



Research Paper

A Legal Appraisal of Port Concession and Impact of Port Reforms in Nigeria

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Abstract

The relevance of ports in a country's internal and international commerce development, whether developed or developing, cannot be overstated. This is why the State in accordance with the Constitution of the Federal Republic of Nigeria 1999 as amended (CFRN 1999) must harness the resources of the nation and promote national prosperity and an efficient and dynamic and self-reliant economy. In a globalised world where distances are shrinking, ports, on the other hand, play a strategic and active role in the long-term development and growth of a country. The research appraised the legality of port concession and the impact of port reforms using the ports in Nigeria as a reference. The reforms took effect from 2006 after the Federal Government of Nigeria concessioned the ports to private investors. The work assessed the performance of Nigerian ports in terms of achieving its key goals of enhancing efficiency and throughput after the 2006 port reforms. It also examined critically the legality of port concession in Nigeria. It evaluated the constitutionality and propriety of the concessioning of Nigerian ports. It was observed that the reforms resulted in significant improvements in cargo throughput as compared to the pre-reform era. It was discovered that the Port throughput has increased significantly since the reform (concessioning) came into effect. There is continuous improvement in the overall efficiency of the Ports in Nigeria since 2006 when the new measure was introduced. The reform also led to more private investment in the ports' existing and new facilities and the introduction of a World Class service in port operation. The research also considered lessons from port reforms in other jurisdictions like Malaysia, the United Kingdom and the United States of America. This paper concluded that the ports in Nigeria are performing better under the reform programme of the Federal Government of Nigeria even though there are challenges and shortfalls, nevertheless, there are benefits as discussed in the paper. Private participation in governmental affairs is legal and constitutional however, depriving the NPA of its roles in port operations, management and control is not supported by the NPA Act. There is an urgent need for a regulator to appraise the performance of the reform programme from time to time as provided by the agreement. It was suggested that there is need to pass National Transport Commission Bill (NTCB), especially for road and rail, and the Ports & Harbours Authority Bill (NPHAB in the National Assembly as they provide private sector participation and investment in ports and transport services.

Keywords: Legal Appraisal, Port Concession, Impact, Port Reforms

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I. Introduction

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 study 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 NPA Act relative to other relevant laws. It will further investigate the impact of the port reforms in the Nigerian economy.

In concession, the project proponent or contractor undertakes the construction, including financing of any infrastructure facility and the operation and maintenance thereof and shall include supply of any equipment and machinery for any infrastructure facility and the operation and maintenance thereof and shall include supply of any equipment and machinery for any infrastructure and the provision of any services".¹

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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.² 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.³ 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 every citizen to engage in any economic activities outside the major sectors of the economy.⁴

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.⁵

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”;⁶ and “approve policies on privatisation and commercialisation”. The Bureau of Public Enterprise is to “implement the (National Council of Privatisation) policies on privatisation”,⁷ as well as on commercialisation. The Act lists NPA as one of the agencies to be commercialised. However, the NPA Act reversed and clearly disallows the complete commercialisation of NPA.⁸

For the purpose of private investment by way of concession, the Infrastructure Concession Regulatory Commission (ICRC) is established by the Infrastructure Regulatory Concession Act.⁹ 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”¹⁰ and to “ensure efficient execution of any concession agreement or contract entered into by the Government”.¹¹ The ICRC Act mandates every Federal Government Ministry and body to prioritise infrastructure projects which may be qualified for concession but does not expatiate 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 prioritise its infrastructure projects and such priority projects may be qualified for concession under this Act”.¹²

1. 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.¹³ Concession Law usually contains prescribed terms that shall be included in a concession agreement between the public authority and concessionaire. The ICRC Act does not

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¹ ICRCA, s36

² C Christopher, ‘Concession’ in *Max Plank Encyclopaedia of Public International Law* (2011) par 3(12).

³ CFRN 1999, s43.

⁴ *Ibid*, s16(1)(c)(d).

⁵ *Ibid*, 16(4)(b) and (c).

⁶ PE(P&C)A 1999, s11(a) – (b).

⁷ ICRCA 2005, s14(a).

⁸ NPAA, s125

⁹ ICRCA, s14

¹⁰ *Ibid*, s20(a)

¹¹ *Ibid*, 20(b).

¹² *Ibid*, 2(1).

¹³ UNCITRAL Model Law, Provision 2

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”.¹⁴ 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.”¹⁵

A concession agreement, for instance, cannot oust the right of public authority to monitor its activities as required under the Act.¹⁶ However, the proviso “in accordance with the provisions of this Act” would work better if the Act had ample 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.”¹⁷ 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.¹⁸

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 Act permits that the “duration of any concession shall be as may be specified in the agreement or contract governing the concession.”¹⁹ 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.²⁰

By virtue of section 7 of the ICRC Act the parties are given freedom to determine the amount of money to be remitted and the interval of remission, in the concession agreement.²¹ 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 United Nations Conference on International Trade Law (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. The main concession agreement normally indicates if and how the concessionaire will seek the permission of the public authority.

2. Legality of Port Concession

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.²²

In the context of the port sector, it needs to be established whether section 16 1(1) (c) and (d) of the CFRN 1999 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.²³ 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

¹⁴ ICRC, s13.

¹⁵ *Ibid*, s1.

¹⁶ *Ibid*, s10.

¹⁷ National Policy on Public Private Partnerships, Para 4.5.

¹⁸ UNCITRAL Model Law, Provision 29.

¹⁹ ICRC, s6.

²⁰ *Ibid*, s7(4).

²¹ *Ibid*, s7(3).

²² CFRN 1999, s13.

²³ *Ibid*, s16 (1)(c-d).

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. The Nigerian seaports is a key sector of the economy being the 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'.

However, the Constitution provides its own objective legal parameters for determining what constitutes 'a major sector of the economy'.²⁴ The major sectors of the economy are economic activities designated as such by the legislature, economic activities being constitutionally characterised include "activities directly concerned with the production, distribution and exchange of wealth or of goods and services."²⁵ 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."²⁶ Based on this part of the section, where an agency or statutory body of the FGN in this case the NPA had been operating and managing the ports on a date immediately preceding the commencement date of the CFRN 1999, 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 FGN through the NPA.²⁷ The relevant question here is: was the port being managed and operated by NPA as at the time the CFRN 1999 came into force? In providing answer to this question, the date of commencement of the constitution is essential. In terms of the CFRN 1999, it comes into force on 29th May, 1999.²⁸

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.²⁹ The NPA Act, the law under which the ports were being run before the concession in 2006, has a commencement date (or vesting date)³⁰ of 10 May 1999. This shows that the enactment of the NPA Act preceded the coming into force of the CFRN 1999 by at least 19 days.³¹ In other words, the NPA Act was an extant and existing law when the Constitution entered into force.³² One legal implication of this is that the ports fall under the category of sectors of the economy being operated by the FGN 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",³³ and which, *ceteris paribus*, therefore "shall be deemed to be major sectors of the economy"³⁴ 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 NPA Act. The CFRN 1999 provides: whereby 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.³⁵

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 NPA Act thus: An Act to establish Nigeria Port Authority with the functions of

²⁴ CFRN 1999, s16(4)(a).

²⁵ *Ibid*, s4(b).

²⁶ *Ibid*, s16(4).

²⁷ SCA, s2(d).

²⁸ CFRN 1999, s320

²⁹ NPAA, s7.

³⁰ *Ibid*, s127.

³¹ CFRN 1999, s316(1).

³² *Ibid*, s315(1), (4)(b).

³³ *Ibid*, s16(4)(a).

³⁴ *Ibid*.

³⁵ CFRN 1999, pt III, 2nd sch.

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’.³⁶ This word again appears with the second word (manage) where the NPA is mandated to “ensure efficient management of port operations”.³⁷ In fact, to that end the “NPA may make byelaws for the control and management of the wharves and premises vested in or in the possession of the NPA and the maintenance of good order in the wharves and premises.”³⁸ Even where a company is established to take care of some of its functions, the NPA is still mandated to “manage, supervise and control or take part in management or supervision or control of any company undertaking in which the NPA is interested by way of shareholding or otherwise.”³⁹

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”.⁴⁰ For this reason while the NPA was commercialised and transformed into Nigeria Ports Plc. ports remained under the control and management of the FGN. 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 NPA Act, statutorily remains the manager and operator of the ports after commercialisation 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 NPA Act: 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 (CAMA) 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.⁴¹

By virtue of the above provisions commercialisation 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, NPA. The CFRN 1999 is clear on the legal requirement of continuity of such statutory duties and roles until another law changes the situation.⁴²

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 CFRN 1999 provides the meaning of the word ‘participate’ to include “the rendering of services and supplying of goods”.⁴³ 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 are understood in the proper sense referred to those which are not applied in any particular science or art.⁴⁴ 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 specialised science or art. The word manage means to run, take charge of, govern, operate, transact, treat, wield authority and work.⁴⁵

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.⁴⁶ 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 port operations”⁴⁷ in its bid to

³⁶ NPAA, s7(a).

³⁷ *Ibid*, s7(c).

³⁸ *Ibid*, s40 (1).

³⁹ *Ibid*, s7(f).

⁴⁰ CFRN 1999, s16(4)(a).

⁴¹ NPAA, s125 (1)(2).

⁴² CFRN 1999, s316(1)

⁴³ *Ibid*, 16 (3) (c).

⁴⁴ *Idika v. Uzoukwu* (2008) 9 NWLR (Pt.1091) 34 at 54-55, paras. H-C; *Egbe v. Yusuf* (1992) 6 NWLR (Pt.24S) 1; *Mbonu v. Nwoti* (1991) 7 NWLR (Pt. 206) 45

⁴⁵ Legal Dictionary, <<http://legaldictionary.thefreedictionary.com/manage>> accessed 22 May 2023

⁴⁶ IA 2015, s18 (2).

⁴⁷ NPAA, s7(c).

oversee the ports while simultaneously carrying out the role “to maintain, improve and regulate the use of the ports.”⁴⁸ 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.”⁴⁹ 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”⁵⁰ as well as the omnibus provision to “provide and operate such other services as the Minister may, from time to time, require.”⁵¹ The Minister, being described as the Federal “Minister for the time being charged with the responsibility for matters relating to maritime shipping and navigation,”⁵² 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 NPA Act 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.⁵³

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 CFRN 1999 recognises the right of private players to engage in economic activities outside the major sectors of the economy while affirming the right of such citizens to ‘participate’ within the major sectors of the economy.⁵⁴ 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.⁵⁵ On the other hand, the private sector is allowed to “participate” within the major sector of the economy. While ‘participate’ has been characterised as “the rendering of services and supplying of goods” as earlier cited, it is clearly subject to the right of the State to “manage and operate the major sectors of the economy”⁵⁶ which in the case of the port unequivocally means to *manage* the port system and *operate* its major “economic activities” 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.”⁵⁷ 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.⁵⁸

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 also means to partake, as to ‘partake’ in a discussion, or in a pension or profit-sharing plan”⁵⁹ and “to take part or become involved in an activity.”⁶⁰

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 NPA 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 NPA Act must be viewed.

⁴⁸ *Ibid*, s7(b).

⁴⁹ (n45).

⁵⁰ NPAA, s7(a).

⁵¹ *Ibid*, s7(j).

⁵² NPAA, s127.

⁵³ CFRN 1999, s360(1).

⁵⁴ *Ibid*, s16 (1) (d).

⁵⁵ MSA 2007, s18

⁵⁶ CFRN 1999, s16 (1) (d).

⁵⁷ *Ibid*, 16 (3)(c)(d).

⁵⁸ (n45)

⁵⁹ *Idris v. A.N.P.P.* (2008) 8 NWLR (Pt.1088) 1 149

⁶⁰ *P.P.A. v. Saraki* (2007) 17 NWLR (Pt. 1064) 453, 498

For example in exercise of duty to ‘maintain, improve and regulate the use of ports’⁶¹, 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.”⁶² 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.”⁶³

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,⁶⁴ as it is trite that legislations are to be interpreted to conform with constitutional framework.⁶⁵

3. Objectives of Concession Versus Objectives of Ports

This part discusses the objectives of concession vis-a-vis the objectives of ports. The underlying issues are the nexus between the two set of objectives help in appreciating some legal aspects of the port concession. These objectives include to wit: improved private sector participation, efficiency, value for money, among others as embodied in such policy document for concession as National Policy on Public Private Partnerships (NPPP) and the master plan for the economy National Economic Empowerment and Development Strategy (NEEDS).

a. Improved private participation

One of the objectives of concession is to ensure improved private participation.⁶⁶ 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.⁶⁷

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.⁶⁸ 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.⁶⁹ However, this general constitutional licence would be interpreted with reference to the specific provisions in NPA Act stipulating statutory functions within the remit of the specific constitutional rules regarding major sectors of the economy. It is submitted that the NPA Act 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 NPA Act outlaws private participation. On the contrary, it does not but this reflects the general tenor of the Act as being essentially about a public asset christened. 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.⁷⁰

b. Efficiency

Being the measure of the cost of an approach and its achievement relative to expected outcome and a determinant and measure of productivity,⁷¹ 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

⁶¹ NPAA 1999, s7(b).

⁶² NPAA 1999, s8(a).

⁶³ *Ibid*, s8(k).

⁶⁴ *Unilorin v. Adeniran* (2007) 6 NWLR (Pt. 1031) 498, 530.

⁶⁵ CFRN 1999, s1.

⁶⁶ CFRN 1999, s16

⁶⁷ C Okafor, ‘FG Asks BPE to Manage PPP Transactions in New Policy’ *ThisDay* (Lagos, 6 October 2020) <<https://www.thisdaylive.com>> accessed 23 May 2023.

⁶⁸ ICRC, s25.

⁶⁹ NPAA, s7.

⁷⁰ NPAA, s7 – 8.

⁷¹ B A Garner, *Black’s Law Dictionary* <<http://thelawdictionary.org/efficiency/>> accessed 23 May 2023

to increase economic growth, productivity, competitiveness, and access to markets”⁷². NEEDS also seeks to “make Nigeria’s ports more efficient and competitive, with capacity to handle modern shipping activities”⁷³ 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 Act 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.⁷⁴ 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”.⁷⁵

Another relevant question is: does NPA Act 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”⁷⁶ In this way, the NPA Act conceives of efficiency in terms of the NPA carrying out its statutory duty for the “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”.⁷⁷ The end-objective is: efficiency. Thus the NPA has a duty not only to ensure efficiency for itself but also others only within the ambit of its statutory duty all in a bid to “ensure the efficient management of port operations”.

c. Value for money

This is closely associated with efficiency,⁷⁸ 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.⁷⁹

The provisions of NPA Act imply that the NPA is required to ensure value for money while carrying out its statutory functions. The NPA Act refers to “optimal allocation and use of resources” as one of the statutory duties of NPA in correlation with “efficient management of port operations”⁸⁰ This accords with the conception, in Public Law, of value for money being about economy, minimising 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 produced them and effectiveness being the link between the intended impact and the actual impact of an activity.⁸¹ These provisions do not imply that value for money under the NPA Act can only be attained vide concession.

d. Access

This is another objective. The NPA under the NPA Act 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”.⁸² Where such public facilities are transferred to private hands, legislative provision needs to make special provision to realise the constitutional objective of access to essential services

⁷² G Salau, ‘PPP critical to providing adequate infrastructure, say Sanwo-Olu, others’ *TheGuardian* (Lagos, 9 December 2021).

⁷³ NPAA, s7.

⁷⁴ O J K Ogundele and others, ‘Projecting the Possible Impacts of the National Economic Empowerment and Development Strategy (NEEDS) on Human Development in Nigeria’ (2011) (3) (4) IJEF<<https://ccsenet.org>> accessed 24 May 2023.

⁷⁵ N. Nan, ‘Nigerians call for transport policy to boost economic, social growth’ *The Guardian* (Abuja, 3 March 2022).

⁷⁶ NPAA, s7(c)

⁷⁷ *Ibid*, s11(1)

⁷⁸ RPGW, s38

⁷⁹ ICRC, s1(2)

⁸⁰ NPAA, s7(a).

⁸¹ M Elliot and R Thomas *Public Law* (4th edn, Oxford University Press 2011) 433.

⁸² NPAA 1999, s7(b).

and facilities without discrimination which is not covered by the NPA Act which creates NPA as a public body to serve public good and hence ports, under, NPA, is to be run to promote access equity.

e. 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”⁸³. 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.⁸⁴ It is one of the challenges of a concessioned or privatised economy, and since NPA Act conceives the NPA as a *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.⁸⁵ The NPA Act creates the NPA 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.⁸⁶

On this issue, no equivalent status is granted to private ships in such an emphatic term. 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”.⁸⁷ 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 competitive principles envisaged by policy instruments such as NPPP or international best practices.

f. Job Security and Rights

Concession, caused massive loss of jobs in the port sector. This brings to question the commitment of the FGN “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.”⁸⁸ 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”.⁸⁹ It is also constitutionally required that governmental actions are required to be humane. While there are general provisions in the NPA Act on the employees of NPA,⁹⁰ 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 NPA Act provides for is the job-related issues arising from its statutory transition or return from a commercialised entity to a full statutory corporation essentially in charge of its management and operations.⁹¹

4. Public-Private Partnership

According to National Policy on Public-Private Partnership of the FGN of Nigeria, Public-Private Partnership (PPP) is defined as a contract, whereby the private sector is engaged by the public sector to manage some public services, and to design, build, finance and operate some infrastructure to enhance efficiency, broaden access, and improve the quality of public services. In such arrangement, it is the role of the public sector to plan and structure projects, while the private sector directly implements and executes the project. According to the work of Oni and Akinbinu, a PPP is a contractual arrangement between the public sector and

⁸³ CFRN 1999, s16 (2)(b)(c).

⁸⁴ *Ibid.*

⁸⁵ FAA 1958, s84.

⁸⁶ NPAA, s83.

⁸⁷ *Ibid.*, 83.

⁸⁸ CFRN 1999, s17(2)(a).

⁸⁹ CFRN 1999, s17(3)(a).

⁹⁰ NPAA, s11(2)(a) – (d).

⁹¹ *Ibid.*, s125 (5).

the private sector to achieve well-defined and shared objectives in a well-managed cost effective, efficient and sustainable manner.⁹²

PPPs also entail a set of contractual agreements between the government and the private sector sponsor. These agreements which will entail a range of commitments such as government tariff policies, land access rights, issuance of licenses, compliance with off-take agreements and terms of payment if the government arbitrarily terminates the agreement involve the grant of rights to private sector operators to provide services usually provided by public bodies for a fee.

This Public Enterprises (Privatisation and Commercialisation) Act lists the NPA for full commercialisation in Part II of the Second Schedule in line with the provision of the Act that public enterprises “listed in Part II of the Second Schedule to the Act shall be fully commercialised.”⁹³ This mode of private participation in the port has already been outlawed by NPA Act when the Act repealed its predecessor which had commercialised NPA.⁹⁴

The Public Enterprises Act also lists the NPA for partial privatisation 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”.⁹⁵ Concession is not privatisation as privatisation envisaged under the Public Enterprises Act entails “an offer for the sale of shares”⁹⁶ either by “public issue or private placement”⁹⁷ 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.”⁹⁸

The Public Enterprises Act bypasses this obvious statutory position in the body of Public Enterprises Act as well as ordinary and statutory meaning of concession vis-à-vis privatisation,⁹⁹ through the ‘amendment’ of the Public Enterprises Act by the National Council on Privatisation, established under the said Act to initiate privatisation and commercialisation,¹⁰⁰ wherein it included concession at the end of the Second Schedule with these wordings: “privatisation by concession shall not entail divestiture of shares” cannot stand legal scrutiny,¹⁰¹ though without making reference to any sector or Government agencies as it does with privatisation and commercialisation. This is in view of the fact that it amounts to usurpation of the constitutionally granted legislative power of the National Assembly.¹⁰²

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.¹⁰³ 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 (“privatisation by concession shall not entail divestiture of shares”) was made on an almost inconspicuous part of the tail end of Second Schedule which is on commercialisation not privatisation, 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 privatisation (transfer of asset or shares) and commercialisation which has been legally reversed by NPA Act enacted after this Act, with provisions that also vest the assets of the then Nigeria Port Plc in the NPA:¹⁰⁴ It is worth reiterating: accordingly, there shall be vested in the Authority

⁹² B Oni and B Akinbinu, ‘Public-Private-Partnership in the Nigerian Development,’ in Marcus, SNA and Others, ‘Public-Private-Partnership: Proposed Nigerian Reform Programme for Electricity Development’ (2015) 15(3) *Asian Journal of Humanities and Social Studies* <<https://www.researchgate.net>> accessed 23 May 2023.

⁹³ PE(P&C)A 2005, s6(2)

⁹⁴ NPAA, s125.

⁹⁵ PE(P&C)A 2005, s1(1).

⁹⁶ *Ibid*, 2(1).

⁹⁷ *Ibid*.

⁹⁸ ICRCA, s36

⁹⁹ *Cooperative & Commerce Bank (Nigeria) PLC v. AG Anambra State* (1992) LPELR-875(SC) (P. 27, paras. E-F

¹⁰⁰ PE(P&C)A 2005, s9.

¹⁰¹ *Ibid*, 2nd sch.

¹⁰² CFRN 1999, (as amended), s4(1).

¹⁰³ *Ibid*, s4(1).

¹⁰⁴ NPAA, s125 (2).

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.

It is apposite to put in context the provision of the ICRC Act to the effect that: “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 prequalified 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 Public Enterprises Act.”¹⁰⁵

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 Public Enterprises Act the picture becomes clearer. In terms of the ICRC Act, 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 and the provisions of any services.”¹⁰⁶

The ICRC Act requires Federal Government body to “prioritise 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.¹⁰⁷ 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”¹⁰⁸ as the ICRC Act 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 Act does not grant ICRC the power to initiate concession as mentioned in chapter two. It rather allows the FGN 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 (NPA Act) permits its infrastructural project to be “qualified for concession” under the ICRC Act.

As explained previously, all the activities herein mentioned are the same activities the NPA has statutory duty to carry out. On one hand, the NPA Act 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”¹⁰⁹ and to “maintain, improve and regulate the use of the ports”¹¹⁰ On the other hand, the ICRC Act 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”¹¹¹

The NPA Act strongly mandates using the word *shall*, the other (ICRC Act) 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 per Niki Tobi, JSC in *Odedo v. INEC* (2008) 17 NWLR (Pt.1117) 554 at 610 and also *Ararume v. INEC* (2007) 9 NWLR (Pt.1038) 127 at 160 *held that 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 import a form of command or mandate which is given a compulsory meaning or denoting an obligation.¹¹² 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. Also, in Cullen C.J. in

¹⁰⁵ ICRC Act, s1(1).

¹⁰⁶ *Ibid*, s36.

¹⁰⁷ *Ibid*, s3.

¹⁰⁸ *Ibid*, s1(1).

¹⁰⁹ NPAA, s7(a).

¹¹⁰ *Ibid*, s7(b).

¹¹¹ *Ibid*, 1(1).

¹¹² *Incorporated Trustee of Nigerian Baptist Convention v Governor of Ogun State* (2006) LPELR-41134 (CA); *Nwankwo v. Yar'adua* (2010) 12 NWLR (Pt.1209) p.518; *Umeanadu v. A.G. Anambra State* (2008) 9 NWLR (pt.1091) 175; *Bamaiyi v. AG. Federation* (2001) 12 NWLR (pt.727) 468 at 480.

Massey v. Council of Municipality of Yao (1922) 22 SRSW 494 at 497 the court observed that 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 while the word 'shall' means 'must'.¹¹³

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 NPA Act 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*.¹¹⁴ Considering the tenor of NPA Act, it could fall in this category.¹¹⁵

The ICRC Act, 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 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*. 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 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'.¹¹⁶

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."¹¹⁷

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 NPA Act, this would still not make concession acquire a legal backing under the NPA Act because concession as envisaged under the current port governance is coupled with services in area that are primarily core statutory functions of NPA.¹¹⁸

In addition, these specific provisions cannot be overridden by a general provision on concession, which more so does not repeal the NPA Act.¹¹⁹ More so, the ICRC Act 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 ICRC Act 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.

5. Outsourcing

Outsourcing is where a company hires an external firm to conduct certain aspect of its business. In other words, one business hires another to operate part of its operations.¹²⁰ For instance, Apple Company outsources the majority of its production to Foxconn which assembles many of its products such as the iPhone.

Outsourcing itself is an efficient cost-cutting measure that businesses use to help increase efficiency and profitability. Outsourcing started to gain traction in the business community in the 1990s and took off

¹¹³ *Unilorin vs Oluwadare* (2002) LPELR-7179(CA) 22, paras C-G).

¹¹⁴ E V Hooydonk, 'The Law Ends Where the Ports Port Area Begins: On the Anomalies of Port Law.' (Europe, Maklu Publishers 2010) 34.

¹¹⁵ NPAA, s111.

¹¹⁶ *Bangboye v. Administrator-General* (1954) 14 WACA 616, 619.

¹¹⁷ *Campagne General De Geopysque (Nil) Ltd v. Anidi* (2005) LPELR-11346 (CA) Pg 34.

¹¹⁸ IA 2015, s9(1)(a) – (d).

¹¹⁹ NPAA 1999, s111(c).

¹²⁰ P Boyce, 'Outsourcing', *Boycewire* (England, May 2021) <<https://www.boycewire.com>> accessed 22 May 2022.

alongside global trade.¹²¹ As trade barriers came down, it became easier and cheaper to outsource production to low cost of businesses abroad.

Although outsourcing and privatisation are similar, there are fundamental differences. Government outsource functions when they engage a non-governmental unit or a private sector to provide services or carry out functions that the government would normally do itself. When outsourcing, government entities usually enter into a contract with an external provider to provide services.¹²² Concession on the other hand is not privatisation as privatisation envisaged under the PE Act entails “an offer for the sale of shares”¹²³ either by “public issue or private placement.”¹²⁴ 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.”¹²⁵

A key driver of reforms such as privatising and outsourcing services of general interest which is intended to increase performance, particularly in terms of economic efficiency. But there are no national laws in Nigeria generally regulating outsourcing. However, the “Guidelines on Labour Administration: Issues in Contract Staffing/Outsourcing in the Oil and Gas Sector”, issued by the Federal Ministry of Labour and Productivity in 2001, regulates outsourcing in the oil and gas sector. However, from the provisions of section (i) of the NPA Act, it can be implied that the NPA Act envisages the importance of outsourcing when it provides that the NPA shall have the power to “enter into agreement with any person for the operation or the provision of any of the port facilities which may be operated by the Authority”.¹²⁶

Although outsourcing and concessioning are different but have similarities and can be used interchangeably as both involve a contractual understanding or arrangement whereby the private sector or an independent body performs services the public sector should have performed with the aim of achieving efficiency and effectiveness in the delivery of the service by the private sector or individual in accordance with the terms of the agreement. They are both conducted by a third party in order to increase capabilities, lower cost, enhance efficiency, and focus on core competencies or operations.

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.¹²⁷ Nigeria ports were concessioned such that operational roles which had been performed by the NPA were ceded to the private sector under concession agreements under the NPA Act.¹²⁸ Also, the possession of core infrastructural assets of NPA such as terminals were transferred to the concessionaires for this purpose.¹²⁹ 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.¹³⁰

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.¹³¹ NPA was conceived to be an operator, landlord and regulator of the ports-all at once.¹³² The designation of Nigeria Shippers Council as economic regulator cannot be supported by the NSC Act 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.¹³³ The regulation of tariff vested in NSC under the concession policy, which legally is the responsibility of the Utilities Charges Regulatory Commission (UCRC) as per section 6(d)(i) of the later Act (the UCRC Act) which mandates it to “regulate tariff charges”.¹³⁴

¹²¹ (n120).

¹²² L Michael and others, ‘*Fostering Private-Sector Development: Outsourcing and Privatisation of Government Functions*’, (New York: Rand Corporation 2014).

¹²³ PE(P&C)A 2005, s2(1).

¹²⁴ *Ibid*,

¹²⁵ ICRC, s36

¹²⁶ NPAA, s8.

¹²⁷ *Ibid*, s125.

¹²⁸ *Ibid*.

¹²⁹ *Ibid*, s8 – 9.

¹³⁰ *Apapa Bulk Terminal Ltd. v NSC* (2018) LPELR – 44802(CA).

¹³¹ NPAA, s7.

¹³² *Ibid*, s8.

¹³³ NSCA 1978, s3.

¹³⁴ UCRCA 1992, s6(d)(i).

However, the principal concession legislation, ICRC Act provides that a government agency may enter into concession agreement; the principal port legislation (NPA Act) provides that the port shall carry out the operational duties¹³⁵ such as handling and provision of port facilities which concession purports to cede to concessionaires in ports.¹³⁶ The official position was that concession in ports was being supported by provision of the NPA Act (section 125) which allows the port authority to lease out its assets or grant some concession of its responsibilities to the private sector.¹³⁷ The concessioning of the port is a bigger or another way of outsourcing the roles of NPA to build a modern, advanced and developed port that will compete with international ports.

6. Benefits of Port Reforms

The port concession is often regarded as Nigeria's most dramatic and successful economic reform. It opened up investment opportunities in the port sector, with several experienced port operators, both local and international, took over the operation of port terminals, and the NPA formed business relationships with world-class dredging companies for both capital and maintenance. As a result of these developments and improvements, the nation's seaports have seen increased traffic, with cargo throughput increasing from 42 million MT in 2006 to 82 million MT in 2011.¹³⁸

An outline of the benefits of port reforms in Nigeria is hereunder stated:

i. Financial Benefits

In addition to other macroeconomic benefits of the reform, quantifiable monetary benefits have been received by the Federal Government within the tenure of the concessions in terms of commencement fees, lease fees and throughput fees.¹³⁹ There are also the investments in port infrastructure upgrade.¹⁴⁰

ii. Enhanced Operational Efficiency

In terms of operations, several operators have seen their cargo throughput/turnover more than double, while their berth occupancy rate has also increased dramatically. In other circumstances, the average time spent waiting at the anchoring has been reduced to zero.¹⁴¹

Ship traffic and throughput have surged, resulting in a 400 percent increase, from 400,000 TEUs in 2006 to 1.6 million TEUs in 2014, there has been a significant increase in container throughput. 'Ships now berth on arrival, thanks to the investments, which have resulted in the elimination of ship waiting time at container ports. The average stay time for cargo clearance has decreased from almost 30 days to just 14 days, while vessel turnaround time has decreased from five days to 41 hours.'¹⁴²

iii. Rehabilitation/Construction of Physical Infrastructure

The atmosphere in the port terminals has changed. Construction of perimeter fencing, installation of suitable and functioning lighting, and other security measures, including the installation of CCTV, have all been implemented in accordance with the ISPS Code. As a result, theft and pilferage have decreased dramatically.¹⁴³

In addition to rehabilitation of the plants and equipment acquired from NPA during the concession, the terminal operators have invested substantially in the procurement of new and modern equipment. This equipment includes cranes, forklifts, trailers and other operational vehicles.¹⁴⁴

In terms of physical structures, the construction of terminal road and rehabilitation of dilapidated buildings and structures (including office blocks, lavatories and warehouses) has been completed. Similarly, the structures earmarked for demolition to create additional container stacking areas have been demolished and the areas paved. Rehabilitation of faulty water systems and construction of new boreholes has been accomplished.

Most of the terminal operators have also invested in modern Information and Communications Technology for improved operational and administrative efficiency, including the installation of modern container tracking systems.

¹³⁵ NPAA, s7.

¹³⁶ *Ibid*, s8.

¹³⁷ *Ibid*.

¹³⁸ ICRC 2005, s36.

¹³⁹ NPAA, s7(b).

¹⁴⁰ F Okotie, 'Competitive Advantage: Repositioning Nigerian Ports', *Businessday* (Lagos, 12 November 2019).

¹⁴¹ NPAA 1, s7(c).

¹⁴² L Muyiwa, 'For Competitive, Efficient Ports,' *The Nation* (Lagos, 4 April 2017).

¹⁴³ NPAA, s8(a).

¹⁴⁴ NPAA 1999, s8(b) – (c).

7. Factors which Encourage Private Investment in Port Development

Some of these factors, which encourage private investments in ports are discussed in detail hereunder:

a. Increased Trade

Over the last 50 years, global trade has gradually and steadily increased, and this practice is predicted to persist in the near future. Noteworthy is the fact that the increase in tonnage terms during the last 50 years has been greater in that period than in the previous 5000 years-since trade began. The majority of this business is done by sea, therefore port capacity has had to expand to keep up with demand. The oil shock of 1973 was a stimulus to trade as nations sought to find ways to increase their income from exports. Now with the emphasis on globalisation, trade continues to increase.¹⁴⁵

As a result of the strong growth in world trade, captive port users who are unable to shift to other means of transportation such as train services or airlines, or to other ports, have put tremendous political influence on authorities to improve handling efficiency, minimise port user fees, and expand facilities to accommodate larger cargo flows. Despite this, many public port authorities have had mixed results in revamping labour and other rules to increase the productivity and efficiency of their existing facilities.¹⁴⁶

b. Technological Change

Shipping Operations have changed radically with the introduction of new cargo-handling techniques, such as containers and automated handling methods for bulks.¹⁴⁷ These changes have implied substantial port investments and consequential changes, especially in the skills and numbers of port workers. Publicly owned ports have sometimes found it difficult to respond adequately to these challenges, on account of the size of the investments involved and the impact on organised labour.

Containerisation of cargo and the construction of larger and deeper specialised ships are two technological changes that have occurred in the maritime transport business in recent decades. These changes have resulted in new demands for seaports to upgrade their infrastructure and purchase new equipment in order to continue to supply services to shipping businesses. These two "revolutions" in the maritime transportation business have compelled seaports to begin a rapid refurbishment of their infrastructure in order to meet the new demands of shipping corporations, particularly a growing demand for container handling services. Seaports are more competitive than they have been in the past, and they must have the appropriate infrastructure as well as reasonable rates or risk losing business to competitors. These businesses, on the other hand, are increasingly using hub-and-spoke networks, necessitating the use of large ports as connection nodes (hubs) where cargo is transferred to smaller ships that provide regional services (feeder services).

c. Slower Public Ports

Economies of scale in cargo shipment have resulted in the formation of a few global shipping companies capable of controlling the distribution of transshipment business to strategically located, well-equipped and successfully managed hub ports.¹⁴⁸ Port authorities must remodel and modernise infrastructure facilities to meet the demands of large shipping companies in order to remain competitive. However, as ships have grown larger, containerisation has advanced, and cargo information systems that are highly advanced have been introduced, the investment necessary has often exceeded public port authorities' financial and management capabilities.

d. Change in the Priorities of Governments.

Following end of World War II, there was a period of transition, the priority for government was in infrastructure, to repair the effect of years of underinvestment. Starting in the mid-1980s, government investment priorities changed under the pressure of increasing population to give more emphasis to education, rural poverty and other social areas, leaving a need to find alternative sources of investment for infrastructure including port modernisation.

e. Change in the Role of Governments

Coupled with this change of investment priorities was a change in the perceived role of government. The state's role was seen to be more one of the regulation of an increasingly private economy-changes associated in the UK with the governments of Mrs. Margaret Thatcher. This meant an abandonment of the

¹⁴⁵ (n142).

¹⁴⁶ *Ibid.*

¹⁴⁷ NPAA, s8(a).

¹⁴⁸ ICRCA, s36.

belief that the state should control the 'commanding heights' of the economy, to take on a new role in establishing policy and long-term planning goals, in partnership with the private sector.

8. Challenges/Shortfalls of Port Reforms

a. Transaction Sequencing

Royal Haskoning recommended that the transactions should be conducted over a period of six years and that one terminal should be taken at a time so that lessons learnt in the course of the exercise could be used to improve subsequent transactions. However, in the course of implementation, the phased approach was set aside and the entire transactions were carried out in six months. This led to avoidable mistakes as a result of which some concessions are not performing optimally and were terminated by the NPA, for example, Greenleigh at Koko, and BUA in Port Harcourt.

b. Legal/Regulatory Framework

The move towards the passage of the new Nigerian Ports and Harbours Authority Act, as well as the National Transport Commission Act, has not been accomplished. The process of consultation and review of the bills by stakeholders is still on, fifteen years post-concession. The necessary regulatory framework to guide the concession programme is therefore absent and NPA cannot step into the gap because it is a party to the concession agreements. NSC was consequently appointed port industry economic regulator pending passage of the bills. The major challenge NSC may face in carrying out this responsibility is information asymmetry. The NSC may not have necessary information on tariff and service quality that should guide it in carrying out its function of economic regulator.¹⁴⁹

c. Port Access

The capacity of any port is mostly determined by the capacity of the port's access. The major problem with Nigerian ports is poor access to and from the hinterland. This has affected operations in the ports, as well as leading to an increase in transportation fares of imported goods and those for exports. Specifically, the most important ports in Nigeria are situated in Apapa/Tin Can Island where access roads to the ports are always congested. This is further compounded by the non-availability of rail haulage of cargo in and out of the ports and non-utilisation of the inland waterways for port access. A large urban conurbation has also arisen around the ports in Nigeria restricting scope for expansion and blocking access to the ports.¹⁵⁰

The NPA has also been unable to meet its contractual obligation to dredge the channels and berths to advertised draughts (depth). The current draught has denied Nigeria the patronage of larger vessels (Panamax). Also, the FGN has failed to fix the major roads leading to the ports. While NPA has made efforts to rehabilitate some of the roads within the ports, the Ministry of Works has failed in finding a lasting solution to the dilapidated roads leading to the ports.¹⁵¹ Apapa, which is home to Nigeria's two busiest ports—Apapa and Tin Can Island—which together handle 75 percent of the country's import and export traffic, has been plagued by constant gridlock caused by unwholesome trucking activity for far too long.¹⁵² The terminal operators complain bitterly of the congestion they suffer within the system as a result. Apart from the terminal operators, importers complain of the loss of their cargo as containers keep falling off trucks because of bad road. Importers also complain of the congestion in the system which leads to slow movement of cargo out of the ports. Dynamar, a marine research organisation located in the Netherlands, has lately released a critical report on the activities of Lagos' seaports losing \$55 million per day due to traffic congestion at the Apapa ports.¹⁵³

d. Multiple Government Agencies in the Ports

Twenty-nine (29) government agencies/units have been identified to be involved in the inspection and clearance of cargo (NAFDAC, FEPA, SON, SSS, etc). Most of them claim to be in the port either by law or presidential directives. The consequence of this is slow and bureaucratic process for clearance of cargo, creation of major bottlenecks, and the breeding of corruption in the system. This is a major impediment to port efficiency and to Nigeria's bid becoming a regional hub despite the fact that about 60 percent of West African bound cargo is for the Nigerian economy. The National Association of Government-Approved Freight Forwarders (NAGAFF) (a trade association that represents government-approved freight forwarders) is

¹⁴⁹ African Bank, 'Reforms and the Regulatory Framework of African Ports – African Development Bank' <<https://www.afdb.org>> accessed 18 June 2021.

¹⁵⁰ LCCI, 'Cost of Maritime Port Challenges in Nigeria' (2018) <<https://www.tralac.org>> accessed 18 June 2023

¹⁵¹ F Ogoke, 'Ports: Reforms and Infrastructure Rehabilitation,' *Thisday* (Lagos, 12 October, 2014) 29.

¹⁵² A Anagor-Ewuzie, '\$1.5bn Lekki Seaport: Analysts Proffer Measures to Avert Repeat of Apapa Scenario,' *Businessday* (Lagos, 6 May 2019) <<https://businessday.ng>> accessed 23 May 2023.

¹⁵³ C Chioma, 'Cutting Inexcusable Losses at the Seaports,' *The Punch* (Nigeria, 10 September 2023) 8.

dissatisfied with the multiple agencies at ports, as well as the duplication of laws and conflicts of interest. The agencies, according to NAGAFF, operate outside of their mandates as outlined in the statutes that established them, frustrating importers and clearing agents.¹⁵⁴

The Ports Offences Act limits the number of government agencies in the ports to five (NCS, NPA, Nigeria Immigration Service, Port Police and Port Health).¹⁵⁵ All other agencies such as NAFDAC, SON, NDLEA, etc. are to work through the Customs on invitation when the need arises in line with international best practice. In order to ensure the implementation of the Ports Offences Act on the number of agencies in the ports, the Presidential Task Force sorted out and got the approval of the president in 2006 for the enforcement of the provision, but to date all the agencies are still in the ports.

e. Labour

One important pillar of the ports reform is labour reform. This is where a greater part of the operational efficiency lies. However, due to the volatile nature of dock labour, labour reform is yet to meet up with private sector operation of the terminals already achieved. Though government paid the dock workers an ex-gratia allowance for those working at the terminals and affected by the concession programme, there is still resistance from labour to allow the terminal operators free hand to engage suitable workers. It is imperative that government supports and give assistance to the terminal operators to achieve labour reform within their terminals.

f. Port Charge

A key objective of the ports reform was to bring down the cost of clearing goods at Nigerian seaports to about 50 percent of their pre-concession levels to encourage port users to patronise them instead of diverting cargo to neighbouring ports. Despite the progress made in the implementation of port reforms, there have been complaints on higher tariff. NPA currently has the statutory role of economic regulation, but it is constrained in performing this function due to lack of capacity and conflict of interest.¹⁵⁶ Nigeria insists on low price and super service in the port industry without commensurate attention on cost reduction for terminal operators.¹⁵⁷ Terminal operators generate power and provide other physical infrastructure that is supposed to come from the public sector, including NPA.

g. Clearing Process

The most frightening component of the experience for an average shipper carrying out business in Nigerian seaports is the cargo clearance process. When compared to the difficulties of eventually transporting the goods out of the port and then attempting to return the empty container to the terminals, this is, of course, the first painful struggle. Agents and importers are subjected to an ordeal in which, they must wait for hours as Customs officers physically scrutinise their cargoes due to lack of scanners.¹⁵⁸ The clearing process adopted by the Nigeria Customs is a major impediment to the achievement of the objectives of the ports reform. International best practice requires a 24-hour customs operation. Though the concessionaires adopt a 24-hour workday, NCS work for only 12 hours thereby slowing down the process.

h. NPA as Terminal Operator

Some facilities should have been reserved for a reorganised NPA management to run. Once the management of NPA is professionalised, political influence in its management and operation is removed and it is allowed to charge market rates for its services, it should be able to compete with any private operator.¹⁵⁹ The Nigerian ports are also faced with insecurity challenges and urbanisation.

¹⁵⁴ Editorial Board, 'Multiple Government Agencies at the Ports' *The Guardian Nigerian News* (Nigeria, 2 October 2016) <<https://m.guardian.ng>> accessed 18 June 2023.

¹⁵⁵ POA 1996, s1.

¹⁵⁶ A Olukanmi, 'Maritime Ports Reform in Nigeria: Feedback from the OPS,' *Businessday* (Nigeria, 22 October 2018) <<https://www.naccima.com>> accessed 23 May 2023.

¹⁵⁷ B Onoja, 'Port Tariffs – Nigerian Ports Authority' *Businessday* (Nigeria, 22 October 2018). <<https://nigerianports.gov.ng>> accessed 18 June 2021.

¹⁵⁸ A Okon, 'Nigeria's Analogue Seaports and Physical Cargo Examination,' *The Punch* (Nigeria, 23 January 2020)

¹⁵⁹ Nigerian Ports Authority *Port Hand Book* (2000) Nigerian Ports Authority: Lagos.

9. Lessons from other Jurisdictions

Some countries in the last few decades witnesses considerable economic growth resulting in considerable increase in the volume of international trade passing through the region. Negative effect of poor transport infrastructure including ports on trade performance of a country is too obvious.¹⁶⁰ Inefficient ports not only act as a stumbling block in the nation's trades but the emergence of transshipment has converted ports itself into a profitable independent business entity. Some countries took the lead in undertaking the reform and involved third parties in managing port facilities:

i. Malaysia

Port Kelang was the first port where privatisation was introduced by Malaysian government. To pursue the privatisation programme, Kelang Port Authority (KPA) was allowed to enter into joint venture arrangement and to establish companies under the Companies Act.¹⁶¹ The first phase of the privatisation programme for KPA started in 1986 when container operations were moved to Kelang Container Terminal (KCT).¹⁶² The KCT was set up as a joint venture between KPA (49%) and Konnas Terminal Klang (51%), a consortium of government owned Kontena Nasional and P&O (Australia) Ltd. KCT was given four berths to handle container operations under a 21-year lease. In order to spread the benefit of privatisation, a condition was stipulated that 40% of the shares of KCT would be divested to public (including 5% to employees). In 1992, KCT's shares were listed on stock exchange.¹⁶³

In the second phase, the remaining 22 berths of the port were privatised and the facilities were given to another company, Kelang Port Management (KPM) on 21 years lease. Kontena Nasional had the majority stake in the KPM and was allowed to divest its 60% equity to other parties. The Port Authority did not subscribe to any share in KPM but the government retained a golden share to ensure national priorities are served. The new container terminal under KPM was to compete with KCT. Both the deals involved taking over of existing infrastructure and payment of upfront for taking over the business and movable assets along with fix lease rental (with yearly fixed escalation) and supplementary lease based on throughput.¹⁶⁴

In development of new facility at the Westport in Port Kelang, BOT system was adopted in which the concession was awarded to a consortium of Malaysia transport companies and financial institutions (Kelang Multi Terminal Consortium – KMTC) on a 30 years lease, which took over semi-constructed facility on the basis of payment actual expenditure and a percentage in pre-tax profit to the government.

In post privatisation setting, KPA regulates the port activities and the operation of facilities by private operators including performance parameters under the powers conferred by the Port (Privatisation) Act, 1990, to maintain healthy growth. Malaysia's three federal ports at Penang, Johor and Bintulu have been corporatised, with new government-owned companies taking over the port services.¹⁶⁵ Johor Port was taken over by a private terminal operator for 30 years in 1995. Some other smaller ports are inviting offers from private parties without going through the corporatisation phase.

ii. The United Kingdom

In the United Kingdom (UK), the privatisation of port has been the most radical in Europe with complete sale of port assets to private operators including the Management and Employees Buy-outs (MEBO). The Associated British Ports (ABP) running 19 ports was formally privatised in 1983 when 49% of the share capital of the company was sold to public and the balance being sold in 1984. The Tees and Hartlepool Port Authority was sold through the process of competitive bidding in 1991. In 1992, the Medway Ports Authority and the Port of Tilbury were privatised and awarded under MEBO.¹⁶⁶ The Ports Act of 1991 promulgated to facilitate the process of privatisation paves the way for vesting of rights and liabilities of the trust port in a new

¹⁶⁰ S K Shahi, 'Indian Port Policy Imperatives Post Privatisation,' (A Master of Science Dissertation submitted to the World Maritime University in partial fulfillment of the requirements for the award of the degree of Master of Science in Maritime Affairs)

¹⁶¹ PPA 1990, s3 - 5

¹⁶² M Magnier, 'Port Privatization in Malaysia Sparks Labour, Safety Concerns,' (1991) (1) The Journal of Commerce Online <<https://www.joc.com>> accessed 1 June 2023

¹⁶³ M Tull and J Reveley, 'Privatisation of ports – an evaluation of the Malaysia experience,' (2010) 21 (4) JAEP <<https://www.researchgate.net>> accessed 1 June 2023

¹⁶⁴ PPA 1990, s9.

¹⁶⁵ *Ibid*, s8.

¹⁶⁶ Great Britain, Department for Transport (2000), 'Modern Ports: A UK Policy,' <<http://www.shipping.dft.gov.uk/modernports/02htm#1.1>> accessed 1 June 2023

successor company formed to privatise the port and Successor Company retains statutory powers and responsibilities.¹⁶⁷

iii. The United States of America

Most of the major ports in the United States of America (US) are administered by public bodies under the administrative control of local or the state government and cut across the various operating models namely operating, non-operating (landlord) and limited operating ports. Though majority of port operate as landlord system but in operating ports also, the private stevedoring companies perform the on-board operations. Many ports have leased individual terminals to stevedores and shipowners. For example, in the port of Los Angeles, Evergreen, APL have been given licences. In order to commercialise operations, some of the ports have formed semi-private operating subsidiaries such as Virginia Port Authority (Virginia International Terminal Inc.). The Federal Government has very little role in port administration but undertakes the responsibility of maintaining the channel, fairways through the US Army Core of Engineers and maintenance of aids to navigation by US Coast Guard.¹⁶⁸

II. Conclusion

The study found that the concession agreements under which the ports were concessioned contravenes the NPA Act. 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 ICRC Act 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 NSC Act as well as UCRC Act. 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 NPA Act. Thus, the existing legislations do not provide an adequate regime for port concession agreement. The proposed legislations namely the NPHAB and NTCB generally succeeded in legalising 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 would not only put the relevant provisions in perspective for an improved legislation. In general, the research is a significant contribution to the small body of knowledge in port law particularly in the field of port concession. It is anticipated that the analysis and proposals on concession related issues in the proposed bills would not only put the relevant provisions in perspective for an improved legislation. Pass the National Transport Commission Bill (NTCB), especially for road and rail, and the Ports & Harbours Authority Bill (NPHAB in the National Assembly. 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 paper. It is also suggested that the concession agreements between the government and concessionaires be renegotiated on the basis of the bills when they are passed into laws. The protracted delay in the passage of the NPHBA 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. In terms of clause 3(1) of the NPHBA Bill, a port authority is established: the “the Nigerian Ports and Harbours Authority”. The NPHBA 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”. The purpose of PHBA Bill is to encourage private investment and promote private sector participation in port services”.

¹⁶⁷ PA 1991, s1

¹⁶⁸ R B Sherman, ‘Seaport Governance in the United States and Canada’, (2010) 1 (1) AAPA <<https://www.aapa-ports.org>> accessed 1 June 2023