the economy such seaports, aviation and petroleum sectors. This issue will be further explored, in the context of the ports with particular reference to the Nigeria Ports Authority Act in chapter four.

<sup>187</sup> S16(4)(b).

into force? If the answer is “yes’, then comes the next question: has there been a resolution of the National House of Assembly that it may no longer be managed and operated by the government? If the answer is in the affirmative, then the private sector may manage and operate that sector of the economy.

### *3 2 Principal concession and concession related legislations*

There are a number of laws dwelling on concession directly and indirectly. Some relate to participation of the private sector in the economy, others have tagential relevance to concession for example in terms of the requirement for economic planning.

#### **3 2 1 Laws on Private Sector Participation**

This deals with legislations that are directly related to private sector participation in the economy.

##### **3 2 1 1 The Infrastructure Concessions Regulatory Commission (Establishment etc.) 2005**

The ICRC is “an Act to provide for the establishment of the Infrastructure Concession Regulatory Commission and for related matters”.<sup>188</sup> The Act “applies to investment and development projects relating to any infrastructure of any Federal ministry, agency, corporation or body”.<sup>189</sup> It is, therefore, the principal Act of the National Assembly which provides for and regulates investment in and development of projects by way of concession in Nigeria. It establishes the Infrastructure Concessions Regulatory Commission and provides for its functions. In general ,the Act provides that “as from the commencement of this Act, any Federal Government Ministry, Agency, Corporation or body involved in the financing, construction, operation or maintenance of infrastructure, by whatever name called, may enter into a contract with or grant concession to any duly pre-qualified project proponent in the private sector for the financing, construction,

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<sup>188</sup> Preamble to the Infrastructure Concession Regulatory Commission Act ,2005

<sup>189</sup> S 1(2).

operation or maintenance of any infrastructure that is financially viable or any development facility of the Federal Government in accordance with the provisions of this Act".<sup>190</sup> This means, from 10<sup>th</sup> of November, 2005,<sup>191</sup> Federal Government bodies are empowered to make concessional grants to the private sector without violating the provisions of ICRC.

In line with its statutory duty of producing policy guidelines for concession,<sup>192</sup>the ICRC formulated the National Policy on Public Private Partnership which provides guidelines for the implementation of concession in Nigeria.<sup>193</sup>

### **3 2 1 2 The public procurement Act 2007**

This is an Act enacted for the purpose of developing the legal framework and professional capacity for public procurement,<sup>194</sup> which, in effect, means acquisition of goods, works and services by any public procuring entity being any public body.<sup>195</sup> The Act provides for the regulatory framework for setting standards and requirements for Public Procurement. The Act essentially covers procurement of goods,<sup>196</sup> services ,<sup>197</sup> works and disposal of assets.

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<sup>190</sup> S1(1).The commencement date as provided after the preamble to the Act is November 2005

<sup>191</sup> The commencement date stipulated in the ICRC Act after the preamble.

<sup>192</sup> S19 (a) Infrastructure Concession Regulatory Commission Act

<sup>193</sup> The National Policy on Public Private Partnerships(NPPP),2009.It describes itself as follows:" This policy statement, and its supporting Supplementary Notes, sets out the steps that the Government will take to ensure that private investment is used, where appropriate, to address the infrastructure deficit and improve public services in a sustainable way"[Par] 2.

<sup>194</sup> See the Explanatory memorandum to the Public Procurement Act No 31 2007.

<sup>195</sup> S 60 Public Procurement Act No 31 of 2007defines procurement simply as acquisition. According to the Supplementary Notes 1 to the National Policy on Public Private Partnership" Public procurement is the process by which government buys goods, works, or services from the private sector." Par 2.Public Procurement refers to the entire process of government acquisition (of goods, services and works). See Arrow smith, Linarelli and Wallace, Jr, *Regulating Public Procurement: National and International Perspectives*, ( 2000) 2 See It is about buying or acquiring goods and services by authorities from another juristic entity.

<sup>196</sup> This refers to "object of every kind and description including raw materials, products and equipment and objects in solid, liquid or gaseous form and electricity as well as services incidental to the supply of the goods" S60 PPA.

<sup>197</sup> Services" means the rendering by a contractor or supplier of his time and effort and includes any object of procurement other than goods, works or constructions 60 Public Procurement Act.



The “disposal of assets” aspect is covered by Part X of PPA and deals with procurement processes involving public enterprises under Public Enterprises (Privatisation and Commercialisation) Act.<sup>198</sup>It provides, *inter alia*, that ‘open competitive bidding shall be the primary source of receiving offers for the purchase of any public property offered for sale’.<sup>199</sup> The PPA does not mention the word concession directly. Its covers works which “means all works associated with the construction, reconstruction, demolition, repair or renovation of a building, structure or works, such as site preparation, excavation, erection, building, installation of equipment or materials, decoration and finishing, as well as services incidental to construction such as drilling, mapping, satellite photography, seismic investigation and similar services provided pursuant to the procurement of contract, where the value of those services does not exceed that of the construction itself”.<sup>200</sup>

The ICRC refers to and defines concession in terms of construction,<sup>201</sup>and typifies Construction as " any form of engineering work whether civil, structural, mechanical or electrical and includes rehabilitation, improvement, expansion, alteration and related works and activities, supply and installation of equipment or materials".<sup>202</sup> This implies that concession is a procurement of works being covered by PPA which provides that “the provisions of this Act shall apply to all procurement of goods, works and services carried out by (a) the Federal Government of Nigeria and all procurement entities”. In fact the type and typology of concession dealt with under the ICRC is called Works Concession as will be shown later in this chapter.<sup>203</sup>

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<sup>198</sup> 1999.

<sup>199</sup> S 55(4).

<sup>200</sup> S36 Infrastructure Concession Regulatory Commission Act.

<sup>201</sup> See S1(1).

<sup>202</sup> S36 Infrastructure Concession Regulatory Commission Act.

<sup>203</sup> See the definition of works in s6 of the Regulation on Public Procurement of Goods Services Statutory Instrument 45 of 2007: "Works" means all works associated with the construction, reconstruction, demolition, repair or renovation of a building, structure or works, such as site preparation, excavation, erection, building, installation of equipment or materials, decoration and finishing, as well as services incidental to construction such as drilling, mapping, satellite photography, seismic investigation and similar services provided

For Federal Government bodies procurement requirement for all good, services and works excludes only 'special goods',<sup>204</sup> to which PPA may be applied only after approval of the president. The relevant section reads:" The provisions of this Act shall not apply to the procurement of special goods, works and services involving national defense or national security unless the President's express approval has been first sought and obtained".<sup>205</sup> This means the Act deals with all procurements –whether concessional or otherwise-by any Federal Government agencies and bodies except the category of "special goods, works and services."

### **3 2 1 3      Public Enterprises (Privatisation and Commercialisation) Act 1999**

This Act deals with privatisation and commercialization of what it calls "certain public enterprises" and establishes the National Council of Privatisation and Bureau of Public Enterprises.<sup>206</sup> The Act does not define privatization and commercialization. While the National Council of Privatisation approves the enterprises to be privatized and commercialized, as well as relevant policies and guidelines,<sup>207</sup> the Bureau of Public Enterprises implements the privatization and commercialization policies and oversees privatization of enterprises approved by the former.<sup>208</sup>

The enterprises to be privatized and commercialized are listed in the Schedules to the Act. The enterprises listed in Part I of the First Schedule to the Act "shall be

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pursuant to the procurement of contract, where the value of those services does not exceed that of the construction itself".

<sup>204</sup> Special goods "means any objects of armaments ammunition mechanical electrical equipment or other thing by the Armed Forces or Police Force as well as the services incidental to the supply of as may be determined by the President needed the objects" S60 Public Procurement Act.

<sup>205</sup> S 15(2) .This may have implications on naval concessions in the Nigerian maritime waters including the ports.

<sup>206</sup> See the Preamble to the Act which provides for" Act to provide for privatisation and commercialisation of certain public enterprises and to establish the National Council on Privatisation and the Bureau of Public Enterprises; and for matters relating thereto".

<sup>207</sup> See s11 PEA.

<sup>208</sup> See s 13 PEA.

partially privatised in accordance with the provisions of this Act”.<sup>209</sup> The enterprises in Part II of the First Schedule are listed for full privatization.<sup>210</sup> Similarly, the enterprises listed in Part I of the Second Schedule to the Act are slated to be partially commercialised while those listed in Part II of the Second Schedule to the Act shall be fully commercialised.<sup>211</sup> In the case of privatisation, the National Council on Privatisation is given the powers to, by order published in the Gazette, alter, add, delete, or amend the list of enterprises in the First Schedule, from time to time.<sup>212</sup>

As far as commercialization is concerned, the Council may, from time to time, also by order published in the Gazette, amend the Second Schedule “so as to alter the category to which any enterprise listed in that Schedule shall be classified”.<sup>213</sup> The implication of this is that the Council has been given legislative powers.<sup>214</sup> Ostensibly in exercise of these powers, the Council made an amendment to include an asterisked statement at the end of the second schedule to the effect that “privatization by concession shall not entail divestiture of shares”, though the Act only empowers the Council to “add, delete or amend the list of enterprises in the First Schedule”(emphasis mine).<sup>215</sup> The Bureau of Public Enterprises, as the implementation agency of privatisation, perhaps following this ‘amendment’, adopts concession as one of the methods of privatization,<sup>216</sup> thereby creating room for potential conflict between operationalization of this Act and ICRCA.

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<sup>209</sup> S1(1).

<sup>210</sup> S1(2).

<sup>211</sup> S6(1)(2).

<sup>212</sup> S 1(3).

<sup>213</sup> S 6(3).

<sup>214</sup> This point will be explored briefly in the proper context later in the work.

<sup>215</sup> S1(1). This point will be discussed in the appropriate context.

<sup>216</sup> National Policy on Public Private Partnership.

### 3 3 *Planning law*

National Planning Commission Act establishes National Planning Commission, which serves as the secretariat of National Economic Council.<sup>217</sup> Its main objectives include determining how best the Fundamental Objectives and Directive Principles of State Policy contained in the Constitution of the Federal Republic of Nigeria 1999 can achieve the major objectives of optimal development and suggesting amendments that may be required, from time to time, to achieve those objectives in the light of encountered national realities.<sup>218</sup> It will draw up, from time to time, national economic priorities and programmes and map out implementation strategies.<sup>219</sup> To that end, the Commission has drawn up a National Integrated Infrastructure Master Plan that spells out a plan for infrastructural programme including through Public Private Partnership.<sup>220</sup>

### 3 4 *Principal sectoral legislations*

These are legislations regulating particular sectors slated for concession such as ports, airports and electricity sector. The Nigeria Ports Authority Act,<sup>221</sup> as earlier stated in chapter one, is the principal legislation for ports in Nigeria and is therefore a critical instrument as far as concession is concerned in this sector.<sup>222</sup> While many sectoral legislations have not been amended or repealed to provide for monumental private sector participation in the relevant agencies' main

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<sup>217</sup> S11 National Economic Council is a constitutional body established under section 153(1)(h) of the Constitution and its composition and functions set out in the Third Schedule(Part I)to the constitution. It comprises the following members - (a) the Vice-President who shall be the Chairman; (b) the Governor of each State of the Federation; and (c) the Governor of the Central Bank of Nigeria .The council have power to advise the President concerning the economic affairs of the Federation, and in particular on measures necessary for the co-ordination of the economic planning efforts or economic programmes of the various Governments of the Federation. Its role in concession and other economic activities is manifested through its secretariat at National Planning Commission.

<sup>218</sup> S2(d) National Planning Commission.

<sup>219</sup> S2(f)National Planning Commission.

<sup>220</sup> National Integrated Infrastructure Master (NIIM) Plan,2014. Its objectives include; adopting an coordinated approach to infrastructure development, Promoting private sector participation in infrastructure development Strengthening the policy, legal and institutional frameworks for effective infrastructure development, among others. See Introduction to NIIM.

<sup>221</sup> Cap126 LFN 2004.

<sup>222</sup> The remit for contextual and substantial analysis of this point in respect of the ports will be explored in chapter four.

operational functions,<sup>223</sup>a few others have been repealed to that effect. An example of repealed legislation is the National Electricity Power Authority Act, which has been repealed by the Electricity Power Reform Act (EPRA).<sup>224</sup>

The EPRA separates the regulatory aspect of electricity sector from the operational aspects by setting up National Electricity Regulatory Commission.<sup>225</sup> The Act provides for private sector participation in the operational aspect of generation, transmission, distribution and sale of electricity,<sup>226</sup> which had essentially been the preserve of the then power behemoth, National Electricity Power Authority. The effect of this is that concession in this particular sector has been enabled by the sectoral Act, the EPRA. An example of legislation that has not been repealed-like NPA Act- is the National Inland Waterways Act.<sup>227</sup>

This Act clearly illustrates the importance of sectoral legislation in concession. This Act has provisions that may hamper private sector from the performance of the functions relating to the Act and makes contravention of this an offence.<sup>228</sup>

### *3 5 Legislations relating to fiscal and financial aspects*

These refer to legislations governing the fiscal and financial aspects of concession

#### **3 5 1 Fiscal Responsibility Act no 31 2007**

This legislation provides for prudent management of the country's revenue and expenditure, longterm economic stability of the national economy and ensures accountability and transparency in government's fiscal operations within what it calls Medium Term Expenditure Framework.<sup>229</sup> According to the interpretation part, Medium Term Expenditure Framework is "the document referred to and the

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<sup>223</sup> Nigeria Port Authority Act ,as earlier stated is an example.

<sup>224</sup> No 77 of 200.

<sup>225</sup> S 31.

<sup>226</sup> S62 Electric Power Reform Act.

<sup>227</sup> Cap N47 LFN 2004.

<sup>228</sup> See s13 and 23 National Inland Waterways Act. These sections hampers private performance of underwater engineering works, hydrographic surveys, sand and gravel-mining, among others within waterways.

<sup>229</sup> See the Preamble to the Act and the explanatory memorandum to the Act.

content of which is prescribed in section 1 of this Act”.<sup>230</sup> In actuality, the Medium Term Expenditure Framework is neither directly referred to nor its content described in section 1, it is prescribed and its contents described in section 11.

According to this section the Federal Government after consultation with the States shall not later than six months from the commencement of the Act, cause to be prepared and placed before the National Assembly, for their consideration a Medium-Term Expenditure Framework for the following three financial years.<sup>231</sup> The government is required to roll out the Medium Term Expenditure every three years .To that effect, Federal Government corporations and agencies and government owned companies listed in the Schedule to this Act shall not later than 6 months from the commencement of the Act and for every three financial year thereafter and not later than the end of the second quarter of every year cause to be prepared and submitted to the Minister(of Finance)their Schedule estimates of revenue and expenditure for the next three financial years.<sup>232</sup> The schedule provides that government agencies not listed may be included by the minister since the Act covers all Federal Government agencies. The Medium Term Expenditure Framework shall contain a fiscal strategy which includes, *inter alia*, the Federal Government’s medium-term financial objectives,<sup>233</sup> the policies of the Federal Government for the medium-term relating to taxation, recurrent (non-debt) expenditure, debt expenditure, capital expenditure, borrowings and other liabilities, lending and investment.<sup>234</sup> The Medium Term Expenditure Framework must form the basis of Federal Government budget,<sup>235</sup> and every government contract in implementation thereof or carried out under it “ shall comply with the rules and guidelines on:(a) procurement and award of contracts; and (b) due process and certification of contract”.<sup>236</sup> Any violation of this

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<sup>230</sup> S 56.

<sup>231</sup> S 11(1).

<sup>232</sup> S 21(1).

<sup>233</sup> S 11(1).

<sup>234</sup> S 11(2).

<sup>235</sup> S 38.

<sup>236</sup> *Ibid.*

requirement amounts to an offence, according to the Act.<sup>237</sup> All this means that Federal Government concessional contracts are required to be within the framework of the Medium Term Expenditure Framework and such concessional contracts must not only comply with this Act but also other laws relating to contract.

### **3 5 2 Debt Management Office Act**

The main relevance of this Act lies in the fact that where the Federal Government procures and incurs debt or borrows in the process of or for the purpose of concessional projects, it must comply with the relevant provisions of the Act. The Act provides that “no external loan shall be approved or obtained by the Minister unless its terms and conditions shall have been laid before the National Assembly and approved by, its resolution”.<sup>238</sup> It provides further that “the Federal State Government or any of their agencies shall not obtain any external loan except with a guarantee issued by the Minister”.<sup>239</sup> It mandates all banks and financial institutions requiring to lend money to the Federal, State and Local Governments or any of their agencies to obtain the privy approval of the Minister.<sup>240</sup>

### **3 6 Other relevant legislations**

According to the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects, a typical concession, apart from principal concession law(s), may characteristically come under the impact of laws such as legislations relating to promotion and protection of investment, property law, security interest, general contract law, administrative law, tax law, environmental law and consumer protection law.<sup>241</sup> In the context of Nigeria, a good example is the

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<sup>237</sup> S 39. The penalty for the offence is not spelt out.

<sup>238</sup> S 21(1).

<sup>239</sup> S 21(2).

<sup>240</sup> S 24.

<sup>241</sup> See Forward to the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects. The Model Law advises that the relationship of the other areas of law to any specifically enacted law on privately financed infrastructure projects. The United Nations Commission on International Trade Law (UNCITRAL), was established by the United Nations General Assembly by resolution 2205 (XXI) of 17 December 1966 to further the progressive harmonization and modernization of the law of international trade. It develops model laws within its mandate as recommendation to member countries

National Investment Promotion Commission Act which provides for the legal and institutional framework for promoting, encouraging, facilitating and regulating investment in the Nigerian economy.<sup>242</sup> The Act applies to investment by both Nigerians and non-Nigerians. It generally permits foreigners to” invest and participate in the operation of any enterprise in Nigeria.<sup>243</sup> However, a foreigner ,unlike a Nigerian, can only invest in Nigeria after incorporating a company in Nigeria for that purpose under the Company and Allied Matters Act,<sup>244</sup> which is the law dealing with registration of companies and other corporate entities.<sup>245</sup> This means that while a natural person can enter into concession, if he is a foreigner, he must incorporate a company for the purpose of the concession as provided for under NIPMCA. Another relevant law is Utilities Charges Regulatory Commission Act, a law that regulates the pricing of services by Federal Government agencies and bodies.<sup>246</sup>It enunciates the principles to be used in calculating of services to include cost, need to eliminate waste, consumer protection, rate of returns of capital invested.<sup>247</sup>It lists Federal Government Agencies to which the law applies to include Nigeria Port Authority.<sup>248</sup>

Neither the ICRC nor NPAA does make cross reference to this Act, yet it is important in the determination of pricing structure in a concessional and other related contractual agreements agreement. Also relevant are regulations made pursuant to any of the above legislations. An example is Regulations on Procurement of Goods and Works made pursuant to the Public Procurement Act.<sup>249</sup>

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See UNCITRAL <http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf> (accessed 14-8-2016).

<sup>242</sup> See preamble to the National Investment Promotion Commission Act I6 of 1995

<sup>243</sup> S17 NIPCA. The only exception to investment by foreigners ,as provided in section 18 of the Act,are items listed in the Schedule to the Act such as arms and ammunitions

<sup>244</sup> S 19.

<sup>245</sup> Company and Allied Matters Act.

<sup>246</sup> Utilities Regulatory Commission Act.

<sup>247</sup> S 6(1)Utilities Regulatory Commission Act.

<sup>248</sup> See Schedule to the Act.

<sup>249</sup> The Regulations on Procurement of Goods and Works Statutory Instrument 45 2007 describes itself as follows in its s 1: “These Regulations shall apply to all Procuring Entities and Participants in Public Contracts and to all public procurements of Goods and Works except where a waiver is first obtained under the Act.”



### 3 7 Common law of contract

Concession as shown in the statutory definition is essentially a contract, being “an agreement by which two parties reciprocally promise and engage or one of them simply promises to give some particular thing or to do or abstain from doing some particular act”.<sup>250</sup> Hence it may come under the radar of common law of contract rules particularly on matters on which there are no specific statutory provisions. The English Common Law, as enunciated in judicial decisions ,including those relating to contract, is applicable in Nigeria.<sup>251</sup> In *Bamidele V Commission for Local Government and Community Development, Lagos*.<sup>252</sup>it was held that every right found in contract whether or not government is involved, conferring sufficient interest on a party to seek redress in the court to enforce his contractual rights shall be enforceable by the court. To that effect, the courts would entertain concessional agreement as a contractual obligation so long as it, like a typical concession, comprises all the elements of contract.<sup>253</sup>

In *Olaope V Obafemi Awolowo University*,<sup>254</sup> the respondent invited the appellant for a briefing on the construction of commercial facilities on a concession area of the education zone .The appellant designed and delivered the structure to the respondent who refused to pay. The court held that a valid contract had not been entered into because the appellant was only invited for a briefing ,there was no contract as yet. The courts could draw on the rich precedent of common law cases on contract to adjudicate on concession cases particularly where the relevant statutes are silent.

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<sup>250</sup> Deventer *Law of Construction Contract* (1993)149.

<sup>251</sup> Folasade Folake Aare *Law of Contract National Open University* (2008 )16.

<sup>252</sup> (1994) 2 NWLR (PT 328) 568.

<sup>253</sup> The elements of contract are;offer, acceptance,intention to create legal relations.

<sup>254</sup> (1997)7 NWLR Pt 1354).

## 4 Objectives and principles of concession

The ICRC does not directly provide for objectives and principles of concession, though some principles and objectives may be inferred from its provisions.<sup>255</sup> However, the National Policy on Public Private Partnerships does directly provide for the benchmarking objectives and principles of concession and other Public Private Partnerships. While objectives form the basis and provide a focus for concession, the principles help in determining the framework for the appropriateness and mechanism of concessional transactions.<sup>256</sup> The policy objectives are so fundamental the government will have to “monitor, review, and from time to time, refine, its PPP Policy in order to achieve its wider policy objectives” and also “propose amendment of existing legislation or the enactment of new legislation”, to that effect.<sup>257</sup> This will “ensure that public authorities are empowered to enter into agreements for the implementation of privately financed infrastructure projects and can delegate their statutory functions to private companies”.<sup>258</sup>

### 4.1 Objectives

The NPPP divides the objectives into economic, social and environmental categories and requires the public authorities to “communicate clearly the objectives of infrastructure policies” and “put in place mechanisms for consultation between the public and private partners regarding these objectives”.<sup>259</sup> This is within the parameters of the economic, social and environmental objectives of state policy contained in chapter two of the Constitution.<sup>260</sup>

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<sup>255</sup> The provisions of related Acts also have provisions relating to some of the principles discussed in this part and shall be appropriately referred to where necessary.

<sup>256</sup> See Par 8 National Policy on Public Private Partnerships(NPPP).

<sup>257</sup> Par [4] NPPP.

<sup>258</sup> Par [4] NPPP.

<sup>259</sup> Par [8] NPPP.

<sup>260</sup> See Chapter 2 of the Constitution titled “Fundamental Objectives and Directive Principles of State Policy”. The constitution requires all organs and bodies of government to comply with the objectives(See s13 of the Constitution).To that end one of the Functions of Fiscal Responsibility Commission, which may involved in concession to ensure fiscal discipline ,is “to monitor and enforce the Act and by so doing promote the economic objectives contained in section 16 of the Constitution” See s 3 Fiscal Responsibility Act No 31 2007.

## **4 1 1 Economic objectives**

In terms of the Constitution “

[t]he State shall, within the context of the ideals and objectives for which provisions are made in this Constitution. (a) harness the resources of the nation and promote national prosperity and an efficient, a dynamic and self-reliant economy; (b) control the national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity.

(2) The State shall direct its policy towards ensuring: (a) the promotion of a planned and balanced economic development;(b) that the material resources of the nation are harnessed and distributed as best as possible to serve the common good; (c) that the economic system is not operated in such a manner as to permit the concentration of wealth or the means of production and exchange in the hands of few individuals or of a group; and (d) that suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care and pensions, and unemployment, sick benefits and welfare of the disabled are provided for all citizens”.

The extent to which different parts of the above constitutional provisions reflect in the characterization of economic objectives by the NPPP and their relationships with other objectives (and principles thereafter) are discussed below.

## **4 1 2 Efficiency in service to all**

In line with the constitutional parameter of “an efficient a dynamic and self-sufficient economy”,<sup>261</sup> the NPPP outlines the economic objective to include the need “to utilise federal and state assets efficiently for the benefit of all users of public services” and to accelerate investment in new infrastructure and ensure that existing infrastructure is upgraded to a satisfactory standard that meets the needs and aspirations of the public in the context of improving “the availability, quality, and efficiency of power, water, transport and other public services in order to increase economic growth, productivity, competitiveness, and access to markets”.<sup>262</sup>

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<sup>261</sup> 16(1)(a).

<sup>262</sup> Par [2].

However, in adopting concession or any other form of PPP, the Government should be making no presumption about the relative efficiency or effectiveness of the public and private sectors in the delivery of projects and services and will have to use PPP where this is likely to result in better value and more affordable.<sup>263</sup>

### **4 1 3 Balanced and planned economy**

In line with the constitutional objective of promoting “ a planned and balanced economic development”,<sup>264</sup> and ensuring “ that the economic system is not operated in such a manner as to permit the concentration of wealth or the means of production and exchange in the hands of few individuals or of a group”,<sup>265</sup> NPPP aims “to ensure balanced regional development”. While the NPPP doesn’t expansiate what balanced regional development entails, the NIIM fills the gap to the effect that it is meant to achieve equity and spread in developmental programmes among all regions of the country and between rural and urban areas.<sup>266</sup>

The notion of a balanced economy entails planning. For this reason and for organized deployment of public resources, the government will ensure that there is coordination and planning of infrastructural investment and greater use of economic appraisal techniques to prioritise investment. To that effect, it will develop an investment strategy in consultation with the States, the public and civil society as well as the public,<sup>267</sup> and will consolidate its Medium Term Expenditure Framework and the sectoral strategies of its ministries, departments and agencies to, *inter alia*, develop the capacity of public authorities to carry out economic appraisal of projects.<sup>268</sup>

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<sup>263</sup> Par [3].

<sup>264</sup> S16(2)(a).

<sup>265</sup> S16(2)(c).

<sup>266</sup> NIIM.

<sup>267</sup> Par [4] NPPP.

<sup>268</sup> *Ibid.*

According to FRA, the Medium Term Expenditure Framework, One common thread of ICRC and PPA as discussed above is that they all provide that concession, procurement and privatization and commercialization should be within government plan. This is what ICRC calls “prioritized projects” and PPA refers to as balanced and planned economy.

#### **4 1 4 Value for money and affordability**

The government must ensure that all investment projects provide value for money and that the costs to the public purse are affordable.<sup>269</sup> To achieve this, It will have to be providing guidance to all public authorities as well as support and advise them on discount rates, inflation, indexation, techniques for measuring costs and benefits, and the valuation of risks and, where required, the government will work with international institutions such as the World Bank to reduce financing costs.<sup>270</sup> Bids for PPP will only be invited when it is clear that there is scope for a private proponent to deliver value for money and the cost of the service payments are affordable to both government and users.<sup>271</sup>

#### **4 1 5 Improved private sector participation**

A core economic objective is “to increase the capacity and diversity of the private sector by providing opportunities for Nigerian and international investors and contractors in the provision of public infrastructure, encouraging efficiency, innovation, and flexibility”.<sup>272</sup> By capacity it would seem the policy mean the technical and financial capability. By diversity of the private sector this would mean all sectors, nationalities and sizes of the private sector.

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<sup>269</sup> Par [2] NPPP. See also s 38 of Regulation on Procurement of Goods and Works which provides that value for money must be obtained through efficiency and fair access to bid.

<sup>270</sup> Par [4].

<sup>271</sup> Par 2.1 Supplemental Notes I to the NPPP. According to the Supplementary Notes I, Value for Money is a combination of the service outcome to be delivered by the private sector, together with the value of risks transferred to the private contractor and direct costs to government and users.

<sup>272</sup> Par [2] NPPP.

In the case of the last category, the state intends “to encourage the direct or indirect participation of small and medium sized enterprises in PPP projects” as much as the bigger players.<sup>273</sup> This is all in view of the fact that increased and improved private sector participation, both through PPPs and privatisation, has been recognized by government to decrease the burden of the required infrastructural investment and financing by the public sector.<sup>274</sup> For this purpose the government shall remove distortions created by existing tax, banking, company, or any other laws that would debar and bar the investment decisions of public authorities against PPP, or would distort the commercial decisions of PPP investors, proponents, contractors, or operators.<sup>275</sup> To facilitate financing by the private sector actors, the government will “take measures to increase the depth of Nigeria’s financial markets and encourage them to provide a range of financial instruments to mitigate financial risks”.<sup>276</sup> This will require that the regulation of Nigeria’s financial and capital markets provides transparency, stability and liquidity for investors in PPP projects and permits the development of new sources of finance.<sup>277</sup>

## 4.2 Social objectives

In terms of the constitution, Nigeria shall be a state based on the principle of social justice.<sup>278</sup> The security and welfare of the people of Nigeria shall be the primary purpose of government.<sup>279</sup> To the same end, it is provided that “the State social order is founded on ideals of Freedom, Equality and Justice”.<sup>280</sup> The

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<sup>273</sup> Par [2]. This will also help in attaining the objective the constitutional objectives which provides that the state ensures “that the economic system is not operated in such a manner as to permit the concentration of wealth or the means of production and exchange in the hands of few individuals or of a group”. See s16(3)(c) of the Constitution.

<sup>274</sup> NIIM par 5

<sup>275</sup> Par [4] NPPP

<sup>276</sup> Par [4] NPPP

<sup>277</sup> Par [4] NPPP

<sup>278</sup> S 14(1)

<sup>279</sup> S 14(2)(b) of the constitution

<sup>280</sup> S17(1). The constitution further provides in sub-section 2 and 3 of that section that “

(2) In furtherance of the social order-

- (a) every citizen shall have equality of rights, obligations and opportunities before the law;
- (b) the sanctity of the human person shall be recognised and human dignity shall be maintained and enhanced;
- (c) governmental actions shall be humane;
- (d)

Constitution links the social objective with economic objectives by providing “that suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care and pensions, and unemployment, sick benefits and welfare of the disabled are provided for all citizens”<sup>281</sup> and by way of another provision to the effect the state shall “control the national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity”.<sup>282</sup>

The social objectives are geared towards promoting social good and well-being. The social objectives are about facilities and services for promoting community well-being relating to, *inter alia*, health, labour, education, sport, culture and tourism and (access to) developmental facilities (especially) for youth and women

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exploitation of human or natural resources in any form whatsoever for reasons, other than the good of the community, shall be prevented and, (e) the independence, impartiality and integrity of courts of law, and easy accessibility thereto shall be secured and maintained;

(3) The State shall direct its policy towards ensuring that- (a) all citizens, without discrimination on any group whatsoever, have the opportunity for securing adequate means of livelihood as well as adequate opportunity to secure suitable employment; (b) conditions of work are just and humane, and that there are adequate facilities for leisure and for social, religious and cultural life; (c) the health, safety and welfare of all persons in employment are safeguarded and not endangered or abused; (d) there are adequate medical and health facilities for all persons: (e) there is equal pay for equal work without discrimination on account of sex, or on any other ground whatsoever; (f) children, young persons and the age are protected against any exploitation whatsoever, and against moral and material neglect; (g) provision is made for public assistance in deserving cases or other conditions of need; and (h) the evolution and promotion of family life is encouraged”.

<sup>281</sup> S16(d).

<sup>282</sup> S16(b). For the nexus between social and economic objectives see the provisions of S17(2)(3) in footnote 280 above.

<sup>283</sup> Par [2] NIIM. It should be noted that NIIM discusses this issue in terms of provision of social infrastructure such as health and educational facilities. From the perspective of NPPP, it goes beyond that and encompasses integration of social consideration into PPP projects whether they are social infrastructure or economic infrastructure such as ports.

## **4 2 1 Access**

Accessibility as a social objective requires that the entire infrastructural service chain be fully accessible.<sup>284</sup>

In line with the constitutional social objective of equality of rights and opportunities,<sup>285</sup> NPPP aims that concession and other PPP “ increase access to quality public services for all members of society”,<sup>286</sup> linking this to the economic aspect earlier discussed “to ensure that user charges for new or improved public services are affordable and provide value for money”. However it doesn’t expansiate its position on the constitutional objective which requires that” provision is made for public assistance in deserving cases or other conditions of need”.<sup>287</sup> This is an obvious reference to social safety nets like subsidy to which the NPPP merely refers when it provides that “the government will ensure that its policies on user charges and tariff subsidies are sustainable and meet the needs of both users and investors”,<sup>288</sup> without indicating the parameters for possible subsidy application that can be used for determining its sustainability. As for parameters for charges this has been provided by the Utilities Charges Regulatory Commission Act which prescribes the principles of ability of consumers protection, avoidance wastes to beat down charges, cost of investment and rate of return on investment in determining charges.<sup>289</sup> However, this does not obviate the need for concession law and particular sectoral Act to make ample provision in this regards in the particular and peculiar context of concession.

## **4 2 2 Job security and rights**

The constitution mandates the state to direct its policy so that “all citizens, without discrimination on any group whatsoever, have the opportunity for securing

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<sup>284</sup> Par [1.5.2] NIIM In the transport sector, for example, this means stations, bus stops, airports, etc., should be fully accessible to and usable by people including people with disabilities”. Par 1.5.2 NIIM.

<sup>285</sup> S17(1) and S16(b).

<sup>286</sup> Par [2].

<sup>287</sup> S17(2)(g).

<sup>288</sup> Par [4].

<sup>289</sup> S10 Utilities Charges Regulatory Commission.



adequate means of livelihood as well as adequate opportunity to secure suitable employment”.<sup>290</sup> For those already employed in concessioned public enterprises, It is an economic policy objective of concession “to respect the employment rights and opportunities of existing employees and to ensure that any redundancy or other social safety net issues are resolved before final project approval”.<sup>291</sup> This objective is quite apposite in view of the fact that concessioning activities for example in Nigeria ports have raised concerns about massive job loss by former employees of government. Constitutionally, governmental actions must be humane.<sup>292</sup>

### **4 2 3 Health and safety**

The NPPP health and safety policy is to “enhance the health, safety, and wellbeing of the public”.<sup>293</sup> This would not only be about ensuring that” the health, safety and welfare of all persons in employment are safeguarded and not endangered or abused”<sup>294</sup> and the provision of social infrastructure such as medical and health facilities for all persons ,<sup>295</sup> but also generally to the effect that” the sanctity of the human person shall be recognised and human dignity shall be maintained and enhanced”, as the Constitution requires.<sup>296</sup> For this reason concession must not only not endanger the safety and health of the public but must promote same in a wholistic manner: enhancing the sanctity of the human person. This would be of special significance for statutory bodies such as Nigeria Railway Authority and Nigeria Port Authority whose incidental functions include issues of Public Safety and Public Health in their respective operational environments. When infrastructural services involving such bodies are concessioned, they would need to pass the social objective of health and safety .Where concession would endanger safety and health of the public particularly the users of such facilities, it is submitted that such agencies would have failed

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<sup>290</sup> Sec 17 (3)(a) .

<sup>291</sup> Par 2]NPPP.

<sup>292</sup> S 17(b) Constitution.

<sup>293</sup> Par 2 NPPP.

<sup>294</sup> 17(3) ( c).

<sup>295</sup> 17(2)(d).

<sup>296</sup> 17(2)(b).

this social objective. A more critical issue would be whether the constituent Acts of such agencies could be interpreted to mean that their core safety and health duties are legally capable of being concessioned and to what extent.<sup>297</sup>

### *4.3 Environmental objective*

In terms of the constitutional objective mandating the state to “protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria”,<sup>298</sup> the NPPP environmental objective is “to protect and enhance the natural environment” .This is quite germane considering the fact that concession is being widely adopted at a time the country is faced with a number of serious environmental challenges. Such environmental challenges include land degradation, oil spills, pollution, urban waste, desertification and erosion, among others.<sup>299</sup> NIIM notes, with concern, that environmental degradation and pollution have led to negative indirect effects on sectors of the economy and direct threats to human existence and survival.<sup>300</sup>

A more specific environmental objective is “to minimize greenhouse gas emissions and other pollutants”.<sup>301</sup> This is in view of the fact that “climate change could make food, energy, and water security more difficult for Nigeria to achieve”.<sup>302</sup> It could also affect the nation’s infrastructure and make future investments more costly or require other types of investments to make the infrastructure climate resilient and resistant.<sup>303</sup>

There are relevant provisions in law that may help in achieving this environmental objective. Under the law, “the public and private sector of the economy shall not undertake or embark on or authorize a project or activity without prior

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<sup>297</sup> The foundation will be laid for discussion of this point in the context of NPA in chapter three and further explored in the context of the thrust of this research in chapter four.

<sup>298</sup> S20 of the Constitution.

<sup>299</sup> NIIMS 2.1.6.

<sup>300</sup> NIIMS 2.1.6.

<sup>301</sup> Par [2] National Policy on Public Private Partnerships.

<sup>302</sup> NIIMS 1.5.1.

<sup>303</sup> NIIMS 1.5.1.

consideration, at an early stage, of the environmental effect” of the project.<sup>304</sup>In a case “where the extent, nature or location of proposed project or activity is such that it is likely to significantly affect the environment, an environmental impact assessment shall be undertaken”,<sup>305</sup>with a view to determining the extent of the effect. Where the environmental impact assessment of an infrastructural concession project or any project at that- returns with a verdict it would significantly affect the environment, it may not be authorized unless the damage can be mitigated.<sup>306</sup>If the impact assessment is positive, the concessional project is still mandated to comply with relevant environmental laws for its whole life cycle.<sup>307</sup> In particular, an infrastructural concessional project, involving construction works, must comply with National Environment (Construction) Regulation.<sup>308</sup> In view of the fact that Infrastructural concession under the ICRC is essentially about construction works, it goes without saying that this regulation applies to it. This is in addition to any other particular instrument specifically regulating the particular sector that is the subject matter of the concession. In the case of the port, for example, there is National Environment (Coastal and Marine) Regulation.<sup>309</sup>

#### *4 4 Principles*

The NPPP provides for principles of PPP and links them to the policy objectives by providing in the Statement of Principles that “strategies for private sector participation in infrastructure will be disseminated and objectives shared throughout all levels of government and relevant parts of the public

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<sup>304</sup> S 2(1)Environmental Impact Assessment Act LFN E21 2004. This is a “An Act to set out the general principles, procedure and method to enable the prior consideration of environmental assessment in certain public or private projects”, according to the preamble to the Act.

<sup>305</sup> S (2)(2) Environmental Impact Assessment Act.

<sup>306</sup> S 4 (e) Environmental Impact Assessment Act.

<sup>307</sup> The general environmental law regulating all aspects of the economy is the National Environmental Standards Regulatory Agency Act 2007 which created the National Environmental Standards Regulatory Agency which has the responsibility of environmental laws, regulations ,guidelines and standards.

<sup>308</sup> Statutory Instrument (S1) 18 of 2011.

<sup>309</sup> Statutory Instrument (S1)18 of 2011.

administration”.<sup>310</sup> Both principles and objectives are mutually reinforcing; in fact they are used interchangeably in the preamble to UNCITRAL Model Law.<sup>311</sup>The principles include public interest transparency, accountability, among others.

#### **4 4 1 Public interest**

Protection of public interest requires that the public is secured from what is injurious while promoting public good and welfare.<sup>312</sup> It is a constitutional requirement” that the material resources of the nation are harnessed and distributed as best as possible to serve the common good”.<sup>313</sup>It is further provided that the” exploitation of human or natural resources in any form whatsoever for reasons, other than the good of the community, shall be prevented.”<sup>314</sup> The primary concern of the for-profit private sector is maximization of profit while the primary objective of government is public welfare. The private sector represents the interest of shareholders or owners, while the government represents the public.<sup>315</sup> To secure public welfare the government will need to continually ensure that public interest is the overriding consideration in any concessional project and to that end, ensure that “adequate consultation with end-users and other stakeholders prior to the initiation of an infrastructure project” ,<sup>316</sup> is undertaken. On the part of the concessionaires providing infrastructural services and facilities in communities, they “need to be mindful of the consequences of their actions for those communities and work, together with the public authorities, to avoid or mitigate socially unacceptable outcomes”.<sup>317</sup> They will therefore have to contribute to strategies for communing and consulting with as well as communicating to the generality of the public, customers, affected communities,

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<sup>310</sup> Par [4] NPPP.

<sup>311</sup> See the Preamble to the UNCITRAL Model Legislation on Privately Financed Projects.

<sup>312</sup> This is how public interest is defined,in obiter,per Mukaila ,Justice of Nigerian Court of Appeal in *Total Nigeria PLC v Ajayi* (2003) LPELR 6174(CA) 28 Par G-B.

<sup>313</sup> S 16(b) of the Constitution.

<sup>314</sup> S 17(2)(d).

<sup>315</sup> Buxham and and Ortiz *Protecting the Public Interest:The role of Long term Concession Agreement for Providing Transportation Infrastructure* (2007) 8.

<sup>316</sup> Par [8] National Policy on Public Private Partnership.

<sup>317</sup> Par [8].

and corporate stakeholders, in order to garner understanding and acceptance of the objectives of the public authorities and private parties.<sup>318</sup>

The ICRC has no specific provision relating to public interest in concession agreement in contrast to UNCITRAL model Law which provides for termination of concession agreement “for compelling reason of public interest, subject to payment of compensation to the concessionaire”.<sup>319</sup>In fact, the ICRC has a provision to the effect that concession agreement made under the Act may not be suspended or terminated.<sup>320</sup>It is submitted that the UNCITRAL Model Law provision is more in tune with the Constitution of Nigeria on this particular issue.<sup>321</sup>

## **4 4 2 Transparency**

Transparency is about being scrupulous and open to stand the weight of public accountability and scrutiny. One distinction between private entity and the public sector is that the latter is subject to strict rules of transparency such as the one relating to information disclosure to the public as provided for in relevant statutes.<sup>322</sup>The FRA for example emphasizes that the Federal Government shall ensure that its fiscal and financial affairs are conducted in a transparent manner that ensures full and timely disclosure and wide publication of all transactions

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<sup>318</sup> Par [8].

<sup>319</sup> Provision 44(b) UNCITRAL Model Law.

<sup>320</sup> S11 Infrastructure Concession Regulatory Commission Act.

<sup>321</sup> See fn 128 and fn 129 above. See also S14(1)(b) of the constitution which provides that “the security and welfare of the people shall be the primary purpose of government” and S 45(1) “Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society in the interest of defence, public safety, public order, public morality or public health.” The sections referred to in this section are about fundamental rights to, privacy(s37),religion(s38),expression (s39), association (s40) and movement (s41).Issues of public interest relating to the categories mentioned are allowed as derogation from these rights to make relevant laws for the purpose of public order, public safety and other mentioned categories. Therefore where a concessional law or agreement provides for possible termination for compelling public interest for example for reason of public safety, public defence, public health or public order, subject of course, to compensation, it will be in tandem with this constitutional provision.

<sup>322</sup> See for example the preamble to the Freedom of Information Act which describes the Law as an Act to “provide for public access to public records and information” and protection of personal privacy. The later category will apply to private persons as guaranteed by the right to privacy in the constitution in S37 of the constitution.

and decisions involving public revenues and expenditures and their implications for its finances.”<sup>323</sup>

The requirement of transparency in a PPP presents a peculiar challenge as it involves two sectors operating within different parameters of transparency working together in the use of public resources. For this reason the NPP provides that “fiscal discipline and transparency must be safeguarded and the potential public finance implications of sharing responsibilities for infrastructure with the private sector fully understood.”<sup>324</sup> This applies at all stages of the relationship starting from the processes involved in the award of concession ,hence the requirement that the” awarding of infrastructure contracts or concessions will be designed to guarantee procedural fairness, non-discrimination, and transparency.”<sup>325</sup> Thought out the concession it is required that “public authorities will take effective measures to ensure public and private sector integrity and accountability and establish appropriate procedures to deter, detect, and penalize corruption”.<sup>326</sup> This is in view of the fact that the state has constitutional duty to “abolish all corrupt practices and abuse of power”.<sup>327</sup> To that end, the NPPP prohibits the private sector participants, their sub-contractors and representatives from resorting to bribery and other irregular practices, gain control over assets to gain an unfair advantage, or attempt to win favours in the course of their infrastructure contract or operations.<sup>328</sup>

One important aspect of transparency which does not enjoy mention in the NPPP’s statement of principle on transparency is the statutory requirement for information disclosure as provided for under Freedom of Information Act (FRA). What looks like this quite important requirement is tucked away in passing

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<sup>323</sup> S 48(1) Fiscal Responsibility Act. See also s16(d) which provides that all public procurement must be done in a manner which is transparent and ensures accountability.

<sup>324</sup> Par [8].

<sup>325</sup> Par [8].

<sup>326</sup> Par [8].

<sup>327</sup> S15(5) of the Constitution.

<sup>328</sup> Par [8].

reference under another principle it calls” Engaging with the Market” .The relevant paragraph therein reads:

They (the public authorities) will disclose all project-relevant information, including the condition of existing infrastructure, and the standards of performance they require, together with proposed penalties for non-compliance as part of the procurement process”. Given the context in which this is mentioned, it is obvious that it provides for information disclosure to the private sector or the market regarding to the concessional contract to be made.

The requirement of Freedom of Information Act goes beyond this highly limited contractual remit providing that “Notwithstanding anything contained in any other Act, law or regulation, the right of any person to access or request information, whether or not contained in any written form, which is in the custody or possession of any public official, agency or institution howsoever described, is established”.<sup>329</sup> It is further provided that “where information is applied for under this Act the public institution to which the application is made shall, subject to sections 6, 7, and 8 of this Act, within 7 days after the application is received-(a) make the information available to the applicant”.<sup>330</sup>This provision applies to what the Act calls public institutions .A government agency such as Ministry of Transport or NPA easily falls under this category.

In situation where a public service function is transferred to a private entity for example in a concessional contract, what happens to the right of the public to information? The answer is provided by the FOI. It defines public institution obligated to provide information as any legislative, executive, judicial, administrative or advisory body of the government, including boards, bureau, committees or commissions of the State, and any subsidiary body of those bodies including but not limited to committees and sub- committees which are supported

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<sup>329</sup> S 1(1) Freedom of Information Act.

<sup>330</sup> S 4(a) Freedom of Information Act. Section 6 provides for extension of time to provide the information, section 7 provides for issues relating to denial of information such as statement to the effect that the requested document is not in existence ,section 8 provides for limitation of fees the applicant is charged to the cost of duplication and transmission.

in whole or in part by public fund or which expends public fund and private bodies providing public services, performing public functions or utilizing public funds.<sup>331</sup>

This includes, for emphasis, “private bodies providing public services, performing public functions or utilizing public funds”. This would include a concessioned public enterprise performing public functions or being paid wholly or partly from public funds as provided under ICRC A to the effect that project proponent investment may be repaid or recouped by government by “way of amortization payment”,<sup>332</sup> meaning by installment.<sup>333</sup>The NPPP does not address itself to this particular aspect of FOI let alone providing more guidance on its application to PPP.

### **4 4 3 Competition**

The principle of competition deals essentially with the economic relationship of players with one another and with their clients and customers in a concessioned or privatized market environment for stalling monopoly of the market by any one or group of players.<sup>334</sup> The NPP observes, “The benefits of private sector

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<sup>331</sup> S 30(3) See also sec 2(7) which provides:” Public institutions are all authorities whether executive, legislative or judicial agencies, ministries, and extra-ministerial departments of the government, together with all corporations established by law and all companies in which government has a controlling interest, and private companies utilizing public funds, providing public services or performing public functions”.

<sup>332</sup> S6 (3) ICRC A.

<sup>333</sup> In interpretation of provisions relating to transparency in the United States of America’s Freedom of Information Act, the US Courts have developed what is known as functional equivalency jurisprudence which means where a private entity is performing a function hitherto performed by a public sector authority, the public record law applies to that entity .See the case of *Friedman v Correction Corporation of America*,310 SW3d 366(2009).In this case Correction Corporation of America managing some America’s prison hitherto managed by the government declined an information requested under transparency law. The court held it was obliged to give the information for reason of functional equivalency. See also the case of *Kimberly Kay Allen et al v John Day and Powers Mgt,LLC*,213 S.W 3d 244(Tenn.Ct. App .2006) with similar holding .It is submitted that this would apply in Nigeria in view of clear provision of the Freedom of Information Act on the definition of public institution.

<sup>334</sup> The issue of competition has been central in the promotion of enhanced private sector participation. This issue is being considered in new proposed laws regulating different sectors. For example the National Transport Commission, proposed to be the new economic regulator for ports ,gives the function of the Commission to include creating “an economic regulatory framework in respect of the provision Commission. of transport services and facilities which promotes and safeguards competition, fair and efficient market



participation in infrastructure are increased by effective competition and by ensuring that business activities are subject to appropriate commercial pressures, dismantling unnecessary barriers to entry, and implementing and enforcing adequate competition laws”.<sup>335</sup> One significant constitutional implication of this is that it embodies constitutional objective of ensuring that “the economic system is not operated in such a manner as to permit the concentration of wealth or the means of production and exchange in the hands of few individuals or of a group”.<sup>336</sup> Hence procurement for concession must be done in a manner that promotes competition.<sup>337</sup>

#### **4 4 4 Capacity development**

This is presented to be about the authorities responsible for privately operated infrastructure having the ability to manage the commercial processes involved in concession and to partner on an equal basis with their private sector counterparts.<sup>338</sup> For this purpose NPPP states that “training will be provided to transfer relevant skills and understanding to those involved in projects, including decision makers”.<sup>339</sup> Capacity is restricted to the commercial –know-how of public officers managing the process and decision makers rather than targeting the whole economy in terms of technology transfer and technical skills acquisition in addition to business-know -how. The ICRCA, in contrast to the provision in the model UNCITRAL Model law ,does not provide for capacity development or spell out a contractual term relating to technology transfer and

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conduct or, in the absence of a competitive market, which prevents the misuse of monopoly or market power.” See Clause 5(1)(a)-(e)National Transport Commission Bill.

<sup>335</sup> Par [8].Contrary to the impression given in this part ,Nigeria has no stand-alone competition law as yet. Relevant Competition Bill is yet to pass.

<sup>336</sup> 16(2) (c) Constitution.

<sup>337</sup> See S16(f) Public Procurement Act.

<sup>338</sup> Par [8].

<sup>339</sup> See S4 National Office for Technology Acquisition (NOTAP) Act Cap62 LFN which provides for the functions of NOTAP to include ensuring efficient technology transfer in the Nigeria economy.

training.<sup>340</sup> The position of UNCITRAL Model Law appears to be more in tune with Nigerian technology transfer Law.<sup>341</sup>

## 5 Types and forms of concession

The use of concession as a mode of private participation comes in different types and takes different forms. Types of concession include natural resource/ extractive concessions, which is about exploitation of raw materials such as oil, rubber, gold, silver, diamonds, iron, coal, tin, timber, fishing, game, and so on,<sup>342</sup> service concession and works concession. In the extractive type of concession, a state grants concessions as an exclusive right to explore, develop, sell or export natural resources or minerals extracted from a specified area for a stipulated period of time and covering defined areas.<sup>343</sup> For the purpose of this thesis, works concession and service concession will be discussed.

Similarly concession takes different forms. These include Build- Operate- and- Transfer (BOT), Design- Build –Operate- and Transfer (DBOT) Lease- Operate- and Transfer (LOT), among others.<sup>344</sup>

### 5.1 Service and works concession

Where a concession aims at transferring a public function such as in respect of a port or harbour, water and electricity supply, to a private investor which entails the transfer of operation of activities formerly carried out by a government authority, it may be of the variety of service concession or works/infrastructure concession.<sup>345</sup> Distinction is normally made between service concession and works concession. Service concession is one in which the object is essentially one of provision of service by a private sector service provider. Works concession is one in which the

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<sup>340</sup> See Provision 48(b) which provides for contractual term between the contracting authority and concessionaire on "transfer of technology relating to the facility" and 48(d) for training of personnel.

<sup>341</sup> See S18(2) of the Constitution which requires the government to "promote science and technology".

<sup>342</sup> Christopher "Concession" 3; see also Guldberg "Concessions: A Problem of International Economic Law" 15 Nordisk Tidsskrift Int'l Ret 47 (1944) 59.

<sup>343</sup> Christopher "Concessions" 6.

<sup>344</sup> Ibid

<sup>345</sup> Christopher "Concession" 10.

object is essentially one involving construction or rehabilitation project. Practically in either case the works concession also involves service component and service concession could also involve element of works.<sup>346</sup>The implication is that there could exist a grey area between the two, which requires criteria for distinction in case of mixture of service with works or works with service.

The criteria that has been adopted in some jurisdictions is that where there is a mixture, the type more important from economic point of view is used to characterise the typology of the contract so that where the works is economically weightier, it is a work concession and vice versa.<sup>347</sup>Also relevant in this is the criteria used for distinguishing contract of service from contract of sale (of goods) in common law known as the principle of substantiality which is based on “what is substantial and what is incidental”.<sup>348</sup>While the ICRCA does not make this distinction, one thing that is clear enough is that it dwells more on concession of works, in fact mostly those that are of infrastructural status.

The ICRCA refers often to “financing, construction or operation of infrastructure”<sup>349</sup> and speaks to concession in terms of “construction including financing of any infrastructure, facility and the operation thereof and shall include the supply of any equipment and machinery for any infrastructure and the provision of any services”,<sup>350</sup> as earlier pointed out. By this provision the ICRCA thereby recognizes infrastructural or facility construction as the *de jure* object of concession while supply of goods and services involved in the process as being

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<sup>346</sup> Georgette and Adam “Public Works Concession: Delimitation from other Contracts” 2012 2 *Juridical Tribune* 194 206.

<sup>347</sup> See for example Article 12 of the Spanish Law of Public Sector Contracts which provides that where a contract includes provision of services based on one or the other type of contract, including the specific elements of public services or public works concession, respectively, the contractual provisions to be considered, based on certain criteria, are those most important from the economic viewpoint.

<sup>348</sup> Where a contract of service and contract of sale of goods are mixed for example as in a contract where a person is contracted to buy and fix a curtain in which case supplying a curtain is goods and fixing it is service. To determine if this is a contract of service or contract of sale of goods, courts have applied substantiality principle whereby the one that is substantial is used to determine if it is one or the other. If service is substantial and supply of the goods is only incidental, then it is a contract of service.

<sup>349</sup> See S 1(1).

<sup>350</sup> S 36.

merely incidental or automatically included irrespective of the economic value of the work concession relative to the value of goods used or the service rendered. It provides no basis for any distinction between the duo of works concession and service concession, though its typification clearly shows that it dwells on works. Works concession “shall include supply of goods” and provision of services. While this helps in establishing the distinctive character of works concession, it means the ICRC has no provision for a type of concession which is essentially that of service by character. NIIM criticizes NPPP for concentrating mainly on concession at the expense of other PPP but it needs reiterating that this is a result of the fact that ICRC pursuant to which NPPP is made dwells more on concession.<sup>351</sup> It dwells not only more on concession in general but essentially on a particular type of concession namely works concession. That means, concession under ICRC is more about procurement of works. This implies that when there is a concession in Nigeria on what UNCLOS calls “harbour works”,<sup>352</sup> it is a works concession which includes service aspect. Under the PPA, there is distinction made between services and works and the basis for distinction is also provided for.

While characterizing services as being other than goods, works and construction,<sup>353</sup> the Act defines works as all works associated with the construction, reconstruction, demolition, repair or renovation of a building, structure or works, such as site preparation, excavation, erection, building, installation of equipment or materials, decoration and finishing, as well as services incidental to construction such as drilling, mapping, satellite photography, seismic investigation and similar services provided pursuant to the procurement of contract, where the value of those services does not exceed that of the construction itself.<sup>354</sup>

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<sup>351</sup> Par [5.4] National Integrated Infrastructure Master Plan.

<sup>352</sup> See Art 11 UNCLOS.

<sup>353</sup> S61.

<sup>354</sup> S 61.

The above provision combines the approach of substantiality by referring to “services incidental to construction” with the approach of economic weight with the proviso “where the value of those services does not exceed that of construction itself”. This distinction means that for works concession as envisaged under the ICRCa to be qualified as such for procurement under the PPA, the services component must be incidental to the works component as long as the value of services is not higher than that of the construction works. Under the ICRCa the service component is declared incidental to the work or construction component without reference to the relative economic value of each. In a situation where the value of service component is higher, the PPA would treat it as service contract for the purpose of procurement.

In a massive Greenfield concession, where the concessionaire undertakes new concession, possibility of works being of higher value is quite high. In a Brownfield concession, where the public sector entity conveys to the private firm the right to provide services directly or indirectly to the public through the use of an existing infrastructure asset, the value of the works may have to be calculated based on renovation to be done on the asset. Where there is little renovation to be done, there is possibility of a lower value.

## *5.2 Forms of concession*

The form used in concession is about the ownership status of the object of concession namely the infrastructural facility. The different forms discussed below depend on the ownership structure between the concessionaire and the public authority and the point at which the facility is returned or transferred to the public authority. The ICRCa does not provide for the different forms. The NPPP merely mentions BOT without expanding on it.<sup>355</sup> Ditto for the Regulations on Procurement of Goods and Services which merely mentions Build- Operate- Transfer (BOT) and Build- Own-Operate-Transfer in the context of being methods of procuring for works contracts without also expanding on the duo.<sup>356</sup>The duo-

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<sup>355</sup> See for example Par 7 National Policy on Public Private Partnerships.

<sup>356</sup> S 4 Regulations on Goods and Works Procurement Statutory Instrument 45 of 2007.

B-O-T, B-O-O-T-will be discussed together with Rehabilitate – Operate –Transfer (R-O-T), Build-Transfer-Operate (B-T-O), Build-Lease-Transfer. All these forms are used in ports operations around the world.<sup>357</sup>

## **5 2 1 Build-Operate-and Transfer (BOT)**

This is the form of concession used for Greenfield concession in Nigerian ports. Perhaps the most popularly used form of works concession, the Build-Operate-Transfer-Model (BOT), is one under which a long term relationship between the State and the investor is established wherein the legal title to the infrastructure, belonged to and remains with the public authority .

Under the BOT Model, the private entity would build the infrastructure or facility, operate it for a determined period and at the end of the concession, transfer the assets and facilities to the Public authority.<sup>358</sup> This means, after construction, the right to operate it commercially, for a stipulated period of time, at the end of which the facility is transferred to the public authority.<sup>359</sup> Either the public or a private entity identifies a need to develop a public infrastructure project. The public authority grants a concession to a private company to build or modernize the infrastructure at the private entity expense to entitle the private entity to operate the infrastructure for a fixed period of time usually between between 15 to 30 years.<sup>360</sup> The notion is that the private partner will also provide some, or all, of the financing for the facility, so the length of the concession is made sufficient to enable the private partner to recoup and gain a reasonable return on its investment through user charges. In the course of the concession, the holder is allowed to charge the users of the facility appropriate tolls and tarrifs,<sup>361</sup> subject usually to the appropriate regulatory regime. This revenue accruing to the private entity is considered a means to recover the investor's costs and to generate a profit over the lifetime of the concession .At the end of the contract, the public

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<sup>357</sup> United Nations Commission on Trade and Development *Review of Maritime Transport* (2013) 92.

<sup>358</sup> Charles *et al Port Policy* 155.

<sup>359</sup> UNCITRAL *Guide to Privately Financed Projects* 5.

<sup>360</sup> Christopher “*Concession*”10 .

<sup>361</sup> Christopher “*Concession*”10-11.

authority may extend the operation contract to the same operator or have it up for bid.<sup>362</sup>The BOT form is considered most appropriate in cases where the public nature of the project would not allow the private entity to become proprietor so that ownership rights remain with the public authority. Where there is a contract to design the building, it is called Design- Build-Operate- Transfer, with same characteristics with a BOT.

## **5 2 2      Rehabilitate-Operate-Transfer(R-O-T)**

In a ROT, the private entity would have an existing asset transferred to him, which would be operated by the private entity and then transferred back to the public authorities after an agreed period of term.<sup>363</sup>It is also called Lease-Operate- Transfer (LOT).<sup>364</sup>This entails that the private entity enhances the value and possibly modernizes the facilities, operate them efficiently and transfer same to the public authority. This is normally used in a Brownfield Concession. At the end of the concession period, the public partner can assume operating responsibility for the rehabilitated facility, transfer the operations to the original operator, or award a new concession to a new private partner.

## **5 2 3      Build-Own-Operate- Transfer (B-O-O-T)**

Where a (BOOT) arrangement is used, the private entity is granted the ownership of the public facility until the end of the arrangement, then transfers that ownership to the public authority.<sup>365</sup> In other words the legal title, acquired by the private entity, remains with it as long as the concession lasts. The private entity owns the facility and its assets until it is finally transferred to the public authority.<sup>366</sup> Thus, risks and responsibilities related to property ownership are allocated to the private sector entity during the pendency of the concession. That

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<sup>362</sup> Geography of Transport System.

<sup>363</sup> UNCTAD 1995.

<sup>364</sup> Charles *et al* Port Policy.

<sup>365</sup> Charles, Ijeoma and Kingsley *The Policy Trajectory of Nigeria Transportation; Port Policy and Administration* (2011)126.

<sup>366</sup> UNCITRAL *Guide on Privately Financed Infrastructure* Project 6.

means in legal terms, after the expiry of the concession, the property rights will be transferred to the public authority.<sup>367</sup>

#### **5 2 4 Build-Lease-Transfer (B-L-T)**

Build-Lease-Transfer –Model (BLT) differs from BOT projects in that the investor builds a complete project, sells it to the government and leases it back for the lifetime of the concession. The private partner builds a facility to standard specifications and transfers the facility by sale to a public authority. It applies for lease of the facility from the public authority for a specified time period under a concession contract with the public body, and then transfers the facility to the public body at the end of the specified period of time.<sup>368</sup>

#### **5 2 5 Build –Transfer- Operate (B-T-O)**

In this form, the private entity constructs the facility and immediately transfers ownership to the public authority.<sup>369</sup> The infrastructure may be put up on a privately acquired piece of land and then have the legal title transferred to the public authority. In other words, the facility becomes the property of the public authority immediately upon the completion of concession, the concessionaire being given the right to operate the facility for a fixed period of time.<sup>370</sup>The BTO model is similar to the BOT model except that the transfer to the public authority is done at the time that construction is completed, rather than at the end of the concession term.

### **6 Nature and features of concession**

In the statutory definition of concession,<sup>371</sup> it is characterised as a contractual arrangement which means ,as earlier stated ,it is essentially a contract .The contract involves a project proponent or contractor. A Project Proponent is a person or body corporate who has contractual responsibilities for the project and

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<sup>367</sup> Christopher “Concession” 11.

<sup>368</sup> UNCITRAL *Guide on Publicly Financed Infrastructure Project* 5.

<sup>369</sup> See fn 197 above.

<sup>370</sup> L UNCITRAL *Guide on Privately Financed Infrastructure Project* 5.

<sup>371</sup> See S36 Infrastructure Concession Regulatory Commission Act.



who has adequate financial base to implement the said project in form of equity and commitments from reputable financial institutions to provide, upon award, sufficient credit lines to cover the total estimated cost of the project.<sup>372</sup>The project proponent is the main private contracting party who bears the responsibility for financing the project and has the backing and confidence of financiers in the banking and equity sector to bankroll the cost of the project. The project proponent may not necessarily be the contractor. The Contractor is a person or corporate body who may or may not be a project proponent who enters into a contract or has been granted a concession by any Federal Government agency or body and undertakes to construct an infrastructural facility or supply any equipment for any such infrastructural facility.<sup>373</sup>

The relationship between the two –project proponent and contractor-will be put in better context while explaining the features of concession. The project proponent or contractor undertakes to carry out construction to actualize the project. The contractor put in place works of construction which means” any form of engineering work whether civil, structural, mechanical or electrical and includes rehabilitation, improvement, expansion, alteration and related works and activities, supply and installation of equipment or materials”.<sup>374</sup>The implication of this, as earlier stated, is that construction also includes supply and services that help to actualize the concession as provided in the definition of concession to the effect that concession shall “include the supply of any equipment and machinery for any infrastructure and the provision of any services”. Thus concession as envisaged by the ICRC combines the design, construction (or rehabilitation) of public infrastructure with its maintenance and the delivery of the service directly to the user. To further put this point in perspective, the ICRC Act provides:

As from the commencement of this Act, any Federal Government Ministry, Agency, Corporation or body involved in the financing, construction, operation or maintenance of infrastructure, by whatever name called, may enter into a contract with or grant concession to any duly pre-qualified project proponent in the private

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<sup>372</sup> S36.  
<sup>373</sup> S 36.  
<sup>374</sup> S 36.

sector for the financing, construction, operation or maintenance of any infrastructure that is financially viable or any development facility of the Federal Government in accordance with the provisions of this Act.<sup>375</sup>

A combined reading of this section and statutory definition of concession contractor and project proponent explains, largely, the nature of concession as envisaged under the ICRCA that could be explained in terms of at least three elements or features contained in those two provisions. The three elements or features are: Public Authority and Private Sector as Contracting Parties, the Object of Concession, Project Financing all of which must be in compliance with the provisions of the ICRCA.

### *6 1 Features of concession*

#### **6 1 2 Public and private parties**

Neither a public –public contractual arrangement nor a private-private contractual can be a concession, according to the provisions of ICRCA. The granting party must be from the public sector, the grantee must be from the private sector. It is important to be able to identify what constitutes public sector and what amounts to private sector. The ICRCA characterizes the concession granting party as Government ministry, agency, corporation or body. In general terms, the public sector comprises of governments as well as publicly controlled or publicly funded agencies, corporations enterprises, and other entities that deliver public programmes, services and goods. It is, however, not always clear whether any particular organization should be included under that category and to also know which level of government is contemplated under a particular law like the ICRCA. Thus, it is necessary to identify specific criteria to help define the boundaries and distinctions between the public and the private.

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<sup>375</sup> S1(1).

## **6 1 3 The boundary between public and private**

### **6 1 3 1 Public sector**

The ICRC Act frequently refers to “Federal Government Ministry, Agency, Corporation or body”.<sup>376</sup> The Act neither defines these terms nor does it list the specific agency, corporation or body. In contrast, the Public Enterprises (Privatisation and Commercialisation) Act provides a definition of what it means by Public Enterprise -even if imperfect-and more importantly, it provides a list of Public Enterprises that it seeks to privatize or commercialise. It describes Public enterprise as any “corporation, board, company or parastatal established by or under any enactment in the Government of the Federation, a Ministry or Extra-ministerial Department or agency has ownership, or equity interest and includes a partnership, joint venture, or any other form of business arrangement or organization”.<sup>377</sup> Similarly, the Fiscal Responsibility Act provides a list of government bodies it covers. The Public Procurement Act also defines what constitutes a (public) procuring entity as any public body engaged in procurement and includes a Ministry, Extra-ministerial office, government agency, parastatal and corporation”,<sup>378</sup> which provides a little improvement on the ICRC Act approach.

While many of these definitions and listings assist in defining the boundaries of public as distinct from the private sector, they do not go the whole hog when it comes to concession as a whole. For instance, the PPA, as important as it is to the whole concession process, deals with the procurement aspect of concession. The PPA says that an entity “which derives 35% of the funds appropriated or proposed to be appropriated for any type of procurement” shall be bound by the PPA. This refers only to the fund to be spent and not the public or private status of the entity itself. The definition in PEA, in fact, illustrates how the line between public and private sector could be blurred. While the listing of the enterprises is a straightforward matter and clearly stipulates what constitutes public enterprise

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<sup>376</sup> See for example ss 1(1),2(1),2(3),3, 4(1),5(b),7(3), 10,12,3.The common thread in all these sections is the phrase: “Federal Government Ministry, Agency, Corporation or body.”

<sup>377</sup> S 33 Public Enterprise(Privatisation and Commercialisation)Act.

<sup>378</sup> S 60 Public Procurement Act.

envisaged in the Act the percentage of equity shares allotted to the private sector, members of the public .Three examples illustrate this point. In the First Schedule to the PEA, three public enterprises were listed under Transport and Aviation Companies to wit: Federal Airport Authority of Nigeria, Niger dock Limited and Nigeria Airways Ltd. In each of these public enterprise, the federal government's share is fourty percent (40%), strategic (private) investor has fourty percent (40%) and members of the public are given the remaining twenty percent (20%).In this arrangement, who has the greatest control of the enterprise? While the 60% goes to the private sector (strategic investor and members of the public), the single highest shareholders are the strategic private investor and the federal government. Between the duo, who has control of the enterprise?

The PEA provides: "A privatised enterprise which requires participation by strategic investors may be managed by the strategic investors as from the effective date of the privatisation on such terms and conditions as may be agreed upon".<sup>379</sup>A subsidiary legislation was passed which allows the strategic investor to be given up to 51% in any of the enterprises slated for partial privatization in the First Schedule, perhaps to make it easier to determine the level of control in the enterprise including between the public and private sector. The percentage of shareholding is useful in law and practice to characterize a company for many purposes including determining the control and management and whether an enterprise is a foreign company. For example for the purpose of fiscal discipline as provided for in FRA "Government Owned Company" means a statutory corporation, Government agency and a company in which Government has controlling interest".<sup>380</sup> Whether or not the Acts referred to above succeeded in clearly establishing the boundary between public and private sector, they provided criteria for making the distinction. A particular criteria for such distinction is not provided in ICRA. The question could be asked, for example: can an enterprise with 40% Federal Government equity share enter into concession as a

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<sup>379</sup> S 4 Public Enterprise (Privatization and Commercialization) Act.

<sup>380</sup> S 56 Fiscal Responsibility Act.

“Federal Government Ministry, Agency, Corporation or body”?. It is submitted that for the purpose of concession, the law needs to be made clear on this.

### **6 1 3 2 Project proponent and contractor**

The private party in the concession is described variously as project proponent and contractor in the ICRC. According to the Act, a Project Proponent is “any person or body corporate who has contractual responsibilities for the project and who has adequate financial base to implement the said project consisting of equity and firm commitments from reputable financial institutions to provide, upon award, sufficient credit lines to cover the total estimated cost of the project”.<sup>381</sup>

The above indicates that the distinctive characteristic of the project proponent is her ability to secure financing as a basis for assuming contractual responsibility for the concession project. This is in sync with the ICRC which requires that in “entering into any contract or granting any concession under section 1 of this Act, the Federal Government Ministry, Agency, Corporation or body shall ensure that the project proponent possesses the financial capacity, relevant expertise and experience in undertaking such infrastructure development or maintenance”.<sup>382</sup> Put in context, the project proponent must have financial capacity or adequate financial base.

A Contractor is described as “any person or body corporate who may or may not be a project proponent who enters into a contract or has been granted a concession by any Federal Government Ministry, agency, corporation or body and undertakes to construct any infrastructure or facility or supply any equipment for any infrastructure or facility under this Act.”<sup>383</sup> This means a natural person or juristic corporate person who enters into concession contract for the construction of an infrastructural project. This is an aspect of the definition. This aspect correlates with the definition of concessionaire under the UNCITRAL Model Law to the effect that “a concessionaire is a ‘person that carries out an infrastructure

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<sup>381</sup> S 36 Infrastructure Concession Regulatory Commission Act.

<sup>382</sup> S 1(3)Infrastructure Concession Regulatory Commission Act.

<sup>383</sup> S 36 Infrastructure Concession Regulatory Commission Act.

project under a concession contract entered into with a contracting authority.”<sup>384</sup>This is the meeting point where the project proponent may double as the contractor. Another aspect of the statutory definition characterizes the contractor as one who supplies “any equipment for any infrastructure or facility under this act’ which may accommodate ordinary suppliers for a concession project with a separate non-concessional contract.

It might be argued that another reason for the use of the word ‘contractor’ is to allow for other kinds of PPP to be carried out under the Act. However, the general tenor of the Act is concession unlike the NPPP, which places emphasis on concession but refers to other kinds of PPP.<sup>385</sup> Incidentally, the ICRC uses project proponent as being synonymous to concessionaire more frequently than the word contractor (which appears together with the word project proponent in section 5(a)(b) and 7(1) of the Act). One instance in which it appears as a stand-alone word is where it is stated that “every contractor to whom any concession has been granted under this Act,”<sup>386</sup> a description which denotes that not all contractors might have been given concession. It would have aided clarity particularly in terms of designation of the main private party in a concession if the ICRC had stuck to one terminology like the UNCITRAL sticks to the word concessionaire .Other words like contractor may thus be used in another context.

The concessionaire, as stated in the definitions of project proponent and contractor, may be either a natural person or corporate body. Where it is a corporate body, it would be registered as such under the Company and Allied Matters Act (CAMA).<sup>387</sup>As earlier stated, where the concessionaire is a foreigner, it is generally mandatory to register a company under CAMA before carrying on business in Nigeria. For this purpose, international companies usually set up local businesses as Special Purpose Vehicles to transact concessional transactions.

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<sup>384</sup> Provision 2(d)UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects 2004.

<sup>385</sup> The name of the Act says it all: Infrastructure Concession Regulatory Commission Act.

<sup>386</sup> S 13 Infrastructure Concession Regulatory Commission Act.

<sup>387</sup> Company and Allied Matters Act Cap 21 LFN.

The concessionaire may also be a consortium in which case it must furnish evidence from the time of bidding that "all its members shall be bound jointly and severally under the contract and the withdrawal of any member of the consortium before or during the implementation of the project may be a ground for review or possible cancellation of the contract."<sup>388</sup>

## 6.2 *Object of concession*

It is provided that a government body "involved in the financing, construction, operation or maintenance of infrastructure" may enter into concession" for the financing, construction, operation or maintenance of any infrastructure". This clearly indicates that the object of the concession is essentially infrastructure which is described as developmental projects.<sup>389</sup> It also indicates that the government body had been involved in the financing, construction, operation or maintenance of infrastructures before entering into concession with the private entity in respect of "any infrastructure." The government body must be one with sectoral responsibility of financing, construction or operation of its sectoral infrastructures and may grant concession in respect of any infrastructure under its remit. This point is captured more poignantly in the definition of infrastructure in ICRC. It says infrastructure

" includes development projects which, before the commencement of this Act, were financed, constructed, operated or maintained by the Government and which, after the commencement of this Act, may be wholly or partly implemented by the private sector under an agreement pursuant to this Act including power plants, highways, seaports, airports, canals, dams, hydroelectric power projects, water supply, irrigation, telecommunications, railways, interstate transport systems, land reclamation projects, environmental remediation and clean-up projects, industrial estates or township development, housing, government buildings, tourism development projects, trade fair complexes, warehouses, solid wastes management, satellite and ground receiving stations, information technology networks and database infrastructure, education and health facilities,

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<sup>388</sup> S 4(3) Infrastructure Concession Regulatory Commission Act.

<sup>389</sup> See fn 208 above.

sewerage, drainage, dredging, and other infrastructure and development projects as may be approved, from time to time, by the Federal Executive Council.<sup>390</sup>

One important issue relating to the object of concession is the ownership status.<sup>391</sup> One character of concession is that ownership of the facility or infrastructure normally remains in the hands of the public authority. The ICRC does not provide anywhere that the ownership of the infrastructure is transferred to the concessionaire yet it is not clear on the possessory status of the facilities. A combined and contextual reading of its provisions-including the part defining infrastructure above cited- does not imply ownership of the concessioned facility by the concessionaire while at the same time clear provisions are not made on the ownership rights of the public on the concessioned facilities.<sup>392</sup> The Act is not explicit about this. In other words there is no explicit provision on the ownership status of the concessioned facility, which-it is submitted-should not be the case.

### 6.3 Financing

One important element is “financing”, a word that frequently appears together with construction, operation and maintenance in ICRC including in Section 1(1). Concession is a contract with “the private sector for the financing”<sup>393</sup> and construction or maintenance of a project. A typical concession shifts the whole or part of financing and financial risks to the private sector. The financing and construction or maintenance of a concession project may be “wholly or partly implemented by the private sector”, as the Act puts it.<sup>394</sup> In general, a concession may be fully financed by the private sector which recoups its investment through

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<sup>390</sup> S 36 Infrastructure Concession Regulatory Commission Act. The UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects defines infrastructure as ‘physical facilities and systems that directly or indirectly provide services to the general public. “See Model Provision 2.

<sup>391</sup> In *Somade v Jaiyesinmi* (2006) LPELR-11866(CA) par A-C ownership, in general legal terms, is explained thus: “Ownership generally connotes the totality of or the bundle of the rights of the owner over and above every other person on a thing. It connotes a complete and total right over property. As Tobi, JSC pointed out in *Fagunwa V. Adibi* (2004) 17 NWLR (pt 903) 544 @ 568 -” The property begins with the owner and also ends with him. Unless he transfers his ownership of the property to a third party he remains the allodia owner”. Per Augie Justice. Court of Appeal

<sup>392</sup> See for example s1(1).

<sup>393</sup> S 1(1) Infrastructure Concession Regulatory Commission Act.

<sup>394</sup> See fn 187 above. Definition of Infrastructure.



user charges.<sup>395</sup> It may also be financed partly by the private sector and partly by the public authorities.<sup>396</sup> In either case, the ICRC provides that the concessionaire “may, subject to the provisions of the concession contract, recover his investments.”<sup>397</sup> The investment is recovered through user charges as well as payment by government where agreed.

The proviso “subject to the provision of the concession” contract would refer to such conditions that may be stipulated in the concession agreement such as the one for performance parameters whereby if the concessionaire falls below the standards set for performance, it may affect if and how much he is paid by the public authority for example where there is an agreement for payment by government. The concessionaire also pays to the government at intervals charges or royalty for the grant of the concession. The Act provides: “Any contractor to whom any concession has been granted under this Act shall make payment to the Federal Government, of such sum and at such intervals, from the proceeds realized from the implementation of the concession as may be provided in the concession-contract or agreement”.<sup>398</sup> For the purpose of payments. “there shall be a Special Concession Account into which shall be credited money accruing to the government and from which shall be defrayed monies to be paid in respect of the concession scheme.”<sup>399</sup>

## **7 Process and procedures**

Relevant law from the beginning to the end must govern the conduct of Concession. The concession process moves in stages from project identification stage to the maturity stage.

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<sup>395</sup> Ismail Globalization and New International Public Works Agreements in Developing Countries (2011) 39

<sup>396</sup> *Ibid.*

<sup>397</sup> S 7(1) Infrastructure Concession Regulatory Commission Act.

<sup>398</sup> S 7(4).

<sup>399</sup> S 9 Infrastructure Concession Regulatory Commission Act.

## 7.1 Commencement stage

The ICRC requires all Federal Government Ministry, Agency, Corporation or body “to prioritize its infrastructure projects”<sup>400</sup> adding that “such priority projects may be qualified for concession” under the Act.<sup>401</sup> This requires the relevant government body to identify its need and develop its priorities around it. It will have to carry out “a systematic appraisal of technical solutions to the identified need”.<sup>402</sup> On the basis of this, the government body determines whether PPP is the most appropriate means of dealing with the infrastructure priority and if such infrastructure is qualified for concession.<sup>403</sup>

The economic, social and environmental costs of the project it identifies to meet the needs, are analyzed to arrive at a decision as to whether go for concession. This is in line with the NPPP which provides that “decisions will be made on merit and all proposals subjected to thorough economic and financial cost benefit analysis”.<sup>404</sup> The project is also tested based on value for money and affordability parameters.<sup>405</sup> Financial analysis is carried and is fed into the plan to test if the project is financially feasible.<sup>406</sup> The plan for the project must be supported by budget within the National Development Plan and should, subsequently, be consistent with the Medium Term Expenditure Framework.<sup>407</sup> With this in place,

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<sup>400</sup> S 2(1).

<sup>401</sup> S 12(1).

<sup>402</sup> Par [9] National Policy on Public Private Partnership.

<sup>403</sup> See s 18(f) which empowers the government body to determine the procurement method to be used because for meeting the identified need.

<sup>404</sup> Par [3] National Policy on Public Private Partnership.

<sup>405</sup> If the value for money requirement is not passed it will fail and important economic objective. It will also fail to pass through at the procurement level. See 16(1)(b) Public Procurement Act.

<sup>406</sup> See Par 9 and s 18© Public Procurement Act.

<sup>407</sup> See S 18(2) Fiscal Responsibility Act; see also Par 9 of National Policy on Public Private Partnership. The NPPP does not define Outline Business Case(OBC) but provides for its contents in the Supplementary Notes. In general an OBC is a document which sets out the preliminary analysis of a proposed project citing information to arrive at an informed decision regarding the adoption of the project, stating the possible outcomes in terms of anticipated benefits and potential risks. See [www.felp.ac.uk/taxonomy/term/62](http://www.felp.ac.uk/taxonomy/term/62) (assessed 8-10-2016).The contents of OBC as listed in the NPPP is :A description of the policy context and business need; cost benefit analysis including non-quantifiable costs and benefits; an evaluation of the options for meeting the project objectives; identification of the preferred procurement route based on value for money and the feasibility or desirability of using PPP;analysis of the project risks and mitigation measures;-description of the

the Outline Business Case (OBC) is approved.<sup>408</sup> Where the concession is within the prior review threshold set by the BPP, <sup>409</sup>the project will require a “Certificate of No Objection’ to be issued by the BPP before it can proceed to the procurement stage.<sup>410</sup> The ICRC is required to publish in the Federal Gazette and at least two newspapers the list of projects eligible for concession,<sup>411</sup> though there is no provision in the Act requiring the government body to submit the list of its “priority project” to the ICRC. It is also not clear in the Act at which stage of commencement this should be done. The NPPP does not even make reference to this requirement at all. The purpose of this publication requirement is also not stated, *albeit* it is certain from the context that this particular requirement for publication is not about soliciting a bid.

## 7.2 Bidding and award

Where a specially created structure does not exist within the government body to carry out the pre-project identification and analysis required in the commencement stage, it is a statutory requirement that such must be put in place for the purpose of procurement under the PPA.<sup>412</sup> In terms of ICRC, the government body is required to publish invitation for bid in at least two newspapers having wide circulation and vide other means of communication or circulation based on open competitive bidding.<sup>413</sup> In terms of PPA, open

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proposed risk allocation and contract terms; affordability analysis, including a cash flow model of estimated costs and returns for a PPP contractor and consequent annual payments to or by the authority; sensitivity analysis to the key input variables. See Par 3.1 National Policy on Public Private Partnership; Supplementary Notes on Procurement Par [9] National Policy on Public Private Partnership.

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409 S16(1)(a) Public Procurement Act.

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S 6(1).Public Procurement Act. A "Certificate of No Objection" means the document evidencing and authenticating that due process and .the letters of this Act have been followed in the conduct of a procurement proceeding and allowing for the procuring entity to enter into contract or effect payments to contractors or suppliers from the treasury” See S60 Public Procurement Act.

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S2(4) Infrastructure Concession Regulatory Commission Act.

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See s 18(g) which requires that a Procurement Planning Committee carries out cost, budgetary and other planning related to procurement. The PPA requires each government body to establish Tender Board which is responsible for the award of procurements of goods, services .S21(1) and s22(3).The ICRC does not require government bodies to create a specialized structure for concession. However, some government agencies have established PPP units in their structure to be in charge of PPPs including concessions.

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See S4(1)Infrastructure Concession Act. See also s 25(2)(1) Public Procurement Act which ,in addition, prescribes that the bid be also published in at least one international

competitive bidding “means the offer of prices by individuals or firms competing for a contract, privilege or right to supply specified goods, works, construction.”<sup>414</sup>Where only one contractor submits a bid after advertisement or only one meets the prequalification requirement, the government body may enter into direct negotiation with such contractor without competitive bidding.<sup>415</sup>In either case, “the concession contract shall be awarded to the bidder who, having satisfied the pre-qualification criteria, submits the most technically and economically comprehensive bid.”<sup>416</sup>

As per the provision of ICRC, the government body shall “ensure that the project proponent possesses the financial capacity, relevant expertise and experience in undertaking such infrastructure development or maintenance”<sup>417</sup>Prior into entering into any concession contract, the government body shall obtain the approval of the Federal (Government) Executive Council.<sup>418</sup>In terms of the PPA, the government body must “obtain the approval of the approving authority before making an award”<sup>419</sup>of a procurement. The approving authority is “ the person charged with overall responsibility for the functioning of a ministry, extra-ministerial department or corporation.”<sup>420</sup>This can be reconciled with the provision of ICRC in that the approval of the approving authority as conceived under the PPA would be needed as well as the approval of the Federal Executive Council for the purpose of a concession. The award is finally made after the approval of the Full Business Case by the Federal

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publication where international bidding is required. It also provides the bid be published in any official website of the government body and the BPP’s website and procurement journal. This may accommodate “other means of circulation “provided for in ICRC. See also s19(a) Public Procurement Act.

<sup>414</sup> S 60 Public Procurement Act.

<sup>415</sup> S 5(1)(2)Infrastructure Concession Regulatory Commission Act.

<sup>416</sup> S 4(2)Infrastructure Concession Regulatory Commission Act.

<sup>417</sup> S 2(3) Infrastructure Concession Regulatory Commission Act.

<sup>418</sup> S 2(2)Infrastructure Commission Regulatory Commission Act.

<sup>419</sup> S 19(d) Public Procurement Act. This would mean that the Tender Board, in line with section 17 of PPA, may clear a procurement for award but the final approval lies with the “approving authority”

<sup>420</sup> S 60 Public Procurement Act. The person with overall responsibility would likely be a minister responsible for that particular ministry or government body .For instance, in the case of ports, this would be the Minister of Transport.

Executive Council.<sup>421</sup> Thereafter, a concession agreement is signed between the government body and concessionaire, which the ICRC is required by law to take custody of.<sup>422</sup>

### *7.3 Implementation and maturity stage*

Before starting the concession project, the concessionaire is required to “undertake an appropriate insurance policy with an insurance company approved by the National Insurance Commission.”<sup>423</sup> While the risks to be insured against are not provided in the Act, possible risks would be in respect of the concession property.

The concessionaire has a duty to undertake the maintenance and repairs of the infrastructure or facility during the subsistence of the contract.<sup>424</sup> In terms of the ICRC, the government body shall supervise the concession granted under the Act.<sup>425</sup> This would involve “monitoring of design and construction, and subsequently, operation and maintenance to ensure compliance with the required service standards.”<sup>426</sup> To that end, the ICRC together with the concessioning government body may enter upon the concession premises to inspect any land or asset related to the concession.<sup>427</sup> The supervisory oversight also involves monitoring of payments made to the government by concessionaire and vice versa.<sup>428</sup> For this purpose, the project cost shall be duly authenticated by the relevant Ministry or government Department as well as relevant qualified professionals for the purpose of determining correctly the amount to be

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<sup>421</sup> See par 9(11) National Policy on Public Private Partnership. The NPPP does not define a Final Business Case. In general it is used to explain the fact that a project is unequivocally affordable and makes a case for putting in place project management structure for successful project development that offers optimum value for money.

See [www.sci.scot.nhs.uk/PDFS/Manuals/BC\\_Guide\\_4.pdf](http://www.sci.scot.nhs.uk/PDFS/Manuals/BC_Guide_4.pdf) (assessed 8-19-2016).

<sup>422</sup> S 20(a).

<sup>423</sup> S 7(a).

<sup>424</sup> S 7(b).

<sup>425</sup> S 12 Infrastructure Concession Regulatory Commission Act.

<sup>426</sup> Par 9 (111) National Policy on Public Private Partnership.

<sup>427</sup> S 10 Infrastructure Concession Regulatory Commission Act.

<sup>428</sup> Par 9(111) National Policy on Public Private Partnership.

paid.<sup>429</sup> When the concession term comes to an end, the government body would inspect the premises. Unless the contract is renewed for the concession area, the assets would be handed over to the government body.<sup>430</sup>

## **8 Concession agreement**

The concession agreement or contract is the mutually binding agreement between the contracting authority (the government body) and the concessionaire that sets forth the terms and conditions for the execution and implementation of the concession.<sup>431</sup> Concession Law usually contains prescribed terms that shall be included in a concession agreement between the public authority and concessionaire. The ICRC does not contain prescribed concessional terms nor does it require the formulation of a model concession agreement by the ICRC or a government body entering into a concession agreement. An important part of the concession agreement is statement of rights and duties of parties. The Act has a few provisions which may be used in framing the rights and duties of parties. For example, it says that “every contractor to whom any concession has been granted under this Act shall have a right of way or easement in respect of any land or property near to or bordering the project site or facility as may be reasonably necessary for the proper implementation of the project under this Act”.<sup>432</sup> This could be used to phrase clauses regarding easement with further details in the spirit of freedom of contract. It would seem the Act’s approach is that of freedom of contract whereby parties can agree on terms so long as they are “in accordance with the provisions of this Act.”<sup>433</sup>

A concession agreement, for instance, cannot oust the right of public authority to monitor its activities as required under the Act.<sup>434</sup> However, the proviso “in accordance with the provisions of this Act” would work better if the Act had ample

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<sup>429</sup> S 8 Infrastructure Concession Regulatory Act.

<sup>430</sup> Par 9(1v) National Policy on Public Private Partnership.

<sup>431</sup> See Provision 2 UNCITRAL Model Law.

<sup>432</sup> S 13 Infrastructure Concession Regulatory Commission Act.

<sup>433</sup> See S (1).

<sup>434</sup> S 10 Infrastructure Concession Regulatory Commission.

provisions on sundry issues, which is not the case. To illustrate, there is no provision on dispute resolution in the Act. The NPPP tries- insufficiently- to fill this gap in a single sentence when it avers that the ICRC will “provide the first point of contact in the event of disputes between the parties.”<sup>435</sup> In any case the phrase “in accordance with the provisions of this Act” is important in another respect: the governing law clause characteristic of contracts with a foreign party. It means the governing law shall be the domestic law.<sup>436</sup>

As far as freedom to stipulate mutually agreed terms by the parties is concerned, the Act refers to the concession agreement in two places. The first is on the issue of duration of the concession and secondly on the amount to be paid as well as interval of payment of charges by the concessionaire to the government body. In the case of duration of the concession, the ICRC permits that the “duration of any concession shall be as may be specified in the agreement or contract governing the concession.”<sup>437</sup> This effectively leaves the period of concession to the negotiation of the parties. This would also imply there is no statutory minimum and maximum time caps. Regarding the provision on payment, the ICRC says:

“any contractor to whom any concession has been granted under this Act shall make payment to the Federal Government, of such sum and at such intervals, from the proceeds realized from the implementation of the concession as may be provided in the concession-contract or agreement” .<sup>438</sup>

By this provision the parties are given freedom to determine the amount of money to be remitted and the interval of remission ,in the concession agreement.<sup>439</sup>

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<sup>435</sup> Par 4.5 Supplementary Notes on Procurement National Policy on Public Private Partnership. This appears to be recommending mediation or arbitration as the first means of settling disputes, rather than negotiation. Had the ICRC makes provision for dispute resolution, it could make clear make the preferred means of settling disputes.

<sup>436</sup> For comparison, the UNCITRAL Model Law clause on this issue reads: “The concession contract is governed by the law of the (the enacting state) unless otherwise provided in the concession contract”. See Provision 29.

<sup>437</sup> S 6 Infrastructure Concession Regulatory Commission Act.

<sup>438</sup> S 7(4).

<sup>439</sup> The National Policy on Public Private Partnership does not state the percentage either. It alludes to the interval of payment with reference to yearly payments. See Par 4.3 National Policy on Public Private Partnerships.

However these are not the only issues that are conventionally dealt with in a typical concession. There are other terms which the parties may include in the concession agreement. In terms of the UNCITRAL Model, the concession agreement may include terms relating to specific statement of rights and duties of each party, performance guarantee, ownership of asset, dispute resolution, circumstances in which the concession may be terminated, among others

There may also be sub-contracts between subcontracts between the concessionaire and separate joint venture companies providing design, construction, or maintenance services.<sup>440</sup> The main concession agreement normally indicates if and how the concessionaire will seek the permission of the public authority.

## **9 Institutional framework**

The main regulatory and institutional body for concession is the ICRC. The institutional framework include such bodies as Fiscal Responsibility Commission, National Planning Commission, Utilities Charges Regulatory Commission as well the sectoral agencies or bodies, among others. However for the purpose of establishing the regulatory nexus between regulatory agencies created by ICRC, PEA and PPA, only ICRC, NCP/BPE and NCPP/BPP are discussed below.

### *9 1 Infrastructure Concession Regulatory Commission (ICRC)*

ICRC, established by the ICRC as a body corporate,<sup>441</sup> is the principal regulatory body for concession. The Director General, appointed by the President subject to confirmation by the Senate,<sup>442</sup> is the chief executive and accounting officer of the commission and is responsible for the day-to-day administration of the commission.<sup>443</sup> The ICRC is under the control of a Governing Board headed by a

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<sup>440</sup> Par 3.4 Supplementary Notes on Procurement, National Policy on Public Private Partnerships.

<sup>441</sup> S 14(1)(2).

<sup>442</sup> S 21(1)(a).

<sup>443</sup> S 21(1)(b) Infrastructure Concession Regulatory Commission Act



part –time chairman and consisting of the Director General, who serves as the secretary,<sup>444</sup> and other persons.<sup>445</sup> Specifically, the Board shall have power to” provide the general policy guidelines relating to the functions,<sup>446</sup> as well as superintend and manage the commission’s policies.<sup>447</sup> Such policies and guidelines are meant “to give full effect to the provisions of this Act”.<sup>448</sup>

As earlier noted the NPPP was made pursuant to this provision. The Board may” subject to the provisions of this Act, make, alter and revoke rules and regulations for carrying on the functions of the Commission”. In other words, the powers to issue regulations is subject to the provisions of the ICRCA which provides that the ‘Commission may, with the approval of the President, make such regulations as, in its opinion, are necessary or expedient for giving full effect to the provisions of this Act and for the due administration of its provisions’.<sup>449</sup>This means regulations can only be made and will only take effect with the president’s approval. The Board has been given the powers to “do such other things which in its opinion are necessary to ensure the efficient performance of the functions of the Commission under this Act”.<sup>450</sup> One of such things is the power to “appoint one or more committees to carry out on behalf of the Board such of its functions

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<sup>444</sup> S 21(1)(d).

<sup>445</sup> S 15(1)(2) The other persons are the Attorney General of the Federation, the Minister of Finance, the Secretary to the Government of the Federation, the Governor of the Central Bank of Nigeria and the Director General. In line with the objective of “balanced development” in the NPPP, It shall also consist of one person each from the six geopolitical zones of Nigeria who shall each have cognate experience and expertise in law, business administration, engineering, economics and two of whom shall be women. See S15(2).This composition may assist in achieving the objective of using concession and other PPPs as a means of achieving “ balanced and planned development’.Furthermore, board member can not be appointed or continue in office if “he is convicted of a felony or of any offence involving dishonesty or corruption” as such a person can not help in implementing the NPPP’s principle of Transparency. See s16(d) and in the case of the case of the Director General see S21(3)(b).It is also worth noting here that for the proper and efficient performance of its functions, the Commission may, from time to time and subject to approval of the Board, appoint such other staff as it may deem necessary and expedient. See S22(a)(b).

<sup>446</sup> S 19(a)Infrastructure Concession Regulatory Commission Act.

<sup>447</sup> S 19(b).

<sup>448</sup> S 34(1)(b).

<sup>449</sup> S 34(a).

<sup>450</sup> S 18(f).

as the Board may determine and report on any matter with which the Board is concerned.”<sup>451</sup>

In general, the commission’s functions include taking “custody of every concession agreement made under this Act and monitor(ing) compliance with the terms and conditions of such agreement”<sup>452</sup> and to “ensure efficient execution of any concession agreement or contract entered into by the Government.”<sup>453</sup> The commission must also ensure compliance with the provisions of ICRC.<sup>454</sup> To this end ,it “shall have the power at any reasonable hour during the day time to enter upon and inspect any land or asset comprised in any concession granted or contract executed pursuant to this Act for the construction or erection of any infrastructure project and it shall be the duty of the project proponent, the contractor or anyone acting on its behalf to permit and give free access to enter and inspect” .<sup>455</sup>

Apart from the foregoing the commission can only perform other duties “as may be directed by the President, from time to time, and as are necessary or expedient to ensure the efficient performance of the functions of the Commission”<sup>456</sup> under the ICRC. A combined reading of the powers of the board, in specific, and the functions of the Commission in general, reveals that the regulatory space of ICRC is quite limited. It does not include specific regulatory oversight at the point of initiating concessional transaction .In the statement of functions and powers, the ICRC is not mandated to be involved at the initiation stage of concession nor are the Federal Government ministries, agencies and bodies specifically mandated to involve the Commission, apart from the requirement under Section 4 of the Act which requires it to publish list of projects eligible for concession without stating how the commission will come about the list and for what purpose the publication is made.

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<sup>451</sup> Par 8 of the Schedule to the Infrastructure Concession Regulatory Commission Act.

<sup>452</sup> S 20(a)Infrastructure Concession Regulatory.

<sup>453</sup> S 20(b).

<sup>454</sup> S 20(c).

<sup>455</sup> S 10

<sup>456</sup> S 20(d).

Perhaps these legislative lacunae contributed to what had previously led many Federal government bodies to bypass ICRC in initiating concessional transactions which led the presidency to issue a directive to all Federal Government agencies and bodies to involve the ICRC at all stages of concession.<sup>457</sup> Had the federal government agencies or bodies flouted this presidential order, there are no punitive measures provided in the Act to that effect. The ICRC must have been correctly interpreted by these agencies and bodies to have given ICRC a limited role of being “a custodian of concession agreement” when the agreement is already signed. Even the post-agreement power given to ICRC to enter premises to inspect is not accompanied with punitive provisions in case of violations or contravention by the concessionaire. This correlates with a general lack of institutional enforcement and regulatory supervisory teeth in the Act.<sup>458</sup> The ICRC, for example, provides that the relevant Federal Government Agency, ministry or body shall supervise a concession project made under the Act without an equivalent provision on the supervisory role of ICRC.<sup>459</sup>

## *9 2 National Council for Privatisation and Bureau of Public Enterprises*

These two bodies are taken together not only because they are created by the same Act, PEA,<sup>460</sup> but also because they work complementarily in the same thematic areas namely privatization and commercialization. By the general tenor of PEA, NCP is the policy and approving body for privatization and

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<sup>457</sup> Federal Government of Nigeria *Presidential Directive To Federal Government Agencies on ICRC's Mandate* 2015.

<sup>458</sup> An example is the requirement on any kind of approval relating to concession transactions or the concession itself. The ICRC for example in s3 says:” No Federal Government Ministry, Agency, Corporation or body shall give any guarantee, letter of comfort or undertaking in respect of any concession agreement made pursuant to this Act, except with the approval of the Federal Executive Council”. While it is expedient for the Federal Executive Council to give final approval to concession transaction, ICRC does not feature at all in the process for approving a concession agreement or transactions neither in this section nor any other.

<sup>459</sup> S 12 Infrastructure Concession Regulatory Commission Act.

<sup>460</sup> The National Council for Privatization (NCP) is created by s9 while the Bureau of Public Enterprises (BPE) is created by S12 of Public Enterprises(Privatization and Commercialization)Act (PEA).

commercialization while BPE is the implementation arm for the same purpose.<sup>461</sup>The NCE, headed by the Vice President working with other government officials,<sup>462</sup>determines the political, economic and social objectives of privatization and commercialization of public enterprises.<sup>463</sup>In that context, it is mandated to review, from time to time, the socio-economic effects of the programme of privatisation and commercialisation and put in place appropriate measures.<sup>464</sup>It goes without saying that the parameters for determining the social, economic and political objectives as well as the effects must be in line with the Constitution.<sup>465</sup>

The Council has been saddled with lots of powers of approval, unlike the ICRC, which confers on the council supervisory independence to give teeth to the provisions of the PEA. It is empowered to “approve policies on privatisation and commercialization”<sup>466</sup> “approve guidelines and criteria for valuation of public enterprises for privatisation and choice of strategic investors.”<sup>467</sup> It has the powers to “approve public enterprises to be privatised or commercialized”<sup>468</sup>determine the time this should be done ,<sup>469</sup>as well as the prices for shares of such enterprises to be offered for sale.<sup>470</sup>It has also been given the mandate to “approve the legal and regulatory framework for the public.

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<sup>461</sup> BPE in fact serves as the secretariat of NCP and carries out functions given to it in the Act as well as other functions assigned to it by NPE. See S15(a)(b) PEA. See also S11 (n) which mandates NCP to supervise the activities of the BPE and give it directions on the implementation of privatization and commercialization .

<sup>462</sup> The following as per the provision of s9(2)are the members of NCP: (a) the Vice-President, as chairman;(b)the Minister of Finance, as vice-chairman;(c) the Attorney-General of the Federation and Minister of Justice; (d) the Minister of Industry;(e) deputy chairman, National Planning Commission; (f) the Secretary to the Government of the Federation; (g) the Governor of the Central Bank of Nigeria;(h) the Special Adviser to the President on Economic Affairs; (i) four other members to be appointed by the President;(j) the Director-General of the Bureau of Public Enterprises. It is further provided (2) of this section, the Council may co-opt the supervising Minister of an affected public enterprise to attend relevant meetings of the Council”.S9(3).

<sup>463</sup> S 11(a).

<sup>464</sup> S 11(i).

<sup>465</sup> See s 16 of the constitution.

<sup>466</sup> S 11(b).

<sup>467</sup> S 11 ( c).

<sup>468</sup> S 11(d).

<sup>469</sup> S 11(g).

<sup>470</sup> S 11(h).

enterprises to be privatised.”<sup>471</sup> This is subject to broad interpretations but it is not expatiated on. This would be narrowly interpreted to mean approval of legal advice on public enterprises to be privatised or commercialised. This may be contrasted with the council’s power, earlier referred to, to alter, add, Delete ,or amend the provisions of the First Schedule which is a list public enterprises to be privatised.<sup>472</sup> It may also be contrasted with its powers in the Act “to amend the Second schedule to this Act so as to alter the category to which any enterprise listed in that Schedule shall be classified.”<sup>473</sup> The two provisions run *ultravires* the Constitution which provides: “The legislative powers of the Federal Republic of Nigeria shall be vested in a National Assembly for the Federation, which shall consist of a Senate and a House of Representatives”.<sup>474</sup>Contrary to this constitutional provision, the PEA gives the power to amend an Act of parliament to the Council.

The council also has the omnibus powers to” perform such other functions as may, from time to time, be necessary to achieve its objectives”.<sup>475</sup>This differs from the equivalent omnibus provision in ICRC in two ways. The NCP does not have to have recourse to the president to carry out other duties. These other duties are to be carried out if they are necessary to achieve its objectives unlike in the ICRC where they are to be carried out when they are “necessary or expedient to ensure the efficient performance of the functions of the Commission under this Act”. By allowing the NCP to carry out other duties in the light of its objectives, which it has been given the power to determine,<sup>476</sup>the council has been given lots of powers for the purpose of privatisation and commercialisation. However such powers must be exercised in line with the provisions of the Act and without overstepping legislative powers of the National House of Assembly.<sup>477</sup>

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<sup>471</sup> S 11(e).

<sup>472</sup> S 1(3)

<sup>473</sup> S 6(3). This schedule lists the public enterprises to be commercialized.

<sup>474</sup> S 4(1).

<sup>475</sup> S 11(r).

<sup>476</sup> See S 11(a).

<sup>477</sup> See fn 215 above.

As far as the BPE is concerned its statutory function shall include implementing the Council's policy on privatization and commercialisation ,<sup>478</sup> preparing public enterprises approved by the Council for privatization and commercialisation,<sup>479</sup> advising the Council on further public enterprises that may be privatized and commercialised.<sup>480</sup>In the case of privatisation, the BPE, apart from having to oversee the actual sale of shares,<sup>481</sup> is mandated to carry out all activities required for the successful issue of shares and sale of assets of the public enterprises to be privatised.<sup>482</sup>In doing this, it must always take cognizance of the need for balance and meaningful participation by Nigerians and foreigners in accordance with the relevant laws of Nigeria.<sup>483</sup> In the case of commercialisation, it shall ensure the success of the commercialization exercise and monitor, on a continuous basis for such period as may be considered necessary, the operations of the public enterprises after commercialization.<sup>484</sup>For that purpose, it shall cooperate and interface with the public enterprises, together with the supervising Ministries, in order to ensure effective monitoring and safeguard of the public enterprises managerial practices.<sup>485</sup>

In all cases the BPE is to “liaise with relevant bodies or institutions locally or overseas for effective performance of its functions under this Act.”<sup>486</sup> The BPE uses concession as one of the means of privatisation.<sup>487</sup> However, a contextual examination of the relevant provisions of PEA, both in respect of functions and powers espoused above and otherwise, does not support any proposition that the BPE or NCO are properly mandated in the law to carry out or oversee concessional transactions. Though privatization is not defined in the PEA, presenting concession as a form of privatization does not sit pretty with

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478 See Ss 13(a) and 14(a).

479 See Ss 13(b) and 14(b).

480 Ss 13(c) and 14(c).

481 S 13(h).

482 S 13(e).

483 S 13(i).

484 S 14(e).

485 S 14(h).

486 S 13(d).

487 See Par 6 National Policy on Public Private Partnership

characteristics of privatization in the Act. To illustrate, section 2 of the Act titled Mode of Privatization, reads:

“(1)Subject to the provisions of section 11 (f) of this Act, an offer for the sale of the shares of a public enterprise shall be by public issue or private placement, as the case may be.”<sup>488</sup>.

This means that the mode of privatization is by way of transfer of shares, subject only to section 11(f) which is one of the functions of the council namely to “determine whether the shares of a listed public enterprise should be by public or private issue or otherwise and advise the Government of the Federation accordingly.” This particular function of the NCP also boils down to shares; it is about advising on other ways of selling the shares of public enterprises. It all correlates with the allocation of shares in the first schedule on partial privatisation and second schedules, which deals with full privatisation. Shares allocated in the schedules between the government, strategic investors and members of the public. Privatisation transfers ownership interest in an asset wholly or partly by way of transfer of shares .In the case of *National Council on Privatisation V Magi Johnson*,<sup>489</sup> is described as “the process of transferring ownership of a business, enterprise agency public service or public property from the public sector (a government) to the private sector.” Concession, on the other hand is not about selling or transferring shares; it is about financing, construction and maintenance of infrastructure or facility in a public private partnership, as frequently reiterated with reference to ICRCA.

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<sup>488</sup> The other part of the section reads :(2) An offer for the sale of shares by public issue to Nigerians may be made at the capital market.(3) Where the shares of an enterprise are not to be offered for sale by public issue of shares or private placement, the Council may approve that the shares be offered for sale through a willing seller and willing buyer basis or through any other means. “This provides other means or mode of privatization which all boils down to one thing: sale of shares.

<sup>489</sup> (2014) LPELR-23611(CA).The case involved a dispute relating to transfer of shares of a privatized public enterprise.

### 9 3            *National Council on Public Procurement and Bureau of Public Procurement*

The National Council on Procurement (NCP) is the topmost body on procurement of goods, services and works.<sup>490</sup>The Bureau of Public Procurement serves as the secretariat of the NCP.<sup>491</sup>The NCP has the function of considering, approving and amending the monetary and prior review thresholds for the application of the provisions of PPA by procuring entities.<sup>492</sup> It shall also consider and approve policies on public procurement.<sup>493</sup> The Bureau of Public Procurement shall have the function of formulating the general policies and guidelines relating to public sector procurement for the approval of the NCP.<sup>494</sup> To that end, it shall supervise the implementation of established procurement policies; (c) The BPE shall certify federal procurement prior to the award of contract, based on the threshold set by NPC.<sup>495</sup> Where it is satisfied that the procurement meets the stipulated threshold within the purview of the PPA, the BPP shall issue certificate of "No Objection for Contract Award" within the prior review threshold for all procurements within the purview determined in accordance with PPA.<sup>496</sup> For the purpose of efficiency, it shall prepare and update standard bidding and contract documents.<sup>497</sup>The BPP shall put measures in place to prevent fraudulent and unfair procurement and where necessary apply administrative sanctions.<sup>498</sup> It shall perform procurement audits and submit such report to the National Assembly bi-annually.<sup>499</sup>It shall also

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<sup>490</sup> It is established by Public Procurement Act (PPA) 2007. See S1. The NCP's composition goes as follows: Minister of Finance as Chairman, the Attorney-General and Minister of Justice of the Federation, the Secretary to the Government of the Federation, the Head of Service of the Federation, the Economic Adviser to the President, six part-time members to represent the following: Nigeria Institute of Purchasing and Supply Management, Nigeria Bar Association, Nigeria Association of Chambers of Commerce, Industry, Mines and Agriculture, Nigeria Society of Engineers Civil Society; the Media; and the Director-General of the Bureau who serves as the Secretary of the NCP. The NCP may also co-opt any person to attend its meeting but the person so co-opted shall not have a casting vote or be counted in the determination of quorum. See S1(2)(3).

<sup>491</sup> S 3(1).

<sup>492</sup> S 2(a).

<sup>493</sup> S 2(b).

<sup>494</sup> S 5(a) Public Procurement Act.

<sup>495</sup> S 5 ( c ).

<sup>496</sup> S 6(b) Public Procurement Act.

<sup>497</sup> S 5(m).

<sup>498</sup> S 5(n).

<sup>499</sup> S 5(p).



review the procurement and award of contract procedures of every entity to which PPA applies.<sup>500</sup>

In addition to the above, the BPP may cause to be inspected or reviewed any (concession) transaction to ensure compliance with PPA.<sup>501</sup> Where there are persistent or serious breaches of BPP or regulations or guidelines made under the BPA, the BPP may recommend to the Council the suspension of officers concerned with the procurement or disposal proceeding in issue or the replacement of the head or any of the members of the procuring or disposal unit of any procuring entity or the Chairperson of the Tenders Board as the case may be or the discipline of the Accounting Officer of any procuring entity or the temporary transfer of the procuring and disposal function of a procuring and disposing entity to a third party procurement agency or consultant and it may also apply any other sanction that the Bureau considers appropriate.<sup>502</sup>

## **10 Conclusion**

The primary law governing concession is the Infrastructure Concession Regulatory Commission Act (ICRCA) that allows government bodies to enter into concession for the financing, construction and operation of their infrastructural facilities. The ICRCA is complemented by other principal legislations such as the Public Procurement Act (PPA) which is the legal regime for procurement of goods, services and works, the Fiscal Responsibility Act (FRA) which provides a fiscal discipline muster of transparency within which all government's transactions must be conducted, the National Planning Commission Act (NPCA) which created the National Planning Commission saddled with the function of drawing up economic plans within the ambit of Fundamental Objectives and Directive Principles of State Policy provided for in the constitution, among other laws. To that end both the National Integrated Infrastructure Master Plan developed by the National Planning Commission and National Policy on Public Private Partnership

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<sup>500</sup> S 5(0).

<sup>501</sup> S 6d(1).

<sup>502</sup> S 6(i)1-V.

formulated by the ICRC ensures, to a great extent, that the objective and principles of concession are in line with the constitutional Fundamental Objectives.

One such objective is protection of public interest in concession agreement, another is economic efficiency, among others. Public interest is not captured in the ICRCA. For example, the ICRCA has a provision that prohibits suspension of concession agreement without providing for instances in which agreement may be suspended for issue of public interest or lack of performance. The later issue-suspension for lack of performance-will help in securing the economic objective of efficiency. More seriously, the ICRCA does not grant the Commission sufficient supervisory and regulatory powers to secure constitutional and policy objectives.

The ICRC has not been given the powers to be involved in the initiation of concession agreements. The ICRCA grants government ministries, bodies and agencies power to initiate concession. This is a direct recognition of the importance of sectoral legal and governance structure like that of Nigeria Port Authority in matters concerning the ports concession, though it would have been better for the regulatory oversight of ICRC if both the sectoral body and the ICRC are involved in the initiation of concession agreement. In any case, the ICRCA does not disregard the Constituent Act of a government body in the concession process.

## CHAPTER THREE

### PORT GOVERNANCE

#### 1 Introduction

Ports are a system of different parts encompassing institutions, operators and players all regulated by a paradigm of laws and governance models. Seaports are essentially a realm of domestic legislation and hence principally regulated by national laws and policies. However, the international nature of port transactions makes them a subject of regional, continental and global instruments. The emergence of ports serving ever expanding areas extending operations to the continental and regional scale feeding into global maritime system, has increased the significance of continental, regional and international legal contexts. Globalization has challenged policy makers to adjust port governance at local level with the accompanying policy and legal implications.<sup>503</sup>

Models of port governance vary from country to country: from public service port model on one hand to the fully privatized port, on the other hand. In the adoption of a particular kind of port model, concession agreements are being used widely as an instrument of port governance.<sup>504</sup> The rationale given by many a policy maker is that ports have become more capital intensive including as a result of ever increasing container handling and need for specialized and more advanced

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<sup>503</sup> Globalization of maritime services is reflected in the fact that 80% of container traffic handled by global commercial operators such as Hutchison, ICTS, APM etc. See Africa Union *Africa Development Report* (2010)78. Globalization has generally brought changes in the role of the State as it has spurned a governance shift from direct service provision by the State to the adoption of “regulating” role in different areas of the economy (such as the port sector) in many countries leaning continuously to market-based economic model in which the private sector plays a more dominant role .See Andrew *Politics* (2013)73. However, it has been recognized that market based economies can only operate successfully within a legal and social order that the state guarantees .See Fukuyama *State Building: Governance and World Order* (2005). See also, Mashood “Law and Development: Toward a New Approach” 2009 20 *German Law Journal* 1258 1273.

<sup>504</sup> Notteboom “Concession Agreements as Port Governance Tools in Devolution, Port Governance and Port Performance” 2007 17 *Research in Transportation Economics* 437 455.

terminal facilities.<sup>505</sup> Introduction of mega container ships have thus compelled many ports to expand their infrastructure to safely and efficiently accommodate such mega ships.<sup>506</sup> This is in view of the fact that a major challenge facing container ports today is the upgrading of facilities to cater for the increase in the size of vessels and the associated pressures this places upon the spatial and time aspects of cargo handling.<sup>507</sup> In many countries especially in Africa, the role of ports as important instruments for greater economic competitiveness, productivity and national prosperity is being challenged by that and a myriad of other problems.<sup>508</sup> As a result of all these, many governments have resorted to a raft of reforms to meet up with contemporary maritime challenges. In a number of countries including Nigeria, public private partnership has been adopted to finance port development and share associated risks.

In view of the above, this chapter is divided into four main parts, barring its introduction and conclusion. The first part examines the notion of port governance in general to lay foundation for the second part which dwells on International Law instruments to which Nigeria is a party by way of examining relevant provisions relating to ports and port governance in the instruments. The third part deals with different port governance models. This helps to appreciate developments in Nigeria's port sector and the adoption of a particular model of port governance- namely landlord model- which is discussed along with other models in the fourth part in view of the fact it is the model adopted by way of concession.

## **2 Notions of Port and Port Governance**

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<sup>505</sup> Okotie and Damian *Transportation Management: A Multi-modal Approach* (2005)158.

<sup>506</sup> Ikodide "Maritime Transport: Port as indispensable Partner" in Ikodide and Aro (ed) *Shipping Management and Policy in Nigeria* (2005)18.

<sup>507</sup> UNCTAD *Review of Maritime Transport* 70.

<sup>508</sup> For Nigeria such problems include loss of revenue by government, high operational cost and inefficiency, poor infrastructure. See Kareem An 'Assessment of Nigeria Seaports' *The Frontiers Post* (27-5-2010) 2; Ndikom and Obed *Element of Transportation Management* (2000) 274.

## 2 1 Notion of Port

### 2 1 1 Introduction

Ports are not coherent entity rather they are fairly arbitrary making it more challenging to throw around and develop universal concepts about.<sup>509</sup> While a Port comes in different types and forms,<sup>510</sup> it has, in general, been described as an “area where ships are loaded with and/ or discharged of cargo and includes the usual places where the ship wait for their turn or are ordered and obliged to wait for their turn, no matter what the distances from that area.”<sup>511</sup> UN Office for Ocean Affairs and Law of the Sea defines a port as “a place provided with various installations, terminals and facilities for loading and discharging cargo and passengers.”<sup>512</sup> Dictionary of Shipping terms characterizes it as a ‘harbour having facilities for ships to moor and load or discharge.’<sup>513</sup> A harbour is described as a natural or artificial shelter for ships.<sup>514</sup>

The Nigeria Port Authority Act (NPAA),<sup>515</sup> the principal port legislation, lists in its second schedule, the ports in Nigeria that are under the control of the Nigerian Ports Authority.<sup>516</sup> The Nigerian Ports Authority Dues and Rates Regulation<sup>517</sup>, a

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<sup>509</sup> Alderton *Port Management and Operations* 92.

<sup>510</sup> Lagoni *Ports* 1. Such types include universal ports containing terminals dealing with cargoes, fishing ports for fishing, bunkering ports, dry port is used to describe a yard used to place containers or conventional bulk cargo, usually connected to a seaport by rail or road, among others.

<sup>511</sup> *Chater party Laytime Definitions 1980* (1981) 424.

<sup>512</sup> UN Office for Ocean Affairs and Law of the Sea *Baselines: An Examination of the Relevant Provisions of the United Nation Convention on the Law of the Sea Appendix* (1989) 47,60.

<sup>513</sup> *Boodie Dictionary of Shipping Terms* (2003)181.

<sup>514</sup> *Ibid.*

<sup>515</sup> To put this in further perspectives, contrast with Nigerian National Inland Waters Act (NIWA) which says the Inland Water Authority covers “all navigable waterways, valleys, inland waters, river-ports and internal waters of Nigeria excluding all the approaches to the port listed in the Third schedule to this Act and all other waters declared to be approaches to port under or pursuant to the Nigeria Ports Authority Act up to 250 meter beyond the upstream edge of the quay of the port, shall be under the exclusive management, direction and control of the Authority...”See sec 11 Inland Waters Act. The Inland water Act does elaborate on its territory of operations by specifying that the Authority deals ,among others, with river-ports The Act specifies the very kind of port it deals with, though the Act also does not define river ports unlike how it defines Internal Water and Inland water ways in its section 29.

<sup>516</sup> The following ports are listed in part 1 of the schedule to wit:1) For Lagos-Lagos Port Complex Apapa, Tinca Island Port, Roro Port Containers Terminals, Kirikiri Lighter Terminals (I and II), Ikorodu Lighter Terminal (2) Port Harcourt (3) Onne Port-Federal

subsidiary legislation on port charges, defines port as the commercial area of the harbour; that part of the harbour used for loading and unloading goods.<sup>518</sup> If that appears restrictive-and tautological in fact, the definition by NIMASA Act is quite extensive and comprehensive:

Any place in Nigeria navigational river or channel leading into such place having facilities for ships to move and load or discharge, including off-shore Cargo and having facilities, including dry ports, harbours, berths, jetties, pontoons or buoys and within the limit of the port and include any place declared to be a port under this Act.<sup>519</sup>

The above definition appears to be broader than the list provided by the Second Schedule to the NPAA as in addition to harbours and coastal ports in the Rates Regulation, it includes river ports. The word harbour, not defined in the NPA Act, according to Black Law Dictionary is sometimes used synonymously with port.<sup>520</sup> The Dictionary adds that port is generally of larger import than harbours implying the presence of wharves or at any rate, the means and opportunities of receiving and discharging cargo.<sup>521</sup> Harbour is a safe haven or a space of deep water so sheltered by land as to afford safe anchorage of ships, estuaries, navigable rivers, piers, jetties and other works in, or of which ship can obtain shelter or ship or unship goods or passengers.<sup>522</sup> According to the Nigerian Sea Fisheries Act, port includes: harbour.<sup>523</sup>

The word port is derived from the latin word *portus* meaning gateway or entry point connecting one place or country to another,<sup>524</sup> being a modal nexus where water and land transport modes intersect along a shore such that the mode of

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Ocean Terminal and Federal Lighter Terminal 4) Warri Port 5) Calabar Port 6) Burutu Port. In part 11 the following are listed to wit: Akassa Port, Bonny Port, Dagana Port, Forcados Port, Koko Town Port, Sapele Port and Tiko Port. See NPA Act Second Schedule Parts 1 and II. See Par 5 1 below.

<sup>517</sup> Nigeria Port Authority Dues and Rates Regulation 1993.

<sup>518</sup> See fn 4 above.

<sup>519</sup> NIMASA Act s 64.

<sup>520</sup> Black Law Dictionary 8<sup>th</sup> Edition.

<sup>521</sup> *Ibid.*

<sup>522</sup> *Ibid.*

<sup>523</sup> Sec 3 Sea Fisheries Act Laws of Federation of Nigeria S4 2004.

<sup>524</sup> Obed *Element of Transport Management* 171.

transport changes from water to land and vice-versa.<sup>525</sup> As a facility with an amalgam of facilities on the sea coast, river or lake shore,<sup>526</sup> it encloses a piece of land and water front for the reception of goods, vessels and other water crafts to serve as node in transport chains.<sup>527</sup>

With the above in context, it is pertinent to state that while the NPA Act does not provide the definition of port, *an esjudem generis* reading of its list and contextual reading of the shows that the ports under the NPA are those in the list and others that may be declared as ports by the Minister pursuant to the powers granted to her under the Act. It is also clear that sea ports, like other waters in Nigerian Maritime Zone,<sup>528</sup> is a realm of federal government legislation.<sup>529</sup>

Seaports are one component of a vertical chain that conveys a product from producer to customer. The chain normally includes inland transport from producer to port, water transport, port services at the destination port, and inland transport to the final customer – as well as intermediate terminals at various stages, plus agents arranging particular steps, such as freight forwarders and third party logistics providers. Together all these components constitute the port system.<sup>530</sup>

## 2 1 2 The Seaport system

Ports, as they are today, are not simply landing places or a group of terminals, but sophisticated and integrated systems that provide a wide spectrum of services for the maritime industry,<sup>531</sup> as well as to the society at large. The

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<sup>525</sup> *Ibid.* See also Eric Port State Jurisdiction 191.

<sup>526</sup> Hercules, Albert “Port Pricing” in *Handbook of Maritime Economics and Business* Costas (ed) (2006) 781.

<sup>527</sup> Langoni “Port” *Encyclopedia of Public International Law* 1.

<sup>528</sup> Nigeria Maritime Zone is a word in NIMASA Act covering Nigerian waters referring to Nigerian internal waters, Territorial Waters, Exclusive Economic Zone. See Sec 64 NIMASA Act.

<sup>529</sup> See fn 280 below.

<sup>530</sup> Organization of Economic Cooperation and Development (OECD) and United States Ministry of Justice *Competition and Port Services* 4.

<sup>531</sup> Obed *Essential of Port Reforms* 30.

seaport links the national economy to the regional and global economy.<sup>532</sup> Port governance system encompasses all these connected levels and espouses its national, regional, continental and global contexts.

The system comprises three distinct facilities to wit: (i) Berth,<sup>533</sup> docks,<sup>534</sup> storage areas and superstructure such as cranes, pipes and so on; (ii) Maritime access infrastructure such as channels, sea defence in the form of breakwaters, buoys, among others; and (iii) Land access infrastructure such as roads, railways, inland navigation channels and pipelines connecting the port with the hinterland.<sup>535</sup> These facilities are used to render the typical services of a port to wit: (i) conservancy service which is about granting ship access to the port and protection at berth or anchorage and provision of navigational aids such as buoys, lights and marks. All these facilitate sea and land access.<sup>536</sup>(ii) Pilotage and towage-provision of pilots and tugs and other vessels to assist ships to navigate safely in and out of ports<sup>537</sup> (iii) Civil engineering involves construction of

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<sup>532</sup> The seaport has been divided into five levels to wit a) intra port comprising of activities conducted within the defined boundary of a port as well as organizations and players (port authority, ship owners, customs ,stevedores, transporters) involved in carrying out the activities. Such activities include cargo-handling, storage, clearance, ship servicing, among others.) The port-hinterland system include the transport services that bind the sea with the land area c) The port-hinterland-foreland system which connects with the port-hinterland system to provide a platform for overseas trading area d) Regional ports system refers to port that are in competition for trade and operation of a common hinterland either in part of a country or countries within a region e) The total port system which is the global maritime system Hilling Transport and Developing Countries (1996).

<sup>533</sup> Berths are the specific places where ship stay to load and discharge. See Alderton *Port Management and Operations* 9. They are provided for ships in a way that suits their moorings and operations and for passengers with terminal buildings where waiting rooms, restaurants, and banking, customs and parking facilities. *Port Safety and Environmental Management* 67.

<sup>534</sup> Docks are artificially constructed shelters for ship Alderton *Port Operations and Management* 7.

<sup>535</sup> Obed *Essential of Port Reforms* 32. A good network of road, rail and inland waterway system is necessary to facilitate the movement of cargo in the port system. See also Joe-hope *Port, Safety and Environmental Management* 66.

<sup>536</sup> See Ndikom and Obed *Transport Management* 273.

<sup>537</sup> Pilotage is a process in which pilots who are familiar with the waters of the seaport help ocean-going vessels to protect the ship from danger or possible accident, while navigating along the coast, in estuaries, canals, rivers or within the port itself Towage is the movement of other vessels, barges, oil rigs or floating structure in the port or harbor by the use of a tug. When a ship is in distress or is too big to navigate within the harbours while docking or sailing, a tug is used for operational efficiency. Joe-hope *Port, Safety and Environment* 128-129.



quay walls, wharfs, roads, parking areas, transit sheds and warehouses, building of offices (iv) cargo handling facilities: quayside cranes, mobile cranes, transit storage facilities and the labour force; and (v) ancillary services involving a number of services which contribute to the total service to the ship owner and the shipper such as fire protection, bunkering, cargo security, warehousing, ship repairs, fresh water supplies ,among others.<sup>538</sup>

## 2 2 *Port governance*

Governance entails management and proper use of resources, ownership of assets, the processes established for decision-making and limits and mechanisms established for activities and operations of an entity.<sup>539</sup> Legally, it has been characterized as application of policies and rules, proper implementation and continuous monitoring through an organizational governing body.<sup>540</sup> The governance of ports is a process in which all port resources and elements-superstructure and infrastructure- are all managed in order to arrive at set objectives in accordance with the applicable rules.<sup>541</sup>

Governance is about distribution of rights, roles and responsibilities among different segments within an entity, specifying rules and laws for making decision and providing the structure through which an entity set and pursue their objectives. It is essentially the adoption and enforcement of rules governing conduct and property rights within this system. It may be imposed by governments or adopted voluntarily by groups or associations. Seen in this context and the paradigm of this research, port governance would be a system through which the ports are situated, organized, directed and managed through

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<sup>538</sup> See generally Alderton *Port Operations* 67.

<sup>539</sup> See Skagway Port Development Plan Part 8-1. Governance is characterized “as the complex forms of interaction between actors belonging to different spheres (political, business, civil society)” which in the context of ports refers to both public and private port players. The word “governance” illustrates the idea of a new complexity which results in the interweaving of the public and private sectors and a complex encounter between the different levels of port development, from local to global. See Debie *Different Tiers of Government in Port Governance: some general remarks on the institutional geography of ports in Europe and Canada* Paper presented at Conference on Transport Lisbon Portugal (July 11-15, 2010) 2-3.

<sup>540</sup> *Black Law Dictionary* 2<sup>nd</sup> Edition 715. See generally Garner *A dictionary of modern legal usage* (1987) 259.

<sup>541</sup> See the description of port management in Joe -hope *Port, Safety and Environment* 56.

administrative structures and the law. It can be characterized as the alignment of interests among the stakeholders in the port system.<sup>542</sup> In this particular context, the alignment of interests include between the public sector and private sectors as well as within each of the two sectors. The strategic alignment of public and private interests determines the nature of port management and port development policy thrust.<sup>543</sup> In the modern world, governance includes three sectors: the public sector (state actors and institutions), the private sector (including firms and companies), and the civil society (non-governmental organizations).<sup>544</sup> These three sectors cooperatively work hand in hand in the process of governance.

Governance principles are applicable to all relationships between businesses and their shareholders, governments and the governed, private entities and public agencies, or between organizations and those who establish them to undertake activities on their behalf. In the case of ports, governments, or other relevant policy makers, usually impose governance structures with particular national or regional policy objectives in mind.<sup>545</sup> Port governance is about management, administration of ports as well as rules underlining same in terms of structure and otherwise with the objectives of the ports determining the governance and governance structure of the port. It has been suggested that the whole concept of port governance is about the scope of private participation in the ports system.<sup>546</sup> This is a restricted view of port governance though it must be acknowledged that this view not only captures an important component of port governance namely the private sector, it also highlights the contemporary transition in port governance from government to governance in which the private sector and the public sector play important stakeholders roles.

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<sup>542</sup> *Ibid.*

<sup>543</sup> World Bank Port Reform *Tool Kits Alternative Port Management Structures and Ownership Models* Module 3 2.

<sup>544</sup> Law Politics and Philosophy What is Governance?  
<https://tamayaosbc.wordpress.com/2014/08/21/what-is-governance/> (Accessed 27-4-2017).

<sup>545</sup> Brookes *Port Governance* 512.

<sup>546</sup> Jean *Different Tiers of Government in Port Governance: Some General Research in the Institutional Geography of Ports in Europe and Canada* Paper Presented at Conference on Transport, World Conference on Transport Research (July 11-15, 2010) 2.

### 3 Port and port governance in international law

In view of the international nature of seaports as a link between a port state and the outside world their status in International law has always been an issue of interest.<sup>547</sup> It has been argued that seaports as domestic establishment has no particular status in International Law.<sup>548</sup> However, the fact that international law recognizes port as a domain of domestic sovereignty is itself recognition of the status of ports. Port lies within a state's territorial boundary and falls under its territorial sovereignty and jurisdiction,<sup>549</sup> being generally part of the port state internal water. Customary International Law has always recognized the sovereignty of States over Internal waters and allows port states expansive discretion in exercising jurisdiction on its port.<sup>550</sup> According to UNCLOS, the jurisdiction of a State extends beyond its internal waters to its territorial sea.<sup>551</sup> Ports are essentially integral parts of internal waters, being waters which lie on the landward side of the baseline from which the territorial sea are measured.<sup>552</sup> The internal water of a state, from the standpoint of International law, is therefore, legally equivalent to a port state land territory such that entry into it would ordinarily require the permission of the state.<sup>553</sup> This would mean that the port state has the powers to accept or decline access to its ports, prescribe conditions of access and stay of a visiting vessel in the port. For port governance, this

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<sup>547</sup> Works on International Law particularly International Law of the Sea may be considered incomplete without discussing internal water and specifically ports. See for example Furthermore, the interest in the position of seaports once led COMTE to attempt coming up with a convention on the status of Seaports in International Law.

<sup>548</sup> Lange *Port* 1.

<sup>549</sup> Jurisdiction is a term describing the limits or extent of the legal competence of a state or other regulatory authority to make, apply or enforce rules of conduct on a person. See Lowe "Jurisdiction" in Evan (ed) *International Law* (ed) 329.

<sup>550</sup> Molenaar "Port State Jurisdiction: Towards Mandatory and Comprehensive Use" in *Law of the Sea: Progress and Prospects*. Churchill and Lowe put it better: "By entering foreign ports and other internal waters, ships put themselves within the territorial sovereignty of the coastal state. Accordingly, that state is entitled to enforce its laws against ship and those on board."-See Churchill and Lowe *Law of the Sea*(1988)51 .See also the International Court of Justice's case *Nicaragua* (1986 ICJ pg 14 at 11) which provides that internal water are subject to the sovereignty of the state and it is by virtue of its sovereignty that the coastal state may regulate access to its port. See also *UK vs Norway* (1951) ICJ II6, 12,86).

<sup>551</sup> UNCLOS Art 3.

<sup>552</sup> Art 8 LOSC. See also The Territorial Sea Convention (TSC) Article 5(1).The internal waters mostly comprises of not only ports but also bays, estuaries. Lowe and Churchill *the Law of the Sea* 51.

<sup>553</sup> Kraska *Maritime Power and the Law of the Sea* (2011)114.

implies that the port state has the legal competence to determine the kind of port governance model it wants, the nature of port administrative structure and the division of roles between the public and private sectors in the port system.

However, where the port state is a party to an international convention with respect to its port, it is bound under international law to comply by same. In this regard, relevant conventions to which Nigeria is a State Party are examined vis-a-vis port governance at global, continental and regional levels. As earlier noted in Chapter 1, Nigerian laws generally require the government to respect International Law. However, there is a constitutional requirement for domestication of International treaties and convention before they could have the force of the law locally in Nigeria.<sup>554</sup>

### 3 1 Global

At the global level, there are a number of conventions relating to ports. This include United Nations Convention on the Law of the Sea,<sup>555</sup> International Convention for the Safety of Life at Sea (SOLAS),<sup>556</sup> and the associated International Ship and Port Security Code (ISPS)<sup>557</sup> (negotiated under International Maritime Organizations),<sup>558</sup> Convention and Statute on International

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<sup>554</sup> See *Ubani v Director of State Security Services* (1999) 11 NWLR (part 625) 129; *Ibidapo v Lufthansa Airlines*(1997) 4 NWLR (part 498) 124. See also *Gani Fawehimi v State* (1996) 9 NWLR part 475 page 710. In the last case, it was held that “where there is no enactment to give effect to the spirit of a treaty notwithstanding its adoption and recognition, and due regard by a sovereign government, it cannot be justiciable in a municipal court”.

<sup>555</sup> 1833 UNTS 3, (1982) 21 ILM 1261. Adopted: 10.12.1982; EIF: 16.11.1994; ratified in 1986.

<sup>556</sup> 1184 UNTS 278 (1974)14 ILM 959. Adopted: 1.11.1974; EIF: 1.5.1991; ratified in 1981.

<sup>557</sup> The main objective of the SOLAS Convention is to specify minimum standards for the construction, equipment and operation of ships, compatible with their safety. ISPS Code is a set of measures agreed to enhance the security of ships and port facilities in response to perceived threats to ships and port facilities after the September 11, 2001 terror attack. The Code is part of Safety of Life on Sea Convention (SOLAS) 1974. Nigeria became a party to the convention on 07 May 1981. See further <https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800ec37f> (Accessed on 4-4-2017).The convention is mentioned here because it is one of the few that dwell on ports but it fundamental focus is beyond the scope of this work.

<sup>558</sup> 289 UNTS 48, (1948) 21 ILM 1261. Adopted: 6.3.1948; EIF: 17.3.1958; ratified in 1962. Established by International Maritime Organization Convention as the United Nations' specialized agency responsible for improving maritime safety and preventing pollution from

Regime of Maritime Ports,<sup>559</sup> Barcelona Convention and Statute on Regime of International Waterways of International Concern<sup>560</sup> and Agreements of World Trade Organizations such as GATT 1994,<sup>561</sup> among others. For the present purposes, all the above mentioned conventions except for SOLAS will be discussed. This is due to particular relevance of the conventions to the general framework on port governance dealt with in this chapter particularly with respect to private participation in ports.

### 3 1 1 Convention on the Law of the Sea

United Nations Convention on the Law of the Sea,<sup>562</sup> one of the most successful international treaties,<sup>563</sup> has been characterized as the constitution and Magna Carta of the sea and oceans.<sup>564</sup> It represents a system where states regulated oceans through bilateral arrangements to a system of highly interdependent actors and stakeholders with common interest in a variety of areas.<sup>565</sup>

The UNCLOS creates or affirms different regimes for the sea. These include Internal Waters,<sup>566</sup> Territorial Sea,<sup>567</sup> Exclusive Economic Zone,<sup>568</sup> Contiguous

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ships. Also see International Maritime Organization Member States <http://www.imo.org/en/about/membership/pages/memberstates.aspx> (accessed 4-4-2017).

559 1833 UNTS 3, (1923) 21 ILM 1261. Adopted: 9.12.1923; EIF: 26.7.1926; ratified in 1962.

560 7 LNTS 35, (1921) . Adopted: 20.4.1921; EIF: 31.10.1922; ratified in 1967.

561 U.N.T.S. 187;. 33 I.L.M. 1153 .Adopted 15-4-1994;EIT: 1994 ;ratified 1994.

562 See Para 2 2 1, Chapter One.

563 Fietta and Cleverly *Practitioners Guide to Maritime Boundary Delimitation* (2016)viii

564 UNCLOS was described as the Constitution of the Ocean by Tommy TB of Singapore, President of the Third Conference of the United Nations Conference on the Law of the Sea. See Constitution of the Oceans [http://www.un.org/depts/los/convention\\_agreements/texts/koh\\_english.pdf](http://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf) (Accessed on 25-4-2017).

565 Kleen *Dispute Settlement in the Convention on the Law of the Sea*(2004)4 UNCLOS defines jurisdiction of states over all kinds of maritime activities and areas including navigation, exploitation of living and non-living resources. See Harron *Meaning of the Law of the Sea: A Study in the Development of International Law* (2011)105.

566 A realm close to the shore. Evan “Law of the Sea” in *International Law* (2003)630. See Art 8(1) LOSC; Art. 5(1) Territorial Waters Convention. See also Regina v Farnquist (1981) 54 CCC (2d) 417; 94 ILR 231.

567 A belt of sea extending up to 12 nautical miles from the baseline. In terms of UNCLOS Article 2(1.): “The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea”. Article 3 goes further: Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention. In this territory States are free to restrict or impose conditions on entry of vessels.

Zone,<sup>569</sup> Continental Shelf,<sup>570</sup> High Sea<sup>571</sup> all these with reference to a baseline by the coastal state determined in accordance with the convention.<sup>572</sup> The scanty provision in UNCLOS on internal waters and specifically on ports represent a tacit approval of the position of customary International Law that the port state sovereignty over its land territory extends to its internal water. In terms of UNCLOS:

For delimiting the territorial sea, the outermost permanent harbor works, which form an integral part of the harbor system, are regarded as forming part of the coast. Offshore installations and artificial Island shall not be considered as permanent harbour works.<sup>573</sup>

This, in general, means that harbour works or port facilities refer to permanent human-made structures built along the coast which form an integral part of the harbor system.<sup>574</sup> These harbour works would include jetties, moles, quays or other port facilities, coastal terminals, wharves, breakwaters.<sup>575</sup> The provision of Article 11 applies to those harbour works and not to other artificial structures which are built along the coast or offshore installations as well as artificial installations which serve different purpose.<sup>576</sup> This explains the inclusion of the proviso in the Article “offshore installations and artificial islands shall not be

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<sup>568</sup> A strip of water seaward of the territorial sea. In terms of Art 57 UNCLOS “The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

<sup>569</sup> See Art 33(1-2) which provides that the Contiguous Zone is that zone that may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured where the coastal state may enforce its custom, immigration and fiscal laws.

<sup>570</sup> Art 76(1) which provides: “The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.”

<sup>571</sup> All parts of the sea not included in the Internal Waters, Territorial Sea Exclusive Economic Zone of a State. See Art 86 UNCLOS.

<sup>572</sup> Art. 5 UNCLOS: Except where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the Coastal State.”

<sup>573</sup> Art. 11.

<sup>574</sup> Walker *Definitions of the Law of the Sea* (2002) 216.

<sup>575</sup> Consolidated Glossary in Walker *Definitions of the Law of the Sea* 216.

<sup>576</sup> Scoraz “Baseline” *Max Planck Encyclopedia of Public International Law* (2007)3.

considered as permanent harbour works.” While explaining this proviso, it has been observed that, the expression “offshore installations and artificial Islands” is added to this provision in UNCLOS III in order to make clear that offshore loading and unloading points are not considered as harbour works. Facilities of this nature are regarded as being separate from the coast off which they stand. This expression does not refer to oil and gas rigs which are outside limits of articles 60 and 80, but does apply to facilities that serve the purposes of ports for large vessels unable to enter harbours, and which are typically linked to shore installations by pipelines.<sup>577</sup>

One cannot agree less with the general tenure of the above position considering another relevant provision of UNCLOSS. To be specific, Article 18(1)(a) which makes reference to and allowance for port facilities that are outside the internal waters.<sup>578</sup>This is understandable in view of the increasing need for sophisticated specialized terminals dealing with bulk cargoes and containers vessels that has led to port facilities being put in place further out toward the sea than had traditionally been the case.<sup>579</sup>

For example, territorial sea may contain port facilities from simple jetty, projecting toward the sea from a straight extension of coastline, to a complex port facilities constructed to service vessels with drafts so deep that it cannot be accommodated by regular harbours.<sup>580</sup> The right to innocent passage will not be available to a vessel that stops at such a port as it is legally deemed to be internal waters.<sup>581</sup> Where such port facilities exist in the Exclusive Economic Zone or on the High Sea, UNCLOS does not deal explicitly with the port state jurisdiction in

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<sup>577</sup> Nandan, Rosenne and Grandy *United Nations Convention on the Law of the Sea 1982: A Commentary* (2002)122.

<sup>578</sup> The article says:” Passage means navigation through the territorial sea for the purpose of a) traversing that sea without entering the internal waters or calling at a roadstead or port facility outside internal waters”.

<sup>579</sup> Broeze, *Containerization and Globalization of Liner Shipping* (1998) 402 See for example S 41 of NPA Act which provides : “The Minister may, by order in the Gazette, establish a pilotage districts in a) in any port b) in the approach to any port or C) in the territorial waters of Nigeria or d)in the Exclusive Economic Zone. ”This implies that port installations for pilotage can exist in any of the mentioned maritime zones.

<sup>580</sup> Marten and Bevan *Background to Port State Jurisdiction* 22.

<sup>581</sup> See Art 18 UNCLOS.

such circumstances.<sup>582</sup> Whether this distinction has significant impact on port governance is an important question.

It appears safe to posit that while the port state has undoubted right to determine the type and nature of port governance it desires in the internal waters and territorial sea where it has been given territorial jurisdiction,<sup>583</sup> nothing in UNCLOS explicitly or implicitly stops it from exercising such a right with respect to port facilities in EEZ and the High Sea. It would be safer, however, to include the rider that such a right would be subject to the specific peculiar regimes of these maritime zones.<sup>584</sup> For example in the case of Territorial Sea, port facilities therein shall not charge a ship passing through the territorial waters levels beyond those charged for specific services rendered to the ship.<sup>585</sup> This implies that a port state could, through a public port authority or private port operator, controls the port facilities in these zones in accordance with its domestic laws without violating the provisions of UNCLOS. UNCLOS does not, at any rate, prescribe for the port state any particular type of port governance system in any of the maritime zones consistent with its generally cautious approach to ports, as earlier stated.

### **3 1 2 Convention and Statute of International Regime of Maritime Ports**

Signed in 1923 in Geneva, this is certainly the first multilateral convention specifically dedicated to ports. The essence of the Convention is aptly summarized in its preliminary provision thus:

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<sup>582</sup> Some countries has made legislation to deal with such situations. For example US Port Act 1974 requires foreign vessels visiting such facilities to consent to US (territorial) jurisdiction as in territorial sea. For the avoidance of doubt, territorial jurisdiction.

<sup>583</sup> This is implied from the provisions of UNCLOS such as art 18. See fn 21.

<sup>584</sup> For example in the Exclusive Economic Zone

<sup>585</sup> UNCLOS article 26. The section reads: 1. No charge may be levied upon foreign ships by reason only of their passage through the territorial sea. 2. Charges may be levied upon a foreign ship passing through the territorial sea as payment only for specific services rendered to the ship. These charges shall be levied without discrimination.



Subject to the principle of reciprocity and to the reservation set out in the first paragraph of Article 8, every Contracting State undertakes to grant the vessels of every other Contracting State equality of treatment with its own vessels, or those of any other State whatsoever, in the maritime ports situated under its sovereignty or authority, as regards freedom of access to the port, the use of the port, and the full enjoyment of the benefits as regards navigation and commercial operations which it affords to vessels, their cargoes and passengers.<sup>586</sup>

By this provision, the Convention commits Members to grant port access to other Members subject to reciprocity which means that if a Member refuses to grant access to another Member in violation of the Convention, the affected Member may deny access to the offending Member.

While Nigeria is required to allow access to its maritime ports and ensure full enjoyment of benefits as regards navigation and commercial operations for vessels and port operators from state parties to the convention, the above provisions in no way restrict the liberty of the competent Nigerian port authorities to “take such measures as they may deem expedient for the proper conduct of the business of the port provided that these measures comply with the principle of equality of treatment as defined in the said Article.”<sup>587</sup>

In general, this is an affirmation of the sovereignty of Nigeria to control its ports as well as determine its administrative structure and governance model. In specific, it implies that Nigeria like other Contracting States reserves the right to make such arrangements for towage and pilotage services in its maritime ports as they deem fit, provided that the provisions of Articles 2 and 4 are not thereby infringed.<sup>588</sup> In terms of Article 2 as earlier cited, the Convention protects vessels, passengers and cargoes from discrimination with regards to facilities of all kinds

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<sup>586</sup> Art 2.

<sup>587</sup> Art 3.

<sup>588</sup> See Articles 10 and 11. Article 11 further provides: “Where pilotage is compulsory, the dues and facilities offered shall be subject to the provisions of Articles 2 and 4, but each Contracting State may exempt from the obligation of compulsory pilotage such as its nationals as possess the necessary technical qualifications.”

including in the allocation of berths and loading and unloading facilities. As per Article 4, Contracting States are required to make provision for the pre-publication of all dues and charges leveled in the name of and for the account of government, public authorities, concessionaires and undertaking of any kind as well as all port byelaws and regulations.

The convention covers maritime ports, and the vessels visiting them whether public or private,<sup>589</sup> and describes maritime ports to be “all ports which are normally frequented by sea-going vessels and used for foreign trade shall be deemed to be maritime ports.”<sup>590</sup> This can be interpreted to mean that the provisions of the Convention cover both sea-port and river ports if such are frequented by sea-going ships and serve the purpose of international trade. Hence, the Convention applies to ports frequented by sea-going vessels.<sup>591</sup> However, the proviso in the Convention which allows Nigeria to have port business operations of choice also implies freedom to have port governance models of their choice in these seaports.<sup>592</sup> While commenting on this proviso, an author observes: “It is undoubtedly a wise article, but it also confirms the resilience of port state and ports against external regulations.”<sup>593</sup> This researcher agrees with this point. Apart from not interfering in port governance, the provisions in the Convention relating to non-discrimination, levies and so on are being qualified by the convention itself by another provision to the effect that “measures of a general or particular character which a Contracting State is obliged to take in case of an emergency affecting the safety of the State or the vital interests of the country may, in exceptional cases, and for as short a period as possible, involve a deviation from the provisions of Articles 2 to 7 inclusive; it being understood that the principles of the present Statute must be observed to the utmost possible extent.”<sup>594</sup>

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<sup>589</sup> Article 13.

<sup>590</sup> Article 1.

<sup>591</sup> See Second Schedule to the NPA Act.

<sup>592</sup> See Article 3.

<sup>593</sup> Hooydonk *The Law Ends Where the Port Starts* 40.

<sup>594</sup> Art 16.

Nigeria and other contracting parties are allowed to plead not only emergency but also their 'vital interest', terms that are not defined and may be open to interpretations that can be used to deviate from the other provisions of the convention. If anything, the Convention is truly a testament to the fact that ports are not easily susceptible to external regulations and governance. Perhaps, the fact that the Convention contains no specific implementation mechanism as evidenced by zero-reference to an Implementing Body is another testimony in that regard.

### **3 1 3 Barcelona Convention and Statute on Regime of International Waterways of International Concern**

Nigeria is a party to this convention.<sup>595</sup> The convention provides for right of access to port situated along waterways on the basis of freedom navigation on international waterways it establishes. It defines the term "navigable waterways of international concern" as any waterway that is connected to the sea and traversing through one or more sovereign states."<sup>596</sup> The convention grants Nigeria and other contracting parties right to equality in the use of all ports situated on navigable waterways of other contracting states.<sup>597</sup>

Subject to the provisions of Articles 5 and 17, the nationals, property and flag of all the Contracting States "shall, in all ports situated on a navigable waterway of international concern, enjoy, in all that concerns the use of the port, including port dues and charges, a treatment equal to that accorded to the nationals, property and flag of the riparian State under whose sovereignty or authority the port is

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<sup>595</sup> Nigeria acceded to the Convention on 3<sup>rd</sup> November, 1967. See <https://web.archive.org/web/20130914215138/http://treaties.un.org:80/Pages/LONViewDetails.aspx?src=LON&id=555&lang=en> (Accessed 8-4-2017) The convention is a multilateral treaty that was concluded at Barcelona on 20 April 1921. Its purpose is to ensure freedom of navigation in waterways (i.e. ports, artificial canals and rivers) which bear international importance. Still in force, the convention, was registered in League of Nations Treaty Series on 8 October 1921 and went into effect on 31 October 1922.

<sup>596</sup> Art 1.

<sup>597</sup> Rivers port ,for example, is situated in the Gulf of Guinea along waters shared with Gulf of Guinea countries() . See <http://www.nigerianports.org/AboutUsRiversPort.aspx> (Accessed on 13-7-2017).

situated.” Nigeria may not charge dues of any kind levied anywhere on the course or at the mouth of a navigable waterway of international concern, other than dues in the nature of payment for service rendered and intended solely to cover in an equitable manner the expenses of maintaining and improving the navigability of the waterway and its approaches, or to meet expenditure incurred in the interest of navigation.<sup>598</sup>

Notable in the above provision is the clause that requires equality between national and non-nationals “in all that concern the use of the port” which shows the wide scope of liberalization of port use, subject only to Article 5 and 17.<sup>599</sup> It also requires the publication of ports regulation and tariff regarding towage and pilotage services. The convention generally prohibits withholding port facilities from public use on navigable waterways.<sup>600</sup> The relevant provision is: “The equipment of ports situated on a navigable waterway of international concern and the facility afforded in these ports to navigation must not be withheld from public use to an extent beyond what is reasonable and fully compatible with the free exercise of navigation.”<sup>601</sup>

This provision’s reference to “equipment of ports situated on a navigable waterway of international concern” seems to capture a requirement of access for the public not only to the geographical limits of ports but also to port installations situated outside the traditional limits of the port on a navigable waterways.

The import of all the proceeding provisions is that they embody some sort of port liberalization. The regime of liberalization of port use created by the convention is supported by an implementation mechanism through the League of Nations

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<sup>598</sup> Art 7.

<sup>599</sup> Art 5 permits some exceptions to the principles of freedom of navigation if a government chooses to give priority to its own nationals in certain cases, conditional on the absence of any agreements to the contrary while Article 17 provides thus: “In the absence of any agreement to the contrary to which the State territorially interested is or may be a Party, this Statute has no reference to the navigation of vessels of war or of vessels performing police or administrative functions, or, in general, exercising any kind of public authority”.

<sup>600</sup> Art 9(1).

<sup>601</sup> Article 9(2).

Communication and Transit Committee,<sup>602</sup> unlike in the case of the Statute and Convention on Maritime Ports with no implementation mechanisms as earlier noted. In any case, the convention does not generally infringe on Nigeria port administration nor does it prescribe particular model of port governance for ports on the country's international waterways, *albeit*, its prohibition on discriminatory pricing system appears to put some sort of brakes on Nigeria's regulatory powers vis-à-vis port pricing. The convention, however, clearly reaffirms the jurisdiction of Nigeria on its ports when it allows governments to apply their rule of law in waterways under their control.<sup>603</sup> However for contracting parties to this convention, Nigeria waves its right to deny access to their vessels in its ports as it is obligated to allow free movement in its waterways to vessels of any state whose government is party to the convention.<sup>604</sup>

### 3 1 4 World Trade Organization agreements

The World Trade Organization (WTO) created in 1995, is the organization overseeing the global multilateral trading system.<sup>605</sup> It replaced General Agreement on Trade and Tariff (GATT),<sup>606</sup> which had been in existence since 1947.<sup>607</sup> Nigeria is a State Party to the WTO Agreement.<sup>608</sup> The WTO Agreement

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<sup>602</sup> This is one of the specialized committees of the defunct League of Nations which deals, among others with international maritime transport.

<sup>603</sup> Art 6.

<sup>604</sup> Art 3.

<sup>605</sup> See World Trade Organization Agreement 1995. Article II thereof provides that "The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement". See also Article III. 1867 U.N.T.S. 154;. 33 I.L.M. 1144 (1994); adopted 15-4-1994 ; EIF:1.1.1995 ratified 1994.

<sup>606</sup> See WTO [https://www.wto.org/english/thewto\\_e/gattmem\\_e.htm](https://www.wto.org/english/thewto_e/gattmem_e.htm) (accessed on 12-4-2017). The World Trade Organization (WTO) describes itself as the only global international organization dealing with the rules of trade between nations overseeing agreements, negotiated and signed by the bulk of the world's trading nations and ratified in their parliaments to help producers of goods and services, exporters, and importers conduct business. See What is the WTO?

[https://www.wto.org/english/whatis\\_e/whatis\\_e.htm](https://www.wto.org/english/whatis_e/whatis_e.htm) (Accessed on 12-4-2017). In terms of Article 1 of WTO Agreement, 1994, the WTO " shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement."

<sup>607</sup> Hudec *Developing Countries in the GATT Legal System* (2010) 5 23. See 55 UNTS 194, (1947). Adopted: 1.1.1948; EIF: 1.1.1948; ratified in 1962

<sup>608</sup> Nigeria was one of the founding State parties on 1st January, 1995

does not directly and comprehensively address Law of the Sea matters so much that it has been posited that possibilities of either conflict or substantial interdependence are currently functionally little.<sup>609</sup>

However two significant WTO –related agreements, General Agreement on Trade and Tariff, 1994 and General Agreement on Trade in Service have liberalization provisions that potentially have impact on maritime and port industry. The Articles of the General Agreement on Tariffs & Trade (GATT) as originally agreed in 1947 and subsequently, with some revisions, in 1994 became part of the Uruguay Round negotiations that created the World Trade Organization.<sup>610</sup> Thus, GATT 1994 Articles are only one component of the WTO Agreements that were included in the Marrakesh Declaration of 1994 which marked the conclusion of the Uruguay Round.<sup>611</sup> On the other hand, GATS Agreement, also concluded in 1994 as part of WTO bundles of agreements,<sup>612</sup> applies to measures by Members affecting trade in services.<sup>613</sup> The ‘measures by members’ covered by GATS " means measures taken by: (i) central, regional or local governments and authorities; and (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities."<sup>614</sup> Effectively, the measure contemplated covers both government entities and the private sector.

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[https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (Accessed on 12-4-2017).

<sup>609</sup> Boyle "Further Development of the 1982 Convention on the Law of the Sea" in *The Law of the Sea: Progress and Prospects* 58.

<sup>610</sup> See WTO [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (Accessed on 12-4-2017).

<sup>611</sup> Nigeria became party on 18 November, 1960.

See [https://www.wto.org/english/thewto\\_e/gattmem\\_e.htm](https://www.wto.org/english/thewto_e/gattmem_e.htm) (Accessed on 20-3-2017).

<sup>612</sup> See WTO Agreements List of Annexes, Annex 1A and 1B.

<sup>613</sup> GATS 1994 GATS further describes trade in service thus: "For the purposes of this Agreement, trade in services is defined as the supply of a service:(a) from the territory of one Member into the territory of any other Member, (b) in the territory of one Member to the service consumer of any other Member;(c) by a service supplier of one Member, through commercial presence in the territory of any other Member(d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member"(Article 2).

<sup>614</sup> In terms of GATS Article XXVIII, It is further provided that "For the purpose of this Agreement: (a) "measure" means any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form;(b) "supply of a service" includes the production, distribution, marketing, sale and delivery of a service;(c) "measures by Members affecting trade in services" include measures in respect of (i) the purchase, payment or use of a service;(ii) the access to and use of, in connection with the

The WTO regime does not derogate from the general principle of Customary International Law which establishes the right of coastal States to their ports including the right to determine both access to visiting vessel and access to the port market. However, in the case of access to ports of contracting States by visiting vessels of other Contracting States, GATT provides that vessels of Contracting States shall be allowed access while in transit. There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties. It allows for no distinction to be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of Vessels or of other means of transport.<sup>615</sup>

The provisions, which cover means of transport including maritime transport, apply only and exclusively to traffic in transit meaning that it extends to all traffic in which the goods or vessels passage across the territory of a Contracting Member is only a portion of a complete journey beginning and terminating beyond the frontier of the Contracting Member across whose territory the traffic passes.

On the other issue of access to port services market, it is apposite to examine relevant WTO principles namely, Most Favoured Nations (MFN) and National Treatment(NT). These principles are pillars of GATT and GATS and issues

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supply of a service, services which are required by those Members to be offered to the public generally;(iii) the presence, including commercial presence, of persons of a Member for the supply of a service in the territory of another Member;(d) "commercial presence" means any type of business or professional establishment, including through (i) the constitution, acquisition or maintenance of a juridical person, or (ii) the creation or maintenance of a branch or a representative office, within the territory of a Member for the purpose of supplying a service.

<sup>615</sup> GATT V(2). It provides further "All charges and regulations imposed by contracting parties on traffic in transit to or from the territories of other contracting parties shall be reasonable, having regard to the conditions of the traffic. Denial of access to ports could amount to trade barriers. It has no effect on regulations relating to vessel safety standard" GATT V(4). See also provisions relating to transit in Art 19 AMTC.

surrounding them reveal the nexus between these WTO Agreements and the maritime and port sector.<sup>616</sup> The Most-Favoured-Nation Treatment requires that trade concessions granted to one Member are applied immediately and without conditions to all other Members.<sup>617</sup> This means that members must apply the same conditions in every trade transactions with other WTO members. In other words, members are required to grant the most favourable conditions under which it allows transaction in a particular product or service type to all other WTO State Parties. National Treatment mandates State Parties to grant to the products and services of other contracting parties concessions it grants to its own products and services.<sup>618</sup>The idea is to “grant someone a favour and you have to do same for all other WTO members.” In GATT, MFN is provided for thus:

[w]ith respect to customs duties and charges of any kind imposed on .importation or exportation any advantage, favour, privilege, or immunity granted by any contracting party to any product originating in or destined for any country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties...<sup>619</sup>

Under GATS, with respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to similar services and service suppliers of any other country.<sup>620</sup>

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<sup>616</sup> The principles are also adopted in continental and regional agreements adopted by Nigeria.  
<sup>617</sup> See for example article 1 of GATT 1994. MFN appears more favourable to the developed countries and it may frustrate the economic measures of developing countries to achieve growth through trade. In a fast globalizing and lopsided world, it appears unrealistic to provide for total equality among States Parties. To cater for the imbalance caused by MFN, the section of GATT on Trade and Development introduced the Differential and More Favourable Treatment for LDCs, which grants them tariff and non-tariff preferential treatment as a fundamental legal concession of the global paradigm (See GATT Part IV Art. XXXVI-XXXVIII).

<sup>618</sup> GATT Art 3.

<sup>619</sup> Art 1.GATT provides exceptions to this rule relating to customs unions and free trade areas that had been part of the GATT from its inception, and preferences for developing countries that were added later. Nigeria stands to benefit from the later exception because it is a developing country.

<sup>620</sup> GATS Art 11



In terms of GATT, NT is to be distinguished from MFN as it refers to the treatment of foreign products or suppliers not with respect to each other but with respect to national products or suppliers. The GATT requires that internal taxes, regulations and the like should not be applied to imported or domestic products so as to afford protection to domestic production.<sup>621</sup> In its wordings: Members may not use internal measures to discriminate between domestic goods and those imported from Members; that is to say that imports from Members are accorded National Treatment (NT) implying that once the authorised form of discrimination has been imposed on a product, there should be no further discrimination according to national source.

How this applies to service is clearly provided by GATS. In terms of GATS, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.<sup>622</sup> National treatment in that context would, therefore, imply that in all aspects, domestic and foreign producers should be treated equally without discrimination. While GATT and GATS are general agreements, WTO members are allowed to negotiate on their application to specific sectors such as the maritime sector in what is called specific commitments.<sup>623</sup>

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<sup>621</sup> GATT Article III. It has been suggested that, for some services, NT means equality of treatment of foreigners and nationals. In certain cases, GATT may legitimize certain forms of discrimination against goods produced by foreigners. The generally authorized form of discrimination according to source is an import tariff, although in some circumstances quantitative restrictions on imports are also permitted.

<sup>622</sup> GATS Article XVII.

<sup>623</sup> The relevant article (XIX (i)) says: "In pursuance of the objectives of this Agreement, Members shall enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of the WTO. Agreement and periodically thereafter, with a view to achieving a progressively higher level of liberalization. Such negotiations shall be directed to the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access. This process shall take place with a view to promoting the interests of all participants on a mutually advantageous basis and to securing an overall balance of rights and obligations". There have been negotiations involving the following countries.

GATS has got an Annex on Negotiation on Maritime Transport Services.<sup>624</sup> The Annex provides that “negotiations enter into force for international shipping, auxiliary services and access to and use of port facilities.”<sup>625</sup> These are made under Part III that provides for Specific Commitments in sundry sector chosen by members such as in the Maritime sector.<sup>626</sup> Under this part, Contracting Members are given a framework to negotiate based on market access, national treatment and additional commitments. On market access, it is provided that “with respect to market access through the modes of supply identified in Article I,<sup>627</sup> each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.”<sup>628</sup>

National treatment, as earlier noted, requires that in the sectors inscribed in its Schedule such as maritime and port sector, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than it accords to its own similar services and service suppliers subject to conditions it has set for itself.<sup>629</sup> Additional Commitments are commitments in a member schedule negotiated with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII, including those regarding qualifications, standards or licensing matters.<sup>630</sup>

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<sup>624</sup> According to GATS Art XXIX on annexes: “The Annexes to this Agreement are an integral part of this Agreement”.

<sup>625</sup> See GATS Annex on Negotiation on Maritime Transport Par 1. According to Par 2, Par 1 shall not apply to any specific commitment on maritime transport services which is inscribed in a Member's Schedule.

<sup>626</sup> Such specific commitments must meet the criteria set in GATS VI (1) thus: “In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.”

<sup>627</sup> Mode of services provided are stipulated as follows: For the purposes of this Agreement, trade in services is defined as the supply of a service:(a) from the territory of one Member into the territory of any other Member; (b) in the territory of one Member to the service consumer of any other Member;(c) by a service supplier of one Member, through commercial presence in the territory of any other Member” Article 1(2).

<sup>628</sup> GATS Art XVI (i).See also article XX which provides that, as part of negotiations, Members make commitments in a schedule which shall form an integral part of GATS.

<sup>629</sup> GATS Art XVII.

<sup>630</sup> GATS Art XVIII.

Based on the above three commitments, there have been negotiations on maritime transport services under GATS focusing on liberalizing access for foreign service suppliers to supply a service and ensuring that foreign users of the service are given non-discriminatory access.<sup>631</sup> In the course of negotiation, port services were initially treated as a sub-sector-under supporting services for maritime transport-whereby Members could make specific commitments on market access and NT. MFN was eliminated from maritime negotiations. Thus, if a Member scheduled this sub-sector and did not impose prohibitive restrictions, it would be possible for the suppliers of another Member to provide these services.

A draft schedule was developed dwelling on the three aspects of the maritime transport sector: international shipping, maritime auxiliary services, and access to and use of port facilities.<sup>632</sup> In the draft schedule, commitments on the first two pillars are included under Article XVI on market access and Article XVII on NT. Commitments on the third aspect is scheduled under Article XVIII on additional commitments. However, differences in the way that the additional commitments are framed may imply differing obligations. For some Member States, port services shall be made available to international maritime transport suppliers on reasonable and nondiscriminatory terms. Others member States have posited that no governmental measure will be taken that may prevent the availability of port services on such terms.<sup>633</sup> It would seem that in the first case, the member states in that category have undertaken to ensure that even private suppliers do not discriminate in the provision of these services and thus committed to competitive regulation.

It must be stated at this juncture that the draft schedule structure has not concluded on the possibility of allowing the service suppliers of another Member to provide port services. The WTO regime, therefore, does not impose particular

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<sup>631</sup> WTO *and State Enterprise* 21.

<sup>632</sup> WTO *WTO and State Enterprise* 21

<sup>633</sup> *Ibid.*

form of port governance, *albeit*, the above discussed provisions that provide scope for negotiation for access to ports services particularly under GATS have the potentials to amplify participation by private port services in contracting parties' maritime sector. In 2005, members agreed on their objectives for maritime transport services during the special session for council for trade in service.<sup>634</sup> For ports services, objectives on additional commitment and regulatory issues agreed on for negotiation included access to and use of port services and access to and use of services necessary for the conduct of multimodal transport operations.<sup>635</sup> While Nigeria is part of the agreement on objectives for negotiation, it has not made specific commitment in this regard.<sup>636</sup>

### 3.2 Continental regime

The legal regime for ports and port governance at the African continental level is at two levels. At the general level, are instruments such as the African Union Constitutive Act (AUCA)<sup>637</sup> and Treaty Establishing African Economic Community (TEAEC)<sup>638</sup> with provisions respectively having indirect and direct bearing on ports? The specific continental framework for ports in the African Union system is fundamentally based on African Maritime Transport Charter (AMTC),<sup>639</sup> Africa

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<sup>634</sup> WTO Report by the Chairman to the Trade Negotiations Committee Council for Trade in Services Special Session Special Session on Council on Trade in Services TN/S/23 28 November 2005 (05-5630). Available on

[https://www.wto.org/english/tratop\\_e/serv\\_e/transport\\_e/transport\\_maritime\\_e.htm](https://www.wto.org/english/tratop_e/serv_e/transport_e/transport_maritime_e.htm)

(Accessed on 24-4-107).

<sup>635</sup> *Ibid.*

<sup>636</sup> [http://i-tip.wto.org/services/GATS\\_Detail.aspx?id=20832&sector\\_path=0001100059](http://i-tip.wto.org/services/GATS_Detail.aspx?id=20832&sector_path=0001100059)

(Accessed 11-4-2017). In spite of this Nigeria was one of the 38 countries that signed a WTO decision calling for the liberalization of maritime services. See <http://www.oecd.org/tad/services-trade/46330212.pdf> (Accessed on 17-4-2017). This is not surprising considering the concession programme that has allowed expansive foreign entry into the country port services sector.

<sup>637</sup> African Union Treaty establishes the AU in 2000 as the umbrella organisation of African States replacing the Organization of African Union. See 2158 UNTS 3 Adopted 2000. Ratified 2000.

<sup>638</sup> UNTS Adopted ;3 -6- 1991, EIF:12-5- 1994, (1991) 30 ILM .Ratified on 31-12-1991 .See also [https://au.int/web/sites/default/files/treaties/7775-sl-treaty\\_establishing\\_the\\_aec.pdf](https://au.int/web/sites/default/files/treaties/7775-sl-treaty_establishing_the_aec.pdf) (accessed 4-4-2017).

<sup>639</sup> See fn 48 below chapter 1. See further [https://au.int/web/sites/default/files/treaties/7776-sl-african\\_maritime\\_transport\\_charter\\_6.pdf](https://au.int/web/sites/default/files/treaties/7776-sl-african_maritime_transport_charter_6.pdf) (accessed on 7-4-2017).

Charter on Maritime Security, Safety and Development,<sup>640</sup> supplemented by African Integrated Maritime Strategy (AIMS).<sup>641</sup> AMTC and AIMS are made pursuant to the ACA. AMTC was “inspired by the objectives stated in the Constitutive Act of the African Union, particularly Article 3”<sup>642</sup> and was made “considering the treaty establishing the African Economic Community, particularly the relevant provisions dealing with maritime transport”<sup>643</sup> Discussed below are the relevant provisions of TAEC and AMTC, in both of which Nigeria is a State Party.

### **3 2 1 African Economic Community Treaty**

The African Economic Community Treaty came into force in 1991.<sup>644</sup> The objective of the Treaty is, among others, “to promote economic, social and cultural development and the integration of African economies in order to increase economic self-reliance and promote an endogenous and self-sustained development,”<sup>645</sup> and establish a continental a framework for the development, mobilization and utilization of the human and material resources of Africa in order to achieve a self-reliant development.<sup>646</sup> Some of the means of achieving the

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<sup>640</sup> See fn 50 above. The Charter is yet to come into force. Nigeria is one of the 34 signatories to it, only one country, Togo, has ratified it. See also [https://au.int/sites/default/files/treaties/33128-sl-african\\_charter\\_on\\_maritime\\_security\\_and\\_safety\\_and\\_development\\_in\\_africa\\_lome\\_charter.pdf](https://au.int/sites/default/files/treaties/33128-sl-african_charter_on_maritime_security_and_safety_and_development_in_africa_lome_charter.pdf) (Accessed on 30th October 2017).

<sup>641</sup> AIMS is a policy instrument made pursuant to AU legal instruments. See for example Par 1(10) AIMS. One provision of Africa Charter on Maritime Safety, Security and Development 2016 be implemented by member states

<sup>642</sup> See the preamble to AMTC which further recognizes “the role of maritime transport in the facilitation and development of trade between Africa and other parts of the world and the need to implement an effective maritime transport policy with a view to promoting intra African trade and trade between African States and other continents”. In terms of Article 3 of AU Treaty, the objectives of AU include to ‘accelerate the political and socio-economic integration of the continent’.

<sup>643</sup> See Preamble to AMTC.

<sup>644</sup> Nigeria signed the Treaty on 3<sup>rd</sup>, June, 1991 and ratified it on 3<sup>rd</sup> December, 1992. See List of Countries which have Signed, Ratified/Accessed to the Treaty Establishing the African Economic Community [www.au.org](http://www.au.org) (Accessed 22-4-2017)

<sup>645</sup> Treaty for the Establishment of African Economic Community Article 1(a).

<sup>646</sup> Treaty for the Establishment of African Economic Community Article 1(b). Other objectives include: (c) To promote co-operation in all fields of human endeavour in order to raise the standard of living of African peoples, and maintain and enhance economic stability, foster close and peaceful relations among Member States and contribute to the progress, development and the economic integration of the Continent; and (d) To coordinate and harmonize policies among existing and future economic communities in order to foster the gradual establishment of the Community.

objectives include the gradual removal, among Member States, of obstacles to the free movement of persons, goods, services and capital and the right of residence and establishment,<sup>647</sup> as well as harmonization of national policies in sundry sectors including transport.<sup>648</sup>

To that end, Member States undertake to harmonise progressively, their rules and regulations relating to transport and communications.<sup>649</sup> Specifically, Member States are required to harmonize their policies on maritime, inter-State lake and river transport.<sup>650</sup> They shall encourage the establishment of Community and African multinational enterprises in the fields of maritime, rail, road, inland waterways and air transport.<sup>651</sup> This is in line with the African Union strategy to forge strong partnership between government and all segments of the civil society in particular organized labour and private sector and professional groups.<sup>652</sup>

While the Treaty commits Member States to expand, modernize and maintain transport and communications infrastructures by means of mobilizing the necessary technological and financial resources,<sup>653</sup> in order to be linked with one another and the outside world,<sup>654</sup> it does not mention how this will be achieved. However, the regime of common market,<sup>655</sup> and right of establishment it creates,<sup>656</sup> as well as free movement of capital,<sup>657</sup> could have effect of bringing in private capital for investment in sundry areas including in ports services, albeit from within the Community. This accords with the general commitment to “facilitate the establishment of African multinational enterprises and encourage and give financial and technical support to African entrepreneurs.”<sup>658</sup> The Treaty

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<sup>647</sup> Art 1(2) (i).

<sup>648</sup> Art 1(2) (e).

<sup>649</sup> Art 61(1) ( c ).

<sup>650</sup> Art 61(2) (b)(i).

<sup>651</sup> Art 62 (i).

<sup>652</sup> Article 2 Statue of Economic, Social and Cultural Council of the African Union (2004).

<sup>653</sup> Art 61(1)(e).

<sup>654</sup> Art 61(d).

<sup>655</sup> Art 1, 43.

<sup>656</sup> Art 43.

<sup>657</sup> Art 45.

<sup>658</sup> Art 49.

also commits Nigeria and other Member States to “organize, structure and promote, at regional and Community levels, passenger and goods transport services.”<sup>659</sup> In the transport sector in general and maritime port sector in particular, it does not provide a particular model of organizing and restructuring. This implies that the decision on this is left to individual members.

### **3 2 2 Revised African Maritime Transport Charter**

It has been noted that establishing a continental maritime economy with improved governance, trade and infrastructure, safety and security is not an easy goal, particularly when it involves the laws of fifty four countries and implies adherence to those laws by the rest of the world.<sup>660</sup>

The Revised African Maritime Charter (AMTC), yet to come into force, is meant to be a legal commitment by African states on issues relating to the maritime sector with the objectives to “declare, articulate and implement harmonized maritime transport policies capable of promoting sustained growth and development of African”,<sup>661</sup> promote undertaking and funding of research studies by national institutions in a way that encourages the development of cooperation in maritime and inland waterways transport and port operations among States Parties and regions,<sup>662</sup> “encourage the establishment and support of maritime and ports administrations”,<sup>663</sup> promote bilateral and multilateral cooperation among the maritime administrations of States Parties, and their respective operational organizations in the field of maritime and inland waterways transport and port activities,<sup>664</sup> among other objectives.<sup>665</sup> From these port related objectives, it is

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<sup>659</sup> Art 61(g).

<sup>660</sup> See African Union Commission for Infrastructure and Energy *Action Plan of the African Union on Maritime Transport* (2009)3.

<sup>661</sup> AMTC Art 3(1).

<sup>662</sup> AMTC Art 3(5).

<sup>663</sup> AMTC Art 3(6).

<sup>664</sup> AMTC Art 3(4).

<sup>665</sup> Other objectives in Article 3 include to :) Facilitate and encourage regular consultations for determining African common positions on issues of international maritime policy and to define, for each given problem, concerted solutions,) promote effective implementation of international maritime instruments to which Member States are parties, encourage the

clear that AMTC is not only an attempt to harmonise continental port law and policies, but also to coordinate the sector for improved efficiency. This is made clearer by the AMTC statement of principles thus:

States parties hereby adopt the following fundamental principles: a) Sovereignty, solidarity, cooperation, and interdependence of States; b) Harmonization and coordination of States parties' policies and procedures where practicable in all relevant areas connected with international maritime transport inland waterways and ports; Merchant fleets and to foster closer cooperation among the States Parties of the same region and between the regions. c) Efficiency, safety, security and global competitiveness of maritime, port infrastructure and operations in order to promote economic and social development; d) Safe, secure and efficient shipping on clean oceans and sustainable maritime, port policies and implementation strategies; e) Rights of access to and from the sea and freedom of transit for every landlocked State parties within the framework of international law; f) Transparency and accountability in maritime and port operations.<sup>666</sup>

Notable in the principles is affirmation of sovereignty of Member States. This is an affirmation of the jurisdiction of Member States over their ports. The Charter qualifies the jurisdiction in certain instance such as in the requirement that States Parties "seek to articulate within the framework of international maritime law, national, sub regional or regional strategies concerning places of refuge for ships in distress taking into consideration real and potential danger they pose to the marine environment and maritime navigation."<sup>667</sup> The commitment to cooperate

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establishment of shippers' councils and support them in the performance of their functions, promote the establishment of national and regional shipping lines and provide them the assistance necessary for their success, develop and promote mutual assistance and cooperation between States Parties in the area of maritime safety, security and protection of the marine environment, promote the sharing of best practices among States parties in the overall management and operation of Maritime Administrations and other maritime entities established in terms of this Charter, promote the provision of maritime education and training at all levels including secondary schools, promote the employment of seafarers, decent working conditions and training of seafarers, promote development of multimodal transport and integration of all modes of transport.

<sup>666</sup> AMTC article 3(a-f)... it is notable that, unlike in the case of the objectives, all the principles of the Charter dwell on ports.

<sup>667</sup> AMTC Art 27.



as provided for throughout the Charter also helps in overcoming jurisdictional limitation to joint actions and measures by all Members. Hence the introduction to the principles provides for cooperation at two levels to wit: firstly, “cooperation among States Parties in maritime transport, inland waters navigation, ports and related activities”<sup>668</sup>; secondly, cooperation between States Parties, regional and international organisations”<sup>669</sup> Specific areas of cooperation are clearly highlighted such as in reform of port services. In that respect, Nigeria undertakes “to cooperate towards the reform and efficiency of port services and promotion of competitiveness of African ports.”<sup>670</sup> In other words, Nigeria’s cooperation in this regard is not only in the reform of its own port but also other African ports. In this connection, Nigeria “shall strive to encourage the promotion of private sector participation in port operations.”<sup>671</sup> The Charter’s position in this regard is in tandem with the AU’s general commitment “to foster new partnership between government and the private sector, a new division of labour in which the private sector will be the veritable engine of economic growth while government concentrates on the development of infrastructure and the creation of macro-economic environment.”<sup>672</sup>

While the extent and model of private sector participation is not specifically stipulated in the Charter, there is provision for cooperation in transport auxiliaries encouraging African private sector participation.<sup>673</sup> The Charter also encourages

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<sup>668</sup> AMTC Art. 4.

<sup>669</sup> AMTC Art 12 particularly art 12(3).The cooperation is multifacet including in entering into international agreement and implementing existing agreement relating to transit. See art 19. See fn above also provision relating to GATT V (3).

<sup>670</sup> AMTC 22(1).

<sup>671</sup> Article 22(2) (a). See also art 35(1) which encourages the participation of the private sector in maritime and inland water transport activities.

<sup>672</sup> Par [23] Africa Union Declaration on Democracy, Political, Economic and Corporate Governance (2002) adopted by New Partnership for African Development (NEPAD) Implementation Committee in Rome, Italy, July, 2002 and endorsed by the Assembly of Heads of States and governments of African Union in Durban South Africa in July 2002. The Declaration further notes that globalization and liberalization does not, however, mean there should be no role for government in socio-economic development, it only means a different type of government which involves providing appropriate institutional framework to guide formulation and execution of economic policy. See Par 23.

<sup>673</sup> AMTC Article 14. The whole section is worth quoting for clearly indicating private sector participation: “1) States Parties agree to structure and organize maritime transport auxiliary services in order to enhance competitiveness and better quality services delivery for the

the promotion of partnerships of African operators in order to improve their financing capacities.<sup>674</sup> Nigeria shall promote cabotage and effective participation of private sector operators at national, regional and continental levels.<sup>675</sup>

Also, in connection to port services, Nigeria and other State Parties shall strive for the promotion of capacity building for port operators,<sup>676</sup> adoption of a system of harmonized framework of port statistics and performance indicators;<sup>677</sup> Strengthening of the existing regional organizations and associations of ports for the benefit of port development. Such port associations in which Nigeria is a member include West and Central African Ports Association,<sup>678</sup> Maritime Association of West and Central Africa (MOWCA)<sup>679</sup> and Pan African Ports Association.<sup>680</sup> In addition to a continental unit for the coordination of maritime transport and port issues,<sup>681</sup> States parties also undertake to establish at

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benefit of their economies. 2) In this regard States Parties shall endeavour to: a) Promote access of African operators to maritime transport auxiliary services or professions; b) Create an enabling environment to foster equity investment by African operators in foreign companies operating in Africa in maritime professions and transport auxiliary; c) Encourage African operators to pool resources including expertise in order to foster the emergence of African maritime transport auxiliary groupings capable of competing effectively in the global industry Regional private sector”.

<sup>674</sup> AMTC Art.35 (2).

<sup>675</sup> AMTC Article 15.

<sup>676</sup> AMTC 22(2) (b).

<sup>677</sup> AMTC 22(2)©.

<sup>678</sup> Port Management Association of West and Central Africa (PMAWCA), a specialized body of Maritime Association of West and Central Africa, was established in and consists of countries Nigeria and other west and central Africa countries. The PMAWCA is a sub-regional intergovernmental economic organization, made up of twenty two regular member Ports and Nine Associate members including landlocked Countries and Maritime Organisations, all located along the West Coast of the Africa Continent from Mauritania to Angola. The Association was established during the historic inaugural Assembly of October 1972 in Freetown (Sierra Leone) by the United Nations Economic Commission for Africa (UNECA). The objective, among others include contributing towards the improvement, coordination and harmonization of port and harbor activities, services and infrastructure in the West and Central African sub region so as to increase the effectiveness of their services to ships and other means of transportation; See <http://www.agpaoc-pmawca.org/portal/abouts/index> (accessed on 24-4-2017).

<sup>679</sup> MOWCA was established for the purpose of maritime development and security of West and Central Africa and consists of 25 countries including Nigeria. The main goal of this organization is to promote cost effectiveness of maritime services, maritime safety and security and environmental protection.

<sup>680</sup> Pan African Association for Port Cooperation. This is a federation of the three sub-regional port Associations in Africa. Namely the Port Management Association of West and Central Africa (PMAWCA), Port Management Association of East and Southern Africa (PMAESA) and the Union of Port Administrations of Northern Africa (UAPNA), The aim is to promote cooperation for port trade, operations and efficient service delivery and information sharing.

<sup>681</sup> Art 5(1).

continental level, an Association of African Maritime Administrations (AAMA), coordinated by the African Union Commission.<sup>682</sup> At the national levels, States Parties shall promote the establishment wherever they do not exist, Maritime Administration and National Ports Authorities and to make them functional and sustainable.<sup>683</sup> Incidentally, Nigeria has got both National Ports Authority and National Maritime Safety Agency.<sup>684</sup> Nigeria also has Nigeria Shippers Council, another requirement of the Charter.<sup>685</sup>

Further on port reforms, Nigeria commits to the promotion of the linkage of ports with development corridors,<sup>686</sup> facilitation of development and acquisition of modern port facilities and equipment,<sup>687</sup> promotion of efficient and effective channel management and port approaches,<sup>688</sup> promotion of safe, secure and efficient port operations; <sup>689</sup> application of internationally acceptable quality

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<sup>682</sup> 5(2).The Association of African Maritime Administrations (AAMA) was officially established at the 2nd Heads of Maritime Administrators held on 23 November 2013 in Sand ton, South Africa. The aim of the Association is to promote the development of Africa's maritime regulatory environment, encouraging harmonisation for greater global competitiveness, promote the sharing of best practices among Africa's Maritime Administrations in order to enable the growth of the African maritime industry and enhancement of continental collaboration to build consensus on issues of common interests in the maritime sector. See <http://africanmarads.com/AboutAama.html> (Accessed on 24-4-2017).

<sup>683</sup> Art 7. In the same vein, according to article 9, State Parties also "agree to promote the establishment of shippers' councils wherever they do not exist, to create an enabling legal framework for their operation and to support them in the performance of their duties. 2) Shippers' Councils are responsible for protecting and defending the interest of shippers by focusing on the simplification of transport and trade procedures, as well as the negotiation of transport costs and conditions. They are also responsible for assisting shippers in their activities especially in training in the area of international transport and trade.3. Shippers' Councils shall establish appropriate they are also responsible for assisting shippers in their activities especially in training in the area of international transport and trade.3. Shippers' Councils shall establish appropriate and integrated database for the benefit of shippers and operators in the transport chain'.

<sup>684</sup> See Par [2 ] 3 Chapter 1.

<sup>685</sup> See Art 9.

<sup>686</sup> Art.22 (e).

<sup>687</sup> Art.22 (f). See Art. 29 which specifically requires States Parties to provide modern port reception facilities thus: 1. States Parties shall, individually or collectively, within the framework of relevant international, regional and national instruments, take all the necessary steps such that port reception facilities comply with the needs of ships. They shall ensure the efficient use of such facilities, making sure that this does not lead to unjustified delays to ships.

<sup>688</sup> Art 22(g).

<sup>689</sup> Art 22(h).

standards in port services;<sup>690</sup> encouragement of consultation among the various port stakeholders through the establishment of port committees.<sup>691</sup>

Another area of cooperation is harmonization of maritime legislations. Nigeria and other Member States shall endeavour to ensure cooperation in the implementation of relevant legislation in the field of maritime transport, inland waterways and port operations and in this regard agree to adapt, and where necessary, update their existing maritime legislations in order to make them compatible with the promotion of safe, secure and environmentally friendly shipping, inland waterways and port activities.<sup>692</sup> It shall also “examine with a view to revising and harmonizing, if necessary, their maritime, port and inland waterways legislations in order to make them compatible with international instruments.”<sup>693</sup>

In this regard, African Integrated Maritime Strategy (AIMS) encourages Members to develop legal framework for coordinated State interventions at sea and inland waterways.<sup>694</sup> AIMS therefore seeks coordinating the harmonization of domestic regulatory regimes.<sup>695</sup> This could be galvanized into “African unified and harmonized maritime code.”<sup>696</sup> AIMS, which describes ports and harbours management as a (key) part of African maritime sector,<sup>697</sup> also stresses the importance of African maritime infrastructure development.

The AMTC and AIMS provide the strongest international commitment yet made by Nigeria on sundry issues in the ports including harmonization of the ports legal framework, port reforms and private participation in the port sector though neither of these instruments obligates Nigeria to adopt a particular mode or model of port governance or to use concession as an instrument for such adoption.

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<sup>690</sup> Art 22(1).

<sup>691</sup> Art 22(j).

<sup>692</sup> Art 23(1).

<sup>693</sup> Art 23(2).

<sup>694</sup> AIMS Par. 60.

<sup>695</sup> AIMS Par. 24( e).

<sup>696</sup> AIMS Par.25(xxi)

<sup>697</sup> AIMS Par [85].

### **3 2 3 Africa Charter on Maritime Security, Safety and Development**

The Africa Charter on Maritime Security, Safety and Development is an African Union treaty aimed at ensuring the security, safety and development of African maritime domain.<sup>698</sup>

The charter requires the parties to improve the competitiveness of their maritime industries particularly in international trade.<sup>699</sup> The parties are required to “facilitate the engagement of non-state actors especially the private sector in the development and implementation of the blue economy.”<sup>700</sup> To that end, the parties “shall encourage Public Private Partnership to facilitate modernization of African maritime industries in order to provide standard quality service and contribute to the attainment of sustainable development.”<sup>701</sup> Specifically in the port sector each Member’s commitment is to “develop and strengthen its infrastructure to enable its port facilities to achieve its economic growth potential and competitiveness.”<sup>702</sup>

However, the charter does not recommend any specific type of Public Private Partnership in the maritime sector nor does it spell specific type of port governance system for Members States.

### **3 3 Regional regime**

#### **3 3 1 Revised Treaty of Economic Community of West African States**

The Economic Community of West African States (ECOWAS) was originally established in 1975. In terms of ECOWAS Treaty, its objectives, among others

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<sup>698</sup> See the preamble to the Charter. The scope of the charter covers “all measures for the sustainable exploitation of marine resources and optimization of the development opportunities of sectors related to the sea.” See Art 23 ACMSSD. See fn 50 below.

<sup>699</sup> Art .23 .

<sup>700</sup> Art. 19(2).

<sup>701</sup> Art 24(2)

<sup>702</sup> Art.24(1)

are “to promote co-operation and integration, leading to the establishment of an economic union in West Africa in order to raise the living standards of its peoples, and to maintain and enhance economic stability, foster relations among Member States and contribute to the progress and development of the African Continent.”<sup>703</sup> The Community seeks to achieve its objectives through a number of measures including the promotion of joint ventures by private sector enterprises and other economic operators, in particular through the adoption of a regional agreement on cross-border investments;<sup>704</sup> and the adoption of measures for the integration of the private sectors, particularly the creation of an enabling environment to promote small and medium scale enterprises.<sup>705</sup>

For the purpose of ensuring the harmonious integration of the physical infrastructures of Member States and the promotion and facilitation of the movement of persons, goods and services within the Community, Member States undertake to, among others, evolve common transport and communications laws, regulations and policies;<sup>706</sup> formulate programmes for the improvement of coastal shipping services and inter-state inland waterways and the harmonization of policies on maritime transport and services; <sup>707</sup> co-ordinating their positions in international negotiations in the area of maritime transport;<sup>708</sup> development of human resources through the harmonization and coordination of their national training programmes and policies in the area of transportation in general ;<sup>709</sup> endeavoring to standardize equipment used in transport and communications and establish common facilities for production, maintenance and repair.<sup>710</sup> Member States also undertake to encourage the establishment and promotion of joint ventures and Community enterprises and the participation of the private sector in the areas of transport and communications.<sup>711</sup>

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<sup>703</sup> Revised Economic Community of West African States Treaty .See fn 54 below chapter 1

<sup>704</sup> Art 2(f).

<sup>705</sup> Art 2(g).

<sup>706</sup> Art 2( a).

<sup>707</sup> Art 3(d).

<sup>708</sup> Art 3(e).

<sup>709</sup> Art 3(f).

<sup>710</sup> Art.3 (i).

<sup>711</sup> Art 3(j).

One of the pillars of ECOWAS Treaty is common market.<sup>712</sup> Seaports play a role in the development of common market as it serves as artery through which goods and services move across borders. While common market does not amount to particular model of port governance, it facilitates entry of the private sector into the partner countries maritime and port sector.<sup>713</sup> The ECOWAS Treaty does not prescribe a particular form of property ownership.<sup>714</sup> For port, this means the treaty does not require Nigeria to maintain a particular model of port governance. However, free movement of natural and corporate persons has the effects of opening the ports to private operators from within the Community. To enhance proper governance of its maritime domain, ECOWAS came up with the ECOWAS Integrated Maritime Strategy (EIMS).<sup>715</sup>

The Strategy is based on the principles that the maritime area is vital for the economic development and, it covers all ECOWAS Members states whether coastal or noncoastal countries,<sup>716</sup> the fact that the maritime challenges are transnational and interdependent and cannot be overcome by any state individually and therefore requires coordination and cooperation.<sup>717</sup> It is also made in the context of infrastructural deficit in maritime transport including in sea

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<sup>712</sup> Nigeria is officially dedicated to common market and to other commitments of ECOWAS. The National Economic Empowerment and Development Strategy (NEEDS) provides as follows: "Nigeria is committed to the full and complete implementation of the free trade zone agreements of the Economic Community of West African States (ECOWAS), the creation of a single monetary zone, and the unification of West Africa into a common customs territory. Government policy will be aligned towards realization of the following objectives: adopt a common trade and competition policy in West Africa as a building block towards full integration of African economies. Adopt a common currency in West Africa under the West African Monetary Zone Protocol. Remove all nontariff barriers to trade and introduce a common external tariff regime. "NEEDS is the country's wholistic development strategy that covers all aspects of national development. See <http://documents.worldbank.org/curated/en/234301468290438608/pdf/33305.pdf> (Accessed on 23-4-2017).

<sup>713</sup> Art. 1 of The ECOWAS Protocol on Free Movement, Residence and Establishment provides that "The Community citizens have the right to enter, reside and establish in the territory of Member States."

<sup>714</sup> See generally ECOWAS Treaty.

<sup>715</sup> ECOWAS integrated Maritime Strategy .See Par 2 2 1(iii) Chapter 1.

<sup>716</sup> ECOWAS Integrated Maritime Strategy par 14(a).

<sup>717</sup> EIMS Par 14(b).

ports which inhibits economic competitiveness of the region's seaports in the world market and hampers regional integration.<sup>718</sup>

The Strategy's strategic objectives include reinforcing the governance of regional maritime domain; ensuring the security and safety of the regional domain; managing and protecting the maritime environment; optimizing the maritime economy of the ECOWAS region; promoting an effective search and rescue regime in the regional maritime area.<sup>719</sup> To achieve the objectives, the Strategy requires Member States to support initiatives on behalf of members' states and private companies aimed at establishing Public Private Partnerships (PPP) to fulfill their objectives.<sup>720</sup> Specifically, the Strategy encourages Members States to evaluate performances of their principal ports and introduce indicators of performance and measure ineffectiveness which increase the commercial costs of these ports while putting in place mechanisms to help operators in maritime transport to look for alternative solutions if that situation persists.<sup>721</sup> One measure that may help in this direction is the requirement for commitment to strengthen the capacity of seaport authorities of Member States.<sup>722</sup>

#### **4 Port governance models**

It is obvious from the foregoing prognosis of International Law instruments that seaports are not easily amenable to external control as a domain of domestic jurisdiction. International Law has not imposed particular models of port governance. In view of this, International organisations have resorted to formulation of port guidelines on ports reforms (which they encourage countries like Nigeria to adopt in their ports).<sup>723</sup> One such guideline is that of World Bank

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<sup>718</sup> EIMS Par 72.

<sup>719</sup> EIMS Par 17.

<sup>720</sup> EIMS Par 73(d).

<sup>721</sup> EIMS Par 73(a).

<sup>722</sup> EIMS 25(d).

<sup>723</sup> See Hooydonk *The Law Ends Where the Port Area Begins* Par 24 48.



which played remarkable roles in the adoption by Nigeria of Landlord port governance model vide concession.<sup>724</sup>

A number of factors determine the way ports are organized, structured, and managed, such as the socioeconomic structure of a country including market economy, open borders, historical developments such as, for example, former colonial structure.<sup>725</sup> Some categories of ports have emerged over time, and they can be classified into four main models: the public service port, the tool port, the landlord port, and the fully privatized port or private service port.<sup>726</sup> These models are distinguished based on how they differ in terms of such features as: Public, private, or mixed provision of service; ownership of infrastructure (including port land) and of superstructure and equipment (particularly ship-to-shore handling equipment, sheds, and warehouses) and status of dock labour and management. While service and tool ports mainly focus on the realization of public interests to differing extent, landlord ports have a mixed character and maintains a balance between public ( that is port authority) and private (port industry) interests. On the other extreme of the divide, fully privatized ports are about private- shareholder interests.

In general, in all models -port authorities, in addition to functions peculiar to any particular model, normally perform functions that include the landlord and performance-evaluation function, the policy-making, planning, and development function, traffic control, regulatory, and surveillance function, marketing/promotional, public relations, and performance evaluation function as well as human resource development function.<sup>727</sup> It is noteworthy that while the functions and operations of most ports around the world are on the whole similar,

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<sup>724</sup> See generally World Bank *Port Reform Toolkit* See fn 31 Chapter 1.

<sup>725</sup> See generally Ayodeji *Maritime Policy and Economic Development* 173.

<sup>726</sup> Yang Ownership and Management of Ports <http://web.idv.nkmu.edu.tw/~hgyang/pm-e2.pdf> (Accessed on 25—2017).

<sup>727</sup> De Monie *Mission and Role of Port Authorities*. Proceedings of the World Port Privatization Conference, London, (27–28 September 1994) 20.

the conditions under which they are performed vary from country to country depending on the legal framework.<sup>728</sup>

#### **4 1 Aspects of port governance**

In specific, there are traditionally three broad roles in the system and it is significant to distinguish who plays each of these roles at a particular port. First is the regulatory responsibility for overall coordinated and safe actions and for shared infrastructure and operations to the benefit of all port users. Second is the landlord and ownership of particular port terminals. Third, is the operational aspect involving operation of particular marine terminal<sup>729</sup> Regulatory, operational and ownership functions are considered an essential way of analysing port organisation.<sup>730</sup> The role of coordination and shared operations deal with activities that are carried out for the benefit of all port actors, to ensure safe operations for example harbour master duties such as traffic control and security measures, to improve works shared by all users and providers for example channel dredging, or to promote the common interests of the port through marketing activities.<sup>731</sup> Also called policing role it involves other actions such as environmental inspection, regulation of handling of goods especially dangerous ones.<sup>732</sup>

The ownership of cargo handling facilities can be vested in a public sector or a private entity. While there may be a single owner of facilities within a given port, there may also be multiple owners of various infrastructures in a particular port system. The operator of a cargo handling facility may be the facility's owner, or the operator may be different from the owner. Where the operator is different from the owner, the operator typically makes lease payments to the owner in return for the right to operate the facility with the duty to attract sufficient business at

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<sup>728</sup> UNCTAD *Legal Aspects of Port Management* (1993) 8 25.

<sup>729</sup> See generally Baltazar and Brookes *The Governance of Port Devolution* paper presented on Port, Seoul South Korea (July 2001).

<sup>730</sup> *Derbie Different Tiers of Government in Port Governance* 4.

<sup>731</sup> US Department of Justice and the US Federal Trade Commission Working Party No. 2 on Competition and Regulation *Competition Concerns in Ports and Port Services* ( )2 51.

<sup>732</sup> Hooydonk "Port Authorities and Port Services Directive" in Hooydonk *et al* (ed) *European Seaport Law* 99.

adequate prices to cover the costs of the lease, other operating costs, and generate a profit. Capital super structural improvements to cargo handling facilities for example repairing berth structures and capital acquisitions while new cranes may be undertaken by either party, depending on the terms of their contract.<sup>733</sup> The arrangement may also be one whereby one single entity takes on all three roles and associated responsibilities. This is normally the case where the entity is a public sector authority such as a public sector port agency responsible for directing vessel traffic, maintaining channel depths, among others. It also owns and operates one or more terminals in the port.

All three roles can be adopted by one or more private sector companies, in the case of a privatised port model. More commonly, an entity takes on roles one and two such as when a public sector port agency also owns, but does not operate, a container terminal or an entity takes on roles two and three for example when a bulk commodity handling facility is being operated by its private sector entity.<sup>734</sup> Another important aspect of port governance is community manager function which has become more important in view of changes taking place in the port.<sup>735</sup> The community manager function is essentially about changing nature of the port system and stakeholders and has both an economic and societal aspects. Where the port system is localized and therefore anchored and committed to the well-being of the port, the role of the port authority could be confined to its traditional functions and was pretty evident and straightforward.<sup>736</sup>

The globalisation process, marked by a power struggle between carriers, terminal operators and logistics operators to control the supply chain, has however fundamentally extended the reach of the port system.<sup>737</sup> Big global firms have

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<sup>733</sup> See Par 4 1 1 below.

<sup>734</sup> See generally Skakway Port Development Corporation *Skakway Port Development Plan* Par 8 2. See an example of this kind of arrangement in Par 4 1 2 below.

<sup>735</sup> For instance, concession programme in Nigeria caused 9000 out of 13000 NPA workers to be sacked. 13000 dockworkers were also sacked causing serious conflict in the port system. See Abdulsalaam *Enhancing Port Efficiency through Concession* paper presented at conference on ports, South Africa (3-6 June) 19.

<sup>736</sup> Verhoeven *European Port Governance* (2010) 45.

<sup>737</sup> *Ibid.*

only limited ties with the port with little or no lack affinity with neighbouring cities and local communities.<sup>738</sup> The societal dimension is marked by conflicting interests with societal stakeholders. The community manager function is essentially a coordinating function meant to solve collective problems in and outside the port area, such as hinterland bottlenecks, training and education, Information Communication Technology, marketing and promotion as well as innovation and internationalization economic dimension and resistance to concession.<sup>739</sup> Issues relating to the development of the community, adherence to local laws and mechanism for social consultation are community manager issues.<sup>740</sup> It also aims to solve conflicts of interest in order to defend the license to operate of the port which is a societal dimension.

Ports express their objectives through taking positions on the above issue and vide particular port governance models with these objectives having economic and non-economic aspects.<sup>741</sup> The economic objectives are varied: maximization of handled tonnage, maximization of added value and maximization of the profit of the port authority stand out as the most significant economic objectives.<sup>742</sup> It has earlier been noted that while the functions and objectives of many ports around the world are quite similar, the conditions under which they are performed differ from country to country. Where the port transits to landlord model, the objective usually includes enhancing efficiency and competition as well as seeking alternative financing.<sup>743</sup> In general, the objectives vary from commercial profitability and customer satisfaction to strategic national interest to sustainable, local economic development and growth.<sup>744</sup> Specific strategic objectives that ports may follow include maximizing profits for shareholders; maximizing return on investment for government; enhancing traffic throughput; maximizing traffic

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<sup>738</sup> *Ibid.*

<sup>739</sup> In Nigeria for example, there was intense resistance to concession particularly in view of loss of jobs associated with the concession programme.

<sup>740</sup> Joe-hope *Port Safety and Environment Management* 63.

<sup>741</sup> Brookes and Pallis *Port Governance* 508.

<sup>742</sup> *Ibid.*

<sup>743</sup> Hooydonk *The Law Ends Where the Port Area Begins* par 25.

<sup>744</sup> See Brooke *Port Governance* 495. The pure economic objectives are varied and include: Maximisation of handled tonnage, . Maximisation of benefit and maximisation of the profit of the port authority .ESPO (2010)10.

throughput; and optimizing economic development prospects, be they local or national. The last objective is the one most frequently chosen.<sup>745</sup>

It is not out of place that ports owned and managed by government seek “to enhance the contribution of the port and shipping related activities to the economy”<sup>746</sup> or “to advance and safeguard the country’s strategic maritime interests.”<sup>747</sup> Neither is it unexpected that private ports will focus on sale and development opportunities or financial value for shareholders, but even some private ports consider the economic value they may generate for their local community. Ports represent and produce a combination of public and private goods.<sup>748</sup> This way they produce direct economic benefits (private goods) through their operations, as well as additional string of indirect benefits (public goods) that comes in the form of trade enhancement.<sup>749</sup> These economic effects have been used by many ports to justify direct public sector investment. It is in this dual production of both public and private goods that complexities arise, which make defining roles for and boundaries between the public and private sectors challenging in the ports sector.<sup>750</sup> This is the case in the policing role of marine and port safety, port security, and the protection of the marine environment.<sup>751</sup> It also necessitates putting in place a solid legal regime.

To achieve some of the objectives highlighted above and in assigning roles between the public and private sector, it is worth reiterating that one or more

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<sup>745</sup> Baltazar and. Brooke “Port Governance, Devolution and the Matching Framework: A Configuration Theory Approach” in Brooke and Cullinane (eds) *Devolution, Port Performance and Port Governance* (2007)379 404. Research in Transport Economics, 17.

<sup>746</sup> As in Nigeria. See par 5 22(ii) below.

<sup>747</sup> Also as in Nigeria. See Par 5 22(ii) below.

<sup>748</sup> Public goods have been described as including goods that are essentially non divisible and non-consumable, such as public safety, security, and a healthy environment on the one hand, and coastal protection works necessary to create port basins on the other hand. Private goods are characterized as both consumable and divisible and their use entails a minimum of economic externalities. See Africa Development Report (2010)79. See also World Bank Port Reform Tool Kits *Alternative Port Management Structures and Ownership Models* Module 3. Public goods has also been described has one for which consumption of the good by one does not detract from that of any other individual. See Veljanovski *Economic Principles of Law* (2007)40.

<sup>749</sup> World Bank Port Reform Tool Kits *Alternative Port Management Structures and Ownership Models* Module 3.

<sup>750</sup> See generally Africa Union *Africa Development Report* (2010) 79.

<sup>751</sup> Hoydonk *Port Authorities and Port Services Directive* 99.

organizations perform the following roles within the port system: serving as Landlord for private entities offering a variety of services; acting as regulator of economic activity and operations as well as regulator of marine safety, security, and environmental control; planning for future operations and capital investments; operator of nautical services and facilities, marketer and promoter of port services and economic development, cargo handler and storer as well as provider of ancillary services activities.<sup>752</sup>

Distribution or redistribution of these roles between the public sector and private entities results in the identified governance models of service port, tool port, land lord port and private port categories.

#### **4 1 1 Service ports**

In a service port, also called operating or comprehensive port, the port authority provides all services,<sup>753</sup> as the name implies. In other words, infrastructure, superstructure and cargo-handling are handled by the public sector.<sup>754</sup> Service ports have an essentially public character.<sup>755</sup> A number of ports in developing countries are still managed according to the service model. Under it, the port authority renders to ships and cargo the complete range of services required for the functioning of the seaport system.<sup>756</sup> The port owns, maintains, and operates every available asset whether fixed and mobile, and cargo handling activities are executed by labour employed directly by the public port authority. It is a model in which the Port Authority owns the land and performs all regulatory and port functions.<sup>757</sup> This means that the same entity has the responsibility for performing regulatory functions, developing and managing infrastructure and superstructure

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<sup>752</sup> *Ibid.*

<sup>753</sup> Hooydonk *Port Authorities and Port Services Directive in European Seaports Law* 96 fn 64. A good example of service Port model can be found in South Africa .See African Development Report 83.

<sup>754</sup> Kruck *Logistic and Port Management* (2004)9.

<sup>755</sup> Alderton *Port Operations* 142.

<sup>756</sup> *Ibid.*

<sup>757</sup> Brook Port Governance Structure2 – June 2004 Review of Network Economics Vol.3, Issue 3.

and carrying out operational activities.<sup>758</sup> In Public Service Port, the state port authority provides not only facilities and equipment but also offers stevedoring services.<sup>759</sup> Service ports are usually controlled by (or even part of) the Ministry of Transport and the head is a civil servant appointed by, or directly reporting to, the line minister.<sup>760</sup>

The other variant of service port is the private service port in which the public sector no longer maintains interest in port activities with port land owned by the private sector. Regulatory functions and operational activities are being carried out by the private sector.<sup>761</sup> Cargo handling activities are among such major operational functions of a service port. In some developing country ports, the cargo handling activities are handled by a separate public body, characterized normally as the cargo handling company.<sup>762</sup> Such public companies usually report to the same ministry as the port authority. To have public entities with different and sometimes conflicting interests reporting to the same ministry, and forced to cooperate in the same operational environment, constitutes a serious management challenge. For this reason, the port authorities and cargo handling companies of Mombasa, Kenya, and Tema and Takoradi, Ghana, were merged into one single entity.

In general, there is no private sector involvement in core port activities and services.<sup>763</sup> It has been observed that the strength of this model lies in the fact that facilities development and operation are the responsibility of only one entity,

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<sup>758</sup> *Ibid.*

<sup>759</sup> Ikodide *Maritime Transport: Port as indispensable Partner* in Ikodide and Aro *Shipping Management and Policy in Nigeria* 16.

<sup>760</sup> World Bank Port Reform Toolkit Module 3 16 17.

<sup>761</sup> Brooke *Port Governance Structure* 4.

<sup>762</sup> For example in Kenya, the predecessor of Kenya Port Authority which covered the whole of East Africa sub region, East Africa Railway and Harbour had a separate company in which it held all shares, Cargo Handling Services Ltd with responsibility for cargo-handling Hoyle *The Sea ports of East Africa* (1967) 60-61.

<sup>763</sup> Brook *Review of Network Economics* "On the other hand", observes the author, "the dearth of internal competition can lead to inefficient port administration, or to a lack of innovation, and services that are not user-oriented or market oriented."

making for a streamlined and cohesive approach to growth.<sup>764</sup> This researcher submits that this would not be the case where there are multiple public agencies operating in the port with overlapping functions with the main port authority.

#### **4 1 2 Tool ports**

In the tool port model, the port authority owns, develops, and maintains the port infrastructure as well as the superstructure, including cargo handling equipment such as quay cranes and forklift trucks.<sup>765</sup> Port authority staff usually operates all equipment owned by the port authority.<sup>766</sup> In other words, port labour is supplied by port authority for operation of port equipment and infrastructure owned, developed and maintained by the public authority.<sup>767</sup> Cargo handling on board vessels as well as on the apron and on the quay is usually carried out by private cargo handling firms contracted by the shipping agents or other principals licensed by the port authority.<sup>768</sup> In some cases, the Tool Port is adopted for medium and small ports in which the private sector lacks incentives to invest.<sup>769</sup> The Port of Chittagong, Bangladesh, is a typical example of the tool port.<sup>770</sup>

Assignment and division of responsibilities within the tool port system clearly shows the fundamental feature of this type of port governance model namely split operational responsibilities and functions. While the port authority owns and operates the cargo handling equipment, the private cargo handling firm usually enters into cargo handling contract with the ship-owner or cargo owner.<sup>771</sup> Cargo-handling is a critical aspect of port operations,<sup>772</sup> and so requires a lot of attention for the port success. In practice, cargo handling company, however, is unable to totally control the cargo handling operations by itself. In order to prevent conflicting operation between cargo handling firms, some port administration

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<sup>764</sup> Ibid.

<sup>765</sup> See also Ikodide *Maritime Transport: Port as indispensable Partner* in Ikodide and Aro *Shipping Management and Policy in Nigeria* 16.

<sup>766</sup> Alderton *Port Operations* 93.

<sup>767</sup> Brookes *Governance Structure of Ports* 2.

<sup>768</sup> Africa Union *Africa Development Report* 81.

<sup>769</sup> Ibid.

<sup>770</sup> Port Reform Toolkit *Model 3* 7.

<sup>771</sup> Ibid.

<sup>772</sup> Ogunjobi *Nature and Challenges of Seaport Operations* paper presented on Marketing Strategies of Ports, Ogun State(25-26-2005) 4.



allow operators to use their own equipment. When this is done, it is no longer a true or conventional tool port category. Incidentally, the tool port shares a number of similarities with the service port, in terms of its public orientation and the way the port is being financed, nonetheless they are different models. The port authority, in a tool port model, makes land and superstructures available to cargo handling companies.

The public port authority makes provision for the superstructure as well as the infrastructure while the private sector carries out cargo-handling operations.<sup>773</sup> In contra, in a service port, otherwise known as operating port, the public port authority not only provides the infrastructure and superstructure but also carries out a whole range of functions including pilotage, stevedoring, warehousing and cargo –handling and delivery.<sup>774</sup> These companies, especially in the past, tended to be small, with few capital asset base with costs being almost entirely variable.<sup>775</sup> The cost of underuse of port facilities was usually absorbed by the port authority, which reduced risk for cargo handling firms. In a number of cases, the provision of cargo-handling services was atomised, companies were small with activity fragmented over many participants.<sup>776</sup> The lack of capitalisation of the cargo handling companies constituted a significant obstacle to the development of strong companies that could function efficiently in the port and be able to compete internationally.

Tool port has been used as a means of transition to a landlord port as was done in Nigeria. Making use of the tool port model as a driver for such transition can be a viable option in instances where the confidence of the private sector is not fully won especially in the face of high investment risks. Using a tool port model may help in reducing initial capital investment requirements. The government could also be putting in place mechanisms to expedite port reform initiatives which demands extensive length of time for the legislative instruments to be

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<sup>773</sup> Charles *Port Administration* 6.

<sup>774</sup> *Ibid.*

<sup>775</sup> Port Reform Toolkit *Model 3* 7.

<sup>776</sup> Brookes *Governance Structure of Ports* 170.

established.<sup>777</sup> In that case, laws and regulations for establishing a tool port may be less extensive since no state assets are being transferred to the private sector, and this therefore presents it as an easier model to adopt in the first phase of reform. Where existing laws support Tool Port model, such laws will need to be amended to make a transition legal.

### **4 1 3 Landlord ports**

In this model, the State owns the land and leases out the terminals to private stevedoring companies.<sup>778</sup> The landlord port is characterised by its mixed public-private characteristic and it is such that the public sector controls infrastructure while the private sector handles superstructure such as cargo handling equipment.<sup>779</sup> The port authority acts as regulatory body and as landlord, while port operations especially cargo handling are carried out by private companies. Infrastructure is leased to private operating entities or to private industries such as refineries, tank terminals, and chemical plants.<sup>780</sup> It is such that the public authority which owns the infrastructure leases them to private operators in the framework of a port concession.<sup>781</sup> The lease to be paid to the port authority is usually a fixed sum over an agreed period of time. The payment for lease may be connected to the initial preparation and construction costs such as those relating to infrastructural issues for example quay wall construction and land reclamation borne by the relevant public authority.

The public authority remains the owner of infrastructure, real estate and basic marine or coastal works.<sup>782</sup> The private port operators provide and maintain their own superstructure including buildings such as offices, warehouses, sheds container freight stations and workshops. In addition, they purchase and install their own equipment on the terminal grounds needed for operation. In the ports, dock labour is employed by private terminal operators, although in some ports

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<sup>777</sup> Port Reform Toolkit *Model 7*.

<sup>778</sup> Alderton Port Operations 93.

<sup>779</sup> Juhel *Management Models and Public Private Partnership in Port in the Sectors 8*.

<sup>780</sup> Port Reform Toolkit.

<sup>781</sup> *Desire Different Tiers of Government in Port Governance 4*.

<sup>782</sup> See [www.worldbank.org/ssatp](http://www.worldbank.org/ssatp). (Accessed on 20-6-2015)

part of the labour may be provided through a port wide labour pool system.<sup>783</sup> In general, the port authority, apart from ownership of land as defined by the law, maintains responsibility for maintaining port approach channels and civil works, provision of navigation aids, harbour masters functions, policy making, planning and development of the port, promotion and marketing of port services.<sup>784</sup> It also engages in regulatory, supervisory and surveillance functions for example by monitoring port services.<sup>785</sup> The landlord port model is thus founded on a distinction between the ownership of the land and the infrastructure assigned to the public sector and the ownership of the equipment as well as the provision of services granted to private sector.<sup>786</sup>

The landlord function can be seen in terms of its developmental function involving infrastructure development and maintenance as well as long term planning and coordination with city or regional development outlays.<sup>787</sup> The port identifies new areas for development while working on capacity utilization of its facilities to enhance revenue capacity.<sup>788</sup> It enacts policies on the use of the port in a way that promotes port efficiency for example by way of quick turnaround of vessels.<sup>789</sup> It characteristically embraces asset management as well as partnership with the private sector.<sup>790</sup> It also involves leasing out of port land.<sup>791</sup> The associated regulatory functions include navigation control, environmental regulation and safety and security control.<sup>792</sup> Regulating, monitoring and supervising commercial practices such as issues of competition and port-pricing

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<sup>783</sup> Tool kit *Module 3 8*.

<sup>784</sup> Obed *Essentials of Port Reforms* 81.

<sup>785</sup> *Ibid.*

<sup>786</sup> Jean *Different Tiers of Government in Port Governance: Some General Remarks on the Institutional Geography of Ports in Europe and Canada* Paper presented at 12th WCTR, Lisbon, Portugal ( July 11-15 2010 )I 4.

<sup>787</sup> *Ibid.*

<sup>788</sup> Adeeko *Characteristics of the Land-lord Model in Port Operations* Paper at Conference on: Presented on Effective Marketing Strategies Best Suited to the Role of National Port Authority As the Regulator of the Seaport of The Nigerian Economy organized Gateway Hotel Ogun State Nigeria (October 24-2<sup>nd</sup> November,2005) 3.

<sup>789</sup> *Ibid.*

<sup>790</sup> Obed *Essentials of Port Reform* 81.

<sup>791</sup> Desire *Different Tiers* 5.

<sup>792</sup> Obed *Essentials of Port Reforms* 41.

also fall under this.<sup>793</sup> Port competition is seen as serving as the stimulus for efficiencies and many ports have undergone reform to create or enhance competition. The regulatory function also entails collation of complaints of port users (such as importers, exporters, freight forwarders, ship operators) and taking appropriate measures.<sup>794</sup> The port authority under this model may also engage in facilitation function which include inter port cooperation and partnership, promotional activities and strategic marketing.<sup>795</sup> The port also educates port users on the developments in the port.<sup>796</sup>

One notable feature in the landlord model is that the port authority acts as an independent and neutral authority, safeguarding the allocation of sites using pre-prepared criteria.<sup>797</sup> There is separation of public (supervisory) control and operational function, though the port authority may have equity interest in one or more terminal operators at arm's length.<sup>798</sup> The port authority has a supervising duty dealing with the overall port activities and port operations with a view to ensuring competitive conditions in the port system, equality in the status of the port clients, fair treatment of all shippers using the port, and maximal utilization of the potentials of the port. The main advantage of this model is that both parties (public and private) invest in key port resources and both share parts of the risk. The private sector is given the right to operate the terminal by signing concession contract and/or permission, in exchange for the concession payments paid by private parties and private investment in port infrastructure.<sup>799</sup> The landlord model success has been linked directly to the quality of the concession agreement.<sup>800</sup>

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<sup>793</sup> *Ibid.*

<sup>794</sup> Adeeko *Characteristics of the Land-lord Model in Port Operations* 3.

<sup>795</sup> Obed *Essentials of Port Reform* 40.

<sup>796</sup> Adeeko *Characteristics of the Land-lord Model in Port Operations* 3.

<sup>797</sup> Valkeniers *Is the Cargo Handling Market in Europe Competitive?* In Hooydonk *European Seaports Law* 309 314.

<sup>798</sup> Valkeniers *Is Cargo Handling Market in Europe Competitive* 313.

<sup>799</sup> [https://bib.irb.hr/datoteka/586246.IMSC2012\\_Proceedings\\_Bukljas.pdf](https://bib.irb.hr/datoteka/586246.IMSC2012_Proceedings_Bukljas.pdf) (Accessed 24-4-2017).

<sup>800</sup> See [https://bib.irb.hr/datoteka/586246.IMSC2012\\_Proceedings\\_Bukljas.pdf](https://bib.irb.hr/datoteka/586246.IMSC2012_Proceedings_Bukljas.pdf) (Accessed 24 - 2017).

The primary asset of the 'landlord' port authority is the ownership of land, consisting of both maritime and hinterland access.<sup>801</sup> Port authorities in most cases are owner of the land within the parameters of the port area. They rent the land to companies for which a port is an attractive location such as container terminals, dry and liquid bulk terminals and petroleum refining companies, energy companies. A major source of income of landlord port authorities is land rent and port dues.<sup>802</sup> Port authorities aim to maximize land rents and accommodate as many firms on their land as possible.<sup>803</sup> This function is common for most port authorities and is related to its landlord function. Some port authorities reconsider engaging in activities beyond their landlord function and develop or consider developing more commercial activities, thereby entering the domain of private companies.<sup>804</sup>

Irrespective of whether the port authority actually owns the port land or manages the land on behalf of the national government, the landlord function consists of a number of common elements, namely the management, maintenance and development of the port estate, the provision of infrastructure and facilities as well as the conception and implementation of policies and development strategies linked to the exploitation of the estate.<sup>805</sup> The landlord function can be considered as the principal function of many contemporary port authorities. It is submitted, however, each country has to adopt what best suits its strategic objective. In any case, it is a function which has undergone substantial changes and is subject to different forms of pressure namely competitive pressure to invest in infrastructure,

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<sup>801</sup> Bichou and Gray *A logistics and Supply Chain Management Approach to Port Management* 47.

<sup>802</sup> *Ibid.*

<sup>803</sup> Larrissa and Peter  
[https://www.researchgate.net/publication/228814779\\_Port\\_Authority\\_Strategy\\_Beyond\\_The\\_Landlord\\_A\\_Conceptual\\_Approach](https://www.researchgate.net/publication/228814779_Port_Authority_Strategy_Beyond_The_Landlord_A_Conceptual_Approach). (Accessed 24-4-2017)

<sup>804</sup> Larrissa and Peter  
[https://www.researchgate.net/publication/228814779\\_Port\\_Authority\\_Strategy\\_Beyond\\_the\\_Landlord\\_A\\_Conceptual\\_Approach](https://www.researchgate.net/publication/228814779_Port_Authority_Strategy_Beyond_the_Landlord_A_Conceptual_Approach). (Accessed 25-4-2017)

<sup>805</sup> Verhoeven *European Port Governance* 29.

financial pressure to make these investments rewarding and competition for land-use.<sup>806</sup>

#### **4 1 4 Fully privatized ports**

Privatized ports, which often take the form of a private service port, are few in number and are at the extreme end of port typology. In other words full privatization is an extreme form of port reform and includes ports such as those of the United Kingdom and New Zealand.<sup>807</sup> The essence is that infrastructure, superstructure and cargo handling are all handled and controlled by the private sector.<sup>808</sup> It means that the public sector no longer has any significant role or public policy interest in the port sector. In fully privatized ports, port land is privately owned, unlike the situation in other port governance models. This requires the transfer of ownership of such land from the public to the private sector. Where the asset had been in public hands and had to be transferred to private hands, it would require a valuation of existing land and properties.<sup>809</sup> In addition, along with the sale of port land to private interests, some governments may simultaneously transfer the regulatory functions to private successor companies. In the United Kingdom for example, in the absence of a port regulator, privatized ports are essentially self-regulating. The downside of this type of arrangement is that port land can be sold or resold for non-port activities, thereby making it impossible to reclaim for its original maritime use. Moreover, there is also likelihood of land speculation, especially when port land is located in or near a major city. The sale of land to private ports may also sometimes constitute a national security issue.

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<sup>806</sup> *Ibid.*

<sup>807</sup> Other examples include the Port of Searsport, Maine, which is owned by the Bangor & Aroostook railroad; and Benicia, California, where the port is owned by a private shareholder-owned corporation, Benicia Port Holdings.

<sup>808</sup> Kirk *Logistics and Port Management* 9.

<sup>809</sup> UNCTAD *Guidelines for Port Authorities* (1998) 1.

## 5 Port governance in Nigeria

Nigerian seaports are on the Exclusive List which implies they are under the jurisdiction of the Federal Government as per the Constitution.<sup>810</sup> The NPA created to oversee the ports is a statutory agency under the Federal Ministry of Transport. From inception it is saddled with the responsibility of regulating shipping and navigational activities, port planning, development and construction, creating an enabling environment for all operators including private entities in the ports and the operation and administration of port activities by way of its oversight supervision of Nigeria Port Authority which oversees all the seaports in the country.<sup>811</sup>

### 5.1 Nigerian seaports

The power to declare ports is vested in the Minister of Transport in terms of the NPA Act.<sup>812</sup> The ports so declared are located in the southern part of the country, being the coastal part of the country.<sup>813</sup> In the Southwestern part of the country in Lagos State, there are two main ports namely Apapa and Tin Can Island Port and another two in Rivers State, Port Harcourt and Onne, while Calabar and Warri ports are in Cross River and Delta States respectively. Prior to concession, Nigeria had eight ultramodern mega-ports categorized into two major zones for administrative purposes namely, Western and Eastern zones both under the control of the NPA.<sup>814</sup> The Western zone consists of Apapa Port, Container Terminal Port, Tin Can Island Port, and a Roll on-Roll off (RORO)<sup>815</sup> port. The Eastern zone comprises of the Port Harcourt port complex, Delta port complex, Onne Port Complex, and the Calabar Port Complex.<sup>816</sup> These eight ports constituted the primary port system, although there are smaller ports and oil terminals that operate under the ports' complexes. After the concession, the ports

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<sup>810</sup> Constitution The Second Schedule Part 1 item 30.

<sup>811</sup> See generally NPA *Service Charter* (2001)5.

<sup>812</sup> See S 30.

<sup>813</sup> See Second Schedule to the NPA Act.

<sup>814</sup> See NPA *Handbook* 124.

<sup>815</sup> Ro-ro is an acronym for Roll-on/roll-off. Roll-on/roll-off ships are vessels that are used to carry wheeled cargo. The ro-ro ship is different from lo-lo (lift on-lift off) ship that uses a crane to load the cargo. See <http://www.marineinsight.com/types-of-ships/what-are-ro-ro-ships/> (Accessed on 22-4-2017).

<sup>816</sup> *Ibid.*

operate as six complexes: Lagos Port Complex, Tin Can Island Port complex, Rivers Port Complex, Delta Port Complex, Onne Port Complex and Calabar Port Complex, each complex having ports under its jurisdiction.<sup>817</sup> Each of these will now be considered.

### **5 1 1 Lagos port complex**

The Lagos Port Complex, registered as an ISPS certified Port facility with the International Maritime Organization (IMO),<sup>818</sup> is located at the Apapa area of Lagos and consists of Apapa Port and a container terminal now called APM terminal with a land area of about 120 hectares. Apapa port, with an intermodal transport network of rail, road and seaport, has conventional berths that service all cargo types.<sup>819</sup> The port, which is the premier and largest port in Nigeria,<sup>820</sup> includes no less than 24 berths for handling dry cargo. It also houses transit sheds with a total storage facilities, warehouses and support facilities for cargo on transit to ECOWAS countries.<sup>821</sup> With container terminal inside of Apapa Wharf the Lagos Port Complex presently hosts five (5) private terminals. The Terminal Operators are: AP Moller Terminal Ltd. (APMT), ENL Consortium Ltd. (ENL), Apapa Bulk Terminal Ltd. (ABTL), Green View Development Nigeria Ltd.(GNDL) and Lily Pond Inland Container Terminal(LPICT).<sup>822</sup>

### **5 1 2 Tin can island port (TCIP)**

Located Northwest of Lagos Port Complex,<sup>823</sup> Tin Can Island Port Complex today is an amalgam of what used to be Roro and Tin Can Island Ports.<sup>824</sup> This merger came with the concessioning of the terminals to five Terminal Operators with different concessioning agreements, in May, 2006 after adoption of the

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<sup>817</sup> See NPA *NPA Brand Manual* 35.

<sup>818</sup> <http://www.nigerianports.org/defaultLagosPort.aspx> (Accessed on 4-17—2017).

<sup>819</sup> Nigeria Port Authority NPA Handbook (2000)124. The Handbook is an official publication of NPA; it describes the activities of NPA.

<sup>820</sup> <http://www.nigerianports.org/defaultLagosPort.aspx> (Accessed on 17 -4-2017).

<sup>821</sup> Charles et al *Port Policy and Administration* 70.

<sup>822</sup> NPA site The Port also has two (2) Logistics bases-Eko Support Services Ltd. and Lagos Deep Offshore Logistics (LADOL) and eight (8) jetties.

<sup>823</sup> Book. It was built in 1976 and began operations in October 1977. The main port occupies an area of 73ha and compliments the RoRo Port also in Lagos.

<sup>824</sup> <http://www.nigerianports.org/defaultTinCanPort.aspx> (Accessed on 17 - 2017).



landlord models.<sup>825</sup> The five terminal operators include: Josephdam Ports Services Limited which handles wet and dry bulk cargoes with lease terms of ten years, Tin Can Island Container Limited specializes in container cargoes with lease terms of fifteen years, Port & Cargo Handling Services Limited handles container cargoes with lease terms of ten years, Five Star Logistics Limited dealing with RORO (Roll on Roll off) services with lease terms of fifteen years, Port & Terminal Multi-Services Limited dealing with RORO services and general cargo.<sup>826</sup> This is the only Terminal with the BOT (Build- Operate- and -Transfer) lease terms of fifteen years.<sup>827</sup> The TCIP also consists of the Kirikiri and Ikorodu kghter terminal, as well as a residential estate and associated private jetties.<sup>828</sup>

### **5 1 3 Rivers port complex**

About seventy nine kilometer upstream from the Gulf of Guinea, the Port Harcourt Port Complex is the largest port infrastructure in Eastern Nigeria and the third largest port complex in Nigeria after Apapa and Tincan Island Ports.<sup>829</sup> It is a natural port with an extensive range of cargo handling plants and equipment.<sup>830</sup> Part of Port Harcourt Port complex is the Okrika refined petroleum oil terminal, which is situated on the Bonny River.<sup>831</sup>It has an outer jetty capable of berthing ocean-going vessels which is dedicated to the government refinery at Eleme. Ports within the Rivers Port include Bonny On-shore Terminal which is a main crude petroleum Terminal located on the Eastern side of the, Bonny River Estuary, Bonny Off-shore Terminal which uses the storage facilities at Bonny Shore Terminal; Brass Off-shore Terminal which is a single mooring terminal being operated by Nigerian Agip Oil Company Limited; Degema- Abonema situated on the Sombreiro river.<sup>832</sup> The terminal operators operating in the Rivers

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<sup>825</sup> *Ibid.*

<sup>826</sup> See Nigeria Port Authority Service Charter (2011)7.The service charter is an official publication of Nigeria Port Authority which spells out its service mission and activities.

<sup>827</sup> <http://www.nigerianports.org/defaultTinCanPort.aspx> (Accessed 24-4-2017).

<sup>828</sup> *Ibid.*

<sup>829</sup> NPA Handbook 154.

<sup>830</sup> *Ibid.*

<sup>831</sup> *Ibid.*

<sup>832</sup> <http://www.nigerianports.org/defaultRiversPort.aspx> (Accessed 17-4-2017).

Port Complex are Ports and Terminal Operator Nigeria Ltd, BUA Ports and Terminal Ltd.<sup>833</sup>

#### **5 1 4 Delta port/Warri port complex**

The Warri Port Complex is an amalgamation of an old and a newly built port.<sup>834</sup> The old port began operations in 1969, while the new port started working ten years later as an extension of the old port having started operations as a privately run port by John Holt.<sup>835</sup> With facilities and capacities at the Warri port and the extensive location of Delta Ports strategically puts it in a position to serve the Warri Refinery, the Petrochemical Plant and the Utorogun Gas Plant all located near Warri. The other Delta Ports include ports at Burutu, Koko and Sapele and the Crude Petroleum Oil Terminals of Escravos, Forcados and Pennington are located in the Delta region of the country.<sup>836</sup> The Delta region is home to one of Nigeria oil refineries, a petrochemical company, the Delta steel complex at Qvwan-Aladja and major oil companies.<sup>837</sup> The Delta Ports Complex serves this important commercial and industrial areas of the country. The Port Complex's terminals were concessioned to the following terminal operators: Intels Nigeria Ltd, Associated Maritime Services Ltd, Julius Berger Plc., Green Leigh Ports Ltd and Warri New Terminals.<sup>838</sup>

#### **5 1 5 Onne port complex**

Onne Ports Complex is Nigeria's most strategic port facility having been conceived, designed and set up to cater for the special industrial needs of the economy, especially, to meet the challenges of the country's oil and gas Free Zone, located at Onne.<sup>839</sup> It was established as a Free Port Zone (FPZ) to serve

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<sup>833</sup> NPA List of Terminal Operators  
<http://www.nigerianports.org/dynamicdata/uploads/Terminal/TerminalOperators.pdf>  
(Accessed on 17-4-2017).

<sup>834</sup> The old port began operations in 1969, while the new port started working ten years as an extension of the old port.

<sup>835</sup> Charles et al *Port Policy and Administration* 76.

<sup>836</sup> NPA *Handbook* 174-176.

<sup>837</sup> Ibid.

<sup>838</sup> See NPA *Service Charter* 8.

<sup>839</sup> See generally NPA *Brand Manual*.

as the focal point for the oil and gas industry in West Africa and is considered the largest oil service center in the region.<sup>840</sup>

Located on the Bonny River Estuary along Ogu creek its operation leaned towards the Land lord Port model even prior to the Port Reform exercise in Nigeria.<sup>841</sup> The Port has an advantage of accessibility, proximity to the Eastern commercial centres like Onitsha, Nnewi, Aba, etc., adequate depth to accommodate Heavy Ocean going vessels and adequate security.<sup>842</sup> It consists of Federal Lighter Terminal (FLT),<sup>843</sup> Federal Ocean Terminals (FOT),<sup>844</sup> National Fertilizers Company of Nigeria (NAFCON) Jetty,<sup>845</sup> Bonny Terminals with modern facilities and equipment. It has one of the biggest harbour mobile cranes in Africa.<sup>846</sup> Onne Ports Complex also includes the crude oil loading terminals known as the Bonny On-shore Terminal and the Bonny Off-shore Terminal.<sup>847</sup> FOT, designed as the deepest draught sea port in Nigeria is conceived to play a vital role in the Free Zone scheme.<sup>848</sup> The private terminal operators are BRAWAL, Intels, Atlas Ltd and WACT Ltd.<sup>849</sup>

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<sup>840</sup> NPA *Handbook* 174.

<sup>841</sup> <http://www.nigerianports.org/defaultOnnePort.aspx> (Accessed 24-4-2017).

<sup>842</sup> *Ibid.*

<sup>843</sup> The FLT was commissioned in 1982 and designed to handle lighters, coasters, oil service, watercrafts and Small Ocean going vessels. With a draught of 4.5 meters, bigger vessels coming to Onne discharge their cargo mid-stream for lighterage. Most of the facilities for storage and convenience sky, have been leased out to specialized companies who service the oil industry.

<sup>844</sup> The FOT was conceived as a deep ocean draught transshipment port capable of handling,, big, deep ocean going vessels which cannot berth in other conventional ports in the country. The terminal was designed specifically for ships which call in the country for crude oil and those bearing raw materials for the Ajaokuta Steel Rolling Mill, NAFCON, Petrochemical Plant at Eleme and the Refineries.

<sup>845</sup> NAFCON Jetty The NAFCON jetty is used for handling vessels carrying imports and exports to and from the National Fertilizer Company of Nigeria.

<sup>846</sup> <http://www.nigerianports.org/defaultOnnePort.aspx> (Accessed 24-4-2017).

<sup>847</sup> *Ibid.*

<sup>848</sup> *Obed Port Administration* 79.

<sup>849</sup> NPA <http://www.nigerianports.org/dynamicdata/uploads/Terminal/TerminalOperators.pdf> (Accessed on 17-4-2017).

## 5 1 6 Calabar port complex

The Calabar Ports Complex, which borders the Calabar Export Processing Zone, is the fourth largest port infrastructure in Nigeria.<sup>850</sup> Occupying an area of 38 hectares of land and conceived under the Third National Development Plan (1975-1980), the Calabar Port Complex comprises of the old port and the newer one commissioned in 1979.<sup>851</sup> The new port complex has got the following major operational areas: the Mileno, Jackson Wharf, Calcemco wharf for ferry operations to Duala in Cameroun, Libreville in Gabon and Malabo in Equatorial Guinea.<sup>852</sup> The Port Complex includes the Old Port, the New Port and the Dockyard; and has jurisdiction over Crude Oil Terminals such as the ones at Antan, Odudu, Yoho and Qualboet.<sup>853</sup> The Calabar Port occupies an area of approximately 38ha of land and channels.<sup>854</sup> The port has its berthing facilities, as well as six transit sheds and many warehouses, which are permanently allocated to oil companies for storage of their rig and drilling facilities.<sup>855</sup> The terminal operators in Calabar Port are Intels Nigeria Limited, Ecomarine, Addax Logistics Nigeria Ltd.<sup>856</sup>

## 5 2 Developments in Nigerian seaports

### 5 2 1 Before concession

Historical development is one of the factors affecting the way ports are organized.<sup>857</sup> It is submitted that the historical background not only informed how the ports had been managed in the past and the associated legal frameworks, but also informs how they are currently being managed and the associated regulatory paradigm. The development of ports in Nigeria dates back to the middle of 19<sup>th</sup>

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<sup>850</sup> NPA *Port Handbook* 186.

<sup>851</sup> <http://www.nigerianports.org/defaultCalabarPort.aspx> (Accessed 24-4-2017).

<sup>852</sup> Charles *Port Policy and Administration* 79 80.

<sup>853</sup> <http://www.nigerianports.org/defaultCalabarPort.aspx> (Accessed 24-4-2017).

<sup>854</sup> Charles *Port Policy and Administration* 79 80.

<sup>855</sup> Ibid.

<sup>856</sup> NPA *Service Charter* 8.

<sup>857</sup> Yang *Introduction to Port Management* 29.

century, long after the sea-borne trade on the coast of Africa.<sup>858</sup> It was heralded by the decision to develop the Apapa Port of what later became Lagos State in 1913, and the subject entry of the first mail-steamer S/s Akoko into the Lagos Harbours territory.<sup>859</sup> This marked the beginning of the modern port development which has its roots in the British occupation of Lagos, a renowned hub of the trans-Atlantic slave trade, in 1861, and the subsequent colonization of the Nigerian hinterland.<sup>860</sup>

Before this era extensive missionary and trade adventure of European missionaries made the establishment of a port on the expansive coastal stretch from Lagos to Calabar necessary.<sup>861</sup> Hence, in the 15<sup>th</sup> century, maritime contracts were broached amidst discovery of the rich natural resources in the West and Central African region required for industrial and economic revolution. Consequent upon this, the Bight of Benin was opened up by John d Aveiru of Portugal in 1485, after which Captain Wyndham of United Kingdom landed on the Nigerian coast in 1553.<sup>862</sup> In the aftermath, Lagos and Port Harcourt eventually emerged the top foremost ports on account of extensive, expansive and expensive construction works.<sup>863</sup> The state of the ports is a critical factor for efficient maritime operations. Hence the establishment of the Nigerian Ports

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<sup>858</sup> Kareem *An Assessment of Nigerian Seaport Reform*, The Frontiers Post, Occasional Papers May 27 (2010) -4. To appreciate the way transportation was treated in the colonial era particularly for export purpose, it is apposite to cite Lord Lugard: 'The material development of Africa can be summed up in one word: transport' See David "The Evolution of the Major Ports of West Africa" in *The Geographical Journal*(135)3(1969)369. *Lugard had created Nigeria Marine in 1906 laying foundation for modern development of Nigerian Ports; see generally Badejo Evolution of Ports Reforms in Nigeria in Maritime Voice Magazine (2007).*

<sup>859</sup> Charles, Kingsley, Ijeoma *The Policy Trajectory of Nigerian Transportation: Ports Policy and Administration* (2011) 71.

<sup>860</sup> David *The Evolution of the Major Ports of West Africa*, *Geographical Journal*, 138 No 3 (1969) 369.

<sup>861</sup> See Ayodeji, *Maritime Policy and Economic Development: A Comparison of Nigerian and Japanese Experiences Since the Second World War in African Zamani* (2014) ? 173.

<sup>862</sup> [www.nigerianports.ng/dynamic/data/our-history.aspx\(last](http://www.nigerianports.ng/dynamic/data/our-history.aspx(last) assessed 3-10-2013).

<sup>863</sup> Charles, Kingsley, Ijeoma, *The Policy Trajectory of Nigerian Transportation: Ports Policy and Administration* (2011)70 73 74.

Authority (NPA) by Ports Act (PA)<sup>864</sup> was to create a structural framework for the efficient governance and regulation of port operations.<sup>865</sup>

The authority executed its first wharf extension project between 1956 and 1961 in Lagos and Port Harcourt ports. Further expansion of Lagos Ports were done between 1970 and 1975 and, in 1977, the Tin-Can Island Port Complex was commissioned to ease the pressure of heavy imports which was mostly government cargoes on Apapa Port.<sup>866</sup> In 1979, the new Warri and new Calabar ports were commissioned.<sup>867</sup> Port construction expansion and rehabilitation continued between 1981 and 1985 with construction of the new Sapele port in 1982 and later in 1996, Federal Ocean Terminal Onne Phase 1 was constructed.<sup>868</sup>

Financing of the project was done through agreement with the International Bank of Reconstruction and Development (World Bank), which would later play an important role in the concessioning of the ports.<sup>869</sup> All this while Nigerian ports were administered as public ports due to the crucial role ports played in the country's economic development and in order to protect public safety and security with service port orientation. With the commercialization of the ports in 1992 and the Port Act of 1999,<sup>870</sup> the NPA use of the Tool port model became more conspicuous. It should be noted that before 2006, all ports in Nigeria were

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<sup>864</sup> Cap 155 LFN 1954.

<sup>865</sup> On 1<sup>st</sup> April, 1955 NPA officially commenced operation with the following specific mandate: To carry on the business of carrier by land or sea: stevedore, wharfinger, warehouseman, lightharman etc. To construct and develop ports, docks, harbours, piers, wharves, canals, water courses, embankment and jetties; To appoint, license and manage ship pilots; To enter into agreement with any person for the operation or provision of any of the port facilities which may be provided by the authority; To develop, own and operate ports and harbours; To provide safe and navigable channels; To provide towage and pilotage services; To offer cargo handling and storage services; To maintain port facilities and equipment; To ensure safety and security; To control pollution within port limits and approaches; To provide other ancillary services such as ship repairs, supplying of water and bunkers to vessels See NPA Service Charter(2001)1.

<sup>866</sup> NPA *NPA Handbook 2*.

<sup>867</sup> NPA *NPA Handbook 3*.

<sup>868</sup> Ibid.

<sup>869</sup> See reference to World Bank role in the port by a former Managing Director of NPA in Abdulsalam *Enhancing Port Operations 17*.

<sup>870</sup> Kareem *An Assessment of Nigerian Seaports 1- 4*.

operating under the Tool Port Model, except Onne port, that has been described as tilting toward the Landlord Port Model.<sup>871</sup>

In all these periods, port developments-and hence the policy- dangled between concentrating investment in and development of a few ports on hand and diffusing development across many a port and diffusing development across many ports on the other hand.<sup>872</sup> This alternating roller-costar policy of concentration and diffusion is attributed to the prevailing global and local economic condition which determined the demand for shipping and port facilities.<sup>873</sup>

The intricate relationship between the thrust of the economy and the port is revealed in how port strategies were programmed to fall in line with the National Development Plan.<sup>874</sup> This was the case with First National Development Plan (1962-1968), the Second National Development Plan (1970-1974), and the third National Development Plan (1975-1988).<sup>875</sup> The period between 1967-1970 had enormous effects on ports development in Nigeria.<sup>876</sup> It was a period which brought the security aspects of ports into conspicuous forms.<sup>877</sup> The port authorities maintained tight control on imports and exports during the civil war. It also showed the place of ports as more of a realm of national legislative and

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<sup>871</sup> See <http://www.nigerianports.org/defaultOnnePort.aspx>.(Accessed 21-10-2014)

<sup>872</sup> Ayodeji *Maritime Policy and Economic Development: A Comparison of Nigerian and Japanese Experiences* (2004)123.

<sup>873</sup> Babafemi *Oscillating Seaport Location in Nigeria Annals of the Association of American Geographers*, 62 110- 121.

<sup>874</sup> Ayodeji *Maritime Policy and Economic Development*.

<sup>875</sup> The National Development Plan (1962-1968) Coming on the heels of National Development Programme (1970-74) the third National Development Plan (1975-80), National Development Plan (1981-85). See National Environment Study, Action (Team (NEST), Nigeria; *The Challenges of Sustainable Development* (1992) 22. These development Plans says Nest, emphasizes sectoral growth and development including the Port Sub – sector as a driver of overall development See also *The National Economic Empowerment and Development Strategy* which focuses on development of efficient and competitive seaport that has the capacity to handle modern shipping activities. See [www.nigeria.gov](http://www.nigeria.gov)(assessed on 3 -10-2013).

<sup>876</sup> This was the period of civil war in Nigeria which had serious impact on the Nigerian economy; exports and imports were seriously impacted on due in part to the effect of the war on trade routes.

<sup>877</sup> Raph *Reflections on the Nigerian Civil War* (1973) 46.

political control. Port Harcourt Port was thus closed to foreign traffic in the wake of the civil war.<sup>878</sup> It was in a fit of exercise of national territorial jurisdiction<sup>879</sup>.

This was by no means out of place. Since the 17<sup>th</sup> century, when the development of seaborne trade and emergence of powerful nations caused a seismic shift from the idea of closed sea claimed by a few countries to the notion of open seas (or Freedom of the Sea), the two basic principles of the law of the sea have been that a narrow strip of coastal waters should be under the exclusive sovereignty of the coastal state and the high sea should be freely accessible to all.<sup>880</sup> These principles were initially geared to and intended for safety and to reconcile the requirements of national security with the freedom of trade and navigation.<sup>881</sup>

The Federal Military Government enacted a special decree which empowered the Port Authority to acquire the ports of Warri, Burutu and Calabar previously operated by the private sector:<sup>882</sup> that was in clear exercise of jurisdictional right. The Lagos Port had borne the burden of the tremendous flow of war time cargo compounded by heavy import of reconstruction materials affecting the whole port systems.<sup>883</sup> Serious cargo and ship congestion was experienced with its attendant effects.<sup>884</sup>

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<sup>878</sup> [www.nigeria.gov](http://www.nigeria.gov) (last assessed 3-10-2013).

<sup>879</sup> With respect to jurisdiction, territorial principle, says Vaughan, is a corollary of the sovereignty of a state over its territory. Sovereignty entails the right of the state to prescribe the laws that set the boundaries of the public order of the state Vaughan Jurisdiction in International Law in Malcolm (ed) International Law(2006) 36, 37.

<sup>880</sup> Carol *The Living Resources of the Sea in the Management of Humanity's Resources: The Law of the Sea Warship (1921) 153- 207.*

<sup>881</sup> Oyeboode *International Law and Politics: An African Perspective (2003) 33- 35.*

<sup>882</sup> Warri Port was under Holls Transport, UAC owned Burutu Port, Calabar was under five private operators. See [www.nigerianports.ng](http://www.nigerianports.ng) (last assessed 2 -10-2013).

<sup>883</sup> [www.nigerianports.ng](http://www.nigerianports.ng) (last assessed 2-10-2013).

<sup>884</sup> Oil boom was another cause of port congestion. The congestion caused imposition of surcharge, ship had to wait for as long as 180 days before berthing. One of the adverse effects of this was the depletion of National Reserves. A demurrage estimated at US\$4,500 per day for each vessel carrying cement for delay more than 10 days was paid by the Federal Government.[www.nigerianports.ng](http://www.nigerianports.ng)(last assessed 2-10-2013).



Cargo and ships congestion used to be the hallmark of Nigerian ports for a long time, with long ship turn- around time and container dwell time.<sup>885</sup>

The Nigerian Ports Authority established as an independent corporation with the enactment of the Ports Act of 1954, was conceived as both regulator and operator.<sup>886</sup> In 1992, the NPA was commercialized, with its name transformed into the Nigerian Ports Plc., albeit the ownership remained in the hands of the government.<sup>887</sup> The Authority was restored back to its former status and named four years later as an agency under the Federal Ministry of Transport.<sup>888</sup> Statistics in the mid-1980s showed that the public ports operated at far below their capacity at the best and cargo throughput also fell. With declared goal of increasing efficiency, enhancing capacity and introducing healthy competition in government enterprise, Government in 1988 promulgated the Privatization and Commercialization Decree. In 1993, the implementation of the commercialization programme of the NPA was partially carried out and it became Nigerian Ports Plc. This was reversed in 1996 as a result of inherent weakness of the policy and Government, through the National Council on Privatization (NCP), changed the status of NPA from full commercialization to concession with improved private sector involvement in port operations.

The Nigerian Government in 2004 thus instituted massive concessioning programmes.<sup>889</sup> Port concessions with long terms were awarded and new legislative Acts governing the port sector placed before the National Assembly in line with the result of a study commissioned by the government conducted by Dutch Royal Haskoning and supported by the World Bank which encouraged

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<sup>885</sup> Leigh land and Palson *Port Reform in Nigeria Gridline No 7(2007)*.

<sup>886</sup> Charles, Kingsley, Ijeoma, *The Policy Trajectory of Nigeria Transportation: Ports Policy and Administration* 38, 39.

<sup>887</sup> *Ibid.*

<sup>888</sup> *Ibid.*

<sup>889</sup> The Technical Committee for Privatization and Commercialisation was established in 1988 for the purpose. Oghojafor, Kuye and Alaneme *Concession As a Strategic Tool for Ports Efficiency: An Assessment of Nigeria Ports in American Journal of Business and Management* 2(1)(2012)30.

Nigeria to adopt landlord model to be achieved through concession<sup>890</sup>. The report by Haskoning pointed out that the Port Authority was responsible for both daily operation as well as regulation of the ports<sup>891</sup>.

## **5 2 2 After concession**

This part deals with how the ports are run after the implementation of concession policy.

### **5 2 2 1 How port are run now after concession**

With the private sector-led port operations, huge private capital investment is being injected into the development of port facilities. The first concession contract was signed in Septembers, 2005 with APM Terminals owned by the Danish Shipping Company.<sup>892</sup> The port reform is based on Landlord port model based on separate roles for the public and private sector.<sup>893</sup> Under this arrangement, concessionaires or terminal operators are selected under laid down procedures based on designated specifications.<sup>894</sup> Successful bidders with the highest bid price and proven technical competence emerged as the winners and were contracted to run their respective terminals after paying agreed fees to the Federal government through Bureau of Public Enterprises (BPE) and signing the concession contract.<sup>895</sup> The period of the concession ranged from ten to twenty five years.<sup>896</sup> At the expiration of the lease period, the terminals would revert back to the Government. However, if both parties agree, the lease could be renewed for another ten or twenty five years.<sup>897</sup> Under the contract, terminal operators provide and maintain their own superstructure such as office buildings, warehouse sheds, container/cargo stacking areas, quays cranes, conveyor belts, forklifts, mechanical workshop, among others. Possessions of key infrastructural

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<sup>890</sup> Sarumi *Port Concessioning, Legal Framework and Challenges* 3, 9.

<sup>891</sup> *Ibid.*

<sup>892</sup> Abdulsalaam *Enhancing Port Efficiency* 21. By 2006, the final concession agreement had been signed

<sup>893</sup> NPA *NPA Service Charter* 1.

<sup>894</sup> <http://www.nigerianports.org/History.aspx?id=241> (Accessed 25-4-2017).

<sup>895</sup> *Ibid.*

<sup>896</sup> See <http://www.nigerianports.org/dynamicdata/ConcessionPrograms.aspx?id=281> (Accessed 21-4-2017)

<sup>897</sup> *Ibid*

facilities such as terminals were transferred to the concessionaires.<sup>898</sup> Private terminal operators employ, remunerate, deploy and train their employees. The responsibility of the public sector under this system is therefore confined to taking charge of port planning, licensing control, port development including quay wall extension and maintenance, technical regulations pertaining to safety, security, environment, marine services such as pilotage and channel management as well as economic regulation relating to port charges.

From the foregoing it is clear that the new system is based on Public Private Partnership (PPP) which involves participation of private sector in port funding, development and technology transfer in port operations. For the port industry, the primary goals of this reform were to increase competitiveness and efficiency of national ports. In order to achieve these goals, the government increased private participation in port management. Nigerian ports thus moved from a tool port model, where the public sector holds the infrastructure and superstructure to a landlord port model whereby the port authority retains the infrastructure ownership, but private operators provide the services through concession.<sup>899</sup> This, in practice, means that the port authorities are saddled with the responsibility for the construction and management of infrastructures associated with navigation, such as piers, dams and access channels while the operators are responsible for hiring workers and for investing in equipment and superstructure such as cranes and gantries used for cargo-handling.

## **5 2 2 2 Objectives**

The concession is defined and guided by newly set objectives. The National Economic Empowerment and Development Strategy (NEEDS) spells out national objectives and plans in the whole economy including in the port subsector.<sup>900</sup> The

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<sup>898</sup> See Mohamed Enhancing Port Efficiency Through Concession of Port Operations paper presented at Africa Ports and Harbour Congress (3rd-6th June 2008) 21.

<sup>899</sup> See generally NPA Brand 3.

<sup>900</sup> In terms of NEEDS, Nigeria is to focus on development of efficiently competitive seaport with capacity to handle modern shipping activities, establish inland dry port and develop human capital. Available on

objectives for the seaports are to create a prominent role for Nigerian sea ports within ECOWAS by encouraging private sector participation in coastal shipping activities, develop a seaport with capacity to handle modern shipping activities, and establish inland dry ports, provide incentives to use other seaports, make Nigeria's ports more efficient and competitive, with capacity to handle modern shipping activities.<sup>901</sup> In terms of NEEDS, through creation of a prominent role for Nigerian seaports within ECOWAS, NEEDS encourages private sector participation in infrastructural development using BOT (Build-Operate-and-Transfer), BOOT (Build Own Operate Transfer), ROT (Rehabilitate- Operate-Transfer) and ROOT (Rehabilitate- Own-Operate -and -Transfer) as investment options.<sup>902</sup>

Specifically, the objectives include increasing efficiency in port operations, decreasing cost of port service and attracting private participation in the provision of core port services.<sup>903</sup> There are two principal reasons for the adoption of the landlord port model in Nigeria. The first one is related to the proclaimed need for funding. The NPA as a public entity was not able to face financing challenge. The second one can be linked to the neo-liberal ideology that has characterized the governments in Nigeria since the inception of democratic rule in 1999 which advocates minimum state intervention.

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<http://documents.worldbank.org/curated/en/234301468290438608/pdf/33305.pdf>  
(Accessed 20-3-107).

<sup>901</sup> See National Economic Empowerment and Development Strategy. Available on <http://documents.worldbank.org/curated/en/234301468290438608/pdf/33305.pdf> (Accessed 20-3-2017).

<sup>902</sup> <http://documents.worldbank.org/curated/en/234301468290438608/pdf/33305.pdf>  
(Accessed on 20-3-2017).

<sup>903</sup> See NPA Brand 2005 .The anticipated benefits of this port reform include the following among others:-Improvement in cargo handling equipment, faster ship and cargo turnaround, improved port efficiency, enhanced revenue by the Government from ports. Complete stoppage of incessant labour strikes, delineation of NPA and terminal operators' responsibilities to avoid conflict enhanced port security and safety, enhanced remuneration for dockworkers injection of private investments into port development. See generally Salam *Enhancing Port Efficiency through Concession of Operations: Case Study of NPA* paper presented at a conference on port, South Africa (3-6-2008). See also the Federal Government of Nigeria *Nigerian Draft National Transport Policy* (2010)7 15.

### *5 3 Division of roles*

One important aspect of the concession is the clear separation of the responsibilities and roles of the public Sector and private operators with each party playing the role assigned to it under the new dispensation. Based on this, institutional roles and structure to provide the operational basis for the Landlord Model and Concession programme was formulated. Under the new paradigm, each player performs the responsibilities hereunder described.

#### **5 3 1 The private sector**

The private sector has been granted the responsibility for terminal operations, employment of port labour, land based investment and maintenance of superstructure and equipment. In terms of the NPA Charter, adoption of concession has led to the ceding of hitherto NPA operating rights to private sector while NPA retains ownership of lands as well as keeping responsibility of licensing private operators and regulating their activities.<sup>904</sup> This means that responsibilities for aspects of port governance namely operational, regulatory and landlord functions have been realigned. The belief is that the adoption of the Landlord model will attract the much needed investment in the Nigerian port sector, as terminal operators are encouraged by the long-term contract between them and the Federal Government to invest. The reform programme includes the deregulation of port labour and concession of terminal operations. Thereafter, the terminal operators took over the terminals in accordance with the terms of the concession agreement such that all cargo handling activities are now under the jurisdiction of the terminal operators while services such as pilotage, towage and warehousing are still being handled by the NPA.

#### **5 3 2 Federal Ministry of Transport**

The role of the Federal Ministry of Transport, as the lead oversight body, was adjusted based on the new regime of concession. The Ministry have been given the following roles:(i) Establishing national port and maritime policy;(ii) Initiating

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<sup>904</sup> NPA NPA Service Charter 1.

port and maritime related legislations; (iii) Planning for adequate port capacity and inland multimodal transport; (iv) Reporting on port performance and contributing to the national transport plan and strategy; (v) Liaising with state authorities as necessary;(vi) Representing Nigeria in international bodies and fora; and (vii) Playing a role in appointing directors of the ports authorities, with approval of the President.<sup>905</sup>

### **5 3 3 Technical and economic regulatory regime**

The major regulatory responsibility for the port has been shared between NPA(as technical regulator) and NSC(as economic regulator)

#### **5 3 3 1 Technical regulator**

The NPA acts as the Landlord, on behalf of the Federal Government. The NPA has the responsibility for planning for and development of, the port including acquisition of new land for ports use where required and facilitating the financing and construction of new port infrastructure through Build-Operate-Transfer (BOT) arrangements, nautical management, ensuring safe and expedient access for ships within the ports limits, concessioning and licensing private operators to provide cargo handling, marine services, and collecting port authority tariffs.<sup>906</sup> NPA has been designated as technical regulator. In terms of the Service Charter, the functions granted to NPA include the following:

Ownership and administration of land and water port systems, planning and development of port operational infrastructure, leasing and concession of port infrastructure and setting, benchmarking for tariff structure, nautical and harbor operations and management, responsible for hydrographic surveys, marine incident and pollution control, maintenance of safety and security at the common user areas, enacting port regulations and bye laws as well as monitoring of operations and enforcement of relevant sections of respective agreements.<sup>907</sup>

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<sup>905</sup> See generally Nigeria Port Authority *Brand Manual*. See also the Nigerian Draft National Transport Policy (2010)7 15.

<sup>906</sup> See NPA Act Sec 7. See further Par 5 4 2 below.

<sup>907</sup> See NPA *Service Charter* 1.

From the foregoing, it is clear that NPA has generally shifted away from providing cargo-handling services. Operational services have thereby been transferred to the private sector and liberalized by way of concession. Thus operational activities of the NPA now focus mainly on the provision of those ancillary services which are considered to be of benefit to the entire port community, such as provision of public utilities and dredging.

### **5 3 3 2 Economic regulator**

The Nigeria Shippers Council has been designated as the Economic Regulator to handle economic issues of port arising from the operation of the concession. The Port Economic Regulator will as well be responsible for providing economic regulation of the ports, including rates charged by private operators while ensuring non-discriminatory access to port facilities, settling disputes, promoting competition and compiling and publishing statistical information on the port system.<sup>908</sup>

A regulation, Nigeria Shippers Council (Port Economic) Regulation 2015,<sup>909</sup> was recently made to formalise the designation of NSC as the economic regulator of the port to oversee the concessionaires' commercial practices and NPA's charges. The NSC's roles as economic regulator are, in terms of the regulation include regulation of tariff, entry and exit from ports, promotion of competition, among others.<sup>910</sup>

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<sup>908</sup> See Par 5 4 2 below for further elucidation on NSC.

<sup>909</sup> 2015 Statutory Instrument No18. The regulation's objective is to create an effective regulatory regime at Nigeria port for the control of tariffs, rates charges and other related economic services. See S 1 of the regulation. S 2 thereof further states that the Nigeria shippers council shall perform economic regulatory role at Nigeria ports as an interim ports regulator, with the administrative backing of the federal ministry in charge of transport.

<sup>910</sup> See S.3. which in full grants the following functions to NSC on concession: " (a) provide guidelines on tariff setting in order to guard against arbitrariness;(b) monitor and enforce standards of services delivery to ensure available, accessibility, affordability, stability, predictability and adequacy of services: (c) encourage competition and guard against the abuse of monopoly and dominant market position(d) perform mediatory role among stakeholders: (e) establish accessible and modern dispute resolution mechanisms; (f) regulate market entry and exit (g) promote efficiency in the provision of port services; (h) minimize high cost of doing business and prevent its inflationary effect on the Nigeria economy(i) encourage private sector investment in the port sector; and (j) monitor and ensure compliance by all parties with the provision of port concession agreement"

The above designations resulting from the concession policy has fundamentally changed the governance roles in the ports, the various aspects of which are discussed in the next part

#### *5 4 Aspects of port governance after concession*

##### **5 4 1 Regulatory aspect**

Further to the discussion above on technical and regulatory regimes, there is need to further put the regulatory regime in context. It should be noted that under concessional paradigm, the regulatory role of the public authorities combines a mixture of duties which can generally be referred to as controlling, surveillance and policing. These essentially relate to ensuring safety and security of ship and cargo operations within the port as well as enforcing applicable laws and regulations in these and other fields such as environmental protection. NPA is saddled with technical regulation such as in respect of environmental pollution protection, dangerous cargo control, safety and security while the NSC as noted above serves as economic regulator. It should be noted that in many cases the regulatory role is not only performed by the port authority, but often in co-operation with other government agencies.<sup>911</sup>The next part discusses port governance structure which in addition to highlighting this point also further explains how the ports are being governed.

##### **5 4 2 2 Port institutional structure**

##### **5 4 2 3 Nigeria Port Authority**

In terms of the NPA Act, the main port Authority is “to be known as the Nigerian Ports Authority.”<sup>912</sup> Founded as a body corporate with perpetual succession and a common seal,<sup>913</sup> it has its headquarters in Lagos State.<sup>914</sup> It may sue and be

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<sup>911</sup> See the NPA *Handbook* which lists a number of such agencies such as NIMASA.

<sup>912</sup> NPA Act sec 1.

<sup>913</sup> S 1(a).

<sup>914</sup> Under the headquarters are two major Operational Areas: Eastern and Western Operations. The Eastern Operations take care of all ports issues in the Zone consisting of Ports in Calabar, Onne, Port Harcourt and Delta Ports comprising of Warn, Koko, Burutu and Sapele. The Western Division consist of mainly the Lagos Ports. The two Divisions are headed by General Managers. Each port is headed by a port manager.



sued in its corporate name.<sup>915</sup> Being a Federal Government agency, the NPA is under the Ministry of Transport, whose supervising minister may give it policy directives which must be complied with.<sup>916</sup>

The NPA is governed by a governing Board which consists of a chairman, one person representing the Federal Ministry of Transport; five persons with experience in shipping and commercial matters, the Managing Director of the Authority, and the Executive Directors of the Authority.<sup>917</sup> The Board has the responsibility for formulating the policies of the Authority. The Chairman and members of the Board, other than ex-officio members, shall, by law, be persons of integrity and relevant cognitive experience,<sup>918</sup> and shall be appointed by the President on the recommendation of the Minister.<sup>919</sup> The Board is required to have a secretary, who shall be the head of the legal department of the Authority.<sup>920</sup> Chairman of the Board and other members, other than ex-officio members hold office for a period of four years on such terms and conditions as may be specified in their letters of appointment and may be reappointed for one further period of four years.<sup>921</sup>

As a way of entrenching good governance in the port system, a member of the Board who is directly or indirectly interested in any matter being deliberated on by the Board or is interested in any contract made or proposed to be made by the Authority shall, as soon as possible after the relevant facts have come to his knowledge, must disclose the nature of his interest at a meeting of the Board.<sup>922</sup> Such disclosure shall be recorded in the minutes of meetings of the Board and the member shall not, after the disclosure, take part in any deliberation or decision of the Board; and must be excluded for the purpose of constituting a

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<sup>915</sup> S 1(b).

<sup>916</sup> S 124 NPA Act.

<sup>917</sup> S (2)a-e.

<sup>918</sup> S 2(2)(b).

<sup>919</sup> S 2(2)a).

<sup>920</sup> S 3 (3).

<sup>921</sup> S 3(a)(b).

<sup>922</sup> S 6(1).

quorum of any meeting of the Board for any deliberation or decision, with regard to the subject matter in respect of which his interest is so disclosed.<sup>923</sup> This is an important provision considering the capacity of NPA to enter into sundry contracts with different stakeholders.

The administrative business of the Authority is headed by the managing director.<sup>924</sup> He has the responsibility of overseeing the realization of the vision and mission of NPA.<sup>925</sup> The managing director shall hold office for a period of five years, on such terms and conditions, as may be specified in his letter of appointment; and may be reappointed for a further period of five years.<sup>926</sup> The managing director shall be the chief executive of the Authority and be responsible for the execution of the policy and the day-to-day administration of the Authority; the direction, supervision and control of all other employees of the Authority and, subject to such restrictions as the Board may impose, for disposing of all questions relating to the service of the employees, their pay, allowances and privileges and for matters concerning the accounts and records of the Authority.<sup>927</sup>

The Managing Director is thus responsible for decision-making and directing daily administration having been appointed by the President on the advice of the Minister of Transportation and also the board members.<sup>928</sup> The President shall also appoint for the Authority, three executive directors to assist the managing director in the performance of his functions under this Act.<sup>929</sup> An executive director holds office for a period of four years, on such terms and conditions as may be specified in his letter of appointment and may be reappointed for a further

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<sup>923</sup> S 6(2). See also First Schedule to the NPA Act Par 10.

<sup>924</sup> S 10(1).

<sup>925</sup> The mission of NPA is "to deliver efficient port service in a safe, secure and customer friendly environment" and the vision is to be the leading port in Africa. See <http://www.nigerianports.org/dynamicdata/visionmission.aspx?id=250> (Accessed on 25-4-2017). See also NPA Act S 7(a) and 7(c); NPA Service Charter i ii iii .

<sup>926</sup> S 10(2)(a-b).

<sup>927</sup> S 10(3)a-c. He also has the powers to sign contracts in the execution of his statutory duties: See First Schedule to the NPA Act Par 7.

<sup>928</sup> S 10(5)a).

<sup>929</sup> S10(4).

period of three years.<sup>930</sup> He performs such functions as may, from time to time, be assigned to him by the managing director and the Board.<sup>931</sup> Under the current dispensation, there are three executive directors namely Executive Director for Marine and Operations, Executive Director for Finance & Administration and Executive Director for Engineering and Technical services which assist in port management and operation, administrative affairs and port construction and maintenance respectively.<sup>932</sup>

In addition, the EDs are assisted by General Managers (GM) that direct and manage specific aspects of the port governance system. Also, under this is an office dedicated to procurement.<sup>933</sup> The GM and other staff are covered by the provision that requires the NPA to appoint other persons as it may deem fit for the efficient management of its statutory functions.<sup>934</sup> The NPA Board may also appoint committee to deal with specific issues.<sup>935</sup> The organogram of the NPA shows that the administrative structure remains top-heavy.<sup>936</sup> To illustrate, the ED Marine is assisted by four GMs, the ED Engineering by 3 and ED Finance and Admin by 6.<sup>937</sup> This massive number of high profile personnel is still being maintained by the NPA after concessioning most of the operational responsibilities to the private sector.

#### **5 4 2 4 Nigeria Shippers Council**

The Nigerian Shippers' Council is established as a body corporate with perpetual succession and a common seal with capacity to sue and be sued in its corporate name.<sup>938</sup> Like NPA, the Council is also under the supervision of the Federal Ministry of Transport whereby the "Minister may give the it directions of a general

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<sup>930</sup> S 10(5) a-b).

<sup>931</sup> S10 (5)c.

<sup>932</sup> NPA Service Charter v.

<sup>933</sup> *Ibid.*

<sup>934</sup> S 11(1).The Service Charter provides that such staff shall be guided by such principles as integrity, transparency, professionalism, among others. See NPA Service Charter iii .

<sup>935</sup> See First Schedule to the NPA Act par 5(1)-(3).

<sup>936</sup> It was even heavier before the concession as seen in the NPA Handbook.

<sup>937</sup> NPA Service Charter V.

<sup>938</sup> NSC Act S 1(1).

character or relating to particular matters (but not to any individual person or case) with regards to the exercise by the Council of its functions, and it shall be the duty of the Council to comply with the directions.”<sup>939</sup>The Council was established for the protection of shippers interest in export and import matters, promoting stakeholders consultation and negotiation on service standards, promoting efficient delivery of shipping services to importers and exporters, advising the Federal government on issues relating to shipping of goods from and into Nigeria, providing a forum for the protection of the interest of shippers on matters affecting the shipment of imports and exports to and from.<sup>940</sup> The Minister of Transport, on the nomination of the Council, is empowered to appoint an Executive Secretary of the Council.<sup>941</sup>

The Executive Secretary is the Chief Executive of the Council and has the responsibility for the execution of the policy of the Council and the day-to-day running of the affairs of the Council.<sup>942</sup> The Council may appoint such other persons as it may determine as employees of the Council to assist the Executive Secretary in the exercise of his functions.<sup>943</sup> The Council may also appoint one or more committees to which it may delegate any of its functions.<sup>944</sup> Such appointed committees shall be headed by a member of the Council and shall be made up of such number of persons as the Council may determine in each case.<sup>945</sup>

One such committee provided for is Port Operations Committee which shall be charged with the duty of considering any matter relating to port charges, port facilities, port problems, customs and other related matters referred to it by the Council.<sup>946</sup> Another Committee, the Freight Committee, shall be charged with the duty of advising the Council on any matter relating to the structure of freight rates,

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<sup>939</sup> S 4.

<sup>940</sup> See generally S 3. This section shall be thoroughly examined in chapter four in discussing legal issues concerning the roles of NSC post concession.

<sup>941</sup> S 5(1).

<sup>942</sup> S 5(2).

<sup>943</sup> S 5(3).

<sup>944</sup> S 7(1).

<sup>945</sup> S 8.

<sup>946</sup> S 7 (2)(a).

surcharges, demurrage, terms of payment, cargo sharing and other related matters as may be referred to it by the Council.<sup>947</sup>

#### **5 4 2 5 Other port related institutions**

While NPA and NSC are the ones designated as technical regulator and economic regulator respectively, there is a plethora of institutions performing some roles or the other in the port system. These include Nigerian Custom Services, Nigerian Immigration, Nigerian Navy, Nigerian Maritime Administration and Safety Agency (NIMASA) among many others.<sup>948</sup> At a point, the port system was inundated with so many institutions that the government had to issue directive to reduce them.<sup>949</sup> For the present purpose, NIMASA is discussed in some details in view of the fact that it is the major maritime body after the NPA and NSC operating in Nigerian maritime zones including the port.<sup>950</sup>

The NIMASA was established as a body corporate with perpetual succession and a common seal, capable of suing and being sued in its corporate name.<sup>951</sup> National Maritime Administration and Safety Agency shall be responsible for the executing the provisions of NIMASA Act, the Merchant Shipping Act and its amendments and all other Federal Legislation on Maritime Labour.<sup>952</sup> It has power to enter into contracts and incur obligations; acquire, hold, mortgage, purchase, sell, lease and deal howsoever with property, whether movable or immovable, real or personal for the purpose of this Act; do and suffer all acts and things which a body corporate may by law do suffer and which are necessary or convenient for the purpose of this Act.<sup>953</sup> The objective of the Agency shall be to promote the development of indigenous commercial shipping in international and

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<sup>947</sup> S. 7(2)(b).

<sup>948</sup> At a point there were no less than 32 government agencies operating in the ports. [www.mikeigbowku.com/major-problemsassociated-with-the-nigerian-port-system-and-suggested-solution](http://www.mikeigbowku.com/major-problemsassociated-with-the-nigerian-port-system-and-suggested-solution) (Accessed 22-6-2010).

<sup>949</sup> *Ibid.*

<sup>950</sup> Issues relating to NIMASA will feature in chapter 4 as part of the prognosis of the legal issues arising from concession of the ports.

<sup>951</sup> S 3(1) (2) .

<sup>952</sup> Sec 3(2).

<sup>953</sup> S 3(2)(a-c).

coastal shipping trade; and regulate and promote maritime safety, security, marine pollution and maritime labour, safety and security.<sup>954</sup>

### **5 4 3 Landlord Aspect**

As noted earlier, the landlord role is based on the ownership of land and water fronts of the port system as well as the infrastructure in the port system.<sup>955</sup> Under the current arrangement in the port, concessionaires or terminal operators are selected under a legal process based on stipulated specifications.<sup>956</sup> At the end of the concession period, the terminals would revert back to the Government.<sup>957</sup> Under the landlord model, the terminal operators provide and maintain their own superstructure including office buildings, quays, cranes warehouses, container and cargo stacking areas, forklifts, among others, while the private terminal operators employ and remunerate, deploy and train their own stevedores.<sup>958</sup> The NPA takes charge of port planning, licensing control, and port development, technical regulations pertaining to safety, security, marine services and channel management as well as environmental regulation.<sup>959</sup> As part of its landlord role, NPA also renders technical nautical services such as pilotage and towage<sup>960</sup>

### **5 4 4 Operational aspect**

The operator function traditionally covers the provision of port services which can be broadly characterized, for example, as the physical transfer of goods and passengers between sea and land, including transport services.<sup>961</sup> The new dispensation on operational service is that concession processes have transferred cargo handling services into the hands of private operators with the port authority acting only as service provider of the last resort where feasible. The general economic interest nature of technical-nautical services explains why these may often still be provided by public entities alongside with ancillary

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<sup>954</sup> S 1(i)(ii).

<sup>955</sup> See generally NPA *NPA Brand*.

<sup>956</sup> Kareem *An Assessment of Nigerian Seaport Reforms* 4.

<sup>957</sup> *Ibid.*

<sup>958</sup> *Ibid.*

<sup>959</sup> See generally NPA *NPA Brand*.

<sup>960</sup> NPA Service Charter 9.

<sup>961</sup> *Ibid.*

services which are mostly provided for the benefit of the wider port community, such as waste handling, bunkering, and fire service, among others.<sup>962</sup>

## **5 4 5 Forms of concession and private participation**

### **5 4 5 1 Build-Operate-Transfer (BOT)**

In terms of NEEDS, one of the models for private participation in the port is BOT which will allow private operators to engage in the construction, financing, operation and maintenance of port facility (including equipment, buildings and quays. One notable BOT concession in the Nigerian port system is the one granted to Port and Terminal Multiservice Limited (PTML), which commenced operations in September 2006 at Tin can Island Port.<sup>963</sup>

### **5 4 5 2 Rehabilitate-Operate-Transfer**

Another concession model used is the Rehabilitate or Lease-Operate-Transfer (LOT) in which existing port facilities are handed over to private port operators. It is also provided for under NEEDS.<sup>964</sup> Other concessionaires such as Josepdam Port Services limited operating at Tincan Island,<sup>965</sup> Apapa Bulk Terminal Ltd. (ABTL), Green view Development Nigeria Ltd. (GNDL) and Lily Pond Inland Container Terminal operating in Lagos Port Complex operate ROT.<sup>966</sup>

### **5 4 5 3 Joint ventures**

The NPA Act makes provision for the Authority to “manage, supervise and control or take part in the management, supervision or control of any company or undertaking in which the authority is interested by reason of shareholding or otherwise and for that purpose appoint and remunerate directors, accountants, other experts and agents.”<sup>967</sup>

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<sup>962</sup> See NPA Service Charter 9 10.

<sup>963</sup> <http://www.nigerianports.org/defaultTinCanPort.aspx> (Accessed on 24-4-2017)

<sup>964</sup> <http://documents.worldbank.org/curated/en/234301468290438608/pdf/33305.pdf>.

<sup>965</sup> <http://www.nigerianports.org/AboutUsTinCanPort.aspx> (Accessed on 24-4-2017).

<sup>966</sup> <http://www.nigerianports.org/defaultLagosPort.aspx> (Accessed on 24-4-2017).

<sup>967</sup> S 7(f).

In line with this provision, NPA has entered into joint venture agreement with the Lagos Channel Management Company for purposes of dredging the ports and removal of wrecks, Bonny Channel Management, also for dredging, Continental Shipyard Ltd for modernizing dock facilities.<sup>968</sup> NPA has 60% equity shareholding in these companies while private sector holds the rest, meaning NPA has controlling shares.<sup>969</sup> Thus, NPA is still involved in operating some port businesses, ostensibly at arms lengths by way of equity partnership with the private sector or by way of creating subsidiaries, though these companies appear to be mostly into businesses related to the landlord roles of the NPA. All this implies that port authorities as regulators would have to self-regulate itself as far as these equity partnerships are concerned.

## 6 Conclusion

Ports are not merely landing facilities or a conglomeration of terminals, but rather sophisticated and integrated systems that provide a wide range of services for the maritime industry as well as to the society at large. While ports are domain of domestic regulation, they are subject of global, continental and regional instruments. However, generally none of the international instruments definitively prescribe a particular typology of port governance, *albeit* a number of them have provisions that directly or indirectly promote private participation in the port sector. AMTC is one example; it commits Nigeria to embark on port reforms and encourage private sector participation in the provision of port services falling short of mandating private entry into member port sector or prescribing a particular type of private participation whether by concession or otherwise. In the absence of definitive prescriptions on port governance models International Law, International Organisations have resorted to port guidelines in their bid to encourage ports reforms particularly in Sub-Saharan Africa. Such guidelines contains analysis of different port governance models and encourages adoption of the landlord model. One example is the World Bank which came up with Port

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<sup>968</sup> <http://www.nigerianports.org/dynamicdata/OurJointVentures.aspx?id=283> (Accessed on 24-4-2017).

<sup>969</sup> Ibid.



Reform Toolkit. Under the influence of World Bank, Nigeria currently practices the Landlord model, though the Port Act remains unamended. Under this model, port operations are being concessioned to private port operators while the NPA acts as the landlord providing infrastructure. It also serves as regulator, a function it has been made to share with the Nigerian Shippers Council under the new arrangement.

## CHAPTER FOUR

### LEGALITY OF PORT CONCESSION

#### 1 Introduction

Having described how concession has characterised port governance in chapter three, this chapter examines the legality of the port concession. The main objective is to determine whether the implementation of concession in the port governance system is in line with the Constitution, Nigeria Port Authority Act (NPAA) and other relevant laws. The chapter will thereby establish the legal veracity or otherwise of the official position that port concession is compatible and in line with the extant port law, the NPAA relative to other relevant laws. It has been previously established that the principal law regulating the port before and after concession remains the NPAA which was not repealed or even amended before the implementation of port concession to provide the legal basis for the new regime of concession, being the current definitive character of port governance in Nigeria as described in chapter three.<sup>970</sup>

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<sup>970</sup> See for example the *National Integrated Infrastructure Master Plan* (NIIM) Par 2.5.1. NIIM states that the port concession is supported by and has legal backing in NPAA. It is constitutional imperative for the government to adhere to the provisions of the law in all its undertakings, whether in port governance or otherwise. An interpretation of the NPAA that does not provide backing for the concession programme would mean that it is simply *contra legis* (that is contrary to the applicable laws) and would constitute another challenge to government adherence to rule of law. If the national policy instruments are anything to go by, the official position of policy makers at the Federal Government level as well as in the management of Nigeria Port Authority and other port related agencies is that the NPAA does provide legal support and backing for the massive concession that has led to the separation of the operational aspects of the port from the regulatory and landlord roles. In other words, the Federal Government posits that the concession programme is *not ultra vires* the port basic law and hence the government has not violated the law in any way. It is a reasonable postulation that this official position contributes, in part, to the delay in passing the legislative Bills proposed to cater for massive changes arising from the port concession programme. It is therefore apposite to critically consider the proposition that the NPAA and related laws provide legal backing for the kind of concession implemented in the port.

It would require a holistic analysis of the relevant port laws to examine the legality or the extent of legality or otherwise of the concession policy which has separated the operational aspects from the landlord and regulatory aspects. This is what this chapter sets out to do. In so doing, the chapter first places the issue within constitutional parameters with a view to ascertaining the general position of the Constitution on the subject matter. This provides a foundation for the specific analysis of the basic law of the port namely NPAA and other relevant laws such as the Infrastructure Concession Regulatory Act (ICRCA). The NPAA is examined in the context of the objective of port concession as this provides an indication as to whether the legislature had contemplated concession in the enactment of the Act or whether such objectives are provided for in another context. The NPAA is then examined to discover the consistency of port concession with the statutory functions of NPA. To that end, the statutory functions are then more critically examined pointing out the legal implications of the landlord, operational and regulatory aspects of the port as a fused amalgam of responsibilities rather than fragmented aspects capable of being arbitrarily ceded to the private sector. After this part of the chapter, the other laws relating to concession-such as ICRCA are analysed with reference to their relevance to port concession. Another part of the chapter examines the legal implication of concession on the port governance structure at the center of which is NPA and what this says about the legislative intent behind the NPAA and related laws.

## **2 Constitutional parameters**

In terms of the Constitution, the State is mandated to run, manage and operate the major sectors of the economy based on the parameters provided by the Constitution. If the port sector falls within the parameters and continues to meet the criteria, then it must be managed and operated by the State.<sup>971</sup> It is worth reiterating here that:

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<sup>971</sup> In terms of s13 of the Constitution, "It shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of" of fundamental objectives and directive principles of State policy which provide the parameter and direction for all activities

The State shall, within the context of the ideals and objectives for which provisions are made in this Constitution (c) without prejudice to its right to operate or participate in areas of the economy, other than the major sectors of the economy, manage and operate the major sectors of the economy;(d) without prejudice to the right of any person to participate in areas of the economy within the major sector of the economy, protect the right of every citizen to engage in any economic activities outside the major sectors of the economy.<sup>972</sup>

The general implication of the above provision for private participation in the economy has been discussed in chapter two. In the context of the port sector, it needs to be established whether the provisions amount to vesting the right to manage and operate the ports, being a major sector of the economy, in the State without prejudice to the right of participation of the State in aspects of the economy that are outside the port sector such as running a real estate enterprise that perhaps supports or complements the operations of the ports. On the other, it also requires elucidation to establish whether the provision restricts the private sector's right to merely 'participate' within the port sector without prejudice to the right of a natural or corporate person to engage in economic activities that are outside such areas of the economy that are considered to be outside the major sectors of the economy. There are a number of legal implications of the above provision for the port sector.

Firstly, the above words (manage, operate, and participate) are used in the section under scrutiny -with reference to 'the major sectors of the economy'. What constitute a major sector of the economy is both an issue of fact and the law. In the former case, the position of the port sector in the overall scheme of the economy in terms of its strategic importance and contribution to the treasury can help in determining whether it is a major sector of the economy. It was found in chapter three that the Nigerian seaports is a key sector of the economy being the

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of the government as contained in chapter two of the Constitution. Any activity that falls outside the parameters are unconstitutional and illegal. Though government cannot be compelled by an action in Court to abide by them as per the provision of s.6(6) of the Constitution, the Courts have held in many cases that where any provision of Chapter two is embodied in any law, it shall be justiciable. See *Attorney General of Ondo State v Attorney General of the Federation (2002) LPELR-623(SC)*.

<sup>972</sup> S 16(1) (c-d).

major point of Nigeria's international trade On this basis of this, the Nigerian seaports is therefore, in fact, 'a major sector of the economy'.

## 2 1 Parameters for 'major sector of the economy'

However, the Constitution provides its own objective legal parameters for determining what constitutes 'a major sector of the economy' for the purpose the above provisions:

The reference to the 'major sectors of the economy' shall be construed as a reference to such economic activities as may, from time to time, be declared by a resolution of each House of the National Assembly to be managed and operated exclusively by the Government of the Federation, and until a resolution to the contrary is made by the National Assembly, economic activities being operated exclusively by the Government of the Federation on the date immediately preceding the day when this section comes into force, whether directly or through the agencies of a statutory or other corporation or company, shall be deemed to be major sectors of the economy.<sup>973</sup>

The major sectors of the economy are economic activities designated as such by the legislature, economic activities being constitutionally characterized include "activities directly concerned with the production, distribution and exchange of weather or of goods and services."<sup>974</sup> Within this framework, the port sector constitutes an economic activity and ports are a point for the production, distribution and exchange of both goods and services. However, for the port sector to be qualified, in constitutional terms, as an economic activity which is 'a major sector of the economy' it must have been designated by a resolution of the National Assembly to be managed and operated by the State. In addition, it is also required that the ports must have been operated by the Federal Government "on the date immediately preceding the day when this section comes into force, whether directly or through the agencies of a statutory or other corporation or company."<sup>975</sup> Based on this part of the section, where an agency or statutory body of the Federal Government in this case the NPA had been operating and

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<sup>973</sup> S16 (4)(a).

<sup>974</sup> S4 (b).

<sup>975</sup> 16 (4).

managing the ports on a date immediately preceding the commencement date of the Constitution, the ports shall, in law, be regarded as a major sector of the economy for the purposes of the section in question and shall continue to be managed and operated by the Federal Government through the NPA.<sup>976</sup> The relevant question here is: Was the port being managed and operated by NPA as at the time the Constitution came into force? In providing answer to this question, the date of commencement of the Constitution is essential. In terms of the Constitution, the Constitution comes into force on 29<sup>th</sup> May, 1999.<sup>977</sup>

It has been established that before 2006 when the ports were concessioned, the NPA not only managed the ports but also mostly carried out operational aspects of the port.<sup>978</sup> The NPAA, the law under which the ports were being run before the concession in 2006, has a commencement date (or vesting date)<sup>979</sup> of 10 May 1999.<sup>980</sup> This shows that the enactment of the NPAA preceded the coming into force of the Constitution by at least 19 days. In other words, the NPAA was an extant and existing law when the Constitution entered into force.<sup>981</sup> One legal implication of this is that the ports fall under the category of sectors of the economy being operated by Federal Government on “the date immediately preceding the day when this section comes into force, whether directly or through

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<sup>976</sup> The Statutory Corporations (Special Provisions) Act Cap 418 lists NPA as one of the statutory corporations under the control of the Federal Government. See s2 (d).

<sup>977</sup> S320 Constitution of the Federal Republic of Nigeria, 1999.

<sup>978</sup> See Chapter three.

<sup>979</sup> Commencement date is otherwise known as vesting date in the NPAA (See s127).

<sup>980</sup> See NPA Act Commencement.

<sup>981</sup> The constitution describes an existing law as “any law and includes any rule of law or any enactment or instrument whatsoever which is in force immediately before the date when this section comes into force or which having been passed or made before that date comes into force after that date.” See Sec 315(4)(b)). Also as per s315 (1) of the Constitution: “Subject to the provisions of this Constitution, an existing law shall have effect with such modifications as may be necessary to bring it into conformity with the provisions of this Constitution and shall be deemed to be (a) an Act of the National Assembly to the extent that it is a law with respect to any matter on which the National Assembly is empowered by this Constitution to make laws” It is further provided by s316(1) Constitution: “Any office, court of law or authority which immediately before the date when this section comes into force was established and charged with any function by virtue of any other Constitution or law shall be deemed to have been duly established and shall continue to be charged with such function until other provisions are made, as if the office, court of law or authority was established and charged with the function by virtue of this Constitution or in accordance with the provisions of a law made thereunder”.

the agencies of a statutory or other corporation or company”,<sup>982</sup> and which, *ceteris paribus*, therefore “shall be deemed to be major sectors of the economy”<sup>983</sup> that the State shall continue to “manage and operate.” Additionally, It is also required that a National Assembly’s resolution designates that the sector be managed and operated by the State. A resolution of the National Assembly, being an important means of legislative powers, may be one for making ordinary decision, one for giving vent to a constitutional requirement (or provision) or one which culminates into an Act as part of law-making process. In the sense in which it is used here, it covers an Act of the National Assembly such as the NPAA. The Constitution provides:

Where by this Schedule the National Assembly is required to designate any matter or thing or to make any declaration, it may do so either by an Act of the National Assembly or by a resolution passed by both Houses of the National Assembly.<sup>984</sup>

The designation of the ports as an aspect of the economy being managed or operated by the state is captured in the preamble to the NPAA thus:

An Act to establish Nigeria Port Authority with the functions of providing and operating necessary facilities in port and maintaining, improving and regulating the use of ports and provide for matters connected therewith.

The preamble clearly summarises the functionality of the NPA in terms of its operational and regulatory aspects. The word “operate” used in the Constitution is clear in the preamble as it is in the body of the Act which provides that the port authority shall ‘provide and operate in the port, such facilities as appear to it best calculated to serve the interest of Nigeria’.<sup>985</sup> This word again appears with the second word (manage) where the Authority is mandated to “ensure efficient management of port operations”.<sup>986</sup> In fact, to that end the “Authority may make byelaws for the control and management of the wharves and premises vested in

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<sup>982</sup> 16(4) (a).

<sup>983</sup> *Ibid.*

<sup>984</sup> Part III Schedule 11 Constitution. The schedule is the list of areas of exclusive legislative competence called Exclusive List where only National Assembly can make laws.

<sup>985</sup> S7 (a).

<sup>986</sup> S7(c).

or in the possession of the Authority and the maintenance of good order in the wharves and premises.”<sup>987</sup> Even where a company is established to take care of some of its functions, the Authority is still mandated to “manage, supervise and control or take part in management or supervision or control of any company undertaking in which the authority is interested by way of shareholding or otherwise.”<sup>988</sup> It should be recalled that management and operation by the State envisaged in the Constitution may be either “directly or through the agencies of a statutory or other corporation or company”.<sup>989</sup> For this reason while the NPA was commercialized and transformed into Nigeria Ports Plc. ports remained under the control and management of the Federal Government as stated in chapter three. At this time, the management and operation was through a company. Before this time it was managed and operated “directly through a statutory agency” namely’ NPA. Currently, NPA, in terms of NPAA, statutorily remains the manager and operator of the ports after commercialization as it was restored back to an agency directly operated and managed by a statutory agency properly so called with the following provisions of the NPAA:

The Nigeria Ports Act 1993 (in this section referred to as (“the repealed Act”), is hereby repealed and the Company known as the Nigerian Ports PLC, registered under the Companies and Allied Matters Act and its Board of Directors is hereby dissolved. Accordingly, there shall be vested in the Authority, immediately at the commencement of this Act, without further assurances, all assets, funds, resources and other movable or immovable property which immediately before the commencement of this Act were vested in the company.<sup>990</sup>

By virtue of the above provisions commercialization of ports was outlawed restoring the properties of the ports and the functions of using and operating them for achievement of ports statutory duties to the public corporation, Nigeria Port

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<sup>987</sup> S 40 (1).

<sup>988</sup> S 7 (f).

<sup>989</sup> 16(4) (a). It is submitted that this phrase is also a tacit statement on the primacy of the laws that established the relevant agencies in the determination of the powers to manage and operate such agencies.

<sup>990</sup> S 125 (1) (2).



Authority. The Constitution is clear on the legal requirement of continuity of such statutory duties and roles until another law changes the situation.<sup>991</sup>

Secondly, the textual and contextual legal implications for the ports, of the three operative verbs at the center of the constitutional provision namely to 'manage', to 'operate' and to 'participate' requires further elucidation. The Constitution provides the meaning of the word 'participate' to include "the rendering of services and supplying of goods".<sup>992</sup> It does not provide the meanings of 'manage' and 'operate', *albeit* the textual meanings of all three in the section are clear in the context in which they are used: the words are used in their ordinary and popular meanings. It is an established canon of interpretation of legislation that words as understood in the proper sense referred to those which are not applied in any particular science or art.<sup>993</sup> It is in this sense that these words are used as -umbrella common words in general reference to different sectors of the economy not to any particular specialized science or art. The word manage means to run, take charge of, govern, operate, transact, treat, wield authority and work.<sup>994</sup>

In terms of the Interpretation Act where, by an enactment, a meaning is assigned to a word, parts of speech related to the word have corresponding meanings.<sup>995</sup> To that end, the above cluster of meanings show that to 'manage' requires taking charge, being in control and may even amount to operating and regulating quite in line with the statutory mandate of NPA to "ensure the efficient management of

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<sup>991</sup> See S 316 (1) as cited in fn 11 above.

<sup>992</sup> S 16 (3) (c).

<sup>993</sup> See *Idika v. Uzoukwu* (2008) 9 NWLR (Pt.1091) 34 at 54-55, paras. H-C (CA) where it was held: "It is the general principle of interpretation of statutes and instruments that in the absence of an ambiguity, no exposition shall be made which is opposed to the express words of the statute or instrument. A court of law will not put any interpretation on any enactment which is contrary to its plain meaning. Therefore, in the interpretation of the provisions of an Act, they must as a cardinal principle be given their ordinary grammatical meaning. It is not proper to read into an enactment, an exception which it has not expressed and which will thereby deprive any person of any protection or right or recourse thereunder." See further *Egbe v. Yusuf* (1992) 6 NWLR (Pt.24S) 1; *Mbonu v. Nwoti* (1991) 7 NWLR (Pt. 206).

<sup>994</sup> These are many of the synonyms of 'manage' given on <http://legal-dictionary.thefreedictionary.com/manage> (Accessed on 4th-6, 2017).

<sup>995</sup> S 18 (2).

port operations<sup>996</sup> in its bid to oversee the ports while simultaneously carrying out the role “to maintain, improve and regulate the use of the ports.”<sup>997</sup> All this accords with the ‘management’ mandate of NPA in the port system.

Closely related to the word ‘manage’ is the second word ‘operate’ meaning to carry into execution, handle, have charge of.”<sup>998</sup> This class of meanings accords with the specific provision to “provide and operate, in the ports, such facilities as appear to it best calculated to serve the interest of Nigeria”<sup>999</sup> as well as the omnibus provision to “provide and operate such other services as the Minister may, from time to time, require.”<sup>1000</sup> The Minister, being described as the Federal “Minister for the time being charged with the responsibility for matters relating to maritime shipping and navigation,”<sup>1001</sup> does even have the function to boost the operational profile of the NPA by adding more services and operations to its functional docket. There is no contrary provision in the whole gamut of the NPAA that clearly allows the Minister or any other person to substantially reduce the statutory operational functions of NPA either by way of concession or by similar tools. It is trite that the Minister may withdraw the additional operational roles added by her but cannot strip the NPA of its specifically promulgated statutory responsibilities.<sup>1002</sup>

The import of these provisions is that management and operation of the ports are primarily the responsibility of the State, being a major sector of the economy. Does this preclude the private sector from playing roles in the port sector? This question leads to the third implication of the constitutional provisions in question and an exposition of the meaning of the third of the tripod-words:” to participate.”

The third implication is that the Constitution recognizes the right of private players to engage in economic activities outside the major sectors of the economy while

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<sup>996</sup> See again s 7(c).

<sup>997</sup> S 7(b).

<sup>998</sup> <http://legal-dictionary.thefreedictionary.com/operate> (Accessed on 10-6-2017).

<sup>999</sup> S 7 (a).

<sup>1000</sup> S 7 (j).

<sup>1001</sup> S 127. The minister in charge of maritime shipping and navigation is the Minister of Transport.

<sup>1002</sup> See s 360(1) of the constitution.

affirming the right of such citizens to ‘participate’ within the major sectors of the economy.<sup>1003</sup> This is a two way provision for the port sector. On the one hand, the private sector may engage in activities such as running an industry that produces cement in the industrial part of the port, or managing a shipping company, economic activities that have not been declared in any way whatsoever to be out of the reach of the private sector.<sup>1004</sup> On the other hand, the private sector is allowed to “participate” within the major sector of the economy. While ‘participate’ has been characterized as “the rendering of services and supplying of goods”<sup>1005</sup> as earlier cited, it is clearly subject to the right of the State to “manage and operate the major sectors of the economy”<sup>1006</sup> which in the case of the port unequivocally means to *manage* the port system and *operate* its major “economic activities”<sup>1007</sup> in line with its core statutory duties. The provision and its proviso are quite clear in meaning and legal effect: “without prejudice to the right of any person to participate in areas of the economy within the major sector of the economy, protect the right of every citizen to engage in any economic activities outside the major sectors of the economy.”<sup>1008</sup>

The general meaning of the word ‘to participate’ is by no means inconsistent with this interpretative outcome: it means to act in concert, have a part in, be a party, unite efforts with, unite with, work together.<sup>1009</sup>

While defining the word in another context the Nigerian Court of Appeal gave general descriptions of the word, which are in sync with the above meanings, as denoting “to receive or have a part or share of; to partake of, experience in common with others; to have or enjoy a part or share in common with others. It

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<sup>1003</sup> S 16 (1) (d).

<sup>1004</sup> See for example under s18 Merchant Shipping Act 2007 private ownership and running of shipping business is provided for thus: “The following are persons eligible to register Nigerian Ships: a. Nigerian citizens b. Bodies corporate established under and subject to Nigerian laws, having their principal place of business in Nigeria c. Such other persons as the Minister of Transport may by regulations prescribe.”

<sup>1005</sup> S 16 (3) (c).

<sup>1006</sup> S 16 (1) (d).

<sup>1007</sup> S 16 (3) (c).

<sup>1008</sup> S 16 (1) (d).

<sup>1009</sup> <http://legal-dictionary.thefreedictionary.com/participate> (Accessed on 10-6-2017).

also means to partake, as to 'partake' in a discussion, or in a pension or profit sharing plan"<sup>1010</sup> and "to take part or become involved in an activity."<sup>1011</sup>

A combination of the ordinary meaning of the word and the constitutional context allows an interpretation which permits a private person to 'cooperate' or 'work with' or 'act in concert with' the Nigeria Port Authority to carry out economic activities in the port without prejudice to the right of the NPA to 'manage and operate' the ports and without compromising its primary legal mandate. It is within this context that a number of provisions in the NPAA must be viewed.

For example in exercise of duty to 'maintain, improve and regulate the use of ports"<sup>1012</sup>,the NPA has the power to "construct, execute, carry out, equip, improve, work and develop ports, docks, harbours, piers, wharves, canals, water courses, embankment and jetties."<sup>1013</sup> While carrying out this duty, it can seek technical help. To that end there are provisions that allow private actors to 'participate' in the port to facilitate NPA in achieving its management and operational responsibilities. One such provision allows the NPA the power to "enter into agreement with any person for the supply, construction, manufacture, maintenance or repair by that person of any property, movable or immovable, necessary for the purposes of the Authority."<sup>1014</sup>

The import of this is that in all instances the statutory functions of NPA is the fulcrum around which its management and operational profiles revolve and is also an important factor in its relationships with the private sector. These statutory regimes are in tandem with and meet the basic constitutional parameters and test, as it is trite that legislations are to be interpreted to conform with constitutional framework.<sup>1015</sup>

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<sup>1010</sup> As per Owoade, J.C.A in *Idris v. A.N.P.P.* (2008) 8 NWLR (Pt.1088) 1 149, paras. [A-B] (CA).

<sup>1011</sup> As per Ogunwumiju JCA in *P.P.A. v. Saraki* (2007) 17 NWLR (Pt. 1064) 453 at 498, paras. B - C (CA)

<sup>1012</sup> S 7 (b) NPAA.

<sup>1013</sup> S 8 (a) NPPA.

<sup>1014</sup> S 8 (k) NPPA.

<sup>1015</sup> See s 1 Constitution. Also see generally Fox and Bell *Learning Legal Skills* (1999) 107. See further the case *Unilorin v. Adeniran* (2007) 6 NWLR (Pt. 1031) 498 at 530 Paras. C - D,

The next part will examine the objectives of concession vis-a-vis the objectives of ports as implied in the NPAA.

### **3 Objectives of concession vs. objectives of ports**

This part discusses the objectives of concession vis-a-vis the objectives of ports.

#### **3 1 Introduction**

The respective objectives of concession in general and the ports in specific determine the thrust of port concession hence both have been discussed separately in chapters two and three.<sup>1016</sup> The underlying issues at the nexus between the two set of objectives help in appreciating some legal aspects of the port concession. It helps to establish whether relevant provisions relating to these objectives were promulgated with concession in mind or are at least adequate to give vent to the objectives or provide for the objective in another context different from concession's. These objectives include to wit: improved private sector participation, efficiency, value for money, among others as embodied in such policy document for concession as NPPP and the master plan for the economy, NEEDS. The NPAA has no specific dedicated part on objectives. However its overall objectives may be implied from express provisions in the Act.

#### **3 2 Improved private participation**

One of the objectives of concession is to ensure improved private participation.<sup>1017</sup> As stated earlier the constitution recognises the right to private participation in the economy with clearly stated *caveat*. Accordingly, the NPPP objective of seeking to increase the capacity and diversity of the private sector by providing opportunities for Nigerian and international investors and contractors in the provision of public infrastructure accords with this constitutional license.<sup>1018</sup>

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539 Paras. C-D, 540 Para. A (CA) "One of the tenets of interpretation of statutes is the need not to impute an intention to contravene the Constitution to lawmakers and to adopt a construction which avoids inconsistency with the Constitution. See *Okeahialam v. Nwamara* (2003) 12 NWLR (Pt. 835) 597; *Adeshina v. Lemomu* (965) 1 ALL NLR 233." Per Ogunwumiju JCA See also *Okeahialam v. Nwamara* (2003) 12 NWLR (Pt. 835) 597.

<sup>1016</sup> See par [5] chapter 2 and par 4 chapter 3.

<sup>1017</sup> See Par [5] chapter 2.

<sup>1018</sup> NPPP Par [4.1]. See also Federal Government of Nigeria *Drat National Transport Policy* Par [2.3].

This objective is also clear in NEEDS: seaports are to create a significant role for Nigerian sea ports within ECOWAS by encouraging private sector participation in coastal shipping activities.<sup>1019</sup> NEEDS encourages private sector participation in infrastructural development using different concession models as a means of leveraging the private sector for the provision of ports services and facilities.<sup>1020</sup> However, this general constitutional licence would be interpreted with reference to the specific provisions in NPAA stipulating statutory functions within the remit of the specific constitutional rules regarding major sectors of the economy. It is submitted that the NPAA does not contain any reference to the word private participation or private sector, nor to the word concession.

However, this does not mean that the NPAA outlaws private participation. On the contra, it does not but this reflects the general tenor of the Act as being essentially about a public asset christened ‘The Nigeria Port Authority’ which gives the Act its name: The Nigeria Port Authority Act whose functional essence is aptly characterized as “an Act to establish the Nigerian Ports Authority with the functions of providing and operating necessary facilities in ports and maintaining, improving and regulating the use of the ports; and to provide for matters connected therewith”.<sup>1021</sup>

In line with the Constitution, it allows the private sector room to “participate” within the port system so that it has power to delegate responsibilities as long as this does not derogate from its core statutory duties of overall management and operation of the ports. To that end, the tool port system-and to some extent the service port model- being practiced in the port system pre-concession reflects this position.<sup>1022</sup> The main point here is that the notion of improved private participation, under the NPAA as it were, must not deviate from NPA’s primary statutory regime. The historical account of the evolution of the NPA has established that the private sector, from time to time, had always played some

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<sup>1019</sup> NEEDS 59.

<sup>1020</sup> NEEDS 58 59.

<sup>1021</sup> See Preamble to the Act.

<sup>1022</sup> See Par 4 1 2 Chapter3.

roles in the port sector before concession which did not detract-and should not have detracted- from the statutory functions of the NPA.

### 3.3 Efficiency

Being the measure of the cost of an approach and its achievement relative to expected outcome and a determinant and measure of productivity,<sup>1023</sup> efficiency is one of the cornerstones of port governance objectives. Accordingly, the NPPP provides for the “efficiency of power, water, transport and other public services in order to increase economic growth, productivity, competitiveness, and access to markets”<sup>1024</sup>. NEEDS also seeks to “make Nigeria’s ports more efficient and competitive, with capacity to handle modern shipping activities”<sup>1025</sup>. The question is: is concession envisaged as the only legal instrument for achieving efficiency in the ports? The answer to this query is straightforward as neither the ICRC nor the NPPP makes a claim that only concession can help achieve efficiency albeit the latter, as much as NEEDS, promotes a more efficient port as an outcome of port concession. It is in this context that the NPPP clearly provides that in “adopting concession or any other form of PPP, the Government should be making no presumption about the relative efficiency or effectiveness of the public and private sectors in the delivery of projects and services and will have to use PPP where this is likely to result in better value—and more affordable”.<sup>1026</sup>

Another relevant question is: does NPAA envisage concession as a means of achieving efficiency? Clear provisions of the Act do not lend credence to any proposition that it does. One relevant reference to efficiency is in respect of the statutory duty of NPA to “ensure the efficient management of port operations, optimal allocation and use of resources, diversification of sources of revenue and guaranteeing adequate returns on its investments, in order to contribute effectively to the wellbeing of the Nigerian society”<sup>1027</sup>. In this way, the NPAA conceives of efficiency in terms of the NPA carrying out its statutory duty for the

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<sup>1023</sup> Black Law Dictionary <http://thelawdictionary.org/efficiency/> (Accessed on 11-6-2016).

<sup>1024</sup> NPPP Par 3.

<sup>1025</sup> NEEDS 59 See National Draft Transport Policy Par [3.1].

<sup>1026</sup> Par [3].

<sup>1027</sup> S 7 (c) NPAA.

“wellbeing of the Nigerian society.” For this purpose, the NPA is mandated to make efficiency its watch word in the management of its human and infrastructural resources. To that end, it “shall appoint such other persons as employees as it may deem necessary for the efficient performance of its functions”<sup>1028</sup>

Similarly, NPA shall do anything for the purpose of advancing “the efficiency of the equipment of the Authority or of the manner in which that equipment is operated including the provision by others of the facilities for training, education and research.”<sup>1029</sup> So the NPAA envisages that while “others” (for example the private sector) “participate” by way of provision of facilities for training, education and research which amounts to ,using constitutional term, “the rendering of services and supplying of goods”,<sup>1030</sup> the end-objective is: efficiency. Thus the NPA has a duty not only to ensure efficiency for itself but also others only within the gambit of its statutory duty all in a bid to “ensure the efficient management of port operations”. This is in tandem with the constitutional duty to ensure “an efficient, a dynamic and self-sufficient economy,”<sup>1031</sup> which for the port is a public service statutory function of NPA as part of its management and operational profile. The summary of this is that under the NPAA, efficiency shall be achieved with NPA as the operator of the port.

### 3 4 Value for money

This is closely associated with efficiency,<sup>1032</sup> value for money being essentially about ensuring the outcome in the port is commensurate to expenditure expended by government on concession. It is clearly provided for by the NPPP thus: the government must ensure that all investment projects provide value for money.<sup>1033</sup>

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<sup>1028</sup> S 11 (1).

<sup>1029</sup> S 8 NPAA

<sup>1030</sup> 16 (3) (c).

<sup>1031</sup> S 16 (1) (a).

<sup>1032</sup> See for example s38 of Regulation on Procurement of Goods and Works which provides that value for money must be obtained through efficiency and fair access to bids.

<sup>1033</sup> NPPP Par 2; Par [4].



The provisions of NPAA imply that the NPA is required to ensure value for money while carrying out its statutory functions. The NPAA refers to “optimal allocation and use of resources” as one of the statutory duties of NPA in correlation with “efficient management of port operations”<sup>1034</sup> This accords with the conception, in Public Law, of value for money being about economy, minimizing cost of resources for an activity, having regard to appropriate quality; efficiency, being the relationship between the output in terms of goods, services and the resources used to produce them and effectiveness being the link between the intended impact and the actual impact of an activity.<sup>1035</sup> These provisions do not imply that value for money under the NPAA can only be attained *vide* concession.

### 3 5 Access

This is another objective. The NPA under the NPAA being a public utility has no particular challenge to ensure there is access to the port facilities and services and emphasises provision of facilities for “the wellbeing of Nigerian society”.<sup>1036</sup> Where such public facilities are transferred to private hands, legislative provision needs to make special provision to realize the constitutional objective of access to essential services and facilities without discrimination which is not covered by the NPAA which creates NPA as a public body to serve public good and hence ports, under, NPA, is to be run to promote access equity.

### 3 6 Competition

The underlying constitutional provision here is to the effect that “the economic system is not operated in such a manner as to permit the concentration of wealth or the means of production and exchange in the hands of few individuals or of a group”<sup>1037</sup>. Thus competition is one of the core issues in private participation in the ports presented by NEEDS as one of the objectives of the port and by NPPP as a principle of concession and other PPPs.<sup>1038</sup> It is one of the challenges of a concessioned or privatized economy, and since NPAA conceives the NPA as a

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<sup>1034</sup> S 7 (a).

<sup>1035</sup> Elliot and Thomas *Public Law* (2011) 433.

<sup>1036</sup> S7 (b).

<sup>1037</sup> S 16 (2) ©. See also s 16 (2)(b).

<sup>1038</sup> See Par [5 22].

*de jure* major operator and manager in the port, there are no particular provisions on competition. This correlates with other major sectors in the economy: as a matter of fact, the country has no specific competition law as the major sectors of the economy had been held by the State under different laws which established agencies, corporations and parastatals running these sectors.<sup>1039</sup> The NPAA creates the NPAA as the dominant power in the port sector and grants it lots of privileges in that respect that are not normally permitted in a competitive market driven environment where there are a number of private players for whom a level playing ground is an important feature of commercial operations. For example it creates a wide regime of freedom from liability for the NPA in the course of running businesses as a carrier of passengers, as a carrier of goods by ships and as a warehouseman subject only to a string of limited exemptions. A few provisions from the NPAA will illustrate this point. Regarding liability for delay to passengers, it is provided in s83 thereof thus:

The Authority shall not be liable for a loss arising from delay to a passenger caused (a) by failure of a ship, vehicle or train to start on a journey; or (b) by the late starting or late arrival of a ship, vehicle, or train, arising from any cause whatsoever.

The above provision is clear in its implication: whatever is the cause of failure of a ship, vehicle or train to start or to arrive late, whether it is by design, negligence or default, the NPA is totally absolved from liability with the emphatic negating phrase 'shall not be liable'. On this issue, no equivalent status is granted to private ships in such an emphatic terms. The NPA also "shall not, in any circumstances, be liable for any loss arising from delay to, detention of, or deviation in the carriage of goods' in a number of situations including "where there is a loss in a particular market, whether held daily or at intervals".<sup>1040</sup> These are by no means an expression of the best principles of competition particularly in an environment of commercial operations running on concession either based on

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<sup>1039</sup> An example in the transport sector is Federal Airport Authority cap F5 Act LFN 2004.

<sup>1040</sup> S 84.

competitive principles envisaged by policy instruments such as NPPP or international best practices.

The above provisions are not isolated clauses: they are a part of similar provisions in a whole part (Part xii) in NPAA titled 'liability of the authority'. This is quite explicable: the NPAA was designed to make the private sector complements NPA, rather than compete with it, having limited private sector players to 'participate' within the major sector of the economy that the port is.

### 3 7 Job security and rights

Concession, as stated in chapter three, caused massive loss of jobs in the port sector. This brings to question the commitment of the Federal Government "to respect the employment rights and opportunities of existing employees and to ensure that any redundancy or other social safety net issues are resolved before final project approval."<sup>1041</sup> The State is mandated to ensure that "all citizens, without discrimination on any group whatsoever, have the opportunity for securing adequate means of livelihood as well as adequate opportunity to secure suitable employment".<sup>1042</sup> It is also constitutionally required that governmental actions are required to be humane. While there are general provisions in the NPAA on the employees of NPA,<sup>1043</sup> it has no special provision on safety valves relating to the kind of massive job loss occasioned specifically by concession presumably due to the fact that concession on the scale it is being practised is not within the contemplation of the Act. What NPAA provides for is the job related issues arising from its statutory transition or return from a commercialised entity to

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<sup>1041</sup> Par [2].

<sup>1042</sup> Constitution 17(3) (a).

<sup>1043</sup> See for example S 11(2) which reads: (2) The Authority may, with the approval of the Minister, make regulations generally relating to the conditions of service of employees of the Authority, and in particular, but without prejudice to the generality of the foregoing, may make regulations relating to- (a) the appointment, dismissal, discipline, pay and leave of, and the security to be given by, the employees; (b) appeals by the employees against dismissal or other disciplinary measures; (c) the grant of pensions, gratuities and other retiring allowances to the employees and their dependants, and the grant of gratuities to the estates or dependants of deceased employees of the Authority; (d) the establishment and maintenance of medical benefit funds, superannuation funds and provident funds, and the contributions payable to and the benefits receivable from those funds

a full statutory corporation essentially in charge of its management and operations. The relevant section provides:

Notwithstanding the provisions of this Act, but subject to such directions as may be issued by the Authority, a person who immediately before the commencement of this Act held office in the Company shall be deemed to have been transferred to the Authority on terms and conditions not less favourable than those obtaining immediately before the commencement of this Act, and service in the Company shall be deemed to be service in the Authority for purposes of pension.<sup>1044</sup>

With the surrender of labour control to concessionaire for their operations, it has not been easy to implement the spirit, let alone the letter of the above provisions. More so, the policy objective of NPPP as earlier stated is to respect employment rights, which is not an outright general undertaking not to arbitrarily dismiss provided for in the case of transition from commercialisation by the above statutory provision.

### 3 8 Environment, safety and security

These three, essentially related being core public interest concerns, are taken together. Concerning environment, the NPAA provides that the NPA shall ensure environmental control and monitoring of oil and other pollution from ships.<sup>1045</sup> These environmental provisions of NPAA are restricted to pollution control and with particular reference to ship, while the NPPP projects a PPP objective including concession's as encompassing bigger environment issues such as climate change. Given the experience of Nigeria with massive environmental degradation by private players in another sensitive industry, the petroleum sector, legislations that have restricted approach to the environment would be grossly inadequate, to say the least.

A related public interest issue is security. Seaports are strategic gateway to the country. With private sector more active at the seaports, the relevant laws, if it had envisaged the transition, would have provided for how to deal with this

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<sup>1044</sup> S 125 (5).

<sup>1045</sup> S 7 (i).

situation. The general tenor of NPAA on security clearly shows this is not anticipated. Ditto for issues of safety, to a lesser extent. Where a particular government economic policy has new security and safety dimensions, the National Assembly is required to exercise its mandate to “make laws for the Federation or any part thereof with respect to the maintenance and securing of public safety and public order and providing and maintaining security of such supplies as may be designated by the National Assembly as essential supplies and services”<sup>1046</sup> as well as another providing that “the security and welfare of the people shall be the primary purpose of the government.”<sup>1047</sup>The next part will examine the statutory functions of NPA indicating aspects of port governance in the NPAA to further establish specifically that the Act does not provide for concession.

#### **4 Statutory functions and aspects of port governance**

It is trite that where a question arises as to the functions, duties or powers of a statutory authority or the legality of actions or inactions of such statutory authority or on the subject matter it deals with, the answer to such question must be found in the constituent Act that establishes the statutory authority.<sup>1048</sup>

The NPAA mandates the NPA to carry out a number of duties spanning regulatory, operational and landlord aspects of the port governance system .An important question of law is how this correlates with the NPA Service Charter description of the current port governance: “The concession approach cedes the hitherto operating rights in Nigerian ports to private sector while NPA still retains ownership of port land as well as keeping responsibility of licensing operators and regulating their activities.”<sup>1049</sup>

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<sup>1046</sup> S11 (1) the Constitution.

<sup>1047</sup> S14 (2) (b).

<sup>1048</sup> See Wade and Forsyth *Administrative Law* (2009) 178.

<sup>1049</sup> NPA Service Charter 1.

The 'hitherto 'operating rights' of the NPA which 'concession approach cedes' to the private sector are actually the statutory functions of NPA granted by the NPAA.

#### 4 1 *Statutory functions*

In terms of the NPAA,<sup>1050</sup> "the functions of the Authority shall be to-

- (a) provide and operate, in the ports, such facilities as appear to it best calculated to serve the interest of Nigeria;
- (b) maintain, improve and regulate the use of the ports;
- (c) ensure the efficient management of port operations, optimal allocation and use of resources, versification of sources of revenue and guaranteeing adequate returns on its investments, in order to contribute effectively to the wellbeing of the Nigerian society;
- (d) provide, for the approaches to all ports and the territorial waters of Nigeria, such pilotage services and lights, marks and other navigational services and aids, including cleaning, deepening and improving of all waterways;
- (e) provide facilities for- (i) berthing, towing, mooring, moving or dry-docking of ships, in entering or leaving a port or its approaches; (ii) the loading and unloading of goods or embarking or disembarking of passengers in or from a ship; (iii) the lighterage or the sorting, weighing, warehousing and handling of goods; and (iv) for the carriage of passengers or goods;
- (f) manage, supervise and control or take part in the management, supervision or control of any company or undertaking in which the Authority is interested, by reason of shareholding or otherwise and for that purpose appoint and reminder ate directors, accountants, other experts and gents;
- (g) provide and use appliances for the towage or protection, or salvage of life and property or for the prevention of fire within Nigeria and on vessels on the high seas;
- (h) supply water to shipping vessels;
- (i) control pollution arising from oil or any other substance from ships using the port limits or their approaches;
- (j) provide and operate such other services as the Minister may, from time to time, require; and
- (k) carry out such other activities which are connected with or incidental to its other functions under this Act.

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<sup>1050</sup> S 7.

The functions are accompanied with powers to “construct, execute, carry out, equip, improve, work and develop ports, docks, harbours, piers, wharves, canals, water courses, embankments and jetties”,<sup>1051</sup> invest and deal with the monies of the Authority not immediately required on such securities or in such investments and manner as may, from time to time, be expedient”;<sup>1052</sup> “erect, construct, lay down, enlarge, maintain and alter any building, erection and work which may seem directly or indirectly necessary or convenient for any of its purposes”,<sup>1053</sup> among others.<sup>1054</sup> While the functions are duty that must be done, powers are normally discretionary.<sup>1055</sup>

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<sup>1051</sup> S 8 (a) NPAA.

<sup>1052</sup> S 8 (b) NPAA.

<sup>1053</sup> S 8 (c) NPAA.

<sup>1054</sup> The other powers are to“(d) act as consultants and advisers in relation to ports and port operations in Nigeria or in any part of the world; (e) carry on the business of carrier by land or sea, stevedore, wharfinger, ware-houseman or lighter man or any other business desirable for the functions of the Authority; (f)acquire any undertaking of any registered business that affords facilities for the loading, unloading or warehousing of any goods in any port in Nigeria; (g) appoint, license and manage pilots of vessels; (h) insure all goods and consignments that are in the custody of the Authority; (i)control the erection and use of wharves in any port or its approaches; (j) buy any property, and sell, let, lease or otherwise dispose of any property, which appears to the Authority to be unnecessary for its purposes; (k) enter into agreement with any person for the supply, construction, manufacture, maintenance or repair by that person of any property, movable or immovable, necessary for the purposes of the Authority; (l)enter into agreement with any person for the operation or the provision of any of the port facilities which may be operated or provided by the Authority; (m) provide, appoint, license and regulate weighers and meters for measuring goods in any port in Nigeria; (n) reclaim, excavate, enclose, raise or develop any of the lands acquired by or vested in the Authority; (o) win sand from the ports and their approaches for such purposes as it may deem fit; (p) do anything for the purpose of advancing-(i) the skills of persons employed by the Authority; or (ii) the efficiency of the equipment of the Authority or of the manner in which that equipment is operated, including the provision by others of the facilities for training, education and research; (q) provide residential accommodation, houses, hostels and other like accommodation for its deserving employees on terms and conditions to be determined, from time to time, by the Authority, in order to promote the welfare of its employees; (r) purchase, take on lease or in exchange or otherwise acquire, hold, manage, work, develop the resources of and turn to account any estate, land, building, tenement, and other real property of any description, including leasehold or other tenure and whosoever situate and any interest therein and any right connected therewith, and in particular, to acquire or take over estates situated, in Nigeria; (s) grant loans to its deserving and needy employees for the purposes specifically approved by the Authority on such terms and conditions to be determined by the Authority at its discretion and in such a manner as is likely to increase the effectiveness of such employees in their service to the Authority, or otherwise for the purpose of the functions of the Authority; (t) provide loans to any of its employees for the purpose of -(i) building a house; (ii) purchasing a plot of land on which to build a house; and (iii) purchasing a house for the employee's use or for the residential use of the employee's family, on such terms and conditions to be determined by the Authority, at its discretion; (u) fabricate and repair

## 4 1 1 Overview of the functions

From the foregoing statutory functions, it is crystal clear that the NPA has the duty to perform commercial operations as well as regulatory functions and does not contemplate separation *vide* concession in the fashion of landlord model of port governance. This requires further elucidation

### 4 1 1 1 Provision and operation of facilities

The provision of the Act is explicit: to “provide and operate, in the ports, such facilities as appear to it best calculated to serve the interest of Nigeria”. To *provide* entails making available, while to operate entails taking charge and making use of them “to serve the interest of Nigeria” commercially, economically and otherwise. It is a statutory expression of the constitutional requirement that the State “provides adequate facilities for and encourage free mobility of people, goods and services”.<sup>1056</sup> The statutory function combines the duty to provide facilities with that of operating them: the two go simultaneously so that it is not enough to provide without operating or operate without providing. It is the first set of functions provided for and constitutes a curb on institutionalised separation of the twin roles. The NPA must provide and operate the requisite facilities whether infrastructure or superstructure needed for proper port governance.<sup>1057</sup> This is further emphasised in another statutory function to

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vessels, engines, boilers and all items being used in vessels; (v) carry on the business of ship builders, engineers and manufacturers of machinery; (w) purchase or otherwise acquire, take on lease, construct, maintain, work and use wet and dry docks, ships, quays, wharves, piers, warehouses, buildings, yards and every kind of property, structure, appliance and anything necessary for equipping, salvaging and assisting ships; (x) form, establish or incorporate subsidiaries or affiliate companies, whether wholly or jointly, with other persons or organisations for the purpose of carrying out any of the functions of the Authority; and (y) do such other things as are necessary for the successful performance of its functions under this Act. 9. Power to act through officer or agent, etc. The Authority may perform or exercise any of its functions or powers under this Act, other than the power to make regulations, through an officer or agent of the Authority or through any other person authorised by the Authority in that behalf.”

<sup>1055</sup> In terms of the Interpretation Act “Where an enactment confers a power or imposes a duty, the power may be exercised and the duty shall be performed from time to time as occasion requires.” See s 10.

<sup>1056</sup> S 11.

<sup>1057</sup> Infrastructure include quay walls, access channel, breakwaters, locks, while superstructure include cranes sheds, container gantries, among others.



provide facilities for-(i)berthing, towing, mooring, moving or dry-docking of ships, in entering or leaving a port or its approaches; (ii) the loading and unloading of goods or embarking or disembarking of passengers in or from a ship; (iii) the lighterage or the sorting, weighing, warehousing and handling of goods; and (iv) for the carriage of passengers or goods.<sup>1058</sup>

It may not only provide but also operate the facilities in provision of services for example by way of the power to “carry on the business of carrier by land or sea, stevedore, wharfinger, warehouseman or lighter man or any other business desirable for the functions of the Authority.”<sup>1059</sup> Resort to concession on the basis of plunging infrastructural deficit cannot be on account of the law not granting the mandate to NPA to source resources to provide such facilities where the NPA lacks the needed funding. The NPA, in fact, has the mandate to borrow or raise capital from both government and non-government to fulfill its functions including for the provision of facilities. In terms of NPAA

The Authority may, with the approval of the Minister, borrow money or raise capital, otherwise than from the Government, by the issue, in such form as may be approved, of stock, bonds, promissory notes, loan certificates or other documents of title, for all or any of the following purposes, that is- (a) the performance of its functions under this Act; (b) the provision of its working capital; (c) the redemption or repayment of any capital raised or money borrowed, which the Authority is required or entitled to redeem or repay; and (d) the provision of money for meeting any expenditure which is properly chargeable to capital account.<sup>1060</sup>

It may also invest all or any part of such monies or other capital on such facilities and related port services,<sup>1061</sup> including to effectuate its power ‘to acquire any

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<sup>1058</sup> S7 (e) NPAA.

<sup>1059</sup> S8 (e) NPAA.

<sup>1060</sup> S16 (1).In terms of s17, there is a similar provision for borrowing from government sources for the same reasons s : “The Authority may borrow money, other than money borrowed by the Government for the exclusive purpose mentioned in section 16 (4) of this Act, or raise capital from the Government in such manner and on such terms and conditions as the Minister may approve for all or any of the purposes mentioned in section 16 (l) of this Act. See also s18.

<sup>1061</sup> S 19.

undertaking of any registered business that affords facilities for the loading, unloading or warehousing of any good in any port in Nigeria,"<sup>1062</sup> or to carry on the business of carrier by land or sea, cargo, warehouseman and other businesses desirable for its functions under the NPAA."<sup>1063</sup>

#### **4 1 1 2 Maintenance, improvement and regulation of ports**

Three functions, closely fused together, mandate the NPA "to maintain, improve and regulate the port."<sup>1064</sup> Maintenance and improvement as used here would not only imply good asset management and sound infrastructural and superstructural practices but would also amount to general management categories that ensure overall betterment in standards of the ports system as a whole. In the former sense maintenance will ensure that the ports are protected, for example from siltation of channels, defective and aged equipment and decaying facilities while improvement entails, for example, rehabilitation. In the later sense both will entail continuous and continual modernization and standardisation of ports to meet up with national and international standards in a fast globalizing and competitive maritime world. Both senses require effective regulation. To that effect, on one hand ,the NPA has the power to "construct, execute, carry out, equip, improve, work and develop ports, docks, harbours, piers, wharves, canals, water courses, embankments and jetties";<sup>1065</sup> and to "erect, construct, lay down, enlarge, maintain and alter any building, erection and work which may seem directly or indirectly necessary or convenient for any of its purposes,"<sup>1066</sup> or "win sand from the port and their approaches for such purposes as it may deem fit."<sup>1067</sup> On the hand, it has the power to institute regulating regime on such activities for example, to "control the erection and use of wharves in any port or its approaches."<sup>1068</sup> For that and related purposes, the Authority may make bye-laws for the control and management of the wharves and premises vested in or in the

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1062 S 8 (f).  
1063 S 8 (e).  
1064 7 (b).  
1065 S 8 (a).  
1066 S 8 (c).  
1067 S 8 (o).  
1068 S 8 (i).

possession of the Authority and the maintenance of good order in the wharves and premises..."<sup>1069</sup> It has thus, pursuant to that provision, been given mandate to make requisite byelaws in exercise of its regulatory authority.<sup>1070</sup>

One take on this statutory function and the associated provisions is the fusion of regulation with other functions in a way that constitutes a challenge to outright separation of major aspects of the statutory functions of NPA concerned.

#### **4 1 1 3      Ensure efficient management of operations**

The NPA is also mandated to “ensure the efficient management of port operations, optimal allocation and use of resources, diversification of sources of revenue and guaranteeing adequate returns on its investments, in order to contribute effectively to the wellbeing of the Nigerian society”.

This is a requirement that NPA must not only operate the port but must do so with efficiency-operational efficiency, financial efficiency, efficiency in investment, technical efficiency et al. It entails efficiency of personnel and facilities captured in the power to “do anything for the purpose of advancing- (i) the skills of persons employed by the Authority; or (ii) the efficiency of the equipment of the Authority or of the manner in which that equipment is operated, including the provision by others of the facilities for training, education and research.”<sup>1071</sup> Specifically, it shall appoint “persons as employees as it may deem necessary for the efficient performance of its functions under or pursuant to this Act.”<sup>1072</sup> It shall also ensure

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<sup>1069</sup> S40 (1).

<sup>1070</sup> The authority ,”in particular may, without prejudice to the generality of the foregoing power, make bye-laws for all or any of the following purposes - (a) regulating, declaring and defining the wharves, docks, piers and places vested in or in the possession of the Authority on and from which goods shall be landed and shipped; (b) regulating the manner in which and the conditions under which the loading and discharging of ships shall be carried out; (c) regulating the use of any shed, warehouse and railway vested in or in the possession of the Authority; (d) the exclusion and removal from the premises of the Authority of idle and disorderly or other undesirable persons and trespassers; (e) regulating the conduct of persons employed on the wharves and premises vested in or in the possession of the Authority; (f) regulating any ferry service maintained by the Authority; (g) for the management of the lighthouses of the Authority; and (h) setting up pollution control guidelines and monitoring oil spillage, dumping of waste and garbage by ships arriving at the ports, wharves and jetties.” See s 40(1) (a).

<sup>1071</sup> S 8(i)

<sup>1072</sup> S11 (1).

“diversification of its sources of revenue”, for example, through different businesses it has general mandate to carry out.<sup>1073</sup> It could also be through the specific business to “fabricate, or repair vessels, engines, boilers and all items being used in the vessels”<sup>1074</sup> or vide its power to “carry on the business of ship builders, engineers and manufacturers of machinery.”<sup>1075</sup> For the same purpose it may “buy any property, and sell or let or otherwise dispose of any property which appears to the Authority to be unnecessary for its purposes.” <sup>1076</sup> It may also “purchase or otherwise acquire, take on lease, construct, maintain, work and use wet and dry docks, ships, quays, wharves, piers, warehouses, buildings, yards and every kind of property, structure, appliance and anything necessary for equipping, salvaging and assisting ships”<sup>1077</sup>All these indicate that NPA is an entity statutorily designed to engage in commercial services and operations for investment and engage in investment by commercial services and operations. In doing all these commercial services and in all its investment portfolios it must ensure “adequate returns on investment”<sup>1078</sup> This, as it were, is all, “in order to contribute effectively to the wellbeing of the Nigerian society” effectively in line with the constitutional provision to the effect that “the security and welfare of the people shall be the primary purpose of the government.”<sup>1079</sup>

#### **4 1 1 4 Provision of navigational services**

The NPA shall “provide, for the approaches to all ports and the territorial waters of Nigeria, such pilotage services and lights, marks and other navigational services and aids, including cleaning, deepening and improving of all waterways.”<sup>1080</sup> This is a function relating to technical-nautical services geared at good navigation for sundry purposes such as safety in the approaches to the ports, being “any navigable channel declared to be an approach to a port under

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<sup>1073</sup> See for example s 8 (e).

<sup>1074</sup> S 8 (u).

<sup>1075</sup> S 8 (v).

<sup>1076</sup> S 8 (j).

<sup>1077</sup> S 8 (w).

<sup>1078</sup> S 7 (c).

<sup>1079</sup> S 14 (2) (b).

<sup>1080</sup> S 7 (d).

section 30 of this Act<sup>1081</sup> as well as the territorial waters of Nigeria.<sup>1082</sup> The NPA is granted powers to provide pilotage services through its own pilots as well as through licencing non-NPA pilots to be used by ships entering and departing the ports as well as while making use of the ports in terms of its powers to “appoint, licence and manage pilots of vessels”<sup>1083</sup> To that end, the NPA follows the order of the Minister who may vide a regulation or “by order in the Gazette, establish a pilotage district (a) in any port; or (b) in the approach to any port; or (c) in the territorial waters of Nigeria; or (d) in the exclusive economic zone of Nigeria.”<sup>1084</sup> Furthermore, a ministerial order may “(a) provide that, in any pilotage district or in any part of a pilotage district, pilotage shall be compulsory; and (b) define the limits of any pilotage district, distinguishing, where pilotage is compulsory in a part of the district, the part of the district in which pilotage is compulsory”.<sup>1085</sup> As a general rule, in places where pilotage is compulsory only NPA and licensed pilots shall be employed by ship to navigate the waters.<sup>1086</sup> For the NPA, apart from

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<sup>1081</sup> S 127. Section 30 referred to here empowers the Minister to declare ports and approaches to the port

<sup>1082</sup> In terms s1(1) of the Territorial Waters Act LFN T5 2004:” The territorial waters of Nigeria shall for all purposes include every part of the open sea within twelve nautical miles of the coast of Nigeria (measured from low water mark) or of the seaward limits of inland waters.”

<sup>1083</sup> S 7 (g).

<sup>1084</sup> S 41 (1).S 41(3) says such may also be made vide regulation. The NPAA also empowers the NPA to make general regulations on pilotage: 53. Power of the Authority to make regulations for pilotage districts Subject to the provisions of this Part of this Act, the Authority may, with the approval of the Minister, make regulations for any pilotage district for all or any of the following purposes - (a) exempting any class of ship from compulsory pilotage; (b) prescribing the occasions on which a ship being moved within a port which forms part of a pilotage district in which pilotage is compulsory, shall not be deemed to be navigating in the port; (c) providing that, in respect of any class of ship prescribed in the regulations, only Authority pilots shall undertake pilotage; (d) determining the qualifications to be required of licensed pilots, and for the grant of licences to pilots; (e) providing generally for the good government of Authority pilots and licensed pilots; (f) providing for the punishment for the breach of any regulation made by the Authority for the good government of pilots by the infliction of fines not exceeding N5,000 (g) prescribing the fees which shall be payable on the grant or renewal of a licence; (h) providing for bonds (the penalty of which shall not in any case exceed N10,000) to be given by pilots for the purpose of the provisions of section 55 of this Act limiting a pilot's liability; and (i) generally regulating pilotage in a pilotage district.” See s 53. One relevant regulation is Nigeria Port Authority Act (Pilotage) Regulation LN 2,1961 according to which, in a "pilot" means a person not belonging to a ship who has the conduct thereof” See s 2.

<sup>1085</sup> S 41 (2).

<sup>1086</sup> See s 42. The relevant section reads: “Obligations where pilotage is compulsory (1) A ship, other than an excepted ship, shall, while navigating in a pilotage district in which pilotage is compulsory, be under the pilotage of - (a) an Authority pilot; or (b) a licensed pilot of the district, for the purpose of entering, leaving or making use of the port in the district. (2) A

being a public interest service, pilotage and other navigational services are also economic services for which ships must pay the necessary fees.<sup>1087</sup>

#### **4 1 1 5 Management of business enterprises**

The NPA is statutorily mandated to functionally “manage, supervise and control or take part in the management, supervision or control of any company or undertaking in which the Authority is interested, by reason of shareholding or otherwise and for that purpose appoint and remunerate directors, accountants, other experts and agents”<sup>1088</sup>. This allows the NPA to establish subsidiaries or co-own a company by way of joint ventures to achieve or give effect to any of its functions. In other words, it may form, establish or incorporate subsidiaries or affiliate companies, whether wholly or jointly, with other persons or organisations for the purpose of carrying out any of the functions of the Authority”.<sup>1089</sup>

In both instances NPA is to be in a position to manage, supervise and control to the point it can “appoint and remunerate directors, accountants, other experts and agents” of the said subsidiary or joint ventures. In that case it will be in charge to ‘manage’ and ‘operate’ the ports. Such other takings could be used to ‘carry on the business of carrier by land or sea, stevedore, wharfinger, warehouseman or lighter man or any other business desirable for the functions of the Authority.”<sup>1090</sup> Essentially this is also a core commercial function that allows NPA to manage and operate the port and its reference to ‘agent’ in the description of this function is an indication that this may be one of the means adopted to act through separate persons, whether natural or corporate-and that the power of NPA to

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ship being moved within a port which is or forms part of a pilotage district, shall be deemed to be a ship navigating in a pilotage district, except so far as may be pro-vided by regulations made by the Authority under this Part of this Act.” See s42 (2). S42 (3) then lists a number of exempted ships which may not comply with this section and it includes ships owned and operated by the NPA.”

<sup>1087</sup> In terms s 62 of NPAA under a section titled pilotage dues and fees, it is provided: “Subject to the provisions of this Part of this Act, the Authority shall levy on any ship, including a ship under arrest -(a) such ship dues and rates for lighthouse, conservancy, buoyage, anchorage, mooring buoy, buoys oil pollution control, berthing and other services rendered to a ship; and (b) such pilotage dues, as the Authority may, by regulations made under section 71 of this Act, prescribe”.

<sup>1088</sup> S 7 (f).

<sup>1089</sup> S 8(x).

<sup>1090</sup> S 8 (e).

delegate should be in line with and in the context of its managerial and operational function in the ports.<sup>1091</sup>

#### **4 1 1 6 Provision of safety measures and appliances**

This statutory function, another set of technical nautical services, is to the effect that the NPA shall “provide and use appliances for the towage or protection, or salvage of life and property or for the prevention of fire within Nigeria and on vessels on the high seas.”<sup>1092</sup> Here it has the mandate not only to provide but also to use appliances for towage, protection and salvage of life and property. The NPA defines salvage as “the property which has been recovered from a wrecked vessel, or the recovery of the vessel herself.”<sup>1093</sup>

In the statutory provision, the sense in which it is used includes the latter sense: the recovery of vessel but also involves salvage of life and other properties. In terms of the Merchant Shipping Act, salvage operation is ‘any activity undertaken to save a vessel or any other property in navigable waters or in any other waters’<sup>1094</sup> and it also involves “salvage of human life.”<sup>1095</sup> These legal constructions are more in tune with the provision of the NPAA on salvage, which also means “all expenses properly incurred by the salvor in the performance of salvor services.”<sup>1096</sup> Towages are “charges for the services of tugs assisting a ship or other vessels in ports or other locations; the act of towing a ship or other objects

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<sup>1091</sup> Note the use of the word agent in this core function of the NPAA. It is in the context of this function that NPA, by power granted it, “may perform or exercise any of its functions or powers under this Act other than the power to make regulations, through an officer or agent of the Authority or through any other person authorized by the Authority in that behalf”. This power is subject to the statutory function of NPA to manage and operate the ports. In other words, it does not strip NPA of its functions or cedes a set of core functions to a private person but may act, in general, through the agency of a subsidiary it owns in totality or co-owns but manage, supervise and control or at least allow such private persons participate complementarily in port activities without stripping the NPA of its core mandate. In that case its ‘management’ and ‘operational’ mandates are not compromised or substantially watered down.

<sup>1092</sup> S 7 (g).

<sup>1093</sup> NPA Definition of Operational Terms  
<http://www.nigerianports.org/dynamicdata/uploads/operationalterm.pdf> (Accessed on 20 - 17).

<sup>1094</sup> S 387.

<sup>1095</sup> S 395.

<sup>1096</sup> S 387 Merchant Shipping Act Cap LFN 2004.

from one place to another.”<sup>1097</sup> Here also it is used in the letter sense: the act of towing a ship or other objects from one place to another. For both services, NPA charges salvages and towages and other related rates. In the same vein, the NPA has the mandate to render services and charge rates “for the use of any ship or lighter, or any engine or boat for the extinction of fire, belonging to or maintained by the Authority”<sup>1098</sup> as it may for “the towing of, and rendering assistance to, any ship, whether leaving or entering a wharf, in possession of the Authority or not, being within or without any port.”<sup>1099</sup>

#### **4 1 1 7      Supply of water to vessels**

The NPA has the duty “to supply water to shipping vessels”<sup>1100</sup>, being one of the ancillary functions of a typical port which though is generally optional but may be imposed by the port Authority for safety reasons.<sup>1101</sup> This may explain why this ancillary role of supplying water is provided as a core function of NPA. For this purpose, rates may be charged “for water supplied by the Authority.”<sup>1102</sup>

#### **4 1 1 8      Environmental control**

The NPA is also mandated to “control pollution arising from oil or any other substances from ships using the port limits or their approaches”<sup>1103</sup> The word control here carries both operational and regulatory implications. The NPA shall control by ensuring that port users particularly the ship maintain sound environmental behavior and avoid conduct or practices that may pollute the environment. It shall also exercise this control by rendering environmental services that “may help control pollution arising from oil” or any other land and marine sources. In the latter case, it may charge rates “for the removal of waste or refuse from any ship”<sup>1104</sup> and other sources. In the former case, the NPA may

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<sup>1097</sup> *Ibid.*

<sup>1098</sup> S 65 (f).

<sup>1099</sup> S 65 (g).

<sup>1100</sup> S 7(h)

<sup>1101</sup> Hooydonk et al *European Seaport Law 118* .See also.

<sup>1102</sup> S 5 (h).

<sup>1103</sup> S 7 (i).

<sup>1104</sup> S 65(i).



generally charge levies” for monitoring port environmental pollution control”<sup>1105</sup> especially from oil. Oil in Navigable Act which vests much of the environmental responsibility for control of oil pollution in the harbor master mandates the Port Authority to provide necessary facilities for pollution control.<sup>1106</sup>

#### **4 1 1 9 Provision of other services**

The NPAA grants the NPAA right to “provide and operate such other services as the Minister may, from time to time, require”<sup>1107</sup> As earlier pointed out, this is a mandate for the Minister to add to the services; it is not a Mandate to her, let alone the NPA, to reduce the functions particularly by stripping the NPA of a substantial bundle of commercial and operational services.

The omnibus provision is an explicit licence for possibility of additional services in a way that can take care of contingencies and exigencies .It is also an implicit curb on substituting services not contemplated by the NPAA with those within its ambit or contemplation. In this way it correlates with the last statutory function which allows the NPA to “carry out such other activities which are connected with or incidental to its other functions under this Act”<sup>1108</sup> This is an open invite carefully qualified with the proviso: connected with or incidental to other functions. To fall under this statutory head, ‘other activities’ that the NPA may carry out must be either connected with or incidental to other functions. The objective criteria for this appears to have been provided by the power to “do such other things as are necessary for the successful performance of its functions under this Act.” In other words, it is not enough for the “other activities” to be connected or incidental to the functions, it should also be necessary for successful outcome in the performance of the statutory functions.

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<sup>1105</sup> S 65 (j).

<sup>1106</sup> See generally S 10 and S10 Oil in Navigable Waters Act Cap 06 LFN 2004

<sup>1107</sup> S 7 (j).

<sup>1108</sup> S 7(K) In terms of the Interpretation Act :”An enactment which confers power to do any act shall be construed as also conferring all such other powers as are reasonably necessary to enable that act to be done or are incidental to the doing of it. Infrastructure include quay walls, access channel, breakwaters, locks, while superstructure include cranes sheds, container gantries, among others” S10 (2).

## 5 NPAA and aspects of port governance

Apart from establishing that the NPAA grants the NPA functions spanning landlord, operational/ commercial and regulatory duties, one notable thread in all the functions is the intricate manner in which one function connects with the other so that attempts to separate or detach a bundle of operational functions from the NPA and transfers same to the private sector as concession does cannot be accommodated by the clear letters of the NPAA. The description of the statutory duties of ports by the NPA Charter was cited in chapter 3.<sup>1109</sup>

When the description is compared with the statutory functions above cited and described, a gulf of differences is easily discernable. What the charter calls “statutory mandates” are only parts of the land lord and regulatory functions. In addition, a wholistic reading of the NPA functions(and powers)<sup>1110</sup> in terms of the landlord, regulatory and operational aspects in the context of the whole Act does not support such an outcome as is further explained below.

### 5 1 Landlord function

The landlord function is essentially about control over the landside and waterfront of the port and the associated management issues. It includes issues relating to ownership, management and provision of ports lands, superstructure and infrastructure. It is one of the key issues in concession which include transfer of possession of port lands and landed properties to concessionaire. It is also noteworthy that concession policy confined the NPA to landlord and technical regulator role. As the landlord, the NPAA vests NPA with lands and landed properties in the port area listed in Schedule Three to the Act.<sup>1111</sup> It is also vested

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<sup>1109</sup> See Chapter 3 par [5 3 3] .The NPA Service Charter to reiterate provides as follows:” Ownership and administration of land and water port systems, planning and development of port operational infrastructure, leasing and concession of port infrastructure and setting, benchmarking for tariff structure, nautical and harbor operations and management, responsible for hydrographic surveys, marine incident and pollution control, maintenance of safety and security at the common user areas, enacting port regulations and bye laws as well as monitoring of operations and enforcement of relevant sections of respective agreements ‘PA Service Charter 1.

<sup>1110</sup> See Par [4 1] above for the functions and fn 81 above.

<sup>1111</sup> It includes hundreds of swathes of land and landed properties in all ports of Lagos, Port Harcourt, Calabar and others.

with the marine side of ports and the lands beneath and surrounding same.<sup>1112</sup> This is in the context of its statutory control of the port declared by the Minister by virtue of the powers conferred on her by the Act.<sup>1113</sup>

Concerning the land side of the ports, the NPA is granted the mandate to acquire land for the purposes of its functions under the Act. It has the power to “purchase, take on lease or in exchange or otherwise acquire, hold, manage, work, develop the resources of and turn to account any estate, land, building, tenement, and other real property of any description, including leasehold or other tenure and wheresoever situate and any interest therein and any right connected therewith, and in particular, to acquire or take over estates situated, in Nigeria.”<sup>1114</sup> Where necessary, the president may exercise the power of eminent domain by acquiring land vested in another person for the purpose of the NPA where the later fails or is unable to acquire the land.<sup>1115</sup> Therefore “when a land or building has been acquired or the rights to it has been revoked, as provided in this section, the President may (a) vest the land or building in the Authority by means of a certificate under the hand and seal of the Chief Federal Lands Officer, to the effect that the land or building has been made over to the Authority; or it may (b) as the case may require, direct that a right of occupancy in respect of the land or

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<sup>1112</sup> In terms of Land Vesting Act LFN 2004:“For the avoidance of any doubt and notwithstanding anything to the contrary contained in the Constitution of the Federal Republic of Nigeria or any enactment, law or vesting instrument, the title to all the lands within 100 metres limit of the 1967 shoreline of Nigeria and any other land reclaimed from any lagoon, sea or ocean in or bordering Nigeria or of oceans bordering the Federal Republic of Nigeria shall, to the exclusion of any right accruing to anybody corporate or unincorporated or industry, vest in the Federal Government of Nigeria without any further assurance than this Act.”

<sup>1113</sup> See s 30 NPAA.

<sup>1114</sup> S 8(r).

<sup>1115</sup> In terms of s 24: “(1)When there is any hindrance to the acquisition by the Authority of any land or building required for carrying into effect any of the provisions of this Act, the President may- (a) on the application of the Authority and after such inquiry as he may think fit, declare that the land or building is required for the services of the Authority; and (b) direct that action be taken under the provisions of the Land Use Act for acquiring the land or building for the Federal Government or, as the case may require, for revoking any rights thereto, and for determining the compensation to be paid to the parties interested. [Cap. L5.] (2) On the making of a declaration under subsection (1) of this section, the land to which it relates shall be deemed to be land required for a public purpose within the meaning of the Land Use Act. [Cap. L5.]” The constitution requires payment of compensation for such acquisition. The NPAA provides, to that end, that the compensation must be paid, in the first instance, by the Federal Government to be reimbursed by NPA to the Federal Government. See s 24(4).

building be granted to the Authority.”<sup>1116</sup>To that end, the NPA may use the land or building so acquired for any purpose connected with its statutory functions.<sup>1117</sup> It is imperative that all authorities, whether public or private, respect or give effect to this right of the NPA to and over the lands.<sup>1118</sup>

This is one aspect of port land or asset governance. The other aspect relates to the power to lease out or otherwise dispose of the land or associated assets to private entities. It is noteworthy that there is no reference whatsoever to the right of NPA to lease out its lands or assets in the whole of the statutory statement of functions.<sup>1119</sup> The only reference to the power of NPA to lease out its land or asset in the whole corpus of its discretionary statutory powers is in form of its power to “let, lease or otherwise dispose of any property which appears to the Authority to be unnecessary for its purposes.”<sup>1120</sup>

This means as a general rule the NPA is not required to lease out its asset as a matter of its statutory function, and where it exercises its discretionary power to do so it is when such property is “unnecessary for its purposes” or not required for its functions and powers. This is more so when such properties are vested in it or acquired to be used by the Authority itself “for any purposes connected with its functions under this Act.”<sup>1121</sup>

Hence, where NPA chooses to “enter into agreement with any person for the operation or the provision of any of the port facilities which may be operated or provided by the Authority agreement ”<sup>1122</sup> or “enter into agreement with any person for the supply, construction, manufacture, maintenance or repair by that person of any property, movable or immovable, necessary for the purposes of the

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<sup>1116</sup> S 24 (3).

<sup>1117</sup> S 24 (6).

<sup>1118</sup> S 24 (5).

<sup>1119</sup> See Par. [4 1 1] above.

<sup>1120</sup> See s8(j)

<sup>1121</sup> S 24 (6).

<sup>1122</sup> S8 (l).See Par 5453 To that end NPA enters into agreements with private entities such as Joint Ventures agreements( discussed in Par 5453 above) specifically provided for in s 7(f) of the NPAA. See further par 5 3 above.

Authority”,<sup>1123</sup> it cannot be vide leases which is about about transfer of possession of assets to private entities because NPA is mandated to grant leases only in respect of assets that are “unnecessary for its purposes.” Are the cargo-handling facilities, facilities for berthing and others concessioned out to concessionaires not necessary for NPA’s purpose? In fact they are not only necessary facilities for a typical port as seen in chapter three, they are in fact critical and essential facilities. They are in fact specifically mentioned in the statutory statement of functions.<sup>1124</sup> Therefore the argument by Federal Government of Nigeria (for example through NIIMS and official documents of NPA) that port concession were done on the basis of provisions relating to leases in the NPAA as well as the cited sections on agreements are ,with due respect, misplaced. Lease is a land or asset use contract and in the case of ports does not characteristically include an obligation for core port services while concession on the other hand combines port service obligation with an obligation for execution of construction or works.<sup>1125</sup> For the purpose of temporary possessory interest, in a concession there is a grant of right to the asset as in transfer of possession in lease, which is one thing they both have in common.<sup>1126</sup> It has earlier been explained transfer of possession of assets by way of leasing for a stated period is an essential step of concession being implemented in the ports.<sup>1127</sup> The point being made here is that the of NPA power to make agreements, whether operational or otherwise, or the mandate to grant lease either in the name of concession or otherwise does not include the power to

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<sup>1123</sup> S8(k) .The power of the NPA to enter into agreements arises from its corporate personality. NPA had always entered into agreements pre-concession which are within its legal mandate for example for the purpose of supply of equipment and enhancing technical operations and traing all of which must not violate the provisions of NPAA.For example NPA in terms of NPAA is required to “do anything for the purpose of advancing- (i) the skills of persons employed by the Authority; or (ii) the efficiency of the equipment of the Authority *or of the manner in which that equipment is operated, including the provision by others of the facilities for training, education and research*”(emphasis mine.) .S8(p) NPAA. See further par 5423.

<sup>1124</sup> See for example s 7 (e).

<sup>1125</sup> See generally Hooydonk et I *European Seaport Law* 151.

<sup>1126</sup> Leasehold or lease is an agreement between a landlord and a tenant for transfer of a possessory interest in land or property .See Schaffer and Wietecki *Real Estate Law for Paralegals* (2009) 72.Compare with the definition of concession in S36 ICRCA. See further Par 6.2 below.See also par 523,525 above.

<sup>1127</sup> See for example par 5221.See also par. 5452

make agreements that are not legally defensible by way of combined readings of the relevant sections of the NPAA referred to above.<sup>1128</sup>

The NPA's provision which is relied on for issue of leases to implement concession is titled 'Restrictions on Alienation of Land' and reads:

The Authority shall not, without the approval in writing of the President, alienate, mortgage, charge or lease any immovable property which has been vested in the Authority or in respect of which a right of occupancy has been granted to the Authority. (2) Notwithstanding the provisions of subsection (1) of this section, the Authority may alienate, charge or mortgage any immovable property for a period not exceeding five years and may terminate, revoke or release any mortgage of, charge on or lease of any immovable property vested in it.<sup>1129</sup>

Sub-section 1 of the above provision prohibits leasing, mortgaging, alienation and charging of immovable property vested in the NPA without the approval of the president in writing. Subsection 2 says NPA may alienate, mortgage or lease such properties for a period not exceeding five years.<sup>1130</sup> The condition under which this may be done for leasing is provided in the NPPA: the power is in the context of the power to "let, lease or otherwise dispose of any property which appears to the Authority to be unnecessary for its purposes." This is part of a general trend of strict protection of the NPA's properties being public asset subject to the strict public sector scrutiny and accountability.<sup>1131</sup> This is in line with established norm for interpreting statutes .As per the case of *Oyeniyi v. Adeleke*,<sup>1132</sup> it was held:

"It is a cardinal rule of interpretation of statutes that a subsection of a legislation and any section thereof must be construed not only on itself or by reference to the section but to the whole sections constituting the statute as a whole."<sup>1133</sup>

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<sup>1128</sup> See for example fn 1120,fn 1122 and and fn 1123 above.

<sup>1129</sup> S 25.

<sup>1130</sup> Under concession the contract period exceeds 5 years in most and many are up to 25 years as explained in chapter 3.

<sup>1131</sup> See for example, s92 and 94 NPA for the protection afforded NPA's property in case of suit. (2008) Vol. 41 WRN 321 at 134 lines 20 - 30 (CA) Per Muhammad JCA.

<sup>1132</sup> See also. See *Yesufu & Anor. v. Ojo & Ors.* (1958) 3 FSC 106; (1958) SCNLR 430, *Krans Thompson Org. v. NIPSS* (2005) 10 WRN 127; (2004) 17 NWLR (Pt. 901) 44." Similarly in

As part of the NPA control over its assets and the ports areas generally it has also been granted the landlord power to control exit and entry into the ports quite in line with International Law. The NPAA is clear on this: “(e)xcept with the prior approval of the Authority, no ship shall enter a port or an approach to a port in Nigeria, except as may be permitted by and in accordance with the terms of an entry issued by the Authority in respect of that ship.”<sup>1134</sup> To that end, the NPAA requires that “the owner of every ship intending to enter any port in Nigeria for any purpose whatsoever shall, not later than thirty days before the departure of the ship for Nigeria, furnish to the Authority a statement in writing.”<sup>1135</sup> Such written statement shall include the name and physical particulars of the ship, the name of port or ports of sailing and estimated time of departure for Nigeria, the name of port or ports of discharge in Nigeria with the estimated date of arrival in Nigerian ports and detailed information (including tonnage) in respect of the cargo carried in the ship<sup>1136</sup>. The NPA shall, on receipt of the statement, issue to the owner or agent of the owner of the ship, an entry notice stating the port or ports in the country to which the ship may proceed for any purpose and the date on which the ship may enter a port or any approach to a port in Nigeria.<sup>1137</sup>

## 5.2 Operational function

The first operational duty provided in NPAA is to “provide and operate, in the ports, such facilities as appear to it best calculated to serve the interest of Nigeria”<sup>1138</sup> combines both the landlord and operational aspect at once. These are clear in their meanings.<sup>1139</sup> To that effect, it is to carry on the business of

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the case of *The State V. Governor of Osun State. (2006) LPELR-11771 (CA)* it was held: "In construing a statute, every word or clause in an enactment must be read together; not in isolation but with reference to the context and other clauses in the statute in order, as much as possible, not only to reach a proper legislative intention, but also to make a consistent meaning of the whole statute."

<sup>1134</sup> S 116.

<sup>1135</sup> S 114.

<sup>1136</sup> 114(a)-(b).

<sup>1137</sup> S115. See also s57 and 59 NPAA.

<sup>1138</sup> S 7 (a).

<sup>1139</sup> According to the case of *Okotieh- Eboh v Manager (2004) LPELR-2502(SC)* "According to the canons of interpretation of statutes, it is a cardinal principle that where the ordinary plain meaning of the words used in a statute are very clear and unambiguous, effect must be given to those words without resorting to any intrinsic or external aid: See *Awolowo v.*

carrier by land or sea, stevedore, wharfinger, warehouseman or lighter man or any other business desirable for the functions of the Authority.”<sup>1140</sup> It also has the power to carry on the business of ship builders, engineers, boilers and manufacturers of machinery.<sup>1141</sup> It may also set up enterprises to ‘fabricate and repair vessels, engines, boilers and other businesses relating to items used in vessels’<sup>1142</sup>

All these may be done directly vide the relevant structure in NPA or by exercise of its power to form, establish or incorporate subsidiaries or affiliate companies, whether wholly or jointly, with other persons or organisations for the purpose of carrying out any of the functions of the Authority.<sup>1143</sup> It may also be done by acquiring “any undertaking of any registered business that affords facilities for the loading, unloading or warehousing of any goods in any port in Nigeria.”<sup>1144</sup> All this must be done while the NPA exercises its function to “manage, supervise and control or take part in the management, supervision or control of any company or undertaking in which the Authority is interested, by reason of shareholding or otherwise and for that purpose appoint and remunerate directors, accountants, other experts and agents.”<sup>1145</sup> The NPA operational aspect as it correlates with other aspects is embodied in the preamble to the NPAA which explicitly describes the object of the Act. The object of statute helps to reveal the intent being its legal constructions. As per the case of *Obomhense V Erhhon*<sup>1146</sup> it was established as follows:

It has long been accepted that in construing a statutory provision, its object which is of paramount importance; is always relevant. It is for this reason that the mischief aimed at by the provision construed is relevant to explain, but not to change what was said by the law maker.

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*Shagari (1979) 6-9 SC 73, Adejumo v. Military Governor, Lagos State (1972) 3 SC 45, A.-G., Bendel State v. A.G., Federation (1982) 3 N.C.L.R. 1.*

<sup>1140</sup> S 8 (e) NPAA.

<sup>1141</sup> S 8(v) NPAA.

<sup>1142</sup> S 8 (u).

<sup>1143</sup> S 8 (x).

<sup>1144</sup> S 8 (e).

<sup>1145</sup> S 7 (f).

<sup>1146</sup> (1993) LPELR-2191(SC). Per Karibi Whyte, J.S.C. (Pp. 27-28, Paras. A-B).



The Nigerian Supreme Court has stressed the importance of preamble in the interpretation of statutes.<sup>1147</sup> Therefore quite helpful in the construction of the object is the preamble, being an introductory statement in Statutes and other instrument explaining the basis of the law and indicating the inconvenience which the statute is designed to remedy.<sup>1148</sup> It is an acclaimed maxim in the ordinary course of administration of justice that the preamble of an Act is a key to open the mind of the makers as to the mischief which is meant to be remedied and the object to be accomplished by the provision of the statute.<sup>1149</sup> On this basis when the preamble says the NPAA is an “An Act to establish the Nigerian Ports Authority with the functions of providing and operating necessary facilities in ports and maintaining, improving and regulating the use of the ports; and to provide for matters connected therewith,” it helps in appreciating the object and tenor of the Act. The preamble not only presents the position of the NPAA as that which is created as a managing, operating and regulating ports but one in which all the functions are connected or linked together. It also reveals that NPA is created for the purpose of “providing and operating necessary facilities in ports”- that is facilities essential and necessary for running a typical port. This correlates with the point being made that the NPA is generally required not to lease out or concession facilities that are “necessary for its purpose”. In addition, the preamble also helps to highlight the mischief the Act seeks to remedy. The fact that NPA was a commercial enterprise and was returned back to its pre-commercial status is, as previously reiterated, a testimony to the fact that it was not intended to tilt more to an advanced form of private participation than

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<sup>1147</sup> See *Federal University of Technology, Minna & Ors v. Adama & others* (2013) LPELR-22350(CA). In that case it was held: "In Maxwell on the Interpretation of Statutes, 12th edition by P. St. J. Langan, pages 6-7 appears the following statement of the law on the importance of preambles: 'Many old statutes have preambles in which the main objects of the Act are set out, and these are legitimate aids in construing the enacting acts.' It was further mentioned in the case that "Lord Normand L.C. held in *Attorney-General vs. H.R.H. Prince Ernest Augustus of Hanover* (1957) A.C. 436 at 467-468 as follows: "When there is a preamble it is generally in its recitals that the mischief to be remedied and the scope of the Act are described. It is therefore clearly permissible to have recourse to it as an aid to construing the enacting provisions..." See also *Chairman, L.E.D.B. vs. Said* (1968) NMLR 183 187 and *Okeke vs. Attorney-General of Anambra State* (1992) 1 NWLR (Pt.215) 60 83." Per Tur, J.C.A. (Pp. 42-43, paras. G-D).

<sup>1148</sup> Black Law Dictionary 10 edition 1365.

<sup>1149</sup> Joseph *Commentary on the Constitution of the US* 326.

commercialisation was. If the legislature intended to replace commercialization with concession it would have been clear-or at least be clearly implied-in the Act. Joint venture Company, for example, was clearly provided for in the Act, but not concession.

### 5 3 Regulatory function

The regulatory regime is part of the integrated port regime and essentially predicated on placing public interest limits on players in the port. It has established in chapter three that the concession policy confined the NPA to technical regulation (and assigned NSC as economic regulator).The function to “maintain, improve and regulate the use of port” and such powers as appointing, providing, licencing and regulating weighter and meters for measuring goods in the ports are more of regulatory categories as they are landlord function. The powers to “appoint, license and manage pilots of vessels”<sup>1150</sup> and to “control the erection and use wharves in any port and its approach” are equally regulatory powers. The regulatory powers covers both the technical aspect such as in respect of environmental protection and the commercial or economic aspect to a limited extent conceived within the framework of a public sector driven port created by NPAA. The regulatory regime is characterized by wide powers granted to the NPA to make regulations to cover sundry aspects, which are in most cases backed by policing powers so that failure to comply attract punitive measures. In terms of the NPAA, the NPA has been granted power “to make regulations for the maintenance, control and management of any port and for the maintenance of good order therein”.<sup>1151</sup> This regulatory regime has been provided to include traffic control, berths use, construction of piers, anchoring, and use of weights for goods, among others.<sup>1152</sup>

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<sup>1150</sup> S 8 (g).

<sup>1151</sup> S 32 (1).

<sup>1152</sup> S 32 (a)-(s).The full text is: “32. Power of Authority to make port regulations (1) The Authority may, with the approval of the Minister, make regulations for the maintenance, control and management of any port and for the maintenance of good order therein, and, in particular and without prejudice to the generality of the foregoing power, may make regulations for all or any of the following purposes, that is- (a) regulating traffic within the limits of a port or the approach to a port; (b) regulating the berths and stations to be occupied by ships and the removal of ships from one berth, station or anchorage to

To that effect it has been given powers to enforce the laws and the associated penalties for instance in the case of pilotage offence it is provided that anyone who “holds himself out as a pilot authorised to pilot a ship in a pilotage district which he is not authorised to pilot under this Act; or pilots a ship in a pilotage district which he is not authorised to pilot, is guilty of an offence and liable on conviction, to a fine of N10, 000.”<sup>1153</sup>

A cursory look at the regulated practices in the relevant section as cited above shows majority amount to such technical regulation.<sup>1154</sup> In few instances where the regulation borders on the economic it is in activities such as pier erection and

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another berth, station or anchor- age, and the time within which the removal shall be effected; (c) regulating ships whilst taking in or discharging ballast or cargo; (d) keeping free passages of such width as is deemed necessary within any port and along or near to the piers, jetties, landing places, wharves, quays, docks, moorings and other similar works in or adjoining the port and for marking out the spaces to be kept free; (e) regulating the anchoring, fastening, mooring and unmooring and warping of all ships and the use of warps, mooring buoys, chains and other moorings; (f) regulating traffic, preventing obstruction and keeping order on piers, jetties and wharves and ensuring the safety of piers, jetties and wharves and any cargo on them; (g) regulating the use of fires and lights and the signals to be used and measures to be taken, by day and by night, in case of fire in a port; (h) enforcing and regulating the use of navigating lights or signals and of signal lights by ships; (i) regulating the flags and signals to be used by ships arriving at, lying in and departing from a port; (j) regulating the manner in which ships arriving a port, shall be boarded by the harbour master, and the information to be supplied to him by the master of the ship; (k) regulating the use by ships of steam whistles, steam sirens and other like instruments; (l) prohibiting chipping, scaling or noisy repairs on ships, except at such anchorages or laces and at such times as may be prescribed or as the harbour master may appoint; (m) prohibiting or regulating the erection, maintenance and working of fishing stakes, prescribing the nature of the nets or stakes which may be used, and providing for the licensing of persons authorised to erect and maintain fishing stakes and nets, and prescribing the fees which shall be paid for the licence; (n) regulating, whether by way of prohibition or otherwise, the floating of timber, casks or other objects in any port or in the approach to any port and the casting or depositing of any dead body, ballast, rubbish, or other thing into any port or in the approach to any port, in contravention of this Act and for the redemption on payment of expenses and a penalty, within a time limit to be fixed, of anything forfeited; (o) providing for the forfeiture of anything found in any port or in the approach to any port in contravention of this Act; (p) prescribing the duties of masters of ships carrying gunpowder or other explosive or dangerous cargo, and of persons engaged in or supervising the shipping, unshipping, landing and transporting of the cargo; (q) regulating the placing and maintaining of moorings or buoys; (r) regulating and licensing weighing and metering of goods; and (s) regulating and licensing porters and carriers and other labourers employed in the working of port facilities. (2) For the breach of any regulation made under subsection (1) of this section, the Authority may prescribe, as a penalty, a fine not exceeding N5, 000 and, in the case of a continuous breach, a further fine not exceeding N500 a day for every day after the first day during which the breach continues, or a term of imprisonment not exceeding twelve months or both such fine and imprisonment.

<sup>1153</sup> S 102 NPAA.

<sup>1154</sup> See fn 181 above

piloting related to safety which NPA has also been mandated to carry out.<sup>1155</sup> As part of its general regulatory it prescribes rules relating to charges, levies and set out penalties for non-compliance whether for technical or purely economic services it renders. In general it provides that

Subject to the provisions of this Part of this Act, the Authority shall levy such rates as the Authority may, by regulations made under section 71 of this Act, prescribe, for the use of any facility, work or appliance provided, or any service to be performed by the Authority in respect of any ship or goods in pursuance of the powers conferred by this Act or otherwise and, without prejudice to the generality of the foregoing, for any of the following- (a) the landing, shipping, wharfage, carnage, storage, carriage or demurrage of goods; (b) the carriage of passengers; (c) the use by any ship or person of any wharf in the possession of the Authority; (d) the use of any gear, tackle, tool, instrument or staging supplied by the Authority for the purpose of any ship using any wharf in the possession of the Authority the use of any ship or lighter, or any engine or boat for the extinction of fire, belonging to or maintained by the Authority; the towing of, and rendering assistance to, any ship, whether leaving or entering a wharf, in possession of the Authority or not, being within or without any port; for water supplied by the Authority; for the removal of waste or refuse from any ship; and for monitoring port environmental pollution control.<sup>1156</sup>

For nonpayment of these dues, the Act spells out the penalty to the effect that a master or an owner of a ship, or an owner or a consignor or consignee of any goods who, by any means whatsoever, evades or attempts to evade any of the dues or rates leviable shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a term not exceeding twelve months or to both such fine and imprisonment and such person is, in addition, liable to pay to the Authority, as penalty, double the amount of the dues or rates he had evaded or attempted to evade.<sup>1157</sup> This is a kind of command-and –control regulatory system.

It is noteworthy that the services listed above are in respect of those to be provided by the NPA. They are “for the use of any facility, work or appliance, or any service to be performed by the Authority”.<sup>1158</sup> This is conterminous with the

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<sup>1155</sup> See for example s 62.

<sup>1156</sup> S 65 NPAA.

<sup>1157</sup> S 103.

<sup>1158</sup> Ibid.

general pattern in the NPAA and it is an indication that the Act envisages the NPA as the major player in the provision of the services in the ports particularly those services specifically mentioned in its statutory functions such as cargo handling. There are no provisions for the regulation of tariffs by the terminal operators and other operators involved in cargo related issues. The concession programme has created a new regime of mega private operators having to charge tariffs previously charged by NPA which is not envisaged by NPAA.<sup>1159</sup>

While the NPAA generally characterises the NPA as a regulator, there is the issue of scantiness of provisions relating to economic regulation of other players in the port which is down to the fact that NPA is the major economic player in the port and the provisions regulating its economic activities is tantamount to self-regulation subject only to tariff control by the Infrastructure Utilities Regulatory Commission as will be explained shortly. It is against this background that the policy makers appointed the Nigeria Shippers Council (NSC) as an economic regulator on the basis that enhanced economic regulatory regime is a key factor in a private sector driven or active port. Whether this is supported by the relevant laws is a different matter. Hence the issue is an aspect of concession that merits examination for its legality.

### **5 3 1 The ‘economic regulator’**

Thus, after the concession, the Federal Government appointment of NSC as the economic regulator of the port,<sup>1160</sup> (thereby designating the NPA as the technical regulator) further changed the port legal landscape. In terms of NSCA,

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<sup>1159</sup> An NPA document titled “Operational Regulatory Guidelines on the Post Concession Billing System” explains this thus:” Following the concessioning of the ports; the Cargo Dues component of both the Provisional and Final Bills has been split into: Stevedoring ii. Harbours Dues iii. Environmental Protection; Under the new format, the Terminal Operations are expected to collect the Stevedoring component since they will handle the cargo; while NPA will collect Harbour Dues, Environmental Protection, Berth Rent and Ship Dues. The Stevedoring component shall apply at any Non concession Area.” See <https://nigerianports.org/dynamicdata/uploads/Tariffs/2016TariffN.pdf?id=335> (Accessed 20-6-2017).

<sup>1160</sup> This was challenged in court by terminal operators who were accused of introducing unnecessary charges in their operations and increasing port charges indiscriminately. *Seaport Terminal Association of Nigeria vs Nigeria Shippers Council FHC/L/CS/1646/2014*

The functions of the Council shall be to (a) provide a forum for the protection of the interest of shippers on matters affecting the shipment of imports and exports to and from Nigeria; (b) provide a forum for consultation between Conference and non-Conference Lines, tramp-owners, the Nigerian Ports Authority and the Government of the Federation on matters of common interest; (c) encourage the formation of shippers' associations all over Nigeria; (d) liaise with the appropriate arms of the Government of the Federation and other organisations in assessing the stability and adequacy of existing services and make appropriate recommendations in that behalf; (e) advise the Government of the Federation through the Minister on matters relating to the structure of freight rates, availability and adequacy of shipping space, frequency of sailings, terms of shipment, class and quality of vessels, port charges and facilities and other related matters; (f) negotiate and enter into agreements with Conference Lines, and non-Conference Lines, ship-owners, the Nigerian Ports Authority and any other bodies on matters affecting the interests of shippers; (g) consider the problems faced by shippers with regards to coastal transport, inland waterways transport and matters relating generally to the transportation of goods by water and advise Government on possible solutions thereto; (h) promote and encourage the study of and research into problems affecting shippers in Nigeria; (i) arrange, from time to time, seminars and conferences on any matter relating to its functions; and (j) carry out such other activities as are conducive to the discharge of its functions under this Act.

The above functions of Nigeria Shippers Council as stipulated in the NSCA, the constituent law, can be reduced or summarised into four roles to wit: consultative/negotiation, advisory, promotional and educational/capacity building. These roles does not include core regulatory mandate of the type granted to it after the concession as economic regulator.

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*(unreported)*. NSC noted that this was causing economic loss to the country. As a result, NSC, appointed economic regulator based merely on policy directive not any legal instrument NSC directed the concessionaire to reduce the charges. Irked by this, the terminal operators sued the NSC. In its ruling the, Federal High Court upheld the appointment of the Nigerian Shippers' Council, NSC, as port economic regulator. It is submitted that the decision was more of a public policy matter than a thorough recourse to the provisions of the NSCA and cannot be said to be correct.

### 5 3 2 Consultation and negotiation duty

The essence of the NSC is to protect the interest of shippers, which “means an individual or body of persons (corporate or unincorporated) having direct interest in cargo and who is the original consignor or the actual owner or future owner of the cargo but does not include a clearing and forwarding agent, insurer or bank which has an interest in such cargo by virtue only of being such a clearing and forwarding agent, insurer or bank”.<sup>1161</sup> Hence the provision which mandates it to “provide a forum for the protection of the interest of shippers on matters affecting the shipment of imports and exports to and from Nigeria”<sup>1162</sup> is a function designating the NSC as a protective forum by way of discursive interactions rather regulatory directive. Another provision directly espansiates on this by specifying how the forum may protect the interest of shippers: “provide a forum for consultation between Conference and non-Conference Lines, tramp-owners, the Nigerian Ports Authority and the Government of the Federation on matters of common interest.”<sup>1163</sup> In other words, NSC provides a consultative and negotiation platform for conference line which is a “a group of two or more ship-owners operating international liner services under uniform or common freight rates for the carriage of goods on a particular route within specified geographical limits”,<sup>1164</sup> non-conference liners,<sup>1165</sup> tramp owners,<sup>1166</sup> the Nigeria Ports Authority and the Government of the Federation on matters of common interest for solutions to concerns of shippers.

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<sup>1161</sup> S 10 NSCA.

<sup>1162</sup> S 3 (a).

<sup>1163</sup> S 3 (b).

<sup>1164</sup> S 10 NSCA.

<sup>1165</sup> That is those who are not conference line as defined in s10 NSCA.

<sup>1166</sup> Tramp owners are owners of Tramp ship. Tramp ships is not defined in NSCA. They are a category of ship owners defined as “owner, lessor charterer of a ship or vessel engaged in the carriage of goods”.S 10 NSCA. According to NPA definition of terms “Tramp Service’ means Vessels operating without a fixed itinerary or schedule or charter Contract. NPA Defination of Terms <https://www.nigerianports.org/dynamicdata/uploads/operationalterm.pdf>(Accessed17-6-2017). Tramps ship has been defined as ship or any vessels that takes part in transportation business by roaming the ocean picking up cargo anywhere and everywhere. Some kind of taxi of the ocean. See Fenton *Tramp Ship: An Illustrated History* (2013)9.

For the same purpose, NSC also has the function to “negotiate and enter into agreements with Conference Lines, and non-Conference Lines, ship-owners, the Nigerian Ports Authority and any other bodies on matters affecting the interests of shippers.”<sup>1167</sup>

### **5 3 3          Advisory function**

This is related to NSC consultative function by the provision to the effect that NSC “liaise with the appropriate arms of the Government of the Federation and other organisations in assessing the stability and adequacy of existing services”<sup>1168</sup> and on the basis of this” make appropriate recommendations in that behalf.”<sup>1169</sup> In general it has the duty to “advise the Government of the Federation through the Minister on matters relating to the structure of freight rates, availability and adequacy of shipping space, frequency of sailings, terms of shipment, class and quality of vessels, port charges and facilities and other related matters”<sup>1170</sup> as well as to consider the problems encountered by shippers with regards to coastal transport, inland waterways transport and matters generally concerning the transportation of goods by water and “advise Government on possible solutions thereto.”<sup>1171</sup> By the competence to advise on matters relating to water transportation, it means its advisory jurisdiction is not confined to seaports but includes inland waters. It is noteworthy that all the relevant sections on the advisory role does not wear the toga of regulatory authority.

### **5 3 4          Promotional duty**

The NSC has the function to “encourage the formation of shippers’ associations all over Nigeria”<sup>1172</sup> This is an essentially a positive function with promotional, not core regulatory, character. In line with this provision, the Shipping Association of Nigeria (SAN) was formed in 1996 by the major shipping lines agents operating in

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<sup>1167</sup> S 3 (f).  
<sup>1168</sup> S 3 (d).  
<sup>1169</sup> S 3 (d).  
<sup>1170</sup> S 3 (f).  
<sup>1171</sup> S 3 (g).  
<sup>1172</sup> S 3 (c).



Nigeria with the main objective of providing a common platform for advocating for and protecting the interests of members as well as to represent them in relationship with the Federal and States governments and their agencies, and other maritime stakeholders.<sup>1173</sup> Also, in line with this provision, state based Shippers' Association has been established across Nigeria.<sup>1174</sup>

### **5 3 5 Capacity building function**

The NSC also has the duty to “promote and encourage the study of and research into problems affecting shippers in Nigeria.”<sup>1175</sup> It shall also take the initiative to “arrange, from time to time, seminars and conferences on any matter relating to its functions”<sup>1176</sup>. The substance and phrasage of this duty is education and research oriented and does not have the context of regulation.

The omnibus function is to “carry out such other activities as are conducive to the discharge of its functions under this Act”<sup>1177</sup> is clearly in reference to the other functions and must align with the core functions. All the above statement and analysis of the functions is crystal clear and imputing or imposing foreign words on the provision will give a contrary outcome not intended by the legislature and will do injustice to the words of the enactment.<sup>1178</sup> The overall tenor of the

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<sup>1173</sup> See Shipping Association of Nigeria <http://san-ng.org/aboutus.php> (Accessed 17-6-2017).

<sup>1174</sup> They were established in South -West South- South- East North- West North -Central North- East. See Nigeria Shippers Council <http://shipperscouncil.gov.ng/shippers-association> (Accessed on 17-7-2017).

<sup>1175</sup> S3 (h).

<sup>1176</sup> S 3 (i).

<sup>1177</sup> S 3 (j).

<sup>1178</sup> See the case of *Asimonye v. Asimonye (Nee Aniebue)*(2009) LPELR-8285(CA) "I wish however to mention for the purposes of emphasis what the Supreme Court said in *Amalgamated Trustees Limited v. Associated Discount House Limited* (2007) 15 NWLR (pt. 1056) 118 at 134 ratio 10 on construction of clear and unambiguous words in a statute. "In the construction or interpretation of the constitution or a statute, where the words are plain clear and unambiguous effect should be given to them in their ordinary and natural meaning except where to do so will result in absurdity. In other words, where an interpretation will result in defeating the object of the statute or constitution the court would not lend its weight to such interpretation. The language of the statute or constitution must not be stretched to defeat the aim of the statute or constitution. Thus; any interpretation which appears to defeat the intention of the legislature, should, and must, be bye-passed in favour of that which would further the object of the statute or constitution. A certain amount of common sense must be applied in construing statutes and the constitution, and the object of an Act (statute) has to be considered. In other words, the words of the Act of parliament must be construed so as to give a sensible meaning to them. The words ought

functions becomes even clearer when put in the context of the overall purpose of the NSC to the effect that it is “to establish the Nigerian Shippers’ Council to provide a forum for the protection of the interest of shippers in matters affecting the shipment of imports and exports to and from Nigeria and to advise the Federal Government on sundry matters related thereto.”<sup>1179</sup>

#### 5 4 The ‘economic regulator’ regulation

The Federal Government enacted the Nigeria Shippers Council (Port Economic Regulator) Regulation with the objective “to create an effective regulatory regime at Nigerian ports for the control of tariffs, rates, charges and other economic services.”<sup>1180</sup>This was on the basis that concessioned port system required an independent economic regulator.

The regulation designates the following as service providers to be regulated by the NSC and requires them to register with the NSC to wit:

“(a)the Nigerian Ports Authority ;(b) Seaport Terminal Operators; (c)Shipping Companies and Agencies; Off Dock terminal Operators; Cargo consolidators; Logistics service providers; Freight forwarders and Clearing Agents; Inland container Depot Operators; Stevedoring or cargo-handling Companies and any other port service provider or user.”<sup>1181</sup>

It also provides additional functions for NSC which include to

provide guidelines on tariff setting in order to guard against arbitrariness b) monitor and enforce standards of service delivery to ensure availability, accessibility, affordability, stability, predictability and adequacy of services c)

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to be construed *ut res magis valent quam pereat*. The Latin maxim, means that the construction should ensure that the intention of the legislature is not frustrated or defected. See:- *Lawal v. G.B. Olivant (Nig.) Ltd.* (1972) 3 SC 124; *Torwla v. Williams* (1982) 7 SC 27; *Sunmonu v. Oladokun* (1996) 8 NWLR 467 387; *Nnoye v. Anyichie* (2005) 2 NWLR (pt. 910) 623; *Ansaldo (Nig.) Ltd v. National Provident Fund Management Board* (1991) 2 NWLR (pt. 174) 392; *Idehen v. Ideben* (1996) 6 NWLR (pt. 198) 382; *Olowu v. Abolore* (1993) 5 NWLR (pt. 293) 255.” Per Bage, J.C.A. (Pp. 20-21, paras. A-C).

<sup>1179</sup> See the preamble to the Act.

<sup>1180</sup> S1 Nigeria Shippers Council (Port Economic Regulator) Regulation .Before this the presidency had issued an order with the same objectives. Titled Nigeria Shippers Council (Port Economic Regulator) Order, 2015.

<sup>1181</sup> S 4.

encourage competition and guard against the abuse of monopoly power d) perform mediatory role among stakeholders e) establish accessible and modern dispute resolution mechanisms f) regulate market entry and exit.<sup>1182</sup>

The NSC is further granted the power to “determine provide and cause to be published guidelines for the registration of Regulated Services Providers specifying amongst other things, the terms and conditions for the registration”<sup>1183</sup> and “provide guidelines on tariffs, rates and charges, including setting the minimum and maximum levels of tariffs that shall be applicable on the port sector in Nigeria”.<sup>1184</sup>It also has the “power to monitor review tariffs, rates and charges of the regulated services to ensure conformity with the approved guidelines, taking into considerations the prevailing local and global economic trends affecting the port industry and the market.”<sup>1185</sup> The NSC also has the powers to publish from time as it may deem necessary, all Tariffs, Rates and Charges levied by the Regulated Service Providers . It creates a regime of penalty to the effect that “regulated Service Provider that publishes any tariff, rate or charge other than the tariffs, rates or charges approved by the council commits an offence and shall be given a public warning or suspension for a specific period not more than six (6) months and if it persists shall be blacklisted by the Council.”<sup>1186</sup> It has also been granted monitoring power in terms of the provision which mandates that it “shall monitor all matters relating to the cost, standard and quality of services rendered by the Regulated service Providers at Nigeria ports and the market.”<sup>1187</sup> In specific, it mandates the NSC to monitor matters relating to the implementation of the Regulations, the standards and quality of services rendered by the Regulated service Providers in the port Sector, the tariff, rates

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<sup>1182</sup> See s3 Nigeria Shippers Council (Port Economic) Regulator 2015.

<sup>1183</sup> S 5 (1) (a).

<sup>1184</sup> S 5 (1) (b).

<sup>1185</sup> S 5 (2).

<sup>1186</sup> S 5 (5).It further provides: “All Regulated Service Providers, shall file its tariffs, rates and charges with the council within 21 days of setting the tariffs, rates or charges or on request (7) A regulated Service provider that fails to comply with the provisions of sub regulation (6) of this regulation commits an offence and shall be suspended for a period not more than 3 months and if it persists, after the three months, shall be black listed and registered. See s5 (6).

<sup>1187</sup> S 6 (1).

and charges applied by the Regulated Service providers in the port sector, cargo clearance procedures and processes as well as any other relevant matter relating to services rendered in the port sector. For that monitoring purpose and reporting thereof, it grants the NSC officials or its authorized agents unrestricted access to port premises and facilities at all times.<sup>1188</sup>

The above clearly shows that the new economic regulation in question has granted strong regulatory duties and powers to NSC and designated it as economic regulator of the port to regulate a number of players in the port including, curiously, the NPA. The regulation makes reference to the statutory functions of the NSC particularly its sections 3(e, (f and (i as the legal basis for this regulation.<sup>1189</sup> As noted and established above, the statutory functions are merely consultative, advisory, promotional and capacity building oriented and are not clearly tended to regulating providers of service to shippers in any of its provisions, let alone the statutory functions. For the avoidance of doubt, the NSCA does not project an authoritative regulatory framework. In fact, unlike this particular regulation, it doesn't have a single regulatory sanction or penalty regime. Regulations are subsidiary legislations and cannot overrule the clear provision of an Act of the National Assembly in any legally plausible way. Regulations –or any subsidiary legislation at that-are supposed to be made within the ambit and gambit of their parent statute wherein the power to make regulations are derived from.<sup>1190</sup> In *Olanrewaju v. Oyeyemi*,<sup>1191</sup> it was held thus:

It is settled law that a subsidiary legislation derives its authority and validity from and subject to the provisions of the parent enabling statute. It follows therefore that a subsidiary legislation cannot expand or curtail the provisions of the

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<sup>1188</sup> S 6 (3).

<sup>1189</sup> See s2 NSC (Port Economic) Regulator 2015.

<sup>1190</sup> In the case of NSCA. The relevant provision to make regulation goes thus: "The Minister may make regulations generally for carrying into effect the provisions of this Act."s9. This means the regulations to be made must be to give effect to the provisions of the Act.

<sup>1191</sup> 2000) LPELR-6045 CA.

substantive statute. It must be within the authority derived in the main enabling statute.<sup>1192</sup>

Similarly, in the case of *Njoku & Ors v. Iheanatu & Ors*, the Court of Appeal observed thus:

“A subsidiary legislation or enactment is one that was subsequently made or enacted under and pursuant to the power conferred by the principal legislation or enactment. It derives its force and efficacy from the principal legislation to which it is therefore secondary and complimentary”

In fact in terms of the Interpretation Act a regulation cannot even deviate from the meanings of words used in the substantive legislation so that any word used in the regulation must mean the same with the ones used in the substantive legislation or Act.<sup>1193</sup>

The regulation cannot, therefore, change the inconsistency of the policy designation of NSC as the economic regulator of the port particularly in respect of port concession including regulating the NPA which has the mandate to “maintain, improve and regulate the use of the port.”<sup>1194</sup>

## **6 Port concession and concession related Laws**

This part is aimed at examining major substantive Acts of parliament and legislative instruments that help determine the legality, extent of legality, applicability of those laws relative to NPAA.

### *6 1 Public Enterprises (Privatisation and Commercialisation) Act (PEA)*

This Act lists the NPA for full commercialization in Part II of the Second Schedule in line with the provision of the Act that public enterprises “listed in Part II of the

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<sup>1192</sup> See *Din v. A. G. Federation* (1988) 4 NWLR (Pt.87) 147; *Governor Oyo State v. Folayan* (1995) 8 NWLR (pt.413) 292 at 327 and *Ishola v. Ajiboye* (1994) 6 NWLR (Pt.352) 506 at 621.” Per TABAI, J.C.A. (P. 34, paras. D-G).

<sup>1193</sup> See s 19.

<sup>1194</sup> S 7(b) NPAA.

Second Schedule to the Act shall be fully commercialised.”<sup>1195</sup> This mode of private participation in the port has already been outlawed by NPAA when the Act repealed its predecessor which had commercialized NPA.<sup>1196</sup>

The PEA also lists the NPA for partial privatization in line with the provision that enterprises listed in Part I of the First Schedule to the Act “shall be partially privatised in accordance with the provisions of this Act”.<sup>1197</sup> Concession is not privatization as privatization envisaged under the A entails “an offer for the sale of shares”<sup>1198</sup> either by “public issue or private placement”<sup>1199</sup> Privatisation involves sale of asset or shares. Port concession is not about sale of shares as it entails lease of, not outright sale-whether in full or in part- of asset or shares. On the contrary, concession is “a contractual arrangement whereby the project proponent or contractor undertakes the construction, including financing of any infrastructure, facility and the operation and maintenance thereof and shall include the supply of any equipment and machinery for any infrastructure and the provisions of any services.”<sup>1200</sup> The Act bypasses this obvious statutory position in the body of PEA as well as ordinary and statutory meaning of concession vis-à-vis privatisation,<sup>1201</sup> through the ‘amendment’ of the Act by the National Council on Privatisation, established under the Act to initiate privatization and commercialisation,<sup>1202</sup> wherein it included concession at the end of the Second Schedule with these wordings: “privatization by concession shall not entail divestiture of shares” cannot stand legal scrutiny,<sup>1203</sup> though without making reference to any sector or Government agencies as it does with privatization and

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<sup>1195</sup> S 6 (2) PEA.

<sup>1196</sup> See s 125.

<sup>1197</sup> S 1 (1).

<sup>1198</sup> S 2 (1).

<sup>1199</sup> S 2 (1).

<sup>1200</sup> S 36 ICRCA.

<sup>1201</sup> In the case *Cooperative & Commerce Bank (Nigeria) PLC V. AG Anambra State* (1992) LPELR-875(SC) (P. 27, paras. E-F, the Supreme Court, the general and ordinary meaning of privatization: "the relinquishment of part or all of the equity and other interests held by the Federal Government or its agency in enterprises whether wholly or partly owned by the Federal Government."

<sup>1202</sup> S 9 PEA. See further chapter 2.

<sup>1203</sup> See the tail end of the 2<sup>nd</sup> Schedule PEA.

commercialisation. This is in view of the fact that it amounts to usurpation of the constitutionally granted legislative power of the National Assembly.<sup>1204</sup>

The power to amend or repeal an Act of the National Assembly is vested in the National Assembly itself as much as the power to amend or repeal a subsidiary legislation is vested in the authority granted the power to make it. Hence the provision that grants power to the National Privatisation Council to “alter, add, delete or amend the list of enterprises in the First Schedule” or “an order published in the Gazette amend the Second Schedule” to the Act could not have justified adding amendment to the body of the Act to legalise concession of the port or any other sector at that. In fact, the addition on concession (“privatization by concession shall not entail divestiture of shares”) was made on an almost inconspicuous part of the tail end to Second Schedule which is on commercialization not privatization, which is in the Second Schedule.

Therefore, on the basis of this and the point earlier made, port concession has no backing whatsoever in this Act which is essentially about privatization (transfer of asset or shares) and commercialization which has been legally reversed by NPAA enacted after this Act,<sup>1205</sup> with provisions that also vest the assets of the then Nigeria Port Plc in the NPA.<sup>1206</sup> It is worth reiterating:

Accordingly, there shall be vested in the Authority immediately at the commencement of this Act, without further assurance, all assets, funds, resources and other movable or immovable property which immediately before the commencement of this Act were vested in the Company.

## *6.2 Infrastructure Concession Regulatory Commission Act 2005 (ICRCA)*

It is apposite to put in context the provision of the ICRCA to the effect that:

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<sup>1204</sup> S4 (1) of the constitution vests the legislative powers over Federal matters in the National Assembly. It includes the power to make law and repeal or amend the law.

<sup>1205</sup> The commencement date of PEA as it appears after the preamble is 31<sup>st</sup> December, 1988 while that of NPAA is 10<sup>th</sup> May, 1999 as earlier noted.

<sup>1206</sup> See s125 (2).

“any Federal Government Ministry, Agency, Corporation or body involved in the financing, construction, operation or maintenance of infrastructure, by whatever name called, may enter into a contract with or grant concession to any duly pre-qualified project proponent in the private sector for the financing, construction, operation or maintenance of any infrastructure that is financially viable or any development facility of the Federal Government in accordance with the provisions of this Act.”<sup>1207</sup>

The activities mentioned in the provision correlates to those NPA has statutory mandate to carry out: operation, maintenance construction of ports infrastructure or facilities and even financing. If one adds the definition of concession provided in the Act the picture becomes clearer. In terms of the ICRCA, the Federal Government Agency and a private person “*may*” enter into a concession contract which it defines as “a contractual arrangement whereby the project proponent or contractor undertakes the construction, including financing of any infrastructure, facility and the operation and maintenance thereof and shall include the supply of any equipment and machinery for any infrastructure frastructure and the provisions of any services.”<sup>1208</sup>

The Act requires Federal Government body to “prioritize its infrastructure projects” adding that “such priority projects may be qualified for concession under this Act.” The Act does not specifically list or mention NPA by name nor any other Federal government body that may enter into concession whether in form of BOT or any other but mentions seaport –along with a number of other sectors such as telecommunication, railways, airports and so on- while defining the word infrastructure used in the Act.<sup>1209</sup> It is a long list of about thirty sectors. In short, the Act is a general one dealing with the whole of the economy. It is another statutory recognition of the fact that sectors of the economy had been operated and managed by Federal Government Agencies and bodies: they were “involved in the financing, construction, operation or maintenance of infrastructure”<sup>1210</sup> as

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<sup>1207</sup> S 1 (1) ICRCA.

<sup>1208</sup> S 36.

<sup>1209</sup> S 3 ICRCA.

<sup>1210</sup> S1 (1).



the ICRC put it. It does not mandate concession, it uses the permissive lexicon “may” in all the parts where it provides that Federal Government Agencies, ministries and bodies enter into Concession contract. The ICRC does not grant ICRC the power to initiate concession as mentioned in chapter two. It rather allows the Federal Government Agency which of course would include NPA to prioritise its infrastructure which “may be qualified for concession.” This allows NPA to decide whether its own constituent Act (NPAA) permits its infrastructural project to be “qualified for concession” under the ICRC.

As explained previously, all the activities herein mentioned are the same activities the NPA has statutory duty to carry out. On one hand, the NPAA says “the functions of the Authority *shall* be to “provide and operate, in the ports, such facilities as appear to it best calculated to serve the interest of Nigeria”<sup>1211</sup> and to “maintain, improve and regulate the use of the ports”<sup>1212</sup> On the other hand, the ICRC says Federal Government agencies and bodies “*may* enter into a contract with or grant concession to any duly pre-qualified project proponent in the private sector for the financing, construction, operation or maintenance of any infrastructure”<sup>1213</sup>

One Act (NPAA) strongly mandates using the word *shall*, the other (ICRC) merely permits using the word *may*. Going by Nigerian jurisprudence and law, the word “shall” generally connotes mandatory positive directive that must be followed while the word may is generally permissive providing options to do a particular thing or not to do it. The Court of Appeal has had to do a prognosis of these words:

“There is a time-tested, time honoured and time-proven principle of construction of statutes that draws a dichotomy between the words “shall and “may” as constituting a mandate, obligation or command and permissiveness or discretion respectively. This is per Niki Tobi, JSC in *Odedo v. INEC (2008) 17 NWLR (Pt.1117) 554 at 610 paragraphs F-G*. See also *Ararume v. INEC (2007) 9 NWLR (Pt.1038) 127 at 160*. In the construction of statutes generally, when the word used is “shall”, it imports that a thing must be done. It is almost always construed to

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<sup>1211</sup> S 7(a). Emphasis mine.

<sup>1212</sup> S 7(b).

<sup>1213</sup> S 1 (1).The emphasis in the quote is mine.

import a form of command or mandate which is given a compulsory meaning or denoting an obligation".<sup>1214</sup>

More authoritatively, it has been asserted that

"In *Edewor v. Uwegba* (1987) 1 NWLR (Pt. 50) 313, the Supreme Court held that it has long been settled that 'May' is a permissive enabling expression. Cullen C.J. in *Massey v. Council of Municipality of Yao* (1922) 22 SRSW 494 at 497 observed that "The ordinary rule for the construction of Statutes containing the word 'may' or the word 'shall', I think is very well expressed in Halsbury's Laws of England Vo. 27, page 170 (2nd Edition)- The use of the word 'may' *prima facie* conveys that, the authority which has power to do such an act has an option either to do it or not to do it. Cotton, L.J said in *Re Baker, Nicholas v. Baker* - "I think great misconception is caused by saying that in some cases 'may' means 'must', It never can be 'must' so long as the English language retains its meaning." From all I have said, the word 'May' always means 'may' and it is permissive".<sup>1215</sup>

In view of the above, where there is a provision that mandates a duty particularly by the word "shall" and another which merely permits a course of action by the word 'may', it is therefore a basic rule of legality that that the former takes precedence and its provision must be implemented to the letters.

Another important issue is that the NPAA is a *lex specialis*, as far as the ports are concerned that is a law directed at a particular subject matter. In fact port law generally has been described a special kind of *lex specialis*.<sup>1216</sup> Considering the tenor of NPAA, it could fall in this category.<sup>1217</sup> The ICRCA, on the other hand is a *lex generalis* that is a law of general application directed at a general category-in this case infrastructural concessioning in the whole economic sectors spanning

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<sup>1214</sup> See *Incorporated Trustee of Nigerian Baptist Convention v Governor of Ogun State* (2006) LPELR-41134 (CA) .The other cases cited in that case are: See *Nwankwo v. Yar'adua* (2010) 12 NWLR (Pt.1209) p.518; *Umeanadu v. A.G. Anambra State* (2008) 9 NWLR (pt.1091) 175 and *Bamaiji v. AG. Federation* (2001) 12 NWLR (pt.727) p.468 at 480.

<sup>1215</sup> *Unilorin vs Oluwadare* (2002) LPELR-7179(CA) P. 22, Paras C-G).

<sup>1216</sup> Hooydonk *The Law Ends Where the Ports Starts* 34

<sup>1217</sup> Consider for example how it declares some general law inapplicable to ports. See for example the following provisions of s111 NPAA: "Exemption of Authority land the provisions of - (a) the Nigerian Urban and Regional Planning Act; [Cap. N138.] (b) any other enactment or any law relating to town or country planning; and (c) any enactment or law regulating the construction, alteration, repair or demolition of buildings, shall not apply to any land for the time being vested in, leased out by or in the possession of the Authority. "See also s112.This does not entail that the NPAA disregards all laws-in fact it cannot-it only means it has specific provisions on certain issues and the tendency to statutorily delimit application of certain laws on those issues.

telecommunication power, ports, sewage et al. It is an established principle in Nigeria jurisprudence-as in International Law- that generally where there is a conflict between a specific enactment and a general one, the specific enactment takes precedence. This is normally expressed as *lex specialis derogat lex generali*.<sup>1218</sup> It has been held that

It is an accepted canon of construction that where there are two provisions, one special and the other general, covering the same subject matter, a case falling within the words of the special provision must be governed thereby and not by the terms of the general provision. The reason behind this rule is that the legislature in making the special provision is considering the particular case and expressing its will in regard to that case; hence the special provision forms an exception importing the negative; in other words the special case provided for in it is excepted and taken out of the general provision and its ambit; 'the general provision does not apply'.<sup>1219</sup>

Similarly it was held that "the general rule of interpretation is that a subsequent general Act does not affect the provision of a prior special or private Act, unless it is expressly provided. In other words, a subsequent general Act will not interfere and modify or repeal the provisions of a special or private Act, unless the intention is clearly manifested in the general Act."<sup>1220</sup>

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<sup>1218</sup> The doctrine is to the effect that that a specific law governing a specific subject matter overrides a law that only governs general matters .Generally, this situation arises with respect to the construction of earlier enacted specific legislation when more general legislation is passed after such enactment. The principle also governs the construction or interpretation of a body of law or single legislative instrument that contains both specific and general provisions. This is later part is explained in the case of Federal Mortgage Bank of Nigeria v., the Nigerian Supreme Court said: "The law is that where there is a special provision in a statute, a later general provision in the same statute capable of covering the same subject matter is not to be interpreted as derogating from what has been specially provided for individually unless an intention to do so is unambiguously declared. To do otherwise is to indirectly use a general provision to alter the intention to provide specially by way of an exception for a subject matter.... The Latin maxim is: *Generalis clausula non purrigitur ad ea quae antea specialiter sunt comprehensa* (A general cause does not extend to those things which are before specially provided for" *Onoh (2002) FWLR (Pt 107) 1244 at 1252 - 1253*

<sup>1219</sup> *Bamgboye v. Administrator-General* (1954) 14 WACA 616, 619.

<sup>1220</sup> *Campagnie General De Geopysque (Nil) Ltd V Anidi* (2005) LPELR-11346 (CA) Pg 34.

The earlier specific provisions regarding the statutory duties of NPA cannot be ousted by a latter general provision on concession more so couched in permissive terms. Already discussed are the NPA provisions on lease used as a basis for justifying concession because concessioned assets are transferred by lease or procedure similar to it. Assuming without conceding that leases of assets 'necessary for the purpose' of NPA is allowed under NPAA, this would still not make concession acquire a legal backing under the NPAA because concession as envisaged under the current port governance is coupled with services in area that are primarily core statutory functions of NPA.<sup>1221</sup> In addition, these specific provisions cannot be overridden by a general provision on concession, which more so does not repeal the NPAA.<sup>1222</sup> More so, the ICRCA is completely silent on possessory status of the government assets to be concessioned. While concession is generally known to transfer possession to the concessionaires the ICRCA is not explicit on whether such infrastructures, which are the subject matter of the type of concession it provides for, are to be temporarily transferred to the concessionaire as in the case of a lease. It only keeps reiterating about "financing, construction, operation or maintenance of infrastructure, by whatever name called'. It does not directly transfer possession of NPA's assets for that purpose or have provisions relating to this or even ownership status of the infrastructure in the course of concession or after.

Another manifestation of *lex specialis* provision of NPAA is the ouster clause on laws relating to building and constructions. The Authority lands are exempted from the provision of "any enactment or law regulating the construction, alteration, repair or demolition of buildings, shall not apply to any land for the time being

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<sup>1221</sup> In terms of the Interpretation Act, there should be strict construction of any enactment that would prejudicially affect the executive authority of the Federal government or its agency or affect the asset of or control over asset the Federal Government must be clear. The relevant section says:" 9 (1) An enactment shall not prejudicially affect-(a) the executive authority of the Federation; or (b) any property in so far as it is held for the purposes of the Government of the Federation. (2) The provisions of subsection (1) of this section shall not apply to an enactment- (a) if the enactment is expressed to bind the State; or (b)in so far as an enactment so provides by other express words or by necessary implication". The general tenor of NPAA supports this position. In fact under it, a property or asset of NPA whether necessary for its function or not cannot be attached by a court government even in case of default of in a mortgage case. See s 94.

<sup>1222</sup> S 111(c) NPAA.

vested in, leased out by or in the possession of the Authority.” While this provision strictly interpreted does exempt NPA land from building regulations, broadly interpreted it would not be unreasonable to see it covering concession on port land, concession having been described “as a contractual arrangement whereby the project proponent or contractor undertakes the construction, including financing of any infrastructure, facility and the operation and maintenance thereof and shall include the supply of any equipment and machinery for any infrastructure and the provisions of any services” This makes ICRCa an enactment with significant relationship to “the construction, alteration, repair or demolition of buildings”, and hence it may be argued that for that particular purpose ICRCa cannot apply to port concession on land. Even if this particular interpretation is pretty farfetched, it is an indication of a particular point. That is, the NPAA as a *lex specialis*, needs repeal if such laws as ICRCa were to cease to be clearly inapplicable to it such for some reasons. These reasons include the mandatory statutory functions of NPA relative to ICRCa own permissive word on concession and the provision on lease of port asset as well as for the purpose of removing ambiguous provisions such as this one on construction and repairs on port land.

### 6.3 Utilities Charges Regulatory Commission Act (URCA)

In terms of UCRCA,

it shall be the duty of the Commission a) to evaluate, on a continuing basis, trends in tariffs charged by any of the public utilities listed in the Second Schedule to this Act (in this Act referred to as “Scheduled Utilities”) with a view to providing the Federal Government with such information as would enable the Federal Government to determine permissible increases’) to advise the Federal Government on guidelines within which increases in tariffs should be confined by Scheduled Utilities” and c) to design and develop an adequate information system relating to the Scheduled Utilities and their tariff charges (d) to keep charges and tariffs under constant surveillance and propose measures (i) to regulate tariff charges; (ii) to prevent undue exploitation of consumers by Scheduled Utilities; (e) to study requests from consumers, the public and private

utility providers on charges in utility rates and make appropriate recommendation in relation thereto; (f) to recommend to the Federal Government the prevailing public utilities rates; (g) to undertake any other activity likely to assist in the performance of the functions conferred on the Commission pursuant to this Act;(h) to do anything which in the opinion of the Commission is calculated to facilitate the carrying out of the functions of the Commission under this Act; and (i) to examine and advise on any matter referred to it by the Federal and State Governments, concerning any of the functions conferred on it by or pursuant to this Act.<sup>1223</sup>

The scheduled utilities mentioned in section 6 above are listed in the Second Schedule and includes the NPA.<sup>1224</sup> The government may also exercise the powers to add more utilities. Therefore, the charges and levies of NPA are subject to the Act. In fact, utilities such as NPA “intending to vary or increase its charges, tariff or rates shall first seek the Commission’s approval for such permissible increase.”<sup>1225</sup> It further provides that “a person who contravenes the provisions of subsection (1) of this section commits an offence under this Act and is liable on conviction to a fine of N10, 000.”<sup>1226</sup> Complaint may be filed in writing with the Commission by person aggrieved by any tariff or rate imposed or services provided by a Scheduled Utility and the Commission has a duty to inquire into the cause and circumstances of the complaint and endeavour to bring about a settlement.<sup>1227</sup>

All this means that designation of NPA as being subject to economic regulation by NSC under the concession programme especially for the purpose of its tariffs also violates this law.

## **7 Port governance structure and concession**

Reallocation of roles and responsibilities between private sector and public authorities particularly NPA occasioned some institutional shift in the post

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<sup>1223</sup> S 6 IURCA.

<sup>1224</sup> See the Second Schedule Par e.

<sup>1225</sup> S 7 (1).

<sup>1226</sup> S 7 (2).

<sup>1227</sup> S 8.

concession port governance system. One of the fundamental purposes of port law, according to an author,<sup>1228</sup> is to effectively govern the tasks and competences of the port authorities as well as their relationships with other public authorities. While the NPAA has its limitations in terms of achieving this, the concession not contemplated in its provisions has further legally disrupted the functional inter-agency relationships. For example, the restriction of NPA's to technical regulation - or the further constriction of its regulatory powers-has brought into sharp focus its traditional overlap with NIMASA which is also a technical regulator in the ports in addition to being a regulator of maritime labour.<sup>1229</sup> NIMASA has statutory responsibilities for safety and environmental issues in the Nigerian maritime zone which NIMASA Act defines to include port, the primary jurisdiction of NPA, which also has responsibilities for these issues for example safety issues in the territorial waters and other Nigeria maritime zones or even on the high sea.<sup>1230</sup> One stated policy instrument for realising and achieving stated objectives is by streamlining the relative roles of the different port related institutions.

As seen in the above analysis, this has become less feasible in view of how policy shifts have occasioned reassignment of roles that may essentially not be supported by the clear statutory provisions of the bodies as seen in the appointment of NSC as an economic regulator over NPA. Before concession, and even after, there was problem of multiplicity of public institutions with overlapping roles. The administrative structure designed for each of the statutory bodies are based on their relative functions in spite of which there were still overlap that would need to be corrected with legislative changes. The current management structure provided for by law for NPA, for example, is not streamlined to

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<sup>1228</sup> Hooydonk *The Law Ends Where the Port Areas Begin par*

<sup>1229</sup> NIMASA 's role as regulator of maritime labour including labour employed by concessionaires is provided for in s27(a)(c) of MIMASA Act thus: "The Agency shall-(a) register and maintain a register of every dock worker, seafarer, stevedoring company and seafarer employer, jetty, terminal operators and offshore platforms or terminals;... (c) Ensure that dock workers and seafarer employers comply with existing regulations and standards in relation to crewing, wages, safety, welfare and training of dock workers and seafarers at ports and on board vessels".

<sup>1230</sup> See s 22 (l), 22 (p) NIMASA Act LFN 2004, see also s 7 (g) NPAA.

accommodate only landlord and regulator role as is the case in the current governance port system with a lot of operational responsibilities removed from the Authority. NPA statutory governance structure as seen in chapter three is wieldy because it has a wider function spanning land lord, operational and regulatory aspects as provided for by NPAA.

## **8 Conclusion**

The ports meet the constitutional parameters for qualifying to be a part of the major sectors of the economy which the Constitution requires the Federal Government to manage and operate. This does not preclude participation by the private sector in the management of the port sector. However, such participation must not strip the Nigeria Port Authority (NPA) of its core statutory duties which include management, operation and regulation of the port. The NPA is established to be at once a commercial operator and a regulator of port activities. The concession policy which characterized the current port system has ceded a whole string of statutory operational rights to the private sector leaving the NPA as a land lord and a regulator of the port, a position not envisaged by the NPAA. Similarly, the restriction of NPA to technical regulation and the assignment of Nigeria Shippers Council as the economic regulator is contrary to the clear statutory provisions establishing the NSC as well as the provisions of Infrastructure Utilities Regulatory Commission which has statutory power to regulate the tariffs charged by NPA. In other words, the implementation of concession in the ports has no backing in these laws particularly, the NPAA.

Similarly, such other laws as Public Enterprise (Commercialisation and Privatisation) Act (PEA) and Infrastructure Concession Commission Regulatory Act (ICRCA) provide no such legal backing. The former (PEA) essentially deals with privatisation and commercialisation, neither of which is tantamount to concession which by the clear provisions of the body of the Act it has no mandate on notwithstanding the attempt by National Privatisation Council to add concession to the schedule, an act it has no legislative competence to carry out particularly more so if the subject matter provisions of the Act are considered.



The ICRC does not repeal the NPAA and couches its provision on concession in permissive language 'may'. It does not –and cannot in view of its provisions– strip the NPA of its mandatory statutory duties in the port. Therefore, the implementation that has changed the port governance system has generally no legal support in the relevant laws, and hence there must be a repeal or amendment of NPAA if any concession programme must have the backing of the law and such amendments must take into cognizance of the necessary legal issues.

## **CHAPTER FIVE**

# **EXPOSITION AND PROPOSALS ON THE PROPOSED PORT LAWS**

### **1 Introduction**

The previous chapter examined the legality of port concession on the basis of relevant laws particularly NPAA. It was pointed out that port concession would only be legal under an amended or repealed port law. However, it is one thing to propose a law, it is another for the law to adequately and effectively deal with the object and objectives for which it is proposed. It becomes necessary, therefore, to examine the proposed laws for the port sector namely, Nigerian Ports and Harbours Authority Bill (NPHB), 2015 and National Transport Commission Bill (NTCB) 2016. For the purposes of this work and particularly this chapter, such exposition and the proposals made therefrom will focus on ports concession and associated issues of port governance. This would help to reveal if the bills legalise practice of concession in ports, how the duo have provided for port concession and its objectives and whether both have adequately dealt with issues not envisaged by the existing port law, the NPAA and to what extent. The NPHB provides for ownership, management and operations of the ports while the NTCB provides for the economic regulation of aspects of the transport industry including the ports.

On the whole, the NPHB is divided into fourteen parts. Parts 1, II and III deals with the Nigeria Ports and Harbour Authority (NPHA-hereafter called Proposed Nigeria Ports and Harbours Authority): its establishment, functions and powers, staffing and issues relating to its finances respectively. Part VI deals with the power to declare a port, the NPHA's landlord's power is covered by part VII, part VII is on concession, part IX provides for the tariff regime, part X is on pilotage

and the harbour master and part XI deals with piers, wharves and safety matters. Part XII provides for legal liability of NPHA, Part XIII creates offences and penalties and finally part XIV covers miscellaneous provisions dealing with such issues as exemptions granted to port land, power to collect taxes, interpretation and so on.

The NTCB is divided into eighteen parts in all. After chapter I which provides for the purpose of the Act, Parts II, III, IV and V all deal with National Transport Commission: its establishments, membership, management and staff as well as its finances respectively. Part VI deals with tariff regime, part VI I with registration of regulated industry, part VIII deals with access to service facilities, part IX with deregistration of a service provider, part X with regulatory powers, directives is dealt with in part XI, enquiry into activities of regulated industry in part XII, investigations and powers of entry in part XIII as well as collection and use of information in part XIV. Other parts deal with resolution of conflicts (part XV), review of the commission decisions (XVI), register of agreements and associated undertakings (part XVII) and as well as miscellaneous provisions (part XVIII) dealing with such issues as power of making regulation and interpretation. As seen above, the two pieces of proposed legislation cover wide areas, but the chapter dwells on aspects of port concession and related issues (of port governance) in relevant parts of the bills. To that end, in the first part of the chapter, the bills are subjected to tests on the issue of port concession vis-à-vis stipulated objectives in the bills and other instruments. Part II deals with port governance analysing in the process, different aspects of port governance as provided for in the bill and the structures put in place to realize same and the provisions of the bills relating to concession in ports. This will reveal how adequate the Bills are for the set objectives particularly for port concession. On the basis of the above analysis, proposals are made for the improvement of the Bills covering aspects related to the subject matter of the research. This is followed finally by conclusion.

## 2 Objectives of the bills

The two bills provide for the purposes and objectives for which both were enacted.

### 2.1 Objectives of NPHB

The preamble to the NPHB provides the first introductory shot on the purpose of the Bill to the effect that it intends to enact “an Act to repeal the Nigerian Ports Authority Act, cap 126 LFN, 2004 and to establish the Nigerian Ports and Harbours Authority, to provide for the ownership, management and development of ports and harbours and for related matters.”<sup>1231</sup> This is further elucidated by the provision that:

[T]he purposes of this Act are to (a) provide an appropriate institutional framework for the ownership, management and development of ports and harbours; (b) ensure the integrity, efficiency and safety of the ports based on the principles of accountability, competition, fairness and transparency; (c) encourage private sector participation in the provision of port services and port infrastructure; and (d) promote and safeguard Nigeria's competitiveness and trade objectives.<sup>1232</sup>

This set the tone for the overall objectives of the Bill as will be discussed shortly in the context of the clause that the provisions of the NPHB shall be read and interpreted in connection with the stated specific objectives in the framework of the above purpose.<sup>1233</sup>

### 2.2 Objectives of NTCB

The purpose of the Act, which applies to the provision or use of transport and related services in marine, rail and road transport,<sup>1234</sup> include to “establish the National Transport Commission as an effective, impartial and independent

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<sup>1231</sup> See the preamble to the Bill. See also the Explanatory Memorandum to the bill which provides that it “seeks to provide, among other things, for the establishment of the Nigerian Ports and Harbours Authority and to provide for the management and development of ports and harbours in Nigeria.

<sup>1232</sup> Clause 1 NPHB.

<sup>1233</sup> Clause 1 (3) (f).

<sup>1234</sup> Clause 2 NTCB.

regulatory authority in the transport sector and to set out the objectives, functions and powers of the Commission.”<sup>1235</sup> The Bill establishes NTCB but does not repeal NSCA as proposed in the policy instruments.<sup>1236</sup> It is the purpose of the bill to “promote the implementation of the national transport policy”<sup>1237</sup> and “provide an economic regulatory framework for the transport sector or regulated transport industry.”<sup>1238</sup> It is also the purpose of NTCB to “provide mechanism for monitoring compliance of government agencies and transport operators in the regulated transport industry with relevant legislation and advice Government on matters relating to economic regulation of regulated transport industry”<sup>1239</sup>, “provide for an efficient economic regulation of the transport Sector”<sup>1240</sup>, “protect the rights and interests of service operators and users within Nigeria”<sup>1241</sup>, and to “create an enabling environment for private sector participation in the provision of services in the transport sector.”<sup>1242</sup> The PNTC “shall at all times perform its functions and exercise its powers in such a manner as to achieve the objectives of this Act and any objectives specified in any sector legislation under which a regulated transport industry operates.”<sup>1243</sup>

### *2 3 The bills overall objectives for the ports*

The bills embody a string of objectives, which are discussed below. This includes attaining improved private participation, access to ports, competition, among others.

#### **2 3 1 Improved private participation**

This is an objective under the NPHB which seeks to “encourage private sector participation in the provision of port services and port infrastructure.”<sup>1244</sup> It is also an objective in the Draft National Transport Policy as it is in NEEDS and

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<sup>1235</sup> Clause 1 (a) NTCB.

<sup>1236</sup> See chapter three above.

<sup>1237</sup> Clause 1 (b).

<sup>1238</sup> Clause 1 (c) NTCB.

<sup>1239</sup> Clause 1 (d) NTCB.

<sup>1240</sup> Clause 1 (e) NTCB.

<sup>1241</sup> Clause 1 (f) NTCB.

<sup>1242</sup> Clause 1 (g) NTCB.

<sup>1243</sup> Clause 6 (3) NTCB.

<sup>1244</sup> Clause 1 (c).

NPPP.<sup>1245</sup> In the same vein, NCTB seeks to create an enabling environment for private sector participation in the provision of services in the transport sector.<sup>1246</sup> To that end, the Proposed National Transport Commission (PNTC) has the function to “promote private participation in the provision of transport services.”<sup>1247</sup> Improved private participation is expected to help in bringing about a number of benefits including facilitation of transfer of technology in port operations.<sup>1248</sup>

NPHB clearly grants authority to the Proposed National Ports and Harbour Authority (PNPHA) to enter into leases, concession agreements, operating agreements, or other arrangements with private parties for the occupation of its land for the purpose of enabling such parties to operate or perform port related activities or services.<sup>1249</sup> For that purpose, it may “lease or concede its premises to terminal operators, shipping companies, shipbuilding companies or any other licensed operator.”<sup>1250</sup> This is definitive liberalization of the port sector in a way that allows private capital to invest in the port sector and provide services by way of leases and concession. The provision of NPHB stipulates that one of the specific objectives of the bill is separation of landlord functions from cargo handling that will statutorily allow the private sector to render cargo handling services like other port services through concession. This allows the port authority to concentrate on its landlord roles with the associated regulatory responsibilities. The relevant provision reads:

Subject to the purposes stated in subsection (1) of this section, the provisions of this Act shall be read and interpreted in connection with the following specific objectives (a) the separation of the cargo handling from the landlord functions and the technical regulatory functions within ports and foster greater operating

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<sup>1245</sup> See for example Par 2.3.1 Draft National Transport.

<sup>1246</sup> Clause 1(g).

<sup>1247</sup> Clause 5(c) NTCB.

<sup>1248</sup> Clause 1(1) (c).

<sup>1249</sup> Clause 31(1).

<sup>1250</sup> Clause 31(2).

efficiency, accountability and transparency in the management and operation of ports.<sup>1251</sup>

Whether the provisions relating to private participation particularly concession meet the above objective is an important question that will determine the kind of impact the proposed laws will have on port governance in Nigeria.

### **2 3 1 1 Concession**

While prohibiting operating in ports without a concession, permit or licence,<sup>1252</sup> the NPAB authorizes the NPHA to “grant a concession subject to laws relating to or governing concessions on such conditions as the Authority may impose and as may be specified in the concession agreement, authorising any person to provide any marine service or facility or any port service or facility.”<sup>1253</sup> Similar to the definition under NTCB,<sup>1254</sup> NPAB defines concession (as per clause 124) as “an arrangement between the Authority and a third party pursuant to which such third party shall be authorized to provide a port service or operate a port facility in accordance with this Act and the term includes the meaning assigned to it in the ICRC Act.” The provision of Clause 34 refers to laws relating to or governing

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<sup>1251</sup> Clause 1(3) (a).

<sup>1252</sup> Clause 33. See also Clause 79(1)-(2) which provides “(1) A person shall not erect, re-erect, alter, extend, own or occupy a pier or a jetty, or a wharf in a port or in the approach to a port or any place within any port except in accordance with a concession or permit granted by the Authority.(2)A person who contravenes the provisions of subsection (1) of this section commits an offence and is liable on conviction to a fine of not exceeding N800,000.00” Another provision provides:“ Unlawful operation of port services or facilities. A person who establishes, installs, maintains, provides or operates any marine service or facility or any port service or facility without an approval from the Authority commits an offence and is liable on conviction to a fine of not less than N1,000,000.00 or to imprisonment for a term of not less than three” See Clause 91 NPHB.

<sup>1253</sup> Clause 34 (1).Port services and facilities are defined to include the whole gamut of port business to include “stevedoring, cargo handling, terminal operations, storage of cargo within a port, tug services, floating crane services, berthing services, firefighting, security, radio and radar services, waste disposal, vessel repairs and any other services, terminal and facilities for the handling, storage and transportation of goods on land adjoining the fore shore of Nigeria or a floating platform and for the handling of passengers carried by vessels within a port” See clause 124NPHB.

<sup>1254</sup> Clause 101 NTCB defines concession defines concession as “an arrangement between the Commission and a third party pursuant to which such third party shall be authorized to provide a port service or operate a port facility in accordance with this Act and the term includes the meaning assigned to it in the ICRC Act; and the word “Concessioned” or “concessionaire” shall be interpreted accordingly.” By defining concession only in respect of ports, it would seem the NTCB, which deals with rail and road transport including issues relating to their concessioning has ruled out concession in these sectors.

concession including the main concession law, the ICRC Act which is also referred to in the definition under both NPHA and NTCB. The reference to ICRC Act is also found in the power to “concession terminal operations and related services to third parties in accordance with the provisions of the ICRC Act.”<sup>1255</sup> This means that in addition to the definition provided in both bills concession also means in both Bills what it means in ICRC Act namely “a contractual arrangement whereby the project proponent or contractor undertakes the construction, including financing of any infrastructure, facility and the operation and maintenance thereof and shall include the supply of any equipment and machinery for any infrastructure and the provision of any services”.<sup>1256</sup> The definition in both NPHB and NTCB describes concession as a port service agreement and nothing more which can also describe other kinds of services in ports. The definition in ICRC Act describes the nature of the service in concession as financing, constructing and operating a facility without the element of possession of the facility by the concessionaire, a deficiency shared with the definition under the Bills. The implication is that reference to ICRC Act definition does not cure the deficiency in the Bills’ description of concession.<sup>1257</sup> Another crucial issue is termination of agreement which is prohibited ICRC Act.<sup>1258</sup> This is not in line with the constitutional provision requiring that all government action should be based on public welfare and interest.<sup>1259</sup> This would mean that where an agreement entered into by Government is inconsistent with public interest, no law should require that it cannot be terminated on that basis.

Furthermore, NPHB allows the PNPFA to agree with the concessionaire the period of the concession as provided by ICRC Act the difference with the latter being that “no concession can be granted which duration is above five

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<sup>1255</sup> Clause 10( r) NPHB.

<sup>1256</sup> S 36 ICRC Act.

<sup>1257</sup> See for example clause 124 which describes concession as” an arrangement between the Authority and a third party pursuant to which such a third party shall be authorized to provide a port service or operate a port facility in accordance with this Act and the term includes the meaning assigned to it under the ICRC Act”.One of the deficiencies in the bill is silence on ownership or possessory status of the concessioned facilities.

<sup>1258</sup> See s 12 ICRC Act.

<sup>1259</sup> See s 17 of the Constitution



years without the approval of the President”<sup>1260</sup> a provision shared with leases under the NPAA.<sup>1261</sup> By leaving the duration of the port concession to the discretion of the parties, it means a port concession agreement can extend as far as 1000 years or more.<sup>1262</sup> Stating the specific duration of the concession also implies that the concessionaire has only possessory right over the concessioned port assets.

While the NPHA has the mandate to issues guidelines on concession,<sup>1263</sup> such guidelines must be subject to existing laws on the subject matter of the concession like those on construction. Apart from this provision being an affirmation of ICRCA, it is also an affirmation of the roles of other extant laws in the concession process. It is also a departure from the provision of NPAA ousting regulations and laws on construction.<sup>1264</sup> Another important improvement in the Bill is that there are also no provisions requiring that leases are to be granted in respect of the ports assets that are not necessary for the performance of port functions as found in NPAA.<sup>1265</sup> Such provisions pave way for smooth implementation of concession in ports without any unclear or ambiguous legal provisions.

Furthermore, the guidelines cannot also specify duration for concession agreements which the Bill has left to the discretion of the parties. Neither the NPHB nor NTCB is quite detailed on aspects of port concession with the later leaving the specifics to ICRCA which itself is not detailed on issues on concession in general not to talk of port concession as explained in Chapter two. The NPHB does not spell out specific content of a typical concession agreement nor does it contain at least general outline of the duties or responsibilities of

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<sup>1260</sup> Clause 34(2).

<sup>1261</sup> See s 125 NPAA.

<sup>1262</sup> This may appear mute but in countries still trying to adopt a culture of rule of law, gaps in the law such as this can be exploited to enter into contract of concession with unreasonable duration. The interpretation of the NPAA to justify concession in Nigeria as described in chapter four and the historical evolution of Nigeria ports with all the attendant challenges as described in chapter three lend weight to this point.

<sup>1263</sup> Clause 116(3).

<sup>1264</sup> See s NPAA.

<sup>1265</sup> See s 8(j)NPAA

concessionaires. Whatever is the content it must be registered with the NTCB, as long as it is consistent with the objects of NTCB and the provisions of NTCB and its subsidiary regulations.<sup>1266</sup>

It is noteworthy that the above provisions on private participation in the ports have clearly legalized concession as an instrument for provision of services in the port. This means that it meets the constitutional parameters for active operational involvement of the private sector in the ports and the requirement legislative instrument of the National Assembly specifically and clearly providing for such.<sup>1267</sup>

## **2 3 2 Competition**

Having opened the port economic space to accommodate active private sector provision of core port services through concession, issues of competition between service providers cannot but arise. Provisions on competition helps to prevent abuse of market power. The NTCB as well as NPHB are not silent on competition unlike NPAA which is being promulgated to cater for domination of services by NPA. In terms of NTCB, the NTCB shall be guided by “the need to promote fair competition and investment in the regulated transport industry.”<sup>1268</sup> Also in terms of the NTCB, a transport service provider shall not engage in any conduct which has the purpose or effect of substantially lessening competition in any aspect of the regulated transport industry.<sup>1269</sup> The NTCB has antitrust provisions preventing service providers from entering into agreements such on issues relating to tariff fixing, boycott of another competitor and others.<sup>1270</sup> To that

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<sup>1266</sup> The relevant provision is (1) a party to a written agreement who is subject to this Act shall apply to the Commission for the registration of the Agreement, if this Act requires such registration. (2) The Commission shall register the written agreement if the Commission is satisfied that the agreement is consistent with: (a) the objects of this Act; (b) any relevant instrument under this Act; and (c). any relevant provisions of this Act or its subsidiary legislation.

<sup>1267</sup> See Par 2, Chapter four.

<sup>1268</sup> Clause 32(6) (d).

<sup>1269</sup> Clause 48(2).

<sup>1270</sup> Clause 48(4) NTCB The clause reads:” A transport service provider shall not enter into any understanding, agreement or arrangement, whether legally enforce able or not, which provides for (a) tariff or freight fixing beyond the range set by the Commission; (b) market sharing; (c) cross-subsidy; (d) boycott of another competitor; (e) boycott of a supplier of

effect there is a provision requiring that the exercise of the NPHA's power to grant concession shall at all times be conducted in a competitive and transparent manner.<sup>1271</sup> The NTCB provides:

Notwithstanding the provisions of any other law, the Commission shall have competence in relation to the regulated industry, to determine, pronounce upon, administer, monitor and enforce compliance of all persons with competition laws and regulations, whether of a general or specific nature, as such laws and regulations relate to the regulated transport industry including prohibition on anti-competition practices.<sup>1272</sup>

To that effect, the Commission may from time to time publish guidelines and regulations on anti-competition practices in the regulated transport industry and such guidelines or regulations taking into cognizance a number of factors such as global trends in the relevant markets in this case the global port and maritime sector.<sup>1273</sup> The PNTCB must also put in place rules to regulate agreements between Government and the private sector and to ensure that such (concession) agreements between the two parties are geared towards promoting competition.<sup>1274</sup> The summary of all this is that in terms of the substantive provisions and clauses mandating the Commission to make regulations, the issue of competition enjoys robust coverage as compared to both NPAA and NSCA.

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apparatus or equipment; or (f) boycott of any other transport service operator. (5) A transport service provider shall not, at any time or in any circumstance, make it a condition for the provision or supply of a product or service that the person acquiring such product or service be required to acquire or not to acquire any other product or service either from himself or from another person."

<sup>1271</sup> Clause 31(3) NPHB.

<sup>1272</sup> Clause 48(1).

<sup>1273</sup> See clause 54(2) NTCB The relevant provision reads: "and such guidelines or regulations may include references to: (a) types of or categories of anti-competitive practices which are prohibited; (b) the relevant economic market; (c) global trends in the relevant market; (d) the impact of the practice on the number of competitors in a market and their market shares; (e) the impact of the practice on barriers to entry into the market and measures necessary to remove or reduce their impact; (f) the impact of the practice on the range of services in the market; (g) the impact of the practice on the cost and profit structures in the market; (h) access to essential transport services and facilities on fair and non-discriminatory terms to all users in an equivalent position; and (i) any other matter which the Commission considers relevant.

<sup>1274</sup> Clause 54 (1) NTCB.

### **2 3 3 Access**

A string of provisions in the bills particularly NTCB paints a picture of the grant of concession as being about access to ports and hence concessionaires and other private actors are expected to protect this right of access principally in respect of commercial users. In a way, NTCB recognizes the need for and provides for the right to access which it describes as “the making available of transport services and facilities by one licensee to another, by a licensee to another lawful user for the purpose of providing services and include access to physical infrastructure including terminals, stations, tunnels, bridges, sidings, jetties, hangers, route and cargo handling equipment.”<sup>1275</sup>

For the purpose of having in place detailed rules on access, the Proposed National Transport Commission (PNTC) is required to publish guidelines on access as part of its mandate to publish guidelines from time to time on a number of issues so that it spells out details about access to essential transport services and facilities on fair and non-discriminatory terms to all users in an equivalent position.<sup>1276</sup> The focus on access as seen from these provisions is on essential facilities or significant infrastructure facilities by and for commercial users. In terms of NPHB, one of the specific objectives is the “protection of the rights and interests of port service providers, commercial port users within Nigeria and ensuring that efficient and effective port services are available at a reasonable cost to the users.”<sup>1277</sup>

This objective makes port services available to users at affordable prices and also speaks to the objective of protecting the interests and rights of service providers and commercial port users. In terms of NTCA, consistent with regulations issued in that behalf by the Commission every “operator subject to registration under this Act shall provide access to a significant infrastructure facility on fair and reasonable terms and conditions”.<sup>1278</sup> In determining whether a

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<sup>1275</sup> Clause 101.

<sup>1276</sup> Clause 54(3) (i).

<sup>1277</sup> Clause 1(3) (f) NPHB.

<sup>1278</sup> Clause 35(2) (1) NTCB.

facility is a significant infrastructure facility for open access, the Commission must put some factors into consideration which include ascertaining that “there are no other alternative facilities”<sup>1279</sup>, that “it would not be economically feasible to use another facility providing access to the same route”<sup>1280</sup> and that “it would not be economically feasible to develop another facility providing access to the same route.”<sup>1281</sup> It must also ascertain that “access to the facility would promote competition in at least one market (whether or not in Nigeria) other than a market for using the facility”<sup>1282</sup> and that “safe access to the facility can be ensured at an economically feasible cost”<sup>1283</sup>. An enquiry shall be conducted to determine whether a facility declared to be a significant infrastructure facility remains as such.<sup>1284</sup>

All this shows that the robust provision on access is for commercial users, necessitating the need to expand the scope for other users such as pleasure yacht users. The commercial aspect should not override the social aspect as part of the means of securing the success of concession. This is in line with the constitutional provision that requires the State to “control the national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity”.<sup>1285</sup>

## **2 3 4      Transparency**

The proposed statutory transfer of functions hitherto performed by a public utility, NPA, to private sector, the concessionaire, raises transparency issues. As if underscoring this point, under the NPHB, assignment of such operating services as cargo-handling to the private sector is linked to the need for transparency.<sup>1286</sup> One issue in this regard relates to transparency in the overall process involving management of port concession. A notable purpose of the NPHB is to ensure the

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1279    Clause 35(2) (a) NTCB.

1280    Clause 35(2) (b) NTCB.

1281    Clause 35(2) (c) NTCB.

1282    Clause 35(2) (d) NTCB.

1283    Clause 35(2) (e) NTCB.

1284    Clause 40(1) NTCB.

1285    S 16

1286    Clause 1(3) (a).

integrity of ports based on accountability and transparency.<sup>1287</sup> The exercise of the NPHA's power concerning concession, is therefore, mandated to be conducted in a transparent manner.<sup>1288</sup> The same goes for PNTC which is required to perform its functions based on transparency.<sup>1289</sup> To that end there are provisions mandating the major players to exude and ensure transparency. The members of Boards of both PNTC and PNPHA are required to display integrity and transparency in their official functions particularly in respect interests in concessional and other companies relating with the ports.<sup>1290</sup> NPHB and NTCB also mandate the concessionaire to provide information to the PNPHA and PNTC when required. The NTCB further requires the concessionaires to be transparent and truthful in the provision of required information to the two public bodies.<sup>1291</sup> The other point is the issue of access to information whereby records of public utilities such as NPA are subject to Freedom of Information Act which generally grants the public access as discussed in chapter two.

When functions that NPA used to perform are transferred to concessionaires, are they (the concessionaires) required to allow the public access to information associated with their performance of hitherto publicly performed functions? This is what in the jurisprudence of some jurisdictions is known as functional equivalency and provides that in cases where a private contractor is performing a function that was the preserve of a public agency such private contractor may be deemed the

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<sup>1287</sup> Clause 1(1) NPHB.

<sup>1288</sup> Clause 31(3) NPHB.

<sup>1289</sup> Clause 32(6) NTCB.

<sup>1290</sup> See for example Clause 6(1) (g) NPHB which provides that a board member may cease to be a member when he violates the conflict of interest provisions in the Fourth Schedule to the Bill which prohibits direct or indirect interest in concessionaire companies and requires disclosure on appointment any such interest. The relevant part of schedule reads: "(1) Subject to the further provisions of this Schedule, no member of the Board or staff of the Authority shall have a direct or indirect financial interest or investment in any shipping, stevedoring, pilotage, terminal operations or any other services or receive therefrom any loan, remuneration or other rights, or have any personal interest in any contract made or proposed to be made by the Authority, throughout the tenure of his office or employment with the Authority. (2) Subject to paragraphs 3 and 4 of this Schedule, each member of Board or staff of the Authority shall on an annual basis present a written declaration not later than the third month of each year affirming the nonexistence of any such interest as is specified in paragraph 1 and shall pledge to disclose and inform the Authority of any such relationship or interest that arises or is likely to arise during his tenure or employment with the Authority."

<sup>1291</sup> See clause 43(2) NTCB.

functional equivalent of the public agency and may be subject to transparency laws that for example require the public agency to make its record accessible.<sup>1292</sup> The proposed laws (NPHB and NTCB) do not require the port concessionaires' to provide information the NPA or PNPHB was bound to provide were they to be the ones performing these functions despite the fact that the ownership concessioned assets remain with the State. The NTCB provides that the PNTC keeps a register of concession agreements but the register shall not to contain the "terms and conditions of the agreement."<sup>1293</sup> This is obviously to afford confidentiality to the agreement.

Under the NPHB, the PNPHA and its employees and agents are generally expected to maintain secrecy and may disclose information only under requirement by another law or the court.<sup>1294</sup> Associated with this is public access to the concession agreements. Neither of the bills directly provide against confidentiality agreement in the possession of the concessionaire which raises question about the level of compliance with the transparency objective of both bills. It would be beneficial if the transparency provisions in the bills provide a statutory expression in the port sector for the International Open Government Partnership entered into by the government as contained in the Open Government Nigerian National Action Plan whose objective include ensuring

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<sup>1292</sup> See for example the American case of *Friedman Vs Corrections Corporation of America* 310SW3d 366 (2009) decided by Tennessee Court of Appeal which involved a request for information in possession of the private contractor managing and operating government prison. The Court held that the private contractor was bound to provide information because the private sector was performing a function traditionally performed by the public. See also S 13.05 Minnesota Data Practices Act 1999.

<sup>1293</sup> Clause 86(2) ( c) NTCB.

<sup>1294</sup> See Clause NPHB 112(1) which reads: "A person who is or has been a member, an officer, employee, adviser or agent of the Authority or a member of a committee of the Authority shall not disclose any information relating to the affairs of the Authority or of any other person which has been obtained by him in the performance of his duties or the exercise of his functions except for the purpose of the performance of his duties or the exercise of his functions or when lawfully required to do so by any court or under the provisions of any written law. (2) A person who contravenes the provision of subsection (1) of this section commits an offence and is liable on conviction to a fine of not less than N300,000.00 or to imprisonment for a term of not less than 6 months or to both."

citizens have access to information on government activities so as to be in a position to challenge retrogressive policies and actions.<sup>1295</sup>

### **2 3 5 Efficiency**

This is one of the fundamental objectives of the bills. To give effect to this objective, the PNTC is required to perform its functions based on the need to ensure “efficient use and management of port and land transport facilities.”<sup>1296</sup> Similarly, NPHB is meant to “ensure the integrity, efficiency and safety of the ports based on the principles of accountability, competition, fairness and transparency.”<sup>1297</sup> For this purpose, PNPFA shall do such things which in its opinion are necessary to ensure the efficient performance of the functions of the Authority under the NPHB.<sup>1298</sup> For example, concerning the NPHA, it shall be the general duty of the Authority to “conduct its affairs in a manner to ensure that its revenue is sufficient to – (i) meet all charges which are chargeable to its revenue account, and (ii) generate a proportion of the capital it requires; and (b) conduct its business in a cost effective and efficient manner.”<sup>1299</sup> For the concessionaire, the NPHA shall ensure they operate in a way that helps in achieving the efficiency objective. On the whole, provisions of both bills embody the efficiency objective.

### **2 3 6 Safety and security**

One of the core objectives of the NPHB is “provision of safe navigation, development and efficient management of harbours, channels and waterways

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<sup>1295</sup> See the Open Government Nigerian National Action Plan(2017-2019).See [www.justice.gov.ng/.../FINAL-NIGERIA%20NATIONAL%20ACTION%20PLAN%2](http://www.justice.gov.ng/.../FINAL-NIGERIA%20NATIONAL%20ACTION%20PLAN%2) (Accessed on 15-7-2017).The National Action Plan seeks to promote transparency through more citizen participation and access to information. Started on 20 September,2011,the Open Government Partnership is a multilateral initiative that aims to secure concrete commitments from governments to promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen governance.Nigeria joined in July 2016. See <https://www.opengovpartnership.org/about/about-ogp> (Accessed on 15-7-2017)

<sup>1296</sup> Clause 32 (6) (b) NTCB.

<sup>1297</sup> Clause 1(b).

<sup>1298</sup> Clause 8 (e) NPHB.

<sup>1299</sup> Clause 26 NPHB.



and all other conservancy functions.”<sup>1300</sup> It is also to ensure the evolution of a high level regime of safety in the ports.<sup>1301</sup> It is, therefore, the duty of PNPHA to set overall policy for port health and safety.<sup>1302</sup> That is part of the overall requirement that the PNPHA takes steps to ensure effective planning and management of the ports and harbours.<sup>1303</sup> This means that the port authority will have to put a policy in place which deals with all aspects of health and safety of the ports as an expression of the requirement to perform its functions in a manner that is safe and secure. It will involve ensuring that others carry out their activities in a bid to ensure the “enhancement of safety and security within the ports limits.”<sup>1304</sup> In view of the fact that increased private participation in ports heightened the need for improved safety, it provides that the PNPHA ensure compliance of private operators with its overall policy on health and safety.”<sup>1305</sup>

For that purpose, the NPHB sets out a framework of safety with respect to provision of navigational aids and piloting. To that end, it is the responsibility of the port authority to “provide and maintain aids to navigation, lighting, and mooring in ports and harbours.”<sup>1306</sup> The NPHB also provides for licencing and certification of pilots to provide navigational services to ships providing that “person shall not perform the duties of a pilot in a port without appropriate training and qualification and without a licence by the Authority to do so”.<sup>1307</sup> The bill also requires that the Government Agency responsible for maritime safety administration (which is NIMASA) may recommend to the Authority the minimum qualifications for any person to be qualified as a pilot, including the content and nature of examinations, if any, to be undertaken and where NIMASA chooses to recommend, it shall consult with the Authority regarding the content of the minimum qualifications referred to in the bill, before any recommendation is

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<sup>1300</sup> Clause 1(3) (b).

<sup>1301</sup> Clause 1(3) (g).

<sup>1302</sup> Clause 9(1) (g) NPHB.

<sup>1303</sup> Clause 9(3) (2).

<sup>1304</sup> Clause 116(4) (f).

<sup>1305</sup> Clause 9(1) (x).

<sup>1306</sup> Clause 9(1) (c)

<sup>1307</sup> Clause 65 (1). See Clause 68(1) (2) which exempts PNPHB pilots being licenced while navigating in pilotage district where pilotage is compulsory.

made.<sup>1308</sup> The requirement of coordination with NIMASA is a departure from NPAA's total silence on maritime agency primarily responsible for marine safety.

On the whole, the provisions of NPHB on port safety is more elaborate than in NPAA consistent with the needs in a liberalized port sector with a more active private presence. In any case such elaborate provisions do not include a requirement for formal risk assessment to ensure that safety management system is truly comprehensive and fully effective and take a more proactive approach. It is notable that NTCB does not have elaborate provision on safety perhaps in view of the fact that safety in addition to security and environmental issues are part of the technical regulatory responsibilities assigned to PNPFA in the emerging port dispensation. However the NTCB has also granted the PNTC powers to "ensure that regulatory decision making has regard to the relevant health, safety, environmental and social legislation and best practices applicable to the regulated transport industry." The applicable legislation here referred to would include the NPHB. Related to the above are the provisions on security which are found together with provisions on safety in a number of places in the bills such as the requirement that the PNPFA performs its functions in a way that is safe and secure.<sup>1309</sup> The underlying issue here is the need to ensure the security of all persons and the country in view of increased and improved private participation at the ports as the main gateway to the country.

## **2 3 7 Environment**

This, in addition to safety and security, is another technical objective of the port which targets a high level of environmental protection in the port.<sup>1310</sup> As part of measure to achieve that the NPHB it is required to set overall policy for port security, health and safety, environmental protection and coastal conservancy. This way the bar of environmental protection in the NPHB is higher than that of NPAA which is essentially focused on waste and oil spill. In fact the port authority is required to perform its functions in a way that is environmentally

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<sup>1308</sup> Clause 65(2) (a) (b).

<sup>1309</sup> Clause 9(2) (b).

<sup>1310</sup> Clause 1(3) (h).

sustainable.<sup>1311</sup> While the NPHB also provides for these,<sup>1312</sup> it is mandated to control “pollution and the protection of the environment within the port limits.”<sup>1313</sup> Similarly, the NPHB requires Environmental Impact Assessment before the declaration of ports.<sup>1314</sup>

### **2 3 8 Port strategic planning**

In terms of NPHB, one objective provides for “creation of means for planning, coordinating, developing and integrating port policies with other maritime activities, surface and air transportation.”<sup>1315</sup> This is to ensure that the PNPHA “in cooperation with other relevant bodies, ensures that the ports are effectively integrated with other systems of infrastructure within and outside the ports”<sup>1316</sup> That is in the context of the overall planning objective which is to “develop a plan for and maintain national strategic port planning and implement same.”<sup>1317</sup> On its part, the NTCB’s purpose includes to ‘promote the implementation of the national transport policy.”<sup>1318</sup> The NPHB does not specifically refer to national transport policy but dwells in general on national plans and port policies.

The provisions on planning are in line with the provision of National Planning Commission (NPC) Act which encourages planning, however there are no references to this Act to ensure that the port plans are in tandem with the overall national strategic plans such as NIIMS produced by NPC.<sup>1319</sup> It is also noteworthy that an important issue is the need for coherence between national policies and the legal instrument on port for example on issues of concession in ports, which

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<sup>1311</sup> Clause 9(2) (b).

<sup>1312</sup> For example Clause 97 NPHB which provide that “throwing ballast and waste into port waters. A person who throws or empties into any port waters any ballast or waste however described commits an offence and is, in addition to other penalty provided in any applicable laws, liable on conviction, in the case of –(a) oil or chemical waste to a fine of not less than N10,000,000.00 or such higher fine as the court may determine; and (b) non-oil or bio-degradable waste, a fine of not less than the sum of N5,000,000.00.”

<sup>1313</sup> Clause 116 (4) (e).

<sup>1314</sup> Clause 27 (4) NPHB.

<sup>1315</sup> Clause 1(3) (d) NPHB.

<sup>1316</sup> Clause 9(1) (m) NPHB.

<sup>1317</sup> Clause 9(1) (c).

<sup>1318</sup> Clause 1(b).

<sup>1319</sup> See s 4 NPCA LFN 2004

can be achieved through periodic review of the policy. The Bills do not provide for periodic review of the policy.

### 3 Port Governance

#### 3.1 *Notion of ports under the bills*

Port concession requires that the exact physical location or geographical coordinate of a port be determined being the subject matter of the concession. The jurisdiction of a port authority-or any other authority at that over a particular place accurately specified to be a port under its control determines its power to grant concession in such areas.<sup>1320</sup> In terms of NPHB, a port is “any place in Nigeria, navigable river or channel leading into such a place having facilities for vessels to moor and load or discharge including offshore cargo handling facilities (artificial islands), inland (dry) ports, harbours, berths, jetties, pontoons or buoys and wharves within the limits of the ports and includes any place declared to be a port under this Act.”<sup>1321</sup> This is in *pari materia* with the description of port in NTCB as “any place in Nigeria, including navigable river or channel leading into such place having facilities for vessels to moor and load or discharge and shall include offshore cargo handling facilities, dry ports, harbour, berths, jetties , pontoons or buoys and wharves.”<sup>1322</sup> There are a number of important issues arising from these interpretations.

While the definitions are essentially the same, their legal implications for the subject matters of the Bills differ relative to other players in the whole Nigerian maritime order. NTCB covers all transport services whether on seaport or in inland waterways. Inland water ways are under the control of Nigeria Inland

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<sup>1320</sup> See the case of *Oba Yekini Elegushi V Attorney General* FHC L/LS/66/95 (unreported) where it was held as per the Federal High Court that not even a state government can grant concession on a property belonging to the Federal Government.

<sup>1321</sup> Clause 124 NPHB. The ports listed in the first schedule to the bill includes (i) Lagos Port Complex, Apapa; (ii) Tin Can Island Port Complex; (iii) Kirikiri Lighter Terminal (I & II); (iv) Ikorodu Lighter Terminal. (v) Port Harcourt; (vi) Federal Ocean Terminal, One; (vii) Federal Lighter Terminal, One; (viii) Warri; (ix) Calabar; (x) Burutu; (xi) Akassa; (xii) Bonny; (xiii) Degema; (xiv) Forcados; (xv) Escravos; (xvi) Koko Port; (xvii) Sapele; (xviii) Brass; and (xix) Lekki Deep Sea.

<sup>1322</sup> Clause 101 NTCB.

Waterways Authority (NIRWA) whose constituent Act provides that ‘all navigable waterways ,inland waterways, river ports and internal waters of Nigeria excluding all direct approaches to the ports listed in the Third Schedule to this Act and all other waters declared to be approaches to ports under or pursuant to the Nigerian Ports Authority Act, up to 250 meters beyond the upstream edge of the quay of such ports, shall be under the exclusive management, direction and control of the Authority”.<sup>1323</sup> In other words, NIRWA has primary responsibilities over river ports. This is definitely not problematic for PNTC with equal jurisdiction over all kinds of ports in all places in Nigeria as far as economic regulation is concerned. The problem lies in NPHB inclusion of navigable rivers without adding exception for ports under NIRWA which is what the NIRWA Act does: expressly excluding ports under the NPA including particularly approaches to those ports. This effectively abrogates all powers of NIRWA under its constituent Act .It also runs contrary to proposed repeal of NIRWA Act.<sup>1324</sup>This issue is compounded by the zero- reference to NIRWA in the provision relating to the power of the minister to declare ports. In terms of NPHB:

The Minister may by order (a) declare any place in Nigeria and any navigable channel leading into that place to be a port within the meaning of this Act; (b) specify the limits of any place declared as a port in accordance with paragraph (a) of accordance with subsection (1) of this section; (c) declare any navigable channel leading into a port to be an approach to that port. (d) declare

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<sup>1323</sup> See s11 National Inland Waterways Authority Act Cap N47 LFN 2004.

<sup>1324</sup> See Clause 2 National Inland Waterways Bill 2015 which reads “This Act applies to all National inland waterways listed in Schedule I and to any other National Inland Waterways as may be declared by the National Assembly and to any person or Government Agency with activities or operations connected with National Inland Waterways in Nigeria.” Clause 16 titled Areas under the control of the authority reads further : “ All navigable waterways, inland waterways, river ports and internal waters of Nigeria, excluding all direct approaches to the ports listed in the Schedule II to this Act and all other waters declared to be approaches to ports under or pursuant to the Nigerian Ports”. See the official webpage of the National Assembly for the Bill <http://www.nassnig.org/document/download/8314> (Assessed 5-7-2017). Authority Act, up to 250 meters beyond the upstream edge of the quay of such ports, shall be under the exclusive management, direction and control of the Authority.

any place in Nigeria to be an inland port or container depot; and (e) make any variations in the limits of any port or the approaches to the Port.<sup>1325</sup>

The limitations in this description of the ports arises from the overall scope of application of NPHB which puts it on collision course with more players in the Nigerian maritime domain if the relative jurisdiction of each player is not spelt out.

In terms of NPHA

This Act shall apply to (a) all port related activities carried out within the Nigeria maritime domain; (b) all ports and harbours specified in the First Schedule to this Act, and all other ports that may be declared from time to time by the Minister; c) any person or government agency with respect to any activity or operations in ports and harbours within Nigeria; d) and any other location where a maritime activity is taking place within the maritime domain of Nigeria.<sup>1326</sup>

Maritime domain is described “as all area and things of ,on ,under relating to adjacent to, or boarding on a sea, ocean, or other navigable waterways, including all maritime related activities, infrastructure, people, cargo and vessels and other conveyances carried out on the Exclusive Economic Zone and Continental Shelf.”<sup>1327</sup>

This is at once comprehensive and inclusive: so comprehensive it entails all areas of Nigerian waters and so inclusive it covers all activities, institutions, infrastructure, cargo, vessels in the maritime domain. By applying the Bill to the domain as described without strong provision respecting the institutional players operating in the same space, a kind of ports is created which may tend to overrule every other institutional players in and outside port limit. The clause

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<sup>1325</sup> Clause 27 NPHB.

<sup>1326</sup> Clause 27 (1) NPHB. The rest of the clause reads. (2) The places specified in the First Schedule to this Act, shall be deemed to be ports, and the limits of and approaches to any port shall until other provision is made in accordance with paragraph (b) of subsection (1) of this section, be the limits declared and in force immediately before the commencement of this Act and shall include a) ocean beaches within 100 metres of high water mark; and (b) the waterways leading to the ports, creeks and swamp land below the highest astronomical tide level and all beacons, moles, piers, slipways, quays and other works extending beyond the natural line of the high -water level.”

<sup>1327</sup> Clause 124 NPHB.

authoritatively asserts the authority of PNPFA in ports, which is quite good as it subjects all players within the port to the PNPFA. The other part relating to areas outside the traditional port limits may also be helpful in asserting universal application of the bill on port issues. However, the subclauses “all ports related activities carried out within the Nigeria maritime domain” and “any other location where a maritime activity is taking place” do not make reference to players such as NIMASA which is also active, for the purpose of its functions,<sup>1328</sup> in the maritime zones of Nigeria including ports and particularly in the TS, EEZ and on the high sea as per its constituent Act.<sup>1329</sup> This leads to another important phrase in the NPHB and NTCB description of ports namely ‘offshore cargo handling facilities’: an important innovation in the bills.

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<sup>1328</sup> See s 22 NIMASA Act. It reads: “22(1) The functions and duties of the Agency shall be to- (a) pursue the development of shipping and regulate matters relating to merchant shipping and seafarers; (b) administering the registration and licensing of ships; (c) regulate and administer the certification of seafarers; (d) establish maritime training and safety standards; (e) regulate the safety of shipping as regards the construction of ships and navigation;(f)Provide search and rescue service; (g) provide directions and ensure compliance with vessel security measures; (h) carry out air and coastal surveillance; (i) control and prevent marine pollution; (j) provide direction on qualification, certification, employment and welfare of maritime labour; (k) develop and implement policies and programmes which will facilitate the growth of local capacity in ownership, manning and construction of ships and other maritime infrastructure; (l) enforce and administer the provisions of the Cabotage Act 2003; (m) perform port and flag State duties; (n) receive and remove wrecks; (o) provide National Maritime Search and Rescue Service; (p) provide Maritime Security; and (q) establish the procedure for the implementation of conventions of the International Maritime Organisation and the International Maritime Labour Organisation and other international conventions to which the Federal Republic of Nigeria is a party on Maritime Safety and Security, Maritime Labour, Commercial Shipping and for the implementation codes, resolutions and circulars arising therefrom. (2) Without limiting the generality of the foregoing, the Agency shall- (a) inspect ships for the purposes of maritime safety, maritime security, maritime labour and prevention of maritime pollution; (b) make enquiries as to shipwrecks or other casualties affecting ships, or as to charges of incompetence or misconduct on the part of seafarers in relation to such casualties; (c) administer policy for the development of shipping in general; (d) provide on request services to the maritime industry on a commercial basis; (e) establish and manage maritime institutions for the training of officers of the Agency; (f) generally to perform any other duty for ensuring maritime safety and security or do all matters incidental thereto; (g) provide consultancy and management services relating to any of the matters referred to in this subsection; and (h) perform any other prescribed functions relating to or incidental to any of the matters referred to in this subsection.”

<sup>1329</sup> NIMASA has mandate to operate in Nigeria waters Nigeria maritime zone defined in the Act as including “inland waters, territorial waters or waters of the Exclusive Economic Zone (respectively together or any combination thereof” See s 64.

The NPAA does not have a similar provision *albeit* it provides, like the NPHB, for navigational aids and related safety facilities in different parts of the sea.<sup>1330</sup> Off-shore cargo handling facility is described as “an off-shore facility within or beyond the port limits used for the transfer of cargo from a vessel to the land and vice versa.”<sup>1331</sup> It is also described as artificial island.<sup>1332</sup> As explained in Chapter three, nothing in International Law of the Sea shows that States are prohibited from maintaining or operating such offshore facilities as long as the legal status of the particular domain or zone is respected .It goes without saying that nothing prevents states from granting concession in respect of these facilities so long as the status of the zones is respected. The NPHB says ports include these offshore cargo facilities.<sup>1333</sup> By characterizing the off-shore facilities that are located outside the traditional ports limits as ports, it is implicit that the legislature’s intention is to grant such facilities all the legal status of a typical port, being part of internal waters where the sovereignty of a State is at its apex. This means if the off shore cargo handling facilities is located in the Exclusive Economic Zone, such facilities would have the status of internal waters or to be specific the legal standing of ports .And since the provision of the NPHB applies in a maritime domain that includes EEZ and the high sea, cargo handling facilities therein, whether handled by concessionaire or the PNPHA, could be given the status of facilities located within the ports limits. Such characterization would not only contravene International Law but would also run contrary to the spirit of the bill which provided for the function of the bill to include implementation of international conventions to which Nigeria is a party.<sup>1334</sup>

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<sup>1330</sup> See Clause 66 NPHB. It reads: “The Minister may, by regulation published in the Gazette, establish a pilotage district – (a) in any port; (b) in the approach to any port; (c) in the waterways and territorial waters of Nigeria; or (d) in the Exclusive Economic Zone of Nigeria.” This similar to s41 NPAA.

<sup>1331</sup> Clause 124.

<sup>1332</sup> See clause 124 NPHB.

<sup>1333</sup> Clause 124.

<sup>1334</sup> See clause 9(k) NPHB .See also Exclusive Economic Zone LFN 2004.See also Territorial Waters Act LFN 2004.While the Exclusive Economic Zones Act provides, in s3, for installations in the EEZ it regonises the right of other nations in this zone by stating its overall purpose to be “An Act to delimit the Exclusive Economic Zone of Nigeria being an area extending up to 200 nautical miles seawards from the coasts of Nigeria. Within this Zone, and subject to universally recognized rights of other States (including land-locked



Another issue- which is not critical and may appear to be of recondite value but of some significance to make the NPHB smarter relates to harbour. Like many other legislations, ports, under NPHB and NTC include harbour defined to mean “estuaries, navigable rivers, piers, jetties and other works in or at which vessels can obtain shelter or load and discharge goods or passengers.”<sup>1335</sup> Since port includes harbour consistent with definitions under the two bills and other laws and even in line with Anglo-Saxon usage of the two words adopted in Nigeria ordinary and legal English, it is not clear in the body of the bill why the name of the port Bill is Nigeria Port and Harbour Authority Bill. It would be smarter to stick to the word port in the title and use the word harbour, in the body of the bill, where it means that particular place in port for sheltering and the word ‘port’ where it encompasses both harbor and other places in the port.

### 3 2 Governance structures of the authority and the commission

It is a fundamental purpose of the NPHB to “provide an appropriate institutional framework for the ownership, management and development of ports and harbours.”<sup>1336</sup> The essence is the introduction and maintenance of appropriate institutional paradigm to support good governance and accountability in the ports.<sup>1337</sup> The NTCB also sets out to put in place an appropriate regulatory authority for the transport sector including ports.<sup>1338</sup> An appropriate institutional framework is essential not only in port governance in general but also concession in particular.

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States), Nigeria would exercise certain sovereign rights especially in relation to the conservation or exploitation of the natural resources (minerals, living species, etc.) of the sea bed, its subsoil and superjacent waters and the right to regulate by law the establishment of artificial structures and installations and marine scientific research, amongst other things.” See s3 and the Preamble to the Act. See also s4 Territorial waters Act which provides for respect to laws of Nation in this jurisdiction. The importance of respecting the jurisdiction of these zones was stressed in the case of *Attorney General of the Federation vs Attorney General of Abia States and 36 States*. ALLFWLR 2002-2003 cited in *AG Rivers State vs AG Akwa Ibom* (2011) FWLR 1063.

<sup>1335</sup> Clause 124.

<sup>1336</sup> Clause 1(a).

<sup>1337</sup> Clause I (e).

<sup>1338</sup> Clause 1(a).

## **3 2 1 Proposed Nigeria Port and Harbour Authority**

### **3 2 1 1 Governance structure**

The PNPHA is established as a corporate body and it is provided that “the ownership of all ports and harbours shall be vested in the Authority for and on behalf of the Federal Government of Nigeria.”<sup>1339</sup> This effectively makes clear that Federal government absolutely retains ownership of ports through the Port Authority. Hence, being a body corporate with the ownership and control of the ports, the PNPHA has the legal status to enter into contracts including concession based on the provisions of the bill. The authority’s day-to-day administration is to be headed by the Managing Director appointed by the President on the recommendation of the Minister.<sup>1340</sup> The Managing Director, who is the Chief Executive and Accounting Officer, is also to be responsible for other employees of the Authority.<sup>1341</sup> The president is required to appoint three Executive Directors,<sup>1342</sup> though the specific designations of the executive directors are not spelt out similar to what it is under the NPAA. The Managing Director, the Executive Directors in addition to a non-executive Chairman and six other persons, also appointed by the President,<sup>1343</sup> are designated as the Governing Board of the Authority, required to be persons of integrity possessing cognate experiences in relevant fields and versed in areas of ports, harbours and environmental management and who shall, in managing the affairs of the Authority, have regard to relevant general guidance on the governance of public bodies and the generally accepted principles of good corporate governance.<sup>1344</sup> In terms of the NPHB, the Board shall consist of “a non-Executive Chairman, the Managing Director of the Authority, the three Executive Directors of the Authority

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<sup>1339</sup> Clause 3 (3).

<sup>1340</sup> Clause 12 (1). The minister is defined as the Minister in charge of transport. See clause 124.

<sup>1341</sup> Clause 12(c) (i). See also clause 15.

<sup>1342</sup> Clause 13(1).

<sup>1343</sup> Clause 4 (3).

<sup>1344</sup> Clause 4(4) (5).

and six persons appointed from each of the six geopolitical zones.”<sup>1345</sup> Headed by the non-executive Chairman, the board is responsible for the overall control of the authority.<sup>1346</sup>

The requirement to appoint six persons from the different geo-political zones of the country is an attempt to meet the requirement of Federal Character and fulfil the constitutional requirement of balanced appointment in government agencies, though it is feasible to meet this requirement in another way as will be shown in the proposals.<sup>1347</sup> However, the total number of board members exceeds the ones under the NPAA in spite of the fact that the bill envisages the transfer of a whole bundle of operational responsibilities-under concessional contract- to the private sector implying the administrative structure should be slimmer and smarter. In addition it exceeds the number provided for statutory corporations in general which, in addition to the Chairman and exofficio is a maximum of eight persons.<sup>1348</sup> It is provided that a statutory body “shall consist of a chairman and not more than eight other members, so however that without derogating from that number there may be ex-officio members (co-opted or otherwise) not exceeding at any one time five in number.”<sup>1349</sup> As it were, the number of board members provided for under clause 4(2) is equal to eleven-two more than the required number. In another part of bill, it is provided that the Board “shall have a Secretary who shall be the Head of the Legal department of the Authority.”<sup>1350</sup>

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<sup>1345</sup> Clause 4(2) (a-d).The clause mentions a non-executive chairman. This is explained in clause 8 which provides that the chairman and ex-officio shall be on part time basis. This section also implies that ex-officio are members of the Board.

<sup>1346</sup> Clause 4(1).

<sup>1347</sup> See generally S14(3) Constitution which reads : “The composition of the Government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the federal character of Nigeria and the need to promote national unity, and also to command national loyalty, thereby ensuring that there shall be no predominance of persons from a few State or from a few ethnic or other sectional groups in that Government or in any of its agencies.

<sup>1348</sup> The word Ex officio is originally from latin ex oh-fish-ee-oh meaning "from the office," to describe someone who has a right because of an office held, such as being allowed to sit on a committee simply because one is president of the corporation.” See <http://legal-dictionary.thefreedictionary.com/ex+officio> (Accessed on 2 9-6-2017).

<sup>1349</sup> See s 3(1)(a) Statutory Corporations Act LFN 2004.

<sup>1350</sup> Clause 14(1)(2) in which it is further provided “The Secretary shall be a legal practitioner of not less than 15 years post call experience.15 (3) The Secretary shall report to the Managing Director and be responsible for –(a) making arrangements for meetings of the Board and preparing the agenda and minutes of such meetings; (b) communicating the

It is not provided in clause 4- which it is submitted should not be the case- that the secretary is a board member, but this is clear in this last provision. Membership of the board could thereby increase by one more person, that is, the secretary making the total number of board members twelve (12) minus the *ex-officio* members.

As stated earlier, the Board has overall control over the PNPBA .In terms of the NPHB “the supplementary provisions set out in the third Schedule to this Act shall have effect with respect to the proceedings of the Board and the other matters mentioned therein.”<sup>1351</sup> In terms of this schedule the Board has powers to make decisions regarding the grant of concession.<sup>1352</sup> While there is no provision for a technical department specifically dedicated to issues of concession, the bill provides that “the Authority shall be structured into such Departments as the Board may from time to time.”<sup>1353</sup>

### **3 2 1 1      Functional profile**

The NPHB does not only provide for the functions of the Port Authority, but also for a framework under which the functions are to be performed to achieve its objectives requiring that the PNPHA “perform its functions in a manner that is safe and secure, environmentally sustainable, effective and efficient and commercially sound”.<sup>1354</sup>

In terms of NPHB, the functions of the PNPHA shall be to:

- (a) develop a plan for, undertake and supervise the dredging and maintenance of channels within the Ports limit and its approaches in Nigeria;
- (b) develop a plan for and maintain national strategic port planning and implement same;
- (c) provide and maintain aids to navigation, lighting and mooring in ports and

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decisions of the Board to members of the Board and keeping records of the Board’s meetings and proceedings;(c) keeping the corporate seal and records of the Authority (d) arranging for payments of fees and allowances of meetings and all other matters affecting members of the Board; and (e) such other duties affecting the Authority as the Board may direct from time to time.”

<sup>1351</sup> Clause 4(6).

<sup>1352</sup> Third Schedule paragraph 7.

<sup>1353</sup> Clause 4(4).

<sup>1354</sup> Clause 9(2).

harbours; (d) provide pilotage services, waste reception facilities and other ports infrastructure; (e) provide and enforce technical regulations on operations, construction and installations within the ports and harbours; (f) develop channels and approaches to ports and harbours; (g) set overall policy for port security, health and safety, environmental protection and coastal conservancy; (h) encourage and facilitate private sector participation and investment in the provision of port services and facilities; (i) approve the establishment and planning of off-shore cargo -handling facilities and related services; (j) represent Nigeria in regional and international fora on matters relating to and connected with ports and harbours; (k) negotiate, supervise, implement and ensure compliance with international maritime obligations under applicable international conventions and protocols; (l) provide landlord services in ports and harbours, in an economically, socially and environmentally sustainable manner; (m) in co-operation with other relevant bodies, ensure that the ports are effectively integrated with other systems of infrastructure within and outside the ports; (n) facilitate the sustainable growth of trade through the ports; (o) provide or arrange for the provision of facilities, services, accommodation and land in the harbours for vessels, goods and passengers; (p) direct and control the movement of vessels within ports and harbours, and provide or arrange for the provision of pilotage services; (q) provide for and maintain all coastal and channel management services; (r) develop and deploy resources in ports to enhance port security; (s) engage in any business activity, either alone or in partnership with other persons, as may be approved by the Minister; (t) in co-operation with relevant Agencies provide or arrange road and rail access to ports and facilitate the integration of infrastructure and logistics systems in the ports; (u) provide requisite assistance, including search, rescue and salvage operations to any vessel entering or leaving any port and within the approaches to the ports for the purpose of saving life and property; (v) develop implementation and operational strategies suitable to the peculiarities and economic viability of the ports with due regard to the consequences of its activities on the environment and the heritage, whether natural or manmade; (w) grant concessions to private entities in accordance with the laid down processes; (x) ensure compliance of private operators with its overall policy on health and safety, environmental

protection, coastal conservancy; and (y) perform such other functions as may be necessary to give effect to the provisions of the Act.<sup>1355</sup>

The bill also grants the PNPHA a wide range of powers some of which are similar to some of the functions such as the power to grant concessions while others amplify the function such as the power to serve as adviser to the government and other ports whether in Nigeria and outside.<sup>1356</sup>

A cursory look at the functions of the PNPHA shows that the functional profile of the Authority remains comprehensive covering all aspects of the port. A combined reading of the functions with the powers makes the picture of a comprehensive port becomes even clearer. The functions are in fact more

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<sup>1355</sup> Clause 9(1).

<sup>1356</sup> See Clause 10 NPHB. The section on the powers reads:” (1) The Authority shall have power to (a) develop, whether by itself or in partnership with others, own and control ports; (b) advise government on and implement national port policies and development strategies;(c) enter into contracts, agreements or leases and all other such obligations or arrangements; (d) grant permits, licenses and approvals for services and facilities provided for the Authority on such terms and conditions as it may determine; (e) employ agents, consultants or contractors or act as agent of another person; (f) construct, execute, carry out, equip, improve, work and develop ports, docks, harbours, piers, wharves, canals, water courses, embankments and jetties; (g) invest and utilize the monies of the Authority not immediately required on such securities, real estate or in such investments and manner as may, from time to time, be expedient; (h) erect, construct, lay down, enlarge, maintain and alter any building, erection and work which may seem directly or indirectly necessary or convenient for any of its purposes; (i) act as consultants and advisers in relation to ports and port operations in Nigeria or in any part of the world; (j) carry on the business of carrier by land or sea, stevedore, wharfing, warehouseman or light man or any other business necessary or expedient for the functions of the authority; (k) acquire any undertaking of any registered business that affords facilities for the loading, unloading or warehousing of any goods in any port in Nigeria; (l) win sand from ports and their approaches for such purposes as it may deem fit; (m) do anything for the purpose of advancing the (i) skills of persons employed; or (ii) efficiency of the equipment or the manner in which such equipment is operated, including the provision by others of the facilities for training, education and research; (n) provide residential accommodation, houses, hostels and other like accommodation for its employees on essential duties on terms and conditions to be determined, from time to time, by the authority; (o) regulate and provide bunkering and chandelling services; (p) provide or arrange for maintenance dredging, aids to navigation, hydrographic services and wreck removal; (q) in collaboration with relevant agencies, plan and provide services in all off-shore cargo handling facilities; (r)concession terminal operations and related services to third parties in accordance with the provisions of the ICRC Act; (s) provide, for the approaches to all ports and territorial waters of Nigeria, such as pilotage services and lights, marks and other navigational services and aids, including cleaning deepening and improving of channels, approaches and its waterways; (t) provide and use appliances for the towage or protection or salvage of life and property or for the prevention of fire within Nigeria maritime domain and on vessels on the high seas; (u) supply water to vessels; and (v) do such other things which are necessary to ensure the efficient performance of the functions of the Authority under this Act.”

comprehensive than is the case under the NPAA. The functional profile makes the port authority an entrepreneur, a planner, facilitator of concessionaires, and manager of port channels among others all at once –an indication that the legislature has not created a true landlord port as it is being implemented in the port in line with policy instruments discussed in chapter three. This will be put in context while discussing aspects of port governance.

## **3 2 2 Proposed National Transport Commission**

### **3 2 2 1 Governance structure**

Established as a body corporate to serve as a multi-sector economic regulator,<sup>1357</sup> the PNTC will be comprised of an Executive Chairman and six Executive Commissioners with the designations of the later not spelt out.<sup>1358</sup> They shall all be persons of recognised expertise, qualification and experience in one or more of the fields of ports or railway administration, maritime transport, rail transport, road transport, engineering, finance, law, transport economics and management and regulatory matters.<sup>1359</sup> This correlates with different sectors over which the PNTC has regulatory control. The Executive Chairman shall be the Chief Executive and Accounting Officer of the Commission to be responsible for the execution of the policy, decisions and programmes of the Commission, day-to-day management, administration and supervision of the activities of the Commission as well as supervision of the Commission’s employees and the implementation of the Commission’s regulatory and control functions.<sup>1360</sup>

As for the Executive Commissioners,” they shall perform such functions as are assigned to them by the Commission or the Executive Chairman from time to time.”<sup>1361</sup>This means their functions are not specifically stipulated as there are no provisions relating to the particular designation of each of the commissioners. It is rather provided that “the Commission shall be structured as the Board may from

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<sup>1357</sup> Clause 4(1)(2).

<sup>1358</sup> Clause 9(1).

<sup>1359</sup> Clause 10 NTCB.

<sup>1360</sup> Clause 16(1).

<sup>1361</sup> Clause 17(2).

time to time deem appropriate for the effective discharge of its functions and operations,”<sup>1362</sup> which further amplifies the power of the Commission to make designations as it deems fit. As in the case of PNPHA, the Commission shall appoint a Secretary who must possess relevant professional qualifications and experience as a legal practitioner with not less than ten (10) years post qualification experience.<sup>1363</sup> It is not explicitly stated if the secretary is a member of the management.

### **3 2 2 2      Functional profile**

In terms of NTCB, the PNTC shall “create an economic regulatory framework for the provision of transport services and facilities”<sup>1364</sup>, “facilitate effective competition, promote competitive market conduct and ensure that the misuse of monopoly or non-transitory market power is prevented in the provision of transport services”<sup>1365</sup> and “promote private sector participation in the provision of transport services”<sup>1366</sup> It shall also “ensure that operators and users have equitable access to the use of transport facilities, services, channels and routes while having regard to the level of competition in and efficiency of, the regulated transport industry”<sup>1367</sup> in addition to the responsibility to “monitor the performance of the regulated sector”<sup>1368</sup>

The Commission has also been given powers that, among others, allow it to resolve dispute among service providers,<sup>1369</sup> set relevant guidelines for its regulatory activities and prescribe performance standards.<sup>1370</sup> On a general note,

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<sup>1362</sup> Clause 4(4) NTCB.

<sup>1363</sup> Clause 18(1).

<sup>1364</sup> Clause 5(a).

<sup>1365</sup> Clause 5(b).

<sup>1366</sup> Clause 5( c).

<sup>1367</sup> Clause 5(d).

<sup>1368</sup> Clause 5(e).

<sup>1369</sup> See specifically clause 75 NTCB.

<sup>1370</sup> In clause 6 ,powers of the commission are provided for as follows: “(1) In carrying out its functions, the Commission shall exercise the following powers -(a) implement Government’s economic regulatory policies on transport; (b) protect the interest of users of transport services by ensuring that prices are fair and reasonable while having regard to the level of competition in, and efficiency of, the regulated transport industry; (c) examine and resolve complaints, objections and disputes referred to it as between Government agencies in the regulated transport industry and concessionaires, licensed operators,



the PNTC is allowed to “do all acts and things which a body corporate may by law do and which are necessary or convenient for the purposes of this Act”<sup>1371</sup> and to exercise all of the powers given it under this Act and do all acts and things which are necessary or convenient for the purposes of this Act.”<sup>1372</sup> These appear like the typical omnibus clause. However, the word ‘convenient –perhaps of archaic usage-in the provisions tend to be unnecessary and does not add value to the provisions as it limits-and in fact defeats- the purpose of an omnibus clause which is to allow an agency to do other things so long as are necessary for the exercise of its functions and attainment of its objectives. The word may create loophole for dereliction of duty in terms of what it should necessarily do on the basis that it is not ‘convenient’ or not easy to carry out more so when the provision gives an option between ‘necessary or convenient’.

It should be noted that a reading of the functions of the PNTC as well as the powers given to it clearly shows that it is a regulatory agency with clear regulatory powers-quite different from the NSC which is more or less advisory and promotional as it is a forum for consultation and negotiation going by its constituent Act .

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users, shippers and consumers or any other person involved in the regulated transport industry, using such dispute-resolution methods as the Commission may determine from time to time including mediation and arbitration; (d) ensure that regulatory decision making has regard to the relevant health, safety, environmental and social legislation and best practices applicable to the regulated transport industry; (e) register all transport service providers and determine the fees for such Registration. (f) set guidelines and general policies on tariffs charged and monitor compliance by public and private transport service operators and suppliers of prescribed goods and services;. (g) monitor the relationship between public transport service operators and their affiliates and the relationship between concessionaires and their affiliates to ensure that no party derives unfair advantages over other transport service operators; (h) develop, enforce and monitor performance standards and indices relating to the quality of transport services and facilities provided to users, shippers and consumers in Nigeria having regard to best international performance indicators; (i) enforce economic regulatory provisions of all relevant legislation on the regulated transport industry including but not limited to legislation on ports, inland waterways, road and rail transport; (j) make such regulations as may be necessary under this Act to give full force and effect to the provisions of this Act; and (k) execute all such other functions and responsibilities as are given to the Commission under this Act.”

<sup>1371</sup> Clause 4(2) (c) NTCB.

<sup>1372</sup> Clause 4(2) (d) NTCB.

### 3 3 Aspects of port governance

#### 3 3 1 Landlord functions

The PNBHA is “vested with the control and ownership of all ports and harbours on behalf of the Federal Government of Nigeria.”<sup>1373</sup> In that regards all lands and assets are vested in the authority.<sup>1374</sup> All this effectively makes the PNPHA the landlord of the ports with the function to “provide land lord services in ports in an economically, socially and environmentally sustainable manner.”<sup>1375</sup> In exercise of this function, it has the associated function to “grant concessions to private entities in accordance with the laid down processes”<sup>1376</sup> and ,accordingly, “may enter into leases, concession agreements, operating agreements, or other arrangements with private parties for the occupation of its land for the purpose of enabling such parties to operate or perform port related activities or services.”<sup>1377</sup> To facilitate activities in the port, the PNPHA is required to “provide for and maintain all coastal and channel management services”,<sup>1378</sup> “develop a plan for, undertake and supervise the dredging and maintenance of channels within the Ports limit and its approaches in Nigeria”,<sup>1379</sup> “construct, execute, carry out, equip, improve, work and develop ports, docks, harbours, piers, wharves, canals, water courses, embankments and jetties”<sup>1380</sup> and “provide and maintain aids to navigation, lighting and mooring in ports and harbours.”<sup>1381</sup> It also has the power to grant or deny access to ports.<sup>1382</sup> However in exercising all these landlord functions, the specific objective provided by NPHB is “the separation of

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<sup>1373</sup> Clause 1(2) (a) NPHB.

<sup>1374</sup> Clause 1(2) (c) NPHB. See also clause 122(1) and the second schedule to the Bill.

<sup>1375</sup> Clause 9(l).

<sup>1376</sup> Clause 9(w) NPHB.

<sup>1377</sup> Clause 31(1).

<sup>1378</sup> Clause 9(q) NPHB.

<sup>1379</sup> Clause 9(a) NPHB.

<sup>1380</sup> Clause 10 (f) NPHB.

<sup>1381</sup> Clause 9 ( c) NPHB.

<sup>1382</sup> See Clause 119 NPHB which reads “Prohibition of entry into Nigerian Ports and Harbours without permit A vessel shall not enter a port or harbour or an approach to a port or harbour in Nigeria without prior permission or approval of the Authority. It is submitted this is a better approach.”

the cargo handling from the landlord functions and the technical regulatory functions within ports.”<sup>1383</sup>

Separation of landlord function results in vesting ownership of the port and associated activities as above described exclusively in the port authority so that the purposes of the Bill “shall be achieved through the establishment of an authority which shall be vested with the control and ownership of all ports and harbours on behalf of the Federal Government of Nigeria”<sup>1384</sup> The import is clear: the Federal Government retains exclusive ownership of the port and this is the way through which the purposes of the port law shall be achieved. In contrast to this, there is this provision that grants the power to the NPHB “to develop, whether by itself or in partnership with others, own and control ports”.<sup>1385</sup> This potentially allows the port to be owned by others (including the private sector) together with the port authority. In other words it allows for what, in the language of PEA, is called partial privatization.<sup>1386</sup> When read together with another provision it goes the whole hog and gives room, in fact, to full privatization. The provision is to the effect that the authority “may dispose of or transfer any of its immovable property vested in it as public property by the Federal Government only with the express written consent of the President”.<sup>1387</sup>

If this provision on co-ownership remains unamended in the bill, the potentials of being exploited to privatize the ports is high and nigh contrary to the specific objectives of the bill as well as other laws.

This negates the specific objective which separates landlord function (vested in Federal Government through the Port Authority) from the cargo-handling principally vested in the private sector through concession. There is another negation of this specific objective in the commercial aspect of the ports which leads to the second issue discussed below: the operational functions.

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<sup>1383</sup> Clause 1(3) (a).

<sup>1384</sup> Clause 2(a) NPHB.

<sup>1385</sup> Clause 10(1) (a).

<sup>1386</sup> See s 1 PEA

<sup>1387</sup> Clause 30(4).

### 3 3 2 Operational functions

In terms of the NPHB, the PNBHA has the function to “engage in any business activity, either alone or in partnership with other persons, as may be approved by the Minister”<sup>1388</sup> In other words, it may do the business all alone or in conjunction with others.<sup>1389</sup> It can also, in collaboration with relevant agencies, plan and provide services in all off-shore cargo handling facilities.<sup>1390</sup> On the whole, it has been granted the specific powers to “carry on the business of carrier by land or sea, stevedore, wharfing, warehouseman or lighter man or any other business necessary or expedient for the functions of the Authority”<sup>1391</sup> This covers an array of businesses including stevedoring (which is about cargo-handling)<sup>1392</sup> thus, running contrary to the specific objective of “the separation of the cargo handling from the landlord functions and the Technical regulatory functions within ports..”<sup>1393</sup> On this score the bill appears to be approbating and reprobriating. It appears to be self-contradictory and requires that one part of it as far as the operational model and commercial mandate is concerned be reconciled. It clearly means that the NPHB, on this score has not succeeded in creating a clearly defined landlord port in a way that can statutorily midwife transition from tool and service port model to a landlord model.

It is apposite at this point to state that the port authority has been given reserved operational powers which is not, in any way inconsistent with its landlord powers as it is a measure meant to deal with emergency situation. It is provided that

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<sup>1388</sup> Clause 9(s).

<sup>1389</sup> Where it does the business with others, the NPHB provides further: “11. Special Powers of the Authority (1) The Authority may (a) establish and maintain subsidiaries, whether wholly or jointly with other persons or organisations for the purpose of carrying out any its functions under this Act (b) appoint directors and agents for the subsidiaries established pursuant to the provisions of paragraph (a) of this sub-section; and (c) participate (i) in the formation of or be a member of any company for the purpose of carrying out all or any of its functions under this Act; (ii) with the approval of the Board in the formation of any company for such other purposes as may be approved by the Minister; and (iii) in the formation of any joint venture or partnership and other similar arrangements.”

<sup>1390</sup> Clause 10(q) NPHB

<sup>1391</sup> Clause 10(j).

<sup>1392</sup> Stevedoring is about loading and unloading of vessels. See <http://www.min.sg/dictionary/maritime-dictionary.asp?s=s&q=stevedoring> (Accessed on 1-7-2017) A stevedore is “a person employed in loading and unloading vessels” <http://legal-dictionary.thefreedictionary.com/stevedoring> (Accessed on 30-7-2017).

<sup>1393</sup> Clause 1 (3)(a).

“Subject to section 31 of this Act, the Authority may provide or cause to provide any port services or facilities, notwithstanding that a concession has been granted to any person if (a) the person has failed or is not discharging his obligation satisfactorily under the concession Agreement; (b) the person has abandoned; or (c) upon termination of the concession for any reason whatsoever”.<sup>1394</sup>

### **3 3 3 Regulatory functions**

Regulatory regime is divided into two namely technical and economic so that technical regulatory regime combined with landlord functions is vested in the NPHA and the economic regulatory power is granted to the PNTC. The NPHB transfers the “technical regulatory powers relating to ports to the Authority”<sup>1395</sup> In terms of NTCB, the NTC is to provide an economic regulatory framework for the transport sector including ports.<sup>1396</sup> While the NPHB does not specifically describe the scope of technical regulation, it is clear from its provisions that it covers issues of safety, security, environment and facilities in port operations. The NPHB is to “provide and ensure technical regulations on operations, construction and installations within ports and harbor.”<sup>1397</sup> To that effect, the port authority shall “set overall policy for port security, health and safety, environmental protection and coastal conservancy.”<sup>1398</sup>

The economic regulatory framework involves facilitation of “effective competition, promote competitive market conduct and ensure that the misuse of monopoly or non-transitory market power is prevented in the provision of transport services.”<sup>1399</sup> It also involves settlement of disputes, registration of concessionaires and other service providers.<sup>1400</sup> It equally includes the power to monitor quality of services as well as tariff, rates and charges paid by port

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<sup>1394</sup> Clause 2 NPHB. The clause 31 referred to in this provision is about the power to grant concession.

<sup>1395</sup> Clause 2 (c) NPHB.

<sup>1396</sup> Clause 1 (c) NPHB.

<sup>1397</sup> Clause 9(c) NPHB.

<sup>1398</sup> Clause 9(1) (g).

<sup>1399</sup> Clause 5(b) NTCB.

<sup>1400</sup> See generally Clause 6 NTCB.

users.<sup>1401</sup> The meaning of all this is that while the PNPFA has regulatory oversight over concessionaires on technical issues, it is also subject to the economic regulatory oversight by PNTC for its commercial activities. To that effect the NTCB amends the UCCA which regulates the tariffs structure of NPA. The NPHB provides as follows:

The Utilities Charges Commission Act CAP. U17, LFN, 2004 is amended in the First Schedule by deleting the following items - (a) Ferry Services Organization; and (b) Nigerian Ports Authority.<sup>1402</sup>

Based on the above, regulation of tariff charged by the port authority and the concessionaires is now statutorily the responsibility of PNTC. To that effect, it is provided that the Commission shall ensure that “the costs of regulation do not exceed the benefits”<sup>1403</sup> and that “the decision takes into account and clearly articulates any trade- off between costs and service standards”.<sup>1404</sup> It is also to

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<sup>1401</sup> Clause 47 NTCB.

<sup>1402</sup> Clause 123(5). Section 123 also have provisions that attempt to reconcile provisions of the bill with other laws establishing agencies that have been active in the ports as follows Ss123. The Federal Environmental Protection Agency Act, Cap F10, LFN 2004 is amended in the following manner by the addition of a new subsection 27(3) to read—“(3) The powers granted under this section shall be exercised in a port, vessel, floating craft or any inland water only upon invitation by the Authority or Nigeria Customs Service and the authorised officer shall only exercise such powers through the Nigeria Customs Service”.(4) The National Agency for Food and Drug Administration and Control Act, Cap N1, LFN 2004 is amended in the following manner by the addition of a new subsection 5(2) to read. “(2) The powers and functions granted under this Section shall be exercised in a port, vessel, floating craft or any inland water only upon invitation by the Authority or Nigerian Customs Service and the authorised officer shall only exercise such powers through the Nigerian Customs Service”. (6) The National Drug Law Enforcement Agency Act, CAP N30, LFN 2004 is amended in the following manner: (a) by the addition of a new Subsection 3(3) to read 65 “(3) The powers and functions granted under this Section shall be exercised in a port, vessel, floating craft or any inland water only upon invitation by the Authority or Nigerian Customs Service and the authorised officer shall only exercise such powers through the Nigerian Customs Service”. (b) Subsection 8(1) (c) is amended by insertion of the words — “working in collaboration with the Nigerian Customs Service” at the beginning of the sentence immediately before the words “detecting”; (c) subsection 8(1) (d) is amended by insertion of the words –“working in collaboration with the Nigerian Customs Service” at the beginning of the sentence immediately before the words “maintaining”. This helps in coordinating activities in the ports between the different agencies. However, it does not include provisions on the closest statutory relatives to the port authority, NIRWA and NIMASA.

<sup>1403</sup> Clause 27(a) NTCB.

<sup>1404</sup> Clause 27(b) NTCB.

ensure that “tariffs are fair, reasonable and non-discriminatory”<sup>1405</sup> and that “tariffs are cost-oriented and in general, cross-subsidies are not permitted”.<sup>1406</sup>

To that effect, it requires that the tariff rates fixed by concessionaires are based on the principles of fair and competitive trading and other principles the Commission may come up with.<sup>1407</sup> It also provides for what it describes as “procedure for tariff determination” to be (a) regulation of tariff (b) specifying pricing policies or principles...<sup>1408</sup>

It is clear that the above are rather factors of tariff determination rather than procedure and the first factor (or “procedure” as it is called) namely “regulation of tariff” appears vague and may need to be removed as all the factors are about regulation of tariff.

Furthermore, the regulatory regime of the NTCB covers its powers to settle disputes including between the port authority and concessionaires and between one concessionaire and another after encouraging the parties to resolve such disputes through negotiation.<sup>1409</sup> The Commission may resolve disputes “in such manner and upon such terms and condition as it may deem fit”<sup>1410</sup> and “is not bound by technicalities, legal form or rules of evidence and shall at all times act according to the ethics of justice and fair play and the merits of each case.”<sup>1411</sup> It is not clear in the bill what specifically most of these terms mean. What, for example, constitutes legal form that the Commission is not bound by? It is submitted that it would be better to include the phrase ‘principles of natural justice’ which is a constitutional category that encompasses such notions as fair-hearing required of both courts of law and administrative tribunals in order to give context to the words used in the provisions.<sup>1412</sup>

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<sup>1405</sup> Clause 27( c) NTCB.

<sup>1406</sup> Clause 27(d) NTCB.

<sup>1407</sup> Clause 27(4). It further provides that in formulating such principles on tariff it must consider the following factors.

<sup>1408</sup> Clause 26(4) NTCB.

<sup>1409</sup> Clause 75(1) NTCB.

<sup>1410</sup> Clause 77(1) NTCB.

<sup>1411</sup> Clause 77(2) NTCB.

<sup>1412</sup> See for example s36(1)-(4) Constitution

Furthermore, it is provided, in one part, that the decision of the NTCB may be enforced in court by the “complainant” who shall be issued a certificate for that purpose by the Commission,<sup>1413</sup> in another part it is provided that the aggrieved party may “apply to the Court for a judicial review of the Commission’s decision.”<sup>1414</sup> What happens if the winner of a case wants to enforce the decision immediately and the aggrieved party also wants to seek judicial review immediately? No answer to this in the bill. It is rather provided that “the decision or direction of the Commission which is the subject matter of an application for judicial review shall subsist and remain binding and valid until it is expressly reversed in a final judgment or order of the Court.”<sup>1415</sup> This is a provision that overrides the inherent powers of the Court to make order of interlocutory and interim injunctions which constitute a challenge to the judicial powers granted the Court by the Constitution.<sup>1416</sup> These provisions appear legally problematic. Similarly by calling the person who can apply to the court a complainant for enforcement of the decision of PNTC, it is automatically assumed that the

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<sup>1413</sup> Clause 79(2).

<sup>1414</sup> Clause 82(1).

<sup>1415</sup> Clause 82(2).

<sup>1416</sup> See S6 of the Constitution. See also the case of *Dr. O. G. Sofekun v. Akinyemi & Others* (1980) 5 - 7 SC 1 at 19 where it was held that "The jurisdiction and authority of the courts of this country cannot be usurped by either the executive or the legislative branch of the Federal or State government under any guise or pretext whatsoever." (Italics mine) There is therefore, no justification or basis for surrendering on the platter of gold or refusing to exercise jurisdiction that is expressly conferred by Section 6 of the Constitution.' In this connection S. 6(2) and (6) are pertinent. Section 6(2) vests judicial powers of a State in the courts to which Section 6 relates while sub-section (6) thereof vests the States Courts with functions which extend to all inherent powers and sanctions of a Court of law and to all matters between persons, or between government or authority and any person in Nigeria and to all actions and proceedings relating thereto, for the determination of any question as to their civil rights and obligations. Section 6(2) and (6) of the Constitution are recited immediately hereunder: "6(1)... 6(2) The judicial powers of a State shall be vested in the Courts to which this Section relates, being Courts established, subject as provided by this Constitution, for a State. (3) ... (4) ... (5)... (6) The judicial powers vested in accordance with the foregoing provisions of this Section- (a) shall extend, notwithstanding anything to the contrary in this Constitution, to all inherent powers and sanctions of a Court of law; (b) shall extend to all matters between persons, or between government or authority and any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligation of that person. (c) shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of the Constitution" See also the case of *Ahmad V. Sokoto State House of Assembly* (2002) LPELR-10996(CA).



complainant to the Commission will always win a case before it. In addition, there is no provisions on the Commission's attitude to arbitration agreement which is the private sector's favourite mode of settling dispute. When there is an arbitration agreement between one concessionaire and another or between the Port Authority and a concessionaire, will the Commission go ahead to resolve the dispute? There is no direct answer to this question in the bill.

The Commission's regulatory power on PNPH relative to the concessionaire is on the economic aspects of the relationship in the ports. This means that what constitutes technical regulatory powers compared to the economic powers have to be clear. It needs to be reiterated that an important part of the technical regulatory is a combination of safety, environmental and security issues and provisions regarding them in various aspects of the bill are discussed above.<sup>1417</sup> The part of NPHB titled 'The Authority's Landlord Powers' actually deals with the landlord powers as well as technical regulatory powers which gives a compound name that does not appear in any other part of the bill "landlord technical" powers.<sup>1418</sup> Under the old version of the bill, the functions mentioned in this part were divided into landlord and technical regulatory parts making it easy to directly distinguish technical regulatory powers reserved for the Port Authority from other categories such as the landlord function and in this context, the economic regulatory function.

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<sup>1417</sup> See pars above.

<sup>1418</sup> The relevant sections reads: "The Authority's Landlord technical powers shall include – (a) giving directions consistent with the provisions of this Act to any person granted a concession under this Act; (b) to impose corresponding obligations regarding standards and codes on all providers and users of marine and port services and facilities; (c) implementing regulations, standards and codes regarding port security and safety and ensuring compliance with such regulations, standards and codes; (d) prescribing the limits within, and the levels to which dredging may be carried out; (e) monitoring and ensuring compliance by all service providers with applicable laws and regulations;(f)providing vessel traffic control and aids to navigation; (g) ensuring that orderly, efficient and reliable transfer of cargo and passengers between sea and land is provided by operators;(h)ensuring that safe, adequate and secure warehousing and storage is provided by operators within the ports; (i) monitoring the performance of terminal operators; (j) ensuring that operators use port facilities to their fullest capacity in the most efficient manner; (k) collecting from concessionaires, licensees and other port service providers data and information needed for accurate planning, reporting and monitoring; and (l) carrying out such other activities as are necessary or convenient in connection with its landlord function.

## **4 Proposals**

In view of the above, the following proposals are hereby made. The import of the proposals is to help improve the bills to attain the objectives stipulated therein as relate to concession.

### **4 1 *On the NPHB***

Proposals are made in the following parts relating to the need for a public port enterprise, provisions relating to concession such as duties of concessionaires, terms of concession agreement, among others.

#### **4 1 1 On the need for a public port enterprise**

In view of the specific objective that requires separation of cargo handling from the landlord functions and the technical regulatory functions and the contradictory clauses providing that the PNPHA carries out business including cargo-handling, it is proposed that the Port Authority (PNPHA) concentrates on its landlord and regulatory functions. This will also allow it to carry out technical nautical services such as pilotage associated with its landlord function. It all means that another government body is specifically provided for and established in the bill and required to be registered under the Company and Allied Matters Act to compete with concessionaire and other actors, in a competitive environment to run cargo handling and other port services, other than technical nautical services such as pilotage that will still be left to the port authority. Instead of general power providing that the port authority may create subsidiary as provided in the NPHB, there should be specific provision creating such a body and having all the cargo-handling and other core commercial operations granted to it. This issue is at the heart of the port governance in Nigeria and concession policy and the legislative instruments proposed over the years makes attempt to balance between private players and the public sector with all the attendant inconsistencies. It requires a firm and specific legislative intervention that allows concessionaire and other players to competitively operate in ports side by side with the public sector by way of a solid structure that allays fears about total reliance on the private sector at the nation's main gate way while at the same time respecting regulatory and

competitive boundaries. It may be given a name of choice by the legislature (such as for example Ports of Federation Plc.). Here the hypothetical name XYX is used to that effect, the provision should read as follows:

- (1) There is established a company to be known as XYX Plc for the purpose of carrying out port commercial services;
- (2) The XYX plc shall be registered under the Company and Allied Matters Act and its articles and memorandum shall not be inconsistent with the provisions of this Act;
- (3) The management of the company shall consist of Chief Executive Officer Director and three executive managers;
- (4) The Chief Executive Officer shall be the head of the company and shall have responsibility for the overall management of the company;
- (5) One of the managers shall be responsible for cargo-handling and other managers shall have designation assigned to them by the Chief Executive Officer and in the assignment of such designation, the business plans and needs of the ports shall be considered;
- (6) The company shall be governed by generally acceptable principles of corporate governance;
- (7) The company shall:
  - (a) provide cargo-handling services in ports;
  - (b) engage in any business activity, either alone or in partnership with others;
  - (c) render ports services subject to the provisions of this Act; and
  - (d) be subject to the economic regulatory oversight of the National Transport Commission.

The proposed clause would follow the provisions relating to the establishment of the PNPHA between clauses 4 and 10. It may replace the current clause 11 which also provides for the business powers of the port authority and would imply that all clauses granting the authority direct business powers will be removed.

The only exception is the reserved operational powers in clause 29 which allows the port authority to step in in case of emergency situation in the ports operations. For the bill, this would also mean that all places where concessionaires are required to carry out an activity same will apply to the company in similar measures being competitive co-players in a new competition-driven port environment.

## **4 1 2 Concession process**

With the context provided in the exposition on the bills above, the scanty NPHA's provision on concession calls for improvement in a number of ways discussed below:

### **4 1 2 1 Duties of concessionaires**

A clause setting out an outline of the duties of concessionaires is proposed to be included in part VIII as clause 36. It should read as follows:

A concessionaire shall

(a) abide by with this Act and any other applicable laws and regulations; (b) meet the performance requirements and standards provided for in the concession agreement with the Authority (a) diligently provide port services and operate the port facilities specified in its concession agreement with due regard to safety, security, social and environmental concerns (d) provide, effective, efficient, reliable and economical port services and facilities to port users submit, within three months after the end of each financial year ,a report to the Authority setting out details of its operations and activities during that financial year and such report shall include (i) the quality and level of its service in the financial year under review; (ii) its compliance with the terms and conditions of its concession, this Act and with other applicable laws.

#### **4 1 2 2 Terms of concession**

It is proposed that the general outline of the content of the concession agreement be provided for in the spirit of transparency and as a framework to guide the overall contents of the concession agreement.<sup>1419</sup> It reads as follows;

1)The concession agreement shall provide for (a) the determination of performance standards and guarantee of performance; (b) provide for minimum levels, nature and scope of service or works required to be performed (c) provide for grade, type, standard and life-span of equipment; (d) stipulated measures for avoiding anti-competitive practices; (e) fairness, reasonableness and equity in tariff structure and other issues relating to tariff subject to the relevant provisions of the National Transport Commission Act f) duration of concession and conditions under which it may be terminated by both parties subject to the provisions of this Act and (g) stipulated terms requiring that the concessionaire shall not transfer controlling interest in the concession company without the approval of the Authority h) mechanisms of settling disputes and i) such other terms and conditions as may be necessary which shall not be inconsistent with the provisions of this Act.

#### **4 1 2 3 Transparency of concession agreements**

The concession agreement should be in public domain to allow for scrutiny of the contents of an agreement which contractually puts public asset in the possession of private hands. As discussed above,<sup>1420</sup> this would provide a statutory expression in the port sector for the Open Government Nigerian National Action Plan which promotes citizens access to information on government activities so as to be in a position to challenge retrogressive policies and actions.

It is proposed that a clause be included as clause 35 in the part on concession which has only two clauses 33 and 34 to read as follows;

1) The Authority shall prepare a template of agreement containing fundamental provisions, terms and conditions of a typical agreement between the authority

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<sup>1419</sup> This is in line with similar provisions in UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Project .See specifically Model 28 thereof.

<sup>1420</sup> See par 2 3 4 above

and concessionaire which shall be available to the public for scrutiny on the official webpage of the Authority.<sup>2</sup>)The template shall be consistent with the provisions of this Act

#### **4 1 2 4 On revocation of concession**

The NPHB provides that concession shall be subject to laws governing concession. The ICRC provision that concession contract cannot be revoked needs to be specifically repealed or excluded under the NPHB specifically in respect of port concession in the short time pending the amendment of the ICRC itself .This would bring the NPHB in line with the constitutional requirement of the overriding status of public interest.<sup>1421</sup>

(1) Notwithstanding provisions in ICRC, the Authority may, in writing, cancel or for a reasonable period suspend for violating any condition in the concession or for reason of national security and safety of persons and vessels and for other reasons of public interest.

#### **4 1 2 5 On general application of ICRC to ports concession**

In view of such provisions of ICRC as above and in the light of scanty provisions of ICRC on aspects of concession, the reference to application to port concession should include the addition of the phrase “under this Act and the ICRC.” The ICRC does not for example provide a general framework of the duties of concessionaires which serve as a framework for their contractual commitment as will be agreed under concession agreement.

#### **4 1 3 On description of ports**

The definition of port should be aligned with the provisions of Exclusive Economic Zone Act and Territorial Water Act, Nigeria Inland Water Act as well as Nigeria’s international obligation. It is noteworthy that legally certain description of ports in harmony with other relevant law is important for grant of port concession this at the international level would require that offshore cargo handling facilities outside

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<sup>1421</sup> See generally s16(2)(b) Constitution.

the internal waters operate within the stipulated jurisdictional limits provided for the parts of the sea zones outside that limit. It also means, at the domestic level, that the jurisdiction of NIWA on the river ports under it is respected based on the NIWA Act and NIWA bill. It should read as follows:

Port means any place in Nigeria, navigable river (other than river declared as ports under the (NIWAA) or channel leading into such place having facilities for vessels to moor and load or discharge including inland (dry) ports, harbours, berths, jetties, pontoons or buoys and wharves and includes any place declared to be a port under this Act. Off shore cargo handling facilities are regarded as port installations subject to relevant laws and International Law.

#### **4 1 4            On access to ports**

In addition to provisions relating to access to significant infrastructure, provisions regarding access equity in general serves public interest better in the era of improved private participation in ports to encompass both commercial and noncommercial users. To that effect, a provision on functions of PNPH that reads as follows is in order:

Promote equity of access of legitimate port users to ports, port services and port facilities.

In the same vein, the specific objective 1(3)(f) be amended to read:

Protect the rights and interests of port service providers and users of Nigerian ports and ensuring that efficient and effective port services are available at a reasonable cost to the users.

#### **4 1 5            Declaration of ports**

On clause 27 which provides that “the Minister may by order (a) declare any place in Nigeria and any navigable channel leading into that place to be a port within the meaning of this Act.”

It is proposed that the phrase in consultation with the Authority be added to the clause to read “in consultation with the Authority, the Minister...” This not only accords more with the landlord role of the authority being the entity that will own

and manage the ports, but also the technical expertise and technical regulatory powers as the regulator of technical issues such as safety and environmental aspects of the prospective port.

#### **4 1 6 On the port governance structure**

The administrative size of the PNPHA is to be brought in tandem with the provision of Statutory Corporations Act providing for a maximum of nine members of management without compromising the need for constitutional requirement of Federal character and to reflect the need for a slimmer institutional structure with a bundle of operational responsibilities to be transferred to concessionaires. In addition to the non-executive Chairman and the Managing director, there should be three executive directors and the secretary. To achieve Federal Character, it should be provided that the three executive directors shall come from geographical zones from where the Chairman and the Managing director and the Secretary hail from. This brings the number of management staff to only six excluding the *ex-officio*.

#### **4 1 7 On port technical regulatory function**

The “landlord technical powers mentioned in part VII be divided into landlord powers and technical regulatory powers as it is under the old version of the bill wherein the functions mentioned in this part were divided into landlord and technical regulatory aspects so that the technical regulatory powers over the concessionaire reserved for the port authority can be easily distinguished not only from the landlord powers but also from the economic regulatory functions. Adapted from the old version of the bill, it is proposed to read as follows to replace current clause 27:<sup>1422</sup> Landlord powers should be phrased as follows:

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<sup>1422</sup> The old version of the bill Nigerian Ports and Harbours Bill 2015 reads “41. Landlord powers (l) Subject to the provisions of this Act, each Authority in relation to the ports under its zone shall have the powers as landlords to -(a) own, develop and manage the port and harbor properties;(b) subject to Part IX of this Act, acquire or dispose of real or personal property;(c) advise on and implement national port policies and development strategies;(d) provide and maintain port infrastructure including break waters, sea walls, quay walls, jetties and channels; (e) provide or arrange road and rail access to port facilities; PUC AND HFW PHA009 25 (f) provide or arrange for services and utilities including water, lights, sewerage and telecommunications to be accessible to terminal operators; (g) provide or



Subject to the provisions of this Act, the Authority shall have the powers as landlord to (a) own and develop the port and harbor properties; (b) acquire or dispose of real or personal property subject to the provisions of this Act; (c) advise on and implement national port policies and development strategies; (d) provide and maintain port infrastructure including breakwaters, seawalls, quay walls, jetties and channels; (e) provide or arrange road, air and rail access to port facilities; (f) provide or arrange for services and utilities including water, lights, sewerage and telecommunications to be accessible to terminal operators; (g) provide or arrange for dredging maintenance, navigational aids, hydrographic services and wreck removal; (h) enter into contracts, agreements or leases; (i) concession terminal operations and related services to third parties; (j) levy such charges and fees for the granting of concessions, permits, approvals, consents and for services and facilities provided by the Authority as may in their opinion be appropriate subject to applicable regulations issued by the Commission; (k) in consultation with the petroleum sector regulator, plan, provide and control all off-

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arrange for dredging maintenance, navigational aids, hydrographic services and wreck removal; (h) enter into contracts, agreements or leases; (i) concession terminal operations and related services to third parties; (j) levy such charges and fees for the granting of concessions, permits, approvals, consents and for services and facilities provided by the Authority as may in their opinion be appropriate subject to applicable regulations issued by the Commission; (k) in consultation with the petroleum sector regulator, plan, provide and control all off-shore cargo Handling facilities; (l) provide safe harbour, make reasonable provision for rendering assistance to vessels within the limits of the ports and within the approaches thereto; (m) employ agents or contractors or act as agent of another person; (2) Do all things necessary or convenient to be done for, or in connection with, the carrying out of its landlord functions under this Act. 42. Technical supervisory powers (l) Subject to the provisions of this Act, and the applicable provisions of the National Transport Commission Act 2006, the technical regulatory powers of each Authority in relation to the ports Under its zone shall include -(a) giving directions consistent with the provisions of this Act to any person granted a concession under this Act; (b) setting standards and codes to be observed by all providers and users of marine and port services and facilities; (c) licensing of pilots; (d) issuing regulations, standards and codes regarding port security and safety and ensuring compliance with such regulations, standards and codes; (e) prescribing the limits within which and the levels to which dredging may be carried out; (f) monitoring and ensuring compliance by all service providers with applicable laws and regulations; (g) issuing regulations in the manner specified in Section 154 of this Act; (h) providing vessel traffic control and navigational aids; (i) ensuring that orderly, efficient and reliable transfer of cargo and passengers between sea and land is provided by operators; (j) ensuring that safe, adequate and secure warehousing and storage is provided by operators within the ports on a commercial basis; (k) monitoring the performance of terminal operators; (l) safeguarding ports users' interests against port operation and service monopolies; (m) ensuring that operators use the potential of port facilities to their fullest capacity in the most efficient manner; and (n) collecting from concessionaires, licensees and other port service providers data and information needed for accurate reporting and monitoring by the Authorities.(2) Do all things necessary or convenient to be done for, or in connection with, the carrying out of its control and regulatory functions under this Act.

shore cargo Handling facilities; (l) provide safe harbour, make reasonable provision for rendering assistance to vessels within the limits of the ports and within the approaches thereto; (m) employ agents or contractors or act as agent of another person; (2) Do all things necessary to be done for, or in connection with, the carrying out of its landlord functions under this Act.

**Technical regulatory powers regulatory powers should be phrased as follows:**

Subject to the provisions of this Act, and the applicable provisions of the National Transport Commission Act ,the technical regulatory powers of the Authority shall include- (a) giving directions consistent with the provisions of this Act to any person granted a concession under this Act; (b) setting standards and codes to be observed by all providers and users of marine and port services and facilities; (c) licensing of pilots; (d) issuing regulations, standards and codes regarding port security and safety and ensuring compliance with such regulations, standards and codes; (e) prescribing the limits within which and the levels to which dredging may be carried out; (f) monitoring and ensuring compliance by all service providers with applicable laws and regulations; (g) issuing regulations in accordance with the provision of this Act (h) providing vessel traffic control and navigational aids; (i) ensuring that orderly, efficient and reliable transfer of cargo and passengers between sea and land is provided by operators;(j)ensuring that safe, adequate and secure warehousing and storage is provided by operators within the ports on a commercial basis;(k)monitoring the performance of terminal operators; (l) safeguarding ports users' interests against port operation and service monopolies; (m) ensuring that operators use the potential of port facilities to their fullest capacity in the most efficient manner; and (n) collecting from concessionaires, licensees and other port service providers data and information needed for accurate reporting and monitoring by the Authority o)ensuring environmental protection of the ports p)ensuring that risks assessment of the ports are carried and concessionaires and licensees provide requisite information for that purpose)coordinate with the relevant agency concerned with maritime safety and administration where necessary particularly when performing these functions outside ports limits (2) Do all things necessary to be done for, or in

connection with, the carrying out of its control and regulatory functions under this Act.

It is anticipated that the above will help in the achievement of all the objectives of the bill including those related to safety security and environmental protection.

Further, the provision, (clause 10 (1) (a) that allows the port authority to 'own' together with others should be amended as follows:

Develop the ports whether by itself or in partnership with others.

There are other adequate provisions on ownership of the ports in the bill such as clause (1)(2) (c) and clause 3(1)(3).

#### **4 1 8 Name and purpose of the port bill**

In view of the proposal to specifically provide for a port company and the provisions relating to the enhanced roles of the private sector particularly through concession, it is proposed that the bill be renamed. It may be renamed Nigeria Ports and Harbours Bill to accommodate the integrated actors provided for the port authority, the port company and the concessionaires. It is, however, better renamed Nigeria Ports Bill, ports having been defined to include harbour in clause 124 of the bill. All this will also mean that the purpose of the bill –in part 1 - will be amended to include “making provision for a port company to carry out port business and commercial operations.”

#### **4 1 9 Port plans**

The port authority function relating to port plan is to be amended to include the requirement for periodic reviews of the plan to be able to deal with emerging challenges including in relation to concession. Accordingly, clause 9 (1) (b) is to be amended to read as follows:

Develop a plan and maintain national strategic port planning and periodically update and implement same at all times

Ditto clause 10(b) which should be amended to reflect the need for law-policy coherence. As seen in the repeal of the port related laws, there is lack of

coherence in what the policy instruments provide for as explained in chapters two and three in terms of the plan to put in place a landlord port vide concession and the provisions of the NPHB which provides for concession but still saddle the port authority with stevedoring functions as explained above. To that effect clause 10(b) should read as follows:

advise government on and implement national port policies and development including on the need to ensure coherence between national plans and the relevant law.

## *4 2 On the NTCB*

### **4 2 1 Registration of Concession Agreements**

Concerning clause 85 (1) that “a party to a written agreement who is subject to this Act shall apply to the Commission for the registration of the Agreement, if this Act requires such registration.” It is proposed that the phrase “if this Act requires such registration” be removed and replaced with “in accordance with the provisions of this Act”. Apart from the fact that it is consistent with the spirit of regulation of agreements to be registered, there is nowhere in the bill that exempts registration of agreement of regulated transport industry.

Clause 8(2) which provides that “The Commission shall register the written agreement if the Commission is satisfied that the agreement is consistent with: (a) the objects of this Act; (b) Any relevant instrument under this Act; and (c) any relevant provisions of this Act or its subsidiary legislation” be amended to include a clause 86 (d) that reads: “the law regulating the regulated transport sector under which the agreement is made.” In this way, the PNTC shall refuse to register a concession agreement if it is inconsistent with the relevant port Act.”

### **4 2 2 Transparency**

Clause 86 which provides that a Register of Agreements be maintained should be amended to remove the phrase in clause 86 (10)(c ) that provides for the contents of the register and excludes “the terms and conditions of the agreement. The reason for the exclusion is not stated but it would not be unconnected with

confidentiality. A sub-clause 86(d) be added which reads “and shall include the terms and conditions of the agreement” and another sub clause (e) “Members of the public shall be allowed to access the register on application to the Commission.”

It is proposed that a under this part a new section immediately following Clause 86 be included. It should read:

The prescribed agency shall prepare a template of agreement containing fundamental provisions, terms and conditions of a typical agreement between the prescribed agency and the service provided which shall be available to the public for scrutiny;

The agreement between the prescribed agency and the service provider shall be made public and shall be available on the webpages of the commission, the prescribed agency and the service provider for public.

These provisions are necessary to meet the high bar set by the transparency objectives of the bill. They also accord with the trend of open government essential for good governance.

## **4 2 3           Dispute resolution**

On the powers to settle dispute between the port authority and concessionaires and between one concessionaire and another after encouraging the parties to resolve their dispute as discussed above, the sections be redrafted as follows:

Adding the following subsection to section 75 as subsection 75(4):

Where there is an arbitration agreement on the subject matter of the dispute brought before the commission, the commission shall direct that the parties refer the matter to arbitration subject to the provisions of Arbitration and Conciliation Act.

Subsection 77(2) be amended as follows not only to include the word “principles of natural justice’ which is a constitutional imperative but also to make the meaning clearer thus:

In carrying out its functions under subsection (1) of this section, the Commission shall always ensure that the dispute resolution is fair, just, economical and effective and shall not be bound by technicalities, rules of evidence and shall at all times act according to the ethics of justice, fair play, the principles of natural justice and the merits of each case.

The part of Clause 78(c) which provides that the register of decisions shall not contain the “terms and reasons for the decision” should be amended in line with the objective on transparency.

Clause 79 should be amended to include a sub clause 4 which allows the aggrieved party to challenge the enforcement of the commission’s decision as follows:

An aggrieved person may challenge in the court the enforcement of the commission’s decision. It is proposed that Clause 82 be amended to remove sub clause 2 which provides that “the decision or direction of the Commission that is the subject matter of an application for judicial review shall subsist and remain binding and valid until it is expressly reversed in a final judgment or Order of the Court.

#### **4 2 4 Tariff regulation**

The description of “the procedure for tariff determination” in Clause 26(4) which includes a sub- clause on ‘regulation of tariff’ be removed and the section should be described as factors for determination of tariff.

#### **4 2 5 Administrative structure**

The word “convenient” needs to be removed from the provisions of NTCB that requires it to “do all acts and things which a body corporate may by law do and which are necessary or convenient for the purposes of this Act” in Clause 4(2) (c) and to exercise all of the powers given it under this Act and do all acts and things which are necessary or convenient for the purposes of this Act” in clause 4(2) (d). This is in view of the fact that the word ‘necessary’ is sufficient to allow the commission carry out other duties helpful to its function compared to the word “convenient” which appears amorphous. More so, the Interpretation Act-as per

section 10-allows an agency to do what is necessary, not what is convenient, to carry out its duties.

## **5 Conclusion**

The proposed laws, the NPHB and NTCB have provisions geared towards adjusting the port governance to allow for increased private sector participation in the ports. NPHB repeals the Nigeria Port Authority Act and establishes the Nigeria Ports and Harbours Authority (NPHA) which it vests with ownership of ports designating it as a landlord and technical regulator of ports. It also provides for concession as a means of private investment in ports and allows concessionaire to render core port services including cargo-handling.

The NTCB does not repeal the NSCA: it establishes the NTC as an economic regulator to regulate such economic issues as competition and tariff in the ports. Both the PNPFA and concessionaires are subject to the supervision of NTC on economic activities in the port and must register their concession operations and the concession agreement with the NTC. An important issue is whether these laws provide adequate framework for port concession. While the NPHB and NTCB have both clearly legalised the use of concession for critical port services, they are inadequate in delivering the objectives stipulated in the bills for this purpose.

The combined effects of the bill shows that they have not effectively created a landlord port. For example, the NPHB provides that one of its purposes is improved private sector participation in the port which it seeks to achieve by the specific objective of separating cargo handling from the landlord functions and the technical regulatory functions within ports. This is consistent with the designation of NPHB as a landlord and technical regulator which implies that the port authority will concentrate on landlord and regulatory functions and grant concessions to the private sector to carry out commercial functions. However, in another stroke, it grants the port authority the function to carry out cargo-handling and other businesses.

In view of deficiencies like these in both bills, attainment of set objectives is a challenge. To that effect, a number of proposals are made to improve the bills. In the case of NPHB, for example, case is made for the bill to specifically require that a specially named port business be registered under the Company and Allied Matters Act transferring the cargo handling function and other core business functions to the company. This will allow the PNPHA to concentrate on its core landlord functions and allow the company to compete with the concessionaires for port services. For both bills, it is also suggested that the bills meet its transparency objective by publishing template of concession agreement for public scrutiny, among other proposals.



## CHAPTER SIX

### CONCLUSION

#### 1 Introduction

This research examined the legal framework for concession in the Nigerian ports. The aim was to examine the adequacy of the legal framework of concession agreements in ports operations in Nigeria. The specific aims were to: (1) examine the legal framework for concession in Nigeria; (2) describe the port governance models and in particular the current governance model in the context of the port system in Nigeria; (3) investigate the extent to which the concessioning of port operations is consistent with existing port legislation;(4) examine the proposed port legislation and make proposals thereon. The summary of findings and arguments below establishes how the aims are achieved in subsequent chapters.

#### 2 Summary of findings

In chapter two, the legal regime of concession in Nigeria was discussed. It was submitted that the Constitution allows private participation in the economy. In particular, section 16 of the Constitution allows the private sector to manage and operate areas of the economy that are not major areas of the economy.<sup>1423</sup> The major areas of the economy described in that section of the Constitution as areas of the economy so designated by the National Assembly and which had been operated and managed by the State as at the time the Constitution came into force.<sup>1424</sup> This section shows the position of the Constitution on private sector participation (which includes concession) and is discussed with a view to laying foundation for discussion on its particular relevance to ports in chapter four. It was further stated that there are a number of legislations which are of relevance

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<sup>1423</sup> Chapter 2 par 3 1.

<sup>1424</sup> *Ibid.*

to concession agreements. These include major legislations such as the Public Procurement Act which is the legal regime for procurement of goods, services and works, the Fiscal Responsibility Act which provides a fiscal discipline muster of transparency within which all government's transactions must be conducted, the National Planning Commission Act which created the National Planning Commission saddled with the function of drawing up economic plans within the ambit of Fundamental Objectives and Directive Principles of State Policy provided for in the Constitution, among other laws.<sup>1425</sup> However, the principal Statute governing concession is the Infrastructure Concession Regulatory Commission (ICRCA) 2005.

The ICRCA provides that a government agency may enter into concession for operating, constructing and financing its infrastructure as per section 1 of the Act. The Act allows a statutory agency to prioritise its own infrastructure and to decide on concessioning such infrastructure. It was argued that this effectively leaves the decision to enter into concession in the hands of the statutory agency. In the case of the port the statutory agency is NPA created by the NPAA.<sup>1426</sup> The chapter discussed the objectives and principles of concession as stated in National Policy on Public Private Partnership made pursuant to ICRCA. Such objective includes promotion of efficiency and the principles include ensuring that public interest is considered in concession agreements, among others.<sup>1427</sup>

In order to appreciate the use of concession in Nigerian ports and the application of NPAA and concession related laws therein, there was a need to examine port governance in Nigeria. Accordingly, chapter three described port governance in general and port governance models in particular. The chapter highlights the international legal and policy contexts and narrowing down to how concession characterized port governance in Nigeria vide the adoption of landlord port model. It was submitted that port governance is essentially the process and system

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<sup>1425</sup> Chapter 2 par 2.

<sup>1426</sup> Chapter 2 par 3 2 1 ;see par 3 4.

<sup>1427</sup> Chapter 2 par 4.

through which ports, its infrastructure and superstructure are managed according to set rules and objectives.<sup>1428</sup> It was submitted that port governance models practised around the world include landlord, service port, tool port and fully privatised port models, all depending on distribution of roles between the private sector and the public sector.<sup>1429</sup>

It was further found that at the international level, none of the international instruments to which Nigeria is a party obligates it to adopt a particular kind of port governance model.<sup>1430</sup> The Law of the Sea Convention 1982, in fact, has scanty provisions on ports providing in section 11 that “the outermost permanent harbour works which form an integral part of the harbour system are regarded as forming part of the coast”.<sup>1431</sup> In contrast, ample provisions on port are found in Statute and Convention on International Regime of Maritime Ports 1923.<sup>1432</sup> The convention recognizes the right of Nigeria as a State Party to provide measures expedient for the proper governance of its ports. It was argued that this provides a clear recognition of Nigeria’s right to choose its own typology of port governance.<sup>1433</sup> At the continental level, Nigeria is a party to a number of treaties including Revised Africa Maritime Transport Charter (AMTC), which is yet to come into force. Under the AMTC, Nigeria commits to cooperate with other State parties to encourage port reforms and efficiency of port services and to promote private sector participation in port services. While AMTC represents the country’s strongest commitment yet on private sector participation in port services, it does not commit Nigeria to a specific type of port governance.<sup>1434</sup> The Revised Treaty of Economic Community of West African States does not also mandate Nigeria to adopt a particular kind of port governance.<sup>1435</sup>

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<sup>1428</sup> Chapter 3 par 2 2.

<sup>1429</sup> Chapter 3 par 4.

<sup>1430</sup> Chapter 3 par 3.

<sup>1431</sup> Chapter 3 par 3 1 1.

<sup>1432</sup> Chapter 3 par 3 1 2.

<sup>1433</sup> *Ibid.*

<sup>1434</sup> Chapter 3 par 3 2 2.

<sup>1435</sup> Chapter 3 par 3 3 1.

Therefore international law has not prescribed particular types of port governance. However, International Organisations such as World Bank has played a significant role in promoting adoption of a particular type of port governance model in countries around the world including Nigeria.<sup>1436</sup> World Bank encouraged Nigeria, which had been operating tool port (in which NPA owns port facilities and carries much of core port services) to adopt the landlord model through the use of concession. In the newly adopted landlord port, the NPA maintains ownership of land and port infrastructure and concedes or transfers possession of terminals to concessionaires to carry out port .<sup>1437</sup>Nigeria ports were concessioned such that operational roles which had been performed by the Nigeria Port Authority (NPA) were ceded to the private sector under concession agreements under the NPAA.<sup>1438</sup> It was also found that possession of core infrastructural assets of NPA such as terminals were transferred to the concessionaires for this purpose.<sup>1439</sup> The NPA was restricted to the role of landlord and technical regulator of ports and Nigeria Shippers Council chosen as economic regulator to supervise the concession agreement on issues such as tariff.<sup>1440</sup> The chapter, based on the above exposition, has thus met the second aim which was to describe the port governance models in general and the current governance model in the context of the port system in Nigeria in particular.

Chapter four attempted to examine whether the concession of ports as described in chapter three is actually consistent with NPAA under which the concession agreements were signed as well as under pieces of legislation such as ICRCA. It was submitted that the ports are constitutionally a major area of the economy which the Constitution obligates the State to manage and operate. It was submitted that in terms of section 16 of the Constitution, a major sector of the economy must have been operated and managed by the State as at the time the

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<sup>1436</sup> Chapter 3 par 4.

<sup>1437</sup> Chapter 3 par 5 2 1.

<sup>1438</sup> Chapter 3 par 5 2 2 ; par 5 2 1.

<sup>1439</sup> Chapter 3 par 5 2 2; par 5 2 2 1.

<sup>1440</sup> Chapter 3 par 5 3 3; par 5 3 3 1; par 5 3 3 2.

Constitution came into force as stated in chapter two.<sup>1441</sup> In this chapter it was argued that the ports were operated and managed by the State as at the time the Constitution came into force and was so designated by an instrument of the National Assembly, the NPAA.<sup>1442</sup> It was stated that the NPAA was enacted as an “[a]ct to establish the Nigerian Ports Authority with the functions of providing and operating necessary facilities in ports and maintaining, improving and regulating the use of the ports; and to provide for matters connected therewith”.<sup>1443</sup> The preamble clearly is an expression of the objectives for which the NPA was established and the object of its enabling Act.

It was further submitted that the statutory functions of NPA was clear: it was mandated, in terms of section 7 to operate the ports and to maintain, improve and regulate the port.<sup>1444</sup> It was therefore found that stripping the NPA of a whole gamut of operational responsibilities and transferring same to concessionaires cannot be supported under the NPAA.<sup>1445</sup> NPA was conceived to be an operator, landlord and regulator of the ports-all at once.<sup>1446</sup> The designation of Nigeria Shippers Council as economic regulator cannot be supported by the NSCA in view of the fact that the NSC was not conceived as a regulator but rather as a promoter of interests of shippers as per section 3 of the Act.<sup>1447</sup> The regulation of tariff vested in NSC under the concession policy, it was submitted, is the responsibility of the Utilities Charges Regulatory Commission (UCRC) as per section 6(d)(i) of the later Act(the UCRC) which mandates it to “regulate tariff charges”.<sup>1448</sup>

Similarly, the principal concession legislation, ICRC) provides that a government agency may enter into concession agreement; the principal port legislation

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<sup>1441</sup> Chapter 4 par 2.

<sup>1442</sup> Chapter 4 par 2; par 2 1.

<sup>1443</sup> Chapter 4 par 2 1.

<sup>1444</sup> Chapter 4 par 4.

<sup>1445</sup> Chapter 4 par 4 1; par 4 1 1.

<sup>1446</sup> Chapter 4 par 5; par 5 1, par 5 2; par 5 3; par 5 4.

<sup>1447</sup> Chapter 4 par 5 4 1.

<sup>1448</sup> Chapter 4 par 6 3.

(NPAA) provides that the port shall carry out the operational duties such as handling and provision of port facilities which concession purports to cede to concessionaires in ports.<sup>1449</sup> By rule of statutory interpretation, the mandatory language of the port legislation, especially as *lex specialis*, overrides the permissive language of the concession legislation. It was submitted that the official position was that concession in ports was being supported by provision of the NPAA (section 125) which allows the port authority to lease out its assets.<sup>1450</sup> It was however argued that statutes are supposed to be interpreted holistically so that if that section is read in the context of section 8(j) which provides that NPA can only lease out its assets which are “unnecessary for its purpose” or statutory duties, it would be clear that the sections on lease by no means provide justification for port concession.<sup>1451</sup> This means NPA cannot grant concession on the basis of section 125 of NPAA to the private sector in respect of assets required for its statutory duties which is what port concession did as found in chapter three.<sup>1452</sup> Provisions allowing NPA to enter into agreement with other persons must be similarly interpreted: it cannot by way of leasing or conceding transfer possession of NPA assets necessary for its purpose under the Act to the private sector.<sup>1453</sup> In presenting this argument, the thesis embarked on a holistic analysis of the NPAA to show that the section of the law permitting leases in port must be read in the context of other sections of the Act. The resulting conclusion is an important contribution made by the thesis regarding illegality of concession on the basis of leases. This chapter thereby found that the concession has no backing in NPAA and other relevant laws and met the third aim of the thesis.

In chapter five, it was submitted that the proposed bills, the Nigeria Ports and Harbour Bill (NPHB) 2015 and National Transport Commission Bill (NTCB) 2016 are targeted at improved private sector participation in the ports including through

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<sup>1449</sup> Chapter 4 par 6 2.

<sup>1450</sup> Chapter 4 par 5 2; par 6 2.

<sup>1451</sup> See fn 1120, fn 1122, fn, 1123 above.

<sup>1452</sup> Chapter 4 par 5 2.

<sup>1453</sup> *Ibid.*

concession.<sup>1454</sup> The NPHB repeals the NPAA and establishes the Proposed Nigeria Ports and Harbours Authority (PNPHA) as the landlord of the port and technical regulator to supervise compliance with technical regulations for example those relating to safety.<sup>1455</sup> The NTCB does not repeal the NSCA but rather establishes the Proposed National Transport Commission (PNTC) as an economic regulator to oversee the concession in terms of issues such as tariff and competition.<sup>1456</sup> It was submitted that the bills provide for a number of objectives. One principal objective of NPHB, for example, is “separation of cargo-handling from the landlord functions and the technical regulatory section” in terms of clause 1(3) (a).<sup>1457</sup> Notwithstanding this specific objective, one of the functions of NPHA includes, according to clause 9(m), carrying out port businesses and specifically it has the power to carry out stevedoring or cargo-handling business.<sup>1458</sup> It was argued that vesting this function and power in the NPHA, as a statutory landlord and regulator, contravenes the statutory objective of separating cargo-handling from the landlord function and regulatory function.<sup>1459</sup> In both bills, there is the objective of transparency.<sup>1460</sup> Neither, however, expresses this through requirement for access to concession agreements by the public.<sup>1461</sup> This would provide a statutory expression in the port sector of the International Open Government Partnership entered into by the government as contained in the Open Government Nigerian National Action Plan whose objective include ensuring citizens have access to information on government activities so as to be in a position to challenge retrogressive policies and actions.<sup>1462</sup>

It was pointed out, specifically, that the NPHB does not contain an outline of the contents of the concession agreement in the spirit of transparency and to help

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<sup>1454</sup> Chapter 5 par 2 3 1.

<sup>1455</sup> Chapter 5 par 2 1.

<sup>1456</sup> Chapter 5 par 2 2.

<sup>1457</sup> Chapter 5 par 2 3 1

<sup>1458</sup> Chapter 5 par 3 21

<sup>1459</sup> Chapter 5 par 3 3 2.

<sup>1460</sup> Chapter 5 par 2 3 4.

<sup>1461</sup> *Ibid.*

<sup>1462</sup> Chapter 5 par 4 1 2(iii).

provide a general guidance for negotiation of terms compatible with public interest. Perhaps UN Model Legislative Provision on Privately Financed Infrastructure Projects contains such outlines for reason of providing general guidance for negotiation of terms.<sup>1463</sup> Another issue is harmonization between the bills and the ICRCA.<sup>1464</sup> In general, NTCB makes reference to ICRCA as a law governing concession in spite of the fact that there are a number of deficiencies in the latter which the bill could have taken care of with specific repeal provision. It was submitted, for example, that ICRCA prohibits cancelling or suspending concession agreement for whatever reason including public interest.<sup>1465</sup> This contravenes the constitutional provision that requires that all governmental actions must be in the interest of the public as per section 17 of the Constitution.<sup>1466</sup>

On the basis of the above analysis, a number of proposals on the bills for the purpose of port concession. To that end, it was proposed that a separate state company be provided in the NPHB to compete with concessionaires for port businesses. It was proposed that the company be required to be registered under the Company and Allied Matters Act.<sup>1467</sup> This would help to meet the specific objective in the bill of separating landlord and cargo-handling and core port businesses in general.<sup>1468</sup> By proposing a separate public company as distinct from the port authority to compete with concessionaires for port services, there will be distinct line between regulatory and landlord function vested in the port authority vis-a-vis cargo-handling and business mandate as vested in the proposed company. This would also allay security and strategic fears of total reliance on private sector at the nation's gateway. This is an important contribution that has not been made elsewhere and is quite significant in view of the fact appropriate balancing of public and private interests is a key issue in port concession.

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<sup>1463</sup> Ibid.

<sup>1464</sup> Chapter 5 par 4 1 2(ii).

<sup>1465</sup> Chapter 5 par 4 1 2(iv).

<sup>1466</sup> Chapter 5 par 4 1 2 (iv);par 2 3 1.

<sup>1467</sup> Chapter 5 par 4 1 1.

<sup>1468</sup> *Ibid.*



It was also proposed that port bill provide for a particular format or model of concession agreement and make same available to the public on the NPHA official webpage in line with the objective of transparency in the bill. Specifically, there should be an outline of basic standard terms of the concession agreement in the bill.<sup>1469</sup> It was proposed that the description of the port be made in such a way that would prevent overlap with Nigerian Inland Waterways Act(NIWA)1997 and Nigeria Inland Waterways Bill 2016 in the grant of concession considering the fact that the definition of ports under the NPHB included rivers port.<sup>1470</sup> This would require the NPHB to be changed to exclude river ports that are currently under the jurisdiction of Nigeria Inland Waterways Authority as per section 11 of NIWAA. Similarly it was proposed that the description of the ports be brought in line with International law consistent with the function of the port authority to respect and implement international law.<sup>1471</sup> To that end, description of ports to include offshore cargo handling facilities should be reframed to include a proviso requiring respect for International rules applicable to the specific part of the sea where such facilities are located.<sup>1472</sup> This was on the basis that legally certain description of ports in harmony with other relevant law is important for grant of port concession.<sup>1473</sup>

In the case of the NTCB, it was proposed that it should contain a clause providing that a format or model of concession agreements in the regulated sectors including port be made available on the webpage of PNTC to meet the objective of transparency provided for in the bill.<sup>1474</sup> This would complement a similar proposal for port concession agreement made in the case of NPHAB. It was also proposed that the clauses on dispute resolution in NTCB be changed to include a requirement that where concessionaires have an arbitration agreement, they be

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<sup>1469</sup> Chapter 5 par 4 1 2(ii).

<sup>1470</sup> Chapter 5 par 4 1 3.

<sup>1471</sup> *Ibid.*

<sup>1472</sup> *Ibid.*

<sup>1473</sup> *Ibid.*

<sup>1474</sup> Chapter 5 par 4 2 2.

directed to have arbitration before bringing their disputes to the PNTC.<sup>1475</sup> It was also proposed that the register of agreements which the commission is required to maintain under the bill and which is stipulated to exclude “terms and conditions of the agreement” should include such “terms and conditions” as terms and conditions constitute the essence of agreements, among other proposals.<sup>1476</sup> It is recommended that the government expedite the passing and signing of the bills into law and before so doing, consider the incorporation of the proposals made in this thesis. It is also recommended that the concession agreements between the government and concessionaires be renegotiated on the basis of the bills when they are passed into laws.

### **3 General conclusions**

The thesis has established that the concession agreements under which the ports were concessioned contravenes the NPAA. The concession policy, which effectively cedes a whole lot of operational duties of NPA to concessionaires, can also not be supported by other relevant laws. The ICRCA does not mandate the NPA to enter into concession agreement in a way that will strip the Port Authority of a whole bundle of operational duties it is mandated to perform in the ports. The designation of NSC as economic regulator to supervise concession agreements also has no basis under the NSCA as well as UCCA. Therefore, the use of concession agreement to midwife the transition of Nigeria ports from tool port and service port model of port governance to landlord model is incompatible with the relevant legislations particularly the NPAA. Thus the existing legislations do not provide an adequate regime for port concession agreement. The proposed legislations namely the NPHB and NTCB generally succeeded in legalizing the use of concession in ports. However they both contain some inadequate provisions which need to be improved as proposed to attain the objectives contained in the bills as far as port concession is concerned. It is anticipated that the analysis and proposals on concession related issues in the proposed bills

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<sup>1475</sup> Chapter 5 par 4 2 3.

<sup>1476</sup> Chapter 5 par 4 2 2.

would not only put the relevant provisions in perspective for an improved legislation. In general, the thesis is a significant contribution to the small body of knowledge in port law particularly in the field of port concession.

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