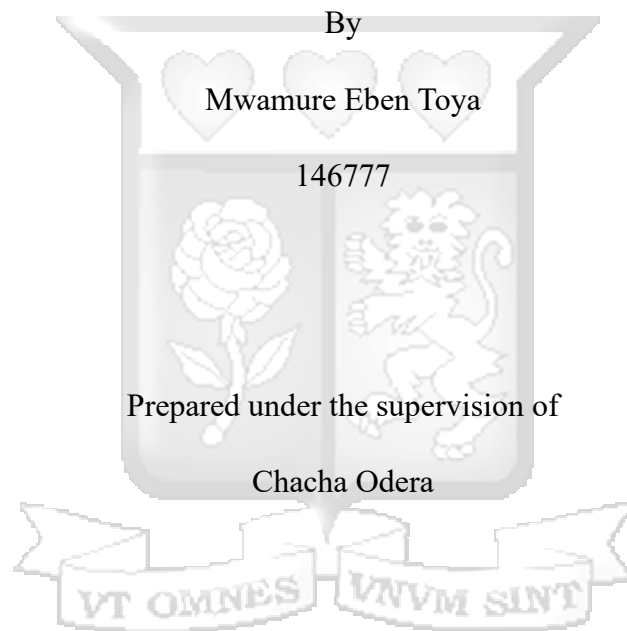


REFORMING THE PORT OF MOMBASA THROUGH CORPORATIZATION

Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree,
Strathmore University Law School




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Declaration

I, MWAMURE EBEN TOYA, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: 

Date: 28th January 2025

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: 

Mr. Chacha Odera

Date: 28th January 2025

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List of Legal Instruments

Constitution of Kenya (2010).

Heritage and Monument Act (Cap 216).

Kenya Ports Authority Act (Cap 391).

Privatisation Act (2023).

Public Private Partnership Act (2021).

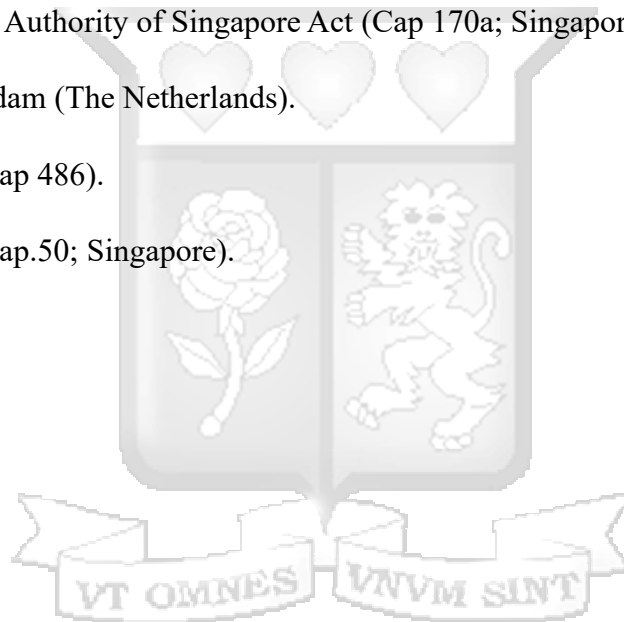
Public Procurement and Asset Disposal Act (2015).

Maritime and Port Authority of Singapore Act (Cap 170a; Singapore; 1996)

Port Act of Rotterdam (The Netherlands).

Companies Act (Cap 486).

Companies Act (Cap.50; Singapore).



List of Cases

Associated British Ports (ABP) v Department of Transport (1997), The United Kingdom Court of Appeal.

Patrick Stevedores Holdings Pty Ltd v Maritime Union of Australia (1998), Australia.



List of Abbreviations

CoK 2010	Constitution of Kenya 2010
GLC	Government-linked companies
GOC	Government-Owned Company
KIPPRA	Kenya Institute for Public Policy Research and Analysis
KPA	Kenya Ports Authority
PoR	Port of Rotterdam
PoRA	Port of Rotterdam Authority
PPP	Public Private Partnership
PSA	Port of Singapore Authority
PSP	Public Service Port
SPV	Special Purpose Vehicle
SSOC	Statutory State-Owned Company
EAC	East Africa Community
EACHC	East African Cargo Handling Company
EAHC	East African Harbours Corporation
SOE	State-operated Enterprises
MPA	Maritime and Port Authority of Singapore Act

Abstract

This dissertation explores the transformative potential of corporatization for the Port of Mombasa, a critical gateway in East Africa's trade landscape. It argues that through a strategic and phased transition to a corporatized model, the Port of Mombasa can enhance efficiency, governance, and service delivery while addressing longstanding challenges such as logistical bottlenecks and bureaucratic hurdles. Drawing on comparative analyses with successful international models – PoR and PSA Intl.—the study elucidates the necessity of incorporating governmental input during the initial stages of transition. This approach aims to balance public interests with the imperatives of a free market, thereby fostering trust among stakeholders. It highlights the vital importance of a robust legislative framework that gradually minimizes state interference, promoting autonomy within port operations. Through critical analysis of existing infrastructures, stakeholder perspectives, and international best practices, the dissertation not only identifies the obstacles hindering the Port's progress but also offers actionable recommendations for policymakers. These include changing some provisions in the Kenya Ports Authority Act, investing in technology-driven solutions, and enhancing public-private partnerships. Ultimately, this work emphasizes that the journey towards an efficient and corporatized Port of Mombasa is not merely a leap, but a systematic process requiring careful navigation. In capturing the essence of this transformation, the dissertation serves as a clarion call to embrace change, facilitating the Port's evolution into a more competitive and responsive entity in the global maritime arena.

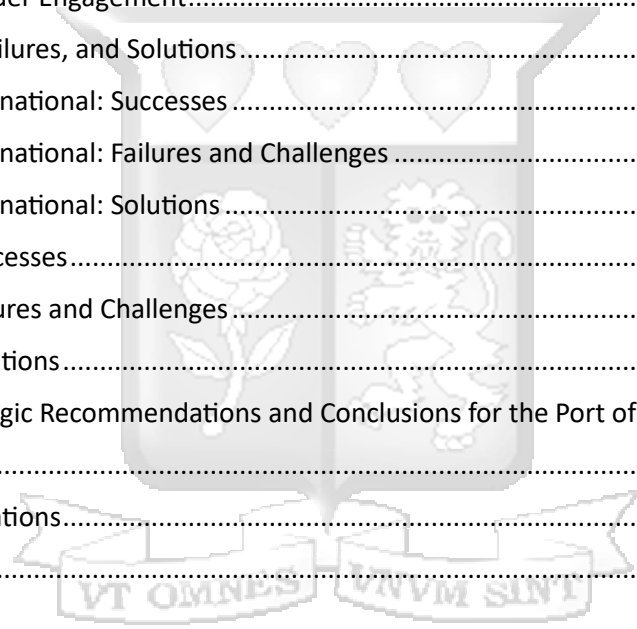
Key words

PoR, PSA Intl.

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Chapter 1: Introduction

1.1 Introduction

Larry Ferguson once said, “*And the sea will grant each man new hope, as sleep brings dreams of home.*”¹

The need for ports to remain relevant and evolve into more compatible shapes and forms has seen a worldwide reform wave. According to the World Bank, over the last 60 years, there has been a sharp increase in world trade, keeping in mind that 80% of world trade is handled through the sea and or oceans.² This has shifted the attention of national governments to the economic importance of ports.³ This led to attempts by many nations to introduce institutional changes intended to coordinate port development at national and regional levels and prevent overinvestment in expensive port infrastructure.⁴ Against this backdrop, the World Bank revised past attempts and failures by nations and helped devise various strategies to achieve targeted ideals. These include modernization, commercialization, concessioning, liberalization, privatization, and corporatization.⁵ This research focuses on corporatization as the subject matter underpinning my study.

1.1.1 Background of the Problem

Kenya's history is rife with public skepticism towards the true intentions of its leaders. “*Scepticism is an important historical tool,*”⁶ underscores the necessity of understanding history to avoid its repetition. State-owned corporations and parastatals in Kenya have often been mismanaged by the government and contracted private actors, resulting in poor

¹ Marland S, ‘155 Beautiful Sea Quotes & Captions for Ocean Lovers (2024)’ We Dream of Travel, 12th December 2023 --< https://www.wedreamoftravel.com/sea-quotes/#%F0%9F%8C%8A_Popular_Quotes_About_the_Sea >-- on 15th December 2023.

² United Nations Conference On Trade And Development, Review of Maritime Transport, 2022 --< <https://United Nations Conference on Trade and Development.org/rmt2022> >-- on 17th December 2023.

³ World Bank Port Reform Toolkit 2nd ed, *Module 3: Alternative Port Management Structures and Ownership Models*, 2017, 99.

⁴ World Bank Port Reform Toolkit 2nd ed, *Module 3: Alternative Port Management Structures and Ownership Models*, 2017, 99.

⁵ Interview with General Manager Corporate Research, Planning and Compliance at KPA on 27th November 2023; World Bank Port Reform Toolkit 2nd ed, *Module 3: Alternative Port Management Structures and Ownership Models*, 2017, 101.

⁶ ‘Communicate State agenda’ Daily Nation, October 12th 2023 --< <https://nation.africa/kenya/blogs-opinion/blogs/communicate-state-agenda-4397672> >-- on 15th December 2023.

economic performance camouflaged by non-commercial objectives⁷. While the State seeks to privatize these institutions for noble reasons, entrusted private actors often act in self-interest, turning privatization into a political and economic quagmire that pits the Executive against Parliament⁸.

The Port of Mombasa, as a vital gateway for trade and commerce in East Africa, stands at a critical juncture where the need for reform is paramount. In recent years, the port has grappled with inefficiencies, bureaucratic hurdles, and a lack of autonomy that hinders its full potential⁹.

However, with corporatization lies a comprehensive and strategic solution that aligns with international best practices, while catering to the unique needs of the Kenyan maritime sector. Through corporatization, the government aims to lend credibility by creating a Special Purpose Vehicle (SPV), where the Kenya Ports Authority (hereinafter referred to as 'KPA') forms a subsidiary company to manage terminal operations. Both entities, the Authority and the SPV, remain government-owned, with the subsidiary operating independently but as an extension of the KPA, akin to a "*phantom limb*."¹⁰ This innovative approach seeks to maintain government control while introducing operational autonomy, potentially reconciling conflicting interests, and bolstering the industry's efficiency.

However, transitioning to this model from our classical Public Service Port model¹¹ is not straightforward. No explicit law allows the KPA to form the SPV¹² and neither is there an active jurisdiction that adopts a reform model arbitrarily without legal conditioning of its

⁷ Mwaura K, 'The Failure Of Corporate Governance In State Owned Enterprises And The Need For Restructured Governance In Fully And Partially Privatized Enterprises: The Case Of Kenya' 31 *Fordham International Law Journal* 1, 2007, 34.

⁸ 'Ruto backs push to sell Kenya parastatals without MPs' approval' Daily Nation, March 22nd, 2023 --<<https://www.theeastafrican.co.ke/tea/business/ruto-backs-sale-of-state-firms-without-mps-approval-4168166> >-- on 28th November 2023.

⁹ See UN DESA – The Sustainable Development Goals Report.

¹⁰ Interview with the General Manager Corporate Research, Planning, and Compliance at KPA on 7th June 2024.

¹¹ World Bank Port Reform Toolkit 2nd ed, *Module 3: Alternative Port Management Structures and Ownership Models*, 2017, 82; The article goes ahead to define a 'Public service port' as "...the port owns, maintains, and operates every available asset (fixed and mobile), and cargo handling activities are executed by labour employed directly by the port authority. Service ports are usually controlled by (or even part of) the ministry of transport (or communications) and the chairperson (or director general) is a civil servant appointed by, or directly reporting to, the minister concerned."

¹² Interview with the General Manager Corporate Research, Planning, and Compliance at KPA on 27th November 2023.

laws.¹³ This then necessitates this research, justifying the need to have a roadmap that is both transparent and accountable at each level, having full participation of all the major and minor stakeholders, and ensuring the transition is in the best interests of the people of Kenya.

“Furthermore, the World Bank Port Reform Toolkit defines a ‘corporatization’ as “...a public port enterprise is given the legal status of a private company, although the public sector or government still retains ownership. All assets are transferred to this private company, including land lease rights. Land ownership usually remains with the port authority...”

It adds that “...the port authority or one or more of its constituent parts, such as a port authority–operated container or general cargo terminal, is converted into a legally and financially independent legal entity with its board of directors. The government or public port authority retains ownership of all shares of the venture. By applying market principles, the corporatized port authority is expected to function more efficiently. A corporatized port authority may also accommodate both national and local interests...”

1.1.2 Problem Statement

To understand the problem, we must fit it into the right contextual reality. By this, I paint out the ideal, status quo, and the consequence that will bring out the git of the problem. Thus, the ideal envisioned for the Port of Mombasa is practical; given that we know where we are and the consequential price, we must pay to realize that ideal.

1.1.2.1 The Ideal

The people of Kenya should no longer have to live shrouded in the fear of the private sector dilapidating their resources through unscrupulous investors. The government should devise

¹³ Australia and The Netherlands are good examples of countries that have embraced the Corporatization reform model and have all had to restructure their statutory laws to incorporate corporatization before proceeding to adopt it. In some sense, it is deductible that no country has arbitrarily taken any reform model absent aligning their laws to suit that model. Arguably, a country can just adopt corporatization or privatization arbitrarily and just run with it. This is challenged on two grounds. Firstly, the theory of Legal Positivism requires there to be some legitimacy and validation to any enactment of any law by a recognizable authority. Secondly, the very nature of the SPVs created by corporatization requires a robust legal framework to define the rights, responsibilities, and governance structures of the model itself. Through corporatization, there is a change in the legal status of the government-owned parastatal into semi-autonomous corporations with separate legal entities.

better alternatives that better defend the interests of the people of Kenya. The government should be able to revise the municipal laws to allow them to run, operate, and manage operations of the Port of Mombasa independently through delegated private but public actors. Notwithstanding the arrangement entered into, the government should still be able to exert effective and reasonable influence to ensure the primary objectives of the model, and the public interests are safeguarded. The government remains the custodian of the people of Kenya in that regard, i.e., *the government/state would retain ownership stakes in the port but would allow management a significant degree of operational independence, reflecting a politically pragmatic approach that recognizes the need for a port to operate with less bureaucratic interference.*¹⁴

1.1.2.2 The Current Situation

However, the current circumstances present a stark contrast to this ideal. Kenyans have put their trust in investors who have always seemed to act in their “own” best interest and not “our” best interest. The Port of Mombasa is “*poorly performing*” as put by KIPPRA¹⁵ in Discussion Paper No.101 of 2009¹⁶. Notwithstanding the poor status quo, it is a situation that can be salvaged and changed for the better.

1.1.2.3 The Consequence

The law does not allow the KPA, through State dictum, to form the desired SPV. It is not a “*KPA does not want,*” but instead is a “*KPA cannot...is not allowed,*” situation.¹⁷ The set of laws around public-private partnerships needs to be revised and necessary changes made to realize the ideal, change the status quo, and reap the consequential benefits.

1.1.3 Statement of Objectives

1. Assess the current (and historical) legal framework of Kenyan laws to pinpoint deficiencies and constraints impeding the adoption of a corporatized governance structure at the Port of Mombasa.

¹⁴ An idea of how the relationship dynamics between the government and the SPV.

¹⁵ Kenya Institute for Public Policy Research and Analysis (KIPPRA) is an autonomous institute whose primary mission is to conduct public policy research leading to policy advice.

¹⁶ Njeru G, ‘Performance of the Mombasa Port: An Empirical Analysis’ KIPPRA Discussion Paper No. 101, 2009, 1 --<

<https://repository.kippra.or.ke/bitstream/handle/123456789/2678/DP101.pdf?sequence=1&isAllowed=y> >--
on 16th December 2023.

¹⁷ Underpins the theory of Legal Positivism requiring validation of the law for applicable legitimacy in the legal realm.

2. Evaluate the comparative successes and failures of Corporatization in port governance reforms globally (The Netherlands and Singapore) with a focus on key performance indicators such as operational efficiency, stakeholder engagement, and financial sustainability.
3. Propose actionable recommendations and policy interventions to enhance the legal and regulatory framework to facilitate a smooth transition to a corporatized governance structure at the Port of Mombasa, whilst ensuring alignment with international best practices in port governance and management.

1.1.4 Hypothesis

Poor port management has seen the decline of many a great port around the world. Port management is at the heart of the shipping industry.¹⁸ Due to varying factors such as historic development, unique geographic characteristics, local political infrastructure, and dynamic trade patterns, no two ports can ever be the same.¹⁹ In the shipping industry, cargo passes through at least two ports i.e., *source and terminal port*. Therefore, each port and the transshipping ports in between play an integral role in facilitating smooth trade. Hence, there is a need to ensure effective management of the ports to guarantee optimal performance. Shipping mainly involves value-additional services in and around logistics.²⁰ Stakeholder interactions are regulated by the port management structure, which draws its credibility and legitimacy from the enabling legislation. When there are neither effective nor efficient stakeholder interactions i.e., *the boundaries are blurred, roles are polluted, and the public interest suffers the most*, management is seen to have failed.

I hypothesize that the current legal framework of requisite Kenyan laws has inherent insufficiencies that hinder effective and autonomous, but mutually interdependent, stakeholder interaction which ultimately hinders the successful adoption of a corporatized governance model at the Port of Mombasa. This impedes operational autonomy and efficiency. Addressing these gaps is crucial for enhancing the port's competitiveness and sustainability in the maritime industry.

¹⁸ Rana K, 'Role of Port Management in Global Shipping' 3(2) *Austin Journal of Business Administration and Management*, 2019, 1040.

¹⁹ Rana K, 'Role of Port Management in Global Shipping', 1040.

²⁰ World Bank Port Reform Toolkit 2nd ed, *Module 3: Framework for Port Reform*, 2017, 70.

1.1.5 Research Questions

1. What are the key legal gaps and limitations within the existing regulatory framework in Kenyan laws that hinder the transition to a corporatized governance model at the Port of Mombasa?
2. How do the successes and failures of corporatization in port governance reforms globally compare in terms of operational efficiency, stakeholder engagement, and financial sustainability, and what lessons can be drawn for the Port of Mombasa?
3. What practical recommendations and policy measures can be put forward to improve the legal and regulatory framework governing port operations in Kenya, whilst aligning with global best practices?

1.1.6 Significance of the Study/Justification

This study is significant because it assesses the current legal framework governing the Port of Mombasa and reconciles it with global best practices. It not only responds to the critical gaps in the existing port governance framework but also provides a strategic roadmap for enhancing efficiency and fostering sustainable growth. This shows the ability to transcend the confines of academic inquiries to practical implications for the reform and operational excellence of the Port of Mombasa.

1.1.7 Theoretical Framework

The political interference and corruption quagmire at the Port of Mombasa has necessitated research on alternative approaches to remedy the cancer. This has particularly been the case due to blurred lines between KPA's autonomy and government and third-party influence in operations and management. The market appears "free and open" but is closed and regulated by some unscrupulous individuals who advance their interests, undermining the institution's credibility. This makes accountability and transparency more abstract than practical.²¹

²¹ 'Shipping Lines, Maritime fraternity at war with new CS Joho' Weekly Citizen 27(38), September 16 – 22 2024, 3. This article discusses and amplifies the nature of the political interference and self-serving interest pushers in the current regime that meddles with the business and operations at the Port of Mombasa. Allegedly, the stakeholders of the maritime fraternity and shipping lines have experienced hardships resulting from monopolizing container freight stations and clearing, forwarding, and warehousing sectors.

From this backdrop, I suggest the neo-liberal and principal-agent theories as viable in the curation for a better alternative approach. The selected theories have differentiated scopes that when integrated have a wholesome assessment of the problems facing the port. The neo-liberal theory emphasizes free market principles, privatization, and limited government intervention in economic activities²². Contextualizing it can provide insights into the rationale for restructuring state-owned enterprises, like port authorities, to operate more efficiently and competitively in a market-oriented environment. The principal-agent theory examines the relationship between the government (principal) and the corporatized port authority (agent) in achieving organizational goals²³.

1.1.7.1 Neo-liberal Theory

This theory, predominantly an economic and political philosophy, originated in the post-war neoliberal effort to revive free market principles which appeared to have been rendered obsolete following the rise of the monopolistic corporation.²⁴ Its main proponent was Friedrich Hayek. He was a central figure in developing neoliberal ideas. He believed in the self-regulating power of markets and advocated for limited government intervention.²⁵ According to Thomas Biebricher, society's political and economic institutions should be robustly liberal and capitalist, but supplemented by a constitutionally limited democracy and modest welfare state.²⁶

The theory has provided an ideological framework that has allowed for the manifestation of 'Neoliberal Corporation'.²⁷ The latter is a practical expression of the original theory (Neoliberal theory). It refers to a business that operates in line with the principles of

²² Pardali A, 'Keynesian And Neoliberal Approach In The Port Industry. The Port's Involvement In The Regional Development: The Case Of Piraeus' 35(1) *International Journal of Transport Economics*, 2008, 75 – 100.

²³ Vining A, Bilodeau N, Laurin C, 'Choice of Organizational Form Makes a Real Difference: The Impact of Corporatization on Government Agencies in Canada' 17(1) *Journal of Public Administration Research and Theory: J-PART*, 2007, 119 – 147; It provides insights into the delegation of authority and control mechanisms.

²⁴ Ciepley D, 'The Neoliberal Corporation', in Thomas Clarke, Justin O'Brien (eds) *The Oxford Handbook of the Corporation*, Oxford University Press, 2019, 274.

²⁵ 'Neoliberalism' Stanford Encyclopedia of Philosophy.

²⁶ 'Neoliberalism' Stanford Encyclopedia of Philosophy. Another proponent, Slobodian, argues that neoliberalism saw the intellectual project as finding the right state and law to serve the market order.

²⁷ Ciepley D, 'The Neoliberal Corporation', 274.

neoliberalism.²⁸ These ‘corporatized’ entities are fully owned and operated by the state but function at arm's length with varying degrees of autonomy.²⁹ The variances, as to what corporatization aims to achieve, are further explained as a subjective position taken by the policy-makers³⁰, which I shall expound on in the next chapter, toward the desired end of corporatization. “*Some managers and policy-makers see corporatization as a first step toward privatization. Some see it as an opportunity to commercialize services without the political and economic risks of direct private-sector participation. Others are committed to social democratic forms of welfarism, while others still see corporatization as a form of (autocratic) state capitalism.*”³¹

As I streamline my research with the findings under this article, it indicates that the best end is commercializing services without the political and economic risks of direct private sector participation. This fundamentally supports my position of Kenyans' sharp skepticism towards private sector participation. Better still, a more practical example would be the Port of Rotterdam, Netherlands.³² It has embraced neoliberal principles by increasing private sector involvement and privatizing some aspects of its operations (terminal).³³ While the

²⁸ McDonald D, ‘To corporatize or not to corporatize (and if so, how?)’ 40 (2) *Utilities Policy*, 2016, 108. They favour globalization seeking markets and resources globally. They deregulated environments for ease of operation. However, the ends derivable vary with the objectives of the managers and policy-makers.

²⁹ To avoid any confusion the idea of ‘fully owned and operated by the state...’ contradicts not my proposal. This article looks at a summative conception of the idea around neoliberal corporation whilst this paper focuses on the management aspect of the corporate entity. It is poor management that sparks the need for this conversation in the Kenyan context. From understanding management (port) do the other intervening factors fall in line with the general conception of neoliberal theory ideals of free market principles and limited government intervention.

³⁰ Taking the example of PoR, it is clear that political support at both national and local levels is important for the successful implementation of any institutional changes. The City of Rotterdam and the Dutch national government were the key political entities behind the corporatization. Both saw the port as a critical economic asset that needed to be run more efficiently to maintain its global leadership. By supporting corporatization, the two levels of government enabled the port to become more responsive to market dynamics, enhance its commercial competitiveness, and ensure financial self-sufficiency in the long-run.

³¹ McDonald D, ‘To corporatize or not to corporatize (and if so, how?)’, 109.

³² The Port of Rotterdam is a relevant example for my research as it is an important global logistics hub and one of the largest ports in the world. It has seen its success result from a successful combination of regulatory and political factors in the Netherlands and its administrative region (Europe). The Netherlands’ well-established legal and administrative framework supports the corporatization of its public entities. This is earmarked by clear rules on governance, fiscal responsibility, and transparency. This granted the Dutch government a legislative pathway for transitioning the port authority from a public to a corporate entity.

³³ World Bank Port Reform Toolkit 2nd ed, *Module 3: Alternative Port Management Structures and Ownership Models*, 2017, 71.

port authority itself remains public,³⁴ many services and terminal operations have been outsourced to private companies, thus minimizing government involvement and promoting competition.³⁵

1.1.7.2 Principal-Agent Theory

This theory was developed from the traditional principles of agency theory,³⁶ where the “Principal” delegates tasks to an “Agent” for execution, within the confines of a contractual bond between the two parties. In this transactional relationship, the agent is expected to present the principal's best interests without regard for their self-interest.³⁷ However, some inherent challenges encapsulated in this agency relationship include information asymmetry and misalignment of goals and desired outcomes.³⁸

The research looks at harmonizing the relationship between the two parties by looking at how to best balance the complexities of governance and accountability in achieving the principal's objectives, i.e., *safeguarding public interest*. As I alluded to earlier, the rationale for entering into a corporatized arrangement is subject to the managers and the policy-makers. Under the Neoliberal (corporation) theory, the article by McDonald mentions that

³⁴ In 2004, PoR was formally corporatized, i.e., *it was restructured into a private company owned by public entities (the City of Rotterdam and the Dutch state)*. However, it operated with commercial objectives. The legal framework enabled the creation of a "*Havenbedrijf Rotterdam N.V.*" (Port of Rotterdam Authority), a public limited company, separating port management from governmental control. This allowed the port to operate under commercial law, facilitating faster decision-making, efficiency, and independence. This is what is also discussed and projected under the 3rd Module of the Port Reform Toolkit from the World Bank.

³⁵ World Bank Port Reform Toolkit 2nd ed, *Module 3: Alternative Port Management Structures and Ownership Models*, 2017, 71; Econometric Institute, Erasmus University Rotterdam, *Performance effects of the corporatization of Port of Rotterdam Authority*, 2013, 1. The article from the Erasmus University Rotterdam gives three major arguments for corporatisation (1) the trend in the 1990s to reduce public involvement in economic activities leading to the liberalization of services like public transport, (2) improve the supply chain integration and international transport networks, and (3) municipal administrators/the State have limited capabilities for commercial activities whereas port development requires an active approach of customers and business-driven investments. The arguments for corporatization implicitly have neoliberal underpinnings that date as early as the 1990s, especially in port management for PoR.

³⁶ See --< [³⁷ The Investopedia Team, ‘What Is the Role of Agency Theory in Corporate Governance?’ Investopedia, 30th April 2021 --< <https://www.investopedia.com/ask/answers/031815/what-role-agency-theory-corporate-governance.asp> >-- on 26th September 2024.](https://www.sciencedirect.com/topics/social-sciences/principal-agent-theory#:~:text=Principal%2DAgent%20Theory%20is%20defined,making%20between%20the%20two%20parties.>-- on 26th September 2024.</p></div><div data-bbox=)

³⁸ The Investopedia Team, ‘What Is the Role of Agency Theory in Corporate Governance?’ Investopedia, 30th April 2021 --< <https://www.investopedia.com/ask/answers/031815/what-role-agency-theory-corporate-governance.asp> >-- on 26th September 2024.

one of the reasons for such an arrangement would be to commercialize services without the political and economic risks of direct private sector participation. This summarizes how public interests are best safeguarded and, at the same time, bolstered and improved on.³⁹

The Port of Singapore is one of the busiest and most efficient ports globally. Putting it into context, the principal is the Singaporean government, and the (corporatized) agent is PSA International (formerly Port of Singapore Authority).⁴⁰ The Singaporean government, through Temasek Holdings⁴¹, remains the principal by maintaining ownership⁴², but the agent, PSA International, operates independently to achieve high levels of operational efficiency. This is mainly through performance-based contracts, which ensure that the principal's national economic objectives are well met, as well as oversight mechanisms.⁴³

Temasek Holdings is Singapore's state-owned investment company, responsible for managing a diversified global portfolio of assets that generate long-term value for the government and its stakeholders. It is pivotal in the corporatization of state-owned enterprises (SOEs). Its principal function is to take ownership of state-owned assets and run them as commercial enterprises by holding significant stakes in many

³⁹ The Kenyan public's scepticism can only be overcome when progressive effort can be seen to be taken concerning their public interests. The public interest concern transcends the bare minimum of merely safeguarding it, but would also be of net societal benefit if gain can be drawn from the same. The gains sought should not be sought in a manner that undermines their overall stake in the assets. This creates a greater sense of trust as it grows simultaneously with the accountability between the ultimate principal (the people) and the agents (the government).

⁴⁰ The corporatization of PSA allowed the port to operate independently from the government in its day-to-day functions, enabling faster decision-making, technology innovation, and accelerated global expansion.

⁴¹ Ramirez C, Ling Hui Tan, 'Singapore, Inc. Versus the Private Sector: Are Government-Linked Companies Different?' International Monetary Fund, IMF Working Paper Number 156, 2003, 1 --<
<https://www.imf.org/external/pubs/ft/wp/2003/wp03156.pdf> >-- on 4th October 2024; Shih Yi-Jen 'Government-Linked Companies and State-Business Relations in Singapore' 39(101) *Taiwanese Journal of Political Science*, 2009, 13.

⁴² GLCs are companies where the Singapore government has a significant ownership stake, usually through Temasek Holdings, allowing the government to influence the company's strategic direction. However, they operate as commercial entities with independent management teams and boards of directors. As a GLC, PSA International enjoys the autonomy to make commercial decisions without needing direct government approval for day-to-day operations. The government retains oversight and can steer the company in line with broader national objectives.

⁴³ 'Formation of the Port of Singapore Authority' National Library Board Singapore --<
[Although PSA International remains government-owned, it follows corporate governance practices akin to a private company, which enhances operational efficiency, accountability, and transparency \(amplified Principal-Agent theory alignment\). This setup allows it to compete effectively with other global port operators while ensuring that Singapore's strategic assets are not fully privatized or subject to foreign control.](https://www.nlb.gov.sg/main/article-detail?cmsuuid=a7193804-3862-4f99-8b3b-46c867073a95#:~:text=In%20the%20face%20of%20increasing,needs%20of%20the%20shipping%20industry.>-- on 26th September 2024.</p></div><div data-bbox=)

strategic companies. PSA operates as a GLC under Temasek Holdings, Singapore's state investment company. This model provides the necessary funding, expertise, and political backing to support the port's international operations, while also keeping strategic assets under national control.

1.1.7.3 Integration and Critiques of the Theories

By focusing on both Neoliberal and Principal-Agent theories, there is potential to integrate and transition towards a holistic evaluation of our current framework. By considering both the micro (governance dynamics) and macro environs (policing), the research can comprehensively analyse the multifaceted aspects of corporatization. By leveraging the principles of neoliberalism, which support free market interaction and limited government intervention, narrowed down to neoliberal corporatization, the potential benefits of privatization and market-oriented reforms can be evaluated. Simultaneously, Principal-Agent Theory offers critical insights into the governance structures necessary to ensure that the port authority, as the agent, acts in alignment with the interests of the government, the principal, who ultimately safeguards the interests of the public. By synthesizing these two theories, the framework facilitates a nuanced analysis of the Port of Mombasa's current management challenges, identifying specific areas where neoliberal reforms can be effectively implemented while ensuring robust oversight and accountability. This will effectively enhance the port's performance, such as adopting international best practices and improving service delivery.

However, the Neoliberal Theory does have its unique weaknesses as well as its strengths. It often pushes for full privatization, which may not be ideal for assets such as ports. It tends to overlook the importance of retaining state control over critical infrastructure, and profit maximization might overshadow broader social or public service objectives.⁴⁴ The Principal-Agent theory on the other hand, also assumes a potential disconnect between the principal and agent which is not always the case in the tightly knit corporatized entities i.e., GLCs, where the government plays a more active role.

⁴⁴ Ciepley D, 'Neoliberalism and the Corporation: Mutually Contradictory and Corrupting' Institute for Advanced Studies in Culture, The University of Virginia; Aarhus University, 2018, 3.

The SOEs in Kenya are equivalent to the GLCs in Singapore, as in both jurisdictions, the government has a significant ownership stake and influences the strategic direction and management. The SPV, in the case of Singapore, is Temasek Holdings, through which the government of Singapore has a stake and runs it as a portfolio management firm for its GLC assets. Simply put, the SPV can be taken as a joint stock company, which operates on open market principles with autonomous management, but the government owns some stake (majority/minority) in the company. This enables a separation between the government and operational management, which is essential for corporatization to be successful.

This integrated framework will serve as a guiding reference for the following chapters, which will delve into identifying legal gaps, conducting comparative analysis based on the PoR and PSA Intl, and formulating practical recommendations aimed at promoting sustainable growth and operational excellence at the Port of Mombasa. Ultimately, the insights derived will contribute to the formulation of actionable strategies that align the port's operations with international best practices, thereby positioning it for enduring success in the competitive landscape of the maritime industry.

1.2 Literature Review

“Most countries are reluctant to entirely privatize their port authorities, making port corporatization the model of choice. Today, the most commonly pursued route for port governance reform embraces the concept of an autonomous, government-owned port authority with terminal operations under private companies. Many countries fall short of fully effective corporatization of their port authorities, however, because they retain some administrative and decision-making mechanisms under government control⁴⁵.”

⁴⁵ World Bank, *Achieving Full and Effective Corporatization of Port Authorities: Reform Models from Global Experience, Trade & Competitiveness In Practice*, 2017, 1. This statement sums up the status quo of many countries with regards to the issue at hand; and the path they have been led upon chasing an ideal. However, the common thorn in most of their sides is the bureaucratic interference with the port management resulting from the fear of being fully privatized, and or completely cutting off government regulation.

1.2.1 Place of government in the bigger picture of things

In her article ‘Corporatization: A legislative framework for port inefficiencies’, Sophia Everett puts up an argument on the cause and effect of political intervention vis-à-vis an inappropriate legislative framework.⁴⁶ She uses comparative analysis from different scholars, i.e., Hirst, Meyrick, and Ford, to erupt discourse on assessing the framework that defeats the system. She is for the argument that to maximize corporatization, it is paramount that the legislation around the model be revised, as opposed to debates over political interventions⁴⁷. She proposes a cohesive and integrated approach riveted with a streamlined strategy and mission-vision⁴⁸. Our thinking is almost streamlined, save for the fact that she is overly assessing the input of “ministers” in the bigger picture. There is no fault with her approach, but I believe our problems are different. Absent some element of governmental input, the model would too swiftly be mistaken to move into privatization by the public. For Kenya, this would trigger mixed reactions owing to our scepticism on privatization and state agenda. I would look at harmonizing governmental input and necessitating it at the budding stages of our transitioning phase. Unlike Australia that has had some years to pick out these issues, the subject is still new to Kenya and may not particularly pan out the same. Thus, I would look at proposing a legislative framework that progressively sheds off inherent governmental interference and allows the model to take an autonomous shape. It is a process, not an instantaneous leap.

English case law⁴⁹, as well as Australian case law⁵⁰, provides useful insight into the powers of government in restructuring port authorities as well as the implications the restructuring has on stakeholders.

⁴⁶ Everett S, ‘Corporatization: A legislative framework for port inefficiencies’ 30(3) *Maritime Policy & Management*, 2003, 211.

⁴⁷ Everett S, ‘Corporatization: A legislative framework for port inefficiencies’, 213.

⁴⁸ Everett S, ‘Corporatization: A legislative framework for port inefficiencies’, 217.

⁴⁹ *Associated British Ports (ABP) v Department of Transport* (1997), The United Kingdom Queen's Bench Division (Administrative Court).

⁵⁰ *Patrick Stevedores Holdings Pty Ltd v Maritime Union of Australia* (1998), High Court of Australia; It involved a dispute over the privatization and corporatization of port operations, particularly concerning labour rights and industrial relations. This case highlighted the legal complexities involved in restructuring port authorities and the implications for stakeholders.

1.2.2 International Best Practice Reform Models

Tabatha Michelle in her doctoral dissertation⁵¹ tries to analyse the legislative frameworks around SSOC⁵² and GOC⁵³ which will permit a port corporation to operate a business that achieves the aims of corporatization⁵⁴. She recognizes the significant role legislative action plays in creating the right conditions for proper corporatization performance⁵⁵. Unlike Sophia Everett, she does not look to completely dispense with the governmental control but instead wishes to use it twofold. Firstly, as a stepping stone, it is requisite in initiating any concept that requires the force of law for legitimization⁵⁶. Secondly, she idealizes the corporatized port models, SSOC and GOC, as business entities and recognizes the need for some level of regulation as do any other commercial enterprises⁵⁷. I agree with how she approaches the situation. However, I am more interested in the first agenda. The KPA has no statutory provision that allows for the corporatization of either model i.e., GOC or SSOC. There is then a need to address the legislative framework around this inadequacy before delving into how to regulate it.

1.3 Research Design

1.3.1 Research Methodology

This study will rely on doctrinal legal research methodology. It will rely on both primary and secondary sources of data, whilst being underpinned by a comparative analysis and best practice study with other jurisdictions. The primary sources include but are not limited to, the CoK 2010, statutory legislations, international conventions, and personalized communication. The secondary sources include, but are not limited to, reviews and critiques of scholarly articles, journals, websites, and dissertations. Hence the research will be able to demarcate a proper roadmap for the successful implementation of the corporatization model at the Port of Mombasa.

⁵¹ Pettitt T, 'The Corporatized Australian Port System: Are there Legislative Constraints upon the Effective Operation of the Model?' published, Macquarie University, Sydney, 2022, 4-7.

⁵² Statutory State-Owned Company, established by a specific legislature.

⁵³ Government-Owned Company, established after incorporation under the Corporation Act.

⁵⁴ Pettitt T, 'The Corporatized Australian Port System: Are there Legislative Constraints upon the Effective Operation of the Model?' published, Macquarie University, Sydney, 2022, 7.

⁵⁵ Pettitt T, 'The Corporatized Australian Port System: Are there Legislative Constraints upon the Effective Operation of the Model?' published, Macquarie University, Sydney, 2022, 9.

⁵⁶ Pettitt T, 'The Corporatized Australian Port System: Are there Legislative Constraints upon the Effective Operation of the Model?' published, Macquarie University, Sydney, 2022, 9.

⁵⁷ Pettitt T, 'The Corporatized Australian Port System: Are there Legislative Constraints upon the Effective Operation of the Model?' published, Macquarie University, Sydney, 2022, 9.

1.3.2 Research Limitations

Limitations of this study include constraints related to the availability of scholarly work and availability of primary data, as access to confidential or proprietary information within the Port of Mombasa may be restricted. Additionally, the scope of the research may be limited by time constraints and the complexity of legal and regulatory frameworks governing port operations. Additionally, the generalizability of findings may be restricted to the specific context of the Port of Mombasa and may not directly apply to other ports or jurisdictions. Some parallels can be drawn, while some would be working on hypothetical assumptions. Despite these limitations, efforts will be made to mitigate biases and ensure the validity and reliability of the research outcomes.

1.3.3 Chapter Breakdown

1.3.3.1 Chapter One: Introduction

This chapter introduces my research. It puts the legal gap in its proper context through the background of the study. It then posits the problem statement and highlights where the conundrum lies in the existing law and the ideal it proposes to achieve. It outlines the hypothesis and the justification of this study, as well as giving the fundamental statement of objectives that underpin the whole research. The research questions shall guide the flow of the research. It is the summary of the research.

1.3.3.2 Chapter Two: Discussion of the existing legal framework

This chapter analyses the relevant municipal and international statutory laws and provisions that discuss corporatization to whichever depth. It shall look at how the laws developed historically from the East African Harbours and Cargo Handling to where it is now as the Kenya Ports Authority. This analysis shall offer a wholesome appreciation of the dynamics of our law and set up the next chapter that will identify the deficiencies and gaps present in those laws.

1.3.3.3 Chapter Three: Identifying Legal Gaps and Limitations in Kenyan Laws Impeding the Transition to a Corporatized Governance Model at the Port of Mombasa

This chapter will pick up the discussion at length on the general position of the municipal laws, and identify the gaps present in the laws that make them insufficient to facilitate a seamless transition to corporatization.

1.3.3.4 Chapter Four: Comparative Analysis of Global Corporatization in Port Governance Reforms: Evaluating Operational Efficiency, Stakeholder Engagement, and Financial Sustainability for Insights into Enhancing the Port of Mombasa

This chapter shall look into other jurisdictions and best practice models, and how they incorporated the corporatization governance model into their port operations. It shall assess their successes, failures, challenges, and solutions synthesized. It shall also examine the legal framework they put in place and how the system responded to the same. Through this, it shall find an optimal balance with the tripartite criteria and incorporate a curated strategy for the Port of Mombasa.

1.3.3.5 Chapter Five: Proposing Practical Recommendations to Enhance the Legal and Regulatory Framework for Port Operations in Kenya

This chapter concludes the research and makes relevant and applicable recommendations in alignment with global best practices.



Chapter Two: Navigating Legal Currents of the Statutory Framework of Kenya's Port of Mombasa

2.1 Introduction

Over the years, governance and operation have evolved under a complex tapestry of legal frameworks, influenced by municipal and international statutes. This chapter explores the historical and statutory foundations that have governed the Port of Mombasa, tracing its journey from colonial-era legislation under the East African Harbours and Cargo Handling laws to its current management by the Kenya Ports Authority. By analyzing the evolution of these legal regimes, this study aims to offer a comprehensive understanding of how regulatory, political, and economic forces have shaped the port's administration.

2.2 Historical Analysis

Before KPA was established in 1978, the East African Harbours Corporation (hereinafter referred to as 'EAHC') was operational.⁵⁸ It managed the port operations within the East African Community, servicing Kenya, Tanzania, and Uganda. It was primarily tasked with managing and operating the major seaports of the above-listed countries, ensuring smooth operation and development in support of regional trade and cargo handling.⁵⁹ There was no clear distinction between where the lines lay concerning the political and state control vis-à-vis the operational autonomy of the entity. As trade increased, and as more attention was taken up at the Port of Mombasa, the East African Community (EAC), through the East African Common Services Organization (EACSO), formed the East African Cargo Handling Company (EACHC).

EACHC was tasked specifically to focus on the operations and logistics handling at these ports particularly Port of Mombasa.⁶⁰ Before EACHC, EAHC enjoyed an "all-inclusive" role in the management and operations of the order of the ports. However, the increased

⁵⁸ Section 3, *East African Harbours Corporation Act*; See About Us, KPA Website --< <https://www.kpa.co.ke/AboutUs/Pages/KPA-History-Introduction.aspx> >-- on 10th October 2024. It was established under the East African Harbours Corporation Act, as part of the broader East African Community (EAC).

⁵⁹ At this time, the countries were fresh from colonialization and trying to find their feet on the international stage. In the period and circumstances around which it developed, this corporation was state-managed, and as such, it enjoyed vast control over the management and operations of the port industry. This in the long run opened up the entity to a lot of political interference and bureaucratic inefficiencies leading to operational difficulties.

⁶⁰ About Us, KPA Website --< <https://www.kpa.co.ke/AboutUs/Pages/KPA-History-Introduction.aspx> >-- on 10th October 2024.

volume of trade and the need for more efficient operations necessitated EACHC.⁶¹ EACHC was a separate company from the EAHC, that was mandated to discharge some responsibilities from EAHC and operate with some level of autonomy as described in the correspondence article.⁶² In the article, the consultants (McKinsey & Co.) express doubts about the continued autonomy of EACHC which accounted for almost 50% of EAHC's operating expenditure but was not directly controlled by EAHC.⁶³ They however criticize this organizational structure on grounds of operational inefficiency which resulted in productivity below the international standards.⁶⁴

Their recommendations sought to integrate the two entities into one operational unit under a unified management system. It hoped to improve operational efficiency and reduce operational costs from EACHC's autonomy.⁶⁵ Integration never materialized, but the pooling of functions under a unified management system crystallized as the municipal governments of the member states took charge of their respective ports in full swing. It is from this backdrop that the KPA came into force in 1978.⁶⁶

2.3 Kenya Ports Authority Act, Cap 391

This statute came into force following the collapse of the EAHC, EACHC, and the EAC.⁶⁷ It is the primary legislation establishing the Kenya Ports Authority at the Port of Mombasa. Unlike the Privatisation and Public Private Partnership Acts, this Act primarily focuses on

⁶¹ World Bank, *East Africa - East Africa Port Studies - Correspondence - Volume 1*, Folder ID: 1576116, World Bank Group Archives, 1971, 12 --< <https://thedocs.worldbank.org/en/doc/327831620033016305-0240021971/original/WorldBankGroupArchivesFolder1576116.pdf> >-- This article centres on the planning and expansion of East African ports, particularly Mombasa and Dar-es-Salaam, in anticipation of increased cargo from the new Tanzania-Zambia railway (TAZARA). The correspondence discusses funding from the World Bank and UNDP for infrastructure developments, including new berths, storage, and cargo-handling facilities. The planning emphasizes feasibility studies to meet future demands and coordination between the World Bank, East African Harbours Corporation, and regional governments. Financial breakdowns and logistical details highlight the economic benefits, while provisions for staff training reflect the goal of ensuring sustainable port operations.

⁶² World Bank, *East Africa Port Studies*, 12.

⁶³ World Bank, *East Africa Port Studies*, 19. This explicitly shows that the concept of corporatization, be it in the shape and form it had at EACHC, is not principally a new concept in Kenya. However, this did not come without its own challenges which the article alludes to.

⁶⁴ The document identifies low productivity in cargo handling as a significant issue. Gang productivity in Mombasa averaged only 50 tons per shift, far below international standards.

⁶⁵ World Bank, *East Africa Port Studies*, 87.

⁶⁶ About Us, KPA Website --< <https://www.kpa.co.ke/AboutUs/Pages/KPA-History-Introduction.aspx> >-- on 10th October 2024.

⁶⁷ About Us, KPA Website --< <https://www.kpa.co.ke/AboutUs/Pages/KPA-History-Introduction.aspx> >-- on 10th October 2024.

the management aspects of the Port of Mombasa as is. This means that it majorly discusses the order of management and day-to-day business at the Port of Mombasa. Contrary to this, the aforementioned Acts discuss in-depth the general legal framework around transitional models and programs and integrate the KPA as an entity subject or not subject to those models.⁶⁸

This Act explicitly grants the authority monopoly rights over port management as well as operational decisions of the Port of Mombasa. In great detail, it analyses the protocol and the order of the business, with overarching bureaucratic oversight from the Cabinet Secretary.⁶⁹ The need for state oversight is important but overarching control and micromanaging defeats the principles of a free market and would then require deregulation or modification of certain provisions of the Act to introduce commercial partnerships.

2.4 Privatisation Act

The relevance of this Act would be somewhat arguable following the court's decision in *HCCHRPET/E491/2023*⁷⁰ at the High Court of Kenya.⁷¹ The new Act, which repealed the 2005 Act, was aimed at sidestepping Parliament in selling at least 35 entities that the government believed were “trapped in bureaucracy.”⁷² The rationale for the government, being trapped in bureaucracy and possibly offloading some entities to raise more revenue for the country, was well-founded. However, in this particular case, it infringed on the cultural rights of Kenya enshrined in the Constitution and as such, unconstitutional.⁷³

In the Privatisation Act 2023, ‘privatisation’ is defined as a transaction that results in a transfer, other than to a public entity, of the assets and or liabilities of a public entity including the shares in a public entity.⁷⁴ The definition under the Act does not explicitly

⁶⁸ Privatisation Act, though recently declared unconstitutional, excludes entities that are national government-owned from the privatisation program, while the Public Private Partnership Act includes contracting entities like the KPA.

⁶⁹ Ministry of Roads and Infrastructure.

⁷⁰ *Orange Democratic Movement v State Law* (2023) eKLR.

⁷¹ Muhindi Susan, ‘KICC not up for sale as High Court declares Privatisation Act, 2023 unconstitutional’ *The Star*, 24 September 2024 --< <https://www.the-star.co.ke/news/2024-09-24-kicc-not-up-for-sale-as-high-court-declares-privatisation-act-2023-unconstitutional> >-- on 14th October 2024. The position of the High Court in this matter was that the continued operation of the Act was a failed attempt at protecting and upholding the sovereignty of the People of Kenya.

⁷² Njiraini J, ‘Kenya: High Court Quashes Privatization Law’ *Global Finance*, 7 October 2024 --< <https://gfmag.com/economics-policy-regulation/kenya-high-court-quashes-privatization-law/> >-- on 14 October 2024.

⁷³ Article 11(2), *Constitution of Kenya (2010)*; Monument and Heritage Act.

⁷⁴ Section 2, *Privatisation Act* (2023).

allude to extremist interpretation as does the World Bank. Furthermore, the Act does not seek to completely exterminate state linkage to the SOEs as does the World Bank as the Cabinet Secretary retains some oversight powers.⁷⁵ This has some striking similarities to the concept of corporatization.

However, this Act precludes national government-owned entities from participating in privatisation.⁷⁶ This reiterates the high threshold of the criteria under the Act for entities of higher strategic importance.⁷⁷ Section 27(3) excludes the KPA from the scope of privatisation owing to its importance as a strategic national asset. It ensures that the Port of Mombasa remains state-owned and protected from unscrupulous private investors. It shows the legislators' commitment to preserving government control thus making an alternative model, as is corporatization, the ideal concept.

2.5 Public Private Partnerships Act, 2021

This Act provides a step in the right direction for corporatization. It discusses in depth the various forms of arrangements of private party participation.⁷⁸ The Act alludes to some key terms of my research i.e., *special purpose vehicle*, and shows some linkage to the ideal corporatization.⁷⁹

The Act defines 'public private partnership' as

“a contractual arrangement between a contracting authority and a private party under which a private party (a) undertakes to perform a public function or provide a service on behalf of the contracting authority, (b) receives a benefit for performing a public function by way of (i) compensation from a public fund, (ii) charges or fees collected by the private party from users or consumers of a service provided to them; or (iii) a combination of such compensation and such charges or fees; (c) is generally liable for risks arising from the performance of the function in accordance

⁷⁵ Section 7(d), *Privatisation Act* (2023).

⁷⁶ Section 27(3), *Privatisation Act* (2023).

⁷⁷ Section 21(2)(c), *Privatisation Act* (2023). The exclusion of KPA means that it continues to operate as a public corporation, with oversight from government bodies such as the Ministry of Transport and Infrastructure. Decisions about port operations remain within public policy frameworks, ensuring that national priorities, including job creation, economic development, and regional integration, continue to be aligned with KPA's operations.

⁷⁸ Second Schedule, *Public Private Partnership Act* (2021).

⁷⁹ Section 2, *Public Private Partnership Act* (2021).

with the terms of the project agreement; and (d) transfers the facility to the contracting authority.”⁸⁰

It prescribes the procedures for the participation of the private sector in the public space through PPPs. It generally makes an exclusion of the Public Procurement and Asset Disposal Act 2015 from applying to a PPP.⁸¹ It does offer a caveat that the said provisions shall apply where there is counterpart funding that is, including public funds, for the public private partnership project.⁸²

Under corporatization, the standout attribute is how the state retains some share capital in the newly formed private company/joint stock company that handles the operations and/or management of the port authority. Owing to this, the principles and directives of the PPP Act are relevant to my research. Additionally, the Act allows the retention of some oversight powers with the contracting authority, which is the KPA in my case, ensuring there is state participation to ensure the safeguarding of the public interests at stake as they enter into commercial agreements with the private party.⁸³ Legally, the PPP Act has provisions that can allow for the potential discourse in transitioning to a corporatization organizational structure.⁸⁴

The Second Schedule informs the various arrangements that can be entered into in a PPP. The KPA is a state corporation that has recently absorbed the Kenya Ferry Services and has a mandate over the Kisumu Port, Lamu Port, and Container Inland Depot.⁸⁵ This is relevant to this discussion because it brings about differentiation in the approaches and arrangements taken up individually in these spaces. Ideally, corporatization is a primary port model. This model is then manifest in various forms depending on the structure and

⁸⁰ Section 2, *Public Private Partnership Act* (2021). The test (a) – (d) is a conjunctive test, requiring the partnership to follow those steps, and (b)(i)-(iii) is a disjunctive test and requires any of the parameters to be fulfilled.

⁸¹ Section 4(2), *Public Private Partnership Act* (2021).

⁸² Section 4(3)(b), *Public Private Partnership Act* (2021). The effect of this proviso is that the concept of corporatization has been brought under the jurisdiction of the PPP Act.

⁸³ Section 22(1), *Public Private Partnership Act* (2021).

⁸⁴ Section 2, 37-67, 68, *Public Private Partnership Act* (2021). These sections are linked with the ‘SPV’ concept which is also outlined in the Abstract of this research as well as the World Bank Port Reform Toolkit. The SPV is the legal entity borne of a successful PPP agreement. It takes the responsibility for raising funds, managing operations, and assuming financial risks related to the new project. It is legally separate/distinct from its parent company, i.e., *the KPA*, and is specifically dedicated to executing the PPP agreement. The difference sets in in the stock sharing ratios between the state (contracting authority) and the private party. This is a foundational element for corporatization which the PPP Act alludes to.

⁸⁵ Kenya Ports Authority, *Organizational Structure, Grading and Staff Establishment*, 2023, 11.

nature of the project in question. BOTs, Greenfields, and Brownfields are various manifestations of corporatization. Ultimately, they will all be brought under one reform scheme, corporatization, but the dynamics vary owing to their “project natures.”⁸⁶

As I conclude the chapter, it is important to note that it is through legal reforms and corporatization in matters of port management that serves as a critical cornerstone in aligning operational efficiency with national and global trade imperatives. As history reveals, a well-structured statutory framework not only fosters economic growth but also secures the strategic autonomy of vital infrastructure, ensuring its sustainability for future generations. This underscores the importance of harmonizing legal evolution with operational innovation, as ports remain pivotal gateways to a nation’s economic and strategic aspirations.



⁸⁶ The Kisumu and Lamu ports and the Kenya Ferry Services constitute different independent projects on their own and as such will attract different arrangements under the Second Schedule. The PPP Act introduces the term ‘**Brownfield project**’ which simply put is the redeveloping, upgrading, or expanding existing infrastructure or facilities. The site exists already and the project involves improving or modifying it e.g., *upgrading an existing port terminal*. However, the World Bank Port Reform Toolkit had made mention of the term ‘**Greenfield project**’ which means a private entity or a public-private joint venture builds and operates a new facility, for the period specified in the project contract, from scratch on previously undeveloped land. Normally Brownfield projects would take the form of a Concession agreements model under a PPP arrangement (which the Second Schedule alludes to) whereas the Greenfield projects would take the ‘Build-Operate-Transfer’ model under a PPP arrangement (which the Second Schedule also alludes to, and what the Adani Group outlined in their JKIA proposal). See ‘Kenyans stand to lose from Adani airport deal: finance guru explains why’ The Conversation, 30 September 2024 --< [22](https://theconversation.com/kenyans-stand-to-lose-from-adani-airport-deal-finance-guru-explains-why-239848#:~:text=Briefly%2C%20Adani%20seeks%20to%20run,know%20as%20the%20deal%20sponsor.> on 15th October 2024; World Bank Port Reform Toolkit 2nd ed, <i>Module 1: Framework for Port Reform</i>, 2017, 6.</p></div><div data-bbox=)

Chapter Three: Global Blueprints of Corporatization: A Comparative Legal Analysis and the Gaps in Kenya's Framework

3.1 Introduction

This chapter continues the conversation in the preceding chapter by attempting to pinpoint the gaps and inefficiencies of the Kenya statutory framework around the adoption and implementation of corporatization. To attempt to address those gaps without having blueprints of successful adoption and implementation would impede a wholesome analysis of our laws to find where the fault lies. The fault is not an erroneous omission or commission but could exist as an unforeseen reality of a changing tide of port management. However, some countries better handle the dynamism of port management and operations and can provide lessons to other aspirational countries.

In this chapter, I adopt a comparative lens exploring the legal frameworks that have successfully facilitated the adoption and implementation of corporatization in other countries. By examining the primary and secondary laws that underpin the operation of the Ports of Singapore and Rotterdam, this study aims to uncover the best legal practices that can be adapted to the Kenyan context; by doing so we identify the gaps in our laws. Both ports exemplify how strategic legal reforms, management structures, and regulatory frameworks can transform SOEs into globally competitive entities. Through this comparative analysis, we will identify the gaps within Kenya's current legal landscape that impede the successful adoption of corporatization.

3.2 Singapore's Corporatization Model: Lessons from a Global Maritime Hub

3.2.1 Historical Development

The Port of Singapore (PSA), like Kenya, had its roots in the colonial timeframe.⁸⁷ Since then, it has become the world's busiest port in terms of container volume.⁸⁸ PSA was formed to take over the functions, assets, and liabilities of the Singapore Harbour Board, and was

⁸⁷ Tan Joanna Hwang Soo, 'Port of Singapore' National Library Board Singapore --<
<https://www.nlb.gov.sg/main/article-detail?cmsuuid=2043f0bb-78b5-4f2f-b021-ecb53bc4fa8b#:~:text=From%20the%20early%20days%20of,in%20terms%20of%20container%20volume.>
>-- on 15th October 2024.

⁸⁸ Tan Joanna Hwang Soo, 'Port of Singapore' National Library Board Singapore --<
<https://www.nlb.gov.sg/main/article-detail?cmsuuid=2043f0bb-78b5-4f2f-b021-ecb53bc4fa8b#:~:text=From%20the%20early%20days%20of,in%20terms%20of%20container%20volume.>
>-- on 15th October 2024.

later corporatized in 1997 and became ‘PSA Corporation’.⁸⁹ In 2003, the PSA Corporation restructured its business by forming a holding company called PSA International Ltd.

3.2.2 Legal Framework and Corporate Structure

Firstly, the Maritime and Port Authority of Singapore Act⁹⁰ (hereinafter referred to as ‘MPA’) is the starting base of our analysis. From the definition of its terms and the powers it is granted, it has a regulatory capacity over the port and maritime sector. This strict role is a product of the legal and corporate structure around the Port of Singapore. In 2003, the government undertook some restructures that led to the formation of PSA International as a separate fully corporatized entity that handles the day-to-day operations of the port.⁹¹

The MPA contains some element of restraint, as it does not allow for overarching state control by the regulatory authority in micromanaging operations and management.

Secondly, the nature of the PPP Model in Singapore is highly structured and strategically integrated into its economic policies.⁹² It is characterized by a very strong retention of government oversight and control over its “contracting party” which includes the GLCs (*companies where the Singapore government has a significant ownership stake, usually through Temasek Holdings, allowing the government to influence the company’s strategic direction. However, they operate as commercial entities with independent management teams and boards of directors*) through their portfolio-managing company.⁹³ At the base of these arrangements, the state retains an ownership stake because it comes in as the “private party” through that portfolio managing company, Temasek Holdings.⁹⁴ This allows for

⁸⁹ ‘Formation of the Port of Singapore Authority’ National Library Board Singapore --< [Parliament of Singapore, Second Reading of the Port of Singapore Authority \(Dissolution\) Bill, 1997, --< \[Official Reports – Parliamentary Debates \\(Hansard\\)\]\(#\) >-- on 15th October 2024.](https://www.nlb.gov.sg/main/article-detail?cmsuuiid=a7193804-3862-4f99-8b3b-46c867073a95#:~:text=In%20the%20face%20of%20increasing,needs%20of%20the%20shipping%20industry.>-- on 15th October 2024.</p></div><div data-bbox=)

⁹⁰ See --< <https://faolex.fao.org/docs/pdf/sin46391.pdf> >--

⁹¹ The relationship between MPA and PSA International is a classic regulator-operator setup, where MPA sets the regulatory framework, and PSA International, as the operator, works within those guidelines to conduct business. Following the creation of PSA International as a fully corporatized and commercialized entity separate from the government-owned enterprise (GLC, which was the then PSA), the government passed the MPA to regulate the port operations with major oversight responsibilities.

⁹² Asian Development Bank, *Public-Private Partnership Handbook*, 2021, 34.

⁹³ Rutten R, Dewulf W, Vanelslander T, and Witlox F, ‘Investigating the efficiency of European port clusters’ *Research in Transportation Business & Management*, 2021, 13 --< <https://www.sciencedirect.com/science/article/abs/pii/S0954349X21001454> >-- on 1 December 2024.

⁹⁴ It is operated under the Companies Act (Cap 50). See *footnotes 41 and 42*.

strategic control of the assets themselves and keeps them in check with the long-term national visions and goals.

The Singaporean model is designed and aligned with their national values and goals. Through Temasek Holdings, the Singaporean government's investment arm, the state can control ownership stakes, which allows them to make important strategic decisions whilst allowing it to run as a commercial entity. This brings about a predetermined share of responsibilities and liabilities which envisage the free-market principles and public interest safeguards as they enter the arrangement, through it, and after it.

3.2.3 Conclusion to the Singapore Model

A gap exists in the Kenya Ports Authority Act's failure to show any form of restraint in consolidating all the regulatory, operational, and management power with the KPA and the concerned Ministry.

Furthermore, the nature of the PPP Act brings a more decentralized process.⁹⁵ This breaks the process and adds multiple checkpoints, which are possible avenues of misappropriation and political interference. This precludes any predetermined share of responsibilities and liabilities, hence damning the integrity and guardianship element of the process. This negative position is also strengthened due to the lack of a separate corporatized government portfolio-managing company that takes the lead in PPP arrangements.

3.3 Navigating Dutch Waters: The Legal Foundations of Corporatization in the Netherlands

3.3.1 Historical Development

Traditionally, the PoR was managed directly by the Municipality of Rotterdam.⁹⁶ It was responsible for oversight and operations. This allowed the local government to control development, but at the expense of public-sector constraints.⁹⁷ In 2004, it was restructured into 'Port of Rotterdam N.V.', which had the legal structure of a limited liability company according to the Dutch Commercial Code.⁹⁸ No other specific port legislation is applicable. The objective of the enterprise was to execute the port business in furtherance of the

⁹⁵ This is characterized by multiple agencies involved at different levels of the process/program and levels of government. This leads to delays, bureaucratic hurdles, and a lack of consistent oversight.

⁹⁶ World Bank Port Reform Toolkit 2nd ed, *Module 4: Legal Tools for Port Reform*, 2017, 136.

⁹⁷ See 'About Us' Port of Rotterdam Website --< <https://www.portofrotterdam.com/en/about-port-authority/our-organisation> >-- on 9th November 2024.

⁹⁸ World Bank Port Reform Toolkit 2nd ed, *Module 4: Legal Tools for Port Reform*, 2017, 136.

strategic position of PoR within the European perspective, both in the short and long term.⁹⁹ This corporatization gave the port a separate legal and financial identity and a business-focused operational model. As a result, it was able to make rapid, market-responsive decisions, enter partnerships, and expand logistics operations.

3.3.2 Legal Framework and Corporate Structure

The nature of the structure of Port of Rotterdam N.V., PoR N.V., is public ownership with private management.¹⁰⁰ This hybrid governance allows it to operate as a public limited company, under the Corporate Governance Code, but a majority of shares are held by public entities, i.e., the Municipality of Rotterdam and the Dutch state. This ensures commercial independence while maintaining public oversight.¹⁰¹

The PoR Authority is not a listed company; hence, liquidity is relatively low as access to the stock is limited. It makes it difficult to enter or exit a position at a desired price. The majority of the shareholders are the Municipality of Rotterdam (70%) and the Dutch national government (30%).¹⁰² Where does the “private” element come in?

Although the port is publicly owned, its operational management functions independently from direct government control, allowing its capacity to function as a private-sector entity i.e., *adapt to shipping trends, pursue commercial partnerships, and undertake infrastructure projects without bureaucratic approvals*. Additionally, it ensures oversight of public interests through the colossus public ownership stake, ensuring the port’s goals

⁹⁹ Article 2(1), *Port Act of Rotterdam* (Netherlands), “*The object of the enterprise is to exercise or cause to be performed the port business and within this framework the furtherance of the strategic position of the Port of Rotterdam within the European perspective, both in the short and long term*”.

¹⁰⁰ See ‘Our Organizational Structure’ Port of Rotterdam Website --< <https://www.portofrotterdam.com/en/about-port-authority/our-organisation/organisational-structure> >-- on 9th November 2024.

¹⁰¹ See ‘Our Organizational Structure’ Port of Rotterdam Website --< <https://www.portofrotterdam.com/en/about-port-authority/our-organisation/organisational-structure> >-- on 9th November 2024.

“*The Corporate Governance Code is applicable to listed companies. Although the Port of Rotterdam Authority is an unlisted company, we have chosen to implement the provisions of the Corporate Governance Code wherever possible and relevant to us. The principles and best practices of the Corporate Governance Code...*”

¹⁰² See --< <https://www.weforum.org/organizations/port-of-rotterdam/> >-- on 9th November 2024.

See --< <https://www.bing.com/search?pc=OA1&q=Port%20of%20Rotterdam%20N.V.%20ownership%20Municipality%20of%20Rotterdam%2070%25%20Dutch%20government%2030%25> >-- on 9th November 2024.

align with the public good. This element comes in when referenced to its independent, business-oriented operational management and corporate governance structure.¹⁰³

Corporatization also brought a decentralized governance structure to PoR. This transformed its management and operational strategies in the following ways:

Board of Directors and Executive Management

The PoR N.V. is managed by an independent board of directors responsible for making strategic and operational decisions. This is a departure from traditional public administration models, which were overly subject to governmental and political influences.

Corporate Governance Practices

The board subjects itself to private-sector governance principles and practices. This is through mechanisms such as performance metrics, financial audits, and transparent reporting, as opposed to government bureaucracy.

Market-Driven Decision Making

It empowers the port's management to respond effectively to competitive pressures and contemporary procedures. This is to stay competitive, favourable, and collaborative with private entities through PPPs.

3.3.3 Conclusion to the Netherlands Model

Drawing from this, a notable gap in the Kenyan legal framework concerning SOEs, such as the KPA, lies in the inability to allow for a decentralized governance system similar to the PoR. Unlike the corporatized structure in the Netherlands which allows the PoR to operate with significant autonomy under a commercially oriented board while maintaining accountability to the public, Kenya's current legal framework lacks such allowance. Instead, Kenyan SOEs remain closely tied to the central government, limiting their ability to pursue market-driven decision-making and apt responses to competitive pressures.

¹⁰³ de Langen P and Heij C, 'Performance Effects of the Corporatisation of Port of Rotterdam Authority' Report / Econometric Institute, Erasmus University Rotterdam, 2013, No. EI2013-06, 1–22 --< <http://hdl.handle.net/1765/38817> >-- on 1 December 2024.

Chapter Four: Pathways To Port Excellence For the Port of Mombasa

4.1 Introduction

Thus far, the research has shown a global inclination towards corporatization as a port management system. Its endorsement of free market principles, systemic accountability, and the decentralization of authority make it a pristine choice. This conveniently ushers in the discussion under this chapter.

The dynamics of implementing corporatization must be balanced with operational efficiency, stakeholder engagement, and financial sustainability. Structured reforms require defined guidelines. The concept of corporatization, though not set in rigid law, has long been shaped by the various port reform modules devised by the World Bank.

These modules analyze specific aspects of the reform process and act as a guide for developing countries to capitalize on their transition as best they can. Through eight modules, they provide a comprehensive framework. The framework begins with a foundational overview of port reform approaches, mentioning the existing models and laying out a potential roadmap for the reforms it envisions. It integrates operational autonomy and governmental oversight to balance profitability with national interests, as seen in PSA International and PoR. Module 4 addresses legal tools, showing the legal frameworks that facilitate effective governance and provide the necessary autonomy for corporatized entities to thrive. In modules 5 through 7, the toolkit delves into the critical operational aspects: financial approaches, organizational structures, and labour reforms (stakeholder engagement). The very subject matter of this chapter. Finally, Module 8 focuses on the implementation of port reforms, offering phased strategies and stakeholder engagement approaches crucial for a successful transition.

4.2 Analysis using the Port Reform Toolkit

4.2.1 Module 1: Framework for Port Reform

It starts with acknowledging the knowledge gap that exists among many policymakers from the unavailability of resources and know-how for a systematic and comprehensive port institutional framework.¹⁰⁴ This gap provides a roadmap that fills out the gaps in knowledge and actual practice.

¹⁰⁴ World Bank Port Reform Toolkit 2nd ed, *Module 1: Framework for Port Reform*, 2017, 3.

It sets the stage for a general plan of going about the reforms and emphasizes setting clear objectives to know where the port intends to go. Private sector involvement is not an end in itself but a means to achieve specific, clear, and well-defined public interest objectives. The reasons for the reforms may be varied and ultimately help understand that the private provision of port services and infrastructure is one tool that public officials can deploy to achieve the desired end. The options for private sector involvement, investment, and risk sharing range from Open entry, Service contracts, Management contracts, Leases, Joint ventures, Control of corporate entities, and Concessions to full divestiture. Hence different forms of private sector involvement have different risk allocation, governmental responsibilities, and oversight.

4.2.2 Module 4: Legal Tools for Port Reform

Transformation often requires new legislation. Because every country has a unique legal and institutional context, it is impossible to present a model law that fits different legal systems. This causes variance of the port law from country to country i.e., *(1) to accommodate new institutional structures that were made necessary by the changed socioeconomic conditions, (2) lays the groundwork for the public sector to participate in port development and infrastructure investments or enables the private sector to carry out port activities that previously resided in a public sector monopoly.*¹⁰⁵

Ports law should establish a flexible business framework that enables a port authority to compete successfully in national and international transport markets. A port law can also set operational conditions for private operators. Ultimately regulating organizational and financial relations between the stakeholders and the maritime administration.

In Singapore, the change/conversion was enabled by two laws enactments.¹⁰⁶ The increased level of terminal operations necessitated the separation of commercial and public services. A new statutory board (Maritime and Port Authority of Singapore, MPA). The commercial and marine activities of the original Port of Singapore Authority were corporatized. The two acts implemented the change; (1) one for the dissolution of the Port of Singapore

¹⁰⁵ World Bank Port Reform Toolkit 2nd ed, *Module 4: Legal Tools for Port Reform*, 2017, 131.

¹⁰⁶ World Bank Port Reform Toolkit 2nd ed, *Module 4: Legal Tools for Port Reform*, 2017, 133.

Authority¹⁰⁷ and (2) establishing MPA.¹⁰⁸ The dissolving act identified a potential successor company that would be the recipient of all the existing property, rights, and liabilities of the Port of Singapore Authority; while the establishing act vested all the powers necessary.

PoR operates as a public limited company (PoR N.V.) in which the Municipality of Rotterdam holds a 70% stake and the Dutch state holds 30%. The port's corporatization is grounded in Dutch law, which enables it to function autonomously within a framework of public accountability. Unlike PSA, which is influenced by Singapore's commercial and investment-driven Companies Act, the Port of Rotterdam operates with a specific municipal ordinance allowing the public ownership structure while granting operational independence.

The KPA operates under Cap.391 with some influence from the Companies Act 2015. However, the nature of the text of Cap.391 limits the level of autonomy KPA has, as it is under close central government control.¹⁰⁹ This lack of a corporatization-friendly framework limits KPA's ability to freely operate at an international level. The KPA Act sets KPA as an SOE but also delegates substantial responsibilities to the Board and MD as any company.¹¹⁰

4.2.3 Module 5: Financial Implications for Port Reform

It primarily focuses on the financial implications of port reforms particularly focusing on PPPs in port management. It addresses the complexities of funding, risk-sharing, and management.¹¹¹ Relevant to the objectives of this chapter, I shall look into the efforts it

¹⁰⁷ Singapore Act 6 (1997). The preface of this law states, “*An Act to provide for the dissolution of the Port of Singapore Authority and for the transfer of its property, rights, and liabilities to a successor company and others, to make financial arrangements for that company and for matters connected therewith, to repeal the Port of Singapore Act (Chapter 236 of the 1985 Revised Edition) and to make consequential amendments to other written laws. Be it enacted by the President with the advice and consent of the Parliament of Singapore, as follows...*”

¹⁰⁸ Singapore Act 7 (1997). The preface of this act states, “*An Act to establish and incorporate the Maritime and Port Authority of Singapore, to provide for its functions and powers, and matters connected therewith; and to repeal the National Maritime Board Act (Chapter 198 of the 1985 Revised Edition) and to make consequential amendments to certain other Acts. Be it enacted by the President with the advice and consent of the Parliament of Singapore, as follows...*”

¹⁰⁹ Unlike the PoR and PSA Int. the KPA lacks the corporatized legal framework that would grant it significant independence in terms of finances, management, and policing. The Companies Act 2015 does not provide for the flexibility needed for public enterprises, SOEs, to pursue market-driven strategies independently.

¹¹⁰ KPA's lack of conformity to private-sector performance standards and competitive management has instead allowed for considerable government intervention. This can sometimes lead to administrative bottlenecks i.e., *tariffs and salaries require ministerial approval.*

¹¹¹ World Bank Port Reform Toolkit 2nd ed, *Module 5: Financial Implications of Port Reform*, 2017, 203.

makes towards improving communication and understanding between public authorities and private sector stakeholders in port development and reform.

PSA International enjoys financial autonomy, facilitated by the legal and corporate structure of Temasek Holdings.¹¹² In a comment made by the Chairman, Mr Peter Voser, he reiterated the operational efficiency and financial successes of the Group. “*The Group delivered a credible performance in 2023 despite numerous challenges, registering 94.8 million Twenty-foot Equivalent Units (TEUs) of containers handled, S\$7 billion in overall revenue, and a net profit of S\$1.5 billion.*”¹¹³

PSA International can independently raise funds, reinvest profits, and enter strategic partnerships. This financial flexibility is instrumental in its expansion strategy, allowing PSA Int. to acquire global terminals and invest in automation and technology.¹¹⁴ This is due to the robust financial framework employed that includes a mix of equity and debt financing. It ensures some financial stability as it funds capital-intensive projects. The corporatized structure reduces the avenues of bureaucratic constraints on financial decisions.

Proper financial sustainability requires a sound and efficient risk management system. PSA Int. employs comprehensive risk management strategies to address financial risks i.e., *Social, Financial, Procurement, Political, Operating, and Hand-Over risks*¹¹⁵ The company utilizes financial instruments such as ‘hedging’ to mitigate exposure to currency and interest rate fluctuations. It also incorporates thorough due diligence and scenario analysis to clock potential risks associated with new projects.¹¹⁶

¹¹² ‘PSA International PTE Ltd and Its Subsidiaries Results’, News Release, 22nd March 2024 --< <https://www.singaporepsa.com/wp-content/uploads/2024/03/240322-PSA-Group-Financial-Results-FY2023.pdf> >-- on 14th November.

¹¹³ PSA International PTE Ltd and Its Subsidiaries Results’, News Release, 22nd March 2024 --< <https://www.singaporepsa.com/wp-content/uploads/2024/03/240322-PSA-Group-Financial-Results-FY2023.pdf> >-- on 14th November 2024.

¹¹⁴ ‘PSA International reports strong financial results amid slight container drop’ Container News, 17th March 2023 --< <https://container-news.com/psa-international-reports-strong-financial-results-amid-slight-container-drop/> >-- on 14th November 2024;

Rutten R, Dewulf W, Vanelslander T, and Witlox F, ‘Investigating the efficiency of European port clusters’ Research in Transportation Business & Management, 2021, 8 --< <https://www.sciencedirect.com/science/article/abs/pii/S0954349X21001454> >-- on 1 December 2024.

¹¹⁵ World Bank Port Reform Toolkit 2nd ed, *Module 5: Financial Implications of Port Reform*, 2017, 215-217.

¹¹⁶ ‘Managing Risk’ Temasek Website --< <https://www.temasek.com.sg/en/about-us/managing-risks> >-- on 14th November 2024.

For PoR, it operates within a financial structure that allows for revenue regeneration, reinvestment, and external financing.¹¹⁷ Its corporatized model helps it to balance commercial profitability with long-term objectives. This is due to the combination of public and private investments. It uses a mix of equity financing, public funding, and debt instruments.¹¹⁸ PoRA manages the port's infrastructure and services while attracting private operators for terminal operations. This opens up the potential for capital-intensive project implementation as the risks are borne by private entities.

Building on the risk discussion, PoR also employs a comprehensive risk management framework to address the various financial and operational risks. Some of the risks include fluctuations in global trade volumes, regulatory changes, and environmental impacts. Environment-oriented risks have been at the forefront of the concerns at PoR.¹¹⁹

KPA's financial operations are constrained by governmental controls, which limit the port's ability to independently generate and allocate funds for infrastructural and technological improvements.

4.2.4 Stakeholder Engagement

The main stakeholders in port reform include: Governments, Transport and terminal operators, Shippers, exporters & importers, Labourers, and Consumers.¹²⁰ As a port transitions, the stakeholders are impacted differently and the dynamics of their interactions can sometimes differ as new dynamics take charge.

As PSA International transitioned to corporatization, stakeholder engagement became crucial. The company implemented labour reforms aimed at enhancing work efficiency and adaptability in a competitive market.¹²¹ This was achieved through upskilling programs and the introduction of performance-based incentives which promoted continuous

¹¹⁷ de Langen P and Heij C, 'Performance Effects of the Corporatisation of Port of Rotterdam Authority' Report / Econometric Institute, Erasmus University Rotterdam, 2013, No. EI2013-06, 1–22 --< <http://hdl.handle.net/1765/38817> >-- on 1 December 2024.

¹¹⁸ See 'About Us' Port of Rotterdam Website --< <https://www.portofrotterdam.com/en/about-port-authority#:~:text=The%20Port%20of%20Rotterdam%20Authority%20lets%20port%20sites%20to%20companies,make%20use%20of%20our%20port.> >-- on 14th November 2024.

¹¹⁹ See --< <https://www.simcotechnologies.com/projects-and-references/port-of-rotterdam-kms-system/#:~:text=Based%20on%20powerful%20algorithms%2C%20that,service%20life%20of%20their%20structures.> >-- on 14th November 2024.

¹²⁰ World Bank Port Reform Toolkit 2nd ed, *Module 1: Framework for Port Reform*, 2017, 1.

¹²¹ 'PSA Group and Singapore Mitigate Impact of Global Supply Chain Distributions' News Release, 10th July 2024 --< <https://www.singaporepsa.com/wp-content/uploads/2024/07/240710-PSA-Group-and-Singapore-mitigate-impact-of-supply-chain-disruptions.pdf> >-- on 14th November 2024.

improvement among employees. PSA International employs various performance metrics to evaluate the financial viability of its operations. They include ROI (Return on Investment), Cash flow analysis, and cost benefits assessments.¹²²

For PoR, there was a collaboration with the terminal operators in their labour reform practices that were aimed at enhancing the quality of service delivery.¹²³ PoRA introduced flexible work arrangements i.e., *shift-work and part-time opportunities*, allowing for better alignment of labour supply with the operational demands.¹²⁴ Additionally, training programs on upskilling focused on digitization to adapt to the automated processes, as well as collaborating with labour unions to secure agreements that well responded to employee welfare.¹²⁵ PoR utilizes various performance metrics to evaluate its financial and operational efficiency. They include ROA (Return on assets), throughput volumes, and revenue per ton. PoRA regularly monitors these indicators to inform their strategic decisions ensuring it continues to operate efficiently.¹²⁶

Finally, the PPPs then bring together the major stakeholders in the industry i.e., *the government, terminal operators, importers, exporters*, etc. As discussed in the previous chapter, the nature of the arrangements allows for collaboration between all the parties in specialized capacities that increase the net productivity and efficiency of the port institution itself. PSA International collaborates closely with the government and other stakeholders to leverage and optimize both financial and operational scales. PoR also exemplifies PPPs by fostering collaboration between the PoRA and private terminal operators. This model facilitates shared investments, balanced risk allocations, and innovative efficiency between the stakeholders at different levels. The regulatory framework established by the Dutch government supports this collaboration, ensuring both public interests and private sector incentives are balanced.

¹²² 'PSA International stays king in Terminal operator rankings' Port Technology International, 11th August 2022 --< <https://www.porttechnology.org/news/psa-international-stays-king-in-terminal-operator-rankings/> >-- on 14th November 2024.

¹²³ See --< <https://www.portofrotterdam.com/en/news-and-press-releases/projects-port-rotterdam-crucial-importance-economy-climate-and-employment> >-- on 14th November 2024.

¹²⁴ See --< https://transport.ec.europa.eu/index_en >-- on 14th November 2024.

¹²⁵ See --< https://transport.ec.europa.eu/index_en >-- on 14th November 2024.

¹²⁶ See 'Port Performance' Port of Rotterdam Website --< <https://www.portofrotterdam.com/en/logistics/port-performance> >-- on 14th November 2024.

KPA's stakeholder engagement is more limited due to the centralized governance and lack of corporatized independence. This limits the capacity to engage with private partners and investors on equal footing, as the government stakes unfair influence.

4.3 Successes, Failures, and Solutions

4.3.1 PSA International: Successes

Corporatization has allowed the port to operate as a commercially competitive entity. Through Temasek Holding's support, PSA Int. has expanded globally, managing terminals in over 26 countries and implementing advanced technologies. This has significantly improved operational efficiency and cargo handling capacity.

Secondly, PSA International operates with substantial financial autonomy, reinvesting profits and maintaining financial independence while achieving high returns on assets, underscoring the effectiveness of a corporatized, government-owned model.

4.3.2 PSA International: Failures and Challenges

Nothing good comes easy, and with every push forward is resistance. Although successful, PSA International occasionally faces the challenge of balancing national priorities with its global commercial focus. The company must align with state interests, which sometimes restrict purely profit-oriented plays in the grand scheme of things.

The transition and conversion from the initial port system to corporatization, characterized by high-level automation and specialization, have challenged workforce management and labour relations.

4.3.3 PSA International: Solutions

These challenges have however not gone unresolved. PSA International has leveraged Temasek Holdings to mitigate the challenges of state influence by having it act as a buffer, enabling greater autonomy while aligning corporate goals with national interests. This limits government interventions.

In response to the labour reform challenges, PSA International has introduced programs to upskill workers and improve workforce adaptability, helping balance automation and the labour skillset.

4.3.4 PoR: Successes

PoR's corporatization has enabled the port to establish successful public-private partnerships, attracting significant private investment and innovative practices in

sustainability i.e., carbon reduction and green shipping. This has helped advance global contribution in the fight against climate change as well as meeting conventional standards under international forums.

By operating as a public limited company, PoR N.V., the port has benefitted from independent, market-driven management while retaining accountability to its public shareholders.

4.3.5 PoR: Failures and Challenges

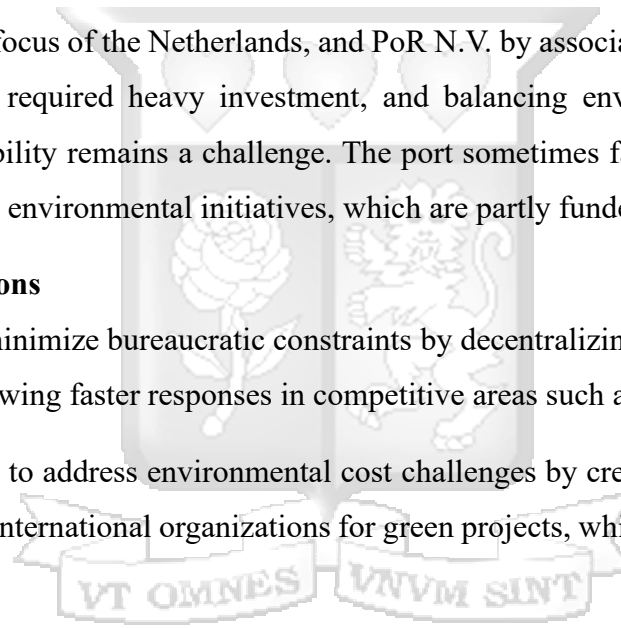
While the corporatized structure has been a success dominantly, the involvement of both the local and national governments can create bureaucratic hurdles in decision making particularly in the PPPs where they interact with the other private stakeholders.

The predominant focus of the Netherlands, and PoR N.V. by association, on environmental improvement has required heavy investment, and balancing environmental goals with financial sustainability remains a challenge. The port sometimes faces pushback on costs associated with its environmental initiatives, which are partly funded by the public sector.

4.3.6 PoR: Solutions

PoR has tried to minimize bureaucratic constraints by decentralizing operational decisions within PoRA, allowing faster responses in competitive areas such as logistics.

PoR has also tried to address environmental cost challenges by creating partnerships with private firms and international organizations for green projects, which helps offset some of the costs.



Chapter Five: Strategic Recommendations and Conclusions for the Port of Mombasa

5.1 Conclusion

This chapter brings the journey of this dissertation to a compelling close, synthesizing and internalizing the critical insights and analyses developed throughout the study. As former late UN Secretary-General Kofi Annan once stated, “*Knowledge is power. Information is liberating. Education is the premise of progress, in every society, in every family.*” Guided by this ethos, this chapter charts a transformative path forward, offering strategic recommendations for the corporatization of the Port of Mombasa. Drawing from the successes and lessons of globally renowned models like PSA International and PoR, it critically evaluates their relevance to Kenya’s distinctive socioeconomic and legal framework. With a vision for revolutionary change, this chapter addresses the gaps identified earlier, presenting actionable solutions that balance operational efficiency, financial sustainability, and inclusive stakeholder engagement. By aligning with international best practices and prioritizing Kenya’s unique needs, this chapter aspires to redefine the future of port management in the region.

From the preceding chapters, it is evident that our laws are flawed. They allow the central government unchecked oversight powers which affect its autonomy. The excessive bureaucratic influence is due to consolidating managerial, operational, and regulatory powers with state actors i.e. *Minister and President*. The same flaws allow for micromanaging and tailoring of ‘self-serving interests’, which result in “...*poor economic performance camouflaged by non-commercial objectives...*” Additionally, bureaucracy also allows for the corruption of the contracting processes in and around PPP arrangements. The preclusion of any predetermined share of responsibilities and liabilities takes away from the integrity and guardianship element of the process.

5.2 Recommendations

The dissertation alluded to an SPV, which would be the vehicle through which an integrated government and private stakeholder engagement would advance corporatization. This model allows for the separation of the port’s core operational and financial responsibilities from government control while ensuring transparency, accountability, and stakeholder inclusivity.

The SPV must therefore be anchored in a robust legal and institutional framework to ensure its sustainability and efficacy. As I reiterated earlier, neither the transition nor the SPV itself can exist in a vacuum; its operations must be guided by amendments to Cap 391, which governs the KPA.

Firstly, the nature of the text of Cap 391 needs revising. The KPA Act was crafted to regulate port operations under a predominantly public sector model. While it has attempted to serve its purpose over the years, lines of weakness have shown in the face of the ever-changing landscape of port management; its provisions are insufficient to support the hybrid public-private operational framework required for a modernized SPV. The overarching state control and consolidation of regulatory, managerial, and operational power with the ministry hinders autonomous operations. The amendments for the incorporation of an SPV necessitates the following changes:

Redefinition of KPA's role as a regulatory authority, overseeing but not directly managing port operations. This separation will ensure that the SPV operates autonomously while remaining accountable to the interests of the people of Kenya.

- a. Amending Section 2, the definition of "Authority" to include its regulatory functions and exclude direct operational roles.
- b. Revise Section 12, to limit the Authority's mandate to licensing, monitoring, and policy implementation, transferring operational responsibilities to the SPV.

Provision for a Special Purpose Vehicle (SPV), within the KPA similar to the PSA International which is a private or joint stock company with legal and financial independence while retaining state ownership.

Provision allowing the SPV to generate, retain, and reinvest profits for operational improvements, similar to PSA Int.'s financial autonomy under Temasek Holdings.

Additionally, introducing financial engineering options that can allow funding for large-scale infrastructural developments without excessive reliance on public funds; through issuing corporate bonds or equity stakes.

Provision for clearly delineated roles and responsibilities between the government and the SPV under the Principal-Agent framework ensuring no overarching micromanagement. In

addition to the roles, a clear ownership framework balances out the public and private stakes in the structure.

Provisionally mandate the SPV to uphold sustainability and community welfare standards, drawing from the PoR model (Environmental and Social Safeguards).

Provision for the adoption of corporate governance principles that streamline with open market practice, including the appointment of an independent board of directors to oversee the port operations autonomously.

Furthermore, the proper leveraging of the Public-Private Partnerships Act for investments. There is a clear disconnect in the execution of the arrangement, through a disjointed process and chain of command, which fails to attract private sector participation in port modernization projects. The situation can be remedied by first ensuring a connected and interlinked system of participation whereby the contracting parties adhere to a neutral tendering system which allows only the best proposal based on an objective metric of predetermined criteria. Additionally, only when the first requirement is met can the PPP Act be utilized to create enforceable PPP contracts with proper financial, operational, and risk-sharing provisions that align with international best practices and free market and corporate governance principles.

Additionally, the research finds that the Build-Operate-Transfer (BOT) models for greenfield projects and the Management-Lease contracts for brownfield projects are most suitable. They ensure private-sector innovation and investment while transitioning ownership back to the state after a predetermined period. For example, the Jawaharlal Nehru Port Trust (JNPT) operates under the Major Port Authorities Act 2021 which allows for PPP models in port operations.¹²⁷ For greenfield projects, JNPT uses BOT agreements, partnering with private entities such as DP World and APM Terminals for terminal development. Older terminals have been managed through lease-based agreements, promoting efficiency without relinquishing ownership.¹²⁸

¹²⁷ See PIB Delhi 19th July 2022 --<
[¹²⁸ 'PSA signs \\$1.3 billion Jawaharlal Nehru Port terminal concession' InfraPPP, 8th May 2014 --<
\[https://www.infrappworld.com/news/megaproject-222-psa-signs-1-3-billion-jawaharlal-nehru-port-terminal-concession?utm_source=chatgpt.com\]\(https://www.infrappworld.com/news/megaproject-222-psa-signs-1-3-billion-jawaharlal-nehru-port-terminal-concession?utm_source=chatgpt.com\) >-- on 18th January 2025. PSA International signed a US\\$1.3 billion concession to develop the fourth container terminal at JNPT on a Design, Build, Finance, Operate, and Transfer \(DBFOT\) basis for 30 years.](https://pib.gov.in/PressReleasePage.aspx?PRID=1842587#:~:text=The%20PPP%20mode%20of%20investment,it%20an%20unique%20container%20terminal.>-- on 18th January 2025.</p></div><div data-bbox=)

In Singapore, the Maritime and Port Authority oversees regulatory functions, while PSA International operates port terminals under a corporatized framework. PSA International has expanded its global footprint through the BOT projects, such as the development of a new container terminal at King Abdul Aziz Port in Saudi Arabia.¹²⁹

Lastly, the time and age we live in require equal and representative participation in matters that affect the public interest. This informs and comments on the importance of stakeholder engagement that is both transparent and accountable. The current situation presents limited stakeholder engagement across all parties. This can be remedied through the implementation of stakeholder councils or advisory boards, comprised of members from each bracket of stakeholders, generally from the local communities, logistics companies, and environmental groups. For example:

Netherlands (Port of Rotterdam)

The PoR has established Stakeholder Councils (RPPC)¹³⁰ and Advisory Boards involving public authorities, private parties, and community representatives. They allow for diverse stakeholder input and alignment with societal interests.

They have, in turn, enhanced trust, minimized conflicts, and ensured long-term sustainability.

Singapore (PSA International)

The MPA regularly conducts public consultations and collaborative workshops with stakeholders, including shipping lines, terminal operators, and local communities – Collaborative Public Engagement. These consultations focus on operational reforms, regulatory updates, and future development plans. The Singaporean Government also facilitates public consultations through the REACH platform, allowing stakeholder participation in policy discussions.¹³¹

¹²⁹ See --< https://www.portstrategy.com/construction-of-new-gulf-terminal-begins/196849.article?utm_source=chatgpt.com >-- on 18th January 2025.

¹³⁰ Rotterdam Port Promotion Council. It connects its members with stakeholders in the global cargo industry through promotional trips, exhibitions, and networking events.

¹³¹ Visit --< https://www.reach.gov.sg/latest-happenings/public-consultation?utm_source=chatgpt.com >-- on 18th January 2025.

It has enabled the parties to have a shared vision for the port's development and growth.¹³²

United Kingdom (Port of Felixstowe)

The Port of Felixstowe incorporates Community Benefit Agreements (CBAs) into its expansion projects, outlining the vast benefits available to the local communities i.e., *infrastructural development, job creation, and environmental safeguards*. It ensures accountability from the private investors involved as the community grows as well.

Thus, drawing from the above examples, Kenya can adopt the following mechanisms and test which piece fits best in our system:

- a). Adoption of Multi-Stakeholder Councils – Include the government agencies, private investors, labour unions, and local communities in decision-making processes.
- b). Institutionalization of Public Consultations – Make the public engagements a legal requirement as is for many constitutionally recognized processes, during corporatization reforms and PPP project planning.
- c). Establish Community Benefit Agreements (CBAs) – Mandate the agreements that ensure tangible benefits for the affected communities to mitigate resistance and foster cooperation.
- d). Leveraging Digital Platforms – Use of online portals for transparent and up-to-date engagement and feedback.

The Port of Mombasa holds the promise of transforming Kenya's destiny, not merely as a gateway for goods but as a beacon of innovation, resilience, and progress. Its future lies not just in its capacity to move goods, but in its ability to inspire confidence, foster collaboration, and adapt to the ever-changing tides of global trade. By boldly embracing transformative models and empowering every stakeholder to share in its vision, we can reimagine the port as a symbol of national pride and regional leadership – an enduring legacy for generations to come. I believe hope is the spark that ignites change, reminding

¹³² 'Maritime Singapore Decarbonisation Blueprint: Working Towards 2050.' MPA Singapore --<
https://www.mpa.gov.sg/maritime-singapore/sustainability/maritime-singapore-decarbonisation-blueprint?utm_source=chatgpt.com >-- on 18th January 2025. The the Maritime Singapore Decarbonisation Blueprint incorporated recommendations from the International Advisory Panel on Maritime Decarbonisation and inputs from a two-month-long public consultation.

us that even the smallest steps can lead to transformative journeys. It is the belief in a better tomorrow that gives us the courage to innovate, to persevere, and to build a future that reflects our greatest aspirations as Kenyans. *“Hope is being able to see that there is light despite all the darkness.”* ~ Desmond Tutu.



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