

De-regulation of Infrastructure  
By  
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Ideas efficacious at some times and in some  
human surroundings are not  
so at other times and elsewhere

- William James

The Varieties of Religious Experience

## Introduction

In the past, it was thought that it was the sole responsibility of governments world-wide to provide infrastructure. Many reasons accounted for these. Essentially it was thought that the capital outlay for the provision of infrastructure was high for the private sector to bear and that public utilities (infrastructure) were public goods. Today, we are witnessing a world-wide revolution in the provision of infrastructure. This is essentially because of the paradigm shift – movement from the provision of infrastructure by government to the private and the governments only creating an effective regulatory.

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Cited in Mody A (ed) Infrastructure Delivery: Private Initiative and the Public Good, Economic Development Institute Studies of The World Bank, The World Bank, Washington, D.C., 1996 p xiii

environment. In other words, movement from government as a provider to government as a regulator.

Infrastructure services are critical inputs in the provisions of goods and services and significantly affect the productivity, cost and competitiveness of the economy. Policy decisions regarding their provision and sector development have ramifications throughout the economy. Indeed the boundaries between the public and private sectors are the most important political issues of our time. There is hardly a discussion today on the provision of infrastructure without reference to de-regulation or their provision by the private sector. It is safe to assert that the primary responsibility to provide infrastructure rests on the public sector and that more than 70% of the responsibility still rests on the public sector. Consequently, the public entities must continue to make budgetary allocation for the provision of infrastructure.

Privatization in its broader sense has been used to reform and de-regulate the economy either solely or in combination with other instruments. However, the reform initiative undertaken by the Federal Government of Nigeria will be incomplete without institutional changes in terms of passing the reform bills that have been drafted by the National Council on Privatization/Bureau of Public Enterprises since 2003. The Federal Government must learn how to retreat from the provision of infrastructure and strengthen regulatory institutions.

The thrust of this chapter, therefore, is the de-regulation of infrastructure.

Guash J L Granting and Renegotiating Infrastructure Concessions: Doing it Right (The World Bank, Washington DC, 2004) ix. See also Kessides, I N Reforming Infrastructure: Privatization, Regulation, Competition (The World Bank, Washington DC, 2004) xi

A clear case is that of the ports. When port services were leased in 2005, it was expected that the Ports & Harbour Bill would be passed into law so that there will be a regulator for the sector. Unfortunately, this Bill has not been passed. At the moment, the Nigerian Ports Authority is the landlord and regulator without regulatory powers.

## Definition of Terms

For a proper understanding of this chapter, it is instructive to define terms that are associated with de-regulation:

Nationalization is a process of bringing an industry under governmental control or ownership. In the 1960s and up to the 70s, this was an instrument used by various governments in emerging economies. In Nigeria, British Petroleum (BP) was nationalized and the government got involved in many commercial ventures . The argument was that some were public utilities that were best owned and managed by government either wholly or jointly with the private sector. Views on how such public utilities should be owned, organized and regulated have since changed.

Indigenisation was an instrument used by the Government of Nigeria in the 1970s. especially with the promulgation of the Nigerian Enterprises Promotion Act of 1972 . This Act is often referred to as the Indigenization Decree/ Act. Under the Act enterprises were categorized: some reserved for Nigerians and others for non-nationals in various percentages. This policy enabled many Nigerians to own shares in the affected enterprises. This Act was amended severally under the promulgation of the Nigerian Investment Promotion Commission (NIPC) Act, No. 16 of 1995 . The NIPC Act changed the landscape for foreign investment in Nigeria. This is so because under the NIPC Act aliens can form or join in the formation of companies apart from those in the negative list.

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See the Schedules to the Privatization and Commercialization Act, 1988, Bureau of Public Enterprises Act, 1993 and the Public Enterprises (Privatization and Commercialization) Act of 1999, now Cap P38, LFN, 2004

Act No. 4 of 1972. This was followed by that of Act No. 3 of 1977 and Act No. 54 of 1989  
Now Cap N117, Laws of the Federation of Nigeria, 2004

Privatization is a concept and a process. It is an elastic word. From a narrow perspective, privatization implies the transfer of ownership of securities and other assets from the public sector to the private sector of the economy. Broadly speaking, it includes all public-private partnership – concession/lease restructuring/reform, divestiture, auction sale, core investor sale, liquidation and management contract. Privatization of one form or the other has been undertaken or is being undertaken in various countries. Privatization as a process describes how privatization transactions are commenced, sequenced and concluded .

Liberalization implies the opening up of the market to competitive forces.

De-regulation - to de-regulate is to free from regulations or controls. According to Stiglitz, “the process of reducing or eliminating regulations is referred to as deregulation”. In other words, the reduction or elimination of government power in a particular industry, usually enacted to create more competition within the industry. A clear example in Nigeria is the telecommunications sector. In the European Union (EU), the de-regulation of the air industry in 1992 gave carriers from one EU country the right to operate scheduled services between other EU states. In the United Kingdom, under Margaret Thatcher, the transport sector (coaches and buses) including the

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In Nigeria, privatization and commercialization have had three phases – 1988-1993, 1993-1999 and 1999 till date. See also Privatization and Commercialization Act of 1988 now repealed, the Bureau of Public Enterprises Act 1993, now repealed and the Public Enterprises (Privatization and Commercialization) Act, Cap P38, LFN, 2004

Build, Operate and Transfer (BOT), Build, Own, Operate and Transfer (BOOT) and Rehabilitate, Operate and Transfer (ROT).

See Guislain, Op Cit at 2

The process includes the diagnostic review of the enterprise, engagement of advisers, advertisement for the expression of interest, issue of bidding documents like request for proposals, information memorandum and receipt of technical and financial proposals, the evaluation of the proposals and announcement of the winner of the bidder. In the case of sale of shares, a share purchase agreement is prepared and executed by the parties. One fundamental component is the post-privatization plan (PAP) to ensure that the representations made by the winner are carried into effect and properly monitored.

Chambers English Dictionary (Edinburgh, New York and Toronto: W & R Chambers Ltd, 1990) p 381

Stiglitz J E Economics of the Public Sector. 2nd Edn New York, London: WW Norton & Company, 1988, p31

railways and telecommunications were de-regulated . De-regulation is when government reduces its role and allows industry greater freedom in how it operates. It is therefore not the opposite of regulation, which refers to governmental administration of market constraints developed by written law and judicial decisions. Other than the transport sector, telecommunications, energy, the financial sector has been de-regulated in other countries . Commercialization means the reorganization of enterprises wholly or partly owned by the government in such a way that the commercialized enterprises operate as profit-making commercial ventures and with or without subventions from the government.

Globalisation focuses on opening up of international trade and removing all barriers – a market economy. The advent of technology and telecommunication has made this possible. As between the developed and the developing economies, there is no consensus as to its effect. However, it hurts the third world countries more than the developed especially where the economy is import-driven.

### Concept of Infrastructure

Countries like Argentina, Australia, Canada, Ireland, New Zealand, Russia, United States have de-regulated in one form or the other

Soifer, Paul et al American Government, Cliffs Quick Review, 2001

<http://en.wikipedia.org/wiki/Deregulation>

There are arguments for and against de-regulation. Lack of de-regulation is seen as anti-competitive while some argue that de-regulation has brought volatile wholesale prices and undermined the reliability of the provision of infrastructure. See <http://www.heritage.org/research/energyandenvironment/bg1169.cfm> and <http://www.prwatch.org/prwissues/2003Q3/dereg.html>,

See generally Stiglitz J E Globalization and Its Discontents. New York: WW Norton & Company, 2003.

See generally Idornigie, P O “Towards Addressing Infrastructural Challenges in the Judiciary” in Azinge, E & Dakas, C.J. Judicial Reform and Transformation in Nigeria: A Tribute to Hon Justice Dahiru Musdapher, GCON, FNIALS, Chief Justice of Nigeria. Lagos: Nigerian Institute of Advanced Legal Studies, 2012, p 357

According to Black's Law Dictionary , 'infrastructure' means 'the underlying framework of a system especially public services and facilities (such as highways, schools, bridges, sewers and water systems) needed to support commerce as well as economic and residential development' while Chambers English Dictionary defines 'infrastructure' as the 'inner structure, structure of the component parts: a system of communications and services as backing for military, commercial, etc, operations'. Other references to 'infrastructure' includes 'public utilities' and 'public goods'. The former relates to a set of services provided by various organizations that are used in every day life by the public. These include airports, roads, bridges, canals, dams, electricity, energy, parks, ports, rail, sewage, solid waste, water and telecommunications. In the case of the latter, scholars are quick to assert that a public good (or collective good) is a good that is non-rival and non-excludable. This means, respectively, that the consumption of the good by one individual does not reduce availability of the good for consumption by others, and that no one can be effectively excluded from using the good . The description of public goods is generally the same with that of 'public utilities'. In some contexts, therefore, 'infrastructure', 'public utilities' and 'public goods' can be used interchangeably.

It is in the area of the procurement of public services or utilities that the concept is more pronounced. While there could be some consensus that tangible assets such as

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Bryan A Garner Black's Law Dictionary. 9th Edn, West Publishing Co, St Paul, MN, 2004, p 851  
Catherine Schwarz, et al Chambers English Dictionary. 7th Edn, Chambers, Edinburgh, 1992 p 732  
[http://en.wikipedia.org/wiki/Public\\_good](http://en.wikipedia.org/wiki/Public_good). For current definitions of public goods see any mainstream microeconomics textbook, eg.: Hal R. Varian, Microeconomic Analysis. 3rd Edn, Norton, W W & Company, Inc, 1992; Mas-Colell, A Whinston, Michael D & Green, J R Microeconomic Theory. Oxford, Oxford University Press, 1995 and Gravelle H & Rees, R Microeconomics. Pearson Education, 2004

bridges, roads, railways and tunnels are infrastructure, others would cast the net much wider. Thus a distinction is often drawn between 'economic' and social' infrastructure.

In terms of infrastructure delivery, it is now recognized that there are four categories:

- a) Hard economic infrastructure
- b) Soft economic infrastructure
- c) Hard social infrastructure
- d) Soft social infrastructure

Economic infrastructure is considered to provide key intermediate services to business and industry and its principal function is to enhance productivity and innovative initiatives. 'Hard Economic' facilities include roads, highways, bridges, ports, railways, airports, public transport, telecommunications, electricity and gas generation, transmission and distribution. 'Soft Economic' infrastructure encompasses vocational training, financial facilities for business (payments, credit, equity, derivatives, venture capital, etc), the facilitation of research and development and technology transfer, and organizations encouraging export orientation and productive cooperation among individuals and entities. Notably many of this are privately owned and operated, some provided by individual institutions (e.g. credit rating organizations) and others by groupings of private entities forming cooperative networks (e.g. payments system).

Social infrastructure is seen as providing basic services to households. Its main role is to improve the quality of life and welfare in the community, especially among those of

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Darrin Grimsey and Mervyn K Lewis Public Private Partnerships (Edward Edgar Publishing Ltd, Cheltenham, 2007) 20. See generally Reforming Public Institutions and Strengthening Governance, A World Bank Strategy, November 2000, and Ashoka Mody (ed) Infrastructure Delivery, The Economic Development Institute of The World Bank, Washington, DC, 1996

limited means. 'Hard social' facilities embrace hospitals, education and training buildings, water storage and treatment facilities, housing, sewerage and drainage pipes, child care and aged care institutions and prisons. Again, some of these are provided by private sector bodies (e.g private hospital and private schools). 'Soft social' infrastructure takes the form of the social security system, a range of community services, and environmental protection agencies. Many of these services are viewed by the community as 'essential' and tend to have the characteristics of 'merit goods' in that they are regarded as socially desirable.

For our purpose, the main argument about infrastructure, public utility, public good is who should provide it – government or the individual or a private entity. Public utilities are often natural monopolies because the infrastructure required to produce and deliver a product such as electricity or water is very expensive to build and maintain. As a result, they are often government monopolies, or if privately owned, the sectors are specially regulated by government. Developments in technology have eroded some of the natural monopoly aspects of traditional public utilities. For instance, electricity generation, electricity retailing, telecommunication, some types of public transit and postal services have become competitive in some countries and the trend towards liberalization, deregulation and privatization of public utilities is growing, but the network infrastructure used to distribute most utility products and services has remained largely monopolistic . This was alluded to by Mody thus:

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Grimsey and Lewis, *ibid* 21

[http://en.wikipedia.org/wiki/Public\\_utility](http://en.wikipedia.org/wiki/Public_utility)



Government-run monopolies were once justified by the low production costs associated with large-scale operations and by the need to protect consumers from voracious private monopolies. But now there is growing recognition that private initiative – disciplined in part by competitive market forces – often has the upper hand in efficiently delivering infrastructure. While the government as a provider is being outmoded (especially in sectors such as telecommunications and electric power) the government as a regulator – protecting the public interest – is acquiring a more prominent role .

#### Privatization, Liberalization and De-regulation in Nigeria

In Nigeria, the Report of the Presidential Commission on Parastatals set up in 1981 under the Shehu Shagari Administration revealed that public enterprises were characterized by misuse of monopoly power, defective capital structure, mismanagement, corruption and nepotism. Consequently, the Commission (also known as Onosode Commission) recommended that there should be an increased role for the private sector especially in parastatals where security and other sensitive aspect of public policy are not as paramount as the satisfactory delivery of service to the people.

Similarly, the International Monetary Fund (IMF), in considering the request by the Federal Government for a loan under Shagari's Administration imposed certain conditionalities. One of them was the divestiture of ownership, management and control of some public enterprises. The debate on whether Nigeria should embark on privatization resonated throughout the regime of Buhari/Idiagbon until General Babangida in his 1986 Budget Speech announced government's intention to divest its holdings in certain key sectors of the economy and subsequently promulgated the

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Mody, Op cit at xiv

See Federal Republic of Nigeria, Report of the Presidential Commission on Parastatals, Lagos, Federal Government Press, 1981, p 63

Privatization and Commercialization Act No. 25 of 1988. This was the beginning of de-regulation in Nigeria.

From 2003 to 2007, Nigeria attempted to implement an economic reform program called the National Economic Empowerment Development Strategy (NEEDS). The purpose of the NEEDS was to raise the country's standard of living through a variety of reforms, including macroeconomic stability, deregulation, liberalization, privatization, transparency, and accountability. The NEEDS addressed basic deficiencies, such as the lack of freshwater for household use and irrigation, unreliable power supplies, decaying infrastructure, impediments to private enterprise, and corruption. The government hoped that the NEEDS would create 7 million new jobs, diversify the economy, boost non-energy exports, increase industrial capacity utilization, and improve agricultural productivity. A related initiative at the state level is the State Economic Empowerment Development Strategy (SEEDS).

#### Reform and De-regulation of Infrastructure

The critical importance of well-performing public institutions and good governance for development and poverty reduction has come to the forefront in the 21st century. Just as it was increasingly recognized in the 1980s that individual investment projects are less likely to succeed in a distorted policy environment, so it has become obvious in the 21st century that neither good policies nor good investments are likely to emerge and be

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See also Amupitan J 'Private Placement Method of Privatization in Nigeria' in *New Vista in Law*, Vol. 2, 2002 pp 343-356

See generally Idornigie, P O 'Privatization and Commercialization in Nigeria' being a paper presented at the Faculty of Law, Obafemi Awolowo University, Ife on 13 July, 2012

sustainable in an environment with dysfunctional institutions and poor governance. Put differently, privatization and commercialization in Nigeria and the attraction of private investors to infrastructure delivery will be a mirage unless institutional reforms take place.

Globally, the last two decades have seen a fundamental shift in the paradigm of infrastructure delivery around the world. Governments in industrial and developing countries alike are retreating from owning and operating infrastructure and are focusing more on regulating and facilitating infrastructure delivery services provided by private firms. In the words of Cleaver

This shift offers the promise of more efficient investment in and operation of infrastructure services, as well as the potential to shift the burden of new investment from public budgets to the private sector. Particularly for developing countries, infrastructure privatization may also unleash large inflows of foreign direct investment and help develop local capital markets. In addition, bold privatization programs can send a clear message to international capital markets, the wider investor community and the local populace that governments are committed to improvement economic management.

The need to manage the Nigeria's economy efficiently can also be felt when considered along 183 countries listed in Doing Business 2012 . Doing Business 2012, in a series

See Reforming Public Institutions and Strengthening Governance, A World Bank Strategy, November 2000, The World Bank, Washington DC, 2000, p vii. See also The World Bank, Public-Private Infrastructure Advisory Facility: Private Participation in Infrastructure: Trends in Developing Countries in 1990-2001, The World Bank, Washington, DC, 2003, Ashoka Mody (ed) Infrastructure Delivery: Private Initiative and the Public Good. The World Bank, Washington, DC, 1996, Michael U Klein and Bita Hadijimichael The Private Sector in Development: Entrepreneurship, Regulation and Competitive Disciplines, The World Bank, Washington, DC, 2003, J Edgardo Campos and Jose Luis Syquia Managing the Politics of Reform, The World Bank, Washington, DC, 2006, Frank Sader Attracting Foreign Direct Investment Into Infrastructure: Why Is It So Difficult, The World Bank, Washington, DC, 2000, Timothy C Irwin Government Guarantees: Allocating and Valuing Risk in Privately Financed Infrastructure Projects, The World Bank, Washington, DC, 2007 and Tomoko Matsukawa and Odo Habeck Review of Risk Mitigation Instruments for Infrastructure Financing and Recent Trends and Developments, The World Bank, Washington, DC, 2007

See Kevin M Cleaver, Foreword to Michel Kerf and Warrick Smith, Op Cit at vii

A Publication of The World Bank and International Finance Corporation, The World Bank, Washington, DC, 2012

of annual reports investigating the regulations that enhance business activity and those that constrain it in developed and developing countries has consistently shown that Nigeria lags behind other countries in Africa. Out of about 183 countries, Nigeria came 114 in 2008 , 118 in 2009 , 125 in 2010 , 133 in 2011 and 133 in 2012 . Countries like South Africa, Botswana, Zambia, Morocco, Kenya, Egypt, Ethiopia, Uganda and Tanzania have consistently done better than Nigeria in this index. For instance in 2011 and 2012, South Africa came 36 and 35 respectively.

In 2005, the Infrastructure Concession Regulatory Commission Act of 2005 was passed to provide a regulatory environment for the attraction of private sector participants to the delivery of infrastructure in Nigeria. This is consistent with the Government policy in fostering public-private partnership (PPP) in infrastructure delivery. In a sector where the Minister has a domineering role, no private sector participant will feel safe to invest. There was therefore the need to confine the Ministers to policy formulation where an independent regulator like the Nigerian Communications Commission and the Nigerian Electricity Regulatory Commission will regulate the key economic sectors. PPP can only thrive where the proper regulatory environment is created.

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Doing Business focuses on key areas like starting a business, dealing with construction permits, getting electricity, registering property, getting credit, protecting investors, paying taxes, trading across borders, enforcing contracts, resolving insolvency (formerly closing of business) and employing workers.

Doing Business 2008, page 6

Doing Business 2009, page 6

Doing Business 2010, page 4

Doing Business 2011, page 4

Doing Business 2012, page 6

See generally Nicholas Avery (ed) Public-Private Partnerships. London: Global Business Publishing Ltd, 2006, Darrin Grimsey and Mervyn K Lewis Public-Private Partnerships. Cheltenham: Edward Elgar Publishing Ltd, 2007, Denton Wilde Sapte LLP Public Private Partnerships: BOT Techniques and Project Finance. 2nd Edn, London: Euromoney Institutional Investor Plc, 2006, J Luis Guasch Granting and Renegotiating Infrastructure Concessions: Doing It Right, The World Bank, Washington, DC, 2004, HK Yong (ed) Public Private Partnerships Policy and Practice. London: Commonwealth Secretariat, 2010, Gerd Schwartz et al (eds) Public Investment and Public Private Partnerships. New York: Palgrave Macmillan, 2008, John D Finnerty Project Financing. New York: John Wiley &

The National Council on Privatization (NCP) and the Bureau of Public Enterprises (BPE) have been known for privatization and commercialization without any regard to their reform activities. The NCP/BPE was involved in the drafting and passage of the following laws that created regulatory institutions:

- a) Nigerian Communications Commission Act, 2003
- b) Pension Reform Act, 2004
- c) Electric Power Sector Reform Act, 2005
- d) The Civil Aviation Act, 2006
- e) The Minerals and Mining Act, 2007

Since 2002, the NCP/BPE has been working on the following reform bills aimed at de-regulating infrastructure delivery in Nigeria, namely,

- i) Federal Competition and Consumer Protection Bill
- ii) The Ports & Harbours Bill
- iii) The Petroleum Industry Bill
- iv) The Nigerian Railway Authority Bill
- v) The National Postal Commission Bill
- vi) The National Transport Commission Bill

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Sons, Inc, 1996 and Scott L Hoffman The Law and Business of International Project Finance. 3rd Edn, Cambridge, Cambridge University Press, 2008.

The Telecoms Sector Reform Implementation Committee set up by the NCP was inaugurated on 21 January, 2000. The Committee was involved in the drafting of the NCC Act 2003.

The Steering Committee on Pension Reform in Public Enterprises in Nigeria set up by the NCP in 2000 drafted the Pension Reform Act 2004.

The Electric Power Sector Implementation Committee set up by the NCP was inaugurated on 1 February, 2000. This Committee drafted the Electric Power Sector Reform Act 2005.

The Aviation Sector Reform Implementation Committee set up by the NCP was inaugurated in 2000 and was involved in the drafting of the Civil Aviation Act 2006. I was personally involved in finalizing the bill in collaboration with the Ministry of Aviation and its parastatals.

The Solid Minerals Steering Committee set up by the NCP was involved in the drafting of the Minerals and Mining Act, 2007. I was personally involved in the review of the final draft of the bill before it was passed into law in 2007.

vii) The Road Sector Reform Bill

viii) Inland Waterways Authority

The aim of these bills is to open the sectors to private sector participation and limit the role of government to policy formulation. The objectives of the bills can be summarized thus:

Federal Competition and Consumer Protection Bill

The objectives of the Bill are:

- a) To promote competition in the Nigerian economy;
- b) To ensure fair trading practices, efficiency, equal opportunities for all players in production, trade and commerce;
- c) To guarantee adaptability and balanced development of the Nigerian economy; and
- d) To protect consumers and end users of products and services from exploitation, unfair trade practices, price collusion etc.

To achieve these, the bill seeks to, among others:

- i) Repeal the Consumer Protection Council Act and harmonize its provisions into the new bill;
- ii) Repeal certain aspects of the Investment and Securities Act that conflicts with the intendment of the Act and its institutional arrangements;
- iii) Promote the welfare and interests of consumers and provide them with competitive prices and product choices;
- iv) Expand the space for domestic and foreign competition in a globalised market in Nigeria;

- v) Regulate monopolies, mergers/acquisition and all forms of business combinations; and
- vi) Prohibit restrictive business practices which prevent, restrict or distort competition or constitute the abuse of a dominant position of market power in Nigeria.

Two institutions will be created under the bill, namely, the Federal Competition and the Consumer Protection Commission and the Competition Tribunal with specific functions.

#### The Ports & Harbours Bill

The Bill seeks:

- a) To provide an appropriate institutional framework for the ownership, management, operation, development and control of ports and harbour to ensure the integrity, efficiency and safety of the ports based on the principles of accountability, competition, fairness and transparency;
- b) To repeal the Nigerian Ports Authority Act, No 38 of 1999;
- c) To separate landlord from operations and regulatory functions in ports and harbour;
- d) To promote efficiency in ports operations nationwide;
- e) To encourage competitive, qualitative and cost effective ports services;
- f) To reduce costs to government for provision of ports services;
- g) To encourage private investment in port infrastructure;
- h) To promote private sector participation in the provision of port services and facilities; and

i) To promote and safeguard Nigeria's competitiveness and trade objectives.

The bill provides for the creation of a National Ports and Harbour Authority that will perform regulatory functions.

The Petroleum Industry Bill

The objectives of the Bill are to:

- a) enhance exploration and exploitation of petroleum resources in Nigeria and to promote petroleum production for the benefit of the Nigerian people;
- b) create a conducive business environment for petroleum operations;
- c) establish a progressive fiscal framework that encourages further investment in the petroleum industry whilst optimising accruable revenues to the Federal Government of Nigeria;
- d) establish a commercially oriented and profit driven National Oil Company;
- e) deregulate and liberalise the downstream petroleum sector;
- f) create efficient and effective regulatory entity;
- g) promote transparency, simplicity and openness;
- h) promote the development of Nigerian Content in the petroleum industry;
- i) protect health, safety and environment; and
- j) optimise domestic gas supplies, in particular for power generation and industrial development.

Various institutions will be created with specific functions.

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The first version of this Bill was drafted by the NCP/BPE in 2006 after the approval of the National Policy on Oil & Gas in 2005. This draft formed the basis of the 2012 Petroleum Industry Bill. Indeed the first Oil & Gas Implementation Committee (OGIC) was inaugurated in April 2001 by the NCP under the chairmanship of His Excellency, Alhaji Atiku Abubakar (former Vice-President). In 2007/2008 another OGIC was set up.



## The Nigerian Railway Corporation Bill

The bill seeks to:

- a) To Repeal the Nigerian Railway Corporation Act, 1955;
- b) To provide the appropriate market design and legal framework for the implementation of Government's reform programme;
- c) To clearly separate the roles of policy making, regulation and operation;
- d) To provide a platform for the introduction of private sector concessionaires;
- e) To make provision for economic and safety regulation by the National Transport Commission;
- f) To promote competition in the provision of railway services nationwide;
- g) Provide for the compulsory acquisition of land and Greenfield developments; and
- h) Introduce the provision of subsidies for public service obligations.

## The National Postal Commission Bill

The Bill seeks to:-

- a) Repeal the Nigerian Postal Service Act, 1992;
- b) To promote the implementation of the National Postal Policy;
- c) Establish a regulatory framework for the postal industry;
- d) Promote the provision of modern universal, efficient and easily accessible postal services;
- e) Encourage private investments;
- f) Ensure fair competition in the postal industry;
- g) Encourage the development of postal service – manufacturing and supply sector within the economy;

- h) Protect the right and interest of service providers and consumers;
- i) Ensure that the needs of the disabled and elderly persons are taken into consideration;
- j) Ensure an efficient management including planning;
- k) Coordination, allocation and use of scarce national resources in the postal sector; and
- l) Establish the Nigerian Postal Commission with responsibility for the regulation of the postal sector.

#### The National Transport Commission Bill

The draft Bill seeks to establish the National Transport Commission (NTC) designed to be a multi-modal/sector regulator covering the transport sub-sectors of roads, rail, and marine. The NTC would introduce synergy and inter-modalism in the transport sector that has in the past operated in a haphazard and un-coordinated manner. It would perform roles akin to those of the Nigerian Communications Commission (NCC) for the tele-communication sector and the Nigerian Electricity Regulatory Commission (NERC) for the electric power sector.

In addition to the establishment of the NTC to be an effective, impartial and independent economic regulator of the regulated transport industry; the other objectives of the bill include:

- a) to promote the implementation of the national transport policy;

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See Estache A and Rus Gines (eds) Privatization and Regulation of Transport Infrastructure: Guidelines for Policymakers and Regulators, The World Bank, Washington D.C., 2000

- b) to provide for an economic regulatory framework for the provision of services and supply of goods in the transport sector or regulated transport industry;
- c) to provide a mechanism for monitoring compliance of government agencies and transport operators in the regulated transport industry and provide advice to the Federal Government on matters relating to economic regulation of the regulated transport industry;
- d) to provide for an efficient operation and regulation of the transport sector through the consolidation and the removal of multiple and duplicate regulatory functions by the Federal Government and its Agencies;
- e) to protect the rights and interests of service operators and users within Nigeria; and
- f) to create an enabling environment for private sector participation in the provision of services in the transport sector.

#### The Road Sector Reform Bill

The bill seeks to provide the legal framework that will, among others:

- a) Repeal the Federal Roads Maintenance Agency (Establishment, etc) Act No 7 of 2002 and subsequent amendments;
- b) Improve service delivery;
- c) Create improved institutional structures;
- d) Separate policy functions from operations and management;
- e) Ensure improved funding of the sector;
- f) Involve the private sector in the financing and management of the sector;

- g) Encourage road users to use roads more responsibly and contribute to the cost of maintaining the road assets;
- h) Promote the sustainable development and operation of the road sector; and
- i) Facilitate the development of competitive markets and the promotion of enabling environment for the private sector participation in the financing, maintenance and improvement of roads in Nigeria.

Two institutions, namely, the National Road Board/Fund and the Federal Roads Management Authority, will be created under the bill with specific functions.

#### Inland Waterways Authority

The Bill seeks to:

- a) repeal the National Inland Waterways Authority Act 1997 and establish the Inland Waterways Authority of Nigeria, and locate its operations within the overall national transport sector reform policy with a view to improving efficiency in service delivery;
- b) attract private sector participation in management, infrastructure and technology development of the inland waterways and thereby reduce cost of transportation and service delivery;
- c) enhance competition;
- d) minimize the public treasury dependence of inland waterways development;
- e) provide for the management, control, operation and development of the inland waterways, private sector participation in the subsector; the regulation of the inland waterways; and other matters connected therewith; and

f) reform the inland waterways subsector presently comatose owing to under-development, poor performance and exclusion of private operators, lack of infrastructure, inadequate funding and non-realization of sub-sector potential among others.

Other than the Petroleum Industry Bill which is before the National Assembly, all the other bills have moved back and forth from the Federal Executive Council (FEC) to the National Assembly. At the moment, the bills are before the FEC for consideration and approval and thence to the National Assembly for passage into law. Thus there can be no full de-regulation of infrastructure in Nigeria without the passage into law of these reform bills. Similarly, Nigeria may be moving from public monopoly to private monopoly if the Federal Competition and Consumer Protection Bill that was initiated in 2001 and drafted in 2003 is not passed into law.

### The Concept of Independent Regulator

When the reform bills sponsored by the NCP/BPE with the cooperation of the sector Ministries (or the reform bills sponsored by the sector Ministries) are passed into law, the issue of a regulator looms large. In Nigeria today, the Central Bank of Nigeria is a regulator, the National Insurance Commission is a regulator, the Securities and Exchange Commission is a Regulator and the Nigerian Communications Commission is a regulator. However, the kind of regulation to be carried out by the Nigerian Electricity Regulation Commission established under the Electric Power Sector Reform Act 2005 is profound in the sense that the power sector is pivotal to the productivity of all other sectors. It has aptly been stated that around the world, governments perform three

main functions: they tax, they spend, and they regulate. And of these three functions, regulation is the least understood. Nigeria falls in this category. One way of appreciating what regulation is all about is to highlight the attributes of an independent regulator or the benchmark used in evaluating regulators. The regulator must be organizationally separate from existing Ministry or Departments (organizational independence), earmarked, secure and adequate source of funding (financial independence) and autonomy over internal administration and protection from dismissal without due cause (management independence). The other attributes include:

- Accountability – regulators need to be held accountable for their action by providing for appeal rights in their enabling laws, ethical and procedural obligations and substantive reporting and audit obligations.
- Transparency – the entire regulatory process must be fair and impartial and open to extensive and meaningful opportunity for public participation.
- Predictability – the regulatory system should provide reasonable, although not absolute, certainty as to the principles and rules that will be followed within the overall regulatory framework.
- Clarity of Roles – roles of the regulator as well as other sector agencies should clearly be defined so as to avoid duplication of functions, mixed signals to stakeholders and policy confusion.

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Brown A C et al Handbook for Evaluating Infrastructure Regulatory Systems, The World Bank, Washington, D.C. 2006, p xi.

Brown et al, op cit at 50

- Completeness and Clarity of rules – through laws and agency rules, the regulatory system should provide all stakeholders with clear and complete timely advance notice of the principles, guidelines, expectations, and consequences of behaviour.
- Proportionality – regulatory intervention in the sector should be proportionate to the challenges the regulators are addressing.
- Requisite powers – regulators must possess the powers to perform their functions. These include the powers to set tariffs, establish, modify, and monitor market and service quality rules.
- Integrity – there must be strict rules governing the behavior of decision makers as to preclude improprieties or any conduct appearing to be improper. For instance prohibition against bribes and gratuities of any kind, prohibition of all forms of conflicts of interest and reasonable disclosure of financial interests.

In view of what happened in the telecommunications sector where the Minister of Information tried to intervene in the operations of the Nigerian Communications Commission, it is clear that regulators should jealously protect their integrity. As can be seen generally and from the provisions of the Petroleum Industry Bill, it would seem that no Minister will be willing to ensure that the existing regulators or those to be created under the reform bills possess these attributes of an independent regulator. This should be resisted. It is worrisome therefore that in the latest version of the Petroleum Industry Bill, the Minister of Petroleum is given many regulatory functions and vested

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Brown et al, op cit at 59-63. See generally Estache A and Rus Gines de (eds) Privatization and Regulation of Transport Infrastructure: Guidelines for Policymakers and Regulators, WBI Development Studies, The World Bank, Washington, D.C. 2000, Kessides, Op cit at 79 and Klein M U and Bitu Hadjimichael The Private Sector in Development: Entrepreneurship, Regulation and Competitive Disciplines, The World Bank, Washington, D.C., 2003

with enormous powers . In the absence of these benchmark for evaluating regulators, reform of the economy belongs to the distant future in Nigeria. It is a major challenge. According to Guislain  
Setting up efficient and independent regulatory mechanisms is a major challenge in the privatization of regulated sectors. Establishing this function at arms length not only from the regulated industry but also, as much as possible, from political and bureaucratic interference should enhance its effectiveness. Although autonomous and independent commissions may be worth pursuing in most countries, in some cases they might be given advisory rather than decision-making role. .... Regulatory issues and analyses tend to converge across infrastructure sectors, and multi-sectoral commissions or agencies should be considered, particularly in countries with limited administrative capacities. Attention should also be given to the design of a transparent regulatory system open to inputs from key stakeholders.

No doubt, Nigeria has limited administrative capacity in regulation. It is important, therefore, that institutions created are transparent. Similarly what has happened in the power sector where functionaries were removed without regard to the provisions of the Electric Power Sector Reform Act 2005 is a

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See sections 5 and 6 of the PIB dealing with the role and functions of the Minister. Under section 5, the Minister shall be responsible for the coordination of the activities of the petroleum industry and shall exercise general supervision over all operations and all institutions in the industry. Under section 6, the Minister shall exercise general supervisory functions over the affairs and operations of the petroleum industry. This provision is similar to section 8(1)(a) of the Petroleum Act, 1969 (now Cap C10, LFN 2004). Similarly section 6 of the PIB provides that the Minister shall advise the President on the appointment of chief executives of the agencies (including the Upstream Petroleum Inspectorate and Downstream Petroleum Regulatory Agency (the two Regulators) established under the PIB. Section 8 deals with the powers to make regulations and this is vested in the Minister. Sections 17 and 47 deal with the Boards of the Upstream Petroleum Inspectorate and Downstream Petroleum Regulatory Agency respectively. These Boards are appointed by the President on the recommendation of the Minister. When the PIB is compared with the NCC Act 2003 and the Electric Power Sector Reform Act (EPSR Act) 2005 in terms of appointment of the regulators and their independence, one wonders whether the PIB is not retrogressive. Under the provisions of section 8 of NCC Act and section 34 of the EPSR Act, the Commissioners are appointed by the President and confirmed by the Senate. Similarly under section 70 of the NCC Act and section 96 of the EPSR Act, the powers to make regulations are vested in the Commissions and not Minister. Indeed under section 23 of the NCC Act, the powers of the Minister are confined to general policy formulation and not general supervision or coordination of activities. It is hoped that all these anti-regulatory sections are deleted before the PIB is passed into law.

Guislain P The Privatization Challenge: A Strategic, Legal, and Institutional Analysis of International Experience, The World Bank, Washington, DC, 1997



cause for concern. Certainly the signals to the investing public especially foreign investors are that Nigeria is not ready for reform. Government's role should be confined to policy formulation if we must embrace reforms. Thus, developing good regulation remains a major challenge. Kessides has put it succinctly thus:

Among the most critical tasks for policymakers in developing and transition economies is designing and implementing stable, effective regulation for network utilities. In many advanced industrial economies the challenge has been reforming existing regulations and reducing unwarranted governmental intrusion. By contrast, in nearly every developing and transition economy the most pressing issue is designing – from scratch – regulatory mechanisms for privatized utilities .

It is not enough to design a regulatory mechanism, it must be properly funded, allowed to function and possess sufficient regulatory capacity. Andres et al, after examining the impact of private sector participation in infrastructure, one of the major findings was weak framework. The effect of a weak framework was highlighted thus:

Only a feeble effort was made to develop an appropriate regulatory framework and a capable regulatory agency with sufficient capacity to avoid a public monopoly from becoming a private monopoly. Although many countries passed laws to create this regulatory framework and regulatory agency, the resources assigned and the political commitment made to that effort left much to be desired. A number of problems resulted from the limited regulatory efficiency, insufficient regulatory capacity, and slow development of regulatory instruments, which mainly were seen in tariff adjustment, investment fulfilment and coverage expansion.

Are the provisions in the draft Petroleum Industry Bill sufficient to ensure that the regulatory institutions created until the bill perform their regulatory functions efficiently given the role of the Minister of Petroleum Resources under the bill? Our view is that these provisions should be carefully scrutinized at the National Assembly to ensure that we have an independent regulator for oil and gas sector in Nigeria.

## Conclusion

The provision of infrastructure (public utilities or public goods) has been a dominant feature in governance over the years. Some of these infrastructure exhibit monopolistic features that it was thought that it was only governments than can provide them. In respect of some, for example, electricity, the financial outlay is high. It was therefore thought that because they are public goods, they can only be provided centrally by governments. However, developments in technology have eroded some of the natural monopoly aspects of traditional public utilities. For instance, electricity generation, electricity retailing, telecommunication, some types of public transit and postal services have become competitive in some countries and the trend towards liberalization, deregulation and privatization of public utilities is growing, but the network infrastructure used to distribute most utility products and services has remained largely monopolistic.

In Nigeria, for example, the de-regulation of telecommunication services has shown the benefits derivable from de-regulation. At the moment, the supply of electricity is undergoing reform. Thus from a situation where the National Electric Power Authority (NEPA) was in charge of generation, transmission and distribution of electricity to the reform in the sector whereby NEPA has been unbundled into generation, transmission and distribution and these three entities are being reformed and privatized, it is hoped that power supply in Nigeria will improve dramatically. Similarly in the area of oil and gas, the Nigerian National Petroleum Corporation (NNPC) has been the major player. With the drafting of the Petroleum Industry Bill which is now before the National Assembly, it is hoped that the oil and gas sector will be fully de-regulated.

Lastly, if the reform bills are passed, the ports, roads, rail, inland waterways and postal services will be fully de-regulated in Nigeria. In which case, government will retreat to the provision of regulatory institutions and ensuring that they are properly run.

Indeed, the notion that it is the duty of government to provide infrastructure or public utilities or public goods (government as a provider) that was efficacious in the past has paled into government retreating and providing the regulatory environment in modern times (government as a regulator) to enable the private sector to provide the infrastructure.