

# PORTS & TERMINALS

## Nigeria



# Ports & Terminals

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Quick reference guide enabling side-by-side comparison of local insights, including into key ports; reform and port models; state development policy; green ports; legislative framework and regulation; public procurement and PPP; port development, construction and operation; corporate, finance, competition and dispute considerations; and recent trends.

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Generated 10 October 2022

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# Table of contents

## GENERAL

Key ports  
Reform and port models  
State development policy  
Green ports

## LEGISLATIVE FRAMEWORK AND REGULATION

Development framework  
Regulatory authorities  
Harbourmasters  
Competition  
Tariffs  
Public service obligations  
Joint ventures  
Foreign participation

## PUBLIC PROCUREMENT AND PPP

Legislation  
Proposal consideration  
Joint venture and concession criteria  
Model agreement  
Approval  
Projects  
Term length  
Fee structures  
Exclusivity  
Other incentives

## PORT DEVELOPMENT AND CONSTRUCTION

Approval  
Port construction

## PORT OPERATIONS

Approval

**Typical services**

**Access to hinterland**

**Suspension**

**Port access and control**

**Failure to operate and maintain**

**Transferrable assets**

**MISCELLANEOUS**

**Special purpose vehicles**

**Transferring ownership interests**

**Granting security**

**Agreement variation and termination**

**Contractual breach**

**Governing law**

**Disputes**

**UPDATE AND TRENDS**

**Key developments of the past year**

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## GENERAL

### Key ports

Which are the key ports in your jurisdiction and what sort of facilities do they comprise? What is the primary purpose of the ports?

The key Ports in Nigeria are (1) the Lagos Port Complex (2) the Tin-Can Port Complex (3) the Rivers Port Complex (4) the Onne Port Complex, (5) the Delta Port and (6) the Calabar Port. There is also the Lekki Deep Sea Port, which has reached advanced level of completion (94.43 per cent as at 28 June 2022) with an expected completion date of September 2022 and commencement of full operation scheduled in December 2022.

The Lagos Port Complex, located in Apapa, Lagos was established in 1913. It is duly registered and certified by the International Ships and Port Facility Security (ISPS) with the International Maritime Organisation (IMO). Sequel to the Ports Concession exercise in 2006, the port is now being operated by five private terminal operators. They are AP Moller Terminal Ltd, ENL Consortium Limited, Apapa Bulk Terminal Limited, Greenview Development Nigeria Ltd and Lilypond Inland Container Terminal Ltd. There are also two logistics bases at the Lagos Port Complex – Eko Support Services Ltd and Lagos Deep Offshore Logistics and about 15 jetties operating within the Port Complex. Lagos Port Complex is a gateway port and the terminals and jetties handle different types of cargo such as oil & gas, dry bulk and wet cargo, general cargo and container.

Tin-Can Port Complex commenced full operation in 1977 and now has five private terminal operators owing to the concessioning of the port in 2006. The terminals are operated by: Josepdam Port Services Limited, Tin Can Island Container Terminal Limited, Port and Cargo Handling Services Limited, Five Star Logistics Limited and Ports and Terminal Multiservices Ltd. Tin-can Port is also a gateway port and the terminals handle different kinds of cargo, which has enhanced their expertise in their specific areas of operation such as dry and wet bulk cargoes, containerised cargoes and ro-ro services among others. There are about nine jetties within the Tin-can Port Complex that handle different kinds of cargoes including oil & gas. There are Kirikiri Lighter Terminals I & II and the Ikorodu Lighter Terminal, which is mainly operated by the Nigeria Customs Service for storage of overtime cargo.

The Rivers Port Complex is a multi-purpose port that handles dry, liquid and general cargoes. The port privatisation exercise in 2006 ushered in private sector participation of two terminal operators, namely, Port and Terminal Operators Limited and BUA Ports and Terminals Nigeria Limited. There are about five jetties within the port complex and they essentially handle petroleum products. The port is also a gateway Port.

Onne Port Complex is arguably one of the biggest oil and gas-free zone globally providing logistics support to the oil and gas industry in Nigeria. This is a multi-purpose port that handles general cargoes, dry and wet bulk, oil well equipment and containerised cargoes among others. The port is a gateway port and it is operated by three private terminal operators – Brawal Shipping Ltd, Intel Nigeria Limited and West African Container Terminal Ltd. There are about 10 jetties within the port complex handling different kinds of cargoes such as bulk, oil and gas, container, general cargoes amongst others.

The Delta Port Complex is a multi-purpose port with eight terminals operated by five terminal operators including NPA. Delta Port is a gateway port and has about 26 jetties handling various kinds of cargoes mainly, petroleum products.

Calabar Port Complex is a gateway port and covers the Old Port, the New Port and the Dockyard. The Port mainly handles oil and gas cargoes and is operated by three private terminal operators, namely: ECM Terminal Ltd, INTELS Nigeria Ltd and Shoreline Logistics Nigeria Limited. There are about 10 jetties within the jurisdictional operation of the port handling various cargoes.

*Law stated - 03 August 2022*

### **Reform and port models**

Describe any port reform that has been undertaken over the past few decades and the principal port model or models in your jurisdiction.

The Public Enterprises (Privatisation and Commercialisation) Act, 1999 (the BPE Act) laid the foundation for the private sector participation in government enterprises including the port sector. The BPE Act established the National Council on Privatisation (NCP), the Bureau of Public Enterprises (BPE) and Part I of its First Schedule contains list of enterprises to be partially privatised while Part II of the First Schedule contains list of enterprises to be fully privatised. Nigerian ports fall under the category of enterprises to be fully privatised. The BPE Act also gives the NCP power to add to, alter or amend the list contained in the First Schedule as well as the power to approve the legal and regulatory framework for the enterprises to be privatised. In the exercise of that power, NCP decided that the port privatisation exercise shall be by concession. As a complement to the BPE Act, Section 8(1) of the Nigerian Ports Authority Act, Laws of the Federation of Nigeria, 2004 (the NPA Act) gives the Nigerian Ports Authority (NPA) the power to enter into agreement with any person for the operation or provision of the port facilities which may be operated or provided by NPA.

Accordingly, and relying on the above legal frameworks, Nigeria commenced the process of ports concessioning in 2004 through open competitive bidding and by 2005, preferred bidders had emerged who later signed various lease agreements with the federal government represented by the NPA as the lessor and the Bureau of Public Enterprises as the confirming party. The Concessionaires were handed over their various terminals at different dates in 2006 with each terminal having varying years of operation granted to it subject to renewal. The port concession exercise adopted the landlord model where the NPA is the lessor upon whom the reversionary right over the terminals resides while the terminal operators are the lessees.

*Law stated - 03 August 2022*

### **State development policy**

Is there an overall state policy for the development of ports in your jurisdiction?

Yes. The NPA Act gives NPA the power to construct, execute, carry out, equip, improve, work and develop ports in Nigeria. It can do this through its officers or agents or through any other person authorised by it. The realisation that government enterprises can best be developed, managed and maintained by private sector participation led to the enactment of the BPE Act, which empowered the NCP and BPE to identify and privatise government enterprises including ports. The BPE Act led to the ports concessioning in 2006. To further cement and advance the participation of private sector in development of the port and other sectors of the Nigerian economy, the government also enacted the Infrastructure Concession Regulatory Commission (Establishment) Act, 2005 (the ICRC Act).

Implementation of the ICRC Act did not take effect until 27 November 2008 when the governing board and management of Infrastructure Concession Regulatory Commission (ICRC) was inaugurated to provide the needed regulatory and institutional framework to enable government's ministries, departments and agencies (MDAs) to partner with the private sector in the designing, financing, construction, operation and maintenance of projects including ports in Nigeria. In line with its mandate, the ICRC developed the National Policy on Public Private Partnership, 2009 but reprinted in December 2013 to provide in clear terms the process and procedure guides for all aspects of Public Private Partnership (PPP) projects development and implementation in Nigeria. Section 1 of the ICRC Act empowers MDAs, upon approval by the Federal Executive Council, to enter into a contract or grant concession to any duly prequalified project proponent in the private sector for the financing, construction, operation or maintenance of any infrastructure. Before a contract or concession is awarded, the underlying project must be subjected to an open competitive public bidding process and the successful bidder must not only satisfy the prequalification criteria but must also have submitted the most technically and economically comprehensive bid (section 4, ICRC Act). There are other related Acts of the National Assembly that have direct bearing on ports and projects procurement and development such as the Fiscal Responsibility Act, 2007, the Nigeria Export Processing Zones Authority Act, 1992 (NEPZA Act) and the Public Procurement Act, 2007. As a result of these legal and regulatory frameworks, the government is currently partnering with the private sector in the procurement, designing and development of the Lekki Deep Sea Port; Badagry Deep Sea Port and Ibom Deep Sea Port amongst others. There are also dry ports and inland container terminals being developed across the country through PPP with strategic plans to connect them with rail transportation for ease of operations and movement.

*Law stated - 03 August 2022*

## Green ports

What 'green port' principles are proposed or required for ports and terminals in your jurisdiction?

The National Policy on Public Private Partnership indicated that the key objectives of the government for its infrastructural investment programme and for PPP projects are economic, social (which seeks to enhance the health, safety and wellbeing of the public) and environmental (which seeks to protect and enhance the natural environment and to minimise greenhouse gas emissions and other pollutants). NPA as the ports' landlord and regulator emphasised, in its port handbook published in 2018 and as part of its functions and obligations, the importance of compliance with health, safety and environment (HSE) in marine environment and ports' operation and management. NPA does this by ensuring compliance with international conventions, regulations, guidelines and national legislations on health, safety and environment such as OHSAS 18001 on Occupational Health & Safety Management System, ISO 14001 on Environmental Management Systems, the International Convention for the Prevention of Pollution from Ships, 1973 and the 1978 Protocol, Safety of Life at Sea (SOLAS), the International Association of Marine Aids to Navigation and Lighthouse Authorities and International Ships and Port Facility Security (ISPS) Code.

The various lease (concession) agreements contain covenants and obligations on the part of the terminal operators to maintain and observe local laws and international conventions on health, safety, security system, spill containment, fire control, traffic, signage and environmental requirements at the ports including the obligation to remediate the port for any waste material as well as to respond to any environmental emergencies that are capable of endangering life or property. In a nutshell, the green port principles are anchored on observance and compliance with health, safety and environment standards, guidelines, regulations, laws and international conventions at the ports to promote sustainability and friendly operating environment as well as safe navigation for humans, equipment and vessels.

*Law stated - 03 August 2022*

## LEGISLATIVE FRAMEWORK AND REGULATION

### Development framework

Is there a legislative framework for port development or operations in your jurisdiction?

Yes. The NPA Act is the primary legislation that deals with port development and it gives the Minister for Transport the power to declare any place in Nigeria as a port and to define the limit of such port as well as the power to declare any navigable channel leading to such port as its approach. The NPA Act also empowers NPA to develop, operate and regulate ports and to carry out its functions and exercise its powers either through its officers, agents or by entering into agreement with other persons in that behalf. The BPE Act on its part gives the NCP and BPE the power to identify and privatise enterprises including ports to qualified private sector entities with technical and financial strength to operate and manage the enterprises.

The BPE Act laid the foundation for the concessioning of the ports in Nigeria in 2006. The ICRC Act of 2005 (which established the ICRC) gives MDAs the power to identify and enter into contracts for Ports and other projects concessioning through competitive bidding process subject to the approval of the Federal Executive Council. The Fiscal Responsibility Act and the Public Procurement Act of 2007 also have bearing on port procurement, concessioning and development. Similarly, the Customs and Excise Management Act, which established the Nigeria Customs Service (the Service), on its part requires an application to be made to the President through the Service for any port to be declared a customs port. On the other hand, the Immigration Act requires that an application for designation of any port as a port of entry be made to the Minister of Interior. The NEPZA Act gives the President the power to designate any area export processing zone which may be operated and managed by a public, private or a combination of public and private entity under the supervision of and with the approval of Nigeria Export Processing Zone Authority (NEPZA).

Accordingly, the Port Concessioning of 2006 was done by virtue of a legal framework namely, the BPE Act and the NPA Act and not by general powers of the government and the ongoing procurement and development of the Lekki Deep Sea Port, Badagry Deep Sea Port and Ibom Dee Sea Port are being done pursuant to the dictates of the ICRC Act, NPA Act, PPA & NEPZA Act among others.

*Law stated - 03 August 2022*

### Regulatory authorities

Is there a regulatory authority for each port or for all ports in your jurisdiction?

Yes. The Nigerian Ports Authority is the regulatory authority for all the ports in Nigeria by virtue of the NPA Act and the Lease Agreements. NEPZA on its part has some regulatory roles to play for ports that are established within a free zone. It is necessary to point out that in 2015, the President of the Federal Republic of Nigeria promulgated the Nigerian Shippers' Council (Port Economic Regulator) Order, 2015 and the Minister for Transport issued a subsidiary legislation, the Nigerian Shippers' Council (Port Economic Regulations), 2015, which appointed the Nigerian Shippers' Council as the economic regulator for the ports in Nigeria. The appointment generated controversy in the industry, which led to separate court cases instituted by the Seaport Terminal Operators Association of Nigeria (STOAN) and the Shipping Association of Nigeria (SAN) and their respective members against the Nigerian Shippers' Council. The court cases are still pending at the Supreme Court for final adjudication.

*Law stated - 03 August 2022*

## What are the key competences and powers of the port regulatory authority in your jurisdiction?

The competences and powers of NPA as the port regulatory authority are as contained in sections 7, 8 & 9 of the NPA Act. They include the following.

1. To provide and operate facilities in the port.
2. To maintain, improve and regulate the use of the ports.
3. To provide pilotage services and lights, marks and other navigational services and aids.
4. To provide facilities for berthing, towing, mooring, loading and unloading of goods or embarking and disembarking of passengers in or from a ship, lighterage, weighing, warehousing and handling of goods and for carriage of goods or passengers.
5. To supply water to shipping vessels.
6. To manage port operations including the allocation and use of port resources.
7. To control pollution in the ports.
8. To provide berthing, mooring, dry-docking, towing and salvage facilities or appliances.
9. To maintain port equipment and facilities.
10. To ensure safety and security in the ports or their approaches.
11. To develop ports, embankments, water courses, harbours, piers, canals, wharves and jetties.
12. To appoint, licence and manage pilots of vessels.
13. To control the erection and use of wharves in any port or its approaches.
14. To enter into a contract for the repair, maintenance, manufacture, construction and supply of any property necessary for the purposes of NPA.
15. To enter into agreement with any person for the operation or provision of any of the port facilities.
16. To provide, appoint, license and regulate weighers and meters for measuring goods in any port.
17. Reclamation, excavation, enclosing and developing lands.
18. To advance the skills of its employees or efficiency of the equipment and manner of operation of the facilities and equipment of the authority.
19. To fabricate and repair vessels, engines, boilers and items used by vessels.
20. To engage in the business of ship builders, engineers and manufacturers of machinery.
21. To form, establish or incorporate subsidiaries or affiliate companies with other organisations towards carrying out NPA's functions.
22. To act as is necessary for the successful performance of its functions under the Act.

*Law stated - 03 August 2022*

## Harbourmasters

### How is a harbourmaster for a port in your jurisdiction appointed?

Section 31 of the NPA Act gives NPA the power to appoint harbour master in respect of any port. The harbourmaster is usually appointed by the NPA from among its staff as part of the usual posting on the job and he or she can be moved any day to another assignment or location and another posted to replace him or her. However, in rare cases where no staff of NPA is qualified to be so appointed, NPA may advertise the job for any qualified candidate to apply and any candidate that meets the requirement will be recruited as an NPA staff, for purposes of internal and regulatory control, and appointed accordingly.

*Law stated - 03 August 2022*

## Competition

### Are ports in your jurisdiction subject to specific national competition rules?

Yes. Ports are subject to the provisions of the Federal Competition and Consumer Protection Act, 2018 (FCCP Act) being part of undertakings and commercial activities within or having effect within Nigeria especially as the FCCP Act applies to body corporate or agency of the government of the Federation or agency of a subdivision of the Federation, provided the body corporate or agency engages in commercial activities – section 2 (1) (2a) of the FCCP Act.

*Law stated - 03 August 2022*

## Tariffs

### Are there regulations in relation to the tariffs that are imposed on ports and terminals users in your jurisdictions and how are tariffs collected?

There are regulations that relate to tariffs at the ports and terminals in Nigeria. The Nigerian Ports Authority Tariff Regulation (NPA Tariff Regulation) available on Port Tariffs – Nigerian Ports Authority is one of such regulations. It specifies different kinds of tariffs payable by Ports and Terminals users ranging from ship dues, wharfage, harbour dues, cargo dues, stevedoring charges, environmental protection levy, pilotage dues amongst others. By virtue of the NPA Tariff Regulation Guidelines on the Post Concession Billing System, Terminal Operators who are now responsible for cargo handling services, collect dues on stevedoring while NPA collects harbour dues and environmental protection levy. NPA however collects stevedoring dues at non-concessioned terminals under its operation. NEPZA collects ground rent from investors operating within a free zone on monthly basis as well as management and promotion fees for services provided on annual basis.

The Port Lease Agreement provides for the operations rates at the terminals and specified the maximum tariffs payable for cargo dues and delivery charges of different cargoes. It also provides a formula for annual adjustment of the operations rates during the period of the lease. It further requires the terminal operators to give specified number of free days' for cargoes that berth at the terminals before collecting storage charges on them upon expiration of the free days period. The terminal operators are at liberty to determine the storage charges subject to approval by the regulator.

Section 3 of the Nigerian Shippers' Council Act, (the NSC Act) Cap N133, Laws of the Federation of Nigeria 2004, which established the Nigerian Shippers' Council (NSC), specifies the functions of the NSC, which among others, include the power 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 – section 3(f); and 'to carry out such other activities as are conducive to the discharge of its functions' – 3 (j).

Section 9 of the Act empowers the Minister of Transport to make Regulations for carrying into effect the provisions of the Act. Regulation 2 (1) of the Nigerian Shippers' Council (Local Shipping Charges on Imports and Exports) Regulations made pursuant to section 9 of the NSC Act provides as follows ' that the NSC, the Nigerian Ports Authority and Shipping Companies shall negotiate all reviews, modifications or increases of local shipping charges and enter into any agreement on the nature or type of charges payable by importers or exporters and the sums so payable'.

Regulation 2 (2) of the same Regulations further provides 'that the Local Shipping Charges recognised as legal and justifiable under international shipping trade agreements shall be due and payable by Nigerian importers and exporters'.

In line with the above statutory and subsidiary powers, the NSC has, in collaboration with port stakeholders, agreed and entered into a MoU on local shipping charges payable at the ports and terminals by port users. The charges are mostly collected by the shipping companies. There is also the Nigerian Shippers' Council (Freight Stabilization Fees on Imports and Exports) Regulations 1995 made pursuant to section 9 of the Nigerian Shippers' Council Act. It empowers NSC to charge on every import or export from Nigeria, a freight stabilisation fee of one per cent of the freight on the import or export. In 2015, NSC issued the Nigerian Shippers' Council (Port Economic) Regulation of 22 April 2015, which provides for tariff methodology at the ports and terminals. The Regulation is not yet in operation as the shipping companies and the terminal operators together with their umbrella bodies are in court challenging the constitutionality and legitimacy of the Regulation.

*Law stated - 03 August 2022*

**Are there restrictions relating to the currency applied to the tariffs or to any fees that are payable by a port operator to the government or port authority? Are any specific currency conditions imposed on port operators more generally?**

The currency for payment of any tariffs at the port is as contained and specified in the lease agreement between NPA as the lessor, Bureau of Public Enterprises as the confirming party and the various terminal operators as the lessees. Under Appendix F of the lease agreement, which provides for lease fees, terminal operators are to pay a specified amount of money known as the commencement fee and lease fee in US dollars. There is also a throughput fee payable on empty and laden containers, import and export cargoes that are handled at terminals in US dollars. There are no specific exchange rate or foreign exchange controls imposed on port operators as the governing exchange rates depend on market forces and any directive issued by the Central Bank of Nigeria Monetary Policy Committee. Any foreign exchange controls are in accordance with the provisions of the Foreign Exchange (Monitoring & Miscellaneous Provisions) Act, 1995, which governs importation of investment capitals and exportation of profits and dividends in any convertible currency.

*Law stated - 03 August 2022*

### **Public service obligations**

**Does the state have any public service obligations in relation to port access or services? Can it satisfy these obligations through a contract with a private party?**

The NPA under the NPA Act has the obligation to develop ports, embankments, water courses, harbours, piers, canals, wharves and jetties as well as to provide and operate facilities in the port including the power to maintain, improve and regulate the use of the ports. The NPA Act also empowers NPA to enter into agreement with any person for the operation or the provision of any of the port facilities that may be operated or provided by it as well as the power to perform or exercise any of its functions, obligations or powers under the NPA Act through any of its officer or agent or through any other person authorised by it under sections 7, 8 & 9 of the NPA Act.

The BPE Act on its part, gives the NCP and the BPE the power to identify and privatise any enterprises including the ports in collaboration with NPA or other MDAs relating to any project within their respective sectors. This led to the privatisation of the ports in 2006. The ICRC Act on its part empowers NPA to enter into a contract with any port project proponent and concession same to that person subject to certain conditions. NPA is currently exploring this power and now at varying degrees of procurement and development of greenfield ports – Lekki Deep Sea Port, Badagry Deep Sea Port and Ibom Deep Sea Port. Suffice to say, in the light of the above, that NPA can enter into a contract with a private

party to realise its functions and obligations.

*Law stated - 03 August 2022*

### **Joint ventures**

Can a state entity enter into a joint venture with a port operator for the development or operation of a port in your jurisdiction? Is the state's stake in the venture subject to any percentage threshold?

Yes. The NPA Act empowers the NPA to, among others, develop ports in Nigeria through its officers or agents or by entering into agreement with any other person authorised in that behalf for the operation or provision of any of the port facilities or performance of its functions or powers. The NPA Act also empowers the NPA 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 its functions.

Article 42 of the ICRC Public Private Partnership Regulations, 2014 (ICRC PPP Regulations) made pursuant to the ICRC Act gives the public infrastructure entity (NPA) and the project proponent (port investor) the power to establish a special purpose vehicle (SPV) either as an incorporated joint venture company or companies for the purpose of implementing a port development agreement.

The state's participation interest in any port project is not subject to any percentage threshold as it depends on the agreement of the parties and specific circumstances of the project.

*Law stated - 03 August 2022*

### **Foreign participation**

Are there restrictions on foreign participation in port projects?

The combined effect of sections 17, 18 & 19 of the Nigerian Investment Promotion Council Act is that a non-Nigerian may invest and participate in the operation of any business in Nigeria except those on the 'negative list' (eg, dealing in security equipment, uniforms, narcotics and psychotropic substances) provided that the foreign entity first obtains an incorporation or registration under the Companies and Allied Matters Act, 2020 (CAMA). After obtaining incorporation or registration in Nigeria, a company with foreign participation will not only need to register with the Nigerian Investment Promotion Commission (NIPC) but will also need to obtain the necessary licences, leases, permits or approvals required of it to operate in any given business of interest.

Section 78 of the CAMA provides that any foreign company that intends to carry out business in Nigeria must first obtain incorporation as a separate entity in Nigeria and, shall not carry out business in Nigeria or exercise any powers of a registered company and shall not have a place of business or address for service of documents or processes except for receipt of notices and other documents for purposes of incorporation, until it is so incorporated or registered. The Minister for Trade under section 80 of CAMA can grant exemption to deserving foreign companies to carry on business in Nigeria without incorporation and the foreign company shall retain the status of an unregistered company under CAMA. The category of foreign companies to be exempted include:

- foreign companies other than engineering consultants invited to Nigeria by or with the approval of the federal

- government to execute any specified individual project;
- foreign companies in Nigeria to execute specific individual loan projects on behalf of a donor country or international organisation;
  - foreign government-owned companies engaged solely in export promotion activities; and
  - engineering consultants and technical experts engaged on any individual specialist project under contract with any of the governments of the federation.

*Law stated - 03 August 2022*

## **PUBLIC PROCUREMENT AND PPP**

### **Legislation**

Is the legislation governing procurement and PPP general or specific?

Public procurement is specifically governed by the Public Procurement Act, 2007 (PPA) and Procurement Procedures Manual (PPM) made pursuant thereto. PPP is specifically governed by the ICRC Act, National Policy on Public Private Partnership, 2009 and the ICRC Public Private Partnership Regulations, 2014 made by ICRC pursuant to section 34 of ICRC Act. The PPA established the National Council on Public Procurement (NCPP) and the Bureau of Public Procurement (BPP) as the regulatory authorities with the responsibility to monitor and oversee public procurement and to harmonise existing government policies and practices by regulating, setting standards and developing the legal framework and professional capacity for public procurement in Nigeria as well as ensuring probity, accountability and transparency in the procurement process and promotion of fairness, competitiveness and transparency in the disposal of public assets and services. The NCPP and BPP act as key stakeholders in the discharge of important responsibilities at various stages of the PPP procurement process. The provisions of the PPA are applicable to the procurement of goods, works and services by the government and all of its MDAs, which derive at least 35 per cent of the funds from the federation's share of the consolidated revenue fund.

The ICRC Act on its part established the ICRC with the responsibility to coordinate, facilitate and monitor PPP projects and PPP agreements. Before the enactment of the ICRC Act, public enterprises were concessioned and privatised under the BPE Act, 1999 but going forward, the government has issued a directive in line with the advice of the Attorney General to the effect that all PPP projects shall abide by and be consummated in accordance with the ICRC Act, being the enactment that specifically deals with PPP and project concessioning, unlike the BPE Act, which relates mainly to divestment of shares. This gains traction when the effect of section 1 of the ICRC Act and especially article 4 of the ICRC PPP Regulations, which requires every PPP to be subject to the ICRC PPP Regulations and requires every MDA to provide in details, the status report of the PPP project within 30 days of its effective date, are considered. Under the ICRC PPP Regulations, the PPA and PPM will not apply in transactions where the relevant MDA has submitted an outline business case to the ICRC after identifying and prioritising a project and the ICRC has issued a certificate of the outline business case to the MDA.

*Law stated - 03 August 2022*

### **Proposal consideration**

May the government or relevant port authority consider proposals for port privatisation/PPP other than as part of a formal tender?

Section 4(1) of the ICRC Act requires MDAs to advertise any projects they intend to concession for open competitive public bids. However, this may not be so in circumstances under section 5 of the ICRC Act and article 20 of the ICRC PPP Regulations where only one contractor or project proponent applied or submitted a bid or proposal or where only one contractor or project proponent meets the pre-qualification requirements. In such a situation, the relevant MDA may proceed to (1) directly negotiate with the project proponent without any competitive bidding process (2) re-advertise the invitation for expression of interest or (3) cancel the procurement process for the PPP project. The relevant MDA may also enter into direct negotiations with a project proponent in the event of an emergency or in case of national security or as specified under article 12(4e) of the ICRC PPP Regulations, which relates to unique projects or a project with a single or few suppliers – article 20(3) of the ICRC PPP Regulations. Furthermore, projects funded by international financial institutions may have peculiar procurement procedures provided that they conform to the existing rules and regulations. Direct negotiation without competitive bidding process may also arise under article 21 of the ICRC PPP Regulations where a project proponent made an unsolicited proposal to the relevant MDA subject to compliance with guidelines and other procedures.

*Law stated - 03 August 2022*

### **Joint venture and concession criteria**

**What criteria are considered when awarding port concessions and port joint venture agreements?**

Article 13(4) of the ICRC PPP Regulations provides that the invitation for expression of interest shall stipulate the criteria for selecting pre-qualified bidders and Schedule III to the ICRC PPP Regulations contains minimum criteria for selecting prequalified bidders. On the other hand, section 4(2) of the ICRC Act and article 16(7) of the ICRC PPP Regulations provide that the concession contract is awarded to a bidder who satisfies the prequalification requirements and, at the same time, submits the most technically and economically comprehensive bid. Article 16(8) of the ICRC PPP Regulations provides that guidelines issued, and from time to time reviewed by ICRC, shall be used to determine the most technically competent and financially viable bid.

*Law stated - 03 August 2022*

### **Model agreement**

**Is there a model PPP agreement that is used for port projects? To what extent can the public body deviate from its terms?**

There is no known government-approved Model PPP agreement used for port projects in Nigeria. However, Schedule VI to the ICRC PPP Regulations specifies minimum content for PPP agreements. This evinces a designed intention to maintain flexibility and avoid being prescriptive so that the minimum content will serve as a guide in drafting PPP agreement and give room for introduction of any peculiarities that may be relevant to an individual case. In any event, the lease agreement governing the current port concessions have similar provisions with minor differences that align with the peculiarities of a particular terminal having regard to the nature of cargoes being handled therein.

*Law stated - 03 August 2022*

### **Approval**

**What government approvals are required for the implementation of a port PPP agreement in your jurisdiction? Must any specific law be passed in your jurisdiction for this?**

Even though the ICRC Act empowers MDAs to enter into a contract and grant concession to a qualified project

proponent, this can only be done upon the approval of the Federal Executive Council on the recommendation of the relevant sector – section 2 (2) ICRC Act. Also, the MDAs are prohibited from giving any kind of guarantee, letter of comfort or undertaking in respect of any PPP agreement except with the approval of the Federal Executive Council. There is no specific requirement for any law to be passed before implementation of any port PPP agreement.

*Law stated - 03 August 2022*

## Projects

On what basis are port projects in your jurisdiction typically implemented?

The implementation approach adopted in the port concession exercise of 2006 was a combination of BOT (Build, Operate and Transfer) for one terminal and ROT (Rehabilitate, Operate and Transfer) for the remaining terminals. NPA being the contracting agency in the concession as the lessor retains ownership of the port area given that the concession adopted the landlord model while the concessionaires as lessees are to operate the terminals and hand back the reversionary interest to NPA at the expiration or sooner determination of the lease.

However, the greenfield port projects of Lekki Deep Sea Port being developed by the concessionaire, Lekki Port LFTZ Enterprise Ltd, is awarded on a Build, Own, Operate and Transfer (BOOT) PPP model; the Badagry Deep Sea Port on its part is also being procured on BOOT model while that of Ibom Deep Sea Port is being procured on a Design, Build, Finance, Maintain, Operate and Transfer (DBFMOT) PPP Model.

*Law stated - 03 August 2022*

## Term length

Is there a minimum or maximum term for port PPPs in your jurisdiction? What is the average term?

By virtue of section 6 of the ICRC Act, the duration of any port PPP project is subject to the agreement of the parties as contained in the concession agreement or any contract governing the port PPP project. However, the minimum term granted under the 2006 Lease Agreements is 10 years while the maximum term granted is 25 years. Statistically, out of about 25 lease agreements, 15 of them have 25 years duration, four of them have 15-year duration and seven of them have 10-year duration subject to renewal. The greenfield port PPP projects of Lekki Deep Sea Port has and that of Badagry Deep Sea Port is being procured on 45-year duration while that of Ibom Deep Sea Port is being procured on a 50-year duration.

*Law stated - 03 August 2022*

On what basis can the term be extended?

The lease agreements issued following the port concession exercise of 2006 did not specify any term on the basis of which the lease agreement would be extended as they merely stated, with a slight modification mainly regarding notice period, that 'the parties may mutually agree to renew this agreement for an additional period; provided that either party has notified the other party in writing of its desire to renew this agreement no less than .... years prior to such ... anniversary of the effective date'. However, in a draft Supplemental Agreement proposed to amend the renewal clause of the Lease Agreement, NPA proposed the inclusion of the following to the original clause: '...provided the party seeking to renew has not defaulted in its covenants...' If this proviso is adopted by the parties, it then means that

compliance with a party's covenants in the Lease Agreement will be a factor to consider in determining whether or not to renew or extend the lease term.

Article 35 of the ICRC PPP Regulations relating to disciplinary action of ICRC requires it to take into account the failure of any project proponent to remedy any irregularity discovered in the course of any inspection or audit, in the subsequent periodic review of the PPP Agreement.

In the absence of any clear provision on term of renewal, NPA is most likely to consider the manner with which the concessionaire carried out and performed the operations and complied with its covenants, payments requirements and other obligations contained in the Lease Agreement before deciding on whether to renew.

*Law stated - 03 August 2022*

## Fee structures

What fee structures are used in your jurisdiction? Are they subject to indexation?

The Nigerian Ports Authority Tariff Regulations contain certain fee structures that are payable at the ports. On the other hand, the concession agreement will also specify fees payable while performing the terms of the agreement. Under the current lease agreements governing the 2006 concession exercise, the lessees were required to pay a commencement fee within 15 days after the execution date. It also provides for payment of a lease fee that is a fixed annual payment of a specified amount to be paid in 12 equal instalments in each year throughout the duration of the lease. The lease agreements further provide for payment of a throughput fee that is to be assessed on empty and laden containers, and import and export cargoes.

The commencement fee is not subject to any adjustment; the lease fee is subject to adjustment in line with the formula provided for in the lease agreement if the guaranteed minimum tonnage is exceeded. The mechanism for adjustment of the throughput fee is also provided for under the lease agreement.

*Law stated - 03 August 2022*

## Exclusivity

Does the government provide guarantees in relation to port PPPs or grant the port operator exclusivity?

The relevant MDA is empowered, pursuant to section 3 of the ICRC Act, to give guarantee, letter of comfort or undertaking in respect of any concession granted under the act upon approval obtained in that behalf from the Federal Executive Council.

Also for foreign investors, protection and guarantees are given to their investment by section 25 of the Nigeria Investment Promotion Commission Act (NIPC Act) (Laws of the Federation of Nigeria (LFN) 2004) against nationalisation and expropriation; the foreign investors shall not be compelled to surrender their interest in any enterprise; the government is barred from acquiring any enterprise belonging to a foreign investor unless this acquisition is in the interest of the nation, in which case, fair and adequate compensation will be paid with a right to access the national courts for the determination of the investor's interest and the quantum of compensation.

Compensation payable under the section shall be paid without undue delay, and authorisation for its repatriation in convertible currency shall where applicable, be issued.

Also, section 26 of the NIPC Act governs dispute resolution procedure between a foreign investor and any government of the federation such that any failure to resolve the dispute, entitles the foreign investor to resort to the framework of any bilateral or multilateral agreement on investment protection between the government and the country of the investor and this guarantee appears to operate outside any dispute resolution procedure stipulated in the agreement between the foreign investor and a Nigerian entity. It further provides that in the event of any dispute as to the dispute settlement method to adopt, the International Centre for Settlement of Investment Disputes Rules shall apply. It is in the light of this provision that the award in *Zhongshan Fucheng Industrial Investment Co Ltd v Federal Republic of Nigeria*, UNCITRAL, Final Award, 26 March 2021 can be further justified notwithstanding that the government was not involved in the underlying dispute that led to the award but rather a sub-national and municipal government.

Similarly, under the 2006 lease agreements, the government waived its sovereign immunity in relation to any claim and enforcement of any judgment or award against it or attachment of any property or asset belonging to the government whether in Nigeria or elsewhere in compliance with any judgment or award.

The 2006 Lease Agreements granted to the lessees (the terminal operators) the exclusive right to perform the permitted operations within the terminal throughout the duration of the lease unless the same is assigned in accordance with the terms of the Lease Agreement.

*Law stated - 03 August 2022*

## Other incentives

Does the government or the port authority provide any other incentives to investors in ports?

There are incentives provided to investors in ports especially ports that are established within a free zone pursuant to the provisions of the NEPZA Act. Section 8 of the NEPZA Act provides that approved enterprises operating within a free zone shall be exempted from all federal, state and government taxes, levies and rates. Also, capital goods, consumer goods, raw materials, components or articles intended to be used for port purposes imported into a free zone by an approved enterprise including those for construction, alteration, reconstruction, extension or repair of premises in a free zone or for equipping these premises shall be exempted from customs duty – section 12 NEPZA Act. Other incentives are as listed in section 18 of NEPZA Act and they are:

- legislative provisions relating to taxes, levies, duties and foreign exchange regulations are not applicable within the free zones;
- repatriation of foreign capital investment in the free zones at any time with capital appreciation of investment;
- remittance of profits and dividends earned by a foreign investor in the zones;
- no import or export licence is required;
- rent-free land at construction stage;
- foreign ownership of business in the free zones can be up to 100 per cent;
- foreign managers and qualified personnel may be employed by companies operating in the free zones; and
- a port investor may be entitled to a tax credit under the Road Infrastructure Development and Refurbishment Investment Tax Credit Scheme introduced by the President in 2019 by Executive Order No. 007 made pursuant to section 23(2) of the Companies Income Tax Act.

In any event, the incentives can apply to both greenfield and brownfield investments depending on the circumstances.

*Law stated - 03 August 2022*

## PORT DEVELOPMENT AND CONSTRUCTION

### Approval

What government approvals are required for a port operator to commence construction at the relevant port? How long does it typically take to obtain approvals?

Ports established within a free zone will need to be designated by the President of the Federal Republic of Nigeria (President) under the NEPZA Act. The operating company needs to be registered by NEPZA as a free zone company and enterprise and accordingly granted permit to enter, remain or reside in a free trade zone and licensed to operate a free trade zone – NEPZA Regulations, part 4, paragraph 2. The Minister of Transport will need to declare the area as a port – NPA Act section 30 while the president will need to declare the area as a customs port under section 12 of the Customs & Excise Management Act, 2004 (CEMA Act). The Board of Customs and Excise must approve a place as a wharf at a customs port under section 14 CEMA Act while the Minister of Interior must recognise the port as a port of entry under section 14 of the Immigration Act.

NPA on its part will need to approve the engineering design and other technical documents as well as approval of the building permit given that the NPA Act exempts the application of any enactment on construction, alteration, repair or demolition of buildings as well as urban, regional, town or country planning from any land belonging to NPA. The NPA will also grant a permit for dredging, dumping and reclamation while operations permit for dredging and development activity will be granted by the relevant ministry in charge of environment of the government where the project is located. The government will also, in certain circumstances, need to grant a certificate of occupancy over the land covering the port area. The National Environmental Standards and Regulations Enforcement Agency (NESREA) may need to grant a dumping permit for the discharge of solid wastes, effluents or discharge of hazardous wastes under the National Environmental (Sanitation and Wastes Control) Regulations, 2009 – articles 35 & 44 of the Regulations. Clearance for ship to shore cranes and other structures that are likely to cause danger to aircraft may need to be issued by the Nigerian Civil Aviation Authority under section 46 of the Civil Aviation Act, 2006. Both the federal and state Ministries of Environment will need to approve an environmental impact assessment regarding the project and, in certain cases, environmental and social impact assessment in line with guidelines and safeguards issued by the World Bank, African Development Bank and International Finance Corporation.

The period it takes to obtain the approvals varies and depends on the circumstances and nature of the permits or approvals required. Most times the concessioning authority may help to facilitate the process of issuing or granting any relevant permit or approval.

*Law stated - 03 August 2022*

### Port construction

Does the government or relevant port authority typically undertake any part of the port construction?

It is almost always the obligation of the port investor to undertake full construction of greenfield port projects including

the quay wall and approach dredging while the government provides or approves the construction standards as may be specified in the concession agreement and monitors the construction implementation. For brownfield ports under concession, the government retains the obligation to maintain and repair quay wall, navigational aids and dredging of the channel, among others, while the terminal operator ensures general maintenance of the lease property excluding latent defects that remain the obligation of the relevant MDA or concessioning authority. In all cases, the government takes responsibility for construction of hinterland access to the ports unless otherwise agreed to by the parties in the concession agreement.

*Law stated - 03 August 2022*

**Does the port operator have to adhere to any specific construction standards, and may it engage any contractor it wishes?**

Yes. The concession agreement especially for greenfield port projects, usually contains construction standards, operations and maintenance standards, and safety standards, which the terminal operator must adhere to while constructing or operating the port. The terminal operator is not at liberty to engage any contractor of its choosing as any engagement in this regard must be by the parties through a competitive bidding process.

*Law stated - 03 August 2022*

**What remedies are available for delays and defects in the construction of the port?**

The relevant MDA or the concessioning authority is entitled to liquidated damages in the manner specified in the concession agreement where delays occur in the construction of the port or failure to attain any specified milestone. Excessive delays that in aggregate exceed a specified number of days or liquidated damages that exceeds a specified percentage of the estimated project cost, will entitle the relevant MDA or concessioning authority to terminate the concession agreement and any consequences of termination as contained in the agreement will apply. Any money to be recovered as liquidated damages may be taken from the performance bond issued in favour of the MDA by the terminal operator.

Upon the recommendation of an independent engineer, the relevant MDA or concessioning authority may, by notice to the concessionaire, suspend the whole or part of the construction works if there are defects in the construction works and if these defects amount to a material breach of the construction standards. The concessionaire shall suspend works as required and propose remedial measures to rectify the defects. If satisfactory with the remedy and if same is properly implemented, the suspension may be lifted by the MDA. Any dispute arising in this regard and not resolved within a specified period, shall be submitted for resolution in line with the dispute resolution mechanism contained in the concession agreement.

*Law stated - 03 August 2022*

## **PORT OPERATIONS**

### **Approval**

**What government approvals are required in your jurisdiction for a port operator to commence operations following construction? How long does it typically take to obtain approvals?**

The concessionaire is required to notify the independent engineer within a specified period prior to the contemplated

completion of the construction works, the date it intends to commence commercial operations. The independent engineer is required to inspect the construction works and if satisfied after necessary tests conducted to ensure that the project complies with the construction standards, shall issue certificate of completion on the basis of which the terminal operator can commence commercial operation of the port on the date specified in the notice without any further approval to do so.

*Law stated - 03 August 2022*

### **Typical services**

What services does a port operator and what services does the port authority typically provide in your jurisdiction? Do the port authorities typically charge the port operator for any services?

Under the 2006 Lease Agreements, the terminal operators are required to perform the following operations on the leased premises:

- handling and delivery services for the cargoes and containers including stevedoring (loading and unloading of vessels, transporting, sorting, storage and procurement, operation and maintenance of equipment for the above;
- repair and maintenance of fixed assets and movable assets;
- warehousing, stuffing and stripping, unstuffing, cleaning and fumigating and consolidation;
- ship shore handling of supplies for vessels;
- project and oversized cargo handling services;
- terminal handling;
- maintenance of safety and security within the terminal premises;
- inland depot transfers; and
- all other activities necessary to conduct operations on the premises.

NPA is saddled with certain services which include:

- provision and maintenance of maritime approaches or channels, canals, turning circles, breakwaters and navigational aids;
- arranging for waste disposal and the supply of utilities in the port in line with internal conventions, agreements and protocols;
- maintaining of quay walls, common areas, berths, and perimeter fencing on the boundaries of the port;
- effecting repairs of latent defects that may substantially affect the use of the terminal or performance of operations;
- provision of road and rail access to the terminal;
- providing pilotage, berthing, unberthing, vessel shifting, towage, harbour, wreck removal and general security of the port including fire-fighting services; and
- waste remediation, removal and containment within the terminal, in the waters or the port.

Most of the services rendered by NPA attract charges but mainly against third parties while others arise as part of its obligations under the Lease Agreement. Terminal operators may, however, be responsible for payment of environmental protection levy, fire service charge if rendered to a terminal, vessel shifting charges depending on the circumstances as the NPA Tariff Regulations provides that the application for shifting of vessel shall specify who will be responsible for payment of the service.

**Access to hinterland**

Does the government or relevant port authority typically give any commitments in relation to access to the hinterland? To what extent does it require the operator to finance development of access routes or interconnections?

Under the 2006 Lease Agreements and the agreement governing the ongoing greenfield ports, the government must provide access road and rail to and from the port premises and to the hinterland for seamless evacuation of cargoes. It is unlikely that the government will require a terminal operator to finance provision of these infrastructures unless under an agreed arrangement, for instance, for tax credit purposes.

Law stated - 03 August 2022

**Suspension**

How do port authorities in your jurisdiction oversee terminal operations and in what circumstances may a port authority require the operator to suspend them?

NPA oversees terminal operations through a reporting system under the Lease Agreements, which require all terminal operators to maintain books and records containing sufficient information to inform the public and customers of the quality of services and performance of operations in the terminal. Terminal operators must maintain account of technical, commercial, financial and personnel information as well as information relating to ship and shore services including records about the state of the leased property and other information relating to management of the terminal. NPA requires lessees to conduct audit of their operations as well as preparation of an annual report, which shall contain specified information about their operations as well as preparation of a planning and investment report and quarterly traffic report. The terminal operators must make these reports and records available to NPA at specified periods during the duration of the lease. The Lease Agreement also requires the lessee to prepare performance report at the end of any operating year and the lessor is also required to provide an evaluation report of the lessee's performance at the end of any operating year in line with procedures specified in the Lease Agreement.

The ICRC Act empowers the NPA to enter and inspect any land or asset that forms a component part of any concession agreement consummated pursuant to the provisions of the ICRC Act. Article 32 of the ICRC PPP Regulations gives ICRC the power to demand and examine records of any entity that is a party to a PPP agreement and may even appoint auditors for purposes of carrying out inspection and investigation of that entity and where irregularity is discovered, this entity may be subject to the disciplinary powers of ICRC.

There is no provision for suspension under the 2006 Lease Agreements as NPA is required to terminate the agreement in the event of the terminal operators' default especially where the default has not been remedied after notification to that effect has been given. The only circumstance where operations may be suspended is in the event of force majeure as contained in the lease agreement.

Law stated - 03 August 2022

### Port access and control

In what circumstances may the port authorities in your jurisdiction access the port area or take over port operations?

Under the 2006 Lease Agreement, where the lessee fails to perform the operations for 14 consecutive days or 60 non-consecutive days in an operating year, the lessor shall be entitled to intervene and divert traffic to other terminals for a period of seven days but can only take such failure as an event of default by the lessee if the traffic is diverted to other terminals for a further seven days. The lessee's events of default such as insolvency, failure to perform the operations, failure to pay any prescribed fees and breach of material term of the lease agreement will entitle the lessor to terminate the Lease Agreement subject to compliance with any procedure specified therein. The lessee is required under the lease agreement to sustain operations throughout the termination period and parties agree to work together to avoid any disruption.

The ICRC PPP Regulations provides for step-in rights whereby the concessioning authority can temporarily take over the operation of the port for the purpose of preventing any interruption of operations where the Lessee fails to perform the operations or remedy any breach. These step-in rights may be exercised by NPA under the 2006 Lease Agreement in the case of environmental emergencies at the terminal for the purpose of public safety, safeguarding life and property including the leased property.

*Law stated - 03 August 2022*

### Failure to operate and maintain

What remedies are available to the port authority or government against a port operator that fails to operate and maintain the port as agreed?

The concessioning authority may terminate the concession granted to the project proponent without prejudice to any rights and liabilities that may have accrued at the date of this termination or that may thereafter accrue to the concessioning authority. The concessioning authority can resort to any dispute resolution procedures specified in the agreement for settlement of any claims it may have against the project proponent. Where the act of the concessionaire discloses commission of a crime, the government may take steps to prosecute it and its directors.

*Law stated - 03 August 2022*

### Transferrable assets

What assets must port operators transfer to the relevant port authority on termination of a concession? Must port authorities pay any compensation for transferred assets?

Under the 2006 Lease Agreement, the cause of termination (whether as a result of force majeure, lessee's event of default, lessor's event of default or by expiration of the term granted) determines what happens to the assets and the compensation payable.

Where termination was sequel to a force majeure event, the parties must bear their respective costs and are not required to pay to the other party any costs arising as a result of the force majeure event except where the termination occurs within two years from the effective date and due to the actions or omissions by any governmental authority not

acted by the actions of the affected party. In such a situation, the lessor shall pay to the lessee, the book value of all infrastructure constructed and developed by the lessee.

Where however, the termination was as a result of lessee's event of default, the lessee must pay to the lessor all actual costs, expenses, charges, and or penalties incurred by the lessor arising from the termination. The lessee must also transfer, convey and assign to the lessor free from lien and any encumbrances, all its right, interest and title in all movable assets for zero consideration using any instrument of transfer requested by the lessor.

If the termination was due to lessor's event of default, the compensation payable to the lessee by the lessor shall be the aggregate of any actual costs, expenses, charges or penalties incurred by the lessee as a result of the termination. The lessor will also need to repay the commencement fee where the termination under this head occurs in the first operating year. The lessee will also be entitled to compensation for any construction and development costs incurred relating to any fixed assets provided this termination occurs within two years of the effective date. In any event, the moveable assets remain the property of the lessee and NPA must pay for any movable assets it wants to buy from the lessee.

The parties must bear their respective costs if the termination was as result of the expiration of the term without any renewal.

Where a party fails to make the payment expected of it on the termination date of the Lease Agreement for any reason not attributable to the other party, the defaulting party shall be required to pay interest at a rate of LIBOR plus five per cent compounded monthly.

*Law stated - 03 August 2022*

## MISCELLANEOUS

### Special purpose vehicles

Is a port operator that is to construct or operate a port in your jurisdiction permitted (or required) to do so via a special purpose vehicle (SPV)? Must it be incorporated in your jurisdiction?

The NPA Act gives the NPA the power to form, establish or incorporate subsidiaries or affiliate companies whether wholly or jointly with some other persons or organisations with the aim of carrying out its functions, which includes ports development. Article 42 of the ICRC PPP Regulations made pursuant to the ICRC Act gives the public infrastructure entity (NPA) and the project proponent (port investor) the power to establish a special purpose vehicle (SPV) either as an incorporated joint venture company or companies to implement a port development agreement. Such a SPV will need to be incorporated in Nigeria.

*Law stated - 03 August 2022*

### Transferring ownership interests

Are ownership interests in the port operator freely transferable?

The ownership interests in the ports are vested in the NPA by virtue of the NPA Act and not the port operator and accordingly, the port operator cannot transfer ownership interests to another entity. Under the 2006 Lease Agreement,

the NPA transferred its operatorship but not ownership rights to the terminal operators while retaining reversionary right over the Port and its facilities. The port operator has the right under the Lease Agreement to assign the agreement transferring operatorship interest in the port on it to a third party provided the NPA consents to the same.

*Law stated - 03 August 2022*

### **Granting security**

Can the port operator grant security over its rights under the PPP agreement to its project financing banks? Does a port authority in your jurisdiction typically agree to enter into direct agreements with the project financing banks and, if so, what are the key terms?

Under the ICRC Act, the PPP project is awarded to a party who among others, is financially capable of executing the project. This implies that the port operator must source the funds to finance its operations. The issue of borrowing with the PPP agreement is not expressly addressed under the 2006 Lease Agreement but it seems possible that the port operator may use the rights granted under the lease agreement to secure or obtain funds from banks provided, and as should be expected, that same does not include using the port fixed infrastructure as security for any loan especially for brownfield ports constructed by the government and concessioned to private investors. It is not likely that NPA will agree to enter into any direct agreements with financiers on behalf of the port operator unless as it relates to satisfying its obligations under any concession agreement.

*Law stated - 03 August 2022*

### **Agreement variation and termination**

In what circumstances may agreements to construct or operate a port facility be varied or terminated?

The ICRC Act provides that no agreement entered pursuant thereto shall be arbitrarily suspended, stopped, cancelled or changed except as provided in the ICRC Act. The 2006 Lease Agreement on its part provides that the agreement cannot be changed, amended or modified except the same is in writing and duly executed by the parties. The agreement does not provide any circumstances under which it may be varied. Article 30 of the ICRC PPP Regulations on the other hand provides that parties to a PPP contract who intend to amend the concession agreement must submit a letter of no objection to the amendment to ICRC before the approval of the Federal Executive Council where the proposed amendment:

- affects the rights, duties and obligations of the parties in material terms;
- affects the financial position or pecuniary gains of the parties in material terms;
- changes the parties to the concession agreement;
- re-allocates any risks in the project;
- introduces changes that ICRC considers material to the successful and sustainable implementation of the PPP agreement; and
- will materially alter the parameters of the project.

The 2006 Lease Agreement provides that it can be terminated under the following circumstances:

- upon the expiration of the term;
- upon the occurrence of an event of default specified in the agreement such as insolvency of the operator, failure

to attain a minimum of 50 per cent of performance requirements, failure to operate for a minimum number of consecutive days or non-consecutive days in an operating year, breach of material provisions of the agreement and failure to pay any sum due under the agreement; and

- upon the occurrence of event of force majeure as specified in the agreement;

*Law stated - 03 August 2022*

## **Contractual breach**

**What remedies are available to a government or port authority for contractual breach by a port operator?**

The remedies available to government or NPA in the event of a contractual breach by a port authority depends on the nature of the breach. If the breach relates to a failure to comply with covenants specified in the Lease Agreement, the NPA is required to notify the lessee of the failure and give the lessee a specified number of days to rectify the failure. If the lessee fails to rectify the failure, the NPA may then carry out the rectification and claim from the lessee. If the parties are unable to agree on the computation of cost for executing the rectification, the parties can resolve the matter by resorting to governing law and dispute resolution provisions of the agreement.

Where the breach relates to lessee's event of default, the NPA may do the following:

- be entitled to resort to dispute resolution procedures specified in the agreement;
- terminate the agreement;
- receive compensation from the lessee for all actual costs, expenses, charges and or penalties incurred as a result of the termination; and
- be entitled to have the lessee's movable assets transferred and assigned to it at no cost.

Any failure by the lessee to pay any amount arising from termination on the termination date attracts an interest rate of LIBOR plus five per cent compounded monthly.

The remedies available to the NPA and terminal operator are cumulative and the exercise of one does not constitute a waiver of other remedies.

*Law stated - 03 August 2022*

## **Governing law**

**Must all port PPP agreements be governed by the laws of your jurisdiction?**

There is no law in Nigeria that mandates that these PPP agreements must be governed by Nigerian laws. Accordingly, the governing law clause in the concession agreement specifies the law to govern relationship of the parties.

*Law stated - 03 August 2022*

## **Disputes**

## How are disputes between the government or port authority and the port operator customarily settled?

The 2006 Lease Agreement provides that any dispute relating to the construction, validity, interpretation, enforceability or breach of the agreement shall be exclusively and finally settled in line with the dispute resolution procedure specified in the agreement. The agreement provides for graduated dispute resolution processes such as mutual consultation by the senior management of the parties; in deserving circumstances, the parties can resort to the assistance of an expert and where parties are unable to settle their dispute through mutual negotiation or either party disagrees with the opinion of the expert where applicable, the dispute may be referred to arbitration to be governed by the Rules of the International Chamber of Commerce. The decision of the arbitral tribunal shall be final and binding upon the parties and the parties waived their right to appeal or to review any such award by the court or tribunal to the extent permitted by applicable law. Where the investor is a foreigner, it may resort to any bilateral or multilateral treaty entered between its country of origin and Nigeria under the NIPC Act as an additional dispute resolution process notwithstanding that the lease agreement made no reference to same.

*Law stated - 03 August 2022*

### UPDATE AND TRENDS

#### Key developments of the past year

Are there any other current developments or emerging trends that should be noted?

Port congestion has been a perennial problem at both the Apapa and Tincan ports and this has led to increased dwell time and delays in taking delivery of cargoes. The situation is made worse by decrepit port access roads (although efforts are being made to fix the roads) and overtime cargo policy. Overtime cargo policy is designed to transfer uncleared cargoes that were abandoned in the terminals for a specified period after complying with laid down procedures, to government warehouse where they would be auctioned. The challenge is that many cargoes that ought to be transferred to the government warehouse as overtime cargoes are still at the terminals for months thereby adding to the space constraint at the ports as well as loss of revenue and earnings by the government and the terminal operators as the space occupied by the cargoes is dormant and not yielding storage charges as it ought to, which may lead to diversion of cargoes to neighbouring countries. Auctioning by Nigerian Customs has not taken place for a while, which technically led to the detention of many containers that could be freed for business. Recent news on the issue indicates that the appropriate authorities are looking into it and Customs is accordingly working towards commencing auctioning of overtime cargoes. There is the need to streamline clearing procedures through automation and introduce measures that will eliminate incidences of overtime cargo. It is hoped that if concerted efforts are directed in this respect, the issue of overtime cargo and management of same would have been streamlined and congestion and loss of revenue and earnings by stakeholders would be ameliorated.

A corollary issue to the above relates to payment for barging services rendered to cargoes transferred from the terminals to coastal jetties situated outside the port terminals and closer to motorable access roads for ease of evacuation of the cargoes. To facilitate delivery of cargoes and ease ports decongestion, terminal operators and shipping companies, resorted to barging cargoes to jetties located outside the terminals and consignees were, in most cases, invoiced to cover the cost associated with the transfers. This resulted in protests by consignees and their agents, which led to the intervention of NPA who issued a circular directing that payment for barging services can only be made by consignees if they request that their cargoes be transferred to coastal jetties located outside the terminals and in any other cases to be borne by the party effecting the transfers. This issue is highlighted to underscore the

difficulty encountered by port operators and shipping companies, such as the additional cost of doing business incurred to decongest the terminals. The dilapidated access roads leading to and from the ports are being reconstructed and it is hoped that sooner than later, direct delivery of cargoes from the ports will increase, which may reduce the high rate of barging of cargoes and attendant cost implication.

*Law stated - 03 August 2022*

## Jurisdictions

	<b>Angola</b>	SRS Advogados
	<b>Brazil</b>	Kincaid   Mendes Vianna Advogados
	<b>Denmark</b>	Gorrissen Federspiel
	<b>India</b>	Phoenix Legal
	<b>Italy</b>	Legal 4Transport
	<b>Japan</b>	TMI Associates
	<b>Mozambique</b>	VdA
	<b>Netherlands</b>	Van Steenderen MainportLawyers
	<b>Nigeria</b>	Creed & Brooks
	<b>Paraguay</b>	Palacios Prono and Talavera Abogados
	<b>Portugal</b>	SRS Advogados
	<b>Russia</b>	Jurinflot International Law Office
	<b>South Korea</b>	DR & AJU LLC
	<b>Turkey</b>	Turunç
	<b>United Kingdom</b>	HFW
	<b>Venezuela</b>	Sabatino Pizzolante Maritime & Commercial Attorneys