A CRITICAL APPRAISAL OF OIL AND GAS DISPUTE PRONE CLAUSES: A CASE FOR UGANDA'S PRODUCTION SHARING AGREEMENTS

By

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DEDICATION

To my family, from whom I had to steal hours away to write this dissertation.

I hope you will forgive me

and enjoy this piece when you read it and gather understanding that

the passion for writing knows neither morning nor night.

This all, to the Almighty God.

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May the Almighty God reward you all sufficiently!

ABSTRACT

To pursue exploration and production activities for her nascent oil and gas resources, Uganda negotiated and continues so to do and enter Production Sharing Agreements as the most appropriate relationship between herself and international hydrocarbon investor companies. Of course disputes in any relationship come about due to several reasons. In this research, potential dispute PSA clauses between investor oil companies and the State were identified for study. Library literature on dispute occurrence in the petroleum sector was confirmed by field interviews and observations carried out in Malaysia and Uganda for four months. This project sought to appraise the need for contractual lawyers and negotiators in the oil and gas field to be armed with adequate contract negotiation and drafting skills whose ultimate purpose was to enhance contract clause clarity and sanctity as dispute mitigation toolkits. Believing that disputes could be severed from contractual obligations, was synonymous to an attempt to planting boundary marks between the two concepts with a blackjack path trekking experience as such disputes could not be extricated from their founding contractual clauses. The roles of appropriate PSA pre-negotiation skills, proper contract drafting etiquettes and observance of the sanctity of contract doctrine were particularly relevant in dispute mitigation. An abundant wealth of knowledge on dispute resolution was however, available although not as such in the area of dispute prevention. This inquiry arose therefore, from the need to pay homage to the most sought for medical adage; "prevention is better than cure."

ABBREVIATIONS

ACODE	Advocates Coalition for Development and Environment
AIPN	Association of International Petroleum Negotiators
AIR	Annual Indian Reports
BP	British Petroleum Company
CVs	Curriculum Vitae
E & P	Exploration and Production
EIAs	Environmental Impact Assessments
HCs	Oil-rich Host Countries; in this study, Uganda is one
IBA	International Bar Association
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States, 1965
IOCs	International Oil Corporations/Companies
JOAs/JVAs	Joint Operating/Venture Agreements
MLJ	Malayan Law Journal
NAFTA	North American Free Trade Agreement
PSAs/ PSCs	Production Sharing Agreements/ Contracts
SC	Supreme Court
Sdn Bhd	Sendirian Berhad (Malay) (English meaning: Private Limited Company)
UK	United Kingdom
UNCITRAL	United Nations Convention on International Trade Law
UNGA	United Nations General Assembly
URA	Uganda Revenue Authority
US	United States
USAID	United States Agency for International Development

LIST OF CASE AUTHORITIES

LIST OF STATUTES

A: **International Conventions and Protocols:**

The Basel Convention 1989
The Convention Concerning the Protection of the World Cultural and Natural Heritage 1972
The Convention on the Conservation of Migratory Species of Wild Animals 1979
The ICSID Convention 1966
The International Covenant on Civil and Political Rights 1976
The Kyoto Protocol 2005
The RAMSAR Convention on Wetlands of International Importance 1971
The Rio Declaration 1992 and Agenda 21
The Stockholm Declaration 1972
The United Nations Commission for International Trade Law Arbitration Rules 1985
The United Nations Environment Programme Principles on Shared Natural Resources 1978
The United Nations Framework Convention on Climate Change 1992
The Universal Declaration of Human Rights 1948

B: **Regional Treaties and Protocols:**

The ASEAN Declaration on Human Rights 2012
The Bamako Convention 1991
The East African Community Master Plan 2003
The East African Community Protocol on Environment and Natural Resources Management 2006
The East African Community Treaty 2000
The Lusaka Agreement on Cooperative Enforcement Operations directed at Illegal Trade in Wild Fauna and Flora 1994
The Trans Boundary Environmental Assessment Guidelines for Shared Ecosystems in East Africa 2005

C: **Municipal Laws:**

(i). The 1995 Constitution of the Republic of Uganda, as amended by the Constitutional (Amendment) Act, 2005

(ii). Legislative Enactments:

The Access to Information Act, 2005
The Companies Act, 2012
The Employment Act, 2006
The Foreign Judgments (Reciprocal Enforcement) Act, Cap.9
The Historical Monuments Act, Cap.46
The Income Tax Act, Cap.340
The Investment Code Act, Cap.92
The Iranian Petroleum Act 1987
The Land Acquisition Act, Cap.226

The Land Act, Chapter 227
The Local Government Act, Cap.243
The National Audit Act, 2008
The National Environment Act, Cap.153
The Occupational Safety and Health Act, 2006
The Petroleum (Exploration, Development and Production) Act, 2013
The Petroleum (Production) Act 1934
The River Act, Cap.357
The Road Act, Cap.358
The Uganda Wildlife Act, Cap. 200
The Water Act, Cap.152
The Workers Compensation Act, 2000

(iii). Statutory Instruments:

The National Environment (Control of Smoking in Public Places) Regulations 2004
The National Environment (Environmental Impact Assessment) Regulations 1998
The National Environment (Minimum Standards for Management of Soil Quality) Regulations 2001
The National Environment (Mountainous and Hilly Areas Management) Regulations 2000
The National Environment (Noise Standards and Control) Regulations 2003
The National Environment (Waste Management) Regulations 1999
The National Environment (Wetlands, River Banks and Lake Shores Management) Regulations 2000
The National Environment Regulations 1995
The Petroleum Regulations as saved by section 189(2) of the Petroleum (Exploration, Development and Production) Act, 2013
Water Resources Regulations 1998

D. **Relevant Policies:**

Disaster Management and Preparedness Policy 2010
Policy Framework for Industry Sector 2008
Resettlement/Land Acquisition Policy Framework 2002
The National Environment Management Policy 1994
The National Oil and Gas Policy for Uganda 2008
The National Water Policy 1999
The Oil and Gas Revenue Management Policy 2012
The Uganda Wildlife Policy 1999

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CHAPTER ONE

INTRODUCTION

1.1.0 Introduction

By instinct, rumours, enthusiasm or traditional knowledge, a country gets wind of the commercial resource endowments on her land. Exploration processes, in case of petroleum, are then commenced to confirm the guess. In developing countries like Uganda, the expertise to explore for, let alone develop and produce the resources usually lacks. What happens is, the resource-rich country opening up investment opportunities for international oil companies with the experience, finances and technology to do the exploration, development and production of the resources on her behalf. For the contemporary arrangements, Uganda has entered into Production Sharing Agreements with a number of prospector companies for the extraction of her nascent oil and gas resources under a legal framework to regulate the state-private investor oil company relationship. It is this contractual relationship that may carry the investment interests and expectations forward or weaken them to the displeasure of the parties and their nationals when disputes occur. This dissertation appraises Uganda's PSA potential trouble spot clauses, and goes ahead to propose dispute prevention measures, with recommendations at the end.

For purposes of this dissertation, "petroleum" is used as a synonym for both "oil" and "gas" although it is, in a strict sense, a synonym for "oil" only; the "petroleum industry" is also referred to as the "oil and gas industry" or simply the "oil industry". Petroleum is

the generic name for oil and gas.[1] The terms were therefore interchangeably applied in this study.

By statutory definition, 'petroleum' means "any naturally occurring hydrocarbons including mineral oil or natural oil and gas, or other hydrocarbons produced or capable of being produced from reservoirs excluding coal, shale or any substance that may be extracted from coal or shale."[2]

Oil and gas have, for decades, sustained mankind in a plethora of household, transportation and industrial utilities world over. Indeed, it is no exaggeration that extensive capital investments to conduct oil and gas exploration, production and marketing have been in place leading to a myriad of agreements and disagreements. Oil and gas resources stimulate economic and social development, and are a source of enrichment with varying intensities of conflict.[3] When drafting oil and gas commercial agreements, it goes without saying that a dispute resolution clause has to be fixed therein whether or not parties to the agreement have discussed it during the negotiation,[4] as a boilerplate clause.[5] In this research project, potential disputes from Uganda's production sharing contract clauses were identified with a view to setting the stage for contract dispute mitigation in her oil and gas industry. It was however, imperative understanding the research problem, issues and methodology thereto.

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[1] Anthony Jennings. 2008. *Oil and Gas Exploration Contracts* (2nd ed.). Sweet and Maxwell, London: p.1.
[2] Reference is made to Article 244(4) of the 1995 Constitution of the Republic of Uganda, as amended by the Constitutional (Amendment) Act, 2005 and Interpretation section 2 of the Petroleum (Exploration, Development and Production) Act, 2013 (herein after referred to as 'the Act') for the definition.
[3] USAID. 2006. "Oil and Gas and Conflict Development Challenges and Policy Approaches Draft Document".
[4] Oon Chee Kheng. 2006. "Drafting Effective Dispute Resolution Clauses: Some Considerations." Vol.3 *Malayan Law Journal*: p.50.
[5] Bryan, A. G. (ed.) 2004. *Black's Law Dictionary* (8th ed.). West Group, US: p.185.

1.1.1 Statement of the Problem

Disputes, disputes, disputes! Almost every oil and gas agreement cannot pass the test of its time without a conflict. It would be a unique covenant between contracting parties in the petroleum resource worldwide to avoid an arbitral clause in their agreements. The ICSID Convention for example, is alive to, and reminds state parties of the possibility of dispute occurrence in the following statement:

> *"Bearing in mind the possibility that from time to time disputes may arise in connection with such investment between Contracting States and nationals of other Contracting States;... Recognizing that mutual consent by the parties to submit such disputes to conciliation or to arbitration through such facilities constitutes a binding agreement which requires in particular that due consideration be given to any recommendation of conciliators, and that any arbitral award be complied with; ...* parties *agree as follows:"*[6]

It is quite clear from the above, that an oil and gas contract is not binding until a dispute resolution clause is implanted therein. Timothy Martin, a celebrated scholar, arbitrator, mediator, expert and counsel at the International Arbitration Institute and the London Court of International Arbitration, writing about international dispute resolution, had this to say:

[6] Paragraphs to the ICSID preamble so state. The International Centre for Settlement of Investment Disputes (ICSID) was established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). Uganda has since October 14, 1966 been a Contracting State Party.

"Nobody likes discussing potential future disputes when making a deal. It is a bit like discussing how you want to handle your divorce at the time you make your marriage proposal. So it is often the last item negotiated in an agreement. However, the dispute resolution clause should not be an afterthought. It is a very significant clause in any international agreement since it is the ultimate determinant of how the agreement will be interpreted, applied and enforced. .....Disputes are therefore a significant risk in any international energy project. The risk is not whether a project will have a dispute, but rather in how well a company can manage the dispute to get a satisfactory result."[7]

The petroleum related disputes, classified as 'crises', were as early as 1980 portended in the following quotation:

"The petroleum 'crisis' that has been with us for the last five years seems likely to continue indefinitely."[8]

The prevalence of disputes is further adumbrated by Klaus Peter Berger when he writes:

"In any human relationship dispute is probable though not inevitable.....international business relationships, where so much is at stake on both sides and so much is the tension of conflict of interest in case things go wrong

[7] 2011. "Dispute resolution in the international energy sector: an overview." Vol.4 *Journal of World Energy Law and Business*: p. 334.
[8] Andrew, D. M. (ed.). 1980. *Facts and Principles of World Petroleum Occurrence*. Canadian Society of Petroleum Geologists Publishers, Canada: p.1.

between the parties, disputes may seem to be at the corner and no long waiting to experience one may be needed...."[9]

Meanwhile, other commentators on the subject matter are quoted as thus:-

"The concept of two people living together for twenty five years without having a cross word suggests a lack of spirit only to be admired in sheep."[10]

Disputes are real in any petroleum relationship and Uganda's situation is no exception.

1.1.2 Research Objective

The purpose of this inquiry is to develop mechanisms for dispute prevention in the nascent petroleum industry for Uganda, with the health adage focus; "prevention is better than cure".

1.1.3 Research Questions

1. What is the background of Uganda's oil and gas exploration, legal and contractual system?
2. What are the trouble spot contract clauses in Uganda's PSAs?
3. What dispute mitigation measures are in place for Uganda's oil and gas PSA regime?

[9] 2006. *Private Dispute Resolution in International Business Negotiation, Mediation, Arbitration.* Kluwer Law International Publisher, Leiden.

[10] In Louis Wells T. and Rafiq Ahmed. 2007. *Making Foreign Investment Safe: Property Rights and National Sovereignty.* Oxford University Press, USA: p.66.

1.1.4 Significance of the Study

An appraisal of potential dispute provisions in Uganda's hydrocarbon industry would be identifying bottlenecks to achieving the National Oil and Gas Policy Objectives for Uganda. This research provides an understanding of the economic impact of dispute prevalence in the petroleum sector. The study would expectedly heighten the awareness of petroleum contract negotiators, drafters and arbiters of the causes of disputes and gives an insight of how to fix the challenge beforehand. The findings would inform the players as well as policy makers of the import of skill in handling oil and gas matters. To the future researchers, this inquiry can provide baseline information for further research in the oil and gas dispute prevention strategies rather than placing sole emphasis on the now abundant dispute resolution mechanisms.

1.1.5 Scope of the Study

The focus of the study was on PSA arrangements between international oil and gas corporations (IOCs) operating in Uganda and the Government of Uganda as a host country (HC) in her upstream petroleum industry. Trouble spot (dispute prone) PSC Draft clauses of 2006 were examined with a view to laying background for review of the pre-2006 signed agreements and setting a precedent for future PSAs' compliance with the provisions of the relevant petroleum laws. An illustrative approach followed international experience though. This study was cognisant of situations and circumstances that could affect or restrict the methods employed in it and analysis of data so gathered.

1.1.6 Limitations

The shortcomings or conditions that this research had no control over, and influenced the methodology although not necessarily validity of the findings in this project[11] were characterised by:-

- Inadequacy of resources of time, and funds.
- Limited availability of energy related data on the topic.
- The confidentiality principle common with oil and gas organisations inhibited access to vital contract documents of some selected energy entities for a deeper understanding of the clauses therein, their interpretations and implications.

1.1.7 Delimitations

These were the choices that defined the boundaries of the study with reasons why such choices were undertaken.[12] In this research, the following were delimited:-

- Quantitative research approach was not undertaken, but qualitative because;

  No hypotheses had been constructed before the data were collected. It was possible to miss out on phenomena occurring because of the focus on theory or hypothesis testing rather than on theory or hypothesis generation (called the *confirmation bias*). Quantitative research required a big sample size on which to carry the study, yet constraints of time and resources were real in this project.

- Questionnaire data collection procedure was not employed because;

Questions therein are standardised and therefore inflexible to new research ideas and also offer no room for any interpretation to the participants in event of

[11] Kumar, R. 2011. *Research Methodology: a step-by-step guide for beginners.* Sage Publications Ltd., London: pp.236-237.
[12] (http://qualiresearch-azm.blogspot.com/2008/06/limitation-explained.html). Accessed on February 3rd 2013.

misunderstandings. Open-ended questions could generate large amounts of data that could take a long time to process and analyse. Respondents could answer superficially especially if the questionnaire took a long time to complete. Some busy respondents would not find time to answer the questionnaire, so to a researcher, that would be no work done.

1.2.0 Literature Review

The ICSID Convention does not define the term 'dispute'. However, J.G. Merrills defined dispute as a specific disagreement concerning a matter of fact, law or policy in which a claim or assertion of one party is met with a refusal, counter claim or denial by another.[13] "The Permanent Court of International Justice in its 1924 judgment in the *Mavrommatis* case, defined the concept of dispute as '...a disagreement on a point of law, a conflict of legal views or of interests between two persons...'"[14]

Adopting two court interpretations in the cases of ***Gujarat State Co-operative Land Development Ltd. vs. P.R Mankad and another,***[15] *and* ***Perbadanan Kemajuan Negeri Perak vs. Asean Security Paper Mill Sdn. Bhd.***[16], Padmanabha Rau, K.V defines a 'dispute' as "a controversy having both positive and negative aspects also postulating the assertion of a claim by one party and it is denied by the other...it must be relevant to the existence of a right to the relief claimed by a party."[17]

The Executive Directors of World Bank in their report on the ICSID Convention distinguished 'legal dispute' from 'conflict of interest' in the following style:

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[13] 1998. *International Dispute Settlement* (3rd ed.). Cambridge University Press, Cambridge.
[14] Dr.Rahmat Mohamad and Azahari Abdul Aziz. 2004. *A Dispute Settlement Mechanism for the ASEAN free Trade Area (AFTA).* Lexis Nexis, Singapore.
[15] AIR (1979) SC 1203.
[16] [1991]3 MLJ 309.
[17] In the 1997 article: *The Law of Arbitration: Cases and Commentaries.* International Law Book Services, Kuala Lumpur.

"[Article 25(1)] requires that the dispute must be a "legal dispute arising directly out of an investment." The expression "legal dispute" has been used to make clear that while conflicts of rights are within the jurisdiction of the Centre, mere conflicts of interests are not. The dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation."[18]

In this inquiry, a dispute was not understood only as a controversy between parties to an agreement; rather it included claims of injury of a right occasioned to third parties by reason of the parties' relationship and conduct.[19]

Certainly there are a number of reasons disputes in the oil industry have over time arisen. The focus of this research was to address disputes arising from contractual obligations and how best the contract terms could be crafted to mitigate this risk. "A casual googling would reveal a prevalence of energy disputes on the CVs of dispute resolution lawyers. Heavy dispute case statistics show anecdotal evidence of frequency with which disputes in the area of oil and gas occur at the Centre for Settlement of Investment Disputes."[20]

Timothy Martin cites **the long investment period** resulting into breach of contract terms; **unstable politics** leading to re-negotiation of terms of contracts, abandonment of agreements or expropriation of businesses to States themselves; **price fluctuations**; and

[18] 1964. International Bank for Reconstruction and Development (the World Bank) Report: p.44.
[19] The cases in point are the public litigation and judicial review claims.
[20] http://newsletters.pwc.com/nl/public/disputeperspectivesa/Dispute_Perspectives_15a.pdf accessed on February 4th 2013.

loss of anticipated financial gains in taxation for example as some grounds for dispute occurrence in the petroleum sector.[21]

Timothy (*supra*), apart from grounds, enumerates and discusses four most common kinds of disputes in the oil and gas business as follows:-

1). State versus State disputes;

2). Company versus State disputes;

3). Company versus company disputes and

4). Individual versus company disputes.

Timothy does not however, allude to 'Individual versus State disputes.' He admits in his conclusion that the list of dispute types was not exhaustive and therefore advises contract drafting counsel to possess deeper and sound knowledge of how to address potential dispute clauses at the drafting of the contracts to avert dispute occurrence.[22]

Raymond F. Mikesell, as early as 1971, while discussing nature of conflicts arising out of foreign investments in minerals and petroleum, asserted that such may arise over **taxes and other payments** to the Government that affect the net earnings of the company, the amount of **earnings that may be repatriated**, the **area that has been explored** by the company in which it is permitted to produce, the **prices charged** for the production, the **level of output**, the **price paid by the company for domestic goods and services**, the **exchange rate applicable** to local currency purchases and the **employment of domestic goods and services against foreign goods and services** in

[21] 2011. "Dispute resolution in the international energy sector: an overview." Vol. 4 *Journal of World Energy Law and Business*: pp. 332-368.
[22] *Ibid*, p.363.

company operations.[23] The learned author however, neither indicated whether or not these disputes were in regard to PSAs or any other relationships nor did he propose remedial interventions.

Maniruzzaman A.F.M.[24] discussed risk engineering and dispute management in the oil and gas industry and stressed the need to craft contracts between HCs and IOCs with such clauses that mitigate dispute liabilities. He cited **resource nationalism** as was tantamount to breach of contractual rights and hence a ground for disputes in the petroleum sector. The professor however, focused only on remedial measures on disputes arising upon resource nationalisation. He did not deal with the subject at length neither did he consider other likely grounds for dispute occurrence. In his discussion, he at least alludes to dispute prevention as a necessary requirement.

Further, while examining the substance and form of contracts in regard to the relationship between oil and gas exploitation and environmental issues, Kyla Tienhaara[25] complains that most oil and gas international contracts usually pay lip service to environmental concerns. He notes that the contracts that have environmental clauses are not generically constructed as among states and this is a ripe source for conflict in the impugned area. Kyla recommends a study into such disparities, and an exploration into whether the environmental clauses in the oil and gas contracts reflect domestic attention to environmental concerns of HCs and the extent to which IOCs

[23] 1971. *Foreign Investment in Petroleum and Mineral Industries: Case Studies of Investor-Host Country Relations*. The John Hopkins Press, Baltimore and London: pp.29-30.
[24] In his 2009 article: "The Issue of Resource Nationalism: Risk Engineering and Dispute Management in the Oil and Gas Industry". Vol. 5 *Texas Journal of Oil, Gas and Energy Law*: pp.79-108.
[25] 2011. "Foreign Investment Contracts in Oil and Gas Sector: A Survey of Environmentally Relevant Clauses". Vol. 11 *Journal of Sustainable Development Law and Policy*, Article 6.

implement them and what monitoring and enforcement strategies there are in the developing host countries' bags.

Connected to this, the Daily Monitor[26], Uganda's newspaper, publishing a report on the management of Uganda's oil by Chatham House, a London-based think tank, notes that the very report in consideration is silent on the issue of managing the environment. This pretty revealed that the petroleum contract relationships were significantly paying lip service to the environmental risks that may be caused by the industry in the Albertine Graben oil-rich region of Uganda.

Lynn Kan believes Malaysia's PETRONAS' over 20 years dispute free track record in the petroleum activities was as a result of their oil industry competence, transparence and respecting the doctrine of sanctity of contracts. Writing on "*Winning contracts 'not about politics*'", Lynn quotes PETRONAS' Chief Executive Officer as saying, "The underlying driver of our ability to win jobs is our capability and ability to deliver to our customers value for what they paid for – that is through our competence, our processes and our people. It is not about politics."[27]

Land is another area where petroleum exploration disputes are abound. Land has been defined by legislation in different jurisdictions. One country may have more than a statute interpreting the meaning of what land is in accordance to usage. There is therefore no uniform definition of the term. For that purpose, scholars and other authorities have had descriptive definitions of 'land' for instance:

[26] Tuesday, February 5th 2013, in the article; "*It's not all gloom in oil sector – report*".
[27] April 26, 2013. "The Business Times Singapore."

"The term 'land' connotes 'all physical elements in the wealth of a nation bestowed by nature; such as climate, environment, fields, forests, minerals, mountains, lakes, streams, seas, and animals. As an asset, it includes anything (1) on the ground (such as buildings, crops, fences, trees, water), (2) above the ground (air and space rights), and (3) under the ground (mineral rights), down to the center of the Earth.'" [28]

The land owner owns rights to such land in the air space above the surface and the soil below under the maxim; "*cuius est solum eius est usque ad coelom et ad inferos*" – to mean "the person who owns land owns it from the heavens above to the centre of the earth below."[29] Interestingly, Daniel Greenberg exempts mineral reserves/mines from the ambit of land when he defines 'land' to mean "the surface of ground, but also everything (except gold or silver mines) on or over or under it."[30] The 'high and deep' concept definition had earlier not garnered support in the judicial wisdom and scholarly writings. In the case of **Wandsworth Board of Works vs. United Telephone Co.,**[31] the court criticised the unlimited spacious nature of ownership of land. Court was of the considered view that the extension must be to a reasonable height and not to infinity. A similar criticism has been extended to the rights further below the earth surface by Peter Butt.[32] A multitude of trespass claims would have had the aircraft businesses recede slowly into the horizons and eventually into oblivion. Certainly that has not been the case.

[28] http://www.businessdictionary.com/definition/land.html (accessed on February 22nd 2013).
[29] Dr. Samantha Hepburn. 2006. *Principles of Property Law* (3rd ed.). Cavendish Publishing Ltd. Routledge: p.5.
[30] 2006. Stroud's Judicial Dictionary of Words and Phrases (7th ed.). Vol.2: F-O. Sweet and Maxwell, London: p. 1459.
[31] [1884] 13 QBD 904.
[32] 2001. *Land Law* (4th ed.). Law Book Co., Sydney: p.13.

Dr. Samantha (*supra*), writing about *'not everything capable of being owned'*, says; "once such things as air, water are of fundamental significance to human existence, they cannot be privately owned, as property in them needs to be fairly distributed to all for the benefit of society and this role becomes the preserve of the state."[33] Invariably hydrocarbons that are found beneath water and the earth surface qualify to be incapable of individual ownership but state owned. It is for this reason that most legislation[34] in oil-rich countries today reserves the ownership of such wealth and land to the state governments in trust for the citizenry.

There is a potential for confusion and therefore conflict over the question of interests in the two resources; land on the one hand and the minerals/petroleum on the other. The statutes seem to have exacerbated this situation. The common law position declares land and the mineral resources to be one thing and belonging to the same entity. The legislation, as seen above usurps the relationship of a land owner's interests as premised under the common law to 'expropriate' the mineral resource interests to government. Analysing the Uganda law for instance, Article 244(1) of the Constitution vests petroleum rights under any land or waters in Uganda in the Government of the Republic of Uganda.[35] Other controversial Constitutional Directives promulgate:

[33] Dr. Samantha Hepburn. *op. cit.* (2006).

[34] The Land Act, Chapter 227 of The Republic of Uganda; Section 44(3) provides that mineral-rich land shall be held in trust for the people and for the common good of the citizens of Uganda by a local government. (4) The Government or a local government shall not lease out or otherwise alienate any natural resource referred to in this section. Meanwhile Section 4 of the Petroleum (Exploration, Development and Production) Act, 2013 vests petroleum rights under any land or waters in Uganda in the Government of the Republic of Uganda. Also Article 3 of the Iranian Petroleum Act provides that "all oil and gas resources, as well as the oil industry itself should be nationalised; and that any activities related to exploration, development, production and distribution of oil and gas were to be carried out solely by national Iranian oil company (NIOC), either directly or through its appointed contractors and agents."

[35] And so does section 4 of the Act.

- Article 237:

"(1) Land in Uganda belongs to the citizens of Uganda and shall vest in them in accordance with the land tenure systems provided for in this Constitution."

"(2) .....

(b) the Government or a local government as determined by Parliament by law shall hold in trust for the people and protect natural lakes, rivers, wetlands, forest reserves, game reserves, national parks and any land to be reserved for ecological and touristic purposes for the common good of all citizens;"

- Article 244(3);

"Minerals, mineral ores and petroleum shall be exploited taking into account the interests of the individual landowners, local governments and the Government."

International Alert, a 27-year-old independent peace building Non-Government Organisation, expressed concern about the need for Government to account for public properties when they noted that "Article 244 is a departure from Article 237(2) (b), which vests natural resources in the citizens, with the government as a trustee. The controversy has been whether petroleum resources fall outside the public trust doctrine, in which case the legitimacy of citizens to hold government accountable is seriously diminished."[36]

[36] In their report issue: "Governance and livelihoods in Uganda's oil-rich Albertine Graben". March 2013: p.13.

There is no provision that suggests the Government of Uganda has ownership rights in any land save where adequate compensation in case of a compulsory acquisition has been the case.[37] It settles the argument that whereas the Government may by law possess interest in the mineral/petroleum wealth, it does not by implication own the land on which such wealth is found. In any case, it only has to get the interest upon dispossessing another person of their land rights lawfully.[38] It is a bit like village boys playing football next to a gated wall fenced home. When the ball bounces into the gated compound, the boys would need to seek the gatekeeper's permission to retrieve their ball. This scenario was brought out quite clearly in a more recent Court of Appeal case of **Bocardo SA vs. Star Energy UK Onshore Ltd and another.**[39] In that case, the defendants owned licences granted by the government to search for and obtain petroleum in reservoir in strata partly under the claimant's land. The Petroleum (Production) Act 1934 vested property in the petroleum in the strata in the Government of Great Britain. The Act permitted the licensees (defendants) to bore, search for and get oil in a naturally occurring reservoir of petroleum and natural gas beneath the land of the resource area. Three pipelines were bored far beneath through the claimant's land to gain access to the oil reserves. A trespass claim against the defendants was prosecuted. While on appeal, court re-affirmed the common law principles with a hybrid statutory touch as follows:

> *"(1) that the land owner was at common law the owner of the strata beneath the surface of his land including minerals, unless there were express or implied alienation of the whole or a particular part of the strata to another; that the*

[37] Compensation provided for under Articles 237(2) (a) and 26 of the 1995 Constitution of the Republic of Uganda.
[38] Upon adequate compensation as provided for by Article 26 *ibid.* Investment in the petroleum activities by IOCs is not an adumbrated ground for compulsory acquisition by the Government per the Uganda Constitution as "public use" under Article 26 (2) (a) thereof does not and cannot be interpreted to include a situation where the Government acquires land for subsequent transmission to an investor IOC, for the relationship between the Government and the investor oil company is contractual.
[39] [2009] Ch.100.

claimant's title extended to the depths where the pipelines had been bored, other than those minerals which belonged to the crown at common law or by statute.

(2) that notwithstanding the provisions of the Petroleum (Production) Act vesting government ownership of the petroleum existing in the natural condition in strata and conferring the government with the exclusive rights to search, bore for and get the petroleum and to grant licences to others to carry out those activities, nothing at the common law or in the Act truly construed, granted a licensee the express or implied right to bore pipelines at depth through the land of another within the licensed area in the absence of an agreement or the grant of an ancillary right under the Act. So the defendants had interfered with the claimant's possessory rights and had thus committed an actionable trespass on the claimant's land."

This was a reasonable departure from ***Wandsworth Board of Works*** (*supra*). It is submitted hereof that interests in land and mineral resources are two distinct issues. One either own land and not the resources, believing in the doctrine that land does not extend indefinitely below or above the earth surface, or the resources alone in which case one has to get rights to their access where they do not own the land. Where the land owner is not the government then mutual agreement must be sought from the landlord to explore for the oil resources. It is not true that possessing mineral rights entitles the government to own the land under which the resources are bedroomed. In an attempt to resolve this eminent conflict, the US upholds individual private ownership rights over land upon which the resource is found.[40]

[40] US hold the position for the protection of individual rights as opposed to national interest in the natural resources. Also Greg Gordon, in the editorial publication, *Oil & Gas Law – Current Practice and Emerging Trends* at page 27, notes that US provide the major exception to the universal state right to the oil and gas rule.

Disputes and contracts were not mutually exclusive of each other. In fact, most petroleum conflicts arose because of parties' failure to harmonise "meaning" of the contract or conveyance.[41]

While giving an editorial brief, King and Spalding LLP[42] discuss the importance of hindsight and foresight when drafting PSCs and other upstream contracts. They noted, disputes were a result of IOC and HCs' failure to address or poorly addressing dispute risk factors at the PSC initial execution process that disputes resulted. They scoff at the practice of parties, when disputes arise, looking for ways to prevent such conflicts in future contracts. Instead they recommended stabilisation clauses to be inbuilt in the contracts to mitigate legislative changes that could affect the terms to the PSC at both operational and fiscal levels to the detriment of IOCs.

The above statements were evidence that disputes were a likely risk, hence a justification of the importance for the study of the problem in issue as envisaged by the research topic hereof.[43]

Unlike human rights and mainstream environmental law jurisprudence, legal literature in the petroleum industry is quite limited. The little that there was, could only be accessed after bursting the "confidentiality ring" surrounding relevant materials in the sector for meaningful scholarly analyses. The researcher's stubbornness lay with proceeding to wade into an inherently yet conservatively documented field.

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[41] David Pierce, E. 2006. "Interpreting Oil and Gas Instruments." Vol. 1 *Texas Journal of Oil, Gas, and Energy Law*: p.2.
[42] 2005. "Special Feature: Production Sharing Contracts". Vol.3 Issue 1 *OGEL*.
[43] Creswell, J. W. 2012. *Educational Research: Planning, Conducting, and Evaluating Quantitative and Qualitative Research.* Pearson, Boston: p.66.

1.3.0 Methodology

Methodology has been defined as "the choices we make about the cases to study, methods of data gathering and other forms of data analysis, in planning and executing a research study."[44]

1.3.1 Research Paradigm

The inquiry was exploratory, descriptive and qualitative in nature. It sought to understand Uganda's oil and gas Production Sharing Agreement regime and the enabling legal framework, their draftsmanship, and the role of parties' religious keeping to contractual obligations as it explored disputes arising therefrom with a view to advising on skilled contract drafting to mitigate disputes in the sector.

1.3.2 Study Design

Study research design is associated with the investigation of a particular place, community, setting or organization.[45] In this research, a grounded theory design was employed that enabled the study to generate a broad understanding of the dispute prevalence grounded in the data from technical petroleum experts and dispute arbitrators. This theory provided "a better explanation than a theory borrowed 'off the shelf' as it was practical and offered a step-by-step systematic procedure for timely and close analysis of data."[46]

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[44] Silverman, D. 2005. *Doing Qualitative Research. A Practical Handbook* (2nd ed.). Thousand Oaks. Sage Publications Ltd., London: p.99.
[45] Patton, M. 1990. *Qualitative Evaluation and Research Methods.* (2nd ed.). Sage Publications Ltd., Newbury Park: pp. 53-54.
[46] Creswell, J. W. *op.cit.* (2012) p.432.

1.3.3 Selection of Participants

Qualitative research paradigm can be thought of as a rough sketch to be filled in by the researcher as the study proceeds.[47] The participants who took part in the study had purposively been selected (as the most appropriate information laden people) either because of their direct involvement in the oil and gas industry, or having been personally engaged in contract negotiation and drafting or dispute settlements. This sample design cut on research costs and time. The results of purposeful sampling are usually expected to be more accurate than those achieved with an alternative form of sampling. Lawyers from renowned Malaysian energy institutions such as PETRONAS; Advocates of Tullow Uganda Operations Pty Limited company, select senior advocates with Attorney General's Chambers; Advocates in private practice; Judges; Ministry of Energy & Natural Resources (Uganda) and Civil Society Coalition on Oil in Uganda were contacted for interviews. In each category four participants were available for interviews and or discussions. 28 participants were considered sufficient for the study.

1.3.4 Data Collection Methods

A deeper understanding of the complexities and challenges the research presented was the brain choice of appropriate methodology.[48] Interviews, focus group discussions, observation and reviewing of existing data were employed in the inquiry.

1.3.4.1 Primary Data:

This constituted fieldwork research by way of visits to the selected participant premises and interviewing them.

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[47] Frankel, R.M. and Devers, K.J. 2006b. "Study design in qualitative research-1: developing research questions and assessing research needs". Vol. 13 *Education for Health*: pp.251-261.

[48] Limb, M. and Dwyer, C. (eds.). 2001. *Qualitative Methodologies for Geographers: Issues and debates.* Arnold, London.

(i). ***Interview guides*** had been developed and these helped guide the flow of the interviews (*Appendix 1*). Interviews, as the most widely employed data collection method in qualitative research, allowed a thorough examination of experiences, feelings or opinions to be noted.[49] These interviews took a semi structured format because the perception of the participants was important to this research and semi structured interviews allowed for flexibility.[50] Relevant information would be gathered in a short time, a variety of issues were discussed, multiple views collected and clarity was easily canvassed.

(ii). ***Focus Group Discussions*** were specifically employed to the lawyer participants who had prior been involved/had experience in contract dispute management in the petroleum industry. Focus group discussions usually brought out feelings, attitudes, perceptions and experiences of such groups.[51]

(iii). ***Telephone interviews*** were used for key participants who would not be reached on a face to face basis.[52] Telephone interviews are increasingly becoming a choice in data collection because of their speed and comparative cheapness though nonverbal communication is missed out.[53] Body language, gestures and other relevant facial expressions could not be noted during the telephone interview sessions though. Lack of a record of these did not affect the results of the research though.

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[49] Kitchin, R. *et al.* 2000. *Conducting Research in Human Geography.* Prentice Hall, London: p.213.
[50] Bryman, A. 2004. *Social Research Methods* (2nd ed.). Oxford University Press, New York: p.321.
[51] Namulondo, J. 2009. "Female genital mutilation among the Sabiny". A dissertation submitted in partial fulfilment for the degree: Master in Human Rights Practice, Department of Social Anthropology, University of Tromsø School of Global Studies, University of Gothenburg School of Business and Social Sciences, Roehampton University Spring: p.16.
[52] Holestein, J. A. and Gubrium, J. F. (eds.). 2003. *Inside Interviewing: New Lenses, New Concerns.* Sage Publications, London.
[53] Sapsford, R. *et al.* (eds.). 1996. *Data Collection and Analysis.* Sage in Association with the Open University, London: p.94.

(iv). ***Internet/e-mail communications*** were used in data collection as the most modern and convenient way to communicate with participants across the globe. This online conferencing proved cheap in terms of time and other resources.

(v). ***Observational techniques*** gave the inquiry an opportunity to record first hand factual information especially on environmental data that could have been altered or reservedly given by participants had other methods of inquiry been employed.

1.3.4.2 Secondary Data:

A number of reports and publications from various legal documents like case law publications, reports from International Arbitration Organisations and Associations were reviewed for policies and initiatives. Draft and signed PSAs, text books, articles in journals and Newspapers were reviewed as sources based on library research. In order to retrieve more up-to-date materials on the current developments in the petroleum sector, online data base research was accessed. Stewart W. David argues; "secondary data provides a comparative tool for the research. This helps to compare existing data with raw data for purposes of examining differences or trends. However, the limitation of using secondary data is that such information may be collected for purposes different from the current research."[54] In this research however, information was purposefully so collected and analysed.

1.3.5 Data analysis

During the interview process and focus group discussions, field notes were taken. At the end of each day, time was taken off to look at the data collected and reflect on it.

[54] 1984. *Secondary Research: Information Sources and Methods*. Sage Publications, Newbury Park, California: p.14.

Data collected was then read over and over again and arranged in themes according to the research questions outlined in this chapter above. This is what Holsti called content analysis[55] while Baxter, *et al.* called it interpretative content analysis.[56] The next stage was drawing of the findings to the research questions as hereof reported *infra*.

1.3.6 Ethical Considerations

Ethics are moral codes that are meant to be followed while doing research. They are binding hence need to be adhered to irrespective of the circumstances surrounding the research; they remind one of the responsibilities to the people being researched.[57] For purposes of this research, all proposed participants were contacted after appropriate permission had been granted. Introduction letters to carry out the research were obtained from: The Dean, Faculty of Law, University of Malaya (*Appendix 2*); request for permission to use PETRONAS facilities (*Appendix 3*); the Chief Registrar, Courts of Judicature, Uganda (*Appendix 4*); Uganda National Council for Science and Technology (*Appendix 5*); the Ministry of Energy and Mineral Development Permanent Secretary (*Appendix 6*). Participants can make informed decisions only if they are aware that substantial understanding and adequate gate keeper's authority to the research have been sought and granted.[58] Participants were asked of their free will to take part in the research upon informing them of the purpose of the inquiry. The option to withdrawing from the research was explained to them. The information has to date been kept confidential.

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[55] 1969. *Content Analysis for Social Sciences and Humanities.* Reading, Mass: Addison. Wesley.
[56] 1991. *Content Analysis in Studying Interpersonal Interaction.* The Guildford Press, New York.
[57] May, T. 1997. *Social Research: Issues, Methods and Process.* Open University Press, London Buckingham: p.54.
[58] Faden Ruth, R., *et al.* 1986. *A History and Theory of Informed Consent.* Oxford University Press, New York.

1.3.7 Study Chapterisation

This dissertation is organised under five main headings of chapters.

Chapter 1 deals with the generic introductory issues in the process of compiling and writing a dissertation. The sub-headings under here include the problem statement, objective of the study, research questions, a brief literature review, research methodology and a report on adherence to ethical research etiquettes.

Chapter 2 gives a general exploration overview of Uganda's oil and gas sector with relevant legal order and the PSA contractual regime being explored.

Chapter 3 examines dispute prone PSA clauses reported upon with examples of occurrence of such oil disputes at various tribunals and courts of law. The study notes the following PSA clauses as prone to disputes in the oil sector: recital provisions, finance related clauses, licensee assignments, environment, arbitration, *force majeure*, termination, law-freezing clauses and the confidentiality provisions.

Chapter 4 explores three areas in which Uganda could mitigate oil and gas conflicts. These include pre-negotiation skills, appropriate drafting knowledge and paying homage to the sanctity of contracts doctrine.

Chapter 5 provides the concluding findings and recommendations for fixing the void and for further research. Each of the five chapters hereof was introduced, relevantly discussed and appropriately concluded in a chain linked style. A bibliography, following the 'Author-date System'[59] of referencing was adopted in this dissertation.

[59] Jonathan, A. *et al.* 2001. *Assignment and Thesis Writing* (4th ed.). John Wiley and Sons, Brisbane: p.135.

1.4.0 Conclusion

To effectively appreciate the topic and the problem statement, introductory remarks that identified dispute related literature in the oil and gas sector were made in this chapter. Methodology following qualitative research paradigm in an appraisal of PSA dispute clauses was carefully chosen. The following chapter discusses the legislative and contractual regimes to lay a basis for addressing the 'disputes' vice under study. This inquiry had disputes prevalence backdrop, therefor the need to 'nip the challenge while in the bud' was a vital concept as 'failing to prepare, was preparing to fail'.

CHAPTER TWO

BACKGROUND OF UGANDA'S OIL AND GAS EXPLORATION, LEGAL AND CONTRACTUAL SYSTEM

2.2.0 Introduction

Uganda has had an endowment of the oil and now is described as Africa's 'hottest inland exploration frontier'.[60] The petroleum extractive activities in Uganda are being carried out in an environmentally diverse and sensitive region. These activities are a known danger to the environment and that is the reason a plethora of legislation announcing environmental safeguards is being addressed herein for the industry to observe. The legal structure of the sector is enjoined by national and international legal instruments and protocols. Meanwhile the contractual regime is a product of legislation. No doubt, environmental PSA clauses were exposed to a compliant legal-contractual test hereof. Brief historical developments of the Uganda's petroleum exploration, relevant laws and the contractual framework have been assembled.

2.2.1 Evolutional history of petroleum exploration in Uganda

During their colonial rule in Uganda, the British, in the early 1920s, identified petroleum resources around the Lake Albert region.[61] The first well to be drilled was by BP in 1938 before the World War intervened.[62] Thereafter, the unstable political regimes before 1986 seem not to have had opportunity in the resources' further

[60] International Alert. May 2011. *Oil and Gas Laws in Uganda: A Legislators' Guide:* p.7.
[61] A *Global Witness* briefing on Donor Engagement in Uganda's Oil and Gas Sector: An Agenda for Action: (1st October 2010). *Global Witness* is a London-based Non-Governmental Organization that investigates and campaigns to prevent natural resource-related conflict, corruption and associated environmental and human rights abuses with the aim of improvements in governance, transparency and accountability in the management of the natural resources sector worldwide.
[62] *Ibid.*

exploration, development or production. Effective prospecting for oil in Uganda resurfaced in 2003-2004.[63] Six PSA licences have so far been awarded by Uganda as the HC to IOCs namely; Heritage Oil of Canada, UK's Tullow Oil, France's Total E&P, China National Offshore Oil Corporation (CNOOC), Dominion Petroleum of UK and Neptune Petroleum also of the United Kingdom over five Exploration Areas 1, 2, 3A, 4B and 5.[64] In August 2010 Heritage assigned all her shares to Tullow that now exclusively enjoys exploration rights in Blocks 1, 2 and 3A. Three oil companies are actively involved in the petroleum explorations in Uganda. These are: Tullow Uganda Pty Limited, Total E&P Uganda B.V. and China National Offshore Oil Corporation (CNOOC) Uganda Limited.

2.2.2 The Oil Legal Regime

Uganda's Oil sector is anchored by legislative directions and contractual frameworks. Under the legislative docket, relevant international conventions, protocols, domestic law and policies that impact petroleum activities were cited.

2.2.2.1 International Conventions and Protocols:

A list of ratified international conventions and protocols with a bearing on the environment and the petroleum resource was availed to this study by one of the oil and gas prospector IOCs.[65] Uganda is obliged to respect and put effect to the instruments herein below:

[63] *Ibid.*
[64] *Ibid.*
[65] Dominion Uganda Limited: in a statement on Environmental and Social Impact of the Oil Exploration Resource; Kampala-Uganda (2009). Accessible in Uganda at ACODE Library of Law & Public Policy.

(a). The United Nations Convention on Wetlands, the Waterfowl Habitat, popularly known as The RAMSAR Convention on Wetlands of International Importance (1971); for the conservation and wise use of wetlands through national action and international co-operation, as the means for achieving sustainable development throughout the world. It seeks to secure the maintenance of the ecological integrity of wetlands, and to promote resource development upon assessment of projects that could affect such wetlands. Most of the petroleum activities in Uganda are carried out in wet land areas along River Nile and Lake Albert water courses where RAMSAR has interest and influence.

(b). Convention Concerning the Protection of the World Cultural and Natural Heritage (1972); to ensure that effective and active measures are taken for the protection, conservation and preservation of the cultural and national heritage found in oil zones.

(c). Convention on the Conservation of Migratory Species of Wild Animals (1979); to conserve terrestrial, marine and avian migratory species throughout their range as petroleum activities could interfere with the species' quiet enjoyment of their habitat due to noise, air pollution, human and automobile presence.

(d). The United Nations Framework Convention on Climate Change (1992); to regulate control of greenhouse gas effect in the atmosphere and to curb dangerous anthropogenic interference with climate.

(e). The Kyoto Protocol (2005); to stabilise atmospheric concentrations of greenhouse gases at a level that prevents anthropogenic harm to the climate system within a time-frame that allows ecosystems to adapt naturally to climate change.

(f). The Basel Convention (1989); to control the generation, management and trans-boundary movement of hazardous waste materials. Petroleum production is associated with these.

(g). The Bamako Convention (1991); to ban the importation into Africa of hazardous wastes and control the trans-boundary movement of hazardous wastes within Africa.

(h). The East African Community Treaty (2000); has Articles 111-114 providing for environmental management and the conservation of natural resources.

(i). EAC Protocol on Environment and Natural Resources Management (2006); provides for environmental management of natural resources including trans-boundary ecosystems and natural resources.

(j). The Trans boundary Environmental Assessment Guidelines for Shared Ecosystems in East Africa (2005); to rationalise the management, exploitation and use of natural resources in shared ecosystems in trans-boundary or cross-border jurisdictions of EAC Partner States.

(k). The Lusaka Agreement on Cooperative Enforcement Operations directed at Illegal Trade in Wild Fauna and Flora (1994); provides for maintenance of Africa's biological diversity and the elimination of illegal trade in these species.

(l). The Stockholm Declaration (1972); to adopt an integrated and coordinated international approach to development planning in order to protect and improve the environment.

(m). The Rio Declaration (1992) and Agenda 21; that recognise the right to uniform sustainable development as well as environmental strategic and impact assessments for both the present and future generations.

(n). United Nations Environment Programme (UNEP) Principles on Shared Natural Resources (1978); lends advice to party states to carry out prior project EIAs in respect to shared natural resources to avert trans-boundary damage and conflict.

(o). The East African Community Master Plan (2003); encourages investment in the energy sector to wit, hydropower, alternative sources of energy, oil geothermal, solar, wind and biogas energy products and improved transport infrastructure to facilitate the distribution of petroleum products.

2.2.2.2 Relevant domestic legislation, regulations and policies:

Uganda is enjoined with a wealth of laws with direct relevance to the managerial framework of her nascent petroleum sector. These include:

(a). Constitutional provisions:[66]

The National Objectives and Directive Principles of State Policy are instructive on the protection of important natural resources, including land, water, wetlands, minerals, oil, fauna and flora on behalf of the people of Uganda.[67] The Constitution further imposes obligations to the Government of Uganda to promote sustainable development and environmental protection, promotion, implementation of energy

[66] The 1995 Constitution of the Republic of Uganda (as amended).
[67] Principle No: XIII on the protection of natural resources.

policies and sanctions Parliament to enact relevant energy legislations that ensure people's needs are met sustainably and further obliges the state and its citizenry to endeavour to preserve and protect public property and Uganda's heritage.[68] Meanwhile, ownership of minerals and naturally occurring hydrocarbons is vested in the Government of Uganda and the Constitution allows for compulsory land acquisition for oil exploration upon prior adequate compensation to the landlords.[69]

(b). Legislative provisions:

(i). The Petroleum (Exploration, Development and Production) Act, 2013; is the law[70] that operationalises Article 244 of the Constitution and whose objectives are: to regulate petroleum exploration, development and production; to establish regulatory and management institutions to wit, the Petroleum Authority of Uganda and the National Oil Company respectively; to regulate the licensing and participation of commercial entities in the petroleum activities; to repeal the Petroleum (Exploration, and Production) Act, Cap. 150; and for incidental matters thereto, among others.[71] It is under this legislation that PSA arrangements between the Government of Uganda and the IOCs are to be premised.[72]

(ii). The National Environment Act, Cap.153; provides for the sustainable management of the environment and the establishment of the National Environment Management Authority. It obliges any project developer, for example, in the exploration for production of petroleum to submit a project brief on EIA to the lead

[68] Articles 244 & 245.
[69] Articles 237(2) (a) & 26.
[70] Enacted by Parliament of Uganda whose commencement date was 5th April 2013.
[71] The long title to the said Act.
[72] Section 6 of the Act makes provision for licences for oil exploration, development and production in Uganda and for model production sharing agreements to guide pre-contractual negotiations. All PSAs before April 2013 were constructed under the now repealed Petroleum (Exploration, and Production) Act, Cap. 150.

agency regarding the environmental effect of such a project.[73] In this report, "a lead agency" refers to any Ministry, department, parastatal agency, local government system or public officer in which or in whom any law vests functions of control or management of any segment of the environment.[74]

(iii). The Uganda Wildlife Act, Cap. 200; provides for sustainable management of wildlife, establishment of the Uganda Wildlife Authority that serves as the lead agency for EIA under the Act. It requires any developer with a project that may have significant effect on any wildlife species or community to undertake an EIA as a general management measure in accordance with the National Environment Act, Cap.153.[75] It is reported hereof that the oil and gas exploration, development and production activities are carried out in one of Uganda's rich wildlife zones of Murchison Falls National Park in Masindi, Bulisa and Amuru Districts.

(iv). The Water Act, Cap.152; is significant for appropriate management of water resources and the protection of the water supply under the offshore Lake Albert and River Nile oil and gas upstream operations. This law establishes a Water Policy Committee whose role is to maintain an action plan for water management and administration. A permit is required to use water for constructing or operating any works.

(v). The Investment Code Act, Cap.92; established the Uganda Investment Authority, attracts and coordinates both local and foreign investments in Uganda for enhanced economic development. It regulates acquisition of investment licences by IOCs and such licence revocation. Section 29 thereof also provides for mandatory

[73] Section 19 of Cap.153.
[74] Cap.153 Interpretation section 1(gg).
[75] Section 15 of Cap.200.

registration of foreign investment agreements involving transfer of foreign technology or expertise to Uganda by the beneficiary party to the transfer.

(vi). The Land Act, Cap.227; provides for the land tenure, ownership and management systems in Uganda. It obliges Government to acquire land from individuals or local governments on prior adequate compensation terms where the land so acquired is for a national project like the oil exploration business.

(vii). The Land Acquisition Act, Cap.226; is the Act that makes provision for the compulsory acquisition of land for public purposes. The Government of Uganda is required to pay compensation to land owners before the acquisition otherwise the compulsory acquisition before would be inconsistent with Article 26(2) of the Uganda Constitution announcing for prior fair and adequate compensation in the circumstances.

(viii). The Historical Monuments Act, Cap.46; provides for the preservation and protection of historical monuments and objects of archaeological, paleontological, ethnographical and traditional interest. This law instructs the Minister to make Instruments to guard against wastage or destruction of historical sites. So historical sites found in oil exploration and development areas are to be preserved or protected.

(ix). The Local Government Act, Cap.243; decentralisation and devolution of functions, powers and services for good governance and democratic participation in decision making for development purposes, have all been catered for under this Act. Local government authorities are empowered under the Act to pass Ordinances and byelaws to protect and preserve the natural resources within their districts against

pollution and any other harmful abuse. Oil prospectors must consult with the local governments therefor.

(x). Occupational Safety and Health Act, 2006; enacts for the duty of employers to care for the safety of their employees at the work places. Section 13 of the Act provides: *"it is the duty of an employer to take, as far as is reasonably practicable, all measures for the protection of his/her workers and the general public from the dangerous aspects of the employer's undertaking at his/her own cost."* Section 18 thereof safeguards the environment by requiring that the employer puts in place mechanisms to monitor and control chemical or dangerous substance escape into the air, soil or water bodies to the ultimate danger to animal and plant lives.

(xi). The Workers Compensation Act, 2000; provides for compensation of workers or their dependents in event of injuries sustained and diseases suffered during the course of their engagements. It requires the employer to provide Personal Protective Gear to employees.

(xii). The Employment Act, 2006; the labour officer is empowered under this legislation to carry out workplace inspections to ascertain compliance with the legal employment standards. The labour officer is also empowered to close down workplaces for non-conformity with health and safety of workers requirements.

(xiii). The Road Act, Cap.358; provides for the establishment of roads and their maintenance. The Government of Uganda is duty bound to construct and maintain roads in this Albertine Graben oil region to boost the resource production.

(xiv). The River Act, Cap.357; provides for dredging a river without a licence as an offence. Every oil explorer on Lake Albert and River Nile ought to comply with these provisions to avoid criminal liability.

(c). Statutory Instruments:

Parliament of Uganda has often delegated her roles in this energy legislative process to key line ministers to come up with appropriate regulations to put effect to parent statutes in line with the public trust doctrine. Among the subsidiary legislations, are the following: The National Environment Regulations (1995), The National Environment (Environmental Impact Assessment) Regulations (1998), The National Environment (Noise Standards and Control) Regulations (2003), The National Environment (Control of Smoking in Public Places) Regulations (2004), The National Environment (Wetlands, River Banks and Lake Shores Management) Regulations (2000), The National Environment (Waste Management) Regulations (1999), The National Environment (Minimum Standards for Management of Soil Quality) Regulations (2001), The National Environment (Mountainous and Hilly Areas Management) Regulations (2000), Water Resources Regulations (1998), and the Petroleum Regulations as saved by section 189(2) of the Petroleum (Exploration, Development and Production) Act, 2013. The essence of the above regulations is to regulate, provide for and support enforcement mechanisms in line with licensing/permit provisions, avoidance of environmental damage, consent approvals and carrying out EIAs for the hydrocarbon industry.

(d). Relevant Policies:

Some policies relevant to the oil exploration have so far been rolled out. The National Oil and Gas Policy for Uganda (2008) and the Oil and Gas Revenue Management Policy (2012) are prominent.

(i). The National Oil and Gas Policy for Uganda (2008):

After a country wide consultative engagement on the framework to guide the petroleum resource development, the National Oil and Gas Policy for Uganda was on 30th January, 2008 approved by cabinet and handed down to the country for all stakeholders in the field to go by. The policy goal is to "Use the Country's Oil and Gas Resources to Contribute to Early Achievement of Poverty Eradication and Create Lasting Value to Society."[76] To ensure its implementation, the ten policy objectives were rolled out for achievement by legislative, administrative and contract regimes as follows:-

"Objective 1:

Ensure efficiency in licensing areas with potential for oil and gas production in the country through legislative stewardship.

Objective 2:

Efficient management of the petroleum resource through the institutional frameworks such as the Petroleum Authority of Uganda and the National Oil Company of Uganda both of which are yet to be constituted.

[76] www.energyandminerals.go.ug or www.petroleum.go.ug accessed on April 30th 2013.

Objective 3:

Efficient production of the hydrocarbon resources through appropriate drill-well appraisal and licensing.

Objective 4:

Valuable utilisation of the oil and gas resources by availing relevant refinery, legislative structures and undertaking feasibility studies in the petroleum sector.

Objective 5:

Promotion and development of oil and gas transport and storage facilities to enhance value to the products.

Objective 6:

Ensure appropriate revenue collection and accountability to the nation through Ministry of Finance, Planning and Economic Development and Uganda Revenue Authority procedures.

Objective 7:

Ensure national participation and local content character in this energy sector through capacity building and planning.

Objective 8:

Development of skilled expertise through technological transfer and training within and without Uganda through partnership with international oil investors.

Objective 9:

Ensure petroleum activities are compliant with sustainable environmental and biodiversity standards upon evaluation of Environmental Impact Assessments and monitoring by the National Environment Management Authority (NEMA), Uganda Wildlife Authority (UWA), the Directorate of Environmental Affairs of the Ministry of Water and Environment, District Local Governments, Ministry of Energy and Mineral Development Petroleum Exploration and Production Department (PEPD), National Forest Authority (NFA), among others.

Objective 10:

Ensure mutual benefit to parties and all stakeholders in the industry through popular participation in the oil and gas sector."[77]

(ii). The National Environment Management Policy (1994):

The policy promotes sustainable economic and social development through a legal requirement of undertaking EIAs and issuing public environment impact statements for every eligible project such as the petroleum exploration, development and production activities.

(iii). The National Water Policy (1999):

Aims at an integrated and sustainable management of Uganda's water resources. Any project carried out on any Uganda water masses must undertake an EIA. In regard to oil explorations, the policy addresses water quality, water use, discharge of effluents and international cooperation on trans-boundary water resource concerns.

[77] *Ibid.*

(iv). The Uganda Wildlife Policy (1999):

The policy aims at ensuring sustainable management of the wildlife resources of Uganda. It requires EIA for all proposed developments in protected areas and environmental audits of existing facilities. Further, management of wildlife resources includes management of important water catchment areas and wetlands that recharge other water resources. Therefore, any oil exploration developments whose activities are located within or outside but linked to a wildlife conservation reserve must consider these policy requirements.

(v). Policy Framework for Industry Sector (2008):

The policy promotes modern, environmentally sustainable industrial sector including the exploration and development of natural resources industries such as the petroleum one. This policy also promotes safety standards at workplaces.

(vi). Resettlement/Land Acquisition Policy Framework (2002):

The policy is intended to offer fair treatment to compulsorily displaced people on compensation and resettlement initiatives that ensure appropriate living standards.

(vii). Disaster Management and Preparedness Policy:

This policy purrs in line with the old adage; "prevention is better than cure." Petroleum exploration must make provisions for disaster management and preparedness for oil spills, gas flaring, gas venting, resettlement of displaced people, land use and compensation payments. It becomes apparent that the negligence

principle laid down by Blackburn J in the celebrated old case of ***Rylands vs. Fletcher***[78] ought to be respected. The judge stated:

"A person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, he is prima facie answerable for all the damage which is the natural consequence of its escape."

It is quite probable on a remoteness test of reasonable foreseeability that oil spills could occur with a devastating effect on the community and the environment, hence the need for the policy.

(viii). The Oil and Gas Revenue Management Policy (2012):

In order to purr in tandem with Objective 6 of the National Oil and Gas Policy, the Ministry of Finance, Planning and Economic Development has settled for a policy whose main objects are:

"To provide details on how the anticipated oil and gas revenues would be managed for sustainable economic and social transformation for the country;

To ensure transparency and accountability in the management of petroleum revenues in accordance with the Constitution, the Petroleum (Exploration, Development and Production) Act, 2013, National Audit Act and other relevant public finance management laws;

To promote harmony and social cohesion and

[78] (1866) LR 1 Exch. 265.

To provide for mechanisms for the sharing of royalty revenues with local governments of the oil producing area."[79]

Assessment and collection of petroleum tax revenue is guided by the Petroleum (Exploration, Development and Production) Act, 2013, taxing statutes, other relevant laws and PSAs.

2.2.3 Contractual Framework

In absence of the Petroleum Authority and the National Oil Company, the Ministry of Energy and Mineral Development initiated negotiations with IOCs into agreements relating to petroleum activities for grant of exploration licences, setting conditions for granting or renewing a licence and general regulation of petroleum activities. The Minister developed and lay before Parliament upon Cabinet's approval a Model Production Sharing Agreement to guide the contractual arrangements between the Government and the oil exploration companies. It is under these provisions[80] that the current PSAs took shape. Unlike her counterpart Nigeria, Uganda did not experience the opportunity of oscillating through the "Old Concessions" regimes, Joint Venture Agreements, Risk Service Contracts and lately PSCs. In Uganda therefore, the terms and conditions of the grant of a licence for the oil and gas exploration, development and production are sanctioned upon agreement in the form of a Production Sharing Agreement (PSA). "The nature of PSA framework in Uganda is a blend of statutory and contractual negotiations between Uganda Government and the IOCs. Aspects predetermined by legislations include: Government participation; Title to Petroleum; Exploration licenses and Mining leases; Commerciality; Royalty; Taxation; Investment

[79] Oil and Gas Revenue Management Policy, 2012.
[80] Section 6 of the Act.

Tax Credits/Allowance; Ring fencing; Domestic requirements; Liability for environmental damage and safety; Training of Ugandan personnel; Local content; Arbitration; and Applicable Law. Areas subject to negotiations include, term /duration; work commitment; relinquishment; insurance; title to equipment; certain rights and obligations of the parties; composition, functions and powers of the Management Committee; bonus payments; cost recovery limits; production sharing; accounting procedure; lifting obligations; and project implementation procedure."[81] Some of these legal and contractual provisions above formed the basis of a detailed discourse in chapters three and four of this research *infra*.

2.2.3.1 Production Sharing Contracts: A general overview:

The choice to refer to them as PSCs or PSAs depends on a particular jurisdiction but really the difference has no legal significance. The present PSCs in the oil economies were first adopted in Indonesia in mid 1960s. A generic definition has unfortunately eluded many authors as observed from the several attempts herein below:

By descriptive definition, "in production sharing agreements the country's government awards the execution of exploration and production activities to an oil company. The oil company bears the mineral and financial risk of the initiative and explores, develops and ultimately produces the field as required. When successful, the company is permitted to use the money from produced oil to recover capital and operational expenditures, known as "cost oil". The remaining money is known as

[81] This analysis by Mohammed Babangida Umar 2005, "Legal Issues in the Management of Nigeria's Production Sharing Contracts from a Study of the Nigerian National Petroleum Corporation's (National Petroleum Management Services') Perspective". Vol. 3 Issue 1 *Oil, Gas and Energy Law Intelligence Journal,* at pp.29-30 represents the Ugandan situation as well.

"profit oil", and is split between the government and the company, typically at a rate agreed upon in the agreement."[82]

The Indonesian Foreign Minister, in contributing to what a PSC was, remarked:

"The production-sharing contract is essentially based on the concept of the owner of the resource (the state) engaging a third party (an oil company in the case of hydrocarbons) as contractors. The proceeds of the contractor's work or activity (i.e. the production) are shared between the state and the contractor on the basis of a previously agreed formula after the subtraction of costs."[83]

Zhiguo Gao makes a contribution to the definition of a PSC as thus:

"The production-sharing contract is an agreement under which a foreign company, serving as a contractor to the host country/its national oil company, recovers its costs each year from production and is further entitled to receive a certain share of the remaining production as payment in kind for the exploration risks assumed and the development service performed if there is a commercial discovery."[84]

On this subject, Kirsten Bindemann, fell short of the definitional debate when he characteristically described a PSA as follows:

"Under a PSA the state as the owner of mineral resources engages a foreign oil company (FOC) as a contractor to provide technical and financial services for exploration and development operations. The state is traditionally represented by the government or one of its agencies such as the national oil company (NOC). The FOC

[82] http://en.wikipedia.org/wiki/Production_sharing_agreement accessed on March 20th 2013.
[83] M. Kusuma-Atmadja. "Indonesia's National Policy on Offshore Mineral Resources: Some Legal Issues."; Borgese, E.M., Ginsburg, N. and Morgan, J. R. (eds) 1991. *Ocean Yearbook* 9. University of Chicago Press, Chicago: p. 92.
[84] 1994. *International Petroleum Contracts: Current Trends and New Directions*: p.72.

acquires an entitlement to a stipulated share of the oil produced as a reward for the risk taken and services rendered. The state, however, remains the owner of the petroleum produced subject only to the contractor's entitlement to its share of production. The government or its NOC usually has the option to participate in different aspects of the exploration and development process. In addition, PSAs frequently provide for the establishment of a joint committee where both parties are represented and which monitors the operations."[85]

Most HCs and IOCs may wish to adopt the Model Draft AIPN Handbook definition as hereunder:

"Under production sharing contract, the production is divided between the Host Government and IOC at an agreed upon point within the gathering/transportation infrastructure, with some production going to the IOC for cost recovery prior to the remaining production being shared by the parties, and with the IOC paying taxes and sometimes also royalty to the host government; Title and risk to contractor's portion of Petroleum hereunder pass to contractor at the relevant Delivery Point." [86]

It is not always the case that governments enter oil agreements with only IOCs/FOCs. Sometimes these companies may be domestic or domiciled in the HC. The practice is to have international oil companies register subsidiaries under the laws of a HC.[87] This arrangement helps parent companies that normally have no

[85] 1999. "Production-Sharing Agreements: An Economic Analysis." Oxford Institute for Energy Studies. Also available at http://www.oxfordenergy.org/wpcms/wp-content/uploads/2010/11/WPM25-ProductionSharingAgreementsAnEconomicAnalysis-KBindemann-1999.pdf accessed on July 12, 2013.

[86] http://www.fmc-law.com/upload/en/publications/2007/hgc_handbook_vol_11.pdf accessed on March 19th 2013.

[87] Uganda's case has Tullow Uganda Operations Pty Limited, Total E & P Uganda B.V and China National Offshore Oil Corporation (CNOOC) Uganda limited, as subsidiary companies to the respective IOCs/FOCs but registered under the Companies Act of Uganda for petroleum activities. Section 4 (6) of the repealed Cap.150, under which the three companies' licences were issued, provided: "No licence shall be granted to a natural person who is not a citizen of Uganda or to a body corporate incorporated outside Uganda unless it has established a place of business in Uganda and is registered as a foreign company in accordance with the Companies Act." This provision has since been abandoned with the enactment of the current law. Section 6 of the 2013 Act enjoins Government to enter into an agreement relating to petroleum activities with **any person** regarding licensing procedures.

assets overseas, to avoid potential liabilities that could lead to property attachment in case of contractual breach. In such event, resort would be had to Irrevocable Letters of Bank Guarantee to cover the liabilities.

A summary of the common characteristic features of PSCs was given by Blinn K. W., *et al.* as follows:

"The HC appoints the IOC as a contractor on a certain area.

The IOC risks and invests seed capital and meets all production expenses but under the management control of the HC.

Any production belongs to the HC.

Title and risk to contractor's portion of petroleum under the agreement pass to contractor at the relevant Delivery Point.

The IOC is entitled to a recovery of its costs out of the production from the contract area.

After cost recovery, the balance of production is shared on a pre-determined percentage split between the HC and the IOC.

The IOC's income is subject to taxation.

Title to the equipment and all installations by the contractor are the property of the HC right from the outset to the decommissioning point."[88]

[88] Blinn, W. K., Claude, D., Le Leuch, H. and Pertuzio, A. 1986. *International Petroleum Exploration and Exploitation Agreements: Legal, Economic and Policy Aspects.* Euromoney Publications, London: p.69.

2.2.3.2 Fiscal Regime under Uganda's PSAs:

The following tax collection and management of oil and gas revenue clauses were incorporated in Uganda's PSAs with varying dispute likelihood intensities as was discussed further in chapter 3 *infra*:

(a). Signature Bonus:

By statutory definition, "signature bonus" means a single, non-recoverable lump sum payment by the licensee (IOC) to the Government upon the granting of the petroleum exploration or production licence.[89] Under some Uganda's draft PSA, it had been proposed that the licensee pays both an exploration bonus upon signing the Agreement and a production bonus. That position would conflict with the legislative directive of "a single non-recoverable lump sum" payment formula in tax assessments. In the same vein, it would be a legal oversight when a PSA were concluded without a clause for the signature bonus payment.[90]

(b). Royalties:

According to Uganda's Oil and Gas Revenue Management Policy, 2012 manual[91], "royalties are payments levied on resource exploitation, and are based on either quantity or value of the resource extracted. The signed PSAs with the IOCs put the rate at which IOCs pay a royalty on gross oil production between 5% and 12.5%." Payment for royalty on petroleum is provided for under section 154 of the Act.

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[89] Section 156(2) of the Act.

[90] Section 156(1) (*supra*) enacts for the mandatory payment of a signature bonus where a petroleum exploration or production licence has been granted to any IOC. This omission or commission could be ground for any Ugandan national or URA (as per s.159 of the Act) petitioning for the payment of the signature bonus and or its accountability since the confidentiality clause would not assail statute. It is submitted hereof that every PSA under Uganda's petroleum regime has to bear a signature bonus clause and compliance with it accordingly observed.

[91] p.18.

(c). Cost Recovery Oil:

When commercial production begins, a portion of the oil so extracted is retained by the licensee in kind to reimburse the licensee's recoverable costs associated with upstream operations as will have been agreed upon in the PSA and approved by the Government. This is what is known as cost oil.

(d). Profit Oil:

After royalties have been paid and the licensee's cost oil provided for, the balance of the total oil produced is profit oil which is again shared between the IOC and HC.

(e). Income Tax:

In computing income tax from a licensee (IOC), apart from the signature bonus (a non-recoverable lump sum), the three; royalties, cost recovery oil and profit oil are deducted from total oil extracted to arrive at the licensee's share of profit oil which share is then subjected to income tax in accordance with the income tax laws.

The essence of PSC is that a HC engages a competent contractor who is granted a licence to undertake petroleum operations on behalf of the hosting state. The contractor (licensee) then undertakes the initial exploration risks and recovers his costs if and when oil is discovered and extracted. The parties' take is computed as follows: - Total crude oil produced is subjected to Government's royalty share first. The balance of the production must cater for: 1): contractor's cost of production (cost oil) and 2): a share of profit for the two parties (contractor and Government). The Income Tax Act of Uganda requires a person that receives a profit on their business transactions to meet their income tax obligations. It is from this that the tax will be

computed in accordance with the taxing Act. As the tax goes to the Government treasury, the balance constitutes the contractor's revenue. The study could not do any better than provide an illustration of the above findings by the Figure PSA mechanism below:

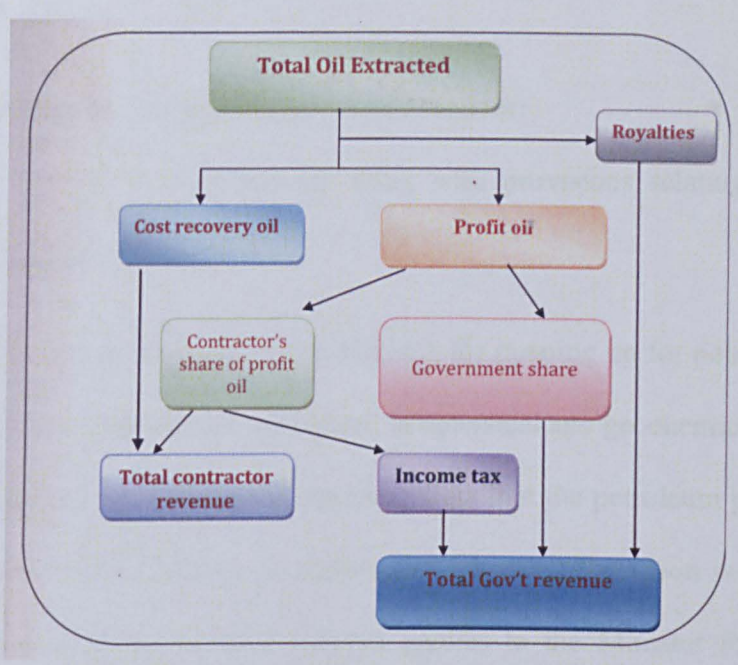

Figure 1: Mechanism of production sharing agreements.[92]

The aggregate of the revenues accruing to a HC is what is referred to as the "government take".[93]

These PSCs are referred to as 'production sharing' because the receipts and payments are in kind/form of the physical oil product (i.e. the production) instead of a cash payment. The product is then commercialised to get the cash. The responsibility to find the market for the production is usually placed to the IOC.

[92] *Source:* Note 80 *supra*, p.17.
[93] Blinn K. W., *et al. op. cit.* (1986) p.224.

PSCs are usually the choice for a number of developing economies because of these countries' lack of technical expertise and financial weight to bring to table. HCs contract the IOCs to carry out the exploration processes with hope that they will hit economic production for which reimbursement of the costs and a reward in profits would pass.

2.2.3.3 Reconnaissance Permits and Licences:

Part IV of the Act exclusively deals with provisions relating to reconnaissance permits and licences.

When an area is required by the Minister for opening up for petroleum activities, an evaluation of preliminary geological, geophysical and geochemical data is conducted to ascertain the possible environmental risks that the petroleum project may pose on the economy and society. A research to get the information is done and a person intending to carry out such surveys applies to the Minister for a reconnaissance permit upon payment of a prescribed fee in accordance with the regulations. In the Act, the permit is to remain in force, unless surrendered or cancelled, for eighteen months from the date of issue.[94]

Under the hydrocarbon industry, a licence is a permission that authorises exclusive right to conduct petroleum operations the conduct of which would otherwise be unlawful. The energy law in Uganda and the PSAs are surprisingly silent about anyone who does particular acts or a series of them, upon another's land without a licence. A remedy perhaps lies in the tort law of trespass. In order to legally undertake exploration and production oil and gas activities of a particular reserviour,

[94] Section 51 thereof.

a licensee must have respectively applied for and been granted by the Minister a petroleum exploration and a petroleum production licence in an open bidding competitive process. The PSAs offer detailed exploration and production terms and conditions, work plans, controlled budget clauses and the licensees' responsibilities upon grant of rights for each contract area. These are required to be religiously followed in any event because any inflated allowable production costs under the licence for example oscillates into a 'charge' on the Government's 'oil pie'. Chapters 3 & 4 were partly discussed against this backdrop.

2.2.3.4 Regulatory and Administrative Mechanisms:

Pursuant to Article 244 of the Constitution and section 4 of the Act, the entire property in, and the control of, petroleum in its natural condition in, on or under any land or waters in Uganda is vested in the Government on behalf of the Republic of Uganda for the beneficial interest of the people of Uganda. In pursuance of these petroleum rights, several institutional bodies are engaged in the oil businesses in Uganda. Three of those are key and are duly empowered to give effect to the legal provisions therefor.[95] Their roles are largely supervisory, regulatory, and participatory in nature.

(a). The Ministry of Energy and Mineral Development:

Is responsible for the formulation, implementation and regulation of the oil and gas related policies. The Minister is also responsible for granting and revoking licences, submission of draft legislation to Parliament, issuance of petroleum regulations, negotiating and endorsing petroleum agreements, approving field development plans,

[95] Reference is made to Part 3 of the Act for the institutional framework.

promoting transparency and approving data management systems for the petroleum sector.[96]

(b). The Petroleum Authority of Uganda:

Section 9 of the Act provides for the establishment of the Petroleum Authority of Uganda with corporate legal personality. Its functions include among others: routine monitoring and regulating of petroleum activities, review and approval of the licensees' annual work plans and other appraisal programme documents, advising the Minister on the appropriateness of the licensees' oil activities and adherence to the laws and contractual terms, administration of the petroleum agreements, ensuring optimal levels of recovery of petroleum resources, promotion of well planned, executed and cost effective operations and ensuring compliance by the licensees with the law.[97] The Petroleum Authority is to be independent in the performance of its functions and duties and exercise of its powers.[98] However, the Minister of Energy and Mineral Development can give written directions to the Authority with respect to the policy to be observed and implemented.[99] It is a legal requirement for such written directions whenever issued to be published in the Gazette.[100] By the time of writing this dissertation, the Authority's leadership had not yet been constituted. It is hoped that a seven member Board of Directors will soon be appointed by the President with parliamentary approval to govern the Authority. The Act elaborately provides for the qualifications for appointment to the Board, tenure of office, termination of appointment, terms of service and functions of the Board among

[96] Section 8 of the Act.
[97] Section 10 of the Act.
[98] International Alert, *op.cit.* (May, 2011) at p.17; Section 14 of the Act.
[99] Section 13(1) of the Act.
[100] Section 13(2) of the Act.

others. The day to day corporate business of the Petroleum Authority shall be run by staff of the Authority headed by the Executive Director, who shall be the accounting and chief executive officer.[101] The Minister appoints the ED on recommendation of the Board under such terms and conditions as the Minister may specify in the instrument of appointment.

(c). The National Oil Company:

Under the Act, there shall be incorporated, in accordance with the Companies Act, 2012 a National Oil Company wholly owned by the State to manage the commercial aspects of the petroleum activities and the participating interests of the State in the petroleum agreements. The company's other functions will include managing the marketing of Uganda's share of petroleum received in kind, developing skilled expertise in the industry, optimising value for the company's shareholders, and contractual participation on behalf of the State.[102] The Board of Directors of the National Oil Company shall be appointed by the President on approval of Parliament. The Minister still has an instructive hand in respect to the company's execution of its management functions.[103] The National Oil Company for Uganda had not yet been incorporated by the time of submission of these study findings.

2.2.4 Conclusion

In order for any engagement in the petroleum activities, a contractual relationship called a PSA must be concluded between the Government of Uganda and a petroleum extractive company usually an IOC in accordance with the Act and other relevant laws.

[101] Section 27 of the Act.
[102] Section 43 of the Act.
[103] Section 46 of the Act.

One of the contractual terms is the requirement to be issued a licence (be it an exploration or production licence) upon compliance with environmental dictates, among others.[104] In pursuit of her National Oil and Gas Policy Objectives and other related policies, Uganda ought to realign her PSAs with the current legislative framework. The saving provisions under section 190 of the Act may not effectively protect the licensing regime prevailing thereunder.[105] For example the repealed Cap.150 made no reflection on the requirement for project EIA before a licence is granted. This requirement, as necessary as it is, is only provided for under section 47(3) of the Act. Any environmental infringement may not therefore have enabling statutory provisions to back up the cause as it is clear from the PSA Draft that no enforcement mechanisms exist therein but only to be provided by the anticipated Regulations to be made under the Act. Until these laws and policies are brought to the attention of the parties and given consideration during the contract negotiation and drafting processes, their possible ignorance could lead to future disputes. This study shades illumination to the industry's legal awareness, appreciation and incorporation into the PSAs to avoid future mistakes.

[104] Sections 56 and 69 of the Act respectively provide for applications for exploration and production licences.
[105] Section 190 of the Act provides for continuation of all licences issued under the repealed Petroleum (Exploration and Production) Act, Cap.150.

CHAPTER THREE

UGANDA'S PRODUCTION SHARING AGREEMENT DISPUTE PRONE CLAUSES

3.3.0 Introduction

A few PSAs have since 2001 been signed between Government of Uganda on the one part and exploration and extraction companies to wit, Hardman Petroleum Africa NL, Energy Africa Uganda Limited, Total E&P Uganda B.V, China National Offshore Oil Corporation (CNOOC) Uganda Limited, Heritage Oil and Gas Limited and Tullow Uganda Operations Pty Limited, among others, on the other for different graticular[106] sections for licence rights in Uganda's Albertine Graben area. The enabling law under which the agreements were made was the Petroleum (Exploration and Production) Act, Cap.150 Laws of Uganda which now stands repealed by Act 3 of 2013.[107] Neither statute nor contract defined what disputes were. This study also gathered[108] that the draft agreement clauses accessed during the study at www.carbonweb.org and the Ministry were basically similar in general substance to the final signed PSA clauses. It was not so possible to lay a research hand on the contents of all Production Sharing Agreements signed between the Minister of Energy and Mineral Development on behalf of Uganda and most investor oil companies as the same "remained a closely guarded secret"[109]. Dispute prone PSA clauses were identified from the said draft.

[106] The Act, in its section 2, interprets 'graticulation' to mean the division of the earth's surface into blocks for petroleum activities.

[107] The Petroleum (Exploration, Development and Production) Act 2013 (herein referred to as 'the Act') is now the current (as of 5th April, 2013) statute giving effect to Uganda's Constitutional Petroleum provisions, regulating issuance of licences for petroleum exploration and production. The Act also establishes the Petroleum Authority of Uganda as a regulatory institution for the sector; it establishes the National Oil Company whose function is to enter into petroleum contractual arrangements on behalf of Uganda among others.

[108] From the participants at the Uganda's Ministry of Energy and Mineral Development.

[109] Comment by authors of a report by Civil Society Coalition on Oil in Uganda titled; "Contracts Curse: Uganda's oil agreements place profit before people." Whereas the field study could discuss the impugned trouble spot PSA clause contents freely with participants, it was not possible to access all agreements as the Uganda Energy Ministry and oil exploration company officials stuck to the confidentiality doctrine to deny such contracts academic review save for the draft PSA that was availed with assurance that the contents therein were in *pari materia* with those of the signed PSAs, that for all purposes and intents the Government of Uganda would follow the draft as a precedent for future engagements.

These included: recital provisions, fiscal terms, assignment clauses, environment, arbitration, force majeure, termination clauses, applicable law clause and confidentiality clauses.

3.3.1 Recital provisions

Statement paragraphs in a commercial transaction that set out the background to the transaction and the purpose for which the parties are engaging are called recitals.[110] Courts usually interpret recitals as evidence of pre-contract representations, the breach of which would provide a basis for an action for misrepresentation.[111] These include:

(a). Parties to the PSAs:

Whereas Cap.150 did not provide for a National Oil Company, the current Act provides for the establishment of a National Oil Company that is 100% State owned to manage Uganda's commercial aspects of the petroleum activities and participating in the petroleum agreements on behalf of the State. Every running PSA however, begins with a recital statement that the agreement is made and entered into between the Government of the Republic of Uganda, acting through the Ministry of Energy and Mineral Development ("Government") and an Oil Company (as a licensee) duly organised and registered either under the Companies Act of Uganda or organised and incorporated under the laws of a foreign state.[112] Indeed the Hon. Minister for Energy and Mineral Development has signed all PSAs on behalf of the Government of Uganda. It becomes clear from this arrangement that the Government and the private oil company are

[110] Richard Christou. 2010. *Boilerplate Practical Clauses* (5th ed.). Sweet and Maxwell, London: p.4.
[111] *Ibid.*
[112] 2006 Draft PSA recital provision accessed from the Ministry of Energy and Mineral Development – Uganda.

business entities in the oil and gas industry to be governed by applicable laws such as the Companies Act, 2012 of Uganda and bound by the contract terms in the particular PSA. Grounds for conflict are bound to surface where the Government, premising her actions and belief in the principle of sovereignty of state, has;

1) assumed contractual liability through unilateral rescission or amendment of the contract in public interest and

2) discomfort with choice of law/jurisdiction for arbitration in event of a dispute arising.

Would it therefore easily be tenable for a private foreign company to fix liability on to a sovereign State like Uganda in the circumstances? Or would the Uganda National Oil Company assume the liability? This uncertainty and apparent non-harmonious provisions of the contract and the legislature are rife with future disputes.

(b). Reference to legislation:

Oil Industry PSAs usually make reference to statutes or statutory instruments. In Uganda's case, these agreements and the consequential issuance of exploration licences were made under a now repealed statute.[113] Modifications in the current or subsequent legal order are bound to affect the contracts made before such changes and so would the substantive rights of the parties be.[114] As a rule, reference to legislation in the recital or contract body clauses, must be accompanied by a corresponding special saving contract clause in event of change, modification, repeal, re-enactment or amendment of the relevant law rather than relying on transitional provisions in the amending legislation to

[113] Section 189 of the Act repealed Cap.150 but saved regulations made thereunder.
[114] Richard Christou. *op.cit.* (2010) p.28.

sustain the life of a prior contractual clause.[115] In other words contractual clauses made under a repealed Act for instance, would not be inherited by the new legislation if no special 'successor clause' had been incorporated in that contract. It is not appropriate to assume that such contractual clause obligations and rights would be saved by transitional provisions of the subsequent legislation. This principle was well articulated in the case of ***William Hare Ltd vs. Shepherd Construction Ltd***[116] where the court declined to incorporate amendments made to an Act before the contract was signed which were not specifically referred to in the contract. To illustrate the point, the Uganda draft PSA recitals state as thus:

> "**WHEREAS**, the Petroleum (Exploration and Production) Act, Chapter 150 of the Laws of Uganda 2000 makes provision with respect to exploring for producing Petroleum and authorises the Minister responsible for petroleum exploration and production to grant Exploration and Production Licences to any person or entity, subject to certain limitations and conditions;
>
> **WHEREAS**, Section 3 of the Act authorises the Government to enter into an agreement, not inconsistent with the Act, with any person or entity in respect of, inter alia, the terms and conditions of the grant of the Licence under the Act;
>
> **WHEREAS**, Licensee has applied for an Exploration Licence over the area described in, and shown on the map in annex A hereof and the Minister, in accordance with Section 9 of the Act, intends to grant the said Licence; and

[115] *Ibid.* p.27.
[116] [2009] EWHC 1603 (TCC).

WHEREAS, Licensee intends, on terms and conditions set out under this agreement and has represented that he/she has or can obtain resources, to undertake Petroleum Operations in the area aforesaid and has for that purpose the necessary financial capacity, technical competence and professional skill to carry out such Operations;

NOW, THEREFORE, the parties hereto agree as follows:"[117]

Pursuant to the above recital statements, Uganda concluded PSAs with oil companies and licences for petroleum exploration were granted in accordance with the now repealed Cap.150. There are however, contract clauses in those PSAs that ought to survive the repealed law. Such clauses would therefore not be enforced under the modified Act by mere reference to the transitional legislative provisions,[118] there being no specific PSA clause incorporating provisions.

What the PSA clauses hereunder state akin to incorporation is but a gateway to arbitration:

"33.1 This agreement shall be governed by, interpretation and construed in accordance with the laws of Uganda.

33.2 If, following the Effective Date, there is any change, or series of changes, in the laws or regulations of Uganda which materially reduce the economic benefits derived by Licensee hereunder, Licensee may notify the Government accordingly and thereafter the Parties shall meet to negotiate in good faith and agree upon, the

[117] Uganda's 2006 Model PSA recitals.
[118] Section 190 of the Act enacts for continuation of licences issued under Cap.150 that were in force prior to and are now subject to the Act.

necessary modifications to this Agreement to restore Licensee to substantially the same overall economic position as prevailed hereunder prior to such change(s). In the event that the Parties are unable to agree that Licensee's economic benefits have been materially affected, and/or are unable to agree on the modifications required to restore Licensee to the same economic position as prevailed prior to such change, within ninety (90) days of the receipt of the notice referred to hereinabove, then either Party may refer the matter for determination by arbitration."[119]

The parties may or may not meet to discuss modifications to the contract or reference to arbitration in event of non-agreement. Such probability could be avoided by simply drafting a clause that makes the PSA inheritable by subsequent legislative changes. The following is such recommended boilerplate clause:-

"Any reference to a statutory provision shall include that provision as from time to time modified or re-enacted provided that in the case of modifications or re-enactments made after the date of this Agreement the same shall not have effected a substantive change to that provision."[120]

With the authority gathered from 'reference to legislation' principle, ideally Uganda's licensing regime would not be halted as has been the case for close to seven years. Parties' non-adherence to contract clause drafting etiquettes could fetter obligations and rights under the PSAs, hence a ground for disputes.

[119] Article 33 of Uganda's 2006 Model PSA.
[120] Richard Christou. *op.cit.* (2010) p.29.

3.3.2 Fiscal terms

Disputes are a likely event regarding the treatment by the parties to the contract of finance related terms to wit, bonus down payments; royalty payments; State participation; cost recovery; production sharing and taxation PSA clauses.

(a). Bonuses:-

The repealed Cap.150, under which the running PSAs were executed, did not provide for bonus payments. This explains why some agreements did not have bonus payment clauses.[121]

However, bonus payment clauses in a PSA made under the old Cap.150 regime and availed to this study read;

> *"9.1 Upon the signing of this Agreement Licensee shall pay to the Government a sum of United States dollars Three Hundred Thousand (US$300,000) as Bonus payment to cover the Exploration Period.*
>
> *9.2 Upon the issuance of a Production Licence, Licensee shall pay to Government a sum of United States dollars Five Million (US$5,000,000) as Bonus payment to cover the Production Period."*[122]

Two signature bonus payments are anticipated by this PSA: an exploration bonus and a production bonus. Section 156 of the Act obligates the licensee to payment of a signature bonus as a single, non-refundable lump sum as follows:

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[121] A 2001 October PSA between the Republic of Uganda and Hardman Petroleum Africa NL and Energy Africa Uganda Limited does not have the signature bonus clause.

[122] www.carbonweb.org accessed on May 7th 2013. "Contracts Curse: Uganda's oil agreements place profit before people."

"(1) Where the licensee has been granted a petroleum exploration or production licence under this Act, the licensee shall pay to the Government a signature bonus as may be prescribed by regulations."

It is clear from the above provision that it is only the signature bonus that must be paid to Government on exploration or production activities of the licensee. In any case, the legislation does not enact for production bonus. Draft clauses such as the one under review could give rise to interpretation challenges and therefore disputes in event that the Government of Uganda attempted to demand for payment of a production bonus under contract and the licensee oil company declined so to pay under the law. It even becomes rifer for conflict where the statute, as above, mandatorily provides for payment of a signature bonus and a PSA omits that obligation. If the Government of Uganda kept aloof of her responsibility to demand this payment, any Ugandan could sue for recovery of the signature bonus sums under public interest litigation from the licensee. Uganda Revenue Authority would also be justified to recover the bonus payments in accordance with the Income Tax Act as such payments are a debt due to the Government.[123] Since it is now mandatory from the law for the State to receive signature bonuses, clause ambiguity in drafting future contracts would certainly cause disputes between parties, leaving assessment and non-accountability regarding the bonus money the Government may have prior received aside.[124] It becomes essential

[123] Section 159 of the Act.

[124] The authors of a report by Civil Society Coalition on Oil in Uganda titled; "Contracts Curse: Uganda's oil agreements place profit before people" point out that Mr.Kabagambe-Kaliisa, Permanent Secretary of the Ministry of Energy, in a loose minute of September 2004 accompanying Heritage Block 3A PSA available at www.carbonweb.org, was on record for acknowledging receipt of US$ 300,000 in signature bonus for the said block. The pertinent question is; under what legal authority may the licensee have paid the said sums?

not to combine or confuse exploration signature bonus payments[125] with production royalty licence fees in future agreements as this appears to have been the case.[126]

(b). Royalty:-

The repealed Cap.150 provided that the holder of a production licence was to pay royalty fees in accordance with the petroleum agreement and so does the Act.[127] Black's Law Dictionary,[128] in reference to oil and gas, defines royalty as "a share of the product or profit from real property, reserved by the grantor of a mineral lease, in exchange for the lessee's right to mine or drill on the land." The following three scenarios are precursory to litigation:-

(i). Lack of clarity in clause language.

According to the draft PSA, royalty is **paid to the Government** on Gross Total Daily Production in Barrels of oil (total output of crude oil) per day. In the same Draft Article the **Government is required to receive** this royalty on a monthly basis in kind or in cash. This sounds confusing as payment to and receipt by Government are one and the same thing at least in terms of financial proceeds to the State. A dispute may therefore arise as to when the royalty passes to Government; whether on daily or monthly basis.

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[125] Signature bonus payments are akin to a bribe given to a state to allow her officials to append their signatures on the document committing the Government into a contract. They seem to serve no legal purpose under PSA regimes since the licensees risk their capital all for the benefit of the State; and in view of the fact that not a single penny under review has ever been accounted for and no official on either side wishes to let the cat out of the bag, it is only possible that a signature bonus in the circumstances served unlawful purposes.

[126] The Act exacerbates this situation in the underlined detail by defining "signature bonus" to mean *a single, non-recoverable lump sum payment by the licensee to the Government upon the granting of the petroleum exploration or production licence.* The law presupposes that the signature bonus is paid on application for petroleum exploration or production licence.

[127] Reference made to s.47 of Cap.150 and s.154 (1) of the Act respectively.

[128] Bryan Garner, A. 2004 (8th ed.) p.1356.

(ii). Applying a percentage gross formula for oil royalty computation.

Uganda's royalty oil clauses stipulate a certain percentage to be charged on Gross Total Daily Production (BOPD) of crude oil in a measure of Barrels. In ***Finley vs. Marathon Oil Company (1996)***[129], Judge Posner practically illustrated the possible dispute in the factual analysis below:

> *"The Finleys were entitled to one-sixth of all oil produced under lease, which translated to 16.67% royalty on the gross revenue (minus selling costs) from the sale of all the oil. It was a matter of indifference to them, but of utmost interest to Marathon, how much the oil cost to produce. Suppose the oil had a value of 100, and cost 90 to produce. Production would then be profitable from the standpoint of the property as a whole and of course from the Finleys' standpoint. But Marathon would lose money because it would bear the entire cost and that cost (90) would exceed its share of the revenue (83.33)."*

It is necessary to deduct the cost of production before levying the percentage formula. In Uganda, the royalties are computed on gross output interest and not on net profit interest formula. Finley (*supra*) is bound to re-occur because royalties are an integral part of the Government's compensation and a substantial cost to the licensee.

On the gas royalty clauses, John S. Lowe, *et al* comment that "cash royalty" provisions are usually the focus of disputes in long-term contracts because of the concept of 'market value' or placing consideration on downstream sales price.[130] Ambiguity in

[129] 75 F.3d 1225 (7th Cir.1996), 434.
[130] 2008. *Cases and Materials on Oil and Gas Law* (5th ed.). Thomson West, US: p.435.

drafting language, insufficient to draw a clear line between 'market value' and 'amount realised' as the basis for royalty calculation, could result into disputes. It is quite possible for conflict to bear due to unforeseeable and unprecedented change (rise or fall) of natural gas prices thereby affecting contract terms. Litigation has often arisen on the meaning of 'market value'. Some authorities (***the Vela rule***) had long held the view that 'market value' was portended futuristic price at the time of production and delivery rather than when the applicable sale contract was made.[131] The rule has since been modified by yet another, ***the Tara rule***, which holds 'market value' to be "the equivalent to the price assigned in the sales contract, made prudently and in good faith".[132]

The Vela and ***the Tara rules*** were ably analysed and discussed in another US later case of ***Piney Woods Country Life School vs. Shell Oil Co.***[133] in an attempt to resolve the ambiguity question and lay precedent. The Supreme Court thereof observed that any gas sales agreement entered into following a cash royalty gas clause was executory to be enforced only until the gas was delivered.[134] The rationale is this simple; one cannot purport to sell gas under the land surface before it is produced and delivered.[135] Invariably, royalty computation formulae cannot reasonably be the subject of any PSA clause construction. Accordingly, "market value at the well" at the time of production and delivery should be the basis to guide royalty computations. The very authority harmonised the explicit language challenges that created inadequate distinctions between gas sold at the well and gas sold off the lease, and between amount realised

[131] Texas Oil & Gas Corp. vs. Vela, 1968, Tex., 429 S.W.2d 866; also Exxon Corp. vs. Middleton, 1981, Tex., 613 S.W.2d 240, 244-45.
[132] Tara Petroleum Corp. vs. Hughey, 1981, Okla, 630 P.2d 1269.
[133] 726 F.2d 225 (5th Circuit Mississippi 1984).
[134] The Vela rule is premised on this doctrine.
[135] A sale consists of passing of title in the goods to the buyer which title the licensee will not have acquired yet.

and market value. The Tara rule eliminated the differences: the Government receives a gas royalty based on the amount realised no matter where and in what form the gas is sold. In his paper, Owen L. Anderson summarised thus: "the basic royalty obligation should be to pay royalty based upon the price that the lessee obtained, or could have obtained upon the sale of gas as a first-marketable product in the vicinity of the well."[136]

(iii). Blinn K. W., *et al* argue that provisions either in the PSAs or in the statutes obliging a contractor to pay a royalty – a share of the production – to the HC are inconsistent with the legal nature of PSAs and are therefore legally incorrect.[137] The authors premise their opinions in the argument that since contractors do not hold any right to production, they cannot be subject to the fee. This proposition holds validity when viewed through the prism of the contractor as a service provider, holding no production rights anywhere, and hired by the HC who earns from the Government only that fraction of the crude oil allocated to him under the cost oil arrangement.

The three highlighted scenarios above could breed conflict between parties to the PSA.

(c). State participation and National content clauses:-

These clauses are relatively new innovations to Uganda's petroleum industry. The repealed Cap.150 neither catered for national content nor state participation. Interestingly the PSAs so far signed in Uganda under the very Act bear these. Part VIII of the current 2013 Act providing for state participation in petroleum activities;

[136] 1997. "Royalty Valuation: Should Royalty Obligations Be Determined Intrinsically, Theoretically, or Realistically?" Vol. 37 *Natural Resources Journal*: *p.611.*

[137] Blinn K. W., *et al. op.cit.* (1986) p.71.

provision of goods and services by Ugandan entrepreneurship; training; transfer of technology and employment of Ugandans, was an anticipated legislation as gathered from the clauses appearing in the PSAs executed as early as 2001. State participation can be possible by execution of a JOA.[138] To appreciate the gist of the potential problem better, it was considered necessary to understand JVAs and JOAs and their legal differences first.

(i). Joint Venture Agreements (JVAs/JVCs):

A wealth of commentators has expressed difficulty in finding a straight cut definition to assign to, in the first place, a 'joint venture' and therefore a joint venture agreement. Instead a description of a joint venture in the oil and gas industry has been handed down to the readership community by Crommelin as follows:

"The mineral and petroleum joint venture is an association of persons (natural or corporate) to engage in a common undertaking to generate a product to be shared among the participants. Management of the undertaking is divided: specified activities are to be performed by a designated person (the operator or manager) as agent for the participants; the power to determine certain matters is vested in a committee (the operating or management committee) upon which participants are represented and entitled to vote in accordance with their interests in the venture; and other matters are decided at the outset by the participants as terms of the association. The relationship among participants is both contractual and proprietary: the terms of

[138] Section 124 of the Act.

the association are fixed by agreement, and property employed in the undertaking is held by the participants as tenants in common."[139]

A joint venture is contractual in nature with the HC holding the resource ownership portfolio. Professor Maniruzzaman observed:

"The association (joint venture) system is completely different from the traditional concession system. When the fields discovered are being developed, the host country takes a direct part in running the joint enterprise through its own managerial, administrative and technical staff and this ensures that the country's interests are represented in all decisions affecting the formation of the oil revenue, while at the same time the staff is acquiring training and experience."[140]

The participation (joint venture) agreement between the HC and the IOC, where the HC controls the resource ownership and obtains larger revenues, is governed by a contractual document called a joint venture agreement.[141] The Uganda Draft PSA defines a JVA to mean "an agreement not inconsistent with the PSA, between Licensee and the Nominee of the Government to be negotiated and executed pursuant to a joint venture state participation clause."[142] At the time of this research, Uganda had not entered any JVA. Interestingly, the draft PSA had a participation clause that contemplated a JVA of not more than 20% Uganda Government participating interest.

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[139] 1986. "The Mineral and Petroleum Joint Venture in Australia". Vol.4 *Journal of Energy Natural Resources and Environmental Law*, pp.65-66. Also quoted by A.F.M Maniruzzaman. 1993. "The New Generation of Energy and Natural Resources Development Agreements: Some Reflections". Vol.11 *Journal of Energy Natural Resources Law*, pp.207-247 at p.211; Talal Al-Emadi. 2010. "Joint Venture Contracts (JVCs) among Current Negotiated Petroleum Contracts: A Literature Review of JVCs Development, Concept and Elements". Vol.1 *Geo. Journal of International Law (The Summit)* pp.645-667 p.646.

[140] Maniruzzaman. *op. cit.* (1993) p.213.

[141] *Ibid.* pp.210-211.

[142] Article 1, definitions clause 1.1.35 of Draft PSA 2006.

(ii). Joint-Operating Agreements (JOAs) and JVAs distinguished:

In the oil and gas industry operations, because of the extensive capital injections and risks involved, oil companies prefer entering business partnerships with fellow companies to mitigate the adverse effects involved by agreeing between themselves to pooling resources, sharing burdens and benefits and spreading risks for joint operations. The agreement between the two is the "joint-operating agreement".[143] Legally, the JOA document spells out the functions of the parties in the operations, the allocation of costs and production sharing procedure. Under the JVA the three variables of ownership, control and risk are present. The resource ownership and management control are a preserve of the state (HC) while the IOC shoulders risks that usually are compensated for at the time of commercial production. Under the JOA, the oil companies foot the costs in accordance with their operating interests. The Executive Management Committee charged with the responsibility for, inter alia, capital expenditure, operational expenses, evaluating and monitoring activities is to JVAs as Operating Committees is to JOAs as coordinating arms of the two relations. Whereas a JVA refers to the relationship between State and an IOC, the JOA relates to that relationship between IOCs in procurement of a joint venture. The Draft PSA (2006) for Uganda clearly brings out the difference between the two concepts as gathered from the definitions clause therein as follows:

"'Joint Venture Agreement' means an agreement, not inconsistent herewith, **between Licensee and the Nominee of the Government** to be negotiated and executed pursuant to paragraph 11.1" (Emphasis supplied).

[143] Blinn K. W., *et al, op. cit.* (1986) p.192. Also Greg Gordon, *et al*, 2011. Oil and Gas Law: Current Practice and Emerging Trends (2nd ed.). Dundee University Press, London: p.359 in their editorial note define a "JOA" as "the common means by which businesses come together as a joint venture in their search for and production of oil and gas, both within the local and international jurisdictions of their operations."

Draft paragraph 11.1 relates to State participation in which the Government of Uganda or through its agent national oil company partners with an IOC company through a JVA.

Meanwhile a JOA is defined as thus:

"'Joint Operating Agreement' means the contract **between the Licensees**, and its appendices and amendments, relating to the joint conduct of Petroleum Operations." (Emphasis again supplied).

As analysed above, JVAs and JOAs are distinct from PSAs as well as in between themselves. Uganda has settled for PSCs. For future licence regimes therefore, care must be had to the following: - differences between purpose of JOAs and JVAs; the sharp distinction between the enabling Act providing for JOAs and the Draft PSAs requiring entry into JVAs, and the requirement for the formation of a Ugandan company whose shareholding is not less than 48% in the joint venture in realising national content principles, if disputes are to be avoided.

- Purposive differences between JOAs and JVAs:

  As already analysed in the preceding notes on the differences between JOAs and JVAs, it is not possible to provide for a JV contractual arrangement in another regime like the drafters of the Uganda PSA did. These two are distinct arrangements in the extractive industry. It showed lack of appreciation of the legal difference between the two concepts. Implanting a State Participation clause within a PSA was a gimmick, perhaps an issue of copy and paste, adding no value to the PSA yet providing no terms for the intended JVA. In short, a State Participation clause is a

preserve for JVAs and cannot therefore validly be the subject of PSAs. At most such construction could only breed future conflict.

- Legislative vs. PSA provisions:

  The legislative provision for State participation states:

  "Government may participate in petroleum activities under this Act through a specified participating interest of a licence, or contract granted under this Act and in the joint venture established by a joint operating agreement in accordance with the licence and this Act."[144] (Underlining supplied).

The impugned Draft State Participation PSA clause appears in part as follow:

"11.1 Government or its Nominee may elect to enter into a Joint Venture Agreement with Licensee thereby allowing for State Participation for no more than twenty percent (20%) and Government shall inform Licensee of its decision in writing within 120 days of receipt of the application for a Production Licence. Government or its Nominee shall be entitled to participate in Development Area by Development Area. Licensee agrees to carry the costs of Government or its Nominee through development to production. These costs are recoverable including interest at the London Inter-Bank Offer Rate (LIBOR) quoted at or about 11:00 am on the date next to when they were incurred by the Licensee. These costs will be repaid out of the Licensee's cost recovery oil. Government will be responsible for any taxes arising out of its share of the Joint Venture."[145] (Emphasis added).

[144] Section 124(1) of the Act.
[145] Uganda's 2006 Draft PSA Article 11.

An interview with Uganda's Ministry of Energy official participants revealed that the State was not in the near future likely to exercise its right to a joint venture. That means Uganda will substantially lose out on revenues to the private companies and will also not gain in expertise and skills development. A JOA can only be executed between a licensee private oil company and Ugandan citizens or companies for the purpose of provision of goods and services locally available and rendered respectively in Uganda; training and employment of Ugandans; training and technology transfer for the petroleum activities. This is what national content and state participation entail. It is not for the exploration and production licensing purposes that the Government of Uganda should be involved although s.124 (2) of the Act attempted to confusingly enact as such.[146] It would be unlikely for a developing country such as Uganda with hardly any technological expertise or advantage to be seen to pool resources in a joint venture to sustain the impugned exploration and production relationships under licence. Besides, 'national content' has not been defined by any law in Uganda and neither has a national content policy been formulated. Other oil producing jurisdictions have attached definition to the concept. Nigeria for instance defines 'Local Content', which Uganda refers to as the 'national content', as "the quantum of composite value added to, or created in, the Nigerian economy through a deliberate utilisation of Nigerian Human and material resources and services in the exploration, development, exploitation, transportation and sale of Nigerian crude oil and gas resources, without compromising quality, health, safety and environmental standards."[147] Borrowing such a definition with necessary modifications for Uganda's case would not be fatal. The requirement for the utilisation of Ugandan human and material resources by the Contractors is

[146] Section 124 (2) provides: "When announcing areas for grant of petroleum exploration licences according to this Act, the Minister shall, with the approval of Cabinet, specify the maximum Government share which may be exercised by the Government under subsection (1)."
[147] Mohammed Babangida Umar. *op.cit.* (2005) p.76.

embodied in two provisions of the Uganda's draft Production Sharing Contract, particularly Articles 20 and 21.

Article 20 on local purchases in Uganda provides:

> "20.1 In procurement, Licensee shall give preference to goods which are produced or **available in Uganda** and services which are rendered by Ugandan citizens and companies, **unless such goods and services are offered on terms which are not equal to or better than imported goods and services with regard to quality, price and availability at the time and in the quantities required**." (Emphasis supplied).

The challenges with this draft PSA clause are that: It talks about goods which are "available in Uganda" and also sets "threshold conditions" for which the Ugandan goods and services must meet in order to be eligible for purchase and use by the licensee/contractor.

- Goods being available in Uganda:

Equally s.125 (1) of the Act provides that the licensee, or its contractors to take preference in procurement of goods which are produced or available in Uganda. Being available in Uganda does not necessarily mean that the goods are locally supplied by a Ugandan citizen or company. Such goods could just have been imported into the country by the licensee/contractor, and hence no national content may be achieved under such procurement procedure.

- Threshold conditions:

To warrant purchase of goods and acquisition of services outside Uganda, the local procurement terms must not be equal to or the home commodities must be of inferior category. Unfortunately these contractual conditions are not supported by the enabling legislation to the PSAs. Section 125 (2) of the Act enacts that where goods and services required for procurement are not available in Uganda, they shall be so provided by a company which entered into a joint venture with a Ugandan company that has a share capital of not less than 48% in the joint venture. In Uganda, at least at the time of this research, not a single Ugandan company had the capacity to raise such share capital and hence no joint ventures had ever been entered let alone contemplated. It is quite unlikely that a Ugandan company will soon form any joint venture with private oil companies for the purpose of procurements for the oil and gas businesses. This could leave the licensees and their contractors with the procurement monopoly in total disregard to the contractual and statutory provisions relating to national content after all the required goods and services may be declared unsuitable in terms of quality, price and unavailable in time and numbers. According to the draft PSA, the licensee wields authority and it is in their province to establish appropriate procurement and tender procedures for the goods and services for the Uganda's petroleum industry.

The PSA defines "goods" as including equipment, materials and supplies but does not shade any light on what "services" are.

A likely conflict looms over provisions of sections 42(1) and 125(2) of the Act. Section 42(1) establishing the National Oil Company for Uganda requires the company which is wholly owned by the State to manage Uganda's commercial aspects of petroleum activities and the participating interests of the State in the Petroleum agreements. A

question may then arise: Would a licensee who does not procure the goods and services locally from Uganda have complied with the PSA or flawed the law? The answer appears to lie in judicial analysis of the contractual and legislative conditions now at crossroads. Such litigious scenarios could be avoided.

(d). Cost recovery:-

As noted herein earlier, the oil and gas extraction process is a very costly venture right from exploration through development to production. The oil investor/licensee must recover what they injected in to realise commerciality of the venture. The PSAs usually dictate how much, when and what costs are eligible for recovery. The amount of oil set aside to cater for offsetting the costs is called 'cost oil'. Apparently it is this same cost component that is deducted for gas production, which production comes much later. Double deduction looms.

(i). how much to recover:

Once commercial production has set in, and after the royalty payments for each contract area have been made to the Government, the total balance barrels[148] of oil cater for cost oil and profit oil. Under the Uganda PSAs, all exploration, development, production and operating expenses for oil and gas, as defined in *Annex C*, incurred by the licensee shall be recovered at a percentage of gross oil production. Participants revealed to this study the percentage rate of 60% and 70% of gross oil production formula for oil and gas deductions respectively. As noted above, gas production comes much later than oil production yet some of the costs incurred for production of the two products are the

[148] According to Cambridge Advanced Learner's Dictionary, (3rd ed.) p.107: "In the oil industry, a barrel of oil is equal to 159 litres."

same/shared. This is a case of duplicity of charges, a thing that could erupt into a dispute.

(ii). when to recover:

The licensee is required to carry forward to subsequent years all unrecovered costs until recovery is completed. Once complete, then the sharing is only subject to operating expenses being deducted and the balance (profit oil) will be charged a percentage on the remaining total daily production. Timely recovery of cost oil would depend on substantial production of the petroleum. The licensee could produce in piece meal to keep carrying forward the costs as there is no restriction on what number of barrels are subject to cost recovery each year. According to the Draft PSA there appears to be two categories of recoveries for purposes of recovery time: one case is that of cost oil accruing from ongoing yearly deductions while the other is the case where full recovery upon exploration, development and production are complete commences in terms of operating expenses. Neither the PSA nor the statute explicitly explains what these operating expenses are. *Annex C* to the Draft does not draw a clear distinction between operating expenses and the sum total of exploration, development and production expenses as all these expenses are described in the Draft PSA as "necessary, appropriate and economical expenditures." This is an eminent ground for conflict.

(iii). eligibility for recovery:

A plethora of allowable expenses has been provided by the Draft PSA. It is difficult to believe whether or not there is any expenditure that does not pass for a recoverable cost

in Uganda's petroleum industry. *Annex C*, Section 4.3 clause to the Draft PSA provides:

> "Other costs and expenses not covered or dealt with in the provisions and which are incurred by Licensee for the necessary and proper conduct of Petroleum Operations are recoverable." (Underlining provided).

Virtually all expenditure by the licensee in the oil and gas sector is "necessary" and therefore a deductible cost for purposes of arriving at the profit oil under Uganda's PSAs. This is casting the snare far and wide for those who are not wary of the other party's intentions. The oil companies could fish for and or unreasonably inflate the costs in order to profit from the 'cost oil'. In a nutshell, the formula on profit sharing being dependent on cost recovery by the licensee encourages the licensee to inflate costs to the detriment of the Government's share in profit petroleum.[149] Civil Society Coalition on Oil in Uganda, a consortium of NGOs operating in Uganda, in their report assert that there are various ways the IOCs could do this – "one is by trying to recover costs that should not be expendable. Another way is to hire an affiliated company as a contractor, and pay them a rate by which they can make a profit."[150] "An Ernst & Young audit of Heritage Oil's exploration activities in Uganda between September 2004 and October 2006 found that Heritage had over claimed cost recoverable expenditure by $586,511 and warned of the risk of inflating costs and expenses, more especially costs incurred outside Uganda."[151] A further reading of the deeply buried Draft PSA clause provisions in Annex C thereof on legal expenses, shows that 'all and sundry' of the legal expenses on litigation for instance in defending and prosecuting law

[149] Report of the Committee on the PSC Mechanism in Petroleum Industry, Government of India December, 2012. http://eac.gov.in/reports/rep_psc0201.pdf accessed on Oct. 7th 2013.
[150] www.carbonweb.org/uganda accessed on July 30th 2013.
[151] *Ibid.*

suits arising out of the activities under the PSA or sums paid in respect of legal services necessary or expedient for the protection of the interest of licensee are to be covered by cost oil without any further approval of the Government. An attempt to sue any licensee or her contractor and vice versa in a petroleum related case means the Government of Uganda has to meet the cost of the process. That position runs counter to the legislative enactment for indemnifying the Republic of Uganda in the event of the licensee defaulting on her obligations under the Act.[152] These scenarios prohibit public litigation and are therefore recipe for conflict.

(e). Production Sharing:-

Having removed royalty and cost recovery, the oil production that remains is "profit oil" which is then shared between the Government and the licensee oil company. The sharing formula is usually on a sliding scale at a percentage of the remaining total daily barrel oil production. The Production Sharing clause provides a lower percentage for smaller production and incrementally higher percentage for the higher production for the Government share/take of the profit oil. The opposite is true for the licensee's take. The tabular analysis below helps to illustrate the point.

[152] Section 181 of the Act provides: "A licensee shall, at all times, keep the Government indemnified against all actions, claims and demands that may be brought or made against the Government by reason of anything done by the licensee in the exercise or purported exercise of the rights of the licensee under the Act or licence."

"Production BOPD	Government Share of Profit Oil	Licensee Share of Profit Oil
0 – 5000	55%	45%
5001 – 10000	60%	40%
10001 – 20000	70%	30%
20001 – 30000	75%	25%
30001 – 40000	85%	15%
40001 – 100000	90%	10%
>100000	95%	5%"[153]

The Draft does not reveal the criteria for constructing the production and percentage ranges. It is possible for different PSAs to have different range formulae and therefor spelling uncertainty over profitability. The construction is assumptive of the fact that profitability of the petroleum project is viable with volume of production. The opposite may be right. For example at times of high oil prices Uganda may wish to interfere with this construction in an attempt to profit but not necessarily look out for higher volumes of production. Disputes could arise in the circumstances.

(f). Taxation:-

The Uganda PSA Draft Taxation Clause provides:

> "All central, district administrative, municipal and other local administrators' or other taxes, duties, levies or lawful impositions applicable to Licensee shall be paid by the Licensee in accordance with the laws of Uganda in a timely fashion."[154]

The Act does not provide for taxation matters. However, any legislation and Statutory Instruments imposing any form of tax to the licensee are applicable laws. Section 159 of the Act enacts that payments under the Act are a debt due to the Government of

[153] *Table source*: Uganda's Draft PSA dated June 2006.

[154] PSA Draft dated 2006.

Uganda and may be recovered in accordance with the Income Tax Act. The taxing statute provides for allowable expenditures for income tax computations. The Draft PSA, under *Annex C*, section 3 volunteered all expenses during petroleum exploration, development and production stages as contract expenses which are allowed for tax purposes. There are two areas of concern: first, challenges brought about by the 'all inclusive' definition of allowable contract expenditures in the PSA and secondly possible replication of recoverable expenses into allowable tax expenditures.

(i). Allowable contract expenditure:

The definition of allowable contract expenditure is limited to petroleum operating expenditures and depreciable petroleum capital expenditures both of whom are of the current tax year. Under the petroleum operating expenditures, all exploration and operating expenses are described by the Draft PSA as "necessary, appropriate and economical" expenditures for deductions in assessing corporate tax. It is common knowledge that exploration and development activities with their attendant expenses come years before oil taxation regimes set in. There now appears to be an irreconcilable conflict between the Draft tax clauses on whether the licensee would only be required to consider for deduction of current tax year expenditures or all necessary, appropriate and economically allowable expenditures incurred over the years.

(ii). Cost recoverable expenses versus Allowable tax expenditures:

Before corporate tax is imposed on the contractor's share of the profit-oil, certain deductions will have been made. Notable among these are expenses to cater for cost-oil expenses and royalties. The Draft PSA classifies, defines and allocates all exploration,

development, production and operating expenses for petroleum activities as necessary, appropriate and economical costs and expenditures required to be regularly allocated and treated as recoverable cost-oil expenses. In other words, to arrive at a figure against which to charge corporate tax, cost-oil expenses must be deducted. The tax draft clause provides for allowable tax expenditures to be deducted. No clear boundary has been drawn between these two expenses in the Draft document, and most likely not in the final signed PSAs either. This lack of clarity could breed disputes between parties to the PSA.

As earlier reported hereof, royalty clause provisions, be they in the contract or the legislation, are illegal given the legal nature of PSAs. So where royalties are illegally imposed, are surely illegally charged. This finding is likely to instruct dispute resolution counsel on the way forward sooner than later.

Ring fencing means non-transferability of costs of one contract area to another in an attempt to offset such costs for either computing share of profit oil or taxation. In the PSA draft, the provision for ring fencing each production area for tax purposes was not set out. On tax consolidation principles, however, it provides as thus:

> "Income Tax in each Tax Year shall be assessed on the basis of the Aggregate Contract Revenues derived from and allowable Contract Expenditures incurred in, the Petroleum Operations carried out hereunder."[155]

[155] Section 3 to the Draft PSA: paragraph 3.1.2 on consolidation tax accounting principles.

The above clause does not clearly tell whether the said aggregate revenues and expenditures refer to a single production licence area or to aggregates of different licence areas in a tax year. There could arise a situation where two or more contract production area revenues and allowable expenditures may be consolidated for tax purposes or expenses not assignable to the petroleum activities being deductible. Taxation accounting principles prohibit such as the same is in violation of ring fencing principles. Absence of a ring fencing clause in the PSA could have been intentional in order to benefit from the deceitful consolidation tax clause that appears in the very Draft at the expense of the State.

Associated with the above, was the irregularly signed Memorandum of Understanding (MoU) between the Government of Uganda and Tullow Oil Company on 15th March 2011.[156] The effect of that MoU was to waive tax liabilities for the oil companies involved in the development of oil and gas resources in the licence areas of the Albertine Graben. This was a mistake as MoUs were neither provided for by law nor contract in the circumstances.

3.3.3 Assignment clause

Assignment is the transfer or setting over of some right or interest in property from one person to another.[157] Assignment was described as a relationship where "one of the parties to an existing contract (the assignee) is replaced by another (assignor) where upon the assignee takes over the benefit of the contract, standing in the shoes of the assignor to assume performance of the contract although the assignor will still be liable

[156] In the Hon. Minister's report to Cabinet, also available at http://www.petroleum.go.ug/page.php?k=curnews&id=14 accessed on September 7th 2013.
[157] Bryan A. Garner. 2004. *Black's Law Dictionary* (8th ed.). West Group, US: p.128.

under the contract."[158] Draft PSA clause 24.1 prohibits the licensee from assigning to any person, affiliated company, firm or corporation not party to the PSA, without prior written consent of the Minister. In event of licensee wishing to assign, the consent shall not be unreasonably withheld or delayed. Both assignee and assignor shall be jointly and severally liable for the performance of all rights, duties and obligations under the PSA.[159]

The above obligating provisions are however, contradicted by the very PSA in another clause as follows:

> "Upon assignment of its interests in this Agreement, the assignor shall be fully released and discharged from its obligations hereunder to the extent that such obligations are assumed by the assignee."[160] (Emphasis added).

Meanwhile s.87 (2) of the Act obligates the assignor to fulfill all financial obligations under the laws of Uganda even where they have applied for assignment. John S. Lowe, *et al* aptly said: "the legal prerequisites for a valid assignment are primarily a matter of state law".[161] What this means is that the contractual clause releasing the assignor from obligations is null and void in light of the law and ought to be severed before it gives birth to disputes.

This study revealed that "in most jurisdictions commercial contracts are not easily assignable so as to enable one party by assignment to release himself from all obligations under the agreement and pass them on to the assignee, unless the contract is

[158] Richard Christou. *op.cit.* (2010) p.251.
[159] Clause 24.3.
[160] Clause 24.6.
[161] John Lowe, S. *et al. op.cit.* (2008) p.725.

of a type where the identity of the person who is to perform the contractual obligations is of no interest to the party who is to take the benefit of such performance."[162] Cockburn L.J. laid down the above principle in the case of ***The British Waggon Company and the Parkgate Waggon Company*** *vs.* ***Lea & Co.***[163] He said:

> *"Where a person contracts with another to do work or perform service, and it can be inferred that the person employed has been selected with reference to his individual skill, competence, or other personal qualification, the inability or unwillingness of the party so employed to execute the work or perform the service is a sufficient answer to any demand by a stranger to the original contract of the performance of it by the other party, and entitles the latter to treat the contract as at an end, notwithstanding that the person tendered to take the place of the contracting party may be equally well qualified to do the service. Personal performance is in such a case of essence of the contract, which, consequently cannot in its absence be enforced against an unwilling party."*

It is deducible from the above case that where the identity and competence of the party performing the obligations are important, assignment is forbidden.

3.3.4 Environment Clause

Whereas petroleum developments come with benefits, they also carry along environmental degradation challenges. Uganda's oil rich Albertine Graben is the most bio-diverse area on Africa's continent.[164] The region is home for 30% of Africa's

[162] Richard Christou. *op.cit.* (2010) p.252.
[163] (1879-80) L.R. 5 Q.B.D. 149, DC.
[164] International Alert. *op.cit.* (May 2011) p.37.

mammal species, 51% of its bird species, 19% of its amphibian species and 14% of its plant and reptile species.[165] The National Objectives and Directive Principles of State Policy No: 27 under the 1995 Uganda Constitution (as amended) enunciate for sustainable utilisation of natural resources in order to meet environmental needs of the present and future generations and direct the State to put in place environmental pollution preventive measures. In the same spirit the State is obliged to promote and implement policies that ensure people's needs and those that preserve the environment. Article 39 of the Constitution guarantees a right to a clean and healthy environment to Ugandans. Under the authority of Article 245, Parliament is mandated to enact laws that protect and preserve the environment from abuse, pollution and degradation. To that end, legislation is in place reiterating the above constitutionally entrenched environmental protection principles. Section 3 of the Act provides:

> "A licensee and any other person who exercises or performs functions, duties or powers under this Act in relation to petroleum activities shall comply with environmental principles and safeguards prescribed by the National Environment Management Act and other applicable laws." (Underlining supplied for discussion *infra*).

Whereas the above provision could have been well intentioned, there is no legislation in Uganda known as the National Environment Management Act. Parliament could have contemplated the National Environment Act, Cap.153 laws of Uganda.[166] This therefore makes the 2013 enactment above irrelevant and inapplicable, in regard to compliance with environmental principles. In this respect, the Draft PSA clause providing:

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[165] *Ibid.*

[166] An Act to provide for sustainable management of the environment, and establishment of the National Environment Management Authority (NEMA).

"25.13 The Licensee shall ensure that: (a) Petroleum Operations are carried out in an environmentally acceptable and safe manner consistent with good international industry practice and applicable laws and that such operations are properly monitored;"

is seriously orphaned.

The text language used in the Draft PSA provisions is so mild and not obligating enough that neither compliance nor action can be taken against anyone who endangers persons, property or the environment under the contract. For example, if any works or installations by the licensee violate environmental integrity to a **degree unacceptable** to Government in accordance with international environmental standards and local circumstances, the licensee **shall take appropriate remedial measures** approved by Government **as far as it is reasonably possible** to fix the damage.[167]

In the first place, how is the "degree of unacceptability" determined? It would appear such is determined by international environmental standards and local circumstances, which guiding principles have not been spelt out by either the contract or statute.

Taking "appropriate remedial measures" is subjective. In absence of compelling circumstances, they may or may not be invoked.

If Government is to approve "as far as is reasonably possible", there could arise a point when the Government may plead unreasonableness or otherwise, which may be difficult to justify to the contrary.

[167] Clause 25.1 of the PSA Draft.

The requirement for "appropriate", "relevant", "as far as reasonably possible", "take all necessary and adequate steps" calls for a test to be applied to achieve these standards which test is not reasonably foreseeable or traceable with the contract or legislation. This is vague and weakly drafted. From the character, torn of the general drafting language, and deliberate absence of environmental monitoring provisions, it can clearly be said that the Draft PSA is an economically prepared document with the IOC interests at heart for exploitation of the HC petroleum resources without paying due attention to environmental concerns.

Whereas the Draft PSA obligates the licensee to take all necessary and adequate steps to compensate victims of the damage caused to the environment during and after the petroleum operations,[168] the Act surprisingly exempts abettors of such environmental damage of liability in what appears to be a stand-off enactment below:

"(2) Liability for pollution damage may not be claimed against:

(a) Any person under contractual relationship in connection with petroleum activities with a licensee;

(b) A manufacturer or supplier of equipment for petroleum operations;

(c) Any pollution averter and

(d) Employees of the licensee."[169]

In light of the enactment that a claim for environmental damage may be made in accordance with the Act and any other applicable law,[170] it is only correct to conclude

[168] Clause 25.5.
[169] Section 132 (2) of the Act so provides.
[170] Section 132 (1) thereof.

that the impugned legislative provisions are sadly contradicted by the contract draft clauses.

Neither the Act nor the Draft agreement did explicitly address wildlife protection initiatives despite the fact that most petroleum activities were being carried out in Murchison Falls National Game Park. The fieldwork survey revealed "highly threatened wildlife had been hunted and killed by oil workers. This included the rare reedbuck, an antelope at risk of extinction in Kabwoya wildlife reserve by workers of Busitema Mining Services, and a Tullow Oil contractor. Wildlife managers and local community members claimed that oil workers had previously been killing other animals in Kabwoya wildlife reserve, which is one of the most ecologically rich areas in Africa."[171]

When interviewed, the Wildlife Conservation Society (WCS) participants revealed that elephants had made sudden and significant movements from their usual habitat during very noisy operations including construction.

Whereas section 47(3) of the Act requires an Environmental Impact Assessment on a petroleum project before an Exploration Licence is granted, the repealed Act under which the current PSAs were concluded did not provide for any EIAs at any stage. Neither the repealed nor the current 2013 Act provided for EIA requirement during the application process for a Petroleum Production Licence.

[171] Also available in the print media: "Oil workers kill remaining male reedbuck", New Vision, 11.01.2010, http://www.newvision.co.ug/D/8/18/706784.

In light of the loosely drafted Environmental PSA clauses, it is obvious, environmental standards are lip service provisions under the current contractual-legal order. All these, and now the lack of vital linkage between the various statutory environmental obligations and the provisions of the PSA, in other words, the 'non-contractualisation' of the statutory obligations into the specific provisions of the PSCs are recipe for disputes.

3.3.5 Arbitration

The Draft PSA declares mandatorily that;

> "**Any dispute arising under the Agreement** which cannot be settled amicably within sixty (60) days **shall** be referred to Arbitration in accordance with the United Nations Commission for International Trade Law (UNCITRAL) Arbitration Rules. The arbitration shall be conducted by three (3) arbitrators appointed in accordance with the said Rules. The said **arbitration shall take place in London, England**. Judgment on the award rendered may be entered in **any court having jurisdiction** or application may be made in such court for a judicial acceptance of the award and an order of enforcement, as the case may be. The Arbitration award shall be final and binding on the Parties to this Agreement."[172] (Emphasis added).

There are three areas of potential conflict in the above draft clause. These have been subjects of disputes before and are likely to breed more.

(a). Any dispute arising under the Agreement:

[172] Clause 26.1.

This provision presupposes that all disputes, be they environmental or tax matters, as long as they are not settled within 60 days, must only be settled before a London Tribunal and under predetermined Rules thereat.[173] Interpreting this clause that way brings hardship because there are provisions in the Act that specifically confer jurisdiction to Ugandan courts over matters of environmental infringement.[174]

Under the authority of s.159 of the Act on payments due to the Government of Uganda from petroleum activities, corporate/income tax for example, is recoverable under the Income Tax Act. A survey with judges of the Uganda High Court commercial Division informed this study that tax disputes were not the subject of international arbitration and that "any dispute arising under the Agreement" was an omnibus misstatement in the PSA. This finding was also supported by the case of ***Heritage Oil & Gas Ltd vs. Uganda Revenue Authority.***[175] The court considered the effect of assignment on taxation under a signed PSA between Uganda Government and Heritage Oil. In that case, "the appellant sold its interests under the agreement to Tullow Uganda Limited under a sale and purchase agreement and a supplemental agreement thereto. As a result of the sale, and under the authority of the Income Tax Act, (ITA), the respondent issued tax assessments for Capital Gains Tax which the appellant objected to and filed two applications in the Tribunal, that is TAT Applications No.26 and 28 of 2010. Before the two applications could be determined, the appellant again filed another Misc. Application No.6 of 2011 in the

[173] The use of the mandatory "shall" in the Draft is clearly distinguishable from the interpretation in the case of *Sabah Shipyard (Pakistan) Ltd vs. The Islamic Republic of Pakistan [2002] EWCA Civ. 1643* where a similar contract clause imposed optional jurisdiction to English courts by the use of the word "may" as not restricting jurisdiction to English courts only.

[174] Section 134 of the Act enacting for an environmental dispute states: "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." It is therefore not possible in the circumstances that "**any dispute under Agreement**" must only be filed in England. Environmental damage compensation is a contractual obligation under Clause 25.5 of the Uganda Draft PSA.

[175] No.14 of 2011 in the High Court Commercial Division – Kampala, before Hon. Lady Justice Hellen Obura.

very Tax Appeals Tribunal seeking a stay of proceedings in the TAT Applications No.26 and 28 of 2010 and have the matter referred to arbitration in accordance with the arbitration clause in the PSA. The impugned arbitration clause under Article 26.1 of the PSA provided as above quoted (*note 173*).

The Tribunal heard and dismissed the application with costs hence the appeal."[176]

For purposes of this research, two issues were relevant:

(1). that reference of the tax dispute, being a dispute between the parties under the agreement, to an arbitral tribunal was necessary; and

(2). that a contractual provision in an agreement could fetter legislative tax provisions.

In disposing of the two issues, court observed that taxes are statutorily provided for and any acts to make it contractual would be ultra vires. Article 152(1) of the Constitution of Uganda provides that no tax shall be imposed except under the authority of an Act of Parliament. The ITA and other tax statutes specify the taxes payable and the URA is mandated to collect those taxes. That mandate of the URA to collect tax in accordance with the laws of Uganda cannot be fettered or overridden by agreement. To this end, court quoted Egonda J., in the case of ***K.M. Enterprises and Others vs. Uganda Revenue Authority***[177] that:-

"...exercise of statutory powers and duties cannot be fettered or overridden by agreement, estoppels, lapse of time, mistake and such other circumstances..."

[176] Brief facts of the appeal case as given by the appellate High Court of Uganda.
[177] Uganda High Court Civil Suit No. 599 of 2001 (Unreported).

It was noted, court made reference to Article 14 of the impugned PSA to drive the argument home. The Article states:

"All central, district administrative, municipal and other local administrators' or other taxes, duties, levies or other lawful impositions applicable to Licensee shall be paid by the Licensee in accordance with the laws of Uganda in a timely fashion."

In that regard, court concluded:

"Any dispute relating to payment of taxes would be resolved in accordance with the laws of Uganda. This is because the mechanism for tax dispute resolution in Uganda is explicit under the ITA and TAT Act. In the instant case, it could not have been the intention of the Government to agree that tax disputes would be referred to arbitration as any attempt to do so would be contrary to the laws of Uganda. It would also be contrary to Article 14 of the PSA which clearly stated that tax would be paid in accordance with the laws of Uganda in a timely fashion. Allowing the tax dispute to go through the arbitration process in London would definitely not facilitate the timely payment of the taxes as agreed. This means that tax by inference was excepted from the scope of the arbitration agreement and as such it was not one of the contemplated disputes for arbitration under Article 26.1 of the PSA."

It becomes clear from the above court findings that Omni busing tax disputes and impliedly subjecting them to arbitration as "any dispute" as under the PSA Draft is an act devoid of legal basis and only prone to disputes.

In line to the foregoing, Patten LJ in ***Fulham Football Club (1987) Ltd. vs. Richards***[178], faulted arbitration clauses propounding the generalist language of "any dispute being forwarded for arbitration" on ground that overriding public policy matters were not the subject of arbitrability. In that case, Peter Crouch, a football player was up for sale to another team. Two contenders, namely Fulham FC and Tottenham Hotspur hotly bid for him. Somehow Hotspur, enlisted the influence of the respondent, Sir David Richards who was at the time the Chairman of Football Association Premier League Ltd. (FAPL), a company incorporated to organise and manage Premier Leagues in Europe for which both teams were members. The Association Rules prohibited Richards' impugned role. An arbitration clause also provided:

"Any dispute or difference between any two or more Participants (which shall include… the Association) including but not limited to a dispute arising out of or in connection with…

(i) …

(ii) …

Which are in force from time to time; shall be referred to and finally resolved by arbitration under those Rules."

Influence peddling by Sir Richards was referred to arbitration. At the appellate level, Patten LJ generally commented that although a dispute which affected third parties was not arbitrable, the mere fact that a dispute affected only the parties to it did not mean that it was automatically arbitrable. He said:

[178] [2010] EWHC 3111 (Ch.).

"It is necessary to consider in relation to the matters in dispute in each case whether they engage third party rights or present an attempt to delegate to the arbitrators what is a matter of public interest which cannot be determined within the limitations of a private contractual process."[179]

The court further held that the phrase "all disputes..." was sufficiently wide to cover overriding public policy issues, hence not the subject of arbitration. It is the finding of this study that taxation in Uganda is a public policy matter with capacity to affect interests of citizens as the third party. From the above arguments, it is further asserted, tax disputes should never be subjected to international arbitration. Under Uganda's present PSA regime, they could be so referred. This is disputable.

As a stabilisation guarantee under international law, IOCs would feel relieved from the clutches of national law by making deserving PSA disputes subject to international law to minimise chances of unilateral breach by HCs.[180] Once the arbitration clause provides for resolution of disputes by an international tribunal, then the PSA becomes internationalised and ceases to be subject to national laws in event of dispute settlements.

(b). Foreign (London) Jurisdiction:

The foreign jurisdiction in the draft runs counter to Article 33.1 of the very draft that requires the PSA to be governed by Uganda laws. It states:

[179] This case was also discussed in the *Arbitration Law Monthly* December2011/January 2012 Vol. 12 Issue 1.
[180] Tari Ambakederemo: "What is the value of stabilization guarantees as relates to fiscal regimes in the energy sector?" p.13. www.dundee.ac.uk/cepmlp/gateway/files.php?file=cepmlp_car13... Accessed on August 8th 2013.

"This agreement shall be governed by, interpreted and construed in accordance with the laws of Uganda."

The challenge arises when parties have to choose the applicable law to entertain a dispute like was the case in ***Heritage Oil & Gas Ltd***. (*supra*).

(c). Recognition and enforcement of foreign awards:

If there are courts in Uganda having similar jurisdiction as the London tribunal, why then take time and incur expenses in moving to England when ultimately Uganda courts are possessed with such jurisdiction? The answer seems to lie in the duty to observe impartiality and the need to heed the biblical warnings; "never go to law with a judge."[181]

3.3.6 Force Majeure

This is the liability exempting clause applicable to the parties in case of breach of the agreement. *Force majeure* is the excuse for delay or failure to perform due to events outside the control or contemplation of the defaulting party. In Uganda's case, *force majeure* is a legislated concept under s.188 of the Act. Under the law, a broad list of liability excluded events together with a sweep-up phrase as to avoid narrow interpretation issues, notice of particulars of failure and its cause, grace period for performance after the event and financial obligations exclusion are prominent. The Draft PSA *force majeure* provisions are required to be drafted in conformity with the law. Disputes abound where, under the premises, the contractual and the legislative drafting did not speak the same language. Such divergent implications were meted by

[181] As adumbrated by NH Chan. 2009. *How to Judge a Judge* (2nd ed.). Sweet and Maxwell, Malaysia Asia.

Article 28 of the Uganda Draft PSA when unreliable, unavailability or rationing of supplies, materials and equipment were smuggled in as *force majeure* events. The Draft clause therefore offends the rule laid down in one very recent case of ***CTI Group Inc. vs. Transclear SA***[182] in which failure to procure supplies in time due to third party inability to satisfy the chain was held not to constitute *force majeure*.

3.3.7 Termination clause

By operation of the law and breach of contractual terms, a PSA will terminate.

The Act provides for and how either a petroleum exploration or production licence may be determined, and these circumstances effectively terminate the Agreement.

The licence comes to its end under the following situations:

(a). Petroleum Exploration Licence:-

Section 61 of the Act instructs the exploration licence to remain in force;

- For the period stipulated in the licence, in any case not later than two years upon its grant;
- In accordance with the Regulations; and
- Until surrendered, suspended or cancelled before the contractual life of the licence.

(b). Petroleum Production Licence:-

[182] [2008] Bus L.R 1729.

Section 77 of the Act enacts that a petroleum production licence shall continue in force;

- For the period stipulated in the licence, in any case not exceeding twenty years upon the grant;
- In accordance with the Regulations made under the Act.

The Draft PSA has added grounds not provided for under the law for terminating a PSA. A PSA will come to its end due to the licensee's:

- Failure to fulfill its financial obligations under the law and the agreement;
- Material breach of the PSA terms;
- Non-compliance with the Act, Regulations, orders or Government instructions and
- Bankruptcy or liquidation due to insolvency.

It is the above legislative and contractual terminating circumstances that the Draft PSA termination clause would embrace as grounds for the termination of the entire PSA. In other words, the life of any PSA would dependent on the tenure of its underlying licences, its compliance to the law and sanctity of contract terms.

From the above, it is obvious, when "government instructions" are addressed by a political statement and are not respected, the PSA would come to an end. Such could lead to disputes with the ultimate effect of frustrating foreign investments in Uganda's nascent petroleum industry. Such fragrant conduct by governments was as early as 1974 particularly condemned in the ***Texaco Overseas Petroleum Co.***

(TOPCO) vs. Government of the Libya Arab Republic (the ***"TOPCO"*** case). The International Court of Justice (the ICJ) concluded:

"*The Government cannot exercise its sovereignty to nationalise in violation of its specific contractual commitments in the stabilisation clauses – the stabilisation clause negates the power of the public authority unilaterally to amend or abrogate the agreement, and nationalisation in the face of a stabilisation clause amounts to a breach of the concession.*"[183]

The Government of Libya was committed to a settlement payment of USD 152 Million with crude oil for unsuccessfully contending that the dispute, among others, was not subject to arbitration because the nationalisation were acts of sovereignty.

Clause 30.8 of the Draft PSA provides:

"On termination of this Agreement and any related Licences or of an interest therein, the rights thereunder of Licensee or the Defaulting Party, as the case may be, shall cease but the termination shall not affect any liability incurred before the termination, and any legal proceedings that might have been commenced or continued against Licensee or such Defaulting Party may be commenced or continued against him."

The challenge with this draft provision arises with loss of the IOC's interest by assignment. Given the unresolved contradiction between two assignment clauses in the PSA that provide:

[183] This was also alluded to by D.R. Bishop and T.W. Walde, 2007. "History of International Oil and Gas Disputes." Vol.5 Issue 4 *OGEL.*

"24.3 ….if Licensee assigns in whole or in part to any Affiliated Company, Licensee, as *assignor and assignee, shall be fully jointly and severally* ***liable for*** *the performance of all rights, duties and obligations under this Agreement* and any related Licences and shall be fully liable for performance of any such assignee unless the Parties otherwise agree."

And

"24.6 Upon assignment of its interest in this Agreement, *the assignor shall be fully released and* ***discharged from*** *its obligations hereunder* to the extent that such obligations are assumed by the assignee." (Emphasis in both cases supplied).

It becomes further unclear whether assignment constitutes termination of the PSA especially in absence of clear statutory provisions regulating assignment, and also in light of the fact that surrender of a licence is not assignment thereof.

The study carried out with selected participants in Uganda and the literature review informed this research that the termination clauses were unfairly slanted towards IOCs. Draft termination clause 30.2 for example provides:

"The Government shall have the right to terminate this Agreement and any Exploration and Production Licences granted hereunder …"

Under contract principles, either party so aggrieved may terminate an agreement. This lack of mutuality in termination prospects serves as an example of coercive drafting atmosphere by the Government. A moderate clause could follow the guideline below:

"Exercise of the right of termination afforded to either party shall not prejudice legal rights or remedies either party may have against the other in respect of any breach of the terms of this Agreement."[184]

(c). Effects of termination – continuation in force:

It has been observed that "certain obligating provisions such as those of confidentiality and dispute resolution may require to be saved even after termination of the agreement."[185] This is particularly so because such clauses are still universally beneficial to parties after termination of the relationship. In the Draft PSA for Uganda, there is nothing to the effect. A legal conflict may arise where:

- Confidentiality principles have to be observed for some time beyond the life of the agreement, and a party breaches the principles.[186]
- Dispute resolution has to continue after the termination, and a party pleads lack of *locus standi.*

3.3.8 Applicable law Clause

The applicable law clause not only ushers the entire PSA into the prevailing legislative regime but also guarantees obligations to comply with the law, avails opportunity to the parties to renegotiate in good faith such terms in the PSA that could have been affected by changes in law and contemplates related indemnities in order not to negatively destabilise the economic status of the licensee.[187] Meanwhile the amendments clause is to the effect that no amendment, modification, variation or supplementary editions may

[184] Richard Christou. *op.cit.* (2010) p.54.
[185] *Ibid.*
[186] Confidentiality is an industry practice where information is only divulged on approval of the parties; it is for the protection of their commercial business interests and in order to preserve the bargaining power when faced with conclusion of another relationship.
[187] Article 33 of Uganda's Draft PSA.

be made to the PSA without a written consent between the parties to the agreement.[188] The two clauses when read together constitute a stabilisation mechanism to the unwarranted modifications to the initial arrangement.

Due to uncertainties in the fiscal, legislative and regulatory regimes of HCs of developing nations, IOCs usually adopt contractual devices freezing the law of a state in a point of time by incorporating stabilisation clauses in their contracts. Nwete B. O.N defines stabilisation clauses as "clauses which seek to preserve not only the terms of a contract, but the rights and obligations of the parties under the contract especially against acts that will jeopardise the economic and financial benefits accruing from the contract. They are clauses that seek to guarantee the priority of contractual agreements over acts from the host state by *immunising* the contract and its benefits especially to the investor, against subsequent legal and fiscal modifications."[189] The IOC's major interest in these clauses is "to reduce political risk by contractually tying the hands of the government as firmly as they can."[190] "Stabilisation clauses effectively immunize an investor from future changes in both fiscal terms and even legislation. To an investor such changes constitute political risks – to a state they constitute exercise of its sovereignty. This is investment colonialism at its most extreme."[191] Maniruzzaman further states that stabilisation clauses could either be classified as classic or modern.[192] "The *classic* stabilisation clauses aim at prohibiting the exercise of the state's sovereign authority to interfere with the IOC's interests by legislative or regulatory means, while the *modern* stabilisation clauses attempt a balance between the state's authority to

[188] Article 34 of Uganda's Draft PSA.
[189] 2005. "To what extent can stabilisation clauses mitigate the investor's risks in a production sharing contract?" Vol.3 *OGEL.*
[190] Greg Muttitt. 2007. "Nationalising Risk, Privatising Reward". *International Journal of Contemporary Iraqi Studies.*
[191] Maniruzzaman, A.F.M. 2009. "The Issues of Resource Nationalism: Risk Engineering and Management in the Oil and Gas Industry." Vol.5 *Texas Journal of Oil, Gas and Energy Law.* p.96.
[192] *Ibid.*

exercise its sovereign power and the contracting IOC's interests. In the latter case, it means that if the state's exercise of its sovereignty disturbs the original balance of the contract agreed to between the parties at the time of the execution of the contract, the state authorities should maintain the original balance at all times during the lifetime of the contract by way of a predetermined formula that could be accompanied by the duty of the state to pay compensation for the loss incurred by the IOC concerned in good faith to do so. In case of parties' failure to reach an agreement, arbitration in a third party state by international law would be resorted to."[193] Uganda has opted to maintain the economic equilibrium of IOCs by proposing the modern clause as follows:

"33.1 This agreement shall be governed by, interpreted and construed in accordance with the laws of Uganda.

33.2 If, following the Effective Date, there is any change, or series of changes, in the laws or regulations of Uganda which materially reduces the economic benefits derived or to be derived by Licensee hereunder, Licensee may notify the Government accordingly and thereafter the Parties shall meet to negotiate in good faith and agree upon, the necessary modifications to this Agreement to restore Licensee to substantially the same overall economic position as prevailed hereunder prior to such change(s). In the event that the Parties are unable to agree that Licensee's economic benefits have been materially affected, and/or are unable to agree on the modifications required to restore Licensee to the same economic position as prevailed prior to such changes, within ninety (90) days of the receipt of the notice referred to hereinabove, then either Party may refer the matter for

[193] *Ibid.*

determination by international arbitration in London in accordance with the UNCITRAL Arbitration Rules."[194]

Where an international dispute arises, three issues namely; jurisdiction, applicable law and how an international judgment would be enforced, must be settled. It would appear from the two clauses above that unless there is a change in the legal regime, adversely affecting the economic status of a licensee, hence resulting into a dispute; the applicable law and jurisdiction would be municipal. The drafting style above has basis in Article 42 of the Convention establishing the ICSID wherein the parties enjoy the freedom to subject their PSA to either municipal law or rules of international law.[195] The recent case of ***Apple Corps Ltd vs. Apple Computer Inc.***[196] demonstrates the application of the Rome Convention in establishing the jurisdiction and therefore the proper law of the contract. In that case, a dispute arose between a company established in one of the contracting states (UK) and another established in a state not party to the Convention (California) over jurisdiction and proper law. When faced with such challenge, the solution lies in the ability to invoke the authorities above.

A court is only obliged to recognise and enforce a foreign judgment if and to the extent required by its national law.[197] In Uganda, the Foreign Judgments (Reciprocal Enforcement) Act, Cap.9 makes provision for enforcement in Uganda of judgments given in foreign countries which accord reciprocal treatment to judgments given in

[194] Uganda's Draft Applicable Law Article 33.
[195] "The arbitral Tribunal shall decide in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State Party to the dispute (including its rules on conflict of laws) and such rules of international law as may be applicable."
[196] [2004] EWHC 768.
[197] Richard Christou. *op cit.* (2010) p.283.

Uganda and this Act facilitates enforcement in foreign countries of judgments given in Uganda.[198]

The above clause, "does not define what *materially reduces the economic benefits* of the licensee. This may in practice constitute a conflict, and it may be difficult to restore a party to substantially *the same economic condition* as they would have been had it not been for the change in law or regulation. The restoration (of the investor) may not exceed the benefit received by the HC as a result of such change."[199]

Another difficulty here is that international law is purely the law regulating interstate relations and may not easily fit into contracts of the nature of private persons (IOCs) and state (Uganda- HC).[200]

3.3.9 Confidentiality clause

Ensuring information is disclosed to and reviewed exclusively by intended recipients is what confidentiality entails. Part 13 of the Act deals largely with parties' obligations on how to handle such information and documentation. The Minister of Energy and Mineral Development may disclose information to the public relating to agreements between the Government of Uganda and IOCs; status of licences; field development plans in approved form and all assignments upon payment of a prescribed fee.[201] Where a licensee wishes to disclose any data, prior written consent of the Minister must be

[198] Long title to Cap.9 Revised Laws of Uganda, 2000.
[199] Nwete. *op.cit.* (2005).
[200] Walde, T., and Kolo, A. 2003. "Renegotiation and contract adaptation in International investment projects: Applicable legal principles and industry practices". *Vol.3 Issue 1 OGEL:* p.17.
[201] Section 151 of the Act.

sought. In case it was the Authority wishing to disclose before relinquishment of the area to which the data relates, with the prior written consent of the licensee.[202] The Act also provides for the persons, circumstances and procedure for disclosure by the Minister to wit, to a Government agency for example a tax authority, professional financial institutions, arbitrators, for statistical purposes and where an award of a new acreage is being sought. The licensee may disclose to a licensee affiliate company, its home Government or agency, stock exchange, financial institutions, arbitrators, to prospective assignees and corporations for merger and consolidation purposes.[203] Except for those circumstances, no information disclosure is permissible under the Act. Disclosure by a public officer or a servant of the petroleum authority is further prohibited until ten (10) years after termination of employment. The Act is, however, silent about the requirement for non-disclosure by terminated civil servants or terminated employees of licensee companies before the ten years statutory 'mute' period. Reading both the Act in sections 152[204], 153[205] and 151[206] and the PSC, one can discern a clear lack of understanding of the distinctive meaning of the two concepts of data and information both legislative and contractual drafters exhibited. How then would they explain the violation against the express constitutional and legislative requirements to avail to the public information and the contracts in the State coffers?

"'Information' means knowledge communicated concerning some particular fact, subject or event; that of which one is apprised or told"[207]. 'Data', on the other hand means information which is recorded or being processed by means of equipment

[202] Section 152 of the Act.
[203] *Ibid.*
[204] On confidentiality of **data**.
[205] On non-disclosure of **information**.
[206] On disclosure of **PSAs** and any other **information** in the domain of the State to the public.
[207] David Hay. (ed.). 2007. *Words and Phrases Legally Defined* (4th ed.) Vol. 1 A-K. Lexis Nexis, United Kingdom: p.1211.

operating automatically in response to instructions given for that purpose.[208] Data can also be manually processed. Pieces of data when put together logically, constitute information. In a nutshell, data is raw information.

It is an offence to contravene disclosure principles. It shall be a defence for violating the confidentiality doctrine if the **accused proved** that the information so disclosed was in the public domain or that the alleged disclosure was for national interest.[209] It is submitted that the statutory requirement for the accused to prove his/her innocence, runs counter to celebrated constitutional and common law principles requiring the prosecution to prove the culpability of the accused. The case of ***Woolmington vs. DPP***[210] speaks volumes on the prosecution's requirement to prove their case beyond reasonable doubt throughout. The reverse onus provision presupposes the onus of proof being such a heavy one on the prosecution that it requires the accused to help the legislature and the prosecution to fill the gaps and religiously carry the 'proof cross'. This kind of criminal trial violates fair hearing principles laid down by the Uganda's 1995 Constitution[211] regarding presumption of innocence and guard against self-incrimination or the right to remain silent. Although Art. 28(4) (a) of the Constitution appears to protect all statutes that shift the onus of proof in criminal cases to the accused regarding proving particular facts, proof of the prosecution's case is not merely proof of facts. A judicial officer must distinguish between "proof of **a fact(s)**" and "proof of **ingredients of a case**". The two are not one thing. 'Proof of a fact' refers to the evidential burden while 'proof of the ingredients of an offence' is for the legal burden, which always must remain with the prosecution in criminal cases in light of

[208] *Ibid.*
[209] Section 153(5) of the Act.
[210] [1935] AC 462.
[211] Article 28(3) (a) and (11).

promulgations for the Bill of Rights. Whenever the common law or statute places a burden of proof on the accused, whether expressly or by implication, consideration must then be given to the jurisprudence concerning the presumption of innocence that has arisen as a result of the International Conventions and national Constitutions on Human Rights. Article 14(2) of the International Covenant on Civil and Political Rights provides:

> *"Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."*

Meanwhile the Constitution of the Republic of Uganda promulgates under Article 28(3) (a) in the same spirit above.

It is not necessary in this discussion to believe whether the onus in the impugned situations would survive scrutiny under the law. It is clear however, that open and democratic societies permit the shifting of the burden of proof to the accused when it would not be disproportionately invasive of the right to silence and the presumption of innocence to do so. This position is further fortified by Article 44(c) of the 1995 Constitution of the Republic of Uganda on non-derogation of the right to fair trial. The Constitutional Court of South Africa, alive to constitutional jurisprudence, in the case of **S vs. Samuel Manamela and Anor**.[212] had earlier had this to say:

> *"A law that shifts the burden of proof in criminal matters (the reverse onus provisions) from the prosecution to the accused is glaringly unconstitutional and invalid as it is clearly incompatible with the right to a fair trial, and, in particular the right to silence and the presumption of innocence."*

[212] (1999) 9 BCLR 994 (W).

If the accused faces the possibility of conviction on the basis that the specified offence deems certain essential facts to exist unless **the accused can prove to the contrary**, that derogates from the presumption of innocence and is contrary to the law as seen above. The same argument can safely be advanced where a statute shifts the legal burden of proof requiring that an accused be convicted unless s/he proves certain facts as part of his/her defence as the impugned Act does provide. This is now the contemporary 21st century position for democratic societies alive to constitutionalism for which it is believed Uganda would not be exempt.

Whereas the Act provides for circumstances under which disclosure of any information or the contents of the agreement may be made, the Draft PSA confidentiality clause freezes those legislative rights when it prohibits disclosure by either party to the agreement of the contents of the PSA and any confidential information and, where official disclosure[213] has taken place to a third party, the third party is under obligation also not to publish or disclose such information.[214] Two aspects are confidentially protected; the 'agreement' and 'any confidential information'.

(a). Confidentiality for the Agreements:

During the field survey, a section of participants expressed concern on keeping the PSAs a secret matter from public. "Keeping oil contracts secret enables increased environmental degradation, human rights abuses, conflict, displacement of communities, corruption and mismanagement."[215]

[213] "official disclosure" in this report refers to that disclosure allowed either by law or agreement; this includes exceptional circumstances under the PSA.
[214] Draft Article 36.1.
[215] Civil Society Coalition on Oil in Uganda participants.

They wondered how the State was likely to protect natural resources such as oil when her people were kept in the dark in disregard of Article 245 of the 1995 Uganda Constitution providing for environmental awareness and without paying allegiance to the National Objectives and Directive Principles of State Policy.[216] Civil Organisations further observed:

"This avoidance of openness and accountability will prevent positive development outcomes while enabling corruption and environmental degradation on the part of the oil companies. Past experience indicates that without public debate, the "resource curse" is largely inevitable."[217]

Media reports have in the recent past insinuated perceived oil corruption by the Head of State.[218] All these ought to be good reasons to keep national resource businesses an open secret.

(b). Confidentiality for any information:

This requirement calls for a proper understanding of what "any confidential information" entails. The Draft attempted to illuminate what "confidential information" meant in the following design:

"... 'confidential information' ... shall mean information identified as 'confidential' **by the party originally in possession of it and disclosed to the other party,**

[216] No. XIII providing; "The State shall protect important natural resources, including land, water, wetlands, minerals, oil, fauna and flora on behalf of the people of Uganda."
[217] *Ibid* note 215.
[218] The Daily Monitor Newspaper, March 19th 2013. "MPs want Museveni defence on oil deal." Accessed at http://accu.or.ug/mps-want-museveni-defence-on-oil-deal/ on August 28th 2013.

excluding information previously known to the other party or information which is publicly known (except through disclosure of the other party in violation of this Article) or information that comes into the possession of such other party other than through a breach of this confidentiality undertaking."[219] (Emphasis provided).

From the above provision, it is the parties themselves that have the capacity to identify what they wish to consider "confidential information." It would also be correct, any information so disclosed in violation of the agreement **only by the other party** and information of public knowledge is not categorised as "confidential."

This undertaking is between Uganda and IOCs. Would a 3rd party, not privy to the agreement who comes in possession of any confidential information by whatever means, identify and appreciate the information they are about to publish or disclose as confidential? The definition is an unsatisfactorily narrow one.

In light of the permanent sovereignty principle over natural resources, conferring a duty to a state to control the exploitation and use of its natural resources for the benefit of its citizens, it would be inappropriate to deny access to such public interest information to citizens because a contract so prohibits.

The International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights (UDHR) are some of the international instruments guaranteeing freedom of information as a fundamental human rights concept. To that end Article 19 of the UDHR provides:

[219] Draft Article 36.2.

"*Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek and import information and ideas through any media and regardless of frontiers.*"

Lately on the Asian continent, Article 23 of the ASEAN Declaration on Human Rights, 2012, the right to information is provided and is unqualified.[220]

In the same spirit, the Uganda Constitution provides the right for citizens' access to information in the possession of the State or any other organ or agency of the State and is instructive to Parliament of Uganda to enact enabling laws to regulate access and limitation procedures.[221] In compliance thereof, the Access to Information Act, 2005 reechoes the international and constitutional promulgations above.[222]

Abu Bakar Munir *et al.* underscored the import of the right to information in the following passage:

"Information is not just a necessity to the people. It is, in fact an essential part of a good government. The right to information is crucial to accountability and good governance. Secrecy, on the other hand, is a breeding ground for corruption, abuse of power and mismanagement. It allows inefficiency, wastefulness and corruption to thrive. A bad government needs secrecy to survive."[223]

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[220] As a civil and political right it is declared: "*Every person has the right to freedom of opinion and expression, including freedom to hold opinions without interference and to seek, receive and impart information, whether orally, in writing or through any other medium of that person's choice.*"

[221] Article 41 thereof.

[222] Section 5 thereof.

[223] 2010. *Information and Communication Technology Law: State, Internet and Information Legal and Regulatory Challenges.* Sweet and Maxwell Asia, Kuala Lumpur: p.1.

In ***Hon. Zachary Olum & Hon. Rainer Kafiire vs. The Attorney General,***[224] a provision of a statute that prohibited access to information in the possession of the state was struck down for contravening the right of access to information enshrined under Article 41 of the Constitution.

The confidentiality clause is one that circumvents a well-entrenched right to information. It is therefore clear, if an Act of Parliament can be declared unconstitutional, what then would remain of a contractual obligation in violation of such constitutional human rights guarantees?

Another challenging area with the Draft PSA is the generality imported into the confidentiality clause when prohibition to disclosure is directed to "any confidential information." There could arise a possibility for unauthorized dissemination of "oral information" as such information would also pass for any confidential information. Proof that such oral but confidential information was ever in the possession of the party who is alleged to be in breach of the confidentiality obligations may be extremely difficult.[225]

Related to the above is the possibility for online internet information communication. It was argued that internet communication is never confidential for as long as the information is not encrypted or sent on a secured site.[226] Megarry J in the case of ***Coco vs. A N Clark (Engineers) Ltd***[227] laid down three ingredients essential to a cause of action for breach of confidentiality as thus:

(a). that the information was of a confidential nature;

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[224] Constitutional Petition No.6 of 1999 (Uganda Constitutional Court), accessible at http://www.ulii.org/ug/judgment/constitutional-court/1999/7.
[225] Richard Christou. *op. cit.* (2010) p.59.
[226] Hurriyah El Islamy. 2005. "Information Privacy in Malaysia: A Legal Perspective". Vol.1 *Malayan Law Journal* p.38.
[227] [1969] RPC 41, [1968] FSR 415.

(b). that it was communicated in circumstances importing an obligation of confidence and

(c). that there was an unauthorized use of information.

In light of Coco (*supra*), it is submitted that the common law principle therein is of no contemporary relevance given the lack of confidentiality with cyber space and the associated cybercrime.

3.3.10 Conclusion

This chapter identified and justified why the impugned PSA clauses were likely to bear disputes. Indeed, disputes are a likely event and the old adage that 'prevention is better than cure' is perfectly applicable to the PSA regimes in the petroleum industry. Uganda cannot play the ostrich's game anywhere. It would be similar to planting square pegs in round holes to ignore preventive measures suggested in this study. It is on record that Uganda is already this early suffering from some of these loosely drafted clauses in courts of law and at international arbitration tribunals. Neither the parties nor the Uganda citizens would pride in spending resources in litigious claims, rather choice lies in appreciating and embracing dispute mitigation strategies adumbrated in the next chapter.

CHAPTER FOUR

DISPUTE MITIGATION MEASURES FOR UGANDA'S OIL AND GAS PSA REGIME

4.4.0 Introduction

In this study, oil and gas disputes were reported to abound due to parties' failure to respect the doctrine of sanctity of contract, lack of clear drafting skills and pre-contract negotiation efforts. An interview with PETRONAS lawyers at the twin towers Kuala Lumpur – Malaysia revealed that those lawyers had their CVs with little dispute resolution experience. The development was traceable to their negotiation skills before the contract drafting engagements, then the drafting clarity and the responsible nurturing of their "child" – the PSA by adhering to sanctity of contract principles. In the preceding chapter, trouble spot Draft contract clauses were identified with the above shortcomings. In this chapter, commercial contract boilerplate draftsmanship is to be provided for guidance of Uganda's future PSA textual content with dispute preventive flavour.

4.4.1 Pre-contract negotiation skills

A cross section of commentators held the view that time, expertise, resources and effort had to be spent on details in negotiations in order to avoid pitfalls and future litigation before construction of a PSA.[228] Negotiating parties were required to comply with the

[228] Kai Kruger. 2004. "Ban-on-Negotiations in Tender Procedures: Undermining Best Value for Money?" Vol. 4 Issue 3 *Journal of Public Procurement*: 397-436 p.398.

laws regulating the subject matter. A systematic discussion on each and every clause must be followed. Some of these are summarised in recitals to the contract.

4.4.1.1 Recital statements:

It was observed that when engaging into commercial negotiations, there are statements that the parties promise each other for guidance of their future relationships. Any deviation from those agreements would be described as a breach thereof. Brief but carefully drawn recitals serve as evidence of pre-contractual representations entitling a party not at fault to sue in misrepresentation.[229] However, in absence of a subsequent formal contract arising from the negotiations, where bad faith dealings were the case or there occurred difficulty in providing a remedy, court would not enforce any pre-contractual agreements.[230] Courts would not either allow sudden unilateral negotiations break offs without lawful justification, as was observed by the quote:

"If freedom [of contract] is the main principle in the pre-contractual period and includes the freedom to break off negotiations at any time, it is still true that when the latter have reached a length and level of intensity such that one party may legitimately believe that the other is about to conclude the contract and in readiness encourages him to incur certain expenses, breaking off such negotiations is wrong, causes loss and gives rise to reparations."[231]

In the process of negotiations, parties' representatives are advised to adequately prepare, state the wants, make proposals, bargain, and agree before final

[229] Richard Christou. *op. cit.* (2010) p.4.
[230] Polkinghorne, M.A. *et al.* 2009. "Pre-Contractual Agreements: How to Keep Out of the Woods." Vol. 7 Issue 4 *OGEL:* pp.6-7.
[231] Kottenhagen, R.J.P. Spring 2006. "Freedom of Contract to forcing Parties into Agreement: The Consequences of Breaking Negotiations in Different Legal Systems", 12 IUS Gentium: pp.80-81, quoting *William Lacey (Hounslow) Ltd. vs. Davis [1957] 2 All ER 712.* Also alluded to by Polkinghorne, M.A. *et al.* (2009) p.12.

documentation. An effective negotiator ought to appreciate the following golden rules of negotiation:

- "Poor preparation makes for poor performance;
- The negotiator least affected by the deadline has greatest power in negotiation;
- Be completely trustworthy but not completely trusting;
- For each and every action there is an equal and opposite reaction plus 20% (the enemies of the negotiated outcome are the impasse and uncontrolled escalation);
- Your first offer has more to do with the outcome of the negotiation than any other single factor;
- Never interrupt an offer or a prelude to an offer;
- Focus on interests not positions;
- Go slow to go fast;
- Never talk more than 50% of the time;
- Choose your negotiation atmosphere wisely – when in doubt, go formal;
- If they are still in the room, they are still negotiating;
- The use of force, threat or bluff is the most ineffective technique in negotiation;
- Your negotiation position is always stronger than you think it is."[232]

Under Uganda's recital Draft provisions, the Government of Uganda is to contract directly with the IOCs through her Ministry of Energy and Mineral Development. The parties thereto are to commit themselves to respecting and upholding the terms of the agreement.[233] Since the current legislation provides for establishment of a National Oil Company for Uganda, whose purpose is to enter into petroleum

[232] Archer, P. 2004. "Best Practice in Contract Communication and Negotiation". Vol.2 Issue 5 *OGEL*, power point slides 8-9.
[233] The doctrine of *pacta sunt servanda*/sanctity of contract introduced at the recital stage of the Draft PSA.

contractual agreements on behalf of Uganda, the Draft provision above ceases to hold significance. Participants from NGO forum on oil expressed fears that such impugned contractual requirement would fix Uganda as a state into direct contractual liability where upon breach; Uganda's assets could suffer attachment.

In view of international law on state sovereignty however, such worry is farfetched for as long as a state breaches a PSA while invoking its legislative authority as seen in the ***Saluka Investments BV (The Netherlands) vs. The Czech Republic.***[234] The tribunal said;

"It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare."

It is also a rule of customary international law and practice that a breach by a state of a contract it signed with a foreign company does not amount to a breach of international law. There would therefore be no international responsibility for Uganda if it breached a contract entered into with an IOC in the circumstances.[235]

4.4.2 Clarity in draftsmanship

Interpretation and enforcement of poorly and badly drafted PSA clauses could pose difficulties in achieving the purpose of the investment. Effective draftsmanship

[234] Partial Award, 17 March 2006, <http://www.investmentclaims.com/>. Access on September 1st 2013.
[235] Prof. Dr. August Reinisch in a Seminar paper on International Investment Protection of Umbrella Clauses; Winter Semester 2006/2007, so states. Available at http://intlaw.univie.ac.at/fileadmin/user_upload/int_beziehungen/Internetpubl/weissenfels.pdf accessed on September 1st 2013.

therefore demands a good knowledge of virtually the full spectrum of the oil and gas laws and their practice.[236]

4.4.2.1 Guiding principles for drafting commercial contracts in general:

In order to avoid dispute occurrence, useful negotiation and drafting considerations as hereunder were advised:

- "(1). Parties should negotiate matters of principle before embarking on drafting the contract; not the other way round. Handling the two important activities contemporaneously should never be the case.
- (2). The competence of any PSA does not lie in its ambiguity but in its clarity and certainty of expression for the *contra preferentem* rule, in event of contract clause interpretation, dictates that court construes an ambiguous clause against the party seeking to rely on or who drafted it.
- (3). The scholarly character of a PSA does not depend on the breadth of its contents, rather on its brevity.
- (4). Negotiations and drafting processes should aim at clearly bringing out parties' intentions so as to assess the consequences of their agreement. Any disagreements should be resolved before penning down the draft.
- (5). Parties should never let triviality to supersede important drafting and negotiation issues.
- (6). Correct command and usage of English grammar are vital in the drafting process.
- (7). Clarity of phraseology is relevant. Standard clauses should be adopted as there is no need to appear novel in contract drafting.

[236] Oon Chee Kheng. *op. cit.* (2006) p.59.

- (8). The legal draftsman should always bear in mind the law affecting the subject under consideration, for instance the effect of taxation legislation on the relevant fiscal clauses is necessary.
- (9). The drafts counsel should possess sufficient knowledge of the *lex mercatoria* to govern the PSA."[237]

4.4.2.2 Basic principles for drafting dispute resolution clauses:

One very clear example where lack of appropriate drafting skills/language played a significant role in dispute occurrence was the confusing ambiguity created by the taxation and arbitration clauses under Uganda's Draft PSA as observed in chapter 3 above. Knowledge of the taxation law of Uganda was necessary for the draftsperson.

In drafting arbitral clauses, "care must be had to the five '**W**'s'; the whats, hows, wheres, whos and whens as these form the cornerstone of the arbitration for legal validity in both substance and form."[238]

It is also good drafting etiquettes when the scope of an arbitration agreement is stated. For example defining and limiting the kind of disputes for arbitral tribunal would minimise delays and unnecessary costs where parties were to choose whether *all* or *particular* disputes could go for arbitration. It is the parties, by agreement, that confer jurisdiction on any arbitral tribunal. Raja Azlan Shah, J. in the case of ***Cheng Keng Hong vs. Government of the Federation of Malaya***[239] clearly expressed the point in the following paragraph:

[237] Richard Christou. *op. cit.* (2010) p.2.
[238] Oon Chee Kheng. *op. cit.* (2006) p.60.
[239] [1966] 2 MLJ 33.

"In my view, an arbitrator derives his authority from the agreement between the parties and therefore his powers and duties are those the parties have agreed to place upon him. It is therefore necessary to see what the agreement stipulates."

When drafting an arbitration clause, it is important to allow parties some cooling period before they submit to the tribunal arbitration proceedings. This is achievable by a drafting style that allows parties to first exchange notices of the pending dispute; enables parties to attempt in good faith to settle such dispute by mutual discussions, which may include referring the dispute to an Advisory Committee. A party may refer the dispute to the chief executive officers of the parties for further consideration. Any party may then refer the matter to an expert in accordance with the agreement or, if the dispute is not a technical one, commence arbitration of the dispute in accordance with the established party internal procedures. Upon exhaustion of the above, technical disputes would be referred to external arbitration. The Tanzanian PSAs incorporate the above procedure.

Bowman J.P., *et al.* advise against duplication of provisions and specifying procedural law to govern arbitration when already a separate choice of law provision is in contract.[240] In this regard, Uganda's Draft Arbitration clause was ambiguously drafted as follows:

"Any dispute under the Agreement which cannot be settled amicably within sixty (60) days shall be referred to Arbitration in accordance with the United Nations

[240] 2007. "Negotiating and Drafting Dispute Resolution Provisions for International Petroleum Contracts". Vol. 5 Issue 4 *OGEL*.

Commission for International Trade Law (UNCITRAL) Arbitration Rules. ..."

(Underlining provided)

From the above statement, it would be unclear whether it is the reference to arbitration that must be done in accordance with the Rules or the arbitration itself to be governed by the Rules. Specifying law to govern arbitration as in the latter case could be interpreted as designation of procedural law for arbitration,[241] a procedure condemned by Bowman (*supra*).

A classic broad form arbitration clause, catering for most of the above circumstances, was propounded by this research as follows:

"Any dispute, except as otherwise provided by law or this agreement, arising out of or relating to the Agreement, including its existence, validity, interpretation, performance, or termination, shall be determined by arbitration....by which parties agree to be bound."[242]

4.4.2.3 'Shall' or 'May':

Use of the mandatory 'shall' is recommended as opposed to the less than obligatory 'may'. This research could not express the need for appropriate application of the two words any better than Nik Hashim J. did, when interpreting provisions of an

[241] *Ibid.*

[242] Court gave the guidance in *Pennzoil Exploration and Production Co. vs. Ramco Energy Ltd. (US 5th Circuit, 1998).*

arbitration clause in the case of ***Westbury Tubular (M) Sdn Bhd vs. Ahmad Zaki Sdn Bhd.***[243] He said:

"Unlike the cases of Perbadanan Kemajuan Negeri Perak, supra;....which used the phrase 'shall be referred to arbitration' in their respective arbitration clauses, the instant case however, uses the phrase 'may be referred to arbitration' clause in the sub-contract. Thus, to my mind, the usage of the word 'may' in cl. 35 suggests that it is not mandatory on the part of the plaintiff to refer the disputes to arbitration. Since it is not a mandatory provision to be bound, the plaintiff cannot therefore be faulted for not exhausting the dispute resolution process by not referring the dispute to arbitration before filing the civil suit."[244] (Emphasis supplied).

4.4.2.4 Proper law clause draftsmanship:

It is usually vital for the PSA to be clear on the proper law of the contract[245] and the applicable law when a dispute[246] arises. Where the contract spells at the outset the law that governs it, then the same law should define the jurisdiction of the court in event of a dispute. Clear drafting is required where particular provisions would demand a different jurisdiction in light of the law of the contract. The case of ***Apple Corps. Ltd vs. Apple Computer Inc.***[247] shades sufficient light on the import of clearly drawn distinctions above. As already observed, a draftsman should as far as possible guard against specifying procedural law to govern arbitration as this law

[243] [2001] 5 CLJ 67.
[244] *Westbury Tubular*, Ibid. p.71.
[245] In the Draft Article 33; "This agreement shall be governed by, interpreted and construed in accordance with the laws of Uganda" represents the proper law of the contract.
[246] In the Draft Article 26; "Any dispute arising under the Agreement...shall be referred to Arbitration in accordance with UNCITRAL Arbitration Rules...to take place in London, England..." appears to represent the applicable law when a dispute arises, although ambiguously drafted.
[247] [2004] EWHC 768.

will be that of the seat of arbitration – *lex loci arbitri.* It would be inappropriate to draft; "arbitration shall be governed by the law of X".[248]

4.4.2.5 Good Oilfield Practices:

Article 25.17 (c) of the Draft PSA demands that the licensee takes all action necessary that comply with "Good Oilfield Practice" to make good all lands disturbed by Petroleum development and production processes. However, neither the Act nor the Draft PSA shades sufficient guidance as to what constitutes accepted practices. Good Oilfield Practices means "those practices, methods, standards and procedures generally accepted and followed by prudent, diligent, skilled and experienced operators in petroleum exploration, development and production operations and which, at the particular time in question, in the exercise of reasonable judgment and in the light of facts then known at the time a decision was made, would be expected to accomplish the desired results and goals."[249]

4.4.2.6 Clarity of drafting language:

Clear and widely constructed language that expressly exempts consequences of negligence is effective as was observed in the case of ***Canada Steamship vs. R.***[250]

Having adhered to the above rules of the thumb in the PSA construction process, parties can then rejoice in clarity of clauses as a dispute mitigating factor in Uganda's oil and gas sector. The wise warning words of Scrutton LJ, while discussing strict contract construction dubbed *contra preferentem* rule in ***Alison &***

[248] Bowman, J.P. *et al.* (2007).
[249] http://openoil.net/2012/12/14/best-practice-as-defined-in-libyas-oil-contracts/ access on September 1st 2013.
[250] [1952] 1 Lloyd's Rep. 1.

Co. Ltd. vs. Wallsend Slipway & Engineering Ltd.[251] have to, at all times, be borne in mind. He advised:

"If a person is under a legal liability and wishes to get rid of it, he can only do so by using clear words."

Lee Mason comments on the role of 'business common sense test' in the construction of commercial contracts in addition to the 'reasonable man's test'. Lee said; "The Supreme Court's decision in *Rainy Sky SA & Ors. Vs. Kookmin Bank [2011] UKSC 50* re-emphasises that the ultimate aim of construing a contract provision is to ascertain what the parties meant by the language used, based on what a reasonable person would have understood the parties to have meant; and that the courts can adopt the construction which is most consistent with commercial common sense."[252]

4.4.3 Role of sanctity of contract in oil and gas dispute mitigation

'Sanctity of contracts' is a principle enunciating that once a contract is freely and voluntarily entered into, it should be held sacred (parties must honour their obligations under it) and should be enforced by the courts if it is broken.[253] Sir George Jessel put it quite emphatically in ***Printing and Numerical Registering Co. vs. Sampson***[254] as thus:

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[251] [1927] 27 LIL Rep. 287.
[252] February 2012. "The Role of 'Business Common Sense' in the Construction of Commercial Contracts." Vol.33 Issue 2, *Business Law Review*: pp.31-56 p.32.
[253] Bryan Garner, A. *Black's Law Dictionary* (9th ed.) p.1459.
[254] (1875) LR 19 Eq. 462 at p.465.

"*If there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty in contracting, and that their contracts, when entered into freely and voluntarily, shall be held and shall be enforced by courts of Justice.*"

So when parties duly conclude a contract between themselves, they must impliedly honour their obligations under that contract. Where a party breaches their part of the bargain, they are liable to pay damages. The concern in this study was whether a party's compliance to what they had agreed to go by under the contract played a role in minimising oil and gas disputes. Can a state party like Uganda religiously keep her part of the bargain? If it would, then disputes arising from breach of contract clauses would be no threat to the relationship.

Sanctity of contract as is usually the obligation placed to domestic equal party relationships, is also known as the doctrine of *pacta sunt servanda* when applied under international treaty law principles of a state and alien nationals. Uganda's PSAs were entered into by the state (Uganda Government) and private foreign oil companies to wit, CNOOC of China, Tullow of Britain and Total (E & P) of France although they each registered companies in Uganda.

The application of the principle of *pacta sunt servanda* is found appropriate when considering agreements between two equal parties. It is mostly applied as a treaty relationship between states, but also invoked in contractual relationships between

private parties in the municipal legal regimes.[255] In the premises, *pacta sunt servanda*[256] would be applicable.

4.4.3.1 Exceptions to the sanctity of contracts doctrine:

The doctrine was described as a 19th century legacy,[257] with no limiting effect or ability to prevent disputes in the energy industry. When a country like Uganda contracts with a private foreign person, it does so in trust and for the public good of her citizenry. That responsibility demands that a state fulfills its public mandate which may involve breaching some clauses in a contract for example those dealing with the environment[258], provisions with the effect of freezing Uganda law[259] and unilateralist amendment clauses to the PSA[260]. Here below are warranting excepting circumstances to the effect:

(a). Clausula rebus sic stantibus:

The doctrine was underpinned by the argument that when the subject matter of the agreement has undergone a change or is no more or the contractual circumstances have changed, the parties' obligations under the contract cease. An agreement can only be followed for as long as its terms and conditions remain at *Steris Paribas*.[261] PSAs are usually constructed for long term relations. Between execution and performance of the agreement, unforeseeable future contract risks and contingencies abound. Once the parties have locked-up themselves by contract, it becomes difficult for them to find an escape route out of the relationship in case the PSA suffers from

[255] Maniruzzaman, A.F.M. 1992. "State Contracts with Aliens – The Question of Unilateral Change by the State in Contemporary International Law." Vol. 9 No. 4 *Journal of International Arbitration:* p.142.
[256] The Latin maxim *pacta sunt servanda* means that agreements of the parties to a contract must be kept. Black's Law Dictionary 8th Ed. p.1140.
[257] Maniruzzaman. *op.cit.* (1992) p.143.
[258] Article 25 of Uganda's Draft PSA.
[259] Article 33 of Uganda's Draft PSA.
[260] Article 34 of Uganda's Draft PSA.
[261] AMINOIL Arbitration Award (*Kuwait vs. American International Oil Co.*) (1982) 21 I.L.M. 976.

changed circumstances. To attempt to do otherwise would be contravening contractual obligations and hence providing ground for disputes. In order to fix the void created by 'the changed circumstances', stabilisation, renegotiation and adaptation mechanisms are usually brought on board as solutions to such uncertainties of fate and time.

(i). Mitigating contractual disputes by stabilisation and renegotiation clauses:

Both State and IOC participants interviewed informed this study that uncertainties in exploration and production of oil and gas activities were due to "discovery of new resources; probable and proven quality or quantity of reserves; economic viability of development; new technological requirements; price volatility; economic and political risks, legal and regulatory risks as topping the list of the supervening impossibility to perform events."[262] To circumvent the effects of changed legislative regimes for example, stabilisation law-freezing clauses are employed. However, such a clause may not usurp the state's exercise of sovereign authority in the public interest.[263]

Uganda's Draft Article 33, the applicable law clauses, constitutes the stabilisation mechanism inbuilt in the PSA. In that clause, parties are required to renegotiate their terms in good faith in event of any change in circumstances or laws of Uganda which circumstances would materially reduce the economic benefits of the IOC. This is one sure way the sanctity of contract would play a role in dispute mitigation.

[262] This list was also alluded to by Oyewunmi Tade. 2011. "Stabilisation and Renegotiation Clauses in Production Sharing Contracts: Examining the Problems and Key Issues." Vol.9 Issue 6 *OGEL*: p.7.
[263] *Ibid.* p.11.

(ii). Mitigating contractual disputes by renegotiation and adaptation clauses:

These clauses propound periodic review of the contractual relationship in changed circumstances by making adequate mechanisms in long-term contracts to conform to the benefits initially contemplated. Under here, parties would renegotiate to suit different conditions.

(b). State sovereignty over natural resources:

The principle of state sovereignty seems to water down absolute observance of contract obligations. The arbitral tribunal in ***Amoco International Finance Corporation vs. The Government of the Islamic Republic of Iran et al***[264] introduced exceptions to the strict observance rule when it stressed that public interests, for which state sovereignty represented, prevailed over private interests as thus:

"*The quoted rule, however, must not be equated with the principle pacta sunt servanda often invoked by claimants in international arbitrations. To do so would suggest that sovereign states are bound by contracts with private treaties exactly as they are bound by treaties with other sovereign states. This would be completely devoid of any foundation in law or equity and would go much further than any state has ever permitted its own domestic law. In no system of law are private interests permitted to prevail over duly established public interests, making impossible actions required for the public good. Rather private parties who contract with a government are only entitled to fair compensation when measures of public policy are implemented at the expense of their contract rights. No justification exists for a different treatment of foreign private interests. To insist on complete immunity from*

[264] Iran-US Tribunal No.56 of 1987.

the requirements of economic policy of the government concerned would be the most certain way to cause the repudiation of the quoted rule."[265]

In order that state sovereignty does not adversely fetter sanctity of contract, foreign investment agreements freely entered into by, or between sovereign states shall be observed in good faith.[266]

(c). *Force Majeure*:

Another exception to strict observance of a party's obligations under the contract is the presence of human or natural conditions beyond reasonable anticipation or management of either party that make contract performance impossible or impracticable, otherwise called *force majeure*. Such conditions include acts of God, law and war. *Force Majeure* is a fetter to sanctity of contract principle. Parties can only be excused of their obligations if they elaborately provided for and observed the *force majeure* clause in the PSA.

4.4.4 Conclusion

Pre-contractual negotiation skills, clarity in draftsmanship and sanctity of contracts were identified as dispute mitigation tool kits for Uganda's petroleum industry under her PSA regime. It was very certain Uganda still suffered from lack of competent skilled manpower to handle the core assignments to dispute prevention strategies. The oil and gas sector is nascent and spends colossal sums of cash to hiring foreign consultancies to negotiate and interpret contracts meant to provide the working framework in regulating licensing, as the PSA draftsmanship was helplessly

[265] *Ibid.* pp.76-78; Also quoted by Maniruzzaman. *op.cit.* (1992) p.144.
[266] UNGA Res. No. 1803 (XVII) paragraph 8.

surrendered to the highly knowledgeable IOC legal teams to plant the goal posts for Uganda. In that regard, there is insurmountable risk for which Uganda will for some time bear.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.5.0 Introduction

A summarised review of this dissertation was earlier made in the chapterisation section of chapter 1. In compliance with the research questions, data collection was dedicated to answering the issues raised for chapters 2 – 4. Chapter 2 gave an overview of the background of Uganda's oil and gas exploration, legal and contractual system. That backdrop was necessary for understanding Uganda's choice of the PSA regime and for a focused appraisal of dispute related clauses therein. Chapter 3 examined dispute prone clauses in Uganda's Production Sharing Agreements while Chapter 4 explored dispute mitigation measures for Uganda's oil and gas PSA regime. It is in this last chapter that findings to issues raised by the research topic and recommendations of the study were made.

5.5.1 Research Findings

Chapter 2 had the objective of understanding the background of Uganda's oil and gas exploration, legal and contractual system. The parties erred in construction and performance of the initial PSA arrangements prior to 2006. The finding of this research was that upon realisation of the above, an attempt to draft a Model PSA for national scrutiny and Parliamentary guidance was made. However, even the said Draft, which constituted the working document of this inquiry, is deficient and still is as wanting as the running PSAs whose mischief it attempts to remedy. This study brought forth

relevant international legal instruments as well as municipal laws that had a direct bearing on the petroleum industry. The 2013 Act on Petroleum activities in Uganda has areas that require urgent amendments to conform to the PSA contractual regime. It was also the finding that the much anticipated Regulations to be made under the Act were very necessary for the licensing and other petroleum processes, and without which not much could be expected to yield oil production regulation mechanisms for Uganda. A solid legal framework is needed for a viable contractual regime as was the finding hereof that legislation, in a way, contributes to disputes because of some irrelevant, confusing and often unclear provisions.

Chapter 3 examined dispute prone clauses in Uganda's PSAs. The research findings revealed that Uganda was already and further likely to suffer from disputes emanating from the cited PSA provisions in light of the legislative regime and policy expectations. Such disputes were a result of unclear and ambiguous contractual clause architecture. This was a demonstration of clear lack of negotiation and drafting skills in the petroleum industry on the part of Uganda yet a deliberate case of economic duress by the IOCs in the contracting process could be traceable. The innocent party can however, set aside the agreement on the grounds of economic duress and recover its losses as was the holding in the recent case of ***Progress Bulk Carriers v. Tube City IMS LLC.***[267]

In expression of the unfairness created by such duress, Presidents Theodore Roosevelt and Richard Nixon once said:

> *"When you've got them by the balls, their hearts and minds follow!"*[268]

[267] [2012]. Available at http://www.lexology.com/library/detail.aspx?g=0afed03c-3178-4169-b1e1-9453907b352d.

[268] Wrote Philip Newman, *et al.* "The Law of Economic Duress." Demolition Publications: http://www.btmk.co.uk/sites/all/files/userfiles/files/Law%20of%20Economic%20Duress.pdf accessed on September 18th 2013.

Where the contract has been a function of legislation like is the case for Uganda, the parties are bound not only by their contractual representations but by law in force.

Long term duration contracts associated with PSAs affected the economic balance of the contract terms and therefor recipe for disputes. For example, the case of ***C-347/6, ASM Brescia SpA vs. Comune di Rodengo Saiano***[269] dealt with a dispute concerning changes in the law with effect to certain long term contracts. The Court of Justice of the European Union in the above conflict found that:

> *"[...] the principle of legal certainty requires, particularly, that rules of law be clear, precise and predictable in their effects, in particular where they may have negative consequences on individuals and undertakings."*

Douglas B. Reynolds, discussing volatility of market environment on contracts, noted that future price changes for instance could make contracts difficult to negotiate and execute.[270] All these unforeseeable circumstances could be guarded against through foresight negotiations and skilled PSA drafting techniques.

Chapter 4 explored dispute mitigation measures for Uganda's oil and gas PSA regime. The inquiry findings give an insight on how the healthcare metaphor: "prevention is better than cure" would deliver Uganda's PSAs from the evil of disputes. Three factors were identified by this research project as possible dispute mitigation mechanisms. These were: Pre-contract negotiation skills, clarity in draftsmanship and paying homage to the doctrine of sanctity of contract/*pacta sunt servanda*.

[269] [2008] ECR 1-5641.
[270] 2009. "Contracts and Great Stagflation." Vol.7 Issue 4 *OGEL*.

(a). Pre-contract negotiation skills: were indeed necessary but found lacking among Uganda's oil and gas contract negotiating team of lawyers. This forced Uganda to hire international experts who were simply classmates with the adversary's legal team. Anybody would guess the quality of protection in the deal to Uganda. It went and continues to go begging.

(b). Clarity in draftsmanship: most disputes and the likely ones were identified to be a result of lack of express drafting knowledge of both art and law irrespective of hired expertise interventions. The case in obvious point was the arbitral clause that required "all disputes under the PSA" to be referred to foreign arbitration. Such drafting lacked the law regarding tax appeals tribunal under Uganda laws where an elaborate procedure was laid down in the tax related disputes. That express drafting deficiency was faulted by court in the case of ***Jafari-Fini vs. Skillglass Ltd.***[271] Uganda ought to heed.

(c). ***Pacta sunt servanda*****:** the findings indicated that Uganda was unlikely to trade off her sovereignty for strict observance of contractual obligations. In that regard, the doctrine of sanctity of contract would be described as a case of "a tail wagging the dog" because no contractual undertaking would oust legislative authority. However, as a dispute management strategy, exceptional qualifications to the doctrine had to be fixed in order for it to bear fruit.

All the above findings were geared towards this research's objective of minimising dispute occurrence in Uganda's petroleum industry under her PSA regime.

[271] [2007] EWCA Civ. 261.

5.5.2 Recommendations

The recommendations hereof are made stemming from the research findings to chapters two, three and four and are in pursuance of goals laid down in the law, the 2008 National Oil and Gas Policy for Uganda and other relevant policies as alluded to earlier in this study for the prudent management of the hydrocarbon resources.

Recommendation No.1: Since it is basically the Petroleum (Exploration, Development and Production) Act, 2013, herein through having been referred to as the Act, regulating all petroleum activities in Uganda including establishment of regulatory bodies, licensing of commercial entities, providing for cessation of petroleum activities and decommissioning of infrastructure, and that repealed the Petroleum (Exploration and Production) Act, Cap.150 under which the model PSA and now the running signed PSAs had been concluded among others, requires urgent amendment. The reasons are as follows:

The functional roles of the Minister for Energy and Mineral Development directly interfere and often threaten duplicity of those of other regulatory bodies created under the Act. Some of the functions bestowed upon the Minister under the Act currently require specialised expertise that the Ministry could certainly best find in the competent and less transferable human resource at the Authority or National Oil Company.[272] There is need to have these roles harmonised to realise the purpose of the establishment under the Act of the Authority and the National Oil Company for Uganda. The Minister's role should largely remain supervisory while the regulatory and participation

[272] The Ministry of Energy is composed of civil servants who by the Public Service Regulations can be transferred to another Ministry with no bearing to energy matters. The Minister, being a political appointee after parliamentary elections, may fail to win a vote and therefore a seat on cabinet. Such officers' experience would cease to benefit the petroleum activities under the premises.

functions should respectively be left to the Authority and National Oil Company. Uganda would not be in a lonely league to the arrangement as countries like Ghana and Norway have successfully divested their respective Ministers' direct participation to agency oil and gas institutions under their jurisdictions.

There is need to weed out typographical errors occasioned under the Act. Section 3 of the Act, for example, should have "the National Environment Management Act" deleted to read "the National Environment Act, Cap.153". There is no such Act as the National Environment Management Act in Uganda. The Act appeared to this study to have been baked in a rush without paying attention to the end user scrutiny let alone the effectual taste of errors of omission and commission. In that regard, the document not only misleads but also misguides subsequent contracts to be made under it.

Both the Act and the PSA model call for passing of the Regulations, establishment of the Petroleum Authority and the National Oil Company of Uganda to guide petroleum business. These are not in place. They should all be in place urgently if any oil activities should meaningfully take place.

It would be good practice to bring forth legislation and regulations that guard contracts from disputes. Hon. Mr. Justice James Ogola, the chairperson of the Judicial Service Commission of Uganda, advised the Government to draft oil and gas regulations that were dispute guarded.[273] The Regulations should criminalise operations in the petroleum exploration, development and production without a licence. It is only then that compliance with the requirements for issuance of a licence will not be eluded.

[273] The *New Vision* paper of July 29th 2013.

Recommendation No.2: The Draft PSA should never be copied and pasted in its current form while concluding future agreements. Adjustments on review are required and should be made to achieve some level of environmental protection, to ensure accountability for key party players, to protect a degree of Ugandan sovereignty, to minimise economic distortion through revenue flows, to capture a more appropriate share of the revenues and to re-apportion the economic risks.

For example, since most IOCs as intending licensees depend on raising capital to conduct their overseas activities, Uganda should require as a condition to licensing, a certification indicating portended compliance with the international best practices on environment such as the Equator Principles (EPs). The EPs were adopted by the world's major private banks for lending money to oil and gas companies as the financial industry "gold standards" for sustainable project finance without which no loan would be extended. Statoil of Norway, for example, has corporate biodiversity policies for 'zero harm to the environment' where no habitat destruction, no introduction of foreign species and no effects on population levels are allowed. Maniruzzaman advises IOCs to "factor EPs environmental standards into their corporate social responsibility (CSR) programs, which could, in turn, be used as a risk management as well as a dispute avoidance tool."[274] A leaf should be borrowed therefrom.

Uganda should consider equity participation in the petroleum industry in a real business sense. Any mishandling of the oil project or the IOCs may be fetal and only equated to 'Uganda burning her own feeding fingers.' It is only then that risk management and dispute avoidance will be achieved.

[274] Maniruzzaman, A.F.M. *op.cit.* (2009) p.101.

To streamline fiscal governance that will nurture transparency and accountability in the management of the oil resources, lessons from international best practices must be partaken of. Guidance should be sought from the 2004 Sao Tome and Principe Oil Revenue Law that was integrated in the PSAs as follow:

- Oil revenues are collected only by the National Oil Company, deposited on to the consolidated account with the central bank and to be authorised by parliament.
- Priority in the application of oil revenue must be for sustainable development geared towards poverty reduction.
- To cater for the environmental mischief occasioned to the local communities where extraction of oil is predominant, an annual environmental tax at 5% of the IOC profits has to be agreed upon and levied. In each year's budget estimates of revenue and expenditure such tax must be allocated to the Albertine Graben districts of Uganda.
- Transparency should be the cornerstone of oil resource management. Full disclosure of all information relating to petroleum resources, and management of the revenues therefrom, including contracts should be reflected. Nigeria is on course pushing for transparency.[275]
- Since sunshine is the best of disinfectants, confidentiality clauses in the PSAs, save for those concerning proprietary industrial rights (Intellectual Property Rights –IPRs), are null and void and should not occupy any space. Ghana's PSAs are opened to scrutiny and she is not about to lose it all.

[275] Notes Chris Byaruhanga in the article, "Let's join Nigeria as it pushes for transparency in oil sector", The Daily Monitor Newspaper of Monday June 24th 2013 at p.11.

- In order not to baby sit corruption, Uganda should join and sign the Extractive Industries Transparency Initiative Protocol (EITI) for constant reminder to abide by the above global transparency and accountability standards. Under the EITI mechanism, companies publish what they pay, and governments publish what they received and these receipts are independently audited and made public. The idea is to help the citizens to hold their governments accountable and for better management of the oil sector. The disclosure also gives a clear view of how much is produced by IOCs, stored and expended by government.[276] In Trinidad and Tobago, where EITI was embraced, her nationals enjoy the oil benefits such as free health care and free education from primary to university level.[277] Norway and Azerbaijan are members to the EITI. Once a country decides to implement EITI, company participation is mandatory. EITI cannot be controlled by governments and companies without the active involvement and scrutiny from civil society. The right of companies to protect commercial confidentiality should never include payments to the state: the public interest overrides everything else.[278]

Recommendation No.3:- In order to avoid mistakes acquired through other jurisdictional drafting "copy and paste" syndrome, it is recommended Uganda adopts the UNCITRAL Uniform Draft Contract Legislation and the IBA (2010) Arbitration Guidelines[279] for guiding her oil and gas PSA drafting processes on a mutatis mutandis basis. A ratification of the law of International Commercial Arbitration based on the

[276] The High Commissioner to Uganda, Ambassador Patrick Edwards, made the appeal reported by a local newspaper in Uganda, "The Observer" of Wednesday September 4th 2013 at p.4.
[277] *Ibid.*
[278] Editorial note by Global Witness. 2005. "Extractive Industries Transparency Initiative (EITI) on the right track: let's go further and faster". Vol.3 Issue 1 *OGEL*. Also available at ***http://www.globalwitness.org/***.
[279] IBA 2010 Guidelines for Drafting International Arbitration Clauses are downloadable at http://www..ibanet.org .

UNCITRAL Model, allowing for modern international arbitration should be Uganda's preserve.

Recommendation No.4: Both the Act and the Draft PSA omitted to define "dispute". This term should be defined and disputes amenable to arbitration be ascertained in the hopefully forthcoming Regulations.

Recommendation No.5: Notably the termination clause in the Draft PSA was slanted towards the licensee when it stated: "30.2 The Government of Uganda shall have the right to terminate this agreement …" It is recommended that this type of wording can be applied on a mutuality basis.[280]

Recommendation No.6: Contracts are sacrosanct and Contractors base their long-term operations, capital structures and investment processes around predictable fiscal systems. Any change in existing contracts will destroy Uganda's credibility, drive away investors, open up multiple disputes, invite further audit scrutiny, and likely to bring E&P activities to a grinding halt. It is the humble recommendation of this study that the sanctity of contracts should be maintained at any cost. India has done so and enjoys a free dispute hydrocarbon contract environment.

Recommendation No.7: Cost oil formula deductions should only follow the biddable contract expenses. This strategy should be an incentive for Contractors/Licensees not to inflate costs. Royalties need not be paid under the PSA arrangement for being inconsistent with the legal nature of PSAs as observed by Blinn K.W., *et al.* (*supra*, note 137).

[280] Richard Christou. *op cit.* (2010) p.54.

Recommendation No.8: Immediate training in international contract negotiations and drafting for Ugandan lawyers and other technical staff should be embarked upon with a possibility of pupilage hands-on training with renowned IOC establishments such as PETRONAS in Malaysia and Statoil of Norway. The current classroom Masters training programs that IOCs are extending to some Ugandans may not adequately be helpful without the practical touch. Mr. Loic Laurendel, the General Manager of Total E & P, proposed that capacity building was still required for many workers in Uganda's oil and gas industry, and recommended advanced practical studies abroad for local personnel to acquire the necessary standards before they could be employed.[281] The National Content Policy that will dictate deliberate utilisation of Ugandan material resources and services regardless of their suppliers' capital base is therefore required. Ghana has it and Uganda should emulate the strategy by amending the law and reviewing the contracts on national content policy.

Recommendation No.9: Since the remedial dispute mitigation findings hereof are '*in-situ*' (contract related), it is recommended that a study be carried out to establish mechanisms that could mitigate '*ex-situ*' contract dispute occurrences such as those alluded to by ICSID and other researchers to wit, Timothy Martin at pages 10-11 of this dissertation.

Recommendation No.10: Strict adherence to the law while dealing with any petroleum matters should be a household etiquette that every player must embrace to avoid

[281] The Daily Monitor News Paper article; "Kigumba Oil College in crisis." Posted on Sunday Oct. 6th 2013. Available at http://www.monitor.co.ug/News/National/Kigumba-oil-college-in-crisis/-/688334/2019952/-/yep0piz/-/index.html. Accessed on October 7th 2013.

mistakes that could plunge the sector into disputes to the disadvantage of the unsuspecting Ugandan citizenry.

5.5.3 Conclusion

Lord Denning modestly concluded in ***Rahimtoola vs. The Nizam of Hyderabad***[282] judgment that "I have stirred these points which wiser heads in time may settle." The findings and recommendations hereof should inform any legislative and contractual engagements for parties in the oil and gas arena to fix the void beforehand.

The drums have been sounded. The writings are eminently on the wall that the role of trouble spot clauses is indisputably abundant in the fossil fuel resource relations between Uganda and oil extracting companies. An appraisal of the contractual framework and the law suggests likelihoods of conflict eruptions along the impugned provisions, hence providing evidence to the deep-seated problem of this research study if recommendations hereof were ignored. The amendment of the Act and the passing of the recommended Regulations invariably would affect the contents of the Draft and future PSA performance. In order to avoid oil disputes, good negotiation, drafting techniques, foresightedness, practical knowledge and wisdom of counsel are vital competencies in the PSA 'baking' processes. Cracks are visibly noticeable in the Uganda's PSA framework, and the remedy continues to lie in embracing the health care metaphor; "prevention is better than cure!"

[282] [1958] AC 379.

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Were accordingly indicated in the main text.

APPENDIX 1

(Interview Protocol Guiding Questions to 3 Categories of Participants)

C/O FACULTY OF LAW,

UNIVERSITY OF MALAYA,

P.O. BOX 50603,

KL, MALAYSIA.

26TH FEBRUARY 2013.

TO: Advocates in private practice/Lawyers in Oil and Gas Corporations:

RE: ADVANCE INTERVIEW SURVEY QUESTIONS

A study is being conducted in the oil and gas field with a goal to **dispute prevention** through **contract negotiation, drafting and sanctity of contracts** between Host Countries (HCs) and International Oil Companies (IOCs). The researcher treasures your resourceful participation. Your response to the interview survey questions in this inquiry will be held in confidence.

Name and Address of Legal Entity Interviewee:.....

How often have you been involved in oil and gas transactions?

.....

What kind of matters have you before been engaged in?

.....

What are the major contracts and categories common with the petroleum sector?

.....

For efficacy, what clauses will not miss in these contract documents?

.....

What are some of the causes of disputes in the energy sector?

.....

What are the troublesome contract clauses leading to disputes in this hydrocarbon industry?

……

Would you highlight on any mal contract drafting skills that have caused disputes in this area?

……

As an energy expert/advocate/lawyer, how would the disputes be avoided for the parties?

……

How important are the contract drafting skills in limiting disputes as a risk management tool?

……

Would you consider the drafting process a vital dispute prevention strategy? Please illustrate.

……

What are some of the challenges faced in the contract drafting process?

……

May you be pleased to let a researcher in this area access any petroleum contracts in your possession?

……

May we please discuss further ways to prevent disputes through contract engineering?

……

Why may contract clauses be altered by a party?.....

Why may a party not respect the sanctity of the contract?.....

Would you consider PSAs & PSCs to be legally different?.....

What are the major contract clauses in a PSC?.....

Why and How may disputes later arise from these clauses?.....

How could it have been possible to avoid such contract clause disputes?.....

Is there anything else you would like to educate this research about?

To Judges:

- How often have disputes arising from oil and gas industry been filed in courts of law?
- What are the most litigated concerns in the oil disputes before court?
- Why file in courts and not the arbitral option?
- What would your Lordship consider to have been the trouble spot contractual oil and gas clauses?
- What suggestive advice have courts handed down to mitigate dispute occurrence?
- May it please Your Lordship when some of the considered oil and gas dispute records are accessed for a deeper study of the nature of conflicts?

My Lord, is there anything else your lordship may wish to say?

APPENDIX 2

UNIVERSITI MALAYA

UM.L/606/1/4/1

28 February 2013

To Whom It May Concern

Samuel Munobe
Registration Number: LGA120050
Passport Number: B0971344

This is to certify that **Samuel Munobe** is currently a registered student of the Master of Laws Programme (Coursework and Research) at the Faculty of Law, University of Malaya.

His initial registration for the programme was on 5th September 2012 (2012/2013 Academic Session). The minimum period of study is three (3) Semesters (ending in Semester I, 2013/2014 Academic Session) whilst the maximum period of study is eight (8) Semesters (ending in Semester II, 2015/2016 Academic Session).

For this Semester II, 2012/2013 Academic Session, he has registered for the Research/ Dissertation component of the programme. As part of his research in the field of **"OIL AND GAS LAW"**, he is seeking your permission to conduct a survey and study at your ministry. The Faculty supports his application and hope it will be given due consideration.

Thank you.

Yours sincerely,

Associate Professor Hajjah Norbani Mohamed Nazeri
Deputy Dean (Higher Degrees & Research)

c.c Candidate file - LGA120050

RAA/zd

Fakulti Undang-Undang, Bangunan Sultan Azlan Shah, Universiti Malaya, 50603 Kuala Lumpur, Malaysia
Tel: (603) 7967 6511 / 6575 • Faks: (603) 7957 3239 / 7967 6573
E-mel: law@um.edu.my • H/page: http://www.um.edu.my/fu2/index/htm

APPENDIX 3

UNIVERSITI
MALAYA

Our Ref: UM/Z/03/617 (23)

Date: 6 Mar 2013

PERPUSTAKAAN UNDANG-UNDANG
TAN SRI PROFESOR AHMAD IBRAHIM
BANGUNAN SULTAN AZLAN SHAH
UNIVERSITI MALAYA
50603 KUALA LUMPUR
TEL: 03-79676516/6514
Faks: 03-79676517

Encik Azahar Md Noor,
Chief Librarian,
Petroleum Resource Centre,
Level 4, Tower 1, PETRONAS Twin Towers,
PETRONAS, KLCC, 50088, Kuala Lumpur

Dear Sir

Request to use the Library – Petroleum Resource Centre

The bearer of this letter is a student at the University of Malaya, who wishes to use your resource centre for reference purposes. His particulars are as follow:

Name:	Samuel Munobe
Passport No:	B0971344
Matric No:	LGA 120050
Faculty:	Law (LLM)
Year:	1st year, 2nd semester
Proposed Dates:	11th – 18th March, 2013
Research Topic:	Planting Boundary marks between contracts and disputes in the oil dan gas field in developing countries: A BLACKJACK PATH.

We hope you will kindly allow the above-mentioned to use your resource centre

Thank you for your cooperation

Your faithfully

Sabariah Basir
Librarian
Tan Sri Professor Ahmad Ibrahim Law Library
University of Malaya

APPENDIX 4

TELEGRAMS

TELEPHONE: 233420 – 3
0414-341067

IN ANY CORRESPONDENCE ON

THIS SUBJECT PLEASE QUOTE NO .....
CR/DOR.1

Our Ref: .....

Your Ref: .....

THE REPUBLIC OF UGANDA

COURTS OF JUDICATURE

P. O. BOX 7085

KAMPALA - UGANDA

5 April 2013

The Country Chief Executive (Uganda)
Tullow Oil Company
KAMPALA

Dear Sir,

SAMUEL MUNOBE: JUD ID NO 3017

This is to certifiy that Mr. Samuel Munobe is a Senior Magistrate Grade One with the Courts of Judicature. The officer is currently undertaking a Master of Laws Degree Programme in Oil and Gas Law from University of Malaya – Malaysia.

He seeks your permission to conduct a survey at your premises as part of his academic research requirements.

The Judiciary supports Mr. Munobe's application to carry out the legal research with your company.

We would be grateful if you consider his application.

Yours sincerely

H.P. Adonyo
Ag. CHIEF REGISTRAR

c.c. officer's personal file

APPENDIX 5

Uganda National Council for Science and Technology

(Established by Act of Parliament of the Republic of Uganda)

23/04/2013

Our Ref: SS 3113

Mr Samuel Munobe
c/o Courts of Judicature
P O Box 7085
Kampala

Dear Mr. Munobe,

Re: Research Approval: **The doctrine of sanctity of contracts under Uganda's production sharing contract legislation in oil and gas dispute mitigation: a case of "A tail wagging the dog"**

I am pleased to inform you that on 16 April 2013 the Uganda National Council for Science and Technology (UNCST) approved the above referenced research project. The Approval of the research project is for the period of 16 April 2013 to 16 July 2013

Your research registration number with the UNCST is SS 3113. Please, cite this number in all your future correspondences with UNCST in respect of the above research project.

As Principal Investigator of the research project, you are responsible for fulfilling the following requirements of approval:

1. All co-investigators must be kept informed of the status of the research.
2. Changes, amendments, and addenda to the research protocol or the consent form (where applicable) must be submitted to the designated local Institutional Review Committee (IRC) or Lead Agency for re-review and approval **prior** to the activation of the changes. The approved changes must be communicated to UNCST within five working days.
3. For clinical trials, all serious adverse events must be reported promptly to the designated local IRC for review with copies to the National Drug Authority.
4. Unanticipated problems involving risks to research subjects/participants or other must be reported promptly to the UNCST. New information that becomes available which could change the risk/benefit ratio must be submitted promptly for UNCST review.
5. Only approved study procedures are to be implemented. The UNCST may conduct impromptu audits of all study records.
6. A progress report must be submitted electronically to UNCST within four weeks after every 12 months. Failure to do so may result in termination of the research project.

Below is a list of documents approved with this application:

	Document Title	Language	Version	Version Date
1	Research proposal	English	N/A	N/A

Yours sincerely,

Jane Nabbuto
for: Executive Secretary
UGANDA NATIONAL COUNCIL FOR SCIENCE AND TECHNOLOGY

LOCATION/CORRESPONDENCE

Plot 6 Kimera Road, Ntinda
P. O. Box 6884
KAMPALA, UGANDA

COMMUNICATION

TEL: (256) 414 705500
FAX: (256) 414-234579
EMAIL: info@uncst.go.ug
WEBSITE: http://www.uncst.go.ug

APPENDIX 6

TELEGRAMS: ENERMIN
TELEPHONE: 234733
GENERAL LINE: 234733
FAX: 230220/234732
E-MAIL: psmemd@energy.go.ug
IN ANY CORRESPONDENCE ON
THIS SUBJECT PLEASE QUOTE NO:

MINISTRY OF ENERGY AND
MINERAL DEVELOPMENT
P. O. BOX 7270
KAMPALA

ADM/187/241/01
6th.May, 2013

Mr.Samuel Munobe
Registration: LGA120050
Faculty of law,
University of Malaysia.

PERMISSION TO UNDERTAKE RESEARCH IN THE MINISTRY:

This is in reference to your application dated 28th.February, 2013 regarding your research in the field of oil and gas in the Ministry of Energy and Mineral Development.

In order to support your research and dissertation component of your academic programme, a no objection to your request has been granted.

Accordingly, you will access the necessary documentation required to support your research in the relevant department in the Ministry.

The Commissioner Petroleum Exploration and Production Department is requested to accord you all the necessary assistance in this regard.

Nagwomu Alfred
For: Permanent Secretary

cc. C/PEPD