

# Manitoba Hydro and Electricity Undertakings in Developing Countries: The Case of Nigeria

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Y E M I O K E \*

## I. INTRODUCTION

The Nigerian government's invitation to Manitoba Hydro International Inc. ("Manitoba Hydro") to take over the management of the Transmission Company of Nigeria ("TCN") presents a mixed reality. First, the efficiency of Nigeria's electric power sector has, through over-centralized governance and administration, been made needlessly difficult and shrouded in secrecy. Also contributing to the challenges of the sector is the fact that Nigeria's power sector stands in close proximity to corruption, like its sister oil and gas industry.

Manitoba Hydro has been invited by the Nigerian government to bid for the management of TCN.<sup>1</sup> The corporation's sound financial and technical bids were all the Nigerian government needed to achieve the desired breakthrough in its five-year search for competent firms to manage the most crucial of the successor companies formed in the wake of the electric power sector reforms which began in 2000.

For Nigeria, electricity is indispensable to national growth and economic development,<sup>2</sup> and energy is widely acknowledged by energy

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<sup>1</sup> See Remi Koleoso, "Federal Government, Canadian Firm in N3.7 Billion Naira Power Transmission Deal" *Compass Newspaper* (4 April 2012) 1, 8, and 12. See also Everest Amaefule, "Electricity: Canadian Firm Demands N3.72 Billion Naira to Manage Transmission Company," *The Punch Newspaper* (4 April 2012) at 1, 19.

<sup>2</sup> See Yemi Oke, "Beyond Power Sector Reforms: The Need for Decentralized Energy

experts and scholars as a prerequisite to economic growth and development.<sup>3</sup> Nigeria has made an attempt at keeping pace with global trends in electricity governance through the enactment of the *Electric Power Sector Reform Act 2005* (the EPSR Act)<sup>4</sup> which aims to bring about a private-sector driven electricity sector in the country. But the reality on the ground shows that the pace of reform has been slow and seemingly unattractive to private investors, who still perceive the Nigerian electricity sector as significantly risky. Also contributing to apparently inactive private sector involvement in the new electricity regime in the country is a host of socio-political issues: security, corruption, host community concerns, and the profitability/bankability of electricity ventures or undertakings in Nigeria.

Having won the bid, Canadian energy giant<sup>5</sup> Manitoba Hydro is about to venture into a transmission management contract with the Nigerian

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Options (DEOPs)" (2012) 18:1 *Nigerian Journal of Contemporary Law*, University of Lagos, 67 at 68-71. See also Yemi Oke, "National Grid or National Greed", *The Punch Newspaper* (7 December 2011) 14 and (8 December 2011) 16.

<sup>3</sup> See FT Sparrow; William A Masters and Brian H Bowen, "Electricity Trade and Capacity Expansion Options in West Africa" *Purdue University Institute for Interdisciplinary Engineering*, online at: <<http://www.ecn.purdue.edu/IIES/SUFG>>, at page 5, accessed April 15, 2012. Accordingly, shortages of electricity are a severe constraint on economic growth and poverty alleviation in West Africa. The lack of electricity is often exacerbated by shortages of imported fuel, wood/charcoal, and other forms of energy. The high cost and unreliability of energy supplies is a handicap for industrial development and employment generation, and also for poverty alleviation and public health in the region.

<sup>4</sup> See *Electric Power Sector Reform (EPSR) Act 2005*, Cap E7, Laws of the Federation of Nigeria (LFN), 2004.

<sup>5</sup> Manitoba Hydro is an electric power and natural gas utility company in Winnipeg, Canada, and currently operates 15 interconnected generating stations and serves over 537,000 electric customers throughout Manitoba and 265,000 natural gas customers in various communities throughout southern Manitoba. The company maintains a position of being among the lowest cost providers of domestic electricity rates in Canada. Essentially, it generates nearly all its electricity from self-renewing water power from 14 hydroelectric generating stations, primarily on the Winnipeg, Saskatchewan and Nelson Rivers. Its world-class technical and organizational capabilities have enabled it to perform power sector works in over 60 countries. For detailed facts about the activities of the company and profile see "Manitoba Hydro," online at: <[http://www.hydro.mb.ca/corporate/about\\_us.shtml?WT.mc\\_id=2103](http://www.hydro.mb.ca/corporate/about_us.shtml?WT.mc_id=2103)>, accessed April 6, 2012, and "Manitoba Hydro International," online at: <<http://www.mhi.ca/about/mhi>>, accessed August 23, 2012.

government for improving electricity transmission and a general turnaround of the country's electricity sector. This paper analyzes anticipated challenges and prospects of the project given certain realities and other overarching issues that might impact the deal in the host country, Nigeria.

The objective of this paper is not to scare Manitoba Hydro away from its new electricity undertaking in Nigeria. Nor is it my intention to flag Nigeria as a dangerous zone to would-be direct or indirect investors in electricity, or to undermine technical partnering. There is a dearth of Nigerian literature on electricity law and regulation, and this paper aims to raise the level of consciousness of the parties and other stakeholders to likely challenges to the deal. It outlines some of the factors and steps to be taken in mitigating or neutralizing potential threats, as the project is crucial to the Nigerian people. This paper also hopes to provide Canada, through Manitoba Hydro as its corporate citizen, with an additional opportunity to lead by example in corporate behaviour and social responsibility in developing countries, particularly in Sub-Saharan Africa.

## II. OVERVIEW OF THE NIGERIAN ELECTRICITY REGIME

The history of electricity in Nigeria dates back to 1896 under the colonial rule, when electricity was first produced in the Ijora area of Lagos by the British Colonial Government.<sup>6</sup> The country subsequently witnessed a significant development in electricity generation with the establishment of the Nigerian Electricity Supply Company (NESCO), which commenced operations as an electric utility company with the construction of a hydro-electric power station at Kuru, near Jos in Central Nigeria.<sup>7</sup> NESCO commenced operations in 1929, pursuant to the *Electricity Ordinance Act* of that year,<sup>8</sup> as a hydro-electric power station, serving mainly the northern part of the country.

In 1946, the colonial government overtook electricity governance by establishing the Public Works Department (PWD). Four years later,

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<sup>6</sup> Niger Power Review: "Development of Electricity Industry in Nigeria (1960-1985)," 1985, 1-6.

<sup>7</sup> CM Nkiruka, "Unbundling and Privatisation of the Nigerian Electricity Sector: Reality or Myth? (LL.M paper, CEPMLP, University of Dundee), 2010 at 2.

<sup>8</sup> See *Electricity Ordinance Act of 1929*.

pursuant to the Electricity Corporation Ordinance of 1950, the Legislative Council transferred responsibility for electricity supply and development to a central body known as the Electricity Corporation of Nigeria (ECN).<sup>9</sup> The Niger Dams Authority (NDA) was also established about the same period by an Act of Parliament. The NDA was responsible for the construction and maintenance of dams and other works on the River Niger and elsewhere, and was statutorily responsible for generating hydro-electricity.<sup>10</sup> The energy produced by the NDA was sold to ECN for distribution and sales as utility voltages. This represents a classical regime of electricity governance in which power generation was separated from distribution, as is currently being promoted under the new reforms.

Fusion of generation and transmission in Nigeria began formally on April 1, 1972 when amalgamation of the ECN and the NDA was effected by a military decree, the *National Electric Power Authority Decree No. 4*,<sup>11</sup> to form a new organization known as the National Electric Power Authority (NEPA). NEPA replaced both the ECN and the NDA, and was mainly and exclusively responsible for the generation and distribution of electricity in Nigeria.<sup>12</sup> The rationale offered for the merger was that:

“... It would result in the vesting of the production and the distribution of electricity power supply throughout the country in one organization which will assume responsibility for the financial obligations. The integration of the ECN and NDA should result in a more effective utilization of the human, financial and other resources available to the electricity supply industry throughout the country”.<sup>13</sup>

The objective of the merger of the ECN and the NDA is far from being realized, as NEPA was established as a vertically-integrated monopoly responsible for the generation, transmission and distribution of power in

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<sup>9</sup> The Electricity Corporation of Nigeria (ECN) was created by the *Electricity Corporation Ordinance* No 15 of 1950.

<sup>10</sup> N Manafa, *Electricity Development in Nigeria*, (Rasheen Publisher: Lagos, 1995), at 37-51.

<sup>11</sup> See the *National Electric Power Authority Decree No 4*, Signed on June 7, 1972 [NEPA Decree].

<sup>12</sup> See OI Okoro, P Govender and E Chikuni, “Power Sector Reforms in Nigeria: Opportunities and Challenges” (unpublished paper) 2000 at 1-10.

<sup>13</sup> Niger Power Review: “Development of Electricity Industry in Nigeria (1960-1989)”, 1989, at 10-15.

Nigeria. By virtue of the *NEPA Decree*,<sup>14</sup> all commercial electric supply was the exclusive preserve of NEPA. This monopoly continued until the regime of privatization and commercialization in 1988.

The commercialization and privatization regime<sup>15</sup> listed NEPA as one of the state enterprises to be commercialized. The activities of the Technical Committee on Privatization and Commercialization (TCPC) otherwise called the committee on privatization, led to the enactment of a new *NEPA Act*<sup>16</sup> to replace the old *NEPA Decree* of 1972. The new *NEPA Act* re-established NEPA as a commercial and self-accounting authority with powers to develop and maintain an efficient, coordinated and economically viable electricity supply in every part of Nigeria.<sup>17</sup> NEPA was also vested with powers over all assets of existing institutions and bodies.<sup>18</sup> License could be obtained by an independent body to supply electricity in accordance with the terms of the licensing authority.<sup>19</sup> The *NEPA Act* also regulated and controlled all aspects of electricity in Nigeria: electrical installations, generation, supply, consumption and others. The legal framework of electricity in the NEPA era included the now-repealed *NEPA Act* and the four regulations made pursuant to it.<sup>20</sup>

Aside from the *NEPA Act* and regulations made pursuant thereto, a number of statutes also provided ancillary electricity sector governance during the NEPA era. For example, the *Energy Commission of Nigeria Act*,<sup>21</sup> provides for a body called the Energy Commission of Nigeria with responsibility for coordinating and maintaining general surveillance over the systematic development of the various energy resources in Nigeria. Like the *Energy Commission of Nigeria Act*, the *Utilities Charges Commission Act*<sup>22</sup> vests its Commission with the power to regulate tariffs charged by

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<sup>14</sup> *Supra* note 11.

<sup>15</sup> See the *Commercialization and Privatization Decree No 25*, 1988.

<sup>16</sup> See the repealed *NEPA Act Cap 106*, Laws of the Federation of Nigeria (LFN) 1990.

<sup>17</sup> *Ibid*, s 1.

<sup>18</sup> *Ibid*, s 5.

<sup>19</sup> *Ibid*, s 3.

<sup>20</sup> These regulations are: *Electricity Supply Regulations*; *Electricity Wiring Regulations*; *Electricity (Private licenses) Regulations*, and *Electricity (Annual Returns) Regulations*.

<sup>21</sup> The *Energy Commission of Nigeria Act*, Cap E 10, Laws of the Federation of Nigeria (LFN), 2004.

<sup>22</sup> The *Utilities Charges Commission Act*, Cap U 17, Laws of the Federation of Nigeria (LFN) 2004.

public utilities, such as NEPA. It is instructive to note that the utilities *Charges Commission Act* does not apply under the regime of EPSR Act 2005. A jurist laments:

The legislation in Nigeria, which provides for public utilities, the *Utilities Charges Commission Cap U 17 LFN 2004*, incidentally has no application when it comes to the electric sector. Section 98(5) of the EPSR Act 2005 makes sure of this in the following words - '*The provisions of the Utilities Charges Commission Act... as amended, shall not apply to any person whom a license has been issued under this Act, in respect of the licensed activities of that person.*' ... Although utility regulation is essentially statutory and hence a legislative function, not just any business can be made utility by passing a statute. Regulation of utilities must be in harmony with the state's power to protect health and general welfare of the citizens.<sup>23</sup>

Notwithstanding the above, it needs to be clarified that the *Utilities Charges Commission Act* applied to the regime of electricity governance in Nigeria under the defunct NEPA, as part of the larger regulatory framework of electricity in the country. Also forming part of the old electricity governance regime is the *Environmental Impact Assessment Act*,<sup>24</sup> which proscribes that mandatory environmental impact assessments should be undertaken in respect of the power and related projects specified in the Act.<sup>25</sup> It is implied that this includes undertakings under the transmission management contract of Manitoba Hydro in Nigeria.

The Nigerian regime of electricity governance subsequently witnessed a major shift towards liberalization of NEPA's monopolistic status in the sector. The *Electricity Act* of 1990 was amended in 1998 by virtue of a military decree (now Act).<sup>26</sup> The amendment stripped NEPA of its monopoly, in terms of power generation, to pave the way for independent power producers (IPPs) in the country. The slogan of the new regime is liberalization, which gave rise to full-blown reforms that eventually led to repeal of the *NEPA (Amendment) Act* and regulations made pursuant

<sup>23</sup> Kanyip, BB (J) "Protecting the rights and interests of consumers in the Electric Sector" (paper delivered at the Seminar for Judges on Regulation in the Power Sector organised by the *Nigerian Electricity Regulatory Commission (NERC)* in collaboration with the *National Judicial Institute (NJI)*, held at Asaa Pyramid Hotel, Kaduna, 12-14 July 2010) at 8.

<sup>24</sup> See the *Environmental Impact Assessment Act*, Cap E 12 Laws of the Federation of Nigeria (LFN) 2004 [the EIA Act].

<sup>25</sup> *Ibid*, s 12 of the EIA Act. See also Schedule 13 of the Act which lists "Power generation and transmission" as part of *Mandatory Study Activities*.

<sup>26</sup> See the *Electricity (Amendment) Act*, No 28 of 1998.

thereto, as well as dissolution of NEPA and its replacement with the Power Holding Company of Nigeria (PHCN), as part of the large-scale reform in Nigeria's electricity sector under the *EPSR Act, 2005*.<sup>27</sup>

The current regime of power sector reform began in 2000 with the implementation of the Electric Power Implementation Committee (EPIC). The committee drafted the *National Electric Power Policy (NEPP)* in 2001 leading to the *2005 Act*.<sup>28</sup> The electricity governance model of Nigeria under the NEPA is radically different from the regime of the *EPSR Act, 2005*.<sup>29</sup> A major difference is that the *NEPA Act* intended a wholly state-owned and government-controlled electricity sector in Nigeria. NEPA merely served as a statutory body to effectuate state monopoly in the sector.<sup>30</sup> The *EPSR Act* expressly provides for a liberalized regime of electricity, and promotes competition and level playing field in the power sector. It embraces radical, private sector involvement by way of direct and indirect investments, including technical partnerships like Manitoba Hydro's transmission management deal with the Nigerian government. Such legislation signifies sharp differences and shifts in the old paradigm of a state monopoly of electricity governance in the Nigerian electric power sector.<sup>31</sup>

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<sup>27</sup> *Supra* note 4.

<sup>28</sup> The reform consists essentially of two main components: restructuring and privatization. The objective was to stimulate competition and promote financial accountability by unbundling the old structure under NEPA into three constituent segments, namely generation, distribution and transmission. Under the new regime, the *Nigerian Electricity Regulatory Commission (NERC)* is to serve as the main regulatory body of the reformed electric power sector. The responsibilities of NERC include licensing of successor power companies, establishment of electricity tariffs, enforcement of performance standards, and the protection of consumer rights. See Yemi Oke, *supra* note 2. See also Chigbue, IN, "Electric Power Sector Reform: Privatization, Regulation and Other Challenges" a presentation at the National Workshop on Electric Power Sector Liberalization, 30th March, 2006, online: <<http://worldstagedgroup.com/truecolour/media/11152404144.ppt>>, accessed April 18, 2010.

<sup>29</sup> *Supra* note 4.

<sup>30</sup> See e.g. ss 1, 3 of the *NEPA Act*, *supra* note 16.

<sup>31</sup> See sections 25, 26, 28, 29, and 82 of the *EPSR Act*, *supra* note 4. For example, sections 80 and 81 of the *EPSR Act* provide for consumer protection, and requires high performance standards by the operators to engender maximum utility and safety to consumers of electricity. Regrettably, section 27 of the repealed *NEPA Act* declares that NEPA is not responsible for safety either of the consumers or for the efficiency or

### III. LEGAL ISSUES IN THE DEAL OF MANITOBA HYDRO IN NIGERIA

The deal between Manitoba Hydro and the Nigerian government is one of the strategies for crystallizing the objective of an effective, liberalized and commercially viable electricity regime in Nigeria, with the goal of instilling confidence in global investors. Beyond a doubt, Manitoba Hydro is intended to be show-cased as a beautiful bride and the springboard for a potentially lucrative electric power sector in Nigeria. Given its status, the mere presence of Manitoba Hydro in the Nigerian electricity sector may be enough to convince potential investors that Nigeria's electricity is bankable. While seeking to unravel how bankable it will be in the context of Nigeria as the host nation, the nature of the deal needs to be understood, though the parties are keeping many details of the transaction away from the public scrutiny of analysts and legal scholars alike.

Manitoba Hydro is a Crown corporation and the province's major energy utility, with its head office in Winnipeg, Canada. It is also a major exporter of electricity to wholesale markets in Canada and the mid-western United States.<sup>32</sup> According to its establishing Act, the objective of forming Manitoba Hydro is:

2. ... to provide for the continuance of a supply of power adequate for the needs of the province, and to engage in and to promote economy and efficiency in the development, generation, transmission, distribution, supply and end-use of power and, in addition, are
  - (a) to provide and market products, services and expertise related to the development, generation, transmission, distribution, supply and end-use of power, within and outside the province; and
  - (b) to market and supply power to persons outside the province on terms and conditions acceptable to the board.<sup>33</sup>

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safety of their cables, appliances of consumers. Section 35 of the NEPA Act forbade any other person or state government agency from obtaining licenses to operate power plants or generate electricity, in contradiction with the level-playing, competitive structure under the EPSR Act of 2005.

<sup>32</sup> See *supra* note 5.

<sup>33</sup> See s 2, *Manitoba Hydro Act*, RSM 1987, c H190, CCSM c H190, online at <http://web2.gov.mb.ca/laws/statutes/ccsm/h190e.php> [Manitoba Hydro Act], accessed April 6, 2012.



By virtue of section 4(2) of the *Manitoba Hydro Act*, the corporation is an agent of Her Majesty, the Queen-in-right of the Province of Manitoba.<sup>34</sup> Also critical to the ability of the company to engage in electricity undertakings is the fact that, by virtue of subsection 2(a) of its Act, it shall market and supply power to persons outside the province on only terms and conditions acceptable to the board.<sup>35</sup>

Another important legal issue in the deal is subsection 4(4) of the *Manitoba Hydro Act*. Extraterritorial application of this provision is doubtful, as it prohibits proceedings against the corporation in respect of electricity supply. The section provides:

No action or proceedings by way of injunction, mandamus, prohibition or other restraining process or proceeding of any nature that has, or may have, the effect of terminating, suspending, curtailing, limiting, or hindering the supply of power to any person shall be brought, or may be maintained, against the corporation in any court.<sup>36</sup>

It is doubtful whether a subsidiary like Manitoba Hydro International Inc. can take advantage of the provision of subsection 4(4) on immunity from action created for the benefit of its parent corporation, Manitoba Hydro, due to the principle of separate corporate legal personality of a parent corporation and its subsidiaries. On the flip side, a subsidiary corporation may involve the parent company in liability from foreign operations, particularly in a socially volatile environment like Nigeria and other developing countries. The case of Halliburton scandal in Nigeria is a good example in this regard.<sup>37</sup> One of Halliburton's subsidiaries operating in Nigeria, KBR, got entangled in local corruption. This led to a threat to arrest and charge the former Vice President of the USA for bribery in Nigeria, on the ground that he was the CEO of Halliburton, the parent company at the time the crime was committed. Details of Halliburton bribery scandal in Nigeria are discussed below under Part VII, "*Official Corruption as Militating Factor*".

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<sup>34</sup> *Ibid.*

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

<sup>36</sup> *Ibid* at s 4(4).

<sup>37</sup> For details on Halliburton Scandal in Nigeria see (Text of Report on the Halliburton Bribery Scandal in Nigeria by a Panel Chaired by IGP Mike Okiro) May 2009, online: Nigerian Muse <<http://www.nigerianmuse.com/20100528080207zg/nigeria-watch/official-fraud-watch-towards-fraud-free-governance-in-nigeria/text-of-report-on-the-halliburton-bribery-scandal-in-nigeria-by-a-panel-chaired-by-igp-mike/>>.

If the above provision applies to the deal under review, then Manitoba Hydro cannot be sued or restrained within or outside Canada in respect of its undertakings in Nigeria. It also follows that Manitoba Hydro may not be able to discontinue its transmission management operations in Nigeria on ground of breach by the other party. This is a potentially sensitive conflict of law issue. Though Manitoba Hydro may sue or be sued for breach and get judgment in a Nigerian court, the proceeding or judgment may be unenforceable in a Canadian court. Recognition and enforcement of foreign judgments in Canada posed logistical challenges until the decision of the Supreme Court in *Morguard Investment Ltd v De Savoye*.<sup>38</sup> The court emphasized the importance of comity, and held that Canadian courts should enforce judgments where foreign courts have legitimately exercised jurisdiction by way of a fair process. This is in line with the principle of “full faith and credit,” a phrase coined by the Supreme Court of Canada and clarified in *Hunt v T & N Plc*<sup>39</sup> as a matter of constitutional imperative.

The provisions of subsection 4(4) of the *Manitoba Hydro Act* could potentially prejudice the parties if invoked. As a way out, the parties would need to make appropriate provisions in their agreement in anticipation of subsection 4(4) of the Act. Generally, the board on behalf of the corporation may perform, execute, and carry out, all the duties, powers, and functions imposed or conferred by the Act upon the corporation. The board could also ratify such agreements or terms entered by the corporation including its subsidiaries, and may generally advise the corporation on its undertakings among others.<sup>40</sup> The board cannot, however, override the provisions of the Act. This makes it potentially prudent for the parties to anticipate the implication of the above provisions, or at least seek clarifications or expressly exclude its application in their contract for the management of the TNC by Manitoba Hydro as the Managing Contractor.

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<sup>38</sup> (1990) 3 SCR 1077, 52 BCLR (2d) 160.

<sup>39</sup> (1993) 4 SCR 289, 85 BCLR (2d) 1.

<sup>40</sup> The board may also do all and any acts and things that are necessary for or incidental to the performance, execution, or carrying out, of any such duty, power, or function, including the passing of such by-laws and resolutions as the board may deem advisable. See *Manitoba Hydro Act*, *supra* note 33, s 14. See also s 15(1) for a comprehensive list of other board powers.

As it stands, Manitoba Hydro is the potential adverse party as far as the above provisions and its undertakings or obligations in Nigeria are concerned. The deal between Manitoba Hydro and the Nigerian Government is with the international arm of the company called Manitoba Hydro International, a subsidiary. The company, in addition to the other powers set forth in its Act and subject to the limitations therein, has the capacity, rights, powers and privileges of a natural person to carry out its purposes and objects and to carry on related business ventures, on such terms and conditions as the board deems proper.<sup>41</sup> Any agreement between the Nigerian government and the MHI may be rendered nugatory subject to value and prior consent of the Lieutenant Governor-in-Council.<sup>42</sup>

The deal between Manitoba Hydro and the Nigerian Government is worth N3.7 billion Naira, equivalent to about \$250 Million CAD based on a conversion rate of CAD\$1 to N150.<sup>43</sup> This is above the limit allowable under the *Manitoba Hydro Act*, making it subject to the approval of the Lieutenant Governor-in-Council through its board. Though the deal is still subject to negotiation of the contract fee, the expectations of the Nigerian Government are well captured in the position of the Nigeria's lead agency, the National Council on Privatization (NCP). According to the Director-General of the Bureau of Public Enterprises (BPE), which is the implementing organ and administrative agency of the NCP, the Nigerian Government and people anticipate that the deal will bring about the following benefits: reduction of electricity losses during transmission; provision for the achievement of pre-determined targets that would improve grid security and integrity and general performance; creating incentives for success and provision of efficient management for government investment in electricity; ensuring adequate and equitable generation of dispatch according to a fair merit order based on sound regulatory principles; ensuring fair market settlements between electricity traders; and provision for skills and expertise transfer to Nigerian counterparts who will serve in deputy and other positions to the

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<sup>41</sup> *Ibid* s 15(1.1).

<sup>42</sup> Approval of the Lieutenant Governor in Council is required where aggregate value exceeds \$5,000,000. See *ibid* s 15(1.3).

<sup>43</sup> See Remi Koleoso, and Everest Amaefule, *supra* note 1.

management staff of the Management Contractor – that is, Manitoba Hydro.<sup>44</sup>

The expectations of the Nigerian Government are based on the reputation and capabilities of Manitoba Hydro, which were apparent in the selection process. The company rose to the top in the *Quantity and Cost Based Selection* (QCBS) method of the World Bank adopted for the transaction.<sup>45</sup> Beyond its global rating as world class electricity company, Manitoba Hydro would need more than reputation and technical competence to survive the Nigerian terrain. The Canadian energy firm has recently been warned by the Chairmen of Nigeria's Senate and House of Representatives Committees on Power to learn from mistakes of the past in the privatization programme and to ensure it deploys the best technical and manpower resources available.<sup>46</sup> The corporation may have to choose whether to do business in Nigeria the Canadian way or the not-too-decent Nigerian way, as discussed below in part VIII.

#### IV. THE BANKABILITY QUESTION

The basis of the deal between the Nigerian Government and Manitoba Hydro is the series of legal and institutional reforms in the former's electricity sector.<sup>47</sup> Given the nature of the Nigerian state, a critical question is this: Will the deal be bankable, particularly on the part of Manitoba Hydro as the Managing Contractor? From the Nigerian perspective, the term bankability is a technical word denoting commercial expectations and assurances that an investor will recoup the investment

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<sup>44</sup> *Ibid* at 8.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> See EPSR Act, *supra* note 4. The aims of the Act are multi-faceted. It seeks to provide legal frameworks for the formation of several legal entities (corporations) to take over the assets and liabilities of the old electricity regulatory body and to establish the NERC as the new regulatory agency for generation, transmission and distribution of electricity in Nigeria. The Act also seeks to develop competitive electricity markets; establish the Nigerian Electricity Regulatory Commission; provide for the licensing and regulation of the generation, transmission, distribution and supply of electricity; enforce such matters as performance standards, consumer rights and obligation; and to provide for the determination of tariffs; and to provide for matters connected with or incidental thereto. See also Yemi Oke, *supra* note 2.

capital with gain in the country. Put differently, will the deal be profitable to Manitoba Hydro, accounting for risk, operational difficulties, and high expectations for translating and remaking the Nigerian electricity sector?

Quite frankly, the Nigerian state is characterized by a confluence of factors.<sup>48</sup> Beyond reforms, the success of the deal will depend largely on the ability of Manitoba Hydro to navigate the “Nigerian factors” which often make business undertakings needlessly complex, expensive, and largely unpredictable or un-bankable.

The deal is a manifestation of decentralized electricity governance advocated elsewhere by myself.<sup>49</sup> This approach to management of electricity is suggested for Nigeria due to its practical and functional approach to energy sustainability.<sup>50</sup> The deal should ordinarily be bankable given the global industry standing of the Management Contractor. However, the issue of sustainability or bankability of a project in Nigeria transcends reputational and technical skills of the contractor. In the energy sector, bankability often becomes very crucial, particularly in a developing country like Nigeria.<sup>51</sup>

The process of making investment decisions or management undertakings can be as much idiosyncratic as it is scientific. It often requires piercing through potentially deceptive incentives for a careful consideration of political, social, and other factors before making business decisions.<sup>52</sup> Risk analyses of investment or undertakings in energy sectors

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<sup>48</sup> Economic interests, political forces, capitalists’ entities and other bureaucratic institutions determine the political, economic, social and other laws or policies suitable or adoptable for the Nigerian state at any given time. The same situation manifests vividly in the electricity sector of Nigeria leading to the current reform in the sector.

<sup>49</sup> Yemi Oke, *supra* note 2.

<sup>50</sup> It involves the transfer of responsibility for planning, management and allocation of resources from the central government and its agencies to units, agencies and private sector players. See M Carley & I Christie, *Managing Sustainable Development* (London: Earthscan Publications, 2000) at 126. See also DA Rondinelli & JR Nellis “Assessing Decentralization Policies in Developing Countries” (1986) 4 *Development Policy Review* 3.

<sup>51</sup> Yemi Oke, “Financing Solid Minerals Business in Nigeria: An Appraisal of the Socio-Political Aspects of the Requirements of Bankability” in *Legal Aspects of Finance in Emerging Markets* (Durban, South Africa: LexisNexis Butterworths, 2005) at 107-118.

<sup>52</sup> Robert Pritchard, “Safeguards for Foreign Investment in Mining” in Bastiba, E; Walde, T, and Warden-Fernandez, J, (Eds) *International and Comparative Mineral Law*

like Nigeria tend to give comparatively high attention to the conflict of interest between the parties, especially where it involves multinational corporations like Manitoba Hydro.<sup>53</sup> Research has shown, however, that host community hostility to energy resource projects is gradually becoming significant, if not already an issue of overwhelming importance in countries like Nigeria.<sup>54</sup> Until recently, foreign and sometimes local investors rarely consider host community hostility to energy resource projects to be of any potential hindrance.<sup>55</sup> It has been observed that in energy resources endeavours, a foreign party should be wary of booby trap incentives often provided in the legislation or policy frameworks to attract a deal. As I have written previously:

An average investor knows that investment is easier made than unmade. This leads to piercing through the sometimes deceptive incentives for a careful consideration of the political, social and other factors that would make investing in a country a reasonable business decision. It makes better business sense to invest in a politically stable and socially reliable country with little or no incentives than to embark on the irrational and expensive decision of investing under a turbulent and politically volatile atmosphere under the guise of distorted, wooly "incentives."<sup>56</sup>

## V. CONSTITUTIONAL AND REGULATORY CHALLENGES

Aside from bankability issues that would need to be ascertained and resolved, constitutional and regulatory questions would substantially determine the sustainability or profitability of the undertaking for Manitoba Hydro. The *Constitution of the Federal Republic of Nigeria* (the

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and Policy: *Trends and Prospects* (The Hague: Kluwer Law International, 2005) at 73.

<sup>53</sup> MA Mohamed Salih, *Environmental Politics and Liberation in Contemporary Africa* (Dordrecht: Kluwer, 1999), at 1.

<sup>54</sup> George S Akpan, "Host Community Hostility to Mining Projects: A New Generation of Risk?" in Elizabeth Bastida, Thomas Walde & Janeth Walden-Fernandez, eds, *International and Comparative Mineral Law and Policy: Trends and Prospects* (The Hague: Kluwer Law International, 2005) 311.

<sup>55</sup> *Ibid* at 312.

<sup>56</sup> Yemi Oke, *supra* note 51. Minor edits have been made to this quotation for grammatical correctness by the Manitoba Law Journal. See also Yemi Oke, "Relevance of Derivatives and Related Debt Instruments to Public-Private Sector Financing of Energy Resources in Nigeria" (2012) 1 *NIALS Journal of Law and Public Policy* 183 at 195.

Constitution) provides for decentralized electricity governance.<sup>57</sup> Sadly, most of the policy-makers at the State levels either have yet to pay adequate attention to the constitutional provisions, or have interpreted them incorrectly or erroneously. The relevant provisions of the Constitution are as follows:

13. The National Assembly may make laws for the Federation or any part thereof with respect to-

- (a) electricity and the establishment of electric power stations;
- (b) the generation and transmission of electricity in or to any part of the Federation and from one State to another State;
- (c) the regulation of the right of any person or authority to dam up or otherwise interfere with the flow of water from sources in any part of the Federation;
- (d) the participation of the Federation in any arrangement with another country for the generation, transmission and distribution of electricity for any area partly within and partly outside the Federation;
- (f) the regulation of the right of any person or authority to use, work or operate any plant, apparatus, equipment or work designed for the supply or use of electrical energy.<sup>58</sup>

By virtue of paragraph 14, State governments in Nigeria are at liberty to engage in licensing and regulation of electricity subject as provided by the Constitution:

14. A House of Assembly may make laws for the State with respect to -

- (a) electricity and the establishment in that State of electric power stations;
- (b) the generation, transmission and distribution of electricity to areas not covered by a national grid system within that State; and
- (c) the establishment within that State of any authority for the promotion and management of electric power stations established by the State.<sup>59</sup>

The implication of these sections is that Nigerian State governments may be able both to set up Electricity Regulatory Commissions and to license private companies to engage in off-grid electricity generation, transmission, and distribution as provided by the constitution. It may also lead to a revolution in the power sector as transmission or distribution companies may back off from the national grid to transmit off-grid from State structures to end users. This will eventually make electricity business more competitive and also afford consumers ample options, as seen in the telecom industry in Nigeria.

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<sup>57</sup> See *Constitution of the Federal Republic of Nigeria* (CFRN) 1999 (as amended).

<sup>58</sup> *Ibid*, Schedule II s 13.

<sup>59</sup> *Ibid*, Schedule II s 14.

Though the Constitution places electricity generation, transmission and distribution on the Concurrent Legislative List to enable the Federal and State government to partner in sustainable electricity, what occurs in practice is a negation of the constitutional provisions. At the moment, electricity regulation in Nigeria clearly depicts the opposite of a decentralized scheme envisaged by the Constitution. This is expected to pitch the State governments against the Federal Government unless the regime is sufficiently liberalized to create dual legal frameworks where electricity governance and undertakings co-exist at the state and federal levels. A mutual settlement is expected in case of litigation like the Supreme Court had done in a line of cases involving the States and Federal Government of Nigeria.<sup>60</sup> It is the considered view of this paper that attendant constitutional and regulatory issues in electricity in Nigeria would be resolved without impacting negatively on existing rights, duties or undertakings of the parties engaging in electricity contracts or trading like Manitoba Hydro.

A major step towards easing the likely constitutional and regulatory tussle had recently been taken by the Federal Government of Nigeria. The Nigerian Electricity Regulatory Commission (NERC) has recently issued two regulations to enable communities, states and local governments to generate and distribute electricity within their domains. This is in line with the yearnings of stakeholders and industry experts for decentralization of electricity generation, transmission and distribution in Nigeria.<sup>61</sup> The EG Regulations primarily aim at ensuring generation of

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<sup>60</sup> See e.g. the conclusion reached by the Supreme Court while interpreting S 162 of the 1999 Constitution in the case of *Attorney-General of the Federation v Attorney-General Abia* 335 Ors (2002) 6 NWLR (pt 764) 542 to the effect that, by law, the Federal Government pays all its revenues into the Federation Account to be appropriated yearly under revenue allocation or appropriation statutes. See also the case of *Attorney-General Ogun State v Attorney-General of the Federation* 335 Ors, (2002) 18 NWLR (pt 798) 232, where the Supreme Court relied on the provisions of Ss 7 and 9 of the NNPC Act, to the effect that the state petroleum company, the Nigerian National Petroleum corporation- NNPC does not have to pay all its revenues into the Federation Account. The apex court reasoned that NNPC is excluded to the extent that deduction of expenses from gross income is legal where such items of expenditure are prospectively included in the budget of NNPC as approved by the Federal Executive Council pursuant to s 7(2) of the NNPC Act; or where same is retrospectively included in the audited accounts of the NNPC.

<sup>61</sup> Namely, the *Nigerian Electricity Regulatory Commission Regulations for Embedded*



electricity directly from the distribution system which is connected to a transmission network operated by a system operator licensee, whereas the IED Regulation aims at enabling issuance of licence to construct, own, operate, and maintain, or to procure the construction, operation, and maintenance of an independent Electricity Distribution Network.

By virtue of embedded regulation, investors, communities, local governments and state governments may now apply for licences for the generation and distribution of electricity using existing electricity distribution companies or independent electricity distribution network operators.<sup>62</sup> Chapter VII of the EG regulations prohibits embedded generation licensees from engaging in other regulated activities like distribution, transmission, trading, and system operations.<sup>63</sup> Chapter VII (1)(d) clarifies that a Distribution Licensee may engage in Embedded Generation by incorporating a separate legal entity, and subsequently applying for a licence to be an Embedded Generator. However, the Embedded Generator and its affiliate shall comply with the Affiliate Code of Conduct approved by the Commission.<sup>64</sup> An Embedded Generator may connect to the transmission network whenever the need arises, but an Embedded Generator intending to connect to the transmission network shall apply for an amendment of the terms and conditions of its Embedded Generation licence.<sup>65</sup>

Under the *Independent Electricity Distribution Regulation of 2012*,<sup>66</sup> the NERC may issue a licence to construct, own, operate, and maintain, or to procure the construction, operation, and maintenance of an Independent Electricity Distribution Network (IEDN) subject to some conditions as

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Generation 2012, online: <<http://www.nercng.org/nercdocs/NERC-Regulation-on-Embedded-Generation-2012.pdf>> [the EG Regulations] and the *Nigerian Electricity Regulatory Commission Regulation for Independent Electricity distribution Networks 2012*, online: <<http://www.nercng.org/nercdocs/NERC-Regulation-for-IEDN-2012.pdf>> [the IED Regulation]. See also Yemi Oke, *supra* note 2.

<sup>62</sup> Accordingly, Chapter III provides for the connection of embedded generators to distribution networks. See Chapter III of the EG Regulations, *supra* note 61.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*, chapter VII (2).

<sup>66</sup> See the *Nigerian Electricity Regulatory Commission Regulation for Independent Electricity distribution Networks 2012*.

provided for by Section 8 of the regulation.<sup>67</sup> An Independent Electricity Distribution Network Operation (IEDNO) is an IEDN operator that is licensed by the NERC. Section 5 provides for the structure of IEDNs. According to the section, an IEDN may be anyone of the trio of *Isolated Off Grid Rural*-IEDN; *Isolated Off Grid Urban*- IEDN or *Embedded* IEDN.<sup>68</sup> It also provides that an IEDN may be required by the NERC to have a generator in its network. Where an embedded IEDN does not have a generator, it shall enter into service agreement with the distribution company supplying the IEDN electric power. On the other hand, if the IEDN has a generator, the generator shall be regarded as an embedded generator in the successor distribution company to which the IEDN is connected.<sup>69</sup>

Undoubtedly, the two regulations recently introduced by the Nigerian Government may go a long way in easing tension in the country's electricity sector, but they may not make the sector wholly sustainable. Other social and community issues that impact directly on the sector and, by extension, the success of contractors and other operators within, must be resolved first. The regulations merely attempt to expand electricity generation and supply to end users, and sustainability may remain just a pipe dream without the much needed adjustment in the governance and regulatory frameworks of the electricity sector. Put differently, the problem of over-centralization of management and administrative structures in the sector must be tackled. The success of the two (new) regulations will also depend on how Manitoba Hydro, as a management contractor, is able to manage the transmission components of the embedded and independent regulatory frameworks in Nigeria in addition to other social and community issues.

## VI. THE SOCIAL AND COMMUNITY RISKS

The making of laws in Nigeria and other countries in Africa leaves much to be desired as to social, environmental and other praxes of sustainability. In the case of Nigeria and other developing African nations, social and community factors have shown that law and policy formulations

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<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid*, Chapter I (2).

<sup>69</sup> *Ibid*, Chapter II (5)(a-c).

may not amount to automatic sustainability due to the misapplication of good laws and policies.<sup>70</sup> It is indisputable that good law aids development. But modern scholars of law recognize that law is not itself a magic wand for development. Scholars have shifted emphasis from law to getting the institutions right.<sup>71</sup> The task of the Nigerian government in its electric power sector reforms therefore lies in getting the institutions right, as doing so will also impact on Manitoba Hydro's undertaking as the TCN management contractor in the country.

Getting the institutions right is the best way to achieve success in the Nigerian electricity sector with Manitoba Hydro coming on board as the transmission manager. Relevance of institutional reforms cannot be ignored in the unfolding electricity regime of the country. The much desired foreign direct investment (FDI) and sustainable electricity governance intended under the EPSR Act may come to naught in the absence of well-articulated institutional reforms. These are *sine qua non* to creating a conducive atmosphere for effective regulation and operation of electricity undertakings and instilling investors' confidence in the Nigerian power sector.<sup>72</sup>

The economic and technical sophistications of handling modern electricity inevitably make technical partners like Manitoba Hydro indispensable.<sup>73</sup> However, there is a growing recognition of the fact that

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<sup>70</sup> MA Mohamed Salih, *African Democracies & African Politics* (London: Pluto Press; 2001) at 8, quoting Lopez and Stohl 1989 with approval. See also Stephen Wright, *Nigeria: Struggle for Stability and Status* (Boulder, CO: Westview Press, 1998) at 38, where he describes the Nigerian elites as "personalized and autocratic, [leaving] no room for opposition or dissent".

<sup>71</sup> See Kevin E Davis, "How Important is the Legal System?", *Nexus* (Spring/Summer 2003) 18.

<sup>72</sup> See Michael Trebilock, "Law and Development", *Nexus* (Spring/Summer 2003) 16 at 17. In carrying out the reforms, Trebilock suggests that:

...developing countries should not focus exclusively on enacting or adopting appropriate bodies of laws or regulations designed to vindicate the particular conception of development that motivates them (like mining). Rather, the empirical evidence suggests that it is appropriate to emphasis reforms that enhance the quality of institutions charged with the subsequent administration and/or enforcement of those laws or regulations.

<sup>73</sup> See Marian Radetzki, "Economic Development and the Timing of Mineral Exploitation" in John E Tilton, ed, *Mineral Wealth and Economic Development*

there is no guarantee that international investment or undertaking would be carried out in an environmentally sound or socially sustainable manner by the so-called technical partners.<sup>74</sup> This notion is often based on instances of economic exploitations and unequal bargaining power between developed countries and their developing partners. Consequently, some have argued that expatriation and remittance of income to the parent company over time would exceed the total new investment in a developing country.<sup>75</sup>

As sound as the above argument appears, it gives little regard to the general impact of multinational corporations such as the royalties and taxes paid over time, employment generation, and technology transfers. Though multinational corporations may share some blame in environmental depletion and host communities' imbroglios, the advantages of opening doors to foreign investments and technical partnership outweigh the disadvantages (which may even be attributable to weak institutions of the host country).<sup>76</sup> As far as the deal between Manitoba Hydro and the Nigerian Government is concerned, the latter stands to benefit more.

It takes a great deal of effort to attract some technical partners or foreign investors to developing countries. Often, countries in Africa embark on promotional activities, such as internet advertisement and

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(Washington: Resources For the Future, 1992) 39 at 45.

<sup>74</sup> See Shedrack Agabkwa, "A Line in the Sand: International (Dis) Order and the Impunity of Non-State Corporate Actors in the Developing World" *The Third World and International Order: Law, Politics and Globalization* (Boston: Martinus Nijhoff, 2002) 1 at 4. See also Madeline Cohen, "A Menu for the Hard-Rock Café: International Mining Ventures and Environmental Cooperation in Developing Countries" (1996) 15 *Stan Envtl LJ* 130 at 154.

<sup>75</sup> See Peter B Evans, "National Autonomy and Economic Development: Critical Perspectives on Multinational Corporations in Poor Countries" (1971) 25: 3 *International Organization* 675 at 678-680. See also OE Udofia, "Imperialism in Africa: A Case of Multinational Corporations" (1994) 14:3 *Journal of Black Studies* 353, and Fredrick Cooper, "What is the Concept of Globalization Good For? An African Historian's Perspective" (2001) 100:399 *African Affairs* 189.

<sup>76</sup> For example, the multinational corporations have been accused of complications in civil wars and other civil unrests in some developing countries. See also Michael L. Ross, "Oil Drugs, and Diamonds: The Varying Roles of Natural Resources in Civil War" in Karen Ballentine and Jake Sherman, eds, *The Political Economy of Armed Conflict* (Boulder: Lynne Rienner Publishers, Inc) 47; Noah Novogrodsky "Redressing Human Rights Violations in Sierra Leone" *Nexus* (Spring/Summer 2003) 27.

country-to-country tours, to attract foreign investors or technical partners like Manitoba Hydro. They often engage in other activities to out-do each other, like lowering environmental and other social standards to attract investors.<sup>77</sup> However, given the unfolding realities of globalization, the imperative of strong government to curtail corporations and transactional forces must be balanced against the need for institutional restructuring to reduce over-centralization of governance mechanisms in the electricity sector of Nigeria.<sup>78</sup> The impact of globalization and trade liberalization in Nigeria appears difficult to put in context. Not necessarily because these conundrums have not affected the country one way or the other, but because globalization, free trade and economic liberalization are hotly debated concepts.<sup>79</sup>

Speaking frankly, a development strategy anchored in energy or natural resources utilization in Nigeria may hardly produce a win-win situation between the local owners of the resources and other stakeholders due to the current “political economy of impunity” in terms of resource utilization and sharing of resource benefits.<sup>80</sup> This has continued to pitch the communities against the operators especially multinational corporations like Manitoba Hydro. This is the single most important challenge facing the Nigerian government in its attempt to ensure improved electricity in the country. Still fresh in the public’s memory is

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<sup>77</sup> See Organization for Economic Co-operation and Development, “Environmental Issues in Policy-based Competition for Investment: A Literature Review”, online: OECD <[http://search.oecd.org/officialdocuments/displaydocumentpdf/?doclanguage=en&cote=env/epoc/gsp\(2001\)11/final](http://search.oecd.org/officialdocuments/displaydocumentpdf/?doclanguage=en&cote=env/epoc/gsp(2001)11/final)>.

<sup>78</sup> A critic of globalization sees the phenomenon as having a fundamentally detrimental impact. Outside of the major industrial nation according to Davis, globalization has not brought integration and harmony, but rather a firestorm of change that has swept away languages and cultures, ancient skills and visionary wisdom, being the “hidden backdrop of our era.” See Wade Davis, “For a Global Declaration of Interdependence: The Roots of Disaffection” (2002) 6 International Herald Tribune 8.

<sup>79</sup> While considering the multifarious effects of globalization and other transnational development, Professor Weiss posits: “[A]t the beginning of the twenty-first century, the international community is globalizing, integrating, and fragmenting, all at the same time. States continue to be central, but many other actors have also become important: international organizations, non-governmental organizations, corporations, ad hoc transnational groups both legitimate and illicit, and individuals.” See Weiss, EB, “Invoking State Responsibility in the Twenty-First Century” (2000) 96:4 AJIL 798.

<sup>80</sup> Shadrack Agabkwa, *supra* note 74 at 5.

the sad incident in the oil and gas sector popularly referred to as *Shell vs Ogoni*.<sup>81</sup> Today, tension is far from over in Ogoni land and other oil-producing communities in Nigeria. The trends of community agitation have heightened in Nigeria resulting in vandalism, kidnappings, and lately, terrorism.<sup>82</sup> This brand of community hostility has become a major threat to foreign participation by direct investors, technical partners, and managers alike.<sup>83</sup> This is because in case of revolt, foreign nationals, their families, companies, and their assets are prime targets of the locals in venting their anger and frustration against the government or its policies. More particularly worrisome is the report that the Nigerian power sector reform may have been “hijacked” by entrenched interests like management of the initial holding company called Power Holding Company of Nigeria,<sup>84</sup> the electricity trade unions, and other forces.<sup>85</sup> This makes it the

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<sup>81</sup> Richard Boele et al, “Shell, Nigeria and The Ogoni: A Study of Unsustainable Development” (2001) 9 Sustainable Development 74; AA Idowu, “Environmental Degradation and Human Rights Violation” (1999) 3:1 Modern Journal of Finance & Investment Law 124 at 125-128; Eusebius Mbioaka, “The Ethical Evaluation of Shell BP in Nigeria”, online: Nigeriaworld <<http://nigeriaworld.com/articles/2004/may/191.html>>.

<sup>82</sup> In recent times, Nigeria has witnessed unprecedented suicide bombings by an Islamic sect called the “Boko Haram” in which hundreds of citizens of the country and foreigners have been killed. Highlights of the series of suicide bombings include suicide bombing attack on the UN building in Abuja, the Federal Capital Territory (FCT) of Nigeria, bombing of a Catholic Church in Suleja on Christmas day of 2011, multiple suicide bombs in Kano, suicide bombing of the Police Headquarters, among others. All the bombings have recorded heavy casualties in death and injuries. For details, see “Kano Bomb Deaths Rise to 162, Highest Ever,” *The Punch Newspaper*, (22 January 2012) 1. See also “Multiple Blasts rock Kano, Bayelsa” *ibid* at 4; “Abbreviated Timeline of Boko Haram Attacks”, *ibid* at 5; and “Tension as Two Explosions Rock Bayelsa”, *ibid* at 5.

<sup>83</sup> George S Akpan, *supra* note 54 at 311.

<sup>84</sup> The electricity reform led to organization and series of resulting in the emergence of the *Power Holding Company of Nigeria* (PHCN), the predecessor of the defunct *National Electric Power Authority* (NEPA). All existing commercial undertakings and legal proceedings of the defunct NEPA were transferred to the initial holding company, the PHCN. See ss 3(6), (7) of the EPSR Act, *supra* note 4.

<sup>85</sup> The plan of the Nigerian Government to ensure stable electricity supply may have been hijacked by opposing interest groups in the power sector. See Everest Amaefule and Fidelis Soriwei, “Jonathan’s Power Sector Reform Hijacked: PHCN Management, Unions Team Up Against Reforms; Inadequate Gas, Water Setbacks to Power Industry- Minister”, *The Punch Newspaper* (7 April 2012) 1, 3. Accordingly, entrenched

more crucial that all necessary institutional, logistical, social and other frameworks be put in place if the project management contract for the Transmission Company of Nigeria (TCN) would be bankable and successful.

## VII. OFFICIAL CORRUPTION AS MILITATING FACTOR

Corruption in Nigeria is monumental, and there is no point playing patriotism with truism. In electricity, corruption could take various ways or forms. The example of Halliburton Bribery scandal in Nigeria is a classic case of the devastating extent to which corporate corruption could be stretched by unscrupulous business actors in collaboration with corrupt local officials.<sup>86</sup> Gas development is crucial to electricity generation and transmission. According to the report:

In efforts to harness Nigeria's gas resources, the Federal Government, between 1995 and 2004, awarded about \$6 billion US Dollars in contract to a consortium of four companies including Kellogg of the USA, later known as KBR for the construction of Trains 1-6 of the *Nigeria Liquefied Natural Gas* (NLNG) Project in Bonny, Rivers State. The consortium was registered as *TSKJ*. In the course of investigation into Elf's activities in France in 2003, the former Director of Technip deposed that the TSKJ consortium had secured the relevant contracts through bribery of key government officials and politicians in Nigeria.<sup>87</sup>

Due to this revelation, an investigation commenced in the United States that led to the indictment of Halliburton (then parent company to KBR) on February 11, 2009 for violation of the *Foreign Corrupt Practices Act*.<sup>88</sup> Part of the punishment, in addition to fines, was that the consortium and Halliburton be excluded from all future contracts in the country.<sup>89</sup>

A crucial lesson for Manitoba Hydro to glean from the Halliburton bribery scandal in Nigeria is that corporate ethics may be compromised due to local factors from the country of operation. Halliburton's case is a

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interests are militating against the success of the electricity reforms. The forces identified include management of the initial holding company, the Power Holding Company of Nigeria (PHCN), the various labour unions in the sector and other logistical factors like gas, water supply among others.

<sup>86</sup> See Halliburton Scandal in Nigeria, *supra* note 37.

<sup>87</sup> *Ibid* at paras 4-5.

<sup>88</sup> 15 USC §§ 78dd-1 (1977).

<sup>89</sup> *Supra* note 37.

relevant case study to guide against unethical corporate practices and avoid certain categories of “consultants” and “agents.” This is because KBR admitted at trial to paying “consulting fees” to agents, referred to as “Cultural Advisors,” effectively bribing the Nigerian officials as well as some political entities in the country to obtain the contract.

The Halliburton case also shows that the mess of corporate misdemeanor may impact negatively on the standing of the country of origin of the erring corporation. In Halliburton’s case, the standing of both the United States and Texas were dragged through the mud of bribery as Nigeria’s anti-corruption agency, the Economic and Financial Crimes Commission (the EFCC), threatened to charge former US Vice-President Dick Cheney, who was the CEO of Halliburton Group when the bribery took place.<sup>90</sup>

It is often difficult tracing illicit wealth in Nigeria. In an attempt to track incidents of money laundering and corruption, some scholars have asked the question: where goes the money?<sup>91</sup> Like money laundering, corruption involves concealing or disguising proceeds from illicit activities and legitimizing their future use.<sup>92</sup> A good illustration of corruption in electricity sector in Nigeria is the case and trial of ex-chairman and commissioners of the NERC<sup>93</sup> as well some officials of the *Rural Electrification Fund* (REF) and their collaborating allies, most of whom were

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<sup>90</sup> The case centres on engineering firm KBR, which admitted and pleaded guilty to paying \$180m in bribes to Nigerian officials prior to 2007, when it was a subsidiary of Halliburton. The firm agreed to pay \$579m in fines related to the case in the US. But Nigeria, along with France and Switzerland, has conducted its own investigations into the case. See BBC report, “Dick Cheney faces bribery scandal charges in Nigeria” *BBC News* (2 December 2010), online: BBC < <http://www.bbc.co.uk/news/world-africa-11902489> >.

<sup>91</sup> See Michael Levi, Maria Dakolias and Theodore S Greenberg, “Money Laundering and Corruption” in J Edgardo Campos and Sanjay Pradhan, eds, *The Many Faces of Corruption* (Washington: The World Bank, 2007) 389.

<sup>92</sup> *Ibid* at 389.

<sup>93</sup> See Yusuf Alli, “EFCC Uncovers Fresh N2b Contracts Scam at NERC” *The Nation*, (4 March 2009) online at: <<http://www.nigeriannewsservice.com/news/147/ARTICLE/6409/2009-03-04.html>>. The operatives of the Economic and Financial Crimes Commission (EFCC) raided the office of the Nigerian Electricity Regulatory Commission (NERC) and uncovered fresh contracts scam of \$2 billion, mainly for contracts that were awarded without due process in January 2009 and backdated to June 2008; most of these contracts were for consultancy.



members of the National Assembly of Nigeria.<sup>94</sup> In developing countries like Nigeria and its other African counterparts, aspects of the resource sector like government policies, investment and financing decisions, customer-interfacing activities, and commercial operations of the utilities, procurement, and human resource management are all potential avenues for corruption and operational ineptitude.<sup>95</sup> The nature of the energy sector in Nigeria often generally makes it possible for monumental corruption.

Effective monitoring and supervision of the power sector has been made needlessly difficult through over-centralization of administration. The top-down model of electricity governance in Nigeria encourages corruption and other illegal dealings. Despite the reforms, the electricity industry, like other sectors in Nigeria, has continued to wallow in endemic corruption. The case of electricity officials in Nigeria stated above<sup>96</sup> has shown that beyond reforming the governing laws and rules in the sector, there is need for institutional reforms and the purging of current corrupt attitudinal dispositions of officials if the reforms will have any impact. The success of Manitoba Hydro is also dependent on this factor.

If Nigeria scales the hurdle of creating a vibrant electricity regime under the new legal and regulatory frameworks through the deal with Manitoba Hydro, the social obstacles and challenges of managing and sustaining it will remain due to debased social orientation of infectious, systemic corruption.<sup>97</sup> Available literature shows that this problem is not easily surmountable in Nigeria.<sup>98</sup> African regional instruments<sup>99</sup> and some

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<sup>94</sup> See "The Raging Scandal over Government's Rural Power Projects" online: NBF General Topics <<http://www.nigerianbestforum.com/generaltopics/?p=4113>>.

<sup>95</sup> Mohinder Gulati and MY Rao, "Corruption in the Electricity Sector: A Pervasive Scourge" in J Edgardo Campos and Sanjay Pradhan, eds, *The Many Faces of Corruption: Tracking Vulnerabilities at the Sector Level* (Washington: The World Bank, 2007) 115.

<sup>96</sup> See *supra* note 91.

<sup>97</sup> RG Eggert, "Mining and Economic Sustainability: National Economies and Local Communities" (2001) 19 *Mining, Minerals and Sustainable Development* 1 at 60

<sup>98</sup> See e.g. AK Dias, "International Standard-Setting on The Rights of Indigenous Peoples: Implications For Mineral Development In Africa" (1999) 6 *South African Journal of Environmental Law and Policy* 67 at 94.

<sup>99</sup> For example, the preamble to the *New Partnership for Africa's Development* (NEPAD), October 2001, recognizes the fact that the continent is impoverished by slavery, corruption and economic mismanagement and that only judicious use of enormous natural and human resources of the region could lead to equitable and sustainable

local enactments in Nigeria<sup>100</sup> also acknowledge the challenge posed by corruption and inequitable management of benefits from energy resources. It has been empirically established that resources and civil conflicts are inseparable in developing countries including Nigeria.<sup>101</sup> This further justifies the argument for neutralizing or avoiding corrupt tendencies in the deal between Manitoba Hydro and the Nigerian Government. The Managing Contractor has a greater role to play in this regard to show its Canadian brand in the area of corporate behaviour and socially responsible electricity undertakings, without yielding to the contagion of corruption in the country of operation. It is therefore not out of place to say that Manitoba Hydro should brace for conflict of corporate behaviour and ethics in Nigeria, as its success may similarly depend on ability to resolve likely conflicts of ethics and corporate orientations in such a socially volatile terrain.

## VIII. CONFLICT OF NIGERIAN-CANADIAN CORPORATE CULTURE

Conflict of culture seems inevitable between Manitoba Hydro and the Nigerian partners on how best to effectuate the transaction. It may become apparent sooner or later, that there is a huge disparity between the declared and actual contract sums. Some of the money may be untraceable or be accounted for as “PR”, “consultancy fees” and “facilitation”, as the Management Contractor may have utilized funds for its “sub-consultants” and public relations sub-managers alike. This was the case in the Halliburton’s scandal in Nigeria and same should be avoided by Manitoba Hydro in the country.

The options before Manitoba Hydro appear to be the following: a) doing business in Nigeria in a normal, professional way otherwise referred

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growth. Online: NEPAD <<http://www.nepad.org>>.

<sup>100</sup> See e.g. the *Corrupt Practices and Other Related Offences Act 5*, Laws of the Federation of Nigeria (LFN) 2000. This Act intends to put an end to corruption and related offences in Nigeria, which vices, according to the Act, are already threatening the basis of the country’s unity and development. See the long title of the Act and the address of the Nigerian President, Olusegun Obasanjo at the signing into law where he said: “With corruption, there can be no sustainable development, nor political stability.”

<sup>101</sup> See ML Ross and Noah Novogrodsky, *supra* note 75.

to in the country as “business unusual”<sup>102</sup> or b) yielding to temptations to do business the way of the country of operation, meaning engaging in what in Nigeria is generally referred to as “business as usual.”<sup>103</sup> The conflict may be easily resolved by Manitoba Hydro if able to put its cards on the table for the Nigerian parties in terms of its good corporate governance, values, and ethical standards.<sup>104</sup>

Ordinarily, good corporate governance should pose no difficulty being essentially about doing business in accordance with laws, regulations, and rules. Though at least one study reveals that Canadian regulators, lawmakers, and corporate actors also look towards the United States and United Kingdom for models of corporate governance due to their analogous Common Law legal systems,<sup>105</sup> the reality is that Nigeria is also a Common Law jurisdiction. Despite being a Commonwealth state like Canada and the UK, Nigeria suffers from divergent corporate and business ethics and behaviour due to the infusion of negative social values in corporate dealings.

Conversely, Manitoba Hydro will be expected to display and uphold a higher degree of fair business practices in Nigeria.<sup>106</sup> Fair business and

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<sup>102</sup> The term “business unusual” in Nigeria refers to the ideological basis for standing-out to do business or carry out an undertaking in a professional, just and upright manner without comprising ethical and moral values.

<sup>103</sup> The term “business as usual” generally connotes a perpetration of the old order or norm of doing business or carrying out an undertaking by compromising ethical and moral values.

<sup>104</sup> Principle 10 of the ILO principles has been recommended for Canadian firms like Manitoba Hydro to the effect that “multinational enterprises should take fully into account established general policy objectives of the countries in which they operate. Their activities should be in harmony with the development priorities and social aims and structure of the country in which they operate.” See Kevin McKague and Wesley Cragg, “Compendium of Ethics Codes and Instruments of Corporate Responsibility,” on-line: York University <[http://www.schulich.yorku.ca/SSB-Extra/businessethics.nsf/Lookup/Codes\\_Compendium\\_Aug\\_2003/\\$file/Codes\\_Compendium\\_Aug\\_2003.pdf](http://www.schulich.yorku.ca/SSB-Extra/businessethics.nsf/Lookup/Codes_Compendium_Aug_2003/$file/Codes_Compendium_Aug_2003.pdf)>.

<sup>105</sup> See Randall Morck and Bernard Yeung, *Some Obstacles to Good Corporate Governance In Canada and How to Overcome Them*, online: Task Force to Modernize Securities Legislation in Canada <[http://www.tfmsl.ca/docs/v4\(5\)%20morck.pdf](http://www.tfmsl.ca/docs/v4(5)%20morck.pdf)>.

<sup>106</sup> The concept of “unfair commercial practices” has been developed in some jurisdiction and particularly given a rather broad definition under the EU legislation. According to Article 6(3) of the EU Cosmetics Directive:

Member States shall all measures necessary to ensure that, in the

commercial practices cover both pre-contractual and post-contractual practices.<sup>107</sup> Corporate orientations of Manitoba Hydro, as a Canadian corporate citizen and that of the Nigerian players should differ, though such differences may often reflect cultural and social backgrounds of the respective corporate actors. Thus, if cultural and social orientations of the host state or country of origin of an operator are fair, commercial practices and exchanges tend to be fair, and vice-versa.<sup>108</sup>

## IX. CONCLUSION

Manitoba Hydro Inc. has a legal and moral duty to the Nigerian people by virtue of its contract with the Nigerian Government for the management of the *Transmission Company of Nigeria* (TCN). As one of Canada's leading energy giants, the Managing Contractor is expected to show leadership in global energy while in Nigeria. There are identifiable but surmountable challenges, and its success will depend on ability to manage perceived but avoidable obstacles to its undertakings. This will also go a long way in enhancing or undermining its corporate image as well as that of Canada and Manitoba as its country and region of origin respectively.

Needless to say, in this deal, Nigeria is the underdog. Manitoba Hydro's expertise, reputation and leadership in electricity generation, transmission and other aspects of business are needed by the Nigerian Government and people. It is anticipated that Manitoba Hydro will rise to the occasion and resist alluring demands of unscrupulous Nigerian officials and their local and foreign collaborators who may wish to

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labeling, putting up for sale and advertising of cosmetic products, text, names, trademarks, figurative or other signs are not sued to imply that these products have characteristics which they do not have.

See EC, *Council directive 76/768/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products* [1976] OJ L 262/169, as amended by EC, *Council directive 88/667/EEC of 21 December 1988* [1993] OJ L 151/32.

<sup>107</sup> See Thomas Wilhelmsson, "Harmonizing Unfair Commercial Practices Law: The Cultural and Social Dimensions" (2006) 44:3 Osgoode Hall LJ 461 at 466.

<sup>108</sup> According to Wilhelmsson, *ibid* at 461, the impact of social, cultural and linguistic factors on corporate or commercial is profound, as empirical research reveal that national variations manifest along the lines of cultural factors based on differences in countries based on consumer trust, understandings, rationality patters, values, among other factors.

perpetrate socially irresponsible culture on hapless Nigerian masses though unfair commercial and corporate practices of “business as usual.” The goodwill, image and reputation of Manitoba Hydro may be at stake as a result of its undertaking in Nigeria. It should be able to tread successfully on roads others have trod and failed. The deal between Manitoba Hydro and the Nigerian Government should not be about business fortune, but about the Canadian global brand. For Manitoba Hydro, it would be better not to venture unless the undertaking is geared towards success given a careful consideration of the nature, peculiar factors and circumstances of the deal and country of performance.

