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Background: Towards a Critical Assessment of Canadian-Nigerian Bilateral Relations

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BACKGROUND: TOWARDS A CRITICAL ASSESSMENT OF CANADIAN-NIGERIAN BILATERAL RELATIONS

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Abstract

Although the diplomatic relations between Canada and Nigeria is almost six decades old, the nature of this bilateral relationship has not been the subject of rigorous academic research. While a recent body of research by international relations scholars has taken up the broad critical study of Canadian-African relations, a significant gap exists with respect to studies that focus on the context of Canada's engagement with individual African countries. Against this background, this paper briefly examines the bilateral trade and investment engagements between Nigeria and Canada. The modest aim is to highlight the existing framework that guides the relations of both countries, highlight some projects, and document some preliminary observations while posing further questions that will deepen our understanding of the socio-legal implications of Canadian-Nigerian bilateral engagements.

1. UNTIL the independence of most African states in the 1960s from European colonial rule,¹ Canada had no direct engagement with these states.² Since then, however, Canadian relations in Africa have expanded broadly across the continent.³ Yet, despite the expansion of these engagements, the nature of Canada's relationship with Africa remains ambivalent.⁴ This article

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¹ For an account that takes stock of Canada's renewed aid policies and programs towards Africa in the context of renewal and reform, see David R Black, "Canadian Aid to Africa: Assessing 'Reform'" in Andrew F Cooper & Dane Rowlands, eds, *Canada Among Nations 2006: Minorities and Priorities* (Montreal: McGill-Queens University Press, 2006) 319; Stephen Brown, "The instrumentalization of foreign aid under the Harper government" (2016) 97:1 *Stud in Pol Econ*, 18 at 19.

² South Africa was an exception in this regard as a small amount of trade existed between both countries. "Since 1957, Canada, either directly or indirectly through dual and multiple accreditation has extended diplomatic relations to the whole of Anglophone Africa as well as to Ethiopia, Somali and Liberia." Robert O Matthews, "Canada and Anglophone Africa" in Peyton V Lyon and Tareq Y Ismael, eds, *Canada and the Third World* (1976, Macmillan of Canada, Maclean-Hunter Press, 1976) 60 at 61, 90 [Matthews, "Canada and Anglophone Africa"].

³ For a historical account of Canadian and Anglophone African countries, see Matthews, *ibid*.

⁴ See generally, Yves Engler, *Canada in Africa: 300 years of aid and exploitation* (Fernwood Publishing, 2015); David R Black, *Canada & Africa in the New Millennium: The Politics of Consistent Inconsistency*, (Waterloo: Wilfrid Laurier University Press, 2015). For an interesting historical account of the emergence of Canadian aid and its politics in Francophone and Anglophone Africa, see Robert O Matthews, "Canada's Relations with Africa" (1975) 30:3 *Intl J* 536 at 549-560 [Matthews, "Canada's Relations with Africa"].

explores and provides some background analysis towards a critical assessment of the bilateral (*i.e.* trade and investment) engagements between Canada and Nigeria. The article is part of a broader research agenda aimed at developing a scholarly documentation of the relations between Canada and Anglophone Africa.⁵ Its modest objective is to look critically at the implications that emerge from these bilateral engagements with a view to likely raising questions for further (empirical) research that will deepen our scholarly understanding. Readers should keep in mind that this article serves primarily as background work for a project that will be further developed in the near future.

II. THEORETICAL BACKGROUND

This section reviews some critical literature from international relations scholars that have examined on the broad level the engagements between Canada and Africa. This heterogeneous theoretical perspective provides the basis for analyzing the implications of the relationship between Canada and individual African countries. Those who utilize this approach (such as David R. Black and Edward Akuffo) are interested in teasing out and explicating the embedded power and other relations in these engagements as a means of fostering a better understanding for challenging their current constitution. Together these scholarly interventions will inform

⁵ See *Canadian-Anglophone Human Rights Engagements*, online: <54.218.11.54/caahre/>. See also *Canada's Rights Role in Anglophone Africa*, online: <www.carriaa.org/about/>.

CARRIAA builds on the success of an existing Social Sciences and Humanities Research Council of Canada (SSHRC) funded research into Canadian-Nigerian human rights engagements led by Professor Obiora Okafor. The research maps, analyzes and theorizes the nature, attainments, problems and prospects of Canadian-Nigerian human rights engagements between 1999 (when Nigeria's current democratic regime was established) and 2011 (a convenient cut-off date). The research study was borne out of a need to address the inadequacy and dearth in existing scholarly literature on the nature, attainments, problems, and prospects of Canadian-Nigerian human rights cooperation despite a long history of general bilateral relations and cooperation in human rights between both countries. One of the goals of the research study is to inform policy and practice in human rights engagement between Canada and Nigeria and also other similar country-to-country relationships.

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some of the critical analysis that this article undertakes in respect of the specific Canadian-Nigerian case.

In his work, David R. Black offers an interesting theoretical analysis of Canada's "high-profile engagement" in Africa.⁶ According to Black, "Analytical Eclecticism" provides a useful theoretical tool for a rigorous study of the engagements between Canada and African countries. It offers a "more complete and compelling interpretation of certain social problems" while also providing the space "to make sense of the persistent patterns and apparent contradictions of a Canadian encounter with Africa that has sometimes enjoyed remarkably high levels of prominence and popularity, but has just as regularly faded into obscurity, with deleterious effects for policy effectiveness."⁷ According to him 'analytical eclecticism' combines competing research traditions with a view to "defining and exploring substantive problems in original, creative ways [that contribute] to both a deeper understanding of a critical problem and theoretical progress for international relations."⁸ In his work, Black combines three frameworks of analysis: the international society/good international citizenship approach, the Coxian or neo-Gramscian/hegemonic middle-powermanship approach, and a post-colonial approach. Through this theoretical lens, he expounds "the inconsistencies and contradictions [that underpin] Canada's involvement in Africa"⁹ in three core areas that define Canada's engagements in the Africa. First, "through erratic aid policies that benefit Canadians and reinforce inequities"¹⁰; second, through failed security policies that do not reflect the "normative advocacy of high

⁶ Black, *supra* note 4 at 15-16.

⁷ Black, *ibid* at 17. See also Black, *ibid* at 34-35 (*i.e.* Table 1.1, titled "Three Theoretical Frames for Canada in Africa").

⁸ See Black, *ibid* at 16. See also Peter Katzenstein & Rudra Sil, "Eclectic Theorizing in the Study and Practice of International Relations" in Christian Reus-Smit & Duncan Snidal, eds, *The Oxford Handbook of International Relations* (New York: Oxford University Press, 2008) 109; Rudra Sil, "Simplifying Pragmatism: From Social Theory to Problem-driven Eclecticism" (2009) 11:3 *Intl Stud Rev* 648.

⁹ See Black, *supra* note 4 at 2.

¹⁰ *Ibid.*

minded principles with sufficient resources to realistically support them”¹¹; and third, through “large extractive industry investments that undermine local environments and human security.”¹² In other words, according to Black, most of Canada’s promises towards the African continent – whether in the context of aid packages, resource extraction and economic growth, or human rights and security – have achieved significantly less than was expected. The critical approach amplifies the hypocrisy of Canadian bilateral trade relations in Africa as one that is too embedded with national interests and has systemically perpetrated narrow self-seeking objectives that are fueled by the empty rhetoric of official statements.¹³

A non-imperial internationalist approach that draws on the theoretical insights of the constructivists informs Edward Ansah Akuffo’s book on Canadian foreign policy in Africa.¹⁴ This ‘non-imperial internationalist’ approach emphasizes the “degree to which Canada’s ‘moral identity’¹⁵ in Africa is co-constituted through the engagements between Canadian and African policies and officials.”¹⁶ According to the approach, foreign policy is not static. Rather, the ideas that “hold it together are produced by societal actors, states and international institutional practice over time and space and therefore are subject to change.”¹⁷ Canada engages global, regional, and local actors in its relations in Africa. Even though African regional institutions have been important mediums of this engagement, they have received less attention. Akuffo’s

¹¹ *Ibid.*

¹² *Ibid.*

¹³ See Matthews, “Canada’s Relations with Africa”, *supra* note 4 at 537.

¹⁴ See Edward Ansah Akuffo, *Canadian Foreign Policy in Africa: Regional Approaches to Peace, Security, and Development*, (Burlington, VT: Ashgate Publishers, 2012). Akuffo offers a “critical examination of Canada’s policy towards peace, security and development in Africa. Specifically, it examines Canada’s response to the post-Cold War security-development challenges in relation to the New Partnership for Africa’s Development (NEPAD), the African Union’s Peace and Security Architecture (APSA), and the Economic Community of West African States (ECOWAS) Security Mechanism.” *Ibid* at 1.

¹⁵ According to Akuffo, “Canada’s moral identity entails how Canada perceives itself as caring, a good international citizen, and as a humanitarian and moral actor. The other side of the coin is the construction of Africa as the ‘other’ which is conflict-ridden and poor and, hence, requiring the benevolent support of Canada especially through development assistance and peacekeeping.” *Ibid* at 2.

¹⁶ Black, *supra* note 4 at 9.

¹⁷ Akuffo, *supra* note 14 at 203.

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work fills this gap by examining “how Canada’s moral identity in Africa has been constructed especially through development assistance and in its relationship with African regional organizations [such as the African Union and the Economic Community of West African States] and how this identity in turn influences the pursuit of Canada’s interests ...” in Africa.¹⁸ In the context of its indirect involvement, Canada has been actively involved in the promotion and entrenchment of neoliberal policies and ideologies through regional economic initiatives in Africa. An instance of this relates to Canada’s promotion of the New Partnership for Africa’s Development (NEPAD).¹⁹ According to Akuffo, “Canada’s support for the NEPAD was driven by economic interest and the opportunity that NEPAD offered to ‘institutionalize’ the neoliberal ideology in African economies.”²⁰ Similarly, the Canadian government’s engagement with African regional institutions, such as the Economic Community of West African States (ECOWAS), has been aimed towards institutionalizing the legal and structural mechanisms that would enhance the continent’s security deficit.²¹ In its relationship with ECOWAS, the promotion of peace, human security, and stability have received significant attention from the Canadian government.²²

Black and Akuffo broadly speak to Canada’s engagement in Africa from different theoretical lenses that enrich the narrative. Yet, the socio-legal implications of Canada’s engagement with individual countries in Africa remains under-studied. An important aspect of this analysis is the role of transnational corporations as actors in trade and investment relations.

¹⁸ *Ibid.*

¹⁹ For more information, see NEPAD, online: <www.nepad.org/content/about-nepad#aboutourwork>. For a critical examination of NEPAD, see James Thuo Gathii, “A Critical Appraisal of the NEPAD Agreement in the Light of Africa’s Place in the World Trade Regime in an Era of Market Centered Development” (2003) 13:1 *Transnat’l L & Contemp Probs* 179.

²⁰ Akuffo, *supra* note 14 at 97.

²¹ See Akuffo, *ibid* at Chapter 6. The chapter is titled “Theorizing Canadian Policy towards the AU and ECOWAS”.

²² *Ibid* at Chapter 5. The chapter is titled “Canada and Human Security in West Africa”.

In focusing on the trade and investment relations between both countries in the ensuing sections, this article examines the context of Canadian-Nigerian bilateral engagements.

III. CANADIAN-NIGERIAN BILATERAL ENGAGEMENTS

Canada and Nigeria's direct diplomatic relations date back to the early years after Nigeria's independence in 1960 from British colonial rule.²³ Despite this long history, the engagement between both countries has been marked by various inconsistencies, as observed by Black (albeit in the context of Canadian-African relations). Understandably, the engagement has, over time, morphed and been reshaped through the years in response to changing political and economic conditions in both countries. Despite the inconsistency,²⁴ some themes nonetheless guide the engagement between Canada and African countries. These themes include: the promotion of democratic values and good governance (particularly with respect to the conduct of elections); trade and investment (which has been marked by the conclusion of different bilateral trade agreements); mineral development in the extractive industries (an area where Canadian mining companies have been very active in Africa); climate change; post-conflict resolution and development; regional institutional and capacity building; and strengthening food security across the continent.²⁵ Canadian transnational corporations have, to date, been less active in the Nigerian extractive industries.²⁶

²³ For an exhaustive list of sectors that Canada is directly involved in in Nigeria, see Government of Canada, High Commission of Canada in Nigeria, *Canada-Nigeria Relations*, online: <www.canadainternational.gc.ca/nigeria/bilateral_relations_bilaterales/canada_nigeria.aspx?lang=eng> [Government of Canada, *Canada-Nigeria Relations*].

²⁴ See Black, *supra* note 4; David Hornsby, "Turning Perception into Reality: Canada in Africa" *OpenCanada.org* (7 November 2013), online: <www.opencanada.org/features/turning-perception-into-reality-canada-in-africa/>.

²⁵ See Government of Canada, Global Affairs Canada, *Canada and Sub-Saharan Africa*, online: <www.international.gc.ca/ss-africa-afrique-ss/index.aspx?lang=eng>.

²⁶ Despite its limited involvement, Canada has influenced the design of the Nigerian mining-industry through its regulatory frameworks. See Patrick Ugeh, "Canada seeks to Invest in Nigeria's Mining Sector" *This Day Live* (8 November). See also Engler, *supra* note 4 at 166-167.

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The focus in this section is on the Canadian-Nigerian bilateral trade and investment regime. In recent times, Canada's trade and investment engagement with Nigeria has witnessed a surge²⁷ of participation by Canadian firms and transnational corporations in specific sectors, such as energy, transportation, and general physical infrastructure.²⁸ Coupled with the surge, neoliberal economic and trade liberalization agendas have been aggressively pursued across the continent.²⁹ According to Akuffo, "[t]o a large extent multilateral aid to Africa...became an instrument for free trade and liberalization that would in turn advance Canada's economic interest in Africa."³⁰ Before examining industry-specific engagements, I analyze two agreements that provide the legal and institutional framework for Canadian-Nigerian trade and investment relations.

A. THE MEMORANDUM OF UNDERSTANDING ON THE NIGERIAN-CANADIAN BI-NATIONAL COMMISSION

The Memorandum of Understanding between the Departments of Foreign Affairs and International Trade of Canada and the Ministry of Foreign Affairs of the Federal Republic of Nigeria on the Establishment of the Bi-National Commission (the "Commission") was signed on April 23rd, 2012. The Commission aims to sustain high-level bi-lateral engagements between Canada and Nigeria with a view to promoting and increasing diplomatic cooperation, including

²⁷ "In 2015, Nigeria was Canada's second largest bilateral merchandise trading partner in sub-Saharan Africa with bilateral merchandise trade totaling \$1.45 billion. Canada's main imports consist of mineral fuels and oils, cocoa, rubber, lead and processed foods." See Government of Canada, *Canada-Nigeria Relations*, *supra* note 23.

²⁸ Matthews, "Canada and Anglophone Africa", *supra* note 2 at 98.

²⁹ According to Yves Engler, "Ottawa invested heavily in African neoliberalism with the Canada Fund for Africa providing some \$30million to promote "trade" agreements and neoliberal reforms. Another \$8 million was put into the Program for Building African Capacity for Trade while \$7 million went into the joint Integrated Technical Assistance Program for help with implementation of WTO agreements, policy formation and market development." Engler, *supra* note 4 at 135.

³⁰ Akuffo, *supra* note 15 at 99.

economic and security issues.³¹ In particular, the Commission focuses on four (4) thematic areas: political relations; economic relations; security cooperation; and development cooperation.³² The political relations extend to broad sub-themes that anticipate promotion of human rights, good governance and democracy, anti-corruption, and migration challenges. Annex A of the 2012 Proposed Bi-National Commission Work-plan anticipates the provision of support to Nigeria's Independent National Electoral Commission (INEC) and the extension of support to enhance democratic development in West Africa through the sharing of best practices. Similarly, the political relations plan foreshadows the facilitation of institutional linkages between bodies that are responsible for the promotion of human rights and good governance in national and regional contexts.

The expansive approach is also reflected in the enhanced economic relations that are anticipated as a result of the establishment of the commission. Nigeria and Canada are to explore opportunities and reduction of barriers to increase economic and commercial relations and investments in sectors of mutual interest such as the following: energy, infrastructure, transportation, information communication technologies, agriculture, hydropower, and mining.³³ Furthermore, the two States are to cooperate to address youth unemployment through improved education and vocational training strategies and institutional partnerships. In addition, both

³¹ See Government of Canada, High Commission of Canada in Nigeria, *Memorandum of Understanding between the Departments of Foreign Affairs and International Trade Of Canada and the Ministry of Foreign Affairs of the Federal Republic of Nigeria on the Establishment of the Bi-National Commission* art 1, online: <www.canadainternational.gc.ca/nigeria/highlights-faits/2013/BiNationalCommissionNationaleMixte.aspx?lang=en> [Government of Canada, *Memorandum of Understanding*].

³² See *ibid*, art 4(1)-(4).

³³ See Government of Canada, Canadian International Development Agency, *Reviewing CIDA's Bilateral Engagement – Countries of Focus and Modest Presence Partners: Qualitative Assessment* at 29, online: "Nigeria"
<static.squarespace.com/static/51e5b274e4b0dbb11f8e2f63/t/52dbabd3e4b02995f7e16018/1390144467014/CIDA%20atip%20countries%20of%20focus%20-%20scanned.pdf>.

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States anticipate the subsequent conclusion of economic partnership agreements such as the Foreign Investment Protection Agreement.³⁴

The Security Cooperation component of the Memorandum focuses on building capacity to respond to domestic and regional challenges, such as terrorism and the advancement of mutual security interests. Through Development Cooperation, both countries plan to explore strategies for the implementation of programs, such as the now expired Millennium Development Goals (replaced by the Sustainable Development Goals³⁵) and the United Nations Commission on Information and Accountability for Women's and Children's Health. The participants in this Memorandum of Understanding may amend it based on mutual consent in writing or may terminate it by giving six-month notice in writing through diplomatic avenues.³⁶

B. THE FOREIGN INVESTMENT PROTECTION AGREEMENT BETWEEN CANADA AND NIGERIA

In Canada, Bilateral Investment Treaties (BITs) are called Foreign Investment Promotion and Protection Agreements (FIPAs). FIPAs set out the respective rights and obligations of the Contracting Countries with respect to the treatment of foreign investment. Since 2008, Canada has concluded several FIPAs with a number of African countries. The former conservative Prime Minister of Canada, Stephen Harper, announced the conclusion of the Canadian-Nigerian Foreign Investment Promotion and Protection Agreement on May 1st, 2013. The agreement is expected to ensure a stable and secure bi-lateral trade and investment environment between Canada and Nigeria. FIPAs are designed to provide strong levels of protection to foreign

³⁴ See Government of Canada, Global Affairs Canada, *Agreement Between Canada and the Federal Republic of Nigeria for the Promotion and Protection of Investments*, online: <international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/nigeria/fipa-apie/index.aspx?lang=eng> [Government of Canada, *Agreement Between Canada and Nigeria*].

³⁵ See UNDP, *Sustainable Development Goals*, online: <www.undp.org/content/undp/en/home/sustainable-development-goals/>.

³⁶ See Government of Canada, *Memorandum of Understanding*, *supra* note 31 art 8(2)-(3).

investors – for both individuals and corporations – from arbitrary treatment by host states in which they own assets. According to a press release from the office of the then-Canadian Prime Minister, the treaty is:

...designed to protect and promote Canadian investment abroad through legally binding provisions and to promote foreign investment in Canada. By ensuring greater protection against discriminatory and arbitrary practices, and enhancing predictability of a market's policy framework, a FIPA allows investors to invest with greater confidence. Canada has consistently supported strong, rules-based investment through the negotiation of FIPAs.³⁷ It is anticipated that the FIPA will facilitate investment flow and contribute to job creation and economic growth in Nigeria and Canada.³⁸ An “investment” means an enterprise, share, stock, or other form of equity participation or other interest in an enterprise, that entitles the owner to share in the income or profits of the enterprise, or the assets of that enterprise on dissolution. It also includes certain loans or advances made to an enterprise – including a bond, debenture, or other instrument – a commitment of capital or other resources in the territory of a Contracting Country to economic activity in that territory, and intellectual property rights and any other tangible or intangible, moveable or immovable, property and related property rights acquired or used for economic benefit or for other business purpose.³⁹ On the contrary, an “investment” does not include a claim to money that arises solely from a commercial contract for the sale of goods or services (either by a national or by an enterprise in the Contracting Country to an enterprise in the other Contracting Country), the extension of credit in connection with a commercial

³⁷ See Government of Canada, Prime Minister's Office, “Canada-Nigeria Foreign Investment Promotion and Protection Agreement: News Release” (1 May 2013), online: Archived <www.canada.ca/en/news/archive/2013/05/canada-nigeria-foreign-investment-promotion-protection-agreement.html?=&wbdisable=true>.

³⁸ See generally Ibronke Odumosu-Ayanu, “Foreign Direct Investment Catalysts in West Africa: Interactions with Local Content Law and Industry-Community Agreements” (2012) 35 North Carolina Central L Rev 65-94.

³⁹ *Ibid*, art 1 (Definitions) FIPA.

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transaction (such as trade financing), or any other claim to money that does not involve the kinds of investments described in the FIPA.⁴⁰

The Contracting Parties are required to treat investors from their countries and covered investments (*i.e.* National Treatment)⁴¹ no less favorably than it treats investors and investments from countries that are not parties to FIPA (*i.e.* Most-Favored Nation Treatment).⁴² The Contracting Parties are further required to provide fair and equitable treatment and full protection and security of covered investments and investors of the other Contracting Country in accordance with the principles of international law.⁴³ Additionally, the Contracting Country must provide non-discriminatory treatment, National Treatment, or Most-Favored Nation Treatment with respect to measures it adopts or maintains regarding compensation for losses incurred by investments in its territory as a result of armed conflict, civil strife, natural disaster, or similar cause.⁴⁴ FIPAs prohibit a party from expropriating or nationalizing any covered investment in its territory, unless such expropriation or nationalization is (1) in the public interest; (2) in accordance with due process of law; (3) effected in a non-discriminatory manner; and (3) accompanied by payment of prompt and adequate compensation.⁴⁵ The Canadian-Nigerian FIPA also prohibits limitations that require senior management to meet specific nationality characteristics (Senior Management). However, a Contracting Country may require that a majority of a board of directors, or any committee thereof, be comprised of members of a particular nationality or territory (provided the requirement does not materially impair the ability of the investor to exercise control over its investment).⁴⁶ Each Contracting Country must grant

⁴⁰ *Ibid.*

⁴¹ *Ibid.*, art 4.

⁴² *Ibid.*, art 5.

⁴³ *Ibid.*, art 6.

⁴⁴ *Ibid.*, art 7.

⁴⁵ *Ibid.*, art 10.

⁴⁶ *Ibid.*, art 8.

temporary entry to nationals employed by an investor of the other Contracting Country who seeks to render managerial or executive services to an investment in that territory, subject to its laws, regulations, and policies relating to the entry of aliens.⁴⁷ The treaty also contains provisions on Corporate Social Responsibility and calls on investors to adopt internationally recognized standards and best practices on issues that include, but are not limited to, labor, the environment, human rights, community relations, and anti-corruption.⁴⁸

The Canadian-Nigerian FIPA has contains provisions on the settlement of disputes between an investor and the host party.⁴⁹ Disputes may be submitted to arbitration for breach of a substantive obligation and for loss or damage as a result of the breach if consultations held to resolve the claim are unsuccessful. Generally, arbitrations are to be governed by the International Centre for Settlement of Investment Disputes (ICSID) Convention, the Additional Facility Rules of ICSID, or the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, as determined under the terms of the FIPA. The ICSID regime provides more certainty with respect to enforcement of awards than other arbitration mechanisms because all ICSID contracting states, whether or not they are parties to the dispute, are required by the Convention to recognize and enforce ICSID arbitral awards. The Contracting Parties anticipate that the agreement shall remain in force for a period of 15 years.⁵⁰

While the efficacy of the FIPA between Canada and Nigeria remains untested by arbitration or otherwise, some observations emerge with regards to the potential nature of the agreement. Naturally, these observations are of an interim nature and would require further inquiry to understand the implication of the FIPA in the context of Canadian-Nigerian bilateral

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, art 16.

⁴⁹ See generally, *ibid.*, ss C, D.

⁵⁰ See Government of Canada, *Agreement Between Canada and Nigeria*, *supra* note 34 art 43(3).

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trade and investment. The first observation is that FIPAs and similar bilateral investment treaties by their nature have locking effects regarding possible economic flexibilities with respect to the concerned developing countries and regarding space or opportunities for citizens of the developing country/partner state to have their say in public policy choice. For instance, in the next section, I highlight the context of the privatization and deregulation of the Nigerian power sector reforms that has been driven primarily by Canadian consulting firms as a form of engagement between both countries. These need to be studied critically to understand the extent to which public policy choices have been constrained by the project.

Second, the dispute settlement mechanism under FIPA – ICSID – has been criticized as unpredictable and open to bias.⁵¹ The ICSID regime provides more certainty with respect to enforcement of awards than other arbitration mechanisms because all ICSID contracting states, whether or not parties to the dispute, are required by the Convention to recognize and enforce ICSID arbitral awards. One of the major concerns is that, unlike judges of both domestic and international courts, arbitrators lack the safeguards that apply to judges. While it is understandable that foreign investors may lack confidence in the national judicial system of a developing country such as Nigeria, one cannot also overlook or underestimate the influence and power of large multinational corporations within such countries. It will therefore be interesting to study the extent to which the threat of actions against the Nigerian government, based on investments under FIPA by Canadian investors, have had any “chilling effect” on the Nigerian government’s decisions to raise regulatory standards or consider new policies in public interest.

Third, the human rights ramifications or overlap of the FIPA requires a critical academic inquiry. It is worrisome that pertinent socio-economic issues, such as human rights and

⁵¹ Iboronke Odumosu-Ayanu, “The Antinomies of the (Continued) Relevance of ICSID to the Third World” (2007) 8 San Diego Intl LJ 345.

environmental protection, were only considered under the Corporate Social Responsibility provision of the FIPA, despite the fact that both Contracting Parties are signatories to various human rights conventions. A major concern is that the protections guaranteed to investors under FIPA can conflict with or constrain states' ability to meet its human rights obligations. This determination can however only be made conclusively in the context of Canadian-Nigerian engagements, by studying the effects of specific projects in Nigeria as the host country. In the next section, I briefly examine the involvement of some Canadian firms in Nigeria with a view to possibly raising future questions for scholarly investigations into the implications of these bilateral relations.

IV. POWER SECTOR REFORMS: THE DOUBLE TALE OF PRIVATIZATION & ENERGY DISTRIBUTION IN NIGERIA

The brief discussion of the privatization process is provided as a background for linking the involvement of Canadian consultancy firms in the process and, more importantly, to raise certain questions, that have remained unanswered in the literature, with respect to Canadian-Nigerian bilateral trade engagements. Historically, meeting the gap between the demand for power in Nigeria and the electricity available from the grid has been a challenge for the Nigerian government. Despite significant investment by the government over time, the power sector in Nigeria faces mixed challenges ranging from slow growth in generation capacity, market deregulation process interference by Government, electrical transmission lines and distribution equipment vandalism, poor maintenance of existing electrical facilities and corruption. Yet, the critical nature of this sector to the overall economic development of Nigeria means the government must continue to find the will and the means to optimize power generation. Against this troubled past, the decision to privatize the sector with the promise of efficiency and

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optimization was widely embraced. The National Electric Power Policy (2001) and the Electric Power Sector Reform Act, 2005⁵² constitute the framework under which fundamental reforms to the power sector in Nigeria were enacted over a decade ago. These reforms included the dissolution of the National Electric Power Authority (NEPA), the creation of the new Power Holding Company of Nigeria (PHCN), and the unbundling of the PHCN into a series of 18 successor companies – six power generation companies, 11 distribution companies and a national power transmission company. The privatization of the defunct PHCN's successor companies, which commenced in December 2010, is now complete. The Federal Government of Nigeria (FGN), however, retained ownership of the Transmission Company of Nigeria (TCN).⁵³

In the implementation of the bilateral engagements between Canada and Nigeria, the power sector is one of the core industries in which Canadian firms have been significantly involved.⁵⁴ Two Canadian firms – Manitoba Hydro⁵⁵ and CPCS Transcom Limited⁵⁶ – have played active roles in the privatization process of the Power Holding Company of Nigeria (PHCN), at the time Nigeria's main electricity provider.

Manitoba Hydro International, a wholly owned subsidiary of a Canadian electric and natural gas utilities company, managed TCN on behalf of the FGN. Following the completion of the privatization of the PHCN successor companies, the next phase of the privatization process was characterized by the sale of 10 government-owned independent power projects, called

⁵² See *Electricity Power Sector Reform Act, 2005*, online: <www.power.gov.ng/download/Electric%20Power%20Sector%20Reform%20Act%202005.pdf>.

⁵³ "Transmission Company of Nigeria (TCN) was incorporated in November 2005. TCN emerged from the defunct National Electric Power Authority (NEPA) as a product of the merger of the Transmission and Operations sectors on April 1, 2004." See Transmission Company of Nigeria, online: <www.tcnorg.com>.

⁵⁴ See generally Yemi Oke, "Manitoba Hydro and Electricity Undertakings in Developing Countries: The Case of Nigeria" (2012) 36:1 Man LJ 37.

⁵⁵ See Manitoba Hydro, online: <www.hydro.mb.ca>.

⁵⁶ See CPCS Transcom Limited, online: <www.cpcstrans.com/en/>.

National Integrated Power Projects (NIPPs), which commenced in 2013.⁵⁷ In 2014, the sale of the NIPPs was concluded. The power sector, however, remains beleaguered by a series of challenges that are beyond the scope of this article.⁵⁸

On the one hand, the Canadian Pacific Consulting Services (CPCS) Transcom has been significantly involved in the power sector in Nigeria since the beginning of the privatization process of the country's major electricity provider.⁵⁹ According to CPCS, in their role as the transaction advisor to the Federal Government of Nigeria, they

... carried out the due diligence review, develop[ed] detailed privatization plans for each of the successor companies, ... advised on and assisted in implementing various reform measures to the electricity sector of Nigeria to support the new commercial framework for the sector, including the drafting of Power Purchase Agreements, Transmission Agreements and Performance Agreements to allow the government to monitor the long-term performance of the private sector and ensure they maintain their investment commitments. CPCS was also responsible for administering the entire privatization transaction, including responding to thousands of investor inquiries, evaluating proposals received, leading the negotiations with preferred bidders, and assisting the government in completing the sale and handing over companies to the private investors.⁶⁰

From the above, it is clear that CPCS was not merely an advisor, but was also charged with the task of full-cycle completion of the successful privatization of Nigeria's power sector. In other words, their involvement was not tangential. CPCS' role in the reform of the power sector in Nigeria has come under close scrutiny. Despite the significant investment in international consultancy provided by the CPCS, the Nigerian electrical power sector remains in need of

⁵⁷ See The Post, "FG Hopes to Raise \$5 Billion Naira from sale of NIPPS" *The Post* (8 March 2014), online: <www.thepost-ng.com/fg-hopes-to-raise-5-billion-from-sale-of-nipps/>.

⁵⁸ See Adamu Abuh, "Why 10 NIPP Projects failed to generate 4, 541 mw, by BPE" *The Guardian* (8 December 2016), online: <guardian.ng/news/why-10-nipp-projects-failed-to-generate-4541mw-by-bpe/>.

⁵⁹ See Table 1.1 of the CPCS Power-related consultancy provided at the Federal and State levels. For a detailed list and description of CPCS' projects in Nigeria, see CPCS Transcom Ltd, *Projects*, online: <www.cpcstrans.com/en/projects/?country=Nigeria&service%5B%5D=>>. These other projects include Public-Private partnership trainings, port and rail concession advisory, among others. See also Geoffrey York, "CPCS Transcom helps tame traffic chaos in Lagos" *The Globe and Mail* (23 August 2012) *The Globe and Mail* <www.theglobeandmail.com/report-on-business/cpcs-transcom-helps-tame-traffic-chaos-in-lagos/article577897/>.

⁶⁰ See CPCS Transcom, *Nigeria – Transaction Advisor for the Power Holding Company of Nigeria (PHCN) Assets (10120)*, online: <www.cpcstrans.com/en/projects/nigeria-transaction-advisor-power-holding-company-nigeria-phcn-assets-10120/>.

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significant investment as its utility-scale electricity generation capacity continues to fall short of meeting domestic demands.

On the other hand, Manitoba Hydro International Nigeria Limited, a subsidiary of Manitoba Hydro, has been involved in a series of projects in Nigeria as part of the privatization of the power sector. CPCS procured their services to “manage the Transmission Company of Nigeria (TCN), the only part of the Power Holding Company of Nigeria that was meant to remain government property.”⁶¹ These include the Management Contract for the Transmission Company of Nigeria,⁶² National Electric Power Authority Training Program,⁶³ Utility Management Services for the National Electric Power Authority of Nigeria,⁶⁴ Implementation of Pre-paid Metering System,⁶⁵ and Technical Assessment – Hydroelectric Project for Tiga and Challawa Dams.⁶⁶ During the power sector reforms, the Nigerian Bureau for Public Enterprises (BPE) transferred the management of the Transmission Company of Nigeria to Manitoba Hydro International Nigeria Limited under a management services contract. Tunji Ariyomo describes the inherent contradiction in Manitoba Hydro, itself a government entity, overseeing the privatization of the Nigerian counterpart. According to Tunji Ariyomo,

[o]ne finds it a bit ironical that while Manitoba [Hydro International] remains solely a government owned company in Canada with a legislative protection to prevent its

⁶¹ Engler, *supra* note 4 at 193-194.

⁶² See Manitoba Hydro International, *Management Contract for the Transmission Company of Nigeria (TCN)*, online: <www.mhius.ca/projects/display,project/164/management-contract-for-the-transmission-company-of-nigeria-%28tcn%29>.

⁶³ See Manitoba Hydro International, *National Electric Power Authority (NEPA) Training Program*, online: <www.mhius.ca/projects/display,project/38/national-electric-power-authority-%28nepa%29-training-program>.

⁶⁴ See Manitoba Hydro International, *Utility Management Services for the National Electric Power Authority of Nigeria*, online: <www.mhius.ca/projects/display,project/137/utility-management-services-for-the-national-electric-power-authority-of-nigeria>.

⁶⁵ See Manitoba Hydro International, *Implementation of Pre-paid Metering Systems*, online: <www.mhius.ca/projects/display,project/83/implementation-of-pre-paid-metering-systems>.

⁶⁶ See Manitoba Hydro International, *Technical Assessment – Hydroelectric Project for Tiga and Challawa Dams*, <www.mhius.ca/projects/display,project/84/technical-assessment-hydroelectric-project-for-tiga-and-challawa-dams>. A case study of these projects will provide important empirical basis for understanding the nature of the engagements between Nigeria and Canada and also for challenging theoretical assumptions about the nature of the relationship.

privatization, the company has announced that one of its key objectives is to reorganize Transmission Company of Nigeria such that its function as a Transmission Service Provider (TSP) could be separated and for the TSP to become a private commercial company.⁶⁷

While it is possible to argue that Manitoba Hydro is simply acting based on the terms of its engagement by the Nigerian government, it is important to situate the relations within the broader socio-economic and historical contexts of both countries.

The activities of Manitoba Hydro International came under closer scrutiny in 2016.⁶⁸ The dispute that led to the intervention of the Nigerian Senate (the upper legislative assembly of that country) arose out of the refusal of Manitoba Hydro to accept payment in Nigerian currency. The motion adopted by the Nigerian upper legislative chamber⁶⁹ complained that the management services contract prepared by the BPE:

was fraught with apparent illegalities and total violation of laws of Nigeria ... these apparent illegalities would inevitably result in corruption, inefficiency, waste of public resources, lack of transparency and accountability in the management of [the Transmission Company of Nigeria (TCN)].⁷⁰

Based on this motion, a Senate Joint Committee on Power and Privatization was mandated to “investigate the entire circumstances surrounding the preparation, execution and implementation of management services for TCN and all other related matters.”⁷¹ The double tale of their engagement in the privatization process presents a challenge to the image of Canada as moral and a good liberal, international citizen that is generally promoted by Canadian government

⁶⁷ See Olatunji Ariyomo, “Power Sector Reform: TCN, Manitoba And Suggestions For The New Power Minister” *Sahara Reporters* (7 February 2013), online: <saharareporters.com/2013/02/07/power-sector-reform-tcn-manitoba-and-suggestions-new-power-minister-tunji-ariyomo>.

⁶⁸ See Kristin Annable, “Hydro subsidiary raises Nigeria’s ire: Practices ‘unwholesome,’ African national accuses” *Winnipeg Free Press* (18 February 2016), online: <www.winnipegfreepress.com/local/hydro-subsiidiary-raises-nigerias-ire-369372331.html>.

⁶⁹ See Federal Republic of Nigeria, National Assembly, “Senate Passes Motions on Unwholesome Practices by Manitoba Hydro Limited & Demise of Olubadan” *NASS* (28 January 2016), online: <nass.gov.ng/news/item/199>.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

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officials. These firms have been at the forefront of the promotion and entrenchment of neoliberal ideologies (requiring privatization, the divestment of government interests and control in the area of the provision of social services, and the promotion of public-private partnerships) as a viable solution in both the Nigerian and broader African contexts. Despite the privatization of the power sector in Nigeria, the sector remains marred by inefficiency and lack of optimization.⁷² Both firms have been highlighted in recent times as examples of engaging Canadian-Nigerian bilateral relations. To understand the implications of their activities in Nigeria, however, more empirical research is required. From the limited research conducted to date, some implications can be drawn that provide the basis for future research. These are discussed below.

V. PRELIMINARY OBSERVATIONS ON CANADIAN-NIGERIAN BILATERAL RELATIONS AND QUERIES FOR FUTURE RESEARCH

Two broad preliminary observations can be gleaned from this background study. The first is that the bilateral trade and investment relations between Canada and Nigeria may possibly be exaggerated. Despite the conclusion of FIPA over 3 years ago, it is yet to come into force. It is difficult to interpret the delay in entering into force of the FIPA. With respect then to the other statistics that account for significant trade flow between both countries, it would be interesting in the future to document the paradigm of such engagement with a view to explicating the socio-economic benefits and implications. For example, to what extent have these trade relations created enhanced economic development in Nigeria? In the context of the power sector considered in the paper, it would be expedient to also pursue research that examines the problems that necessitated a legislative inquiry into the activities of the CPCS and Manitoba Hydro in Nigeria.

⁷² See PwC, *Powering Nigeria for the Future* (PwC, 2016), online: <www.pwc.com/gx/en/growth-markets-centre/assets/pdf/powering-nigeria-future.pdf>.

Second, the engagement between Canada and Nigeria has the tendency to reinforce the structural imbalances in the international economic trading regime that is heavily skewed in broad favor of developed countries. The location of Canada and Nigeria in the Global North and Global South respectively, as well as the power imbalance between the two countries, means that it would be important to examine the extent to which, if any, these factors have impacted the bilateral relationship between both countries. As noted in this article, FIPAs by their nature favor investors more than the host state party. While the Canadian-Nigerian FIPA has yet to enter into force, the likelihood of a reproduction of the international imbalance that has historically posed a serious challenge for developing countries should not be underestimated.

Clearly, this article has raised more questions than it answers. Although a general historical, thematic, and theoretical analysis of key aspects of Canada's engagement with Nigeria has been undertaken, more empirical research (based on interviews and documentary search available for public viewing) is required in the future produce a more conclusive interpretive and legal analysis of Canadian-Nigerian engagements on the broad level.