AN APPRAISAL OF THE LEGAL FRAMEWORK FOR THE PRIVATIZATION AND REFORM PROGRAMME FOR THE ENERGY SECTOR IN NIGERIA

BY

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BEING A THESIS SUBMITTED TO THE POSTGRADUATE SCHOOL, AHMADU BELLO UNIVERSITY, ZARIA IN PARTIAL FUFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF THE DEGREE OF MASTER OF LAWS LL.M

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DECLARATION

I hereby declare that this thesis is written by me and it is my own research work. It has not been presented by any previous applicant for higher degree.

All quotations and references are indicated with requisite acknowledgement.

OMOLUABI VICTOR ESQ
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CERTIFICATION

This thesis entitled **"AN APPRAISAL OF THE LEGAL FRAMEWORK FOR THE PRIVATIZATION AND REFORM PROGRAMME FOR THE ENERGY SECTOR IN NIGERIA"** written by Omoluabi Victor Esq., meets the regulations governing the award of the degree of Masters of Laws LL.M of the Ahmadu Bello University Zaria and is approved for its contribution to academic knowledge and literary presentation.

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DEDICATION

This thesis is dedicated to the evergreen memory of my late father, Mr. S.S Omoluabi who taught me the virtue of commitment as well as dedication to duty. He was fully supportive and facilitated my education up till the tertiary level, and to my immediate family, my darling wife, Esther and our children for their perseverance and endurance in the course of my undertaking this research work.

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I wish to express gratitude to my major supervisor, Dr. A. A. Akume who provided invaluable assistance and drew my attention to certain aspects of this research work that required review from time to time. May God bless you.

I must publicly express my profound gratitude to my second supervisor, Dr. A. K Usman for his acceptance to supervise this thesis.

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May I also register my gratitude to my colleagues in the office, Messrs. Chike Okoye, and Eze Johnson and a couple of the other secretarial staff for their respective administrative and scholastic inputs into this research project–may the Lord reward you all abundantly.

I also wish to immensely thank my wife of inestimable value, Mrs. Esther Omoluabi and the children, Comfort (Uje) and Janelle (Ubani) for their patience throughout the long hours I had to dedicate to working on my laptop and PC to ensure that the research work came out within acceptable time frame.

Above all, praises, glory, adoration and appreciation goes to the Almighty God, my saviour and redeemer for favouring me with sound health, intellectual capacity and financial resources that made the dream of undertaking this project (thesis) assignment a reality – May your name alone be glorified.

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1. Petroleum Act 2004
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ABSTRACT

This Research Study titled: "AN APPRAISAL OF THE LEGAL FRAMEWORK FOR THE PRIVATIZATION AND REFORM PROGRAMME FOR THE ENERGY SECTOR IN NIGERIA" was chosen after a careful review of the process and nature of the legal framework put in place in some relevant Nigeria legislations such as the Public Enterprises (Privatization and Commercialization Act) Laws of the Federation of Nigeria (LFN) 2004 (being the governing law on privatization of public enterprises) and the Electric Power Sector Reform Act No 6 2005, which provides the legal framework for the reform of the Energy Utilities in Nigeria. The Research Study explains the rationale for the implementation of the Privatization Programme in Nigeria, discusses the legal framework put in place for its implementation in order to guarantees investors' confidence in the privatization programme and processes which should be open, transparent and sustainable as well as backed up by a strong will demonstrated by the Government at the centre. The Research Study provides an overview of the energy sector in Nigeria to include majorly, the electric power sector and the oil and gas industry and touches on the various policies and Legal Frameworks established for the privatization and reform of the Electricity Sector in Nigeria. In the same vein, the research study also highlight the key provisions of some relevant Laws that guide exploration and production of oil and gas in Nigeria over the past years such as the Petroleum Act, 2004 and the Deep Offshore, Inland Basin Production Sharing Contract Act 2004 (DOA), Petroleum (Drilling and Production) Regulations 1995 to name a few. The Research Study presents a critical appraisal of the various legal provisions that govern the regulatory institutions, evaluates the achievements or performance of the regulatory institutions (in relation to their regulatory mandates) set up to implement the Federal Government of Nigeria's privatization programme for the electricity sector and reform of the sector, and suggest or recommend ways of improving on the effectiveness/efficiency of these institutions going forward. The Research Study stressed the critical relevance of the reform of the Energy Sector in Nigeria to the sustenance and

growth of the national economy and therefore strongly recommend amongst others, the vigorous execution of the FGN's reform programme for the energy sector and the strengthening of regulatory capacities of the agencies and institutions of Government that have been mandated to execute the said reform programmes. The Research Study noted that it was therefore imperative that scheduled timelines for specific privatization milestones are strictly adhered to and pursued with the seriousness it deserve and for the overall benefit of Nigerians. The Nigerian Energy Sector has suffered serious setback arising from poor infrastructure situation and improper handling and management of Energy Utilities hence the call for a reform of the sector, the objective of this thesis is to take an academic excursion into the nature of legal framework that exist and support the privatization and reform of the said Energy sector in Nigeria and make far reaching recommendations on how to strengthen the governing legal framework for the Energy sector in Nigeria which for purpose of this study is restricted to the Electricity Power Sector and to some extent, suggest or make recommendations on the proposed oil and gas sector reform in Nigeria. This research work was chosen with the aim of broadening knowledge and academic literature on privatization and reform of the Energy Sector in Nigeria generally and in particular, provide a medium for making specific academic contributions towards developing legal issues arising from the legal framework for the privatization and reform of the said Energy Sector Nigeria.

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CHAPTER ONE

1.1 GENERAL INTRODUCTION

The Energy Sector in Nigeria is one of the most strategic sectors of our national economy accounting for nearly 85% of the net national resources and income and the Gross Domestic Products (GDP) of the country.

As in other parts of the world, the Energy Sector in Nigeria comprises the following:

a) Electric Power Sector Industry (NESI), and

b) Petroleum (Oil and Gas) Industry

However, this Research Study shall primarily focus on the appraisal of the legal framework for the privatization and reform of the Electric Power Sector in Nigeria while also identifying the challenges in the oil and gas industry arising from the consensus by critical stakeholders that the oil and gas sector requires appropriate legal and regulatory framework for it to function optimally.

Electric power production in Nigeria commenced in 1896[1]. However, it was not until 1929 that the first utility company in Nigeria was established. This company was the Nigerian Electricity Supply Company (NESCO) -

[1] Nigeria Electricity Regulatory Commission (NERC), 2009 Annual Report on "Overview of the Electricity Industry" at Pages 6-7"

NESCO was developed as an hydro power electricity facility in Jos within the North Central Zone of Nigeria[2].

Between 1950s and 1960, the Government promulgated Decrees setting up the Electricity Corporation of Nigeria (ECN) in 1951 with a mandate to control all existing and diesel/coal isolated power plants across the country whilst the Niger Dams Authority was mandated to take charge of the hydropower stations.

Subsequently, in 1972 to be precise, the ECN and Niger Dams Authority were amalgamated to form the National Electric Power Authority (NEPA). The Authority was set up as a monopoly i.e. Wholly/solely in charge of generation, distribution and transmission of power supply services along horizontal and vertical integration of the entire electric power value chain. NEPA was therefore the Government owned wholly integrated monopoly services provider responsible for generation, transmission, distribution and sales/distribution of electricity services.

In spite of the several Federal Government of Nigeria (FGN's) investments in the electric power sector in Nigeria, the sector has persistently posted poor annual performances necessitating a need to reform the sector.

The term "reform" simply means to radically change the situation or condition of a san entity or corporate body. In this context, it connotes the

[2]Nigeria Electricity Regulatory Commission (NERC), 2009 Annual Report on "Overview of the Electricity Industry" at pages 6-7"

"restructuring" and "privatization" of FGN's entities and assets in the energy sector generally.

The reform of the sector actually commenced in the early 1990s but could not be actualized due to lack of clear legal and regulatory framework for the electric power sector and the near absence of political will and commitment by successive administrations/leaderships to "see through" the reform and privatization programme for energy utilities.

However, a first step towards reforming the electric power sector in Nigeria was launched in 1998 with major amendment made to the Electricity Act of 1990 which removed the "monopoly" hitherto conferred on or enjoyed by NEPA as it was shielded from legal actions arising from negligence or damages caused to or committed against third parties: However, NEPA remained a vertically integrated electricity provider maintaining undue dominance over the sector and yet performing below par.

Infrastructure development in the last fifteen years has been neglected or unattended and electric power supply/delivery in Nigeria has been erratic over the years. This was made worst by poor performance of its generation, transmission and distribution sectors of the Electricity Industry. This prompted the civilian administration to declare power supply as one of the national priority projects. The Federal Government, therefore, in 1999, commenced the implementation of the Electric Power Reform with

the approval of a Sector Policy known as the National Electricity Power Policy (NEPP) released by the Government in 2001[3] . NEPP amongst others provided for:

(a) Drafting of a new electricity law to provide the legal framework for the

reform agenda.

(b) Establishing of an independent Regulatory Agency.

(c) Development of a wholesale Electricity Market.

(d) Establishment of a Power Consumer Assistance Fund to ensure and targeted application of subsidies to less privileged Nigerians.

(e) Establishment of Rural Electrification Agency (REA) to manage the Rural

Electrification Fund (RE-Fund) and ensure a focused application on subsidies for the efficient distribution of scares resources in completing rural electrification projects.

Nigeria's hydro and thermal power plants are generating at sub-optimal levels hence, the current capacity of our power plants most times fall below 2000 Mega Watts (MW). This is in contrast with the electricity

[3] The National Electric Power policy (NEPP) was approved as a FGN's blue print for the development of the Electric Power Sector in March 2001. The policy was aimed at the liberalization of the sector and attracting the much needed private sector investment.

power supply situation in year 2007, when the combined installed capacity of the nation's power plants came up to 6,000MW.[4]

Other challenges/problems attributable to power generation over the years include:

a) Inadequate capital expenditure in the sector up till 2008/2009 budgetary years;
b) Inadequate supply of gas being a major feedstock for the thermal power plants;
c) Irregular maintenance and obsolete state of the power plants across the country;
d) Frustrated and non-motivated NEPA/PHCN workforce working under extremely unconducive work environment.

The challenges facing power transmission include but are not limited to the following:

a) Transmission capabilities inefficient and grossly inadequate;
b) Obsolete radial transmission systems/structures which affect system integrity and reliability;
c) Irregular maintenance, lack of prompt or regular upgrades of transmission infrastructure;
d) Vandalization of transmission infrastructure;

[4] Bureau of Public Enterprises (BPE) statement posted on its website: website:www.bpeng.org last dated visited March 10, 2012

e) Absence of modern power dispatch facilities thereby disrupting appropriate power dispatch activities;

f) High technical losses arising from poor transmission infrastructure;

In the area of electricity distribution, the following challenges are prevalent:

a) Inadequate power distribution facilities;

b) Uneconomic/unviable economics of distribution activities and poor revenue collection system. Revenue is usually maintained at a level below actual cost of production thereby making the sector unattractive to investors;

c) Inadequate system planning resulting in fragile and overloaded distribution networks;

d) High percentage of recorded technical and non-technical losses of power along the electricity value chain;

e) Inaccurate/unreliable billing system. This however, is being gradually addressed by the pre-paid metering system which is being introduced nationwide;

f) Vandalization of distribution facilities;

g) Corruption and misapplication, and mismanagement of appropriated public funds/ approved budget dedicated to Electric Power Infrastructure without same resulting in value addition coupled with improperly managed procurement related activities.

In order to holistically address the forgoing lapses in the electricity sector, the FGN is undertaking a reform of the electric power sector. The reform was officially launched in 2001 through the approval of a National Electric Power Policy (NEPP) by the Federal Executive Council. In a nutshell, NEPP being an essential policy directive of the FGN was conceptualized to achieve the following:

a) Reduce FGN's involvement in generation and distribution of electric power through the promotion of private sector participation in ownership and operation of power utilities; and
b) Ensure improved and sustainable investment by the private sector in the sector.

The Reform Programme has three (3) main components namely:

i) Restructuring of the Nigerian Electric Power Sector Industry with the establishment of the Nigerian Electricity Power Regulatory Commission (NERC) as the Sector Regulator and thereby confining the Ministry of Power to its traditional role of policy formulation and preventing it from performing regulatory functions as well as ensuring a reduction in FGN's direct involvement in commercial activities in the electric power sector.

ii) Transformation or Unbundling of the National Electric Power Authority (NEPA) into Power Holding Company of Nigeria (PHCN) by splitting the National Electric Power Authority (NEPA) into

successor companies, district or business units and ensuring they are corporatized as stand alone limited liability companies with autonomous spheres of operations;

iii) Privatization of generation and distribution companies that have taken over the assets, staff, and operations of PHCN Business Units. The National Council on Privatization (NCP) and the Bureau of Public Enterprises (BPE) have in line with the Electric Power Sector Reform (EPSR) Act 2005, called for Expressions of Interest (EOIs) from private sector organizations willing to invest in the generation and distribution companies to do so under the FGN's privatization programme thereby setting the stage for the gradual divestiture of FGN's interest in PHCN successor companies.

The privatization of the Nigerian Electric Power Sector is considered to be the most important and far reaching privatization programme in Nigeria[5]. An estimated 100 million Nigerians are without access to electricity supply. A further 30 million Nigerians have connections to electricity but receive low and intermittent supply.

Owing to the foregoing, many commercial and industrial users self generate their own supplies or operate back-up power supply.

Therefore, the privatization project, by encouraging investment is intended to increase both access and supply of electricity.

[5] Nigeria Electricity Regulatory Commission unpublished Annual Report - 2009

Recently, President Goodluck Jonathan on 26th August, 2010, launched the most comprehensive power sector reform programme tagged: "*Roadmap for Power Sector Reform*"[6] aimed at restructuring the power sector and thereby achieving stable electricity in Nigeria. Mr. President identified the following as factors that had for long militated against stable power supply:

a) Absence of a sustained and deliberately deployed long term power development strategy;

b) Under exploitation of the nation's abundant energy endowment; and

c) Absence of adequate implementation of reform

Mr. President's Roadmap to Power Reform identified the highlights to include:

i) Divestiture of Seventeen (17) of the PHCN successor companies to private investors by the National Council on Privatization/Bureau of Public Enterprises (BPE) under the National Privatization Programme.

ii) Introduction/Establishment of appropriate pricing regime for daily consumption of electricity power to be introduced by Nigerian Electricity Regulatory Commission (NERC).

iii) Establishment of a bulk purchaser company that will act as an intermediate agency between generation and distribution companies

[6] Blue Print for Roadmap for Power Sector Reform unpublished prepared by Presidential Implementation Committee on Power Sector Reforms- 2010

in the purchase of generated power from generation and distribution companies;

iv) Provision of FGN credit enhancement to ensure that the Electricity Bulk Purchaser company- i.e. the Nigerian Electricity Management Company Limited (NELMCO) is credit worthy as it carries out its statutory mandate; and

v) Clarifying and strengthening the licensing regime for private operators in the industry to enable them recoup their investment.

1.2 STATEMENT OF THE PROBLEM

Over the years, the Nigerian Electric Power Sector Industry (NESI) as well as the Oil and Gas Industry in Nigeria (which together and for the purpose of this Research Study) make up the Energy Sector, have not fully realized their potentials.

The existence of inappropriate national policy as well as adequate and robust legal and regulatory regimes to govern the development of these sectors, unclear delineation of roles and responsibilities for regulatory institutions in the sectors often created difficulties for industry stakeholders who had to deal with issues arising from overlapping statutory roles of institutions and authorities operating in the Energy Industry from time to time.

Before the enactment of the Electric Power Sector reform Act No 6, 2005, NEPA (now PHCN) operated as a sole electricity provider or assumed the

role of a vertical and horizontal monopoly provider of electricity service to the nation.

On the other hand, the Petroleum Industry was regulated by the Inspectorate Division of the Ministry of Petroleum Resources as well as its commercial operations.

Prior to the establishment of the Nigerian National Petroleum Corporation (NNPC) in 1977, and the separation of its commercial functions from regulatory roles, which is now being handled by the Department of Petroleum Resources (DPR) that presently regulates activities in the upstream petroleum sector, the roles of the various bodies set up by Government for the Oil and Gas Industry were opaque and devoid of clarity, hence the roles of the institutions were sometimes confused.

The non-establishment of clear regulatory and commercial institutions to handle specific aspects of downstream, midstream and upstream petroleum operations resulted in the poor performance of the industry as well as its non accountability and ineffective activities over the years.

The reform of the energy sector and its privatization was therefore targeted at making the energy sector to attain improved efficiency, minimize costs and earn adequate return on investments thereby bringing the sector back to the path of profitability.

1.3 AIMS AND OBJECTIVES OF STUDY

The Research study is aimed at reviewing and discussing the various legislations that provide legal and regulatory framework for the operation of the electric sector industry and to some extent, appraise the ongoing effort to privatize and reform the oil and gas sector in Nigeria.

The Research study is also intended to highlight some of the key provisions in some of the legislations that have brought about changes in the operation of the Electric Power Sector in Nigeria, and the oil and gas industry in Nigeria:

a. Petroleum Act Laws of Federation of Nigeria 2004
b. Electric Power Sector Reform Act 2005
c. Federal Executive Council Approved –National Gas Master plan
d. Constitution of the Federal Republic of Nigeria (LFN) Cap 32 2004.
e. Companies Income Tax Act (CITA) LFN Cap 21, 2004
f. Petroleum Profit Tax Act (PPTA) LFN Cap 13, 2004
g. Nigerian National Petroleum Corporation Act, LFN 2004.

At the end, this Research Study would have succeeded in making some contribution to academic research in the area of governing legal framework for the Electric Power Sector in Nigeria and the Oil and Gas Sector and make some relevant recommendations that will strengthen the regulatory institutions created under these laws with a view to increasing

their overall efficiency and positive impact on this strategic sector of our national economy.

These laws have been promulgated to sustain and deepen activities in the Energy Sector and it is hoped that the passage of the Petroleum Industry Bill in to law by the National Assembly will usher in the desired transformation of all segments of the oil and gas sector value chain would have been attained and the sector made competitive and attractive to investors.

1.4 METHODOLOGY

The methodology adopted in this Research Study is doctrinal as research materials were obtained through data gathering primary from the main statute the Electricity and obtaining information from text books, journals and previous legal literature on the subject.

In addition, this Research Study also benefited from personal observations and knowledge gained on this subject through empirical examination undertaken by the Researcher.

1.5 SCOPE AND LIMITATION OF STUDY

The Research work covers current developments in both electric power and oil and gas sectors. It is interesting to note that most of the proposed laws that will ultimately change the face of the Energy Sector are awaiting passage into law by the National Assembly. The final position of Government and indeed the National Assembly cannot be speculated.

However, we are convinced that going by the general policy direction of the Nigerian Government in evolving a sustainable power sector industry with improved power generation and reliable energy performance sector. Therefore, there is the constraint of time and inadequate research materials on the Nigerian Power Sector reform and privatization as well as petroleum industry reforms.

1.6 LITERATURE REVIEW

There is presently inadequate literature on the Nigerian perspective to the legal and regulatory framework for the Energy Sector Reform and Privatization Programme being implemented by the Federal Government of Nigeria (FGN).

However, we shall review a few of the previous research studies, papers, presentations and journals on this subject and in the process, provide the limitations arising from these prior literature or works.

Mrs. Irene Chigbue,[7] a seasoned bureaucrat,[8] defines privatization as the transfer of ownership of assets from the public sector (Government ownership to private ownership)thereby making the private sector the key engine for economic growth.

[7] CHIGBUE.I.N: former DG Bureau of Public Enterprise (BPE) : 2006- "the Legal Aspects and Implementations of Privatization in Nigeria at PP 1 and 4 being text of a presentation at the Nigerian Bar Association, 2006 Bar week

[8] CHIGBUE.I.N: former DG Bureau of Public Enterprise (BPE) : 2006- "the Legal Aspects and Implementations of Privatization in Nigeria at PP 1 and 4 being text of a presentation at the Nigerian Bar Association, 2006 Bar week

She listed the various laws that provide the legal framework for the economic reform agenda of the previous administration of former President Olusegun Obasanjo to include inter-alia:

a. The Bureau of Public Enterprises Act No 78 of 1993 repealed and replaced by the Public Enterprises (Privatization and Commercialization) Act No 28 of 1999.
b. Nigerian Investment Promotion Act No 16 of 1995 re-enacted as NIPC Act 2004.
c. The Foreign Exchange (Monetary and Miscellaneous Provisions) Act

   No 17, 1995 passed into law in 1995 to replace the Exchange Control Act (Cap 113, LFN, 1990).

She noted that the extant law governing the Privatization Programme in Nigeria made provision for the establishment of two main bodies namely:

a. The National Council on Privatization (NCP) – is the policy making organ of the Bureau chaired by the Vice-President with membership drawn from organized labour, Chamber of Commerce, Ministry of Finance and the organized private sector; and
b. The Bureau of Public Enterprise (BPE) being the implementation agency for the privatization and reform programmes for public enterprises in Nigeria established pursuant to the enabling law, i.e.

the Public Enterprises (Privatization and Commercialization) Act 1999.

The above paper presented by Chigbue I.N., does not cover specific issues generated by this research study- as the current research work focuses on appraising the performance of the legal and regulatory framework established for the energy sector in Nigeria with a view to ensuring improvement in the performance of the sector.

In a related paper[9], Messrs. Babalakin & Co[10] defines "privatization" as the process whereby the FGN or its agencies relinquish their equity or interest in enterprises which it wholly or partly own.

Furthermore, the law firm observed that in the 1980s, it was desirable for the FGN to invest in strategic sectors of the economy in order to take charge of the commanding heights of the national economy.

Babalakin & Co also posited that several laws have been promulgated to govern the Nigerian privatization programme, the most fundamental being the 1999 Constitution of the Federal Republic of Nigeria.[11] The law firm expressed doubts whether the Public Enterprises Privatization and Commercialization Act 1999 can stand in the light of the inconsistencies in its provision viz-a-viz the provision of the 1999 Constitution particularly

[9] Babalakin & Co: "Legal Dynamics of Privatization in Nigeria" posted on website: http://www.babalakin&co.com/documents last visited:20th March, 2012

[10] Messrs Babalakin & Co is a reputable Commercial Law firm, with head office in Lagos and branch offices in Port-Harcourt and Abuja.

[11] Sections 43 & 44 of the 1999 Constitution- provide for the right of the individuals to own moveable and un-moveable property in Nigeria. As a corollary to these Constitutional guarantee individual properties cannot be acquired by government without payment of compensation.

Sections 28(3) of the Public Enterprises Privatization and Commercialization Act of 1999 that provides inter-alia that the decision of the Arbitration Panel shall be binding in any dispute between NCP & BPE and bars any appeal to any other Court.

The other laws examined in Babalakin & Co's paper is (Foreign Exchange Monitoring and Miscellaneous Provision Act 1995). The firm highlighted the failure by Government to create a transparent mechanism for the implementation of the privatization programme through proper valuation of shares in the previous privatization exercises under the repealed privatization laws, accounted for the set back that characterize that programme.

The paper concluded by stating that for the privatization programme to succeed in Nigeria, the laws and the processes should be more original and tailored to the expectations and peculiarity of Nigerians.

Other positions taken by previous literature on the Energy Sector include the views of: Messrs. Gbenga Biobaku & Co:[12] in their Newsletters of August 2010 at page 2 thereof, the firm observed in relation to legal framework for the power sector as follows:

That Government has decided to follow through the reform of the electric power sector through the enactment of the EPSR Act 2005 which already

[12] . Gbenga Biobaku & Co. Barristers and Solicitors August 26,. 2010 Newsletter page 2 on Nigeria Launches Roadmap for Power Sector Reform. Posted on www.gbc-law.com last visited on March 10th, 2012

provides an enabling regulatory framework for the private sector participation in the electricity industry.

The EPSR Act, the firm noted gives legal authority and support to the restructuring of the single and vertically integrated Government owned power sector utility and the unbundling of the said power utility (PHCN) through the creation of the initial holding company (PHCN) to take over the assets, liabilities and employees of NEPA followed by the unbundling of PHCN into 18 successor companies and the partial transfer thereto of the asset, liabilities and staff of PHCN to the said successor companies and the establishment of NERC.

The law firm observed that the Act further stipulates that all electricity generated in the country must be wheeled through a transmission grid and allotted to distribution companies.

Currently, NERC is limited to licensing off grid producers that are permitted to establish mini power plants of less than 20MW. Where excess capacity is available, it can be transmitted through the national grid for onward sale to other parts of the country.

Messrs. Gbenga Biobaku & Co. concluded the Newsletter by expressing optimism that the present civilian Administration's determination and effort will result in increased access to affordable and reliable electricity to all Nigerians and also create an environment that would attract private sector participation in the power sector.

J. Ikeme and Obas John Ebohon in their article available on line (31st January 2004). stated[13]:

"Nigerian's electric power sector requires substantial reforms if the country's economic development and poverty eradication programme is to be realized''.

It is obvious that whilst Gbenga Biobaku & Co's highlighted the fact that EPSR Act favours a sequenced unbundling of PHCN, the other authors discussed the impact, effective regulation of the sector could have on the sector reforms and by extension, positively impact on the overall growth of our national economy.

Furthermore, Ikeme .J. and Obas J. E. in their article[14] observed that Nigeria's electric power sector requires substantial reform if the country's economic development and poverty eradication program is to be realized.

They observed also that the country faces serious energy crisis due to declining electricity generation from domestic power stations which have become dilapidated, reflecting their poor state of maintenance and the gross inefficiency of the public utility providers.

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[13] J. Ikeme and Obas J Ebohon on 31st January 2004 on Nigeria's electric power sector reform: what should form the key objectives posted on http://www.sciencedirect.com/science/article/pii/S0301421503003574 last visited on March 10th 2012

[14] Ikeme L. and Obas J.E. 2005: "Nigeria's Electricity Power Sector Reform: what should form the key objectives posted on http:www.sciencedirect.com/articles/so301421503003574. Last visited on March 10,2012

These previous papers only analyzed major shortcomings of the current Electricity Power Company (PHCN) and presented the central issues that should form the plank of the Electric Power Sector Reform Programme. They listed these as corporatization of the Electric Power Sector Industry; increasing electricity access and power delivery capacity, highlighted the constraints to the power industry efficiency. The paper under reference (by J. Ikeme and Obas J Ebohon) concluded by stating that efforts at reforming the energy sector will not yield the desired result if the end user inefficiency is not curtailed.

Furthermore, Ikeonu .I.[15] in an article posted on the website of the Institution of Public- Private Partnerships (IPP3) touches on the licensing regime/ framework as a tool for attracting investment into the Power Sector. She noted that the EPSR Act empowered NERC to license participants in the following activities in the industry namely[16], Electricity generation in excess of 1MW, electricity distribution in excess of 100KW, electricity transmission, electricity trading, system operation and electricity installation and wiring.

She listed the procedure for the grant of license and concluded by stating that with the establishment of NERC, the reform of the Power Sector in Nigeria has indeed become a reality.

[15] Ikeonu .I. : Nigerian Electricity power Sector Reform: establishing an effective framework as a tool for attaining investment posted on http.www. last visited on March 10th, 2012

[16] Section 62 of the Electricity Power Sector Reform Act No 6 of 2005

On their part, Messrs. Banwo & Ighodalo (solicitors)[17] in a presentation to NERC organized seminar posited that the key priority objectives of the Legal framework for the Electricity Sector in Nigeria is to "create efficient market structures, within clear regulatory frameworks, that encourages more competitive markets for Electricity generation and sales (marketing) which, at the same time, are able to attract private investors and ensure economically sound development of the system"

It is noteworthy that none of these previous papers or research efforts critically appraised the roles, functions and responsibilities of NERC, almost seven (7) years after its establishment and also did not adequately address the challenges the Energy Sector faces in terms of the adequacy or otherwise of its legal and regulatory framework and suggest positive way forward.

1.7 ORGANIZATIONAL LAYOUT OF THE STUDY

The research study is divided into six chapters.

Chapter one introduces the thrust of the research study as well as traced the history of the energy sector in Nigeria to its formative years and the transformation of the Niger Dams Authority to Electricity Corporation of Nigeria and thereafter to NEPA and now PHCN. The chapter defines the

[17] Messrs. Banwo & Ighodalo; 25th January, 2007 : Legal & Regulatory Framework for the Nigerian Power Sector, Paper presented at a seminar on financing investment opportunities in the new Power Sector in Nigeria.

reform programme within the context of the Nigeria energy sector industry. It also identified the objective of the energy sector reform programme.

Chapter two discusses the general principles underpinning the Oil and Gas/ Petroleum Industry in Nigeria over the years. The chapter analyzes the various contractual and legal framework (such as the joint venture partnerships and production sharing contract as well as licensing regimes) governing the implementation of Oil and Gas exploration and production activities in Nigeria.

Chapter three deals with the existing framework for the privatization and reform of the Electric Power Sector in Nigeria. It appraises the roles of existing institutions and bodies set up by law and critique their performance.

Chapter four appraises the current efforts at privatizing and reforming the energy sector particularly the power sector. It enumerates the various forms of privatization and assesses government new role in power sector.

Chapter five deals with the historical perspective to the Oil and Gas sector reform which has led to the submission of the Petroleum Industry Bill to the National Assembly for onward passage into law. The paperevaluate the roles of likely institutions that may emerge post Oil and Gas sector reform.

Chapter six being the last chapter covers recommendation and conclusion.

CHAPTER TWO

2.1 OVERVIEW OF THE PETROLEUM INDUSTRY IN NIGERIA

The term "Petroleum" has been variously defined in the relevant statute i.e. the Petroleum Act. 2004 as "mineral oil/or any related hydrocarbon or natural gas as it exists in natural state in situ.

As far back as the Minerals Oil Act 1914, a Nigerian Statute was enacted to govern the exploration, production and refining or distribution of petroleum products.

Although pioneering exploration and production activities in the petroleum industry commenced in 1908, this was spearheaded by the German firm called- the Nigerian Bitumen Company Limited. However, with the outbreak of the First World War these initial activities were stunted or checkmated.

In 1937, a company Known as Shell D'Arcy commenced oil and gas exploration in the area now known as the Niger-Delta region. They too were interrupted by the 2nd World War.[1]

With the renewed entry of British Petroleum and Shell Petroleum Development Company led to the commercial finding of oil in Olobiri, in modern day Bayelsa State in 1956[2].

In the meantime, in 1959, the sole concession rights over the whole country granted to Shell had to be reviewed. Consequently, exploration

[1] Official website of the Department of Petroleum Resources (DPR): www.dprnigeria.com
[2] Official website of NNPC: www.nnpgroup.com

rights were extended to companies with other nationalities in line with the Government's policy of increasing the pace of exploration while also ensuring that the country was not overtly dependent on one company.

Therefore, there was an increased and sustained participation by other International Oil Companies (IOCs) from the 1960s to 1977 when Nigeria's first national oil company was established.

2.2 PAST AND PRESENT LEGISLATIONS GOVERNING THE PETROLEUM INDUSTRY

a. The Mineral Oils Act 1914 was enacted to:

b. "Regulate the right to search for, win and work minerals oils"

c. Similarly, other Mineral Oil laws were enacted in 1946, 1948, and 1950.

Section 2(1) of the Mineral Oil Act 1914 specifically provides for the ownership of petroleum as well as the right to search for a new mineral oil in Nigeria. The said Section 3(1) provides thus:

a. "The entire property in and control of all mineral oils, under or upon any lands in Nigeria and of all rivers, streams and water, courses throughout Nigeria, is and shall be vested in the crown in so far as such right may in any case have been limited by any express grant made before the commencement of the Act-see also **Sections 1(1) and 14 (1) of the Petroleum Act as well as Section 44 (3) of the Constitution of the Federal Republic of Nigeria 1999.**

b. With increased oil and gas exploration activity in Nigeria in the 1950s and was to ensure;

c. Compliance by oil company with the exploration rules'

d. Ensure safe and good oil field practice measured by international standards as of the time; Accordingly, a set of Regulations were made pursuant to **Section 9 of the Mineral Oils Act 1914,** updated and renewed to **Minerals Oil (safety) Regulation 1963**-These Regulations which have been variously updated include the subsidiary legislation- Mineral Oil (Safety) Regulation made pursuant to the extant Petroleum Act Cap 350 LFN 2004.

e. **Nigerian Government Participation in Petroleum Activities**

Nigeria's active participation in oil and gas activities even through dates back to the 1914 when the Mineral Oils Act was enacted. Physical participation in the industry was largely absent until the 1970s when the Nigerian National Petroleum Corporation (NNPC) was established as a wholly owned and fully integrated national oil and Gas Corporation established in 1977 through the NNPC Act of 1977.

Before 1970s, there were yet no real discernible policy on oil and gas because of inadequate production of oil.

Further, the petroleum sector arose from Nigeria's underdeveloped economy and the country its economic life line tied to "apron strings" of that the colonialist-Britain

Therefore, the country after independence and in 1970s established the Nigerian National Oil Company (NNOC) to regulate and manage Government's investment as well as explore the country's huge hydrocarbon resources

However, currently the current legal/regulatory framework for the Oil and Gas Industry in Nigeria consists of the following Principal Legislations:

a. Petroleum Act LFN 2004
b. Deep Offshore & Inland Basin (Production Sharing Act) LFN 2004
c. Petroleum Profits Tax Act LFN 2004
d. Nigerian National Petroleum Act, LFN 2004
e. Oil Pipelines Act LFN 2004
f. Nigerian National Petroleum Corporation (Projects) Act LFN 2004
g. Nigerian Oil and Gas Industry Contents Development Act 2010

Whilst the key subsidiary legislations include:

a. Deep Water Block Allocation (Back-in-Rights) Regulations 2003
b. Petroleum (Drilling and Production) Regulations 1995
c. Oil Prospecting Licenses (Conversion to OML etc) Regulations.

2.3 LEGAL FRAMEWORK GOVERNING CONTRACTUAL RELATIONSHIP/ARRANGEMENTS IN THE UPSTREAM SECTOR (EXPLORATION AND PRODUCTION OF PETROLEUM IN A CONTRACT AREA)

Section 5(1)(9) of the NNPC Act confers on NNPC to, on behalf of the Federal Government of Nigeria enter into various forms of contractual relationship relating to its participation on oil and gas exploration and production activities from the contract. These include[3]:

a. The traditional joint venture (J.V) arrangement with multinational oil companies.

b. Production sharing contract (PSCs) with international oil companies (IOCs) contractor parties;

c. Service contracts.

d. Arrangement Involving Indigenous Companies

e. Discretionary award of oil prospecting licenses (OPLs) to indigenous companies.

f. Sole risk operation on concessioning arrangements

g. Marginal field award/operation

h. Marginal field and Farm- Out agreement.

Regulations governing petroleum drilling include:

a. Petroleum (Drilling and Production) Regulations

b. Oil and gas pipeline Regulations 1995

[3] Etikerentse.G.: (2004) Nigerian Petroleum Law 2nd Edition Dredew Publishers at Pages 8-115

c. Petroleum Back in Right Regulations 2003

We shall now discuss the nature of the above contractual relationship and legal framework for oil and gas exploration and production in Nigeria in details.

2.3.1 Joint Venture Arrangement

Apart from the granting of Oil and Gas Prospecting Licenses (OPLs) and Oil Exploration Licenses (OELs) and Oil Mining licenses (OMLs) in which the FGN requires participating interest through NNPC.

Under a Joint Venture arrangement, NNPC and the major oil companies, is an arrangement that was traditionally employed to govern the relationship of NNPC as agent of Government/and the oil companies.

2.3.2 Traditional Joint Venture Participation

This arrangement obviously in effect, gives NNPC certain participating equity interest in the operations of the multi-national / transnational oil companies.

The acquisition of such interests by the Nigerian Government was to have begun in 1962 with the Nigerian Agip Oil Company to coincide with the discovery of commercial quantity of oil that year by the company. However, for some reason arising from set back of poor record keeping on the part of the Nigerian Government, the Nigeria – Agip J.V arrangement

could not commence until 1971, and it was with Nigerian National Petroleum Company (NNPC) a predecessor – in title to NNPC whereby the latter acquired 31% equity stake in Agip. Subsequent to this, NNPC further in April 1971, acquired 35% in the operation of Elf in other participation of NNPC in the participation interest in the generation of other oil majors, it is interesting to note that NNPC did not at any time hold equity interest i.e share or obviously of these oil companies i.e NNPC and the J.V partners of the oil Blocks.

Therefore, under the Joint Venture Arrangement, the oil firms who held 100% concession of the oil Block had to accommodate their new partners, FGN through NNPC in the Venture as a co – Venture or Joint partners.

In this case, NNPC's interest was limited to "Working interest" and does not affect the foreign oil companies ownerships rights over there shares. NNPC however maintains undivided interest in the concession as well as undivided interest in the assets and liabilities of the Venture in line with its participating interest which is employed and reflected in the Joint operating agreement and Participation Agreement executed with the international oil companies as of the time[4].

[4] Etikerentse G: 2004 -Nigerian Petroleum Laws 2nd edition (supra)

2.3.4 Features of Traditional Joint Venture Agreement

i. Cash Call Obligations – meaning that parties that enter into the Joint – Venture jointly contribute to capital and operating costs in the ratio of their participating interests.

ii. Applicable Tax Rate and Revenue from J.V Operations

Usually, NNPC earns 85% from the profit from the J.V operations and an after tax profit of nearly 60% of the concession production. The commercial aspect of the memorandum of understanding – MOU defines the guaranteed minimum profit such as the price per barrel of crude oil, after tax and royally payable on the equity crude etc.

iii. Marketing Rights Over Crude Oil

Each party under the J.V arrangement markets its equity or participating interest percentage of the available crude oil production from the concession.

2.3.5 Production Sharing Contract

Contractual arrangements involving Production Sharing Contracts (PSCs) commenced in 1972, with the first production sharing contract executed with Ashland Oil Company Limited (now Addax oil) in that year. Under this arrangement, the concession ownership remains entirely with NNPC

while NNPC entirely holds the concession i.e. Oil Mining Lease (OMLs), the operation of the oil blocks is held by the contractor company who operates the oil blocks for NNPC as the concession holder. The operator / contractor undertake on sole risk basis, the operations and if commercial quantity of oil reserve is made, it is able to recover its production costs.

In other words, the contractor initially bears all the expenses but obtains reimbursement through the allocation of "cost oil" upon discovery of "first oil" therefore, no contribution towards cost recovery is made by NNPC if the operator fails to make commercial discovery of oil reserves.

Tax is assessed at 50% flat rate over charged oil for petroleum profit tax purposes (PPT) while profit oil the is computed after tax in line with the agreed proportion as defined in the PSC and the governing legislations such as Petroleum Profit Tax Act (PPTA) 2004 and the Deep offshore and Inland Basin Production Sharing Contract Act 2004 and other subsidiary legislations and regulations made pursuant thereto.

Royalty payable on the Deep Offshore and Inland Basin are determined by the Department of Petroleum Resources (DPR) in accordance with the provisions of the Deep Offshore and Inland Basin Production Sharing Contract Act 2004.

It must however be noted that under **Section 16(1) of the said Deep Offshore Act,** FGN reserved the right to review the price mechanism for

production and exploration activities in the contract Area / oil Block once the price per barrel of crude oil exceeds US$ 20 barrel per day threshold.

It is strange that FGN has not triggered this provision in the Deep Offshore Act to initiate a review of the 1993 production sharing contracts entered into with companies such as Shell Nigeria Exploration Company Limited (SNEPCO), Nigerian Agip Exploration Company Limited (NAE) and ESSO Exploration Company Limited (ESSO) and this dispute over crude oil allocation with NNPC has been a major features of companies operating 1993 PSC. This no doubt requires FGN's intervention for the overall benefit of FGN reserve and the interest Nigeria at large.

2.4 KEY TERMINOLOGIES USED IN PRODUCTION SHARING CONTRACTS (PSCS)

As earlier noted, the first major Law established to govern NNPC contract with the PSCs was the **Deep Offshore and Inland Basin Production Sharing Contract (PSC) Act no. 9 of 1999.** Under this arrangement, available crude oil is apportioned on the following priority basis:

a. Royalty oil
b. Cost oil
c. Tax oil
d. Profit oil

We shall now explain the above terms:

2.4.1 Royalty oil

Royalty rates are fixed in line with the location of the field or Block such that the deeper or further the location of field from the onshore, the lower the applicable royalty rate – apparently included to encourage Deep offshore prospecting for oil which was largely absent as of the time The PSCs were executed in 1992 and 1993 were generally subjected to the same rate as defined in the "Deep offshore and Inland Basin" (PSC) Act. It is however instructive to note that Royalty oil is allocated to NNPC or (the holder of the oil prospecting license OPL) in such quantum as shall generate an amount of proceeds equal to the actual royalty payable during each month and the concession rental payable annually in accordance with the PSC terms.

2.4.2 Cost oil

This is the quantity of available crude oil allocated to the contractor to enable it generate an amount of proceeds for the recovery of operating costs in the OPLs and any OMLs derived therefrom as defined in accounting procedure of the PSCs.

2.4.3 Tax oil

It is that portion of oil allocated to NNPC or (holder of OPLs) in Such quantum as will generate an amount of proceeds equal to the petroleum profit tax (PPT) liability payment during each month. As with Royalties, NNPC or holder is responsible for payment of PPT on behalf of the parties.

However, in practice, the Federal Board of Inland Revenue Service (FIRS) issue separate tax receipt in the names of NNPC or (holder of OPLs) and the contractor companies who operates the oil Block for the respective amount paid as tax.

The PPT rate applicable to the PSCs is a flat rate of 50% of the chargeable profit for the duration of the PSCs **(See Sections 9, 11 and 4 of the Deep offshore Act) 1999.**

2.4.5 Profit oil

Profit oil split is the balance of available crude oil after deducting Tax oil, Cost oil, Royalty payable on the oil Block. It is allocated to each party in accordance with the terms of the PSC.

2.4.5 Service Contract Arrangement

After the execution of the first PSC with Ashland oil Nigeria Company Limited, Nigeria Government decided in certain instance to adopt the risk service contract or service contract Arrangement in respect of production and exploration of some of the country's oil fields.

2.5 RIGHT'S HELD BY PARTIES UNDER OIL CONCESSION ARRANGEMENTS

2.5.1 Oil Exploration license (OELs)

a) The grant of this license by the Federal Government of Nigeria through the Department of Petroleum Resources (DPR) is both contractual and regulatory.

b) It confers on a licensee, usually a third party surface right of exploration for oil in the area covered by the license not withstanding the occupiers of that land and granted in respect of areas not covered by existing oil prospecting licenses (OPLs)or oil mining licenses (OMLs).

Right conferred on the licenses by OELs includes:

i) Non – exclusive right to explore for oil in the area covered by the license since another exploration license may be granted over the same area.

ii) Right to erect temporary structures and acquire machinery for its operation and;

iii) Right to undertake aerial and seismic surface and preliminary drilling works.

The duration of the OELs is normally for one year and the fees and rate payable are now provided in the applicable law and the regulation[5].

2.5.2 Oil Prospecting License (OPLs)

The Petroleum Act 1990 make adequate provisions that empowers the Minister of Petroleum Resources to grant oil prospecting license (OPL) a prospective license after a successful biding for oil blocks.

The processes or requirements for applying for an oil prospecting license include but are not limited to the following:

[5] Section 59 Petroleum (Drilling and Production) Regulations 2001

a) Filling of application form for OPL **(See Regulation 1 of the Petroleum (Drilling and Production) Regulations;**
b) Payment of the fixed OPL fees;
c) Acquisition of seismic covering the area applied for;
d) Ensuring that the area covered by the license is demarcated dealing with boundaries or with grid lines designated by the applicant;
e) Concession is then granted over the area covered by the OPL which is normally compact.

Further and upon furnishing amount of funds as agreed as Signature Bonus, the FGN through the department of Petroleum Resources, grants OPL i.e. exclusive license or right to prospect or explore for oil within the exclusive area covered by the grant.

During the operation or tenure of the OPL, the licensee is permitted to undertake the following activities:

1. Commence work operation of the contract area or concession area by closing the concession area, making roads within the boundary areas, construct , bring, maintain, and operate or dismantle equipment etc;
2. Rights Conferred by OPL

The following right are conferred on a Holder of concession of OPL:

It must be emphasized that although by its nature, oil prospecting license, they are contractual as well also regulates the action of a license. This is

because upon the license, payment of the acquired licensee fee/ adequate compensation, he/she is entitled to enter into the area covered by the license to explore for oil.

Therefore, the following rights are exercisable:

i. Exclusive rights to explore and carry away and dispose of petroleum discovered and won in the area of the licensee's sphere of operation.
ii. However, subject to the terms of the license, no other grant for petroleum prospecting may be made to another licensee for the same license area.

2.5.3 Oil Mining Lease (OML)

Just as the relationship of "lease" gives rise to landlord and tenant relationship, an Oil Mining Lease (OML) is normally granted by the Minister of Petroleum Resources pursuant to Section 2 of the Petroleum Act[6]. An OML contains regulatory and contractual terms or provision and standard action provision.

However, it is quite distinct from "Lease of Land" which creates an "Estate in Land" an OML lessee a mineral lease, allows the lessee to use land, explore and dispose of any petroleum discovered within the leased area for a definite period, usually not more than twenty (20) years during which Royalty oil.

[6] Olakanmi & Co: Petroleum, Minerals and Mining Law: August 2008 Law lords Publication Abuja Nigeria at Pages 21-151

In a nutshell therefore, the actual or real rights conferred on a lessee of an OML: "are limited to the interest in the petroleum discovered in the subsoil of the geographical area covered by the OML subject to applicable standardization provisions."

The foregoing, we believe aptly discusses the various forms of regulatory contracts and contractual relationships that govern exploration and production contracts in the oil and gas industry being a fundamental part of the Energy Sector in Nigeria.

2.6 FEATURES OF JOINT VENTURE ARRANGEMENTS

The principal features of this Joint Venture Arrangements are as follows:

a) **Concession Ownership –** Under the service contract arrangement, ownership of concession remain in NNPC and each contract relates to a single concession or Block unlike in PSC which can cover more than two OPLs e.g. the earlier NNPC / Ashland oil Nigeria PSCs over oil Blocks 98 and 118.

b) **Duration –** Service contract covers a short length of time i.e between two (2) to three (3) years but renewable for another short term. This duration is at variance with certain Pre – 1959 oil mining areas granted for over forty years (continental shelf areas) and thirty years (land and territorial waters) as well as twenty years for the 1993 PSCs.

Service contracts which are for shorter period allows NNPC and Federal Government to reserve full ownership of the contract area, where the concession is refurbished at the end of the exploration period.

New arrangements are therefore made to contract out the contract area for much shorter period, than would apply to Traditional Joint Venture.

However, if no commercial quantity of oil reserve is found within the primary period of the service contract, the contract is terminated without further renewal.

c) **Provision of Fund –** All funds for petroleum operations are provided by the contractor in a service contract as well as technical expertise required to operate exploration and production activities in the contract area. The contractor is then reimbursed from funds derived from the sale of the available crude oil. It invariably means that the contractor could not recover its cost when there is no production of commercial quantity of oil from the concerned oil Blocks.

However, it is often argued which makes it a right legal deduction that since NNPC holds the right and title to the oil produced under a service contract arrangement and therefore, it is within the discretion of NNPC either to pay the contractor for his service in cash or kind.

This being the position, NNPC has the right to market the oil produced and he is also liable to payment of petroleum profit tax (PPT) in respect of the contract area NNPC is said to be in "petroleum operation" in accordance with Section 2 of the Petroleum Profit Tax Act, a service contractor under the PPT Act can only engage in petroleum operations not for its own benefit but for the account of NNPC who appointed it as its contractor – ordinarily therefore, taxation of profit of oil majors – servicing as contractor, should not pay PPT but should only pay company income tax under the relevant Companies Income Tax Act (CITA) 2004.

d) **Consideration –** another major requirement for legally binding service contractor arrangement to exist is that the service contractor is given first option to "buy back" crude production from the concession. The exercise of this option may even continue long after the life of the contract thereby generating sustainable supply of crude in the event that crude oil in commercial quantity is required from the OPL.

e. **NNPC's Exercise of Right to Take Over Entire Operation–** In exercise of the above powers, NNPC may under the service contract take over the entire production activities in the oil field after three

years from the date of commercial production of oil from the oil field.

CHAPTER THREE

3.1 LEGAL FRAMEWORK FOR POWER SECTOR REFORM IN NIGERIA

As earlier noted in Chapter one of this research study or thesis, the legal framework is the basis for which the National Council on Privatization (NCP) and its Secretariat, the Bureau of Public Enterprises (BPE) were created and have so far implemented a robust programme for the privatization of the Power Sector in Nigeria. This can be gleaned from both the horizontal and vertical unbundling of the predecessor - in – title – to the Power Holding Company of Nigeria (PHCN), the National Electric Power Authority (NEPA). This was made possible with the passage into law of the Electric Power Sector Reform Act No 6, 2005.

Before 2005, NEPA was the Government wholly owned and integrated monopoly electric power provider responsible for generation, transmission, distribution and sale of electric power.

However, the amendments made to the Electricity Act and NEPA Act removed NEPA's monopoly even though it remained for a long time, a vertically integrated service provider.

3.2 EVOLUTION OF NEW LEGAL FRAMEWORK FOR ELECTRIC POWER SECTOR

Clearly, the industry required reform and a restructured legal and regulatory framework needed to be established.

3.2.1 Pre- Year 2005 & Passage of EPSR Act[7]

The following are highlights of Government actions and legislations promulgated to make way for the reform of the sector:

- **1998:** Statutory amendments "de – monopolization" of NEPA;
- November 1999: Electric Power Sector Reform Implementation Committee (EPIC) inaugurated by the National Council on Privatization (NCP) to recommend measures for sector reform, promote the policy goal of liberalization, competition and private sector led growth and superintend the draft of a new legislation for the Electric Power Sector.
- The process was driven by the Bureau of Public Enterprises (who engaged International Consultants and Advisers);
- **March 2001:** NCP issued the National Electric Power Policy (NEPP), which defined framework for power sector reform;
- **August 2001**: NCP issued final draft of Electric Power Sector Reform Bill.
- **March 2005:** Electric Power Sector Reform (EPSR) Act enacted.

3.2.2 National Electricity Power Policy (NEPP) 2001

Broad goals

The National Electricity Power Policy (NEPP) aims at creating a conducive environment that enables:

[7] Electric Power Sector Reform (EPSR) Act 2005

- Satisfaction of all economically viable demands for electric power in Nigeria;
- Modernization and expansion of the power system;
- Supporting national economic and social development, and relations with neighbouring countries.

Priority Objectives:

To "create efficient market structures, within clear regulatory framework that encourage more competitive markets for electricity generation and sales (marketing), which at the same time are able to attract private investors and ensure economically sound development of the system".

Reform Strategy:

- Legal and functional unbundling
- Independent regulation
- Private sector participation

3.2.3 Policy Formulation and Regulation: Key Players

- **Federal Government of Nigeria:** Overall policy direction, general consistency of electric power policy with all other policies.
- **Ministry of Energy Resources (former Federal Ministry of Power and Steel):** formulation, monitoring and evaluation of energy sector (including electric power) policy

- **State Government:** Development of off – grid electrification
- **Nigerian Electricity Regulatory Commission:** Independent technical and economic regulatory responsible for:

- Licensing
- Tariffs
- Quality and safety standard, etc

3.3 LEGAL FRAMEWORK ESTABLISHED PURSUANT TO THE ELECTRIC POWER SECTOR REFORM ACT NO 6 2005.

The enactment of the Electric Power Sector Reform (EPSR) Act Nos 6 of 2005 heralded a new legal and regulatory framework for the Sector[8], gave impetus or legal backing to the approved National Electric Power Policy (2001) and the establishment and operationalization of the Sector Regulator, the Nigerian Electricity Regulation Commission (NERC).

3.4 REVIEW OF KEY PROVISIONS OF THE ELECTRIC PAOWER SECTOR REFORM (EPSR) ACT NO. 6, 2005

Sections 1-7 of the EPSR Act empower the National Council on Privatization to establish the Initial Holding Company (PHCN) to hold the assets and liabilities of NEPA, transfer such assets to the holding company as well as license the initial holding company to operate for a given period of time (18) months.

[8] **Ojukwu C. N.:** 2009: 'Roadmap to the Reform of the Electric Power Sector' posted on NERC website, www.nerc.org last date visited, 10th March,2012

Furthermore, Sections 8-23 of the EPSR Act provide for a sequenced unbundling of PHCN (the initial holding company of NEPA) into eighteen successor companies and granting them an effective operational autonomy. In addition, Sections 25 and 82 of the EPSR Act defines the various stages of evolution of the Electricity Market, while Section 31 of the Act establishes NERC as a statutory organization to regulate the Electricity Power Sector.

3.5 OBJECTS, POWERS AND FUNCTIONS OF NERC

The object, powers and functions are defined in Section 32 of the EPSR Act as follows:

a) To create, promote and preserve efficient industry and market structures, and to ensure optimal utilization of resources for the provision of electricity services.

b) To maximize access to electricity services, by promoting and facilitating Consumers' connection to distribution system in both rural and urban areas.

c) To ensure that adequate supply of electricity is available to consumers.

d) To ensure that the prices charged by licensees are fair to consumers and are sufficient to allow licensees to finance their activities and allow for reasonable earnings for efficient operation.

e) To ensure safety, security, reliable and quality of service in the production and delivery of electricity to consumers.

f) To ensure that regulation is fair and balance for licensees, consumers, investors and other stakeholders; and

g) To present quarterly report to the President and National Assembly on its activities.

(2) For the furtherance of the objects referred to in subsection (1) of this section, the NERC shall perform the following functions:

a) Promote competitive and private sector participation, when and where feasible;

b) Establish or as the case may be, approve appropriate operating codes and safety, security, reliability, and quality standards;

c) Establish appropriate consumer rights and obligations regarding the provision and use of electricity services;

d) License and regulate persons engaged in the generation, transmission, system operation, distribution, and trading of electricity;

e) Approve amendment to the Market Rules;

f) Monitor the operation of the electricity market; and

g) Undertake such activities which are necessary or convenient for the better carrying out of or giving effect to the objects of the Commission.

(3). In the discharge of its functions, the Commission shall consult from time to time, and to the extent the Commission considers appropriate, such persons or groups or groups of persons who may or are likely to be affected by the decisions or order of the Commission including, but not limited to licensees, consumers, potential investors and other interested parties.

Sections 88 – 92 of the EPSR Act 2005 provides for the establishment of the Rural Electrification Agency (REA) and Rural Electrification Fund (RE-Fund) to fund access to electricity by rural residents.

Sections 83-87 of the EPSR Act makes adequate provision for the establishment of Power Consumer Assistance Fund to bridge the funding gaps and payments for electricity consumed by indigent Nigerians or low income earners.

Section 24 of the EPSR Act provides for the privatization of the power utilities as follows:

"The National Council on Privatization may at any time and by such means as it deems appropriate begin the process of privatization of the successor companies that are holders of generation license, distribution license, or a transmission license in accordance with the Public Enterprises (Privatization and Commercialization) Act"

It would be noted that unbundling of this sector shall first occur before the privatization process could be undertaken.

3.6 KEY OPERATIONAL DOCUMENTS

3.6.1 The Market Rules

* Define the electricity trading arrangements for the wholesale electricity

market in Nigeria, including:

- Rights and obligations of the market operator, the system operator and participants ; and
- Related interactions and general procedures

3.6.2 The Grid Code

Defines rules for administration and operation of the transmission system, and technical procedures for planning, coordination, supervision and operation of the system.

3.6.3 Industrial and Market Regulation

* Under the EPSR Act, NERC replaces Federal Ministry of Power and Steel (FMOPS) as sector regulator;
* Also, the Ministry of Petroleum Resources' role is now limited to giving general policy direction to the Oil and Gas Industry.
* **Part III of the EPSR** Act 2005 establishes NERC as an independent regulator (funding & security tenure) to:

- Foster industry development & investment
- Ensure safe, high quality service
- Promote least cost production

- Facilitate attainment of desired consumption levels
- Promote more equitable outcomes
- Limit the abuse of monopoly power

3.6.4 NERC Regulations

- NERC (Application for license – Generation, Transmission, System Operation. Distribution & Trading) regulations
- License and operating fees regulations
- Customer complaints handling: standard procedures regulations
- NERC (Business Rules of the Commission) regulations.

3.7 ELECTRICITY LICENSES

- Issued by NERC to industry and market participants
- Licensed activities are :
    * Electricity generation exceeding 1MW;
    * Electricity distribution exceeding 100MW;
    * Electricity transmission;
    * System operation; and
    * Electricity trading

3.7.1 Key Operational Principles

a) Freedom from undue political and market influence

b) Openness of the process

c) Use of appropriate instruments to response to changing situations

d) Information to stake holders on a timely & accessible basis

e) Participation of stake holders in the regulatory process

f) Consistent behaviour across market participants over time

3.7.2 Setting the New Framework for Power Reform

Criteria:

- Clear policy framework, backed by legislation
- Clearly specifies the respective roles for and terms of public and private sector investment
- Clarified industry structure and addressing corporate governance issues to be complied with by industry players
- NERC to champions both long – term view, lead, support and implement reforms (post unbundling of PHCN)

Provide clear direction on how developments in the electric power sector fit into the overall energy sector reform etc.

Ensuring appropriate cost recovery (after market initiation)

Clear standards or norms for exercise of regulatory discretion

(precedents)

3.8 FISCAL INCENTIVES FOR ELECTRICITY GENERATION COMPANIES UTILIZING GAS AS FUEL:

Tax free holiday: initially for 3 years (subject to certification of commencement of production by DPR), renewable for 2 years upon satisfactory performance

Accelerated capital allowance: (after tax free period) annual allowance of 90% with 10% retention for investment in plant and machinery + additional investment allowance of 15% which shall not reduce the value of the asset

Additional investment allowance: (as an alternative to the tax free holiday) additional investment allowance of 35% which shall not reduce the value of the assets (however, this incentive is not available to a company which claimed the 15% additional investment allowance above)

Tax free dividends: (during tax free period) where the investment was in foreign currency or imported plant and machinery introduced during the period is at least 30% of the company's equity share capital.

Tax deductibility of loan interest: subject to prior approval of loan by the Federal Minister of Finance.

Tax exemption for export: profit from goods exported from Nigeria are tax exempt, provided proceeds there from are repatriated to Nigeria and use exclusively for purchase of raw materials, plant, equipment and spares.

Investment tax relief: varied amounts are allowed as tax relief for expenditure for the provision of infrastructure where government has not provided for same.

Investment tax credit (ITC): 15% ITC is allowed for expenditure on replacement of obsolete equipment.

3.9 KEY ACHIEVEMENTS/MILESTONE RECORDED IN THE REFORM OF THE ELECTRICITY POWER SECTOR

Below are some of the key milestones attained since the implementation of the Power Sector Reform in 2000[18]:

In 2000, the Electric Power Sector Reform Implementation Committee (EPIC) was constituted by the National Council on Privatization, BPE, Federal Ministry of Finance, National Assembly, NNPC, Energy Commission of Nigeria and the organized private sector etc.

In September 2001, the Federal Executive Council approves the National Electric Power Policy (NEPP) as FGN's new blueprint for the power sector reform.

Market design: A design/structure has been put in place for the National Electricity Market, consistent with the market design are the stages planned for the market development and the trading arrangements. The market design provides for the sellers, who will inject energy into, and the buyers who will extract energy from the whole sale market. The market design provides for adequate commercial arrangements for market settlements and payments.

On the 11th of March 2005, the President signed the Electric Power Sector Reform Act which gives legal backing to the industry reform programme.

[18]2009 Published Annual Report: Nigerian Electricity Regulatory Commission (NERC)/Abuja Headquarters.

On 5th May 2005, the National Electric Power Authority (NEPA) was transformed into Power Holding Company of Nigeria (PHCN) PLC as a holding company for the assets, liabilities, employees, rights and obligations of NEPA. The process of corporatization of PHCN has long been concluded.

The National Council on Privatization by an Order published in a Federal Gazette fixed July 1st 2005 as the initial transfer date of assets, liabilities and staff of NEPA to PHCN.

Shadow Trading: From the plan put in place for its development, the Nigeria Electricity market is at the end of the pre-transitional stage, which is the stage for the preparatory works to initiate the transitional market. With the trading point metering has been completed, the major characteristics of this stage of the market is the shadow trading designed to operationalize the Grid Code, Market Rules and Procedures. Through the shadow trading, awareness on the market arrangements is created. To this end, payment culture among the market participants has been promoted. Also, efficiency improvement programmes have been introduced for the distribution companies and these have resulted in some form of competition among the distribution companies.

Some forms of private sector participation has been achieved at some levels in the industry.

At the generation level, there are some IPPs who generating into the whole sale market, e.g. the AESNB at Egbin in Lagos State, Nigerian Agip Oil Company (NAOC) at Okpai in Delta State and Omoku in Rivers State. There are also some IPPs generating into captive distribution networks such as in Jos and Port-Harcourt.

On 30th October 2005, the Nigeria Electricity Regulatory Commission (NREC) Commissioners were inaugurated. The Commission has since commenced operation with start-up staff pooled from the Federal Ministry of Power and Steel, BPE and PHCN.

In March 2006, the Rural Electrification Agency was established.

In November 2005, PHCN was unbundled into eighteen (18) new successor companies on the basis of six (6) generation companies, one (1) transmission company, and eleven (11) distribution/marketing entities.

Grid Codes, Distribution and Mmetering Codes have been issued by the regulator.

On 1st July 2006, the asset, liabilities and staff of PHCN were transferred to the successor companies, thereby granting the latter greater operational autonomy.

On 1st July 2006, PHCN commenced gradual winding down of its operations with transfer of assets, liabilities and staff to it successor companies.

In 2009 the President in accordance with the Act, approved the Market Rules for the industry.

3.10 APPRAISAL OF CHALLENGES OF THE REFORM OF THE ELECTRICITY POWER SECTOR

Implementing the power sector reform exercise entail a very challenging process because in most cases the dividends of the reform are only realizable on the long run. The Nigerian Power Sector Reform is even more challenging as poor performance of the sector has led to impatience which has translated into the disruption of long term plans with the introduction of short term interventions that only worsens the problem.

The implementation of the reforms has thrown up several challenges many of which are historical and some are the fall-out of organized resistance to the reform programme.

Below, are some of the identifiable challenges to the effective implementation of the programme:

Sector liquidity issues: The tariffs are not yet cost reflective and may need to be reviewed upwards overtime. There is a huge constraint in doing this is that unlike other jurisdictions where tariff increases were implemented following a reform programme, they have the advantage of also having significant service improvement before tariff increase. It becomes " an egg and chicken" situation whether tariff needs to be adjusted before service

improvement or after service improvement when sector liquidity is critical to sector improvement.

The poor infrastructure base of the industry has further complicated the implementation of the reform. Without system reliability and presence of persistent inadequate transmission constraints, it is very difficult to attract investment in the distribution and generation sectors.

Over bloated non-core staffing profiles of PHCN and the successor companies.

Labour interference in the reform and privatization of the sector has continued to be a major obstacle to the reforms.

Huge funds are required to settle labour liabilities of PHCN staff.

Vandalization of electric and gas pipeline facilities.

Low level of water resources at dam for hydro power generation activities.

Inadequate incentives for investors and policy inconsistencies.

High commercial and technical losses.

CHAPTER FOUR

4.1 CURRENT EFFORTS AT PRIVATIZING THE ELECTRIC POWER SECTOR INDUSTRY

4.1.1 Privatization

In the early 1980s, the Nigerian Government commenced divesting itself of its interest in the commercial (public) enterprises due largely to the failure of these business even though most of them, such as NITEL, Nigerian Airways, Nigerian National Shipping Line, NEPA were virtual monopolies.

The Federal Government of Nigeria was therefore compelled to shift away from the initial theory of the mid 1970s, that Government must be in control of the "Commanding heights" of the national economy hence the statutory Corporations (NITEL, NEPA, NNSL) establish pursuant to the said "commanding heights" philosophy had to be reviewed in terms of Government continued ownership and control. There are so many methods of attracting private sector participation in an hitherto public sector driven industry such as the energy industry in Nigeria. These include:

Concessioning

Privatization

Operate and Maintenance (O & M) Contract system

Build, Own and Operate (BOO)

Build, Own and Transfer (BOT)

Build, Own, Operate and Transfer (BOOT) etc.

However, this research work focuses on the methods stipulated in the Legal framework for privatization and reform of the Energy Sector in Nigeria. We shall limit the discussion to the privatization of the energy utilities.

Although the enabling Law on Privatization and commercialization of public enterprises in Nigeria i.e. the Public Enterprises (Privatization and Commercialization) Act 2004 which re-enacted the Public Enterprises (Privatization and Commercialization) Decree No 28 of 1997, does not define the term "Privatization". The Privatization and commercialization Decree 1988 however defines Privatization as a process where the FGN or its agencies relinquishes its equity or proprietary interest in enterprises which it wholly or partly owns.

In other words, simply put, privatization means the sale or transfer of public utilities to private enterprises.

In America, the successes recorded in the privatization efforts today are in large part a reaction to the dissatisfaction with Government's performance and/or unhappiness with the level of taxation that is levied on individuals and businesses by municipal, state, and Federal Governments who pay for such services. This trend has grassroots origins, with local governments in the forefront and state and federal levels of government trailing behind. The purpose of privatization is to take advantage of the perceived cost efficiencies of private firms. Indeed, proponents of the practice say that

privatization results in better performance of needed services at lesser cost. "The government usually allows the firm to choose how it will satisfy the contract," wrote Simon Hakim and Edwin Blackstone in American City and County. "For example, a contract may specify trash removal services for the area residents a certain number of times per week. The firm is normally allowed to choose the methods it will use to perform the requirements of the contract, the trash trucks, used, and the number of workers on each trash truck.

The profit motive will encourage the firm to produce the services efficiently at the least cost, a motive absent in government provision of services." Even after privatization, however, government monitoring is necessary in order to ensure that satisfactory services are provided to residents.

4.1.2 Variations in Privatization

The term “privatization” has been applied to three different methods of increasing the activity of the private sector in providing public services:

1) Private sector choice, financing, and production of services;

2) Public-sector choice and financing with private sector production of the service selected; and

3) Deregulation of private firms providing services.

In the first case, the entire responsibility for the provision of service is transferred from the public sector to the private sector, and individual

consumers select and purchase the amount of services they desire from private providers. For example, solid-waste collection is provided by private firms in some communities.

The second version of privatization refers to joint activity of the public and private sectors in providing services. In this case, consumers select and pay for the quantity and type of service desired through government, which then contracts with private firms to produce the desired amount and category of service. Although the government provides for the service, a private firm carries out the actual execution of it. The government determines the service level and pays the amount specified in the contract, but leaves decisions about production decisions to the private firm.

The third form of privatization means that Government reduces or eliminates the regulatory restrictions imposed on private firms providing specific services.

Drawing the lessons from the foregoing to Nigeria, following the dissolution of the Technical Committee on Privatization and commercialization (TCPC) 1993, the Federal Military Government promulgated the Bureau for Public Enterprises Act 1993 which repealed the 1998 Act and set up the Bureau for Public Enterprises (BPE) to implement the privatization programme in Nigeria.

In 1999, the Federal Government enacted the Public Enterprise (Privatization and Commercialization) Act 1999 which created the

National Council on Privatization under the chairmanship of the vice President. The functions of the Council include:

i) Making policies on privatization and commercialization.

ii) Determining the modalities for privatization and advising the government accordingly.

iii) Determining the timing of privatization of particular enterprises

iv) Approving the prices for shares and the appointment of privatization advisers.

v) Ensuring that the commercialized public enterprises are managed in accordance with sound commercial principles and prudent financial practices.

vi) Interfacing with the public enterprises, together with the supervising Ministries, in order to ensure effective monitoring and safeguard of the managerial autonomy of the public enterprises.

The Act also established the Bureau of Public Enterprises (BPE) as the secretariat of the National Council on Privatization. The functions of the Bureau include:

vii) Implementing the Council's policy on privatization and commercialization

viii) Preparing public enterprises approved by the council for privatization and commercialization.

ix) Advising Council on further public enterprises that may be privatized or commercialized

x) Advising Council on capital restructuring needs of the public enterprises to be privatized.

xi) Ensuring the update of accounts of all commercialized enterprises for financial discipline.

4.2 LEGAL FRAMEWORK FOR PRIVATIZATION OF PUBLIC UTILITIES

The privatization exercise in Nigeria is being presently pursued under Public Enterprises (Privatization and Commercialization) Act. But the privatization programme actually commenced under the Privatization and Commercialization Decree of 1988. There are remarkable differences between these two laws. Under the 1988 Decree, state owned enterprises were listed for partial privatization and 67 for full privatization. A technical Committee (TCPC) was set up to implement the programme.

The policy objectives of the privatization programme include raising capital; removing bureaucratic control; encouraging Nigerian shareholders and encouraging employees. Shares of the listed companies for privatization were to be sold by Public Issue in the Nigerian capital market, (or by private placement Where the TCPC so recommended to Government). The law expressly reserved between 10% - 20% of the shares of state owned companies to be privatize for associations and

interest groups (i. e. trade unions), while maximum of 10% was reserved for the staff of such state owned enterprises.

State owned enterprises on the list that were not already incorporated as companies were to be incorporated within 12 months as public companies by the TCPC. In determining the sale of shares of listed state owned enterprises, the TCPC relied on the Security and Exchange Commission. Significantly, TCPC was not autonomous as the President, Commander in Chief exercise a lot of control over it. For instance, the President could add, remove or alter the list of state owned enterprises to be privatized, however, the Committee required the prior approval of the Federal Government before shares could be sold.

Evidently, the privatization exercise under this Decree was not transparent. There was no mechanism for the valuation of shares to be offered for sale. By the time the Decree was replace by the Bureau of Public Enterprises Decree No. 78, only about 87 state owned enterprises had been privatized. Under the new law, the Bureau of Public Enterprises was established to take over the implementation of privatization programme, hitherto performed by TCPC. Under this law, shares could be sold either by public issue through the capital market or private placement where the Bureau recommends to the Federal Government.

The Decree maintained the 10-20% shareholding reservation for union and associations, and 10% for staff. It also stipulated a maximum of 1%

shareholding for any individual. The Bureau, like the TCPC, acted at the federal Government's direction, and the wide powers of the President of Nigeria under the previous Decree were left intact. The new law created a Public Enterprises Arbitration Panel for effective settlement of disputes between an enterprise and the supervisory Ministry.

By the time the Public Enterprises (Privatization and Commercialization) Act promulgated in 1999 and re-enacted as Public Enterprise (Privatization and Commercialization Act) 2004. Sections 1 and 2[19] of the Act gives the list of enterprises to be privatized and the methods of privatization to be applied. While Sections 9 and 12 of the Act establishes the National Council on Privatization and the Bureau of Public Enterprises as the agency governing council and secretariat of the Privatization agency respectively.

Some 1000 state owned enterprises existed in Nigeria and successive Nigerian Government were said to have invested an estimate of ₦800 billion in these companies. For this heavy investment the aggregate returns to the Government was less than 10% of the amount invested.

In the guidelines on Privatization of Government Enterprises, the objectives of the privatization programme were listed as including – restructuring and rationalizing the public sector in order to reduce dominance of unproductive investments in the sector; re-orientating states

[19] Sections 1 and 2 of the Public Enterprises (Privatization and Commercialization Act) list out the enterprises to be privatized and the mode of privatization to be adopted.

owned enterprises listed for privatization for performance and efficiency; raising funds for financing socio-economic development in the areas as health, education, and infrastructure; ensuring positive returns on public sector investment through efficient management; avoiding dependence on treasury for funding and encouraging the use of the Nigerian capital market to meet such funding requirements; creating jobs, acquiring knowledge and technology, and exposing the country to international competition.

Unlike the objects of the previous privatization regime, the policy was silent on the Nigerian shareholders. The emphasis of Privatization changed from transferring assets to Nigerians to transferring the asset to any person who could enhance the business.

Apart from the apparent policy shift, the 1999 Public Enterprises Act is remarkably different from the previous Privatization laws. Unlike the previous Privatization laws where the Federal Government had express direct control over the TCPC and the Bureau, the Bureau under the present law is answerable to the National Council on Privatization, a body under the Chairmanship of the Vice-President whose membership include the Ministers of Finance and Industry, the Attorney General of the Federation, the Secretary to the Government of the Federation, the Governor of Central Bank of Nigeria, etc.

Amongst other powers, the NCP approves prices of shares for sale; the mode of selling the shares; (that is either by public or private issues, or

otherwise) as well as the timing of the sale. Its function also includes approving the legal and statutory frameworks for State- owned enterprises to be privatized.

Significantly, strategic investors are favoured under the present position. The programme reserved 40% of the shares for strategic investors, 20% to the Nigerian public through the Nigerian stock market, while the Government is to retain 40% of shares. I have always found it difficult to understand the concept of strategic investor. Why should any shareholder be allotted any volume shares over and above all other willing buyers of the shares of the company.

Further, why should the shareholder- strategic investor enjoy the right to install the privatized enterprise's management to the exclusion of other shareholders. Is this not the ability to identify a consensus amongst shareholders on any issues including the installation of management the Hallmark of share holders' democracy? With the introduction of the strategic investor policy, is Government trying to replace the tyranny of Government with tyranny of a strategic core investors who does not derive its powers from the shareholders but from a process determined by a seller who has already been paid for his goods?

Unfortunately, the failure to create a transparent mechanism for the valuation of shares of State owned enterprises to be privatized in previous privatization laws has not been rectified under this law, SEC was to advise

on share pricing. The present law provide for an arbitration mechanism for resolving disputes between state owned enterprises and the Bureau. Under the earlier law, the mode of sale of the shares of the enterprises was by way of public issues unless otherwise stipulated by Government while under the present law; there is greater flexibility in mode of selling the shares. It can now be done "by public or private issue or otherwise and government would be accordingly advised"

4. 3 OTHER RELEVANT LAWS REGULATING THE PRIVATIZATION PROGRAMME

Nigerian laws dealing with the issues of privatization do not exist in a vacuum. It is part of the body of laws governing the transfer and acquisition of property in Nigeria. The most fundamental legal document in Nigeria is the constitution of Federal Republic of Nigeria 1999. Under Sections 43 and 44 of the 1999 Constitution, the right of the individual to own movable and immovable property is guaranteed by the constitution.

As a corollary to this guarantee, these properties cannot be acquired by the Government without the payment of compensation. The issue that has been discussed very frequently is whether the guarantees protect the sale of shares. This depends on whether the shares are movable property under the constitution. It has been argued that since shares are choses in action they are not strictly so called movable property. They are special specie; consequently they are not protected under the constitution. If this argument

prevails it means that if a new Government which does not share the philosophy of the Government in power, ascends to power, it can reacquire the shares which it had disposed off without any obligation to pay compensation for the shares. At present, the position of the constitution should not create any serious alarm.

Under the Nigeria Investment Promotion Commission Act, Decree No. 16 1995 (the law enacted to encourage inflow of investments in Nigeria) the Government of Nigeria guarantees expressly that no compulsory acquisition of enterprises and interest shall take place in Nigeria. This clearly includes chooses in action, despite this consoling provision, it is important that when the constitution is going to be reviewed specific provisions guaranteeing in very clear terms that shares and other choses in action are protected from compulsory acquisition by the Government, would be entrenched.

It is doubtful whether the entire provisions of the Public Enterprises (Privatization and Commercialization) Act 1999 will survive as an existing law under the 1999 constitution. Under the constitution, Decree promulgated by the Federal government of Nigeria takes effect as Acts of the National Assembly if they are not inconsistence with the Constitution. Section 6 of the 1999 Constitution provides that the judicial powers of Nigerian courts shall extend to "all maters between persons, between Government or authority and to any person in Nigeria, and all actions and

proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person". This provision is irreconcilable and inconsistent with Section 28 (3) of the Public Enterprises (Privatization and Commercialization) Act which provides that the decision of the Arbitration Panel set up under the Act shall be binding in any dispute between the Bureau of Public Enterprises and National Council of Privatization and bars any appeal to any other court.

A similar provision is to be found in Section 244 of Investment and Securities Act 1999. Under section 244 of the Act an Investment and Securities Tribunal is established with jurisdiction, power and authority over disputes and controversies arising under the Investment and Securities Act. Section 424 of the Act expressly ousted the jurisdiction of civil courts. These two provisions are inconsistent with constitution of Nigeria and therefore invalid.

Regarding the privatization of electric power utilities in Nigeria, President Goodluck Jonathan launched the most comprehensive plan which he tagged " Roadmap for Power Sector Reform" aimed at restructuring the power sector and achieve electricity in the country.

The president in his speech delivered on August 26th, 2010 in Lagos. Identified the factors that affected reliable electricity service delivery to include the absence of a sustained and deliberately deploy long term power

development strategy, under exploitation of the nation's abundant energy endowments and the absence of adequate implementation of reforms.

4.4 HIGHLIGHTSOF THE ROAD MAP FOR THE POWER SECTOR:

Some key highlights of the roadmap as presented by the President include:

4.4.1 Divestiture of Successor Companies:

Government in seeking to encourage the inflow into the industry of private sector investments and accompanying managerial and technical expertise has decided to divest a minimum of 51% of its equity in the 17 of the 18 successor companies, consisting of 11 power distribution companies and 6 generating companies, to core private sector investors. In the area of transmission, the government will retain control of Transmission Company of Nigeria (TCN); however, it will be under private sector management.

The Bureau of Public Enterprise (BPE) will grant operational concession of the hydro power generating plant in (Kainji, Shiroro and Jebba) while the thermal generating plant under the national integrated power project (NIPP) will be managed under operation and maintenance (O&M) contract upon completion and subsequently divested to core investors in the same way as the successor companies.

4.4.2 Establishment of an Appropriate Pricing Regime

The roadmap identified the tariff system as a very critical factor in resolving the entire value chain of supply of electricity. Consequently the

Nigerian Electricity Regulatory Commission (NERC) is undertaking a major review of the existing tariff structure which will be completed before April 2011with a view to replacing the national uniform tariff with a genuinely cost reflective ceiling on end – user tariffs.

In pursuance of its powers, the NERC established a15 year tariff path for the Nigeria electricity industry with limited minor reviews each year in the light of changes in a limited number of parameters (such as inflation and gas prices) and major reviews every 5 years, when all of the inputs are reviewed with stakeholders.

On July 1, 2008 NERC issued the multi – year Tariff order (MYTO) for the determination of charges and tariff for electricity generation, transmission and retail tariffs over the period of 1 July 2008 to 30th June 2013.

It is expected that the tariff review, when effective would result in at least a 100% increase in the effective tariff paid by consumers. Thus giving a more reflective position on power pricing as in comparable countries.

4.4.3 Establishment of a Bulk Purchaser

The Nigeria bulk electricity trading company plc. (The bulk purchaser) will play an intermediate role between the generating and the distribution companies whereby it will purchase power from successor generating companies. Existing independent power producers (IPPs) and potential new entrance in the power generating market and resell to distribution

companies. The establishment of the bulk purchaser however, will not impose a 'single buyer' model upon the industry because the distribution companies, to the extent that they are able to, will be allowed to procure power bilaterally alongside the bulk purchaser.

4.4.4 The Provision of Federal Government of Nigeria (FGN) Credit Enhancement:

The federal government has also factored into the road map credit enhancement guarantees to encourage investments in the construction of power plants. Current options for credit enhancement include those to support the more immediate investment by IPP developers in power generation by ensuring that the bulk purchaser is credit – worthy. To do this, the federal government will look to provide some form of credit enhancement for the bulk purchaser along with the installment of an appropriate payment mechanism to ensure the liquidity of such credit support arrangement.

Some potential options are:

(a) An FGN – backed letter of credit (LC), to provide liquidity to the bulk purchaser;

(b) A rolling guarantee of the obligations of the bulk purchaser, issued by a multilateral institution or domestic and/or international bank, with a counter guarantee issued by the FGN;

i. A world bank partial risk guarantee back by an FGN indemnity;

ii. An FGN treasury bond issue; or

iii. A combination of two or more of these options.

2.4.5 Clarifying and Strengthen the License Regime

Since the power sector involves high fixed costs of asset investment with a long duration, investors expect the life of the license to be more or less in line with the period required to recover their investments, typically 20 – 50 years. However, the electricity power sector reform Act, 2005 (EPSRA) provides for license that shall not exceed 10 years duration although NERC may extend the validity of the license, on a rolling basis, for additional 5 years periods. To provide greater comfort to investors, mechanism are being developed that will assure investors of renewal/extensions of their license provided they meet the necessary conditions.

4.4.6 Time Line for the Privatization Programme

The action plan for reform and privatization of the Nigeria electricity supply industry, key task and milestone dates have been broadly set over a period of one year by the Presidential Committee on Power.

Sequenced activities commenced in July of year 2010 and was expected to attain a steady speed by mid year 2011, definite timelines that was set by the Committee include – investors' Fora organized between October and December 2010 while privatization of generating companies, distribution companies and other generating assets (new transactions with core investors/concessionaries) commenced in November 2010 and continued

until June 2011. Preparation of bidding documents started from December 2010 – January 2011 and the exercise for pre – qualification of bidders ran from November 2010 – January 2011 which was immediately followed by approval of EOI evaluation reports in January 2011

Actual bidding and selection of selected bidders will began in January through April 2011. Negotiation and signing of final agreement, payment of purchase price balance (for equities) are fixed for the second quarter of 2012 while handover and commencement of operations have been scheduled for mid 2012[20].

4.5 APPRAISAL OF THE LEGAL FRAMEWORK FOR THE PRIVATIZATION PROGRAMME

It cannot be over-emphasized that the legal framework for a sensitive programme like privatization must be in conformity with the constitution or basic laws of the country. It is therefore imperative to ascertain the constitutionality Act of 1999 before going ahead to analyze the same.

The Public Enterprises (Privatization and Commercialization) Act, 1999[21] is an existing law within the meaning of Section 315 of the 1999 constitution[22],[23]. The constitution does not contain any provision that specifically refers to privatization. However, as part of the fundamental objectives and directive principles of state policy (Chapter II), the

[20]See: www.bpeng.org-offical the official website of the Bureau of Public Enterprises (BPE)
[21] Hereinafter, referred to the Act
[22] Hereinafter, called the 1999 Constitution
[23] As it is a new law that was in force immediately before the date when the Constitution came into force and shall be deemed to be an Act of the National Assembly.

Economic Objectives' are provided for in Section 16 of the 1999 Constitution as follows:

"The State shall, within the context of the ideals and objectives for which provisions are made in this Constitution –

Harness the resources of the nation and promote national prosperity and an efficient, a dynamic and self-reliant economy.

Control the national economy in such a manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity.

Without prejudice to its right to operate or participate in areas of economy, other than major sector of the economy.

Without prejudice the right of any person to participate in areas of the economy within the major sectors of the economy, protect the right of every citizen to engage in any economic activities outside the major sector of the economy.

Section 16 (4) of the same Constitution further provides as follows:

The reference to the 'major sectors of the economy' shall be construed as a reference to such economic activities as may, from time to time, be declared by the resolution of each House of the National Assembly to be managed and operated exclusively by the Government of the Federation; and until a resolution to the contrary is made by the National Assembly, economic activities being operated exclusively by the Government of the

Federation on the date immediately preceding the day when this section came into force, whether directly or through the agency of a statutory or other corporation or company, shall be deemed to be major sector of the economy.

'Economic activities' includes activities directly concerned with the production, distribution and exchange of wealth or of goods and services; and

'Participate' includes the rendering of services and supply of goods."

Iheme[24] deduces from the foregoing provision that the Nigerian state constitutionally mandated to (a) 'operate or participate' in sectors of the economy other than the major sectors, and (b) 'manage' and 'operate' the major sectors of the economy. Individuals, however, may 'participate' in economic activities in any sector means that private enterprises can be engaged in any sector. In addition, the state is positively obliged under Section 16 (1) (d) of the said Constitution to 'protect the right of every citizen to engage in economic activities outside the major sector of the economy'. He submitted that these provisions rightly give the Government ample room to decide on how to bring the good things of life to the citizen – whether and how far it wishes to operate public enterprises or dismantle them by way of privatization and rely on private enterprises.[25] It follows

[24] Onyekpere E. : Article titled: "Legal Regulation of Privatization in Nigeria" in readings on Privatization,(Lagos: SERI, 2003), 3
[25] Id

therefore that by reason of the meaning of the word 'participation', it goes without saying that the participation of core investors[26] and other private individuals in major sectors of the economy has the 'blessing' of the Constitution.

However, the above view has been countered by Kalu Onuoha.[27] He argued that the combined provisions Sections 14(b),[28] 17(2)(d)[29] , 16(1),(2) and (4) of the 1999 Constitution reveal that the Constitution envisages a situation where the state will continue to manage and operate the major sector of the economy while protecting the rights of the citizens to participate in the same to ensure their welfare and the common good. He further argued that the major sectors are by definition those economic activities being operated exclusively by the Government of the federation immediately before the coming into force of the Constitution. It is therefore the expectation of the programme, according to him, that the major sectors remained in the hands of the state and are not to be transferred to private investors.[30]

However, these arguments are needless because the provision of the Constitution with respect to running the major sectors of the economy is

[26] See Section 4 of the Act
[27] "Legal Regulation of Privatization – A Critique" in Readings on Privatization Supra n. 12, 13
[28] Which provides that the security and welfare of the people shall be the primary purpose of the Government.
[29] Which provides that exploitation of human or natural resources in any form whatsoever, for reasons, other than the good of the community, shall be prevented.
[30] Id

unambiguous.[31] Allowing individuals to participate in the running of the major sectors of the economy is a function of the Government's obligation to manage those sectors. This will be made clearly practical when the current privatization and commercialization programme progresses.

On the whole, however, whether a Government maintains public enterprises or privatizes them is a question to be addressed by successive Governments in its own wisdom and for the overall good and interest of the citizens of Nigeria who are the ultimate beneficiaries.[32]

4.6 THE ROLE OF THE LEGISLATURE IN THE PRIVATIZATION PROGRAMME[33]

The role of the legislature shall include but not be limited to the following:

- The review of existing body of legislation and the making of new ones where necessary;
- Taking active part in the fashioning out the regulations for the sector;

[31] Consider section 16(1)(d) and 16(4)(c) (discussed above)

[32] Iheme (supra) has substantiated this assertion as follows: The Government of General Ibrahim Babangida (1985-1993) introduced the programme but the government of General Sani Abacha (1993-1998) was very much enthusiastic about it. Abacha sought to address the problems of the public enterprises, not by privatizing them or even commercializing them as provided for in the Act of 1993, but by seeking to apply the flaws approach of intensifying political and bureaucratic control over them. Towards this end , his government enacted the Public Enterprises Regulatory Commission Act, 1996, a law that curiously remains in the statute books without being implemented. Under the successive governments of General Abdusalam Abubakar (1998-1999) and Olusegun Obasanjo (199-2007), privatization has been favoured.

[33] Duru, N. C. "The Legislature in Privatization Process" a paper delivered at the fourth Pan-African Privatization summit, Abuja, 19-22 November 200,88

- Discharging of its oversight functions with regard to the implementation of the privatization programme as well as its regulatory agencies;
- Ensuring the proper management of the privatization proceeds through appropriate budget processes;
- Helping to relate to Nigerians (through members' constituencies) the need for effective participation in the privatization process, and helping to enlist interest groups like labour.

4.6.1 Provision Inconsistent with the Power of the National Assembly

Inspite of the foregoing arguments in favour of the constitutionality (validity) of the Act, it must be noted that the Act contains some provision that are not in conformity with the Constitution. Provision that empowers the NCP to change rules and guidelines; review the privatization programme and effects without reference to anybody, especially the National Assembly.

Generally, the NCP with the Vice-President as the Chairman, can exercise a lot of other sweeping powers under the law without reference to any other authority and this is considered dangerous even under military dictatorship. A beneficent Vice-President or Chief of General Staff may cause no problems, but he will certainly not always be there.

First, Section 1 of the Public Enterprises (Privatization and Commercialization) Act provides that the National Council on

Privatization (NCP) is vested with the power to "Alter, add, delete or amend the provisions of the First Schedule" which contains a list of enterprises slated for privatization. Section 6 of the same Act empowers the NCP in like manner to make changes to the Second Schedule, which contains a list of enterprises slated for commercialization. It must be observed that some of the enterprises listed in these schedules, as well as good numbers of other existing public enterprises that the council may conceivably add to the lists, are statutory corporations while others are limited liability companies set up by the government without the enactment of a special statute. Iheme[34] has rightly submitted that to the extent that the privatization or commercialization of an enterprise established as a statutory corporation, will not most probably entail the alteration of some of the provisions of the statute that established the Corporation, neither the Council nor even the President of the Federal Republic of Nigeria can validly exercise this power. It is only the National Assembly that can constitutionally exercise the power to repeal a statute.

Again, the establishment of a dedicated Privatization Proceeds Account under Section 19(1) of the Act is decidedly against the spirit of the constitution. The provision under section 19(2) for its utilization by the

[34] Note 19 above,

Government of the Federation without appropriation by the National Assembly is completely *ultra vires* the same constitution.[35]

Thirdly, Section 28(3) of the Act provides that the ruling of the Public Enterprises Arbitration Panel (PEAP), a creation of the Act, on a dispute brought before it, "shall be binding on the parties and no appeal shall lie from the decision of the panel to any court of law or tribunal". This provision is clearly in breach of section 4(8) of the constitution[36] and therefore invalid. Generally, the court may review the rulings or awards of arbitration panels, especially if an impropriety such as fraud or lack of fair hearing is established.[37] By virtue of section 315(3) of the Constitution, the court has power to declare invalid any provision of an 'existing law' that is inconsistent with any other Act or the provisions of the Constitution.[38]

It is hoped that the current efforts by President Goodluck Jonathan administration will result in increase access to affordable and reliable electricity to all Nigerians and also create an environment that would attract private sector participation.

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[35] Thankfully, the Advisory Council established by the proposed law will replace the National Council on Privatization with most of it powers removed from the realm of absolutism into that of enlightened democratic culture. The chairman of the council shall be appointed (from the public or private sector) subject to approval by the National Assembly.

[36] Which provides as follows: "save as otherwise provide by this constitution, the exercise of legislative powers by the National Assembly or by House of Assembly shall be subject to jurisdiction of the courts of law and of judicial tribunals established by law, and accordingly, the National Assembly or House of Assembly shall not enact any law, that ousts the jurisdiction of the jurisdiction of the court of law or of a judicial tribunal established by law.

[37] Duru, N. C. Note 30 above (supra) .

[38] Balewa V. Doherty (1963) 1 WLR, 949

CHAPTER FIVE

5.1 APPRAISAL OF THE IMPLEMENTATION OF OIL AND INDUSTRY REFORM AND INSTITUTIONAL RESTRUCTURING IN NIGERIA

5.2 INTRODUCTION

The FGN's efforts to restructure and reform the oil and gas sector or industry in Nigeria in an holistic manner commenced in year 2000.

In the opening months of the new century, it became obvious that the legal and governance structures that have been designed for the sector since the 1970s could not adequately cater for the requirements of a contemporary Nigerian oil and gas industry. For example, though amended in many instance along the way, the Petroleum Act (1969) despite the various amendment is an outdated piece of legislation that is out of tune with contemporary global business realities. In addition, oil and gas released laws are contained in several pieces of legislation. This is coupled with the fact that the numerous amendments, policy statements and regulations are dispersed in several documents that are often difficult to locate.

The above also applies to virtually all the institutions in the industry, The Ministry of Petroleum however remains essentially a civil service outfit that is ill-equipped to conceive and formulate the required policies for such a complex and sophisticated industry.

The regulatory body, the Department of Petroleum Resources (DPR) is by and large, similarly constrained by the same bureaucracy as its parent

ministry and the Nigerian National Petroleum Corporation (NNPC). Is simply a typical state institution that operates as a huge amorphous cost centre with little or no sensitivity to its bottom line.

The past federal administration in Nigeria under President Olusegun Obasanjo laid foundation for the pronouncement of pragmatic policy objective and instruments, when it inaugurated the Oil and Gas Sector Implementation Committee (OGIC) on April 24 2000. The essence of the National Oil and Gas Policy (NOGP) that emerged from the OGIC efforts was anchored on the need to separate the commercial institutions in the oil and gas sector in Nigeria from the regulatory policy making institutions. Unfortunately, the Obasanjo's administration did not completely put into operation the recommended OGIC policy instruments to facilitate oil and gas sector institutional restructuring.

On September 7, 2007, the Federal Government administration under President Umaru Musa Yar'Adua appointed Dr. Riwlanu Lukman[39] to chair a reconstituted OGIC with a mandate to transform the broad provisions in the NOGP into functional institutional structures that are legal and practical for the effective management of the oil and gas sector in Nigeria. The mandate basically calls for a restructuring of the petroleum industry in Nigeria that can facilitate the re-positioning of the national

[39] Iledare O.O. (2008): Petroleum and the Future of Nigeria: Challenges, Constraints and Strategies for Growth and Development. IPS Monograph Series No.5, pp30. University of Port Harcourt's Institution of Petroleum Studies, Nigeria.

economy to a GDP level comparable to the top twenty (20) largest worldwide economies by the year 2020.

5.3 A SYNOPSIS OF THE OGIC REPORT

The Lukman Committee submitted its OGIC report on August 3, 2008 and the report provided a pragmatic regulatory framework and institutional arrangements that could bring Nigeria oil and gas industry into global prominence.[40] The report addressed the ineffectiveness of the oil and gas sector in Nigeria over the years, which borders on the use of outdated or very archaic regulatory and institutional arrangements to govern the petroleum industry.

The Lukman's OGIC confirmed that such regulatory and institutional structures are incongruous with contemporary global oil business. The report also provided insight into the current national petroleum policy framework, objectives and goals and the innovative institutional structures and policy functions to proffer solutions to the problems affecting oil and gas industry in Nigeria.

Further, it highlighted certain operational strategy and action items necessary to drive the national oil company to a global status and suggested solution to fiscal policy problems and community issues affecting all segments of the petroleum industry in Nigeria.

[40] Dr. Lukman, former OPEC administrator for many years, chaired the original OGIC inaugurated by President Olusegun Obasanjo in April 2000, let me also add that Dr. Lukman has also been a major player in the Nigeria oil and gas policy development and implementation since 1980s. Perhaps, public perception of the OGIC as a sort of "new wine in an old wine cloth" are legitimate

Without mincing words, the Lukman OGIC advocated the need for consultation with energy experts on various regulatory frameworks and institutional structures for clarity and research. The aspects of the said Report which is under going further research consideration include funding sources and sustainability, capitalization of commercial institutions, incorporation of joint venture operations as autonomous commercial entities, and finding progressive policy instrument and terms for existing and new contractual and concessionary fiscal arrangements.

The aspect of the OGIC reform efforts that has attracted public attention is the unbundling of the Nigerian National Petroleum Corporation (NNPC) as presently constituted. However, the purpose for a new institutional framework or structures in the OGIC report is intended to facilitate managing and overseeing all the respective arms of the oil and gas sector in Nigeria more effectively than before, by assigning functional responsibilities to separate institutions/bodies.

The institutional framework is also based on the policy mandate to separate the commercial/operations (private sector culture) of the oil and gas sector from the policy making and regulatory aspects (public sector administration) in Nigeria. Accordingly, the institutions are revenue generating and some are non-revenue generating or revenue "enhancing" institutions. In any case, for many oil industry observers in Nigeria, the main features for the entire oil and gas sector reforms is restructuring of

Nigerian National Petroleum Corporation (NNPC) and its subsidiaries. The success of the restructuring, therefore, will depend on the implementation of these institutions' policy and statutory functions. An appraisal of the new institutional structures proposed by the OGIC for effective governance and management of oil and gas sector in Nigeria are as follows:

5.4 NATIONAL PETROLEUM DIRECTORATE (NPD)

In the said OGIC Report, The National Petroleum Directorate (NPD) is designed as the primary institution to initiate, create, and implement the petroleum policy governing the oil and gas sector in Nigeria. The predecessor, the Ministry of Petroleum Resources (MPR), has not shown adequate capacity to handle the tasks of oil and gas policy initiation, formulation, and implementation. It is my opinion, that the ineffectiveness of MPR in its functions as a policy making institution, has never been because of its location in the Ministry or lack of competent and highly skilled manpower, but a result of lack of institutional empowerment and putting a "round peg in a square hole" by the central government. Thus, the oil and gas industry policy initiation and implementation functions ended up being assumed by NNPC to the detriment of its commercial and operational responsibilities over the years.

Accomplishing the thirteen stated objective for NPD by OGIC would depend significantly on institutional empowerment, funding, and finding and putting highly skilled personnel in key management positions as

envisioned by the OGIC. Surprisingly either by error of commission or omission or because we have had several versions of the final report, the OGIC is silent on the terms of employment for the Director General (DG) of NPD. Neither were there any guidelines on whether NPD management positions shall be filled by political appointees or be hired through open resource recruitment. The government, as a matter of obligation, must avoid invoking or applying the spirit of federal character or "geopolitical zoning" to justify "putting a square peg in a round hole" during recruitment or selection exercise for the filing top management positions in NPD. These principles must be used in pragmatic manner without sacrificing efficiency and effectiveness for equity. Regarding funding for NPD, a surcharge or fees on per fiscal barrel of oil equivalent basis to NPD is constitutionally taxing. A constitutional amendment may be required to do this. A line-item budgeting approach should be evaluated for consideration.

5.5 NIGERIAN PETROLEUM INSPECTORATE (NPI)

The National Petroleum Inspectorate (NPI) is the regulatory institution for the upstream segment of the oil and gas industry in Nigeria. NPI will assume the functions of the Department of Petroleum Resources (DPR) and it will be the upstream industry operation and technical regulator. It will have operational autonomy from the NPD unlike its predecessor, the DPR, which traditionally deprived it of its operational efficiency as it took

directives from the Minister of Petroleum Resources. The extent of NPI's strategic autonomy from the NPD, which served as the Secretariat of the Minister of Petroleum Resources is not clear. The terms of employment for management positions in the NPI and the optimal approach to filling these positions either as political appointees or professionally recruited management staff are very important if the ongoing restructuring efforts are to be successful. Over the years, we have had many former DPR Directors and GMDs as the number of Presidents or Heads of States. The undeveloped nature of oil and gas industry regulatory framework in Nigeria is, therefore, not surprising to many industry analysts. Thus, a confirmation process by the National Assembly for a fixed term appointment for the Director General of the upstream regulatory institution will enhance its service delivery; but I would recommend against making Deputy Director General's (DDG) position a political appointee. It should left for bureaucracies as this will ensure continuity of regulatory assignment and internal development of capacity of personnel.

5.6 PETROLEUM PRODUCTS/REGULATORY AUTHORITY (PPRA)

The Petroleum Product Regulatory Authority (PPRA), which has been designated to regulate the downstream sector of the oil and gas, is a stand-alone institution with no functional relationship with NPI. Alternatively, it could have been a division of the NPI. PPRA should be directed by a

technically competent Deputy Director General (DDG) and not a political appointee. This arrangement would optimize the distribution of the limited skilled labour force available at this time both locally and in the Diaspora. This revised arrangement is also not expected to affect the already defined functions and funding of PPRA. The terms of employment for the management positions in the PPRA and the optimal approach to filling these positions either as political appointees or professionally recruited management staff are very important if the ongoing restructuring efforts are to be successful. Thus a confirmation process by the National Assembly for a fixed term of appointment for the Director General would enhance the institutional performance of PPRA.

1.7 NIGERIAN NATIONAL PETROLEUM CORPORATION (NNPC LTD.)

There is no doubt that restructuring the Nigerian National Petroleum Corporation (NNPC) is the focal point of the ongoing oil and gas sector reforms in Nigeria. The general opinion of the public is that NNPC has failed woefully to fulfill its statutory mandate is perhaps justifiable. It must be recognized, however, that its failure to attain the prospect to drive the national economy has not entirely been the Corporation's omission or default.[41] For example, there has been many NNPC CEOs as there Heads of State or Presidents in Nigeria from 1976 to 2007. Thus, the degree of

[41] Oil and Gas sector Reforms Implementation Committee Draft Final Report, pp79, May 2008.

operational and strategic autonomy of the current NNPC from the national government in comparison to successful global NOCs is appalling. Ironically, most of these successful NOCs companies are as old as NNPC, which was created in 1976.

Therefore, the new goal is to reposition the new Nigerian National Petroleum Corporation to be known as (NNPC Ltd.), on a level that is comparable to the status of any successful National Oil Corporation (NOCs) worldwide, such as the Malaysia NOC, (Petronas), Brazilian (Petrobras), Venezuela NOC (PdVSA), Norway Statoil, Algeria NOC (Sonatraco), Mexico NOC (PEMEX), and Saudi Arabia's (Saudi Aramco). The desired goal is to get the new Corporation or Nigerian NOC to a level in which acceptable degree of operational and strategic autonomy from the government and similar to the Norway's Statoil. The separation of commercial and business operations from regulatory and policy-making functions in the oil and gas sector in Nigeria will assist in transforming NNPC Ltd. to be a more focused, more so because the regulatory and the operational functions of the oil and gas sector will henceforth to undertake separate and autonomous institutions, *ceterus paribus.*

The identity and corporate culture of NNPC Ltd., is such that it is expected to operate along the entire petroleum supply value chain. This will make NNPC Ltd, a fully integrated oil and gas company. The envisioned ownership structure will enhance its ability to function as a purely

commercial and capitalized business entity. The exclusion of NNPC's current profitable assets from the take - off assets for the new National Petroleum Corporation NNPC Ltd., however, may make the capitalization process of the national company difficult. The functionality of the Board of Directors in the governance structure of NNPC Ltd. is vague. There is also uncertainty as to the extent of the operational and strategic autonomy of the NNPC Ltd and its insulation from the influence and dictate of Minister of Petroleum Resources.

5.8 NATIONAL PETROLEUM ASSETS MANAGEMENT AGENCY (NAPAMA)

The National Petroleum Assets Management Agency (NAPAMA), like NNPC Ltd., is a commercial and operational institution empowered to undertake cost/commercial regulation of the oil and gas industry. It is conceived to manage all national assets and investments in exploration and production ventures to ensure maximum government return and "take" statistics. It is paradoxical, however, for NAPAMA to regulate and control costs within the Incorporation Joint Ventures (IJV) framework. The IJV concept seeks to convert all of the existing JV arrangements into autonomous commercial entities. Thus, how can NAPAMA regulate and control cost for IJV companies who have autonomous Board of Directors? An outright rejection of the IJV idea as currently proposed seems more likely than not in the National Assembly. Further, the idea is most likely

dead at the door steps of the International Oil Companies operating in Nigeria, not because of its illegality, but the expediency of the concept. The biggest concern of all, of course, border on international business ethics. The IJV concept will be thwarted if the international community perceive it as a form of petroleum assets nationalization.

5.9 NATIONAL PETROLEUM RESEARCH CENTRE (NPRC)

National Petroleum Research Centre (NPRC) is to be responsible for research and development in the petroleum industry in Nigeria. It is expected to pay a great deal of attention to upstream exploration and development issues and problems. As with NAPAMA, NPI, and PPRA, the nucleus of NPRC will be formed by the old NNPC, R & D Assets. This is going to be another drain on the NNPC Ltd. human resources capacity. The idea of a separate National Oil and Gas Research Centre is obsolete. All the NPRC policy functions could easily be handled by existing federal institutions. This formed the basis for the establishment of the existing Petroleum Technology Development Fund (PTDF) and the many Departments of Petroleum Engineering and Geosciences in Federal Universities and the Centre for Petroleum Studies in Nigeria.

In conclusion, the rationale for restructuring the oil and gas sector in a petroleum dependent economy like Nigeria should be to enhance the sustainability of petroleum wealth and its impact on all stakeholders. Undergoing such reforms presupposes that the current state of the industry

is inefficient in service delivery and inefficiency at promoting society's welfare objectives. This notwithstanding, such reforms or restructuring must not only focus on enhancing industry effectiveness and efficiency, it must be mindful of equity issues with respect to wealth distribution among all stakeholders-governments, communities, and operators.

For an average citizen of Nigeria, the final issue raised by the OGIC reform is simple: how will the recommended oil and gas institutional structure and regulatory framework maximize the economic benefits of producing and remaining petroleum reserves in Nigeria for current and future generation! The regulatory framework and institutional structures espoused in the OGIC Report could facilitate economic prosperity for an average citizen in Nigeria. However, the caveat or critical issues to keep in mind is recognition of the fact that petroleum is an exhaustible resources and a barrel of oil and gas produced and consumed in one generation is no longer available for the next generation. Yet, there is an opportunity lost if a barrel of oil equivalent of hydrocarbons being produced in this generation is not produced efficiently, effectively and equitably. Thus, hydrocarbons produced today must be used to develop durable infrastructures and human capital that benefits and advance society for generations to come. This is the way to render ineffective the "Dutch Disease," that has traditionally infected most natural resources dominated economies.

5.10 KEY PROPOSAL INTRODUCED BY THE PETROLEUM INDUSTRY BILL

The key objectives of the Petroleum Industry Bill being proposed as an Executive Bill at the National Assembly are as follows:

i) Maximization of the nation's economy rent from oil and gas sector whilst not jeopardizing the growth and development of the Industry.

ii) Separation and clarity of roles between the different public agencies operating in the industry

iii) Infusion of strict commercial orientation in all relevant aspects of the industry.

iv) Ensure an increased transparency and good governance, accountability and accurate processes; and

v) Fostering an enabling business environment with minimal political interference,

vi) Maximization of local content and development of Nigeria capacity

vii) Diversification of the economy.

A single robust legal and regulatory Framework/Legislation to address all issues that are covered by downstream, midstream and upstream of the Nigerian Oil and Gas Sector that are currently regulated by principal and subsidiary legislation above.

The Petroleum industry Bill and the recommendations proposed therein shall fundamentally address issues relating to environment, health, safety and community rights and development.

5.10. Licensing/Lease Regime For the Award of Oil Blocks Proposed Under the Petroleum Industry Bill (PIB)

Under the current oil Prospecting license (OPL) Regime, a licensee for an has a duration of 5years with no provision for renewal and with no special work programme. In the PIB, a further renewal of OPL equivalent for 5years is assured.

However, the OPL regime proposed under the new legislation (PIB) makes room for a National Grid System which gives basic information on oil blocks and relevant data on the oil fields to assist in proper acreage management.

In addition, Petroleum Prospecting License (PPL) that is proposed to replace the resent OPL regime requires the licensee to commit to a work programme. Again, the new legislation (PIB) provides a separate Petroleum Mining Lease (equivalent of Oil Mining Lease (OML) each for crude oil and gas.

CHAPTER SIX

6.1 SUMMARY, FINDINGS, CONCLUSION AND RECOMMENDATIONS

6.2 FINDINGS

The underlisted findings have arisen from this Research Study:

1. The need for a robust and firm legal framework for the Privatization of the Energy Sector (Power Utilities and Oil and Gas firms) in Nigeria being the strategic sector of our national economy.
2. The roles and responsibilities of regulatory institutions in the Energy Sector (Oil, Gas and Power Utilities) are still very much opaque and not properly defined as there are overlapping functions between the Department of Petroleum Resources, Ministry of Petroleum Resources and the Nigerian National Petroleum Corporation.
3. There is clear need to strengthen the regulatory powers of the Nigeria Electricity Regulatory Commission (NERC) to enable it effectively regulate Power Utilities operating in Nigeria especially the Power Holding Company of Nigeria PLC (PHCN).
4. The imperative of ensuring that the Regulatory Institutions in the Energy Sector are truly independent so that they can be free from unwholesome interference that often leads to regulatory capture

which hampers foreign direct investments as well as inflow into the domestic section of the Energy Sector.

5. Government's continued funding of critical Sector of the economy e.g. (Electricity Transmission) is necessary to improve the poor state of critical infrastructure in the Energy Industry.
6. That it is necessary that earnings in terms of tariffs should correspond with current realities and be such that will attract private investors and drive efficiency in the Power Sector.

6.3 CONCLUSION

We have note the need for expeditious passage of the Petroleum Industry Bill by the National Assembly so that reforms earmarked for that vital Sector of the Energy Industry can be implemented.

In the same vein, the Nigerian Electricity Regulatory Commission must display the capacity to effectively regulate the Electric Power Sector utilities.

The Bureau of Public Enterprises (BPE) is advised to fastrack the privatization for the power Utilities to enable them take full advantage of the present administration's demonstration of political will to implement the Electric Power Sector Reform Programme in a manner that ensure that at least 70% of Private Sector participation in the Sector by mid 2012.

Going forward, the Energy sector in Nigeria should attract the desired foreign investment with the right focus, appropriate regulatory framework and the right managers.

It is also provable that the sector may be able to generate employment through training and staff capacity building programmes.

The Nigerian Government appears to be taking concerted action to reform the Nigerian power sector to drive expansion of capacity so as to enable the growth of the overall Nigerian economy. The establishment of the Presidential Task Force on Power and the publication of the Roadmap for Power Sector Reform has revitalized the reform process that was initiated with the enactment of the 2005 Reform Act. The renewed governmental commitment to privatize the gas-fired generation companies (GenCos) and Distribution companies (DisCos), its commitment to enter into concession agreements for hydro GenCos and the regulatory and commercial framework that has been put in place to make Nigeria an attractive market in which to explore IPPs, has the potential to open the door to significant private sector

investment in the Nigerian power sector, presenting opportunities and challenges to potential investors.

To be able to achieve the set target for Private Sector Investments in the Nigerian Electricity Sector the Legal and Regulatory Institutions already

established to deliver on their statutory objectives for instance; NERC and DPR, Ministry of Petroleum Resources should be holistically strengthened:

6.4 RECOMMENDATIONS

In view of the forgoing, we recommend as follows:

1) **Restructuring and Reform or the Regulatory and Legal Framework for the Oil and Gas Industry through:**

a. The immediate passage of the Petroleum Industry Bill into a full fledged law.
b. The full implementation of Nigerian Content Management Development Act the Policy for domestic gas utilization especially to run our Gas turbines use in generating electricity thereby boosting power generation capacity.
c. Strengthening and broadening DPR's Regulatory capacity and its efficiency in the regulation of players in the sophisticated upstream oil operations.
d. Ensuring the establishment of a more transparent application of consistent principles of due processes in the Award/bidding for Oil Blocks under the Petroleum Act and its subsidiary legislation.
e. BPE, an agency for the implementation of the reform should ensure complain with transparency and due process.

2) Reform and privatization of the Electric Power Sector

a. Strengthening NERC's regulatory capacity in regulating the sector particularly as the electricity market becomes competitive.

b. **License Duration**

The 2005 Reform Act and NERC's regulations provide for a generation license to have a duration of 10 years, renewable for a further five years. While this aligns with the total duration of the uniform tariff envisaged by the Multi Year Tariff Order (MYTO), a total license duration of 15 years may present challenges to potential investors and their lenders given that such a 15-year period likely is well short of the useful life of the assets involved, either in a privatisation or an IPP transaction. In addition, 15 years would be shorter than the tenor of long-term debt financing that an investor would target in a finance plan for a green-field IPP.

NERC is already addressing the concerns surrounding the duration of licenses by granting a further 10-year license towards the end of the initial 10-year license (which such second 10-year license would then be followed by the five-year renewal license) — resulting in a 25-year total license period. Though helpful, investors have questioned the level of discretion given to NERC at each renewal phase during such 25-year period. In response to this, NERC stated that so long as the operator was compliant with its license obligations, the second 10-year license and the five-year renewal license would be granted automatically. While certainly

a step in the right direction, investors will want to be sure that such undertakings are reflected properly in the law and in its regulations therefore, NERC's enabling law (EPSR Act) requires an amendment in this direction.

c. PPA Counterparty and Duration

The establishment of the Bulk Electricity Trader provides a degree of certainty in managing PPA counterparty risk, but the Nigerian government's plan regarding the future transition to a wholesale market (including with respect to timing) remains uncertain. PPAs entered into with the Bulk Electricity Trader should provide adequate protection to projects, investors and lenders for any transition arrangements and the duration should be sufficient to attract long-term debt financing. Investors may wish to consider a range of options that have been put in place in other locations around the world in PPAs with monopoly offtakers to address this risk including appropriate credit support and/or "put" options. The tariff reflected in the PPA also will be a primary focus for investors. Other key factors will include the proposed duration of the PPA (does it match the tenor of the investor's financing; the duration of the fuel supply); commercial reasonableness of terms (*i.e.* pricing, pass through costs); risk of non-dispatch; and foreign currency risks.

d. Gas Supply Counterparty and Duration

Gas supply remains a real concern for investors. Investors should review the form gas supply agreements being developed by the Gas Aggregator. Key factors will include the proposed duration of such agreement (does it match the tenor of the investor's proposed financing; the duration of the PPA); commercial reasonableness of terms (*i.e.,* pricing, pass through costs); and risk of non-supply, both in reasonably foreseeable circumstances and in the event of force majeure.[42]

In addition, the following actions should be taken:

i. Development of a Legal and Regulatory Framework for Embedded Generation and Independent Electricity Distribution Network (IEDN) – the purpose this is to encourage the provision of decentralized energy as a means of increasing access to electricity supply and at the same tome avoiding the current challenge posed inadequate transmission capability in the country.

ii. Establishment of a Regulatory Framework for Renewable Energy – To complement public and private efforts in developing renewable energy as an alternative to electric power supply, NERC has identified the need to promote renewable power generation not only because this clean form of energy is pivotal to the protection of the environment but also because Nigeria currently has huge untapped

[42] Latham & Watkins LLP- Firm's 2010 : Publication – Nigerian Power Sector Reforms: opportunities and challenges pages 1-8

renewable energy e.g. solar, wind, biomass etc. we therefore recommend that this huge renewable energy source be harnessed.

iii. Survey of Nigeria's Captive Power Generation – NERC should carry out a statistical survey of the quantum of captive generation (self-generation) in the country. This data is necessary in proper planning for the procurement of additional generation capacity. This should assist NERC in formulating new guidelines for its operations in the area.

The Commission should also develop a Regulation on labeling standards that will mandate manufacturers of electrical appliances and luminaries to have labels showing the energy efficiency level of luminaries and appliances. This project will be carried out in collaboration with other government agencies like the Standard Organization of Nigeria. This initiative is urgently recommended to boost standardization of quality of materials in the industry.

iv. Framework for Development of Power Consumer Assistance Fund – As part of its regulatory roles, the EPSR Act[43] provides for the setting up of power Consumer Association fund to subsidize underprivileged power consumers who are unable to pay cost reflective tariff. NERC is advised as part of strengthening its roles to

[43] **Section 83-87 of the Electric Power Sector Reform Act No 6, 2005** provides for the establishment of Electricity Consumers Assistance Fund to provide access and connection to electricity by providing funds to indigent Nigerians for this purpose.

finalize without further delay the required framework for the implementation of this fund.

v. Improving the capacity of Judicial Officers on the Regulatory Issues in the Electric Power Sector: As part of stakeholders awareness programme, NERC should prioritize the organization of capacity building programme for Judicial officers of the Federal and States' High Courts and Court of Appeal to bring them up-to-date with development in the Power Sector and the Sector Reform Programme. This is especially important as appeals from the Commission's decision go to these courts and there is therefore need to develop the capacity of judges who may have to adjudicate over power sector specific issues.[44]

In conclusion, it is hoped that these recommendations will bring about a major change in the final legal framework for the privatization and reform of the energy Sector in Nigeria as this is required urgently to transform the said Energy Sector being a strategic Sector of our national economy.

[44] Nigeria Electricity Regulatory Commission- Annual Report 2009- pages 39-40

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