A REVIEW OF THE LEGAL FRAMEWORK ON PRODUCTION SHARING AGREEMENTS IN THE OIL AND GAS INDUSTRY: THE UGANDAN CASE STUDY.

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DECLARATION

I, **TUMUSIIME KEFAH** hereby declare that this proposal is my work and it has not been submitted before to any other institution of higher learning for fulfilment of any academic award.

Signed……

Date…….

APPROVAL

This is to certify that, this dissertation entitled "**A REVIEW OF THE LEGAL FRAMEWORK ON PRODUCTION SHARING AGREEMENTS IN THE OIL AND GAS INDUSTRY: THE UGANDAN CASE STUDY**" has been done under my supervision and now it is ready for submission.

Signature……

MR. IVAN MUGABI

(Academic supervisor).

Date……

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LIST OF ACRONYMS

1. CNOOC -Chinese National Offshore Oil Corporation
2. IOC -International Oil Company
3. NOC -National Oil Company
4. PAU -Petroleum Authority of Uganda
5. PSA -Production Sharing Agreement
6. STOIIP -Stock Tank Oil Initially In Place
7. FDI -Foreign Direct Investments
8. OFID -OPEC Fund for International development
9. PEDP -Petroleum (Exploration, Development and Production) Act
10. NNPC -Nigeria National Petroleum Corporation
11. NNOC -Nigerian National Oil Corporation

ABSTRACT

This research paper analyses the existing laws and regulatory frameworks in the oil and gas sector with a particular focus on Uganda's oil and gas industry. This research analyses the background of the country's oil and gas industry with specific reference to the adaptation of the Production sharing agreement (PSA) model in as far as oil and gas contracts are concerned.

The research commences by undertaking an in-depth analysis of the basic laws, regulatory, policy and institutional frameworks concerning the management and administration of the oil and gas sector. The research then focuses on the legal framework on the PSA model pertaining to the ownership of the resources, the issuing of licenses and concessions, in as well as efforts undertaken to safeguard the effects of signing PSAs on aspects of environmental protection.

This research is also designed to critically analyse the weaknesses and strengths of the current legal regime as well as identifying the gaps in laws relating to the applicability of PSAs and measures being taken to tackle such gaps in the regulatory framework of the country and exploring the ways in which aspects of transparency and effective management of the oil and gas industry are concerned.

The research paper also discusses if other factors such as the different stakeholders like media houses, civil societies, non-governmental organisations and International Oil and gas companies have a had a role to play in influencing the PSA model as the most appropriate choice of the Ugandan oil and gas contracts.

Conclusively the research puts forward recommendations regarding how the gaps in the legal framework on the PSA model should integrate or regulate the identifiable influences of other stakeholders in Uganda's oil and gas industry.

CHAPTER ONE: INTRODUCTION AND BACKGROUND

1.0. Introduction

Production Sharing Agreements (PSAs) are one of the most popular types of contractual arrangements that are being used for petroleum exploration and development activities.[1]

According to Taverne[2], PSAs are a form of contract between an oil company (contractor) usually an international oil company (IOC) and a state entity usually the National Oil Company (NOC) where the latter authorises or grants rights to the former to exploit and develop an oil and gas field by providing technical and financial services for the oil and gas operations and in return for the risk taken and services rendered IOCs are compensated in accordance with the terms of the PSA.[3]

However, under a PSA, host countries retain the ownership of the natural resources and the oil produced which is only subject to the IOCs' share. Host countries are also allowed to participate in oil exploitation and development processes to any extent as is expressly stipulated in the PSAs.[4]

PSAs give developing countries an opportunity to reap and benefit from the technical resources provided by the IOCs in the development of the oil and gas industry without incurring any financial burdens.[5]

PSAs were first used in Indonesia in the 1960s in order to facilitate the exploitation of natural resources and to enable the country retain ownership and control of the natural resources and the exploitation and development processes respectively.[6] PSAs were adopted as a new legal regime to replace concessions that allowed IOCs not only to own but also to manage oil and

[1] Kristen Bindemann, "Production Sharing Agreements: An Economic Analysis" Oxford Institute for Energy studies, WPM 25, October, 1999.
[2] Bernard Taverne, "Production Sharing Agreements in Principle and Practice" in M.R. David (ed.), Upstream Oil and Gas Agreements (1996), p.44.
[3] N'di and T.W. Walde, "Stabilising International Investment Commitments: International Law versus Contract Interpretation" (2003) 1 O.G.E.L. Archive Issue 32.
[4] Kristen Bindemann, "Production Sharing Agreements: An Economic Analysis" Oxford Institute for Energy studies, WPM 25, October, 1999.
[5] ibid
[6] Achmad Zen Umar Purba, 'Production Sharing Contract: Is It within Private or Public Domain' (2009) 7 Indonesian J Int'l L 21

gas projects which was to the detriment of the host countries and its people consequently leading to stagnation in these projects.[7]

PSAs have been widely adopted by especially developing countries because of the need for foreign investment due to their inadequate potential or limited financial and technical abilities in terms of exploiting and developing these natural resources. The advantage of the PSA regime in terms of a developing country such as Uganda is that the financing risk is borne by IOCs and the ownership to petroleum remains with the host government.[8]

They have also been adopted because of their nature to increase the generation of revenues for the benefit of both the state and its people thus their acceptance and usage globally today[9].

PSAs are different from other types of petroleum contracts in such a way that under a PSA the IOCs carry the entire risk of exploitation and development of oil and gas projects by investing in the technical and financial services required and are in return compensated by a share of oil produced referred to as "*Cost recovery oil"*[10] in accordance with the terms of the agreement.[11] However, key to note is that an IOC is only rewarded dependant on the oil produced which implies that if no commercial production is made then they do not recover the costs incurred[12].

Under PSAs, IOCs carry out majority of the oil and gas operations but under the supervision of the host state through a committee made up of representatives of the parties[13].

IOCs are entitled to recover expenses incurred in the carrying out of petroleum activities through "*Cost recovery oil"*[14]. After deduction of the cost oil, the remainder is referred to as

[7] Kristen Bindemann, "Production Sharing Agreements: An Economic Analysis" Oxford Institute for Energy studies, WPM 25, October, 1999.
[8]Ali Ssekatawa, "Understanding Cost Recovery in Uganda's Petroleum Sector", https://pau.go.ug/site/assets/files/1105/article_on_cost_management_final.pdf accessed on 5th May, 2020
[9] Achmad Zen Umar Purba, 'Production Sharing Contract: Is It within Private or Public Domain' (2009) 7 Indonesian J Int'l L 21
[10] Miguel Branco, "Product Sharing Agreements-Legal Blessing or Curse for Developing Countries?" (2012) 4 I.E.L.R. 147, 148
[11] N'di and T.W. Walde, "Stabilising International Investment Commitments: International Law versus Contract Interpretation" (2003) 1 O.G.E.L. Archive Issue 32.
[12] Bernard Taverne, "Production Sharing Agreements in Principle and Practice" in M.R. David (ed.), Upstream Oil and Gas Agreements (1996), p.44.
[13] Miguel Branco, "Product Sharing Agreements-Legal Blessing or Curse for Developing Countries?" (2012) 4 I.E.L.R. 147, 148.
[14] M. Branco, "Product Sharing Agreements-Legal Blessing or Curse for Developing Countries?" (2012) 4 I.E.L.R. 147, 148

"*profit oil"* and this is shared between the contracting parties in accordance with the pre-agreed formula in the agreement, however the host state retains ownership of the natural resources and oil produced.

Host governments have the rationale to impose royalties on gross production rather than profit[15]. IOCs are subjected to payment of income tax chargeable on its share of the profit oil[16], export taxes, production and discovery bonuses in accordance with the terms of the PSA and the laws applicable.

Uganda in particular runs a hybrid PSA which in addition to cost and profit oil requires IOCs to pay other royalties prescribed by law such as the discovery and production bonuses. It is important to note that PSAs differ in different ways depending on the legal framework, negotiations between the IOCs and host governments and the geological risk profile[17].

This research paper analyses the existing legal frameworks on Production Sharing Agreements in the oil and gas industry with a particular focus on Uganda's oil and gas industry and hence commences by briefly highlighting the background of the country's oil and gas industry.

1.1. Background of Uganda's oil and gas industry

Uganda is located on Eastern subcontinent of Sub-Saharan Africa bordered by South Sudan in the North, Kenya from the East, Democratic Republic of Congo in the west, Tanzania from the south and Rwanda in the Southwest[18].

Uganda made her first commercial discovery of petroleum in 2006 in the Albertine Graben in the western part of the country with an estimated total volume of about 6.5 billion barrels Stock Tank Oil Initially In Place (STOIIP) out of which 1.4 billion barrels of oil are recoverable and 500 billion cubic feet of gas resources.[19] Since the discovery of petroleum resources in Uganda,

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[15] Bryan Land, "Capturing a Fair Share of Fiscal Benefits in Extractive Industry" (2009) 18(1) Transnational Corporations 157.
[16] Tade Onyewunmi, "Stabilisation and Renegotiation Clauses in Production Sharing Contracts: Examining the Problems and Key Issues" 276, 277.
[17] Ali Ssekatawa, "Understanding Cost Recovery in Uganda's Petroleum Sector", <https://pau.go.ug/site/assets/files/1105/article_on_cost_management_final.pdf> accessed on 5th May, 2020
[18] The oil and gas sector in Uganda, <https://pau.go.ug/site/assets/files/1116/uganda_oil_and_gas_sector_brochure-_april_2019.pdf> accessed 24th March, 2020.
[19] Ministry of Energy and Mineral Development; Uganda's Second oil and gas licensing round, <http://www.energyandminerals.go.ug/site/assets/files/1275/africa_oil_article-final_eddition2-1.pdf> accessed on 24th March, 2020.

the country put forward stringent measures to address key elements of exploration, development and production of the country's oil and gas resources among which measures included enacting laws namely; The Petroleum(Exploration, Development and Production) Act, 2013, The Petroleum (Refining, Conversion, Transmission and Midstream storage Act, 2013, the formulation of a National Oil and Gas policy of 2008, establishment of the Petroleum Authority of Uganda (PAU) and the National Oil Company (NOC) whose mandate is to regulate the different key players in the industry and to handle commercial interests of the state and its participation in the industry respectively[20].

To date, nine production licenses have been issued by the government of Uganda to licensed companies. And subsequently government is now proceeding to development, production and commercialization of the oil and gas resources.[21] The production Licenses have been awarded over the blocks of the Kingfisher project in Hoima and Kikuube districts that were issued to CNOOC in 2012. Five production Licenses were also awarded to Tullow Uganda Ltd and these are being operated since 2016 over blocs of Mputa-Nziz-Waraga, Kasamene-Wahrindi, Kigogole-Ngara, Nsoga and Ngege fields. Additionally, other three production Licenses were issued to Total E&P Uganda in 2016 over blocs situated regions of Ngiri, Jobi-Rii and Gunya fields.

The development and production of the oil resources shall at the moment be executed through two separate projects, one at Tilenga project in Buliisa and Nwoya districts and the other at the Kingfisher Project in Hoima and Kukuube districts.

Commercialisation shall be undertaken through a country refinery with capacity of up to 60,000 bpd as well as the East African Crude Oil Pipeline with capacity of up to 180,000 bpd respectively which projects are being developed concurrently to receive the first oil by 2022/23.[22]

[20] Ministry of Energy and Mineral Development; Uganda's Second oil and gas licensing round, <http://www.energyandminerals.go.ug/site/assets/files/1275/africa_oil_article-final_eddition2-1.pdf> accessed on 24th March, 2020.
[21] Ministry of Energy and Mineral Development; Uganda's Second oil and gas licensing round, <http://www.energyandminerals.go.ug/site/assets/files/1275/africa_oil_article-final_eddition2-1.pdf> accessed on 24th March, 2020.
[22] Ministry of Energy and Mineral Development; Uganda's Second oil and gas licensing round, <http://www.energyandminerals.go.ug/site/assets/files/1275/africa_oil_article-final_eddition2-1.pdf> accessed on 24th March, 2020.

1.2. Statement of the Problem

The exploration, extraction and production of oil and gas is a very expensive and complex process that involves use of highly trained technocrats and sophisticated technological machinery. Due to the complexity and expenses involved in the extraction of hydro-carbons, less developed countries such as Uganda face a very big challenge since they lack availability of adequate expertise in terms of the required human resource, technology and the finances for sustaining activities of the oil and gas industry.

In the circumstances, in order to tackle this challenge, developing countries with oil and gas natural resources have a tendency of subcontracting the usually more experienced multinational companies with the capacity to exploit and produce the oil and gas.

Such commercial relationships with multinational companies are made possible through contractual arrangements such as Production Sharing Agreements (PSAs) which can be broadly defined as an agreement or contract between an oil and gas company (IOCs/ contractor) and a national oil company/ state party (NOC).[23]

Developing an effective legal and policy frameworks for regulating these commercial contracts in the oil and gas industry plays a key role in determining the investment levels in the industry. It is important to design, develop and adopt a logically coherent legal framework to protect the priorities and objectives of the host governments as well as providing a conducive environment for foreign investment.

In that context, Uganda has enacted different laws and policies to regulate the oil and gas industry for example the, Petroleum (Exploration, Development and Production) Act, 2013, The Petroleum (Refining, conversion, Transmission and Midstream Storage) act, 2013, The Public Finance Management Act, 2015 among others.

Under the Petroleum (Exploration, Development and Production) Act, 2013, Laws of Uganda section 6 (2) of, the Minister shall develop or cause to be developed a model Production Sharing Agreement or any other model agreement as maybe entered into by Government under this section which shall be submitted to Cabinet for approval.

[23] Miguel Soares Branco: Product Sharing Agreements-Legal Blessing or curse for developing countries, I.EL.R. 2012, 4, Pg 2.

Furthermore, according to Section 6 (3) of the Petroleum (Exploration, Development and Production) Act, 2013, The Minister shall lay before Parliament the model Production Sharing Agreement or any other model agreement approved by Cabinet under subsection (2).

Finally, Section 6 (4) of the same act also requires that a model agreement approved by Cabinet shall guide negotiations of any future agreements under this section.
Though the Ugandan government has taken greater strides in enacting laws for regulating the oil and gas industry, there is still a need of designing a more comprehensive legal and institutional policy framework on Production sharing agreement models.

Uganda's legal and regulatory framework limits the powers of designing and negotiating the PSA terms to the minister in charge of the industry and manifests a narrow focus on environmental protection in the oil rich regions. Other areas that still have room for improvement relate to negotiating and overseeing PSAs as well as the management of oil revenue collection from and by beneficiary entities and hence this research.

1.3. Purpose/Significance

The importance of this research is based on the usefulness of its findings in ensuring the future adopting of viable policies by the Government of Uganda, the Ministry of Energy and Mineral Development and other oil and gas institutions such as the Petroleum Authority of Uganda (PAU).

The study is equally useful to other researchers and/ or academicians in fields of oil and gas, energy governance and geologists aspiring to improve their knowledge on legal frameworks and regulatory tools governing Production sharing agreements in the oil and gas industry.

1.4. Objectives of the study

i. To identify the current state of the legal frameworks in Uganda's oil and gas industry.
ii. To investigate ways in which Ugandan laws fails affording an effective legal framework for regulating actors involved in the country's production sharing agreements.
iii. To examine how the gaps in the frameworks of Ugandan oil and gas laws lead to compromising capabilities of regulatory and institutional actors in supervising and managing actors in the country's production sharing agreements of the oil and gas industry.

iv. To put forward possible recommendations or measures to fill the legal gaps with possible reforms in regulatory frameworks on Production Sharing agreements.

1.5. Research Questions

i. What is the current state of the legal frameworks in Uganda's oil and gas industry?
ii. What are the ways in which Ugandan laws fails affording an effective legal framework for regulating actors involved in the country's production sharing agreements?
iii. What are the gaps in the frameworks of Ugandan oil and gas laws that lead to compromising capabilities of regulatory and institutional actors in supervising and managing actors in the country's production sharing agreements of the oil and gas industry?
iv. What are the possible recommendations or measures that can be undertaken to fill the legal gaps in regulatory frameworks on Production Sharing agreements?

1.6. Scope of the Study

The scope of this research shall cover three areas namely the Content, geographical and time scopes.

i. Content Scope

The research focuses on reviewing if and how the Ugandan law is affording an effective and viable legal framework for acting as a regulatory and institutional tool for governing production sharing agreements as used in the oil and gas industry in Uganda's industry.

ii. Time Scope

The research covers data from 2006 to present and this is because Uganda made her first commercial discovery of oil and gas in 2006 and a lot of policies, laws and institutions have been adopted and put in place to guide and regulate the oil and gas industry hence the time scope choice was influenced by the availability and accessibility of data for this particular period.

iii. Geographical Scope

The research focuses on Uganda's oil and gas industry in as far as its Geographical scope is concerned. Uganda made her first commercial oil discovery in 2006 and has not yet started commercial production this makes her one of the African countries in which oil and gas industry remains a recent economic activity in its formative stages. Uganda's oil and gas industry still has considerable gaps and lessons of good practice to learn from other African countries with a longer period of experience in this industry hence a suitable choice for purposes of the geographical scope.

1.7. Chapter synopsis

The research will be comprised of five (5) distinct chapters.

Chapter one

This chapter will cover the introductory and explanatory part of the study by discussing aspects of the study; the background information of the research topic, statement of the research problem, general and specific objectives, research questions, limitations, highlighting the significance and scope of the study, give a brief description of the study methodology and a summary of the literature review which will be discussed fully in the second chapter.

Chapter two

The second chapter will review the available literature on the subject matter in much broader detail and at this stage the researcher will identify and compare what other authors have previously discussed in relation to this topic, consequently establishing the presently existing body of knowledge on the legal framework on product sharing agreements remains among the major objectives of the chapter. This chapter shall also critically examine such literature with an aim of also highlighting and pointing where the gaps subsist in the available literature, in so doing this chapter shall be fulfilling its second objective of demonstrating how this work builds upon work of other scholars and which gaps it addresses

Chapter three

The third chapter will discuss the methodology that will be adopted and used in the course of the research. This chapter shall further explain the suitable research design and the contractual law theory on unconscionable bargains as the theoretical/conceptual framework of the analysis of law and PSA.

It will also explain the choices made for the methodological and theoretical framework.

Chapter four

The fourth chapter will discuss the findings of the research taking into account the research observations and discussing how the theoretical framework is applicable to the findings. The findings shall be used as a basis for the measures or recommendations.

Chapter five

The fifth chapter will be the last chapter of the research and shall discuss the conclusions and recommendations to the findings of the research.

CHAPTER TWO: LITERATURE REVIEW

2.0. Introduction

Although there is a lot of literature on the legal frameworks related to the oil and gas industry, there is limited literature when it comes to the area of the legal regimes regulating production sharing agreements in the oil and gas industry. Even the presently identifiable literature remains far from being comprehensible and falls short in terms of exploring the relationship between substantive law on production sharing agreements and ways in which that law has effectively regulated the respective parties involved in different activities along the chain of exploration and production stages. The above observation accounts for the research gaps in the existing body of knowledge in as far as legal frameworks on production sharing agreements are concerned. Therefore this study is set out to review the present literature in line with the research objectives and questions of the study.

2.1. Summary of Literature Review

Eze Emem Chioma[24], expounds an account of the complexity of the processes associated with the exploitation and production of hydrocarbons.

This proponent further states that undertaking petroleum operations has pre-requisites such as being highly capital demanding and technologically intensive that would require high-profile skills and expertise.[25] The scholar also notes that this sector involves complicated highly risky activities such as surveying, identifying, exploiting, transporting and storing and discovering hydrocarbons deposits.[26] , It is imperative to note that the availability of the above pre-requisites are usually inadequate in developing countries. Consequently developing countries are more likely to grant their rights of oil exploitation and development to International Oil Companies (hereafter the IOC) that have the capacity to carry such investments in the oil and gas industry

The transferring of those exploitation rights is normally done by granting licenses or concessions and contractual arrangements depending on the preferred level of State

[24] Eze Emem Chioma; "Examining the crucial impact of a well drafted stabilisation and renegotiation clause on production sharing agreements" I.E.L.R, 2015, 5,212-217
[25] Eze Emem Chioma; "Examining the crucial impact of a well drafted stabilisation and renegotiation clause on production sharing agreements" I.E.L.R, 2015, 5,212-217
[26] Eze Emem Chioma; "Examining the crucial impact of a well drafted stabilisation and renegotiation clause on production sharing agreements" I.E.L.R, 2015, 5,212-217

participation by the hosting State and the extent of control granted the State concerned to the IOC.[27]

According to *Eze Emem Chioma*, concessions were the earliest form of arrangement under which IOCs were granted total and exclusive ownership rights over a specific area. Such concessionary rights not only relate to the ownership of hydrocarbons produced within a particular area but also confer such rights for a given period of time that usually ranges from 70-90 years. Concessions were also subject to the obligatory payment of royalties and other taxes related remittances like the income tax, among others. All risks were borne by the concessionaire simply because of the nature of the concessions, and as a result all benefits, attendant rights and interests in the petroleum, control of production and development activities were all in favour of the concessionaire.[28]

In line with the UN Declaration on Permanent Sovereignty over Natural Resources of 1962, licenses were introduced as newer form of concessions. Licences are often but not always perceivable as standardised contractual regimes that are found in legislation and are commonly used in developed countries like the UK, Norway among others.[29] The most unique feature with licenses is the possibility of retaining ownership over the natural resources by the host state while granting exclusive rights to IOCs. Given the legality of those mining rights, the IOC can carry out petroleum activities within a given contract area for a period usually between 20-30years.[30]

Contractual arrangements that are capable of being adopted by parties within the oil and gas industry include Production Sharing Agreements (PSAs) which have been adopted by especially developing countries because of the need to maintain the stability of the contractual obligations between the parties through stabilisation and renegotiation clauses.[31] *Eze Emem Chioma*, adopted Taverne's definition of PSAs that means a contract between an oil company (contractor usually an IOC and a State entity usually the National Oil Company (the NOC). In

[27] Nutaroot Pongsiri, "Partnership in Oil and Gas Production-Sharing Contracts" (2015) 17(5) International Journal of Public Sector Management 431-442
[28] Tade Oyewunmi, "Natural Gas Exploration and Production in Nigeria and Mozambique: Legal and Contractual Clauses," (2015) 13(1) O.G.E.L. 2.
[29] Ibid.
[30] Eze Emem Chioma; "Examining the crucial impact of a well drafted stabilisation and renegotiation clause on production sharing agreements" I.E.L.R, 2015, 5,212-217
[31] Nutaroot Pongsiri, "Partnership in Oil and Gas Production-Sharing Contracts" (2015) 17(5) International Journal of Public Sector Management 431-442

terms of the operational mechanisms for PSA, the NOC authorises the IOC to carry out petroleum operations within a contract area in accordance with the terms of the agreement.[32]

According to this form of contractual arrangement, the IOCs takes on the various risks and expenses as well rights of exploitation, development, and production
Those rights are compensated in accordance with the terms of the PSA whereas the host State retains the supervisory role and ownership over all the natural resources and produced oil. The PSAs also allow developing countries to reap and benefit from the technical resources provided by the IOCs in the development of the oil and gas industry without having to shoulder the financial burden.[33]
However, IOCs sometimes take advantage of the financial weaknesses of developing countries to negotiate the PSA terms and conditions in their favour. Meaning that even though the States hosting the IOC retains ownership of the natural resources, those States are always subject to accept whatever share of the oil barrels that are claimed to be produced by the IOCs.

It is also noted from *Eze Emem Chioma's* analysis that the objectives of the parties to a PSA differ, in such a way that on one hand, the aim of the host States is maximising revenue and retaining the sovereign control over its natural resources as whereas the IOCs on the other hand are more interested in profit maximisation as and recovering the expenses incurred when investing in the oil and gas sector.[34]

Conclusively, the author discusses advantages of PSAs to developing countries in terms of enabling these countries to maximise their benefits from the oil and gas resources. However, Eze Emem Chioma's analysis largely limited in terms of failing to expound on possible risks that developing countries are likely to face because of licencing national proprietary interests in natural resources to a percentage share of the oil and gas ratios which are influenced by IOCs. The above author also emphasizes the value of preserving the sanctity of contractual arrangements between parties. This is achievable by illustrating the importance of stabilisation clauses and renegotiation clauses in the PSAs. Eze Emem Chioma further states that stabilisation clauses are vital in reinforcing the principle of "*pacta sunt servand"* by

[32] Bernard Taverne, "Production Sharing Agreements in Principle and Practice" in M.R. David (ed.), Upstream Oil and Gas Agreements (1996), p.44.
[33] ibid
[34] Eze Emem Chioma; "Examining the crucial impact of a well drafted stabilisation and renegotiation clause on production sharing agreements" I.E.L.R, 2015, 5,212-217

committing the host State to ensure the stability of any applicable regulatory framework needed in governing the agreement. Such commitment is important in balancing the "stability" and "flexibility" needs of both the IOC and the host state. This proponent also states that a renegotiation clause that is well drafted must provide necessary economic equilibrium for the overall effectiveness of PSAs.

However, given the nature of freezing clauses, they preclude the right of host governments to enact new legislation that may amend the terms and conditions of the agreement. These clauses also limit legislative rights and control of host States over the possibility of producing its own natural resources. Moreover, whenever the State's unchallengeable rights over its natural resources are limited, it casts doubts on the effectiveness of stabilisation clauses.[35] Stabilisation clauses also tend to give the IOCs special treatment which maybe to the detriment of the host States and national investors.[36]

Kirsten Bindemann[37], in "*Production Sharing Agreements: An Economic Analysis*", discusses the contractual equilibrium that subsists between the parties to a PSA. According to "*Kristen Bindemann*" PSAs are among the most common types of contracts used in the petroleum industry especially by the oil rich developing countries.

This proponent discusses the balance between risks, rewards and the division of shares or benefits among the contracting parties as this phenomenon has not yet been addressed by the tools of modern industrial economics.

Kristen Bindemann commences by discussing the rationale underling the use of PSAs. According to which Kristen Bindemann commences with an overview on the nature of mineral developments in a generic context. Mineral development ventures are highly risky in their nature, due to the fact that it is usually difficult to determine their existence, quality, extent or size of the deposits, production costs and future prices in the market.[38] The exploration and development of these minerals must take place in locations where the hydrogen carbons are

[35] Piero Bernardini, "Stabilisation and adaptation in Oil and Gas Investments" (2008)1(1) *Journal of World Energy Law & Business 101.*
[36] Jean-Marc Loncle and Damien Philibert-Pollez, "Stabilisation clauses in investment contracts" [2009] *International Business Law Journal 7.*
[37] Kristen Bindemann, "Production Sharing Agreements: An Economic analysis;" Oxford Institute of Energy Studies, WPM October 1999.
[38] Kristen Bindemann, "Production Sharing Agreements: An Economic analysis;" Oxford Institute of Energy Studies, WPM October 1999 p.5

situated a processes that remains highly challenging both physically, commercially and politically.

Natural resources are usually owned by the State in which they are situated. This implies that companies interested in exploiting and development of such resources, must acquaint themselves with the policies and legal regimes of those States.

The process of mineral development and mineral production are long-term investment undertakings whose benefits are realised at a later time rather than in the nearby future.

Resource rich countries, particularly those located in developing regions are hampered by the lack of the required industrial prerequisites. For example, developing regions continue facing a number of limitations in as far as investment technological and human resource capital are concerned.

Moreover, the above listed industrial prerequisites are instrumentally crucial in facilitating exploitation and feasibility studies. Consequently, that makes such ventures to usually be executed between two parties; namely; the host State through a State entity usually identifiable as the National Oil Company (NOC) and a multinational company usually an International Oil Company (IOC) often from a country with a much stronger and more developed economy. Such affairs subject oil and gas industries of most developing regions to be submissive to the whims of influences of ideas and wishes of more westernised IOCs.

In as much as the aims of the host State revolve around meeting domestic demands, which range from creation of employment opportunities, minimising effects of environmental exploitation, promotion of local content, technology transfer and revenue maximising, whereas for the IOC aims at recovering incurred costs while maximising profit.

This signifies that there is high likelihood of having the two parties seeking to achieve different agenda. The PSAs are prone to creating tension due to the parties seeking to achieve completely clashing aspirations. This exposes them to unending scuffles in which case the NOC as the representative of a more economically desperate party might experience unbalanced or unconscionable bargain grounds hence place the IOCs in much more favourable positions and not only use their economic power to influence but also to deviate from its promised obligations to the NOCs without any recourse.

Kristen Bindemann, further argues that contracting is potentially doable in two ways namely; competitive bidding and bilateral negotiation.[39]

Under the competitive bidding process, the governments of the resource rich countries have the discretion of deciding upon whom to award the contracts.[40] They set required standards to participate in their oil and gas industries. The bidding may be based on bonus payments, royalty payments, with the highest bidder receiving a contract whose terms are prescribed by legislation of the hosting States. A contract is awarded to a qualified bidder on the basis of the competitive and seal bids.

This competitive bidding process affords interested parties an equal opportunity to participate in the oil and gas industry. Competitive bidding has been adopted widely, for example; in the process of extending loans under the OPEC Fund for International development (OFID), the procurement guidelines are used to guide the international bidding process[41].

In Uganda enacted the Public procurement and disposal of public assets Act, 2003, which under section 5 provides for the establishment of the Public Procurement and Disposal of Public Assets Authority whose mandate is to ensure the application of fair, competitive, non-discriminatory, transparent and value for money procurement and disposal standards and practices.[42]
It is self-evident that here host state adopts the principles of invitation of tender that are synonymous to the concept of invitation to treat that has often been under common law in convention contracts.

Under bilateral negotiation, an IOC submits a proposal to a country's government in order to obtain concessions for exploration and development of the mineral deposits which rights may be granted dependant on the country's interests in return for an agreed royalty payment by the intending company.

[39] Kristen Bindemann, "Production Sharing Agreements: An Economic analysis;" Oxford Institute of Energy Studies, WPM October 1999 p.7-8
[40]
[41] Procurement Guidelines under Loans Extended by the OPEC Fund for International Development (OFID), Vienna Austria;
https://opecfund.org/var/site/storage/original/application/50c12e9285d0dbb78dd48d3042fc2027.pdf
[42] Public procurement and disposal of public assets Act, 2003, section 6

However concession were usually one - sided and in favour of the IOC since they would obtain comprehensive or general rights and control over the mineral deposits and the production.
Miguel Soares Branco[43]**;** in his journal "*Product Sharing Agreements-Legal Blessing or curse for developing countries"* describes a PSAs to mean a contract between an oil company (contractor) and a state party (NOC) that is authorising the former to carry out petroleum operations within their contracted area.[44] The author also points out that the substantial capital investment as well as sophisticated technical skills are a necessity for the industry. Unfortunately, in most developing countries there is a lack those conducive factors hence making most, if not all of them, to end up into contracting with multinational oil companies that are in a more economically powerful and more technologically experienced.[45] He further supports the need for a coherent legal regime in order to secure the priorities of host governments in addition to efficiently encouraging foreign investors to come into the industry. According to *Miguel Soares Branco*, most PSAs are designed with a hidden aim of attaining political concerns by developing countries. That makes PSAs not only problematic but also unsuitable in facilitating developing nations in achieving the strategic objectives. For example Tullow had to choose between two PSAs, whereby one had a requirement of training and education of Ugandans while the other did not have such requirement. Chances were that Tullow was more likely to advocate for a PSA without local content training obligations in order to lower its production costs since its mother company in the UK might be less interested in investing in the training of Ugandans to learn or understand the aspects of oil and gas. He emphasizes that possibility of achieving strategic objectives not only depends on the model of PSAs employed but it is also affected by the terms and conditions of the agreement. Those terms and conditions are instrumentally crucial considering their role in influencing the balance of control and revenues between the host government and the foreign investor.[46]

[43] Miguel Soares Branco: *Product Sharing Agreements-Legal Blessing or curse for developing countries,* I.EL.R. 2012, 4, Pg 2.
[44] Bernard Taverne, "Production **Sharing Agreements** in Principle and Practice" in M.R. David (ed.), *Upstream **Oil** and **Gas Agreements*** (1996), p.44.
[45] Kamal Hossain, *Law and Policy in Petroleum Developments, Changing Relations between Transnationals and Governments* (1979), p.58.
[46] Greg Muttitt, "Crude Designs: The Rip-Off of Iraq's **Oil** Wealth" (Platform with Global Policy Forum, Institute for Policy Studies, 2005), p.4.

P. O. Olalere[47]*;* in his journal article pauses a question of whether "*product sharing agreements are presenting a fair balance between host state, national oil company and foreign investors?"*
P. O. Olalere goes on to state that through a PSA an IOC is given the authority to explore, exploit and produce oil and gas in a given area for a defined period of time by a host state.[48] The IOC provides investment capital, technology and expertise for the exploration, development and production of the hydrocarbons. That development and production happens subject to a condition of a defined share of revenue from the produced oil and gas. That portion of revenue is also referred to as *Cost oil* which is sold to recover the production costs incurred by the IOC and the remaining oil is referred to as *Profit oil* and this is usually shared among the NOC and IOC in accordance with the terms of the PSA.
P.O. Olalere also emphasizes that under the PSA the ownership of the oil reservoirs shall always remain with the host state (NOC).
However the author neither discusses nor appreciates the importance of having a comprehensive legal regime that will operationalize how these PSAs can be used to meet the objectives of the host states without discouraging foreign investment. It is this research gap in legal knowledge that this research project seeks to comprehensively and effectively investigate.

2.1.1. Overview of PSAs in other African countries: NIGERIA

Ownership of natural resources, maximization of revenue and benefits are some of the major factors that resource rich countries consider when adopting a particular contractual arrangement in the exploitation and development of petroleum resources.

Due to the technical complexity, high costs, and the nature of petroleum operations, developing countries have prioritized and emphasized the use of PSAs in the oil and gas industry and as a result many African petroleum exploiting countries have enacted different laws to regulate PSAs in their different oil and gas industries.

Overview of Nigeria's PSA

In the bid to overcome challenges like the high costs involved in the oil and operations and the need for technical expertise, the desire to enhance the country's oil reserve and improve the

[47] Peter Olaoye Olalere; Searching for contractual equilibrium. Is a product sharing agreement in the oil and gas industry a fair balance between the interests of the host state, National oil company and foreign investor? I.E.L.R. 2015, 1, 30-38
[48] Peter Olaoye Olalere; Searching for contractual equilibrium. Is a product sharing agreement in the oil and gas industry a fair balance between the interests of the host state, National oil company and foreign investor? I.E.L.R. 2015, 1, 30-38

economy of the country, a PSA was introduced as a policy for the exploration of the Nigeria's petroleum resources. This policy is mainly regulated by the Deep Offshore and Inland Basin Production Sharing Contract Act, Laws of the Federation of Nigeria 2004.[49]

Section 1 of the Nigerian National Petroleum Corporation Act (NNPC Act), 2004 establishes the NNPC and empowers the corporation to participate directly in oil and gas operations and manage the interest of the oil and gas industry on behalf of the Federal Government. Under the PSA the Nigeria National Petroleum Corporation (NNPC) a governmental agency engages a competent contractor (Petroleum Exploration and Production Companies or its Subsidiary duly registered in Nigeria) to carry out petroleum operations in Nigeria.

Nigeria executed her first PSA on 12th of June 1973 between the Nigerian National Oil Corporation (NNOC), the predecessor of the Nigerian National Petroleum Corporation (NNPC) and Ashland Oil (Nigeria) Company. Nigeria has executed several other PSAs post 1973 and all these have been executed by the government in a bid to exercise control over petroleum activities in Nigeria.[50]

The operation of Nigeria's PSA does not differ so much from that of Uganda. In all the PSAs the contractor who in most cases is an IOC undertakes the initial exploration risks and if oil is discovered and extracted, the contractor is allocated a portion of the oil produced sufficient to reimburse its costs of production referred to as cost oil, as well as payment of royalty (royalty oil) which is fixed in accordance with the location of the oil field such that the deeper the concession is from onshore, the lower the royalty rate that is applicable. Nigeria imposes a tax (tax oil) on a portion of production and the remaining oil produced also called the profit oil is shared among the parties in accordance with the terms of the PSA.

2.1.2. Challenges of relying on PSAs as a contractual regime in the oil and gas sector.

Firstly, under a PSA the contractor/IOC finances the largest percentage of the project operations and as a result my concentrate on one field that is lucrative and this may affect the rate at which other exploration areas covered by the contractor and this is risky for the host country.

[49] https://www.hg.org/legal-articles/production-sharing-contract-in-the-nigerian-oil-and-gas-sector-21398 accessed 20th January 2021

[50] Dr. Taiwo Adebola Ogunleye, "A Legal Analysis of Production Sharing Contract Arrangements in the Nigerian Petroleum Industry." Vol.5, No.8, 2015

Secondly, one the major aims of the IOCs/ contractors is to maximize profits and as a result the contractor can chose to be uneconomical or extravagant in the petroleum operations knowing that such expenses will be fully reimbursed under the cost oil, which would obviously be to the disadvantage of the host country.

The third challenge is in instances when the oil prices shoot up than they were anticipated at the time of contracting. The contractor will earn windfall profits, thereby giving the contractor a greater share of revenue than would ordinarily have been conceded.[51]

The other challenge related to the use of PSAs is the inclusion of stabilization clauses in these contracts. Stabilization clauses like the freezing clauses limit the host countries in making adjustments to the contractual legal regimes even after there's a change in the national law. To many this has been seen as an encroachment on the sovereignty of these host states and it is therefore advisable that host countries should not allow stabilization clauses for along a period of time in order to protect their sovereignty from being interfered with.

The other challenge associated with PSAs is they take away the judicial jurisdiction from the host countries. Commercial disputes that arise out of PSAs are usually referred to international arbitration centres largely because the contractors or IOCs do not trust the technical expertise of the host states' judiciary to handle such disputes arising out of petroleum transactions.

Therefore it is important that countries like Uganda that are engaging in the oil and gas industry for the first time look out for and pay attention to these challenges so that they are adequately provided for in the PSA at the time of contracting.

2.2. Conclusion

In conclusion, there is limited literature expounding the relevance of a comprehensive legal framework in regulating interests of parties to PSAs in the oil and gas industry. That problem also partly explains why even the presently available literal texts are largely shallow with hardly in-depth analysis of this topic.

Developing countries adopt PSAs because from the above reviewed literature, under PSAs ownership over the natural resources is maintained and the host government assumes greater control over its oil production. The major objective for adopting a PSA usually is to enable the government to secure its control over the operations, to enhance economic growth. The

[51] Omorogbe, Y. (1986) "Contractual Forms in the Oil Industry: The Nigerian Experience with Production Sharing Contracts" 20 J.W.T.L. (1986) p. 342 at 345

retaining of State resource control is useful given its benefits to the entire country in terms of providing incentives for foreign direct investments (FDI). Although politics may play an important role in shaping a government's decision, the structure and the fiscal arrangements of a PSA determine its effectiveness in attaining intended objectives by developing countries. Among other factors, that effectiveness is largely dependent on how an agreement was carefully and skilfully drafted so as to ensure that its objectives are designed to balance the interests of the parties' involved.

Key to note is that fiscal elements such as the production sharing clause which provides for the extent of each party's stake in the project, has to be drafted in such a manner that targets the economic rent of a project so as to facilitate rapid cost recovery for the IOCs and early earning of revenue for host States.

CHAPTER THREE: RESEARCH METHODOLOGY

3.0. Legal Context and Research Setting

3.1. Research Design

A research design is the conceptual structure through which research is conducted.[52]

It is the overall strategy used to address all the research objectives in a coherent and logical manner in order to address the research problem. The research design is basically comprised of the research methods through which data is collected and analysed.[53]

These research methods guide the researcher when studying and analyzing the available materials and data sources in order to successfully respond to the research questions. The research design ensures data is effectively analysed in order to address the research problem in an unambiguous manner.

The research questions for this study are best addressed through a qualitative research design.[54] Academicians have argued that a qualitative methodology is appropriate when a study aims to research a less known phenomenon.[55]

This suitability is a result of this method being in position to identify and appreciate gaps in the literature. This research method has the capacity to help the researcher identify how and where their study fits in the already existing epistemological body of knowledge.

It is through the qualitative based methodological framework that it became evident that pre-existing literature hardly expounds on PSAs without fairly sufficient detail. A qualitative approach enables investigation of complex social phenomenon where the focus is on understanding 'the how' and 'the why' of the phenomenon in question.[56]

This study perceives PSAs as a phenomenon which the study is designed to examine and explore using socio-legal lenses. Thus, this research study shall adopt a qualitative

[52] Kothari C.R, "Research Methodology Methods and Techniques: New Age International Limited," 2004
[53] Kirshenblatt-Gimblett, Barbara. "Part 1, What Is Research Design? The Context of Design. Performance Studies Methods Course syllabus. New York University, Spring 2006< https://library.sacredheart.edu/c.php?g=29803&p=185902#:~:text=The%20research%20design%20refers%20to,measurement%2C%20and%20analysis%20of%20data.>
[54] Edmondson, A. C., & McManus, S. E "Methodological Fit in Management Field Research" : The Academy of Management Review, (2007) 32(4), 1155-1179
[55] Marshall, C., & Rossman, G. B. (2015): "Designing qualitative research" (Sixth edition.). (Thousand Oaks, California (2015).
[56] Edmondson & McManus, 2007 op cit.

methodology to allow the researcher to be alert to the different perspectives surrounding the legal framework on PSAs and their use in the oil and gas industry.[57]

Qualitative research approaches tend to also involve an in-depth probing and application of subjectively interpreted data.[58]

This legal research also involved using the archival desktop approach that relies on law library to locate authoritative decisions. This method was also equally resourceful in identifying of applicable legislation and useful discussions from secondary sources. In this regard the archival based method enabled access to useful literal materials that were analysed further to ensure that the materials are useful in formulating substantial conclusions of the study results and making satisfactory recommendations.[59] This method shall also enable the researcher to appreciate and understand the PSA contents and context advanced in other materials such as those of Kristen Bindemann and India Ministry of Petroleum and Natural Gas Fifth offer of Block 2005. Adopting a qualitative methodology for this study was instrumentally vital in providing an insightful description of perceptions of other scholars. Special attention was also afforded to viewpoints of different scholars to develop a better understanding of explanatory account for theoretical and practical realities.[60]

3.1.2. Area of Study

Contextually, the study will focus on the legal framework on PSAs as used in the oil and gas industry with a specific focus on Uganda's oil and gas industry.[61]

The case study research approach shall be relied on in studying this chosen area of the study. This will be for purposes of analysis of the case of study of the Ugandan oil and gas industry that shall be used in advancing the investigative and critical examination of PSAs.

3.1.3. Research Method

The researcher used doctrinal and textual based qualitative research methods. This research method also involved critically analysing of different literature, from textbooks on PSAs. The

[57] Van de Ven, A. H. (2007): "Engaged scholarship: a guide for organizational and social research". (Oxford University Press', 2007)
[58] Oso, W.Y & Onen, D (2009): "A general guide to writing research proposal and report". (Nairobi: The Jomo Kenyatta Foundation, (2009).
[59] Ibid
[60] Kvale, S. (1996): "Interviews: an introduction to qualitative research interviewing: Thousand Oaks," 1996.
[61] Bariyo, N. (2015): "Uganda Set to Award New Oil Exploration Licenses in 2015", (2014). "The Wall Street Journal, the Wall Street Journal": New York. 3 June 2014. http://online.wsj.com/articles/uganda-set-to-award-new-oil-exploration-licenses-in-2015-1401793334>

doctrinal and textual based research approaches were also important in identifying appropriate online publications, reports, and journal articles on the subject of PSAs.

Doctrinal research also known as, theory-testing or knowledge building research in the legal academia is the established traditional genre of research in the legal field.[62] P. Chynoweth asserts that doctrinal research methodology is the process of undertaking legal analysis.[63] The method dealt with studying existing Ugandan laws as well as researching more on some related cases and authoritative materials through an analytically methodological manner. This was done with a view to develop a better understanding of the research subject matter. Given that the study relates to a legal research that touches on the legal and policy regimes, the researcher thought it wise to use the doctrinal method.

The nature of the qualitative doctrinal legal research methodology henceforth enables the researcher to analyse the literature review. The need to appreciate and articulate the legal aspects of this research such as laws, statutes, case law as indicated in the literature review is highly unlikely to require the researcher undertake data collection. That is simply because such information could be acquired through the desk and library research methods. Henceforth being the study of legal nature, partly justifies why the researcher chose this methodology as the best method to be used to carry out the research.

3.2. Sample and Sampling Techniques

In this study the researcher used documentary review to analyse the evolution and adaptation of PSAs in the oil and gas industry. In Uganda, documents used in legal, fiscal, environmental and institutional frameworks are all representative of useful evidence. It is these documentary materials that are subject of investigation to examine statutes history and case reports. The rationale behind documentary review is founded on its effectiveness in providing clear and comprehensive evidence.[64] The study used desk research in reviewing the documents.

[62] Desmond Manderson and Richard Mohr, "From Oxymoron to Intersection: An Epidemiology of Legal Research" (2002) 6(1) Law Text Culture 159, 161. For a breakdown of empirical and doctrinal PhDs in Australia see Desmond Manderson, 'Law: "The Search for Community' in Simon Marginson (ed), Investing in Social Capital (University of Queensland Press," 2002) pg. 152.

[63] Paul Chynoweth, "Legal Research' in Andrew Knight and Les Ruddock (eds), Advanced Research Methods in the Built Environment Wiley-Blackwell," 2008 pg. 37.

[64] Mvgalakwa. M, The Use Of Documentary Research Methods' (2006) Social Research Reports African Sociological Reviews'' Vol. 10 Issue 2 p. 221.

3.3. Data Collection Strategy/Methods

Qualitative research is the approach that was used in undertaking data collection. It involved reviewing, content and textual analysis and attempting to uncover the deeper meaning and significance of the issues being researched.

Data relating to the relevant legal regimes pertaining to PSAs in Uganda's oil and gas industry was reviewed and analysed and is to be used in answering the research questions.

3.3.1 Documentary Review

Documentary research method is the use of sources or documents as authoritative basis for supporting arguments of an advanced academic proposition. The process of undertaking documentary research often involves conceptualizing, reviewing, using and assessing relevant documents.

In the secondary analysis of qualitative data, the relevance of good documentation is unlikely to be underestimated. This is mainly because it provides the necessary background and the much-needed context, both of which make re-use not only a more worthwhile but also a systematic endeavour. Secondary data was obtained through using both published and unpublished documents. The researcher reviewed various publications, magazines and newspapers, reports, textbooks, journals and different sources of published information.

Analysis of the data gathered from these reports was undertaken to understand stakeholder engagements, as well as understand legal framework on PSAs.

3.4. Data Analysis Plan

The qualitative data was analysed using both thematic analysis and content theoretical analysis. The data gathered from desk research, annual reports presented for providing the types of engagements reported by parties to the PSAs were analysed. The interpretation stage involved the development of links that bring together themes by selecting the most useful data segments to support an emerging story.[65]

[65] Marshall & Rossman, 2015.

When analysing the legal, policy and institutional frameworks, the researcher adopted a gap analysis.[66] Gap analysis is a way to compare existing laws and practices to identify the gaps with regards to compliance to relevant required standards.

The steps involved in gap analysis include; finding out the existing laws, practices and the current situation, determining what the best practice is, developing a plan to fill the identified gaps in the laws and policies and carry out an implementation plan to arrive at the objectives which are based on the best practices.

The researcher adopted a gap analysis so as to critically analyse the legal and institutional frameworks related to PSAs through international standards for: rule of law, participation, transparency, accountability, publicity, equity, inclusiveness, effectiveness and efficiency.

3.5. Case study approach

In reviewing the legal and regulatory framework on PSAs, the researcher adopted a case study approach to aid in the easy collection of data and thus adopted Uganda's oil and gas industry as the case study for this research.

3.6. Ethical Considerations

This research study followed UCU Law Students Research guidelines. It was designed in line with UCU Research ethics procedures, that require potential participants, if need for them arises to be provided with details of the research project. The objectives shall respect and take into consideration all institutional ethical procedures associated benefits and risks, and privacy and confidentiality measures.

3.7. Conclusion

This chapter details the research methodology that was used to address the research questions. It provided evidence that the design was selected considering time and resource constraints of this project. It also provided a detailed description of the research process, including data collection and analysis. The Qualitative approaches involved an in-depth probe and application of subjectively-interpreted data which was used in this study.

[66] Hamid Ashraf and Fredrick Cawood,"Mineral Development for Growth: The Case for a New Mineral Policy Frame Work For Pakistan Journal Of Science And Technology Policy Management", 2017 p. 246- 274 at p.25

CHAPTER FOUR: RESULTS AND ANALYSIS

4.0. Introduction

This chapter gives a brief description of the background of the study, gives an analysis of the collected data results and discusses the findings in accordance with the research questions and objectives of the study.

4.1. Recap of research objectives

The first objective of the study is to identify the current state of the legal frameworks in Uganda's oil and gas industry. It will go further to investigate ways in which Ugandan law fails affording an effective legal framework for regulating actors involved in the country's product sharing agreements.

The other objective of the study is to examine how the gaps in the frameworks of Ugandan oil and gas laws lead to compromising capabilities of regulatory and institutional actors in supervising and managing actors in the country's production sharing agreements of the oil and gas industry.

And the last objective of the study is to put forward possible recommendations or measures to fill the legal gaps with possible reforms in regulatory frameworks on Production Sharing agreements.

4.2 Synchronizing Primary and Secondary findings

4.2.1 The legal frameworks on PSAs in Uganda's oil and gas industry

Uganda has for a long time lacked a comprehensive legal framework to regulate her oil and gas sector and this is partly because exploration for the resource in Uganda was not taken seriously until the early 1980s. Prior to 1980 the colonial government did not believe that oil and gas resources were available in sufficient quantities to justify its exploitation.[67]

[67] Okuku, J.A. (2015), 'Politics, the State and Limits of Oil-led Development in Uganda'. Paper presented at Makerere Institute of Social Research (MISR) Seminar, Kampala p.4; https://misr.mak.ac.ug/sites/default/files/events/UGANDA%20OIL-LED%20DEVELOPMENT.pdf accessed 15th July, 2020.

The Petroleum (Exploration and Production) Act, No. 20 of 1985 that was repealed by the Petroleum (Exploration, Development and Production) Act 2013 was the only law applicable to the management and regulation of all activities in Uganda's oil and gas sector.[68]

Since discovery of commercial oil and gas deposits, Uganda has through the parliament and the relevant institutions enacted different laws to regulate the oil and gas sector and among these include; the Constitution of the Republic of Uganda 1995,[69] the National Oil and Gas Policy (NOGP), 2008, the Petroleum (Exploration, Development and Production) Act, 2013 (the Upstream Act);[70] the Oil and Gas Revenue Management Policy (OGRMP), 2012, the Petroleum (Refining, Conversion, Transmission and Midstream Storage) Act,[71] 2013 (the Midstream Act); and the Public Finance Management Act (PFMA) of 2015. A further analysis of the above legal regime shall be discussed below;

4.2.2 The Constitution of the Republic of Uganda, 1995

The 1995 Constitution of Uganda is the primary source of regulation of the Ugandan oil sector. As the supreme law of the country, it necessitates the Government to ensure that resources are used for the benefit of all Ugandans.[72]

The Constitution under Article 244(2) mandates the Parliament of Uganda to make laws regulating the exploitation, exploration and development of petroleum and mineral resources, and the management of the revenues arising from petroleum exploitation and other related activities.

Article 41(1) of the Constitution of the Republic of Uganda states that every citizen has a right to access information in the possession of the state or any other organ or agency of the state except in cases where the release of such information is likely to prejudice the security, Contract Transparency in Uganda's Petroleum and Mining Sectors Contract Transparency in

[68] J. Oloka-Onyango; "Courting the Oil Curse or Playing by the Rules? An Analysis of the Legal and Regulatory Framework Governing Oil in Uganda" https://www.jstor.org/stable/pdf/j.ctvt9k690.9.pdf?refreqid=excelsior%3Aa7571c7c5f7529c2a0adb8525320fd8d accessed on 16th July, 2020.

[69] Article 244
[70] Section 6 (2) (4)
[71] Section 8 and 9
[72] ObjectiveXIII of the National Objectives and Directive Principles of State Policy, and Article 244(1) of the 1995 Constitution of Uganda

Uganda's Petroleum and Mining or sovereignty of the state or interfere with the right to privacy of any other person.[73]

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

The Act gives life to the NOGP of Uganda (2008) by putting in place an effective legal framework and institutional structures for ensuring that processes of exploring, developing and producing of petroleum resources in Uganda are carried out in a sustainable manner that guarantees optimum benefits for all Ugandans, both the present and future generations.[74]

The Act also created a conducive environment for the efficient management of petroleum resources of Uganda by providing for institutions to manage the petroleum resources and regulating the petroleum activities which includes licensing, exploration, development, production and cessation of petroleum activities or decommissioning as well as ensuring public safety and protection of public health and the environment in petroleum activities.[75]

The Upstream Act regulates the licensing and participation of commercial entities in petroleum activities. It expressly states under Section 5 that;

> "*Petroleum activities under Ugandan jurisdiction shall not be conducted without an authorisation, license, permit or approval in accordance with this Act*.[76]"

The Act under Section 6 gives power to the Government to enter into agreements relating to petroleum activities consistent with this Act with any person with respect to the granting or renewing a license, the conduct by a person, of petroleum activities on behalf of any person to whom a license is granted.[77]

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[73] Bagabo, P., Mugyenyi, O., Magara, S., and Twebaze, P., Contract Transparency in Uganda's Petroleum and Mining Sectors, Kampala: ACODE Policy Research Paper Series No.94, 2019 https://media.africaportal.org/documents/Contract_transparency_in_uganda.pdf accessed on 16th July, 2020.
[74] Petroleum (Exploration, Development and Production) Act, section 1
[75] Petroleum (Exploration, Development and Production) Act, section 1(a,b,c,d,e,f,g)
[76] Section 5 PEDP Act 2013
[77] Section 6(1)

The Act further states that;

> "*The Minister shall develop or cause to be developed a model Production Sharing Agreement or any other model agreement as may be entered into by Government under this section which shall be submitted to Cabinet for approval.*"[78]

Under section 6(3), The Minister shall lay before Parliament the model Production Sharing Agreement or any other model agreement approved by Cabinet under section 6(2) and it shall be this model agreement approved by Cabinet that shall guide negotiations of any future agreements under this section.[79]

The Act also promotes transparency in conducting petroleum activities and to this effect the specific provision in the Act tends to expressly require the Petroleum Authority to

> *"ensure transparency in relation to the activities of the petroleum sector and the Authority"*[80]

The NOC in line with above requirement of the law and the principle of Access to information enshrined in the Constitution of the Republic of Uganda[81] makes the model PSAs available to the public through its website.[82]

However one of the weaknesses of the Act in line with ensuring transparency, it has no specific provisions relating the penalties or consequences in the event of a failure to disclose the model PSA to the public and Parliament. In this context the consideration of the Parliament remains key given the advisory role it plays in developing and approving of the model PSAs.

Consequently the Government of Uganda and particularly the ministerial bodies concerned have taken advantage of this lacuna in the law to disregard the role of upholding the availability of these extractives agreements (PSAs) to the public. The constrained availability of PSA to the public impacts the Constitutional right of enhancing the accessibility to information.

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[78] Section 6(2)
[79] Section 6(4)
[80] Section 11(2d)
[81] Article 41(1)
[82] See https://www.unoc.co.ug/wp-content/uploads/2018/06/MPSA.pdf accessed 16th July, 2020.

Mindful of the above predicament, there is a high likelihood that interested parties might have to seek the indulgence of Courts as exemplified in the case of "***Charles Mwanguhya Mpagi and Izama Angelo v. Attorney General,[83] Misc. Cause No.751 of 2009"*** in which two journalists sought to be furnished with copies of PSAs made between the government of Uganda and various oil companies. Those oil companies involved were entrusted with the role of prospecting the exploitation of the oil resources in the country. However the presiding magistrate declined the applicant's request for disclosure of the PSAs on grounds of the applicants' failure to prove that their disclosure to the public would be used for public benefit only and not harm third party interests. In this regard the reference made to third parties was aimed at protecting of IOCs and Government.

The presiding Court declined making disclosure on grounds of contractual confidentiality clauses. This extrapolates the weakness underlying possible unbalances between notions of contractual confidentiality on one hand and the public right of access to information on the other hand.

For PSAs to functions in better forms, there is a need to devise measures to minimise the unbalance effects of the above conflict between commercial confidentiality and the citizenry right of access to information.[84]

In accordance with Section 4 of the Upstream Act, which provides for vesting of petroleum rights, the Act restates article 244 of the Constitution of the Republic of Uganda, which vests the entire property in, and the control of, petroleum in its natural condition in, on or under any land or waters in Uganda in the Government on behalf of the Republic of Uganda. The Act further states that

> *"for the avoidance of doubt, the Government of Uganda shall hold petroleum rights on behalf of and for the benefit of the people of Uganda."*[85]

It is therefore clear that these resources do not belong to government which makes public involvement paramount in ensuring that the government is held accountable by the public. Therefore non-disclosure of these PSAs increases the risks of mismanagement of oil and gas

[83] Charles Mwanguhya Mpagi and Izama Angelo v. Attorney General, Misc. Cause No.751 of 2009
[84] https://globalfreedomofexpression.columbia.edu/cases/charles-mwanguhya-mpagi-izama-angelo-v-attorney-general-miscellaneous-cause-no-751-200/ accessed 16th July, 2020
[85] Section 4(2) PEDP Act 2013

revenues, poor negotiation of PSAs as a result of corruption or incompetence in bargaining terms which may turn out to be inconsistent with the interests of the nation.

4.3 Conclusion

Given the fact that PSAs are contractual arrangements usually between an IOC from a more developed country and NOC usually of a developing country, they could be perceivably seen as key instruments for ensuring proper management of the oil and gas resources. That makes the proper drafting of terms and conditions that are included or negotiated when formulating these PSAs determines a vital determinant of the extent to which a host state and its people are likely to benefit from the exploration and development of oil and gas fields. In other wards the clearer and stricter the developing host state crafts the terms of a PSA, the more effective is such a model likely to be in as far as promoting and supporting locally or nationally beneficial outcomes from the oil and gas industry. Such stricter terms of the PSA model should be conceivably important in reducing the impacts of unconscionable bargains in as far as oil and gas contracts are concerned and should be able to protect the country's sovereignty.

However for such progress to be attained, it remains immensely important for the host states to bear it in their minds that the primary interests of these IOCs is to maximize the exploitation of natural resources and recover their incurred costs with profit. And since they have the technical, expert and financial muscle, they tend to have higher bargaining power compared to the host states and thus front contractual terms that are not in the interest of the host states. This trend of event is synonymous to how the contractual theory of unconscionable bargain extends its implicit application to poorly developed PSA models.

It is therefore important that host states put in place legal regimes that protect their interests and shield their sovereignty from international influence and interference.

The next chapter discusses the study conclusions and Recommendations.

CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

5.0 Introduction

This Chapter is comprised of conclusions that are drawn from findings and potentially useful recommendations to be considered when designing a new or amending the existing legal framework on PSA regimes. It further highlights the limitations to the study and finally concludes the study.

5.1 Discussion of conclusions

The presence of PSAs since their inception and adoption by countries like Indonesia which started using PSAs in oil and gas transactions in the early 1960s, PSAs have been one of the most widely adopted and often used as contracting regimes by developing countries in the oil and gas sector.

Developing countries like Uganda commonly lack financial, technical and human resources that are required for undertaking petroleum operations. In order for developing countries to tackle problems of inadequacy associated with exploring, exploiting, producing and developing resources from their oil fields, they contract IOCs.

The economies of less developed countries are dependent on these natural resources and therefore the major objectives of the host state are to maintain and retain ownership and control over these natural resources, generate revenue, promote and enhance economic growth as well as encourage foreign investment.

The extent to which these objectives are achieved is determined by the legal frameworks regulating the PSAs.

It is therefore key that the legal frameworks that regulate PSA regimes should be drafted effectively and in line with the host country's goals and objectives of the oil and gas policy and should target the economic rent of an oil and gas project.

It is also important that the legal frameworks meet the required international standards not only in protecting the sovereignty of the host state but also in encouraging the success of foreign investment in the sector.

5.2 Limitations of the Study

There were shortcomings and limitations that this research hardly had control about, some of which had influence on the methodology that was adopted, but did not necessarily influence the findings of the project.

These limitations included the following;

5.2.1 Inadequate time and funds

Conducting a legal research requires a lot of time and funds to facilitate the data collection process. This research was hampered partly limited time and funds.

5.2.2 Limited availability of literature, data about the topic under study

There is very limited literature and data on the topic under study especially on Ugandan context. Uganda legal scholars have barely picked interest in understanding how the subject of legal frameworks interacts, regulates and monitors actors or parties to the PSAs. This limited the researcher in accessing a lot of viable literature.

5.2.3 Confidentiality policy in oil and gas transactions

Given the politicised nature of the oil resource, some of information is inaccessible due to the absence of transparency especially in relation to certain PSAs documents detailing the records, participants and background of negotiations on oil and gas exploration and production. Most of the PSAs have a confidentiality clause which bars any of the parties to the contract from issuing or allowing access to information on PSAs to non-parties. This limited the researcher since current PSAs wouldn't be accessed in public domain.

5.3 Recommendations for Future Research

The recommendations that are put forward shall stem from the research findings contained in chapter four and are in pursuance of the goals laid out in law and other relevant policies.

Recommendation 1;

The Petroleum (Exploration, Development and Production) Act, 2013 is almost the only Act which is entrusted with regulating petroleum activities in Uganda. It also provides for the establishment of institutional and regulatory structures such as PAU and NOC[86] that are largely responsible for licencing of commercial entities in the oil and gas sector.

[86] Section 9 and 42, Petroleum (Exploration, Development and Production) Act, 2013

Under the Petroleum (Exploration, Development and Production) Act, 2013 the roles of the Minister tend to often interfere with those of established institutions. For example, under section 6 of the Act, the minister is required to draft a model PSA that is subjected to approval as set out in the Act.

The Energy Minister in Uganda is a public servant who can be transferred from one ministry to another at any time since the ministerial position is a political appointment. In most cases the Minister and the deployed members in the office are lacking the required expertise in drafting a competitive PSA in the oil and gas sector. In my view this function ought to have been placed under institutions such as the PAU or the NOC that have specialised experts capable of handling and dealing with petroleum activities.

It is therefore recommended that these roles and functions could be harmonised to realise the rationale for which institutional structures like the PAU and NOC that were established under the Petroleum (Exploration, Development and Production) Act, 2013. The research justifies that the Minister's roles ought to be mainly limited to supervisory duties rather than participation and regulation that remains within the scope of the PAU and NOC.

Recommendation 2;

There is need to review the Petroleum (Exploration, Development and Production) Act 2013 to correct the typing errors. For instance Section 3 of the Act provides for compliance with environment principles and it states that;

> *"…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*".[87]

However there is no law in Uganda known as the **National Environment Management Act,** since the current legislation is called the **National Environment Act.**[88]

This is a sign that the Act was enacted haphazardly without review to eliminate such errors which may be costly in the long run in case legal disputes arise out of the PSAs.

[87] Section 3, Petroleum (Exploration, Development and Production) Act, 2013
[88] National Environment Act cap 153 which has been repealed by the National Environment Act 2019

Recommendation 3;

According to the Petroleum (Exploration, development and Production) Act, 2013[89], the purpose of the Act is operationalising the National Oil and Gas Policy of Uganda by establishing an effective legal framework and supporting institutional structures to ensure that the exploration, development and production of petroleum resources of Uganda is carried out in a sustainable manner that guarantees optimum benefits for all Ugandans, both the present and future generations.[90]

This is key because this Act is remains one of the guiding laws in oil and gas operations of Uganda. However, neither does the Act nor the PSA model define the term "**Dispute"** in as far as petroleum activities are concerned. The purpose of parties participating in the oil and gas operations entering into a PSA is to clearly state their obligations so that both of the parties can protect interests from being affected in case of a default or a dispute arising out of the contractual relationship. The researcher finds it commendable that the term dispute should be defined to avoid misinterpretation legally.

This research therefore recommends that both the PSAs and the Acts should define the term "**Dispute"** and also shed some light on some of the lawfully permissible mechanisms of dispute settlement in the oil and gas operations.

Recommendation 4;

IOCs being the major funders and highest risk bearers in oil and gas operations, they tend to have a comparably higher bargaining power compared to the host states. It is therefore recommendable following from such a possibility that countries like Uganda, countries which are investing or exploiting petroleum resources for the first time should prioritise in the training of experts in not only the drafting of international contracts but also the negotiating of such contracts. The government should also embark on giving the technical staff in the oil and gas sector hands-on training. An arrangement that might be achievable through making collaborative partnerships with popular IOCs like TOTAL, TULLOW, and CNOOC among others that are currently engaged in the exploration and development of Uganda's petroleum resources.

[89] Section 1
[90] Section 1, Petroleum (Exploration, Development and Production) Act, 2013

And in the case of Uganda this will promote the local content policy[91] and uphold the national local content bill.[92]

Local content in the oil and gas sector focuses on citizen participation in the oil and gas activities and this can be done through citizenry empowerment through training, capacity building, technology transfer, employment and service provision. In countries like Uganda where the industry is still growing as earlier noted it is prudent for governments to embark on giving the technical staff in the oil and gas sector hands-on training and exert more efforts to ensure that citizens competitively take part in the oil and gas sector.

Recommendation 5;

One of the findings from this research is either the limited or the complete non-disclosure of information for public benefit. It is therefore a recommendation that players and regulators in the petroleum sector should strictly adhere to the laws that oblige them to ensure public accessibility of oil and gas information. This would minimise or even avoid a multiplicity of legal cases.

Recommendation 6;

The study further recommends that more investigations and studies are still needed particularly on the fiscal arrangements. Such studies are instrumentally crucial in determining the most relevant arrangements for developing countries to avoid blunders that could lead to disputes in the oil and gas sector, some of which disputes maybe disadvantageous of the country and its citizens.

5.4 Conclusion

In conclusion, the conclusions, findings and recommendations discussed herein should guide and inform any legislative framework on contractual engagements in the oil and gas sector. The usefulness of the above findings and recommendations lies in urgency of protecting the interests of the country and encouraging foreign investment in the petroleum sector while minimising the prevalence of legal disputes in the oil and gas sector.

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[91] National Content Policy For the Petroleum subsector in Uganda; http://pau.go.ug/uploads/NATIONAL_LOCAL_CONTENT_POLICY_FOR_PETROLEUM_IN_UGANDA.pdf accessed 16th July, 2020

[92] https://ulii.org/ug/legislation/bill/2019/no-1, https://www.softpower.ug/cabinet-approves-local-content-policy-for-oil-and-gas/ accessed 16th July, 2020

Therefore, as recommended above, competences such as good negotiating skills, experience of legal drafting skills, practical knowledge and good counsel are important in enhancing the process of formulating and adopting a beneficial PSA model.

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