NOTTINGHAM TRENT UNIVERSITY

NOTTINGHAM LAW SCHOOL

ASSESSMENT OF NATIONAL AND INTERNATIONAL LEGAL FRAMEWORKS FOR ENSURING SOCIO-ECONOMIC RESILIENCE AND ENVIRONMENTAL PROTECTION IN UGANDA'S PETROLEUM INDUSTRY

A THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS OF NOTTINGHAM TRENT UNIVERSITY FOR THE DEGREE OF

DOCTOR OF PHILOSOPHY

BY

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DEDICATION

To my precious son Bahati Amani Rivers. You decided to come into my life in the second year of my PhD studies. You became an incredible source of motivation that I never knew I needed, yet the greatest strength that kept me going.

ABSTRACT

Historically, majority of developing resource-rich countries that base their economic development on exploring and developing natural resources, tend to be inadequate to utilise that wealth to enhance their economies. Counter-intuitively, these countries experienced worse off economic development outcomes, increased levels of corruption, civil conflict and more authoritarian governments, a phenomenon often referred to as the 'Resource Curse' Phenomenon. As a nascent petroleum exploring and producing country, Uganda anticipates a myriad of benefits. However, there are concerns that the new industry would make the country susceptible to the resource curse phenomenon. This thesis critically assesses Uganda's national and international laws, Production Sharing Agreements (PSAs) and Bilateral Investment Treaties (BIT), investigating their adequacy in circumventing the 'Resource Curse Phenomenon.' The assessment established that the Government has enacted several laws to govern the petroleum industry. However, the assessment also identified significant disparities in the State's ability and willingness to implement and enforce the enacted laws. Also, there were several investor-protection terms in the legal framework with a detrimental impact on the Government's ability to pursue sustainable development, ensure socio-economic resilience and environmental protection. This research proposes several recommendations to the Government, including, clarifying broad and ambiguous terms in the law and petroleum contracts; establishing clear and separate roles for the relevant institutions; establishing a transparent and equitable fiscal regime; utilising petroleum

revenues to diversify the economic sector; and establishing liabilities for environmental damage, among others. It expands on the available literature on the 'Resource Curse Phenomenon' to include impacts of the petroleum exploration projects on the local environment and communities' human rights, as another symptom of the resource curse.

Keywords: Uganda's petroleum industry, petroleum legal frameworks, 'Resource Curse Phenomenon,' sustainable development, socio-economic resilience, environmental protection.

PUBLICATIONS

The author has presented the fundamental parts of this research work at various conferences, peer-reviewed by academics and professionals within institutions active in Uganda's oil and gas industry. Conference presentations include:

- Leicester University PGR Law Conference, 18 June 2019– "*Is Foreign Direct Investment a Necessary Evil for Developing Countries?*"
- Arab and African Mining Conference, 25-26 June 2019– "*Reversing the Resource Curse Phenomenon through Collaborative Partnerships between Co-Located Agricultural Communities and Petroleum Mining Companies in Uganda*"

Ronnah T. Tumusiime, *Reversing the Resource Curse Phenomenon Through Collaborative Partnerships Between Co-located Agricultural Communities and Petroleum Mining Companies in Uganda* (The Law Reports 1 June 2021) https://thelegalreports.com/2021/06/01/reversing-the-resource-curse-phenomenon-through-collaborative-partnerships-between-co-located-agricultural-communities-and-petroleum-mining-companies-in-uganda/

Academia Publication

The author has made available several research articles on Academia Publications. These have been mentioned in 50 papers and viewed by over 17,785 readers.

https://nottinghamtrent.academia.edu/RonnahTumusiime/Analytics/activity/documents

- Is Foreign Direct Investment a Necessary Evil for Developing Countries.
- Expropriation, Nationalisation of Oil and Gas Assets, and the Relevance of Stabilisation Clauses.
- Framework (legislation, treaties, industry practice, guidance) that exists for neighbouring states to develop transboundary offshore oil and gas resources.
- Renewable Energy and the Benefit to Inter-generational Social Equity.
- Has the Interplay Between UNCLOS, OSPAR, EU and UK Legislation Covering Environmental Regulation of The UKCS Oil and Gas Industry Led to "Over-Regulation" And Possibly Confusion at Both Government/Operator Levels?
- The Range of Approaches That Government Can Use to Regulate Environmental Impact Associated with The Upstream Oil and Gas Industry.
- Alternative Dispute Resolution in Oil and Gas Contracting.
- Relevant Aspects of the Management of Oil and Gas Resources.

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ABBREVIATIONS

BIT	Bilateral Investment Treaties
CDA	Community Development Agreements
CNOOC	China National Offshore Oil Corporation
CSCO	Civil Society Coalition on Oil
CSD	Commission for Sustainable Development
CSR	Corporate Social Responsibility
DWRM	Directorate of Water Resource Management
EAC	East African Community
EI	Extractive Industries
EIA	Environmental Impact Assessment
EITI	Extractive Industry Transparency Initiative
ESIA	Environmental and Social Impact Assessment
FET	Fair and Equitable Treatment
HLPF	High-Level Political Forum
ICSID	International Centre for Settlement of Investment Disputes
IFC	International Finance Corporation
IIED	International Institute for Environment and Development
IIT	International Investment Treaties

IMF	International Monetary Fund
IPIECA	International Petroleum Industry Environmental Conservation Association
ISDS	Investor-State Dispute Settlement
IUCN	International Union for the Conservation of Natural Resources
MEMD	Ministry of Energy and Mineral Development
MDGs	Millenium Development Goals
MFN	Most Favoured Nation
MFPED	Ministry of Finance and Planning and Economic Development
MMSD	Mining, Minerals and Sustainable Development
MOC	Multinational Oil Companies
MOEMD	Minister of Energy and Mineral Development
MOFPED	Minister of Finance and Planning and Economic Development
NEMA	National Environment Management Authority
NFA	National Forest Authority
NGO	Non-Governmental Organisation
NOC	National Oil Company
NRGI	Natural Resources Governance Institute
OECD	Organisation for Economic Cooperation and Development

OPEC	Organization of Petroleum Exporting Countries
PAP	Project Affected Persons
PFMA	Public Financial Management Act
PSA	Production Sharing Agreement
RWI	Revenue Watch Institute
SI	Social Investment
SIA	Social Impact Assessment
UHRC	Uganda Human Rights Commission
UIA	Uganda Investment Authority
UNCED	UN Conference on Environment and Development
UNCITRAL	United Nations Commission for International Trade Law
UNCTAD	United National Conference on Trade and Development
UNCSD	United Nations Conference on Sustainable Development
UNECA	United Nations Economic Commission for Africa
UNEP	United Nations Environment Programme
UNESCO	United Nations Education, Scientific and Cultural Organisation
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nation General Assembly
UNIDO	United Nations Industrial Development Organization

UNRA	Uganda National Roads Authority
UNRISD	United Nations Research Institute for Social Development
UPIK	Uganda Petroleum Institute Kigumba
URA	Uganda Revenue Authority
URSB	Uganda Registration Services Bureau
UWA	Uganda Wildlife Authority
SDGs	Sustainable Development Goals
WCED	World Commission on Environment and Development
WSSD	World Summit on Sustainable Development

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LIST OF ANNEXES

CHAPTER ONE

1.0 INTRODUCTION

On 6 January 2006, the Government of Uganda confirmed that Hardman Resources Company had discovered commercially viable oil reserves in Mputa Oil Field located in the Albertine Graben region, in Hoima District.[1] From 2006 to 2020, the Government had discovered about 21 reserves of oil and or gas. Over 121 exploration and appraisal wells have been drilled, with 106 of them encountering oil and or gas.[2] The total proven oil reserves from the explored fields are estimated to amount to 6.5 billion barrels of oil with about 1.4 - 1.7 billion barrels of these resources recoverable.[3] The associated natural gas established in the country is estimated at 170 billion cubic feet while Government estimates non-associated gas at 500 billion cubic feet.[4]

The Government resolved to explore and develop these petroleum resources anticipating that the new industry would contribute to early poverty eradication, new jobs, technological transfer, infrastructure development and increased taxes.[5] Also, increased support for the communities' ability to access

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[1] Ministry of Energy and Mineral Development, *Progress of Implementation of the National Oil and Gas Policy for Uganda* (Ministry of Energy and Mineral Development, 2019) <https://www.petroleum.go.ug/media/attachments/2020/03/12/oilgaspolicy.pdf> accessed 28th June 2019

[2] Ibid; Petroleum Authority Uganda, *Status of Licensing in the Albertine Graben of Uganda*, (Petroleum Authority Uganda 2017)

[3] Petroleum Authority Uganda, *Exploration and Appraisal of Oil and Gas Discoveries*, (2018)

[4] Ibid.

[5] Ministry of Energy and Mineral Development, *National Oil and Gas Policy for Uganda* (Ministry of Energy and Mineral Development 2008) (NOGP 2008); Ministry of Finance, Planning and Economic Development, *Oil and Gas Revenue Management Policy* (Ministry of Finance, Planning and Economic Development February 2012) (OGRMP 2012); Refer to chapter two, section 2.3 for detailed discussion on the potential benefits of developing Uganda's petroleum industry; Refer to chapter three for detailed discussion on Uganda's petroleum legal and regulatory framework

clean and reliable, sustainable energy were also expected, all of which form the basis of sustainable development that secures prosperity of the present generation and posterity.[6]

However, there have been many studies over the years that have shown that the majority of resource-rich countries that base their economic development on exploring and developing natural resources, tend to be inadequate to utilise that wealth to enhance their economies.[7] Counter-intuitively, these countries experienced worse off socio-economic development outcomes, increased levels of corruption, environmental degradation, rent-seeking[8] civil conflict and more authoritarian governments, among other adverse outcomes, than those without an abundance of natural resources.[9] The above phenomenon, commonly known either as the 'Resource Curse Phenomenon', or the 'Dutch disease' or the 'paradox of plenty',[10] is what Uganda, as a nascent petroleum

[6] Gro Harlem Brundtland, Khalid Mansour, *Report of the World Commission on Environment and Development: Our common future* (United Nations Document: A/42/427, Oslo, 20 March 1987) (Brundtland Report) Article 1, 2, and para 27; Xavier Sala-I-Martin, Arvind Subramanian 'Addressing the Natural Resource Curse. An Illustration from Nigeria.' *IMF Working Paper* (2003)

[7] Richard M Auty, *Sustaining Development in Mineral Economies: The Resource Curse Thesis* (Routledge, 1993); Richard M Auty, 'Is There a Policy Learning Curve?: Trinidad and Tobago and the 2004–8 Hydrocarbon Boom', in Shaffer B and Ziyadov T (eds), *Beyond the Resource Curse*, (84-109 University of Pennsylvania Press, 2012); Richard M Auty, 'Natural Resources, Capital Accumulation and the Resource Curse' (2007) 61(4) Ecological Economics 627-634; Sachs J D, 'Warner A M Natural Resource Abundance and Economic Growth' *NBER Working Paper* No. 5398, 1995; Davis, Graham A. and John E. Tilton, The resource curse,' *29 Natural Resources Forum* (2005) 233-242; Refer to Chapter Two section 2.2 for detailed discussion on Resource Curse Phenomenon

[8] Typically occurring where an entity seeks to gain added wealth without any reciprocal contribution of productivity.

[9] Refer to Chapter Two section 2.2 for detailed discussion on Resource Curse Phenomenon

[10] Ibid

exploring and future producing country, should aim at circumventing, if it is to achieve the expected benefits.

The Uganda Government does not yet have the necessary local financial, human, and technological resources to explore, produce and refine its petroleum resources. Therefore, it must rely on attracting and contracting Multinational Oil Companies (MOCs) with the necessary capacity to carry out the operations. As of 2019, the MOCs operating in Uganda were Tullow Uganda Operations Pty Limited, Total E&P Uganda BV(Total Energies), CNOOC Uganda Limited, Armour Energy Limited, and Oranto Petroleum Limited.[11]

The Government attracted the above MOCs by offering various guarantees of stable fiscal, legal, and regulatory frameworks.[12] However, Uganda is a developing country[13] and establishing a thriving petroleum industry is typically a long-term project, marred by the highs and lows of economic and price cycles. Therefore, it becomes fundamentally essential that the legal, regulatory, and fiscal framework from the onset is in consideration of the "developing" socio-economic circumstances, technological advancement,

[11] Ministry of Energy and Mineral Development, *Progress of Implementation of the National Oil and Gas Policy for Uganda* (Ministry of Energy and Mineral Development, 2019) <https://www.petroleum.go.ug/media/attachments/2020/03/12/oilgaspolicy.pdf> accessed 28th June 2019; Refer to section 1.3.4.1

[12] Refer to Chapter Three for detailed discussion on the legal and regulatory framework governing Uganda's petroleum industry, Chapter Four for detailed discussion on Production Sharing Agreements, Chapter Five for assessment of international laws with a bearing on Uganda's petroleum industry and Chapter Six for detailed discussion on international investment treaties relevant to Uganda's petroleum industry

[13] Refer to section 1.3 of this chapter for historical and background information on Uganda's economy and the oil and gas industry.

improvements in industry best practices globally, climate change concerns and the Government's public interest obligation.

The purpose of this thesis is to critically assess Uganda's petroleum-related policy and legal framework, international laws, arbitration laws and cases. This thesis will investigate whether they sufficiently promote sustainable development, by ensuring local communities' socio-economic resilience and the protection of human life, property, the environment, and wildlife in the biologically sensitive Albertine Graben region[14] where MOCs are operating petroleum exploration and production activities.

Secondly, this thesis focuses on Uganda's Production Sharing Agreements (PSAs) with the MOCs operating in Uganda,[15] and the Uganda-Netherland Bilateral Investment Treaty (BIT).[16] PSAs are typically negotiated and drawn with foreign investors, while BITs are negotiated and drawn between host states and home states of foreign investors to protect the rights of both parties, albeit with foreign investment protection remaining key. This research identifies and analyses the investor protection terms that impact on the

[14] NEMP 2014, objective 6(h) (iii), 7.2.6.1(b) (xiv); National Environment Management Authority, Environmental Sensitivity Atlas for the Albertine Graben Second edition, 2010; Refer to section 1.3 of this chapter for detailed discussion of the Albertine Graben Region.

[15] Johnston D, *International Petroleum Fiscal Systems and Production Sharing Contracts* (Pen Well Publishing Company 1994); Refer to chapter four for the detailed analysis of the PSAs between the Ugandan Government and the MOCs

[16] J Bonnitcha, *Substantive Protection under Investment Treaties* (CUP 2014); Johnson L and Sachs L, 'Investment Treaties, Investor-State Dispute Settlement, and Inequality: How International Investment Treaties Exacerbate Domestic Disparities' in *International Rules and Inequality: Implications for Global Economic Governance* (CUP 2018); UNCTAD, Agreement on encouragement and reciprocal protection of investments (Netherlands - Uganda BIT (2000)) (adopted 30 May 2000 entered into force 1 Jan 2003); Refer to Chapter Six for assessment of Bilateral and Multilateral Investment Treaties governing Uganda's petroleum industry.

Ugandan Government's ability to apply, as well as continue enacting, sustainable development-friendly laws and regulations over the petroleum industry's lifetime.

The present assessment indicated that since 2013, the Government has made significant steps in adopting several such sustainable development-friendly oil and gas policies and laws;[17] establishing a robust institutional framework;[18] and adopting a new Model PSA to govern the industry. [19] Consequently, this thesis acknowledges that the legal regime's provisions have created specific judicious parameters of operation fundamental to fighting off the onset of the 'Resource Curse Phenomenon,' including express recognition that the petroleum resources belong to the Ugandan Government which holds them on behalf of the public. The law also provided the requirement that MOCs conduct petroleum activities according to the environmental protection laws; that MOCs engage with local content, transfer technology, and build capacity. The law further provided for MOCs to recover the substantial costs incurred in exploration and for both parties to share profits accordingly, among other positive enactments.

[17] Refer to Chapter Three for the detailed discussion of the national policy, legal, regulatory and institutional frameworks governing Uganda's petroleum industry

[18] Ibid

[19] Ministry of Energy and Mineral Development, *Production Sharing Agreement for Petroleum Exploration Development and Production in The Republic of Uganda by and Between the Government of The Republic of Uganda and Tullow Uganda Limited: In respect of the Kanywataba Prospect Area* (Ministry of Energy and Mineral Development 2012) (Kanywataba Prospect Area PSA 2012) Article 26; Refer to Chapter Four for a critical assessment of Uganda's production sharing agreements.

However, several glaring gaps were also found, such as the significant disparity in the State's capacity and willingness to implement and enforce the laws;[20] as well as frequently using the confidentiality clause in the PSA to withhold vital information contrary to the laws.[21] The BIT contained a vast array of investor-protective terms,[22] such as international arbitration clauses, stabilisation clauses, vague and ambiguous terms like expropriation and nationalisation clauses, most favoured nation clause, fair and equitable clause, among others. [23] These substantial legal protections have the unintended impact of restricting the State's sovereign right to regulate for fear of exposing themselves to liability before international arbitration forums for copious amounts in compensation and litigation expenses,[24] often unaffordable for developing countries, diverting resources away from other domestic priorities.

[20] Uganda Human Rights Commission Special Report, *Oil in Uganda: Emerging Human Rights Issues, Special Focus on Selected Districts in the Albertine Graben* (Uganda Human Rights Commission Special Report, 2013); Office of the Auditor General, *Report of the Auditor-General to Parliament for the Financial Year Ended 30th June* (2019); Office of the Auditor General, *Report of the Auditor-General on the Financial Statements of the Petroleum Fund for the Six-Month Period Ended 31st December* 2016; Refer to Chapter Two, section 2.2.3 for detailed discussion of the negative socio-economic and environmental impacts of the petroleum industry on Uganda sustainable development goals.

[21] PSA Terms on payment made to the Government; Refer to Chapter Three, section 3.7.3 for detailed assessment on the implementation of access to information laws; Refer to Chapter Four for detailed assessment of PSAs concerning the confidentiality terms contained therein.

[22] Peter D Cameron, *International energy investment law: the pursuit of stability* (Oxford University Press 2010); J Bonnitcha "*Substantive Protection under Investment Treaties*." (Cambridge University Press 2014).

[23] Refer to Chapter Six for assessment of Bilateral and Multilateral Investment Treaties governing Uganda's petroleum industry.

[24] Ibid

There is no generic universal solution for averting the 'Resource Curse Phenomenon'.[25] However, this thesis offers several recommendations[26] that the Ugandan Government could consider improving within its legal and regulatory framework to address the multitude of financial, technical, and socio-economic challenges and thereby avert the likelihood of 'Resource Curse Phenomenon.' The Government could utilise petroleum revenues to diversify the economic sector by promoting modern agricultural practices.[27] It could establish clear and separate roles for the relevant institutions to foster transparency and accountability of administration of the sector. It could prioritise implementation and enforcement of the substantial prescriptive laws, particularly those governing petroleum revenues, to avoid abuse and misappropriation of the oil funds.

Furthermore, it could ensure the implementation of best practices in environmental protection for sustainable development; [28] and prioritise multi-stakeholder cooperation and engagement to foster accountability. Within the BIT framework, the Government could clarify the vague and ambiguous terms utilised within the standard form BIT agreements, which should not apply

[25] Refer to Chapter Two, Section 2.2 for detailed discussion on the Resource Curse Phenomenon.
[26] Refer to Chapter Seven for extensive discussion on the possible recommendations advanced in this study.
[27] World Bank, 'Uganda Country Economic Memorandum: Economic Diversification and Growth in the
Era of Oil and Volatility' Report No: 97146-UG, (World Bank, Washington, DC 2015)
[28] Patricia Park, *International Law for Energy and the Environment* (2nd edn, CRC Press 2013) 75, 78-80

when laws are passed in a non-discriminatory manner and in the interest of the environment and public health.

The petroleum industry transcends generations and different government structures. Therefore, the thesis considers that Uganda's Government should safeguard its right to regulate the petroleum industry as an extra-contractual right and establish adequate legal and regulatory frameworks that enable Uganda to have the best possible chance to achieve sustainable development. This thesis is based on research available up until 31st April 2021.[29]

1.1 Aims and Objectives of the Research

This thesis aims to examine the development of Uganda's nascent petroleum industry. The specific objectives are:

i) To discuss the primary motivations behind the said development,[30] one of which is the possibility of bringing about the overdue socio-economic development to the 3rd most impoverished country in the world.[31]

[29] Updates post April 2021 have been included on the 2nd February 2022 2022.
[30] Refer to Chapter Two, section 2.2.3 for detailed discussion of the negative socio-economic and environmental impacts of the petroleum industry on Uganda sustainable development goals, and section 2.3 for detailed discussion on the potential benefits of developing Uganda's petroleum industry.
[31] FocusEconomics, 'The Poorest Countries in the World', *FocusEconomics (*19 November 2018) < https://www.focus-economics.com/blog/the-poorest-countries-in-the-world#GDP%20per%20capita%202016-2022) accessed on 19 January 2019

ii) To analyse the risks of establishing a petroleum industry in a developing country, particularly those risks related to the characteristics of the 'Resource Curse Phenomenon'.[32]

iii) To address the gap in the existing academic literature that focuses on economic consequences of natural resource development, often categorising it as the 'Resource Curse Phenomenon,' thereby expanding the 'Resource Curse' theory to include the socio-economic and environmental repercussions of natural resource development.[33]

(v) To critically assess the entire spectrum of Uganda's legal and regulatory framework governing the petroleum industry, as the first line of defence to circumvent the 'Resource Curse Phenomenon' and investigate its sufficiency in promoting sustainable development.[34]

(vi) To propose recommendations for reform of the Uganda legal framework to promote responsible and sustainable development that ensures communities' socio-economic resilience and the continued protection of the natural environment.[35]

1.2 Statement of the Problem

Uganda is motivated to explore and develop petroleum resources for the various potential benefits. MOCs, on the other hand, are attracted to operate

[32] Refer to Chapter Two section 2.2 for detailed discussion on Resource Curse Phenomenon and the potential benefits and negative effects of developing Uganda's petroleum industry.
[33] Ibid
[34] Refer to Chapter Three for a detailed assessment of Uganda's national legal and regulatory framework, Chapter Four for a detailed assessment of Uganda's PSAs, chapter five for a detailed assessment of the international laws relevant to the petroleum industry and Chapter Six for assessment of BIT(s) with influence in Uganda's petroleum industry.
[35] Refer to Chapter Seven for proposed recommendations

in Uganda because there is a possible financial benefit, but also because the Government guarantees them a stable fiscal, legal and regulatory framework.[36] The thesis will establish whether Uganda's national laws and regulations, PSAs, applying international laws (including BITs) promote sustainable socio-economic resilience and environmental protection, to avert the 'Resource Curse Phenomenon.' It will identify what possible impacts the investor protection terms in these legal frameworks might have on the Government's ability to pursue sustainable development policies considering the 'Resource Curse Phenomenon.'

1.3 Justification of Uganda as the Case Study

The justification of Uganda as the case study jurisdiction is that it is an African developing economy with several unique characteristics discussed below. Uganda is also a nascent petroleum exploring and future producing country. It is at a pivotal point where appropriate decisions, especially legally, could be made that might ensure the petroleum resources deliver the hoped-for sustainable development achievements, and not lead to a worse off economic, social, and environmental state for generations to come.

1.3.1 Overview of Uganda's Historical and Economic Background

The Republic of Uganda is a landlocked country in East Africa[37], bordering Kenya to the east, Tanzania to the south, South Sudan to the north, the

[36] Refer to Chapters Three, Four, Five, and Six for the detailed assessment of national laws, PSA, international laws and BITs respectively governing Uganda's petroleum industry.
[37] Constitution of the Republic of Uganda 1995, Article 5, Chapter 2.

Democratic Republic of Congo (DRC) to the west, and Rwanda south-west. In 1894, the United Kingdom's Uganda Protectorate was established under Queen Elizabeth II's leadership as the Head of State.[38] It became an independent country on 09 October 1962, and since 1986, the Government has been under the current President General Yoweri Kaguta Museveni's leadership.[39]

The Government projected the Gross Domestic Product (GDP) per capita to increase to $823.11 billion in 2020 compared to $622.22 billion in 2010, and $381.13 billion in 1986 when the current President took office.[40] The continuous increase in GDP is due to increased private sector credit, favourable weather conditions enabling recovery and development in the agriculture sector, the sustained growth in services, the Government's continued massive investment into public infrastructure, and increase in Foreign Direct Investment (FDI).[41]

[38] George Kanyeihamba, *Constitutional and political history of Uganda: From 1894 to the present* (Centenary Publishing House Ltd 2002); The Commonwealth: Uganda History http://thecommonwealth.org/our-member-countries/uganda/history accessed 13 June 2017; Ministry of Energy and mineral development, History of Uganda, http://gou.go.ug/about-uganda/sector/history

[39] George Kanyeihamba, Constitutional and political history of Uganda: From 1894 to the present (2002) Centenary Publishing House Ltd

[40] International Monetary Fund, *World Economic Outlook Database*, October 2019 Netherlands

[41] Ministry of Finance, Planning and Economic Development, *Budget Speech Financial Year 2019/20*, (13 June 2019) (Ministry of Finance, Planning and Economic Development June 2019); PWC, 'Uganda Economic Outlook – 2019' (*PWC* 2019) 3-18 available at https://www.pwc.com/ug/en/assets/pdf/ug-economic-outlook-2019.pdf accessed on 19 February 2020

Uganda's current economy relies on sectors[42] like Agriculture 24.2% (includes fisheries, animal husbandry, dairy, and crop sub-sectors) which employs more than one-third of the workforce; the industry sector at 25.5% (manufacturing, construction, and electricity supply sub-sectors); and services 50.3% (wholesale and retail trade, telecommunications, hotels and restaurants, transport, communications and tourism sub-sectors).[43] As much as extracting oil and gas will contribute to building a substantial resource base for the economy, and provide jobs to many more Ugandans,[44] hinging Uganda's economic development on the petroleum industry, might stifle development in other sectors, leading to the 'Resource Curse Phenomenon'.[45]

As of 2019, Uganda's population size was at 39 million,[46] with the Uganda Bureau of Statistics projecting one million people per year growth.[47] Uganda has one of the world's youngest population, with 77% being under 25 years of

[42] OGRMP 2012; Ministry of Finance, Planning and Economic Development, *Budget Speech Financial Year 2019/20*, (Ministry of Finance, Planning and Economic Development 13 June 2019)

[43] R B Ggoobi, 'Performance of Uganda's Economy: Progress, Opportunities, Challenges and way forward' (2016) 1–26; Isaac Shinyekwa, Julius Kiiza, Eria Hisali, Marios Obwona (eds), 'The Evolution of Industry in Uganda in Manufacturing Transformation Comparative Studies of Industrial Development in Africa and Emerging Asia' (*Oxford Scholarship Online* August 2016) http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198776987.001.0001/acprof-9780198776987-chapter-10> accessed on 3 March 2018

[44]NOGP 2008; OGRMP 2012; Refer to Chapter Two, section 2.3 for detailed discussion on the potential benefits of developing Uganda's petroleum industry; Refer to chapter four for detailed discussion on Uganda's petroleum policy

[45] Refer to Chapter Two section 2.2 for detailed discussion on Resource Curse Phenomenon.

[46] Ministry of Finance, Planning and Economic Development, *Budget Speech Financial Year 2019/20*, (13 June 2019) 2

[47] Uganda Bureau of Statistics, *World Population Day Celebrations: Leveraging Uganda's Population Dynamics for A Resilient Future Amidst Covid-19* (Saturday, 11 July 2020) 5

age.[48] Given the force of demographic momentum, Uganda will see high population growth rates for decades to come, having a substantial impact on its socio-economic development. The nascent petroleum industry presents both immense opportunities and higher risks because such a youthful and growing population is more likely to be considered most vulnerable to experiencing the 'Resource Curse Phenomenon' and climate change concerns.

1.3.2 The Albertine Graben Region

Uganda's petroleum resources were discovered in the Albertine Graben, on the western arm of the Great Rift Valley system in East Africa.[49] It is a unique physiographic region, comprising of the rift escarpments, the towering block of Rwenzori Mountains and an extensive Rift Valley that runs along Uganda's western border with the DRC, to the border with South Sudan.[50]

The Albertine Graben region is paramount to this thesis for several reasons. First, because it is considered a biologically-sensitive area with lakes, rain forests, waterfalls, mangroves, bird areas with 217 bird species; it is a natural habitat of endangered species such as the African forest elephant, eastern chimpanzee, and l'Hoest's monkey, Rwenzori black-fronted or red duiker, and

[48] Population Action International, *The Effects of a Very Young Age Structure in Uganda* 24 Jan 2013 *available at* <http://www.populationaction.org/oldmedia/SOTC_Uganda.pdf> accessed 1 February 2018

[49] NEMP 2014, objective 6(h) (iii), 7.2.6.1(b) (xiv); National Environment Management Authority, *Environmental Sensitivity Atlas for the Albertine Graben* Second edition, 2010

[50] Ibid

a rich and unusual flora comprising, among other species, the giant heathers, groundsels, and lobelias.[51]

Secondly, it is home to several protected national parks:[52] Semliki National Park, Kibaale National Park, the Rwenzori Mountains National Park, Lake Mburo National Park, Bwindi National Park, Mgahinga National Park, Murchison Falls National Park, Queen Elizabeth National Park. Two of the national parks listed above are United Nations Education, Scientific and Cultural Organisation (UNESCO) World Heritage sites. That is Bwindi Impenetrable Forest National Park, [53] and Rwenzori Mountains National Park,[54] which is contiguous with the DRC's Parc national des Virunga, also a World Heritage site.[55]

Thirdly, the natural and cultural heritage sites in the Albertine Graben are critical to Uganda's tourism sector. The Tourism sector ranks as the highest foreign exchange earner and in 2018, foreign receipts from tourism reached

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[51] Ibid

[52] National Environment Act, 2019

[53] UNESCO, *Bwindi Impenetrable National Park*, (UNESCO World Heritage Centre) http://whc.unesco.org/en/list/682 accessed 26 June 2019

[54] Ramsar Sites Information Service, 'Rwenzori Mountains Ramsar Site' https://rsis.ramsar.org/ris/1861?language=en#risv-section-download> accessed on accessed on 3 January 2018

[55] National Environment Management Authority, *Environmental Sensitivity Atlas for the Albertine Graben* (2 edn 2010) (NEMA 2010); NOGP 2008, objective 6(h)(iii), 7.2.6.1(b)(xiv); UNESCO, *Bwindi Impenetrable National Park (*UNESCO World Heritage Centre) http://whc.unesco.org/en/list/682 accessed 26 June 2019; UNESCO, 'Rwenzori Mountains National Park - UNESCO World Heritage Centre' http://whc.unesco.org/en/list/684 accessed 26 June 2019 ; Save Virunga, 'Breaking: CSOs Call on the Presidents of Uganda and DRC to Avoid Oil Exploration in Sensitive Ecosystems in Albertine Graben' (22 May 2019) https://savevirunga.com/2019/05/22/breaking-csos-call-on-the-presidents-of-uganda-and-drc-to-avoid-oil-exploration-in-sensitive-ecosystems-in-albertine-graben/ accessed 26 June 2019

USD 1.02 billion, with 1.6 million being international tourist arrivals.[56] As the Government pursues the petroleum industry's development, there is a legitimate concern from Albertine Graben's environment's potential degradation and its contribution to the 'Resource Curse Phenomenon'. Continued utilisation of Uganda's natural heritage endowment by realising its tourism potential remains significant in providing Uganda economic benefits.

Also, Uganda ratified the UNESCO Conventions on conservation and Ramsar,[57] the conventions mandate all State parties to commit to avoid any activities that might directly or indirectly degrade Ramsar and World Heritage sites' cultural and natural heritage. Some Civil Society Organisations (CSO) have expressed concern that if the Government undertakes petroleum exploration in Lake Edward, Virunga national park, Queen Elizabeth national park, and other sensitive ecosystems, it will abuse its commitments. [58] However, it is essential to note that even with that concern, for projects supported by the International Finance Corporation (IFC), such as the East

[56] Ministry of Finance, Planning and Economic Development, Budget Speech Financial Year 2019/20, 13 June 2019, page 11 available at https://www.finance.go.ug/sites/default/files/Budget/FY%202019-20%20Budget%20Speech.pdf accessed 19 February 2020

[57] Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention) (23 June 1979) 1651 UNTS 333, Uganda ratified this Convention on 1st August 2000; Convention on Wetlands of International Importance especially as Waterfowl Habitat (Adopted 2 February 1971) 996 UNTS 245, Ratified in Uganda on 04th March 1988, Article 1, 2(2); Refer to chapter six for discussion on International laws applicable to environmental protection relevant to Uganda's petroleum industry

[58] Africa Conservation Foundation, 'Local and International Organisations Call on Ugandan And DRC Presidents to Protect Sensitive Ecosystems in New Oil Licensing Round,' *Africa Conservation Foundation* (22 May 2019) <https://africanconservation.org/local-and-international-organisations-call-on-ugandan-and-drc-presidents-to-protect-sensitive-ecosystems-in-new-oil-licensing-round/> accessed on 30 May 2019

Africa Crude Oil Export Pipeline (EACOP),[59] and its associated upstream projects, Performance Standard 6 provides conditions under which project developments may be allowed in critical habitat areas such as a national park.[60] The requirement for developers is to prove that the Performance Standard 6 conditions are met, including mitigation measures during project implementation to show that there will not be a net loss of critical habitat due to project activities.

The Albertine Graben stretches from Southwestern to West Nile regions in North-Western Uganda. Therefore, it is home to diverse and multicultural communities cutting across several districts, including Hoima, Masindi, Buliisa, and Kibaale.[61] The Albertine Graben region has always grappled with numerous challenges including the communities collecting firewood and bamboo from the national parks for fuel; tourism development and its associated management of the waste generated through tourism operations, and human population growth and agricultural practices encroaching on the national park and wildlife sanctuaries. However, the exploration and production of oil and gas resources pose new challenges, whose potential

[59] Total, 'Tilenga and EACOP: Acting Transparently' (2020) https://www.total.com/projects/oil-gas/tilenga-and-eacop-acting-transparently> accessed on 10th January 2020

[60] International Finance Corporation, Performance Standard 6: Biodiversity Conservation and Sustainable Management of Living Natural Resources 1 January 2012 available at https://www.ifc.org/wps/wcm/connect/3baf2a6a-2bc5-4174-96c5-eec8085c455f/PS6_English_2012.pdf?MOD=AJPERES&CVID=jxNbLC0 accessed on 19 February 2020

[61] NEMA 2010 (n 55); Refer to Annex A – Map showing Status of Licensing in the Albertine Graben of Uganda (2019).

socio-economic impacts could result in the "resource curse".[62] Suppose Uganda is to experience all the potential benefits from its new petroleum industry, the Government and the MOCs must develop the petroleum resources in an environmentally, socially, and economically responsible manner.

1.3.3 Uganda's Oil and Gas Resources

1.3.3.1 History of Uganda's Oil and Gas Resources

Following reports by the indigenous people of oil seepage on Lake Albert's shores,[63] the British Government tasked geologist, Edward James Wayland to investigate the reported oil seepage.[64] In 1925, Mr Wayland made the first documented evaluation of the country's hydrocarbon occurrences in the Albertine Graben.[65] Following this report, the British Government granted an exploration license to the Anglo European Investment Company of South Africa in 1937 and again in 1938, who drilled the first well[66] and 20 others

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[62] Refer to chapter two section 2.2 for detailed discussion on Resource Curse Phenomenon.

[63] D M Anderson, A J Browne, 'The politics of oil in East Africa', (Journal of Eastern African Studies 5, 2011) 369–410; R Vokes, 'The politics of oil in Uganda.' (2012) 111 African Affairs 303–314

[64] Edward James Wayland, *Petroleum in Uganda*, (Nature, 1925), Volume 115, Issue 2904, pp. 980; Global Rights Alert, History of Uganda's Oil and Gas (2016) https://www.globalrightsalert.org/news-and-views/history-ugandas-oil-and-gas; Ibrahim Kasita, History of Oil in Uganda, *New Vision* Friday, 23 January 2009.

[65] Edward James Wayland, *Petroleum in Uganda*, (Nature, 1925), Volume 115, Issue 2904, pp. 980; Global Rights Alert, History of Uganda's Oil and Gas (2016) https://www.globalrightsalert.org/news-and-views/history-ugandas-oil-and-gas

[66] Petroleum Authority Uganda, *The History and Progress of Petroleum Exploration and Development in Uganda*, (Petroleum Authority Uganda) http://www.petroleum.go.ug/page.php?k=abthistory accessed on 3rd October 2016; Global Rights Alert, 'History of Uganda's Oil and Gas' (*Global Rights Alert,* 22 august 2016) https://www.globalrightsalert.org/news-and-views/history-ugandas-oil-and-gas accessed on 3 November 2016; Luke Patey 'Oil in Uganda: Hard Bargaining and Complex Politics in East Africa' (Oxford Institute for Energy Studies 2015)

subsequently, made geological correlation and confirmed the presence of petroleum resources, albeit without establishing their commercial value.[67] Between 1945 and 1980, exploration activities halted due to several reasons, first the Second World War, and then change in the colonial Government's policies that zoned East Africa for Agriculture and West Africa for Oil Exploration.[68]

In 1985, the Ugandan Government established the Petroleum Exploration Project to undertake Exploration promotion and Acquisition of Geological and Geophysical Data in the Albertine Graben region. In the same year, Parliament enacted the first Petroleum (Exploration and Production) Act (now repealed). [69] In 1986, following the onset of the currents president's Government, he issued policy direction for the petroleum sector covering aspects of Capacity Building, Data Acquisition and Promotion, and Monitoring of Compliance of License Companies.[70]

In 1991, the Government (through the Department of Geology and Mines Department of the Ministry of Energy and Mineral Development (MEMD), now the Petroleum Exploration and Production Department (PEPD)) awarded the Belgian company Petrofina the first Production Sharing Agreement (PSA) with exclusive exploration Licence for the entire Albertine Graben. Following

https://www.oxfordenergy.org/wpcms/wp-content/uploads/2015/10/WPM-601.pdf accessed on 23rd November 2016

[67] Ibid

[68] Ibid

[69] Ibid

[70] Ibid

the acquisition of ground geological and geophysical surveys, the Government used this data to subdivide Graben into nine smaller Exploration Areas.[71] The Government did not renew Petrofina's Exploration license in 1993. Instead, the Minister of Energy and Mineral Development promoted petroleum exploration opportunities in Uganda, issuing Request for Qualification (RFQ) inviting interested firms and or consortia with the financial capability and technical expertise to submit applications. Among the companies that expressed interest and submitted a bid for exploration license was Hardman Resources Company.

1.3.3.2 Current Status of Uganda's Oil and Gas Resources

On 6 January 2006, the Government confirmed that Hardman Resources Company had discovered commercially viable oil reserves in the Albertine Graben region. The total proven oil reserves from the explored fields are estimated to amount to 6.5 billion barrels of oil in place[72] and about 1.4 – 1.7 billion barrels of these resources recoverable in Hoima District.[73] The area explored presently represents only 12% is licensed and less than 40% of the total area with the potential for petroleum production in the Albertine

[71] Ministry of Energy and Mineral Development, *Progress of Implementation of the National Oil and Gas Policy for Uganda* (Ministry of Energy and Mineral Development, 2019) <https://www.petroleum.go.ug/media/attachments/2020/03/12/oilgaspolicy.pdf> accessed 28th June 2019; Petroleum Authority Uganda, *Status of Licensing in the Albertine Graben of Uganda*, (Petroleum Authority Uganda 2017); Petroleum Authority Uganda, Exploration and Appraisal of Oil and Gas Discoveries, (2018)

[72] Petroleum Authority Uganda, *Status of Licensing in the Albertine Graben of Uganda*, (Petroleum Authority Uganda 2017); Petroleum Authority Uganda, Exploration and Appraisal of Oil and Gas Discoveries, (2018)

[73] Ibid

Graben.[74] Therefore, there is potential for the Government to discover additional petroleum resources when it undertakes a further exploration of the remaining 60% of the Graben.[75] The Uganda government will earn 9.4 trillion shillings (about $3.6 billion) from the petroleum industry annually when it starts production.[76]

There are three primary phases in the Petroleum Value Chain: upstream, midstream, and downstream.[77] The thesis's primary focus is the upstream phase, which covers exploration, appraisal, development, production of petroleum and decommissioning of infrastructure at the end of a field's economic life.[78] Exploration refers to the search for petroleum accumulations. It includes the appraisal of the resources to establish the extent (distribution) of the petroleum accumulation below the earth's surface and the ease of flow of the petroleum from this accumulation.[79] Development involves preparing for production by putting facilities and infrastructure for collection, transportation and processing of crude oil and gas.[80] Production removes petroleum from the accumulations below the earth's surface and prepares the

[74] Ibid
[75] Ibid
[76] National Planning Authority (NPA) in collaboration with Africa Centre for Energy & Mineral Policy (ACEMP), 'Annual Petroleum Development Scorecard' (2016) <file:///C:/Users/n0688650/Downloads/ANNUAL-PETROLEUM-DEVELOPMENT-SCORECARD-FINAL-TUESDAY-29-NOV-2016_-2-3.pdf> accessed on 20th February 2017
[77] Gordon G, Paterson J and Usenmez E (eds), *Oil and Gas Law: Current Practice and Emerging Trends*, (2nd edn, DUP 2011); Midstream activities include the storage, processing, and transportation of petroleum products; Downstream operations are the processes involved in converting oil and gas into the finished product. These include refining crude oil into gasoline, natural gas liquids, diesel, and a variety of other energy sources.
[78] Ibid
[79] Ibid
[80] Ibid

petroleum for transportation and refining.[81] And once it is no longer cost-effective to extract remaining reserves, the site is decommissioned, and the operating companies are typically responsible for returning the site to as close to original state as possible. This phase can take decades if environmental monitoring is required.

1.3.4 Ownership of Uganda's Petroleum Resources

The Constitution vests the ownership and control of minerals and petroleum in the Government on behalf of the people.[82] The Constitution also empowers Parliament to enact laws regulating the exploration and exploitation of minerals and petroleum.[83] Consequently, Parliament enacted the Petroleum (Exploration, Development and Production) Act in 2013, which also vests petroleum resources in the Government on behalf of the people.[84] As earlier stated, the Government does not yet have the financial, technical and human resource necessary to explore and produce petroleum resources. Therefore, it enters PSAs with qualified MOCs.[85]

[81] which are midstream, and downstream activities.
[82] Constitution of the Republic of Uganda 1995, Objective XIII.
[83] Ibid Article 244
[84] Petroleum (Exploration, Development and Production) Act 2013, S 4; Refer to chapter three, for a detailed assessment of Uganda's national legal framework governing the petroleum industry.
[85] Refer to chapter four for detailed assessment of the terms contained within the PSA.

1.3.4.1 Licensed Multinational Oil Companies (MOCs)

1.3.4.1.1 Operators 1997 – 2001

In 1997, Heritage Oil and Gas Limited (Heritage) (Tullow Oil later acquired its interests) were granted an Exploration Licence for Exploration Area (E.A.) 3 (Semliki Basin),[86] and from 1998 to 2001, Heritage acquired several 2-D seismic data and additional data in Semliki Basin. Heritage subsequently drilled Turaco-1, 2 and 3 wells, confirmed oil and natural gas and stated that the natural gas was heavily contaminated by carbon dioxide. The Government relicensed Heritage licence for an additional E.A. 1 in 2004, and E.A. Area 3A in the Buhuka/Bugoma area in 2005.[87]

1.3.4.1.2 Operators 2001 – 2006

In 2001, the Government granted Hardman Resources and Energy Africa (Tullow Oil acquired 100% interest of Hardman Resources interest in EA-2 in 2007) an Exploration Licence for E.A. Area 2 (Northern Lake Albert Basin). It obtained the seismic data for the area in 2003. From 2005 to 2006, Hardman acquired the 2-D seismic data over the Kaiso-Tonya area and commenced drilling Mputa-1 well in the same area.[88] In 2004, the Government granted Tullow 50% of Energy Africa's interest in E.A. 1, 2 and 3A in the Lake Albert Rift Basin.[89]

[86] Petroleum Authority Uganda (n 66)
[87] Petroleum Authority Uganda (n 66)
[88] Petroleum Authority Uganda (n 66)
[89] Petroleum Authority Uganda (n 66)

1.3.4.1.3 Operators from 2006 to date

Over the following years, the Government had granted several other MOCs exploration licenses which include: An Exploration Licence over E.A. 5 (The Rhino Camp Basin) to Neptune Petroleum (Tower Resources) in 2006,[90] however, this Licence was not renewed; In 2007, the Government granted an Exploration Licence to Dominion Petroleum over E.A. Area 4B (Lakes Edward and George Basin), however, when the license expired, Government did not renew it.

As of 2019, the MOCs operating in Uganda with Exploration Licenses include Tullow, CNOOC, Total, Armour Energy Limited and Oranto Petroleum International Ltd.[91] In May 2019, the Minister of Energy and Mineral Development announced that five new blocks were now available for the second exploration licensing round in the Albertine Graben.[92]

1.3.4.1.3.1 Tullow Uganda Operations Pty Limited (Tullow)

Tullow's parent company, Tullow Oil plc, is a multinational oil and gas exploration company founded in Tullow, Ireland in 1985, headquartered in London, United Kingdom.[93] It has exploration and production activities in

[90] Petroleum Authority Uganda (n 66)
[91] See Annex A for the Map showing Status of Licensing in the Albertine Graben of Uganda; Upstream Act 2013, s 8; Petroleum Authority Uganda (n 66)
[92] Ministry of Energy and Mineral Development, 'Five New Blocks up for grabs, (*Facebook*, 8 May 2019) https://www.facebook.com/minstryofenergyandmineraldevelopment/posts/2694486123901469?_rdc=1&_rdr accessed on 10th May 2019; See Annex A for the Map showing Status of Licensing in the Albertine Graben of Uganda.
[93] Tullow Oil plc "Annual Report 2017" accessed 30 March 2018

Africa, Asia, and South America. In Uganda, Tullow Uganda Operations Pty Limited is registered by the Uganda Registration Services Bureau (URSB) as a foreign company incorporated in Australia [94]

Tullow's history in exploration activities in the Albertine Graben area began as early as 2004. Since 2013, Tullow has experienced an unprecedented success rate of 1.7 billion barrels of oil with 66 of the 79 wells drilled finding petroleum.[95] Aside from the exploration licences, Tullow has also secured five production Licenses.[96]

1.3.4.1.3.2 Total Exploration and Production Uganda B.V (Total Energies)

Total S.A. (the parent company) is a public limited company incorporated in France in 1954.[97] It is a multinational integrated Oil and Gas Company with businesses spanning across the entire petroleum value chain from exploration, production, to petroleum product marketing, and international crude oil and product trading in more than 50 countries worldwide. On an operational level, Total Energies organises it's group's businesses in segments, which receive

[94] Tullow Oil plc "Annual Report 2017" accessed 30 March 2018; Tullow Uganda Country Report, "Creating Shared Prosperity in Uganda," 2013, http://www.tullowoil.com/Media/docs/default-source/3_investors/2013-tullow-uganda-country-report.pdf?sfvrsn=4; See Annex 1 for the official letter from the URSB
[95] Ibid
[96] Ibid
[97] Total, 'Our activities in Uganda' 2017 available at https://www.total.com/sites/default/files/atoms/files/brochure_ouganda_en.pdf accessed on 19th July 2018; Total, 'Registration Documents: Including Financial Reports' (2017) available at https://www.total.com/sites/default/files/atoms/files/ddr2017-va-web.pdf accessed on 19th July 2018; Registered in the French trade registry in Nanterre under no. 542 051 180 RCS
[97] Ibid

assistance from the corporate functional divisions. One of the segments is the Exploration and Production segment under which Uganda's operations fall [98]

Total S.A. registered two subsidiaries in Uganda: Total East Africa Midstream B.V. and Total Exploration and Production Uganda B.V. The URSB registers both companies as foreign companies from the Netherlands.[99] Total began operations in Uganda in 1955, primarily through Total East Africa Midstream B.V. in the Marketing and Services segment,[100] and now evolved to explore blocks 1 and 1A and production.[101]

1.3.4.1.3.3 China National Offshore Oil Corporation (CNOOC)

CNOOC is a limited liability company incorporated in Hong Kong, China, in 1999,[102] as a state-owned enterprise.[103] Its businesses span across the entire oil and gas value chain from exploration, development, production, and oil and natural gas sales. According to URSB, CNOOC Uganda Limited was registered in Uganda on the 11 May 2010[104] under registration number 118364 (See attached official letter from the URSB). Its shareholders are CNOOC Uganda (BVI) Limited incorporated in the British Virgin Islands holding one share in the company and CNOOC Netherlands B.V. the controlling

[98] See official letter from the URSB annexed to this Thesis
[99] Refer to Annex 1 for the official letter from the URSB
[100] Petroleum Authority Uganda (n 66); Petroleum Authority Uganda, Exploration and Appraisal of Oil and Gas Discoveries, (2018)
[101] Petroleum Authority Uganda (n 66); Petroleum Authority Uganda, Exploration and Appraisal of Oil and Gas Discoveries, (2018)
[102] Companies Ordinance, Chapter 32 of the Laws of Hong Kong
[103] Ibid
[104] See official letter from the URSB annexed to this Thesis

shareholder holding 9,999 shares. CNOOC Uganda Limited has interests in both exploration and in the production joint venture discussed below.

1.3.4.1.3.4 Armour Energy Limited (AEL) and Oranto Petroleum International Ltd (Oranto)

Armour Energy Limited (AEL) and Oranto are the newest MOCs to obtain exploration licenses from the Ministry of Energy and Mineral Development (MEMD) in 2017.[105] AEL is a private limited Company incorporated in 2009 in Australia, while Oranto is a Nigeria private limited company. AEL took over the Licence for the Kanywataba block area after Tullow's 2012 License over the same area expired. [106] While Oranto obtained the License to Ngassa Deep and Ngassa Shallow blocks.[107] These new Licenses and their subsequent PSAs were the first kinds granted according to the Upstream Act.[108]

1.3.4.2 Production Licenses

In 2016, Production licenses[109] were granted by the Government of Uganda to Total E&P Uganda BV (Total Energies), Tullow Oil and CNOOC as a Joint

[105] Petroleum Authority Uganda, *Exploration and Appraisal of Oil and Gas Discoveries*, (2018)
[106] Baz Waiswa, 'Here Are PSA Conditions under Which Armour Energy Will Operate in Uganda' (*Earth Findings* 14 September 2017) <http://earthfinds.co.ug/index.php/oil-and-gas/item/1092-here-are-psa-conditions-under-which-armour-energy-will-operate-in-uganda> accessed 1 February 2017; Baz Waiswa, 'Uganda Offers Oil and Gas Exploration License to Australian Firm' (*Earth Findings* 2017) <http://earthfinds.co.ug/index.php/oil-and-gas/item/1083-uganda-offers-exploration-license-to-australian-firm> accessed 1 February 2017.
[107] Petroleum Authority Uganda, *Exploration and Appraisal of Oil and Gas Discoveries*, (2018)
[108] Upstream Act 2013, s 52, 53, 58.
[109] Ibid Section 66, 69-75; Ministry of Energy and Mineral Development, 'Uganda issues five petroleum production licences' http://petroleum.go.ug/news/62/Government-of-Uganda-Issues-Five-5-Petroleum-Production-Licences-to-Tullow-Uganda-Operations-Pty-Limited-

Venture (J.V.) partner to develop and produce blocks 1, 1A, 2 and 3A, [110] with each partner holding a 33.3% interest.[111] Entering a J.V. allows all the partners to share the investments' potential costs, the industry's risk, the technology and technical capacity, the experience and equipment, and effectively and efficiently manage the J.V. activities. The J.V. project will be executed in a series of activities first through project engineering, land acquisition and resettlement, the development of new infrastructure and the temporary facilities by the project operator, then the development of production infrastructure including Construction and Drilling; Pre-commissioning; and Commissioning; Operation and production; and Decommissioning.[112] At the time of writing this thesis, the Government anticipated that the board of Directors of the MOCs would take the Final Investment Decision (FID) before the end of 2020, with first oil expected three years after FID.[113] On 1st February

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and-Three-3-Petroleum-Production-Licences-to-Total-Uganda-BV accessed on 15th November 2016.

[110] PL 01/16 in Kasamene and Wahrindi field, PL02/16 Kigogole, Ngara field, PL03/16 in Nsoga field, PL04/16 Ngege field, PL 05/16 in Mputa, Nzizi and Waraga field http://www.parliament.go.ug/index.php/about-parliament/parliamentary-news/1072-oil-production-to-start-in-2020; Five to Tullow Uganda Operations Pty Limited (Ngege Field, Mputa-Nzizi-Waraga Fields, Kasamene-Wahrindi Field, TUOP: Nsoga Field, Kigogole-Ngara Fields) and three to Total E&P Uganda B.V. (Gunya Field, Jobi-Rii Fields, Ngiri Field) and one to China National Offshore Oil Corporation Uganda Limited (Kingfisher Field) acquired in 2013

[111] 'Tullow Licence Interests', (Tullow oil Plc) https://www.tullowoil.com/Media/docs/default-source/operations/tullow-group-licence-list-August-2018-v3.pdf?sfvrsn=64; Total, Our activities in Uganda 2017 available at https://www.total.com/sites/default/files/atoms/files/brochure_ouganda_en.pdf accessed on 19th July 2018; Abdallah, Halima 'Uganda issues 8 production licences to Tullow Oil, Total', (*The EastAfrican* Nairobi, 30 August 2016). http://www.theeastafrican.co.ke/news/Uganda-issues-8-production-licences-to-Tullow-Oil-and-Total/2558-3363216-mf7ksy/index.html accessed on 30 August 2017.

[112] 'Tullow in Uganda' (Tullow oil plc) https://www.tullowoil.com/operations/east-africa/uganda;

[113]Ian Lewis, 'Uganda battles to revive oil project: The energy ministry's aim to achieve FID in early 2020 looks ambitious' (21 November 2019) https://www.petroleum-economist.com/articles/politics-economics/africa/2019/uganda-battles-to-revive-oil-project

2022, the FID was announced by the MOCs (Total Energies, CNOOC) and the Government of Uganda, which will kick start investments needed to start producing crude oil. It also signifies their commitment to invest over US$ 10 Billion to develop Uganda's oil and gas resources.[114]

Under the 2017 Sale and Purchase Agreement between Total Energies and Tullow, Tullow agreed to a substantial farm-down[115] of its assets in Uganda to Total, a further transfer of 21.57% of its 33.33% interest in Exploration Areas 1, 1A, 2 and 3A. CNOOC Uganda Limited (CNOOC) subsequently exercised its pre-emption rights under the joint operating agreements to acquire 50% of the interests to Total Energies on the same terms and conditions. The farm-down leaves Tullow with an 11.76% interest in the upstream and pipeline, which will reduce to 10% when the Government of Uganda formally exercises its right to back-in.[116] However, as of 23rd April 2020, Tullow agreed to sell its entire stake in the Lake Albert Development Project in Uganda to Total Energies for US$575 million in cash and post first oil contingent payments.[117] On 28th May 2020, CNOOC Uganda Limited gave its approval to Total Energies to acquire

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[114] The Independent, 'Historic: Final decision on $10bn Uganda oil project, *The Independent* (February 1, 2022) https://www.independent.co.ug/historic-final-decision-on-10bn-uganda-oil-project/> accessed on 1st February 2022

[115] A contractual agreement with an owner who holds a working interest in an oil and gas lease to assign all or part of that interest to another party in exchange for fulfilling contractually specified conditions; Sally Gibson, 'Farm Out Agreements' (OGLTR 11, 1993) 45-51; Geoff Hewitt, Terence C Daintith, *United Kingdom Oil & Gas Law Ring-bound* (Sweet & Maxwell, 2nd edn 13 Dec. 1984)

[116] Total, Our activities in Uganda 2017 available at https://www.total.com/sites/default/files/atoms/files/brochure_ouganda_en.pdf accessed on 19th July 2018

[117] Tullow Oil Press Release, Tullow agrees sale of its entire stake in the Lake Albert Development Project in Uganda to Total 23 April 2020 https://www.tullowoil.com/media/press-releases/tullow-agrees-sale-its-entire-stake-lake-albert-development-project-uganda-total/ accessed on 3 May 2020

Tullow Uganda Operations Pty Ltd assets in Uganda, without exercising its pre-emption rights.[118]

There was a two-year standoff with the Government that delayed the farm down because the Government has passed a law requiring Capital Gains Tax on the farm down, and that the Capital Gains Tax assessed by Uganda Revenue Authority (URA) amounted to US$14.6 million, which led to Tullow and the Government's failure to reach an agreement.[119]

Having secured the sell, Tullow will now seek approval from the company's shareholders and enter into a tax agreement with Uganda Revenue Authority and approval by the Government of Uganda. Government approval of the transaction is expected to be conditioned to Tullow's willingness to pay the assessed taxes. The near conclusion of the deal is good news for Uganda's oil and gas sub-sector for there is some visible movement towards FID for Uganda's up-stream petroleum developments. On 1st February 2022, the FID was announced by the MOCs (Total Energies, CNOOC) and the Government of Uganda, which will kick start investments needed to start producing crude oil. It also signifies their commitment to invest over US$ 10 Billion to develop Uganda's oil and gas resources.

Although this research focused primarily on Uganda's socio-economic and environmental vulnerabilities considering the emerging petroleum industry

118 Oil and Gas Links, 'CNOOC gives Total green light to acquire Tullow's assets in Uganda' 29 May 2020 https://oglinks.news/cnooc/pr/gives-total-green-light-acquire-tullows-assets-uganda> accessed 3rd June 2020

119 Refer to chapter five for the discussion on the stabilisation clauses contained in the Model PSA.

and the Government's pursuit of sustainable development, many of the same challenges are shared by most developing countries in varying degrees. However, Uganda is at a pivotal point where the Government ought to make appropriate legal decisions to ensure the petroleum resources deliver the hoped-for sustainable development achievements and avert the 'Resource Curse Phenomenon.'

1.4 Literature Review

The literature review will discuss several critical conceptual, policy and legal aspects pertinent to this thesis. First, is how the legal and regulatory framework interacts with the petroleum industry. Secondly, how the Petroleum industries interact with the pursuit of Sustainable Development Goals (SDGs). Finally, the concept of State's permanent sovereignty over its natural resources and whether the petroleum industry's legal and regulatory framework will impact this right.

1.4.1 The Concept of "Petroleum Law."

Petroleum Law is primarily concerned with balancing the relational interests, rights, obligations, and liabilities of resource-rich states and persons, both natural and legal, who provide the capital and carry out operations in the petroleum development. Petroleum Law exists, operates, and develops within the broader framework of both National Law and International Law.

Nationally, it is national laws[120], which give rise to Petroleum contracts to define and govern legal and commercial relationships between the State and MOCs.[121]

Internationally, there is no distinct "petroleum" field or body of international Law with its separate sources and law-making methods deriving from rules and principles exclusive to petroleum matters.[122] However, there are several identifiable sources of International Petroleum Law. These include Declarations, Customary Law,[123] Multilateral Conventions or Treaties[124] and Bilateral Investment Treaties which govern different investment matters between several States[125]

Other sources of IPL include international judicial decisions[126] or arbitral tribunals and awards such as those of the International Court of Justice (ICJ)[127]

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[120] Petroleum (Exploration, Development and Production) Act 2013; Petroleum (Refining, Conversion, Transmission and Midstream Storage) Act 2013; Refer to chapter three for the assessment of Uganda's national laws

[121] Taimour Lay and Mika Minio-Paluello, 'Contracts Curse: Uganda's oil agreements place profit before people, (*PLATFORM and Civil Society Coalition on Oil (CSCO) in Uganda*, February 2010) http://platformlondon.org/wp-content/uploads/2012/01/Contracts-Curse-Uganda-Platform-CSCO.pdf accessed on 19 July 2017
Taimour Lay, 'Worst Kept Secret' (*PLATFORM*) <http://blog.platformlondon.org/content/worst-kept-secret-tullow-oil%E2%80%99s-contract-uganda> accessed on 19 June 2019; Ministry of Energy and Mineral Development, *Production Sharing Agreement for Petroleum Exploration Development and Production in the Republic of Uganda By and Between the Government of The Republic of Uganda And Tullow Uganda Limited in Respect of The Kanywataba Prospect Area* (February 2012); refer to chapter four for discussion on PSAs

[122] Richard, W. Bentham, *The International Legal Structure of Petroleum Exploitation,* 9 OGLTR, (1984-1985) 234-238

[123] Ibrahim F.I. Shihata, and William Onorato, *Joint Development of International Petroleum Resources in Undefined and Disputed Areas,* paper presented at the International Conference of Lawasia Energy Section, Kuala Lumpur, Malaysia, October 18-22, 1992.

[124] Refer to chapter five for assessment of international laws relevant to Uganda's petroleum industry.

[125] Refer to chapter six for assessment of the BITs relevant to Uganda's petroleum industry.

[126] *Earl of Lonsdale v Attorney-General, (1982) 1 WLR 887*

[127] The North Sea Continental Shelf Case, (1969), ICJ Rep. 3

and the Permanent Court of Arbitration,[128] recognised Juristic works in academic texts publications and journals.[129] Finally, resolutions of international institutions or international conferences,[130] for example, U.N. resolutions on ownership of natural resources, Organization of Petroleum Exporting Countries (OPEC) resolutions on oil pricing or oil development, World Bank Guidelines on the Treatment of Foreign Direct Investment 1992 binding on the institution's members.[131]

1.4.1.1 Investment Law, Petroleum Contracts, and the Petroleum Industry

The literature on international investment law provides that resource-rich states and MOCs come together to pursue mutually beneficial relationships.[132] For the resource-rich State, the petroleum industry contributes to sustainable development in several ways. These include[133] creating direct and indirect jobs and providing energy that enables economic activity and social development. Also, contributing substantial taxes and other types of revenue to the State; contributing to the development of technological advancements; contributing to socio-economic investments within the local communities co-located with

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[128] *Libyan American Oil Co. (Liamco) v The Government of the Libyan Arab Republic, (1981) 20 ILM 1-87; Award of Amnioil - Kuwait Arbitration* of March 24, 1982, 21 ILM, 976-1005, (1982).
[129] Oil, Gas & Energy Law (OGEL); Journal Journal of Energy and Natural Resources Law, (JENRL), and the Oil and Gas Law and Taxation Review, (OGLTR).
[130] J.G. Starke, *Introduction to International Law,* 10th ed. (London: Butterworths, 1989) 51-54
[131] World Bank, 'Legal Framework for the Treatment of Foreign Investment: Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment' 1992 <http://documents1.worldbank.org/curated/en/955221468766167766/pdf/multi-page.pdf> accessed on 20 June 2018
[132]Ibid
[133] Bernard Taverne, *Petroleum, Industry and Governments Electronic Resource: A Study of the Involvement of Industry and Governments in Exploring for and Producing Petroleum* (3rd edn Vol 24 Wolters Kluwer Law and Business 2013) (Taverne 2013)

the petroleum exploration and production activities.[134] For the MOCs, the goal primarily is for economic gain.

MOCs have several considerations before making investment decisions, and all centre around the risk-benefit ratio. One of these considerations is the legal and regulatory framework that the resource-rich State has in place. For example, MOCs might consider whether that State has a BIT with its home country. The primary intention of BITs between states is to facilitate the flow of foreign capital from multinational private corporations from each other's States and provide for corresponding obligations for the host government to ensure a favourable and predictable fiscal and legal regime to promote foreign investment.[135]

MOCs also consider the type of investment contracts they might enter into with the resource-rich State, and how they impact their investment profitability. The literature on petroleum contracts provides several possible long-term investor-state contracts, such as concessions, service contracts, and PSAs. [136] Uganda uses PSAs to grant legal rights to MOCs to explore and

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[134] Refer to chapter two, section 2.3 for discussion on the potential benefits of developing Uganda's petroleum industry

[135] Peter D Cameron, *International energy investment law: the pursuit of stability* (Oxford University Press 2010) 3 -17; Aisbett E "*Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus Causation*." (Department of Agricultural and Resource Economics, UCB 2007); Patricia Park, *International Law for Energy and the Environment* (2nd edn, CRC Press 2013) 75, 78-80

[136] Gordon G, Paterson J and Usenmez E (eds), *Oil and Gas Law: Current Practice and Emerging Trends*, (2nd edn, DUP 2011); Peter D Cameron, *International energy investment law: the pursuit of stability* (Oxford University Press 2010) 3 -17; Patricia Park, *International Law for Energy and the Environment* (2nd edn, CRC Press 2013) 75, 78-80; Bonnitcha J "*Substantive Protection under Investment Treaties*." (Cambridge University Press 2014); Aisbett E "*Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus Causation*." (Department of Agricultural and Resource Economics, UCB 2007); Neumayer, Eric/Spess, Laura 2005: Do Bilateral Investment

produce petroleum resources. The main difference in this type of contract is that MOCs can recoup their investment costs and earn a share in the produced petroleum.[137]

Reviewed literature provides that whereas both MOCs and Host State's intended for BITs and PSAs to form mutually beneficial relationships and promote international investments, they often contain several investor protection clauses. [138] Examples of investor protection clauses include stabilisation clauses, arbitration clauses requiring international arbitration, confidentiality clauses, most favoured nation, direct and indirect expropriation, as well as fair and equitable treatment.[139] These clauses often have the impact of empowering private foreign investors to submit a State to international arbitration forums for perceived "unfair" fiscal and legal changes, for large sums of money in compensations.

Treaties Increase Foreign Direct Investment to Developing Countries?, World Development, Vol. 33, No. 10, pp. 1567–1585, 2005

Salacuse, Jeswald W. 2010: The Emerging Global Regime for Investment, Harvard International Law Journal, Volume 51, Number 2, Summer 2010, pp. 427-473; Jonathan Bonnitcha, Assessing the Impacts of Investment Treaties: Overview of the evidence (IISD Report 2017), (The International Institute for Sustainable Development September 2017) https://www.iisd.org/sites/default/files/publications/assessing-impacts-investment-treaties.pdf

[137] Ibid

[138] Ibid

[139] P D Cameron, *Stabilization in Investment Contracts and Changes of Rules in Host Countries: Tools for Oil and Gas Investors* (AIPN 2006) 12; E Aisbett and others, *Rethinking International Investment Governance: Principles for the 21st Century* (1st August 2018); Bonnitcha J, *Substantive Protection under Investment Treaties* (CUP 2014); J Bonnitcha, E Aisbett, 'An Economic Analysis of the Substantive Protections Provided by Investment Treaties" in Sauvant K P (ed) *The Yearbook on International Investment Law and Policy 2011/2012* (OUP 2013); P D Cameron, *International energy investment law: the pursuit of stability* (OUP 2010); Scherer Maxi, *International Arbitration in the Energy Sector* (OUP 2020)

For example, where Parties to PSA use stabilisation clauses, they are intended to freeze the contract to the applicable host State national laws when signing.[140] Unfortunately, this creates a freezing ability[141] on the host state's right to pursue legitimate public policy aims, and further regulate to promote public health, economic, environmental sustainability, or social justice throughout the lifetime of the petroleum contract. [142] It distorts the Government's accountability to its citizens, prioritising the concerns, interests and profits of MOCs, over citizens and the environment. For a developing country like Uganda, with a developing legal and fiscal system, it creates an unrealistic expectation that its needs could remain frozen in time.

Whereas confidentiality clauses have a positive role in any contract, in contracts with a significant public interest, they tend to keep the exact terms of the agreements private from public engagement and assessment as to whether the contracts offer any hoped-for benefits in the pursuit of sustainable development.[143] However, as earlier stated, the Constitution (and Petroleum

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[140] Ministry of Energy and Mineral Development, *Production Sharing Agreement for Petroleum Exploration Development and Production in The Republic of Uganda By and Between the Government of The Republic of Uganda And Tullow Uganda Limited in Respect of The Kanywataba Prospect Area* (February 2012) Article 33; Refer to chapter four for discussion on PSAs; P D Cameron, Stabilization in Investment Contracts and Changes of Rules in Host Countries: Tools for Oil & Gas Investors (Association of International Petroleum Negotiators 2006) 12, 53–72.

[141] E Aisbett and others, *Rethinking International Investment Governance: Principles for the 21st Century* (1st August 2018)

[142] Ibid

[143] Taimour Lay and Mika Minio-Paluello, Contracts Curse: Uganda's oil agreements place profit before people (PLATFORM and Civil Society Coalition on Oil (CSCO) in Uganda, February 2010) available at http://platformlondon.org/wp-content/uploads/2012/01/Contracts-Curse-Uganda-Platform-CSCO.pdf accessed on 26th February 2018; Kanywataba Prospect Area PSA 2012 (n 19); Global Witness, A Good Deal Better. Available at: https://www.globalwitness.org/reports/good-deal-better/ [Accessed: 5th May 2015]. See Also Platform Contracts Curse: Uganda's oil agreements place profit before people. Available at: http://platformlondon.org/p-publications/contracts-curse-uganda-oil-agreements-profit-before-people/

Laws and Access to Information Act 2005)[144] provides that citizens of Uganda own the petroleum resources and vest them in the Government for effective management, it would be logical to say that the Government should at least in theory remain accountable and transparent regarding its commercial arrangements. That way, every citizen should have the freedom to access, assess and monitor the petroleum industry as a means of fostering transparency and accountability. Therefore, confidentiality clauses might significantly limit the right to access information if PSAs included them.

Furthermore, if a dispute arises concerning a BIT or PSA term's perceived breach, the dispute is submitted to international arbitration forums before ad hoc arbitral tribunals. [145] However, international investment arbitration proceedings are also mostly kept private and confidential in a private forum, and yet the impact of their binding arbitral awards bears significant financial implications on the State's economy.[146] A mere threat to complain is sufficient to deter the developing host states, preferring to avoid international arbitration processes and the resulting substantial compensation.[147]

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[144] Access to Information Act, 2005 (The Uganda Gazette No. 42 Volume XCVIII dated 19th July 2005) (ATIA 2005); Refer to chapter three, section 3.7.3

[145] Johnson L and Sachs L, 'Investment Treaties, Investor-State Dispute Settlement, and Inequality: How International Investment Treaties Exacerbate Domestic Disparities' in *International Rules and Inequality: Implications for Global Economic Governance* (CUP 2018)

[146] Taverne 2013 (n 133); Convention on the Settlement of Investment Disputes Between States and Nationals of Other States - International Centre for Settlement of Investment Disputes, (Washington ICSID 1965) Article 16 (ICSID 1965)

[147] Eric Neumayer, Laura Spess, 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?' (2005) 33 (10) World Development 1567–1585; Salacuse Jeswald, 'The Emerging Global Regime for Investment' (2010) 51 (2) Harvard International Law Journal 427-473; E Aisbett and others, *Rethinking International Investment Governance: Principles for the 21st Century* (1st August 2018); Refer to chapter six for discuss on the international legal framework and BITs relevant to the Uganda's petroleum industry; Refer to

1.4.2 Petroleum Industry and Sustainable Development

The World Commission on Environment and Development also known as the Brundtland Report defines Sustainable Development as "*development that meets the needs of the present without compromising the ability of future generations to meet their own needs*." [148] The UN has carried the Brundtland Report's recommendations over the years in the different international environmental and sustainable development fora[149]

After the eight Millennium Development Goals expired in 2015, the UNGA adopted the 2030 Agenda for Sustainable Development on 25th September 2015 (2030 Agenda).[150] Uganda presided over the 69th session of the UN General Assembly when they formulated Agenda 2030 and the Sustainable Development Goals (SDGs). Therefore, it is safe to assume that it has a special vested interest in implementing the SDGs.[151] The Agenda 2030 has four main

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Chapter seven for the recommendations that level the playing field between resource-rich-states and MOCs

[148] United Nations General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development* (adopted by the General Assembly on 25th September 2015) UN Doc. A/Res/70/L.1) (Agenda 2030); United Nations General Assembly, *Report of the World Commission on Environment and Development: Our Common Future (*UNGA, Development and International Co-operation: Environment. (1987) GA A/42/427, Article 1, 2, and para 27; Brundtland Report, paragraph 49; J Vinuales, 'Foreign Investment and the Environment in International Law: Current Trends,' in K Miles (ed), Research Handbook on Environment and Investment Law (Cheltenham:Edward Elgar, 2018) Chapter 2

[149] Rio+20 UN Conference on Sustainable Development, "The History of Sustainable Development in the United Nations". 22 June 2012; Refer to chapter five, section 5.2 for a further discussion on the International Law instruments on sustainable development and the environment.

[150] Agenda 2030 (n 148)

[151] United Nations Country Team in Uganda, 'United Nations Sustainable Development Cooperation Framework, Uganda 2021-2025' (2020) https://uganda.un.org/sites/default/files/2020-11/Uganda%20UN%20Sustainable%20Development%20Cooperation%20Framework%202021-2025.pdf > accessed 15 December 2020

components: A short preamble, a declaration, a set of 17 Sustainable Development Goals, and finally, a set of observations on implementations and a review system (High-Level Political Forum (HLPF)). [152] These SDGs comprises of a total of 169 targets, measured in 230 indicators.

The Preamble sets an overall framework for peace and partnership within which Governments are to pursue social development, environmental protection and economic growth and development. Agenda 2030's Declaration provides for the shared principles and commitments prior made in the Rio Declaration on Environment and Development, including, the principle of common but differentiated responsibilities, as set out in principle 7.[153] The 17 SDGs set out the collective resolve of all the 198 signatory countries to [154] "*End poverty and hunger everywhere;[155] to combat inequalities within and among countries;[156] to build peaceful, just, and inclusive societies;[157] to protect human rights[158] and promote gender equality and the empowerment of women and girls;[159] to ensure the lasting protection of the planet and its natural resources.[160] We also resolve*

[152] Agenda 2030 (n 148) paragraphs 62, 82-90; UNGA, 'Addis Ababa Action Agenda of the Third International Conference on Financing for Development,' (27 July 2015) UN Doc. A/RES/69/313, Annex; B H Desai, B K Sidhu, 'Quest for International Environmental Institutions: Transition from CSD to HLPF,' in S Alam et al International Environmental Law and the Global South (Cambridge University Press, 20016) 152-68

[153]Agenda 2030 (n 148) paragraph 10, 12; P Chasek et al, 'Getting to 2030: Negotiating the Post-2015 Sustainable Development Agenda' (2016) 25/1 *Review of European, Comparative and International Environmental Law 5*.

[154] Agenda 2030 (n 148) paragraph 3

[155] Agenda 2030 (n 1488) Goal 1 -ending poverty; Goal 2 - zero hunger

[156] Agenda 2030 (n 148) Goal 10 - Reduced inequality

[157] Agenda 2030 (n 148) Goal 16- peace, justice and strong institutions; Goal 11 - Sustainable cities and communities

[158] Agenda 2030 (n 148) Goal 3- good health and well-being); Goal 4- quality education; Goal 6- clean water and sanitation; Goal 7 -affordable and clean energy

[159] Agenda 2030 (n 148) Goal 5- gender equality

[160] Agenda 2030 (n 148) Goal 13 -climate change; Goal 14- life below water; Goal 15- life on land; Goal 12 - responsible consumption and production

to create conditions for sustainable, inclusive, and sustained economic growth, shared prosperity and decent work for all, [161] *considering different levels of national development and capacities.*[162]"

The UN expects its member states to refer to all 17 SDGs as a guiding tool to frame their development programmes to address their economic, social, and environmental challenges.[163] They are also to give priority to reach the furthest behind first;[164] especially the local communities often left out of the investment and development discussion that impact their lives.

The SDGs emphasise that economic growth needs to be accompanied by social fairness and environmental sustainability. Therefore, the SDGs comprise economic, social, and environmental dimensions that are strongly inter-related, such that contributing to one SDG will have an impact other SDGs, just as noteworthy progress on one SDG will require progress on others.

The SDGs are also country-based,[165] which means that they place the essential responsibility at the national level while recognising the importance of global, regional, and sub-regional efforts. They also consider all countries, not just developing countries (unlike the MDGs), hence calling for collective

[161] Agenda 2030 (n 148) Goal 8 - decent work and economic growth; Goal 9 - industry, innovation and infrastructure
[162] Agenda 2030 (n 148) Goal 17 - implementation of the SDG through partnership
[163] Agenda 2030 (n 148), Para 41
[164] Agenda 2030 (n 148) para 4
[165] In 2019, Uganda's progress on SDGs was ranked 40 out of 162 countries with a global index score of 52.6 per cent declining from 125th position out of 156 Countries in 2018. According to the SDG Global Index, Uganda's achievement is average, with moderate performance on SDGs 3, 8, 9, 13 and 15. SDGs 2, 5 and 6 have stagnated and the country is off-track in achieving SDGs 1, 11, and 16 (United Nations Sustainable Development Cooperation Framework, Uganda 2021-2025).

prosperity within and amongst all nations. The SDGs also recognised that international capital flows, including foreign direct investment (from MOCs), have an essential role in achieving the SDGs,[166] especially concerning finance and technology transfer.[167] In Chapter Two, this thesis discusses how MOCs can collaborate with the Government and civil society organisations and communities to implement the various aspects in the above SDGs.

However, the petroleum industry's operations are likely to have both negative and positive impacts on the various dimensions of the above SDGs. Concerning the impact on the local communities in which they operate, the industry might ensure equitable and inclusive quality education and promote lifelong learning opportunities by building schools accessible to the locals.[168] The industry can ensure good healthy lives and promote well-being for all ages by building health centres within the communities they operate.[169] The industry can offer jobs to community members and contribute to ending poverty.[170] It can contribute to gender equality by empowering all women and girls.[171] It can also promote inclusive and peaceful societies for sustainable development.[172] It can partner with the State to provide access to reliable, affordable, sustainable and modern energy.[173] Finally, it can participate in the

[166] Agenda 2030 (n 148) Goal 17
[167] Agenda 2030 (n 148) paragraph 70
[168] Agenda 2030 (n 148) Goal 4; The Constitution of the Republic of Uganda, 1995, Article 30
[169] Ibid Goal 3
[170] Ibid Goal 1
[171] Ibid Goal 5
[172] Ibid Goal 16
[173] Ibid Goal 7

strengthening the means of implementation of global partnerships to achieve sustainable development.[174]

Within Uganda, the petroleum industry can contribute to SDGs concerning the protection of ecosystems by ensuring sustainable management of water,[175] and conserving life below water[176] especially for exploration and production activities taking place on Lake Albert and Lake George; engaging in responsible consumption and production patterns;[177] taking action to urgently combat the impacts of climate change through minimising and subsequent elimination of greenhouse gas emissions;[178] and protecting, restoring and promoting sustainable use of life on land particularly in the biologically sensitive Albertine Graben.[179]

The petroleum industry most positively impacts the economic dimension of the SGDs. That is by offering decent work and participating in inclusive and sustainable economic growth;[180]building resilient infrastructure, promoting inclusive and sustainable industrialisation, reducing inequality, fostering innovation [181] within and among countries, [182] and sustainable, safe, and resilient cities and communities.[183]

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[174] Ibid Goal 17
[175] Ibid Goal 6
[176] Ibid Goal 14
[177] Ibid Goal 12
[178] Ibid Goal 13
[179] Ibid Goal 15
[180] Ibid Goal 8
[181] Ibid Goal 9
[182] Ibid Goal 10
[183] Ibid Goal 11

The SDGs highlight sustainability challenges concerning the industry's environmental footprint on biodiversity in the Albertine Graben, and the associated climate change impacts on local communities. The Government can do more to mitigate the adverse effects of petroleum development, starting with making petroleum contracts, investment agreements and laws relevant to the petroleum industry a lot fairer and sustainable-development-friendly. It also highlights the importance of collaborative partnerships between the various stakeholder, from Government, community leaders, civil society, Non-Government Organisations and MOCs, which means removing the veil of secrecy surrounding petroleum industries' activities. The industry's positive and negative impacts on sustainable development will be discussed extensively in Chapter Two of this thesis.

1.4.3 Permanent Sovereignty over Natural Resources and the Right to Self-Regulate

Another key conceptual issue is how the principle of State's Permanent Sovereignty over Natural Resources, embedded in International Law,[184] is impacted by the "investor protective provisions" in the legal frameworks discussed above.[185] The United Nations General Assembly (UNGA) debates on international economic Law required countries (particularly developing countries) to assert their right to enjoy the benefits of resource exploitation

[184] Refer to chapter five for assessment of the international law relevant to Uganda's petroleum law.

[185] R D Deutsch, T J Tyler, *Options for the Nervous Investor in Venezuela: Structuring for Bit Protection and preserving the ICSID Option* (OGEL / TDM Special Issue on Venezuela: The battle of Contract Sanctity vs. Resource Sovereignty, Vol. 6 - issue 2, 2008) 7

within their territories.[186] It also requires countries to allow 'inequitable' legal arrangements, under which foreign investors can obtain title to exploit resources.[187]

Article 18(3) of the Energy Charter Treaty (ECT) provides that:[188]

> "*Each state continues to hold in particular the right to decide the geographical areas within its area to be made available for exploration, and development of its energy resources, the optimisation of their recovery and the rate at which they may be depleted or exploited, to specify and enjoy taxes, royalties, or other financial payment payable by virtue of such exploration and exploitation and to regulate the environmental and safety aspects of such exploitation inter alia, through direct participation by the government or state enterprises.*"

The adoption of UNGA Resolution on "Permanent Sovereignty over Natural Resources [189] was the landmark resolution generally considered as an expression of customary international law. It states that "*the right of people and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the*

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[186] UNGA, 'Development and Environment,' 20 December 1971 UN Doc. A/Res/2849, paragraph 11; K Mickelson, 'The Stockholm Conference and the Creation of the South-North Divide in International Environmental Law and Policy,' in S Alam et al, (eds0, International Environmental Law and the Global South (Cambridge University Press, 2016) 109-29; UN General Assembly "Permanent Sovereignty over Natural Resources UNGA on the 14 December 1962 UN Doc.A/RES/1803/XVII, Para. 1; UNGA Resolution 523 (VI) 12 January 1952 ; UNGA Resolution 626 (VII), 21 December 1952

[187] UN General Assembly, Right to exploit freely natural wealth and resources, 21 December 1952, A/RES/626 (VII); Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (CUP 2008) 36-76

[188] European Energy Charter Treaty, Lisbon, 17 December 1994, Article 1.5, Article 2(1), and in 6(2), 18 (3).

[189] UN General Assembly Resolution 1803 (XVII) "Permanent Sovereignty over Natural Resources UNGA on the 14 December 1962 UN Doc.A/RES/1803/XVII

people of the State concerned." The main feature of the above resolution is permanence. Sovereignty is indeed the rule, and its limitations are circumscribed in their scope and time.[190]

Also, the UNGA adopted Resolution 3016 (XXVII) in 1972 and United Nations Conference on Trade and Development's (UNCTAD) adopted Resolution 46 (III) in the same year, both dealing with the international investment policy and law framework providing for:

> "*prohibition of coercion (economic, political, or any other kind), that is, any actions, measures or legislative regulations by States aimed at coercing, directly or indirectly, other States engaged in the change of their internal structure or in the exercise of their sovereign rights over their natural resources, and that any threat to infringe on this right would constitute a threat to international peace and security.*"[191]

The Charter of Economic Rights and Duties of States (CERDS) provides that "*Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities*".[192] This principle is also reiterated in paragraph 18 of the 2030 SDGs,

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[190] G Abi-Saab, 'Permanent Sovereignty over Natural Resources and Economic Activities', in M Bedjaoui (ed), *International Law: Achievements and Prospects*, (Dordrecht: Njihoff, 1991), 597-617

[191]United Nations Conference on Trade and Development Resolution 46 (III) Principle II *Trade and Development Report: Global governance and policy space for development*, (New York/Geneva, 2014); UNCTAD Resolution 46 (III) of 18 May 1972, Principle II United Nations Conference on Trade and Development, *Investment Policy Framework for Sustainable Development*, (2015)

[192] UN General Assembly resolution 3281 (XXIX) "Charter of Economic Rights and Duties of States" on 12 December 1974, Article 2

signifying the importance of the State's Permanent sovereignty, especially in the pursuit of SDGs.[193]

Petroleum regulatory frameworks facilitate foreign capital flow from multinational private corporations and provide for the host government's corresponding obligations to ensure a favourable and stable legal environment.[194] The host Government's obligations mean that they must grant legal protection to foreign investors from the governments' perceived adverse action.[195]

However, as discussed above, some of the investor protection terms in petroleum regulatory frameworks have the unintended effect of limiting the State's right to further legislate on environmental damage, protect indigenous communities' rights, taxes, and rights of workers.[196] The Government should maintain discretion to re-evaluate the petroleum legal framework, to make sure it complies with the strictures of sustainable development and other international law provisions.[197] The only limitation is that countries should not

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[193] Agenda 2030 (n 148)

[194] Peter D Cameron, *International energy investment law: the pursuit of stability* (Oxford University Press 2010) 3 -17; Aisbett E "*Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus Causation*." (Department of Agricultural and Resource Economics, UCB 2007).

[195] Peter D Cameron, *International energy investment law: the pursuit of stability* (Oxford University Press 2010) 3 -17; Aisbett E "*Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus Causation*." (Department of Agricultural and Resource Economics, UCB 2007); Jonathan Bonnitcha, *Assessing the Impacts of Investment Treaties: Overview of the evidence* (IISD Report 2017).

[196] Cyril Obi, Siri Aas Rustad, *Oil and Insurgency in Niger Delta: Managing the Complex Politics of Petro-violence* (Zed Books, 2011)

[197] Gotanda J, 'Renegotiation and Adaptation Clauses in Investment Contracts,' [2003] 36 Vanderbilt Journal of Transnational 1461-1472; International Centre for Settlement of Investment Disputes, (Washington ICSID 1965) Article 16 (ICSID 1965) Article 16; M Kielmas, 'Politics by other means' (In Petroleum Review, International Arbitration, 2008) 29

prejudice contracting MOCs in any "*…international economic cooperation based upon the principle of mutual benefit*", including direct and indirect nationalisation and expropriation.[198]

The principle of permanent sovereignty over its natural resources suggests that a State's discretionary right to legislate is not to be subject to limitation by contractual obligation, if it will be exercised for public interest issues and not for deliberately prejudicing investors.[199] Another category of limitations is the constraints derived from the introduction of international environmental protection laws. It is challenging for developing countries to balance their economic development interests and environmental protection obligations, especially concerning the extractive industry.[200]

The UNCTAD (United Nations Conference on Trade and Development) provided an International Investment Policy Framework,[201] which provided design strategies in BIT negotiation and drafting that consider sustainable development implications. These include incorporating commitments to promote and facilitate investment for sustainable development; balancing

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[198] International Covenant on Economic, Social and Cultural Rights, (adopted 16 Dec 1966, entered in force 3 Jan 1976) 993 UNTS 3 (CESCR) Ratified 21 Jan 1987, Article 1(2)

[199] European Energy Charter Treaty, Lisbon, adopted on 17 December 1994 and entered into legal force in April 1998, Article 18(1); International Covenant on Civil and Political Rights of 1966, Article 1(2); International Covenant on Economic, Social and Cultural Rights 1966

[200] Pierre-Marie Dupuy, Jorge E. Viñuales, *International Environmental Law* (2nd ed Cambridge University Press 2018) 8; Schrijver N, *Sovereignty over Natural Resources: Balancing Rights and Duties* (CUP 2008) 231-50; C Brighton, 'Unlikely Bedfellows: The Evolution of the Relationship between Environmental Protection and Development' (2017) 66 *International and Comparative Law Quarterly* 209

[201] United Nations Conference on Trade and Development, *Investment Policy Framework for Sustainable Development*, (2015) Principle II

State commitments with investor obligations to domestic and international Law and promoting responsible investment among others.

For developing countries, the principle of permanent sovereignty is fundamental. Unlike environmental protection, which comes with global concern, socio-economic development is the most paramount objective for the individual States' economic development goals and takes primacy in them being able to express their independence.[202] It would be interesting to see how Uganda reconciles the two objectives with the SDGs.[203]

1.5 Contribution to The Field of Study

Considering that Uganda's petroleum sector is new, there are hardly any substantial studies on the adequacy of petroleum laws, seven years since being enacted. This research hopes to contribute to new ways to draft and negotiate sustainable development-friendly petroleum laws, PSAs, and BITs for developing petroleum-producing countries, using Uganda as the case study. It proposes critical considerations that developing countries should consider while negotiating contracts with MOCs and their treaty negotiations with foreign Governments.

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[202] UNGA, 'Development and Environment,' 20 December 1971 UN Doc. A/Res/2849, paragraph 11; K Mickelson, 'The Stockholm Conference and the Creation of the South-North Divide in International Environmental Law and Policy,' in S Alam et al, (eds0, International Environmental Law and the Global South (Cambridge University Press, 2016) 109-29

[203] Refer to chapter, section 5.2.1.5 on the Implementation of Sustainable Development Principles in Uganda's national context.

The researcher hopes to expand the available literature on the 'Resource Curse Phenomenon' to include impacts of the petroleum exploration projects on the local environment and communities' human rights, as another symptom of the resource curse. Research done in Chapter Two revealed that literature on the 'Resource Curse Phenomenon' often focuses on the economic impacts of natural resource development,[204] even though there are well documented environmental and social impacts of extractive industries in developing countries.[205]

1.6 Research Questions

The overarching research question this thesis set out to answer is whether Uganda's petroleum legal and regulatory frameworks adequately considered socio-economic resilience, environmental protection and curbs the 'Resource Curse Phenomenon.'

The above research question raises more specific issues as follows:

1. whether the legal and regulatory framework has any inadequacies, limitations, loopholes, enforcement gaps, and the impact this would have on the Government's objective to pursue its U.N. 2030 sustainable development obligations.

[204] Refer to chapter two, section 2.2.1
[205] Claudine Sigam, Leonardo Garcia, 'Extractive Industries: Optimizing Value Retention in Host Countries' (2012) 9-15 <https://unctad.org/system/files/official-document/suc2012d1_en.pdf> accessed on 13 May 2017

2. Whether Uganda's Model PSA aligns with the national legal frameworks to set a favourable contractual framework to guide future PSAs with MOCs. Also, whether the Model PSA contain investor-protection clauses, such as stabilisation clauses, confidentiality clauses, and Investor-State Dispute Settlement (ISDS), nationalisation and expropriation clauses. If so, what impact do these have on Government's ability to further legislate on matters affecting socio-economic development, environmental protection, and the advancement of sustainable development.
3. Whether the Uganda-Netherland BIT assessed in this thesis contains investor protection clauses, such as Fair and Equitable Treatment (FET), Most Favoured Nation (MFN), Umbrella, Investor-State Dispute Settlement (ISDS) among others, acting against specific government regulation. If so, whether these provisions undermine the Uganda's domestic legal and judicial system, create costs for developing countries like Uganda, both in terms of loss of policy space, defending and paying adverse arbitral awards.
4. Whether PSA and BIT negotiations considered or involved third-party interests (NGOs, CSO, and local communities), as far as enabling them to objectively access, assess and monitor information related to the developing petroleum industry.

1.7 Methodology

The methodology adopted for this study is primarily the doctrinal legal approach. This doctrinal methodology involves analysing primary and secondary sources of Law to form an independent but informed opinion on the issues or questions raised in this research. These primary sources include relevant international environmental, human rights, energy, investment and arbitration laws and cases, Uganda's legislation, policies, case law. Finally, the relevant BITs, model PSAs and the publicly available PSA used by the Ugandan Government. The secondary sources include Academic books, journal articles, industry-specific commentaries, and other scholars' research studies on the subject matter. All primary and secondary source material is from the public domain, and nothing contained herein breaches any form of confidentiality.

The legal doctrinal approach is supplemented by recourse to broader Non-Doctrinal (or) Socio-Legal strategies aimed at socio-economic transformation through Law and legal institutions. It involves studying socio-legal and economic academic and policy literature concerning the broader 'Resource Curse Phenomenon.' These are accessible through published or unpublished reports of Governmental and Non-Governmental Agencies, for example, quantitative reports from the Uganda Human Rights Commission and the National Environment Management Authority. These are independent government bodies that provide detailed and current information on the community's socio-economic impacts and environmental effects. As well as

commentaries from contemporary media like newspapers and official websites of regulatory bodies and the MOCs.

The researcher is accessing the primary and secondary sources from university libraries, official government databases and relevant authoritative websites, and responses from official government bodies holding public documents in Uganda. These sources are critically analysed to generate relevant knowledge to develop related pertinent recommendations to effect change in Uganda's petroleum sector development.

The thesis is desk-based research; therefore, it has no empirical aspects of interviews, questionnaires, schedules, interview guides, and observations. However, it has been seen by high-level employees within Uganda's petroleum industry, who have gracefully offered valuable comments and/or criticism. The author hopes this research will be more than just an academic document aimed at achieving an academic qualification but prove valuable to the very industry the author researches in, as well as improve the regulatory competency of the Ugandan government

1.8 Limitation of the Study

Uganda's petroleum industry is nascent, and the legal and regulatory framework is developing along with the industry as added information becomes available. Uganda's Parliament has had to play catch up with the industry, and that transitory nature of the study area makes it the single biggest obstacle of the proposed research. It makes it challenging to commit

pen to paper researching an evolving field of Law that can quickly change one's perception and make obsolete one's arguments as new laws applicable to the industry are enacted every year since this research was first started.

The prevailing practice to avoid public disclosure of the PSAs and any disputes arising out of the contractual or treaty investment protection obligations is a key finding made in this thesis that became a limitation in this thesis. Due to the lack of accurate information on PSA terms, and convoluted process to access information from Government agencies, the PSA terms on socio-economic resilience and environmental protection are not well understood. The analysis done in this thesis is based on the Model PSA and the publicly available PSAs (2012 Kanywataba PSA).

1.9 Structure of The Thesis

The current chapter introduces the thesis and gives the aims and objectives of the thesis. It gives a brief overview of Uganda's historical and economic background and summarises the nascent Petroleum industry concerning its location, ownership of the resources, and industry operators. This chapter also discusses the literature review regarding all conceptual, policy and legal aspects of Uganda's petroleum development. Finally, it discusses the research questions arising, the methodology used for this research, and the chapter breakdown. The purpose of this background is to provide the reader with a clearer understanding of Uganda's petroleum industry and lays out the foundation for the statement problem.

Chapter Two examines the theoretical perspective of this thesis, the 'Resource Curse Phenomenon.' Uganda is a nascent petroleum exploring and future producing country. However, historical evidence discussed in this chapter shows that resource-rich countries that focus on developing their natural resources, tend to experience worse economic development outcomes than countries with fewer natural resources. The thesis will expand on the existing discussion on the 'Resource Curse Phenomenon' by incorporating the environmental and social aspects at the local or regional level. The "resource curse" theory applied to this thesis is not intended as a methodological bias to prove that Uganda's economy will inevitably suffer negatively. Therefore, this chapter will also identify how the petroleum industry might also most effectively support the SDGs' achievement.

Chapter Three discusses the national legal, regulatory, and institutional framework. This analysis establishes whether the legal framework adequately supports Uganda's petroleum industry to become a valuable contributor to Uganda's sustainable development objectives. One of the crucial ways the Government can circumvent the 'Resource Curse' and manage the petroleum industry's impacts is to have an effective policy, legal, regulatory, and institutional frameworks. Petroleum Law exists, operates, and develops within the broader framework of both National Law and International Law.

Therefore, Chapter Four discusses the Petroleum contracts that define and govern legal and commercial relationships between the State and MOCs.

These agreements play a significant part in determining and balancing their parties' rights, duties, and obligations. The author assesses whether the PSAs align with the national legal frameworks to establish whether they make any positive contributions to the communities' socio-economic resilience and environmental protection and contribute to the industry's overall sustainable development.

Internationally, there is no distinct "petroleum" body of international Law with its separate sources and law-making methods deriving from rules and principles exclusive to petroleum matters. However, there are several identifiable sources of International Petroleum Law. Chapter Five analyses the principal International Laws that influence the petroleum industry. Uganda is a member state of the United Nations since 25 October 1962, and thus a signatory to numerous Declarations, and party to many Conventions or Treaties. Therefore, Uganda is obligated to honour those principles, especially since the petroleum industry carries potential global impacts. The assessment undertaken in Chapter Five will clarify whether Uganda has so far adhered to the international laws it subscribes to as far as socio-economic resilience and environmental protection is concerned.

Chapter Six analyses the International Investment Treaties, another Petroleum law source, that Uganda signed with the MOC's home State Governments. These treaties include obligations for Uganda not to expropriate property, not to discriminate against the Investor, to treat investors fairly and equitably, among others. Often, these Treaties also permit foreign investors to directly

bring legal challenges against the Government through a process known as investor-state dispute settlement.

Chapter Seven will recommend possible legal and regulatory reforms necessary to promote responsible and sustainable development that ensures socio-economic resilience and environmental protection, for communities and environment co-located with petroleum exploration and production activities.

CHAPTER TWO

2.0 NATURAL RESOURCE DEVELOPMENT AND THE RESOURCE CURSE PHENOMENON.

This chapter will examine the theoretical background of this thesis. What the hypothesis of 'Resource Curse Phenomenon' means, how it comes about, and what the implications are as they relate to petroleum development in Uganda. Secondly, this chapter will discuss the possible links between the petroleum industry and the three - economic, social, and environmental - dimensions of SDGs. That is, by identifying how the petroleum industry might negatively impact Uganda's ability to achievement of the SDGs and lead to the 'Resource Curse Phenomenon.' Despite the above, the threat of experiencing the 'Resource Curse Phenomenon,' there exists a real motivation for developing the petroleum industry. Therefore, this chapter will also identify any potential positive impacts of the industry and how the industry players might most constructively support the Government to achieve the SDGs.

2.1 Definition of the Term: 'Natural Resource'

The term "natural resource" refers to naturally occurring materials useful to man or could be helpful under conceivable technological, economic, or social circumstances.[206] Natural resources are divided typically into non-renewables and renewables.[207] Non-renewables include land, minerals and fossil fuels

[206] 19 Encyclopedia Americana (1982), p. 792

[207] Macartan Humphreys, Jeffrey D Sachs, and Joseph E Stiglitz (Eds.) *Escaping the Resource Curse* (CUP, 2007) 11-13. R.J. Johnson (ed.) The Dictionary of Human Geography (Blackwell, London, 1986) 2nd ed, 408–9; Macartan Humphreys, Jeffrey D Sachs, and Joseph E Stiglitz

that have taken millions of years to form and are consumed by use. However, their exploitable reserves' size depends very much on their price and on the knowledge, technology, and investment available to exploit them. [208] Renewable natural resources are naturally regenerating materials that provide new supply units within at least one human generation. For example, biomass energy (such as ethanol), hydropower, geothermal power, wind energy, and solar energy.[209] However, their renewability and regeneration would often depend on actual use levels and human decisions relating to investment and management.[210]

Within International Law, there is no generally accepted definition of the term 'natural resources,' such that different treaties provide varying definitions. The Convention on the Continental Shelf, [211] and the Law of the Sea Convention[212] both provide that natural resources "*...consist of the mineral and other non-living resources of the seabed and the subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or are unable to move except in constant physical contact with the seabed or the subsoil.*" While the African Convention on the Conservation of Nature and Natural Resources [213] provides that the term

(Eds.) *Escaping the Resource Curse* (CUP, 2007) 11-13. Jeffrey D Sachs, Andrew M Warner, Natural Resource Abundance and Economic Growth' *NBER Working Paper* No. 5398, 1995.

[208] Ibid

[209] Ibid

[210] Ibid

[211] Convention on the Continental Shelf 1958, Article 2

[212] Law of the Sea Convention (1982), Article 77; Convention on the Continental Shelf, (1958) Article 2(4).

[213] African Convention on the Conservation of Nature and Natural Resources, 1968, Article III.1

'natural resources' means '*renewable resources, that is soil, water, flora and fauna*'. The Biodiversity Convention employs the term 'biological resources' as meaning' *genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity*'.[214]

Over the years, the UNGA has held several conferences attempting to design a blueprint when considering the availability of natural resources, their regenerative capacity, and the technical and economic processes employed to exploit them to achieve sustainable development.[215] Some of these conferences include[216] the 1983 World Commission on Environment and Development (WCED), culminating in the report Our Common Future in 1987, also known as the Brundtland Report.[217] More recently, the 2030 Sustainable Development Goals (SDGs) adopted in 2015.[218]

The Brundtland Report defined "Sustainable Development' as "*development that meets the needs of the present without compromising the ability of future generations to meet their own needs*."[219] It is essential for a resource-rich state to carefully consider the implications of natural resources development on their

[214] Convention on Biological Diversity, (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79 ratified in Uganda 8 September 1993, Article 2
[215] Rio+20 UN Conference on Sustainable Development, "The History of Sustainable Development in the United Nations". 22 June 2012.
[216] United Nations Conference on the Human Environment, 1972; International Union for the Conservation of Natural Resources (IUCN), 1980; UN Conference on Environment and Development (UNCED), 1992; World Summit on Sustainable Development (WSSD), 2002; United Nations Conference on Sustainable Development (UNCSD), 2012.
[217] World Commission on Environment and Development, *Our Common Future* (OUP, 1987) 43
[218] Agenda 2030 (n 148); Refer to chapter five for further discussion on the international law that developed from some of these conferences.
[219] Brundtland Report, para 27

pursuit of sustainable development, to circumvent the risk of experiencing the 'Resource Curse Phenomenon'.[220]

2.2 The Resource Curse Phenomenon

The term 'Resource Curse Phenomenon' was first coined by British economist Richard Auty in 1993.[221] As a theory, it describes how countries rich in mineral resources (such as fossil fuels and certain minerals) and base their economic development on exploring and developing those natural resources cannot use that wealth to boost their economies for varying reasons[222] discussed in the following sections. As well as how, counter-intuitively, these countries experienced lower economic growth, increased levels of corruption, more violence, and more authoritarian governments than countries without an abundance of natural resources.[223] This phenomenon is what has also come to be known as the paradox of plenty.[224]

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[220] Agenda 2030 (n 148); Refer to chapter one, section 1.4.2 for discussion on petroleum industry and sustainable development

[221] Richard M Auty, *Sustaining Development in Mineral Economies: The Resource Curse Thesis* (Routledge, 1993); Richard M Auty, 'Natural Resources, Capital Accumulation and the Resource Curse' (2007) 61(4) Ecological Economics 627-634.

[222] Jeffrey D Sachs, Andrew M Warner, Natural Resource Abundance and Economic Growth' *NBER Working Paper* No. 5398, 1995.; Karl, T. L. The Paradox of Plenty: Oil Booms and Petro-States (Berkeley, CA: University of California Press 1997); Davis, Graham A. and John E. Tilton, The resource curse'. Natural Resources Forum 2005. Vol. 29, pp. 233-242.

[223] Ibid

[224] Paul Stevens, 'Resource impact: Curse or blessing? A literature survey' (2003) 9(1) Journal of Energy Literature 3–42; Paul Stevens, Glada Lahn and Jaakko Kooroshy, 'The Resource Curse Revisited' (Chatham House 2015); Evelyn Dietsche, 'Good Governance" of the Extractive Resources Sector: A Critical Analysis' (DPhil thesis, University of Dundee, 2014); Paul Stevens, J Considine, 'The Economic Case for the Staged Development of Extractive Industry Projects in the Presence of Potential "Resource Curse"', Energy Politics, Fall (2013); Anthony J Venables, 'Using Natural Resources for Development: Why Has It Proven So Difficult?' (2016) 30 (1) Journal of Economic Perspectives 161–184; Ross L Michael 'The Political Economy of the Resource Curse' (1999) 51 (2) World Politics January 297–322; Ross L Michael, 'How Mineral-Rich States Can Reduce Inequality: Escaping the Resource Curse'

Concerning petroleum development, the OPEC's Co-Founder stated: "*I call petroleum the devil's excrement. It brings trouble, waste, corruption, consumption, our public services falling apart, and debt, a debt we shall have for years.*"[225] This statement continues to be accurate, particularly for developing resource-rich countries that unfortunately tend to experience the worse of socio-economic and environmental consequences. For example, Nigeria's oil exploration has resulted in bouts of civil conflict and environmental damage.[226] In Sierra Leone and Angola, the exploration of diamonds either exacerbated or led to massive deaths. [227] In Ecuador, petroleum exploration resulted in devastating environmental damage and led to the loss of lives.[228] In Indonesia, the oil booms in 1974 and 1979's significantly increased export revenues[229]. In these examples, the presence of natural resources should have been a blessing,

(2007); Paul Stevens, Jaakko Kooroshy, Glada Lahn, B Lee, 'Conflict and Coexistence in the Extractive Industries' (London: Chatham House 2013).

[225] The Economist, "The devil's excrement: Is oil wealth a blessing or a curse?" May 22, 2003 https://www.economist.com/finance-and-economics/2003/05/22/the-devils-excrement

[226] F Emiri and G Deinduomo, *Law and Petroleum Industry in Nigeria Current Challenges* (Malthouse Press, Nigeria 2009); P Maass, *Crude World: The Violent Twilight of Oil.* (Penguin Group London 2009); G I Malumfashi, 'Phase-Out of Gas Flaring in Nigeria by 2008: The Prospects of a Multi-Win Project' (2008) Review of The Regulatory, Environmental and Socio-Economic Issues; Cyril Obi, Siri Aas Rustad, *Oil and Insurgency in Niger Delta: Managing the Complex Politics of Petro-violence* (Zed Books, 2011); T Mkandawire, C Soludo, 'Our Continent, Our Future' Wayback Machine (2007) 04-16

[227] Frynas Jedrzej George, and Geoffrey Wood, 'Oil and War in Angola' in *Review of African Political Economy* (*JSTOR* 2001) vol. 28, no. 90, 587–606.

[228] Background on Texaco Petroleum Company's Former Operations in Ecuador http://www.texaco.com/sitelets/ecuador/en/history/background.aspx> accessed 3 May 2019; Sanchez, Mariana, 'Amazon Tribe Sues Texaco for $6bn' *Al Jazeera English* (27th March 2007) https://www.aljazeera.com/news/americas/2007/03/200852517253550087 5.html accessed 9 January 2017.

[229] Peter McCawley, 'Indonesia's New Balance of Payments Problem: A Surplus to get rid of', *Ekonomi dan Keuangan Indonesia*, 28(1), March 1980, pp. 39–58; Peter McCawley, 'Indonesia's New Balance of Payments Problem: A Surplus to get rid of The Dutch Disease" *The Economist* (November 26, 1977) 82–83

unfortunately, became an incentive for civil conflict and increased corruption and, in the wrong hands, a source of ruin.

In more developed economies like the Netherlands, the term 'resource curse' phenomenon, or 'paradox of plenty' presents a subset of the curse referred to as the "Dutch disease".[230] A term coined in 1977 by the Economist, referring to the difficulties experienced by the Dutch economy (and therefore, society) following North Sea gas development in the 1970s.[231] The development of Dutch's natural gas resulted in increased wages, appreciation of the real exchange rate, leading to increased domestic incomes inflation, and demand for goods. As a result, the relative cost of non-natural resource-related products (like the manufacturing sector or agriculture) increased, and their exports become expensive compared to world market prices.[232]

However, natural resources development does not automatically have to lead to the "Resource Curse". Norway is one example of a hydrocarbon producing country that has achieved considerable success in averting the 'Resource Curse Phenomenon's typical characteristics. Norway used its North Sea oil to transform itself from an economy based on fish, trees and boats into a diverse

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[230] The Economist, 'The curse of oil: The paradox of plenty' *The Economist* (Special Report 20th December 2005) https://www.economist.com/node/5323394 accessed on 26th June 2017; The Economist, "The Dutch Disease" *The Economist* (November 26, 1977) 82–83; Warner Max Corden, *Booming sector and Dutch disease economics: survey and consolidation* (36 OUP 1984) 359-380; Warner Max Corden, Peter Neary, 'Booming Sector and De-Industrialisation in a Small Open Economy' (1982) 92 The Economic Journal, 825-848.

[231] The Economist, "The Dutch Disease" *The Economist* (November 26, 1977) 82–83

[232] Jeffrey A. Frankel, 'The Natural Resource Curse: A Survey of Diagnoses and Some Prescriptions' (2012) HKS Faculty Research Working Paper Series RWP12-014; Michael Beine, Charles S Bos, Serge Coulombe, 'Does the Canadian economy suffer from Dutch Disease?' (2012) 34 Resource and Energy Economy, 470

and equitable place by careful macroeconomic management, strong institutions and a commitment to fairly distributing the wealth.[233] Norway like the Netherlands is a developed country, however, in Norway's case, to ensure security and mitigate against the "Dutch disease" the Government deposited its petroleum revenues into the Government Pension Fund Global.[234] As an investment strategy, the Government used the fund to invest in international equity and fixed-income markets and real estate, therefore circumventing the effects of oil price fluctuations and a safety net for dealing with its current and future citizens' socio-economic concerns.[235] However, it is also important to note that even without experiencing the typical 'Resource Curse' patterns, Norway experienced residual environmental impacts from its hydrocarbon resources' development, leading to a worsening climate change concerns.[236] Consequently, the Norwegian fund no longer invests in fossil fuels.[237]

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[233] Steinar Holden, 'Avoiding the resource curse the case Norway' (2013) 63 Energy Policy 870-876; Larsen E Røed, 'Are rich countries immune to the resource curse? Evidence from Norway's management of its oil riches' (2005) 30 (2) Resources Policy 75-86

[234] Ibid; Norges Bank Investment Management, 'Government Pension Fund Global: Quarterly report' (2019) <https://www.nbim.no/contentassets/d3a372eb9d234e57a07caaf0f35cef67/spu_1q_19_web.pdf> accessed 13 March 2018

[235] Ibid

[236] Ibid

[237] Jillian Ambrose, 'World's biggest sovereign wealth fund to ditch fossil fuels' *The Guardian* (Wed 12 Jun 2019) < https://www.theguardian.com/business/2019/jun/12/worlds-biggest-sovereign-wealth-fund-to-ditch-fossil-fuels> accessed on 17 September 2019

Rob Davies, 'Norway's $1tn wealth fund to divest from oil and gas exploration' *The Guardian* (08th March 2019) < https://www.theguardian.com/world/2019/mar/08/norways-1tn-wealth-fund-to-divest-from-oil-and-gas-exploration> accessed on 17 September 2019

2.2.1 Resource Curse Phenomenon and National Governance

In section 2.2 above, natural resource development gave rise to two different developmental outcomes. Compared to Nigeria and Ecuador still struggling to support their economies, Norway achieved more significant economic growth. One of the prominent differences in these States is the Government's level of democracy or political freedom. Therefore, it seems more appropriate to exploit further the 'Resource Curse phenomenon' as a "Governance Curse", particularly for developing resource-rich states.[238]

Governance consists of the traditions and institutions by which Government's exercise authority in a country.[239] Governance includes the process by which the public selects governments, monitors and replaces them; the Government's capacity to effectively formulate and implement sound policies, and the respect of citizens and the State for the institutions that govern economic and social interactions. [240] According to the World Bank, good governance indicators include voice and accountability, political stability and absence of

[238] Jesse Salah Ovadia, 'Natural Resources and African Economies: Asset or Liability?' *The Palgrave Handbook of African Political Economy* (2020) 667-677; Zainab Ladan Mai-Bornu, Introduction. Political Violence and Oil in Africa, (2020) 1-27; Michael I Ross, 'The oil curse: How petroleum wealth shapes the Development of nations' (PUP, 2012); Victor Polterovich, Vladimir Popov and Alexander Tonis, 'Instability of Democracy as Resource Curse' (New Economic School Working Paper, February 2009) <https://ssrn.com/abstract=1755007 > accessed on 26th June 2017; Robert J Barro 'Democracy and growth' (1996) 1 Kluwer Academic Publishers 3–27; Richard M Auty, *Sustaining Development in Mineral Economies: The Resource Curse Thesis* (Routledge, 1993); Richard M Auty, 'Natural Resources, Capital Accumulation and the Resource Curse' (2007) 61(4) Ecological Economics 627-634;

[239] World Bank report, Worldwide Governance Indicators 2018 https://info.worldbank.org/governance/wgi/Home/downLoadFile?fileName=wgidataset.xlsx; Daniel Kaufmann, Aart Kraay, and Pablo Zoido, *Governance Matters* (World Bank Policy Research Working Paper No. 2196 August 1999).

[240] Ibid

violence/terrorism, government effectiveness, regulatory quality, the Rule of Law, and corruption control.[241]

A special report by the Economist on the "resource curse" phenomenon described the level of democracy of a government as either setting off or exacerbating natural 'Resource Curse' and preventing economic development.[242] The report used the term "flawed democracy" to describe a situation where *even though public elections are held; voting is not done freely and independently*".[243] This situation creates fertile grounds for increased cases of corruption tendencies and bribery practices,[244] civil conflicts, reduction in the rule of Law, use of restrictive regulations, lack of transparency, reduced standards of human development, and weak monitoring institutions.[245] Uganda is considered a "flawed democracy" by the World Bank, which ranks Uganda as having one of the world's worst public sectors.[246]

The 'Resource Curse' issue has had a significant impact on many oil-producing countries' political economy. It has been decisive in the erosion of state legitimacy and accountability, which has had significant consequences

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[241] Ibid

[242] The Economist, '*The curse of oil: The paradox of plenty*' (Special Report 20th December 2005) https://www.economist.com/node/5323394 accessed on 26th June 2017; Economist Intelligence Unit 2012 and 2016 http://www.eiu.com/Handlers/WhitepaperHandler.ashx?fi=Democracy-Index-2016.pdf&mode=wp&campaignid=DemocracyIndex2016 accessed on 26th June 2017

[243] Victor Polterovich, Vladimir Popov and Alexander Tonis, 'Instability of Democracy as Resource Curse' (New Economic School Working Paper, February 2009) <https://ssrn.com/abstract=1755007 > accessed on 26th June 2017

[244] Ibid Polterovich

[245] Ibid Polterovich

[246] World Bank 2018 (n 239)

for those countries' peace and prosperity.[247] The activities of foreign oil companies have also affected the shape of civil conflicts: where intense competition for oil contracts has influenced the companies to seek out favour from host governments through dubious donations, weapon deals, and other forms of assistance.[248] Furthermore, where there is an added element of increased revenue from petroleum development, it tends to create a financial pot (oil money) worth fighting for and fund civil wars.

For example, in Angola, such revenues were used to fund government actors in civil wars in 1992.[249]In Nigeria, the Niger Delta has gone through decades-long violent conflict, and the local communities are dealing with the environmental and social impacts of oil companies' operations to date.[250] In some oil-producing countries, even if there was no active conflict, oil resources have tended to generate much higher military spending levels as was the case in Libya (before the 2014 civil war which continues to date).[251] Since petroleum exploration work began in Uganda: there has been an influx of military army, police, and other Ugandan government security personnel in the Albertine Graben region, which has intimidated and concerned the local communities.[252]

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[247] Collier, P. and Hoeffler, A. 'Greed and Grievance in Civil War', (Oxford Economic Papers, 2004), 56: 563–95; M I Ross, *The Oil Curse: How Petroleum Wealth Shapes the Development of Nations* (Reprint edition, Princeton University Press 2013)

[248] Frynas, Jedrzej George, and Geoffrey Wood, 'Oil and War in Angola' in *Review of African Political Economy* 28 (90) (*JSTOR* 2001) 587–606.

[249] Ibid; Quint Hoekstra, 'Conflict diamonds and the Angolan Civil War (1992–2002)' *Third World Quarterly* 40:7 (2019) 1322-1339.

[250] Cyril Obi, Siri Aas Rustad, *Oil and Insurgency in Niger Delta: Managing the Complex Politics of Petro-violence* (Zed Books, 2011)

[251] Ibid Collier

[252] Haggai Matsiko, 'Guns in the oil region' *The Independent* http://www.independent.co.ug/coverstory/5968-guns-in-oil-region accessed on July 5th,

Reacting to reports that oil would be a curse for Uganda, the President, Yoweri Museveni, said,

> "*There is a lot of nonsense that oil will be a curse. No way. The oil of Uganda cannot be a curse. Oil becomes a curse when you have got useless leaders, and I can assure you that we do not approach that description by even a thousandth of a mile…. The oil is a blessing for Uganda, and money from it will be used for development.*"[253]

The President intended this statement to increase the public's confidence that the Government is committed to averting Uganda's likelihood of experiencing the typical 'Resource Curse' characteristics discussed above. However, the President has also made some statements that have caused concern, such as "*That is my oil…… won't allow anybody to play around with it, …You hear people say, 'Museveni should go,' but go and leave oil money.*[254] True to his word, the President was re-elected for a sixth term on the 17th of January 2021, allowing him to lead the country for a total of 40 years.[255]

2.2.2 Resource Curse Phenomenon and Foreign Investment and Aid

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2017; Luke Patey "Oil in Uganda: Hard Bargaining and Complex Politics in East Africa" Oxford Institute for Energy Studies 2015 https://www.oxfordenergy.org/wpcms/wp-content/uploads/2015/10/WPM-601.pdf accessed on 23rd November 2016

[253] Uganda announces oil discovery, available at http://www.iol.co.za/news/africa/uganda-announces-oil-discovery-1.296822?ot=inmsa.ArticlePrintPageLayout.ot accessed on 11 April 2017.

[254] Alon Mwesigwa, 'Uganda determined not to let expected oil cash trickle away' *The Guardian* (Kampala, Wed 13 Jan 2016) <http://www.theguardian.com/global-development/2016/jan/13/uganda-oil-production-yoweri-museveni-agriculture> accessed 23rd November 2017

[255] Africa News, Uganda's President Yoweri Museveni re-elected for sixth term,' *Africanews* (16th January 2021) <*https://www.africanews.com/2021/01/16/uganda-s-president-yoweri-museveni-re-elected-for-sixth-term//> accessed on 18th January 2021*

While the "Resource Curse" phenomenon most often refers to natural resource exploitation, it can also refer to "*any development that results in a large inflow of foreign currency, including a sharp surge in natural resource prices, foreign assistance, and foreign direct investment*".[256] It becomes a potential problem where the Government lacks information, appropriate legal and fiscal frameworks, technical and human capacity, making it ill-prepared to manage the sudden increase in revenue, and vulnerable to the 'Resource Curse' phenomenon.

Unfortunately, Uganda could experience all the forms of the 'Resource Curse' phenomenon mentioned above, not just from the exploitation of petroleum resources, but also from high dependency on foreign aid, and a high influx of Chinese foreign direct investment.[257] While this international financing is undoubtedly a valuable and essential factor in developing under-developed countries, it is not ideal. The ideal would be to attain economic independence by exploiting and disposing of its natural resources to obtain revenue to support economic development.

2.2.3 Resource Curse Phenomenon and The Degradation of Environment and Human Rights

[256] Christine Ebrahim-zadeh, 'Back to Basics – Dutch Disease: Too much wealth managed unwisely' *Finance and Development, A quarterly magazine of the International Monetary Fund* Volume 40, Number 1 (March 2003,)
<https://www.imf.org/external/pubs/ft/fandd/2003/03/ebra.htm> Accessed 16th June 2017

[257] Taddeo Bwambale, 'China tops investments in Uganda in 2018, *The New Vision Publication* (24th September 2019) < https://www.newvision.co.ug/news/1507462/china-tops-investments-uganda-2018> accessed 19 August 2018

This thesis considers the impacts of the petroleum exploration and production projects on the local environment and communities' livelihoods as another symptom of the 'Resource curse Phenomenon.' The literature on the 'Resource Curse Phenomenon' often focuses on the economic impacts of the extractive industry, neglecting the associated environmental damage and human rights abuses; that create the conditions leading to the resource being considered a curse.[258] In some of the examples mentioned above, Nigeria, Ecuador, there are well documented environmental and social impacts of extractive industries.[259]

The development of the petroleum industry comes with new sets of challenges, particularly, for a developing country like Uganda. The challenges range from social, economic, political, and environmental aspects. The following section will highlight these challenges and provides examples of the negative impacts that have already happened in Uganda. If not managed well, they will have severe consequences for local communities, and contribute to Uganda's likelihood of experiencing the 'Resource Curse Phenomenon'.[260]

2.2.3.1 Social Impact

[258] Ibid Stevens (n 224); C S Norman, 'Rule of Law and the Resource Curse' (2008) 43 (2) Environmental and Resource Economics 183–207; Tom Ogwang, Frank Vanclay, Arjan van den Assem, 'Impacts of the oil boom on the lives of people living in the Albertine Graben region of Uganda, (2018) 5 (1) The Extractive Industries and Society, 98-103.
[259] Rachel Davis, Daniel M Franks, 'The costs of conflict with local community in the extractive industry' (Santiago, Chile 19-21 October 2011) First International Seminar on Social Responsibility in Mining 19-21
[260] Tom Ogwang, Frank Vanclay, Arjan van den Assem, 'Rent-Seeking Practices, Local Resource Curse, and Social Conflict in Uganda's Emerging Oil Economy' (2019) 8 Land 53.

2.2.3.1.1 Loss of Land and Low Compensation

The development of the petroleum industry necessitated the displacement and relocation of several communities from several zoned areas cutting across 13 villages of multicultural communities.[261] The Government relocated the communities to construct planned infrastructure required for the exploration, development, production, refining and transportation of the petroleum resources. For example, an international airport, road networks, well pads, a central processing facility, refineries, crude oil and products storage facilities, transmission hub, Pipelines, logistics warehousing, offices, Petrochemical industries, and associated facilities.[262]

Such projects are subject to national[263] and international laws[264] that require that resettlement of Project Affected Persons (PAPs) that is considered involuntary should be avoided,[265] and if it cannot be avoided due to public interest, the PAPs should be fully and fairly compensated promptly before

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[261] National Environment Management Authority (NEMA), 'Environmental Sensitivity Atlas for the Albertine Graben' (2nd edn 2010); NOGP 2008, Objective 6(h)(iii), objective 7.2.6.1(b)(xiv); T Ogwang, F Vanclay, A van den Assem, 'Impacts of the oil boom on the lives of people living in the Albertine Graben region of Uganda.'(2018) 5, 98–103; P B Kinyera, 'Land, oil and expressions of citizenship in Uganda's Albertine Graben' (2019) 6, 110–119; D R Olanya, 'Will Uganda succumb to the resource curse?' (2015) 2, 46–55

[262] NOGP 2008; Tilenga project; the Kingfisher project; the East African Crude
Oil Pipeline (EACOP); the Kabaale Industrial Park; and the Hoima–Kampala Petroleum Products
Pipeline.

[263] Constitution of the Republic of Uganda, 1996 Articles 26, 237(2) (a); The Land Act, Cap. 227 of 1998 Section 73; Land Acquisition Act, Chapter 226 of the Laws of Uganda, 1965; Ministry of Lands, Housing and Urban Development, The Uganda National Land Policy, 2013, Paragraph 3.8

[264] F Vanclay, 'Project-induced displacement and resettlement: From impoverishment risks to an opportunity
for development? Impact Assess.' (2017) 35, 3–21

[265] World Bank, 'Involuntary Resettlement Sourcebook, (2004)

taking possession of or acquiring their property.[266] They should also have a fair opportunity to be involved in the process of resettlement.

Despite having the Constitutionally guaranteed rights to own property,[267] number of PAPs made complaints to the Uganda Human Rights Commission (UHRC) that they lost their land and crops to make way for the petroleum industry, and that Government had delayed payment of the compensations, even though compensation rates had been determined by the Government Valuer for their land as early as 2011 and 2012.[268] In some cases, the Government paid the PAPs in 2015,[269] without considering inflation issues and the Ugandan shilling depreciation. They alleged that even when the Government Valuer completed the valuation process, the compensation agreements' signing was delayed and was silent on the payment date. Also, that the valuation process did not consider the value of the crops for families that depend on the sale of tree products like mangoes, avocadoes, and that the seismic surveys had destroyed those crops.[270]

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[266] Constitution of the Republic of Uganda, 1996 Article 26; The Land Act, Cap. 227 of 1998; Land (Amendment) Act, (2010) Uganda Gazette Extraordinary No. 10 Volume Clll;

[267] Ibid

[268] Uganda Human Rights Commission Special Report, *Oil in Uganda: Emerging Human Rights Issues, Special Focus on Selected Districts in the Albertine Graben* (Uganda Human Rights Commission Special Report, 2013); NTV Uganda, 'Lands Minister Betty Amongi, Buliisa Residents Clash Over Oil Compensation Rates' https://www.youtube.com/watch?v=xOQNrz2i6b4> accessed on 19 June 2019.

[269] Ibid

[270] Uganda Human Rights Commission Special Report, *Oil in Uganda: Emerging Human Rights Issues, Special Focus on Selected Districts in the Albertine Graben* (Uganda Human Rights Commission Special Report, 2013); Land compensation rates have been fixed by the government land valuer at 3.5 million Uganda shillings per acre (equivalent to 946 USD). However, some community members are demanding 21 million shillings per acre (equivalent to 5675 USD).

Owing to the PAPs complains on the low compensation rates, the Government proposed a Constitution (Amendment) Bill, 2017[271] to amend Article 26 of the Constitution which required that compensation be paid prior to Government taking possession of the property. They instead proposed that after the government valuer [272] determined how much the land was worth, the government would compulsorily take over the land and deposit any disputed compensation with the court. The PAPs can then individually (not through the Attorney General as provided by the Land Acquisition of 1965) apply to the Court to determine the fair amount owed to the property owner or person having an interest in or right over the property. To date, Parliament has not yet enacted this the Bill into Law, due to further objections that the proposed amendment does not address the timeline in which courts might require the Government to pay such additional sum if awarded by the court.

Government justified the proposal as a means to stop the delays on government infrastructure implementation and investment projects due to the landowners objecting to the compensation amount.[273] However, Government needs to ensure that the land needed for petroleum infrastructure is acquired fairly and transparently, and with PAPs accorded a fair opportunity to be

[271] The Constitution (Amendment) Bill (Uganda Gazette No. 33, Volume CX, 2017)
[272] Section 73, The Land Act, Cap. 227 of 1998
[273] Phillip Karugaba, Expediting compulsory land acquisition: The Constitution (Amendment) Bill, 2017 https://www.ensafrica.com/news/Expediting-compulsory-land-acquisition-The-Constitution-Amendment-Bill-2017?Id=2699&STitle=ENSafrica%20ENSight accessed on 18th July 2017

involved, or risk protests, suits, reputational damage, and civil conflict, which are all symptoms synonymous with the 'Resource Curse Phenomenon'.[274]

2.2.3.1.2 Impacts on Cultural and Community Practices

In addition to the above impact of land loss and resettlement of PAPs, another social impact that emerged is the associated impacts on cultural and community practices. Ugandan families bury their deceased relatives on their ancestral lands in their village homes instead of publicly designated cemeteries. That means their village land hold ancestral value, unlike the areas to which they are being relocated and resettled. The financial burden of relocating their families' remains falls on the family, with as little as $50 being provided by the government for the process of exhuming, transporting and reburying their family graves to the new land.[275] This amount they allege is insufficient to cater to that financial burden.[276] Such social-cultural issues are challenging to compensate; however, if the government does not compensate land fairly and adequately to cater to this process, it will likely result in

[274] F Vanclay, P Hanna, 'Conceptualizing Company Response to Community Protest: Principles to Achieve a Social License to Operate' (2019) 8(6) Land 101; P Collier, A Hoeffler, 'Resource rents, governance, and conflict.' (2005) 49 Journal of Conflict Resolution 625–633; P Hanna, et al, 'Conceptualizing social protest and the significance of protest action to large projects.' (2016) 3 The Extractive Industries and Society 217–239

[275] F Musisi, 'What lies ahead for Uganda's gas' *Daily Monitor*, (4th June 2013) http://www.monitor.co.ug/ Business/Prosper/What-lies-ahead-for-Uganda-s-gas/-/688616/1871248/-/op1uy6/-/index.html accessed June 2014; Uganda Human Rights Commission Special Report, *Oil in Uganda: Emerging Human Rights Issues, Special Focus on Selected Districts in the Albertine Graben* (Uganda Human Rights Commission Special Report, 2013); Refer to chapter three for further discussion on the legal and regulatory aspects of community resettlement.

[276] Ibid

animosity between the community members and MOCs and lead to civil conflict a clear symptom of the 'Resource Curse Phenomenon'.

Another socio-economic impacts of developing the Petroleum Industry in numerous local communities is the region's haste economic development.[277] The increasing population and economic activity will continue to change the community's cultural values. Many youths will disregard the cultural values and skills like handicraft weaving, communal grazing, respect for traditional attire, storytelling, traditional songs, and instrument playing.[278] These values will lose cultural meaning, which will be unfortunate because they encourage a sense of identity and responsibility, helping individuals feel part of the community.

Uganda's MEMD estimates that 3.5 billion barrels of petroleum discovered in Uganda lie Hoima District, Bunyoro Kingdom.[279] The Bunyoro Kingdom has expressed concern that community relocation could potentially affect or disrupt the culture and traditional practices, and damage areas of their historical, archaeological, and or religious significance, known locally as *Ihangiro*. [280] Asuman Irumba, a member of the Custodians' Coalition in

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[277] E Smyth, F Vanclay, 'The social framework for projects: A conceptual but practical model to assist in assessing, planning and managing the social impacts of projects' (2017) 35 Impact Assessment and Project Appraisal 65–80

[278] Uganda Human Rights Commission Special Report, *Oil in Uganda: Emerging Human Rights Issues, Special Focus on Selected Districts in the Albertine Graben* (Uganda Human Rights Commission Special Report, 2013)

[279] Ministry of Energy and Mineral Development, *Progress of Implementation of the National Oil and Gas Policy for Uganda* (Ministry of Energy and Mineral Development, 2019) <https://www.petroleum.go.ug/media/attachments/2020/03/12/oilgaspolicy.pdf> accessed 28th June 2019

[280]National Association of Professional Environmentalists (NAPE), *Mining and its impacts on Water, Food Sovereignty and Sacred Natural Sites and Territories*: *Advocating for Recognition and*

Bunyoro, in the Albertine region, comments" Sacred *Natural Sites existed before our great grandfathers, but oil activities could destroy them despite the spiritual significance of our sites. In Kaiso, we have many Sacred Natural Sites. We shall not be intimidated, and we shall not give up performing our rituals in our sites. We are who we are because of our Sacred Natural Sites."*[281]

There is already evidence of destruction of some sites, such as the shrine at Nsonga Ijumika and Ekibaale kya Wamala in the Kaiso Tonya area. A Munyoro spiritual leader Sadiq Ngasirwaki of the Bakobya clan, complaining about the destruction of a sacred cultural site during the drilling of Ngasa 2 Oil well by Tullow, stated that[282]

> "*The coming of Tullow people deeply saddened me, I oversee all the spiritual things here, but they did not consult me. When they began drilling their oil, they did not even endeavour to reach me, yet I live very close...We got to a point of writing them (Tullow officials) a letter referring to culture issues, they disregarded us, we wrote about three times. Tullow undermined us, they always never replied…. They even destroyed things belonging to us at the site, the small house they found. They began sleeping and drinking in the cultural site…. they dug holes, destroyed our things and there is nothing to do. Their*

Protection of Water, Food Sovereignty and Sacred Natural Sites and Territories in Uganda`s Oil Region' (2014) 22 <https://sacrednaturalsites.org/wp-content/uploads/2014/09/napegaiaminingreport.pdf> accessed on 15th May 2017; Oil in Uganda, 'Cultural institutions agitate for fair share in extractives sector' (Wednesday, 2nd August 2017) <https://oilinuganda.org/features/companies/cultural-institutions-agitate-for-fair-share-in-extractives-sector/> accessed 13 march 2019;

[281] Ibid page 24

[282] As extracted from the film MAKUTA (Translated from Lunyoro to English), viewing from 2 minutes 49 seconds to 23 minutes 3 seconds (December 2011).

destruction is the reason that has brought suffering here in Kaiso, fish is scarce, people are dying day and night, people drowning frequently… artifacts destroyed, they carried some away…. constructed a road to their well, yet that is where we gradually conducted rituals …. We had many small pots, baskets with money that no one would ever pick from. We do not know where the people of Tullow took these things. I have strong conviction from our culture, as it was from the beginning, as our ancestors believed… We also want and appreciate development stemming from oil, and we are not sabotaging government programmes, but they (Tullow) have disregarded us ... if they have business to conduct on our land, they should first go through us."

Mining activities would significantly affect or undermine these Sites' values and functions and host ecosystems or habitats. [283] Communities are increasingly concerned for Sacred Natural Sites' survival due to the threat of destruction, displacement or limited access, infrastructure development, and associated security measures and use emanating from petroleum exploration and development activities.[284] Since the Government legally owns Uganda's minerals and metals, it could undermine the ability of communities to exercise

[283] National Association of Professional Environmentalists (NAPE), *Mining and its impacts on Water, Food Sovereignty and Sacred Natural Sites and Territories*: *Advocating for Recognition and Protection of Water, Food Sovereignty and Sacred Natural Sites and Territories in Uganda`s Oil Region*' (2014) 24 <https://sacrednaturalsites.org/wp-content/uploads/2014/09/napegaiaminingreport.pdf> accessed on 15th May 2017; Oil in Uganda, 'Cultural institutions agitate for fair share in extractives sector' (Wednesday, 2nd August 2017) <https://oilinuganda.org/features/companies/cultural-institutions-agitate-for-fair-share-in-extractives-sector/> accessed 13 March 2019

[284] Ibid page 24

their rights and responsibilities to self-governance/sovereignty, including of their food, Sacred Natural Sites and Territories and water.

As part of Tullow's corporate social responsibility, in 2011, they pledged to the Bunyoro Kingdom a sum of USD10 million to facilitate construction of a museum for Conservation and Preservation of Cultural and Historical Heritage.[285] The pledge to enhance cultural heritage protection; however, this is yet to be constructed.[286]

2.2.3.1.3 Mass Migration of Population

Uganda's population is currently 39 million,[287] with the Uganda Bureau of Statistics projecting growth of one million people per year,[288] forecasted to increase up to 63 million people by 2030.[289] The Petroleum industry can alter local ecosystems with people migrating to the districts where the petroleum is being explored and developed, for work and other opportunities. [290] The

[285] Alex Osiba, Bunyoro-Kitara museum project stalls as Tullow fails to meet offer The Street journal (15th July 2020) <https://thestreetjournal.ug/news/bunyoro-kitara-museum-project-stalls-as-tullow-fails-to-meet-offer/> accessed July 2020; Oil in Uganda, 'Cultural institutions agitate for fair share in extractives sector' (Wednesday, 2nd August 2017) <https://oilinuganda.org/features/companies/cultural-institutions-agitate-for-fair-share-in-extractives-sector/> accessed 13 March 2019

[286] Alex Osiba, Bunyoro-Kitara museum project stalls as Tullow fails to meet offer The Street journal (15th July 2020) <https://thestreetjournal.ug/news/bunyoro-kitara-museum-project-stalls-as-tullow-fails-to-meet-offer/> accessed July 2020

[287] Ministry of Finance, Planning and Economic Development, *Budget Speech Financial Year 2019/20*, (13th June 2019) 2

[288] Uganda Bureau of Statistics, *World Population Day Celebrations: Leveraging Uganda's Population Dynamics for A Resilient Future Amidst Covid-19* (Saturday, July 11, 2020) 5

[289] R B Ggoobi, Performance of Uganda's Economy: Progress, Opportunities, Challenges and way forward. (2016) 1–26; R B Ggoobi, Analysis of Existing Industrial Policies and State of Implementation in Uganda. (Friedrich-Ebert-Stiftung 2017).; STATE OF UGANDA POPULATION REPORT 2017

[290] Organisation for Economic Cooperation and Development, *The Economic Impact of Local Content Requirement*,' Trade Policy Note February 2016; African Development Bank, *African Economic Outlook*. (2017); The Petroleum (Exploration and Production) Act 2013, Section 124-

migration can create an increase in the population growth in areas with insufficient health, water and sanitation infrastructure causing a strain on the meagre local health facilities.[291] This pressure on the already struggling social services creates negative social impacts, increases infectious diseases, poor sanitation, and overwhelming pressure on health care services.[292]

The three social impacts discussed above are associated with the significance that land holds for the communities in the Albertine Graben, but also throughout Africa. Land is often considered *the place of birth; the place where the ancestors are laid to rest; the place which the creator has designated to be passed down to successive generations; and the final resting place for every child born on its surface.*[293] Therefore, its importance transcends economics benefits and bears cultural, spiritual, political and social value, if this sacred significance is not carefully managed by the Government, it will likely lead to conflicts between the communities, the Government and the MOCs.

2.2.3.2 Economic Impact

2.2.3.2.1 Inflation of the Country's Currency

127, Uganda Gazette No. 16; The Petroleum (Exploration, Development and Production) (National Content) Regulations (The Uganda Gazette No. 45, Volume CIX, 2016)

[291] World Health Organization, 'Managing the public health impacts of natural resource extraction activities,' (November 2010); IPIECA, 'Vector-borne disease management,' (March 2013); Booz & Company, 'HIV, TB & Malaria Management & Prevention in the Oil & Gas Supply Chain,' (2010); USAID, 'How the Oil and Gas Industry Can Address Emerging Infectious Diseases". https://www.usaid.gov/sites/default/files/documents/1864/Reducing-Zoonotic-Disease-Transmission-Oil-Gas-Industry-red.pdf

[292] Ibid

[293] A Alao, 'Natural Resources and Conflict in Africa: The Tragedy of Endowment.' (University of Rochester Press, NY, USA, 2007) 63

One of the potential negative economic impacts of the petroleum industry's development is the increase in inflation of the country's currency, which is the traditional symptom of the 'Resource Curse Phenomenon' as discussed earlier in section 2.2.[294] It can affect other economic sectors, like agricultural sector, fishing sector, pastoral sectors, tourism, and hospitality sectors, rendering them unable to compete regionally and globally; thereby contributing to growing inequalities.

A lot of the communities in the region are engaged in both subsistence and commercial farming, grazing, and fishing. The developments from the petroleum industry will exposed the communities surrounding the projects to many uncertainties, either due to being displaced from their source of livelihood, an influx of in-migration, and immigrants, increasing the demand on the resources (overfishing), and the increase in inflation in the cost of goods and services, a combination that creates a real concern that the communities will be unable to sell their products to support their families, render local people vulnerable to food insecurity, prostitution, landlessness, and increased poverty

2.2.3.2.2 Misappropriation of Petroleum Derived Revenues

The development of the petroleum industry has the potential to increase the countries revenue exponentially from taxes, royalties, signature bonuses,

[294] Refer to section 2.2 of this chapter; Richard M Auty, *Sustaining Development in Mineral Economies: The Resource Curse Thesis* (Routledge, 1993); Richard M Auty, 'Natural Resources, Capital Accumulation and the Resource Curse' (2007) 61(4) Ecological Economics 627-634.

surface rental fees, and other payments from the sales of crude oil and end-use energy products such as fuels.[295] The Uganda government will earn 9.4 trillion shillings (about $3.6 billion) from the petroleum industry annually when it starts production.[296] This situation creates fertile grounds for increased cases of corruption tendencies and bribery practices.[297] In a government already marred with corruption scandals involving public officials, the risk of misappropriation of petroleum derived revenues increases.[298]

According to the 2019 Transparency International (TI) Corruption Index, Uganda scored 28/100 points and was ranked 137 out of 180 countries/territories worldwide.[299] According to the Worldwide Governance Indicators (WGI), Uganda's score on governance effectiveness stood at 31.25

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[295] International Monetary Fund, 'Fiscal Regimes for Extractive Industries' (2012). https://www.imf.org/external/np/pp/eng/2012/081512.pdf accessed 13 June 2017; Transparency International, 'Oil and Gas' <http://www.transparency.org/topic/detail/oil_and_gas> accessed 13 June 2016); Ranjit Lamech, Kyran O'Sullivan, Chapter 21: Energy, *PRSP Sourcebook, World Bank* (2001).

[296] National Planning Authority (NPA) in collaboration with Africa Centre for Energy & Mineral Policy (ACEMP), 'Annual Petroleum Development Scorecard' (2016) <file:///C:/Users/n0688650/Downloads/ANNUAL-PETROLEUM-DEVELOPMENT-SCORECARD-FINAL-TUESDAY-29-NOV-2016_-2-3.pdf> accessed on 20th February 2017

[297] Ibid Polterovich

[298] Maira Martini, 'Uganda: overview of corruption and anti-corruption.' *Transparency International* 379 (8 April 2013); Reuters, 'Oil Bonuses an Early Sign Uganda Suffering Resource "Curse",' *Saw Critics* (6 January 2017); D R Olanya, 'Will Uganda succumb to the resource curse?' (2015) 2, 46–55; Business Anti-Corruption Portal, *Uganda Corruption Report,* https://www.business-anti-corruption.com/country-profiles/uganda/ accessed on 16th October 2017; The Independent, 'Analysis: Messing with Uganda's Minerals', *The Independent* (17 July 2017); Transparency International, Global Corruption Barometer 2015; R Arezki, M Brückner, 'Oil rents, corruption, and state stability: Evidence from panel data regressions.' European Economic Review, 55(7) (2011) 955-963; R Arezki, T Gylfason, 'Resource rents, democracy and corruption: Evidence from Sub-Saharan Africa,' *CESifo working paper: Resource and Environment Economics* 3575 (2011) https://www.transparency.org/files/content/corruptionqas/379_Uganda_Overview_of_corruption_and_anticorruption.pdf

[299] Transparency International, 'Corruption Perceptions Index 2019,' (2020) 3 https://images.transparencycdn.org/images/2019_CPI_Report_EN_200331_141425.pdf> accessed on 27th July 2020

in 2019 with control of corruption index standing at 11.54.[300] The governance effectiveness index reflects perceptions of the quality of public services, the quality of the civil service and the degree of its independence from political pressures, and the policy's quality.

Corruption misappropriates State's revenue, increases political turmoil, and discourages foreign investment, which subsequently hinders infrastructure development.[301] Corruption creates more perilous working environments for example where substandard health and safety measures are overlooked for a bribe.[302] It widens inequality,[303] which is, in turn, linked to higher poverty levels, [304] child mortality rates, [305] lower school-graduation rates, [306] and increased gender inequality. [307] Corruption can misrepresent market incentives, countermine environmental protection laws, [308] and undermine

[300] World Bank report, Worldwide Governance Indicators 2019 http://info.worldbank.org/governance/wgi/Home/downLoadFile?fileName=wgidataset.xlsx;

[301] Agenda 2030 (n 148) 9 and 11; Refer to chapter one, section 1.4.2 for discussion on petroleum industry and sustainable development; UNDP, "Chapter 6: Income Inequality and the Condition of Chronic Poverty," Towards Human Resilience: Sustaining MDG Progress in an Age of Economic Uncertainty, (2011); Sarah Peck, Sarah Chaves, 'The Oil Curse: A Remedial Role for the Oil Industry,' (Carnegie Endowment for International Peace September 2015); Natural Resource Governance Institute, 'Natural Resource Revenue Sharing: Executive Summary,' (September 2015); Paul Collier and Benedikt Goderis, 'Commodity Prices, Growth, and the Natural Resource Curse: Reconciling a Conundrum,' (Centre for the Study of African Economies Working Paper Series, August 2007); UNDP, "Goal 10: Reduced inequalities," http://www.undp.org/content/undp/en/home/sdgoverview/post-2015-development-agenda/goal-10.html accessed 13 June 2017; European Commission, 'Oil and Gas Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights,' https://op.europa.eu/en/publication-detail/-/publication/e05fc065-f35c-4c0d-91e9-7e500374ee0f> accessed 24 May 2019

[302] Agenda 2030 (n 148) 8

[303] Agenda 2030 (n 148) 10

[304] Agenda 2030 (n 148) 1

[305] Agenda 2030 (n 148) 3

[306] Agenda 2030 (n 148) 4

[307] Agenda 2030 (n 148) 5

[308] Agenda 2030 (n 148) 14 and 15

responsible production and consumption.[309] Corruption can create additional barriers for the poorest in the community to access clean water[310] and food.[311]

Transparency regarding petroleum-derived revenue payments and transfers can help check whether transfers have indeed occurred and enable greater accountability in managing public resources and curbing corruption at the national, provincial, local level and MOCs involved.[312] Transparency and accountability traverses several SDGs, such that, if prioritised and implemented , the Government can achieve the hoped-for SGD.[313]

MOC's are already held at a higher standard internationally.[314] They must comply with the Foreign Corrupt Practices Act (FCPA), UK Bribery Act 2010, the 2013 EU (European Union) Accounting and Transparency Directive. Their internal ethics code of conduct, compliance programmes, and human rights policies, also enables them to take precaution and to avoid risky situations.

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[309] Agenda 2030 (n 148) 12
[310] Agenda 2030 (n 148) 6
[311] Agenda 2030 (n 148) 2
[312] Agenda 2030 (n 148) 16; Alex Johnson, 'End Corruption for a Sustainable Future,' *Transparency International* (18 February 2016), <http://www. transparencyinternational.eu/2 016/02/end-corruption-for-a-sustainable-future/> accessed on 3rd April 2017; Transparency International, 'On Anti-Corruption Day, UN says ending 'corrosive' crime can boost sustainable development,' *Transparency International* (9 December 2015), <http://www.un.org/sustainabledevelopment/blog/2015/12/on-anti-corruption-day-un-says-ending-corrosive-crime-can-boost-sustainabledevelopment/> accessed on 3rd April 2017;
[313] Refer to Chapter One, Section 1.4.2
[314] Bain & Company "How National Oil Companies Can Fuel Economic Development," (1 May 2012), http://www.forbes.com/sites/baininsights/2012/05/01/how-national-oil-companies-can-fuel-economic-development/#721dbd8038d8 accessed 13 June 2017; European Commission, 'Oil and Gas Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights,' https://op.europa.eu/en/publication-detail/-/publication/e05fc065-f35c-4c0d-91e9-7e500374ee0f> accessed 24 May 2019 ; IPIECA, 'Preventing corruption: promoting transparent business practices,' (April 2012); World Economic Forum, 'Trust Challenge Facing the Global Oil & Gas Industry,' (2016). Foreign Corrupt Practices Act, 15 U.S.C. §78dd-1 (1977).

However, the Government has the primary obligation to utilise petroleum revenues adequately.

By adopting Agenda 2030, the Government committed itself to achieve sustainable development by reducing corruption, establishing transparent and accountable institutions, promoting the rule of law, and encouraging decision making process that is inclusive.[315] The Government also committed itself to join the Extractive Industries Transparency Initiative (EITI) in the 2012 Oil and Gas Revenue Management Policy (OGRMP 2012). EITI requires governments to publish PSAs, strengthen tax collection, improve the investment climate, and the directors of MOCs and require companies and civil society to work together.[316] However, it was not until the 12 August 2020 that it joined the EITI.[317]

There have been examples where the Government's actions have been concerning. For example, when Tullow acquired the assets of Heritage at the

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[315] Agenda 2030 (n 148) Goal 16; TRACIT, Mapping the negative impacts of Illicit Trade on the UN Sustainable Development Goals, (2018)
Available at https://www.tracit.org/uploads/1/0/2/2/102238034/illicit_trade_and_sdgs_v16.docx

[316] Agenda 2030 (n 148) 17; EITI, 'Guidance note 10 on subnational reporting,' (2016) https://eiti.org/sites/default/files/documents/guidance-note-10-subnational-reporting-2016_0.pdf accessed 13 June 2017; UN Chronicle 'Goal 10 –Why Addressing Inequality Matters,' http://unchronicle.un.org/article/goal-10-why-addressing-inequality-matters/ accessed 13 June 2017; Michael Ross, 'How Mineral-Rich States Can Reduce Inequality,' in Escaping the Resource Curse (2007); BP Global, 'Supporting development in societies where we work,' http://www.bp.com/en/global/corporate/sustainability/society/supporting-development-in-societies-where-we-work.html accessed 13 June 2017); European Commission, 'Oil and Gas Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights," UN Human Rights Council (2011)

[317] Uganda Joins the Extractive Industries Transparency Initiative (EITI) 12th August 2020 https://globalrightsalert.org/news-and-views/uganda-joins-extractive-industries-transparency-initiative-eiti> accessed on 13th August 2020; Refer to chapter three, section 3.7.3.2 on External Obligations to Disclose Information

cost of USD1.36 billion, the Uganda Revenue Authority (URA) correctly assessed and demanded the US $ 434 million for Capital Gains Tax. The Uganda Revenue Authority successfully defended its assessment in the Tax Appeals Tribunal[318] and the subsequent appeals in the High court[319] the London Tribunal based on the Arbitration Clauses contained in the PSA.[320] The court awarded a sum of S $ 434 million to the Government in the arbitration case. The Government had an opportunity to utilize these resources for the benefits of all Ugandans. However, the President awarded UGX 6 billion in appreciation to a team of 42 Public officers for successfully resolving the arbitration case. Such examples are concerning as they show, an element of mismanagement of petroleum revenues, which would lead to the likelihood of experiencing the 'Resource Curse Phenomenon.'

Companies flourish in peaceful and stable environments, and it is the obligation of the Governments to maintain security and peace. However, Companies have a role to play too, by conducting their activities with accountability and transparency, adhering to anti-corruption and anti-bribery laws, conducting regular comprehensive engagement sessions with all stakeholders, and mitigating unfavourable human rights impacts of their

[318] *Heritage Oil and Gas Vs Uganda Revenue Authority* [2011] UGTAT 1; *Heritage Oil and Gas Ltd v Uganda Revenue Authority [2011] UGTAT 5*
[319] *Heritage Oil and Gas Ltd v Uganda Revenue Authority [2011] UGCOMMC 97*
[320] The United Nations Commission for International Trade Law & Arbitration Rules 1976, Article 3; *Tullow Uganda Ltd v Heritage Oil and Gas Ltd and Anor* [2013] EWHC 1656 (Comm)

operations, they will be able to foster stability and avoid conflict with the members of the communities in which they operate.[321]

To mitigate conflict, whether between the MOC and local communities, or political, civil conflict, companies can establish robust risk and impact assessments to establish innovative ways of addressing any potential security risks brought on by disgruntled community members. In that case, companies' security provider is expected to respect the human rights laws in the course of their duties and apply standards such as the Voluntary Principles on Security and Human Rights.[322] MOCs could integrate human rights issues into the existing EIAs approaches by conducting comprehensive Human Rights Impact Assessment (HRIA).

Companies have to be mindful and respectful of the protected rights of indigenous communities described in the UN Declaration on the Rights of Indigenous Peoples[323] and International Labour Organization convention 169.[324] The location of the operation and complexity of relationships involved in the petroleum industry mean the MOCs have to ensure their business is

[321] Agenda 2030 (n 148); Refer to chapter one, section 1.4.2 for discussion on petroleum industry and sustainable development

[322] European Commission, 'Oil and Gas Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights,' 2012; IPIECA, 'Guide to operating in areas of conflict for the oil and gas industry,' (March 2008)

[323] IPIECA, 'Indigenous Peoples and the oil and gas industry: context, issues and emerging good practice,' (April 2012); Oxfam International, 'Community Consent Index 2015,' (July 2015); European Commission, 'Oil and Gas Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights,' 2012; IPIECA, 'Integrating human rights into environmental, social and health impact assessments, 2012; http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

[324] Indigenous and Tribal Peoples Convention, 1989 (No. 169) http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169

conducted legally and ethically with zero corruption tolerance, especially where their home countries have in place anti-bribery laws with extraterritorial reach.[325] It is an essential aspect of sound business practices and risk management for MOCs. MOCs can also incorporate anti-corruption policies within their business practices, train their staff, and implement compliance programmes to protect themselves from economic, legal, and reputational risks associated with corruption.[326]

2.2.3.3 Environmental Impact

Uganda's petroleum resources are in the Albertine Graben, a biologically sensitive region.[327] Among the environmental challenges associated with petroleum development, is its footprint on biodiversity and climate change.[328] National and international laws require that the State "*promote sustainable development and public awareness of the need to manage land, air, water resources in a balanced and sustainable manner for the present and future generations*…and to… *take all possible measures to prevent or minimise damage and destruction to land, air and water resources resulting from pollution or other causes*"[329] particularly in this

[325] UK Bribery Act 2010
[326] EY, 'Managing bribery and corruption risks in the oil and gas industry," (2014); "Illicit Financial Flows," World Bank (April 2016), available at http://www.worldbank.org/en/topic/financialmarketintegrity/brief/illicit-financial-flows-iffs (last accessed on 13 October 2016)
[327] Refer to chapter one, section 1.3.2 for the discussion on the Albertine Graben
[328] Nathan Jones, Liba Pejchar and Joseph Kiesecker, 'The Energy Footprint: How Oil, Natural Gas and Wind Energy Affect Land for Biodiversity and the Flow of Ecosystem Services,' BioScience (28 January 2015).
[329] The Constitution of the Republic of Uganda, 1995, Article 27; Refer to Chapter Three section 3.5 on National Legal and Regulatory Framework Governing Environmental Protection; Refer to Chapter Five, section 5.2 for the International Environmental Law Frameworks Relevant to the Petroleum Industry; Agenda 2030, SDG 15

critical Albertine Graben ecosystem. Court have also held that States must balance human rights and economic development.[330] As such, the petroleum development should consider the need to protect the right to a hygienic and healthy environment and other related rights alongside petroleum industry's development. This section discusses the potential adverse impacts that contribute to the likelihood of Resource Curse Phenomenon' from an environmental degradation standpoint.

2.2.3.3.1 Waste Management

Poor waste management of extracted drill cuttings, oil-based drilling bits, and produced water with naturally occurring heavy metals, radionuclides, and oil field chemicals is a potential risk in developing the petroleum industry.[331] Dumping such waste in open waste pits will lead to contamination of the land,[332] water bodies,[333] and air,[334] thereby increasing the toxicity in the

[330] *Susethat* Vs *State of Tamil Nadu* Civil Appeal 3418 of 2006
[331] S V Vingradov and J P Wagner, 'International Legal Regime, for Protection of the Marine Environment Against Operational Pollution from Offshore Petroleum Activities' in Z Gao (ed), *Environmental Regulation of Oil and Gas* (Kluwer Law International, London 1998) 93-142.
[332] United Nations General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development* (adopted by the General Assembly on 25th September 2015) UN Doc. A/RES/70/1 Goal 15
[333] Agenda 2030 (n 148) Goal 14
[334] Agenda 2030 (n 148) Goal 13; Refer to chapter one, section 1.4.2 for discussion on petroleum industry and sustainable development

surrounding environment.[335] These environmental laws violations cause harm to the people, animals, and the biodiversity of the surrounding areas.[336]

In July 2013, Community members in Kakindo village accused Tullow Oil of dumping two human waste trucks, causing severe health risks to locals and several diseases.[337] Tullow claimed its subcontractor, Saracen Uganda Limited was responsible for the entire incident.[338] Furthermore, Nigeria's experience offers a classic example of how poor waste management led to the destruction of Ogoni land.[339] In Ecuador, Texaco dumped its waste in open pits in the Amazonian Forest, and due to this, people's health in neighbouring communities were affected, and many died.[340]

2.2.3.3.3 Environmental Disruption Due to Infrastructure development

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[335] Total SA, 'Preventing and managing accidental pollution,' http://www.total.com/en/society-environment/environment/local-environmental-footprint/preventing-and-managing-accidental-pollution#sthash.bFwGreTp.dpuf accessed 13 June 2016; Total SA, 'Preserving the marine environment,' (March 2010).

[336] UNEP, Environmental Assessment of Ogoni land (2011) <http://allafrica.com/download/resource/main/main/idatcs/0002129 3:deb9cb4322608e852fc03d5fbbcf25d4.pdf> accessed on 24th May 2017

[337] Isaac Imaka, 'Contractor dumps human waste in homesteads' *Daily Monitor* (9th July 2013) http://www.monitor.co.ug/News/National/Contractor-dumps-human-waste-in-homesteads/-/688334/1909062/-/149b7oqz/-/index.html accessed on 3rd November 2017

[338] Ibid

[339] F Emiri and G Deinduomo, *Law and Petroleum Industry in Nigeria Current Challenges* (Malthouse Press, Nigeria 2009); P Maass, *Crude World: The Violent Twilight of Oil.* (Penguin Group London 2009); G I Malumfashi Phase-Out of Gas Flaring in Nigeria by 2008: The Prospects of a Multi-Win Project
(Review of The Regulatory, Environmental and Socio-Economic Issues)

[340] Background on Texaco Petroleum Company's Former Operations in Ecuador http://www.texaco.com/sitelets/ecuador/en/history/background.aspx; Sanchez, Mariana, "Amazon Tribe Sues Texaco for $6bn" *Al Jazeera English* (27th March 2007) https://www.aljazeera.com/news/americas/2007/03/200852517253550087 5.html. Accessed 9 January 2017.

The exploration and production of petroleum resources involves setting up several infrastructures,[341] such as workers' camps, access roads, production sites, equipment storage camps, pipelines, and cables. [342] Large scale infrastructural development required clearing farmlands, cutting trees and shrubs, even in national parks, displacing wildlife in cases where exploration has been taking place and where production will commence in the national parks. This will create a significant impact on the environment.[343]

For example, several pipelines will be constructed from the Central Production Facilities to the refinery, and the longest being the East Africa Crude Oil Export Pipeline (EACOP) pipeline taking crude oil from Albertine Graben to the Tanzanian port for the international market. These pipelines will need to be heated so that the crude oil would easily flow. They cross several local rivers, and this might impact the communities' water sources, especially if the pipeline ruptures. This is a major risk to the right to water of local communities[344]

2.2.3.3.4 Risk of Air Pollution

[341] R M Kityo, 'The Effects of Oil and Gas Exploration in the Albertine Rift Region on Biodiversity; A Case of Protected Areas (Murchison Falls National Park)' http://www.natureuganda.org/downloads/Oil%20and%20Gas%20%20in%20the%20AR.pdf accessed 13 March 2018

[342] Refer to section 2.3.1.1.

[343] Refer to Annex B Map showing the EACOP Pipeline; WWF, CSCO, 'Safeguarding People and Nature in the East African Crude Oil (EACOP) Pipeline Project: A Preliminary Environmental and Socio-Economic Threat Analysis' (2017) https://wwf-sight.org/wp-content/uploads/2017/07/Safeguarding-Nature-and-People-Oil-and-GasPipeline_Factsheet.pdf> accessed on 19 June 2019; Atacama Consulting, 'Tilenga Project: Resettlement Action Plan 1 (RAP1) for the Proposed Industrial Area and N1 Access Road' (2018).

[344] Constitution of the Republic of Uganda, 1996, Article 21

Uganda is yet to commence production and refining of its petroleum resources, it is at these stages that the risk of releasing hazardous and toxic air pollutants[345] is at the highest.[346] As part of the petroleum production process, any excess associated natural gas that is not needed commercially would usually get flared off, as permitted by the law.[347] Some of the chemicals released are known or suspected cancer-causing agents, responsible for developmental and reproductive problems, and may aggravate certain respiratory conditions like asthma. Along with the possible health effects from exposure to these chemicals, these chemicals may cause worry and fear among residents of surrounding communities. In Nigeria's Niger Delta Region, the community alleged that atmospheric pollution caused acid rains, damaging the entire community's agricultural capacity.[348] Considering that Uganda is predominantly an agricultural economy with most of its population being peasant farmers, engaged in subsistence farming, this kind of air pollution

[345] Center for International Relations and Sustainable Development, 'Implementing the Paris Climate Agreement –Achieving Deep Decarbonization in the Next Half-century' (2016); Columbia Center on Sustainable Investment, 'A Regulatory, Operational and Commercial Framework for the Utilization of Associated Gas (2016); Columbia Center on Sustainable Development, 'Timeline: Fossil Fuel Companies and Climate Change' (2016); Critical Resource, 'The Heat is On: Catalysing Leadership by Fossil Fuel Companies on Climate Change' (2015); International Energy Agency, 'Energy and Climate Change' (2015); IPIECA, 'Energy and GHG Efficiency Compendium' (2015); IPIECA, 'The Oil and Gas Industry and Climate Change' (2007); Oil and Gas Climate Initiative, 'More energy, lower emissions: Catalyzing practical action on climate change' (2015); UN Framework Convention on Climate Change 2015, The Paris Agreement; Environmental performance in the Exploration and Production Industry, 2008 data, OGP Report No 429 November 2009.(www.ogp.uk/pubs/429-pdf).

[346] Pollutants such as benzene, methane, nitrogen oxides, hydrogen sulfide, carbon dioxide, toluene, xylene, ethylbenzene, carbon monoxide, Sulfur dioxide

[347] Upstream Act 2013, s 100; NEA 2019, s 78 -88, 90, 93; The Penal Code Act (cap 120, 1950) section 176 - 178; The Penal Code (Amendment) Act, 2007; Refer to Chapter Three, section 3.5.3

[348] K C Nduka, J and Orisakwe, Orish and O Ezenweke, L and E Ezenwa, T and N Chendo, "Acid Rain Phenomenon in Niger Delta Region of Nigeria: Economic, Biodiversity, and Public Health Concern" (The Scientific World Journal, 2008) 811-8

would significantly impact the environment and affect the surrounding communities' ability to sustain a livelihood.

There are other kinds of air pollution from dust that could cause community concern. There have been several violations over the years since petroleum activities commenced. For example, in 2012 there were complaints in Buliisa District of pollution from dust, noise and a stench that affected people's health, especially pregnant women, children and older persons. The community members alleged that Tullow had dumped waste containing copious quantities of lead in Bugana near a River used by animals and human beings.[349] Tullow claimed its subcontractor, Saracen Uganda Limited was responsible for the entire incident.

2.2.3.3.5 Risk of Oil Spills

The potential for accidental oil spills during production drilling and transportation phases present an additional risk to the environment.[350] Due to the Albertine Graben region's biological sensitivity, any potential oil spills may devastate wildlife in the national parks. It will contaminate water bodies such as Lake Albert shared with the Democratic Republic of Congo. Lake

[349] Uganda Human Rights Commission Special Report, *Oil in Uganda: Emerging Human Rights Issues, Special Focus on Selected Districts in the Albertine Graben* (Uganda Human Rights Commission Special Report, 2013); Isaac Imaka, 'Contractor dumps human waste in homesteads' *Daily Monitor* (9th July 2013) http://www.monitor.co.ug/News/National/Contractor-dumps-human-waste-in-homesteads/-/688334/1909062/-/149b7oqz/-/index.html accessed on 3rd November 2017

[350] Patricia Birnie, Alan Boyle, and Catherine Redgwell, International Law and the Environment (3rd ed OUP 2009) 256

Albert also feeds into the White Nile that flows to South Sudan to Egypt. Therefore, an oil spill will have a far-reaching impact.

BP's unprecedented disaster caused by the Deepwater Horizon offshore drilling rig explosion and oil spill in the Gulf of Mexico in 2010[351] is an excellent example of how devastating accidental oil spills can cause environmental damage. Not to mention the financial costs in clean up and compensate those affected, it is said to have cost BP $62billion. If oil spills, and gas flaring occur, the possible consequences are the destruction of wildlife habitats and therefore the tourism sector, loss of land for agricultural communities co-located with petroleum projects, [352] and the relocation of those inhabiting that land, [353] and many others.

2.2.3.3.6 Risk of Noise Pollution

Petroleum exploration requires the use of the high-intensity sound (Seismic surveys) and stone blasting technology during the exploration phase, movement of vehicles and these activities lead to noise pollution. In 2013, the seismic and stone blasting activities carried out by CNOOC and Tullow in the national parks scared off wildlife from the park. [354] Also, vehicles in the

[351] A Knap, The Macondo Oil Spill: Environmental Perspective http://www.sim.bm/downloads/KnapMacondo.pdf accessed 15 June 2017

[352] Davis, Rachel and Daniel M. Franks. 2011. 'The costs of conflict with local community in the extractive industry'. First International Seminar on Social Responsibility in Mining. 19-21 October 2011. Santiago: Chile.

[353] Uganda Human Rights Commission Special Report, *Oil in Uganda: Emerging Human Rights Issues, Special Focus on Selected Districts in the Albertine Graben* (Uganda Human Rights Commission Special Report, 2013)

[354] Uganda Human Rights Commission Special Report, *Oil in Uganda: Emerging Human Rights Issues, Special Focus on Selected Districts in the Albertine Graben* (Uganda Human Rights Commission Special Report, 2013)

national park and the Tangi dumping site's construction within the elephant corridor in Nwoya District, resulted in the elephants fleeing into the villages and destroying crops, houses and even killed a Nwoya District resident in January 2012.[355]

In Nebbi District, the people complained that the heavy machinery used in the exploration was operated both day and night causing vibrations as far as 2km away, noise pollution at night, so people could not sleep for close to three months.[356] The community also alleged that dust from roads construction, caused them to get ailments like cough and flu. That ripened cotton pods were soiled from the dust emitted and were unmarketable, which affected their income sources.[357]

2.2.3.3.7 Risk of Water Pollution

States should ensure availability and sustainable management of water and sanitation for all.[358] However, Petroleum exploitation requires water for exploration, development, production, and refining process. Some petroleum discoveries in Uganda are in and near freshwater bodies, and the potential to affect water quality and sanitation becomes a concern.[359] Since the community

[355] Ibid
[356] Ibid
[357] Ibid
[358] The Constitution of the Republic of Uganda, 1995, Article 17; Agenda 2030 (n 148) Goal 6; Refer to chapter one, section 1.4.2 for discussion on petroleum industry and sustainable development
[359] UN General Assembly, The Human Right to Water and Sanitation, the General Assembly A/RES/64/292, 3 August 2010; World Bank Brief, 'Thirsty Energy: Securing Energy in a Water Constrained World,' (29 August 2013), available at http://www.worldbank.org/en/topic/sustainabledevelopment/brief/water-energy-nexus (last accessed 10 June 2016); Mauro Small, "Cities are Addressing Sustainable Development," Popular Resistance (15 January 2014), https://www.popularresistance.org/cities-are-

also heavily relies on water bodies for fishing, domestic use, and agriculture, petroleum development would affect their livelihoods.[360]

2.2.3.3.7 Climate change

The petroleum industry is generally considered a major contributor to an increase in anthropogenic Green House Gas (GHG) emissions and global warming,[361] through the emission of some of the pollutants discussed earlier.[362] Although climate change is as a stand-alone goal in the SGDs, it impacts all 17 SDGs that Uganda signed up to pursue.[363] Climate change increases the severity and frequency of weather-related hazards and the resultant consequences, which disproportionately affects the poor and most

addressing-sustainable-development/ accessed 10 June 2016; BP Global Sustainability "Water", http://www.bp.com/en/global/corporate/sustainability/environment/water.html accessed 10 June 2016; Antonia Sohns, Diego Rodriguez and Anna Delgado, 'Thirsty Energy (II): The Importance of Water for Oil and Gas Extraction,' *World Bank Group* (2016)

[360] IPIECA, 'Water Management Framework,' http://www.ipieca.org/water-management-framework accessed 12 June 2017; IPIECA, 'Efficiency in water use. Guidance document for the upstream oil and gas industry,' (October 2014); Ruth Romer, 'Can integrated water resource management be of value to business, specifically the oil and gas sector?', *International Journal of Water Resources Development* (March 2017); BP Global, 'Water', http://www.bp.com/en/global/corporate/sustainability/environment/water.html accessed 12 June 2016.

[361] R.E.H. Sims, R.N. Schock, A. Adegbululgbe, J. Fenhann, I. Konstantinaviciute, W. Moomaw, H.B. Nimir, B. Schlamadinger, J. Torres-Martínez, C. Turner, Y. Uchiyama, S.J.V. Vuori, N. Wamukonya, X. Zhang, 'Climate Change 2007: Mitigation: Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change' (2007) 261

[362] Refer to Chapter Two, Section 2.2.3.3.4

[363] Refer to chapter one, section 1.4.2 for discussion on petroleum industry and sustainable development

vulnerable. Particularly for women who still are responsible for securing food, water, and energy for their households. It undermines efforts to end poverty,[364] achieve gender equality[365] and reduce inequality.[366] Climate change can increase stress on water resources[367] and threaten food security.[368] It also alters ecosystems and damage biodiversity.[369] It may change the distribution patterns of infectious diseases affecting global health.[370] These impacts combined may threaten security and peace.[371]

At the same time, the response to climate change will also drive progress on other SDGs. For example, by promoting improved energy efficiency, encouraging the development of carbon capture and storage (CCS), and stimulating investment in cleaner-burning natural gas alongside renewable energies and technologies,[372] all of which can open new economic opportunities.[373] Also, integrating disaster risk reduction and climate change adaptation in development and social transformation in Uganda will contribute towards improving the general quality of life and ultimately towards achieving the SDGs.[374]

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[364] Agenda 2030 (n 148) Goal 1
[365] Agenda 2030 (n 148) Goal 5
[366] Agenda 2030 (n 148) Goal 10
[367] Agenda 2030 (n 148) Goal 6
[368] Agenda 2030 (n 148) Goal 2
[369] Agenda 2030 (n 148) Goal 14, 15.
[370] Agenda 2030 (n 148) Goal 3
[371] Agenda 2030 (n 148) Goal 16
[372] Agenda 2030 (n 148) Goal 7
[373] Agenda 2030 (n 148) Goal 8
[374] United Nations Country Team in Uganda, 'United Nations Sustainable Development Cooperation Framework, Uganda 2021-2025' (2020) https://uganda.un.org/sites/default/files/2020-

From the above discussion, it becomes clear that there is a correlation between natural resource development and socio-economic and environmental disruptions, such that any discussion on the 'Resource Curse Phenomenon' should be synonymous with these negative environmental and social impacts of extractive industry operations and not limit the discussion to economic impacts. There have been many international law developments, non-legal norms and guidelines adopted by industry[375] and reinforced by national regulation and legislation to circumvent the possible environmental and human rights impacts.[376] Uganda is at a pivotal point in the development of its petroleum industry, and vital lessons on how to circumvent the 'Resource Curse Phenomenon' from other jurisdictions must be considered if it hopes to achieve the hoped-for benefits from its nascent petroleum industry.[377] One of

11/Uganda%20UN%20Sustainable%20Development%20Cooperation%20Framework%20202 1-2025.pdf > accessed 15 December 2020

[375] Refer to Chapter Five, section 5.2 for the discussion on the International Environmental Law Frameworks Relevant to the Petroleum Industry; International Finance Corporation, Environmental and Social Performance Standards, 2012 http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Sustainability+Framework/ accessed May 2018; UN Human Rights Office of High Commissioner, "Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf accessed 23rd June 2018

[376] Refer to Chapter Three, section 3.5 for the discussion on the National Legal and Regulatory Frameworks Governing Environmental Protection; NEA 2019, s 20(5); Environmental Impact Assessment Regulations (EIA), 1998 S.I 153-1 Regulations 19-20; Coakes Sheridan, Andreas Sadler, 'Utilizing a sustainable livelihoods approach to inform social impact assessment practice' in Frank Vanclay, Ana Maria Esteves (eds) *New Directions in Social Impact Assessment. Conceptual and Methodological Advances* (Cheltenham, 2011).

[377] J Mosbacher, 'Fighting the resource curse: Uganda's pivotal moment' (2013) 36 (4) The Washington Quarterly 43-54; M Ross, 'What have we learned about the resource curse?' (2015) 18 The Annual Review of Political Science, 239–259; A Sturesson, T Zobel, 'The Extractive Industries Transparency Initiative (EITI) in Uganda: Who will take the lead when the government falters?' (2015) 2 The Extractive Industries and Society 33–45; B Shepherd, 'Oil in Uganda: International Lessons for Success' (The Royal Institute of International Affairs: London, UK, 2013) https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Africa/0113pr_ugandaoil.pdf> accessed on 15 June 2019

the significant developments is the requirement that MOCs carry out Environmental and Social Impact Assessments (ESIAs) as part of their exploration and production licensing processes.[378]

2.3 Petroleum Industry's Contribution to Uganda's Sustainable Development Goals.

Uganda's petroleum industry does not have to lead to the 'Resource Curse Phenomenon' as discussed above. The Government decided to develop this industry hoping it would add considerable value to the Country's economy. It is important to also look at the potential benefits and opportunities that the industry might bring for Ugandans. The goal is for the nascent industry to set its self-up as a 'Resource Blessing' and for Uganda not to join the list of 'Resource Curse' countries.

While the Government has the primary responsibility to prioritise and implement approaches to meeting the SDGs; this section discusses how the Government in collaboration with the MOCs, NGOs, development partners, private sector, and communities[379] could work together to contribute to the achievement of Uganda's SDGs most effectively.

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[378] NEA 2019, s 110 19(1) (a)- 116, the Third Schedule; Uganda Wildlife Act 2000, section 15; National Environment (Environment Impact Assessment) Regulations No. 13 of 1998; Upstream Act 2013, s 135; Refer to Chapters Three, section 3.5.2.1 and Four for a detailed discussion on the national and international legal framework.

[379] International Petroleum Industry Environmental Conservation Association, 'Partnerships in the Oil and Gas Industry' (2006) www.ipieca.org/resources/good-practice/partnerships-in-the-oil-and-gas-industry/ accessed 13 June 2016; PwC, 'Make it your business: Engaging with the Sustainable Development Goals' (2015) https://www.pwc.com/gx/en/sustainability/SDG/SDG%20Research_FINAL.pdf accessed 13 June 2016; Van Hinte, et al, Evaluation of the assessment process for major projects: A case

2.3.1 Socio-economic Benefits

2.3.1.1 Through contributing to fiscal sustainability

Uganda's 2040 Vision sets out an ambitious agenda of transforming the country into a middle-income country, with the majority of its citizens living in urban areas, having smaller families, and earning income from non-agricultural sectors. [380] Developing Uganda's petroleum industry would contribute to the achievement of this vision by increasing the country's revenue from taxes, royalties, signature bonuses, surface rental fees, and other payments from the sales of crude oil and end-use energy products such as fuels.[381] The Government intends to utilise the petroleum sector's revenue to support the Government's national budget to support national development goals and community development goals. [382]

study of oil and gas pipelines in Canada. Impact Assessment and Project Appraisal (2007), 25(2), 123-137

[380] World Bank, 'The Uganda Poverty Assessment Report 2016: Farms, Cities and Good Fortune: Assessing Poverty Reduction in Uganda from 2006 to 2013.' (2016) <http://pubdocs.worldbank.org/en/381951474255092375/pdf/Uganda-Poverty-Assessment-Report-2016.pdf> accessed 13th May 2018; A Bainomugisha, H Kivengyere, B Tusasirwe, 'Escaping the Oil Curse and Making Poverty History: A Review of the Oil and Gas Policy and Legal Framework for Uganda' (2006) ACODE Policy Research Series, No. 20 <https://www.africaportal.org/documents/9141/PRS_20.pdf> accessed 10 May 2018

[381] International Monetary Fund, 'Fiscal Regimes for Extractive Industries' (2012). https://www.imf.org/external/np/pp/eng/2012/081512.pdf accessed 13 June 2017; Transparency International, 'Oil and Gas' <http://www.transparency.org/topic/detail/oil_and_gas> accessed 13 June 2016); Ranjit Lamech, Kyran O'Sullivan, Chapter 21: Energy, *PRSP Sourcebook, World Bank* (2001).

[382] NOGP 2008; OGRMP 2012; Public Finance Management Act, 2015 (The Uganda Gazette No. 11 Volume CVIII) (PFMA 2015) section 55 to 75; Refer to Chapter Three, section 3.6 for further discussion on the legal framework governing the management of revenues received from petroleum resources; Refer to chapter four for a Critical Assessment of Uganda's PSAs

The Ugandan government is committed to using the increased revenue to address prevalent levels of poverty amongst most Ugandans.[383] Addressing poverty means ensuring that Ugandans, particularly, the vulnerable, and poor like women and the disabled have equal rights to access to healthcare services, economic resources, ownership, and control over land or property, food security, access to quality education, natural resources like clean and safe water, access to appropriate modern technology like modern energy sources, financial services like microfinance, improved infrastructure, reducing exposure and vulnerability to climate change impacts. [384]

The Government has stated that it will use petroleum revenues to improve Uganda's infrastructure and sustainable industrialisation of the transportation, telecommunications technology (ICT) sectors. With the petroleum industry's onset, the Government has built several roads.[385] The building of an international airport in Hoima district is already underway,[386]

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[383] Agenda 2030 (n 148) Goal 1; Ministry of Finance, Planning and Economic Development, *Poverty Eradication Action Plan* (2004/5-2007/8), 2004; Sudharshan Canagarajah, Arthur van Diesen, 'The Poverty Reduction Strategy Approach Six Years On: An Examination of Principles and Practice in Uganda Development Policy Review' (2011) 29 (s1): s135-s156; Refer to chapter one, section 1.4.2, chapter 3 section 3.6 for discussion on the Legal and Regulatory Framework Governing the Management of Petroleum Revenues

[384] OGRMP 2012; Refer to chapter 3 section 3.6 for discussion on the Legal and Regulatory Framework Governing the Management of Petroleum Revenues

[385] FN, 'Oil sparks roads upgrade, *Oilinuganda* (2013) http://www.oilinuganda.org/features/infrastructure/oil-sparks-off-roads-upgrade.html accessed 4 March 2017.

[386] African Aerospace Online News Service, 'Uganda to get second International Airport' *African Aerospace Online News Service* (21 December 2016) accessed 10 June 2017; CAPA Centre for Aviation, ''Profile of Hoima International Airport' *CAPA* (Sydney, 31 December 2016) <https://centreforaviation.com/data/profiles/newairports/kabaale-parish-international-airport> accessed 10 June 2017; Stéphane Billé, 'Uganda launches Kabaale International Airport construction' *Ecofin Agency* (Port-Louis, Mauritius: 7 June 2018) <https://www.ecofinagency.com/public-management/0706-38595-uganda-launches-kabaale-international-airport-construction> accessed 11 September 2018; Alon Mwesigwa, 'Airports to generate Shs8.5 trillion annually' *The Observer* (Kampala, Uganda, 1 February

to allow easy access to equipment and staff to construct the oil refinery and oil fields. The Government hopes this infrastructure will also help develop Uganda's agriculture and tourism sectors, benefit local communities, and contribute to the achievement of Uganda's sustainable development goals.

2.3.1.2 Through supporting the communities' ability to access to clean, reliable, sustainable energy

In rural Uganda, access to affordable, reliable, modern, and sustainable energy is expensive.[387] The communities rely on unsustainable and inefficient use of traditional fuels such as firewood, charcoal and animal waste for heating, cooking, and lighting, [388] which causes pressure on the environment, deforestation increases as the population increases needing to support the above needs.

However, energy is an essential element of sustainable development, which affects the other SDGs' achievement. SDGs 7 on affordable and clean energy and 13 on climate action require decisive actions from the States for the considerable increase of clean and affordable energy sources in the countries' energy mix that enables economic activity and social development.[389] Access

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2015) <https://www.observer.ug/business/38-business/36196--airports-to-generate-shs-85tn-annually>accessed 4 March 2016.

[387] Agenda 2030 (n 148) Goal 7; Gwénaëlle Legros, Ines Havet, Nigel Bruce, and Sophie, 'The Energy Access Situation in Developing Countries: A Review Focusing on the Least Developed Countries and Sub-Saharan Africa,' United Nations Development Programme (November 2009); Refer to chapter five, section 5.2.2 for discussion on international law governing reduction of climate change related disruptions.

[388] Uganda National Climate Change Policy 2013; Department of Economic and Social Affairs of the United Nations, 'World Population Prospects,' (2015).

[389] Refer to chapter one, section 1.4.2 for discussion on the SDGs

to clean, modern energy would increase productivity in diverse ways, like increasing working hours due to adequate lighting.

2.3.1.2.1 Uganda's Renewable Energy Potential

Uganda is richly endowed with abundant renewable energy resources to produce energy.[390] These include biomass estimated at 1,650 MW (mainly from firewood (78.6%), charcoal (5.6%) and crop residues (4.7%), [391] hydropower estimated at 2,000 MW (Uganda has an installed capacity of 822 MW), solar energy estimated at 5.1 kWh/m2,[392] geothermal estimated at 450 MW from Uganda's hot springs located in the western branch of the East African Rift Valley, and peat estimated at 800 MW,[393] wind energy currently considered insufficient for large scale electricity generation. [394] The total renewable energy estimated potential is about 5,300 MW for power generation. These resources remain mostly unexploited because of the perceived technical and financial risks.[395] Revenue derived from the petroleum

[390] Ministry of Energy and Mineral Development, The Renewable Energy Policy for Uganda (2007); The Electricity Act, 1999; Ministry of Energy and Mineral Development, The Energy Policy for Uganda, (2002); The Atomic Energy Act, 2008

[391] Ministry of Energy and Mineral Development, Strategic Investment Plan 2014/15 – 2018/19, page 101

[392] REA - Rural electrification strategy and plan 2013-2022; Worldbank - http://www.worldbank.org/projects/P112334/uganda-energy-rural-transformation-apl-2?lang=en>

[393] Ministry of Energy and Mineral Development, Strategic Investment Plan 2014/15 – 2018/19

[394] R Pallabazzer, The Wind resources in Uganda (1998) 13 (1) Renewable Energy 41-49; Electrowatt-Ekono Oy – Norplan AS, The Uganda Alternative Energy Resources Assessment and Utilisation Study, COWI A/S 2003.

[395] Power Africa, 'Uganda Factsheet' (2018) https://www.usaid.gov/sites/default/files/documents/1860/Uganda_November_2018_Country_Fact_Sheet.pdf

industry would be an essential resource to fund the development of renewable energy sources.

The discovery of Petroleum resources presents an opportunity for Uganda from reliance on imported petroleum and petroleum products,[396] especially as the Government plans to build a refinery with an input capacity of 60,000 barrels per day. [397] The petroleum industry might play a vital role by contributing to the possible alternatives to energy sources for the communities. For example, by producing and refining petroleum resources, by-products like butane could be an energy source, producing approximately half the coal's carbon footprint.[398]

Oil companies can also contribute to the achievement of accessible clean energy for Ugandan's by contributing to the development of lower-carbon energy sources and renewables like wind, solar, hydroelectric and geothermal, and the use of carbon-capture and storage or other emissions-reduction technologies.[399] For example, Total Energies launched the "Total Access to

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[396] Ministry of Energy and Mineral Development, Strategic Investment Plan 2014/15 – 2018/19, page 71, 72

[397] Allan Olingo, 'Uganda signs $4 billion refinery plant deal' The EastAfrican (Kampala, 14 April 2018) https://www.theeastafrican.co.ke/business/Uganda-signs-USD4bn-refinery-plant-deal--/2560-4393822-oyqk9rz/index.html accessed 16 April 2018

[398] Accenture, 'The role of the oil and gas industry in tackling energy poverty,' (2014); The Paris Agreement was adopted on 12 December 2015 Entry into force 4 November 2016 FCCC/CP/2015/L.9/Rev.1 signed in Uganda in 22 Apr 2016 ratified on 21 Sep 2016 C.N.63.2016.TREATIES-XXVII.7.d; US Energy Information Administration, frequently asked questions: How much carbon dioxide is produced when different fuels are burned? <https://www.eia.gov/tools/faqs/faq.cfm?id=73&t=11> accessed 26 December 2016;National Energy Technology Laboratory, 'Cost and performance baseline for fossil energy plants, Volume 1: Bituminous coal and natural gas to electricity' (Revision 2, 2010).

[399] IPIECA, 'Natural gas: Into the future (The Paris Puzzle),' (June 2015); International Energy Agency, 'Energy Technology Perspectives 2012, (2012); International Energy Agency, 'Energy and Climate Change,' (2015).

Energy" program under the "Awango by Total" brand in 2011.[400] It is a project incubator designed to make energy in the form of solar solutions accessible to everyone. So far, Total Energies has distributed 1.9 million solar lamps in 40 countries, including Uganda. The solar solution is cleaner than kerosene, firewood, and batteries, it can also be used to charge phones, and lighting.

2.3.1.3 Through promoting small-scale agricultural activities

Uganda's current economy is 24.2% reliant on the agricultural sector, which employs over 80 per cent of the labour force, to support their socio-economic needs.[401] However, communities carry out agriculture for subsistence living. That means most of the population, still do not have food security and healthy lifestyles. [402] The Government has had to relocate many of the adjacent

[400] Total, "Solar Solutions to Improve Access to Energy" (2013) <www.ambafrance-id.org/IMG/pdf/AWANGO_Presentation_reduced.pdf> accessed 13 June 2017; Total, T'otal Introduces Awango By Total Solar Solutions Improve Access Energy' <https://www.total.com/en/media/news/press-releases/total-lance-awango-total-des-solutions-solaires-pour-faire-progresser-lacces-lenergie> accessed 13 June 2017

[401] R B Ggoobi, 'Performance of Uganda's Economy: Progress, Opportunities, Challenges and way forward' (2016) 1–26; Isaac Shinyekwa, Julius Kiiza, Eria Hisali, Marios Obwona (eds), 'The Evolution of Industry in Uganda in Manufacturing Transformation Comparative Studies of Industrial Development in Africa and Emerging Asia' (*Oxford Scholarship Online* August 2016) http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198776987.001.0001/acprof-9780198776987-chapter-10> accessed on 3rd March 2018; World Bank, 'Uganda Country Economic Memorandum: Economic Diversification and Growth in the Era of Oil and Volatility' Report No: 97146-UG, (World Bank, Washington, DC 2015);

[402] Agenda 2030 (n 148) Goal 2; Food and Agriculture Organization of the United Nations, 'Key facts on food loss and waste you should know,' <http://www.fao.org/save-food/resources/keyfindings/en/> accessed on 4 October 2017; World Food Programme, 'Hunger Statistics,', <https://www.wfp.org/hunger/stats> accessed on 13 June 2017; United Nations "UN projects world population to reach 8.5 billion by 2030, driven by growth in developing countries," (29 July 2015), <http://www.un.org/sustainabledevelopment/blog/2015/07/un-projects-world-population-to-reach-8-5-billion-by-2030-driven-by-growth-in-developing-countries/#prettyPhoto> accessed 13 June 2017).

communities to develop Uganda's petroleum sector and deployed the army to guard the development facilities, which has maligned the communities.[403]

Ending hunger, achieving food security, and improving nutrition require the promotion of sustainable agriculture.[404] The Government can promote the use of petroleum by-products to supply energy for all food production stages, as raw materials for fertilizers and pesticides, in manufacturing of hydrocarbon-based packaging, power agricultural machinery, and for transportation and storage or refrigeration facilities.[405] Hydrocarbons are vital in increasing modern agriculture's productivity, thus enabling the achievement of food security.

Uganda's Poverty Eradication Action Plan (PEAP)[406] and Vision 2040[407] provided that one of the strategies to achieving poverty eradication is through modernising agriculture to increase incomes of the poor by raising farm productivity, and increasing the share of agricultural production, and creating

[403] Uganda Human Rights Commission Special Report, *Oil in Uganda: Emerging Human Rights Issues, Special Focus on Selected Districts in the Albertine Graben* (Uganda Human Rights Commission Special Report, 2013)

[404] Agenda 2030 (n 148) Goal 2; World Bank, 'Agriculture overview' http://www.worldbank.org/en/topic/agriculture/overview accessed 11 November 2016; Food and Agriculture Organization of the United Nations, 'Climate- Smart Agriculture Sourcebook,' (2013).

[405] Ibid

[406] International Monetary Fund, 'Uganda: Poverty Reduction Strategy Paper' International Monetary Fund Country Report No. 05/307 (31 August 2005) <https://www.imf.org/en/Publications/CR/Issues/2016/12/31/Uganda-Poverty-Reduction-Strategy-Paper-18522> accessed on 11 November 2016

[407] Government of Uganda, 'Vision 2040: A Transformed Ugandan Society from a Peasant to a Modern and Prosperous Country within 30 years' (2012) https://www.gou.go.ug/content/uganda-vision-2040> accessed 3 March 2018; MFPED National Development Plan 2010/11 – 2014/15. Ministry of Finance, Planning and Economic Development (2010)..

on-farm and off-farm employment.[408] MOC's could advance the vital agricultural sector by establishing a "shared-use infrastructure" with the small-scale farmers in neighbouring communities who are often competing for land and water usage. Through building reservoirs for water storage, designing infrastructure that supports access to energy for irrigation, and harnessing natural gas to produce fertilisers to support agriculture production.

There are several positive examples where MOCs have collaborated with agricultural communities' sustainable development. Nigeria's Nigerian Agip Oil Company (NAOC) Limited promoted the Green River Project (GRP) for rural host farming communities in the Niger River Delta. NAOC provides technology transfer through vocational guidance and training to increase food availability.[409] In Parentis-en-Born (France), Vermillion Rep Energy partnered with the Tom Daqui Tomato Company to build a tomato farm (producing 7,500 tonnes of vine tomatoes per annum) next to its extraction facilities that utilise its surplus heat energy at a low cost.[410] Without this heat source, the

[408] Economic Policy Research Centre (EPRC), 'Fostering A Sustainable Agro-Industrialisation Agenda in Uganda' (2018) <file:///C:/Users/n0688650/Downloads/Agro%20Industrialisation%20MAIN%20Report%202019.pdf> accessed on 23rd November 2018; Ministry of Foreign, 'Uganda's Plan for the Modernisation of Agriculture' (20 January 2006)

[409] GRP, 'Green River Project, Nigerian Agip Oil Company Limited, Impact Evaluation, April,' (2005), p 117; Franklin Eziho Nlerum, 'Effect of Green River Project on Rural Poverty Alleviation in Bayelsa State, Nigeria,' *Journal of Sustainable Agriculture and the Environment*, 12(2) (2010) 107-114; Ikechukwu Mark Nwachukwu, 'Planning and Evaluation of Agricultural and Rural Development Projects' *Lamb House Publishers*, (2008) 74

[410] Vermilion Energy, "Advancing Sustainability Through Partnership: Together 2017: Partnerships for the UN SDGs" (2017) <https://www.vermilionenergy.com/files/pdf/investor-relations/Advancing_Sustainability_Through_Partnership_V4.pdf> accessed on 4th August 2018

greenhouses would have to be heated by combustion of oil or gas, which would add to production cost. This whole operation supports 250 local jobs.[411]

2.3.1.4 Through revenue-sharing arrangements

To allow the local communities to self-determine economic development goals,[412] MOC's can also participate by creating Community Development Agreements (CDA) between the MOC the government and the local communities. [413] In this way, CDAs can help provide the enhanced development cooperation needed to implement anti-poverty programmes.[414] An example of a good CDA is through revenue-sharing arrangements. These are financially inclusive business models in which MOC can share project revenues with the community, through community trusts, which the community could spend on development projects at its discretion.

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[411] Ibid

[412] James M Otto, 'Community Development Agreement: Model Regulations & Example Guidelines' *World Bank Group* (Washington 2010) <http://documents1.worldbank.org/curated/en/278161468009022969/pdf/614820WP0P11781nal0Report0June02010.pdf> accessed 10 December 2017

[413] Emma Irwin, 'Introduction to Community Development Agreements' (2015) https://www.slideshare.net/ethicalsector/session-5-cd-as-mcrb-workshop-january-2015?from_action=save> accessed 10 December 2017; International Council on Mining and Metals, 'Understanding Company-Community Relations Toolkit' *International Council on Mining and Metals* (London, 2015) <https://www.icmm.com/website/publications/pdfs/social-and-economic-development/9670.pdf> accessed 10 December 2017; Jennifer Loutit, Jacqueline Mandelbaum and Sam Szoke-Burke, 'Emerging Practices in Community Development Agreements,' *Columbia Center on Sustainable Investment* (February 2016); Jordon Kuschminder, Nuru Deen, Morten Blomqvist, '6 Significant Steps to Reach a Community Development Agreement in Sierra Leone,' *Oxfam IBIS* (Sierra Leone 2016) <https://oxfamibis.dk/sites/default/files/PDF%20global/Sierra%20Leone%20PDF/6_steps_to_reach_a_com_dev_agree.pdf> accessed 10 December 2017

[414] Jennifer Loutit, Jacqueline Mandelbaum and Sam Szoke-Burke, 'Emerging Practices in Community Development Agreements,' (*Columbia Center on Sustainable Investment* February 2016).

MOCs could maintain direct project management oversight, where the local leadership is weak or constrained. They could create independent charity organisations or establish independent development trust, with trustees appointed by the investor and the community. Through these organisations and trust, MOCs provide financial, medical, and material assistance, and education workshops. For example, suppose communities have a high prevalence of prostitution and HIV. In that case, the MOCs could set up a charity focused on supporting HIV-positive individuals, orphans and single-headed households who had lost income providers due to the disease.

Another example of CDA is where MOCs get involved in training local communities on fiscal management. For example, CNOOC participated in this by facilitating fiscal management skills training project to Project Affected People (PAP) and their family members to prepare them to utilize the compensation funds well rather than putting it to waste.[415]

2.3.1.5 Through Education and Vocation Training Programmes

Socio-economic empowerment strategy includes supporting education as a fundamental right established under Uganda's Constitution.[416] It provides that every person has a right to affordable and accessible education. Also, The Government committed to providing high-quality education to all the citizens

[415] Uganda Human Rights Commission Special Report, *Oil in Uganda: Emerging Human Rights Issues, Special Focus on Selected Districts in the Albertine Graben* (Uganda Human Rights Commission Special Report, 2013)
[416] The Constitution of the Republic of Uganda, 1995, Article 30.

of a country by 2030.[417] Good quality education enables both social mobility and equitable economic development.

For the petroleum industry to significantly impact the country's socio-economic development, a collaborative effort on both the MOCs and the Government is necessary to develop the education and vocational skills sector. [418] Since the petroleum industry is nascent in Uganda, MOCs face challenges employing locals due to the lack of suitably skilled workers.[419] To address this, both the MOCs and the government can enhance the education sector by supporting specialised training in science, engineering, technology, and math (STEM) education relevant to the industry.[420] As well as training in skills such as book-keeping, marketing, language, communication, and technical advice to helping them develop business plans.[421]

Not all Ugandans can afford higher education. Therefore, MOCs and government could work on a programme or policy that aims at implementing

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[417] Agenda 2030 (n 148) Goal 4

[418] Upstream Act 2013, S 56 (3) (f); Jerry Lee, "How oil & gas companies are promoting STEM education," Oil Online (5 November 2014), available at https://www.oilonline.com/news/career/how-oil-gas-companies-are-promoting-stem-ucation#sthash.cSyIESqp.dpuf (last accessed 13 June 2016); Living Earth "Vocational Training in the Context of Oil and Gas Developments: Best Practice and Lessons Learnt," (November 2014).

[419] Upstream Act 2013, S 124-127; The Petroleum (Exploration, Development and Production) (National Content) Regulations, (The Uganda Gazette No. 45, Volume CIX 2016) Regulation 1-3, 10, 16; IPIECA, 'Local content guidance for the oil and gas industry' (2nd edn April 2016); Agenda 2030 (n 148) Goal 8.

[420] Ibid; Bill and Melinda Gates Foundation Flagship Report Paper Series 'Leveraging extractive industries for skills development to maximize sustainable growth and employment,' (June 2015); Centre De Recherches Entreprises et Societes, 'Skills shortages in the global oil and gas industry: How to close the gap' (2008) Parts I, II; International Labor Organization and European Union, 'Skills and Occupational Needs in Renewable Energy,' (2011); IPIECA 2016. Local content guidance for the oil and gas industry (Second edition)

[421] Upstream Act 2013, S 124-127; The Petroleum (Exploration, Development and Production) (National Content) Regulations, (The Uganda Gazette No. 45, Volume CIX 2016) Regulation 10

this training in the local educational institutions, not just specialised training relevant to the industry.[422] Companies can partner with local service providers to offer technical and vocational education and training, which improves employability by providing practical, profession-oriented training and knowledge, including assisting potential suppliers with business improvement plans and tender preparation.[423] Support can also take the form of providing opportunities for people to have hands-on, project-based mentoring experiences within the petroleum industry or facilities. As well as identify candidates already in the industry for leadership positions and provide sponsorship and training.[424]

MOCs in Uganda have already engaged in this goal; for example, Tullow constructed several classrooms, housing units and kitchens for Kaiso Primary School, which is within their operation area. Through the Tullow Group Scholarship Scheme (TGSS), Tullow offered scholarships to Ugandans from 2012 to 2016[425] to help them pursue postgraduate degrees with relevance to the petroleum industry, in leading universities in the UK, Ireland and France.

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[422] Refer to chapter three, section 3.7.2.3 for discussion on the provision of training and skilling of Ugandans to work in the petroleum industry; Bill and Melinda Gates Foundation Flagship Report Paper Series 'Leveraging extractive industries for skills development to maximize sustainable growth and employment,' (June 2015).

[423] IPIECA, ''Local Content: a guidance document for the oil and gas industry,' (2nd edn 2016); Living Earth "Vocational Training in the Context of Oil and Gas Developments: Best Practice and Lessons Learnt," (November 2014Chinyere Ayonmike, 'TVET: Model for addressing the skills shortage in Nigerian oil and gas industries,' *Department of Technical and Business Education, DeltaState University*;)

[424] PWC, 'Building talent for the top: A study of women on boards in the oil and gas industry,' *PricewaterhouseCoopers* (November 2013).

[425] Tullow Oil Plc, 'Tullow Group Scholarship Scheme,' (2015) <https://www.tullowoil.com/media/case-studies/2015-tullow-group-scholarship-scheme> accessed on 19th July 2018.

Tullow invested over $20m in the scheme, allowing the Group to address the need for skilled professionals for the petroleum industry. Total Energies offered Scholarships to indigent students from the project districts for advanced level studies in selected modern schools in Kampala, the capital city.[426]

Also, CNOOC donated various scholastic materials and foodstuff to Buhuka Primary School and paid salaries to its teachers. [427] It donated USD50,000 (Shs131 million) as a sponsorship package in support of 70 youths who enrolled for the Basic Skills Training programme at the Nile Vocational Institute in Hoima district. CNOOC contributed a total of UGX23, 385,600 ($6,650) to award 60 best students in Hoima district at PLE, UCE and UACE to further their education.

In 2011, Schlumberger, one of the companies providing services to the petroleum sector in Uganda, donated USD 3.5million to the Department of Geology and Petroleum Studies at Makerere University. The Donation covered computer software licenses, hardware installation, support and maintenance and training seminars for both the students and lecturers. The company also donated furniture to the laboratory.[428]

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[426] Total, 'Our activities in Uganda,' (2017) available at <https://www.total.com/sites/default/files/atoms/files/brochure_ouganda_en.pdf> accessed on 19th July 2018.

[427] Uganda Human Rights Commission Special Report, *Oil in Uganda: Emerging Human Rights Issues, Special Focus on Selected Districts in the Albertine Graben* (Uganda Human Rights Commission Special Report, 2013)

[428] Ibid

Despite the above positive action, in the refinery areas, some residents decided to stop their children from going to school when the Government relocated the Primary Schools their children attended to make way for the petroleum activities. Ultimately violating the rights of the children and regressing the government policy to empower the locals through education.[429] Engaging in consultation with the families in such communities should have been a priority, so that the MOCs reach a reasonable compromise that did not negatively infringe on the children's right to education.

2.3.1.6 Offering Direct and Indirect employment

The Government can leverage the Petroleum industry to further support the achievement of SDGs through offering new direct and indirect employment opportunities for Ugandans. [430] MOCs and their subcontractors could participate by relying on the services and goods provided by Ugandans and Ugandan companies within their value chain. The National Content Regulations provides for categories of goods and services reserved for Ugandan entrepreneurs where possible.[431]

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[429] Ibid

[430] Refer to chapter one, section 1.4.2 for discussion on petroleum industry and sustainable development; Agenda 2030 (n 148) Goal 1 (no poverty), 2 (zero hunger), 8 (decent work and economic growth) and 9 (industry, innovation and infrastructure); Upstream Act 2013, s 124-127; The Petroleum (Exploration, Development and Production) (National Content) Regulations 2016, (The Uganda Gazette No. 45, Volume CIX) Regulation 1

[431] Refer to chapter three, section 3.7.2. discussing Local Content and the Petroleum Industry; Upstream Act 2013, s 124-127; The Petroleum (Exploration, Development and Production) (National Content) Regulations 2016, (The Uganda Gazette No. 45, Volume CIX) Regulation 10; Elijah Dickens Mushemeza, John Okiira, 'Local Content Frameworks in the African Oil and Gas Sector: Lessons from Angola and Chad, *ACODE Policy Research Series, No.72* (Kampala 2016)

SDG 5 provides for the need to empower women and decrease gender inequalities.[432] In Uganda, women and girls are often the underrepresented groups within the labour force (except agricultural sector). The development of the petroleum industry presents an opportunity for MOCs with inclusive policies and experience to replicate this culture in Uganda and create an opportunity to support women's career advancement within the petroleum industry.[433] They can empower women through training[434] and employment opportunities[435] and access to revenue. They can develop gender-equitable benefits systems, require female inclusion in their community engagement activities, [436] and implement gender-sensitive local content policies that give preference in local procurement to companies owned by women entrepreneurs.[437] Skills and training gained from working in the oil industry can, in turn, be used in other sectors, for the longer-term economic development of the women.

[432] Agenda 2030 (n 148) Goal 5
[433] Ibid Goal 1
[434] The Gulf Intelligence, 'How to Advance Women in the Global Oil & Gas Industry,' (2015).
[435] American Petroleum Institute, 'Minority and Female Employment in the Oil & Gas and Petrochemical Industries,' (March 2014) 20; Agenda 2030 (n 148) Goal 5, Achieve gender equality and empower all women and girls
[436] PWC, 'Building talent for the top: A study of women on boards in the oil and gas industry,' *Price water house Coopers* (November 2013).
[437] Upstream Act 2013, s 124-127; The Petroleum (Exploration, Development and Production) (National Content) Regulations 2016, (The Uganda Gazette No. 45, Volume CIX) Regulation 1; American Petroleum Institute, 'Minority and Female Employment in the Oil & Gas and Petrochemical Industries,' (March 2014) 20; Jen Scott, Rose Dakin, Katherine Heller and Adriana Eftimie, 'Extracting Lessons on Gender in the Oil and Gas Sector,' *Extractive Industries for Development Series #28, World Bank* (May 2013).

Currently, women employees in the sector constitute 9.4% of the total labour unit.[438] The local women have taken up low wage petty jobs as drivers, cooks, and flag raisers to direct traffic. However, there is a small number of women already in highest leadership positions in Uganda's petroleum industry, for example, the Minister of Energy and Mineral Development, Minister of State for Mineral Development, CEO of Uganda's National Oil Company, the chairperson of the Uganda Refinery Holding Company a subsidiary company of the Uganda National Oil Company, among other. These are positive steps towards the industry's contribution towards sustainable development.

2.3.1.7 Through promoting Healthy Lives and Well-being

The petroleum industry's actors can also promote healthy lives and well-being in the countries they operate by prioritizing their workers' health and safety, investing in community health systems, and training local health workers in the little-known occupational health knowledge (SDGs 3 and 6).[439] Also, by making fiscal contributions to collaborative projects by the governments and other stakeholders and global initiatives to combat infectious diseases like HIV/AIDS, malaria, tuberculosis, and Ebola.[440] MOCs can also contribute to

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[438] Akina Mama wa Afrika, 'An in - depth research on Oil & Gas Extraction Industry in East Africa: An African Feminist Perspective, (2014) 20 file:///C:/Users/n0688650/Desktop/THESIS%20FINALS/Feminist%20Analysis%20on%20%20Oil%20and%20Gas%20Report.pdf> accessed on 20th March 2018

[439] Sam Jonah, 'Common Health, Safety and Environmental Concerns in Upstream Oil and Gas Sector: Implications for HSE Management in Ghana, School of Business, University of Ghana; World Health Organization, 'Managing the public health impacts of natural resource extraction activities,' (November 2010); IPIECA, 'Vector-borne disease management programmes,' (March 2013).

[440] World Health Organization, 'Managing the public health impacts of natural resource extraction activities,' (November 2010) https://commdev.org/wp-content/uploads/2015/06/WHO-Managing-the-public-health-impacts.pdf accessed 13 June

the government's efforts in developing public health systems by training local health workers in the little-known occupational health knowledge.[441]

Tullow Uganda has already engaged in such initiatives by constructing Buliisa Health Centre[442] to improve local communities' quality of life. It also facilitated free HIV/AIDS counselling/testing and free maternity services to local community members in Kyehoro, Hoima District. Total E&P Uganda has also constructed the Avogera Health Center in the sub-county of Ngwedo. In June 2012, CNOOC donated drugs worth Shs85 million ($24,172.56) to Ntoroko Local Government responding to the cholera epidemic in the area;[443] paid salaries to Buhuka Health Centre nurses. All this served to contribute to the improvement of the network of community health centres in the region.

2017; Global Business Coalition, 'HIV, TB & Malaria: Management & Prevention in the Oil & Gas Supply Chain (2010) http://gbchealth.org/wp-content/uploads/2015/09/HIV-TB-and-Malaria-Management-and-Prevention-in-the-Oil-and-Gas-Supply-Chain.pdf accessed 13 June 2017; International Finance Corporation, 'Environmental, Health and Safety Guidelines for Onshore Oil and Gas Development,' (2007) https://www.ifc.org/wps/wcm/connect/4504dd0048855253ab44fb6a6515bb18/Final%2B-%2BOnshore%2BOil%2Band%2BGas%2BDevelopment.pdf?MOD=AJPERES&id=1323153172270 accessed 13 June 2017; IPIECA, 'Managing health for field operations in oil and gas activities '(2011); USAID, 'How the Oil and Gas Industry Can Address Emerging Infectious Diseases. '(2-13) https://www.usaid.gov/sites/default/files/documents/1864/Reducing-Zoonotic-Disease-Transmission-Oil-Gas-Industry-red.pdf

[441] World Health Organization, 'Managing the public health impacts of natural resource extraction activities,' (November 2010); IPIECA, 'Vector-borne disease management programmes,' (March 2013); Sam Jonah "Common Health, Safety and Environmental Concerns in Upstream Oil and Gas Sector: Implications for HSE Management in Ghana," School of Business, University of Ghana.

[442] Tullow Oil Plc, 'Tullow Group Scholarship Scheme,' (2015) <https://www.tullowoil.com/media/case-studies/2015-tullow-group-scholarship-scheme> accessed on 19th July 2018.

[443] Alan Baguma 'Corporate Social Responsibility: The Perspective of Oil and Gas Companies' (2019) http://afrienergyminerals.org/wp-content/uploads/2019/05/AEMI-Corporate-Social-Responsibility-Alan-Baguma-UNOC.pptx> accessed 20 December 2019

2.3.1.8 Opportunity to Develop New Cities

Uganda has one major city, Kampala, and that is where most of its population is concentrated as people search for job opportunities. The development of the petroleum industry in different districts has led to opportunities for the government to create other modern cities. As Government develops new infrastructures, and the potential to access energy, new jobs, and benefits from the other social initiatives, this adds to increasing the economic output of another region within the country.[444] MOCs can contribute to long-term planning for urban development by "*identifying opportunities to improve how cities generate and use energy, use infrastructure, reduce waste, reduce their carbon footprint, and provide cleaner and more efficient power generation through the increased provision of natural gas*"[445] thereby contributing to SDG 7, 8, 9 and 11.[446]

As an example, Tullow Uganda has already partnered with several organisations and companies to achieve the above goals. First with Traidlinks, an Irish non-profit organisation, to establish Hoima Enterprise Centre, in

[444] Shell Global, 'Future Cities,' available at http://www.shell.com/energy-and-innovation/the-energy-future/future-cities.html (last accessed 13 June 2016); Shell International B.V., 'New lenses on Future Cities,' (2014).
[445] IPIECA, 'Mapping the Oil and Gas industry to the Sustainable Development Goals: An Atlas' (2017) 22 https://www.commdev.org/wp-content/uploads/2015/05/P_For-Comment_Mapping-the-Oil-and-Gas-industry-to-the-Sustainable-Development-Goals-an-Atlas_Feb2017.pdf
[446] Refer to chapter one section 1.4.3; The Independent, 'Parliament approves 15 new cities for Uganda' *The Independent* (April 28, 2020) https://www.independent.co.ug/parliament-approves-15-new-cities-for-uganda/ accessed on 3rd May 2020

Hoima District.[447] The centre boasts local businesses by providing business training, information on emerging opportunities and services for development. Secondly, Tegeka contractors constructed a Community Resource centre furnished with computers and internet facilities in Buliisa district. The community will use the Resource centre to access information on the district's programs and mobilize and sensitize youth development activities.

2.3.1.9 Health Impact Assessments within Environmental Impact Assessments (EIAs)

MOCs are legally required to conduct ESIAs to ensure that they plan to prevent or mitigate their operations' environmental impacts.[448] However, ensuring the community's social resilience means expanding the elements of EIAs to include Health Impact Assessments (HIA).[449] Owing to the potential health risks associated with the petroleum industry, like exposure to air and water emissions, risk of fires, among others. HIAs can be a useful strategy in

[447] Tullow Oil Plc, 'Tullow Group Scholarship Scheme,' (2015) <https://www.tullowoil.com/media/case-studies/2015-tullow-group-scholarship-scheme> accessed on 19th July 2018.

[448] NEA 2019, s 110 19(1) (a)- 116, the Third Schedule; Uganda Wildlife Act 2000, section 15; National Environment (Environment Impact Assessment) Regulations No. 13 of 1998; Upstream Act 2013, s 135; Refer to discussion in chapter three, section 3.6 for a detailed discussion on the legal and regulatory framework governing environmental protection in the petroleum industry.

[449] IPIECA "Health," available at http://www.ipieca.org/focus-area/health (last accessed 13 June 2016); Deanna Kemp, Frank Vanclay, 'Human rights and impact assessments: clarifying the connections in practice' (Impact Assessments and Project Appraisal 2013). Vol. 31, No. 2, pp. 86-96; World Health Organization "Managing the public health impacts of natural resource extraction activities," November 2010).

guiding the development and implementation of systematic health action plans as envisioned in SDG 7, 9, and 11 to 13.[450]

Although ultimate responsibility remains with the Government to provide social services, the petroleum industry opens numerous opportunities for stakeholder collaboration *inter alia* to design social benefit programmes, such as modern healthcare facilities, affordable housing, care for the elderly, childcare, quality education facilities for those that cannot afford it.

2.3.1.11 Through prioritising issues of health and safety of petroleum industry workers

The Local Content provisions ensure the public participates in the petroleum industry, through employment opportunities. However, the petroleum industry involves heavy equipment, hazardous chemicals, exposure to biological agents, and geographical risks that might harm the workers' health and productivity and sometimes the communities.[451] Therefore, MOCs can do their part by ensuring that their employees' health and safety remains a priority per the health and safety laws.[452]

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[450] Agenda 2030 (n 148); Refer to chapter one, section 1.4.2 for discussion on petroleum industry and sustainable development

[451] United States Department of Labor "Health Hazards Associated with Oil and Gas Extraction Activities,", available at https://www.osha.gov/SLTC/oilgaswelldrilling/healthhazards.html (last accessed on 13 June 2016).

[452] Occupational Safety and Health Act, 2006; Petroleum (Exploration, Development and Production) (Health, Safety and Environment) 2016; Agenda 2030 (n 148) Goal 3: Good health and well-being; Refer to chapter one, section 1.4.2 for discussion on petroleum industry and sustainable development

Uganda's health and safety laws are not sophisticated to effectively govern the nascent petroleum industry. MOCs can rely on their advantageous experience from working in multiple countries and knowledge of international best practice standards to take the lead to design safe and healthy working environments. In addition to implementing strong internal health and safety policies in line with international standards. MOCs can also support its employees with advanced technical, cognitive, and social skills training and provide protective equipment.[453]

For example, when Chevron began constructing the Bibiyana Field in Bangladesh in 2005, the employees on the project, being local villagers were not accustomed to wearing safety glasses, protective shoes, and fire-retardant clothing.[454] They needed time to learn new a workplace safety culture, and Chevron fostering this cultural paradigm shift by establishing a Health, Environment and Safety training centre within the local community. The training utilised visual aid so that the illiterate community members also benefited. They also required that their employees and contractors hold daily safety meeting onsite and undergo Fitness for Duty process.[455] By extending the safety culture into the local communities Chevron managed to avoid any significant environmental incidents, spills, or fires.[456]

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[453] IPIECA, 'Local Content: a guidance document for the oil and gas industry' (2nd edition April 2016); Chinyere Ayonmike, "TVET: Model for addressing the skills shortage in Nigerian oil and gas industries," Department of Technical and Business Education, Delta State University; Living Earth "Vocational Training in the Context of Oil and Gas Developments: Best Practice and Lessons Learnt," (November 2014).

[454] Ibid

[455] Ibid

[456] Ibid

2.3.2 Environmental Benefits

There is a global consensus that Petroleum development has historically contributed to some of the challenges that the SDGs seek to address, like climate change and environmental degradation. However, the petroleum industry still has a unique role in establishing substantial positive impacts on the environment. The discussion below focuses on how MOCs can advance the pursuit of SDGs in Uganda, like avoiding or mitigating the negative impacts (SDG 13, 14 and 15).[457]

2.3.2.1 Through the Adoption of Technological Advancements that Reduce or Eliminate Greenhouse Gas Emissions

The petroleum industry is one of the significant contributors to increased anthropogenic Green House Gas (GHG) emissions, due to the high concentrations of nitrous oxide, carbon dioxide, and methane emitted during the exploration and production process.[458] GHG has contributed to global warming, whose consequences include unpredictable extreme weather events, patterns and frequency.[459] SDG13, the United Nations Framework Convention on Climate Change (UNFCCC), Paris Agreement, among others, focus on

[457] Refer back to chapter one section 1.4.2 for discussion on petroleum industry and sustainable development; A King, and M Lenox, 'Industry self-regulation without sanctions: The chemical industry's responsible care program' (*Academy of Management Journal*, 43(4), 2000) 698-716; OECD, 'Mobilising private investment for development: Policy lessons on the role of ODA, (*The DAC Journal*, 6(2) 2005

[458] R E H Sims, R N Schock, A Adegbululgbe, J Fenhann, I Konstantinaviciute, W Moomaw, H B Nimir, B Schlamadinger, J Torres-Martínez, C Turner, Y Uchiyama, S J V Vuori, N Wamukonya, X Zhang, "Climate Change 2007: Mitigation," Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change (2007) 261

[459] Ibid

eliminating energy sources of GHG emission and promoting technologies that reduce emission in the context of global development.[460]

The Paris Agreement acknowledges that achieving net-zero greenhouse gas emissions has to be accomplished in the context of the priorities of sustainable development and poverty eradication.[461] It does not call on developing countries to take on absolute emission-reduction targets, but slightly enhance emission-mitigation efforts, and "*encourages them to transition over time to economy-wide reductions that reflect their specific circumstances.*"[462] Uganda's petroleum industry is nascent and will need time to achieve its economic development goals. Since it is unlikely that the Government would stop its petroleum development goals, the MOCs and the government will have to support technological advancements.

MOCs can help the government achieve SDG 13 by minimising carbon emissions from their operations by using carbon-capture-utilisation and storage and introduce technological innovations in the form of methane detectors to identify leaks.[463] Instead of flaring gas, they can utilise it for

[460] Refer to chapter one, section 1.4.2 for discussion on petroleum industry and sustainable development; Refer to chapter five for further discussion on the international legal framework on environmental protection.
[461] Agenda 2030 (n 148); Paris Agreement Under the United Nations Framework Convention on Climate Change (adopted 12 December 2015, entered into force 04 November 2016) UNTS No. 54113 Ratified in Uganda 21 September 2016 (Paris Agreement); Oil and Gas Climate Initiative "More energy, lower emissions: Catalyzing practical action on climate change," (October 2015); Critical Resource "The Heat is On," (November 2015)
[462] Douglas Barnes, Robert van der Plas and Willem Floor, "Tackling the Rural Energy Problem in Developing Countries," (International Monetary Fund 1997); World Bank Group "Toward a Sustainable Energy Future for All: Directions for the World Bank Group's Energy Sector," (July 2013).
[463] Refer to chapter one, section 1.4.2 for discussion on petroleum industry and sustainable development.

energy production, liquefying it for transportation or putting it back to the source.[464] MOCs are knowledgeable of these technologies, even more than the government, and therefore investing in their use allows them to be engaged as active participants in Uganda's efforts to combat climate change and its impacts and mitigate their potential impacts from petroleum exploration and production activities.

For example, by using technological advancements such as directional drilling techniques which allows for one pad to be used to drill multiple wells, thus reducing the operational footprint. Also, by using enhanced oil recovery techniques like re-injecting Natural gas into the reservoirs can maintain the pressure that boosts the volume of crude oil recoverable from a given well, thereby reducing the number of well that need to be drilled.[465]

2.4 Conclusion

The 'Resource Curse Phenomenon' evidently raises more complex realities than merely being an economic issue from the preceding discussion. Petroleum development comes with significant impacts on the environment, and the communities. However, Uganda's petroleum resources do not have to

[464] Shay Banerjee, Perrine Toledano, 'A Policy Framework to Approach the Use of Associated Petroleum Gas,' Columbia Center on Sustainable Investment, Columbia University, (2016), http://ccsi.columbia.edu/files/2014/06/A-policy-framework-for-the-use-of-APG-July-2016-CCSI.pdf accessed on 29th June 2017

[465] Upstream Act 2013, S149 (h)

lead to the 'Resource Curse Phenomenon.' MOCs and Uganda's Government must balance the challenging expectations in a developing country with enormous social and economic needs, limited institutional capacities and lingering ethnic tensions, and the expectations of increased opportunities and benefits capable of transforming the Country from the third most impoverished country in the world[466] to a more self-reliant country capable of achieving its 2040 Vision of transforming the country into a middle-income country.[467]

One of the crucial ways the Government can achieve these expectations and mitigate the petroleum industry's impacts is to have an effective policy, legal, regulatory, and institutional frameworks. Since 2013, Uganda has been legislating for the Petroleum industry. The following chapter assesses Uganda's legal and regulatory framework governing the petroleum industry, to establish whether it has put adequate protective measures to circumvent the likelihood of the 'Resource Curse Phenomenon' as discussed in this chapter and achieve sustainable development.[468]

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[466] FocusEconomics, 'The Poorest Countries in the World', *FocusEconomics* (19 November 2018) < https://www.focus-economics.com/blog/the-poorest-countries-in-the-world#GDP%20per%20capita%202016-2022) accessed on 19 January 2019

[467] Government of Uganda, 'Vision 2040: A Transformed Ugandan Society from a Peasant to a Modern and Prosperous Country within 30 years' (2012) https://www.gou.go.ug/content/uganda-vision-2040> accessed on 3rd March 2018; MFPED, National Development Plan 2010/11 – 2014/15. Ministry of Finance, Planning and Economic Development (2010).

[468] Refer to Chapter Three for a detailed assessment of Uganda's national legal and regulatory framework, Chapter Four for a detailed assessment of Uganda's PSAs, chapter five for a detailed assessment of the international laws relevant to the petroleum industry and Chapter Six for assessment of BIT(s) with influence in Uganda's petroleum industry.

CHAPTER THREE

3.0 NATIONAL POLICY, LEGAL, REGULATORY, AND INSTITUTIONAL FRAMEWORKS GOVERNING UGANDA'S PETROLEUM INDUSTRY

The previous chapter discussed natural resource development and the theory of 'Resource Curse Phenomenon.' It also discussed the various associated negative impacts of the petroleum industry on the economy, environment, and community as a further/additional aspect of this Resource Curse phenomenon. One of the crucial ways Uganda can manage the petroleum industry's negative impacts is to have effective policy, legal, regulatory, and institutional frameworks. Therefore, this chapter assesses the above frameworks to establish their adequacy in ensuring socio-economic resilience, environmental protection, and generally, its ability to foster the achievement of Uganda's Vision 2040 and commitments to UN 2030 SDGs.

3.1 Constitution of the Republic of Uganda, 1995.

The Constitution of the Republic of Uganda (the Constitution) is Uganda's supreme law, providing the basis for all other legal and regulatory frameworks to derive authority.[469] Objective XXVII (iii) lays out the foundation for sustainable energy development by providing a duty for the state to promote and implement energy policies that meet people's basic needs and environment. The Constitution provides that "*the entire property in, and the control of, all minerals and petroleum in, on or under, any land or waters in Uganda*

[469] The Constitution of the Republic of Uganda, 1995 Article 2.

are vested in the Government on behalf of the Republic of Uganda."[470] Therefore, since the government represents citizens' interests, all petroleum contracts with MOCs, and the legal and institutional framework established for the development of Uganda's petroleum industry, ought to ensure socio-economic resilience of the community and environmental protection, consequently avoiding the 'Resource Curse' experience.[471]

The Constitution establishes the Parliament of Uganda,[472] which is further empowered to make laws on any matter for the peace, order, development, and good governance of Uganda.[473] Specific to matters on the petroleum industry, the Constitution provides that the Parliament "*shall make laws regulating the exploitation of petroleum, sharing of royalties, the conditions for payment of indemnities, and the conditions regarding the restoration of derelict lands*."[474] To this regard, the Parliament passed the Petroleum (Exploration, Development, and Production) Act 2013 (the 'Upstream Act'),[475] which repealed the Petroleum (Exploration and Production) Act of 1985; the Petroleum (Refining, Conversion, Transmission and Midstream Storage) Act

[470] Ibid Article 244 (2); The Constitution (Amendment) (No. 2) Act, 2005, (Uganda Printing and Publishing Corporation, Government of Uganda 2005) Section 43; Petroleum (Exploration, Development and Production) Act (2013) section 4.
[471] Refer to section 3.2 below.
[472] Constitution of the Republic of Uganda, 1995, Article 77
[473] Ibid Article 79
[474] Ibid Article 244 (2); The Constitution Amendment Act of 2005, (Uganda Printing and Publishing Corporation, Government of Uganda 2005) S 43
[475] Upstream Act 2013

2013 (the "Midstream Act")[476] among others discussed below,[477] to govern the petroleum industry.

3.2 National Oil and Gas Policy (NOGP 2008)

NOGP was approved and adopted by Cabinet in 2008 following the discovery of commercially viable petroleum resources in 2006.[478] The overall goal of the NOGP is to "*Use the Country's Oil and Gas Resources to Contribute to Early Achievement of Poverty Eradication and Create Lasting Value to Society*".[479] The policy has ten objectives setting out the Government's plan of action in guiding the process of achieving the various strategic goals for petroleum development. These objectives include developing the legal and institutional frameworks, petroleum contracts, environment protection and biodiversity conservation, public anxiety management, transparency and accountability and revenue management of petroleum resources. The legal framework discussed below covers the different objectives in the NOGP.

[476] Petroleum (Refining, Gas Processing and Conversion, Transportation and Storage) Act 2013
[477] Petroleum (Exploration, Development and Production) (Metering) Regulations 2016; Petroleum (Refining, Conversion, Transmission and Midstream Storage) Regulations 2016; Petroleum (Refining, Conversion, Transmission and Midstream Storage) (National Content) Regulations, 2016; Uganda Wildlife (Murchison Falls National Park) Regulations-S.I 2003; National Environment (Standards for Discharge of Effluent into Water or on Land) Regulations, 1999; Environmental Impact Assessment Regulations, 1998; National Environment (Noise Standards and Control) Regulations, 2003; Petroleum Exploration and Production (Conduct of Exploration Operations) Regulations, 1993; Petroleum (Exploration, Development and Production) Regulations 2015; Petroleum (Exploration, Development and Production) (Health, Safety and Environment) Regulations 2016; Petroleum (Exploration, Development and Production) (National Content) Regulations 2016
[478] NOGP 2008, Objective 1
[479] Ibid

3.3 Petroleum Laws

3.3.1 The Petroleum (Exploration, Development and Production) Act 2013 (the 'Upstream Act 2013')

Parliament enacted the Upstream Act to effectuate article 244 of the Constitution and the NOGP. The Upstream Act makes several provisions concerning the regulation of petroleum exploration, development, and production. It establishes the institutional framework that regulates the industry[480] and manages the Government's commercial interests.[481] It also regulates the licensing and participation of commercial entities in petroleum activities through Production Sharing Agreements (PSA).[482] It provides for an open, transparent, and competitive process of licensing.[483]

The Upstream Act also makes provisions for creating a conducive environment for promoting exploration, development, and production of Uganda's petroleum potential. It also provides for efficient and safe petroleum activities,[484] for the cessation of petroleum activities and decommissioning of infrastructure,[485] for the payment arising from petroleum activities, the

[480] Upstream Act 2013, s 9-41; NOGP 2008, objective 2.
[481] Upstream Act 2013, s 42-46
[482] Ibid s 47-92
[483] Upstream Act 2013, s 48(2), 69 (6), 78, 81 (5), 86 (3), 92, 93(1), 93(2), 94(2), 95 (1), 96 (3), 121(2), 123, 128(1), 155(1), 168(2) and 183; The Petroleum (Exploration, Development And Production) Regulations, 2016 section 7, 11-17
[484] Ibid s 96-111
[485] Ibid s112-120

conditions for the restoration of derelict lands,[486] and state participation and national content,[487] and other related matters.[488]

The first objective of the NOGP is to ensure efficiency in licensing areas that have the potential for petroleum production in the country. The policy provides for the initiation of gradual licensing vis-à-vis licensing all areas at once; open and transparent bidding; execution of due diligence on companies applying for licenses and avoiding the undesirable situation of a monopoly by licensing and maintaining several oil companies. The Upstream Act effectuates this NOGP provision by giving power to the Government, through the Minister of Energy and Mineral Development (MOEMD) to enter into agreements relating to petroleum activities with any person concerning granting or renewing a license.[489] The Upstream Act also empowers the MOEMD to develop a Production Sharing Agreements (PSA)[490]

The Upstream Act, and the Public Procurement and Disposal Act (PPDA),[491] grants authority to the Government to conducts open bidding rounds with a sealed bid process and a decision made against established criteria. Using the authority granted by the above laws, the Government has granted exploration and production licenses[492] to five Multinational Oil Companies (MOCs), all

[486] Ibid s112-120
[487] Ibid s124-127
[488] Ibid s 1
[489] Ibid S 6
[490] Ibid S 8
[491] Acts of Parliament (Reprint of the Public Procurement and Disposal of Public Assets Act, 2003), Order, 2014 (The Uganda Gazette No. 12 Volume CVII dated 28th February 2014); Public Procurement and Disposal of Public Assets (Amendment) Act, Act No. 11 of 2011
[492] Upstream Act 2013, s 6; Refer to chapter one, section 1.3.4.1 for discussion on the Licensed MOCs; Refer to chapter three, section 3.4 for procedure to apply to the Government for a

registered as foreign companies as per the Companies Act 2012[493] and the Investment Code Act 2019.[494] These include Tullow Uganda Operations Pty Limited (Tullow) and Armour Energy Limited from Australia, Total E&P Uganda B.V. (Total Energies), and China National Offshore Oil Corporation Uganda Limited (CNOOC) from the Netherlands, and finally Oranto Petroleum International Ltd from Nigeria.[495]

Article 9 of the UN Convention against corruption[496] recommends "*that governments disclose information on licensing processes, including distributing information on licensing procedures and contracts, including information on the invitation to tender and on the award of contracts, allowing potential bidders sufficient time to prepare and submit their proposals.*" Uganda's government has followed this directive and through the PPDA regulations; this information is always shared and run through various local and regional newspapers and the MOEMD website. Information advertised includes information on licensing process, the contract terms for licenses, the geographic scope of the blocks and a complete description of the procedure for awarding a license (including bidder qualification procedures or rules for contacting the licensing authority

Licence; Refer to chapter four for discussion on the terms contained in the publicly available PSAs and model PSA.

[493]The Companies Act, 2012 (The Uganda Gazette No. 52 Volume CV) Section 252 - 260; Refer to section 3.4 for discussion on the Legal Process for Multinational Oil Companies to Register in Uganda

[494] Investment Code Act Cap 92, 2019 Section 9 – 20

[495] Petroleum Authority of Uganda, Exploration and Appraisal of Oil and Gas Discoveries, 2018

[496] UN General Assembly, The United Nations Convention against Corruption (adopted in October 2003, entered into force in December 2005, ratified by Uganda on 9 Sep 2004) 2349 UNTS 41, Article 5, 9; Antonio Argandoña, 'The United Nations Convention Against Corruption and its Impact on International Companies,' *Journal of Business Ethics 74* (November 6, 2006)

in case of the negotiated process). Hence the licensing process is open to all qualified companies and promotes competition based on technical, financial, and environmental criteria. However, the MOEMD's independence in awarding licenses is under scrutiny as the public deems it to adhere to influence from the President.[497] Good practices recommend establishing regulatory agencies with a clear division of roles and responsibilities to grant the licenses and contracts.

After negotiations, the government also publishes information, including bids received, winning bids and information on final contract awards and blocks licensed. However, the contracts are not published in full with actual terms after negotiations (duration, royalties, and tax obligations), or the main negotiated terms, winning bidding variables and production sharing rules left out of the information published. Therefore, Chapter Four of this thesis will be assessing the Model PSA,[498] against the only publicly available PSA, the 2012 Kanywataba Prospect Area PSA.[499]

[497] National Planning Authority (NPA) in collaboration with Africa Centre for Energy & Mineral Policy (ACEMP), 'Annual Petroleum Development Scorecard' (2016) 15

[498] Ministry of Energy and Mineral Development, *Model Production Sharing Agreement for Petroleum Exploration, Development and Production or Petroleum Development and Production* (Ministry of Energy and Mineral Development 2018) (Model PSA 2018); Upstream Act 2013, s 6, 7, 52-58, 69-92,

[499] Kanywataba Prospect Area PSA 2012 (n 19), which area also lies within the Albertine Graben.

3.3.2 Petroleum (Refining, Conversion, Transmission, and Midstream Storage) Act 2013 (Midstream Act 2013)

The NOGP recommends commercialising the discovered resources, including developing a refinery in Uganda to supply the national and regional petroleum product demand before considering exportation.[500] To effectuate this policy objective on sustainable management of the midstream petroleum sector and Article 244 of the Constitution, Parliament enacted the Midstream Act.[501] Among its fundamental provisions are: to regulate, manage, coordinate, and monitor midstream operations;[502] to enable the construction, placement, and ownership of facilities;[503] to provide third-party access to facilities;[504] and regulate tariffs.[505]

The Midstream Act also provides for an open, transparent, and competitive process for licensing by the Minister.[506] It provides for additional health, safety and environment regulations not sufficiently regulated in other laws;[507] it provides for cessation of midstream operations and decommissioning of facilities[508] and regulates any other matters related to midstream operations. The Government, regulatory and oversight bodies principally responsible for regulating oil and gas activities and monitoring the implementation of these

[500] NOGP 2008, objective 4 and 5
[501] Petroleum (Refining, Conversion, Transmission and Midstream Storage) Act 2013, the Uganda Gazette No. 38 Volume CVI dated 26th July 2013 (Midstream Act 2013) s 1
[502] Ibid Section 4-7.
[503] Ibid Section 10, 16.
[504] Ibid section 18 (j), 24 (d), 78.
[505] Ibid Section 39-42.
[506] Ibid Section 8 -27.
[507] Ibid Section 37, 57-62.
[508] Ibid Section 43 -51

provisions will be discussed in detail later in this chapter,[509] but it is Parliament that exercises an oversight function over the oil and gas sector in general.

The NOGP proposed for the development of a refinery within the Kabaale Industrial Park in Hoima district, with the capacity to refine 60,000 barrels of oil per day.[510] The Government expects that the refinery construction will also lead to the development of petrochemical and energy industries to convert crude oil into different products such as diesel, gasoline, kerosene, and liquefied Petroleum Gas, petrol, jet fuel, Heavy Fuel Oil, among others.[511] The government plans to use these products to generate electricity for domestic purposes such as heating and cooking, fuel vehicles, fertiliser plants, and chemical feedstock to manufacture plastics and other commercially important organic chemicals.[512]

In April 2018, Uganda's government signed a definitive Project Framework Agreement with Albertine Graben Refinery Consortium (AGRC).[513] The

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[509] Refer to chapter Three section 3.8.

[510] NOGP 2008, objective 4, 5; Ministry of Energy and Mineral Development, *Progress of Implementation of the National Oil and Gas Policy for Uganda* (Ministry of Energy and Mineral Development, 2019) <https://www.petroleum.go.ug/media/attachments/2020/03/12/oilgaspolicy.pdf> accessed 28th June 2019; Ministry of Energy and Mineral Development, 'Government plans to develop 60,000 barrels of oil per day refinery,' http://www.petroleum.go.ug/page.php?k=curnews&id=60 accessed on 3 February 2017.

[511] Midstream Act 2013; National Planning Authority (NPA) in collaboration with Africa Centre for Energy & Mineral Policy (ACEMP), 'Annual Petroleum Development Scorecard' (2016) 2

[512] NOGP 2008, objective 6(h)(iii), 7.2.6.1(b)(xiv).

[513] Allan Olingo, 'Uganda signs $4 billion refinery plant deal' *The EastAfrican* (14 April 2018) https://www.theeastafrican.co.ke/business/Uganda-signs-USD4bn-refinery-plant-deal--/2560-4393822-oyqk9rz/index.html accessed 16 April 2018; Frederic Musisi, "Uganda signs off Shs4 trillion for US in refinery" *Daily Monitor* (Kampala, 8 May 2018) https://www.monitor.co.ug/News/National/Uganda-signs-off-Shs4-trillion-US-

Consortium consists of Yaatra Africa LLC, and Lion Works Group, both from Mauritius, then Nuovo Pignone International SRL (a General Electric subsidiary located in Italy), and Saipem S.P.A. from Italy. The Government of Uganda will participate in the refinery development through the Uganda Refinery Holding Company, a subsidiary of the Uganda National Oil Company. [514]

The AGRC and the Uganda Refinery Holding Company will work together to design, develop, finance, construct, operate and maintain the planned Uganda Oil Refinery. Concerning the agreement to construct the refinery, the President stated that "*This agreement is a key step towards constructing the oil refinery in Hoima District since it ensures development, design, financing, construction, operation and maintenance of the 60,000 barrel-a-day facility. This deal would contribute to making Africa a huge powerhouse in terms of business*." [515]

The Government expects to produce 190,000 barrels of oil per day, yet the planned Uganda Oil Refinery can only refine 60,000 barrels per day. [516] Therefore, the Government plans to export the excess oil and gas produced to

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refinery/688334-4550148-sj5gxr/index.html?fbclid=IwAR1fcJJsFFfI8Jaci777iA6tDe7BRzNA55NhckBWGEa1QuWmMhsPBJ5OCHk accessed 8 May 2018; Elias Biryabarema, 'Uganda signs agreement with investors to build oil refinery' *Reuters* (10 April 2018) https://www.reuters.com/article/uganda-refinery/update-1-uganda-signs-agreement-with-investors-to-build-oil-refinery-idUSL8N1RN533> accessed 10 April 2018

[514] Ministry of Energy and Mineral Development, *Progress of Implementation of the National Oil and Gas Policy for Uganda* (Ministry of Energy and Mineral Development, 2019) 14 <https://www.petroleum.go.ug/media/attachments/2020/03/12/oilgaspolicy.pdf> accessed 28th June 2019

[515] Olingo (n 513)

[516] Total, 'Non-Technical Summary (NTS) of the Environmental and Social Impact Assessment (ESIA) Report for the proposed *Tilenga Project*' (2019) https://www.scribd.com/document/411330955/TILENGA-ESIA-NTS-28-02-19

international markets through the East Africa Crude Oil Export Pipeline (EACOP), as Uganda is landlocked.[517] The Government chose to invest in the development of a proposed 24-inch-diameter electrically heated crude oil export pipeline. It is approximately 1,445 km in length and will route the excess produced oil from the delivery point in Kabaale, Hoima district in Western Uganda to an export terminal in Chongoleani, Tanga, Tanzania.[518] The Governments of Uganda and Tanzania signed an Inter-Governmental Agreement (IGA)[519] in May 2017 to construct the EACOP.[520]

To operationalise the main terms contained in the Upstream and Midstream laws, [521] MOEMD passed the Petroleum (Exploration and Production) (Conduct of Exploration Operations) Regulations, (the 'Petroleum Regulations'). [522] Several other Regulations cover technical aspects like metering; national content; and Health, Safety and Environment aspects for both the Upstream and Midstream Sub-sectors.[523]

[517] NOGP 2008, objective 6(h)(iii), 7.2.6.1(b)(xiv).
[518]Ministry of Energy and Mineral Development, *Progress of Implementation of the National Oil and Gas Policy for Uganda* (Ministry of Energy and Mineral Development, 2017) Paragraph 46; Total, 'Uganda and Tanzania sign Inter Governmental Agreement for Crude Oil Pipeline,' (25/05/2017) http://ug.total.com/en/home/media/list-news/uganda-and-tanzania-sign-inter-governmental-agreement-crude-oil-pipeline accessed 10 April 2018
[519] Ibid
[520] Ibid
[521] Upstream Act 2013, 48(2), 69 (6), 78, 81 (5), 86 (3), 92, 93(1), 93(2), 94(2), 95 (1), 96 (3), 121(2), 123, 128(1), 155(1), 168(2) and 183
[522] The Petroleum (Exploration and Production) (Conduct of Exploration Operations) Regulations, 2016 S.I. 150-1
[523] Ibid

3.4 Legal Process for Multinational Oil Companies to Register in Uganda

According to Uganda's Companies Act,[524] the most common form of business vehicle in Uganda is a private limited liability company. Notably, shareholders can take any form from natural persons to corporate bodies or Ugandan and non-Ugandan directors and shareholders. The most common form of business vehicle used by foreign investors in Uganda is a private limited liability company. Another common alternative is for a foreign incorporated company to register to do business in Uganda as a branch.

The Companies Act also provides the legal process through which all foreign companies incorporated outside Uganda establish a business in Uganda.[525] The Act allows for 100 per cent foreign-owned businesses and foreign businesses partnering with Ugandans to carry out business in Uganda without restrictions. The only exception is for goods and services required within the petroleum industry, yet not available in Uganda as described in the National Content Regulations.[526] In this circumstance, where a foreign company is to provide specialised services and goods, they should enter a joint venture with a Ugandan company.[527]

[524] The Companies Act, 2012 (The Uganda Gazette No. 52 Volume CV) Section 4-27
[525] The Companies Act, 2012 (The Uganda Gazette No. 52 Volume CV) Section 252 - 260
[526] The Petroleum (Exploration, Development and Production) (National Content) Regulations 2016, The Uganda Gazette No. 45, Volume CIX, Regulation 6, 10, 16-19
[527] Upstream Act 2013, s 124-127

A foreign company must first be registered locally with the Registrar General at the Uganda Registration Services Bureau (URSB).[528] The company applies to the Registrar with the following documents: Certified copies of Memorandum or Articles of Association/Charter/ Constitution and Certificate of incorporation from the country of origin duly witnessed, and where the instrument is not in the English language, a certified translation of the instrument, registration forms of Particulars of Directors and Secretary, Statement of all subsisting charges as set out in section 105(2) of the Companies Act and a list of Names and Address of Persons Resident in Uganda authorised to accept service on behalf of the company, address and Principal Officer of the Company.[529] Once MOC files all these requirements, the company registrar will issue a registration certificate as proof of registration.

According to the Investment Code Act 2019[530], all foreign investors must obtain an Investment License from the Uganda Investment Authority (UIA) before operating their businesses in Uganda.[531] Before UIA grants an investor the license, it performs due diligence to ensure the investment provides value addition, technology transfer and employment creation. The MOCs' applies to UIA using the same documents required by the URSB.

As well as other documents which include, the certificate of incorporation, certified copy(s) of bio pages of Director's passport; a business plan; Bill of

[528] The Companies Act, 2012 (The Uganda Gazette No. 52 Volume CV) Section 262; Uganda Registration Services Bureau Act Cap 210
[529] The Companies Act, 2012 (The Uganda Gazette No. 52 Volume CV) Section 252
[530] Investment Code Act Cap 92, 2019 Section 9 – 20
[531] Ibid S 11– 15

lading to confirm importation of machinery; a copy of the secondary license issued by the relevant Government Ministry or Agency; EIA Certificate of Approval by NEMA; evidence of the availability of funds for the project. Also, a copy of the land title or a tenancy agreement to confirm the project's location, Uganda Revenue Authority registration for Tax Identification Number. The UIA then assists the MOCs by recommending and following up on acquiring work permits for their expatriate staff from the Ministry of Foreign Affairs.

Before the MOCs can operate in Uganda's Petroleum Industry, they must apply for an Exploration License from the MEOMD per the Upstream Act.[532] The MOCs can apply either following the publication of areas open for bidding in the Gazette, newspapers of national and international circulation, or direct applications to the Minister of Energy and Mineral Development (MEOMD).[533] The Exploration License granted confers on the MOCs the exclusive right to explore for petroleum, in the EA stipulated.[534] It also contains the conditions under which the Government grants the license and expresses an interest in the venture.[535]

Since Uganda does not currently have the financial capability or technical expertise to explore, develop and produce her petroleum resources, the Government signs Production Sharing Agreements (PSAs) with MOCs' per

[532] Upstream Act 2013, S 8, 52-68
[533] Ibid S 52, 53
[534] Ibid S 60
[535] Ibid S 59

the Upstream Act.[536] PSAs are contracts between one or more investors and the host government. They confer the right to prospection, exploration, and extraction of mineral resources from a specific area over a specified period are determined.[537] The investors administer the business at their own expense and risk, then share with the government part of the production output and other payments due to the Government as per the agreement.[538]

3.5 Legal and Regulatory Framework Governing Environmental Protection

The Constitution of the Republic of Uganda provides for a right to a clean and healthy environment.[539] The previous chapter discussed the potential impacts of the petroleum industry on Uganda's environment.[540] From that discussion, we established that the petroleum industry presents new sets of potential environmental challenges. Therefore, as the Government elects to utilize its natural resources to meet development needs, it must take precautions to prevent or minimise degradation to land, air, and water resources.

3.5.1 National Environment Management Policy (NEMP)

In 1994, the Government adopted the National Environment Management Policy (NEMP) as the cornerstone of the country's commitment to social and

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[536] Ibid Sections 8, 52-68, 69-75; Refer to chapter one, section 1.3.4.2 for discussion on Petroleum Production licenses in Uganda; Refer to discussion in chapter four on Uganda's PSAs
[537] Ibid
[538] Patricia Park, *International Law for Energy and the Environment* (2nd edn, CRC Press 2013); Peter D Cameron, *International energy investment law: the pursuit of stability* (OUP 2010) 75, 78-80
[539] The Constitution of the Republic of Uganda 1995, Objective 27 (2), Article 39, Article 237 (b); NEA 2019, s 3
[540] Refer to Chapter Two, section 2.2.3.3 for discussion on the potential environmental impacts from the petroleum industry

economic development that is environmentally sustainable, bringing the benefits of a better life to all. Given the new implication of the petroleum industry on the environment, the government is currently reviewing this policy. It developed a Draft National Environment Management Policy in 2014 to address emerging issues. [541] Although this draft reflects similar commitments made by the Government in NOGP on conserving the environment and biodiversity,[542] it is not yet adopted by Cabinet 7 years on, which would have been a serious reflection on the Government's lack of commitment to implement the policy, had the 2019 NEA not been enacted.

3.5.2 National Environment Act 2019 (NEA 2019), and Uganda Wildlife Act 2019 (UWA 2019)

The legal framework governing environmental concerns arising out of the petroleum industry includes the NEA 2019 in February 2019 (which repealed and replaced the National Environment Act, 1995),[543] the Uganda Wildlife Act in July 2019 (repealing of the Uganda Wildlife Act, 2014). [544] Several Regulations predate the NEA 2019 and need updating to consider the Petroleum industry's environmental impacts.[545]

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[541] NEMP 2014, objective 4.11; National Environment Management Authority, 'National State of The Environment Report for Uganda 2014: Harnessing our environment as infrastructure for sustainable livelihood & development' 2016

[542] NOGP 2008, objective 9

[543] National Environment Act, 2019 (The Uganda Gazette No. 10, Volume CXII, dated 7th March 2019) section 1, 17, 110

[544] The Uganda Wildlife Act, 2019 (The Uganda Gazette No. 49, Volume CXII, dated 27th September, 2019); Uganda Wildlife Act, Cap. 200, 2014; Uganda Wildlife Policy, 2014; National Environment (Environment Impact Assessment) Regulations, 1998

[545] National Environment (Environment Impact Assessment) Regulations No. 13 of 1998, the National Environment (Wetlands, Riverbanks and Lake-Shore Management) Regulations,

The Upstream Act and Midstream Act[546] also provide that any licensee who exercises or performs functions, duties or powers under these Acts shall comply with the NEA 2019's environmental principles and safeguards and other applicable laws. The law requires that MOCs conduct Environment and Social Impact Assessments (ESIAs) before undertaking each activity in the petroleum sector to avoid or mitigate the adverse impacts of development activities.[547] However, the Upstream Act and NEA Act do not make public disclosure provisions for Environmental and Social Impact Assessments (ESIAs). This perpetuates lack of transparency and infringes on citizens' right to access information regarding the enjoyment of a clean and healthy environment.[548]

3.5.2.1 Environment and Social Impact Assessments (ESIAs)

The purpose of ESIAs is to analyse the positive and negative effects of a proposed project, plan, or activity on the environment and society, and establishing what mitigations measures are available to curb any potential negative impacts.[549] It includes studies on the weather, flora and fauna, soil, human health including physical, social, biological, economic, and cultural

No.3 of 2000, the National Environment (Waste Management Regulations), No. 52 of 1999, the National Environment (Audit) Regulations 2009, among others.

[546] Upstream Act 2013, s 3; Midstream Act 2013, s 3.

[547] NEA 2019, s 49(1) & (2), 110 19(1) (a), 112 (1), (2) & (3), 176 (1), 177(1) and (2) Schedule 4 (13), schedule 5 (21); Uganda Wildlife Act 2000, section 15; National Environment (Environment Impact Assessment) Regulations, 1998; Upstream Act 2013, s 135.

[548] The Republic of Uganda Constitution, 1995 Article 39

[549] NEA 2019, s 110 19(1) (a)- 116, the Third Schedule; Uganda Wildlife Act 2000, section 15; National Environment (Environment Impact Assessment) Regulations No. 13 of 1998; Upstream Act 2013, s 135.

impacts, to ensure that development is sustainable.[550] Unlike the repealed NEA that only provided for EIAs, the 2019 NEA includes social impacts assessments, which consider that petroleum activities may impact the lives and communities surrounding the exploration and production areas.[551]

The ESIAs process also requires that consultations be undertaken with stakeholders at community and national levels to ensure a harmonious interface between petroleum activities, communities, the environment, and the Albertine Graben biodiversity.[552] Regarding the negative impacts, the mitigation measures mentioned above refer to actions that avoid, reduce, restore, or offset the project's potential adverse environmental consequences.[553] If MOCs identify any positive impacts, they are to enhance these through employing advanced technological developments that support sustainable development.

3.5.2.2 The Process of Carrying Out ESIAs

The 2019 NEA and Environment Impact Assessment Regulations provides for the process of carrying out ESIAs as follows.[554] MOCs submit a project brief

[550] Ibid
[551] Ibid
[552] Ibid
[553] International Finance Corporation, Performance Standard 6: Biodiversity Conservation and Sustainable Management of Living Natural Resources January 1, 2012 available at https://www.ifc.org/wps/wcm/connect/3baf2a6a-2bc5-4174-96c5-eec8085c455f/PS6_English_2012.pdf?MOD=AJPERES&CVID=jxNbLC0 accessed on 19/02/2020
[554] NEA 2019, s 49(1) & (2), 110 19(1) (a), 112 (1), (2) & (3), 176 (1), 177(1) and (2) Schedule 4 (13), schedule 5 (21); UWA 2019, s 15; National Environment (Environment Impact Assessment) Regulations, No. 13 of 1998, Regulation 5 – 8; Upstream Act 2013, s 135

to the lead agency, National Environmental Management Authority (NEMA)[555], stating the nature of the project, the projected area of land, water and air that may be affected, the activities to be undertaken during and after the development of the project, the design of the project, and the materials that the project will use.[556] Suppose that development is considered likely to impact the environment with no sufficient mitigation measures to cope with the anticipated impacts.[557] The MOC will have to carry out an environmental impact study. Where it discloses no significant impact on the environment or where it reveals sufficient mitigation measures to cope with the anticipated impacts, the project may be approved, and a certificate of approval issued.[558]

The MOCs conducts the environmental impact study per the Terms of Reference prepared by the developer in consultation with the Lead Agencies and NEA.[559] After a person or firm approved by the Executive Director completes the study,[560] he prepares an Environmental Impact Statement (EIS). The EIS considers several issues;[561] ecological considerations with emphasis on biological diversity, sustainable use, ecosystem maintenance; social considerations with emphasis on immigration and emigration effects, social disruption, the effect on culture and objects of cultural value, and effects on

[555] National Environmental Management Authority Act 1998
[556] NEMA, Tilenga Project: Environmental and Social Impact Assessment (May 2018) http://nema.go.ug/sites/all/themes/nema/docs/TILENGA%20ESIA%20Volume%20I_13-09-18.pdf> accessed on 15th July 2018
[557] Environment Impact Assessment Regulations, No. 13 of 1998, Regulation 9
[558] Ibid Regulation 9
[559] Ibid Regulation 10 - 14
[560] Ibid Regulation 11
[561] Ibid First schedule

human health, land use; landscape and such other issues as laid down in the EIA regulations.

The EIS must also contain the proposed site and reasons for rejecting the alternative sites, the material inputs into the project, and their potential environmental effects. Also, the technology and processes that MOCs will use and a description of the alternative technologies and processes and reasons for selecting them, an economic analysis of the project; the measures proposed for eliminating, minimising, or mitigating adverse impacts.

The EIA Regulations[562] and the EIA Public Hearing Guidelines[563] provides for public participation in the EIS. To seek the people's views, MOCs must publicize the intended project, its anticipated effects, and benefits through the media, in a language that the affected communities understand. MOCs then hold meetings with the affected communities to explain the project and its effects in places convenient to the affected people and agreed by the local leaders.[564]

The ESIA regulations are in place and applied; however, they do not cater to specific petroleum issues. They are biased towards minerals mining sector activities. The ESIA Regulations also puts a caveat in accessing the ESIA report

[562] Ibid Regulation 11, 14

[563] the EIA Public Hearing Guidelines, 1999, Clause 10(1) 15(5) and (6); These Guidelines issued pursuant to the National Environment Statute of 1995 and Environment the Impact Assessment Regulations of 1998 by the Executive Director of the National Environmental Management Authority make provision with respect to public hearings as being part of environmental impact assessment.

[564] EIA Public Hearing Guidelines 1999, Clause (6) 7(3), 10(1), 15(5); Environment Impact Assessment Regulations, No. 13 of 1998, Regulation 22 (2)

by the public from the Authority.[565] It provides that any person who desires to consult the documents shall be granted access by the Authority on such terms and conditions as the Authority considers necessary.[566] These prevail over the free access to information as prescribed in the Access to Information Act, 2005.[567]

Failure to involve the public in significant public interest areas creates the risk of downplaying the affected communities' social concerns. In preparing some EIAs, Total Energies did not consult the public or project-affected communities for their input, which may have already caused conflict between MOCs and communities. For example, the Tilenga project involves laying Crude Oil Pipelines across environmentally sensitive Murchison Falls National Park, River Nile, Lake Albert, Budongo Forest Reserve, Bugungu Game Reserve.[568] The project also cuts across several districts in which various communities reside to the Central Processing Facility.[569] In 2019, Guild Presidents' Forum on Governance (GPFOG) and CSOs filed a High Court case against the Petroleum Authority of Uganda and the National Environment Management Authority (NEMA). They alleged that NEMA's presiding officer violated the above requirements by denying the youth groups an opportunity

[565] Environmental Impact Assessment Regulation, S.I. No. 13/1998, Part VII
[566] National Environmental Management Authority Act 1998, section 85
[567] ATIA 2005; Refer to section 3.7.4 for the discussion of access to information and the petroleum industry
[568] Total EP Uganda, 'Non-Technical Summary (NTS) of the Environmental and Social Impact Assessment (ESIA) Report for the proposed Tilenga Project submitted to NEMA on 28-02-NEMA' <https://www.scribd.com/document/411330955/TILENGA-ESIA-NTS-28-02-19> accessed on 28th Match 2019
[569] Ibid

to make formal presentations, before issuing Total, Tullow and CNOOC an EIA certificate for the Tilenga oil project.[570] The case is still ongoing, but the Court suspended it as a preventative measure against the spread of COVID-19, the hearing did not proceed. Should the plaintiff succeed, the courts will cancel the ESIA certificate for Tilenga project,[571] thereby delaying the USD 3.5 Billion Tilenga project further, increasing costs to the developers.

Similarly, Non-governmental organisations (NGOs) Survie (Survival) and Friends of the Earth (FoE) of France as well as Uganda's National Association of Professional Environmentalists (NAPE) with four Ugandan associations (AFIEGO, CRED, NAPE/Friends of the Earth Uganda and NAVODA) filed a case against Total Energies in Nanterre High Court in Paris for alleged "failure to elaborate and implement human rights and environmental vigilance", under the new "Duty of Vigilance" legislation passed by the French legislature in 2017.[572]

The lawsuit alleged that the petroleum exploration activities of Total Energies and it's counterparts CNOOC and Tullow within the Albertine Graben, had

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[570] Doreen Namara, 'Tilenga EIA certificate won't conserve the environment and protect livelihoods' *Daily Monitor* (15th May 2019) <https://www.monitor.co.ug/OpEd/Commentary/Tilenga-EIA-certificate-environment-protect-livelihoods/689364-5115232-70wrcj/index.html> accessed on 15th July 2019; Oil in Uganda, 'Tilenga ESIA certificate: CSOs want court to strike out NEMA's evidence' *Oil in Uganda* (Friday, 22nd November 2019) <https://oilinuganda.org/features/environment/tilenga-esia-certificate-csos-want-court-to-strike-out-nemas-evidence/> accessed on 13th December 2019

[571] The Independent, 'Court adjourns case against NEMA, petroleum authority of Uganda' *The Independent* (November 6, 2019) <https://www.independent.co.ug/court-adjourns-case-against-nema-petroleum-authority-of-uganda/> accessed on 13th December 2019

[572] Barry Morgan, 'Uganda's Lake Albert development lands Total in court' *Upstream online* (25 October 2019) <https://www.upstreamonline.com/safety-and-environment/ugandas-lake-albert-development-lands-total-in-court/2-1-694583> accessed on 13th December 2019

resulted in an increased emission of greenhouse gases affecting the biodiversity in the region, and that the development of the 1445-kilometre East African Crude Oil Pipeline (EACOP) to take oil from the Tilenga and Kingfisher fields for export at the Tanzanian port of Tanga, had displaced over 50,000 people from their homes and land damaging the ecosystems of the Graben.[573] They further alleged that proper hearings were not conducted, and no mitigation plans were either absent or inadequate, falling short of Ugandan regulatory requirements.[574]

According to the rights groups, Total Energies also intimidated local farmers into signing compensation agreements and forced them off their land before receiving any money. Rights groups also say that Total Energies did not respond appropriately to minimise its environmental impact within the region. The plaintiffs asked the Paris court to decide whether "*Total should be constrained, on potential pain of penalty, to review its vigilance plan, acknowledge the true impact of its oil activities on local communities and the environment (or) ordered to undertake measures to prevent further human rights violations or environmental damage.*"[575]

[573] Barry Morgan, 'Uganda's Lake Albert development lands Total in court' Upstream online (25 October 2019) <https://www.upstreamonline.com/safety-and-environment/ugandas-lake-albert-development-lands-total-in-court/2-1-694583> accessed on 13th December 2019
[574] Ibid
[575] Ibid

However, on 30th January 2020, the Nanterre French High court judges refused to hear a complaint brought by the complainants, [576]ruling that the case did not fall within their jurisdiction; instead, they should file in the commercial court. The complainants are currently contesting this decision for reasons ranging from a negative impact moving the matter to the commercial court would have on the case's future. It would take several months to obtain a ruling on the case. At the same time, serious human rights and environmental violations in Uganda continue. It will be interesting to follow as it could mark the beginning of a shift in environmental accountability for multinationals around the continent.

3.5.2.3 Enforcement of ESIA (Environmental and Social Impact Assessment) Regulations

The NEA provides that any person who carries out a project (for which ESIA is a prerequisite for petroleum activities)[577] without approval from NEMA contrary to the NEA[578], commits an offence. That on conviction, they would be liable on conviction to imprisonment for a term not exceeding fifteen years or a fine not exceeding one hundred thousand currency points or imprisonment not or both in case of an individual, and the case of a body corporate, to a fine not exceeding five hundred thousand currency points. The NEA also

[576] Uganda oil, 'Total in Court Battle Over Greenhouse Emission in Uganda,' (4 Feb 2020) <http://www.ugandaoil.co/2020/02/04/total-in-court-battle-over-greenhouse-emission-in-uganda/> accessed on 16th May 2020

[577] Ibid Third schedule.

[578] NEA 2019, s 157-175; Environment Impact Assessment Regulations, No. 13 of 1998, Regulation 36;

established a specialised unit, the Environmental Protection Force, to handle enforcement of the provisions of the NEA.[579]

Environmental Inspections are carried out by a multi-institutional environment monitoring team[580] that assesses compliance with environmental requirements and investigates impacts that the government and MOCs did not predict at the time of granting the ESIA approval.[581] Should the Monitoring Team reveal non-compliance of any of the environmental laws and regulations, they have the powers to issue an environmental improvement notice or environmental compliance notice requiring the perpetrator to cease any activity to or take the necessary action to mitigate or stop further pollution and minimise the impacts of the pollution deleterious to human health or the environment.[582] They also have powers to permanently shut down part of an operation of a facility that is seen to have irreversible impacts on the environment.[583] To revoke a permit due to unanticipated impacts that may arise during a facility's implementation or operation.[584] To require a facility to clean up and restore the environment as near as possible to its original state. NEMA may also require the perpetrator to pay compensation for the damage caused.[585]

[579] NEA 2019, s 25, 110- 116
[580] NEA 2019 Section 25, 80, 122-140, 153, 163-164, 171-175; Refer to Chapter Three, section 3.8.6
[581] Refer to section 3. 8 for discussion on the institutional framework.
[582] NEA 2019 Section 25, 79, 80, 122, 127, 128, 153, 163-164, 171-175 128
[583] Ibid section 129
[584] Ibid
[585] Ibid

3.5.3 Protection of the Atmosphere

Section 2 of the Upstream Act defines pollution as "*any direct or indirect alteration of the physical, thermal, chemical, biological or radioactive properties of any part of the environment by discharging, emitting or depositing wastes or emitting noise to affect any beneficial use adversely, to cause a condition which is hazardous or potentially hazardous to public health, safety or welfare of animals, birds, wildlife, fish or aquatic life, land and water sources or to plants or to cause a contravention of any condition, limitation or restriction which is subject to a licence under this Act*."

One of the negative environmental impacts of the petroleum industry is air pollution because of fossil fuel combustion and vehicle exhaust emissions. The Upstream Act provided for restrictions on gas flaring and gas venting stating that "*A licensee shall not flare or vent petroleum in excess of the quantities needed for normal operational safety without the approval of the Minister on the advice of the Authority…. except in case of an emergency*".[586] It further states that a company that flares or vents in case of emergencies should keep it at the lowest possible level, and submit a technical report informing the Petroleum Authority of the circumstances that caused the emergency. Even though the Act imposes a fine not exceeding five hundred thousand currency points in that case, however, it does not specify what entails the "lowest possible level," and this leaves room for varying interpretations.

[586] Upstream Act 2013, s 100; NEA 2019, s 78 -88, 90, 93; The Penal Code Act (cap 120, 1950) section 176 - 178; The Penal Code (Amendment) Act, 2007

3.5.4 General Liability for Environmental damage caused by Petroleum Activities

The Upstream Act provides that "*a licensee is liable for pollution damage without regard to fault*" except if the cause of pollution damage is due to circumstances "*...beyond the control of the licensee, the liability may be reduced to the extent it is reasonable...*".[587] The Act further provides that "*…pollution damage occurs during a petroleum activity and the activity has been conducted without a licence, the party that conducted the petroleum activity is liable for the damage, regardless of fault*".[588]

The NEA is a lot clearer on this issue and does not consider whether the perpetrator of environmental pollution is licensed or not. It provides that "*a person shall not cause pollution or initiate anything that may occasion a risk of pollution, except in accordance with this Act and any other applicable law*"[589] and that person should put in place measures to prevent the pollution from occurring, including by use of best available techniques and best environmental practices.[590] However, the NEA does provide an exception to circumstances where the law permits venting or flaring of gases.[591]

The Upstream Act further provides that an aggrieved person may bring an action against the perpetrator for damages, albeit also providing exception

[587] Upstream Act 2013, s 130; Midstream Act 2013, s 58 (1))
[588] Upstream Act 2013, s 131
[589] NEA 2019, s 78-80,
[590] Ibid section 78
[591] Ibid

against whom the aggrieved party can claim liability.[592] For example, a contractor of the MOC performing his tasks in connection with petroleum activities. The exception created a loophole whereby it was unclear who would be legally responsible in the Kakindo village incident where community members accused Tullow Oil of dumping two trucks of human waste, causing severe health risks to locals and several diseases.[593] Tullow claimed its subcontractor, Saracen Uganda Limited was responsible for the entire incident.

In 2019 The Government enacted the Petroleum (Waste Management) Regulations and in 2020 the National Environment (Waste Management) Regulations [594] which provides that MOCs "*contract a separate entity as a petroleum waste handler to manage the transportation, storage, treatment or disposal of petroleum waste*"[595] That the contracted entity must have undertaken an ESIA and obtained a certificate of approval from NEMA[596] and obtained a Licence to manage petroleum waste from NEMA.[597] However, it still holds the MOC

[592] Upstream Act 2013, s 132
[593] Isaac Imaka, 'Contractor dumps human waste in homesteads' *Daily Monitor* (9th July 2013) http://www.monitor.co.ug/News/National/Contractor-dumps-human-waste-in-homesteads/-/688334/1909062/-/149b7oqz/-/index.html accessed on 3rd November 2017
[594] Petroleum (Waste Management) Regulations S.I. No. 3 of 2019 (The Uganda Gazette No. 5, Volume CXII, dated 1st February 2019) Section 2, 13-22, 24 Schedule 7, 7; National Environment (Waste Management) Regulations S.I. No. 49 of 2020, 153-2 3835, (The Uganda Gazette No. 18, Volume CXIII, dated 20th March 2020) section 5, 16, 92, 93; National Environment (Strategic Environmental Assessment) Regulations S.I. No. 50 of 2020
[595] Petroleum (Waste Management) Regulations S.I. No. 3 of 2019 (The Uganda Gazette No. 5, Volume CXII, dated 1st February 2019) section 5, 16, 17, 34; Upstream Act Section 3(3); Midstream Act, Section 3(3)
[596] NEMA Act Section 19 (5)
[597] Petroleum (Waste Management) Regulations S.I. No. 3 of 2019 (The Uganda Gazette No. 5, Volume CXII, dated 1st February 2019) Section 13

responsible for the petroleum waste handler (Vicarious liability),[598] which clarifies who would be legally responsible for the actions or omissions of the exempted subcontractors, in the context of contractual liability, agency, vicarious liability and non-delegable-duties. In addition to the above, Article 23 of the Model PSA[599] also provides that the EIAs done concerning each project should be available to the Licensee's employees and subcontractors to enable them to employ similar measures to ensure environmental protection.

Regarding the legal avenue through which to file a claim, the Upstream Act provides that "*legal action for compensation for pollution damage shall be brought before a competent court in the area where the effluence or discharge of petroleum takes place or where damage is caused*."[600] There was no specialised court with competent jurisdiction to handle environmental pollution cases until August 2017, when the Judiciary established a specialised court (Utility, Standards, Wildlife and Environment court) to handle cases of perpetrators of environmental degradation.[601] Besides finding companies liable for pollution, the laws are not clear on the compensation regime for victims of such pollution or any losses resulting from poor management of petroleum operations,

[598] Petroleum (Waste Management) Regulations S.I. No. 3 of 2019 (The Uganda Gazette No. 5, Volume CXII, dated 1st February 2019) Section 5(8), 6
[599] Model PSA 2018 (n 498) Article 23; Article 25 of the Kanywataba Prospect Area PSA; Refer to Chapter Four, section 4.2.5
[600] Upstream Act 2013, Section 134
[601] P Tajuba, "Judiciary okays environmental court" Saturday Monitor (Uganda February 18th, 2017) 5.

especially for the unforeseeable long-term damage to the environment and human health.[602]

MOCs have also set up their internal mechanisms through which to handle grievances from communities. For example, Total Energies has set up at a Concerns and Grievance Mechanism modelled on International best practice such as the IPIECA Community Grievance Mechanism toolbox.[603] It handles matters on various areas of environment and health, safety social behaviour and cultural heritage of the communities, land, security, logistics and transport, economic loss employment. Communities and local civil society can directly contact the Community Liaison Officer, record their grievance.[604] The MOC responds to the claim on a four-step basis; the first level is when the complaint and proposed resolution are accepted at the first instance. When the resolution proposed to the complainant is not accepted at the first level, the MOC escalates the complaint to levels 2 for further investigation. If they cannot resolve the complaint, the MOC seeks intervention from a third party. Still, if the MOC cannot resolve the grievance, level 4 provides for the judicial system's intervention. Total Energies is said to have received "*170 complaints between January 15, 2018, and end of 2019. 82% of these complaints were fully*

[602] PAPs might be able to challenge any acts of negligence or nuisance under Tort Law, but they would be required to prove for example that a particular MOC's actions was directly responsible for such unforeseeable long-term damage to their health.
[603] Total E&P Uganda, 'Total's Reaction to FIDH and FHRI Report: Way Forward for a Constructive Dialogue,' (10th September 2020) 10 https://www.sustainable-performance.total.com/en/system/files/atoms/files/totals_reaction_on_fidh_report_2020_and_annex-_vfinal.pdf> accessed 13 November 2020; IPIECA 'Community Grievance Mechanisms toolbox,' (2014) <https://www.ipieca.org/resources/good-practice/community-grievance-mechanisms-toolbox/> accessed 13th November 2020
[604] Ibid

processed within an average period of three months."[605] The majority of complaints related to challenges to compensation rates and asset valuation by people affected by the project, and Total Energies stated that these had been resolved at level 1 and 2. It is unclear how much compensation was readjusted based on the complaints. However, Total Energies maintains that compensation rates were defined based on local market studies and were set above market prices.[606]

3.6 Legal and Regulatory Framework Governing the Management of Petroleum Revenues

Revenue management is an essential link in the chain of petroleum exploitation and production industry. Even the best production process cannot cure the debilitating effects of misappropriated petroleum-derived revenues and contribute to the likelihood of experiencing the typical resource curse characteristics discussed in Chapter Two. [607] Proper revenue management determines whether the oil-exploitation process, laboured through years, at a substantial cost, yields real benefit to become a great asset to the nation or leads to the infamous resource curse. Flawed revenue management has the power to cripple developing economies, exacerbate poverty and income inequality, breed more entrenched autocracies, and catalyse conflict, amongst other possibilities. Therefore, this section pursues a

[605] Ibid
[606] Ibid 10
[607] Refer to chapter two, section 2.2 on the discussion on the characteristics of the Resource Curse Phenomenon, and section 2.2.3.2.2 on the initial discussion of misappropriation of petroleum derived revenues.

critical assessment of Uganda's existing oil revenue management legal regimes to establish its adequacy in petroleum revenue management.

The petroleum industry is a lucrative opportunity for the country to attract foreign direct investment, not only in the industry but also in other sectors. Revenues collected from the sector are likely to become the largest source of government funding as the country enters the development phase, and subsequently, the production, transportation, and refining phases of the petroleum value chain. NOGP places emphasis on the collection of the right revenues and to use them to create lasting value for the entire nation.[608]

The Ministry of Finance, Planning, and Economic Development (MFPED) and subsequently Minister of Finance, Planning, and Economic Development (MOFPED) have the lead responsibility in implementing the above policy objective. MFPED formulated the OGRMP in February 2012 [609] as the framework aiding the sustainable management of revenues accruing from petroleum resources for the benefit of current and future generations. Subsequently, Parliament enacted the Public Finance Management Act in 2015 (PFMA 2015) that repealed the Public Finance and Accountability Act, 2003.[610]

The PFMA defines petroleum revenue as:

[608] NOGP 2008, objective 6(h)(iii)
[609] OGRMP 2012
[610] Public Finance Management Act, 2015 (The Uganda Gazette No. 11 Volume CVIII) (PFMA 2015)

> "……*tax paid under the Income Tax Act on income derived from petroleum operations, Government share of production, signature bonus, surface rentals, royalties, proceeds from the sale of Government share of production, any dividends due to Government, proceeds from the sale of Government's commercial interests and any other duties or fees payable to the Government from contract revenues under a petroleum agreement.*"[611]

PFMA provides vigorous checks against government expenditure and conformity of sector budgets to gender and equity budget guidelines. The PFMA addresses four critical issues: The Petroleum Fund, the Petroleum Revenue Investment Reserve, Royalty-Revenue Sharing, and Accountability.

3.6.1 Petroleum Fund

The NOGP[612] and the PFMA[613] (reflecting the Norwegian model) establishes the Petroleum Fund as the fund where the Uganda Revenue Authority (URA)[614] will deposit revenues collected from the Petroleum industry and other related activities. The PFMA establishes that the Petroleum Fund's revenue is only withdrawn and deposited into two avenues: The Consolidated Fund Accounts and the Petroleum Revenue Investment Reserve Account in Bank of Uganda in a Dollar and Uganda Shilling account.[615] Bank of Uganda

[611] PFMA 2015, s 89A
[612] NOGP 2008, objective 6(h)(iii), 7.2.6.1(b)(xiv).
[613] PFMA 2015, s 55, 56(1) and (2) – 75
[614] Income Tax Act 1997, (amended in 2015)
[615] PFMA 2015, s 58

will manage the Fund on behalf of Government.[616] Parliament and the Auditor General will oversee the management of the fund.[617]

The revenue deposited into the Consolidated Fund supports the country's annual budget for financing infrastructure and development projects, goods, and services, and not the government's recurrent expenditure like public servants' salaries.[618] While funds deposited into the Petroleum Revenue Investment Reserve Account are for future investment. The PFMA also establishes that withdrawal of the Petroleum funds' revenue is only under authority granted by Parliamentary Appropriation and issuance of a grant of Credit by the Auditor General.[619]

PFMA also provides petroleum as a payment other than cash using a value calculated in international and freely convertible currency, thereby enabling the country to have its petroleum reserve under the fund.[620] PFMA stipulates that such petroleum received as payment shall be received and recorded by the National Oil Company, which must then submit a copy of the record to the MFPED, URA, the Secretary to the Treasury, the Accountant General as well as to the Auditor General.[621] This practice will ensure the maintenance of accurate records, thereby encouraging transparency in the Petroleum Fund management.

[616] PFMA 2015, s 64
[617] Ibid section 46, 61.
[618] Ibid Section 58 (a)
[619] Ibid Section 58 (b)
[620] Ibid Section 57(4)
[621] Ibid Section 57(5)

To ensure total safety of the Petroleum Fund assets, the PFMA prohibits earmarking, pledging, loaning out, or otherwise encumbering the Petroleum Fund's financial assets by any person or entity.[622] The same provision [623]states that "*The government shall not borrow money from the Petroleum Fund or hold a financial instrument that may place a contingent liability on the Fund*." Consequently, any contract that encumbers a financial asset of the Petroleum Fund is invalid.

According to the Auditor General's 2019 report,[624] the Fund had an opening balance of USD 120.5 billion. It received revenue totalling to USD 14.9 Million during the year, of which MFPED authorized the transfer of USD 52.7 Million to the Consolidated Fund for budget support (amount converted from USD based on exchange rate on 1st April 2020). In the report, the Auditor General noted several concerning issues discussed below.

3.6.1.1 Lack of Fiscal Targets

Fiscal Targets in Petroleum Fund Management impose a long-lasting constraint on Government spending and public debt accumulation. Fiscal targets are essential for growing and diversifying the economy from depending on finite and volatile petroleum revenues. They enable the Government to determine how much they spend and invest from petroleum

[622] Ibid Section 74 (2)
[623] Ibid section 74 (3)
[624] Office of the Auditor General, Report of The Auditor General to Parliament for The Financial Year Ended 30th June (Uganda 2019 December) paragraph 3.5, Page 51

revenues to avoid the temptation to borrow more, leaving future generations to deal with the consequences.[625]

However, the Auditor General noted that the withdrawal process of USD 52.7 Million from the Petroleum Fund to the Consolidated Fund did not follow the process in Section 58 (a) (b) of PFMA and was not guided by any fiscal rule. Instead, "*it had been left to the discretion of the Ministry of Finance, Planning and Economic Development during the budget formulation process, and Parliament, which lacks guidance in assessing and approving Government proposed spending and investment of oil revenues during appropriation*." Such violations could result in the government's misappropriation of petroleum funds, especially economic instability. Thereby exposing the country to experiencing the 'Resource curse phenomenon.'

3.6.1.2 Non-Disclosure of Development Projects

The Auditor-General also noted that the USD 52.7 Million transferred to the Consolidated Fund was not justified by a specific disclosure on what infrastructure and development projects the Government would be funding.[626] It was, therefore, impossible to confirm whether the government used that amount to finance public infrastructure. The Government must formulate appropriate procedures to ensure clarity in the appropriation of petroleum funds.

[625] PFMA 2015, section 63(2) (a-c)
[626] Office of the Auditor General, Report of The Auditor General to Parliament for The Financial Year Ended 30th June (Uganda 2019 December) paragraph 3.5, Page 51

3.6.2 Petroleum Revenue Investment Reserve

The government intends to use the revenue deposited into the Petroleum Revenue Investment Reserve to support planned investments for future generations.[627] The MFPED, particularly the Assets Management Department, together with the Investment Advisory Committee,[628] is responsible for designing the investment strategy, which will then be managed by the Bank of Uganda, subject to a contractual arrangement with MFPED.[629] The Investment Advisory Committee also advises the MOFPED on the financial reports, annual reports and annual plans of the Petroleum Fund, the sharing of royalties, and any related offences.[630]

PFMA prescribes specific investments that Bank of Uganda should undertake and that such investments should not jeopardise Uganda's macroeconomic stability.[631] These investments include an internationally convertible currency deposit or debt instrument denominated in an internationally convertible currency that bears interest or a debt instrument of a fixed amount equivalent to the interest of investment-grade security. As well as any other qualifying instrument prescribed by the Minister; in minimal risk diversified investment portfolios abroad that also guarantee availability if the government needs it to deal with domestic emergencies. If there are any balances on revenue withdrawn to the consolidated fund at the end of each fiscal year, the Bank of

[627] PFMA 2015, section 62
[628] Ibid section 66 -68
[629] Ibid section 63
[630] Ibid section 66
[631] Ibid section 63(2) (a-c); Bank of Uganda Act, Cap. 51, 1993

Uganda will invest it. Any interest earnings deposited back into the Petroleum Fund.[632]

3.6.2.1 Lack of an approved Petroleum Investment Framework

According to the Auditor General's 2019 report, [633] even though the Government had appointed the Investment Advisory Committee, there was no approved Petroleum Revenue Investment Policy, and Investment Framework developed to guide the operations of the Petroleum Revenue Investment Reserve by Bank of Uganda. Lack of an approved Petroleum Revenue Investment Policy delays appropriation of petroleum funds for investment. It delays subsequent investment growth as the funds continue to remain unutilized on the Petroleum Fund account without maximizing any returns. The report stated that the Investment Advisory Committee had reviewed both the Petroleum Revenue Investment Policy and the Operational Agreement between Bank of Uganda and MOFPED and forwarded to MOFPED for approval and signature.

3.6.3 Royalty-Revenue Sharing

According to the PFMA, the central Government retains 94% revenue from petroleum production, while it will share 6% among local governments located within the petroleum production areas.[634] The local governments will

[632] PFMA 2015, section 58
[633] Office of the Auditor General, Report of The Auditor General to Parliament for the Financial Year Ended 30th June (Uganda 2019 December) paragraph 3.5, Page 51
[634] PFMA 2015, section 75 (1)

share 50% of the revenue from the appropriate pool of royalties, based on each local government's production level.[635] The Government shares the remaining balance of 50% due to the local governments based on population size, geographical area, and terrain.[636] The PFMA also provides that the government shall grant 1% of the royalty due to the central government to a gazetted cultural or traditional institution, which is a relatively small sum considering the sum would be shared amongst several cultural institutions in the mineral host communities.[637]

This thesis makes several observations about the above formula of royalty revenue-sharing. It does not provide individual reporting lines for these payments, so there is no way for local communities and subjects to hold their local governments accountable for such monies. The percentages allocated to the local government and cultural institutions seem significantly low compared to what the central government retains. Nevertheless, the local governments interact directly with the people and bring services directly to them.[638] Thus, there is a need to achieve consensus on the sharing formulae, especially with the communities based within the production areas, to avoid conflict that usually arises from revenue/royalty sharing arrangements.[639]

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[635] Ibid section 75 (3)
[636] Ibid section 75 (4)
[637] Ibid section 75 (8); Murindwa Rutanga, 'Traditional/Cultural Institutions in Uganda's Democratic Transition, Political Stability and Nation Development: A Case of Buganda' (2010)14 Jadavpur Journal of International Relations (1)125-166
[638] Avocats Sans Frontieres, 'Business, Human rights and Uganda's oil and gas industry: A Briefing of Existing Gaps in the Legal and Policy Framework,' *Avocats Sans Frontieres* (Kampala, 2015) 8
[639] Oyefusi Aderoju, 'Oil-dependence and Civil conflict in Nigeria,' *WPS 2007 – 09, Centre for the Study of African Economies* (2007)

3.6.4 Accountability

For purposes of accountability transparency and good governance of petroleum revenues, Section 60 of the PFMA requires the Accountant General to maintain proper books of accounts and proper records. The Accountant General must submit semi-annual and annual reports to the MOFPED, Secretary to the Treasury Bank of Uganda, and the Auditor General.[640] This oversight is essential for the successful management of natural resource funds and contributes to the Government's efforts to avoid the 'Resource Curse Phenomenon' and the impacts.[641]

The Auditor General's office has the authority and resources to review and audit oil revenues' use and disbursement. To ensure that internal controls are adequate and provide assurances of public funds' integrity and sound fiscal management. The Officials in the Office of the Auditor General are supposed to disclose their financial status annually[642] . However, they are not obligated to disclose their financial interest in the petroleum subsector. It can create a loophole and potential conflict of interest for those involved in the sector's oversight role.

<https://www.csae.ox.ac.uk/workingpapers/pdfs/2007-09text.pdf> accessed on 20th May 2018; Mika Minio-Paluello, 'The Ugandan Upstream Oil Law: A Search in Vain for Accountability and Democracy Oversight,' *Platform Briefing Paper* (2012); Elijah Dickens Mushemeza, John Okiira, 'Local Content Frameworks in the African Oil and Gas Sector: Lessons from Angola and Chad, *ACODE Policy Research Series No.72* (Kampala. 2016)

[640] National Audit Act, 2008; PFMA 2015, s 73.

[641] Refer to discussion in Chapter Two, section 2.2.3.2.2

[642] PFMA 2015, section 48, 50

Annually the Office of the Auditor General reports to Parliament, providing objective analysis of the MFPED and Bank of Uganda as per their petroleum revenue management role.[643] The PFMA also requires the MOFPED to present to Parliament the estimated Petroleum revenue (collection, management, and use of all oil revenues) for the financial year and semi-annual and annual reports indicating the various transactions out of the Petroleum Fund.[644] The Parliament receives and scrutinizes these reports and discusses them within a year after the audit report date.[645] These reports are to be published in newspapers and on the website. Having this provision enhances transparency over the monies collected; it also ensures public involvement in the same.

PFMA gives the MOFPED the responsibility for the overall management of the Petroleum Fund.[646] The MOFPED tables before Parliament the estimated petroleum revenue for the financial year.[647] However, Parliament receives no information on the award of contracts and licenses in the petroleum subsector, which excludes the legislative powers of having an oversight role in scrutinising whether the financials reported correlating with the expectations placed in the contract. Therefore, the PFMA could be giving MOFPED extensive discretionary powers, concentrating power in a single individual, without making provision for the necessary checks and balances. It can result in miscalculated and unchecked decisions, that could prove costly.[648] The

[643] Ibid section 60, 69- 73
[644] Ibid Section 61
[645] Ibid section 61
[646] Ibid section 56 (3)
[647] Ibid Section 61
[648] Refer to the examples in section 3.6.1.1 and 3.6.1.2 above.

Parliamentary ratification or contract approval does not necessarily mean that Government disseminated the contracts to the public. Neither does parliament approval of financial budget mean that they are privy to whether the collected petroleum revenues correlate with the contractual expectations.

In 2016, the Auditors General reported [649] that the government paid only surface area rentals into the Petroleum Fund. That petroleum income tax, such as Pay as you Earn, Value Added Tax, and Withholding Tax, had not been deposited in the Petroleum Fund as required by the PFMA.[650] The Auditors General reported that instead, the Government deposited funds into commercial banks, which then remitted to the consolidated fund directly.[651] This discrepancy is an early indicator of some inefficiency in implementing the PFMA, whose repercussions will significantly impact the country's socio-economic development, if not rectified, moving forward.

Petroleum revenues and their management present opportunities, and unique policy challenges, unlike revenues from other sectors. On the one hand, the emergence of petroleum resources will improve the Government's net worth. On the other hand, if mismanaged, these revenues can present significant challenges characteristic of the 'Resource Curse Phenomenon'.[652] The UN Convention against Corruption recommends building an effective domestic

[649] Office of the Auditor General Uganda, 'Report of the Auditor General on the Financial Statements of the Petroleum Fund for the six-Month Period Ended 31st December 2016,' (2016)
[650] The Income Tax Act Cap. 340, 1997
[651] Office of the Auditor General Uganda, 'Report of the Auditor General on the Financial Statements of the Petroleum Fund for the six-Month Period Ended 31st December 2016, (2016)
[652] Refer to Chapter Two section 2.2.3.2.2 for discussion on risk of revenue misappropriation

review system, including an effective accountability system.[653] The IMF guides that the internal audit controls should be clearly defined and subject to external reviews accessible to the public.[654] If the Government follows through with its obligations, as laid out in the discussions above, they will provide adequate assurance that controls on the use of the oil revenues are in place and ensures more comprehensive participative governance measures with local communities. The aim should be to create multi-tiered accountability mechanisms rather than concentrate power in a single individual's hands.

Despite the above concerns, this thesis credits the Government for successfully defending the Heritage case[655] even though they settled the Capital Gains Tax dispute with Tullow Oil out of court the.[656] In these cases, the successful conclusion and reasonable settlement present some assurance that the

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[653] UN General Assembly, The United Nations Convention against Corruption (adopted in October 2003, entered into force in December 2005, ratified by Uganda on 9 Sep 2004) 2349 UNTS 41, Article 5, 9; Antonio Argandoña, 'The United Nations Convention Against Corruption and its Impact on International Companies,' *Journal of Business Ethics 74* (November 6, 2006)

[654] Christine Ebrahim-zadeh, 'Back to Basics – Dutch Disease: Too much wealth managed unwisely' *Finance and Development, A quarterly magazine of the International Monetary Fund* Volume 40, Number 1 (March 2003,)
<https://www.imf.org/external/pubs/ft/fandd/2003/03/ebra.htm> Accessed 16th June 2017 International Monetary Fund, 'Fiscal Regimes for Extractive Industries' (2012). https://www.imf.org/external/np/pp/eng/2012/081512.pdf accessed 13 June 2017; Transparency International, 'Oil and Gas' <http://www.transparency.org/topic/detail/oil_and_gas> accessed 13 June 2017)

[655] *Heritage Oil and Gas Ltd v Uganda Revenue Authority* [2011] UGCOMMC 97; *Heritage Oil and Gas Vs Uganda Revenue Authority* [2011] UGTAT 1; *Heritage Oil and Gas Ltd V Uganda Revenue Authority* [2011] UGTAT 5; *Tullow Oil v Uganda Revenue Authority* [2011] UGTAT 1; *Tullow Uganda Ltd v Heritage Oil and Gas Ltd and Anor* [2013] EWHC 1656 (Comm)); The New Vision, 'Tullow Oil wins case against Heritage' *The New Vision* (2013) https://www.newvision.co.ug/new_vision/news/1323045/tullow-oil-wins-heritage>

[656] Tullow settles Capital Gains Tax dispute in Uganda (Published on 22 June 2015) http://www.tullowoil.com/media/press-releases/tullow-settles-capital-gains-tax-dispute-in-uganda

Government is committed to achieving a considerable petroleum revenue collection.[657]

3.7 Legal and Regulatory Framework Relevant to the Socio-Economic Aspects of Petroleum Development

3.7.1 Land Ownership Rights and the Petroleum Industry.

The Ugandan Cabinet approved the Uganda National Land Policy in February 2013.[658] It provides the framework that harmonises and streamlines the complex land tenure regimes in Uganda and ensures sustainable utilisation, management, and protection of environmental, natural and cultural resources on land for poverty reduction, wealth creation, and overall socio-economic development.[659] Objective 29 of the above policy states that "*minerals and petroleum being strategic natural resources shall vest in the State for the beneficial interest of all the citizens of Uganda.*" This objective reiterates the provision of Article 244 (1) of the 1995 Constitution of Uganda.

Since the Government adopted the Land Policy after the Upstream Act and Midstream Acts, it provides the Government's strategies for managing land resources concerning minerals and petroleum development.[660] Among those strategies, the government plans include protecting the land rights and land

[657] See chapter five for further discussion on arbitration clauses contained in PSAs and their implications.
[658] Ministry of Lands, Housing and Urban Development, The Uganda National Land Policy, 2013.
[659] Ministry of Lands, Housing and Urban Development, The Uganda National Land Policy, 2013.
[660] Ibid Paragraph 30.

resources of customary owners, individuals, and communities owning land in areas where mineral and petroleum deposits exist. To the extent possible, it allows the co-existence of customary owners, individuals, and communities owning land in areas where petroleum and minerals exist. It provides for restitution of land rights in the event of minerals or oil being exhausted and guarantees the right to the sharing of benefits by landowning communities and recognise the stake of cultural institutions over ancestral lands with minerals and petroleum deposits. Finally, it provides for the government's strategy in acquiring the land identified for petroleum development and the subsequent compensation to any Project Affected Persons (PAPs).[661]

The Constitution[662] and Uganda's land laws[663] provides that land in Uganda belongs to Uganda's citizens. This right is protected from deprivation, subject only to the prompt payment of fair and adequate compensation before taking possession of the property.[664] The Land Act also provides that to carry out any project in the public's interest, the government's authorised undertaker enters into a mutual agreement with the occupier or owner of the affected land.[665] If the Government does not agree with the PAPs, the government is entitled to acquire that land compulsorily, [666] subject to prompt and adequate

[661] Ibid Paragraph 30.
[662] Article 26, 237
[663] The Land Act, Cap. 227 of 1998; Land (Amendment) Act, 2010 (Uganda Gazette Extraordinary No. 10 Volume Clll); Constitution of the Republic of Uganda, 1996 Article 26
[664] Constitution of the Republic of Uganda, 1996 Article 26, 237
[665] The Land Act, Cap. 227 of 1998 Section 73,
[666] Constitution of the Republic of Uganda, 1996 Article 237(2)(a)

compensation to those PAPs.[667] Supreme Court ruling of *Uganda National Roads Authority* v *Asumani Irumba*,[668] reiterated this position, stating that before the compulsory acquisition of land for government projects development, the property owner must receive prompt payment of fair and adequate compensation.

Despite having legal protection to privately-owned land, several PAPs have made concerning reports to the Uganda Human Rights Commission (UHRC) regarding the compensation amounts and process.[669] UHRC reported that the Government was offering community PAPs inadequate compensation. Secondly, the Government valuer did not consider their social-cultural values and their crops' value to determine the compensation amounts.[670] Thirdly, that compensation was being paid late without considering inflation.[671] Finally, wealthy individuals and government officials strategically bought land in the oil prospect areas to secure generous compensation packages.[672] If true, this could likely alienate the local communities and contribute to the 'Resource Curse Phenomenon's civil conflicts characteristic.[673]

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[667] Land Acquisition Act, Chapter 226 of the Laws of Uganda, 1965; Section 73, The Land Act, Cap. 227 of 1998

[668] *Uganda National Roads Authority v Irumba and Anor* [2015] UGSC 22

[669] Uganda Human Rights Commission Special Report, *Oil in Uganda: Emerging Human Rights Issues, Special Focus on Selected Districts in the Albertine Graben* (Uganda Human Rights Commission Special Report, 2013)

[670] Refer to chapter two, section 2.2.3.1 on the negative social impacts of the petroleum industry.

[671] Uganda Human Rights Commission Special Report, *Oil in Uganda: Emerging Human Rights Issues, Special Focus on Selected Districts in the Albertine Graben* (Uganda Human Rights Commission Special Report, 2013)

[672] G Peter, Veit, C Excell, and A Zomer, 'Avoiding the resource curse: spotlight on oil in Uganda' (World Resources Institute, 2011); NOGP 2008

[673] Oyefusi, Aderoju, Oil-dependence and Civil conflict in Nigeria, WPS 2007—09, Centre for the Study of African Economies, (2007). Available at

The Constitution (Amendment) Bill was proposed in 2017[674] to amend article 26 of the Constitution. Currently, Article 26 provides "*No person shall be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied- (a) the taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health; and (b) the compulsory taking of possession or acquisition of property is made under a law which makes provision for- (i) prompt payment of fair and adequate compensation.* ***prior to the taking of possession or acquisition of the property****; and (ii) a right of access to a court of law by any person who has an interest or right over the property"* [emphasis added].

Instead of ascertaining whether the valuation made by the Government Valuer was fair and adequate, the Government proposed to amend Article 26 to enable the government valuer to unilaterally determine how much the land is worth, the government would then compulsorily take over the land and deposit any disputed compensation with the court. The PAPs can then individually (not through the Attorney General as provided by the Land Acquisition of 1965) apply to the Court to determine the fair amount owed to the property owner or person having an interest in or right over the property. The Government justified this proposal as resolving the current delays in

https://www.csae.ox.ac.uk/workingpapers/pdfs/2007-09text.pdf accessed August 2019; Refer to Chapter Two, section 2.2.1 for the discussion explaining 'Resource Curse' Phenomenon's governance and civil conflicts characteristics.

[674] The Constitution (Amendment) Bill (not yet law) (Uganda Gazette No. 33, Volume CX, 2017); Phillip Karugaba, 'Expediting compulsory land acquisition: The Constitution (Amendment) Bill, 2017' https://www.ensafrica.com/news/Expediting-compulsory-land-acquisition-The-Constitution-Amendment-Bill-2017?Id=2699&STitle=ENSafrica%20ENSight accessed on 18th July 2017

government infrastructure implementation and investment projects due to the landowners objecting to the compensation amount.[675] To date, Parliament has not yet enacted this Bill into Law, due to further objections that the proposed amendment does not address the timeline in which courts might require the Government to pay such additional sum if awarded by the court.

3.7.2 Local Content and the Petroleum Industry

The NOGP provides for national participation (Local Content) in the petroleum activities. [676] Through strategies such as promoting state participation in production sharing agreements;[677] promoting the use of the country's materials, goods and services in the petroleum sector;[678] promoting direct and indirect employment of Ugandans in the sector;[679] supporting the development and maintenance of national expertise through broadening the national education curricula to prepare the necessary workforce for engagement with the sector.[680] The Upstream Act, 2013,[681] the Midstream Act 2013,[682] and Petroleum (Exploration, Development, and Production) (National

[675] Phillip Karugaba, Expediting compulsory land acquisition: The Constitution (Amendment) Bill, 2017https://www.ensafrica.com/news/Expediting-compulsory-land-acquisition-The-Constitution-Amendment-Bill-2017?Id=2699&STitle=ENSafrica%20ENSight accessed on 18th July 2017
[676] NOGP 2008, Objective 7
[677] Refer to section 3.9 of this chapter.
[678] Upstream Act 2013, S 124-127; The Petroleum (Exploration, Development and Production) (National Content) Regulations 2016, The Uganda Gazette No. 45, Volume CIX, Regulation 10
[679] Upstream Act 2013, s 56(3)(f); Midstream Act 2013, s 10(6)(s); Refer to chapter two, section 2.3.1.4 and 2.3.1.5
[680] NOGP 2008, Objective 7, 8
[681] Upstream Act 2013, s 124-127
[682] Midstream Act 2013, s 52-55

Content) Regulations in 2016[683] effectuate the national content provision in the NOGP.

3.7.2.1 Promoting the Use of the Country's Materials, Goods and Services

Concerning this objection, the National Content Regulations provide categories of goods and services reserved for Ugandan entrepreneurs where possible. These goods and services include[684] Transportation, Security, Foods and beverages, Hotel accommodation and catering, Human resource management, Office supplies, Fuel supply, Land surveying, Clearing and forwarding, Crane hire, Locally available construction materials, Medical services, Civil works, Environment studies, and impact assessments, Communications and information technology services, Waste management, Furniture manufacturing, generic and Hazardous waste management, general maintenance, Light equipment, Manpower consultancy, Mechanical construction, Production operations, Structural/ flat steel, Technical consulting, the supply of work safety products and reinforcement steel manufacturing.

Despite having the above objective, the Auditor General's report indicated that out of USD 9.5 billion spent on goods and services; MOCs only spent USD 267 million on Ugandan goods and services.[685]The report stated that in 2013,

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[683] The Petroleum (Exploration, Development and Production) (National Content) Regulations 2016, The Uganda Gazette No. 45, Volume CIX, Regulation

[684] Upstream Act 2013, s 124-127; The Petroleum (Exploration, Development and Production) (National Content) Regulations 2016, The Uganda Gazette No. 45, Volume CIX, Regulation 10

[685] Office of The Auditor General, 'Implementation of National Content in The Oil and Gas Sector: Value for Money Audit Report (2015) 16-23; Mary Karugaba, 'AG exposes rot in oil firms,' *New Vision* (Wednesday 3rd April 2015)

MOCs had procurements from international companies foreign-owned contractors, but typically registered as Ugandan companies.[686]

The above provision remains ambiguous because the strict interpretation of "Ugandan company" leaves out well-recognised commercial "business entities" such as partnerships and cooperative societies, among others that local Ugandans often establish[687] instead of companies established according to the Company Act. [688] The Midstream Act attempts to correct the above ambiguity by providing that the "*licensee and its contractors shall prioritise citizens and registered entities owned by Ugandans in the provision of goods and services.*"[689] Unlike the Upstream Act, the Midstream Act, therefore, considers other business entities in addition to companies.

3.7.2.2 Promoting Direct Employment of Ugandans in the Sector

The National Content Regulation requires MOCs to submit to the Petroleum Authority for approval, a National Content Programme,[690] within twelve months after obtaining a licence. The national content programme states proposals for the employment and training of Ugandans; the required quality,

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https://archives.visiongroup.co.ug/vision/NewVisionaApi/v1/uploads/NV010415pg07.pdf> accessed on 25th August 2017; Avocats Sans Frontieres Business, 'Human rights and Uganda's oil and gas industry: A Briefing of Existing Gaps in the Legal and Policy Framework, Kampala: ASF. (2015), 11; Peter Magelah Gwayaka, 'Local content in Oil and Gas Sector: An Assessment of Uganda's Legal and Policy Regimes,' *ACODE Policy Briefing Paper Series, No.28* (Kampala 2014)

[686] Refer to section 3.4 on the legal process of registering a foreign company

[687] Gwayaka, Peter Magelah, "Local content in Oil and Gas Sector: An Assessment of Uganda's Legal and Policy Regimes," ACODE Policy Briefing Paper Series, No.28: Kampala (2014) 12

[688] Refer to section 3.4 on the legal process of registering a foreign company

[689] Upstream Act 2013, S 56(3)(f); Midstream Act 2013, s 10(6)(s)

[690]The Petroleum (Exploration, Development and Production) (National Content) Regulations 2016, Regulation 7-20, The Uganda Gazette No. 45, Volume CIX

health, safety and environment standards for goods and services to be procured; the transfer of technology, knowledge, and skills to Ugandan companies, Ugandan citizens and registered entities; research and development in Uganda; the procurement of goods and services obtainable in Uganda; local supplier development; partnership with Ugandan companies, Ugandan citizens and registered entities; the succession of expatriates by Ugandan citizens; support to local education institutions; support to partnerships and collaborations; and for services provided by Ugandan companies, Ugandan citizens and registered entities. [691]

Concerning the provision on expatriates' succession by Ugandan citizens, the PSAs allow the licensees' permission to recruit expatriates, after satisfying the Advisory Committee, that no suitably qualified Ugandan citizens are available for the task.[692] However, the licensees are also required to gradually replace their expatriate staff in crucial senior management or technical positions with suitably qualified and experienced Ugandan citizens. [693] The MOCs are not required to publish how many expatriates they replaced since the law came into effect, making it difficult to establish whether MOCs follow through with this provision.

Also, both Acts lack provisions to ensure that Ugandans employed by the oil companies receive the same treatment, pay, and opportunities at the

[691]Ibid

[692] The Petroleum (Exploration, Development and Production) (National Content) Regulations 2016, The Uganda Gazette No. 45, Volume CIX, Regulation 6, 10, 16-19

[693] The Petroleum (Exploration, Development and Production) (National Content) Regulations 2016, Regulation 20, The Uganda Gazette No. 45, Volume CIX.

workplace with their foreign counterparts.[694] An audit done by the Auditor-General's office[695] into the MOCs operations revealed that nationals employed by the companies were underpaid compared to the MOC workers of similar qualifications and working experience. The Auditor-General stated that "*There is a risk that nationals are not benefitting proportionately in terms of wages and salaries*." [696] Oil companies explained that they paid expatriates according to the terms set in their countries of origin, which are higher than the nationals. If this is the case, then the Ugandan Government is not doing enough, legally, to ensure that their skilled nationals earn a fair wage. The disparity can affect performance, credibility, and transparency in the sector.

In February 2019, Parliament passed the Minimum Wage Act.[697] The Act seeks to set up a minimum wage determination mechanism across different economic sectors for skilled, professional, and unskilled workers. This new development will be a positive enhancement of the Labour and Human Rights

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[694] Avocats Sans Frontieres Business, Human rights and Uganda's oil and gas industry: A Briefing of Existing Gaps in the Legal and Policy Framework, Kampala: ASF. (2015), 12

[695]Office of The Auditor General, 'Implementation of National Content in The Oil and Gas Sector: Value for Money Audit Report (2015) 24-36 Keith Muhumuza, 'Auditor General Faults and Government and Oil Companies on skilling Locals.' http://www.monitor.co.ug/Business/Auditor--General--faults--government-oil/-/688322/2687092/-/af385ez/-/index.html accessed June 30th, 2017; Mary Karugaba, 'AG exposes rot in oil firms,' *New Vision* (Wednesday 3rd April 2015) https://archives.visiongroup.co.ug/vision/NewVisionaApi/v1/uploads/NV010415pg07.pdf> accessed on 25th August 2017

[696] Office of The Auditor General, 'Implementation of National Content in The Oil and Gas Sector: Value for Money Audit Report (2015) 24-36; Mary Karugaba, 'AG exposes rot in oil firms,' *New Vision* (Wednesday 3rd April 2015) https://archives.visiongroup.co.ug/vision/NewVisionaApi/v1/uploads/NV010415pg07.pdf> accessed on 25th August 2017

[697] The Minimum Wage Bill, (Uganda Gazette No. 74, Volume CVIII, 2017) available at https://www.parliament.go.ug/documents/1277/bills-2015 accessed on 20th June 2018; Parliament of Uganda, "Parliament passes Minimum Wage Bill 20 Feb 2019" available at https://www.parliament.go.ug/news/3160/parliament-passes-minimum-wage-bill accessed on 13th August 2019

Laws as it ensures that all workers, especially the unskilled casual workers within the petroleum industry, earn a living allowance.

The Auditor General's report also indicated that MOCs employed expatriates longer than the approved period, stating that "*The overstay of expatriates is not only against succession planning, but also denies the locals opportunities to take jobs in the sector*."[698] It further stated that "*In September 2014, 11 expatriates from Total and 74 working for CNOOC and its sub-contractors were working without work permits*."[699] The Minister of Energy and Mineral Development attempted to explain the overstay citing that there were not appropriately skilled nationals identified to replace them. However, there was no evidence that they advertised the job, which makes the claim unsubstantiated.[700]

In the few instances where MOCs advertised the jobs in the newspapers, MOCs do not appoint local applicants "*citing lack of experience in the oil and gas sector. Instead, CNOOC recommended the recruitment of expatriates*."[701] Uganda does have legal sanctions for expatriates working beyond their approved work permits. Therefore, the Government should make every effort to enforce this law. Concerning lack of skilled nationals to fill these positions, the

[698] Office of The Auditor General, *Implementation of National Content in The Oil and Gas Sector: Value for Money Audit Report* (Office of The Auditor General 2015) 24-36; Keith Muhumuza, 'Auditor General Faults and Government and Oil Companies on skilling Locals.' http://www. monitor.co.ug/Business/Auditor--General--faults--government-oil/-/688322/2687092/-/af385ez/-/index.html accessed June 30th, 2017.
[699] Ibid
[700] Ibid
[701] Ibid

Government has the mandate to skill and equip nationals to fill these positions when vacant.[702]

3.7.2.3 Promoting Training and Skilling of Ugandans

Since the petroleum industry is nascent in Uganda, direct local employment is challenging due to the lack of suitably skilled workers.[703] The NOGP provides for the training and skilling of nationals to work within the petroleum industry. The Government developed the Workforce Skills Development Strategy and Plan (WSDSP) for the petroleum subsector in 2015. The comprehensive plan would enable Ugandans to participate in petroleum sector activities fully. The efforts to enhance skills development are the Ministry of Education, Science, Technology, and Sports' responsibility with the MEMD and development partners' support.

Positive steps have been introduced by Government and MOCs to implement the above requirement by establishing several specialised institutions to train Ugandans in skills relevant to the petroleum industry.[704] For example, the Uganda Petroleum Institute Kigumba (UPIK) offers diploma and certificate courses. Victoria University, the Institute of Petroleum Studies/Quest Energy, OGAS Training East Africa and ICON Industry Services have all started

[702] NOGP 2008, Objective 7, 8

[703] Upstream Act 2013, s 124-127; The Petroleum (Exploration, Development and Production) (National Content) Regulations, (The Uganda Gazette No. 45, Volume CIX 2016) Regulation 1-3, 10, 16; IPIECA, 'Local content guidance for the oil and gas industry' (2nd edn April 2016); Agenda 2030 (n 148) Goal 8; Refer to chapter two, section 2.3.1.5 for discussion on Education and Vocation Training Programmes

[704] The Petroleum (Exploration, Development and Production) (National Content) Regulations 2016, (The Uganda Gazette No. 45, Volume CIX) Regulation 16-19

teaching petroleum-related short term or long-term training courses. Several Government institutions have also embraced capacity building by offering petroleum-related scholarships to staff members to contribute to the petroleum sector's successful development.[705] Other development partners such as Japan Oil, Gas and Metals National Corporation, Norwegian Agency for Development Cooperation, United States Agency for International Development, and the World Bank are also offering scholarships for the sector's training opportunities at blue-collar and professional levels.

However, the country still lacks the legal framework for National Content. Even though the international oil companies are compelled within PSAs to train and employ Ugandans, this should be operationalized and enforced by law. The National Content Policy is yet to be approved by Cabinet.[706] The National Local Content Bill, 2019 is yet to be enacted by Parliament;[707] and this has affected the development of a Legal Framework. The National Local Content Bill, 2019 establishes a Local Content Department under the Ministry of Finance, Planning and Economic Development to implement the Act's provisions. Also, the WorkForce, Skills Development Strategy and Plan were conducted by the MEMD. However, it was not exhaustive because unlike the Ministry of Gender, Labour and Social Development (MGLSD), the MEMD

[705] Refer to chapter three, section 3.8 for discussion on the institutional framework; Refer to chapter two, section 2.3.1.4 and 2.3.1.5 for MOC engagement in education and training.
[706] Ministry of Energy and Mineral Development, *National Content Policy for The Petroleum Subsector in Uganda,* (Ministry of Energy and Mineral Development 2017)
[707] On 20 May 2020, the Parliament of the Republic of Uganda passed the National Local Content Bill, 2019, (National Local Content Act or Act) into law and it now awaits the President's assent.

does not know about disaggregated skills data and employment qualifications. It is questionable why the MEMD would exercise this mandate which is absolutely a mandate of the institution charged with labour.

3.7.3 Access to Information and the Petroleum Industry

The constitution established that all oil resources belong to the government, which must control and exploit them for the people's benefit in a fiduciary arrangement.[708] The Constitution further provides that "*every Ugandan citizen has the right to participate in government affairs, individually or through their representative per the law.*"[709] That *"every citizen of Uganda has the right of access to information in possession of the State, except where the release of such information is likely to prejudice the security or interfere with the right of another person."*[710]

The NOGP also concurs with this critical importance of transparency in handling all aspects of natural resource management, as transparency and accountability towards stakeholders enshrined as a guiding principle. It provides that

> *"Openness and access to information are fundamental rights in activities that may positively or negatively impact individuals, communities and states. It is important that information that will enable stakeholders to assess how their*

[708] The Constitution of the Republic of Uganda 1995, Article 244 (2); The Constitution (Amendment) (No. 2) Act, 2005, (Uganda Printing and Publishing Corporation, Government of Uganda 2005) Section 43; Petroleum (Exploration, Development and Production) Act (2013) section 4; Right2info, 'Access to Information Laws: Overview and Statutory Goals' <http://www.right2info.org/access-to-information-laws#section-2> accessed April 03, 2017
[709] The Constitution of Republic of Uganda, 1996, Article 38(1)
[710] The Constitution of the Republic of Uganda 1995, Article 41

interests are being affected is disclosed. This policy recognises the important roles different stakeholders must play to achieve transparency and accountability in the oil and gas activities. Therefore, this policy shall promote high standards of transparency and accountability in licensing, procurement, exploration, development, and production operations as well as management of revenues from oil and gas. The policy will also support disclosure of payments and revenues from oil and gas using simple and understood principles in line with accepted national and international financial reporting standards."[711]

This fiduciary arrangement naturally imposes the need for transparency and accountability on the part of the government. It also necessitates access to information so that the people as the principal beneficiaries of the resources can ably gauge the same government's performance and hold it accountable.[712] On this basis that Parliament enacted the Access to Information Act, 2005 (ATIA 2005).[713] The Act promotes an efficient, effective, transparent, and accountable government and empowers the public to access information, scrutinise it, and participate effectively in government decisions that affect them.[714]

However, the ATIA did not repeal the Official Secrets Act of 1964 (OSA). The OSA might directly counter what would have been fruits of the ATIA. OSA

[711] NOGP section 5.1.3
[712] Refer to the discussion in chapter two, section 2.2.1.
[713] ATIA 2005, s I-10
[714] ATIA 2005, s 3, 5 -6

provides for the protection of 'official information' more particularly the information concerning national security. It makes it an offence to 'obtain, collect, record, publish or communicate in whatever manner to any person.' Additionally, the Public Service Standing Orders[715] bar any officers from disclosing information that is privy to them for official use unless authorized by a superior not lower than the rank of a Permanent Secretary in the department or institution with authority to release the requested information. Similarly, the Access the Information Act also provides exceptions to information that can be accessed, for example, commercial information of the third party that puts that third party at a disadvantage in contractual or commercial negotiations, and commercial competition.[716] The continued existence of OSA and the exceptions in the Access to Information has equipped some officials of a government with the means to deliberately deny the public access to information by classifying it as official and confidential and cannot be released to the public. It could imply the protection of MOCs over citizens' ability to participate in petroleum activities' oversight.[717]

Concerning the Petroleum Industry, the NOGP promotes high transparency and accountability in licensing, procurement, exploration, development, and production operations and the management of revenues from petroleum.[718] The above NOGP Objective was reiterated in the Upstream and Midstream

[715] The Uganda Public Service Standing Orders, (2010)
[716] ATIA 2005, s 27; Constitution of the Republic of Uganda, 1995, article 41
[717] ATIA 2005, s 27(c) (1)
[718] NOGP 2008, objective 3

Act, allowing public access to information relating to petroleum activities.[719] Information such as the announcement of new areas for petroleum exploration, the publication of application notices and bidding processes, and access to some information/reports from the Petroleum Fund and the Petroleum Revenue Investment Reserve.[720] However, it does not provide for the publication of PSA terms, and still, there are challenges in accessing the information by the public.

3.7.3.1 Disclosure of PSA Terms

The Upstream Act tasks the MOEMD to develop a Model PSA and share PSAs with Parliament for approval. [721] Additionally, the Upstream Act, also provides that the MOEMD "may" make available to the public details of all agreements and licenses or approved field development plans upon payment of a prescribed fee.[722] The disclosure of petroleum contracts is beneficial, not only to Governments but also to the MOCs. For the MOCs, it provides certainty, transparency, stability, and improves marketing efficiency. It would ensure the Governments maximise and invest petroleum wealth into advancing all the SDGs discussed in Chapters One and Two. Without this information, the public, and Parliament cannot rightfully judge the risks accompanying petroleum exploration and development, effectively monitor

[719] Upstream Act 2013, s 52, 54
[720] Ibid Sections 57-75
[721] Ibid Section 6 (3-4), 8
[722] Ibid Section 51; ATIA 2005, s 43

the agreements, hold the Government accountable for the PSAs they signed and assess whether these were beneficial for the country's development goals.

In countries like Ghana, United States, Timor-Leste, and Peru, where companies disclose contract terms, the public can understand why the contract limits the government's revenue due to the MOC's exploration risks and costs.[723] Other countries like Columbia, Mexico, allow for disclosure under the freedom from information laws and policies. In Iraq, the government has published all its PSA. In Africa, Niger's 2010 Constitution mandates the publication of all its contracts, while Sierra Leone, São Tomé and Príncipe and Guinea all have embedded contract transparency requirements in oil sector legislation and code.[724]

However, saying that the Minister of Energy and Mineral Development "*may make available all agreements licences and any amendments to the licences or agreements whether or not terminated or valid*".[725] The use of "may" rather than "shall" implies that the availability of such information remains at the discretion of the Minister who may choose to disclose only selected information while withholding the rest.[726] However, the Upstream Act prohibits disclosing information in a report submitted by a licensee to any

[723] Revenue Watch Institute, 'Contract Disclosure Through EITI: Background Paper for the EITI Strategy Working Group' *Revenue Watch Institute* (April 2012) <https://eiti.org/files/documents/2012-04-11-proposal-rwi_swg_paper_contract_transparency_april_2012_0.pdf> accessed on 13th February 2018
[724] Ibid
[725] Upstream Act 2013, Section 151
[726] Ibid

person who is not a Minister or an officer in public service.[727] The exception being where the Licensee consents to such disclosure. The government also subjects its employees to an oath of secrecy and imposes strict penal sanctions for its breach.[728] Also, since the Act does not provide any penalties for failure to disclose PSAs to Parliament, it has created a situation where the government has consistently refused to make PSAs publicly available.

For example, Members of Parliament complained of a lack of information and transparency about the sector, Theodore Ssekikubo, the chairperson of the Parliamentary Forum of Oil and Gas stated that "*oil sector is still engrossed in a culture of secrecy as a governance challenge. Whereas a number of efforts have been undertaken by the government such as the development of a strong policy, legal and institutional framework, it is still difficult even for Parliament to access information which is pertinent to fostering the much-required transparency and accountability in the management of the sector,*"[729] even as the government claims that they provided the PSAs to Parliament.

In *Charles Mwanguhya Mpagi and Izama Angelo* v. *Attorney General*,[730] Magistrate's court rejected an attempt to seek disclosure of the contents of PSAs. The Court stated that the applicants failed to show that nondisclosure violated a constitutional right of access to information[731] and that the public

[727] Ibid Section 153
[728] Ibid Section 153 (3)
[729] Parliamentary Forum on Oil and Gas https://www.parliament.go.ug/page/parliamentary-forum-oil-and-gas accessed on 5th May 2019
[730] *Charles Mwanguhya Mpagi and Angelo Izama* Vs. *Attorney General* [2009] MC 751
[731] Avocats Sans Frontieres Business, Human rights and Uganda's oil and gas industry: A Briefing of Existing Gaps in the Legal and Policy Framework, Kampala: ASF. (2015) 10;

benefit in their disclosure outweighed the harm to the third parties, i.e., the Government and the oil companies. This lack of transparency creates an incentive for either corruptly or incompetently negotiated PSAs terms that are unfavourable to the nation's interest as a whole,[732] which can contribute to the 'Resource Curse Phenomenon.' Full disclosure forces the government to negotiate tighter and better terms because any slips will stir a controversial public debate to its detriment.

3.7.3.2 Disclosure of Petroleum Revenue

The PFMA also requires the Minister to present to parliament the estimated inflows and outflows of each financial year's Petroleum Fund.[733] However, there is no requirement for the MOFPED to stipulate the payment type, origin and source, making it impossible to follow company payments with government receipts since the national budget recognizes only one single figure from the petroleum industry.[734] The discussion in sections 3.6, revealed many mistakes done by the MOFPED concerning the Petroleum Fund's disbursement.

Karama, James, 'Uganda Can Learn from Nigeria's Oil, Gas Experiences,' Daily Monitor, October 21, 2016

[732] Gary Ian, Terry L Karl, 'Bottom of the Barrel: Africa's Oil Boom and the Poor' (*Catholic Relief Services* 2003) http://www.egjustice.org/sites/default/files/crs_barrel.pdf accessed 17th April 2019; Civil Society Coalition on Oil in Uganda, "Contracts Curse: Uganda's oil agreements place profit before people". Kampala, Uganda: CSCO, (2010), http://platformlondon.org/wp-content/uploads/2012/01/Contracts-Curse-Uganda-Platform-CSCO.pdf accessed 18th May 2019

[733] Upstream Act 2013, s 61

[734] Avocats Sans Frontieres Business, 'Human rights and Uganda's oil and gas industry: A Briefing of Existing Gaps in the Legal and Policy Framework,' *ASF* (Kampala, 2015).

Revenue and payment disclosures do not enable the citizens to assess the return they receive on the sale of petroleum resources, nor do they provide context for the size and timing of certain payments or information concerning the MOCs operational, social, and environmental obligations. Making revenue information public allows citizens, media, legislators, and investors to assess the actual financial terms or share of the wealth produced by resource development is supposed to stay in the country, which often differs from what the model PSA contains. It allows the public to assess what taxes and incentives the government offer MOCs that reflect what profit the MOCs hope to get and what tax MOCs pay on that profit and many other more specific terms on environmental and social impacts.

With the above in mind, there are signs of an early disconnect between laws and practice, even with the same laws containing various inadequacies. Presently, it is plausible to say that unless Uganda fully adheres to the disclosure requirements, it is bound to make the same mistakes as many other oil-producing countries. In countries like Nigeria, Gabon, Angola, Chad, and Equatorial Guinea,[735] non-disclosure of information blindsided the public as governments engaged in embezzlement and misappropriation of oil revenues causing the mineral and petroleum resources to become a curse. One of the main questions this thesis seeks to answer is whether the confidentiality

[735] Gary (n 732)

clauses in PSAs limit the Government's commitment to disclose vital information related to the petroleum industry.

3.7.3.3 Challenges to Disclosure of PSAs Terms

Should the government decide to make such information public, there is still a challenge that the majority Ugandans face, elevated levels of illiteracy.[736] Therefore, it will be crucial that the Government disseminate such information either in non-technical or basic English or even better in the native languages that people might best understand.[737]

Furthermore, the ATIA provides that every citizen is supposed to access information easily and promptly.[738] It further provides for a maximum of 21 days to respond to a citizen's information request. However, accessing information in Uganda has proved to be quite tedious and expensive, especially with the various red tape levels.[739] Should the request be denied, the law provides that people file appeals through courts of law or an internal appeal to a public body.[740] However, appeals have often gone to the Chief Magistrate's Court as there are no clear guidelines on internal appeals.[741] It has

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[736] Ashnah Kalemera, Paul Kimumwe, Lillian Nalwoga, Juliet Nanfuka and Wairagala Wakabi, 'Citizens Perceptions on Using ICT to Make Rights to Information Requests in Uganda' *CIPESA ICT Policy Research Series No. 02* (15 January 2015) http://cipesa.org/?wpfb_dl=124> accessed 18th July 2018; Ashnah Kalemera, Paul Kimumwe, Carlota Estalella, Lillian Nalwoga, Juliet N. Nanfuka and Wairagala Wakab, 'Ugandan Public Officials Perceptions of Using ICT to Advance the Rights to Information,' *CIPESA ICT Policy Research Series No. 01* 15 January 2015) http://cipesa.org/?wpfb_dl=155> accessed 18th July 2018

[737] Refer to section 3.7.3.4 of this chapter discussing the national communication strategy.

[738] ATIA 2005, s 3 (d)

[739] Upstream Act 2013, s 151 (2)

[740] ATIA 2005, s 16 (2) (c) and 16 (3) (c), 38

[741] *Sekyewa t/a Hub for Investigative Media* vs *National Forestry Authority* [2014] MC 73; *Charles Mwanguhya Mpagi and Angelo Izama* Vs. *Attorney General* [2009] MC 751; *Edward Ronald Edward*

made access to information complex, thereby denying the citizens their right to information. The appeal process is demanding and requires further time commitments on top of the first 21 days that the applicant may have to wait for a response to the requested information.

Also, the culture of government secrecy over state affairs remains deeply entrenched, to the extent that even the courts of law have been reluctant to enforce provisions that would compel the government to divulge information on the agreements made in the oil sector. Such reluctance was apparent in the following cases.

In *Charles Mwanguhya Mpagi & Angelo Izama* v. *The Attorney General*[742] , two journalists sought copies of agreements made between the government of Uganda and various companies involved in the prospecting and exploitation of oil. Although the Permanent Secretary of the MEMD did not directly reject the request, he responded to it by stating that more time was needed to consult other government bodies before reacting appropriately. The Solicitor General also stepped in to argue that the journalists could not access the agreements due to a confidentiality clause prohibiting their disclosure. The petitioners took the Permanent Secretary's non-committal response and the Solicitor General's opinion as a refusal to release the information. They filed a complaint in the Chief Magistrates Court under Section 37 of the Access to

Ronald Sekyewa Vs *Makerere University* [2014] UGCC 949; *Isaac Kimeze* Vs *Mandela National Stadium Ltd* [2011] NAK-00-CV-MC-0720.

[742] *Charles Mwanguhya Mpagi and Angelo Izama* Vs. *Attorney General* [2009] MC 751

Information Act.[743] The court dismissed the government's argument that they could not release the information because it was subject to a confidentiality clause in the agreements. The Court further stated that using the confidentiality clause to withhold information would mean that the State would restrict all information arising out of agreements by simply inserting language that covers this angle.

However, the Court assesses both the public interest and the harm contemplated by the disclosure, declaring that it was not satisfied that the public interest in the disclosure was more significant than the harm contemplated. The Court went on to hold that the two journalists did not show how they would use the information for the benefit of the public, stating that "*Government business is not in its entirety, supposed to be in the public domain*." The court determined that demonstrating such a benefit was necessary to prove public interest in disclosure.[744]

This thesis criticizes the verdict in *Charles Mwanguhya Mpagi and Izama Angelo* v. *Attorney General*[745] for two main reasons. First, the MOEMD must prove that any disclosure of the information in its possession would be more harmful to the public interest than its nondisclosure. The burden of proof should not fall on for the persons requesting that information. Secondly, there is no provision in the law, which requires that the person requesting the information justifies

[743] ATIA 2005, s 18, 37
[744] *Charles Mwanguhya Mpagi and Angelo Izama* Vs. *Attorney General* [2009] MC 751
[745] Ibid

how they will use it. Nevertheless, the decision was arrived at within the context of a heated exchange between Parliament and the Executive, with threats issued by the President, that eventually cowed the legislature from further pursuing the matter.[746] When Global Witness eventually accessed the PSAs, they found many loopholes in the agreements.[747]

3.7.3.4 National Communication Strategy

The NOGP explicitly provides for developing and executing a National Communication Strategy (NCS) for the petroleum sector.[748] The NCS for the Petroleum Sector was developed in 2011 to bridge the communication gap between the petroleum industry and the general public.[749] This effort includes using different stakeholder groups such as the media like radio and television programmes across the country, civil society, business entrepreneurs, religious and cultural institutions together with community leaders, as well as websites of different ministries to pass on the information to the public on the developments and documents relating to the petroleum sector.[750] It recognises the critical importance of transparency, accountability, and access to information on the development of petroleum resources because disclosure enables stakeholders to assess available opportunities, participate, and protect their interests. [751] However, the successful implementation of this

[746] Global Witness, 'A Good Deal Better? Uganda's Secret Oil Contracts Explained,' Sept. 2014, <https://www.globalwitness.org/en/reports/good-deal-better/> accessed 3rd August 2018
[747] Ibid
[748] NOGP 2008, Objective 10 (g) Action (III)
[749] Ministry of Energy and Mineral Development, A *National Communication Strategy for the Oil and Gas Sector in Uganda (*2011)
[750] ATIA 2005; NOGP 2008, objective 10
[751] NOGP 2008

Communication Strategy will depend on establishing a clear communications function, structure and reporting lines.

3.7.3.3 External Obligations to Disclose Information

The NOGP and OGRMP set out Uganda's commitment to join the Extractive Industry Transparency Initiative (EITI). In February 2019, the MOFPED stated in a press statement that, "*We believe that initiatives such as the EITI that emphasise transparency have the potential to strengthen the efforts of the Government in ensuring overall transparency in the sector, strengthen tax collection, improve the investment climate, build trust and create a lasting value of petroleum resources.*" [752]

For Uganda to comply with EITI requirements, it will need to develop an EITI work plan, establish a multi-stakeholder group comprising the Government, company and civil society, then submit an EITI candidature application to the EITI Board.[753] Upon joining, the Government will need to disclose the primary resource contracts such as Production Sharing Agreements (PSAs) including addendums, annexes and amendments.[754] This requirement is already in line with NOGP[755] and Section 152 of the ATIA which provides that a public register of licences and licence holder(s) should be publicly accessible.[756] On

[752]EITI, 'Ugandan cabinet gives go-ahead to apply for EITI membership to boost investments' https://eiti.org/news/ugandan-cabinet-gives-goahead-to-apply-for-eiti-membership-to-boost-investments accessed 19 January 2019
[753] Ibid
[754] Requirement (3.12 (c)) of the Extractive Industries Transparency Initiative.
[755] ATIA 2005; NOGP 2008, objective 11
[756] Upstream Act 2013, s 151.

August 12, 2020, came the monumental approval of Uganda's application to join the EITI.[757]

3.7.4 Enforcement of Human Rights Violations

Parliament enacted the Human Rights (Enforcement) Act, in March 2019 to enable individuals or organizations seek civil remedies for human rights violations through the regular court systems or the Uganda Human Rights Commission (UHRC), which has judicial powers under the constitution.[758] The courts will hear matters of human rights violations (including denial of access to information, right to clean environment and others) [759] and grant restitution, or compensation to victims of human rights abuses.

3.8 Institutional Framework Governing the Petroleum Industry

The NOGP called for a new Institutional framework for the petroleum industry[760] that separates the three aspects of policy setting, regulating the industry, and executing the state's commercial interests. The Upstream Act 2013 subsequently established the three key institutions.[761]

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[757] Uganda Joins the Extractive Industries Transparency Initiative (EITI) 12th August 2020 https://globalrightsalert.org/news-and-views/uganda-joins-extractive-industries-transparency-initiative-eiti> accessed on 15th October 2020

[758] EITI, 'EITI guide for legislators: How to support and strengthen resource transparency.' (2009). <http://eiti.org/files/MP_EITI_Guide.pdf> accessed on 3rd May 2019

[759] The Constitution of Republic of Uganda, 1996, Article 50 (4)

[760] NOGP 2008, Objective 2

[761] Upstream Act 2013, s 8 -46

3.8.1 The Ministry of Energy and Mineral Development (MEMD)

The MEMD, particularly the Directorate of Petroleum, is the overall administrator responsible for petroleum activities.[762] It designs policies and the substantive laws and legislations relevant to govern the petroleum industry, like the NOGP and the Petroleum Laws discussed above; and it negotiates and endorses petroleum agreements with the MOCs.[763] MEMD is responsible for approving data management systems, approving field development, and promoting and sustaining transparency in the petroleum sector.[764] A multi-sectoral technical team assists MEMD at the national level to inspects oil exploration activities quarterly.[765] This team comprises the Petroleum Exploration and Production Department (PEPD), the Department of Occupational Health and Safety in the MGLSD, and the NEMA.

3.8.2 Petroleum Authority of Uganda

The second administrative institution is the Petroleum Authority of Uganda established in 2016 as an independent body corporate, with powers to monitor and regulate the petroleum industry.[766] It participates in the negotiation and administration of PSAs by advising the minister during the negotiation of petroleum agreements and granting and revoking licences; it regulates

[762] Upstream Act 2013, s 8.
[763] Ibid
[764] Ibid
[765] NOGP 2008, objective 2; *Status of Implementation of the National Oil and Gas Policy for Uganda* (2017)
[766] Upstream Act 2013, s 9-10.

petroleum activities, including reserve estimation and measurement of produced petroleum.

The Petroleum Authority also reviews and approves any proposed exploration activities contained in the annual work programme, appraisal programme and production forecasts submitted by any licensee; reviews and approves budgets submitted by any licensee; and assesses field development plans and makes recommendations to the MEMD for approval, amendment or rejection of the plans.[767] The Authority assesses tail-end production and cessation of petroleum activities and decommissioning; participates in the measurement of petroleum to estimate and assess royalty and profit petroleum due to the Government.[768]

The Authority also ascertains the cost of petroleum due to the licensee; supervises the licensee to ensure they uphold the laws and regulations and contractual terms and enforces the requirements or regulations to protect workers' and the public's health and safety.[769] Furthermore, it administers petroleum agreements, ensures optimal levels of recovery of petroleum resources. It promotes well planned, executed, and cost-effective operations and ensures establishing a central database of persons involved in petroleum activities. It also manages the petroleum data and provides periodic updates on the status of petroleum activities. The Authority monitors the operators'

[767] Ibid
[768] Ibid
[769] Ibid Section 9 to 41

conditions and their trade practices to ensure that competition and fair practices are maintained. It provides information to the Uganda Revenue Authority for the collection of taxes and fees from petroleum activities. The Authority also, supervises exploration, harvesting, refining, marketing, storage of petroleum and gas and disposal of petroleum products. Finally, it contributes to national (budgetary) planning and control.[770]

The Petroleum Authority acts as an independent body in the performance of its functions and duties mentioned above. However, the Minister of Energy and Mineral Development has powers to give it directions concerning the policy to be observed and implemented.[771]

3.8.3 National Oil Company Limited

The third administrative institution is the National Oil Company Limited, established in 2015 per the Petroleum Act.[772] It is a separate commercial entity, incorporated under and managed according to the Companies Act.[773] It manages Uganda's commercial aspects of petroleum activities and the State's participating interests of the PSAs.[774]

Its functions include[775] to handle the state's commercial interest in the petroleum sub-sector; to manage the state's participation in the petroleum activities; to manage the marketing of the countries' share of the petroleum

[770] Upstream Act 2013
[771] Ibid Section 13
[772] Ibid Section 42 -46
[773] The Companies Act, 2012 (The Uganda Gazette No. 52 Volume CV)
[774] Upstream Act 2013, s 42 to 46
[775] Ibid

received in kind; to manage the business aspects state's participation, and to develop in-depth expertise in the petroleum industry. It is under a duty to optimize value to its shareholders; to participate in joint ventures on behalf of the state; to participate in meetings of the operating committees in the respective joint operating agreements; and investigates and proposes new upstream, midstream, and downstream ventures locally and internationally.

3.8.4 Ministry of Finance, Planning, and Economic Development (MFPED)

The management of revenue from Uganda's petroleum resources is in the ambit of the MFPED, which exercises ownership and control over the Petroleum Fund through the Investment Advisory Committee and the Fund Assets Management Department.[776] The ministry formulated the OGRMP and the subsequent PFMA to provide for the Petroleum Fund.[777]

PFMA also established the Investment Advisory Committee (IAC) in the MFPED to issue strategic investment guidelines and benchmarks to the Central Bank; draw up the Fund's management contract; to monitor the Fund's overall performance, and report to Parliament on the performance of the Fund periodically. The principal responsibility of the IAC is to oversee the operations of the Petroleum Investment Fund. To periodically report on the fund's governance to the Minister and the public, subject to independent

[776] OGRMP 2012; International Alert, 'Oil and Gas Laws in Uganda: A Legislators' Guide' (2011) <http://www.international-alert.org/sites/default/files/publications/18-Oil-web.pdf> accessed on 15 February 2017; ACODE, 'State of Uganda's oil and gas legislation' (2011).
[777] PFMA 2015, s 56,

audits. To set ethical codes and standards for fund management.[778] Good governance, professional management and oversight will be vital principles for successful management of natural resource funds.[779]

3.8.5 The Ministry of Lands, Housing and Urban Development (MLHUD).

The MLHUD is responsible for providing policy direction, national standards and coordination of all matters concerning lands, housing, and urban development. Regarding the petroleum industry, they are responsible for ensuring sustainable land management and planning for the Albertine Graben and its surrounding areas as recommended by the NOGP, where the Graben was declared a particular planning area. The MLHUD has already prepared a regional physical development plan for specific towns in the districts' operation areas affected by petroleum development.

3.8.6 Institutions charged with Environmental Protection.

Protection of wildlife, water bodies, air, and designated national parks, from the potential impacts from petroleum activities, is carried out by a team led by the National Environment Management Authority (NEMA). [780] Other members of the team include the Uganda Wildlife Authority (UWA), Directorate of Water Resource Management (DWRM) in the Ministry of Water and Environment, Wetlands Management Department in the Ministry of Water and Environment National Forest Authority (NFA), and Fisheries

[778] Ibid s 66-68,
[779] Refer to chapter two, section 2.2.
[780] NEA 2019, s 4

Resources Department in the Ministry of Agriculture, Animal Industry and Fisheries.[781] The monitoring team is composed of senior-level technical officers from these institutions based in the field. They assess ESIAs done by MOCs, conduct regular monitoring visits to field operations, and report to a committee of executives from the same institutions.

NEMA particularly is mandated to coordinate, monitor and supervise all activities to ensure observance of proper safeguards in the planning and execution of all development projects likely to have a significant impact on the environment.[782] NEMA is responsible for environmental management and has the Authority during environmental enforcement; impose a schedule for compliance to all facilities whose activities are likely to harm the environment. To permanently shut down part of an operation of a facility that is seen to have irreversible impacts on the environment. To deny a permit for an activity likely to cause irreversible damage to the environment. To revoke a permit due to unanticipated impacts that may arise during a facility's implementation or operation. To require a facility to clean up part of the environment. NEMA also requires monitoring and reporting by a facility and requires facilities to undergo an environmental audit.

Since substantial petroleum resources are in lakes Albert and George, DWRM becomes involved in managing, monitoring, and regulating water resources.

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[781] Ministry of Energy and Mineral Development, *Progress of Implementation of the National Oil and Gas Policy for Uganda* (Ministry of Energy and Mineral Development, 2019) 14 <https://www.petroleum.go.ug/media/attachments/2020/03/12/oilgaspolicy.pdf> accessed 28th June 2019

[782] NEA 2019, s 4, 6 (1), 22

It issues water use, abstraction, and wastewater discharge permits. UWA is involved because petroleum resources are within designated national parks, the authority assesses submitted ESIA from MOCs to ascertain the potential impact on any wildlife species or community.[783] Like UWA, Wetlands Management Department in the Ministry of Water and Environment and NFA[784] due to the national parks and forest reserves' potential environmental issues.[785]

NEMA establishes an Environment Monitoring Plan and A National Oil Spill Contingency and carries out routine Environmental Inspections to assess compliance with environmental requirements and investigates impacts that they may not have predicted at the time of approving the ESIA.

3.8.7 Ministry of Gender, Labour and Social Development (MGLSD)

The MGLSD is the lead agency for the Social Development Sector (SDS). SDS promotes social protection issues, gender equality, equity, human rights, culture, decent work conditions and empowerment for different groups such as women, children, the unemployed youth, internally displaced persons, the older persons and persons with disabilities.[786] The MGLSD is constitutionally mandated to develop and implement the Social Development Investment Plan (SDIP) that ensures that all Ugandans enjoy better living standards and

[783] UWA 2019, s 15
[784] National Forestry and Tree Planting Act, 2003.
[785] Refer to section 3.5.2.1 of this chapter for the process of conducting EIAs.
[786] Ministry of Gender, Labour and Social Development, *Social Development Sector Plan 2015/16 -2019/20*
(Ministry of Gender, Labour and Social Development, 2016)

harness their potential through skills development, especially the disadvantaged and vulnerable groups.[787]

The MGLSD is also mandated to empower communities to access and participate in the management of public and community-based initiatives. To empower communities by protecting vulnerable persons from deprivation and livelihood risks. To create an enabling environment for increased employment opportunities for improved livelihoods and social security. To address issues of inequality and exclusion in access to services across all sectors and at all levels.[788] Therefore, the MGLSD should address the challenges to access to information discussed in section 3.7.3.3. However, MGLSD is limited due to human and financial constraints, which will significantly impact its ability to deliver on its mandate.

The Department of Occupational Safety and Health, in MGLSD, will carry out regular inspections to ensure health and safety and compliance with national labour policies, guidelines and standards, and mediates labour disputes and monitors compensations in the petroleum industry.[789] The MGLSD has prepared a checklist it applies to all elements in the industry. It carries out inspections in the petroleum exploration and production areas. It engages the

[787] Constitution of the Republic of Uganda, 1995 Chapters 4 and 16; Refer to chapter two section 2.3. for the social-economic aspects under the mandate of MGLSD

[788] Ministry of Gender, Labour and Social Development, *Social Development Sector Plan 2015/16 -2019/20*
(Ministry of Gender, Labour and Social Development, 2016)

[789] Occupational Safety and Health Act, 2006; Ministry of Gender, Labour and Social Development, *Social Development Sector Plan 2015/16 -2019/20* (Ministry of Gender, Labour and Social Development, 2016)

employees within the Petroleum industries to discuss the various health and safety risks. Should it find that employee lack safety or protective gear, are exposed to dangerous chemicals and waste from the crude oil, lack of adequate health services; the MGLSD will order the MOCs to provide necessities to ensure a healthy and safe working environment.

However, the above checklist is inadequate, and the MGLSD is limited on resources and lack of personnel to monitor occupational safety and health issues in the sector effectively. The MGLSD should address the issues by first updating the current legal framework for occupational safety and health to make it specific to the petroleum subsector. The PSAs do contain a contractual obligation for all oil companies to ensure compliance with HSE standards and guidelines.

3.8.8 Uganda National Roads Authority (UNRA)

UNRA under the Ministry of Works and Transport is mandated to develop and maintain the national road network, advise Government on public roads policy, and address transport concerns.[790] Since the petroleum industry's onset, UNRA has built several roads to allow easy access to the exploration sites.[791] It completed the Hoima-Buseruka-Kaiso Tonya Road in 2014, and

[790] Uganda National Roads Authority Act, 2006

[791] Ministry of Energy and Mineral Development, *Progress of Implementation of the National Oil and Gas Policy for Uganda* (Ministry of Energy and Mineral Development, 2019) <https://www.petroleum.go.ug/media/attachments/2020/03/12/oilgaspolicy.pdf> accessed 28th June 2019; FN, 'Oil sparks roads upgrade,' *(Oilinuganda 2013)* http://www.oilinuganda.org/features/infrastructure/oil-sparks-off-roads-upgrade.html accessed 4 March 2017.

construction of the Kyenjojo-Kagadi-Hoima-Masindi and the Hoima–Biso–Wanseko Road is already underway.[792]

3.8.9 The Civil Aviation Authority (CAA)

CAA also extends support to the promoting of the development of the petroleum sector.[793] It has undertaken the construction of Hoima International Airport, or Kabaale International Airport)[794] to support the infrastructure needed for active development of the petroleum industry.

3.8.10 The Uganda Human Rights Commission (UHRC)

UHRC is the constitutionally mandated institution that "*monitors the Government's compliance with the international treaty and convention obligations on human rights*".[795] It receives and considers communications from individuals who claim to be victims of a violation of rights. Concerning socio-economic rights, [796] the UHRC has received several complaints from local community members regarding violations of their socio-economic rights since petroleum

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[792] Refer to chapter two, section 2.3.1.8 on opportunities to develop infrastructure.
[793] Civil Aviation Authority Act, (Cap 354).
[794] African Aerospace Online News Service, 'Uganda to get second International Airport' *African Aerospace Online News Service* (21 December 2016) accessed 10 June 2017; CAPA Centre for Aviation, ''Profile of Hoima International Airport' *CAPA* (Sydney, 31 December 2016) <https://centreforaviation.com/data/profiles/newairports/kabaale-parish-international-airport> accessed 10 June 2017; Stéphane Billé, 'Uganda launches Kabaale International Airport construction' *Ecofin Agency* (Port-Louis, Mauritius: 7 June 2018) <https://www.ecofinagency.com/public-management/0706-38595-uganda-launches-kabaale-international-airport-construction> accessed 11 September 2018; Alon Mwesigwa, 'Airports to generate Shs8.5 trillion annually' *The Observer* (Kampala, Uganda, 1 February 2015) <https://www.observer.ug/business/38-business/36196--airports-to-generate-shs-85tn-annually>accessed 4 March 2016.
[795]Constitution of the Republic of Uganda, 1995, Article51, 52 (g)
[796] Craven M, The International Covenant on Economic, Social and Cultural Rights: A perspective on its development (1995) Oxford University Press, and Arambulo K, Strengthening the supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and procedural aspects (1999) INTERSENTIA.

exploration and production activities in the Albertine Graben region commenced.[797] Many of the complaints related to inadequate compensation amounts and process, and that wealthy individuals and government officials strategically bought land in the oil prospect areas to secure generous compensation packages.[798] The UHRC carried out investigations on the complaints made by Project Affected Persons (PAPs) against the violation of their human right, and wrote a report "*Oil in Uganda: Emerging Human Rights Issues, Special Focus on Selected Districts in the Albertine Graben"* with recommendations to Parliament[799] to effectively monitor the provision of compensation to the victims of violations of human rights or their families. Since the complaints came from many people, and required structural action not individual remedy (UHRC can order compensation for human rights violations), the UHRC thought it best to sign-posted these specific complainants to the MEMD or NEMA for further investigation and redress of their grievances.

3.8.11 Other Ministries with Significant Role.

Several other Ministries also have a role to play in the effective management of the petroleum industry. For example,

[797] Refer to Chapter Two, section 2.2.3 for detailed discussion of the negative socio-economic and environmental impacts of the petroleum industry on Uganda sustainable development goals.
[798] Uganda Human Rights Commission Special Report, *Oil in Uganda: Emerging Human Rights Issues, Special Focus on Selected Districts in the Albertine Graben* (Uganda Human Rights Commission Special Report, 2013)
[799] Constitution of the Republic of Uganda, 1995, Article 52 (2) (3)

a) The Ministry Responsible for Foreign Affairs ensures cordial bilateral relations with MOCs original countries, and advocate for joint exploration of any petroleum resources along the country's shared border with the Democratic Republic of Congo.
b) The Ministries Responsible for Security to provide security for the petroleum activities and installations against external aggression and any internal threats.
c) The Ministry Responsible for Information and Communication Technology formulates and implements information technology laws and regulations to facilitate data transmission and storage for petroleum activities.
d) The Uganda Revenue Authority collects revenue from petroleum activities as discussed in detail in section 3.6; The Auditor General provides independent oversight of government petroleum operations through financial and other management audits and ensures adherence to national and international accounting standards.

3.8.12 The Judiciary

The Judiciary is responsible for administering justice in conformity with the law and with the people's values, norms, and aspirations.[800] In August 2017, the Judiciary established a specialised court (Utility, Standards, Wildlife and Environment court) to handle cases of perpetrators of environmental

[800] Article 126 (1) The 1995 Constitution of the Republic of Uganda

degradation.[801] The creation of the court is a culmination of years of protracted negotiations between Judiciary and environment ministry. The creation of a specialised court, a departure from the typical court system, rests on the allegations that judicial overload caused delays in hearing cases. However, potential environmental degradation in the petroleum industry often happens faster, and aggrieved parties should not wait for prolonged periods before seeking justice.

The Judiciary spokesperson, Mr Erias Kisawuzi[802] said that "*the new court seeks to lessen issuance of court injunctions against agencies like the National Environment Management Authority (NEMA) and Uganda Wildlife Authority (UWA)"* and the court will handle their cases expeditiously.

3.8.13 The Non-Governmental Organisations and Civil Society Organisations

The non-governmental organisations and civil society organisations are relevant institutions in the petroleum sector and perform advocacy, mobilisation, and dialogue with communities. They also monitor human rights violations and environmental damage occasioned by the petroleum industry's development and work with the government and international organisations to deliver healthcare, education, and economic facilitation

[801] P. Tajuba, "Judiciary okays environmental court" Saturday Monitor (Uganda February 18th, 2017) 5.
[802] Ibid

services. In their advocacy work, they work to foster accountability from the government institutions discussed above, and from MOCs.

Non-governmental organisations such as Advocates Coalition for Development and Environment (ACODE) Africa Institute for Energy and Governance (AFIEGO) and The Environmental Action Network (TEAN) among other have contributed massively to environmental health and safety standards. For example, in February 2019, AFIEGO supported over 100 youth and women leaders from over seven oil-affected to be skilled on the Relevance of ESIA in promoting environmental conservation.[803] The youth and women leaders gained knowledge that enabled them to participate in the monitoring and enforcement of ESIA reports for the oil sector, and in May and October 2019 they were able to submit written comments to NEMA on the Kingfisher, and EACOP ESIA reports for the first time due to the knowledge that was imparted by AFIEGO.[804]

The 1995 Constitution empowers NGOs and CSOs to represent many people in courts for violations of the environmental cases, through a procedure termed *public interest litigation (*PIL).[805] For example, in 2019 youth and CSO

[803] Africa Institute for Energy Governance, 'Annual Report,' (2019)15-29 https://www.afiego.org/download/afiegos-2019-annual-report/?wpdmdl=2084&refresh=60010a6fd5cad1610680943> accessed 2nd January 2020

[804] Ibid

[805] The Constitution of the Republic of Uganda, 1995, Article 50; *Advocates Coalition for Development and Environment (ACODE) v Attorney-General* [2004] HCMC No. 0100; The *Environmental Action Network (TEAN)* v. *Attorney General and National Environmental Management Authority* [2001] Miscellaneous Application No. 39; J Oloka Onyango, 'Human Rights and Public Interest Litigation in East Africa: A Bird's Eye View,' (05 January 2015) 5 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2606120> Accessed on 26 August 2019.

(Guild Presidents' Forum on Governance and AFIEGO) filed a case in the High Court against Petroleum Authority of Uganda and the National Environment Management Authority (NEMA).[806] They alleged that NEMA had issued an ESIA certificate to Total Energies for the Tilenga oil project even though they had not carried out consultations with the public or project-affected communities or persons as required by the EIA Regulations.[807] They asked the Court to cancel the Tilenga EIA certificate. This case is still ongoing, should the plaintiff succeed, the courts will cancel the ESIA certificate for Tilenga project.[808]

Similarly, Non-governmental organisations Survie (Survival) and Friends of the Earth (FoE) of France as well as Uganda's National Association of Professional Environmentalists (NAPE) with four Ugandan associations (AFIEGO, CRED, NAPE/Friends of the Earth Uganda and NAVODA) filed a case against Total Energies in Nanterre High Court in Paris for alleged "failure to elaborate and implement human rights and environmental vigilance", under the new "Duty of Vigilance" legislation passed by the French legislature

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[806] Africa Institute for Energy Governance, 'Annual Report,' (2019)15-29 https://www.afiego.org/download/afiegos-2019-annual-report/?wpdmdl=2084&refresh=60010a6fd5cad1610680943> accessed 2nd January 2020

[807] Doreen Namara, 'Tilenga EIA certificate won't conserve the environment and protect livelihoods' *Daily Monitor* (15th May 2019) <https://www.monitor.co.ug/OpEd/Commentary/Tilenga-EIA-certificate-environment-protect-livelihoods/689364-5115232-70wrcj/index.html> accessed on 15th July 2019; Oil in Uganda, 'Tilenga ESIA certificate: CSOs want court to strike out NEMA's evidence' *Oil in Uganda* (Friday, 22nd November 2019) <https://oilinuganda.org/features/environment/tilenga-esia-certificate-csos-want-court-to-strike-out-nemas-evidence/> accessed on 13th December 2019

[808] The Independent, 'Court adjourns case against NEMA, petroleum authority of Uganda' *The Independent* (November 6, 2019) <https://www.independent.co.ug/court-adjourns-case-against-nema-petroleum-authority-of-uganda/> accessed on 13th December 2019

in 2017.[809] They hoped that the ruling would act as a precedent that will hold French multinationals working outside France accountable to uphold the highest standards that advance humanity and nature. However, on 30th January 2020, the Nanterre French High court judges refused to hear a complaint brought by the complainants, [810]ruling that the case did not fall within their jurisdiction, and they should file in the commercial court. The applicant has contested the decision for varying reasons, among which, the fact that it would take several months to obtain a ruling on the case. At the same time, serious human rights and environmental violations in Uganda continue.

However, NGOs and CSOs face a substantial financial challenge. In most cases, there is no proper mechanism to enforce the court ruling because they are limited in resources and authority. For example, although ACODE was successful in the above-cited case, they could not enforce the judgment as it was merely declaratory.[811] The court merely revoked the permit and the developer. Kakira Sugar Works is still occupying the forest, which is cut down and planted sugar cane in blatant violation of the law. Another high-profile case where the court imposed a heavy financial burden on the applicant is the

[809] Barry Morgan, 'Uganda's Lake Albert development lands Total in court' *Upstream online* (25 October 2019) <https://www.upstreamonline.com/safety-and-environment/ugandas-lake-albert-development-lands-total-in-court/2-1-694583> accessed on 13th December 2019
[810]Uganda oil, 'Total in Court Battle Over Greenhouse Emission in Uganda,' (4 Feb 2020) <http://www.ugandaoil.co/2020/02/04/total-in-court-battle-over-greenhouse-emission-in-uganda/> accessed on 16th May 2020
[811] Ibid

Greenwatch and ACODE v Golf Course Holdings.[812] Greenwatch eventually ceased operating in Uganda as a result.

3.9 Conclusion

This chapter has explored a rich collection of laws, policies, and regulations regulating all concerned parties' rights, duties, and obligations in the petroleum industry. Currently, Uganda's legal regime appears to have made significant steps to guide the sector's development. The legal framework continues to develop with parliament continuously enacting new fundamental laws as recently as 2020. This thesis acknowledges that the legal regime has created specific prudent parameters of operation necessary to stave off the resource curse's onset. The Government has also been reporting on various issues, including petroleum licensing, the oil reserves and revenues, the establishment and composition of the institutional framework, amount of revenues transferred to local governments in the Albertine Region, and local content opportunities.

However, there are gaps that the Government needs to address. For example, the lack of a regulatory framework that provides parliamentary oversight into the licensing process limits transparency and public participation. The lack of a due process to appeal licensing decisions in the petroleum industry, the lack of a legal obligation compelling the UNOC and Petroleum Fund executives to disclose their commercial interests in petroleum activities. The lack of a Health

[812] *Greenwatch and ACODE v Golf Course Holdings [2001] HCMA No. 390*

Safety and Environment policy and legal framework for the petroleum industry; lack of a clear strategy and plan for value addition in the sub-sector despite having enacted the midstream act and signing the Project Framework Agreement with Albertine Graben Refinery Consortium. The limited public participation in ESIA and issues regarding reporting practices with the government failing to publish government share in the PSAs (royalties, acreage fees, bonuses) leaves room for misappropriation of the oil funds.

One of the most significant challenges affecting Uganda is that Government hardly enforces the laws. Therefore, the government would need to follow through with implementing the above laws. It is no use having a robust prescriptive legal framework if they do not subsequently implement it.

Concerning Uganda's institutional framework, it appears the Government has established a robust institutional framework if their establishment is to be considered the most critical aspect in petroleum resource development. Unfortunately, that is not the case; success will depend on clear and separate roles, transparent, ethical, and accountable institutions to the public, monitors being provided, adequate training and resources to carry out their roles, increased role in parliamentary oversight. From the discussion held in this chapter, there is still room for improvement in implementing and enforcing the abundant laws and regulations.

The Upstream Act discussed in this chapter provides that Government through the Minister of Energy and Mineral Development (MOEMD) may

enter into an agreement (Production Sharing Agreements) [813] with any commercial entity (MOCs) on matters relating to petroleum activities.[814] The Upstream Act also empowers the MOEMD to develop a model Production Sharing Agreements (PSA)[815] to guide the relationship between the MOC and the State by detailing the parties' specific rights, duties, and obligations to the Agreement. [816] Therefore, the following chapter will critically analyse Uganda's 2018 Model PSA, and the only publicly available PSA (2012 Kanywataba PSA), [817] since they form part of Uganda's national legal frameworks governing the petroleum industry.

[813] Upstream Act 2013, s 47-92
[814] Upstream Act 2013, S 6
[815] Ibid S 8
[816] Patricia Park, *International Law for Energy and the Environment* (2nd edn, CRC Press 2013) 75, 78-80
[817] Kanywataba Prospect Area PSA 2012 (n 19)

CHAPTER FOUR

4.0 A CRITICAL ASSESSMENT OF UGANDA'S PRODUCTION SHARING AGREEMENTs (PSAs).

The previous chapter analysed the national legal regimes governing the petroleum industry. However, one cannot discuss the petroleum legal regime without analysing the Ugandan Government's agreements with the MOCs. As of 2019, there are seven (7) active PSAs: however, none are made public. Therefore, this chapter will analyse specific terms in the Model PSA, and the publicly available PSAs (2012 Kanywataba PSA).[818] To establish whether they are in line with the national legal frameworks discussed in the previous chapter, and their contribution to sustainable development, socio-economic resilience, and environmental protection. Also, to establish whether they contain investor protection terms that unfairly impede the State's pursuit of sustainable development.

4.1 Drafting and Negotiating PSAs

Like any commercial contract, PSAs require extensive planning, organising, structuring, and negotiation to secure the best possible outcome for both parties concerned. An effective PSA should have a clear and concise language concerning rights, obligations, liabilities, warranties, remedies for breach of the contract, and think about the end of the contract.[819] Therefore, it is

[818] Kanywataba Prospect Area PSA 2012 (n 19)
[819] Leigh Thompson, *The Mind and Heart of the Negotiator* (6th edn Pearson, 2014)

incumbent on the negotiating parties to ensure that they come to the negotiating table with adequate skills to identify the commercial interest, motivations and risks involved in the industry (for both parties), allocate risk, and price the risk appropriately.[820] If negotiators inaccurately identified or expressed the risks involved, one party would be required to pay too much or too little, creating the most fertile ground for dispute.[821] For example, where they disproportionally distribute revenue sharing between the parties, one of the parties suffers a loss and might challenge the contract.[822]

MOCs Negotiators are concerned with financial and political risks, nationalization, [823] expropriation, [824] increasing regulatory and financial scrutiny. Also, the evolving environmental pressures, market fluctuations, and infrastructure obsolescence.[825] They also must manage, the expectations of a vast number of stakeholders, from their shareholders, employees, community, regulators, politicians, suppliers, NGOs, and even the media, all of which often carry conflicting expectations.[826] On the other hand, the Government must

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[820] Leigh Thompson, *The Mind and Heart of the Negotiator* (6th edn Pearson, 2014)
[821] Ibid
[822] M K Kachikwu, Navigating the Challenging Topography of the Contemporary Energy Industry Emerging Risks (OGEL 2013).
[823] United Nations World Investment Report, *Investment and Digital Economy,* (New York and Geneva 2017)2, 37, 108, detailing the wave of nationalizations of foreign mining investments, 1960–1979.
[824] P E Comeaux, N S Kinsella, *Reducing Political Risk in Developing Countries: Bilateral Investment Treaties, Stabilization Clauses, and MIGA and OPIC Investment Insurance* (Vol 15 New York Law School Journal of International and Comparative Law 1994)1; T Moran (ed) *Managing International Political Risk*
(Malden, MA: Blackwell 1998)15-43; W Irwin, "Political Risk: A Realistic View Towards Assessment, Qualification, and Mitigation" in T Moran (ed) *Managing International Political Risk,* (Malden, MA: Blackwell 1998)57-69
[825] M K Kachikwu, Navigating the Challenging Topography of the Contemporary Energy Industry Emerging Risks (OGEL 2013).
[826] Refer to chapter two sections 2.2.3 and 2.3, chapter three, section 3.8.13

also think about the risks discussed earlier in Chapter Two, section 2.2.3. Having this clear understanding enables the negotiators to draft agreeable "risk mitigation terms," or "investor protection terms" that preserve the mutually beneficial arrangement and preserve the contract's survivability.[827]

The Government's choice to contract using PSA is advantageous because it enables the Government to develop new reserves at no risk and limited costs. The MOC incurs all the costs associated with the business of exploring for and producing petroleum. If MOCs do not make a commercial discovery, they will not recover from the Government the costs incurred.[828]

4.2 Analysis of Key Terms in Uganda's PSA

4.2.1 Ownership of the Petroleum Resources

The Model PSA provides that petroleum in or under any land or water in Uganda is the property of the Republic of Uganda, in respect of which the Government contracts with one or more MOCs and grants them rights to prospect, explore and extract mineral resources from a specific area over a specified period.[829] The Government also agrees with the MOC to participate in the operation management,[830] cost recovery, and profit division.[831] Providing that the Government would retain ownership of the resources

[827] *Goodlife* v *Hall Fire Protection* [2018] EWA CIV 1371
[828] Gordon G, Paterson J and Usenmez E (eds), *Oil and Gas Law: Current Practice and Emerging Trends*, (2nd edn, DUP 2011); Gordon G, Paterson J and Usenmez E (eds), *UK Oil and Gas Law: Current Practice and Emerging Trends: Commercial and Contract Law Issues*: Vol 2 (3rd edn Edinburgh University Press 2018)
[829] Model PSA 2018 (n 498) Preamble, Article 3.
[830] Ibid Article 10
[831] Ibid Article 11, 12

protects the State's sovereignty over its natural resources, thereby allowing the Government to promote sustainable exploration, development, and production for the maximum benefit to the country.[832]

Including this provision in the PSA makes it in line with Uganda's national legal framework[833] and international law to provide that the State's permanent sovereignty over its natural resources and the rights invoked should not be subject to limitation by contractual obligation.[834]

4.2.2 Grant of Rights to Explore, and Petroleum Payments

The Upstream Act,[835] the Model PSA,[836] and the 2012 Kanywataba PSA[837] provide that the Government of Uganda, through the MOEMD, may enter PSAs relating to petroleum activities with any qualifying person who applies. The Minister then grants Exploration and or Production Licences and determines the conditions for granting or renewing a Licence, and the conduct of any person granted a license.[838]

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[832] Patricia Park, *International Law for Energy, and the Environment* (2nd edn, CRC Press 2013) 79
[833] Constitution of the Republic of Uganda 1995, Article 244; Upstream Act 2013, S 4
[834] European Energy Charter Treaty, Lisbon, 17 December 1994, Article 1.5, Article 2(1), and in 6(2), 18(1) 18 (3); United Nations General Assembly Resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources (1962); Article 1(2) International Covenant on Economic, Social and Cultural Rights 1966; International Covenant on Civil and Political Rights of 1966; A Faruque, 'Typologies, Efficacy and Political Economy of Stabilization Clauses: A Critical Appraisal,' (5(4) OGEL 2007
[835] Upstream Act 2013, s6, 7, 52-58, 69-92.
[836] Model PSA 2018 (n 498) Preamble.
[837] Kanywataba Prospect Area PSA 2012 (n 19) Preamble
[838] Upstream Act 2013, s 6, 7, 52-58, 69-92,

Once the Government signs a PSA with the MOCs and grants it an Exploration Licence, the MOCs administers the business operations at their own expense, technology, and risk, then shares with the government part of the production output per the terms in the PSA.[839] Meaning, MOCs receive a proportion of the petroleum produced to recover their expenditure in the exploration and production process (commonly termed as Cost Oil) [840] and share the profits per the PSA's negotiated formula (Profit Oil).[841]

In addition to the share of the Profit Oil paid to the Government, the Model PSA provides that the licensees pay royalties, bonuses, land rentals, and other fees to the Government at the rate which depends on the project and the volume of oil produced.[842] MOCs also pay corporate profit taxes on the share of the Profit Oil received.[843] Furthermore, all land, equipment, and assets acquired and owned by the Licensee become government property on the PSA's expiration since they received Cost Oil. Another fundamentally important term in the PSA is the ring-fencing of costs for cost recovery purposes. If a licensee has more than one contract area, they cannot recover costs incurred from another contract area.[844]

[839] Patricia Park, *International Law for Energy, and the Environment* (2nd edn, CRC Press 2013) 75, 78-80; Peter D Cameron, *International energy investment law: the pursuit of stability* (Oxford University Press 2010) page 78- 81
[840] Model PSA 2018 (n 498) Article 11, 12
[841] Ibid Article 12
[842] Ibid Article 8, 9, 14, 26
[843] Ibid Article 13
[844] Ibid Article 11.

Considering that Parliament approved the model contract in 2018, this thesis presumes it made considerations to the national legal and regulatory provisions in the 2013 petroleum laws. It appears that the Model PSA terms on licensing and payments terms do provide for socio-economic resilience, and therefore sustainable development. However, based on the assessment done on the management of petroleum revenues in the previous chapter,[845] several concerns were raised: the MOEMD has used the leeway granted in determining project-specific terms of PSA in ways that this thesis considers to be of concern. Also, since the Government keeps project-specific terms of PSAs confidential, there is no way of knowing the exact payment percentages, bonuses, royalties paid into the Petroleum Fund and Revenue Investment Reserve. Therefore, it is significantly harder to assess accountability.

4.2.3 Liabilities for Unilateral Measures

The implications of granting the MOEMD authority to contract on behalf of the Republic of Uganda exposes the Government to contractual liabilities. Should the Minister make wrong unilateral decisions on PSA terms, the impact of such unilateral measures and the resulting compensation awards can be detrimental to the State's economy. It is inevitably the citizens who feel the brunt of the impact.

[845] Refer to chapter three, section 3.6 for assessment of the Legal and Regulatory Framework Governing the Management of Petroleum Revenues.

For example, in the *Tullow Uganda Limited, Tullow Operational Property Ltd vs Uganda Revenue Authority*[846] case, Tullow could rely on a tax exemption in the 2012 Kanywataba PSA.[847] The exemption had been granted by the then MOEMD. Article 23.5 of that PSA stated, "*The assignment or transfer of an interest under this Agreement and any related Exploration or Production License shall not be subject to any tax, fee, or other impost or fee levied on the assignor or assignee in respect thereof.*"[848] The Tax Appeals Tribunal agreed that the wording of Article 23.5 was such that it provided an exemption to the company from all taxes, including capital gains tax. However, it held that the MOEMD did not have the legal authority to grant tax exemption, which is under the ambit of the Uganda Revenue Authority operating under the MFPED. The MOEMD contravened Article 152 of the Constitution, requiring that the MOEMD report any tax exemptions to Parliament.[849] The Uganda Revenue Authority successfully defended its assessment in the Tax Appeals Tribunal[850] as well as the subsequent appeals in the High court[851] and the London Tribunal based on the Arbitration Clauses contained in the PSA.[852] The court awarded a sum of S $ 434 million to the Government in the arbitration case.

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[846] *Tullow Oil v Uganda Revenue Authority* [2011] UGTAT 1
[847] Kanywataba Prospect Area PSA 2012 (n 19)
[848] Martin Hearson, Jalia Kangave, 'A review of Uganda's tax treaties and recommendations for action.' Working paper, 50, *Institute of Development Studies, International Centre for Tax and Development* (London, UK 2016) 60.
[849] Martin Hearson, Jalia Kangave, 'A review of Uganda's tax treaties and recommendations for action.' Working paper, 50, *Institute of Development Studies, International Centre for Tax and Development* (London, UK 2016) 60.
[850] *Heritage Oil and Gas Vs Uganda Revenue Authority* [2011] UGTAT 1; *Heritage Oil and Gas Ltd v Uganda Revenue Authority [2011] UGTAT 5*
[851] *Heritage Oil and Gas Ltd v Uganda Revenue Authority [2011] UGCOMMC 97*
[852] The United Nations Commission for International Trade Law & Arbitration Rules 1976, Article 3; *Tullow Uganda Ltd v Heritage Oil and Gas Ltd and Anor* [2013] EWHC 1656 (Comm)

The previous chapter discussed many other examples of unilateral decisions that the Minister has taken.[853] There is a concerning pattern in disregard of the legal system, and such unilateral decisions expose the Government to breach of contracts and mismanagement of petroleum revenues. It is still difficult to judge whether there are any other concerning measures in the current PSAs since they are not public.

4.2.4 National Interest Provisions

The Model PSA contains national interest provisions aimed at enhancing and protecting the socio-economic wellbeing of Ugandans. Article 19 Provides that MOCs engage in local content, technology transfer, and capacity building per the Upstream Act 2013,[854] the Midstream Act 2013,[855] and the Petroleum Regulations 2016.[856] It also provides nominal amounts of what the MOC pays the Government to fund training and research purposes.

The thesis discussed several examples through which the MOCs operating in Uganda have actively engaged with the national interest provision's fulfilment.[857] However, the previous chapter, this thesis revealed several concerning disparities between the local content provisions and some of the actions done by the MOCs.[858] MOCs must commit to following this legal

[853] Refer to Chapter three, section 3.6.1.1, 3.6.1.2, 3.6.2.1, and 3.6.4
[854] Upstream Act 2013, s 124-127
[855] Midstream Act 2013, s 52-55
[856] The Petroleum (Exploration, Development and Production) (National Content) Regulations 2016, The Uganda Gazette No. 45, Volume CIX, Regulation
[857] Refer to Chapter Two, section 2.3
[858] Refer to Chapter three, section 3.7.2, for the detailed discussion on the legal provision for national interest provisions referred to in the PSA.

requirement because it benefits their operations and makes business sense overall.

4.2.5 Protection of the Environment and Communities.

The Model PSA makes provision for the "*Danger to Persons, Property or Environment.*"[859] It provides that the Licensee is to conduct all Petroleum Activities per the Upstream Act, the NEA, the Occupational Safety and Health Act, 2006 and other applicable laws and regulations, to prevent or minimise danger to human life, property, pollution to the environment or harm to wildlife.

The Licensee is obligated to employ the most advanced and available techniques to prevent environmental damage caused by petroleum activities and minimise the effects of adjoining lands' activities.[860] Article 23 further provides that the EIAs done concerning each project should be available to the Licensee's employees and subcontractors to enable them to employ similar measures to ensure environmental protection.[861]

However, there have already been severe contraventions of this legal requirement.[862] MOC and or their subcontractors had caused environmental damage in Buliisa District, as community members complained of pollution of the environment from dust, noise, and a stench, alleging that Tullow had

[859] Model PSA 2018 (n 498) Article 23; Article 25 of the Kanywataba Prospect Area PSA
[860] Ibid
[861] Ibid
[862] Refer to Chapter Two, Section 2.2.3.3

dumped waste in Bugana near a River used by animals and human beings.[863] Tullow denied it was responsible and that their subcontractor was liable. Unfortunately, the Upstream Act provides exceptions against whom aggrieved parties cannot claim liability,[864] among which a contractor of the MOC performing his tasks in connection with petroleum activities. There is a great deal of room for improvement and enforcement by the Government.

Article 23.2 of the Model PSA also provides, *"should any works or installations erected by Licensee endanger any persons, property, or cause pollution or harm wildlife or the environment to a degree unacceptable to Government per applicable laws and international environmental standards and local circumstances the Licensee is to discontinue the petroleum activities in whole or in part and take appropriate remedial measures approved by Government, within a reasonable period to repair any damage to the environment so caused as far as it is reasonably possible, taking into consideration provisions of the law and Best petroleum industry practices."*[865] It further provided that if the Licensee fails to take the appropriate remedial measures within a reasonable period, the Government may, after consultation with Licensee, carry out such remedial measures for Licensee's account.[866]

The above provision does not impose a strict liability obligation on the MOCs, clearly suggesting that the Government has the discretion in determining what

[863] Uganda Human Rights Commission Special Report, *Oil in Uganda: Emerging Human Rights Issues, Special Focus on Selected Districts in the Albertine Graben* (Uganda Human Rights Commission Special Report, 2013)
[864] Upstream Act 2013, s 132
[865] Kanywataba Prospect Area PSA 2012 (n 19)
[866] Ibid

degree of environmental damage is considered unacceptable and that repair of damage depends on if it is possible. Since MOCs often have extensive experience, financial and technological expertise, they should be well equipped to avoid damage to the environment and communities, or at the very least, restore the damaged environment, or compensate the aggrieved party or Government. Fortunately, Article 23.7 of Model PSA did expressly provide that any approvals given under PSA would not limit the minister's right to take appropriate regulatory or other action where Petroleum Operations pose a material danger to public health safety or result in significant irreversible damage to the environment.

Article 23.10 of the Model PSA provides that the Licensee prepare and submit to the Government an oil spill and fire contingency plan designed to achieve a rapid and effective emergency response.[867] However, it makes no provision for the impact, if any, caused by controlled and legally acceptable[868] limits of gas flaring or gas venting in the process of carrying on the petroleum activities. The Government should consider the danger that might be caused by even the acceptable limits on the environment, especially on the agricultural activities contiguous with the petroleum activities, since this could threaten food production in the region.

[867] Upstream Act 2013, s 100; NEA 2019, s 78 -88, 90, 93
[868] Upstream Act 2013, s 31 (2), (3), 100

Despite the above concerns, to the Government's credit, the PSA does provide that the Licensee is to ensure that an Environmental Social Impact Assessment (ESIA) is carried out and submitted to NEMA for approval.[869]

4.3 Investment Protection Terms in the PSA

Investments in the Petroleum industry are usually vulnerable to governmental interference because they concern valuable resources, intrigue from public and CSOs, and are typically highly regulated. These attributes increase the likelihood of disputes arising from changing political and regulatory landscapes over a project's life. These risks associated with investing in the Petroleum industry compel MOCs to negotiate investment protection terms under the PSA.

Within Articles 24, 30, and 33 of Model PSA are specific investor-protective terms subject to analysis in this thesis: Dispute Resolution Clause, Stabilisation Clause, and Confidentiality clause, respectively. It is essential to appreciate that no two PSAs are alike. Various combinations of features can be adopted depending on the negotiations between the Government and the oil company, and the geological risk profile.

4.3.1 Stabilisation Clauses

These are clauses negotiated into investment contracts by MOC to mitigate their investment's political and legal risk. They address legal changes after the PSA's execution and the extent to which these changes modify the rights and

[869] Refer to chapter three, section 3.5.2.1

obligations of the MOC.[870] The main concerns for the MOC include, Governments deciding to demand a higher profit share, unilaterally changes terms of contracts, imposes higher taxes on Petroleum activities, enacts new social and environmental regulations,[871] seizure of MOCs' fixed or mobile assets.[872]

The most relevant aspect to this thesis is the imposition of new human right and environmental obligations by subsequent regulation or by an administrative or judicial ruling reinterpreting existing law which MOCs used to make investment decisions. While environmental liability is a significant political risk in transition economies, global climate change concerns have also caused unforeseen environmental opposition on petroleum industry developers. With this experience in mind, it is understandable that foreign investors will wish to protect their position at the moment of their most favourable bargaining power when dealing with a weak (developing or transition) government anxious to attract investment before and during the negotiations for an attractive investment.[873]

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[870] R Dolzer, C Schreuer, *Principles of International Investment law* (Oxford University press 2008) 89-118 for an overview on expropriation see 75-78; *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru,* Award on the Merits, 18 August 2008, ICSID Case No. ARB/03/28

[871] P E Comeaux, N S Kinsella, *Reducing Political Risk in Developing Countries: Bilateral Investment Treaties, Stabilization Clauses, and MIGA and OPIC Investment Insurance* (Vol 15 New York Law School Journal of International and Comparative Law 1994)1; T Moran (ed) *Managing International Political Risk* (Malden, MA: Blackwell 1998)15-43; W Irwin "Political Risk: A Realistic View Towards Assessment, Qualification, and Mitigation" in T Moran (ed) *Managing International Political Risk,* (Malden, MA: Blackwell 1998)57-69

[872] Ibid

[873] Thomas Walde, George Ndi, 'Stabilizing International Investment Commitments: International Law Versus Contract Interpretation,' 31 Tex. Int'l L.J. 215, 230-1

The most common types of stabilization clauses are Freezing clauses, economic equilibrium clauses, and the hybrid clauses.[874] The Freezing clause freezes the domestic law applicable to the project for the entire term of the project.[875] Such that legislation adopted after signing the PSA would be inapplicable to the MOCs or project, especially regarding raising taxes, environmental issues, and continuity of the contract to full term. For a developing country like Uganda, with a developing legal and fiscal system, stabilisation clauses would have created an unrealistic expectation that its needs could remain frozen in time.

The Economic equilibrium clauses provide that any change in law after the signing of the PSA will apply to the MOCs if the Government indemnifies the investor against the costs of complying with the new laws.[876] These clauses preserve the project's economics,[877] with compensation taking such forms as adjusted tariffs, an extension of the concession, tax reductions, monetary

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[874] Ibid 218-9; Thomas Walde, *Stabilizing International Investment Commitments: International Law Versus Contract Interpretation* (CEPMLP 2004) 57-581; Andrea Shemberg, 'Stabilization Clauses and Human Rights' IFC (May 27, 2009) <https://www.ifc.org/wps/wcm/connect/0883d81a-e00a-4551-b2b9-46641e5a9bba/Stabilization%2BPaper.pdf?MOD=AJPERES&CACHEID=ROOTWORKSPACE-0883d81a-e00a-4551-b2b9-46641e5a9bba-jqeww2e> accessed on 23rd May 2017

[875] P D Cameron, *Stabilization in Investment Contracts and Changes of Rules in Host Countries: Tools for Oil & Gas Investors* (Association of International Petroleum Negotiators 2006) 12, 53–72. <http://lba.legis.state.ak.us/sga/doc_log/2006-07-05_aipn_stabilization-cameron_final.pdf > accessed on 30/10/2017

[876] J Gotanda, *Renegotiation and Adaptation Clauses in Investment Contracts*, (Revisited 36 Vanderbilt Journal of Transnational 2003) 1461-1472

[877] P D Cameron, *Stabilization in Investment Contracts and Changes of Rules in Host Countries: Tools for Oil & Gas Investors* (Association of International Petroleum Negotiators 2006) 12, 53–72. <http://lba.legis.state.ak.us/sga/doc_log/2006-07-05_aipn_stabilization-cameron_final.pdf > accessed on 30 October 2017; E Woodhouse, *The Obsolescing Bargain Redux? Foreign Investment in the Electric Power Sector in Developing Countries* (38 Journal of International Law and Politics, 2006) 121-219; C Ochieze, *Fiscal Stability: To What Extent Can Flexibility Mitigate Changing Circumstances in a Petroleum Production Tax Regime?* (OGEL 2 (2007).http://www.ogel.org/article.asp?key=2403 accessed 1st 10 2017.

compensation, or others. However, PSAs often do not explicitly mention exemptions. The scope of the host government's indemnification obligation depends on the negotiating strength of the parties and the host government's need for the proposed investment.[878]

The hybrid clause combines the above two types, where MOCs "may" be granted an exemption from applying the new laws, but it is not an automatic exemption.[879] They may also require compensation for the certain specified changes in the law, as opposed to all laws applicable to the project.

Although stabilization clauses are beneficial to foreign investors and those host governments perceive them as helping attract foreign investment; they can prevent the host State's ability to pursue legitimate public policies to promote public health, economic, environmental sustainability, or social justice throughout the lifetime of the petroleum contract. [880] Stabilisation clauses also can distort the Government's accountability to its citizens as they prioritised the concerns, interests, and profits of MOCs, over citizens.

4.3.1.1 Uganda's Economic Equilibrium Clause

This section assesses whether Uganda's stabilisation clauses limit the application of new social and environmental regulations to investment activities over the lifetime of the investment or enable MOCs to obtain

[878] G Verhoosel, *Foreign Direct Investment and Legal Constraints on Domestic Environmental Policies: Striking a "reasonable" Balance Between Stability and Change, Law and Policy in International Business 1 (1998)*
[879] Ibid Cameron
[880] R Dolzer, C Schreuer, *Principles of International Investment law* (Oxford University press 2008) 89-118 for an overview on expropriation see 75-78.

compensation from the Government for the costs of compliance with such new laws.

Article 30 of the Model PSA provides that the PSAs would be governed by, interpreted, and construed per Uganda's existing laws and the terms in that PSA.[881] After the execution of a PSA, amendments, and enactment of any law that substantially and adversely alters the economic benefits (Present Net Value) accruing to the MOCs, will entitle the MOCs to renegotiate any necessary adjustments to the PSA to maintain their existing economic benefit. [882] It further provides that if the parties are unable to agree on the modifications required to maintain the economic benefits, either Party may refer the matter for Expert Determination.[883]

As earlier discussed, stabilisation clauses traditionally created a freezing ability[884] on the host State's ability to take the actions necessary to protect their

[881] Model PSA 2018 (n 498) Article 30; Article 33.1 of the Kanywataba Prospect Area PSA provides that the PSAs would be governed by, interpreted and construed in accordance with the existing laws of Uganda.

[882] P D Cameron, *Stabilization in Investment Contracts and Changes of Rules in Host Countries: Tools for Oil and Gas Investors* (Association of International Petroleum Negotiators 2006) 12, 53–72. <http://lba.legis.state.ak.us/sga/doc_log/2006-07-05_aipn_stabilization-cameron_final.pdf> accessed on 30/10/2017; A F M Maniruzzaman, *Drafting Stabilization Clauses in International Energy Contracts: Some pitfalls for the Unwary* (OGEL 2 (2007) < http://www.ogel.org/article.asp?key=2498> Accessed 30th 10 2017; D Johnston, *International Petroleum Fiscal Systems and Production Sharing Contracts* (Pen Well Publishing Company, USA 1994).

[883] Refer to section 4.2.2.2 below for the discussion on Expert Determination.

[884] P D Cameron, *Stabilization in Investment Contracts and Changes of Rules in Host Countries: Tools for Oil and Gas Investors* (Association of International Petroleum Negotiators 2006) 12, 53–72. <http://lba.legis.state.ak.us/sga/doc_log/2006-07-05_aipn_stabilization-cameron_final.pdf> accessed on 30/10/2017; A F M Maniruzzaman, *Drafting Stabilization Clauses in International Energy Contracts: Some pitfalls for the Unwary* (OGEL 2 (2007) < http://www.ogel.org/article.asp?key=2498> Accessed 30th 10 2017; D Johnston, *International Petroleum Fiscal Systems and Production Sharing Contracts* (Pen Well Publishing Company, USA 1994).

citizens' rights and enforce national laws that apply elsewhere in the country. However, the drafters of Uganda's Model PSA chose to use a different type of stabilisation clause called an "economic equilibrium clause" [885] or "renegotiation clause" to reassure the MOCs of maintaining their economic benefits.[886] This type of clause allows room for the Government to enact new laws such as those intended to levy additional profit tax on additional profits, laws concerning health, safety, and environmental standards.

The Ugandan Government made a favourable decision by framing the stabilisation clause to read like an "economic equilibrium clause" or a "renegotiation clause." However, if the parties cannot agree, the MOC can refer the matter to an international dispute settlement forum where the State may pay compensation.[887] The possibility of not coming to a resolution, filing an international arbitration case, and potentially the subsequent award of

[885] P D Cameron, *Stabilization in Investment Contracts and Changes of Rules in Host Countries: Tools for Oil & Gas Investors* (Association of International Petroleum Negotiators 2006) 12, 53–72. <http://lba.legis.state.ak.us/sga/doc_log/2006-07-05_aipn_stabilization-cameron_final.pdf> accessed on 30/10/2017; A F M Maniruzzaman, *Drafting Stabilization Clauses in International Energy Contracts: Some pitfalls for the Unwary* (OGEL 2 (2007) < http://www.ogel.org/article.asp?key=2498> Accessed 30th 10 2017; D Johnston, *International Petroleum Fiscal Systems and Production Sharing Contracts* (Pen Well Publishing Company, USA 1994); Patricia Park, *International Law for Energy and the Environment* (2nd edn, CRC Press 2013); Peter D Cameron, *International energy investment law: the pursuit of stability* (Oxford University Press 2010)

[886] J Gotanda, 'Renegotiation and Adaptation Clauses in Investment Contracts,' 2003 Revisited 36 Vanderbilt Journal of Transnational, 1461-1472.

[887] Greg Muttitt, "Nationalising Risk, Privatising Reward", International Journal of Contemporary Iraqi
Studies, September 2007. (which commit to stabilize royalties for the entire project for example Angola, Cambodia, Guyana, Iraq, Kazakhstan, Bolivia); T W Walde, *Stabilizing International Investment Commitments: International Law Versus Contract Interpretation* (CEPMLP 2004) 57-581.

large sums in compensation is often what inadvertently limits the State's willingness to legislate further.

International arbitrators settling investor-State disputes tend to take PSA terms literally, and therefore provisions for regulatory stability are considered strictly. In *Texaco v. Libya*[888], the State attempted to nationalise Texaco's rights, interest, and property in Libya. The arbitrator ruled that stabilisation clauses provided for in the contract were valid and had a legal effect in international law. It further stated that whenever PSAs refer to "general principles of law," it is sufficient to make a PSA adhere to International Investment Law which protects the investor from the host state's unilateral law modifications. The above views were reiterated, with some variants, in the subsequent cases of *The Government of the State of Kuwait vs The American Independent Oil Company,*[889] *AGIP S.p.A. vs The People's Republic of the Congo*,[890] and *Revere Copper and Brass, Incorporated vs Overseas Private Investment Corporation.*[891] In the most recent case of *Duke Energy International Peru Investments No. 1 Ltd. vs the Republic of Peru* [892] the arbitral tribunal ordered the Government of Peru to pay the compensation awarded for breaching the stabilisation clauses contained in its contract.

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[888] *Texaco Overseas Petroleum Co. v Libya* International Arbitral Award, 104 J. Droit Int'l 350 (1977), translated in 17 I.L.M. 3 (1978)
[889] *The Government of the State of Kuwait vs The American Independent Oil Company* (AMINOIL), 21 ILM 976
[890] *AGIP* S.p.A. *v People's Republic of the Congo*, ICSID Case No. ARB/77/1.
[891] *Revere Copper and Brass, Incorporated v Overseas Private Investment Corporation* 17 ILM 1978, at 1321 et seq
[892] *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru,* Award on the Merits, 18 August 2008, ICSID Case No. ARB/03/28

It is worth noting that human rights law requires states to protect human rights from interference by private parties (including companies).[893] The passing and implementing of laws regulating private parties' behaviour (including companies) is one of the primary methods by which states fulfil "*their international human rights obligations. UN human rights law and policy support the idea that failures by a state to regulate and enforce its regulations against companies can amount to a violation of the state's international treaty obligations*."[894] Stabilization clauses can either make foreign investments immune from bona fide social and environmental laws that come into force after the effective date of the agreement or require the host state to compensate the investor for compliance with new social and environmental laws".[895] This requirement for the host state to pay for compliance is wrong in principle because it denies the state its proper role as a legislator with powers different and more significant than companies. It creates a financial disincentive for the host state, thus chilling or hindering the application of dynamic social and environmental standards over the lifetime of a long-term project.[896]

Also, the term "maintain their existing economic benefit" might be ambiguous in some respects. Where the financial implications on the MOCs are due to new laws on environmental protection, workers' rights, standards of socio-

[893] Final Report of the UN SRSG, UN DOC A/HRC/4/35, paras. 10- 18.
[894] The International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted in 1966 and ratified in Uganda in 1987
[895] Lorenzo Cotula, 'Stabilization Clauses and the Evolution of Environmental Standards in Foreign Investment Contracts,' *Yearbook of International Environmental Law 17* (January 1, 2007) 111-138
[896] Ibid

economic promotion, the question that arises is why should MOCs be compensated. Nevertheless, the Government has successfully enacted the NEA 2019, Wildlife Act 2019, Investment Code 2019, and many others; it remains to be seen whether MOCs will offset and recoup any operational costs rising as part of the cost of production.

In more recent cases, host Governments have offered various justifications for their unilateral actions, stating that they made decisions based on the public's interest. For example, in *Methanex Corporation vs the United States of America,*[897] the tribunal concluded that the ban of MTBE in gasoline in California due to environmental and public health reasons was a non-discriminatory regulation. It was done in the public's interest, stating that the decision was not done contrary to the stabilisation clause, and therefore non-compensable.

It is essential to establish what degree of stabilisation is needed for the MOCs to consider the investment viable to maximise the investment's contribution to sustainable development. It is also prudent to tailor the scope and content of any stabilisation clauses to the parties required explicitly from any given investment. Also, to develop ways of reconciling the investors' legitimate need for protection against the State's arbitrary actions, maintaining the host state's ability to pursue sustainable development goals through regulation in social and environmental matters.

[897] *Methanex Corporation v United States of America*, UNCITRAL (NAFTA), Final Award (3 August 2005); *Parkerings–Compagniet AS vs Republic of Lithuania*, ICSID Case No. ARB/05/8

One of the most critical functions of having Economic Equilibrium Clause in PSAs is that it is considered a useful and practical tool to balance the 'the competing interests of control and stability needed by the state and foreign investors.'[898] The traditional legal technique used by parties was the 'Freezing Clause' which limits state sovereignty and turn illegal any adverse state action.[899] Nonetheless, both of the parties may be cautious in respect of such mechanism. On the one hand, the state, primarily, does not want to lose its sovereignty by tying itself with laws and regulations that were effective when signing a PSA with the foreign investor. Secondly, this mechanism leads to complicated administrative processes by forcing the state to consider a particular legal regime for each investor and 'to apply to each project the law existing at the time of concluding the contract'.[900] On the other hand, MOCs would receive less benefit under applying the freezing clause, which provides only lump-sum damages, than Economic Equilibrium Clause.[901]

The modern alternative to freezing clauses being the economic equilibrium clauses provides the solution to this dilemma to protects both parties' interest, by including renegotiation provisions, it allows both parties to air their grievances, and an amicable resolution is expected to be reached. Where

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[898] J R Ray, 'Illusory Control of State Controlled Resources through Stabilisation Clauses: Renegotiation Clauses May Save the Contract, (2013) 11 (5) OGEL 1.
[899] P D Cameron, *Stabilization in Investment Contracts and Changes of Rules in Host Countries: Tools for Oil & Gas Investors* (Association of International Petroleum Negotiators 2006) 12, 53–72. <http://lba.legis.state.ak.us/sga/doc_log/2006-07-05_aipn_stabilization-cameron_final.pdf> accessed on 30/10/2017
[900] A.F.M Maniruzzaman, 'Drafting Stabilisation Clauses in International Energy Contracts: some Pitfalls for the Unwary' (2007) 5 (2) OGEL 3, 124.
[901] Ibid 126.

negotiations fail and no amicable resolution is reached, either party is able to refer the dispute to a third party (expert determination or arbitration) to determine adaptation.[902] From a legal point of view, "*economic equilibrium clauses do not seem to pose significant problems, as they do not prevent host state regulation so long as the economic equilibrium is restored*"[903]

In contractual practice, this clause protects, asserts, and keeps intact the state's sovereignty by protecting its right to change its laws and regulations during the contract's lifetime, even if these changes would affect the investor's financial benefit. Nevertheless, the investor would then have the right to renegotiate or adapt the contract to restore the parties' original equilibrium.

The state's main advantage in this mechanism is should the state acts unilaterally in a manner that affects the rights and interests of the MOCs; there is an opportunity for the parties to re-establish the contract's equilibrium by way of negotiation.[904] However, from a political point of view, although providing for flexibility and being at first glance less intrusive with respect to the state's sovereignty, economic equilibrium clauses may prove to be costly for the host state. Restoring the economic equilibrium could lead to a more

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[902] John Y Gotanda, 'Renegotiation and Adaptation Clauses in Investment Contracts', Revisited, 36 Vanderbilt Journal of Transnational Law, 2003) 1461-1473, pp. 1462

[903] Lorenzo Cotula, Reconciling Regulatory Stability and Evolution of Environmental Standards in Investment Contracts: Towards a Rethink of Stabilization Clauses, (1 Journal of World Energy Law & Business, 2008) 158-179; Lorenzo Cotula, Investment contracts and sustainable development: How to make contracts for fairer and more sustainable natural resource investments (International Institute for Environment and Development, 2010) 75-7; Lorenzo Cotula, 'Stabilization Clauses and the Evolution of Environmental Standards in Foreign Investment Contracts,' *Yearbook of International Environmental Law 17* (January 1, 2007) 111-138

[904] A.F.M Maniruzzaman, 'Drafting Stabilisation Clauses in International Energy Contracts: some Pitfalls for the Unwary' (2007) 5 (2) OGEL 3.

comprehensive claim for damages and a larger coverage of claims than compensation for the breach of freezing commitments.[905] Arguably, the alleged advantage, it appears is its contribution to the stability of the investor-state relationship, thus maintain a negotiation atmosphere when otherwise the tension between host states' regulatory interests and investors' expectations would have amounted to conflict and contractual breach. Nevertheless, Article 30 of the model PSA appears to protects both the states and MOCs' interests[906] and does not aim to prevent a change in the law by the state but, instead, address the economic impact of such changes.[907]

4.3.2 Dispute Resolution Mechanism

A vital aspect of any contract is how the parties hope to manage any future disputes. It is advisable to expressly provide well-thought dispute resolution clauses in the contract to avoid confusion.

4.3.2.1 Arbitration

The Model PSA provides that disputes arising under the PSA shall be referred to Arbitration per the United Nations Commission for International Trade Law (UNCITRAL) Arbitration Rules and take place in London.[908] Except disputes relating to taxation, health, safety, and environment (disputes

[905] A.F.M. Maniruzzaman, The Pursuit of Stability in International Energy Investment Contracts: A Critical Appraisal of the Emerging Trends, (Vol 1 Journal of World Energy Law and Business, 2008), 126.
[906] Gotanda (n 197) 1462.
[907] T. Oyewunmi, 'Stabilisation and Renegotiation Clauses in Production Sharing Contracts: Examining the Problems and Key Issues' (2011) 9 (6) OGEL 9; Abdullah Faruque, 'Validity and Efficacy of Stabilisation Clauses: Legal Protection *vs.* Functional Value' (2006) 23 (4) Journal of International Arbitration 31-33, 317, 332.
[908] Kanywataba Prospect Area PSA 2012 (n 19) Article 26

relating these exceptions are handled through different mechanisms discussed below in section 4.3.2.3 and 4.3.2.4). It also provides that the Arbitration award shall be final and binding on the PSA Parties.[909]

4.3.2.1.1 Advantages of Using International Arbitration Forums

There are numerous advantages for both the investor and the host government in using international arbitration.[910] It involves using an independent and neutral third party to privately determine the parties' rights and obligations to a contract and resolve their dispute.[911] The parties appoint the arbitrator they believe is an expert in the field of dispute. Where they cannot agree, they would appoint a nominee (usually the LCIA, UNCITRA) to appoint their arbitrators.[912] Therefore, in Petroleum disputes, the Government and Investor can choose an arbitrator they believe would act justly and protect their interests.

International Arbitration is a significant attractive aspect for MOCs as they perceive domestic jurisdiction to have biases. Parties to an arbitration agreement believe that they have absolute autonomy to execute an arbitration

[909] New York Convention of 1958 on the Recognition and Enforcement of Foreign Judgments; The Arbitration and Conciliation Act, (Cap. 4) Section 73; Arbitration and Conciliation (Amendment) Act 2008 (No. 3 of 2008); Model PSA 2018 (n 498) Article 24.1

[910] H Brown and A Marriot, *ADR Principles and Practice* (2nd edn, sweet and Maxwell, London 1999); K Mackie (ed), A Handbook of Dispute Resolution: ADR in Action (1991) 3–5; K Mackie, D Miles and W Marsh, Commercial Dispute Resolution: An ADR Practice Guide (1995) 7

[911] M Rutherford, "Arbitration: be there dragons?" (Law Society Gazette of 2 September 1987) 2423; B *T P Tioxide v Pioneer Shipping Ltd and Armada Marine S A* [1982] AC 724; Antaios *Compania Naviera S.A v Salen Rederierna A.B. The Antaios* [1985] A.C. 191.H L for the Position Since 1996; R D Fischer, and R S Haydock, International Commercial Disputes: Drafting an Enforceable Arbitration Agreement, 21 Wm. Mitchell L. Rev. 941 (1996); A Redfern, M Hunter, N Blackaby and C Partasides, "Law and Practice of International Commercial Arbitration", (4th Edn, Sweet and Maxwell 204)

[912] London Court of International Arbitration (LCIA Rules); English Arbitration Act 1996

agreement consensually and choose applicable substantive law to govern the contractual relationship.[913] However, developing States and international Investors have varying bargaining power. The cost-benefit that arises for either Party plays a part in determining the extent to which freedom or autonomy can be conclusively confirmed.

Other advantages that arbitration offers include a flexible procedure that is mostly confidential in comparison to litigation. **[914]** The venue and timing of the proceedings are determined to meet the convenience of the parties. The final decision does not carry an automatic right to appeal, or review save for certain limited circumstances. [915] Finally, International arbitration awards are enforceable in foreign jurisdictions, unlike domestic court judgments.[916]

4.3.2.1.2. Disadvantages of Using International Arbitration Fora

Arbitration can be disadvantageous for parties who desire a speedy, cheaper process[917] since arbitrators must still refer to substantive, mandatory, and procedural laws of the seat and an unpredictable process left to the arbitration panel to determine. The confidentiality element in international Arbitration

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[913] Michael Pryles, 'Limits of Party Autonomy in Arbitral Procedure' <http://www.arbitration.icca.org/media/0/12223895489>accessed 30 May 2019; Sunday Fagbemi, 'The Doctrine of Party Autonomy in International Commercial arbitration: Myth or Reality?' Available at https://www.ajol.info/index.php/jsdlp/article/viewFile/128033/117583 accessed 19 June 2019

[914] Association for International Arbitrators (ed), Alternative Dispute Resolution in the Energy Sector (Maklu 2009); H Brown and A Marriot, *ADR Principles and Practice* (2nd edn, sweet and Maxwell, London 1999) 17

[915] Arbitration Act 1996, Section 58 (1)

[916] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

[917] Arbitration Act 1996, Section 59

can be a cause of concern since it does not allow for oversight from Parliament, or any stakeholders interested in the matter.[918]

4.3.2.2 Expert Determination

Disputes concerning the determination of "market price used to value crude oil,"[919] and disputes relating to the sharing of "Profit Petroleum",[920] are first to be considered by the MOEMD, together with two technical representatives from the Government and two technical representatives of the Licensee.[921] If the representatives cannot resolve the dispute, they refer it to an expert appointed by both parties or the Petroleum Institute President (London). The expert is to decide based on PSA's provisions, the Upstream and Midstream Act, Regulations, and the standards of Best Petroleum Industry Practices. Finally, the decision of the expert is final and binding on both the Licensee and the Government.[922]

4.3.2.2.1 Advantages of Using Expert Determination

Expert determination is advantageous because of the technical nature of potential disputes. Having someone knowledgeable in determining such disputes allows for an accurate, neutral, flexible, quick, and inexpensive process. Since the law does not lay out the procedure, it allows for an informal

[918] D Kolo, A. and Wälde T. (2000), 'Renegotiation and Contract Adaptation in International Investment Projects', Journal of World Investment, 1, pp. 5–58, reproduced in OGEL – Oil, Gas & Energy Law Intelligence, 1: 2, March 2003.
[919] Model PSA 2018 (n 498) Article 14.1
[920] Ibid Article 12.2
[921] Ibid Article 24.2, 12.2, and 14.1.6
[922] Ibid Article 14

process that preserves the commercial relationship. [923] Also, expert determination allows for confidentiality as the expert need not give reasons for his decision. However, that decision remains binding and only appealable on the grounds of fraud, like taking a bribe[924] and a manifest error in law.[925]

Article 24 of the Model PSA does not provide for a specific procedure to be used by the expert, and there is no requirement for the rules of natural justice or due process to be followed for that determination to be valid and binding between the parties."[926] The cases of *Douglas Harper v Interchange Group Ltd*[927], and *Sunrock v Scandinavian Airlines,* [928] reiterated this binding nature and prohibited any aggrieved parties appealing the expert determiners decision. Moreover, the unwillingness of a party to participate exposes it to an order of damages.[929]

4.3.2.2.2 Disadvantages of Using Expert Determination

The expert determiners decide based on the information provided by both parties. If the expert bases their decision on any misinformation, provided they

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[923] H J Brown, A L Marriott, *Choice and Timing of Process Use in H J Brown, and A L Arthur, ADR Principles and Practice* (Sweet and Maxwell Ltd 1999) 390-441
[924] *Bernhard Schulte GmbH and Co KG v Nile Holding Ltd* [2004] EWHC 977 at 96
[925] *Dixons Group Plc v Murray-Obodynski* [1997] 86 BLR 16; *Conoco Ltd v Phillips Petroleum Co U.K. Ltd* (Unreported, 1996); P Roberts, *Gas Sales and Gas Transportation Agreements Principle and Practice* (sweet and Maxwell, London, 2004) 318
[926] *Bernhard Schulte GmbH and Co KG v Nile Holding Ltd* [2004] EWHC 977 at 96
[927] *Douglas Harper v Interchange Group Ltd [2007] EWHC 1834*
[928] *Sunrock Aircraft Corporation V Scandinavian Airlines System Denmark-Norway-Sweden [2007] EWHC Civ 882*
[929] *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002; *Brookfield v Mott MacDonald* [2010] EWHC 659 (TCC); *Charles Church Developments Ltd v Stent Foundations Ltd* [2007] EWHC 855 (TCC); Kevin Barrett, Enforcing ADR Agreements (2013) http://www.no5.com/news-and-publications/publications/201-enforcing-adr-agreements/ accessed on 3rd/ 5/2013.

decide good faith, it remains binding[930] and conclusive and therefore not open to review or treatment by the courts as a nullity because the expert's decision was erroneous in law.[931] To avoid this shortcoming, the PSA should provide more details about the mandate of the expert's powers,[932] the methods of identifying, selecting, and appointing the expert, the requirement for neutrality, the time frame, and the procedure, among others. This thesis assumes that the Institute of Petroleum (London) provided for in the PSA makes provision for reliable procedure rules.[933]

4.3.2.3 Objections and Appeals or Tax Appeals Tribunal

The Model PSA provides that MOCs resolve any tax disputes per the Objections and Appeals mechanisms stipulated under Uganda's laws.[934] An Objection is a communication in writing from a taxpayer to the Commissioner or Commissioner General of Uganda Revenue Authority expressing dissatisfaction with an assessment raised on him or her. The Commissioner or Commissioner-General then makes an Objection Decision to allow the objection made by a taxpayer either in whole or in part and amend the assessment accordingly or disallow the objection.[935]

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930 *Campbell v Edwards* [1976] 1 WLR
931 *Nikko Hotels (U.K.) Ltd V MEPC Plc* [1991] 2 EGLR 103
932 *Campbell v Edwards* [1976] 1 WLR
933 C Kehoe and T Greeno, 'Expert Determination and Final Offer Arbitration' (Proceedings of Institute of Petroleum Conference on Dispute Resolution in the International Oil and Gas Industries, 4 December 1998, London) 43–54
934 Model PSA 2018 (n 498) Article 13.2; Value Added Tax Act CAP 349 1997, Sections 33A, 33B, 33C and 33D; Income Tax Act CAP 340, Sections 99, 100 and 101; East African Community Customs Management Act 2004, Sections 229, 230 and 231
935 Ibid

If the taxpayer is still dissatisfied with the Objection Decision made by Commissioner or Commissioner General, they can apply to the Tax Appeal Tribunal to review the decision. [936] If they are still dissatisfied with the Tax Appeal Tribunal decision, they may appeal to the High Court, if it is strictly on the question of the law. The burden of proving that an assessment is excessive is on the person objecting.

4.3.2.4 Utility, Standards, Wildlife and Environment Court

Chapter Three, section 3.5 this thesis discussed legal and regulatory framework governing environmental protection addressing the effects of human activity on the natural environment. The laws provided that every person (in Uganda) has a right to a clean and healthy environment. The NEA further provides that if the above right is threatened, the affected person can file a civil suit in the Magistrates' Court against the offender whose act or omission has or is likely to cause harm to human health or the environment. [937]

In Uganda, NEMA has the primary responsibility of enforcing all the environmental laws. [938] If a person is dissatisfied with the Decisions on ESIA made by NEMA, they can appeal in the High Court. The List of environmental offences, penalties, fees, fines and other charges is in Part XVI of the NEA 2019

[936] Tax Appeals Tribunal Act 1997
[937] National Environment Act, 2019 (The Uganda Gazette No. 10, Volume CXII, dated 7th March 2019) section 3
[938] Refer to Chapter Three, Section 3.8.6

and applies to all perpetrators, including MOCs.[939] Even though the Model PSA does not expressly provide for the procedure for disputes relating to environmental damage from petroleum activities, it provides compensation for resulting injury caused to persons and property.[940] In 2017, the judiciary created the new specialised court called: Utility, Standards, Wildlife, and Environment to deal with such suits.[941] In 2019 youth and CSO (Guild Presidents' Forum on Governance and AFIEGO) filed a case in this new court against Petroleum Authority of Uganda and the National Environment Management Authority (NEMA).[942] They alleged that NEMA had issued an ESIA certificate to Total Energies for the Tilenga oil project even though they had not carried out consultations with the public or project-affected communities or persons as required by the EIA Regulations.[943] They asked the Court to cancel the Tilenga EIA certificate. This case is still ongoing, should

[939] National Environment Act, 2019 (The Uganda Gazette No. 10, Volume CXII, dated 7th March 2019) Section 153

[940] Model PSA 2018 (n 498) Article 23.5

[941] P. Tajuba, "Judiciary okays environmental court" Saturday Monitor (Uganda February 18th, 2017) 5.

[942] Africa Institute for Energy Governance, 'Annual Report,' (2019)15-29 https://www.afiego.org/download/afiegos-2019-annual-report/?wpdmdl=2084&refresh=60010a6fd5cad1610680943> accessed 2nd January 2020

[943] Doreen Namara, 'Tilenga EIA certificate won't conserve the environment and protect livelihoods' *Daily Monitor* (15th May 2019) <https://www.monitor.co.ug/OpEd/Commentary/Tilenga-EIA-certificate-environment-protect-livelihoods/689364-5115232-70wrcj/index.html> accessed on 15th July 2019; Oil in Uganda, 'Tilenga ESIA certificate: CSOs want court to strike out NEMA's evidence' *Oil in Uganda* (Friday, 22nd November 2019) <https://oilinuganda.org/features/environment/tilenga-esia-certificate-csos-want-court-to-strike-out-nemas-evidence/> accessed on 13th December 2019

the plaintiff succeed, the courts will cancel the ESIA certificate for Tilenga project.[944]

4.3.3 Confidentiality Clauses

Article 33 of the Model PSA provides that the Agreement and any other documents connected with the Agreement's performance shall not be published or disclosed to third parties without written consent from either Party. Except for communication made to legal counsel, accountants, other professional consultants, underwriters, lenders, agents, licensees, or shipping companies to the extent necessary in connection with the PSA, and even they must keep that information confidential.

In Uganda, many aspects of the oil industry are deliberately treated as state secrets or shrouded in mystery. The government argues that the PSAs contained confidential information that would reduce its negotiating position on subsequent blocks if released. In August 2009, Engineer Hillary Onek, the Energy and Mineral Development Minister, had this to say about the confidentiality issue, "*that the agreement the government signed with Tullow Oil provides for confidentiality…. the government risks being sued if it publicised the document*." [945] However, this secrecy makes it extremely difficult, if not impossible, to assess whether the PSA proportionally distributed revenue

[944] The Independent, 'Court adjourns case against NEMA, petroleum authority of Uganda' *The Independent* (November 6, 2019) <https://www.independent.co.ug/court-adjourns-case-against-nema-petroleum-authority-of-uganda/> accessed on 13th December 2019

[945] Taimour Lay "Worst Kept Secret", http://blog.platformlondon.org/content/worst-kept-secret-tullow-oil%E2%80%99s-contract-uganda

sharing between the parties equitably. Also, to monitor the extent to which the Government is utilising its share to the public's benefit, in whose trust Petroleum resources are explored, and managed.

Confidentiality clauses leave room for speculation and public anxiety that governments and MOCs might publish inaccurate records on known reserves of mineral resources and petroleum revenues, among others, to strengthen their negotiating position and business prospects. Some critics and observers stated that the terms of the early agreements signed were not favourable to the government.[946] At least three cases have been filed in court over this issue, with media and NGO as complainants seeking access to documents.[947] There is already evidence discussed in the previous chapter, [948] where the Government has mismanaged petroleum revenues, which is a cause for concern. Transparency in revenue payments is not a panacea for revenue mismanagement problems. Transparency remains a necessary first step for corporate and government accountability because one cannot manage what one cannot measure.

The question that arises is to what extent does that confidentiality clause contravene the Constitution as the supreme law of Uganda and the Upstream

[946] Credit Suisse, Ernst and Young, the Civil Society Coalition for Oil (CSCO) in Uganda, 'Avoiding the resource course: Spotlight on oil in Uganda.' World Resources Institute Working Paper (2011) <http://pdf.wri.org/working_papers/avoiding_the_resource_curse.pdf> accessed on 13th April 2017

[947] Refer to chapter three, section 3.7.3

[948] Refer to Chapter Three, section 3.6 on Legal and Regulatory Framework Governing the Management of Petroleum Revenues

and Midstream Acts, and ATIA.[949] This thesis does not argue that MOCs should disclose commercially confidential information but instead voluntarily publish the same underlying data on payments made to governments that they are required to disclose in many developed countries. MOCs might be motivated to eliminate confidentiality clauses in PSAs if their home countries require them to disclose payments.[950]

In a move to increase transparency, the MOEMD released snippets of the Armour Energy's PSA's critical terms in 2017.[951] These terms included that the exploration license will be for four years, for an acreage of 344 sq Kilometre. That Armour is to acquire seismic data and drill at least one well in the first two years. That all annual exploration work programmes, budgets, and production forecasts are to be reviewed by the Investment Advisory Committee, the Petroleum Authority of Uganda, and a representative from the Licensee.[952] Other terms provide that Armour Energy is to pay Royalty based on the Gross Total Daily Production in Barrels of Oil Per Day (BOPD) at a rate ranging from 8.5% to 21%. That state participation to be no more than 20%; the cost recovery limit for petroleum is set at 65%; Signature Bonus, Research and Training fees, and Annual Acreage Rental fees for the First Exploration Period

[949] Refer to chapter three, section 3.7.3-Access to Information and the Petroleum Industry
[950] Refer to chapter three, section 3.7.3.3 External Obligations to Disclose Information
[951] Baz Waiswa, Here Are PSA Conditions Under Which Armour Energy Will Operate in Uganda (September 14, 2017http://earthfinds.co.ug/index.php/oil-and-gas/item/1092-here-are-psa-conditions-under-which-armour-energy-will-operate-in-uganda; Baz Waiswa, Uganda Offers Oil and Gas Exploration License to Australian Firm (Earth Findings 2017) http://earthfinds.co.ug/index.php/oil-and-gas/item/1083-uganda-offers-exploration-license-to-australian-firm.
[952] Upstream Act 2013, S 8-10

of USD 316,000 be paid to the Uganda Petroleum Fund per the PFMA; A Performance (Bank) Guarantee amounting to 50% of the Minimum Exploration Expenditure for the First Exploration Period be obtained; and national content provisions. All these terms discussed comply with the provisions of the petroleum laws discussed in Chapter Three. This research takes the assumption that the Armour PSA included environmental protection and socio-economic considerations.

4.4 Conclusion

PSAs are crucial to define the terms of an investment project and constitute a vital instrument of governance. They determine the distribution of risks, costs, and benefits of the project. If well designed and implemented, contracts can maximise the contribution of natural resource investment to sustainable development goals. However, poorly drafted PSAs may impose unfavourable terms on the host country, sow the seeds of disputes and undermine the pursuit of sustainable development. This chapter sought to assess two questions. First is whether Uganda's Model PSA (and therefore other PSAs) are in line with the national legal frameworks discussed in Chapter Three. The second is whether the reviewed PSA terms create obstacles to applying new social and environmental legislation to investment projects in the host state; and if so, to what extent do they impede the advancement of sustainable development.

On the first question, this chapter concludes that the Model PSA contains several favourable terms that reflect Uganda petroleum laws and SDGs. For example, by providing that the petroleum resources belong to the Ugandan Government, it permanently acknowledged Uganda's sovereignty and sovereign rights over its natural resources, to be developed on behalf of the public. Concerning the protection of the environment and communities, the PSA provides that the MOC must conduct all its Petroleum Activities per the Upstream Act, the NEA, and other applicable laws and regulations, to prevent or minimise danger to human life, property, pollution to the environment or harm to wildlife. Concerning national interests' provisions, the PSAs require MOCs to engage in local content, technology transfer, and capacity building per the national legal and regulatory framework.

On the second question, there have also been some positive considerations. For example, concerning stabilisation clauses, this clause's wording in model PSA reads like an economic equilibrium clause or renegotiation clause, which allows room for the Government to enact new laws and reassures the MOCs of maintaining their economic benefits. The dispute resolution clauses create four distinct avenues that deal with different potential areas of conflict. Finally, whereas the Model PSA contains restrictive confidentiality clauses, the Government seems to be showing commitment to disclosing PSA terms in the

future. They have done this by deciding to publish the Armour Energy's PSA's snippets and joining EITI on the 12 August 2020.[953]

However, there are also several glaring gaps. First, the confidentiality clause is in direct disregard with the Constitution, Upstream and Midstream Acts, and Access to Information Act. Until the PSAs are made public, civil society, NGOs, researchers, and even facets of the governments' entities will continue to speculate on whether the PSA terms are favourable. The stabilisation clause does not clarify what constitutes the term "maintain their existing economic benefit." It can be easily interpreted in many ways as the MOCs seek to minimise the investment costs that they are entitled to recoup, such as costs brought on by legal obligation such as national content obligations.

Finally, even though the Model PSA provides multiple avenues to resolve specific disputes between the Government (institutions) and MOCs, it does not provide a clear avenue or process through which PAP can find justice against MOCs. They often must go through the Concerns and Grievance Mechanism set up by the various MOCs,[954] and it only until that process fails, that they seek for intervention of the judicial system. The above discussion shows that the Model Production Sharing Agreements reflects the Government's interests. However, Chapter Seven will discuss community

[953]Refer to chapter three, section 3.7.3.3 for discussion on the external obligations to disclose information; Uganda Joins the Extractive Industries Transparency Initiative (EITI) 12th August 2020 https://globalrightsalert.org/news-and-views/uganda-joins-extractive-industries-transparency-initiative-eiti> accessed on 15th October 2020

[954] Refer to chapter three, section 3.5.4 for discussion on the general liability for environmental damage caused by petroleum activities

development and benefit agreements as a viable option to deal with the social, cultural, environmental, and economic interests and rights of resource host communities in oil-rich areas.

CHAPTER FIVE

5.0 INTERNATIONAL LEGAL AND REGULATORY FRAMEWORKS GOVERNING THE PETROLEUM INDUSTRY IN UGANDA.

The previous chapters assessed the national laws and PSAs, which formed the primary sources of laws regulating Uganda's petroleum industry. They were primarily concerned with balancing the interests of the Government and MOCs in their petroleum relations. They were not concerned with the inter-state relations concerning petroleum exploration and production.

However, petroleum activities remain of international concern for several reasons.[955] Firstly, as a necessity, petroleum investment involves various host countries contracting various MOCs to explore, exploit, manufacture useful products from the petroleum resources, and sell the products in international markets.[956] Secondly, petroleum is the most crucial energy source globally, an essential commodity in global trade, and a critical variable in measuring the global socio-political and economic system's stability.[957] Thirdly, petroleum extraction, and production processes pose various environmental protection challenges, which carry global concern.[958]

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[955] Richard, W. Bentham, A *Petroleum Regime: Background and Legalities, (1993)* 15(2) Houston Journal of International Law, 489-497, 491; Ernest Smith, et al., *International Petroleum Transactions,* (Denver, Colorado: Rocky Mountain Mineral Law Foundation, 1993).

[956] Nwosu E Ikenna, 'International Petroleum Law: Has It Emerged as a Distinct Legal Discipline' (1996) 8(2) *African Journal of International and Comparative Law* 428- 446.

[957] Robert Falkner, 'Global environmental responsibility in world politics,' in Hannes Hansen-Magnusson, Antje Vetterlein (eds), *The rise of responsibility in world politics* (Cambridge University Press 2020) 101-124; Daniel Yergin, *The Prize: The Epic Quest for Oil, Money, and Power*, (Reissue edn, Simon & Schuster, 2009) 149-763, 545, 570.

[958] Pierre-Marie Dupuy, Jorge E Viñuales, *International Environmental Law* (2nd ed Cambridge University Press 2018) 8 ; Schrijver N, *Sovereignty over Natural Resources: Balancing Rights and*

Therefore, this chapter will identify the various sources of "International Petroleum Law" (IPL), who are its subjects, and the nature of Uganda's relationship with the IPL. It will also assess whether there is an identifiable body of international laws that regulate or influence how the Government will manage the petroleum industry in Uganda to ensure environmental protection and socio-economic resilience.

5.1 International Petroleum Law (IPL)

The United Nations does not explicitly acknowledge the distinct existence of "international Petroleum Law" as a legal discipline. However, it acknowledges that the international legal structure for petroleum exploitation originates from applying various international environmental law principles, international law of natural resources, public international law, international human rights law, and economic laws.[959] IPL also acknowledged the vital importance of national petroleum laws discussed in Chapters Three and Four as an essential element to customary international law. These collectively govern how states use their natural resources (petroleum included) to pursue socio-economic benefits and sustainable development.[960]

Duties (CUP 2008) 231-50; C Brighton, 'Unlikely Bedfellows: The Evolution of the Relationship between Environmental Protection and Development' (2017) 66 *International and Comparative Law Quarterly* 209

[959] David H Getches, *Preface: On Natural Resources as an Area of Law,* 19(2) Public Land and Resources Law Digest, (1982) 214-231

[960] Elisa Morgera, Kati Kulovesi, *Research Handbook on International Law and Natural Resources* (Edward Elgar Publishing Ltd 2016) 1-25; Patricia Birnie, Alan Boyle, and Catherine Redgwell, International Law and the Environment (3rd ed OUP 2009) 256

Therefore, resource-rich countries must conduct their relations with MOCs in substantial conformity with international treaties, conventions, pacts, protocols, and covenants set by the global community of states.[961] The above principles' collective application ensures that states' international community does not face insurmountable anarchy in the global socio-political and economic systems, and years of petroleum-resource-induced civil conflict.[962]

5.1.1 Sources of International Petroleum Law (IPL)

The principal sources of IPL include Customary Laws, Treaties and Conventions, Declarations, Bilateral Investment agreements and Multilateral Investment Agreements, Public International Laws, UN decisions or resolutions, judicial or arbitral decisions, and juristic works,[963] discussed briefly below.

Customary rules evolved after a long historical process of commercial and administrative usage and practices by States' in pursuit of their self-interested policies on the international stage.[964] Although it lacks a centralised lawmaker,

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[961] Refer to section 5.2, 5.3

[962] Daniel Yergin, *The Prize: The Epic Quest for Oil, Money, and Power*, (Reissue edn, Simon & Schuster, 2009) 149-763, 545, 570; Goke Lalude, 'Importance of Oil to the Global Community,' (2015) 15(1) *Global Journal of Human-Social Science* 15-24; Toby Craig Jones, *America, Oil, and War in the Middle East* (2012) 99(1) *The Journal of American History* 208-218; *Libyan American Oil Co. (Liamco) v. The Government of the Libyan Arab Republic,* 20 ILM 1-87 (1981**);** Aderoju Oyefusi Oil-dependence and Civil conflict in Nigeria, (2007); P Collier, A Hoeffler, 'Resource Rents, Governance, and Conflict.' (2005) 49(4) *Journal of Conflict Resolution* 625-33; P Collier, L Elliot, H Hegre, A Hoeffler, M Reynal-Querol and N Sambanis, *Breaking the Conflict trap, Civil War and Development Policy* (Oxford University Press, 2003)

[963] Rosalyn Higgins, Philippa Webb, Dapo Akande, Sandesh Sivakumaran, James Sloan *Oppenheim's International Law: United Nations*, (OUP, 2017) Ch 12; Nwosu E Ikenna, 'International Petroleum Law: Has It Emerged as a Distinct Legal Discipline' (1996) 8(2) *African Journal of International and Comparative Law* 428- 446.

[964] Eric Posner, Jack L Goldsmith, 'A Theory of Customary International Law,' (1999) 66 University of Chicago Law Review 1113

a centralised executive enforcer, and a centralised authoritative decision-maker; it has gained recognition by the international community and now possesses the force of law as Customary International Law.[965] For example, the evolution of joint petroleum development in undefined and disputed areas.[966]

Legally binding Conventions or Treaties between the United Nations Member States dealing with environmental and human rights,[967] such as the Vienna Convention on the Protection of the Ozone Layer (1985), UN resolutions on ownership concepts applicable to natural resources, and none legally binding declarations and resolutions of UN Member states stating agreed-upon political or moral commitments (many UNGA Resolutions are not binding).[968]

Another source of IPLs is legally binding International Investment Treaties (IITs) between two or more states, such as Bilateral Investment Treaties that govern the relationship between State and foreign investors. [969] Then, Multilateral Investment Treaties to govern investment (petroleum) matters between several states such as the European Energy Charter Treaty.[970] IITs aim to promote economic development by attracting foreign investment and providing foreign investors and their investments with certain protections,

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[965] Ibid

[966] Ibrahim F I Shihata, William Onorato, *Joint Development of International Petroleum Resources in Undefined and Disputed Areas*, paper presented at the International Conference of Lawasia Energy Section, Kuala Lumpur, Malaysia, October 18-22, 1992

[967] Refer to Chapter Five, section 5.2 and 5.3

[968] Stephen M Schwebel, 'The Effect of Resolutions of the U.N. General Assembly on Customary International Law.' (1979) 73 *Proceedings of the Annual Meeting (American Society of International Law)* 301–309.

[969] Refer to Chapter Six

[970] European Energy Charter Treaty, Lisbon, 17 December 1994, Art. 1.5, Article 2(1), and in 6(2), Article 18 (3); Richard, W. Bentham, A *Petroleum Regime: Background and Legalities,* 15(2) Houston Journal of International Law, 489-497, 491 (1993).

including some protections beyond those available to domestic investors, for example, obligations on the host state not to expropriate property, or discriminate against the Investor.[971]

Another source of IPL are decisions of judicial or arbitral tribunals such as those of the International Court of Justice (ICJ),[972] state judicial decisions (treated as weighty precedents),[973] and arbitral awards of international tribunals, such as awards of the Permanent Court of Arbitration, awards made by other independent arbiters,[974] and determinations of jurists' committees.[975] Also, academic texts by recognised jurists and other specialised publications and journals amplify and interpret treaty rules and catalyse the uniform application and assimilation of Petroleum Law's customary rules.[976]

The other sources of IPL are Decision of organisations such as World Bank, OPEC, International Maritime Organisation (IMO) and others,[977] that serve as reference points for determining the validity of petroleum activities and are

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[971] Refer to chapter six

[972] The North Sea Continental Shelf Case, (1969), ICJ Rep., 3

[973] Earl of Lonsdale v AG Libyan American Oil Co. (Liamco) v. The Government of the Libyan Arab Republic, 20 ILM 1-87 (1981) (which dealt with the right of a host state to unilaterally abrogate a petroleum concession agreement); Earl of Lonsdale v. Attorney-General, (1982) I.-WLR 887 (which dealt with the nature of a host state's interests in petroleum resources); and The Texas Eastern Case (1989) (Unreported) (which dealt with the right of interest assignment under joint operating agreements)

[974] Award of Amnioil - Kuwait Arbitration of March 24, 1982, 21 ILM, 976-1005, (1982).

[975] United Nations Centre for Transnational Corporations (UNCTC), *Main Features and Trends in Petroleum and Mining Agreements*, UN DOC. ST/CTC/29. 1983; UNCTC, *Alternative Arrangements for Petroleum Development: A Guide for Policy Makers and Negotiators*, UN DOC ST/CTC/43, 1982

[976] Journal of Energy and Natural Resources Law, (JENRL), and the Oil and Gas Law and Taxation Review, (OGLTR).

[977] Refer to section 5.2.5

binding on their members.[978] For example, OPEC resolutions on oil pricing or oil development, World Bank Guidelines on Foreign Direct Investment 1992, and the IMO Guidelines and Standards such as IMO regulations on Abandonment, 1989).

5.1.2 Subjects of IPL

IPL is concerned with the rights, duties, interests, obligations, and liabilities of various subjects.[979] Some of these include resource-rich-states, whose national interests lie in using foreign investment to develop petroleum resources to benefit their socio-economic progress. The Consumer States whose national interests lie in the stability of oil supply at affordable prices. MOCs who provide the capital, expertise, and technology that make resource development possible.

Other subjects include capital providing investors, such as individuals and lending institutions, natural persons employed within the industry in varying capacities to make resource development possible, persons engaged in petroleum transactions, such as persons engaged in the sale, purchase and transportation of crude oil, and crude oil products. International organisations engaged in petroleum-related activities, such as OPEC. Finally, the international community with interest in global peace and progress, pollution reduction, and freedom of commerce and navigation.

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[978] Nwosu E Ikenna, 'International Petroleum Law: Has It Emerged as a Distinct Legal Discipline' (1996) 8(2) *African Journal of International and Comparative Law* 428- 446.
[979] Richard, W. Bentham, A *Petroleum Regime: Background and Legalities, (1993)* 15(2) Houston Journal of International Law, 489-490

5.1.3 Application of IPL Nationally

Since post-colonial times, the concept of permanent sovereignty over natural resources has played a significant role for (developing) countries as a condition for achieving not only political but also economic independence.[980] One of the ways both international laws and national laws concur in promoting common interests[981] is assigning resource-rich States the rights to explore and exploit their natural resources.[982] Such that "*where foreign investment is concerned, and it is so often needed for the exploitation and sale of petroleum, Public International Law plays an important part in holding the balance between the interests of the state and those of the investors.*"[983] The continuing interplay between public and private interest is perhaps the outstanding characteristic of Petroleum Law.

Traditional notions of sovereignty call for reserving the maximum flexibility to national institutions to develop their own national or local policies, even while implementing international law. It is incumbent on the host Government to enact and amend its legislation to reflect its International Law

[980] Pierre-Marie Dupuy, Jorge E. Viñuales, *International Environmental Law* (2nd ed Cambridge University Press 2018)7; G Abi-Saab, 'Permanent Sovereignty over Natural Resources and Economic Activities', in M Bedjaoui (ed), *International Law: Achievements and Prospects*, (Dordrecht: Njihoff, 1991), 597-617

[981] Rosalyn Higgins, Philippa Webb, Dapo Akande, Sandesh Sivakumaran, James Sloan *Oppenheim's International Law: United Nations*, (OUP, 2017) Ch 12

[982] Pierre-Marie Dupuy, Jorge E. Viñuales, *International Environmental Law* (2nd ed Cambridge University Press 2018) 6; European Energy Charter Treaty, Lisbon, 17 December 1994, Art. 1.5, Article 2(1), and in 6(2), Article 18 (3); Richard, W. Bentham, A *Petroleum Regime: Background and Legalities,* 15(2) Houston Journal of International Law, 489-497, 491 (1993).

[983] Richard, W. Bentham, The International Legal Structure of Petroleum Exploitation, (1984-1985) 9 OGLTR, 238; World Bank Guidelines for The Treatment of Foreign Direct Investment, 1992

commitment.[984] Uganda is a dualistic State; after the Government ratifies international law,[985] it must domesticate it within the national legal framework to be binding and confer rights and obligations cognisable in Uganda's Courts.[986] Despite the requirement to domesticate above, international law remains binding at the international level. It is no defence to breach an international obligation that a state's domestic law differs or that the State's Government has failed to give effect to the international norm.[987] Whether based on a treaty or customary international law, breaking of an international obligation gives rise to certain automatic consequences, the first of which is an obligation to cease the breach and conform conduct to the law.[988]

The Government enacted the petroleum laws and adopted the Model PSA to provide for the economic and administrative regulation of petroleum exploitation and trade. Their existence is a necessary reflection of the domestic concern for the control of local natural resources. If the national legal framework does not reflect the international standard it committed to upholding, or if the national petroleum law or code are repealed, or if a State's Model PSA is withdrawn (for instance for remodelling): there is an identifiable body of IPL enforceable in national and international courts and tribunals

[984] Richard, W. Bentham, A Petroleum Regime: Background and Legalities, 15(2) Houston Journal of International Law, (1993) 493-494.
[985] The Constitution of the Republic of Uganda, 1995, Article 123
[986] Ratification of Treaties Act 1998; S N Malcolm, *International Law* (4th ed Cambridge University Press, 1998)100; Alexander Orakhelashvili, Akehurst's *Modern Introduction to International Law*, (Taylor & Francis, 2018) Ch 3, 4; Alexander Orakhelashvili, *Akehurst's Modern Introduction to International Law* (8 edn Routledge 2018) p. 45
[987] Vienna Convention on the Law of Treaties, (adopted 23 May 1969, entered into force 27 Jan 1980) 1155 UNTS 331, Article 27, 46
[988] LaGrand Case (Ger. v. U.S.), 2001 ICJ (June 27), 40 ILM 1069 (2001).

when resolving petroleum-related disputes.[989] Although in the past there was a tendency for governments and national courts to pay primary regard to national law, [990] this attitude is rapidly changing in the judiciary, and international law principles remain persuasive in Uganda's judicial proceedings through judicial activism.[991]

5.2 International Environmental Law Frameworks Relevant to the Petroleum Industry

Dating back to the 19th century, International environmental law was designed to protect the global environment from pollution and provide a sophisticated legal framework to ensure maximum efficiency in using or exploiting natural resources. [992] It calls upon States to ensure that natural conditions remain conducive to life and human wellbeing. As a developing country, the Government of Uganda bears the challenge of balancing its economic development policies with ensuring that its development activities do not infringe on the sanctity of the environment.

The variety of international environmental protection regulatory instruments of relevance to the petroleum industry in Uganda is wide. It covers areas of

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[989] Vienna Convention on the Law of Treaties, (adopted 23 May 1969, entered into force 27 Jan 1980) 1155 UNTS 331, Article 27

[990] J.G. Starke, Introduction to International Law, 10th ed. (London: Butterworths, 1989) 51-54.

[991] *Courts in Concorp International Ltd v. East and Southern Development Bank,* [2010] UGSC 19; *Akidi Margaret v Adong Lilly, Electoral Commission, [2011] UGHC 57; Testimony Motors Ltd v Commissioner of Customs Uganda Revenue Authority [2013] UGCOMMC 139;* Thomas W. Walde, Recent Developments in the Negotiation of Petroleum Agreements, Petroleum Economist, July 1992.

[992] Pierre-Marie Dupuy, Jorge E. Viñuales, *International Environmental Law* (2nd ed Cambridge University Press 2018) 3

conservation of species, ecosystems and biodiversity, protection of the global atmosphere, stratosphere and climate change, management of hazardous substances and wastes, and sustainable development aspects. This thesis will not dwell on the full historical details of their development;[993] neither will it dwell on the numerous reasons they were developed. Instead, this section will identify the international environmental laws that play a vital role in determining the response to petroleum-related environmental problems by governments, industry, and international institutions.[994] It will also assess whether these international environmental laws are implemented within the body of laws governing Uganda's petroleum industry.

The International Environmental Laws that Uganda is a signatory to include the Stockholm Declaration,[995] the Rio Declaration,[996] Agenda 21,[997] and the Johannesburg Declaration, [998] which directly influence the pursuit of

[993] L K Caldwell, *International Environmental Policy. From the Twentieth to the Twenty-First Century* (3rd edn Duke University Press 1996); E Brown Weiss, 'The Evolution of International Environmental Law' (2011) 54 Japanese Yearbook of International Law 1; B Boer, 'The Globalisation of Environmental Law: The Role of the United Nations' (1995) 20 Melbourne University Law review 101; R H Grove, Green Imperialism. Colonia Expansion, Tropical Island Edens and the Origin of Environmentalism, 1600-1860 (Cambridge University Press, 1996)

[994] Patricia Birnie, Alan Boyle, and Catherine Redgwell, International Law and the Environment (3rd ed OUP 2009) 256; A O Adede, 'The Treaty System from Stockholm (1972) to Rio de Janeiro (1992),' (1995) 13 *Pace Environmental Law Review* 33

[995] Stockholm Declaration of the United Nations Conference on the Human Environment, 5-16 June 1972 A/CONF.48/14/Rev.1 (Stockholm Declaration); Stockholm Convention on Persistent Organic Pollutants (adopted22 May 2001, entered into force17 May 2004) 2256 UNTS 119 ratified in Uganda 20 July 2004

[996] Rio Declaration on Environment and Development (Rio de Janeiro, 3-14 June 1992) A/CONF.151/26 (Vol.1), 31 ILM 874 (1992) (Rio Declaration)

[997] United Nations Conference on Environment & Development (Agenda 21) Rio de Janerio, Brazil, 3 to 14 June 1992 A/CONF.151/26 (Vol. I and II)

[998] Johannesburg Declaration on Sustainable Development (adopted at the World Summit on Sustainable Development (WSSD), 26 August to 4 September 2002) UN Doc. A/CONF.199/20 (Political Declaration)

sustainable development. The International laws that deal with climate change and depletion of Ozone layer concerns include The UN Framework Convention on Climate Change (UNFCCC),[999] Montreal Protocol[1000], Kyoto Protocol, [1001] Paris Agreement, Vienna Convention.[1002] Those that deal with Prevention and management of hazardous waste include the Bamako Convention,[1003]Basel Convention.[1004] Those that deal with biodiversity include the Convention on Biological Diversity, [1005] The World Heritage Convention,[1006] Ramsar Convention,[1007] Bonn Convention,[1008] Convention on International Trade in Endangered Species of Wild Fauna and Flora,[1009] and

[999] United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC) ratified by Uganda 8 September 1993

[1000] The Montreal Protocol on Substances that Deplete the Ozone Layer (signed 16 September 1987, entered into force 1 January 1989) 1522 UNTS 28 ratified by Uganda 15 September 1988 (The Montreal Protocol)

[1001] Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162 ratified in Uganda 25 March 2002 (Kyoto Protocol)

[1002] Vienna Convention for the Protection of the Ozone Layer (adopted 22 March 1985, entered into force 22 September 1988) 1513 UNTS 293 Ratified in Uganda 24 June 1988 (Vienna Convention)

[1003] Bamako Convention on the Ban of the Import into Africa and the Control of Trans-boundary Movement and Management of Hazardous Wastes within Africa (adopted 30 January 1991, entered into force 22 April 1998) and ratified in Uganda on 10th January 1998. (Bamako Convention)

[1004] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal Basel (adopted 22 March 1989, entered into force 5 May 1992) 1673 UNTS 57 ratified by Uganda 11 March 1999 (Basel Convention)

[1005] Convention on Biological Diversity, (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79 ratified in Uganda 8 September 1993 (Convention on Biological Diversity)

[1006] Convention Concerning the Protection of The World Cultural and Natural Heritage (Adopted 16 November 1972) 1037 UNTS 151 (WHC), Acceded by Uganda 20 November 1987

[1007] Convention on Wetlands of International Importance especially as Waterfowl Habitat (Adopted 2 February 1971) 996 UNTS 245, Ratified in Uganda on 04th March 1988

[1008] Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention) (23 June 1979) 1651 UNTS 333, Uganda ratified this Convention on 1st August 2000

[1009] Convention on International Trade in Endangered Species of Wild Fauna and Flora (signed on 3 March 1973 and entered into force on 1 July 1975) 993 UNTS 243 (CITES) Accented in Uganda in 18 Jul 1991 and entered into force on the 16 Oct 1991

the African Convention on the Conservation of Nature and Natural Resources.[1010]

5.2.1 Sustainable Development Incorporates both Development and the Environmental Protection

5.2.1.1 The Stockholm Declaration (1972)

The history of sustainable development in the United Nations dates back to the United Nations Conference on the Human Environment, held in Stockholm, Sweden, in 1972.[1011] The conference adopted the Stockholm Declaration and Plan of Action in 1972, containing principles on preserving and enhancing the human environment with recommendations for international environmental action.[1012] It enjoined states to ensure that activities within their jurisdiction, do not cause environmental damage to other states or areas,[1013] and affect man's wellbeing and dignity,[1014] other natural resources of the earth,[1015] wildlife and its habitat.[1016] Concerning the

[1010] African Convention on the Conservation of Nature and Natural Resources (Revised Convention adopted 7 March 2017, entered into force 4 February 2019) ratified in Uganda 15th November 1977

[1011] Stockholm Declaration of the United Nations Conference on the Human Environment, 5-16 June 1972 A/CONF.48/14/Rev.1 (Stockholm Declaration); 'Action plan for the Human Environment' 16 June 1972 UN Doc.A/CONF.48/14, 10-62; UNGA Resolution 'Problems of Human Environment,' 3 December 1968 UN DOC 2398(XXIII); Stockholm Convention on Persistent Organic Pollutants (adopted22 May 2001, entered into force17 May 2004) 2256 UNTS 119 ratified in Uganda 20 July 2004

[1012] Stockholm Declaration 1972 (n 1011) Preamble

[1013] Stockholm Declaration 1972 (n 1011) Principle 6-8, 21; The Rio Declaration (1992), A/CONF.151/26 (Vol.1), Principle 2, 14

[1014] Stockholm Declaration 1972 (n 1011) Principle 1, 19

[1015] Stockholm Declaration 1972 (n 1011) Principle 2

[1016] Stockholm Declaration 1972 (n 1011) Principle 4

substantive principles, the Declaration provided for the early formulations of inter-generational equity,[1017] international cooperation for protecting the environment,[1018] and the Prevention of environmental damage.[1019]

It also provided that economic development of non-renewable resources must be employed in such a way as to guard against the danger of their future exhaustion and to ensure that all humanity shares benefits from such employment.[1020] The Stockholm Declaration placed the responsibility on Governments to restore or improve vital renewable resources affected by such development activities.[1021] It also compelled more developed countries to offer financial and technological support to developing countries in environmental protection efforts.[1022] The Declaration also established the United Nations Environment Programme (UN Environment)[1023] and entrusted it with the responsibility of coordinating environmental affairs, promoting international cooperation in environmental matters. Including initiatives of normative entrepreneurship and codification.[1024]

Principle 21 of the Stockholm Declaration affirms states' sovereign right to develop laws and policies concerning resource use, provided the State does

[1017] Stockholm Declaration 1972 (n 1011) Principle 2
Stockholm Declaration 1972 (n 1011) Principle 24
[1019] Stockholm Declaration 1972 (n 1011) Principle 21
[1020] Stockholm Declaration 1972 (n 1011) Principle 5; World Commission on Environment and Development (Brundtland Commission), GA Res. 38/161 of 19 December 1983, Article 1, 2
[1021] Stockholm Declaration 1972 (n 1011) Principle 3- 6
[1022] Ibid Principle 9-10, 12
[1023] UNGA Resolution, 'Institutional and Financial Arrangements for International Environmental Cooperation,' 15 December 1972, UN Doc. A/RES/2997/XXVII
[1024] UNGA Resolution, 'The Future we want,' 11 September 2012 UN Doc. A/Res/66/288, paragraph 88(a)

not cause harm extra-territorially. However, the Declarations also warned against the possible adverse impacts of domestic environmental policies on economic development.[1025] To this regard, the Government created a substantive institutional framework devoted to environmental problems.[1026] Also, Parliament enacted several laws enshrining the rights reflected in this Stockholm Declaration. Notably, the 2019 NEA that requires MOCs must conduct ESIAS before obtaining a license to explore and produce Uganda's petroleum resources.[1027]

5.2.1.2 The Rio Conference and Declaration on Environment and Development (1992)

In the years that followed the Stockholm Declaration, UNGA realised that the Declaration and Action Plan's implementation had been left wanting. They established the Brundtland commission to study the prospects for environmental protection beyond 2000. The Commission issues a report introducing the concept of sustainable development.[1028] It defined sustainable development as "*development which implied meeting the needs of the present without compromising the ability of future generations to meet their own needs*."[1029] UNGA welcomed the report and convened several international conferences to discuss the relationship between the environment and development.[1030]

[1025] Stockholm Declaration 1972 (n 1011) Principle 11
[1026] Refer to Chapter Three, section 3.8.6
[1027] Refer to Chapter Three section 3.5
[1028] Process of Preparation of Environmental Perspective to the year 2000 and Beyond,' 19 December 1983, UN Doc. A/RES/38/161
[1029] Brundtland Report, para 49
[1030] UNGA, United Nations Conference on Environment and Development.' 22 December 1989, UN Doc.A/RES/44/288; Report of the United Nations Conference on Environment and

The 1992 United Nations Conference on Environment and Development "Earth Summit" resulted in five primary outcomes: the adoption of the Rio Declaration,[1031] Agenda 21,[1032] the opening of signature to the climate change convention (UNFCCC)[1033] and Convention on Biological Diversity,[1034] the creation of a Commission for Sustainable Development (CSD),[1035] and finally, the Forest Principles.[1036] The two conferences will be discussed later in this chapter.[1037] Also, note that the CSD was replaced in 2012 by the High-Level Political Forum (HLPF).[1038]

The Rio Declaration sought to help Government's rethink economic development and find ways to stop polluting the planet and depleting its natural resources.[1039] The Rio Declaration had 27 principles, on new and equitable partnerships and development through cooperation among States, social sectors, and individuals. They reflected human beings' responsibility for

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Development, Rio de Janeiro, 3-14 June 1992 (United Nations publication, Sales No. E.93.I.8 and corrigenda), vols. I-III; Rio+5; Rio+10; Rio+20

[1031] Rio Declaration on Environment and Development (Rio de Janeiro, 3-14 June 1992) A/CONF.151/26 (Vol.1), 31 ILM 874 (1992) (Rio Declaration)

[1032] Report of the United Nations Conference on Environment and Development, A/CONF.151/26/Rev.1 (Vol 1), Resolution 1, Annex 2: Agenda 21.

[1033] UNFCCC (n 999)

[1034] Convention on Biological Diversity 1992 (n 1005)

[1035] UNGA, 'Institutional Arrangements to follow up the United Nations Conference on Environment and Development.' (22 December 1992) UN Doc. A/RES/47/191; Report of the United Nations Conference on Environment and Development, A/CONF.151/26/Rev.1 (Vol 1), Resolution 1, Annex 2, chapter 38; UNGA Resolution to establish Commission for Sustainable Development (12 February 1993) UN Doc. A/Res.1993/207

[1036] UNGA, 'Non-binding Statement of Principles of a Global Consensus on the Management, Conservation and Sustainable Development of All types of Forests,' (14th August 1992) UN Doc. A/CONF/151/26 (Vol III)

[1037] Section 5.2.2.2, and Section 5.2.4.1

[1038] B H Desai, B K Sidhu, 'Quest for International Environmental Institutions: Transition from CSD to HLPF,' in S Alam et al *International Environmental Law and the Global South* (Cambridge University Press, 20016) 152-68

[1039] J E Vinuales (ed), *The Rio Declaration on Environment and Development: A Commentary* (Oxford University Press, 2015)

sustainable development; the right of States to use their resources for their environmental and development policies; and the need for State cooperation in poverty eradication and environmental protection. The idea was that the States must act in a global partnership spirit to conserve, protect, and restore the earth's ecosystem's integrity.

The Rio Declaration provided the most generally accepted formulation of environmental protection in the context of sustainable development. Its main Principles include: principles of Prevention, [1040] inter-generational equity, [1041] public participation, [1042] precautionary approach, [1043] the polluter pays Principle, [1044] Env Impact Assessment (EIA), [1045] and cooperation on transboundary and global issues.[1046] The prevention approach provides more effective and less costly to prevent environmental harm than remedying or compensating for such harm. The precautionary approach requires taking appropriate action, anticipating, preventing, and monitoring the risks of potentially dangerous or irreversible environmental harm from human activities, even without scientific certainty about the precise degree of risk. While the polluter pays approach provides that the consequential costs of preventing, controlling, and reducing environmental pollution are to be borne

[1040] Rio Declaration, Principle 2
[1041] Ibid Principle 3
[1042] Ibid Principle 10
[1043] Ibid Principle 15
[1044] Ibid Principle 16
[1045] Ibid Principle 17
[1046] Ibid Principle 18, 19, 7 and 27.

by those responsible for causing such harm. The Public Participation principle provided for individual rights in environmental matters.[1047]

The Rio Declaration addressed implementation questions, stating the need to reduce and eliminate unsustainable production patterns and consumption, promote appropriate demographic policies,[1048] encourage the transfer of technology,[1049] and avoid using environmental consideration as an excuse to restrict trade[1050] and develop national and international instruments on compensation for environmental damage.[1051] The implementation strategy was specified in the Agenda 21 Action Plan.[1052]

The Action Plan is concerned with four significant aspects: the social and economic dimensions, conservation, and management of resources for development,[1053] strengthening the role of major groups, and the means of implementation, with particular attention given to developing countries.[1054] This thesis will not elaborate on the details of the action plan. However, the main point is that the Government should make proper plans and develop policies on the maximum recovery of non-renewable natural resources, like petroleum, without causing detrimental harm to the environment and human wellbeing. The Government should also ensure that petroleum revenues are

[1047] Ibid Principle 10
[1048] Ibid Principle 8
[1049] Ibid Principle 9
[1050] Ibid Principle 12
[1051] Ibid Principle 13
[1052] Report of the United Nations Conference on Environment and Development, A/CONF.151/26/Rev.1 (Vol 1), Resolution 1, Annex 2: Agenda 21.
[1053] Ibid chapter 10, 14
[1054] Ibid Paragraph 39.1

utilised and managed sustainably without regard to immediate gratification. The Government of Uganda still has some ways to go, considering the numerous inconsistencies in accountability discussed in Chapter Three on how it is currently managing the petroleum resources.[1055]

5.2.1.3 The Johannesburg Declaration 2002

In 2002, the World Summit on Sustainable Development in Johannesburg, South Africa adopted the Johannesburg Declaration. [1056] It reiterates sustainable development principles in the above two Declarations, emphasising the practical implementation of the recommendations and standards adopted in previous Declarations. [1057] Notably, the recommendations emphasising the social dimensions of development as an integral part of sustainable development. It focused on compelling Governments "*to assume collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development- economic development, social development and environmental protection at the local, national and global levels*."[1058]

The Johannesburg Declaration also provided that as private companies' pursuit their legitimate activities, they had "*a duty to contribute to the evolution of equitable and sustainable communities and societies*".[1059] In Chapter Two, this

[1055] Refer to chapter three, section 3.6.1.1, 3.6.1.2, 3.6.2.1, 3.6.4
[1056] Political Declaration, Preamble
[1057] UNGA, 'Ten-year Review of Progress Achieved in the Implementation of the Outcome of the United Nations Conference on Environment and Development,' 20 December 2000, UN Doc. A/RES/55/199; Political Declaration, Paragraph 34-7
[1058] Political Declaration, Paragraph 5, 18
[1059] Ibid paragraph 27, Implementation Plan

thesis discussed how MOCs operating in Uganda could collaborate with the Government to pursue the petroleum industry's sustainable development to effectuate positive impacts. The collaborative partnership[1060] ensures that the future citizens inherit a country free of poverty,[1061] poor health and environmental degradation[1062] occasioned by unsustainable development patterns.[1063]

5.2.1.4 The Rio+20 Summit (2012)

The continuing pattern in the above Declarations and the principles therein was carried forward in subsequent 2000, 2005, 2008, and 2010 Millennium Development Goals,[1064] and the 2012 Rio Summit (Rio+20).[1065] The objective of the Summit was "*to secure renewed political commitment for sustainable development, assessing the progress to date and the remaining gaps in the implementation of the outcomes of the major summits on sustainable development and addressing new and emerging challenges.*"[1066] The priority areas identified included: decent jobs, energy, food security, water, oceans and disaster preparedness, agriculture, and sustainable cities. The summit outcome was a document "The Future We Want" which focused on implementation and

[1060] Ibid Paragraph 145
[1061] Ibid Paragraph 7(J), 9(g)
[1062] Ibid Paragraph 25(g), 43 (a)
[1063] Ibid Paragraph 20 (t)
[1064] Millennium Declaration (adopted 13 September 2000) UN Doc. A/RES/55/2, Paragraph 6, 7, 21-3
[1065] UNGA, 'Implementation of Agenda 21, the programme for further Implementation of Agenda 21 and the outcomes of the World Summit on Sustainable Development.' 31 March 2010, UN Doc A/RES/64/236, Paragraph 20
[1066] Ibid Paragraph 20(a)

development concerns. [1067] It also called for the development of SDGs post-2015, [1068] subsequently adopted in 2015 (2030 Agenda for Sustainable Development),[1069] and regular review of the SDGs by the HLPF[1070] through voluntary national reviews' Scheme.[1071] In 2015, Uganda presided over the 69th session of UN General Assembly when the Agenda 2030 and the SDGs were formulated. In Chapter One, this thesis discussed the general provisions of the 2030 Agenda for sustainable development.[1072] The following section will focus specifically on how Uganda has implemented the SDGs Goals within its national context.

5.2.1.5 Implementation of Sustainable Development Principles in Uganda's national context

Uganda's petroleum resources are in the Albertine Graben, [1073] and the petroleum industry's proposed development would make it challenging to prevent all potential socio-economic and environmental harm.[1074] However,

[1067] UNGA, 'The Future We Want,' 11 September 2012, UN Doc. A/RES/66/288, Paragraph 88 (a)
[1068] Ibid Paraph 245-51
[1069] United Nations General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development* (adopted by the General Assembly on 25th September 2015) UN Doc. A/Res/70/L.1) (Agenda 2030)
[1070] UNGA, 'The Future We Want,' 11 September 2012, UN Doc. A/RES/66/288, paragraph 85 (e); P Chasek et al, 'Getting to 2030: Negotiating the Post-2015 Sustainable Development Agenda' (2016) 25/1 *Review of European, Comparative and International Environmental Law 5*.
[1071] Report of Secretary General, 'Critical Milestones towards coherent, efficient and inclusive follow-up and review at the global level.' (15 January 2016) UN Doc. A/170/684, Annex. <https://sustainabledevelopment.un.org/content/documents/17346Updated_Voluntary_Guidelines.pdf> accessed on 3rd May 2019
[1072] Refer to chapter one, section 1.4.2
[1073] Refer to chapter one, section 1.3.2
[1074] Refer to chapter two, section 2.2.3

the Government must minimise the industries' detrimental consequences through regulation.[1075] Since ratifying the international environmental laws discussed above (cognizant of sustainable development), this section will assess whether the national legal framework incorporated the principles it committed to upholding.

The Government made significant steps by repealing and replacing the 2014 Uganda Wildlife Act, and the 1995 National Environment Act, with the new counterparts in 2019.[1076] The new NEA provides for the use of Best Available Technique (BAT) on the technology used for MOCs' installations, and minimum standards (emission controls, emission limit values, environmental quality standards). These provisions seem to be cognizant of precautionary Principle in the Rio Declaration[1077] and Goal 9 of the SDG.[1078] The new NEA also provides for the use of Best Environmental Practices, which requires MOCs to carry out ESIAs[1079] before obtaining consent to carry out petroleum-related activities, which also reflects principle 17 of the Rio Declaration and SDGs 3, 6, 7, 12, 13, 14, and 15.[1080]

The Constitution,[1081]the new NEA, and the ATIA,[1082] also provide for public participation, reflecting principle 10 of the Rio Declaration, Johannesburg

[1075] Refer to chapter three, section 3.5
[1076] NEA 2019; The Uganda Wildlife Act, 2019 (The Uganda Gazette No. 49, Volume CXII, dated 27th September 2019)
[1077] Rio Declaration, Principle 15
[1078] Refer to chapter one, section 1.4.2
[1079] Refer to section 3.5.2.1, and 3.5.2.2
[1080] Refer to chapter one, section 1.4.2
[1081] The Constitution of the Republic of Uganda 1995, Article 41
[1082] ATIA 2005, s 3, 5 -6

Declaration,[1083] and SDG 17,[1084] all of which provided individual rights in environmental matters. The public should have the right to access information held by NEMA concerning environmental issues. They should be able to have the opportunity to participate in decision-making processes, especially when petroleum activities could cause hazardous harm to their wellbeing. They should also have adequate access to judicial and administrative proceedings.

Even though NEMA indicates that ESIAS for the petroleum industry is made available to the public and for stakeholder review on the NEMA website, the website has only provided one press statements on the approved ESIA Certificate for the East African Crude Oil Pipeline.[1085] As discussed in Chapter Three,[1086] the Ugandan public and CSOs have had considerable challenges accessing ESIA Reports or even being included in the process of carrying out ESIAS. These challenges have already resulted in several court cases.[1087] One of which was challenging the approved EIA certificate for the Tilenga oil project.[1088]

On 09 September 2020 the Government in collaboration with the UN published an important document "*UN Sustainable Development Cooperation*

[1083]Annex to the note verbale dated 27 June 2012 from the Permanent Mission of Chile to the United Nations, addressed to the Secretary-General of the United Nations Conference on Sustainable Development, United Nations A/CONF.216/13
[1084] Refer to chapter one, section 1.4.2
[1085] National Environment Management Authority 'Press Statement: NEMA approves ESIA Certificate for the East African Crude Oil Pipeline,' NEMA (Thursday 3rd December 2020) <https://www.nema.go.ug/sites/default/files/FINAL%20STATEMENT%20.pdf> accessed on 21 December 2020
[1086] Chapter three, section 3.5.2 and 3.7.3.3
[1087] Chapter three, section 3.5.2 and 3.7.3.3
[1088] Chapter three, section 3.5.2.2

Framework for Uganda (2021-2025)"[1089] which highlight how Uganda will practically incorporate the SDGs within its National Vision 2040 and the Third National Development Plan 2020/21 – 2024/25. It also offers collaborative partnership strategies that the Government, the UN, and various stakeholders hope to develop to support the national implementation of the 2030 Agenda effectively. Particularly by offering options to reframe economic policies and practices around sustainability for inclusive, diversified, and job-intensive economic development. Also, to promote access to and utilise essential social and protection services that advance human rights, gender equality, and wellbeing people in Uganda, and protect the planet. The study of this report will form part of the author's future study.

5.2.2 Protection from Substances That Deplete the Ozone Layer

The atmospheric issues tacked in this section are diverse. They range from climate change, fume emissions (with transboundary effects), acidification of the environment or depletion of the ozone layer. From the discussion in Chapter Two, though nascent, Uganda's petroleum industry can contribute to the above issues, if not well managed.[1090] One of the negative environmental

[1089] United Nations Uganda, 'The United Nations Sustainable Development Cooperation Framework (UNSDCF) 2021-2025 for Uganda,' (2020) <https://uganda.un.org/sites/default/files/2020-11/Uganda%20UN%20Sustainable%20Development%20Cooperation%20Framework%20202 1-2025.pdf> accessed on 10th January 2021; UNGA, 'Repositioning of the United Nations development system in the context of the quadrennial comprehensive policy review of operational activities for development of the United Nations system,' (31 May 2018) UN Doc. A/RES/72/279

[1090] Refer to chapter two, section 2.2.3.3

impacts of the petroleum industry is air pollution. It is because of the combustion of petroleum and vehicle exhaust emissions. It results in "acid rain" caused by the emission of Sulphur dioxide, nitrogen oxide, carbon dioxide, Sulphur, methane, and others discussed in this section.

Different regulatory regimes govern this topic in Uganda;[1091] however, this section will focus on those that apply to the petroleum industry in the Ugandan context. These include the Vienna Convention[1092] and Montreal Protocol,[1093] UN Framework Convention on Climate Change (UNFCCC),[1094] Kyoto Protocol, [1095] Paris Agreement (2015).[1096]

5.2.2.1 Vienna Convention on the Protection of the Ozone Layer (1985) and Montreal Protocol, 1987

The Vienna Convention and the Montreal Protocol forms the global regime[1097] providing protection of human health and the environment against adverse effects[1098] resulting or likely to result from human activities[1099] which modify

[1091] United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 397; ASEAN Agreement on Transboundary Haze Pollution, 10 June 2002; Convention on Long Range Transboundary Air Pollution, adopted in Geneva on 13 November 1979, 1302 UNTS 217; Agreement between the Government of Canada and the Government of the United States of America on Air Quality, 3 March 1991.
[1092] Vienna Convention (n 987)
[1093] The Montreal Protocol on Substances that Deplete the Ozone Layer (signed 16 September 1987, entered into force 1 January 1989) 1522 UNTS 28 ratified by Uganda 15 September 1988 (The Montreal Protocol)
[1094] UNFCCC (n 999)
[1095] Kyoto Protocol (n 1001)
[1096] Paris Agreement Under the United Nations Framework Convention on Climate Change (adopted 12 December 2015, entered into force 04 November 2016) UNTS No. 54113 Ratified in Uganda 21 September 2016 (Paris Agreement)
[1097] Vienna Convention (n 1002) 99-123; The Montreal Protocol (n 1000)
[1098] Vienna Convention (n 1002) Article 1(1), 1 (2)
[1099] Vienna Convention (n 1002) Article 2 (1)

or are likely to modify the atmospheric ozone layer.[1100] The Vienna Convention and Montreal Protocol further set firm targets,[1101] timetables for phasing-out such human activities and provides technical and financial incentives to control human activities found to have adverse effects on the ozone layer.

The Vienna Convention provides that States must take appropriate measures, including adopting more stringent national measures to prevent human activities from modifying the ozone layer.[1102] However, it also encourages States to cooperate with other States and institutional bodies (Global Atmosphere Watch Programme)[1103] to carry out more scientific research and systematic observations on the ozone depletion in order to harmonise their internal policies and develop Protocols to the Convention,[1104] thus, the Montreal Protocols and other Conventions discussed below.

5.2.2.2 Montreal Protocol

The Montreal Protocol is particularly successful in setting out an ambitious legal framework regarding the obligations of the States and system designed to secure compliance.[1105] Unlike in 1987 when only 24 countries signed the Montreal Protocol, by 2012, the Montreal Protocol was binding on 197

[1100] Vienna Convention (n 1002) Annex 1 referring to the various substances whose effect should be monitored
[1101] The Montreal Protocol (n 1000) Article 1(7), 3
[1102] The Montreal Protocol (n 1000) Article 2(1), 2(2)(b), 3 and 5
[1103] The Montreal Protocol (n 1000) Article 6 (4) (b), (d), and (i)
[1104] The Montreal Protocol (n 1000) Article 6 (4) (h)
[1105] D S Bryk, 'The Montreal Protocol and Recent Developments to Protect the Ozone Layer,' (1991) 15 *Harvard Environmental Law Review* 275; D Kaniaru (ed), *The Montreal Protocol: Celebrating 20 Years of Environmental Progress* (London: Cameron May 2007)

countries. It reduced the production and consumption [1106] of controlled substances by 98% compared to 1987 levels (1.8 million tonnes annually), and 45,000 tonnes in 2010.[1107] On the success of the Montreal Protocol, the former United Nations Secretary-General Kofi Annan remarked on the success of this global response by saying, "*perhaps the single most successful international environmental agreement to date has been the Montreal Protocol*." Assuming continued international compliance with the Montreal Protocol, Antarctic ozone levels are expected to return to pre-1980 levels by 2050, which would benefit human health and the environment.[1108]

Since its inception in 1987, the Montreal protocol has been strengthened to reflect the latest scientific information and technological advances. There have been several amendments to the Montreal Protocol,[1109] but the most recent amendments to the protocol were adopted in Kigali in 2016.[1110] The Kigali Amendments to the Montreal Protocol outlines a global phase-down of the

[1106] The Montreal Protocol (n 1000) Article 1 (5), 1 (6)

[1107] Ozone Secretariat, 'The Montreal Protocol on Substances that Deplete the Ozone Layer, Achievements in Stratospheric Ozone Protection: Progress Report 1987-2012' <https://ozone.unep.org/sites/default/files/UNEP-MP_Achievements_in_Stratospheric_Ozone.pdf> accessed on 23rd October 2019

[1108] Environmental Protection Agency, Stratospheric Ozone Protection:30 Years of Progress and Achievements (2017) <https://www.epa.gov/sites/production/files/2017-12/documents/mp30_report_final_508v3.pdf> accessed on 23 October 2019

[1109] London Amendment of 1990 (Control use of CFS, CTC and methyl Chloroform); Copenhagen Amendment of 1992 (control use of 34 Hydrochlorofluorocarbons (HCFCs), Methyl bromide, and 34 Hydrobromofluorocarbons); Montreal Amendment of 1999 (establishment of import/export licensing systems for ozone depleting substances); Beijing Amendment of 1999 (sets out control measures on use of Bromochloromethane (BCM), as well as controls on manufacture of HCFCs, and use of Methyl bromide for quarantine and pre-shipment purposes)

[1110] UNEP 'Further amendments of the Montreal Protocol,' 14 October 2016 Doc. UNEP/OzL.Pro.28/CRP/10; UNEP, 'Decision Related to the amendment Phasing Down Hydrofluorocarbons,' 14 October 2016, Doc. UNEP/OzL.Pro.28/CRP/10, (entered into force 1 January 2019).

production and consumption of a class of powerful greenhouse gases called hydrofluorocarbons, previously not part of the ozone-depleting substances.[1111] Developing countries are scheduled to complete phase-out hydrofluorocarbons in 2030.[1112]

The Protocol has mechanisms to encourage participation, facilitate compliance, and manage non-compliance. This is done through trade regulation, benefits offered to developing countries,[1113] reducing the demand of controlled substances, and an extensive procedure to manage non-compliance (such as warnings, suspension of rights and privileges, technical assistance, technology transfer, financial assistance, training).[1114]

The Kigali Amendment has implications for international law of climate change. It suggests States prefer to regulate climate change (reduce global temperature rise by half a degree Celsius overall) under the Montreal Protocol rather than the Kyoto Protocol[1115] and rely on many different treaties to organise climate change response. The Kigali protocol did not enter into force until 2019 after more than 20 States ratified it. The author acknowledges that the Kigali Amendment only addresses greenhouse gas used in certain

[1111] The Montreal Protocol (n 1000) Article 1 (4), Annexes A, B, C, E, and F.
[1112] The Montreal Protocol (n 1000) Article 2-21, 5(1), (3) (a) and (c) and (8bis) (a); Kigali Amendment, Article 2 (j), Annex F; Environmental Protection Agency, Stratospheric Ozone Protection:30 Years of Progress and Achievements (2017) <https://www.epa.gov/sites/production/files/2017-12/documents/mp30_report_final_508v3.pdf> accessed on 23 October 2019
[1113] The Montreal Protocol (n 1000) Article 10, 10(a)
[1114] The Montreal Protocol (n 1000) Article 4, 5, and 6
[1115] UNEP 'Further amendments of the Montreal Protocol,' 14 October 2016 Doc. UNEP/OzL.Pro.28/CRP/10, Article 3

activities (refrigeration, and air conditioning) and has negligible impact on Uganda's petroleum industry.

In the next section, the author will tackle other international laws more specific to climate change caused by fossil fuels (anthropogenic emissions).[1116] However, the author also notes that climate change also refers to aspects of extreme weather, such as heatwaves, heavy rains, violent storms, and droughts.

5.2.2.3 Implementation of the Vienna Convention and Montreal Protocol Nationally

Uganda does not manufacture ozone-depleting substances used in refrigeration and air-Conditioning Sector. Neither does it manufacture Aerosols (asthma inhalers), Solvents Sector (laboratory solvents), Halons Sector (firefighting), Floriculture (Methyl bromide used to control soil-borne pests), Foam Sector (manufacture of flexible polyurethane foam).[1117] However, as part of its commercialisation plan, it will refine its petroleum products, which will produce Iso-butane, which does not deplete the Ozone Layer and

[1116] D Bodansky, 'The United Nations Framework Convention on Climate Change: A Commentary' (1993) 18 *Yale Journal of International Law* 451; J Gupta, *The History of Global Climate Governance* (CUP, 2014); C Carlarne, K Gray, R Tarasofsky (eds), the *Oxford Handbook of International Climate Change Law* (OUP, 2016); D Farber, M Peeters (eds), *Climate Change Law* (Cheltenham: Edgar Elgar, 2016); D Bodansky, J Brunne and L Rajamani, *International Climate Change Law* (OUP, 2017).

[1117] Margaret Aanyu, NEMA, 'The Status of Implementation of the Vienna Convention on Protection of Ozone Layer, and the Montreal Protocol on Substances That Deplete the Ozone Layer,' (2017) <https://www.nema.go.ug/sites/default/files/BRIEF%20on%20%20Implementation%20of%20Vienna%20Convention%20%20Montreal%20Protocol_Oct-2017_1.pdf> accessed on 23rd May 2019

will not contribute to global warming or climate change when emitted into the atmosphere.

To further implement its obligations in the above international law, Government enacted a new NEA 2019 [1118] and revoked its National Environment ((Management of Ozone Depleting Substances and Products) Regulations, 2001[1119] replacing it with a more recent National Environment (Management of Ozone Depleting Substances & Products) Regulations.[1120] The new law provides for the importation of various alternatives in the market to the controlled substances.

Other notable achievements include[1121] the phasing out of Methyl Bromide for controlling soil-borne pests in the flower farms in 2007, eight years ahead of the 2015 global target. [1122] The country phased out and importation of Chlorofluorocarbons' use in 2007, again three years ahead of the 2010 global target. These are now classified as banned chemicals. Uganda participated in making the Common (Harmonised) Policy and Action Plan, and Regulations – On Control of Ozone Depleting Substances in The COMESA Region, 2007.[1123]

[1118] National Environment Act, 2019, (Act 5 of 2019) sections 75 and 179(1) and (2)(p)
[1119] National Environment ((Management of Ozone Depleting Substances and Products) Regulations, S.I. No. 63/2001
[1120] National Environment (Management of Ozone Depleting Substances & Products) Regulations (The Uganda Gazette No. 18, Volume CXIII, dated 20th March 2020) S.I. No. 48 of 2020
[1121] Margaret Aanyu, NEMA, 'The Status of Implementation of the Vienna Convention on Protection of Ozone Layer, and the Montreal Protocol on Substances That Deplete the Ozone Layer,' (2017) <https://www.nema.go.ug/sites/default/files/BRIEF%20on%20%20Implementation%20of%20Vienna%20Convention%20%20Montreal%20Protocol_Oct-2017_1.pdf> accessed on 23rd May 2019
[1122] Ibid
[1123] Ibid

Also, the Government banned the use of second-hand equipment by 2006.[1124] In 2006 and 2012, Uganda received two Awards from the Ozone Secretariat/UNEP for outstanding compliance with the Montreal Protocol.[1125] In collaboration with UNEP, NEMA has also conducted training for Customs Officers in the Uganda Revenue Authority, Officers from the then Ministry of Tourism, Trade and Industry, and UNBS, on the control and monitoring of trade including illegal trade in controlled substances and related equipment.[1126] These are indeed positive steps by the Ugandan Government to implement the Vienna Convention and the Montreal Protocol.

5.2.3 Climate Change

The Intergovernmental Panel on Climate Change (IPCC) published its fifth assessment report in 2014 stating that "*warming of the climate system is unequivocal, and …. Anthropogenic greenhouse gas emissions have increased since the pre-industrial era, driven largely by economic and population growth…*".[1127] However, it is their first report in 1990[1128] that contributed to the adoption of the UNFCCC.[1129] The IPCC's 1995/1996 report suggesting "*a discernible human influence on global climate*"[1130] was shared with the Conference of the Parties (COP) of the UNFCCC (Berlin Mandate) which laid the groundwork for the adoption of the Kyoto Protocol in 1997.[1131]

[1124] Ibid
[1125] Ibid
[1126] Ibid
[1127] IPCC, Climate Change Synthesis Report, (2014) Summary for policy makers, 2(1.2), 4(1.2)
[1128] IPCC, Climate Change (1990) General Overview, section 1.05, page 53
[1129] UNFCCC (n 999)
[1130] IPCC, Climate Change 1995, Second Assessment Synthesis, paragraph 2.4, page 5
[1131] Kyoto Protocol (n 1001)

The IPCC's subsequent third and fourth reports influenced several other Mandates,[1132] all attempting to reduce or eliminate the gap between the developed countries' obligations and the developing countries. It was not until IPCC's 2013/2014 report that the COP purposed to create a protocol or Agreement with legal capabilities under the UNFCCC; thus, the Paris Agreement was created and adopted in 2015.[1133]

5.2.3.1 The United Nations Framework Convention on Climate Change (UNFCCC) (1992)

Regarding the substantive aspects, the UNFCCC sets an objective, certain principles, and some procedural and substantive obligations. The main objective of the Convention was to stabilise greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system and threaten food production.[1134] They set out a series of general principles, among which, the requirement of precautionary measures to be taken to anticipate, prevent or minimise the causes of climate change and mitigate its adverse effects, which might be

[1132] Marrakesh Accords, Decision 2/CP.7 to 14/CP.7, 21 January 2002 Doc. FCCC/CO/2001/13/Add.1; Bali Plan of Action Decision 1/CP.13, 14 March 2008, Doc. FCCC/CP/2007/6/Add.1; Copenhagen Accord, Decision 2/CP.15, 30 March 2010, Doc. FCCC/CP/2009/11/Add.1; The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention,' Decision 1/CP.16, 15 March 2011, Doc. FCCC/CP.2010/7/Add.1, CMP.6, 15 March 2011, Doc. FCCC/CP.2010/7/Add.1,

[1133] Paris Agreement (n 1150)

[1134] UNFCCC (n 999) Article 2, Chapter XXVII, VOL-2, page 38-68

severe or irreversible damage.[1135] Notably, the Principle of common but differentiated responsibility within the UNFCCC reflects the Montreal Protocol's approach.[1136] Governments cannot say they do not have full scientific certainty to postpone taking appropriate measures, as long as it would be cost-effective to ensure global benefits. The UFCCC set up a Green Climate Fund[1137] to assist developing States, cover the full costs of adapting or mitigating various projects to the UNFCCC obligations.

The UNFCCC obliges all parties to develop national inventories of anthropogenic emissions by sources of GHG. Similarly, parties are to implement national programmes to mitigate climate change by addressing anthropogenic emissions by sources.[1138] Regarding the institutional aspects, the UNFCCC is mainly a framework instrument, allowing for the progressive development of broad obligations. It creates a COP,[1139] a secretariat,[1140] a scientific body,[1141] an implementation body,[1142] a Green Climate Fund (Agreed Incremental Costs and Agreed Full Costs),[1143] and technology mechanism (to

[1135] UNFCCC (n 999) Article 3
[1136] UNFCCC (n 999) Article 3(1), 4 (7); The Montreal Protocol (n 1000) Article 5(5)
[1137] UNFCCC (n 999) Article 11; The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention,' Decision 1/CP.16, 15 March 2011, Doc. FCCC/CP.2010/7/Add.1, CMP.6, 15 March 2011, Doc. FCCC/CP.2010/7/Add.1, Chapter 4, Section a; Establishment of the Green Climate Fund, Decision 3/CP.17, 15 March 2012, Doc. FCCC/CP/2011/9/Add.1, Annex: Governing instrument for the Green Climate Fund, Paragraph 35
[1138] UNFCCC (n 999) Article 4, 12
[1139] UNFCCC (n 999) Article 7
[1140] UNFCCC (n 999) Article 8
[1141] UNFCCC (n 999) Article 9
[1142] UNFCCC (n 999) Article 10
[1143] Ibid UFCCC, Article 11; The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention,' Decision 1/CP.16, 15 March 2011, Doc. FCCC/CP.2010/7/Add.1, CMP.6, 15 March 2011, Doc. FCCC/CP.2010/7/Add.1, Chapter 4, Section a; Establishment of the Green Climate Fund,

encourage the development of technologies for mitigation and adaptation and to ensure dissemination of such technology to developing States.[1144]

Although the UNFCCC does not provide for specific requirements applicable to atmospheric emissions from petroleum activities, it has prompted a process of review and rule-making in Uganda regarding GHG emissions, for example, from gas flaring. Some countries have introduced carbon taxes to curb energy use and emissions from oil and gas installations. Uganda's Upstream Act has made specific provisions preventing gas flaring and gas venting save for emergency purposes, as well as other measures discussed in Chapter Three.[1145]

5.2.3.2 The Kyoto Protocol to the United Nations Framework Convention on Climate Change (1997) (Kyoto Protocol)

The Kyoto Protocol[1146] establishes more robust and more concrete measures, including binding numerical targets for the limitation and reduction of greenhouse gas emissions mainly carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, among other for the industrialised and transitional countries during the period 2008-2012.[1147] The Kyoto Protocol did not set

Decision 3/CP.17, 15 March 2012, Doc. FCCC/CP/2011/9/Add.1, Annex: Governing instrument for the Green Climate Fund, Paragraph 35

[1144] Technology Executive Committee- Modalities and Procedures, Decision 3/CP.17, 15 March 2012, Doc. FCCC/CP/2011/9/Add.1.

[1145] Refer to Chapter Three, section 3.5.3.

[1146] Kyoto Protocol (n 1001)

[1147] Ibid Article 3 read together with Annex A of the Protocol

numerical targets for the reduction of emissions for the developing countries. However, they are required to report on their emissions and Clean Development Mechanism (CDM).[1148] When Uganda sells its certified Emission Reduction units to developed countries that go above their caps, it becomes an incentive to meet its SDGs and a useful incentive to help countries reduce their emissions. The Government submitted its first National Communication in 2002, the Second National Communication in 2014 and the Nationally Determined Contribution in 2015/2016, and in 2019, its first Biennial Update Report to UNFCCC.[1149]

5.2.3.3 Paris Agreement of 2015

The Paris Agreement,[1150] as an instrument has three main components: its goals;[1151] its action areas (mitigation,[1152] adaptation,[1153] loss and damage,[1154] transparency mechanism,[1155] global stocktake,[1156] and education[1157]); and

[1148] A Regional Collaboration Centres (RCCs) was established in Kampala, Uganda to serve the rest of Africa; Ministry of Water and Environment (Climate Change Department), 'Uganda's First Biennial Update Report to The United Nations Framework Convention on Climate Change (September 2019) vii

[1149] Ministry of Water and Environment (Climate Change Department), 'Uganda's First Biennial Update Report to The United Nations Framework Convention on Climate Change (September 2019); UFCC, 'Report of the Conference of the Parties on its seventeenth session, held in Durban from 28 November to 11 December 2011, decision 2/CP.17. FCCC/CP/2011/9/Add.1

[1150] Paris Agreement Under the United Nations Framework Convention on Climate Change (adopted 12 December 2015, entered into force 04 November 2016) UNTS No. 54113 Ratified in Uganda 21 September 2016 (Paris Agreement)

[1151] Ibid Article 2

[1152] Ibid Article 3 -6

[1153] Ibid Article 7

[1154] Ibid Article 8

[1155] Ibid Article 13

[1156] Ibid Article 14

[1157] Ibid Article 12

implementation techniques (finance,[1158] technology transfer,[1159] capacity building.[1160] It also provides a compliance and dispute settlement mechanism (non-compliant procedure,[1161] dispute settlement procedure).[1162] Article 2 of the Paris Agreement sets three goals within the broader objective of Article 2 of UNFCCC. One of the prominent ones being "*upholding the increase in global average temperature to well below 2 degrees Celsius above pre-industrial levels…. And to pursue efforts to limit the temperature increase to 1.5 degrees Celsius*."[1163]

Since ratifying the Paris Agreement on 21 September 2016, Uganda has developed a draft national Measurement Reporting and Verification framework (Enhanced Transparency Mechanism (EF)), conducted several training sessions in GHG Inventory management, and a National Forest Monitoring System (NFMS) and in 2016, submitted its Nationally Determined Contributions (NDCs) that include emission reductions target of 22% below the business as usual by 2030.[1164] It is a clear committed by the Government to honour its reporting obligations under the Paris Agreement. However, the additional actions are contingent upon receiving international finance, technology, and capacity-building support for energy demand and agriculture.

[1158] Ibid Article 9
[1159] Ibid Article 10
[1160] Ibid Article 11
[1161] Ibid Article 15
[1162] Ibid Article 24
[1163] Paris Agreement (n 1096) Article 2(1)
[1164] Ministry of Water and Environment (Climate Change Department), 'Uganda's First Biennial Update Report to The United Nations Framework Convention on Climate Change (September 2019)

5.2.3.4 Application of UFCCC, Kyoto Protocol and Paris Agreement in Uganda.

In Uganda, the people's economy and well-being are highly dependent on climate due to its dependence on rain-fed agriculture.[1165] Chapter One discussed how Uganda's current economy relies on the agriculture sector, which contributes 24.2%of its GDP, accounts for 48% of exports, and employs 73% of the population.[1166] Consequently, climate change poses a risk to the country's GDP growth and export earnings.[1167] In Uganda, there have already been incidences of rainfall patterns changes and intensity, frequent intense flood, and declining water levels in Lake Victoria, all negatively impacting the economy.[1168] Agriculture was the leading source of GHG emissions in 2012 (use of fertilisers, animal husbandry related chemicals) with land-use change and forestry (from forested land to cropland and bush increasing) as the second most significant source.[1169] The Government has committed itself to promote modern agricultural practices, climate-smart dairy value chain, integrated waste management, and bio-gas production.[1170]

[1165] R Cooper, 'Current and projected impacts of renewable natural resources degradation on economic development in Uganda.' (2018) *K4D Emerging Issues Report*

[1166]OGRMP 2012; Ministry of Finance, Planning and Economic Development, *Budget Speech Financial Year 2019/20*, (Ministry of Finance, Planning and Economic Development 13th June 2019)

[1167] World Bank, *Uganda Economic Update* (February 2017) <http://www.worldbank.org/en/country/uganda/overview> accessed on 5th April 2018

[1168] Ministry of Water and Environment (Climate Change Department), 'Uganda's First Biennial Update Report to The United Nations Framework Convention on Climate Change (September 2019)

[1169] World Resources Institute Climate Analysis Indicators Tool (WRI CAIT) 2.0, 2015.

[1170] Ministry of Water and Environment (Climate Change Department), 'Uganda's First Biennial Update Report to The United Nations Framework Convention on Climate Change (September 2019)

The legal regime for climate change established by the Rio Declaration,[1171] Stockholm Declaration [1172] Vienna Convention, UNFCCC, and its Kyoto Protocol,[1173] and the SDGs adopted in 2015[1174] are of particular relevance for the petroleum industry in the context of the potential increase in atmospheric GHG emissions. Whether through gas flaring or gas venting and the construction of the entire infrastructure needed to advance the petroleum industry. The 2019 NEA acknowledges the above conventions' binding nature and compels the State to honour its reporting obligations to principles contained therein.[1175] The State has honoured those obligations by providing specific measures to address atmospheric GHG emissions within the Petroleum industry. [1176]

However, Uganda has no legal framework on climate change. Parliament developed the National Climate Change Bill in 2020[1177] to enhance Uganda's ability to adapt to the adverse impacts of climate change, build climate resilience and pursue low greenhouse gas emissions development. If passed into law, Uganda will be able to pursue its voluntary mitigation targets under

[1171] Principle 2
[1172] principle 21
[1173] Ministry of Water and Environment, 'Uganda Second National Communication (SNC) to the UNFCCC.' (2014); USAID, Greenhouse Gas Emissions in Uganda (2016) https://www.climatelinks.org/sites/default/files/asset/document/GHG%20Emissions%20Factsheet%20Uganda_v5_11-02-15_edited_rev08-18-2016.pdf> accessed on 5th April 2018
[1174] SDG Goal, 3 (3.9), 11 (11.6), 13; B Lode, P Schonberger, p Toussaint, ,Clean Air for All by 2030? Air Quality in the 2030 Agenda and International Law (2016) 25
[1175] National Environment Act, 2019 (The Uganda Gazette No. 10, Volume CXII, dated 7th March 2019) Section 150
[1176] Ibid section 100; Upstream Act 2013, s 2; Refer to Chapter Three, section 3.5.3 which addresses the measures in place to reduce atmospheric pollution.
[1177] The National Climate Change Bill, 2020, (The Uganda Gazette No. 8, Volume CXIll, dated 7th February 2020)

the Paris Agreement of reducing greenhouse gas emissions in the energy supply, forestry, and wetland sectors by 22% in 2030.[1178]

Concerning the institutional framework; The Government, through its National Climate Change Policy (2015) established the Climate Change Department (CCD) within the Ministry of Water and Environment, to strengthen the implementation of UNFCCC and its Kyoto Protocol and the Paris Agreement.[1179]The department coordinates all climate change response activities in Uganda. The newly established Parliamentary Standing Committee on Climate Change will serve as the oversight body for national climate action. The National Climate Change Bill (2020) is awaiting Parliamentary debate.

5.2.4 Management of Hazardous Waste

The body of international laws to be discussed below focuses on regulating sources of pollution, such as operational discharges, oil spills, dumping, emission of certain substances that pollute the atmosphere and harm the climate, and public health. Both the Montreal Protocol and Kyoto provide for a list of these specific substances.[1180] There are several international laws

[1178] A Regional Collaboration Centres (RCCs) was established in Kampala, Uganda to serve the rest of Africa; Ministry of Water and Environment (Climate Change Department), 'Uganda's First Biennial Update Report to The United Nations Framework Convention on Climate Change (September 2019)

[1179] Ministry of Water and Environment (Climate Change Department), 'Uganda's First Biennial Update Report to The United Nations Framework Convention on Climate Change (September 2019)

[1180] The Montreal Protocol (n 1000) Annexes A, B, C, E; Kyoto Protocol (n 1001) Annex A

which target hazardous substances.[1181] However, this section focuses on those laws that prevent and control these substances and activities within Uganda's Petroleum industry context. That is the Basel Convention, Bamako Convention, and OECD Decisions.[1182]

5.2.4.1 Basel Convention on Control of Trans-boundary Movement of Hazardous Wastes and their Disposal (1989)

The overall goal of the Basel Convention[1183] is to reduce the generation of hazardous waste[1184] to a minimum;[1185] to provide for the disposal in an environmentally sound manner by facilities located near to the source;[1186] to prohibit the export of hazardous waste from developed countries to countries (developing countries, non-OECD Countries, those without the capacity to manage the waste in an environmentally sound manner) for elimination or discharge;[1187] re-importation of hazardous waste.[1188] The aims were to protect human health and the environment against the adverse effects resulting from the generation, transboundary movement and mismanagement of hazardous

[1181] Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, (adopted 10 September 1988, entered into force 24 February 2004) 2244 UNTS 337, ratified in Uganda on 18 August 2008, entered into force 16 November 2008; Stockholm Convention on Persistent Organic Pollutants (adopted 22 May 2001, entered into force 17 May 2004) 2256 UNTS 119, ratified in Uganda 20 July 2004; Convention on the Physical Protection of Nuclear Material May 1980, IAEA/INFCIRC/274/Rev. 1, accented by Uganda on 12 October 2003

[1182] Decision of the Council on the control of transboundary movement of waste destined for recovery operations, 21 May 2002 C (2001) 107/FINAL.

[1183] Basel Convention (n 1004)

[1184] Basel Convention (n 1004) Article 1(1) (b), 17, 18, Annexes I, II, III, VIII, IX,

[1185] Basel Convention (n 1004) Article 4(2) (a)

[1186] Basel Convention (n 1004) Article 4 (2) (b)

[1187] Basel Convention (n 1004) Article 4(5), 4(2) (e), (g), 4(6), 6,

[1188] Basel Convention (n 1004) Article 8

and other wastes and ensuring their environmentally sound management. The application of this convention within Uganda's legal framework is assessed below in section 5.2.4.3.

5.2.4.2 Bamako Convention on the ban of the Import into Africa and the Control of Trans-boundary Movement of Hazardous Wastes within Africa (1991)

Like the Basel Convention, the Bamako Convention[1189] bans the importation of hazardous waste into the African continent. It also aimed at protecting human health and the environment from dangers posed by hazardous wastes by reducing their generation to a minimum in terms of quantity and hazard potential.[1190] The Convention requires that each party adopt and implement the preventive and precautionary approach to pollution problems, which entails preventing the release into the environment of substances that may cause harm humans or the environment without waiting for scientific proof regarding such harm.[1191]

[1189] Bamako Convention (n 1003)
[1190] W F Jones, 'The Evolution of the Bamako Convention: An African Perspective' (1993) 4 *Colorado Journal of International Environmental Law and Policy* 324
[1191] [1191] Bamako Convention (n 1003) Article 3(d)

5.2.4.3 Application of Hazardous Waste Management Conventions in Uganda's Legal Framework

As earlier stated, both section 2 of the Upstream Act and section 150 of NEA acknowledge the above conventions' binding nature. The above Conventions are especially critical for two reasons, first because some petroleum discoveries are in lake Albert, shared between Uganda and the Democratic Republic of Congo. Secondly, Lake Albert feeds into river Nile (Albert-Nile), which flows to other countries in Africa such as Southern Sudan, Sudan up to Egypt. Therefore, if the MOCs do not effectively manage their waste, trans-boundary pollution may occur. The Government enacted a National Environment (Waste Management) Regulations which provides that "*A person who intends to export waste from Uganda or to import waste into Uganda shall apply in writing to the Authority for a licence*." The NEMA will only issue a Licence after being satisfied that the person has a movement document and also obtained the "*consent of the Designated National Authority of the state to which the waste is to be exported and, where applicable, the country through which the applicant intends to move the waste*."[1192]

Concerning waste from the petroleum industry, the Government enacted the Petroleum (Waste Management) Regulations which classifies petroleum

[1192] National Environment (Waste Management) Regulations S.I. No. 49 of 2020, 153-2 3835, (The Uganda Gazette No. 18, Volume CXIII, dated 20th March 2020) section 5, 16, 92, 93; National Environment (Strategic Environmental Assessment) Regulations S.I. No. 50 of 2020

waste.[1193] It provides that MOCs "*contract a separate entity as a petroleum waste handler to manage the transportation, storage, treatment or disposal of petroleum waste.*"[1194] That the contracted entity must have undertaken an ESIA and obtained a certificate of approval from NEMA[1195] and obtained a Licence to manage petroleum waste from NEMA;[1196] the entity is also required to not "*import, export, transport, store, treat or dispose petroleum waste*" without a Licence from NEMA.[1197] However, it still holds the MOC responsible for the petroleum waste handler's actions.[1198]

The enactment of the above laws is a positive step, considering prior incidences of hazardous waste dumping.[1199] For example, in 2008, NEMA issued an EIA certificate to Tullow to establish hazardous waste storage facilities in Exploration area 2 Kaiso-Tonya, Hoima district, and Butiaba-Wanseko Exploration area, in Buliisa district, even though Tullow Uganda never carried out the EIA.[1200] The Communities complained that "companies were allegedly piling wastes in gazetted places, waiting for the NEMA to issue

[1193] Petroleum (Waste Management) Regulations S.I. No. 3 of 2019 (The Uganda Gazette No. 5, Volume CXII, dated 1st February 2019) Section 2, 13-22, 24 Schedule 7, 7
[1194] Petroleum (Waste Management) Regulations S.I. No. 3 of 2019 (The Uganda Gazette No. 5, Volume CXII, dated 1st February 2019) section 5, 16, 17, 34; Upstream Act Section 3(3); Midstream Act, Section 3(3)
[1195] NEMA Act Section 19(5)
[1196] Petroleum (Waste Management) Regulations S.I. No. 3 of 2019 (The Uganda Gazette No. 5, Volume CXII, dated 1st February 2019) Section 13
[1197] National Environment (Waste Management) Regulations S.I. No. 49 of 2020, 153-2 3835, (The Uganda Gazette No. 18, Volume CXIII, dated 20th March 2020) 92, 93
[1198] Petroleum (Waste Management) Regulations S.I. No. 3 of 2019 (The Uganda Gazette No. 5, Volume CXII, dated 1st February 2019) Section 5(8), 6
[1199] Refer to Chapter two, section 2.2.3.3.1
[1200] J Manyindo, et al, The Governance of Hydrocarbons in Uganda: Creating Opportunities for Multi-Stakeholder Engagement. (Kampala, Uganda August 2014) 7.11

guidelines." [1201] However, since then, NEMA established interim waste management guidelines (2012), which were subsequently incorporated into the new Petroleum (Waste Management) Regulations discussed above.

5.2.5 Protection of Species, Ecosystems and Biodiversity

There is a comprehensive international legal framework to protect biological diversity, natural habitats, and wildlife species, which may significantly impact Uganda's petroleum industry. Some of these instruments include The Ramsar Convention, [1202] World Heritage Convention, [1203] CITES, [1204] Bonn Convention, [1205] Convention on Biological Diversity, [1206] and the African Convention on the Conservation of Nature and Natural Resources.[1207]

The diversity of the above legal instruments has resulted in various approaches based on different considerations, including the regulation of resource exploitation, regulation for the protection of spaces and regulation of trade in certain species.[1208] The Considerations could be whether to exploit the resources to propel economic development or protect the environment. It

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[1201] Ibid

[1202] Convention on Wetlands of International Importance especially as Waterfowl Habitat (Adopted 2 February 1971) 996 UNTS 245, Ratified in Uganda on 04th March 1988

[1203] Convention Concerning the Protection of The World Cultural and Natural Heritage (Adopted 16 November 1972) 1037 UNTS 151 (WHC), Acceded by Uganda 20 November 1987

[1204] Convention on International Trade in Endangered Species of Wild Fauna and Flora (signed on 3 March 1973 and entered into force on 1 July 1975) 993 UNTS 243 (CITES) Accented in Uganda in 18 Jul 1991 and entered into force on the 16 Oct 1991

[1205] Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention) (23 June 1979) 1651 UNTS 333, Uganda ratified this Convention on 1st August 2000

[1206] Convention on Biological Diversity 1992 (n 1005)

[1207] African Convention on the Conservation of Nature and Natural Resources (adopted 15 September 1968, amended 11 July 2003) 1001 UNTS 3 ratified in Uganda 15th November 1977 (Revised Convention adopted 7 March 2017, entered into force 4 February 2019)

[1208] R Rayfuse, 'Biological Resources.' In D Bodansky, J Brunnee and E Hey (eds) The Oxford Handbook of International Environmental Law (OUP, 2007)362-93, 374

would be interesting to observe how the Ugandan Government reconciles these competing interests and implements these international laws within its national context.

5.2.5.1 The Ramsar Convention

The Ramsar Convention defines protected wetlands as included in the Ramsar list as waterfowl habitat and referring to their ecology, botany, zoology, limnology, or hydrology. [1209] It, therefore, protects these areas as both sites and as habitats. The Ramsar Convention seeks to ensure the sustainable, wise use of wetland resources including the designation of wetland sites of international importance and to ensure that all wetland resources are conserved, now and in the future. [1210]

Countries are required to implement the *"wise use"* principles of the Convention (including wetland policies, awareness programmes, and legislative review) and cooperate with other Contracting Parties.[1211] As well as to manage a network of protected wetland sites of international importance in cooperation with provinces, territories, and NGOs; foster cooperation through joint work plans and Memoranda of Understanding with the Convention on Biological Diversity, Bonn Convention, the World Wildlife Fund for Nature, Wetland International, Birdlife International, International Union for

[1209] Convention on Wetlands of International Importance especially as Waterfowl Habitat (Adopted 2 February 1971) 996 UNTS 245, Ratified in Uganda on 04th March 1988, Article 1, 2(2)
[1210] Ibid Ramsar 3(1), 3(2), 4(1), 5, 8 (2) (c)-(d)
[1211] Ibid

Conservation of Nature, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), and other international treaties and organisations; and contribute financially to the Convention.

The Ramsar Convention is very instructive. It requires Contracting Parties to inform the International Union for Conservation of Nature and Natural Resources "*at the earliest possible time if the ecological character of any wetland in its territory and included in the list has changed, is changing or is likely to change as the result of technological developments, pollution or other human interference*"[1212] When it comes to operations on the Tilenga project area (in Ramsar Sites of the Rwenzori Mountains, Murchison Falls-Albert Delta Wetland System, shores of Lake George), the Government is required to notify Ramsar of such operations, the International Union for Conservation of Nature and Natural Resources then convenes a Conference of the Contracting Parties review the information passed on and make recommendations regarding the conservation, management and wise use of wetlands and their flora and fauna.[1213] The recommendations may include that the party take measures to deal with the threat or damage to the site.[1214] Ramsar Sites which are potentially at risk as a result of technological developments, pollution or other human interference may be placed on "*The record of Ramsar Sites where changes in ecological character have occurred, are occurring, or are likely to occur*"

[1212] Convention on Wetlands of International Importance especially as Waterfowl Habitat (Adopted 2 February 1971) 996 UNTS 245, Ratified in Uganda on 04th March 1988, Article 3.2
[1213] Convention on Wetlands of International Importance especially as Waterfowl Habitat (Adopted 2 February 1971) 996 UNTS 245, Ratified in Uganda on 04th March 1988, Article 6,8
[1214] 'Changed in the Ecological Character of Ramsar Sites, (Montreux, Switzerland, 1990) Recommendation 4.8; 'Operating Principles of the Montreux Record' (2015) Resolution XII.6

(the Montreux Record).[1215] Lake George is listed on that record, although the listing was not due to petroleum activities.

5.2.5.2 Convention Concerning the Protection of The World Cultural and Natural Heritage (World Heritage Convention)

The General Conference of the United Nations Educational, Scientific and Cultural Organization adopted the World Heritage Convention on the 16 November 1972, Uganda acceded to this Convention on 20 November 1987. [1216] The Convention mandates all signatory countries[1217] to commit to avoid any activities that might directly or indirectly degrade Ramsar and World Heritage sites' cultural and natural heritage.[1218] These sites are considered to have outstanding universal value, "*transcending national boundaries and of common importance for present and future generations of all humanity*.". [1219] Protection of world heritage has implications on global peace. In March 2017,

[1215] Ibid

[1216] Convention Concerning the Protection of The World Cultural and Natural Heritage (Adopted 16 November 1972) 1037 UNTS 151 (WHC), Acceded to by Uganda 20 November 1987, there are 194 State Parties to the Convention as of 23-Oct-2020, https://whc.unesco.org/archive/convention-en.pdf

[1217] Ibid WHC Article 4, 5, 6 (1), 6(2), 7

[1218] Ibid WHC Article 1, 2, 11, 12; Africa Conservation Foundation, 'Local and International Organisations Call on Ugandan and DRC Presidents to Protect Sensitive Ecosystems in New Oil Licensing Round,' *Africa Conservation Foundation* (May 22, 2019) <https://africanconservation.org/local-and-international-organisations-call-on-ugandan-and-drc-presidents-to-protect-sensitive-ecosystems-in-new-oil-licensing-round/> accessed on 30th May 2019

[1219] 'Operational Guidelines for the Implementation of the World Heritage Convention, 26 October, WHC.16/01, paragraph 49

the UN Security Council recognised the vital role of cultural heritage in maintaining international peace and security.[1220]

Uganda's petroleum resources are in the Albertine Graben, and in Chapter One, we established that within the Graben are United Nations Education, Scientific and Cultural Organisation (UNESCO) World Heritage sites. That is, Bwindi Impenetrable Forest National Park,[1221] and Rwenzori Mountains National Park (since 23 January 2008),[1222] which is contiguous with the Democratic Republic of Congo (DRC)'s Parc national des Virunga, also a World Heritage site.[1223] As the Government pursues the petroleum industry's development, there is a legitimate concern from Albertine Graben's environment's potential degradation.

However, it is essential to note that even with that concern, the International Finance Corporation (IFC) Performance Standard 6 provides conditions under which project developments may be allowed in critical habitat areas such as a

[1220] UNGA Resolution 2347, 24 March 2017, UN Doc. S/RES/2347/2017.
[1221] UNESCO, *Bwindi Impenetrable National Park*, (UNESCO World Heritage Centre) http://whc.unesco.org/en/list/682 accessed 26 June 2019
[1222] Ramsar Sites Information Service, 'Rwenzori Mountains Ramsar Site' https://rsis.ramsar.org/ris/1861?language=en#risv-section-download> accessed on accessed on 3rd January 2018
[1223] National Environment Management Authority, *Environmental Sensitivity Atlas for the Albertine Graben* (2 edn 2010); NOGP 2008, objective 6(h)(iii), 7.2.6.1(b)(xiv); UNESCO, *Bwindi Impenetrable National Park* (UNESCO World Heritage Centre) http://whc.unesco.org/en/list/682 accessed 26 June 2019; UNESCO, 'Rwenzori Mountains National Park - UNESCO World Heritage Centre' http://whc.unesco.org/en/list/684 accessed 26 June 2019 ; Save Virunga, 'Breaking: CSOs Call on the Presidents of Uganda and DRC to Avoid Oil Exploration in Sensitive Ecosystems in Albertine Graben' (May 22, 2019) https://savevirunga.com/2019/05/22/breaking-csos-call-on-the-presidents-of-uganda-and-drc-to-avoid-oil-exploration-in-sensitive-ecosystems-in-albertine-graben/ accessed 26 June 2019

national park.[1224] The requirement for developers is to prove that the Performance Standard 6 conditions are met, specifically for the East African Crude Oil Pipeline and its associated projects, including mitigation measures during project implementation to show that there will not be a [1225] net loss [1226] due to project activities. In their ESIAS, MOCs indicate the mitigation measures for any identified impacts their activities might have on the environment. [1227]

5.2.5.3 Convention on International Trade in Endangered Species of Wild Fauna and Flora Threatened with Extinction (CITES).

CITES is a multilateral treaty, adopted to protect endangered animals and plants from international trade and ensure the survival of the species in the wild.[1228] The exploitation of species may be regulated indirectly by artificially reducing demand for the resource. This is the approach used by CITES.[1229] The obligations[1230] under the Treaty apply to certain species listed in appendices I,

[1224] International Finance Corporation, Performance Standard 6: Biodiversity Conservation and Sustainable Management of Living Natural Resources January 1, 2012 available at https://www.ifc.org/wps/wcm/connect/3baf2a6a-2bc5-4174-96c5-eec8085c455f/PS6_English_2012.pdf?MOD=AJPERES&CVID=jxNbLC0 accessed on 19/02/2020

[1225] Total, 'East African Crude Oil Pipeline (EACOP) Project: General Project Update.' (03 December 2020) https://eacop.com/wp-content/uploads/2020/12/GENERAL-EACOP-PROJECT-UPDATES-2020-.pdf> accessed on 10th January 2021; Chapter one, section 1.3.2

[1227] Refer to Chapter Three, section 3.5.2.1.

[1228] Convention on International Trade in Endangered Species of Wild Fauna and Flora (signed on 3 March 1973 and entered into force on 1 July 1975) 993 UNTS 243 (CITES) Acceded in Uganda in 18 Jul 1991 and entered into force on the 16 Oct 1991

[1229] Ibid

[1230] Ibid CITES, Article 3, 4, 5

II, III, which can be updated to reflect a particular specie's evolving circumstances.[1231] In Appendix I, the trade-in listed endangered plant and animal species is prohibited.[1232] In Appendix II, trade in the listed species is permitted but subject to strict control, because they are likely to become endangered.[1233] In Appendix III, CITES established a system facilitating other State Parties' assistance in implementing this unilateral regulation.[1234] CITES also provides a system of import and export permits[1235] and exemptions where species' cross-border movement is not subject to permits.[1236] CITES also provides that States must establish institutions to implement and manage the permit system (Management Authority, Scientific Authority, and Rescue Centre).[1237]

As noted previously, Uganda's petroleum resources were discovered in the Albertine Graben.[1238] The Graben is also the natural habitat of endangered species such as the African forest elephant, eastern chimpanzee, and l'Hoest's monkey, Rwenzori black-fronted or red duiker, Mountain gorillas (*Gorilla beringei beringei*), and a rich and unusual flora comprising, among other species, the giant heathers, groundsels, and lobelias.[1239]

[1231] Ibid CITES, Article 15, 15 (3), 16, 16 (2), 23
[1232] Ibid CITES Article 2(1) 3 (2), 3(3)
[1233] Ibid CITES, Article 4, 4(2)
[1234] Ibid CITES, Article 5, 5(2), 10
[1235] Ibid CITES, Article 3 (2), 3(3), 4(2), 5(2), 6
[1236] Ibid CITES, Article 7, 7(1), 7(3), 7 (6), 7(7),
[1237] Ibid CITES, Article 8, 9
[1238] Refer to chapter one, section 1.3.2; National Environment Management Authority, *Environmental Sensitivity Atlas for the Albertine Graben* (2 edn 2010)
[1239] Convention on International Trade in Endangered Species of Wild Fauna and Flora (signed on 3 March 1973 and entered into force on 1 July 1975) 993 UNTS 243 (CITES) Accented in Uganda in 18 Jul 1991 and entered into force on the 16 Oct 1991, Appendices I, II and III

Before 2019, the applicable law on protecting endangered and protected species was the 1996 Wildlife Act. The Act prohibited activities which are going to be destructive to the protected species or its habitat within Protected Areas.[1240] However, since the discovery of commercially viable petroleum resources, the NOGP required the Ministry responsible for tourism and wildlife to harmonize tourism and wildlife Policies with Oil and Gas Policy.[1241] The Upstream Act also provided for the supremacy of that Act over all other relevant laws relating to petroleum activities in Uganda, save for the Constitution, the National Environment Act and the Access to Information Act, 2005. Where there is a conflict between the provisions of the Upstream Act and any other written law, for example laws protecting the land rights and land resources of customary owners, individuals, and communities owning land in areas where mineral and petroleum deposits exist, then the provisions of the Upstream Act would prevail.[1242]

Since the exploration of petroleum began, the Wildlife Authority has indicated the escalation of human-wildlife conflicts where wild animals destroy crops and feed on domestic animals, and escalation of illicit wildlife trade and trafficking.[1243] Parliament enacted the 2019 Wildlife Act,[1244] which reflects the provisions in CITES.[1245] Concerning the human-wildlife conflicts, the 2019

[1240] Wild Life Act 1996 section 19 (2), (7)
[1241] NOGP 2008, objective 7.2.6.1 (g); NEMP 2014, objective 6(h) (iii), 7.2.6.1(b) (xiv); National Environment Management Authority, *Environmental Sensitivity Atlas for the Albertine Graben* Second edition, 2010
[1242] The Petroleum (exploration, Development and Production) Act of 2013, Section 186
[1243] NEMA, National State of the Environment Report 2016/17 (2016)
[1244] The Uganda Wildlife Act, 2019 (The Uganda Gazette No. 49, Volume CXII, dated 27th September, 2019)
[1245] UWA 2019, s 4 (c) 6(j) 34, Part X, 76

Wildlife Act will help manage and mitigate human-wildlife conflicts, by providing that those individuals whose lives and property has been affected by human-wildlife conflicts, would be compensated for their loss. [1246] Chapter Two highlighted some of the conflicts already happening.[1247] Concerning the trade in endangered species, the Act provides that "*A person who imports, exports or re-exports or attempts to import, export or re-export any species or specimen, without a permit; or without passing through a designated customs post or port, commits an offence…. is liable to a fine not exceeding ten thousand currency points or to life imprisonment or both.*"[1248]

5.2.5.4 Convention on Biological Diversity (1992) (CBD)

The protection of biodiversity was contemplated in the World Conservation Strategy of 1980 (1991 revision) and the Brundtland Commission, but the CBD established a binding legal obligation.[1249] It is mainly concerned with the conservation of biological diversity; [1250] the sustainable use of its components[1251] , and the fair and equitable sharing of the benefits of utilising genetic resources. [1252] It was reiterated in SDG 15 which focuses on

[1246] The Uganda Wildlife Act, 2019 (The Uganda Gazette No. 49, Volume CXII, dated 27th September 2019) Section 32, 58, 83, 84
[1247] Refer to Chapter Two, section 2.2.3.3.6
[1248] The Uganda Wildlife Act, 2019 (The Uganda Gazette No. 49, Volume CXII, dated 27th September 2019) Section 62
[1249] Convention on Biological Diversity 1992 (n 1005) page 79
[1250] Convention on Biological Diversity 1992 (n 1005) Article 6, 7, 8, 8(h), 9, 6(b); Agenda 2030 SDG 2 (targets 2.4, 2.5), 15
[1251] Convention on Biological Diversity 1992 (n 1005) Article 6, 10, 11, 14, 15, 16, 19 8(j)
[1252] Convention on Biological Diversity 1992 (n 1005) Preamble, paragraph 3, 5, Article 1.

conservation, restoration and sustainable management of species, ecosystems and biodiversity.

Article 2 of the CBD defines biodiversity as "*the variability among living organisms from all sources including, inter alia, terrestrial, marine, and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems.*" The CBD combines conservation with economic considerations. It provides that parties consider enacting legislation (mainly through EIAs, SEAs)[1253] to integrate sustainable utilisation into national strategies and plans and programmes.[1254] It promotes conservation and, in particular, protects traditional knowledge about conservation and protecting threatened species,[1255] promotes the sustainable use of biological diversity and promotes international cooperation in protecting biological diversity.[1256] Those activities that have, or are likely to have, significant adverse impacts on the conservation and sustainable use of biological diversity, require proper monitoring under the domain of NEMA and UWA.[1257]

The Convention also promotes conservation by establishing protected areas, regulation, or management of biological resources necessary for the conservation of biodiversity and rehabilitation and restoration of degraded

[1253] Convention on Biological Diversity 1992 (n 1005) Article 14
[1254] Convention on Biological Diversity 1992 (n 1005) Article 6
[1255] Convention on Biological Diversity 1992 (n 1005) Article 8
[1256] Convention on Biological Diversity 1992 (n 1005) Article 10
[1257] NEA 2019, s 4; Uganda Wildlife Act (Cap 200) Section 15; Refer Chapter 3, Section 3.8 on the Institutional framework.

ecosystems. The contracting parties are required to take measures to implement EIA requirements and thereby minimise adverse impacts. Even though the Convention does not provide operational provisions, there will likely be increased pressure to subject exploration and production activities to more stringent conditions in the Albertine Graben since it is an environmentally sensitive area. The NEA and its supporting regulations provide that MOCs carry out ESIAs.[1258]

5.2.5.5 Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention) (1979)

Uganda ratified this Convention on 1st August 2000.[1259] The Bonn Convention aims at conserving terrestrial, marine and avian migratory species throughout their range on a global scale.[1260] The Convention states that "*the parties Should promote, cooperate in and support research relating to migratory species; Shall endeavour to provide immediate protection for migratory species included in Appendix I; and Shall endeavour to conclude Agreements covering the conservation and management of migratory species included in Appendix II*."[1261]

[1258] Refer to Chapter Three, section 3.5.2
[1259] Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention) (23 June 1979) 1651 UNTS 333, Uganda ratified this Convention on 1st August 2000
[1260] Ibid Bonn Convention Article 2
[1261] Ibid Bonn Convention, Article 2 (3)

Many varied species of birds and animals of the world have migrated, and some settled in the Albertine region due to the favourable climate and thick rain forests and swamps that characterise the region.[1262] Notably, the Mountain Gorilla (Gorilla beringei beringei) listed in Appendix I of the Convention.[1263] Uganda signed the legally binding Gorilla Agreement with ten other gorilla range states to maintain and restore gorilla populations and their habitats.[1264] The Agreement allows for coordinated and concerted action to be taken by the Range States throughout the transboundary range. It is administered by the CMS Secretariat which works closely with the UNEP Great Apes Survival Partnership and benefits from partnerships with CITES and the Primate Specialist Group of the IUCN Species Survival Commission.

In June 2019, the range States held a meeting in Uganda, in which they resolved to implement the Gorilla Agreement through the four sub-species Action Plans;[1265] among which the Action Plan for the Mountain Gorilla (Gorilla beringei beringei) applicable to Democratic Republic of Congo (DRC), Rwanda and Uganda.[1266] One of the action plans' key objectives was for States

[1262] Refer to Chapter One, section 1.3.2
[1263] The Agreement on the Conservation of Gorillas and Their Habitats 25 April 2008 UNEP/CMS/GOR-TC1/NR.9 <https://www.cms.int/sites/default/files/instrument/Scanned_Agreement_text_E.pdf> accessed on 15th May April 2019
[1264] Ibid
[1265] Agreement on the Conservation of Gorillas and their Habitats of the Convention on Migratory Species: Updating the Action Plans,' (20 June 2019) UNEP/GA/MOP3/Resolution 3.1
[1266] Agreement on the Conservation of Gorillas and their Habitats of the Convention on Migratory Species: Action Plan for the Mountain Gorilla (Gorilla beringei beringei), (Entebbe, Uganda, 18-20 June 2019) UNEP/GA/MOP3/Inf.6

to develop national strategies to conservation Migratory Species. The 2019 NEA makes provision to this effect.[1267]

5.2.5.6 African Convention on the Conservation of Nature and Natural Resources (Algiers Convention)

The Algiers Convention [1268] on the conservation of nature and natural resources was adopted in 1968. It was revised on 11 July 2003 in Maputo,[1269] as a regional treaty, dealing with an array of sustainable development issues within the African context. It covers a broad spectrum of issues, including, management of natural resources,[1270] processes and activities damaging to the environment, [1271] introduces procedural rights, [1272] economic and social development goals,[1273] requirements for cooperation in the implementation of the convention (where transboundary aspects arise). [1274] It also provides mechanisms to assist in its implementation (Secretariat, EIAs, research,

[1267] NEA 2019, s 33, 34
[1268] African Convention on the Conservation of Nature and Natural Resources (Revised Convention adopted 7 March 2017, entered into force 4 February 2019) ratified in Uganda 15th November 1977 (Algiers Convention)
[1269] African Union Assembly, Decision 4(II)
[1270] Ibid Algiers Convention Article V (1), V (7), VI, VII, VIII, IX, XI, XII (3), XVII (3)
[1271] Ibid Algiers Convention Article XIII; Refer to discussion in section 5.2.4 on Basel Convention and Bamako Convention
[1272] Ibid Algiers Convention, Article XVI, XVII
[1273] Ibid Algiers Convention Article II, XIV, XV; Stockholm Declaration 1972 (n 1011) Principle 13; Rio Declaration, Principle 4
[1274] Ibid Algiers Convention, Article XIX (1)

education and training, technology transfer, Africa Court of Justice, financial mechanism, domestic institutional mechanisms).[1275]

Without repeating the theme- inspiration in the previously discussed Conventions, and those before the Algiers Convention;[1276] what is notable about this convention is that it recognises local users' rights, traditional knowledge, and community-based resource management.[1277] The Convention requires the Parties to adopt regulatory measures to enable the public to access environmental information, participate in decision-making, and recourse to courts of justice in matters relating to environmental actions.[1278] Public participation enables citizens to voice their concern and obtain information to improve the quality of environmental decisions. However, the previous discussion on this issue revealed the numerous challenges the PAPs and CSO have had with accessing vital information connected to the petroleum industry[1279] and protecting the cultural customs and sites.[1280]

[1275] Ibid Algiers Convention, Article XVI, XVIII, XX, XXI, XIX, XXIX, XXVI (5), XXVIII, XLI; Protocol of the Court of Justice of the African Union (adopted 11 July 2003) Article 19(1)
[1276] Convention on the Preservation of Wild Animals, Birds and Fish in Africa adopted in London on 19 May 1900; Convention Relative to the Preservation of Fauna and Flora in their Natural State, adopted 14 January 1936; United Nations Convention to combat Desertification in those Countries Experiencing Serious Drought and Desertification, Particularly Africa (adopted 17 June 1994, entered into force 26 December 1996)
[1277] Ibid Algiers Convention, Article XVII (3), XII (3)
[1278] Ibid Algiers Convention, Article XVI, XVII; Rio Declaration Principle 10, 23; CBD Article 8(j), Convention on Access to information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (entered in to force 30 October 2001), Uganda is not party to this Convention.
[1279] Refer to Chapter Three, section 3.5.2.2 and 3.7.3
[1280] Refer to Chapter Two, section 2.2.3.1.2, and Chapter three, Section 3.7.3.3, Chapter Four 4.2.5

5.2.6 Regional Laws

5.2.6.1 The Treaty of the East African Community (1999)

The East African Community (EAC) is an intergovernmental organisation composed of six countries in the African Great Lakes region in eastern Africa: Burundi, Kenya, Rwanda, South Sudan, Tanzania, and Uganda, with a possible increase to include DR Congo.[1281] The East African Community members agreed to have a concerted effort in economic development, law development and enforcement, and environmental protection and conservation, as established in the EAC Treaty.[1282] The Partner States recognised that development activities may negatively impact the environment leading to the degradation of the environment and depletion of natural resources and that a clean and healthy environment is a prerequisite for sustainable development. Thus, they agreed to co-operate in the conservation, sustainable utilisation, and management of their environmental and natural resources.[1283]

As a member of the EAC, Uganda is obliged to comply with sound environmental management principles as prescribed in the Treaty while undertaking all development activities,[1284] which include petroleum

[1281] The treaty for The Establishment of the East African Community signed on 30 November 1999 and entered into force on 7 July 2000
[1282] Ibid Chapter 2, 12, 19
[1283] Ibid Article 111, 112, 114 and 151
[1284] The Environmental Assessment Guidelines for Shared Ecosystems in East Africa (2007)

exploration and production.[1285] For example, Uganda should ensure that there are consultations and cooperation on the technologies to be adopted and prevent transboundary disposal of oil-related pollutants within the region, bearing in mind the Albertine Graben's geographical location. The EAC member states agreed to develop a harmonised and facilitative regulatory and institutional framework for promoting investment in the extractive and mineral processing industries.[1286]

5.2.6.2 The EAC Protocol on Wildlife Conservation and Law Enforcement (1999)

A protocol to the EAC treaty providing that member states have the sovereignty to manage their wildlife resources and the corresponding responsibility to use and conserve these resources sustainably.[1287] It stipulates that each party is required to ensure the conservation and sustainable use of wildlife resources in its jurisdiction. Each State is also required to ensure that activities in its jurisdiction or control do not damage wildlife resources of other states or in areas beyond the limits of national jurisdiction.[1288] The observation of this protocol is very instrumental in assessing environmental law

[1285] 'East African Community, Development and Promotion of Extractive Industries and Mineral Value Addition,' https://www.eac.int/treaty/index.php?option=com_content&view=article&id=206&Itemid=331> accessed on 5th March 2019
[1286] Ibid
[1287] The EAC Protocol on Wildlife Conservation and Law Enforcement (1999), Preamble
[1288] Ibid, Article 2(i)

compliance of the Albertine rift's oil activities because this is the place that harbours Uganda's significant wildlife National Parks and game reserves,[1289] shared by some member states.

5.2.6.3 The EAC Protocol on Environment and Natural Resources Management (2006)

This protocol to the EAC treaty makes specific provisions for environmental and natural resources management in the EAC. The Protocol provides for the Protocol's application by partner states and cooperation in managing the environment and natural resources within their jurisdiction, including transboundary ecosystems and natural resources.[1290] It also provides that each partner state shall take appropriate measures within its competence, including adopting laws and regulations, administrative and enforcement measures, to ensure compliance with this protocol.[1291] The Protocol requires the Partner States to promote the joint harnessing of hydropower and other potential renewable energy sources and petroleum, geology and hydrocarbon potential of the community.[1292] Therefore, this means that the extraction of petroleum resources in Uganda should comply with the protocol principles to avoid a situation where the consequences cost Uganda and the entire EAC.

[1289] Refer to Chapter One, section 1.3.2
[1290] The EAC Protocol on Environment and Natural Resources Management (2006), Article 2
[1291] Ibid, Article 39
[1292] Ibid, Article 19

5.2.6.4 The IGAD (Intergovernmental Authority on Development) Agreement (1996)

The goal of this organisation is to achieve economic integration and sustainable development. It aims to promote joint development strategies and gradually harmonise macro-economic policies and programmes in the social, technological, and scientific fields; harmonise policy concerning natural resources and promote programmes to achieve sustainable development of natural resources and environmental protection in the region. The environment created by this agreement is vital for petroleum production in Uganda, especially the midstream and downstream elements of transportation, distribution, and marketing. Consequently, the Governments of Uganda and Tanzania signed an Inter-Governmental Agreement (IGA) in May 2017 to construct the East Africa Crude Oil Export Pipeline (EACOP), at approximately 1,445-kilometres, it will be the longest electrically heated crude oil export pipeline in the world with capacity to transport 216,000 barrels of oil per day once fully operational.[1293] Some of the salient issues covered by the IGA include investment protection through stabilisation clauses to mitigate the risk of subsequent governments revising the terms of the agreement or passing new laws that negatively impact the original balance of economic returns. It also includes taxation terms, transit rights, land rights, transit tariffs,

[1293]Ministry of Energy and Mineral Development, *Progress of Implementation of the National Oil and Gas Policy for Uganda* (Ministry of Energy and Mineral Development, 2017) Paragraph 46; Total, 'Uganda and Tanzania sign Inter Governmental Agreement for Crude Oil Pipeline,' (2017) http://ug.total.com/en/home/media/list-news/uganda-and-tanzania-sign-inter-governmental-agreement-crude-oil-pipeline accessed 10 April 2018

dispute resolution, and local content provisions such as simple contractual requirements that favour the use of local goods and services, imposition of training obligations, employment of locals and preferential regulation and taxation of local companies over foreign companies, and technology transfer. Concerning aspects of environmental protection and social resilience, the IGA requires that ESIAs must be carried out in both countries to identify and assess the potential environmental, social and health effects of a project and to identify adequate measures to avoid and mitigate their impacts. An ESIA Certificate must be obtained from the respective environmental management authorities in both countries. On 3rd December 2020, NEMA approved the ESIA Certificate for the East African Crude Oil Pipeline for the Uganda section of the project. The approval for the Tanzanian section was issued on 29th November 2019[1294]

5.3 Industry guidelines and Recommendations

Other soft laws play an increasingly significant role in regulating petroleum industry activities and maintaining focus on sustainable development, climate, and biodiversity. Significant examples are provided by guidelines and recommendations issued by The United Nations Environment Programme (UNEP),[1295] the World Bank, the International Association of Oil and Gas

[1294] Total, 'NEMA approves ESIA Certificate for the East African Crude Oil Pipeline' (2020) https://eacop.com/wp-content/uploads/2020/12/NEMA-approves-ESIA-Certificate-for-the-East-African-Crude-Oil-Pipeline-Project-DEC-3-2020.pdf> accessed on 10th January 2021

[1295] UNEP, Environmental Management in Oil and Gas Exploration and Production: An Overview of Issues and Management Approaches, at 2-3

Producers, and the International Union for the Conservation of Nature and Natural Resources.

The 1982 UNEP Guidelines, related to offshore mining and drilling,[1296] is a non-binding instrument which sets out general directives to be adhered to by states in their national legislation or international arrangements. Along with some general provisions, the Guidelines contain specific recommendations concerning the authorisation of offshore operations, environmental assessment, and monitoring systems, possible transfrontier environmental impact and procedures for information and consultation, safety measures, contingency planning, and implementation measures, as well as liability and compensation.

The World Bank has prepared detailed EIA requirements and criteria (in the form of its Environmental Assessment Sourcebook) [1297] for environmental protection in specific industrial sectors and briefly mentions offshore exploration and production activities as contributing to environmental damage. The World Bank's Pollution Prevention and Abatement Handbook 1998[1298] provides guidelines for onshore oil and gas operations. They establish maximum levels for liquid effluents, air emissions, and noise levels; describe

[1296] UNEP Guidelines related to offshore (1997) mining and drilling (1982) 11

[1297] World Bank, Environmental Assessment Sourcebook (1991) Volume 2 - Sectoral Guidelines. World Bank technical paper no. WTP 140. Washington DC <http://documents.worldbank.org/curated/en/415971468137388990/Environmental-assessment-sourcebook-volume-2-sectoral-guidelines> accessed on 3 May 2018

[1298] Richard O Ackermann, et al, 'Pollution Prevention and Abatement Handbook 1998: Toward Cleaner Production' (World Bank Group, 1999). http://documents.worldbank.org/curated/en/758631468314701365/Pollution-prevention-and-abatement-handbook-1998-toward-cleaner-production> accessed on 3 May 2018

industry practices and processes used to reduce and control pollution and make recommendations for monitoring and reporting.

The International Association of Oil and Gas Producers provides clear guidance to its members.[1299] The organisation promotes measures to improve the industry's environmental record and disseminates information on good practice by developing industry guidelines, codes of practice, and checklists. These include guidelines on operations in tropical rainforests, waste management, decommissioning, operations in mangrove areas, and waste disposal and produced water. These recommendations aim to establish and disseminate internationally acceptable standards, practices, and procedures on environmental protection in petroleum exploration and production activities—for example, EIA and Health, Safety and Environmental Management Systems (HSE-MS) guidelines.[1300]

While often not compulsory for individual operators, these instruments are of growing importance worldwide and, with time, evolve into legally binding standards through national practice or international standard-setting. Uganda provides for the application of relevant international standards in the NEA 2019. [1301] Also, NEMA is mandated to advise the MOEMD on the implementation of relevant international conventions, treaties, and agreements in the field of environment.[1302] MOCs can participate in Uganda's

[1299] Gao Z, *Environmental Regulation of Oil and Gas* (Kluwer 1998)
[1300] International Standard Organization (ISO) 14001 Environmental Management System (EMS) series (2015) https://www.iso.org/standard/60857.html
[1301] NEA 2019, s 5, 150, 151
[1302] Ibid s 9(r)

pursuit of sustainable development and implement the international laws in ways discussed in Chapter Two.

5.4 International Law Frameworks applicable to Socio-Economic rights subject to Petroleum Extraction Activities

Human rights must be viewed as an integral component of sustainable development and causally linked to the environment rights discussed above. The Socio-economic rights encompassed in the Universal Declaration of Human Rights (UDHR)[1303] include;[1304] access to clean energy and adequate living standard in an environment of a quality that permits a life[1305] of dignity and wellbeing.[1306] They also include the right to work and workers' rights,[1307] health, [1308] education, [1309] food, shelter, property rights, [1310] freedom of thought, [1311] freedom of expression, [1312] the right to public assembly, [1313] democracy,[1314] social security,[1315] and others.

[1303] General Assembly of the United Nations, Universal Declaration of Human Rights (UDHR), adopted 10 December 1948) (A/RES/217(III); Office of the High Commission for Human Rights, Uganda and the United Nations Human Rights Mechanisms, "A Compilation on the Occasion of the 60th Anniversary of the Universal Declaration of Human Rights" 2008 <https://www.ohchr.org/Documents/Countries/PublicationUgandaUNHRMechanisms.pdf> accessed on 23rd August 2018

[1304] Ibid UDHR, Article 25

[1305] Ibid UDHR, Article 3

[1306] Ibid UDHR, Article 1; Declaration of the United Nations Conference on the Human Environment, 16 June 1972 UN Doc. A/CONF 48/14Rev.1

[1307] Ibid UDHR, Article 23

[1308] Ibid UDHR, Article 25

[1309] Ibid UDHR, Article 26

[1310] Ibid UDHR, Article 17

[1311] Ibid UDHR, Article 18

[1312] Ibid UDHR, Article 19

[1313] Ibid UDHR, Article 20

[1314] Ibid UDHR, Article 21

[1315] Ibid UDHR, Article 22

In addition to the UDHR, Uganda ratified: The Elimination of All Forms of Racial Discrimination (ICERD);[1316] Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);[1317] Convention against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment (CAT);[1318] International Convention on the Rights of Migrant Workers and All Members of their Families (ICRMW);[1319] Convention on the Rights of Persons with Disability (CRPD);[1320] International Covenant on Economic, Social and Cultural Rights (ICESCR);[1321] International Covenant on Civil and Political Rights (ICCPR);[1322] and The Convention on the Rights of the Child (CRC).[1323] Regionally, Uganda is also a party to the African Charter on Human and Peoples' Rights (ACHPR).[1324] This section will also look at the UN Guiding Principles on Business and Human Rights and the zero drafts of the Legally Binding Instrument which establishes the "*effective access to justice and remedy to victims of human rights violations in the context of business activities*" and Optional Protocol addresses enforcement mostly through national implementation mechanisms and an international committee of experts. Both

[1316] Elimination of All Forms of Racial Discrimination (ICERD) in 1965 and ratified in Uganda in 1980
[1317] Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979 and ratified in Uganda in 1985.
[1318] CAT adopted in 1984 and ratified in 1986.
[1319] ICRMW adopted in 1990 and ratified in 1995.
[1320] CRPD adopted 2006 ratified in 2008
[1321] ICESCR, adopted on 16 December 1966 entered into force 3 January 1976 and ratified in Uganda in 1987, 993 UNTS 2
[1322] ICCPR adopted 16 December 1966 and ratified in Uganda in 1995, 999 UNTS 171
[1323] CRC (Optional Protocols) adopted in 1989 and ratified in 1999.
[1324] ACHPR, adopted 27 June 1981, 21 ILM 58

jointly focusing on making business enterprises accountable for human rights abuses.

Chapter Four of the Ugandan Constitution reflects the principles in the above international human rights law instruments. Parliament also enacted the Human Rights (Enforcement) Act, in March 2019 to enable individuals or organizations seek civil remedies for human rights violations through the regular court systems or the Uganda Human Rights Commission (UHRC), which has judicial powers under the constitution.[1325] As a UNGA member, human rights abuses perpetrated by third parties, including MOCs, can be reported to the National Contact Point in an OECD member state. However, it takes more than the ratification of the above treaties and public pronouncements to end human rights violations. In practice, Uganda's human rights record is still stained by repression and lack of accountability.[1326]

5.4.1 Health and Safety

There are several International Conventions which regulate the health and safety of employees and communities.[1327] They promote a preventative safety and health culture and progressively achieving a safe and healthy working environment. They require ratifying States to develop, in consultation with the most representative organisations of employers and workers, a national

[1325] EITI, 'EITI guide for legislators: How to support and strengthen resource transparency.' (2009). <http://eiti.org/files/MP_EITI_Guide.pdf> accessed on 3rd May 2019

[1326] Refer to Chapter Two, section 2.2.3.1, Chapter Three 3.7.3.3, 3.7.4, Chapter Four, Section 4.2.5

[1327] Occupational Safety and Health Convention, 1981 (No. 155) and its Protocol of 2002; the Promotional Framework for Occupational Safety and Health Convention, 2006 (No.187); and the Working Environment (Air Pollution, Noise and Vibration) Convention, 1977 (No.148)

policy, national system, and national programme on occupational safety and health. Uganda has domesticated them within its national laws, like the Constitution,[1328] and Employment Act, 2006, Occupational Safety and Health Act, 2006 and others providing people's rights to work under satisfactory safe and healthy conditions.[1329] However, in the previous chapter, the author has identified incidences where MOCs violated these rights.[1330] The MGLSD lacks the adequate capacity to monitor occupational safety and health issues in the sector.[1331] Also, there are incidences of contravening Article 23 UDHR; as local communities are voicing allegations that MOCs *"do not give us jobs on the pretext that we are not qualified, yet they go and bring people as drivers from Mbarara District who cannot even speak broken English."*[1332] Essentially saying that MOCs engage in tribalism when offering even the low skilled jobs.[1333]

5.4.2 Loss of Land and other forms of livelihood

In contravention of the above International Laws[1334] and its national laws,[1335] the Government's decision to compulsorily acquire land zoned for petroleum activities means that PAPs will lose their land and crops to make way for the petroleum industry. Being agricultural communities, they relied on the land

[1328] Constitution of the Republic of Uganda, 1995, Article 40 (1) (a)
[1329] Chapter Three, Section 3.7.2
[1330] Refer to Chapter two, section 2.2.3, chapter three, section 3.7.2.2, 3.8.7, Chapter four 4.2.4
[1331] Ibid
[1332] Uganda Human Rights Commission Special Report, *Oil in Uganda: Emerging Human Rights Issues, Special Focus on Selected Districts in the Albertine Graben* (Uganda Human Rights Commission Special Report, 2013)
[1333] Ibid
[1334] UDHR Article 17 ; ICESCR Article 1-3; ACHPR Article 1
[1335] Constitution of the Republic of Uganda, 1995, Article 26, 237 (2) (a); The Land Act, Cap. 227 of 1998 Section 73,

for economic development.[1336] The Government did take measurements to pay compensation before taking possession of the property. However, PAPs have made concerning reports to the UHRC regarding inadequate compensation amounts and process. [1337] That wealthy individuals and government officials strategically bought land in the oil prospect areas to secure generous compensation packages.[1338] It is in clear violation of the right to "*freely dispose of their natural wealth and resources*" for their benefit.[1339] It will likely alienate the local communities and contribute to the 'Resource Curse Phenomenon's' civil conflicts characteristic.[1340]

5.4.3 Access to information

Access to information is a fundamental human right recognised by international human rights instruments. [1341] The UDHR provides that "*Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.*" [1342] The

[1336] Refer to Chapter Two, section 2.2.3.1.1, and Chapter Three, section 3.7.1
[1337] Uganda Human Rights Commission Special Report, *Oil in Uganda: Emerging Human Rights Issues, Special Focus on Selected Districts in the Albertine Graben* (Uganda Human Rights Commission Special Report, 2013); Refer to chapter Two, section 2.2.3.1 on the negative social impacts of the petroleum industry.
[1338] Ibid
[1339] C Mbazira, 'Enforcing the economic and social rights in the African Charter on Human and Peoples' Rights: Twenty years of redundancy, progression and significant strides' (2006) *African Human Rights Law Journal* 333
[1340] Oyefusi, Aderoju, 'Oil-dependence and Civil conflict in Nigeria', (2007) WPS 2007-09, Centre for the Study of African Economies, <https://www.csae.ox.ac.uk/workingpapers/pdfs/2007-09text.pdf> accessed August 2019; G Peter, Veit, C Excell, and A Zomer, 'Avoiding the resource curse: spotlight on oil in Uganda' (World Resources Institute, 2011)
[1341] UDHR Article 19, 21(1); ICCPR Article 19; CRC, Articles 13(1), 17; ICCPR, Article 25; ACHPR Article 13 (1)
[1342] UDHR Article 19

ACHPR states that "*Every individual shall have the right to receive information and the right to express and disseminate his/her opinions within the law*[1343]*…. the right to participate freely in the government of his country, either directly or through freely chosen representatives per the provisions of the law*".[1344] In 2012, the United Nations recognised access to the internet as an essential tool for promoting the right of access to information. They marked September 28 as the "*International Day for Universal Access to Information*" in 2016.

Previous assessment on this vital aspect[1345] revealed that despite having domesticated the right to access information within the Constitution[1346] and the Access to Information Act;[1347] the UHRC noted that "*there had been only minimal efforts and, in some aspects, none, to enable all the community members to understand the legal requirements, the procedures, processes and the entire management framework of the oil and gas industry in the region*."[1348] The report gave examples of some of the locals in the communities who did not quite understand English compensation agreements because most of the residents could not read or write English. There are several other examples where the public have had challenges relying on this right to access petroleum-related information.[1349]

[1343] ACHPR, Article 9
[1344] ACHPR, Article 13 (1)
[1345] Refer to Chapter Three, section 3.7.3; Chapter Four, section 4.3.3, and earlier in this chapter, section 5.2.1.5, and 5.2.5.6
[1346] Constitution of the Republic of Uganda, 1995, Article 38(1), 41
[1347] ATIA 2005; NOGP 2008, 11
[1348] Uganda Human Rights Commission Special Report, *Oil in Uganda: Emerging Human Rights Issues, Special Focus on Selected Districts in the Albertine Graben* (Uganda Human Rights Commission Special Report, 2013)
[1349] Refer to Chapter Three, section 3.7.3; Chapter Four, section 4.3.3, and earlier in this chapter, section 5.2.1.5, and 5.2.5.6

5.4.4 Protection of Cultural Values

Uganda ratified World Heritage Convention[1350] and the Convention for the Safeguarding of the Intangible Cultural Heritage.[1351] These conventions are relevant to Uganda's petroleum industry because the petroleum resources in the Albertine Graben, [1352] which encompasses many multicultural communities, notably the Bunyoro Kingdom. The Ugandan Constitution[1353] was amended in 2005 to protect this right to culture and similar rights.

These legal instruments intend to protect traditions or living expressions inherited from ancestors and passed on to descendants, such as oral traditions, performing arts, social practices, rituals, among others, and encourages mutual respect for other ways of life. However, The Bunyoro Kingdom has expressed concern that community relocation could potentially affect or disrupt the culture and traditional practices, and damage their historical, archaeological, and religious areas, known locally as *Ihangiro*.[1354]

[1350] Convention Concerning the Protection of The World Cultural and Natural Heritage (Adopted 16 November 1972) 1037 UNTS 151 (WHC), Accepted by Uganda 20 November 1987

[1351] Convention for the Safeguarding of the Intangible Cultural Heritage adopted by the UNESCO General Conference on 17 October 2003, entered into force in 2006, 2368 UNTS I-42671, ratified by Uganda on 13 May 2009

[1352] Refer to Chapter one, Section 1.3.2

[1353] Constitution of the Republic of Uganda, 1995, Article 37

[1354] Refer to Chapter Two, Section 2.2.3.1.2; National Association of Professional Environmentalists (NAPE), *Mining and its impacts on Water, Food Sovereignty and Sacred Natural Sites and Territories*: *Advocating for Recognition and Protection of Water, Food Sovereignty and Sacred Natural Sites and Territories in Uganda`s Oil Region*' (2014) 22; Oil in Uganda, 'Cultural institutions agitate for fair share in extractives sector' (Wednesday, 2nd August 2017) <https://oilinuganda.org/features/companies/cultural-institutions-agitate-for-fair-share-in-extractives-sector/> accessed 13 march 2019;

5.4.5 Protecting Vulnerable Persons

In Chapter Two, the author discussed concerns of mass migration associated with the petroleum industry,[1355] as males found jobs within the industry, leaving their wives, children (under five years of age), and disabled or elderly relatives vulnerable to sexual exploitation. These people would not be able to protect or provide for themselves. The UN acknowledges that the different kinds of negative impacts, resulting from petroleum-related activities can be more severe when individuals or groups are vulnerable.[1356] The UN Guiding Principles on Business and Human Rights distinguish between states' duty to protect human rights, the duty of business to respect these duties and their joint responsibility for providing access to remedies for the victims of human rights abuses.[1357] However, the UHRC reported there seemed to be a limited implementation of the legal mechanisms in place to address issues of vulnerability among the affected communities.[1358] Uganda could pick a leaf from the French corporate duty of vigilance law and legally mandate business activities to show respect for human rights and the environment.[1359]

[1355] Chapter Two, section 2.2.3.1.3

[1356] UN Human Rights Office of High Commissioner, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011); UN Secretary-General, 'Secretary-General Appoints John Ruggie of United States Special Representative on Issue of Human Rights, Transnational Corporations, Other Business Enterprises' SG/A/934, 28 July 2005

[1357] Jonathan Drimmer, 'Human rights and the extractive industries: Litigation and compliance trends' (2010) 3 (2) *Journal of World Energy Law and Business*; Kemp, Deanna and Frank Vanclay. 'Human rights and impact assessments: clarifying the connections in practice' (2013) 31 (2) *Impact Assessments and Project Appraisal*, 86-96.

[1358] Uganda Human Rights Commission Special Report, *Oil in Uganda: Emerging Human Rights Issues, Special Focus on Selected Districts in the Albertine Graben* (Uganda Human Rights Commission Special Report, 2013)

[1359] The French Duty of Vigilance Law No. 2017-399 of 27 March 2017

5.4.6 The UN Guiding Principles on Business and Human Rights

The United Nations Guiding Principles on Business and Human Rights (Ruggie Framework) adopted on 16th June 2011, is the first global soft law instrument for preventing and addressing the risk of adverse impacts on human rights linked to business activities of transnational corporations and other business enterprises. [1360]

The Ruggie Framework encompasses three pillars outlining how states and businesses should implement the framework: the State duty to protect against business related human rights abuse through regulation, policymaking, investigation, and enforcement; [1361] the corporate responsibility of companies to act with due diligence to avoid infringing on the human rights of others and to address any negative impacts arising from their activities; [1362] and the need for states to strengthen access to appropriate and effective remedies for victims of business-related human rights abuses through judicial, administrative, and legislative means, and that these mechanisms should be legitimate, accessible,

[1360] UN Human Rights Office of High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (HR/PUB/11/04, 2011); Surya Deva, "Guiding Principles on Business and Human Rights: Implications for Companies", 9 (2) European Company Law, (2012) 101-109

[1361] Rachel Davis, 'The UN Guiding Principles on Business and Human Rights and Conflict-Affected Areas: State Obligations and Business Responsibilities'. 94 (887) International Review of the Red Cross (2012) 961–979

[1362] Rachel Davis, 'The UN Guiding Principles on Business and Human Rights and Conflict-Affected Areas: State Obligations and Business Responsibilities'. 94 (887) International Review of the Red Cross (2012) 961–979

predictable, rights-compatible, equitable, and transparent.[1363] As well as the corporate responsibility to prevent and remediate any infringement of rights that they contribute to, through dialogue and engagement, rather than with the company acting as the adjudicator of its own actions. These principles reaffirm states' existing obligations under UDHR[1364] discusses earlier in section 5.4.

The Ruggie Framework encourages companies, while conducting their due diligence, to also conduct a Human Rights Impact Assessment in order to assess their actual and potential human rights impacts. However, because the framework does not have an enforcement mechanism, "*they cannot actually require companies to do anything at all. Companies can reject the principles altogether without consequence – or publicly embrace them while doing absolutely nothing to put them into practice.*"[1365]

In 2016, Uganda accepted 149 UNGP recommendations and rejected 78.[1366] In its 2016 Universal Periodic Review (UPR), Uganda accepted five

[1363] Rachel Davis, 'The UN Guiding Principles on Business and Human Rights and Conflict-Affected Areas: State Obligations and Business Responsibilities'. 94 (887) International Review of the Red Cross (2012) 961–979

[1364] General Assembly of the United Nations, Universal Declaration of Human Rights (UDHR), adopted 10 December 1948) (A/RES/217(III); Office of the High Commission for Human Rights, Uganda and the United Nations Human Rights Mechanisms, "A Compilation on the Occasion of the 60th Anniversary of the Universal Declaration of Human Rights" 2008 <https://www.ohchr.org/Documents/Countries/PublicationUgandaUNHRMechanisms.pdf> accessed on 23rd August 2018

[1365] Christopher Albin-Lackey, "Without Rules: A Failed Approach to Corporate Accountability" (Human Rights Watch, page 4 Accessed on 30th January 2022

[1366] UN Human Rights Council, Report of the Human Rights Council on its thirty-fourth session, 27 December 2016, UN Doc. A/HRC/34/2, para. 699; Amnesty International, 'Uganda: Guarantee Human Rights: Amnesty International Submission for The UN Universal Periodic Review, 40th Session of The UPR Working Group, January-February 2022' 30 July 2021

recommendations to strengthen its national human rights institution[1367] and to develop and implement its National Human Rights Action Plan (NHRAP) or other plans.[1368] Although it did not receive a specific recommendation on business and human rights, Article 20(2) of the Constitution explicitly recognizes that private actors have human rights responsibilities.

The country's second five-year National Development Plan (NDP II) prioritizes private sector-led growth and recognises the role of the extractive industry following the discovery of commercially viable oil and gas resources in 2006. The NDP II envisaged the significant role for the private sector in financing the country's development and set out to create a conducive environment for MOC to do business in Uganda as evidenced by the legal framework discussed in Chapter Three.[1369] However, increasing private sector involvement in the country's development has not been accompanied by adequate efforts to protect, respect and remedy human rights[1370] in line with UNGP.

Laws to regulate the human rights impact of corporate activities have weaknesses in their design, implementation and enforcement. For example,

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[1367] UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Uganda, UN Doc. A/HRC/34/10, Recommendations 115.39-43 (Nepal, Philippines, Bangladesh, Niger, South Africa).

[1368] A/HRC/34/10, Recommendations 115.27-32 (Cuba, Angola, Mauritius, Sudan, Venezuela, Russian Federation) Recommendations 115.1 - 3 (Congo, Syrian Arab Republic, Azerbaijan) and Recommendation 115.38 (Djibouti); Office of the High Commissioner for Human Rights (OHCHR), "A National Human Rights Action Plan – Uganda follows through on its commitment to the Universal Periodic Review", 6 November 2013,

[1369] Refer to Chapter Three, section 3.4

[1370] The Constitution of the Republic of Uganda 1995, Objective 27 (2), Article 39, Article 237 (b); NEA 2019, s 3

the Upstream Act and the 2019 NEA obliges a MOCs to carry out an Environment Impact Assessment[1371] and to take all necessary steps to prevent and minimise environmental pollution. However, EIAs are rarely shared with or explained to communities, leaving them without benchmarks to hold companies accountable. Critically, there is no requirement to assess human rights impacts. Also, the Upstream Act vests the minister with broad discretionary powers [1372] and leaves Parliament without a meaningful oversight role and thus fails to establish an open and transparent procedure for determining applications for licences[1373]

Members of Parliament complained of a lack of information and transparency about the sector, Theodore Ssekikubo, the chairperson of the Parliamentary Forum of Oil and Gas stated that "*oil sector is still engrossed in a culture of secrecy as a governance challenge. Whereas a number of efforts have been undertaken by the government such as the development of a strong policy, legal and institutional framework, it is still difficult even for Parliament to access information which is pertinent to fostering the much-required transparency and accountability in the management of the sector.*"[1374]

[1371] NEA 2019, s 49(1) & (2), 110 19(1) (a), 112 (1), (2) & (3), 176 (1), 177(1) and (2) Schedule 4 (13), schedule 5 (21); Uganda Wildlife Act 2000, section 15; National Environment (Environment Impact Assessment) Regulations, 1998; Upstream Act 2013, s 135.
[1372] Upstream Act, 2013 S 6
[1373] Uganda Consortium on Corporate Accountability, 'The State of Corporate Accountability in Uganda.' (2016).
[1374] Parliamentary Forum on Oil and Gas https://www.parliament.go.ug/page/parliamentary-forum-oil-and-gas accessed on 5th May 2019

The National Land Policy recognizes the need for clear procedures for local consultation prior to accessing land for investments.[1375] However, "*indigenous groups in Uganda are still not afforded legal recognition and there is no specific legislation enforcing the obligation to obtain their free, prior and informed consent on matters relating to the exploitation of their resources*."[1376] Therefore businesses are failing to respect the principle of free, prior and informed consent.[1377]

The Investment Code also creates a dual, conflicting, role for the Investment Authority,[1378] promoting and facilitating business on the one hand and monitoring and enforcement on the other. In particular, the Authority does not have express powers to address complaints by citizens related to the environment, employment practices, and human rights.

Victims of corporate abuse are entitled to constitutional and legislative remedies. However, there are enormous limitations, the UHRC for example faces inadequate financial and human resources, affecting the timely resolution of complaints. UHRC is also unable to address human rights

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[1375] Ministry of Lands, Housing and Urban Development, *The Uganda National Land Policy* (2013) Chapter 4, 4.16, Paragraph 89

[1376] UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Uganda, UN Doc. A/HRC/34/10; Danish Institute for Human Rights (DIHR) and Uganda Human Rights Commission, 'Business and Human Rights Country Guide' (2016); Democratic Governance Facility (DGF) Democracy, 'Justice, Human Rights and Accountability in Uganda' (2013); Uganda Human Rights Commission (UHRC), '17th Annual Report' (2014).

[1377] Refer to Chapter two, section 2.2.3.1.2; The Independent, 'Court adjourns case against NEMA, petroleum authority of Uganda' The Independent (November 6, 2019) <https://www.independent.co.ug/court-adjourns-case-against-nema-petroleum-authority-of-uganda/> accessed on 13th December 2019; Barry Morgan, 'Uganda's Lake Albert development lands Total in court' Upstream online (25 October 2019) <https://www.upstreamonline.com/safety-and-environment/ugandas-lake-albert-development-lands-total-in-court/2-1-694583> accessed on 13th December 2019.

[1378] Investment Code Act Cap 92, 2019 Section 9 – 20

complaints from many people, which required structural action not individual remedy, therefore, it would often in these cases signpost these specific complainants to the MEMD or NEMA for further investigation and redress of their grievances. The absence of a witness protection law also weakens its tribunal function. [1379] Also the widespread corruption undermines accountability for corporate abuse, and the government too has acknowledged that significant shortcomings "*in economic and corporate governance*" have had negative influences on development.[1380] Corruption also fuels state complicity in corporate human rights abuses, especially where huge public investment is involved, such as in oil and gas.

If Uganda is to achieve its hoped-for benefits from the oil and gas industry, and foster socio-economic resilience, it is imperative that the Government develops stronger mechanisms to assess the human rights impact of the oil and gas industries' activities and ensure that licences are only granted after indigenous communities have given their free, prior and informed consent, the land compensation rates are fair and equitable, that revenue sharing mechanism is fair, that transparency and accountability is prioritised by strengthen oversight of oil and gas industry. Also, by ensuring victims of corporate abuses can access effective remedies, and tangible punitive damages awarded for human rights abuses.

[1379] Uganda Human Rights Commission (UHRC), '17th Annual Report' (2014).
[1380] Government of Uganda, National Development Plan II 2015/2016 – 2019/2020

5.4.7 The Zero Draft Treaty

The Zero Draft Treaty was first published on 16 July 2018,[1381] with the Second Revised Draft of the treaty released on 06 August 2020[1382] by the Open-Ended Intergovernmental Working Group on transnational corporations and other business enterprises with respect to human rights (OEIGWG), as a legally binding instrument to regulate, under international human rights law, the activities of all business activities, including particularly but not limited to those of a transnational character. [1383] Its purpose was to "*strengthen the respect, promotion, protection and fulfilment of human rights*" and to "*ensure effective access to justice and remedy to victims of human rights violations*" in the context of transnational business activities and to "*advance international cooperation in this regard*."[1384]

The release of the Treaty marked a significant milestone for the evolving global business and human rights framework, aiming to ensure corporate accountability and reduce the culture of impunity, during both peace time and

[1381]OEIGWG, *zero draft of a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises*. (2018) <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf> accessed on 2nd February 2022; C Lopez, Toward an international convention on business and human rights. *9*(3) *Investment Treaty News* (2018) 13-16 <https://www.iisd.org/itn/2018/10/17/toward-an-international-convention-on-business-and-human-rights-carlos-lopez> Accessed on 2nd February 2022

[1382] OEIGWG, *Second Revised Draft of a Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises*. (2020) <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf> Accessed on 2nd February 2022

[1383] Revised Zero Draft, Article 3 (1).

[1384] Revised Zero Draft 2018, Article 2

situations of conflict. It complements the UNGP[1385] in ensuring corporate accountability, and elimination of ongoing disregard for international law and human rights standards by transnational corporations and other business enterprises in the context of "*any business activities of a transnational character*".[1386] It also reaffirms the right of victims[1387] to "*fair, effective and prompt access to justice and remedies*" in accordance with international law, including, restitution, compensation, rehabilitation, non-repetition as well as environmental remediation and ecological restoration.[1388]

It mandated State parties to incorporate in their domestic law provisions for universal jurisdiction over human rights violations that amount to crimes,[1389] to provides for a comprehensive and adequate system of legal liability (encompassing civil, criminal and administrative liability including torts based on negligence, strict liability) for human rights violations or abuses in the context of business activities, including those of transnational character.[1390]

It also mandates States to guarantee the right of victims to present claims to their Courts,[1391] to investigate human rights violations and take action against perpetrators,[1392] to provide legal assistance to victims[1393] to establish an

[1385] Ibid preamble, Article 5
[1386] Revised Zero Draft, Article 3
[1387] Ibid Article 4
[1388] Ibid Article 8
[1389] Ibid Paragraph 11
[1390] Ibid Article 6 (1) (6) (7)
[1391] Ibid Paragraph 2
[1392] Ibid Paragraph 3
[1393] Ibid Paragraph 5

International Fund for victims,[1394] to provide effective mechanisms for enforcement of remedies,[1395] to protect victims, their representatives, families and witnesses from unlawful interference with their privacy and from intimidation, and retaliation. It also mandates States to hold perpetrators criminally, civil and administratively liable for human rights violations in the context of transnational business activities through their domestic law,[1396] for remedies to victims such as reparation or compensation.

The Zero Draft Treaty also mandates States to ensure "*in their domestic legislation that all persons with business activities of transnational character*" undertake due diligence obligations throughout their business activities,[1397] as well as effective national procedures to enforce compliance. It further provides that due diligence includes:[1398] monitoring human rights impacts; identifying and assessing human rights violations; preventing human rights violations; reporting on non-financial matters, including at a minimum environmental and human rights matters; undertaking environmental and human rights impact assessments; and carrying out meaningful consultations with affected groups and relevant stakeholders. Failure to comply with due diligence will result in liability and compensation.

[1394] Ibid Paragraph 7
[1395] Ibid Paragraph 8
[1396] Ibid Article 10
[1397] Ibid Article 9 (1)
[1398] Ibid Article 9 (2)

Notably, the Zero Draft Treaty establishes a nexus between the treaty and other international treaties, like the BITs,[1399] stating that "*States Parties agree that any bilateral or multilateral agreements, including regional or sub-regional agreements, on issues relevant to this (Legally Binding Instrument) and its protocols, shall be compatible and shall be interpreted in accordance with their obligations under this (Legally Binding Instrument) and its protocols*." Although a positive amendment to the first Zero Draft Treaty, it might benefit from adding that States should "*ensure upholding human rights in the context of business activities by parties benefiting from such agreements*,"[1400]given that an increasing number of trade and investment agreements have provisions on the promotion of responsible business conduct.

However, the Revised Zero Draft Treaty does not recognise the role of human rights defenders, activists and civil society, including those advocating for land rights and environmental justice relevant to corporate abuses, and thus doesn't address the fundamental issues and risks against human rights defenders when documenting and exposing human rights violations, including those carried out by private actors (exemplified in attacks, intimidation, threats and criminalization) and to ensure their protection and safety by the state. These pertinent issues will need future discussion, and possibly considered for inclusion.

[1399] Revised draft, supra note 1, Art. 12(6).
[1400] Zero draft, Article 13(6)

Uganda acceded to the International Covenant on Economic, Social and Cultural Rights (ICESCR),[1401] the International Covenant on Civil and Political Rights (ICCPR)[1402] and the African Charter on Human and Peoples' Rights (ACHPR). [1403] Chapter Four of the Ugandan Constitution reflects the principles in the above international human rights law instruments. Parliament also enacted the Human Rights (Enforcement) Act, in March 2019 to enable individuals or organizations to seek compensation, or any other legal remedy for human rights violations through the regular court systems or the Uganda Human Rights Commission (UHRC),[1404] which has judicial powers under the constitution. [1405] As a UNGA member, human rights abuses perpetrated by third parties, including MOCs, can be reported to the National Contact Point in an OECD member state. Also since Uganda is an AU member, victims of human rights violations may also file complaints to the African Commission on Human and Peoples' Rights. The Ugandan government is under the obligation to respect and protect the internationally recognized human rights it's legally mandated to uphold. Fortunately, there is no statute of limitations for violations of international human rights law which constitute crimes under international law.

[1401] ICESCR, adopted on 16 December 1966 entered into force 3 January 1976 and ratified in Uganda in 1987, 993 UNTS 2
[1402] ICCPR adopted 16 December 1966 and ratified in Uganda in 1995, 999 UNTS 171
[1403] ACHPR, adopted 27 June 1981, 21 ILM 58
[1404] The Constitution of the Republic of Uganda, 1995, Article 52
[1405] EITI, 'EITI guide for legislators: How to support and strengthen resource transparency.' (2009). <http://eiti.org/files/MP_EITI_Guide.pdf> accessed on 3rd May 2019

5.5 Conclusion

The above international, regional and industry guidelines set ethical and legal compliance obligations for the State Parties regarding environmental protection and socio-economic development. Undoubtedly, Uganda's petroleum industry can contribute to the socio-economic aspects discussed in Chapter Two. Unfortunately, the industries' negative impacts are just as concerning, especially regarding their contribution to the 'Resource Curse Phenomenon.'

This thesis's overarching research question is whether Uganda's legal and regulatory frameworks adequately circumvented the 'Resource Curse Phenomenon' associated with the petroleum industry by incorporating socio-economic and environmental protection provisions within its legal framework. An assessment of the international laws' application within Uganda's national context revealed that the government had enacted several substantial prescriptive laws domesticating the international law provisions to govern its nascent petroleum industry. Notably, the provisions for EIAs, pollution control, conservation of the environment and access to information. The Government is also actively enacting new laws, amending its current national legal framework, and considering the petroleum industry concerns. However, the assessment also identified significant disparities in the State's ability or willingness to implement and enforce the enacted laws, with increasing incidences of non-compliance being reported.

CHAPTER SIX

6.0 ASSESSMENT OF BILATERAL AND MULTILATERAL INVESTMENT TREATIES GOVERNING UGANDA'S PETROLEUM INDUSTRY.

Among the identifiable sources of IPL are International Investment Treaties (IITs), which Governments of the resource-rich State (host state) sign with the Government of the Investor's home State. The aim of IITs is to attract foreign investment to promote economic development. They also provide foreign investors and their investments with certain protections, which sometimes go beyond those available to domestic investors. Such as obligations on the host state not to expropriate property, not to discriminate against the investor, and to provide 'fair and equitable' treatment to the Investor, and others. Often, IITs also permit foreign investors to directly bring legal challenges against the host State through a process known as investor-state dispute settlement (ISDS). MOCs often consider whether a prospective host State has a BIT with their home state because of the above additional guarantees for investment promotion and protection.

Concerning Uganda's petroleum industry, this chapter will assess the Uganda-Netherlands BIT as an example. The above BIT analysis hopes to answer two questions, the first being whether the terms contained in Uganda-Netherlands Bilateral Investment Treaties (BIT) correlate and complement the legal frameworks discussed in Chapters Three, Four, and Five. The second

question is whether the BIT investor-protection terms impact Uganda's pursuit of socio-economic resilience, environmental protection, and general SDGs.

6.1 Overview of International Investment Law (IIL)

IIL is the field of international law that governs relationships between states and foreign investors. It comprises of BITs signed between two States, Multilateral Trade and Economic Agreements (such as Free Trade Agreements), and Multilateral Investment Treaties (MITs) signed between multiple States (such as the Energy Charter Treaty).[1406]

IIL dates back from the post-World War II period when liberalisation of trade, international investment, and privatisation of state-owned companies accelerated economic globalisation allowing many companies to seek out investments in different jurisdictions.[1407] Since then, many Governments have concluded IITs. The early regional Treaties included the North American Free Trade Agreement (NAFTA, 1994)[1408] and sectoral agreements such as the

[1406] Peter D Cameron, *International energy investment law: the pursuit of stability* (Oxford University Press 2010) 3 -17; Emma Aisbett, *Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus Causation*. (Department of Agricultural and Resource Economics, UCB 2007); UNCTAD, "Recent Trends in IIAs and ISDS" (IIA Issues Note No. 1, February 2015) 1

[1407] The Bretton Woods Agreements Act 1962 LN. 480/1973 available at https://moj.gov.jm/sites/default/files/laws/Bretton%20Woods%20Agreements%20Act.pdf accessed on 1st May 2019; Edwin M. Truman, "17-11 The End of the Bretton Woods International Monetary System" (Peterson Institute for International Economics October 2017) available at https://www.piie.com/system/files/documents/wp17-11.pdf accessed on 3rd May 2019; Peter D Cameron, *International energy investment law: the pursuit of stability* (Oxford University Press 2010) 3 -17

[1408] North American Free Trade Agreement, 1994

Energy Charter Treaty (ECT, 1998),[1409] and Association of Southeast Asian Nations Comprehensive Investment Agreement (2009). [1410] More recent regional Treaties include the Trans-Pacific Partnership Agreement,[1411] which subsequently became the Comprehensive and Progressive Agreement for Trans-Pacific Partnership.[1412] Others include the Protocol for Cooperation and Facilitation of Intra-MERCOSUR Investments,[1413] the Pacific Agreement on Closer Economic Relations,[1414] and the Regional Comprehensive Economic Partnership Agreement[1415]. In 2018, the number of IITs was 3,317, with 2,932 as BITs.[1416]

Many IITs are negotiated and entered into with economic diplomacy being the backbone of the process.[1417] However, they still owe their origin to power asymmetries among negotiating parties, with capital-exporting States seeking to impose substantial investor protection obligations on capital-importing States for a favourable and stable legal environment.[1418] Home States attempt to de-politicise investment disputes by advocating for the inclusion of the

[1409] The Energy Charter Treaty signed in December 1994 and entered into legal force in April 1998, 2080 UNTS 95; 34 ILM 360 (1995)
[1410] ASEAN Comprehensive Investment Agreement signed 26 February 2009, entered into force 24 February 2012
[1411] Trans-Pacific Partnership Agreement, Signed 4 February 2016
[1412] Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Signed 8 March 2018, effective 30 December 2018
[1413] Protocol for Cooperation and Facilitation of Intra-MERCOSUR Investments signed 07 April 2017.
[1414] The Pacific Agreement on Closer Economic Relations (PACER) Plus, signed 2017
[1415] Emma Aisbett, et al, *Rethinking International Investment Governance: Principles for the 21st Century* (2018).
[1416] UNCTAD, Taking Stock of IIA Reform: Recent Developments (IIA issue note 3, 2019)
[1417] R Dolzer, C Schreuer *Principles of International Investment law* (Oxford University press 2008) 89-118 for an overview on expropriation see 75-78.
[1418] Emma Aisbett, et al, *Rethinking International Investment Governance: Principles for the 21st Century* (2018). 22-27

international dispute resolution forums in IITs to support their investors at arm's length. However, because most capital-importing countries desperately need to boost their economy, they are often eager to attract foreign direct investment (FDI), even if it means entering into restrictive BITs. [1419] Unfortunately, this places them in a weaker position while negotiating IITs.[1420]

6.2 Uganda's BIT Concerning the Petroleum Industry

Uganda has BITs with only 17 foreign countries.[1421] Concerning the petroleum industry, the relevant BITs include the Nigeria-Uganda BIT (signed on 15 January 2003 but not in force), the China-Uganda BIT (signed on 27 May 2004 but also not in force),[1422] the Uganda-France BIT (signed on 03 January 2003 and entered into force on 20 January 2004),[1423] and the Netherland-Uganda BIT (signed on 30th May 2000 and entered into force on 01 January 2003).[1424]

BITs usually enter into force when both parties agree to be bound as of a specific date.[1425] The vast majority of BITs condition the entry into force of the

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[1419] Ibid

[1420] Refer to Chapter Four, Section 4.2

[1421] UNCTAD, International Investment Agreements: Uganda, https://investmentpolicy.unctad.org/international-investment-agreements/countries/218/uganda> accessed on 20 November 2016

[1422] UNCTAD, Agreement Between the Government of The People's Republic of China and The Government of The Republic of Uganda on The Reciprocal Promotion and Protection of Investments 2004.

[1423] UNCTAD, Agreement Between the Government of The Republic of France and The Government of The Republic of Uganda on the Reciprocal Promotion and Protection of Investments, 2003

[1424] Agreement on encouragement and reciprocal protection of investments between the Republic of Uganda and the Kingdom of the Netherlands 2000 (entered into force 01 January 2003) (Uganda-Netherlands BIT)

[1425] UNCTAD, 'The Entry into Force of Bilateral Investment Treaties (BITs)' (2006) UNCTAD/WEB/ITE/IIA/2006/9

agreement to the completion of the domestic requirements for such entry into force (which often means ratification by the national parliaments).[1426] In most cases, the treaty becomes effective after the contracting parties have notified each other that they have met these requirements. Without entering into force, BITs cannot fulfil their intended role as legally binding instruments to promote and protect foreign investment.[1427]

This chapter analyses the Uganda-Netherland BIT,[1428] mainly because both Total Energies and CNOOC, being French and Chinese companies respectively, chose to incorporate subsidiaries in the Netherlands, and subsequently register those subsidiaries with the URSB to operate in Uganda.[1429] CNOOC probably did this because the China-Uganda BIT is not in force, and it needed to take advantage of the BIT protections on offer.[1430] Total Energies did not rely on the France-Uganda BIT. The next section explains why these the MOCs chose to use the Netherlands BIT and not their own country's BIT.

Similarly, Uganda does not have a BIT with Australia, but Tullow and Armour operate under their Australian registered subsidiaries. At the same time, Oranto, being a Nigerian Company, did not consider that Uganda has not

[1426] Ibid
[1427] Ibid
[1428] Ibid
[1429] Refer to Chapter Three, Section 3.4
[1430] Ian Meredith, et al, *Investment Treaties: Taking Advantage of The Protections on Offer* (Graham LLP, 2006)

consented to be bound by the Nigeria-Uganda BIT. However, all MOCs enjoy the investor-protective measures negotiated in their respective PSAs.[1431]

6.3 Analysis of the Key Terms in Uganda- Netherlands BIT

In general terms the Uganda-Netherlands BIT provided for strengthening traditional ties of friendship, encouragement and reciprocal protection of investments by investors from either country.[1432] Its main goal was to stimulate the flow of capital, technology and economic development fairly and equitably, carefully avoiding impairing by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment, or disposal by those investors.[1433] It also provided for dispute settlement mechanisms, repatriation of capital, profits, other assets, and the favourable treatment of foreign investments.[1434]

6.3.1 Definition of Investor.

The Uganda-Netherland BIT defines an Investor as either a natural or legal person of the Netherlands or legal persons controlled, directly or indirectly, by natural persons of the Netherlands:[1435] These are the only kind of Investors eligible for protection under the Treaty. This definition in the Uganda-Netherland BIT is wide enough to allow investors from other countries to incorporate an entity in the Netherlands to benefit from the Treaty provisions

[1431] Refer to chapter Four, section 4.3
[1432] Uganda-Netherlands BIT Article 1
[1433] Uganda-Netherlands BIT Article 3
[1434] Ibid
[1435] Uganda-Netherlands BIT Article 1

even without any substantive business activity or management control in the contracting State. There are two main criteria, and one alternative criterion are used in BITs to determine nationality, that is the place of incorporation, head office and control.

6.3.1.1 The Place of Incorporation Criterion

Article 1 of the Uganda-Netherland BIT uses incorporation as the sole criterion in its BITs. States adopt this criterion when they wish to encourage the establishment of companies in their territory without concerning themselves with the fact that those companies carry out cross boarder business activities. This is the case, for example, of the Netherlands, which is frequently used as the country of incorporation by investors wishing to do some treaty shopping. In effect, the Netherlands has signed 107 BITs around the world, mainly with developing countries. As such, it increases opportunities for an investor company in France or China in this case to find a BIT between that State and the Netherlands. It is therefore very easy to create a subsidiary under Netherlands law that will be protected by the Netherlands' BITs.

There are numerous other reasons why Total Energies and CNOOC incorporated holding companies in the Netherlands. The first is that the Netherlands is among the EU's most politically stable and pro-business governments and offers a conducive business environment and a beneficial tax regime.[1436] Additionally, a Dutch BV company is fast and easy to form,

[1436] Roelof Gerritsen, Ivo Kuipers, 'The post-BEPS advantages of the Netherlands' *International Tax Review* (25 January 2017)

control and close down. [1437] The Netherlands provides legal security of ownership (money, assets, real estate) for the company's assets. [1438] It has a robust financial sector, business climate, and a superior infrastructure, a highly esteemed education system, a multilingual workforce, and also offers an excellent quality of life.

Lastly, the Netherlands also has a Double Taxation Treaty (DTT) with Uganda,[1439] and the Uganda- Netherlands BIT explicitly includes taxation matters within the Treaty's effects. [1440] That notwithstanding, Uganda's Income Tax Act restricted the benefits of a Double Tax Treaty to only nationals of the contracting State who have "*economic substance in the country of residence.*"[1441] It did this to reduce treaty shopping and tax avoidance by the taxpayer claiming to rely on the DDT. The Income Tax Act was also amended in 2015[1442] to provide for provisions for taxation of petroleum operations. The tax provisions are beyond the scope of study in this thesis.

6.3.1.2 The Head Office and Control Criterion

The head office refers to the place from which the company is actually managed.[1443] It is either the place of residence of the board of directors or the

[1437] Ibid
[1438] Ibid
[1439] Convention Between the Kingdom of The Netherlands And the Republic of Uganda for the Avoidance of Double Taxation and The Prevention of Fiscal Evasion with Respect to Taxes on Income. (2006)
[1440] Uganda- Netherland BIT Article 4
[1441] Income Tax Act Cap 340 2000 (Amendment included in 2011) Section 88(5), 6 and Part X
[1442] Income Tax (Amendment) Act 2015 Section 89A- 89QD, Third Schedule, Part IX; Tax Procedure Code Act Section 50, 60, 63-65, 67, Part XIV
[1443] Suzy H. Nikièma, *Best Practices Definition of Investor* (2012) 11- 13; Germany–Burkina Faso BIT (1962), Article 1.4.b

place where the managerial meetings are held and decisions made. The head office criterion therefore requires that, in order to acquire the nationality of a State, management or central administration of a company should effectively occur in the territory of that State.[1444] On the other hand when applying the Control criterion, the company will hold the nationality of the persons which control it, that is the principal shareholders.[1445] This criterion leads to a "piercing of the corporate veil" of a company, for the purpose of considering the members which constitute it. It has the advantage of revealing the "true" nationality of the company capital.[1446]

6.3.1.3 Treaty Shopping

Investment treaties are formally preferential instruments, protecting only the contracting parties' investments, such that having a vague definition of Investor can encourage the issue of "treaty shopping."[1447] It appears that CNOOC and Total Energies strategically incorporated in the Netherlands, even though their parent companies are from China and France respectively, and both countries have BITs with Uganda.

[1444] Ibid
[1445] Ibid
[1446] Ibid
[1447] Gio Wiederhold, *Valuing Intellectual Capital, Multinationals and Tax Havens* (Springer Verlag, 2013) Chap 4

Arbitral tribunals have generally allowed the practice of treaty shopping,[1448] subject to narrowly defined exceptions. The case of *Philip Morris Asia Limited vs Australia*[1449] exemplifies the temptations of treaty shopping. In November 2011, Australia enacted the Tobacco Plain Packaging Act. Until February of 2011, Philip Morris Australia had been owned by its Swiss parent, Philip Morris International. However, Philip Morris Asia, based in Hong Kong, suddenly acquired all of the shares of Philip Morris Australia so that it could file an investor complaint against Australia. As a result of the acquisition, Philip Morris was able to rely on the Hong Kong-Australia BIT to assert investor rights and claim that the regulation affected its investment, Phillip Morris Australia. Without shifting its investment, Phillip Morris would not have challenged the Australian regulation because there is no BIT between Switzerland and Australia. The strategy was not successful when the Tribunal found that Phillip Morris' hasty restructuring to avail itself of Hong Kong-Australia BIT constituted an abuse of process.

Nevertheless, the Tribunal in this case and others[1450] seem to have converged around the view that it is "*uncontroversial that the mere fact of restructuring an*

[1448] *Mobil Corporation, Venezuela Holdings B.V. and others v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010; Multilateral Investment Guarantee Agency, 'Industrialized countries' policies affecting foreign direct investment in developing countries,' (Washington DC: World Bank 1991) Vol I.
[1449] *Philip Morris Asia Limited (Hong Kong) v The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, (Award 17 December 2015) 540, Award on Jurisdiction and Admissibility; Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments, dated 15 September 1993.
[1450] Ibid n 1321

investment to obtain BIT benefits is not per se illegitimate." [1451] However, as the Philip Morris case demonstrates, such treaty shopping may not be permitted if done to gain treaty protection to resolve a specific dispute that has already arisen or is foreseeable. Australia also had to bear excessive costs, not covered by the Investor, for defending the case.

In *Heritage Oil & Gas Limited v Uganda Revenue Authority*[1452], Heritage contested the $400m Capital Gains tax bill that the URA had assessed to transfer its petroleum Licence to Tullow. The Court held that the Income Tax Act[1453] required that the company pay capital gains tax on the transaction. While the URA eventually succeeded in taxing capital gains after multiple appeals,[1454] Heritage, a Jersey incorporated company, attempted to re-domicile in Mauritius because Mauritius has a double-tax agreement Uganda that exempts charging any Capital Gains Tax on the sale of assets.[1455] The attempt to redomicile was unsuccessful, and as earlier discussed, this prompted the Government amend the Income Tax Act in 2015, to restrict exemptions to only nationals with economic substance in the contracting State.

[1451] Ibid n 1322; Allen and Overy, Restructuring business to take advantage of investment treaty – a cautionary tale (*Allen & Overy Litigation and Dispute Resolution Review* 26 July 2016)
[1452] *Heritage Oil and Gas Ltd v Uganda Revenue Authority [2011] UGCOMMC 97*
[1453] Income Tax Act, (Cap 340) 2000
[1454] *Tullow Uganda Ltd v Heritage Oil and Gas Ltd & Anor* [2013] EWHC 1656 (Comm); The New Vision, "Tullow Oil wins case against Heritage" 2013 https://www.newvision.co.ug/new_vision/news/1323045/tullow-oil-wins-heritage; The New Vision, "Tullow case: Judge clears company of bribery allegations hails Peter Kabatsi" 2013 available at https://www.newvision.co.ug/new_vision/news/1323057/tullow-judge-clears-company-bribery-allegations-hails-peter-kabatsi; *Andrew M. Mwenda*, "Tullow's Alleged Bribe to Museveni" (The Independent, 2013) available at https://allafrica.com/stories/201304011031.html accessed 10 may 2017.
[1455] BBC Panama Papers, "How Jersey-based oil firm avoided taxes in Uganda", 8 April 2016 https://www.bbc.co.uk/news/world-africa-35985463

6.3.1.3.1 Recent Developments in Definition of Investor

The definition in the Uganda-Netherland BIT is wide enough to allow investors from other countries to incorporate an entity in the Netherlands to benefit from the Treaty provisions even without any substantive business activity or management control in the contracting State. The restrictions and specifications included in certain treaties signed relatively recently tend to curtail the extension of BIT coverage to unintended investors. In order to resolve potential conflicts in the case of dual nationality, some BITs already include a specific clause on this matter. For example, the United States–Uruguay BIT[1456] states that "*investor of a Party means ..., a national ... of a Party, ...; provided, however, that a natural person who is a dual national shall be deemed exclusively a citizen of the State of his or her dominant and effective citizenship*". The solution proposed means that, in the case of dual nationality, the investor shall, in practice, only be able to use his or her effective nationality in the context of an international arbitration process pursuant to a BIT.[1457]

In order to reduce the practice of treaty shopping, recent clauses have used the requirement for genuine close links between the investor and the State of their nationality, aside from the standard criteria of incorporation or head office. For example, the Gabon–Belgium BIT[1458] defines a national of a State party as "*any legal person incorporated in accordance with the legislation of one of the*

[1456] United States–Uruguay BIT (2005) Article 1; Canada–Lebanon BIT (1997), Article 1
[1457] Hague Convention of April 12, 1930 pertaining to legal conflicts on nationality, Article 5
[1458] Gabon–Belgium BIT (1998) Article 1.2.b; Cameroon–China BIT (1997), Article 1.3 ; Belgium–Benin BIT (2001), Article 1.b ; France–Nigeria BIT (1990), Article 1.3

contracting States which has its head office in the territory of that State…." This means that companies would need to establish its head office in the place in which it was incorporated and not just a mere "mailbox" subsidiary company. Other treaties require that incorporation and head office criterion be accompanied with significant business activity and include the Denial Clause both of which will be discussed below.

6.3.1.3.1.1 The Concept of Substantive Business Activity in BIT Contracting States

Some treaties now require that that the investor have substantial business activities either in the territory of the host state, or in the home state or other states in order to pass the test in determining the legal entity/company as an investor.[1459] For example, the Colombia–Switzerland BIT[1460] defines investors as "*legal entities….. which are constituted or … organised under the law of that Party and have their seat, together with real economic activities, in the territory of the same Party*."

More notable the 2019 Netherland Model BIT elaborated on the meaning of the concept in Article 1(c) which states that

> "*Indications of having 'substantive business activities' in a Contracting Party may include: (i) the undertaking's registered office and/or administration is established in that Contracting Party; (ii) the undertaking's headquarters and/or*

[1459] A C Sinclair, *The Substance of Nationality Requirements in Investment Treaty Arbitration*, (20, ICSID Review-FILJ 2, 2005) 388; Czech Republic–China BIT (2005) Art. 1.2.b ; Germany–Algeria BIT (1996), Article 1.4; Burkina–Chad BIT (2001) , Article 1.2.b

[1460] Colombia–Switzerland BIT (2006) Article 1.2.b

management is established in that Contracting Party; (iii) the number of employees and their qualifications based in that Contracting Party; (iv) the turnover generated in that Contracting Party; and (v) an office, production facility and/or research laboratory is established in that Contracting Party"

Here we have the strictest definition regarding the investor's nationality. Dutch companies will in effect have to satisfy the above cumulative criteria in order to claim the nationality of a signatory State, and enjoy the benefits and protections derived from the BIT.

6.3.1.3.1.2 The Denial of Benefits Clause

In some instances, Denial of Benefits clauses are included in BITs to deny the protections of the treaty to certain categories of investors that the treaty did not intend to protect.[1461] Thereby allowing States to pre-emptively avoid claims by investors they did not intend to protect and to "*counteract strategies that seek the protection of particular treaties by acquiring a favorable nationality*."[1462] Thereby, investors who formally satisfy the definition of "Investor," yet have no real economic connection with the home State, are excluded from the treaty benefits, thus contributing to the developmental goals underpinning an

[1461] L Gastrell, PJ Le Cannu, Procedural Requirements of 'Denial of Benefits' Clauses in Investment Treaties: A Review of Arbitral Decisions, ICSID Review, Vol. 30, Issue 1, 2015; M Feldman, Chapter 33: Denial of Benefits after Plama v. Bulgaria, in M Kinnear, G R Fischer et al. (eds), *Building International Investment Law: The First 50 Years of ICSID*, 2015, 465; *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005 SCC, Final Award, 26 March 2008, para.61

[1462] R Dolzer, C Schreuer, *Principles of International Investment Law*, (Oxford University Press, 2012) 55.

investment treaty. In the case of *Hulley Enterprises vs. Russia*[1463] the tribunal noted that "*Investment treaties with a broad definition of the term 'investor' often contain a 'denial of benefits clause', with which the protection of the treaty is denied to certain categories of investors, for example investors who do not engage in any significant business activities in the country of which they are nationals. States can address abuse through such a clause; treaty shopping through sham companies can be countered.*"

Commonly, denial of benefits clauses aim to deny benefits to an investor if the conditions stipulated in the denial of benefits clause are met and are an element of the contracting party's conditional consent to arbitration.[1464] These conditions are contingent on the exact language or wording of the treaty clause. In *Guaracachi v. Bolivia*[1465] the tribunal noted that "*Whenever a BIT includes a denial of benefits clause, the consent by the host State to arbitration itself is conditional and thus may be denied by it, provided that certain objective requirements concerning the investor are fulfilled. All investors are aware of the possibility of such a denial, such that no legitimate expectations are frustrated by that denial of benefits.*

Most common forms permit a State to trigger the denial of benefits if the investor falls under one of the following categories: Entities owned or controlled[1466] by a third non-contracting party to the treaty at stake with no

[1463] *Hulley Enterprises Ltd. v. Russian Federation*, PCA Case No. 2005-03/AA226 Judgment of the Hague Court of Appeal (Unofficial English Translation) - 18 Feb 2020, 5.1.8.2 .
[1464] *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, PCA Case No. 2011-17, Award, 31 January 2014, para.372
[1465] *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, PCA Case No. 2011-17, Award, 31 January 2014, para.372
[1466] *Hope Services LLC v. Republic of Cameroon*, ICSID Case No. ARB/20/2 CIRDI, Sentence, 23 December 2021, para.105

substantial activity in the home State.[1467] The "*materiality, not the magnitude*" is typically decisive in determining "*substantial business activity*."[1468] The activity of the "enterprise" and not the group of claimant's companies is determinative.[1469] Entities owned by a national of a State that does not have diplomatic relations with the host State;[1470] Entities owned by nationals of the host State.[1471] Most treaties, entitle the denying State to unilaterally invoke the denial of benefits clause, with minor variances for example, the requirement for prior notification or consultation.[1472] However, Some treaties require mutual consent of the States to invoke the denial of benefits clause.[1473] The burden of proof to establish the conditions necessary to deny benefits in the

[1467] *Yukos Capital SARL v. The Russian Federation*, PCA Case No. 2013-31 PCA, Interim Award on Jurisdiction, 18 January 2017, para.545; Free Trade Agreement between Canada and Colombia Adopted on 21 November 2008, Article, 814; Agreement for the Reciprocal Promotion and Protection of Investments between the Argentine Republic and the United Arab Emirates, Adopted on 16 April 2018, Article, 13

[1468] *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005 SCC, Final Award, 26 March 2008, para.69 The tribunal in *Amto v Ukraine* (an ECT case under SCC Rules) held that "substantial" does not mean "large"; it means "of substance, and not merely of form"', and that it is the "materiality not the magnitude of the business activity [that] is the decisive question"

[1469] *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12 ICSID, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, para 4.66

[1470] Treaty between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment, adopted on 19 February 2008, entered into force 1 January 2012, Art. 17; Agreement between Japan and the Islamic Republic of Iran on Reciprocal Promotion and Protection of Investment, adopted 5 Feb 2016, entered into force 26 Apr 2017, Article 12

[1471] *Red Eagle Exploration Limited v. Republic of Colombia*, ICSID Case No. ARB/18/12 ICSID, Decision on Bifurcation, 3 August 2020, para.64; GCM Mining Corp. (formerly Gran Colombia Gold Corp.) v. Republic of Colombia, ICSID Case No. ARB/18/23 ICSID, Decision on the Bifurcated Jurisdictional Issue, 23 November 2020, para.133

[1472] *Hope Services LLC v. Republic of Cameroon*, ICSID Case No. ARB/20/2 CIRDI, Sentence, 23 December 2021, paragraphs 106, 120, 127, 128, 129, 131, 132, 144, 145, 146.

[1473] APEC and UNCTAD, "Flexibilities and General Exceptions (Denial of Benefits)", International Investment Agreement Negotiators Handbook: APEC/ UNCTAD Modules (2012), pp. 105-108; *Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, BSS-EMG Investors LLC and David Fischer v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11 ICSID, Decision on Jurisdiction, 1 February 2016, para.147

meantime typically lies on the respondent State,[1474] although several tribunals have ruled otherwise.[1475]

Long before any disputes arise and arbitral proceedings are initiated,[1476] the Uganda's BITs would benefit from the inclusion of the Denial Clause in order to establish the much needed "*predictable legal framework for investments*." It also works to preserve reciprocity by restricting the treaty benefits to investors of the States that accepted the reciprocal treaty obligations.[1477] As well as combatting treaty shopping discussed in section 6.3.1.3, by investors that structure their investment simply to gain access to treaty protections without having substantive operations in the home State.[1478]

[1474] *Hope Services LLC v. Republic of Cameroon*, ICSID Case No. ARB/20/2 CIRDI, Sentence, 23 December 2021, para 117; *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12 ICSID, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, para.4.92; *Ulysseas, Inc. v. The Republic of Ecuador*, PCA Case No. 2009-19 PCA, Interim Award, 28 September 2010, para.166, para.170

[1475] *Bridgestone Americas, Inc. and Bridgestone Licensing Services, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34 ICSID, Decision on Expedited Objections, 13 December 2017, para.289; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24 ICSID, Award, 27 August 2008, para.89

[1476] *Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, BSS-EMG Investors LLC and David Fischer v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11 ICSID, Decision on Jurisdiction, 1 February 2016, para.167, para.168; *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1 ICSID, Award, 16 May 2018, para.239

[1477] L A Mistelis, C Baltag, '*Denial of Benefits' clause in Investment Treaty Arbitration*, (Queen Mary University of London, School of Law, 2018) 1-2; Elena Bertola, Mohammed Bashir and Maria Florencia Sarmiento, "Denial of Benefits", New Generation IAA's: A Negotiators Handbook (2019)

[1478] APEC and UNCTAD, "Flexibilities and General Exceptions (Denial of Benefits)", International Investment Agreement Negotiators Handbook: APEC/ UNCTAD Modules (2012) 105-108

6.3.1.4 Parent companies' liabilities for their subsidiary's actions

Corporate governance is the way a company is organised, managed, and controlled. Considering the intricate corporate structures of the MOCs discussed earlier,[1479] it is not public knowledge how much time the parent company spends on overseeing the activities of the subsidiaries business and risks. However, the author assumes that because the MOCs parent companies have the financial capability and technical expertise in petroleum exploration and production process, they are therefore involved in approving the subsidiaries actions or spending.

The current intricate corporate structure of the MOCs is advantageous in limiting the Parent companies' liabilities for their subsidiary's actions, since both companies maintain separate legal personality or identities, except if the subsidiary is acting as an agent of the holding company.[1480] The Zero Draft Treaty posits a standard of legal responsibility of one company in relation to the harm caused by another company, no matter where the latter is located, when the former company controls or supervises the activities that caused the harm.[1481] The Ruggie Framework also noted that there was a challenge of

[1479] Refer to Chapter one, section 1.3.4.1.3

[1480] UK Companies Act 2006 c 46, section 3, 4, 136, 138; Corporations Act 2001 (Cth)

[1481] OEIGWG, *Second Revised Draft of a Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises*. (2020) Article 6 (6) <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf> Accessed on 2nd February 2022

providing effective remedies for victims, particularly with judicial remedy to victims of transnational corporations that operate in more than one state, but also failed to recognise the power imbalance in terms of resources and information between victims of corporate abuse and the businesses themselves, which perpetrates the injustice.

Where victims of abuse by multinational corporations routinely face insurmountable obstacles to remedy in the host state and are unable to differentiate between the parent company and the subsidiary and feel that they have no other place to turn for help. If companies are not going to get meaningful human rights oversight from the governments of the countries in which they operate, they need to get it somewhere else. Perhaps the victims should be able to sue subsidiary and perhaps the parent company in their home state. Where the justice system is a lot more transparent and efficient.

In *Okpabi vs Royal Dutch Shell Plc (RDS) and Shell Petroleum Development Company (SPDC),*[1482] the plaintiff petitioned the UK court to hold the parent company RDS liable for environmental damage caused by its subsidiary SPDC for oil spillages in Nigeria. Court of Appeal ruled that there was insufficient evidence that RDS exercised a high degree of oversight, control, or direction over SPDC. Therefore, the parent company had no legal responsibility for pollution by its Nigerian subsidiary. The Court addressed the circumstances

[1482] O*kpabi and others (suing on behalf of themselves and the people of Ogale Community) v. Royal Dutch Shell Plc and another UKSC 2018/0068; Alame and others v Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Limited (SPDC),* [2018] EWCA Civ 191; *Caparo v Dickman [1990] 2 AC 605, [1990] 1 All ER 568*; *AAA and others v. Unilever Plc* [2017] EWHC 371 QB

in which a parent company will owe a duty of care and be liable for damages arising from its overseas subsidiaries' actions.

These include where the parent company has taken direct responsibility for devising a material health and safety policy and the adequacy of the claim's subject. Also, where it controls the operations which give rise to the claim. Where both parent and subsidiary have similar knowledge and expertise, and they jointly make decisions about the relevant operations, which the subsidiary implements. Based on these aspects, the question before court was whether the UK Courts had preliminary jurisdiction to hear the case. Court of Appeal held that it did not have jurisdiction to hear the case. Okpabi filed an appeal to the above decision to Supreme Court on in July 2019. The Court heard the matter on 23 June 2020 and a decision was reached on 12 February 2021[1483] overturning the Court of Appeal's decision and that the case could now proceed to trial on the substantive merits in the UK. The Supreme Court determined that appellants have a real chance of success in holding the parent company liable for its subsidiary's actions in Nigeria. This decision reaffirms the earlier Supreme Court's decision in *Lungowe vs Vedanta Resources,*[1484] which allowed the case to proceed in London on the question of jurisdiction. These two cases show a willingness for the UK courts to entertain litigation

[1483] Amnesty International, "Okpabi and others vs Royal Dutch Shell plc and another UKSC 2018/0068: Rule 15 submission to Supreme Court of the United Kingdom by Amnesty International" (2018); O*kpabi and others (suing on behalf of themselves and the people of Ogale Community) v. Royal Dutch Shell Plc and another* [2021] UKSC 3

[1484] *Lungowe and Others v. Vedanta Resources Plc and Konkola Copper Mines Plc* [2017] EWCA Civ 1528, [2017] All ER (D) 102 (Oct); *Lungowe and Others v. Vedanta Resources Plc and Konkola Copper Mines Plc* [2019] UKSC 20

based on factual occurrences in other jurisdictions and to accept the liability of parent companies for actions of their subsidiaries in appropriate circumstances demonstrating the necessary duty of care to the claimants.

It is noteworthy that Netherlands's 2019 model BIT also now incorporates provisions like corporate environmental and social responsibility,[1485] the possibility of claims against the Investor in their home state, gender equality, protection of human rights, and the requirement for substantive business activities, among others.[1486] The author also notes that holding the parent company directly responsible for the subsidiaries' tortious actions does not subvert corporate law's separate legal personality and corporate veil principles.[1487]

6.3.2 Definition of Investment

The Uganda-Netherlands BIT defines the term "investments" "*as every kind of movable and immovable asset, shares, bonds, and other kinds of interests in companies and joint ventures. As well as title to money, to other assets or performance with economic value, intellectual property, technical processes, goodwill and know-how, rights granted under public law or contract, including rights to prospect, explore, extract and win natural resources.*"[1488]

The Clause does not exclude portfolio investment, other specific assets (sovereign debt, ordinary commercial transactions). It does not list the

[1485] Netherlands model Investment Agreement 22 March 2019 Article 7
[1486] Netherlands model Investment Agreement 22 March 2019 Article 6
[1487] *Salomon* v *A Salomon and Co Ltd* [1896] UKHL 1, [1897] AC 22
[1488] Uganda-Netherlands BIT, Article 1

required characteristics of an investment, nor does it set out an exhaustive list of covered assets. It also does not contain "*in accordance with host State laws*" requirement. Therefore, the clause covers a broad range of 'investments,' including those providing limited or non-existent benefits to the host country, and in which investors assume little to no risk.

The extent to which such anticipated profits should be protected from various government action becomes a contentious issue. Such definitions blur the line between investment and business traders because it includes international subcontractors like Schlumberger Eastern Oil Field Ltd, Baker Hughes that established operations in Uganda's petroleum industry.

6.3.2.1 The Recent Development in the Definition of Investment

The question that arises is whether BITs cover all forms of cross-border business. Treaties concluded in the last three years apply directly into their definitions of 'investment' the Salini test, established by the tribunal in *Salini* v *Morocco.*[1489] It requires that the alleged investment satisfy four criteria to be considered an "investment"; a contribution; a specific duration; a risk; and a contribution to the host State's economic development.[1490] They also apply several clauses set out in UNCTAD's Investment Policy Framework for

[1489] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* [I], ICSID Case No. ARB/00/4

[1490] A Martin, *Definition of 'Investment': Could a Persistent Objector to the Salini Tests Be Found in ICSID Arbitral Practice?* (Global Jurist, 2011)

Sustainable Development,[1491] follow UNCTAD's Road Map for IIT.[1492] These set out five action areas: safeguarding or preserving the right to regulate while providing protection; reforming investment dispute settlement; promoting and facilitating investment; ensuring responsible investment and enhancing systemic consistency.

Concerning responsible investment, the India Model BIT (2015) narrows the traditionally broad definition of a protected investment by stating that it covers "enterprises" such as subsidiaries established in the host country by a foreign parent company.[1493] The India Model BIT further narrows the scope of covered investments by identifying specific characteristics that investments should possess, such as the investment has to have considerable significance for the host state's development. The Uganda- United Arab Emirates BIT (2017), Belarus–India BIT, Lithuania–Turkey BIT concluded from 2018[1494] include clauses that limit the treaty scope by excluding certain types of assets from the definition of investment such as debt securities in, or loans to, a company.[1495]

[1491] UNCTAD, *Investment Policy Framework for Sustainable Development* (2015); UNCTAD, *World Investment Report 2012: Towards a New Generation of Investment Policies* (2012)
[1492] UNCTAD, *Reform Package for the International Investment Regime* (2018).
[1493] Grant Hanessian, Kabir Duggal, 'The Final 2015 Indian Model BIT: Is This the Change the World Wishes to See?' (2017) 32(1) *ICSID Review-Foreign Investment Law Journal*, 216–226
[1494] UNCTAD 2015 (n 1491); UNCTAD, *Taking Stock of IIA Reform: Recent Developments* (IIA issue note 3, 2019)
[1495] Ibid

6.3.3 Standard of Treatment Terms in the BIT

6.3.3.1 National Treatment Obligation (NT)

The Uganda-Netherlands BIT provides that the Ugandan Government treat Dutch companies' or their investment in the same manner as Ugandan companies' or their investment.[1496] That Uganda should not treat Dutch investors (post-establishment) less favourably than a domestic investor in matters of taxes, fees, charges, fiscal deductions, and exemptions.[1497] One regularly cited justification for the inclusion of such a National Treatment obligation clause within BITs is that it would be able to level the playing field by redressing any discrimination against foreign investors favouring domestic companies.[1498]

The National Treatment standard usually applies only to investments and investors "in like circumstances".[1499] The 1993 OECD declaration stated that "*likeness*" effectively meant the "*same sector*".[1500] That exceptions to NT obligation included investments by established foreign-controlled companies, official aids and subsidies, tax obligations, access to local bank credit and the capital market, and government procurement.[1501] Even though the Uganda-Netherland BIT does refer to '*in the same circumstances*', it could benefit from

[1496] Uganda-Netherland BIT Article 3 (2)
[1497] Ibid
[1498] R Dolzer, C Schreuer *Principles of International Investment law* (Oxford University press 2008) 89-118 for an overview on expropriation see 75-78; Peter D Cameron, International Energy Investment Law: The Pursuit of Stability (Oxford University Press 2010) 3 -178
[1499] *ADF Group Inc* Vs *United States of America, ICSID* Case No. ARB(AF)/00/1 (Final Award of Jan. 9, 2003).
[1500] OECD, *National Treatment for Foreign Controlled Enterprises*, (1993)
[1501] Ibid

specifying or clarifying that it related to investments in the same sector, this would distinguish any favourable treatment accorded to Ugandan manufacturing or construction companies and not Dutch mining or petroleum exploring companies.

Uganda-Netherland NT obligation enables foreign Investors to challenge Government measures that they perceive discriminatory in favour of domestic individuals and entities. For example, if the Government restricted foreign-owned companies from total or partial engagement in specific sectors, owning land, getting tax incentives or subsidies, and any other privileges it offers to domestic companies. There are numerous examples where investors have sought compensation claiming indirect discrimination based on the Host Governments' decision to enact new local content requirements,[1502] more stringent environmental regulations,[1503] terminated investment contracts for a public interest,[1504] revoked or decided not to grant permits authorising investors' operations,[1505] or made changes to its fiscal regime changes.[1506]

[1502] *Mobil Investments Canada Inc. v. Canada*, ICSID Case No. ARB/15/6

[1503] *Glamis Gold vs. United States*, 2003 Award (concerning claims that denial of gold mining permits for environmental and cultural reasons breached the NAFTA standards of treatment); *Lone Pine Resources Inc. v Canada ICSID Case No. UNCT/15/2*

[1504] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. the Republic of Ecuador* (II) ICSID Case No. ARB/06/11, Award, 1 July 2004, paragraphs 180-92, 185-186, 190-191

[1505] *The Renco Group, Inc. v. The Republic of Peru*, ICSID Case No. UNCT/13/1; *Gold Reserve Inc. v Bolivarian Republic of Venezuela, ICSID Case No. A.R.B. (A.F.)/09/1*; *Pac Rim Cayman L.L.C. v El Salvador, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, para. 2.99*; *Clayton and Bilcon of Delaware Inc. v. Government of Canada* [2009] PCA 04 Award on Jurisdiction and Liability, 17 March 2015

[1506] *Occidental v. Ecuador* (n 1504) The FET obligation enables review of the correctness of domestic court and/or administrative determinations, and requires "stability and predictability" and "certainly entails an obligation not to alter the legal and business environment in which the investment has been made"; *Perenco Ecuador Limited v Ecuador,*

In *Bilcon* vs *Canada*[1507], the Arbitration Tribunal concluded that Canada had breached its national treatment obligations towards the American Investor by treating Bilcon's EIA process less favourably than the treatment afforded to domestic investors. The Tribunal found that Bilcon did not have to prove that Canada's departure from national treatment obligation expressly showed that it was due to Bilcon's nationality if they perceived it as such. Parties to BITs can help reduce uncertainty and enhance predictability for investors, contracting parties, and tribunals by narrowing National Treatment Clause's interpretation. Uganda-Netherland BIT might also benefit from adding a reference to "*like circumstances*" to limit the current BIT clause's broad interpretation.

6.3.3.1.1 The Recent Development in the Interpretation of National Treatment Obligations

Since the launch of UNCTAD's options for IIT Reform,[1508] a growing number of countries have taken steps to issue joint interpretative declarations that clarify any vague and ambiguous clauses within their existing IITs that impeded their pursuit of sustainable development. [1509] They have also established joint bodies in their IITs with a mandate to issue binding interpretations of treaty provisions.[1510] For example, in 2018, Colombia and

ICSID Case No. A.R.B., Decision on Remaining Issues of Jurisdiction and on Liability, 12 September 2014.

[1507] *BBilcon of Delaware et al. v Canada*, (PCA 2009-04) Award on Jurisdiction and Liability, 17 March 2015

[1508] UNGA, *World Investment Report 2017: Investment and Digital Economy*. (2017)

[1509] Ibid

[1510] Ibid

India signed a joint interpretative declaration on their 2009 BIT.[1511] It refines vital clauses found in the 2009 treaty to reflect sustainable development objectives, strengthen the parties' right to regulate in the public interest, and clarify the provisions on FET, expropriation, national treatment, most-favoured-nation treatment and ISDS. In the last three years, Bangladesh-India (2009), Australia–Peru FTA (2018) and Colombia-France (2014), CPTPP (2018), the EU–Singapore IPA (2018) and many other countries have now signed similar joint interpretative declarations on their BITs.[1512] Netherlands's 2019 model BIT also requires that parties establish a joint body with a mandate to issue binding interpretations of treaty provisions.[1513] It also incorporates provisions like corporate environmental and social responsibility,[1514] the possibility of claims against the Investor in their home state, gender equality, protection of human rights, and the requirement for substantive business activities, among others.[1515]

[1511] Press Information Bureau Government of India Cabinet, Cabinet approves Joint Interpretative Declaration between India and Colombia regarding the Agreement for the Promotion and Protection of Investments signed on November 10, 2009 <https://mea.gov.in/Portal/LegalTreatiesDoc/CO18B3453.pdf> accessed on 4th November 2019

[1512] UNCTAD, Recent Policy Developments and Key Issues, 2018; Eduardo Zuleta, María Camila Rincón (Zuleta Abogados), Colombia's Constitutional Court Conditions Ratification of the Colombia-France BIT to the Interpretation of Several Provisions of the Treaty, July 4, 2019, <http://arbitrationblog.kluwerarbitration.com/2019/07/04/colombias-constitutional-court-conditions-ratification-of-the-colombia-france-bit-to-the-interpretation-of-several-provisions-of-the-treaty/> accessed on 5th November 2019

[1513] UNCTAD, Recent Policy Developments and Key Issues, (2018) 99

[1514] Netherlands model Investment Agreement 22 March 2019 Article 7

[1515] Netherlands model Investment Agreement 22 March 2019 Article 6

6.3.3.2 Fair and Equitable Treatment (FET) Obligations

The Uganda-Netherlands BIT requires that the Ugandan and Dutch Governments should "*ensure fair and equitable treatment of the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors. Each Contracting Party shall accord to such investments full physical security and protection.*"[1516] Investment tribunals have interpreted this right to include a right to a "*stable and predictable regulatory environment*" that does not frustrate investors' "*legitimate expectations*".[1517] It bears similar intent to the stabilization clauses in the PSAs.[1518] If those expectations are not met, FET terms allow investors to seek compensation from the host state for changes in domestic regulatory standards. In *PSEG vs. Turkey* [1519] the obligation to provide a stable regulatory framework to investments was interpreted broadly as placing strict limits on a State's ability to change its laws.

The notion of "*stable and predictable regulatory environment*" implies that an investor has the right to expect that a general regulatory framework that exists at the time of investment will not be significantly altered by a host

[1516] Ibid, Article 3 (1)
[1517] *Occidental v. Ecuador* (n 1504) 180-92)
[1518] Refer to Chapter Four, section 4.3.1
[1519] PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5 Award, 19 January 2007, para.253, para.254

State.[1520] Some arbitral tribunals have equated the stability requirement under the fair and equitable treatment standard with the same requirement existing under the international minimum standard of treatment.[1521] The obligation of regulatory stability has been successfully invoked by investors under the fair and equitable (FET) standard in numerous investment cases.[1522]

Given the vague nature of the words "fair" and equitable" and the broad interpretations given to the FET concept by tribunals, it is exceedingly difficult for governments and others to know precisely what standard the Tribunal considered or when a Government has breached these terms. [1523] Some tribunals have adopted a relatively narrow approach, concluding that states will only be liable if their conduct is egregious and shocking.[1524] Others have interpreted the provision much more broadly, establishing a high standard that requires host states ("*free from ambiguity and totally transparent*") not to act in a manner that affects the "basic" or "legitimate expectations" taken into

[1520] M Valenti, The Protection of General Interests of Host States in the Application of the Fair and Equitable Treatment Standard, in G. Sacerdoti and others (eds.), *General Interests of Host States in International Investment Law*, (Cambridge University Press, 2014) 41.
[1521] Occidental Exploration and Production Company v. Republic of Ecuador (I), LCIA Case No. UN3467, Award, 1 July 2004, para.190
[1522] Y Levashova, The Right of States to Regulate in their Public Interest and The Right of Investors to Receive Fair and Equitable Treatment, Chapter 6: The State's Right to Regulate and the Legitimate Expectations of the Investor, (Kluwer Arbitration Series, 2019) 113-166; Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3 ICSID, Award, 22 May 2007, para.260; G&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1 ICSID, Decision on Liability, 3 October 2006, para.124, para.125
[1523] Matthew C Porterfield, 'A Distinction Without a Difference? The Interpretation of Fair and Equitable Treatment Under Customary International Law by Investment Tribunals,' *IISD Investment Treaty News* (22 March 2013) <https://www.iisd.org/itn/2013/03/22/a-distinction-without-a-difference-the-interpretation-of-fair-and-equitable-treatment-under-customary-international-law-by-investment-tribunals/> accessed on 23rd
[1524] *Glamis Gold vs United States*, (n 1503)

account by the foreign investor when investing.[1525] In turn, this uncertainty can have negative impacts, including over-deterring legitimate regulatory conduct and generating unnecessary and undesirable litigation[1526] allowing investors to succeed where their other claims (concerning expropriation) fail.[1527]

In *Perenco vs Ecuador*,[1528] the Tribunal found that Ecuador's newly introduced taxes on windfall profits and other measures to capture a larger share of investors' increased profits from higher oil prices constitute a breach of the FET clause in its investment treaty. Similarly, in *Técnicas Medioambientales Tecmed, S.A*. v. *The United Mexican States* (2003)[1529] brought under a Mexico-Spain BIT, the Investor, Tecnicas Medioambientales, was awarded USD 5.5 million in 2003 when the Government denied the renewal of the license for a hazardous waste facility for environmental reasons. The Tribunal held that FET clause required the government "*to act consistently, free from ambiguity and transparently in its relations with the foreign investor, so that it may know beforehand*

[1525] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, (ICSID Case No. ARB (A.F.)/00/2) (Award, 29 May 2003)* 154; *Occidental v. Ecuador* (n 1504) paragraphs 185-186, 190-191

[1526] J Bonnitcha, *Substantive Protection under Investment Treaties* (CUP, 2014); J M Bonnitcha, and Emma Aisbett, 'An Economic Analysis of the Substantive Protections Provided by Investment Treaties.' *The Yearbook on International Investment Law and Policy 2011/2012.* (OUP, 2013).

[1527] Nathalie Bernasconi-Osterwalder, et al, 'Investment Treaties and Why They Matter to Sustainable Development: Questions& Answers' (IISD, 2012) 12

[1528] *Perenco Ecuador Limited v Ecuador*, ICSID Case No. A.R.B., Decision on Remaining Issues of Jurisdiction and on Liability, 12 September 2014.

[1529] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States,* (ICSID Case No. ARB (A.F.)/00/2) (Award, 29 May 2003) para.154

any rules and regulations that will govern its investments"[1530] before concluding that the lack of FET amounted to indirect expropriation.[1531]

In assessing claims based on an investor's expectations concerning the stability of a general regulatory framework, some tribunals have considered that such expectations are subject to limitations imposed by a host State's right to regulate.[1532] In *Infracapital v. Spain*,[1533] The Tribunal disagrees that, as a general proposition, a fundamental or continual change in regulations constitutes a breach of the FET standard. It stated that "*Absent a showing of a stabilisation clause or otherwise, States have the right to regulate and modify course in response to changing circumstances to alleviate a public concern or address public needs. The Tribunal considers that, in these circumstances, the FET would be breached if a State unreasonably modifies the legal framework or adopts an economic framework with the intention to modify it drastically once it has successfully induced the wanted investment in contradiction with specific commitments to the investor not to do so*." This was also the similar position held in *Murphy vs. Ecuador (II)* [1534] and *Micula vs. Romania* (I)[1535]

[1530] David A Pawlak, APEC-UNCTAD Regional Training Course on Core Elements OF International Investment Agreements in the APEC Region (2009) 11

[1531] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States,* (ICSID Case No. ARB (A.F.)/00/2) (Award, 29 May 2003)154; *Occidental* v *Ecuador*, (n 1504) 185-186, 190-191

[1532] Y Levashova, *The Right of States to Regulate in their Public Interest and The Right of Investors to Receive Fair and Equitable Treatment*, Chapter 6: The State's Right to Regulate and the Legitimate Expectations of the Investor, (Kluwer Arbitration Series, 2019) 113-166;

[1533] Infracapital F1 S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain, ICSID Case No. ARB/16/18 Decision on Jurisdiction, Liability and Directions on Quantum - 13 Sept 2021 paragraph 527

[1534] *Murphy Exploration & Production Company – International v. The Republic of Ecuador (II),* PCA Case No. 2012-16 PCA, Partial Final Award, 6 May 2016, para.276;

[1535] *Ioan Micula, Viorel Micula and others v. Romania (I),* ICSID Case No. ARB/05/20 ICSID, Final Award, 11 December 2013, para.666

Investors cannot expect that the legal framework will not evolve during the lifetime of investments,[1536] except where specific commitments have been made by the host State.[1537] In In *El Paso v Argentina*,[1538] the tribunal decided: "*There can be no legitimate expectation for anyone that the legal framework will remain unchanged in the face of an extremely severe economic crisis. No reasonable investor can have such an expectation unless very specific commitments have been made towards it or unless the alteration of the legal framework is total*."

Similarly, in *UAB vs. Latvia*[1539] the Tribunal noted that "*Whereas stability and predictability of the legal environment have been regarded as concrete renderings of the fair and equitable treatment standard in a number of decisions,1291 these cannot be absolute requirements, and have often been weighed against further criteria, and most notably the right of the host State to exercise its general legislative power and enforce laws and regulations to protect the public interest.*"

In assessing the investor's expectations, tribunals take several factors into consideration that may limit an investor's right to avail itself to protection.

[1536] Infracapital F1 S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain, ICSID Case No. ARB/16/18 Decision on Jurisdiction, Liability and Directions on Quantum - 13 Sept 2021 paragraph 528; Silver Ridge Power BV v. Italian Republic, ICSID Case No. ARB/15/37 ICSID, Award, 26 February 2021, para.416

[1537] Infracapital F1 S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain, ICSID Case No. ARB/16/18 Decision on Jurisdiction, Liability and Directions on Quantum - 13 Sept 2021 ICSID, Award, 2 August 2019, para.366; Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 ICSID, Award, 8 July 2016, para.422, 423; Spółdzielnia Pracy Muszynianka v. Slovak Republic, PCA Case No. 2017-08 PCA, Award, 7 October 2020, para.466; CEF Energia BV v. Italian Republic, SCC Case No. 2015/158, SCC, Award, 16 January 2019, para.185

[1538] El Paso Energy International Company v. Argentine Republic, ICSID Case No. ARB/03/15, Award, 31 October 2011, para. 374, Exhibit CL-0012.

[1539] UAB E energija (Lithuania) v. Republic of Latvia, ICSID Case No. ARB/12/33 ICSID, Award of the Tribunal, 22 December 2017, para.836

These include: whether regulatory changes were foreseeable at the time of investment when it conducted the necessary due diligence[1540]; whether changes to a regulatory framework were motivated by specific circumstances of public interest in a host State[1541]; whether changes were undertaken gradually without eliminating the key features of a general regulatory framework and in accordance with the long-term objectives of the State.[1542]

6.3.3.2.1 The Recent Development in the Interpretation of FET Obligations

Recent treaties include elements aimed at preserving regulatory space for host state governments and minimising exposure to investment arbitration. They include general exceptions for protecting human, animal, plant life or health, and conserving exhaustible natural resources.[1543] They also include clauses that limit or clarify obligations, for example, by omitting or including more detailed clauses on FET and indirect expropriation.[1544] Examples of these new treaties include Argentina–Japan BIT, Belarus–India BIT, Argentina–United Arab Emirates BIT, Lithuania–Turkey BIT, Australia–Peru FTA.[1545] The

[1540] FREIF Eurowind Holdings Ltd v. Kingdom of Spain, SCC Case No. 2017/060, SCC, Final Award, 8 March 2021, para.471, para.472
[1541] Total S.A. v. Argentine Republic, ICSID Case No. ARB/04/1, ICSID, Decision on Liability, 27 December 2010, para.123
[1542] Charanne B.V. and Construction Investments S.A.R.L. v. Spain, SCC Case No. 062/2012, SCC, Final Award, 21 January 2016, para.539
[1543] UNCTAD 2015 (n 1491); UNCTAD, *Taking Stock of IIA Reform: Recent Developments* (IIA issue note 3, 2019)
[1544] Refer to chapter five, section 6.3.3.4
[1545] UNCTAD 2015 (n 1491) 9

Colombia-India BIT (2009)[1546], and the Colombia-United Kingdom BIT (2010) redefined FET to provide for "*the prohibition against denial of justice in criminal, civil, or administrative proceedings per the principle of due process.*"[1547]

6.3.3.3 Interpretation of Most Favoured Nation (MFN) Clauses

The Uganda-Netherlands BIT provides that concerning taxes, fees, charges, fiscal deductions, and exemptions, Dutch MOCs (post-establishment) should receive treatment "*not less favourable*" than any other oil company, Ugandan or otherwise, "*whichever is more favourable*" to the Dutch MOCs.[1548] The FET clause is unqualified and makes no reference to international law and does not provide an exhaustive or indicative list of MFN elements. In many instances, foreign investors have been able to rely on this provision to "import" more favourable provisions in other agreements, including more favourable substantive protections and more favourable dispute resolution clauses.[1549]

[1546] UNCTAD, Agreement for The Promotion and Protection of Investments Between the Republic of Colombia And the Republic of India 2009 Article 3 (4)
[1547] UNCTAD, Bilateral Agreement for the Promotion and Protection of Investments between the Government of the United Kingdom of Great Britain and Northern Ireland and Republic of Colombia 2010, Treaty Series No. 24 (2014) Article 2 (4)
[1548] Uganda-Netherland BIT, Article 4
[1549] Emma Aisbett, et al, 'Compensation for Indirect Expropriation in International Investment Agreements: Implications of National Treatment and Rights to Invest.' (2010) 1(2) *Journal of Globalization and Development*, 1-35; Emma Aisbett, *Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus Causation*. (UCB 2007).

6.3.3.3.1 Recent Developments in the Interpretation of MFN and FET Clauses

In reforming IITs, it may be pertinent to clarify the meaning accorded to MFN clauses from IITs or to avoid unintended expansion of their scope. Article 8.7(4) of the CETA between Canada and the European Union and its Member States, states:[1550]

> *"For greater certainty, the 'treatment' referred to [the MFN provision] does not include procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements. Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute 'treatment,' and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Party pursuant to those obligations."*

In 2019, the European Commission Council adopted a negotiation directive approving a timeline for the discussion on the modernisation of the Energy Charter Treaty and agreed on a set of topics to be reviewed, including the right to regulate, sustainable development CSR, FET, and indirect expropriation.[1551] It will be a positive step for Uganda to reference international law and clarify

[1550] Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States, signed 30 October 2016

[1551] European Commission, 'Council Decision: Authorising the entering into negotiations on the modernisation of the Energy Charter Treaty,' (Brussels, 14 May 2019 COM (2019)231 final; UNCTAD, *Recent Policy Developments and Key Issue*s, (2018) 99

the ambiguity in FET, MFN, and NT Clause terms, which are often the subject to dispute.

6.3.3.4 Expropriation and Nationalisation of Investments

The Uganda-Netherlands BIT provided that neither contracting parties were to take any measures depriving, directly or indirectly, investors of the other contracting party of their investments.[1552] It further provided that if the Government does decide to nationalise or expropriate lawfully, it must be done in the public's interest, and only under due process of law, not in a discriminatory manner, not contrary to the PSA obligations.[1553] Such expropriation could arise only for security or the national interest reasons that both parties recognised as overriding purely individual or private interests. The Uganda-Netherland BIT further provides that if the Government nationalise or expropriates the investment, the Government must compensate the Investor justly, fairly, and according to the *investments' genuine value and include interest.*[1554]

Direct expropriation is clearer to ascertain because it involves "*the physical taking or nationalisation of an enterprise, which usually involves a transfer of ownership to the state.*"[1555] It is usually easy to identify whether there has been

[1552] Uganda-Netherlands BIT Article 6
[1553] Ibid
[1554] R Dolzer, C Schreuer *Principles of International Investment law* (Oxford University press 2008) 89-118 for an overview on expropriation see 75-78.
[1555] Nathalie Bernasconi-Osterwalder, et al, *Investment Treaties and Why They Matter to Sustainable Development: Questions& Answers* (IISD, 2012) 15.

a direct expropriation because the company loses tangible assets.[1556] In such cases, the more difficult question often relates to the appropriate measure of just and fair compensation to be awarded to the affected company representing the genuine value of the investments and interest.

On the other hand, indirect expropriation is a measure or action taken by the host government that deprives the Investor of the benefit of its investment, even though it does not result in the transfer of ownership. The Uganda-Netherland BIT does mention indirect expropriation; however, it does not define it, cover the scope of measures covered, nor provide carve-out for general regulatory measures. Indirect expropriation is more challenging to identify and separate from the legitimate exercise of a state's bona fide regulatory power, making it even more challenging to ascertain a just and fair compensation for the MOC. For example, if the Government takes a legal measure to protect the environment that increases the MOC's operational costs.

6.3.3.4.1 The Recent Development in Expropriation and Nationalisation Clauses

Since nationalisation and expropriation clauses create uncertainty levels that leave the host government vulnerable to unnecessary claims, many countries have tried to resolve this by excluding regulatory action from the definition of

[1556] Ibid

expropriation. For example, the Brazilian Model BIT (2015)[1557] provides that Government can expropriate or nationalise if they do it for a public purpose, in a non-discriminatory manner, according to the law, it does not involve the formal transfer of title or ownership rights.

The Netherlands model Investment Agreement concluded in 2019,[1558] as well as several IITs concluded in the last three years include a large number of provisions explicitly referring to sustainable development issues.[1559] They included clauses for the promotion of the right to regulate for sustainable development-oriented policy objectives, clauses concerning the protection of human, animal or plant life or health, labour rights or the conservation of exhaustible natural resources, in their quest to attract investment, as well as Corporate Social Responsibility (CSR) obligations, and carve-out clauses for prudential measures.[1560]

[1557] UNCTAD, The Brazilian Model BIT (2015) Article 7, 7(5) https://investmentpolicyhub.unctad.org/Download/TreatyFile/4786

[1558] Netherlands model Investment Agreement 22 March 2019 Article 6 https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download

[1559] UNCTAD 2015 (n 1491); UNCTAD, Taking Stock of IIA Reform: Recent Developments (IIA issue note 3, 2019) https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d5_en.pdf accessed July 2019; Argentina–Japan BIT; EU–Singapore IPA; Argentina–United Arab Emirates BIT; Japan–Jordan BIT; Armenia–Japan BIT; Japan–United Arab Emirates BIT; Australia–Peru FTA; Belarus–India BIT; Belarus–Turkey BIT; Kyrgyzstan–Turkey BIT; Brazil–Chile FTA; Lithuania–Turkey BIT; Brazil–Ethiopia BIT; Mali–Turkey BIT; Brazil–Guyana BIT; Brazil–Suriname BIT, Mauritania–Turkey BIT; Cambodia–Turkey BIT; Canada–Republic of Moldova BIT; State of Palestine–Turkey BIT; Central America–Republic of Korea FTA; United Arab Emirates–Uruguay BIT; Congo–Morocco BIT

[1560] Ibid Argentina–Japan BIT; EU–Singapore IPA; Argentina–United Arab Emirates BIT; Australia–Peru FTA; Belarus–India BIT; Brazil–Chile FTA; Lithuania–Turkey BIT; Brazil–Ethiopia BIT; Brazil–Guyana BIT; Brazil–Suriname BIT.

6.3.3.5 Umbrella clauses

Chapter Four, section 4.2.1, discussed the stabilisation clauses in the Uganda Model PSA and circumstances under which parties to the PSA can re-negotiate.[1561] The Uganda-Netherland BIT provides that contracting parties must observe their contractual obligations entered into concerning investments (this is known as an 'umbrella clause').[1562] Such obligations fall under the auspice of PSAs. By bringing PSAs under the umbrella of BIT, they gave investors a lot more avenues for MOCs to file a breach of contract claim under both BITs and PSAs. Umbrella clauses included in investment treaties, whereby the state parties commit themselves to honour contractual undertakings, corroborate the value of stabilisation clauses.

In 2007 Venezuela expropriated ExxonMobil and ConocoPhillips's heavy crude oil projects. The Companies pursued a case at the International Centre for Settlement of Investment Disputes (ICSID), citing breach of the BIT between the Netherlands and Venezuela.[1563] Both investors also filed ICC cases for the same expropriations against PDVSA, the Venezuelan State-owned petroleum company, under arbitration provisions in their contractual arrangements.[1564] In March 2019, the ICSID tribunal awarded over USD 8.7

[1561] Uganda-Model PSA, Article 30; Kanywataba Prospect Area PSA, Article 33.1; Refer to chapter four section 4.3.1 for the discussion on the impact of stabilisation clauses

[1562] Ibid Article 3 (4)

[1563] Gregg Coughlin, ICSID tribunal awards ConocoPhillips USD 8.7 billion plus interest in dispute with Venezuela, April 23, 2019 <https://www.iisd.org/itn/2019/04/23/icsid-tribunal-awards-conocophillips-usd-8-7-billion-plus-interest-dispute-venezuela-gregg-coughlin/> accessed on 3 October 2019

[1564] E Aisbett and others, *Rethinking International Investment Governance: Principles for the 21st Century* (1st August 2018) 31

billion-plus interest to ConocoPhillips for Venezuela's unlawful expropriation of three oilfield investments.[1565] The award came nearly one year after an ICC tribunal also awarded over USD 2 billion the contract-based claim against Venezuela related to two of the three oilfield investments implicated in this case.

Another example of how investors can rely on PSA stabilisation clauses in BIT disputes was in the *Foresti vs South Africa case.*[1566] In this case, a group of Italian nationals and a Luxembourg-registered company sued South Africa over breach of stabilisation clauses when the Government enacted a new mining law to support black economic empowerment in redressing apartheid injustices. The new law required mining companies to transfer a portion of their shares to "historically disadvantaged South Africans." The investors claimed that this law amounted to expropriation and a breach of the stabilisation clause and the "fair and equitable treatment" standard under the existing BIT. Courts agreed with the Investor's in the arbitration settlement, and significantly reduced the investors' requirement to divest shares to South Africans.

Following the impact of the above case, South Africa reviewed its investment framework.[1567] The Department of Trade and Industry concluded that "*BITs extend far into developing countries' policy space, imposing damaging binding*

[1565] Ibid
[1566] *Foresti v South Africa*, ICSID Case No A.R.B. (A.F.)/07/1 Award 4 August 2010; Traidcraft, *International Investment Agreements Under Scrutiny: Bilateral Investment Treaties, EU Investment Policy and International Development*," (2015) 8
[1567] Protection of Investment Act No. 22 of 2015 Government Gazette No. 39514

investment rules with far-reaching consequences for sustainable development."[1568] Investment rules that prevented governments from requiring investors to transfer technology, train local workers, or source inputs locally failed to foster development. [1569] In 2010, South Africa decided to refrain from entering into new IITs "*unless there are compelling political or economic reasons to do so*." It announced that it would terminate existing investment treaties but "*offer partners the possibility to re-negotiate IIAs based on a new South African Development Community (SADC) Model BIT concluded in 2012*"[1570] and the *South African Protection of Investment Act* No. 22 of 2015.[1571] The two legal frameworks protect investment "*in a manner which balances the public interest and the rights and obligations of investors*". [1572] Thereby affirming their "*sovereign right to regulate investments in the public interest*."[1573] South Africa's reforms aimed to make it difficult for investors to pursue similar contract-related claims under both the PSA's stabilisation clause and BIT's umbrella clauses.

Overall, the above arbitrations suggest that, if the host government acts in breach of a PSA's stabilisation clause, it must compensate the Investor for losses suffered. Therefore, it is prudent to thoroughly assess whether PSA

[1568] Republic of South Africa 2009: Bilateral Investment Treaty Policy Framework Review, Government Position Paper, Pretoria, June 2009
[1569] Traidcraft, *International Investment Agreements Under Scrutiny: Bilateral Investment Treaties, EU Investment Policy and International Development*," 2015
[1570] Carim, Xavier 2013: Lessons from South Africa's BITs review, Vale Columbia Center on Sustainable International Investment, Columbia FDI perspectives, No. 109, November 25, 2013
[1571] Protection of Investment Act No. 22 of 2015 Government Gazette No. 39514
[1572] Ibid
[1573] UNCTAD, *World Investment Report 2012: Towards a New Generation of Investment Policies* (2012); J E Spangenberg, 'Southern African Development Community Amends Limit on Investment Protection' (2017)

should include such a clause and if so, to negotiate its scope, structure, and content carefully.[1574]

6.4 International Settlement of Investment Disputes

The Uganda-Netherland BIT provides that either party to the Treaty can submit any legal dispute to the ICSID, for settlement per the Convention on the Settlement of Investment Disputes.[1575] It further provides the procedure of appointing the arbitrators, and that the Tribunal would decide the procedure.[1576] It also provides that Arbitral decisions were final and binding on the Parties.[1577]

6.4.1.1.1 Depoliticisation of Investment Disputes

States justify using arbitration as the dispute resolution mechanism in investment treaties because it "de-politicises"[1578] investment disputes, and home states would not need to advocate for their aggrieved investors.[1579] Involving home states in investment disputes has the potential to harm the otherwise diplomatic relationship between the States. BITs attempt to resolve this risk by providing an independent legal mechanism through which

[1574] Lorenzo Cotula, Investment contracts and sustainable development: How to make contracts for fairer and more sustainable natural resource investments (International Institute for Environment and Development, 2010) 75-7
[1575] Uganda-Netherlands BIT Article 9
[1576] Ibid Article 12.
[1577] Refer to chapter four, section 4.3.2.1.1, 4.3.2.1.2 for the discussion on the advantages and disadvantages of using international arbitration forums
[1578] Note that this is a very particular use of the term "depoliticisation"; Emma Aisbett, et al, *Rethinking International Investment Governance: Principles for the 21st Century* (2018).
[1579] Vandevelde K, United States Investment Treaties: Policy and Practice. (Kluwer Law International 1992); Paparinskis M, The limits of depoliticisation in contemporary investor-state arbitration. In James Crawford and Sarah Nouwen (Eds.) Select Proceedings of the European Society of International Law (Hart 2010).

investors and host states can resolve investment disputes without involving their home governments.

However, there are circumstances in which these disputes become subject to political controversy or public debate. For example, the Philip Morris case where the investor challenged Australia's plain tobacco packaging legislation and Vattenfall's challenge to Germany's decision to phase out the use of nuclear power.[1580]

6.4.1.1.2 Government Policy Space

Unlike developed countries, developing countries often lack the human, financial and technical capacity to negotiate IITs, implement their obligations effectively, evaluate their legal implications, and defend their actions in investment treaty arbitration proceedings. [1581] They, therefore, face a significant risk of having their space available for policymaking limited. With a threat of an "*investment dispute, a host state may have to choose between two different costs, the cost of acceding to a foreign investor's demands and abandoning a preferred regulatory measure, or the cost of defending the measure in investment treaty arbitration with the associated risk of an adverse award.*"[1582]

[1580] *Philip* v *Australia* (n 1449); *Vattenfall* v *Germany* (n 1585)

[1581] Lauge Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (CUP 2015); Z P Williams, 'Risky Business or Risky Politics: What Explains Investor-State Disputes?' (DPhil thesis, Hertie School of Governance 2016); Emma Aisbett, et al, *Rethinking International Investment Governance: Principles for the 21st Century* (2018).

[1582] Lauge Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (CUP 2015); Z P Williams, 'Risky Business or Risky Politics: What Explains Investor-State Disputes?' (DPhil thesis, Hertie School of Governance 2016); Emma Aisbett, et al, *Rethinking International Investment Governance: Principles for the 21st Century* (2018).

The domestic governance of extractive industry is one of the areas in which the impact of BITs is especially pronounced. However, good governance of this sector will require a significant degree of state involvement to maximise the benefits and limit the social and environmental harms that might result from natural resources exploitation. One of the strongest criticisms of ISDS is that they bear a significant impact on national governance. Foreign investors have used them as a threat to challenge many host Government's extensive actions or inactions.

For example, on March 20, 2015, Total Energies instituted arbitration proceedings under the ICSID Convention against Uganda for breach of the Uganda - Netherlands BIT. [1583] In that claim, Total Energies disputed the imposition of stamp duty on an oil block, which it alleged was an unlawful tax. The Government quickly initiated settlement negotiations which precipitated suspending the Arbitration proceeding for two years, until the parties settled the dispute privately. On the 3rd of August 2018, the Tribunal issued a procedural order taking note of the proceeding's discontinuance according to ICSID Arbitration Rule 43(1).[1584]

[1583] *Total E&P Uganda BV v Republic of Uganda* (ICSID Case No. ARB/15/11) Order of The Tribunal Taking Note of The Discontinuance of The Proceeding available at https://www.italaw.com/sites/default/files/case-documents/italaw10060.pdf accessed on 16th January 2020

[1584] Ibid

In the above case, The Government did not publicise what they did or compromise to settle the dispute. However, in *Vattenfall AB and others vs Germany case*,[1585] Germany relaxed environmental conditions attached to a coal power station to settle an investment treaty dispute.[1586] The settlement in that case, however, also ended ongoing domestic court proceedings. Therefore, it seems plausible that the BIT had a role to play in pressuring Germany to settle.

It is not always the case that ICSID will decide against a host country for legitimate regulatory action. For example, in *Feldman Carpa v. Mexico,*[1587] where the Tribunal stated that "*Governments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, reductions or increases in tariff levels… Reasonable government regulation...cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this.*" The ICSID tribunal held a similar position in *Liberian Eastern Timber Corporation (LETCO) v. the Republic of Liberia*.[1588]

[1585] *Vattenfall AB and others v Federal Republic of Germany* (ICSID Case No. ARB/12/12)
[1586] K Miles, 'Investor-State Dispute Settlement: Conflict, Convergence, And Future Directions', in Bungenberg M, Herrmann C, Krajewski M, Terhechte P J (eds) *European Yearbook of International Economic Law 2016* (Springer 2016)
[1587] *Feldman Carpa v Mexico* ICSID Case No ARB(AF)/99/1.
[1588] *Liberian Eastern Timber Corporation (LETCO) v the Republic of Liberia* ICSID Case No. ARB/83/2.

6.4.1.1.3 ISDS Compensations

When claims are successful, the compensation awarded in individual cases "*can amount to millions, if not billions of dollars, which can be a substantial financial burden for States; notably smaller developing countries, or countries facing financial crises.*"[1589] The mere threat to complain is sufficient to deter the host States, hence the freezing/chilling effect on host State regulation of foreign investors. Such that even if the host country defended its case successfully, it would still have hefty amounts in legal fees and suffer longstanding reputational costs.[1590]

Uganda is a developing country, and BITs increase the level of risk it is exposed to as it tries to balance the need to stimulate FDI, without unduly restricting its policy space on a broad range of measures taken in the public interest.[1591] When signing the Uganda-Netherlands BIT in 2000, there was no way for treaty negotiators to anticipate the potential risks posed by the petroleum industry, and the magnitude of compensation costs that would arise. This perception is only now changing when three-quarters of known investor-state disputes to date before ICDS are from investors from developed

[1589] *Tethyan Copper v Pakistan* (2012); Neumayer (n 147) 1567–1585; Jeswald (n 147) 427-473; E Aisbett and others, *Rethinking International Investment Governance: Principles for the 21st Century* (1st August 2018) 31

[1590] Wallach Lori, Beachy Ben *Occidental v. Ecuador* Award Spotlights Perils of Investor-State System, Public Citizen, Memorandum, November 21, 2012

[1591] Neumayer, Eric/Spess, Laura 2005: Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?, World Development, Vol. 33, No. 10, pp. 1567–1585, 2005

countries against Governments of developing transition economies or countries.[1592]

Just the threat of filing investment claims would tend to stifle the government authority to take action with the so-called "regulatory chill".[1593] It is especially problematic for developing countries like Uganda, whose legal and regulatory frameworks are still evolving.[1594]

Compared to government budgets and in per capita terms, most developing countries could pay significantly more in damages than developed nations.[1595] The recent compensation damage of USD 50 Billion ordered against Russia[1596] is a perfect example of how high compensation rates can get. Another example is the 2012 ISDS tribunal decision to order Ecuador to pay USD1.77 billion in compensation to US Company Occidental Petroleum. Interest and legal costs increased the total penalty to USD2.4 billion, a sum equivalent to Ecuador's annual spend on health care for seven million people.[1597] Having the looming threat of high compensation rates can deter developing countries' actions that

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[1592] Lauge Poulsen, Emma Aisbett, 'When the claim hits: bilateral investment treaties and bounded rational learning' (2013) 65 (02) World Politics 273-313; UNCTAD, *Recent Developments in Investor-State Dispute Settlement (ISDS)*, (IIA Issues Note, No. 1, April 1, 2014)
[1593] D Gaukrodger, K Gordon, "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community,' (2012) *OECD Working Papers on International Investment No. 2012/03*
[1594] UNCTAD's Investment Dispute Settlement Navigator, <http://investmentpolicyhub.unctad.org/ISDS> accessed 1 September 2019).
[1595] Kevin Gallagher, Elen Shrestha, *Investment Treaty Arbitration and Developing Countries: A Re-Appraisal* (Tufts University, Global Development and Environment Institute, Working Paper No. 11-01, May 20112)
[1596] 'Former Yukos shareholders awarded $50bn in damages against Russia' *Financial Times* (28 July 2014) http://www.ft.com/cms/s/0/f5824afa-1623-11e4-8210-00144feabdc0.html#axzz3I6BnmRVY> accessed 28 September 2019
[1597] Wallach (n 1590)

foreign companies may perceive as breaching investment agreements (considering how vague and ambiguous they can be), even when done in the public interest.

6.4.1.1.4 Independence of Arbitrators

A small group of commercial lawyers from a few large law firms often dominate ISDS arbitration proceedings.[1598] Parties to the IITs give them powers to judge the executive, legislative, and judicial acts of sovereign states. Therefore, their independence is of immense importance. Unlike Judges, private lawyers now turned Arbitrator, are unaccountable and mostly unappealable. They might also have a commercial interest in attracting in as many cases as possible, and often change roles sometimes acting as counsels and sometimes as arbitrators, which creates the potential for severe conflicts of interests. Having seen how investor-state disputes can limit the governments legal and policy space, delegating treaty interpretations to arbitrators effectively grant them the power to take over state functions, reserved for legitimate policymakers.

In the 1990s, there were only about ten known ISDS cases registered; however, after 2000, arbitrations multiplied.[1599] A report done by Corporate Europe Observatory and the Transnational Institute exposed the high degree of

[1598] Traidcraft 2015 (n 1569)
[1599] UNCTAD, *Recent Developments in Investor-State Dispute Settlement (ISDS)*, (IIA Issues Note, No. 1, April 1, 2014)

concentration in the investment arbitration industry.[1600] With a large proportion of the cases going to a handful of international law firms such as Freshfields Bruckhaus Deringer (UK), White & Case (US) or King & Spalding (U.S.), with a small group of 15 elite lawyers deciding 55 per cent of the known disputes.[1601] The report stated that

> "*The alleged fairness and independence of investment arbitration is entirely illusory. Governments have their hands tied, while multinationals benefit from an inherently pro-corporate bias. A handful of firms are actively encouraging corporate clients to sue governments; meanwhile, top arbitrators are using their influence to secure investor-friendly rules and sustain the flow of multi-million-dollar lawsuits.*"[1602]

According to the OECD, the billing rates for specialised arbitration lawyers are around $1,000 an hour.[1603] In recent ISDS cases, the overall costs for legal counsel and arbitrators averaged $8 million, in some cases even exceeding $30 million.[1604] Consequently, the profit-driven arbitration market puts cash-strapped developing countries at a systematic disadvantage, and with this, the stakes are high for Uganda's petroleum industry.

[1600] Corporate Europe Observatory, "Exposed: elite club of lawyers who make millions from suing states" 2012; P O Eberhardt, 'Profiting from injustice – How law firms, arbitrators and financiers are fuelling an investment arbitration boom' (2012) *Corporate Europe Observatory/Transnational Institute*

[1601] Ibid

[1602] Corporate Europe Observatory, 2012 (n 1600)

[1603] Gaukrodger, 2012 (n 1593)

[1604] Eberhardt, 2012 (n 1600)

6.4.1.1.5 Transparency in Arbitration Proceedings.

Another challenge with ISDS is the lack of transparency in the arbitration process.[1605] Cases handled by international tribunals are not only handled privately; they usually do not provide data on the number of cases brought before them, except ICSID. Cases filed under the rules of the UN Commission on International Trade Law, the Stockholm Chamber of Commerce, or the International Chamber of Commerce may remain undisclosed for years.[1606]

Also, the arbitral decisions, as far as they have been made public, expose many system deficiencies. UNCTAD has found that the large room for interpretation led to "*recurring episodes of inconsistent findings*" and "*erroneous decisions*" taken by investment tribunals.[1607] Including "*divergent legal interpretations of similar or identical treaty provisions,*"[1608] which is fundamentally inconsistent with the basic premises of the rule of law as generally understood. However, as discussed above, the binding arbitral awards are usually for large sums of money in compensation,[1609] which have significant financial implications on the State's economy.

According to Uganda's legal and regulatory framework concerning access to information,[1610] every citizen should have the freedom to access, assess and

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[1605] Luke Eric Peterson, 'Why it's important to read between the lines of UNCTAD's annual review of investor-State dispute settlement cases,' *Investment Arbitration Reporter* (, May 12, 2014) <http://www.iareporter.com/articles/20140512> accessed May 2018
[1606] Ibid
[1607] UNCTAD, *Recent Developments in Investor-State Dispute Settlement (ISDS)*, (IIA Issues Note, No. 1, April 1, 2014) 3
[1608] Ibid
[1609] Taverne 2013 (n 133); ICSID 1965 (n 146) Article 16
[1610] Refer to Chapter Three, section 3.7.3

monitor the petroleum industry to foster transparency and accountability. The inclusion of investor-state dispute resolution mechanism through international arbitration significantly limits this right.

6.4.1.1.6 Exhaustion of Local Remedies as a Precondition For ISDS

The ISDS system established in BITs tends to marginalise domestic courts and legal institutions, often justified by the fear that a host country's legal and judicial systems are not independent and qualified to handle such investment disputes. In some cases, this might be justified. Uganda's judicial system, for example, has been marred with numerous corruption controversies over the years.

A report by Irene Mulyagonja Kakooza, the Inspector General of Government (2012-2019) stated that there were incidences of poor general adherence to the rule of law. That there were also incidences of bribery in the Judicial system, personal involvement of judges/judicial officers in accepting bribes, incidences of other court personnel bribery in the judiciary, and misuse or diversion of funds allocated to Judiciary, among others.[1611] The International Bar Association established a Judicial Integrity Initiative. It is a Judicial Systems and Corruption identifying means to counter corruption within judicial systems worldwide, developing a sound knowledge base of patterns of corruption; to provide preliminary insights into areas of heightened

[1611] Irene Mulyagonja Kakooza, 'Combating Real and Perceived Corruption in the Uganda Judiciary' http://www.judiciary.go.ug/files/downloads/Combating%20Real%20and%20Perceived%20Corruption%20in%20the%20Uganda%20Judiciary%20by%20Hon.%20Lady%20Justice%20Irene%20Mulyagonja%20%20Kakooza_IGG.pdf accessed 23 August 2018

corruption risks and systemic weaknesses in judiciaries, and to establish critical areas for subsequent research.[1612]

As earlier discussed in section 6.3.3.5, South Africa took a different route. It enacted the *South African Protection of Investment Act* No. 22 of 2015[1613] which provided that parties to the BIT would resolve disputes by way of mediation, but if this is unsuccessful, investors should litigate in domestic fora within South Africa. For Uganda, proposing that foreign investment disputes get resolved in Ugandan courts would offer a chance to clarify on the laws applicable to both domestic and foreign investment, for example on the criteria and process of granting petroleum exploration and production licenses.

Suppose the dispute is taken further to the ISDS tribunals. In that case, the domestic courts' interpretation of the factual record and the relevant domestic law principles will assist the tribunal correctly interpret the domestic laws.[1614] An example of this is India's new Model Bilateral Investment Treaty,[1615] which incorporated a requirement for at least five years to resolve investment claims locally before parties can commence an international claim.

Where parties prefer to resolve their disputes through Arbitration, EAC Governments have developed international arbitration centres in Mauritius

[1612] The International Bar Association, 'Judicial Integrity Initiative: Judicial Systems and Corruption,' (Basel Institute on Governance 2016).
[1613] Protection of Investment Act No. 22 of 2015 Government Gazette No. 39514
[1614] Matthew C Porterfield, 'Exhaustion of Local Remedies in Investor-State Dispute Settlement: An Idea Whose Time Has Come?' (2015) 41 The Yale Journal of International Law Online, 5-7
[1615] Grant Hanessian, Kabir Duggal, 'The Final 2015 Indian Model BIT: Is This the Change the World Wishes to See? (2017) 32(1) ICSID Review-Foreign Investment Law Journal, 216–226

(LCIAMIAC), Rwanda (KIAC) and Kenya (NCIA). However, much these are in their infancy; they present an opportunity for an African seat of arbitration and African practitioners in international arbitration.[1616]

6.4.1.1.7 Settlements in Investment Disputes

Investment treaties could have further distributive impacts if they alter how host states and foreign investors bargain 'in the shadow of the law' toward agreed settlements in investment disputes.[1617] In theory, investment treaties are likely to strengthen foreign investors' bargaining position vis-à-vis host states in negotiations to settle any investment disputes.[1618] Such effects are likely to be important in practice because a negotiated settlement is the most common method of resolving investment disputes.[1619]

Further to the above, as of September 2015, 667 known treaty-based investor-state dispute settlement (ISDS) cases had been lodged; at least 16% of these cases concerned investments in extractive industries, making this sector the second most disputed in international investment arbitration.[1620]

[1616] Sadaff Habib, 'Watch Out, Africa is Here! – The East African International Arbitration Conference 2019' *(Kluwer Arbitration Blog* 29 October 2019) <http://arbitrationblog.kluwerarbitration.com/2019/10/29/watch-out-africa-is-here-the-east-african-international-arbitration-conference-2019/> accessed 3rd December 2019

[1617] S Franck, 'Conflating Politics and Development? Examining Investment Treaty Arbitration Outcomes.' (2015) 55 Virginia Journal of International Law, 13–71. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2574299> accessed on 3 December 2019

[1618] M Koskenniemi, 'It's Not the Cases, It's the System' (2017) 18(2) The Journal of World Investment and Trade 343–353

[1619] J G Merrills, *International Dispute Settlement* (5th edn CUP 2011); M Waibel, 'The Diplomatic Channel' in James Crawford, Allain Pellet and Simon Olleson (eds), *Handbook on State Responsibility* (OUP 2010).

[1620] UNCTAD's Investment Dispute Settlement Navigator, accessible at http://investmentpolicyhub.unctad.org/ISDS> accessed 1 September 2019).

The majority of extractives cases filed are against developing countries, whose nascent regulatory frameworks can be subject to change as governments seek to find the correct balance between attracting investment and encouraging sustainable development.[1621] These include cases where Government has introduced more stringent environmental regulations,[1622] terminated PSAs,[1623] decided not to grant[1624] or revoke Licences or permits,[1625] and where Government has changed fiscal regimes[1626] and introduced local content provisions.[1627]

6.4.1.1.8 Appeals of the Arbitral Tribunals.

Compared to the domestic Court, international investment arbitration does not include an appeal mechanism for arbitral awards, on points of law or fact. As previously discussed in this chapter, several BIT clauses such as "fair and equitable treatment (FET)," "indirect expropriation," "most favoured nation" among others are open for broad interpretations. FET has emerged as "the most relied upon and successful basis for IIT claims by investors"[1628] because

[1621] Ibid
[1622] *Glamis Gold vs United States*, UNCITRAL, Award, 8 June 2009; *Lone Pine Resources Inc. v. Canada* (ICSID Case No. UNCT/15/2)
[1623] *Occidental v. Ecuador* (n 1504) paras. *180-92, 185-186, 190-191*
[1624] *Pac Rim Cayman L.L.C. v El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, para. 2.99; *Clayton and Bilcon of Delaware Inc. v. Government of Canada* [2009] PCA 04 Award on Jurisdiction and Liability, 17 March 2015
[1625] *The Renco Group, Inc. v The Republic of Peru*, (ICSID UNCT/13/1); *Gold Reserve Inc. v Bolivarian Republic of Venezuela*, ICSID Case No. A.R.B. (A.F.)/09/1
[1626] *Occidental v. Ecuador* (n 1504) paras. 180-92, 185-186, 190-191; *Perenco Ecuador Limited v Ecuador*, ICSID Case No. A.R.B., Decision on Remaining Issues of Jurisdiction and on Liability, 12 September 2014.
[1627] *Mobil Investments Canada Inc. v. Canada*, ICSID Case No. ARB/15/6
[1628] UNCTAD 2012: Fair and Equitable Treatment: A sequel, UNCTAD Series on Issues in International Investment Agreements II, New York and Geneva, 2012

tribunals consider the investors' "legitimate expectations" as a critical element of the FET standard in maintaining a "stable and predictable business environment".[1629] In some cases, investor claims are such that a host state that makes regulatory changes that diminish private profits may be considered to have breached the Investor's "legitimate expectations" thereby justifying compensation.

Unlike direct expropriations, regulatory changes do not involve an outright seizure of property as, for example, in the case of nationalisations. However, tribunals tend to denounce many public interest regulations as measures tantamount or equivalent to expropriation.[1630] By interpreting the extremely vague BIT standards, arbitral tribunals tend to take on lawmakers' role, transforming these broad clauses into more precise rules, which prescribe how governments must treat foreign investors. In doing so, arbitrators take over functions belonging to the State, functions which rightly belong to democratically elected lawmakers or regulatory bodies accountable to the public.[1631] There is no expectation of ISDS Arbitrators considering the public welfare aspects when interpreting BIT or PSA terms in a dispute. If these disputes might have arisen from governments' obligation to guarantee financial stability, control corporate conduct, foster social inclusion, and protect the environment.

[1629] Ibid page 66
[1630] Ibid
[1631] UNCTAD 2014: Trade and Development Report 2014: Global governance and policy space for development, New York/Geneva, p. 138

6.4.1.1.9 The Recent Development in ISDS Clauses

Several Investment Agreements concluded in 2018 carefully regulate ISDS through limiting treaty provisions subject to ISDS.[1632] They exclude general public policy areas from the scope of the Treaty and ISDS, limit the time to submit claims and omit the ISDS mechanism altogether.[1633] Furthermore, they include a requirement to exhaust local judicial remedies for a specific period (18 months or more) before turning to arbitration.[1634]

An example of this is Argentina–United Arab Emirates BIT, which provides that an international investor has to have an economic contribution to the host State economy before it can rely on the BIT.[1635] Treaties like Belarus–India BIT exclude intangible rights, goodwill, brand value and market share from the definition of investment. The EU–Singapore IPA replaced the system of ad hoc

[1632] UNCTAD 2015 (n 1491); UNCTAD, Taking Stock of IIA Reform: Recent Developments (IIA issue note 3, 2019) https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d5_en.pdf accessed July 2019;

[1633] UNCTAD, Reform Package for the International Investment Regime. (New York and Geneva: United Nations 2018) available at https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_Reform_Package_2018.pdf; Weber, Joerg and Titi, Catharine, UNCTAD's Roadmap for IIA Reform of Investment Dispute Settlement (December 2015). New Zealand Business Law Quarterly, Vol. 21(4), Dec. 2015. Available at SSRN: https://ssrn.com/abstract=2845976; UNCTAD 2015 (n 1491); UNCTAD, Taking Stock of IIA Reform: Recent Developments (IIA issue note 3, 2019) https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d5_en.pdf accessed July 2019; and Argentina–Japan BIT, Argentina–United Arab Emirates BIT, Japan–Jordan BIT, Armenia–Japan BIT, Japan–United Arab Emirates BIT, Australia–Peru FTA

[1634] Belarus–India BIT, Singapore–Sri Lanka FTA Argentina–Japan BIT, Argentina–United Arab Emirates BIT, Japan–Jordan BIT, Armenia–Japan BIT, Japan–United Arab Emirates BIT, Australia–Peru FTA

[1635] UNCTAD, Reform Package for the International Investment Regime. (New York and Geneva: United Nations 2018) available at https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_Reform_Package_2018.pdf; Weber, Joerg and Titi, Catharine, UNCTAD's Roadmap for IIA Reform of Investment Dispute Settlement (New Zealand Business Law Quarterly December 2015) Vol. 21(4) Available at SSRN: https://ssrn.com/abstract=2845976; UNCTAD 2015 (n 1491); UNCTAD, Taking Stock of IIA Reform: Recent Developments (IIA issue note 3, 2019) https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d5_en.pdf accessed July 2019

investor-State arbitration and party appointments with a standing court-like tribunal, including an appellate level, with members appointed by contracting parties for a fixed term.[1636] The Brazil–Chile FTA, Brazil–Ethiopia BIT, Brazil–Guyana CIFA, Brazil–Suriname BIT eliminated ISDS by providing that an investment treaty will not entitle investors to refer their disputes with the host State to international arbitration, or it is made subject to the State's right to give or withhold (opt-out) arbitration consent for each specific dispute, in the form of the so-called "case-by-case consent".[1637]

There are some BITs concluded in the last three years that still preserve the system of investor-State arbitration. However, they include certain essential modifications, like increasing State control over the proceedings, opening proceedings to the public and third parties, enhancing the suitability and impartiality of arbitrators, improving the efficiency of proceedings, or limiting the remedial powers of ISDS tribunals.[1638] Countries are pursuing ISDS reforms at various levels of development and across various regions. However, there are some countries and regions that have been the driving forces behind certain approaches, for example, Brazil's "no ISDS" approach, India's "limited ISDS" approach, and the EU's adoption of a "standing ISDS tribunal."

[1636] Ibid
[1637] Ibid
[1638] Ibid

Other development includes treaties that include express consent to counterclaims, [1639]but they also incorporate a relatedness requirement into that consent. [1640] Furthermore, tribunals have also stated that where the treaty incorporated domestic[1641] and international law obligations,[1642] it provided a cause of action.[1643]

Multilateral engagement on ISDS reform is also gaining prominence at UNCITRAL, ICSID, and other institutions. Based on the three-phase mandate provided by the UNCITRAL Commission in July 2017, deliberations in UNCITRAL Working Group III on possible reform options have so far focused mostly on the "improved ISDS procedures" approach, while giving some consideration to the "standing ISDS tribunal" approach. [1644] The proposed amendments to the ICSID Arbitration Rules published by the ICSID

[1639] *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, 2016; *Rusoro Mining Limited V. Bolivarian Republic of Venezuela*, Civil Case No. 16-Cv-02020 (Rjl) United States District Court, District of Columbia, 2018, Para. 628; *Anglo American Plc V. Bolivarian Republic of Venezuela*, ICSID Case No. Arb(Af)/14/1, 2019, Award at Paras. 529–530 Https://Www.Italaw.Com/Sites/Default/Files/Case-Documents/Italaw10293.Pdf Accessed 26/08/19

[1640] Slovak Republic–Iran BIT, CPTPP, Agreement for the Reciprocal Promotion and Protection of Investments between the Argentine Republic and the United Arab Emirates, signed 16 April 2018 Article 28.4; Gustav F W Hamester GmbH & Co KG v. Republic of Ghana ICSID Case No. ARB/07/24, Award, 18 June 2012, para. 352; *Goetz v. Burundi*, Award at paras. 286–87.

[1641] *Rusoro Mining Limited V. Bolivarian Republic of Venezuela*, Civil Case No. 16-Cv-02020 (Rjl) United States District Court, District of Columbia, 2018, Para. 628; *Anglo American Plc V. Bolivarian Republic of Venezuela*, ICSID Case No. Arb(Af)/14/1, 2019, Award at Paras. 529–530; P Lalive and L. Halonen, 'On the availability of Counterclaims in Investment Treaty Arbitration', (2011) Czech Yearbook of International Law 141-7.19; Agreement Between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments, signed 30 August 2017, Article 14(3).

[1642] *Urbaser v. Argentina*, Award at para. 1192

[1643] *Aven v. Costa Rica*, Final Award at paras. 73–34; *Urbaser v. Argentina*, Award at para. 1192.

[1644] Report of the United Nations Commission on International Trade Law, 50th session, A/72/17

Secretariat in August 2018[1645] also put forward procedural improvements. These plurilateral and multilateral efforts might have the potential to contribute to modernising old-generation treaties as well.

6.5 Termination of BIT

The Uganda-Netherlands BIT provides that either Contracting Party can give notice of termination at least six months before the date a BIT is set to expire.[1646] If the parties do not give such notice, all the BIT provisions automatically renew for an additional ten years. The Uganda-Netherland BIT was due to terminate on 01st January 2018. Also, a report was done by BothENDS[1647] claiming Uganda terminated its BIT with the Netherlands. However, the Government has not released an official statement to corroborate the BothENDS report. According to UNCTAD's Investment Policy Hub, this BIT is still in force or active. Regardless of whether the Government terminated the BIT or not, the survival clause of an additional fifteen years still applies for any investments made before the BIT termination.[1648]

[1645] ICSID Secretariat, Proposals for Amendment of ICSID Rules (Aug. 2, 2018), available at https://icsid.worldbank.org/en/Documents/Amendments_Vol_Three.pdf
[1646] Uganda-Netherlands BIT Article 14 (3)
[1647] BothEnds, Annual Report 2017, para 3.4 page 14 https://www.bothends.org/uploaded_files/document/Both_ENDS_Annual_Report_2017.pdf 10 May 2019
[1648] Uganda-Netherlands BIT Article 14 (3)

6.5.1.1 The Recent Development in Termination of BITs

For old-generation treaties that have not yet entered into force, countries could formally indicate their decision not to be bound by them as a means to help clean up its IIT network. Although explicit actions to abandon unratified treaties have been rare, notable examples include India's "termination" of several BITs with Ethiopia (2007), Ghana (2002), Nepal (2011), and Slovenia (2011) that had been signed but not entered into force.[1649] About nine Ugandan BITs were signed more than ten years ago, including Uganda - China BIT signed in 2004 but never entered into force.[1650] Having a BIT with China that is not in force may have influenced CNOOC's decision to incorporate in the Netherlands and use its Dutch subsidiary to operate in Uganda.

Terminating outdated BITs, whether unilaterally or jointly, is another way to release the parties from their obligations. IIT terminations have increasingly progressed, reaching a total of 309 by the end of 2018, for various reasons.[1651] For example, Venezuela terminated its Dutch IIT in 2008 following a string of US firms' claims with 'shell companies' set up in the Netherlands to benefit from treaty protection.[1652] Between 2010 and 2018 alone, 187 terminations of

[1649] UNCTAD, Recent Policy Developments and Key Issues, 2018 page 99-102 https://unctad.org/en/PublicationChapters/wir2018ch3_en.pdf accessed 15 July 2019
[1650] Refer to Section 6.2 this chapter.
[1651] UNCTAD, Recent Policy Developments and Key Issues, 2018 page 99- https://unctad.org/en/PublicationChapters/wir2018ch3_en.pdf accessed July 2019
[1652] Van Os, Roos/Knottnerus, Roeline 2011: Dutch Bilateral Investment Treaties – A gateway to 'treaty shopping' for investment protection by multinational companies, SOMO, Amsterdam, October 2011

IITs took effect, of which 128 resulted from unilateral terminations.[1653] In 2018, at least 24 terminations entered into effect, half of which were BITs signed by Ecuador, another five were BITs signed by India,[1654] and two intra-EU BIT terminations took effect in 2017, more expected to increase by the end of 2020.[1655]

6.6 Conclusion

One of the primary considerations for developing countries signing BITs is the belief that it will attract FDI.[1656] The Uganda-Netherland BIT may have played a role in why Total Energies and CNOOC decided to use their Dutch subsidiaries to benefit from the existing BIT benefits. However, both Tullow and Armour operate using their Australian subsidiaries, and Oranto is a Nigerian Company. Therefore, there seems to be no correlation between whether BITs had any role in attracting FDI from these particular MOCs.

[1653] UNCTAD, Reform Package for the International Investment Regime. (New York and Geneva: United Nations 2018) available at https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_Reform_Package_2018.pdf; Weber, Joerg and Titi, Catharine, UNCTAD's Roadmap for IIA Reform of Investment Dispute Settlement (December 2015) 21(4) New Zealand Business Law Quarterly; UNCTAD 2015 (n 1491); UNCTAD, Taking Stock of IIA Reform: Recent Developments (IIA issue note 3, 2019)

[1654] Belarus–India BIT

[1655] *Slovak Republic v Achmea B.V.* Case C-284/16 (6 March 2018); *Achmea* (formerly Eureko B.V. v. The Slovak Republic) Judgment of the Court 6 March 2018; EU Press Release, Commission asks Member States to Terminate Their Intra-EU Bilateral Investment Treaties (June 18, 2015), http://europa.eu/rapid/press-release_IP-15-5198_en.htm.

[1656] Emma Aisbett, Bilateral Investment Treaties and Foreign Direct Investment: Correlation Versus Causation, In Karl Sauvant and Lisa Sachs (Eds.), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows*. (OUP 2009); J Bonnitcha, et al, *The political economy of the investment treaty regime*. (OUP 2017).

Although BITs intend to apply equally to both parties, the assessment done on Uganda's BIT framework revealed that investments flowed almost exclusively from developed capital-exporting countries to Uganda. There was no real reciprocity.[1657] If anything, one would expect investment treaties to be more valuable to foreign investors in circumstances in which otherwise viable investments are subject to high risks of such government interference in situations where the investment climate is poor.

The analysis in this chapter hoped to answer two questions: whether the terms contained in Uganda-Netherlands BIT correlate with the legal frameworks discussed in Chapters Three, Four and Five. The second question is whether the BIT investor-protection terms have any impact on Uganda's pursuit of socio-economic resilience, environmental protection, and sustainable development.

On the first question, Uganda's national policy and laws provide a favourable environment for foreign investors and investment to register and carry-on economic activities.[1658] The Model PSA offers progressive clauses that guarantee a stable legal and fiscal environment through its stabilisation clauses and dispute resolution clauses.[1659] Uganda has also domesticated several international laws and continues to enact or amend laws to reflect its resolve to honour its international law obligations for environmental

[1657] Wolfgang Alschner, 'Americanization of the BIT Universe: The Influence of Friendship, Commerce and Navigation Treaties on Modern Investment Treaty Law (2013) 2(5) Goettingen Journal of International Law 465
[1658] Refer to Chapter three, sections 3.2, 3.4
[1659] Chapter four, sections 4.2.2, 4.3

protection and socio-economic development.[1660] Consequently, it's no wonder that the assessed terms in Uganda- Netherland BIT read like a manifesto to attract any investors or investments (Dutch investment in this case). It seemed to have played a fundamental role in why Total Energies and CNOOC incorporated in the Netherlands.

On the second question, the Uganda-Netherland BIT's extensive assessment also revealed several investor protection clauses (FET, MFN, NT, Umbrella, and ISDS clauses) against specific government interference. The definitions of the investor and investment are also broad enough to include companies without economic contributions to the Ugandan economy. Some of the repercussions of the clauses discussed and the unfairness of the arbitration system (particularly the small exclusive club of arbitrators) are rightly concerning. The assessment also suggests that Investment treaties also create costs for developing countries, both in terms of loss of policy space and defending and paying adverse awards in investment treaty arbitrations. Several examples were given of countries, mostly developing countries which have lost millions (and billions) of taxpayers' monies because of their BITs and IITs obligations.[1661]

Actively pursuing BIT may not be what Uganda needs as it tries to develop its economy, because the impacts that investment treaties can have on domestic

[1660] Refer to Chapter five, sections 5.2.1.5, 5.2.2.3, 5.2.3.4, 5.2.5.
[1661] Refer to section 6.4.1.1.3 on ISDS Compensations

governance of foreign investments can be significant and varied.[1662] To maximise the benefits and at the same time minimise the costs of investments in extractives industry: host Governments have to be able to retain the right to regulate economic, environmental, and social laws and policies, over the lifetime of the petroleum industry to respond to changing circumstances, best practices and, technologies. While at the same time, they do not expose themselves to excessive costs in terms of liabilities and litigation expenses that divert resources away from other domestic priorities.

[1662] Gaukrodger, (n 1593); The Economist, 'The arbitration game: Governments are souring on treaties to protect foreign investors' (2014), https://www.economist.com/news/finance-and-economics/21623756-governments-are-souring-treaties-protect-foreign-investors-arbitration accessed on 24th August 2018

CHAPTER SEVEN

7.0 RECOMMENDATIONS AND CONCLUSIONS.

7.1 Recommendations

In Chapters Three to Six, this thesis analysed a relatively rich collection of Uganda's national and international laws, policies, regulations, PSAs, and BITs regulating the rights, duties, and obligations of all concerned parties in the petroleum industry. The primary question this thesis sought to answer was whether this legal framework was adequate in ensuring social resilience, economic empowerment of the local communities, environmental protection in the areas where the MOCs operate and contribute to the pursuit of sustainable development, as discussed in Chapter Two.[1663]

The Government has made considerable steps by enacting and ratifying substantive prescriptive laws. Based on the recent development of repealing and replacing old laws relevant to the petroleum industry, Uganda's legal framework continues to develop for the better. However, there are still several gaps both in the law and in its implementation, which the Government needs to review to circumvent the Resource Curse.[1664]

Chapter Four and Six discussed several investor-protection terms in PSAs and BITs.[1665] The analysis revealed substantive negative impacts that those terms

[1663] Refer to Chapter Two, section 2.3.
[1664] Refer to Chapter Two, Section 2.2.
[1665] Refer to Chapter Four, section 4.3 and Chapter Six, sections 6.3.3 and 6.4,

have on the Government's ability to pursue sustainable development. However, based on the recent modification, termination, and replacement of the old generation BITs, and reframing of the old generation freezing stabilisation clause to read like an economic equilibrium clause in the 2018 Model PSA, there is evidence that investor-protection terms are also evolving. These novel changes aim at guaranteeing the host State's right to pursue legitimate public policy objectives, and further regulate to promote public health, socio-economic, social justice, and environmental sustainability, throughout the lifetime of the petroleum contract.

This section presents recommendations for improvement in the identified current weaknesses in Uganda's petroleum legal and regulatory frameworks, as well as strategies for the Government to consider creating additional prudent parameters of operation necessary to starve off the resource curse. The author hopes the Government policy makers will embrace the recommendations to support their development objective, socio-economic resilience, and environmental protection.

7.1.1 Streamlining the Roles of National Institutions

The national laws created separate institutions with varying roles to monitor and regulate the petroleum industry's different aspects.[1666] However, the analysis revealed considerable gaps in how they function, including working in isolation of each other, which often works against getting a unified

[1666] Refer to Chapter Three, section 3.8

Government position to provide a unified front to MOCs. The institutions in place are capable. If only they were working together, through special vehicle arrangements for the sector, it would go a long way in ensuring our 'excellent on paper' laws and regulations bring about desired results.

Functional institutions need to have independent and accountable leaders who are not susceptible to corruption and can implement the law to the letter. Perhaps having more oversight roles across the systems might help circumvent corruption and ensure effective implementation of the law. Even though the NEA, EIA Regulations, and the EIA Public Hearing Guidelines offer discretion to the NEMA Executive Director to decide whether a specific project requires a public hearing, NEMA should consider all petroleum-related activities as requiring a public hearing. That way it would not have issued the ESIA Certificates to MOCs that did not conduct public hearings[1667]

The Government has a wealth of expertise, and the financial support needed (including external partners like the Norwegian Agency for Development Cooperation) to create an independent regulatory body and train new professionals to staff it. Therefore, the Government should prioritise technical skilling of the regulators; foster accountability as well as independence from central Government interference, for them to carry out their roles effectively.[1668]

[1667] Refer to Chapter Three, section 3.5.2.2
[1668] Refer to Chapter Three, section 3.8.7

7.1.2 Diversifying the Economic Sectors

Resource wealth can crowd out domestic manufacturing and agricultural sectors that have more potential for sustained economic growth, favouring extracting commodities for export, subject to the vagaries and price fluctuations of global markets. The tendency to focus on natural resource development and all the negative economic impact is the 'Resource Curse Phenomenon'.[1669]

To mitigate the impact, diversification in the economic sector and industry is essential in achieving the SDGs.[1670] The thesis discussed how the Government plans to utilise petroleum revenue deposited in the Petroleum Fund,[1671] then shared between the Consolidated Fund and Petroleum Revenue Investment Reserve. The Government plans to use the money deposited in the Consolidated Fund to support its annual budget for financing infrastructure and development projects, goods, and services.

However, there are no express provisions for how the Government intends to diversify the economy. The Government does not have fiscal targets in management of the Petroleum Fund.[1672] It is of utmost importance that the Government, in collaboration with stakeholders, develops its Fiscal Targets and plans how to diversify the economy from depending on finite and volatile petroleum revenues. This is particularly prudent for the agricultural sector

[1669] Refer to Chapter Two, section 2.2
[1670] Agenda 2030 (n 148) Goals 8, 9, 11
[1671] Refer to Chapter Three, section 3.6.1, 3.6.2, 3.7.2
[1672] Refer to Chapter Three, section 3.6.1.1

and tourism sector (which supports the hospitality industry)[1673] that are the most prominent contributor to Uganda's revenue; also employing the largest population. The Government should, for example, consider funding modern irrigation technologies and facilities to achieve high economic productivity levels.

7.1.3 Managing Expectations

Conducting skills assessment and communicating expectations is essential to managing reasonable expectations from the local communities, civil society organisations, media, and Governments. Local communities typically react to the arrival of MOCs with unreasonable expectations of impending and far-reaching economic development, and the host governments progressively incorporate national content clauses within the PSAs.

However, MOCs typically work in remote and financially underdeveloped locations where conditions make it difficult, if not impossible, to meet these expectations or requirements. Companies typically perform a skills assessment and compare it to the requirements of the project.[1674] They then communicate to the Government, educational organisations, local communities, civil society organisations, about the various stages of the

[1673] Refer to Chapter One, section 1.3.1, and Chapter Five, section 5.2.3.4, 5.4.2
[1674] ACODE, 'Local Content in Oil and Gas Sector:An Assessment of Uganda's Legal and Policy Regimes (2014) ACODE Policy Briefing Paper Series, No.28, 3.1, 3.8

project, and its economic opportunities per the MOCs' Local Content Development Plan.[1675]

Government has made efforts in skill development by ensuring that Uganda universities offer petroleum-related courses. However, this has created a situation where universities are now conferring degrees and diplomas to more graduates than the industry can absorb, and who also need additional skilling to meet the high petroleum industry standard.

The Government could also reinstate the scrapped cooperatives so the local communities or national companies can pool and build capacity to participate in providing goods (especially food products) to the industry. As it stands now, service companies still lack the capacity to meet the high petroleum industry standards (especially Health and Safety requirements). Overall, the Government should prioritise early and continuous dialogue that can reasonably manage expectations, to mitigate any dissatisfaction that may influence a company's social permit to operate.

[1675] IPIECA, 'Local Content: a guidance document for the oil and gas industry' (2nd edition April 2016); Chinyere Ayonmike, "TVET: Model for addressing the skills shortage in Nigerian oil and gas industries," Department of Technical and Business Education, Delta State University; Living Earth "Vocational Training in the Context of Oil and Gas Developments: Best Practice and Lessons Learnt," (November 2014).

7.1.4 Establishing a Transparent and Equitable Fiscal Regime

The Government made the right steps by enacting the Public Finance Management Act in 2015 (PFMA 2015) that established the Petroleum Fund, the Petroleum Revenue Investment Reserve and the Royalty-Revenue Sharing and Accountability conditions.[1676] However, such a robust fiscal regime works best when it is properly implemented to interact with Uganda's overarching economic goals. The MOEMD should not have the freedom to unilaterally decide to issue tax exemptions contrary to the Upstream Act and Income Tax laws. [1677] The same minister should not unilaterally decide to authorise payments from the Petroleum Fund without due process.[1678]

Therefore, the Government should take the next step after developing its sound fiscal regimes, to develop its fiscal targets to impose a long-lasting constraint on government spending and public debt accumulation. Fiscal targets would enable the Government to diversify the economy from depending on finite and volatile petroleum revenues, [1679] which is a fundamental cause of the 'Resource Curse Phenomenon.'

[1676] Refer to Chapter Three, section 3.6
[1677] Refer to Chapter Four, section 4.2.3
[1678]Refer to Chapter Three, section 3.6.1.1 and 3.6.1.2, 3.6.2.1
[1679] Jillian Ambrose, 'Oil prices slump as market faces lowest demand in 25 years' *The Guardian* (15 Apr 2020) <https://www.theguardian.com/business/2020/apr/15/oil-prices-slump-as-market-faces-lowest-demand-in-25-years-covid-19> accessed on 20th April 2020

Government should also revise its revenue-sharing strategy,[1680] to increase the minimum percentage set aside to support the local governments located within the petroleum production areas. These local areas bear the highest impacts of extraction,[1681] and therefore, should get a noticeably higher proportion of benefits from development.

7.1.5 Increasing the Level of Transparency

Uganda's 'formal' legal framework concerning access to information and transparency is adequate.[1682] However, there is considerable disparity concerning the implementation of these laws.[1683] Where the law provided, for example, that the MOEMD "may" make available to the public details of all agreements, licenses or approved field development plans, the Government has often used the word "may" strategically to withhold this information. Information sharing empowers and educates civil society and stakeholders at all levels on the advancements made in the petroleum industry. It allows the public to understand that contracts limit the government's revenue due to the exploration risks and costs assumed by the MOC. Disclosing payments made to the Government also allows the public to hold it accountable on its spending of petroleum revenue and minimises corruption opportunities. Perhaps while also providing an exception to commercially sensitive information that would affect the MOC's competitive advantage in business.

[1680] Refer to Chapter Three, section 3.6.3
[1681] Refer to Chapter Two, section 2.2.3
[1682] Refer to Chapter Three, section 3.7
[1683] Ibid

The thesis discussed how natural resource development could give rise to corrupt behaviour, create political instability, and sometimes lead to civil conflict.[1684] Uganda made commitments to join EITI in the 2012 Oil and Gas Revenue Management Policy, an excellent starting point. However, it was not until the 12 August 2020 that it joined the EITI.[1685] The Uganda Government cannot reasonably expect to hold MOCs to higher standards than it is willing to adhere to. Genuine transparency keeps governments accountable and can prevent the 'Resource Curse Phenomenon'. The Uganda Government should sincerely and actively pursue anti-corruption policies and develop appropriate enforcement tools as a prerequisite to petroleum development.

7.1.6 Monitoring and enforcing environmental protection laws.

The thesis explained comprehensively the environmental vulnerability of Uganda due to the petroleum industry activities.[1686] Both the environmental protection laws, Regulations, and the Model PSA[1687] provide that MOCs are to conduct all Petroleum Activities in accordance the laws to prevent or minimize danger to human life or property or pollution or harm to wildlife or the environment. Because of that, MOCs should have taken extra precaution to avoid prior incidents of dumping petroleum-related waste within the

[1684] Refer to Chapter Two, section 2.2.2
[1685] Uganda Joins the Extractive Industries Transparency Initiative (EITI) 12th August 2020 https://globalrightsalert.org/news-and-views/uganda-joins-extractive-industries-transparency-initiative-eiti> accessed on 13th August 2020; Refer to Chapter Three, section 3.7.3.2 on External Obligations to Disclose Information
[1686] Refer to Chapter two, section 2.2.3.3
[1687] Refer to Chapter Three section 3.5 and chapter Four section 4.2.5

communities.[1688] They had an obligation to vet entities contracted to provide appropriate waste management systems and monitoring their activities. Especially considering that any costs for measures taken to avoid waste, prevent damage or pollution in the conduct of petroleum activities are considered recoverable costs under the Model PSA.[1689]

The Government needs to invest heavily in equipping the existing environmental regulators and enforcers to monitor petroleum operations. Considering the scale of the project and the fast-paced timelines proposed, NEMA, UWA, NFA should be adequately staffed (numbers and competence), so that the MOCs will not leave behind a trail of devastation similar to what occurred in Nigeria, for the Government to clean up for decades to come.

Since NEMA, UWA and NFA are semi-autonomous bodies, the Government could establish another body or mechanisms to audit whether they have carried out roles adequately. Under NFA's watch, for example, about 70% of forest cover has disappeared,[1690] so, it is difficult for institutions already struggling before petroleum operations to suddenly be capable and deliver when it comes to the petroleum industry. Currently, the CSOs and NGOs take on the oversight mantle with challenges of getting information from NEMA.[1691] Monitoring and enforcement cannot be overemphasized.

[1688] Refer to Chapter Two, section 2.2.3.3.1
[1689] Model PSA 2018 (n 498) Annex B- Accounting and Financial Procedure 3.1 (o)
[1690] F I Kayanja, D Byarugaba, 'Disappearing Forests of Uganda: The Way Forward. (2001) (81)8 Current Science, 936–947
[1691] Refer to Chapter Three, section 3.5.2.2; Morgan (n 572)

MOCs can also voluntarily commit to Global Investment Performance Standards (GIPS) and Best Available Techniques (BAT), and others discussed in the thesis.[1692] To do this might require an extra cost on investment, but the sensitive environment in the Albertine Graben would benefit. MOCs need to show commitment to executing Net Gain, i.e., mitigating impacts beyond what they directly affect because of operations, such as restoring the natural habitat, forests within and around their operation areas.

MOCs could minimise carbon emissions from their operations by using modern technology to capture and utilise the gas for energy production, liquefying it for transportation or putting it back to the source.[1693] MOCs could introduce technological innovations in the form of methane detectors to identify leaks.[1694] MOCs could also sponsor public awareness campaigns on cleaner forms of energy since most people in Uganda still use firewood and bamboo for energy. This duty is a government mandate, but MOCs could support it for sustainability. Such investments would encourage the public to be more environmentally conscious and raise the company's profile as a beneficial institutional actor in the local economy.[1695]

[1692] Chapter Five, section 5.3

[1693] Shay Banerjee, Perrine Toledano, "A Policy Framework to Approach the Use of Associated Petroleum Gas,"
Columbia Center on Sustainable Investment, Columbia University, (2016), available at: http://ccsi.columbia.edu/files/2014/06/A-policy-framework-for-the-use-of-APG-July-2016-CCSI.pdf

[1694] Shay Banerjee, Perrine Toledano, "A Policy Framework to Approach the Use of Associated Petroleum Gas,"
Columbia Center on Sustainable Investment, Columbia University, (2016), available at: http://ccsi.columbia.edu/files/2014/06/A-policy-framework-for-the-use-of-APG-July-2016-CCSI.pdf

[1695] IPIECA. UNDP. IFC. 2017. Mapping the oil and gas industry to the Sustainable Development Goals: An Atlas.

7.1.7 Applying Good International Industry Practice

At the heart of the 'Resource Curse Phenomenon' in developing countries lie the inadequacies of the national and local governance structures in managing a country's natural resource industry. Therefore, MOCs as investors are ill-suited to resolve the inadequacies. However, MOCs can play their role by embracing high integrity standards in their operations; by voluntarily adopting good international industry practice, even in developing countries whose systems and legal requirements may not be stringent. Their home states' legislation can also help support this prospect.[1696]

MOCs can stabilise and add value to their investment by negotiating fair PSA terms, as the most important public manifestation of the MOC's good citizenship. For a developing country like Uganda, a fair allocation of petroleum returns (and windfall rents), and the adoption of BAT in environmental measures, can make a difference in whether or not, the country experiences sustainable development. Refer to Chapter Two, section 2.3 which discusses the positive impacts of the petroleum industry and how the MOCs can contribute to Uganda's pursuit of the SDGs.

MOCs should play an essential role in avoiding corrupt behaviour by rejecting inappropriate requests from the Government and any other companies; so that they can meet the anti-corruption obligations detailed by the OECD

[1696] The French Duty of Vigilance Law No. 2017-399 of 27 March 2017

Convention[1697] and their home state regulations. If MOCs hope to sustain a good reputation and support from the communities in which they operate, it is in their interest to be transparent about what they pay to the Government. This is especially so since Government often uses the phrase "*shall not be published or disclosed to third parties without written consent from either Party*" to withhold vital information. [1698] MOCs can support and participate in increasing transparency by consenting to the disclosure.

7.1.7.1 Collaborative efforts between MOCs, Government and Local Communities in pursuing SDGs

The local content obligations discussed in this thesis are one way in which MOCs could participate in sustainable development by engaging the local communities. [1699] However, MOCs can also voluntarily participate in numerous ways, such as funding the development of the infrastructure needed for operations (roads, railways, and telecommunications) and making it available to the local community as soon as the company is using them. Another way is through creating community development agreements (CDA) between the MOC and the local communities.

[1697] Gordon, K., J. Pohl, and M. Bouchard. 2014. "Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact-Finding Survey" OECD Working Papers on International Investment, No. 2014/01.
[1698] Refer to Chapter Four, section 4.3.3
[1699] Refer to Chapter Three, section 3.7.2

Voluntary participation enhances the company's reputation, develops a strong social license to operate and might add value accordingly to their operations. Where for example, MOCs fund vocational training for project workers or technical institutes to support the new industry, they can also develop a pool of skilled employees. The funding should be extended to training skills that can be used in other sectors to facilitate diversification of the economy. The thesis recommends that where possible, MOCs should seek consultation and endorsement from the community for their CSR projects. It would be ineffective and counterproductive to build school infrastructure when PAPs cannot afford to pay fees or buy educational materials for children, or government cannot provide teachers.[1700]

7.1.8 Clarifying any Broad and Ambiguous Terms in BITs

The thesis discussed several BIT clauses written vaguely and ambiguously in the Uganda-Netherlands BIT.[1701] Breach of these terms has often been the subject of ISDS, yet Arbitral Tribunals have always interpreted them differently. If the Uganda-Netherlands BIT continues to be in force, then Treaty partners could establish a joint body with the mandate to issue binding interpretations of treaty provisions.

Netherland's 2019 model BIT now requires that parties establish the joint body and incorporate provisions for corporate environmental and social

[1700] Refer to Chapter two, section 2.3.1.5
[1701] Refer to Chapter Six, section 6.3

responsibility,[1702] gender equality and human rights protection. It also provides for the possibility of claims against the investor in their home state, and the requirement that investors carry out substantive business activities,[1703] limiting the possibility of 'treaty shopping' for the purpose of tax avoidance. These are the novel changes that Uganda should consider and will not receive much resistance from the Netherlands.

NT Clauses should be interpreted based on whether the investments and investors have "like circumstances" with the domestic investor or investment instead of the current situation that extends its ambit based on nationality alone. FET clause should be limited to protection against denial, unreasonable delay, gross injustices by domestic courts, gross inadequacy in the administrative or judicial processes, and failure to provide free and fair due process rights in the judicial proceedings.

This thesis recommends that BITs include exceptions or carve-outs to exclude specific sectors, policy objectives, or government tools from the treaty's scope (or its ISDS).[1704] The interpretation of expropriation should exclude regulatory action if done legally, for legitimate public policy aims (public morals, health, safety, the environment, or public order); in a non-discriminatory manner; and not involve the formal exchange of title or proprietorship rights.[1705]

[1702] Netherlands model Investment Agreement 22 March 2019 Article 7
[1703] Ibid Article 6
[1704] E Aisbett and others, *Rethinking International Investment Governance: Principles for the 21st Century* (1st August 2018) 102
[1705] Ibid

7.1.9 Rebalancing Dispute Settlement in PSAs and BITs

The Model PSA and BIT contain Arbitration forums for ISDS, to rebalance investor-state rights. Several reforms to address numerous rule of law and procedural shortfalls need consideration. It would involve strengthening transparency rules of arbitral awards and decisions, restoring state-to-state arbitration, and expanding review of awards by creating an appellate body. It would also entail including private actors, strengthening arbitrators' independence and more drastically, eliminating ISDS and replacing the forum with an international investment court system. The following sections discuss these aspects.

7.1.9.1 Making Damages Awarded by Arbitration Tribunals More Consistent

The thesis analysed the current ISDS system and its arising issues concerning inconsistent compensation.[1706] One of the crucial issues was that arbitral tribunal compensation awards differ substantially in comparable cases and are substantially large compared to a host country's ability to pay.[1707] Arbitral awards are intended to restore the investors to the position they would have been in without the host government action. However, this process does not consider some government actions arising out of extenuating circumstances such as financial crises, or environmental protection concerns.

[1706] Refer to Chapter Four, section 4.3.2 and chapter six, section 6.4.1.1.3
[1707] Refer to Chapter Six, section 6.4.1.1.7

In addition, many developing countries may not have experience in the sector, and furthermore, they tend to deal with experienced companies. When negotiating the PSAs or other agreements, sometimes they make bad deals, and later attempt to change them by enacting new laws that affect the MOCs' profit margin. In cases where a host state indirectly expropriates the MOCs' asset, the tribunal might not consider whether a state is developing or developed at the time of awarding damages. Therefore, it might award substantial damages that might affect the developing State's economy. In view of this, tribunals should contemplate on the impact an arbitral award might have on host countries, especially developing countries and consider justifications on a case-by-case basis.[1708]

7.1.9.2 Incorporating the Requirement of Transparency of Arbitral Process and Awards

In only a few cases are arbitral filings, decisions, and awards, made public in their entirety, which creates a lot of speculation, controversy, and negative perception of the ISDS system. To restore public confidence in the system, tribunals (with parties consent) should publish all documents associated with the arbitration, including the award. The exception being where the information is confidential for national security, and information that may affect a MOC's commercial interests.

[1708] E Aisbett and others, *Rethinking International Investment Governance: Principles for the 21st Century* (1st August 2018) 104

In Chapter Four, section 4.2.2.2.1, the thesis analysed the dispute resolution forums in Uganda's Model PSA, which provides that parties refer any dispute to Arbitration as per the UNCITRAL Arbitration Rules. [1709] Incidentally, UNCITRAL does have Transparency Rules which provide that: [1710]

> *"1. Subject to article 7 [covering confidential or protected information], the following documents shall be made available to the public: the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defence and any further written statements or written submissions by any disputing party; a table listing all exhibits to the aforesaid documents and expert reports and witness statements, if such a table has been prepared for the proceedings, but not the exhibits themselves; any written submissions by the non-disputing Party (or Parties) to the treaty and by third persons, transcripts of hearings, where available; and orders, decisions and awards of the arbitral tribunal.*
>
> *2. Subject to article 7, expert reports and witness statements, exclusive of the exhibits thereto, shall be made available to the public, upon request by any person to the arbitral tribunal.*
>
> *3. Subject to article 7, the arbitral tribunal may decide, on its own initiative or upon request from any person, and after consultation with the disputing parties, whether and how to make available exhibits and any other documents*

[1709] Model PSA 2018 (n 498) Article 24

[1710] United Nations Commission on International Trade Law, UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, 2014

provided to, or issued by, the arbitral tribunal not falling within paragraphs 1 or 2 above."

However, the UNCITRAL Rules also provide in Article 7 for confidential or protected information that is exempted from public disclosure, such as confidential business information, treaty protected information, legally protected information that would impede law enforcement in both States party to the contract, and information protected from public disclosure by the arbitral tribunal rules. Article 7 also leaves the arbitral tribunal with the discretion to determine whether the information is confidential or protected, after consultation with the disputing parties.

The issue is whether PSA terms on financial payments can be considered confidential and protected business information, which is left to the discretion of the contracting parties. If the Government committed itself to fostering accountability in the petroleum industry, and supporting the pursuit of sustainable development, then encouraging transparency in the arbitral process would enable stakeholders affected by MOC activities to follow and hopefully participate in the resolution process, evaluate the arbitral awards, and establish whether their interests have been protected.

7.1.9.3 Expanding Review Mechanisms

As dispute resolution forum designed to advocate for justice in IIL, ISDS lacks several of the elemental tenets of fair a judicial system. There is no purposeful review mechanisms to which a dissatisfied party can seek redress, or at least

challenge any inconsistencies in the Arbitrator's decisions in like cases.[1711] Unlike what a specialised international investment court could provide, ISDS does not have a permanent body of decision-makers.[1712] This creates a situation for incoherent and typically wide diverging rulings, based on broad interpretation of the treaty provisions, often in favour of the investors.[1713] Such expansive interpretations of IIT, if not checked by an appellate body, create a compounding problem where both States and investors face challenges understanding their rights and obligations.[1714]

There are few arbitral decisions that can be reviewed under International investment law. The justification being that proceedings are conducted with relative speed and that awards are final and easily enforceable.[1715] However, the restricted scope of review implies that countries "*may be bound to awards that violate fundamental principles of their domestic law*."[1716] The decisions bind countries to adverse awards that may even be legally or factually incorrect. In addition, because there is no review process, Arbitrators have tended to interpret similar treaty terms inconsistently.[1717]

An appellate system would enable aggrieved parties to appeal arbitral awards, thereby correcting the erroneous or conflicting awards and rebalance the

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[1711] E Aisbett and others, *Rethinking International Investment Governance: Principles for the 21st Century* (1st August 2018) 116
[1712] Refer to Chapter Six, section 6.4.1.1.4, 6.4.1.1.7, 6.4.1.1.8
[1713] E Aisbett and others, *Rethinking International Investment Governance: Principles for the 21st Century* (1st August 2018) 125
[1714] Ibid 125
[1715] Ibid 126
[1716] Ibid 126
[1717] E Aisbett and others, *Rethinking International Investment Governance: Principles for the 21st Century* (1st August 2018) 125-126

effects of the current ISDS. However, this is a general recommendation considering it would require creating a special international investment appellate institution. Perhaps, one like the WTO Appellate Body that hears appeals from trade panels' decisions for disputes between WTO Members. The Government might probably be able to negotiate new IITs or review existing ones to incorporate this recommendation.

7.1.9.4 Abolishing ISDS from Uganda's BITs

The option to abolish ISDS altogether from Uganda's PSAs and BITs is always available as a way to reform its investment law and eliminate some of the issues discussed in this thesis.[1718] Though radical, it is increasingly becoming popular in BITs signed in recent years.[1719]

The main benefit in relying on ISDS for MOCs appears to be large-scale compensations instead of redressing any wrongs. However, MOCs still have the option of relying on the Multilateral Investment Guarantee Agency, which offers political risk insurance to public or private companies. Foreign investors can rely on these forums for claims of compensation for the most sever property rights violations similar to those covered under IITs.[1720]

Removing ISDS may leave room for the host country to build capacity in national courts. UNCTAD has observed: "*Rather than focusing exclusively on ISDS, domestic reforms aimed at fostering a sound and well-working legal and judicial*

[1718] Refer to Chapters Four, section 4.3.2 and Six section 6.4.
[1719] Refer to Chapter Six, section 6.4.1.1.9
[1720] E Aisbett and others, *Rethinking International Investment Governance: Principles for the 21st Century* (1st August 2018) 117

institutions in host states are important. This may ultimately help remedy some of the host-state institutional deficiencies which IITs and the ISDS mechanism were designed to address."[1721] There is some evidence that the EAC Governments hope to use the newly established international arbitration centres in Mauritius (LCIAMIAC), Rwanda (KIAC) and Kenya (NCIA) to this effect.[1722]

The establishment of a new centre for arbitration and mediation in Kampala, the International Centre for Arbitration and Mediation in Kampala (ICAMEK) on the 26 July 2018 is a development worth noting.[1723] As governments become more motivated to reform their domestic judicial systems, they can make an even stronger case for abolishing ISDS, thereby re-establishing the State's regulatory authority and rebalancing investor-State rights.[1724]

7.1.9.5 Exhausting Local Remedies as a Precondition For ISDS

The discussion on ISDS in previous chapters[1725] showed how the system tends to marginalise domestic courts and legal institutions. MOCs often justify using international arbitration forums due to fear that a host country's legal and

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[1721] UNCTAD, World Investment Report 2015 available at slidelegend.com. https://slidelegend.com/world-investment-report-2015-unctad_59b3ae7a1723dd6c7341ec81.html> accessed 27 May 2019

[1722] Sadaff Habib, 'Watch Out, Africa is Here! – The East African International Arbitration Conference 2019' *(Kluwer Arbitration Blog* 29 October 2019) <http://arbitrationblog.kluwerarbitration.com/2019/10/29/watch-out-africa-is-here-the-east-african-international-arbitration-conference-2019/> accessed 3 December 2019

[1723] Uganda Bankers Association, 'The International Centre for Arbitration & Mediation in Kampala commences operations' https://ugandabankers.org/the-international-centre-for-arbitration-mediation-in-kampala-commences-operations/> accessed on 3 January 2020

[1724] E Aisbett and others, *Rethinking International Investment Governance: Principles for the 21st Century* (1st August 2018) 118

[1725] Refer to Chapter Four, section 4.3.2 and Chapter Six section 6.4.1.1.6

judicial systems are not independent and qualified enough to handle such investment disputes. The discussion revealed that in some cases, this might be justified as is the case of Uganda discussed in Chapter 6, section 6.4.1.1.6.

However, prior to even considering the option to exhaust local remedies, the Government needs to promote and strengthen the domestic legal systems to promote the rule of law. There are several advantages and opportunities that open up if Uganda were to rely on domestic courts to resolve foreign investment disputes. First, the judicial forum would know the Ugandan circumstances and laws and therefore have the ability to clarify any legal ambiguities applicable to domestic and foreign investment. Secondly, it is an opportunity for the Government to reform its judicial governance, enhance judicial independence, and offer continuing education of the judiciary in areas outside their technical knowledge. The Government can provide domestic courts as the first instance and for a limited timeframe, before bringing the matters to international arbitration.

Where parties prefer to resolve their disputes through Arbitration, EAC Governments have developed international arbitration centres in Mauritius (LCIAMIAC), Rwanda (KIAC) and Kenya (NCIA). However much these are in their infancy; they present an opportunity for an African seat of arbitration and African practitioners in international arbitration.[1726]

[1726] Sadaff Habib, 'Watch Out, Africa is Here! – The East African International Arbitration Conference 2019' *(Kluwer Arbitration Blog* 29 October 2019) <http://arbitrationblog.kluwerarbitration.com/2019/10/29/watch-out-africa-is-here-the-east-african-international-arbitration-conference-2019/> accessed 3rd December 2019

7.1.10 Expanding liability for breach of Investor's Obligations

In Chapter 6, section 6.3.1.4 this thesis discussed how advantageous a BIT can be for companies when considering where to invest. As well as how this can encourage treaty shopping, with parent companies incorporating subsidiaries in a BIT contracting Party to take advantage of the Treaty provisions. Considering the intricate corporate structures of the MOCs discussed in earlier,[1727] it is not public knowledge how much time the parent company spends on overseeing the activities of the subsidiaries business and risks. However, the author assumes that because the MOCs parent companies have the financial capability and technical expertise in petroleum exploration and production process, they are therefore involved in approving the subsidiaries actions or spending. This current intricate corporate structure of the MOCs is advantageous in limiting the Parent companies' liabilities for their subsidiary's actions, since both companies maintain separate legal personality or identities, except if the subsidiary is acting as an agent of the holding company.[1728]

The Government can rely on the Revised Zero Draft Treaty,[1729] and the UNGP[1730] to ensure corporate accountability, and eliminate any ongoing

[1727] Refer to Chapter one, section 1.3.4.1.3
[1728] UK Companies Act 2006 c 46, section 3, 4, 136, 138; Corporations Act 2001 (Cth)
[1729] OEIGWG, *Second Revised Draft of a Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises*. (2020) <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf> Accessed on 2nd February 2022
[1730] Ibid preamble, Article 5

disregard for international law and human rights standards by transnational corporations and other business enterprises in the context of "*any business activities of a transnational character*".[1731] It now requires the Government to establish a comprehensive and adequate system of legal liability (encompassing civil, criminal and administrative liability including torts based on negligence, strict liability) for human rights violations.[1732]

The Government can also refer to the Pan-African Investment Code (PAIC)[1733] acting simply as a guide on how to introduce direct obligations for investors. It provides that "*Investors shall abide by the laws, regulations, administrative guidelines and policies of the host State…and in pursuit of their economic objectives, ensure that they do not conflict with the social and economic development objectives of host States …… and contribute to the economic, social and environmental progress with a view to achieving sustainable development of host States."*[1734] It also provides that Investors should not "*exploit or use local natural resources to the detriment of the rights and interests of the host State"* and to "*support and respect the protection of internationally recognized human rights*".[1735] such that if the investor breaches

[1731] Revised Zero Draft, Article 3
[1732] Ibid Article 6 (1) (6) (7)
[1733] Makane Moïse Mbengue1, Stefanie Schacherer, 'The 'Africanization' of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime' (18(3) *The Journal of World Investment & Trade*, 2017); Mouhamadou Madana Kane, 'The Pan-African Investment Code: a good first step, but more is needed' Columbia Centre on Sustainable Investment, *FDI Perspectives on topical foreign direct investment issues No. 217* (2018); R Rameau, "The Pan-African Investment Code as a Model for Negotiation on the Investment Protocol to the Agreement Establishing the African Continental Free Trade Area" TDM 4 (2021)
[1734] The Draft Pan-African Investment Code (PAIC) (2016 Article 22
[1735] Article 23, and 24

those obligations, the State *may initiate a counterclaim against the investor*,[1736] to offset any merits of a claim or on any damages awarded by the ISDS body.

To resolve the issue of ascertaining the parent company's liability for actions of its subsidiary, this thesis recommends enjoining the parent company to PSAs, to establish a direct contractual nexus that deals with the separate legal personality issue. They can also provide within the PSA that the host state can raise defence that the investor violated their legal or contractual obligation[1737] in order to circumvents the investor's ability to claim alleged violations of its rights under an IIT ("clean hands" doctrine).[1738] Alternatively, if the investor breaches their legal or contractual obligations, the host government could request a reduction in damages awarded to the investor.[1739] All investors would then have strong incentives to take note of and meet their PSA obligations.

7.2 Conclusion

The overarching research question this thesis set out to answer was whether Uganda's petroleum legal and regulatory frameworks adequately considered socio-economic resilience, environmental protection and curbs the 'Resource Curse Phenomenon.' Chapters Three to Six assessed Uganda's national and

[1736] Article 43
[1737] Refer to discussion in Chapter five, sections 5.4.6 and 5.4.7 on The UN Guiding Principles on Business and Human Rights (Pages 321-327); and The Zero Draft Treaty (Pages 327-331); Refer to discussion in Chapter Six on Parent Companies' Liabilities for Their Subsidiary's Actions (Pages 351-354)
[1738] E Aisbett and others, *Rethinking International Investment Governance: Principles for the 21st Century* (1st August 2018) 109
[1739] E Aisbett and others, *Rethinking International Investment Governance: Principles for the 21st Century* (1st August 2018) 109

international policies, laws, regulations, PSAs, and treaties that govern the petroleum industry. From that assessment, it appears that since 2013, the Government has established a robust and prescriptive regime to guide the sector's development, and the legal framework continues to develop as Parliament enacts new fundamental petroleum-related laws, even as recently as 2020.

Uganda has also ratified several international laws discussed in Chapter Five and domesticated them within their national legal framework. The Ugandan Government has also established a robust institutional framework per its NOGP. Therefore, this thesis acknowledges that the legal regime's provisions have created specific prudent parameters of operation necessary to stave off the onset of the resource curse.

However, the thesis also identified several inadequacies, limitations, loopholes, and enforcement gaps within its legal and regulatory framework that the Government needs to address, such as the lack of a regulatory framework that provides parliamentary oversight into the licensing process, limiting transparency and public participation. The established institutional framework, though robust, is not adequately funded nor with adequate capacity to carry out their various roles. There are no policies and legal framework for health safety and the environment for the petroleum industry. There is a lack of clear strategy and plan for value addition in the sub-sector despite having enacted the Midstream Act and signing the Project Framework Agreement with Albertine Graben Refinery Consortium.

The most significant challenge identified is that Government hardly enforced some of the laws, notably withholding petroleum-related information concerning its share in the PSAs (royalties, acreage fees, bonuses) despite laws providing access to information; and hindering public participation in ESIA hearing, contrary to the EIA Regulations and the EIA Public Hearing Guidelines. This leaves room for misappropriation of the oil funds.

Therefore, the Government need to follow through with implementing the robust laws discussed in Chapter Three. The impact of the gaps discussed throughout the thesis is that they can exacerbate the 'Resource Curse Phenomenon' as discussed in Chapter Two, and harm Uganda's developmental goals.

Government's Model PSA (and therefore other PSAs) are crucial to defining the investment project and constitute a vital instrument of governance since they determine the distribution of risks, costs, and benefits of the project. If well designed and implemented, contracts can maximise the contribution of natural resource investment to sustainable development goals. However, poorly drafted PSAs may impose unfavourable terms on the host country, sow seeds of disputes and undermine the pursuit of sustainable development.

The second thesis question was whether Uganda's Model PSA (assessed in Chapter Four) aligns with the national legal frameworks discussed in Chapter Three to set a favourable contractual framework to guide future PSAs with MOCs. In addition, investor-protection terms were examined to see whether they create obstacles for the host State to apply new social and environmental

legislation to investment projects in the host state; and if so, the extent they impede the advancement of sustainable development.

The thesis concluded that the Model PSA contains several favourable terms that reflect Uganda's petroleum laws and SDGs. In particular, they provide that the petroleum resources belong to the Ugandan Government, thereby acknowledging Uganda's permanent sovereignty and sovereign rights over its natural resources, to be developed on behalf of the public. The Government introduced provisions on national interest which require MOCs to engage in local content, technology transfer, and capacity building as per the national legal and regulatory framework. Local communities would benefit from getting direct or indirect jobs within the industry and improve their socio-economic circumstances.

The 2018 Model PSA also introduced a renegotiation clause which allows room for the Government to enact new laws and reassures the MOCs of maintaining their economic benefits. Unlike the old generation stabilisation clauses that stifled the State's ability to legislate legitimately on matters affecting socio-economic development and environmental protection, those laws would affect the investor's economic benefits. Instead, it addresses the economic impact by renegotiating to re-establish the equilibrium of the contract. However, the clause does not clarify what constitutes the term "maintain their existing economic benefit." It can be easily interpreted in many ways as the MOCs seek to minimise the investment costs that they are entitled

to recoup, such as costs brought on by legal obligations including national content.

On whether the law provides for investor-protective terms capable of creating obstacles for the host State to enact new social and environmental legislation, the thesis found that the 2018 Model PSA provides that the MOC conduct all its Petroleum activities per the Upstream Act, the NEA, and other applicable laws and regulations. These require an MOC to conduct ESIAs to prevent or minimise danger to human life, property, pollution to the environment or harm to wildlife. The Government has also removed pertinent environmental protection issues, fiscal and economic empowerment from the jurisdiction of international arbitration forums.

However, the Model PSA contains a restrictive confidentiality clause, and the Government has used this clause to withhold vital information from third-parties, such as NGOs, CSO, and local communities. This denied them an opportunity to objectively access, assess and monitor information related to the developing petroleum industry, which is contrary to the Constitution, and Access to Information Act. Until the PSAs are made public, civil society, NGOs, researchers, and even facets of the governments' entities will continue to speculate on whether the PSA terms are favourable. The government seems to be showing commitment to disclosing PSA terms in the future. They have done this by deciding to publish the Armour Energy's PSA's snippets and joining EITI

The assessment further revealed that Uganda-Netherland BIT's contains several investor protection clauses (FET, MFN, NT, Umbrella, and ISDS clauses) against specific government interference. The definitions of the investor and investment are also broad enough to include companies without economic contributions to the Ugandan economy. Some of the repercussions of the clauses discussed and the unfairness of the arbitration system (particularly the small exclusive club of arbitrators) are rightly concerning. The thesis concludes that these clauses can create costs for developing countries, both in terms of loss of policy space and defending and paying adverse awards in investment treaty arbitrations. To maximise the benefits and at the same time minimise the costs of investments in the extractives industry, the Government will need to review its BIT clauses in view of the recommendations in this thesis.

In conclusion, MOCs also have a role to play by making choices that are in their hosts' best interest and their businesses' long-term viability. As earlier discussed,[1740] MOCs can engage with SDGs and so the Government should support them when taking the right steps and offer oversight and constructive advice when appropriate. If all stakeholders work together, Uganda will have the best possible chance to achieve the desired sustainable development from its petroleum industry.

7.3 Implications of the Study for Future Research

[1740] Refer to Chapter Two, section 2.3

The author capped the research done in this thesis to February 2020.[1741] Since then, Uganda has made a significant step to join EITI. This new development will inform future study on the Government's commitment to the disclosure of information.

Since 1st February 2020, the unprecedented global pandemic caused by COVID-19 created a global downturn in the petroleum industry, with global oil demand falling by 25% in April.[1742] It created new causes of concern for the adverse impact of deteriorated fiscal balances on petroleum exploration and producing countries, and increased risk to MOCs. The new development will need further study beyond this thesis's scope and will inform further research to assess their implications on Uganda's Petroleum industry.

[1741] Thesis Updated on 2nd February 2022

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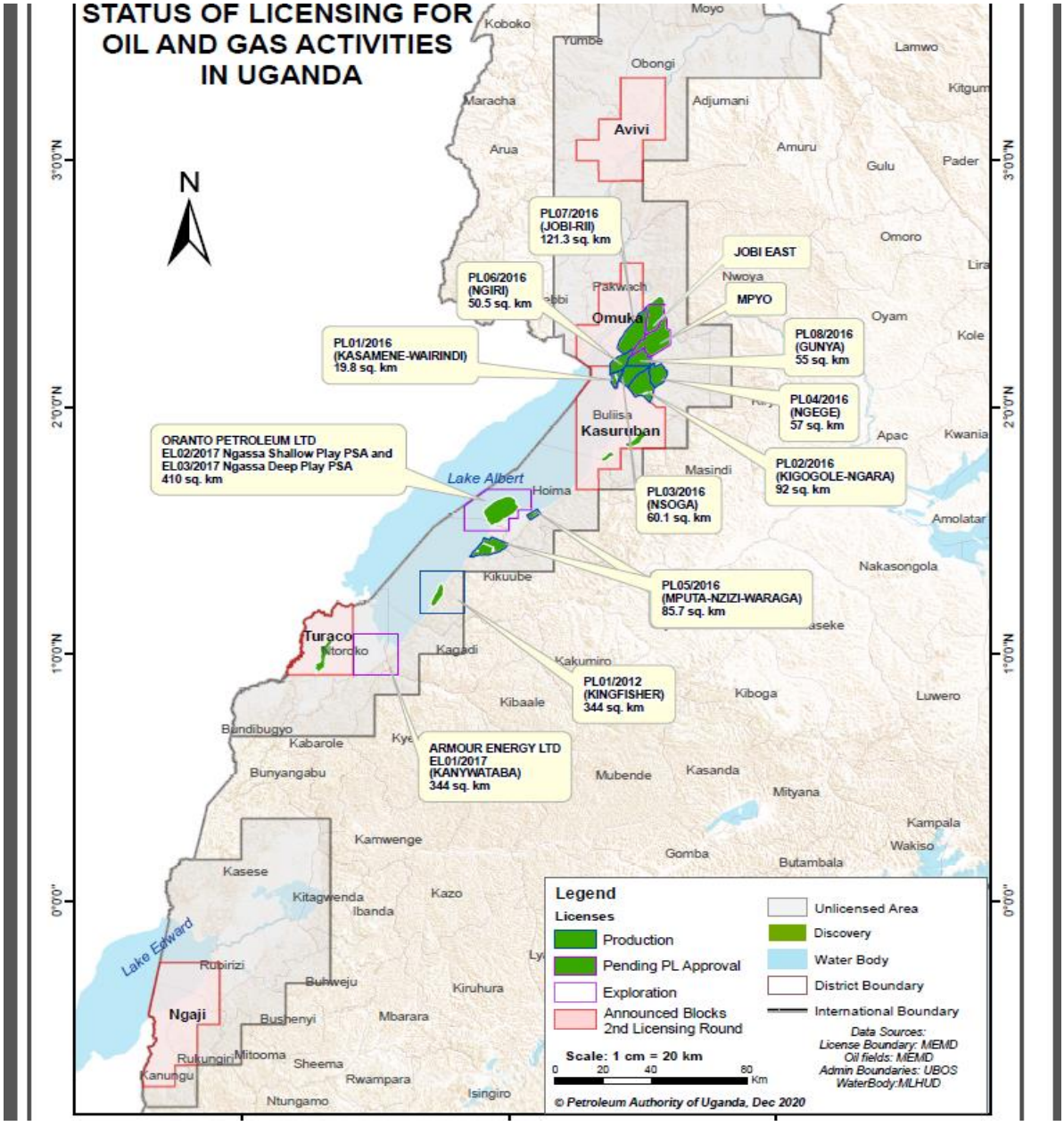
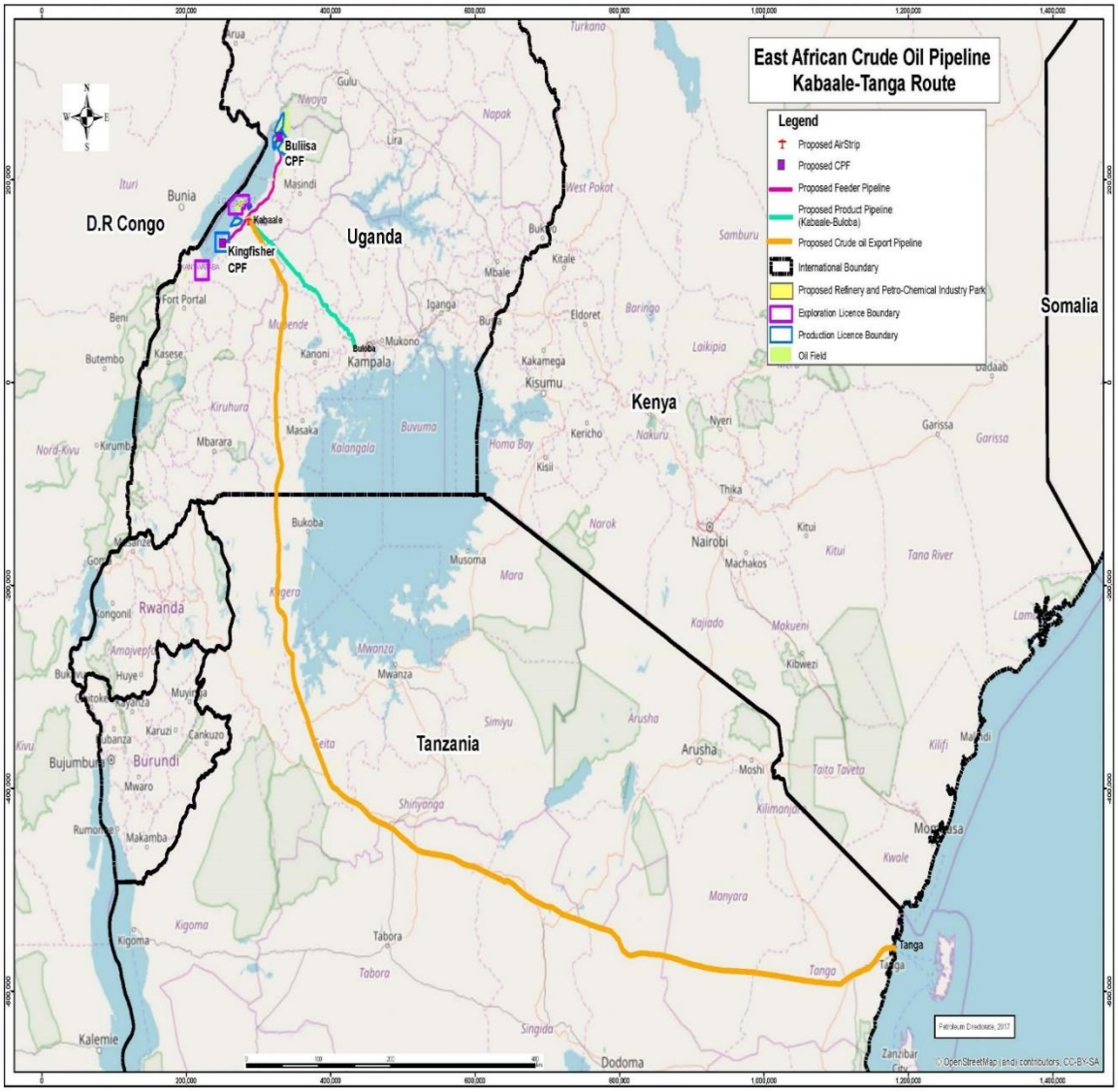
ANNEX A

1. Map showing Status of Licensing in the Albertine Graben of Uganda (2020)[1743]



[1743] Petroleum Authority Uganda, Status of Oil and Gas Licensing in Uganda, (2020) https://paumaps.pau.go.ug/portal/sharing/rest/content/items/9468ba98d05248d0bca4b29a972f5a54/data

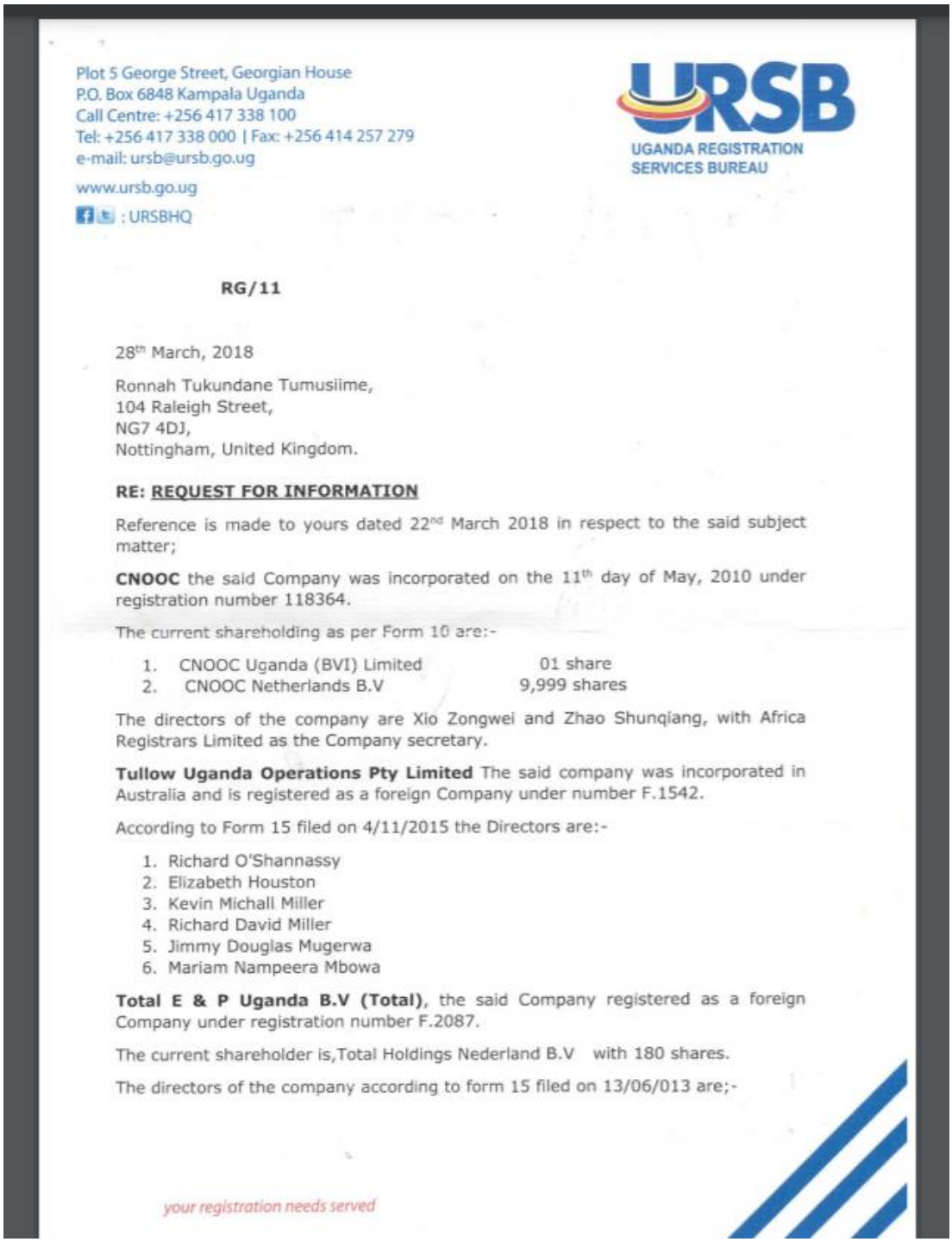
2. Map showing East Africa Crude Oil Pipeline[1744]



[1744] Petroleum Authority Uganda, East Africa Crude Oil Pipeline (EACOP) (2020) <https://www.pau.go.ug/maps/> accessed 3 June 2019

ANNEX B

Official letter from the URSB



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: URSBHQ

URSB
UGANDA REGISTRATION SERVICES BUREAU

RG/11

28th March, 2018

Ronnah Tukundane Tumusiime,
104 Raleigh Street,
NG7 4DJ,
Nottingham, United Kingdom.

RE: REQUEST FOR INFORMATION

Reference is made to yours dated 22nd March 2018 in respect to the said subject matter;

CNOOC the said Company was incorporated on the 11th day of May, 2010 under registration number 118364.

The current shareholding as per Form 10 are:-

1. CNOOC Uganda (BVI) Limited 01 share
2. CNOOC Netherlands B.V 9,999 shares

The directors of the company are Xio Zongwei and Zhao Shunqiang, with Africa Registrars Limited as the Company secretary.

Tullow Uganda Operations Pty Limited The said company was incorporated in Australia and is registered as a foreign Company under number F.1542.

According to Form 15 filed on 4/11/2015 the Directors are:-

1. Richard O'Shannassy
2. Elizabeth Houston
3. Kevin Michall Miller
4. Richard David Miller
5. Jimmy Douglas Mugerwa
6. Mariam Nampeera Mbowa

Total E & P Uganda B.V (Total), the said Company registered as a foreign Company under registration number F.2087.

The current shareholder is,Total Holdings Nederland B.V with 180 shares.

The directors of the company according to form 15 filed on 13/06/013 are;-

your registration needs served

The directors of the company according to form 15 filed on 13/06/013 are;-

1. Serge Matesco
2. Total Management B.V
3. Martine Napia Valeix
4. Marcel Alexander Remko Silvester Mars

With Pauline Bos- Breitbarth as the Company Secretary.

We remain at your service.

Nalubiula Diana
For: The Registrar General