TOPIC

Petroleum Resources Taxation Disputes:

A critical review of the tax dispute resolution mechanisms in Uganda's oil sector.

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REG. NO: RJ20M23/025

A DISSERTATION

SUBMITTED TO THE FACULTY OF LAW IN PARTIAL FULFILMENT OF THE REQUIREMENT FOR THE AWARD OF A MASTER OF LAWS OF OIL AND GAS INSTITUTE OF PETROLEUM STUDIES KAMPALA IN AFFILIATION TO UCU.

AUGUST 2021

KAMPALA, UGANDA

DECLARATION

I, PETER KAUMA, do hereby declare that this dissertation is my original 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 "Petroleum **Resources Taxation Disputes: A critical review of the tax dispute resolution mechanisms in Uganda's oil sector**" has been done under my supervision and now it is ready for submission.

Signature……
Associate Professor George W.K.L. Kasozi

Date……

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LIST OF ACRONYMS

1. AAA- American Arbitration Association,
2. ADR- ALTERNATIVE DISPUTE RESOLUTION
3. BEPS- Base Erosion and Profit Shifting project
4. EACC- The Euro-Arab Chambers of Commerce
5. HMRC- Her Majesty's Revenue & Customs
6. ICC-INTERNATIONAL CHAMBER OF COMMERCE
7. ICSID-International Centre For Settlement of Investment Disputes
8. IOC- INTERNATIONAL OIL COMPANY
9. LCIA- The London Court of International Arbitration
10. MAP- MUTUAL AGREEMENT PROCEDURE
11. NAI- The Netherlands Arbitration Institute
12. OECD- ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT
13. PSA- PRODUCTION SHARING AGREEMENT
14. RRA- Rwanda Revenue Authority
15. SCC- The Stockholm Chamber of Commerce
16. TAT-TAX APPEALS TRIBUNAL
17. UNCITRAL
18. URA-UGANDA REVENUE AUTHORITY

ABSTRACT

Following the discovery of commercial reserves of oil and gas in Uganda's Albertine Graben, the Government of Uganda has taken various steps to progress development and production. One of the key issues that has already presented is disputes arising out of taxation in the oil and gas sector. Some delays in the development and production schedule have indeed been attributed to these disputes. If Uganda's oil and gas is to be exploited optimally for the benefit of the country, taxation disputes have to be managed well. This calls for the need to have robust dispute resolution mechanisms in place. Given that the interests of the Government and those of International Oil Companies (IOCs) are usually at odds in petroleum resource taxation matters, a balance has to be struck. The thesis reviews the institutions and fora available as well as the different procedures that can be undertaken to handle and resolve tax disputes. It examines the challenges, constraints and setbacks that need to be addressed to ensure fairness and justice in tax administration. In light of the divergent Government and IOC interests, the paper applies the Sovereignty Theory on the one hand and the Global Economy Theory on the other and takes the view that to attract investment, a global approach ought to be adopted. The paper examines tax dispute resolution mechanisms in various other countries and makes several recommendations on how the tax dispute resolution mechanisms in Uganda can be improved.

CHAPTER ONE: INTRODUCTION

Title: Petroleum Resources Taxation Disputes:

A critical review of the tax dispute resolution mechanisms in Uganda's oil sector.

1.1 INTRODUCTION AND BACKGROUND

Any discovery of commercial reserves of oil is certain to generate excitement followed by debate about good or bad management of the discovered reserves. There was a lot of excitement about Uganda's oil from 2006 when it was confirmed that the country had between 100-300 million barrels of oil reserves in the Albertine Graben.[1] Since then, Uganda has attracted several International Oil Companies (IOCs) such as Heritage, Tullow Oil, CNOOC and Total with the hope of expanding their business in the petroleum business. The IOCs have set up shop in Uganda, hired employees and made other investments that are essential to the oil extraction. On its part, the government has invested in training personnel in various departments, enacting laws, and policies to prepare Uganda for exploration, development, marketing, and taxation of the petroleum sector. Whereas the oil and gas sector was reported to have experienced a boom between 2004 and 2014,[2] Uganda did not enjoy its benefits as it isyet to get its 'first oil'.[3] It has been reported that the seemingly perpetual delay has been caused

[1] Associated Press, 'Uganda Announces Oil discovery' 9 October 2006 Uganda announces oil discovery (iol.co.za) accessed 27 March 2020.
[2] Luke Patey, 'Oil, Risk and Regional Politics in East Africa' 7 (2020) Danish Institute for International Studies 1182
[3] Daniel Abowe 'Will Uganda produce its 'First Oil' by 2023?' 18 May 2020 Will Uganda produce first oil by 2023? (observer.ug) accessed 28 March 2020

by *inter-alia* some disagreements on the tax system and disputes over strategies of field development.[4]

The petroleum sector is no stranger to disputes- much like any other lucrative sector. However, there are special circumstances that make it more prone to disputes. Disputes in the sector can be classified into 5 (five) categories: disputes between the government and IOCs,[5] between IOCs and their home countries; among the IOCs or their sub-contractors; between the IOCs and the community or individuals and last but not least, international disputes between countries.[6] I will elaborate on the categories in the following paragraphs.

In the first category, examples of such disputes include tax disputes and contractual breaches for instance where an IOC breaches provisions of the PSA. The disputes between IOCs and their home countries are usually tax disputes. These may arise where the home country disagrees with the tax treatment of a transaction in the investment country. Such disputes are likely to arise under the proposed Pillar 2 of the Base Erosion and Profit Shifting project (BEPS Project) 2.0 which requires that income of Multinational companies (MNCs) is subjected to a globally agreed minimum rate.[7] Failing this, the home country is required to increase the tax charged to the MNC in its jurisdiction to ensure that globally agreed effective rate of taxation is achieved.[8] While the dispute may arise out of the jurisdiction in which the investment is made, it may inevitably affect the business in the source country. The third category usually

[4] Elias Biryabarema, 'Uganda reached deal on tax dispute, paves way for Tullow stake sale' Reuters 2 December 2019
[5] Karen Mills, Mirza A. Karim, 'Disputes in the Oil and gas sector: Indonesia' 3 (2010) The Journal of World Energy Law and Business, p.44
[6] Ibid
[7] OECD 'Public Consultation Document, Global Anti-Base Erosion Proposal ("Globe") (Pillar Two) Tax Challenges Arising from the Digitalisation of the economy'(2019) 6
[8] Ibid

involves contractual breaches between joint venture partners for example through the misallocation of funds.

Disputes between the community or individuals and IOCs usually involve violation of environmental standards and breach of agreements concluded between communities and IOCs. A good example of disputes involving communities has arisen in Canada where First nations have sued IOCs for violation of their rights to culture and a safe environment. Individuals may also bring suits for violation of rights and torts such as personal injury. Public interest litigation in which individuals seek more positive participation of IOCs in community affairs through increased indirect taxation may also feature in this category. The last category of disputes is the international disputes. These are between countries and are common where the oil reserves straddle territorial boundaries for example in the Albertine Graben where the oil is shared between Uganda and the Democratic Republic of Congo.

The classification of the categories is important because the means used to resolve one may not be applicable to the other. For example, domestic disputes may be limited to local courts while international disputes can be entertained in international courts and tribunals such as the International Court of Justice.

The mechanisms in place for dispute settlement with a specific focus on tax dispute settlement must be investigated as they are key to success of the sector. The ongoing Final Investment Decision (FID) process makes this even more pressing.

Comparatively, many other jurisdictions have developed and applied mechanisms in oil and gas tax dispute settlement from which Uganda can learn. Other jurisdictions that have been

producing oil and gas for longer periods have tested and tried various dispute settlement mechanisms. Some of these mechanisms have worked well while others have not. As a late bloomer in the sector, Uganda has the benefit of benchmarking against these jurisdictions with a view to adopting the best practices.

1.2 STATEMENT OF THE PROBLEM

For several years now Uganda is yet to commercially develop her oil. Challenges with the tax system have been highlighted as some of the leading causes of the delay. Indeed, there have been several cases in local and foreign courts that have determined disputes between the URA and IOCs and those between IOCs that relate to taxes charged in Uganda. Uganda's laws on petroleum taxation have been amended several times.[9] These changes are a breeding ground for uncertainty that has led and will lead to disputes. There is therefore a need to streamline the dispute resolution mechanisms employed in the oil and gas sector.

1.3 GENERAL OBJECTIVE OF THIS STUDY

The major objective of this study is to assess the disputes resolution mechanisms in place to address tax disputes in the oil and gas sector.

1.4 SPECIFIC OBJECTIVES OF THE STUDY

[9] Cristal Advocates, 'Troublesome Taxation: Is Uganda's Oil Stalling Sector Development?' (August 2019) Cristal Knowledge series

The Specific objectives are:

1.1. To examine the various modes of resolving disputes in the oil and gas sector.
1.2. To examine the bottlenecks that are faced by the government and IOCs in the resolving of tax disputes in the oil and gas sector.
1.3. To suggest recommendations that can improve the current system of tax dispute resolution in the oil and gas sector.

1.5 RESEARCH QUESTIONS

1.1. What dispute resolution mechanisms are available to handle tax disputes in the oil and gas sector?
1.2. What challenges does the dispute resolution regime for tax disputes pose?
1.3. What can Uganda learn from other countries with advanced oil and gas sectors?
1.4. What is the best way forward to ensure a robust dispute resolution regime for oil tax disputes?

1.6 SIGNIFICANCE OF THE STUDY

This study is primarily for academic purposes, as one of the requirements for the award of a Master of Laws degree in Oil and Gas from the Uganda Christian University. However, it is also relevant for non-academic reasons as explained below.

The importance of the oil and gas sector cannot be understated. The government has already gleaned some of the benefits in terms of revenue. The Albertine Graben has seen infrastructural development that did not exist prior to the oil discovery. Given its centrality in Uganda's

economy, it is pertinent that the country has a robust legal and institutional framework for the resolution of tax disputes which are common in the sector.

The research will be useful to legislators, the judiciary, officials of the URA, policy makers in the Ministry of Finance, Planning and Economic Development, tax advisors, academia, and the public in a multitude of ways:

The findings can help legislators to identify the shortfalls created by Ugandan tax laws and policies and suggest improvements to close the gaps in tax dispute resolution in the oil and gas sector.

The research will benefit policy makers in the URA, Ministry of Finance, Planning and Economic Development and the Ministry of Energy and Mineral Development and related government bodies in drafting policies, negotiating contracts with IOCs and coming up with best practices for the oil and gas sector for purposes of optimizing tax revenue.

The judiciary, specifically the courts of law and tribunals, stands to benefit from the research in form of the recommendations that can be implemented in the court system to improve the resolution of oil and gas disputes and ensure more efficient dispute resolution mechanisms.

The research will contribute to the general body of knowledge that can be drawn upon by scholars, researchers, and international bodies in relation to dispute resolution in the natural resources sector. It will further help scholars and tax experts to better understand Uganda's fiscal regime and assist all stakeholders in the taxation system to come up with the most appropriate tax regime that blends with Uganda's peculiar circumstances.

The study will also improve this researcher's knowledge and practice in the area of resolution of petroleum tax disputes.

1.7 SCOPE OF THE STUDY

The study will cover the legal framework for resolution of tax disputes in Uganda. The research will focus on the challenges surrounding the current framework for the resolution of tax disputes. Comparison will be made to Uganda's electricity disputes resolution mechanisms which present learning points for Uganda's petroleum sector. In making analysis, the study will use some examples from other countries both for general matters relating to tax and issues that are specific to the oil and gas industry. The study considers the literature available on the subject, both primary and secondary.

The interviews will be carried out in Kampala, involving URA officials that are familiar with petroleum tax disputes and lawyers that have handled these disputes. Officers working with the Tax Appeals Tribunal will also be interviewed.

1.8 THEORETICAL FRAMEWORK

The oil and gas industry usually involves multinational companies with business empires across countries with varying tax regimes. Decisions and business undertakings in a subsidiaryin one country may affect business in another. Similarly, the international tax regime made upof a network of double tax agreements usually comes into play. As a result, this study is predicated on two related theories: fiscal sovereignty and the global economy.

1.8.1 The Fiscal Sovereignty Theory

The principle of sovereignty has been held as a fundamental to international law and the existence of states.[10] A single definition of what sovereignty means is difficult to come by.[11] Several authors have defined sovereignty. For example, Jackson defines sovereignty as 'a bundle of rights and competencies which go to make up the nation state, as a consequence of which bit can be equated to statehood.'[12] The bundle of rights includes the freedom to regulate the activities of the executive, legislature and judiciary.[13] Other authors like Diane Ring define sovereignty by referring to what they consider as core elements of the principle: people, territory and government.[14] In a nutshell, sovereignty is the power of a state to exist as such within a specified territory coupled with authority over the people within the territory. By this theory, states have the authority to adopt tax laws and regulations as they deem fit. It follows that states can put in place dispute resolution mechanisms that suit their territories.

Sovereignty can be classified into 3(three) categories: Domestic, Westphalian and international legal sovereignty.[15] Domestic sovereignty has been defined to mean the authority of the government and structures within a state's territory.[16] Westphalian sovereignty essentially refers to the non-intervention policy which requires states to stay away from any interference in another state's affairs.[17] Lastly, international legal sovereignty refers to the place of a single state within the global community- whether a country is recognized by other states and

[10] Sjoerd Douma, 'Optimisation of Tax Sovereignty and Free Movement' 2011 IBFD p. 78
[11] Diane Ring, 'Democracy, Sovereignty and Tax Competition: The Role of Tax Sovereignty in Shaping Tax Competition' (2009) 9 Fla Tax Rev 555, 557
[12] John H. Jackson, Sovereignty, the WTO and Changing Fundamental of International Law (Cambridge University Press 2006) as cited in Sjooerd Douma p.79
[13] Ramon J. Jeffery, 'The Impact of State Sovereignty on Global Tax and International Taxation' Kluwer Law International 1999 as cited in Sjoerd
[14] Diane Ring, 'What is at stake in the Sovereignty Debate?: International Tax and the Nation State' (2008) 49 Virginia Journal of International Law 160
[15] Peter Dietsch, 'Rethinking sovereignty in international fiscal policy' (2011) 37 Review of International Studies 2107, 2109
[16] Ibid
[17] Ibid

international bodies like the United Nations.[18] For purposes of this thesis, the domestic and Westphalian classifications will be considered.

Theoretically, sovereignty makes the presumption that there is no authority higher than the state- whether powerful foreign states or supranational bodies.[19] However, sovereignty is not absolute as it is limited by several factors. Domestically, a state's authority may be limited by powerful actors within its territory for example wealthy taxpayers and the citizenry through civic actions like protests.[20] Even without pressure, states have the desire to attract Multinational Enterprises and often make changes to their tax systems for that purpose. This has mainly been exemplified through lowering tax rates, a practice that has stirred the global race to the bottom. On the international arena, increased globalization means that states cannot act without due regard to other countries. The fiscal policies taken by one country may have far reaching effects in other countries.[21] The tax regime of one state may affect the tax base in another. For this reason, a state's authority to tax may be constrained by tax rules that have been developed internationally. For instance, the international tax regime of many states is modelled after the OECD Model Tax Convention and the UN Model Tax Convention between Developing and Developed Countries.

1.8.2 The Global Economy Theory

[18] Ibid
[19] Sjoerd Douma, 'Optimisation of Tax Sovereignty and Free Movement' 2011 IBFD p.80
[20] Diane Ring, 'Democracy, Sovereignty and Tax Competition' p.559
[21] Assaf Razin and Joel Slemrod, 'Taxation in the Global Economy' (National Bureau of Economic Research 1990) 1

The global economy theory, as proposed by Gereffi propounds the view that organisation of economies has moved away from the acts of single countries and is now centered around actors outside the state.[22] These include Multinational enterprises and supranational organisations like the United Nations and the International Monetary Fund. The supranational bodies set the rules that guide global interactions while actions of multinationals may influence states to make laws.

Gereffi argues that globalization has created the global economy which is a playground in which countries compete for different products.[23] It has been argued that the origin of the global economy can be traced back to the long-distance trade from 1450–1640.[24] This period saw chartered companies move goods and human beings in form of slaves from one continentto another.[25] Since then, interaction between states and businesses has expanded from exchangeof simple goods like salt to more sophisticated ones such as computers. The present-day digitalage has exacerbated these international interactions leading to what is now called 'the global village'.

To have a competitive advantage in the global market, a country's strategies must include systems that make it easy for people to transact. Such systems include the settlement of disputes that arise as multinationals and citizens conduct their businesses. This is even more important for the discussion in this thesis because globalization has increased the challenges that countries face when levying and collecting taxes.[26] Such challenges include aggressive tax planning

[22] Gary Gereffi, 'The Global Economy: Organization, Governance, and Development' in Neil J Smelser and Richard Swedberg (eds) *The Handbook of Economic Sociology* (Princeton University Press 2005) p. 160
[23] Ibid
[24] Ibid
[25] Ibid
[26] Peggy B. Musgrave, 'Combining Fiscal Sovereignty and Coordination: National Taxation in a Globalising World' in Inge Kaul (ed) *The New Public Finance* (Oxford University Press 2006) p. 168

which allows multinationals to shift income from one country to another without paying taxes. States therefore seek to balance the need to participate in the global economy controlled by multinationals with the ever present need to collect sufficient taxes from such international businesses. In my opinion, this balancing act forces countries to cede aspects of their fiscal sovereignty to enable them to participate in the global market hence the relationship between the two theories.

1.9 SUMMARY OF THE CHAPTERS

This research paper shall be comprised of five (5) chapters.

Chapter one

This chapter contains the introduction to the study. The introduction gives the context within which the research is made. It gives a brief background the oil and gas sector in Uganda and the disputes that have arisen since the discovery of oil in 2006. Chapter one states the statement of the problem that the study seeks to address as well as the objectives of, and significance of this paper. It further consists of research questions that are to be answered as well as the significance of the study.

Chapter two

The chapter consists of literature review which is divided into a general overview of the oil and gas disputes and specific aspects of petroleum dispute resolution. Positions in select countries are also be reviewed.

Chapter three

In this chapter, I set out the methodology used in this study.

Chapter four

The fourth chapter contains the results and findings of the study. I examine the dispute resolution mechanisms in detail. I also examine the challenges faced by both IOCs and government departments such as the URA and the courts in the resolution of tax disputes in the petroleum sector. Results from interviews with officers of the Tax Appeals Tribunal, the URA and lawyers that have represented parties in oil and gas disputes and representatives of oil companies are presented and discussed.

Chapter Five

In the last chapter, I present the recommendations that can be adopted to improve the tax system in Uganda in relation to disputes in the oil and gas sector. This chapter also contains the conclusions that can be drawn from the study.

CHAPTER TWO: LITERATURE REVIEW

2.1 Introduction

The literature review in this chapter looks at the general overview and principles. The various mechanisms of dispute resolution are also reviewed looking at both litigation and non-litigation mechanisms. We also look at some examples of dispute resolution mechanisms in several countries.

2.2 General overview and principles

2.2.1 The need for extensive knowledge of the sector

The entry point to any successful dispute resolution is a deep understanding of a particular sector. Gordon et. al (editors) argue that understanding of the technical aspects of the oil and gas industry is essential to dispute management and settlement.[27] They argue that parties that do not have much familiarity with the industry are likely to make it difficult to resolve disputes.[28] For instance advocates that are not familiar with the sector may rush to court instead of using other dispute resolution mechanisms. I agree entirely with this position. Given the fact that Uganda is fairly new to this area, technical expertise may be limited. There is also a likelihood of the knowledge available being theoretical. In this study, I will argue that Uganda has only had active dealings in the petroleum sector for a few years which is likely to affect the

[27] Greg Gordon, et al. eds *Oil and Gas Law: Current Practice and Emerging Trends* 2nd ed (Dundee University Press 2011) 575

[28] Greg Gordon n. 6

handling of tax disputes in the oil and gas sector.[29] However, it is expected that experience will be built as officials handle more transactions and tax disputes in the sector.

2.2.2 Nature of oil and gas sector

Martin argues that the nature of the sector and its related projects such as construction significantly increases the risk of disputes in any multinational project.[30] For instance, oil and gas projects usually have long exploration and production periods.[31] In such projects, there is potential for many changes that were not anticipated at the time of signing a contract, which increases the likelihood of disputes. This knowledge should inform state actors and IOCs about the dispute resolution strategies and mechanisms to be adopted both at the time of negotiation and when disputes arise.

Manniruzaman[32] reviews dispute resolution in the oil and gas industry from the perspective of resource nationalism. He posits that in various geopolitical contexts and situations, resource nationalism has tended to assert the nation-state's sovereign authority over the activities of IOCs. He says that the divesting of IOCs of their properties in several countries like in Latin America and Russia due to resource nationalism is a big risk factor and leads to disputes between IOCs and their host states. He identifies various means, legal and extra-legal of dispute management in which such risks can be tackled.

Maniruzzaman further identifies resource nationalism as a cyclical phenomenon, the intensity of which is felt more acutely at the upper end of the resource cycle than at the lower end when

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[29] Doris Akol, 'Case Study on Tax Dispute: HOGL and GoU' (2016) IMF Tax Seminar 10 http://www.imf.org/external/np/seminars/eng/2016/taxation/pdf/da.pdf Accessed 27 March 2021

[30] Timothy. A. Martin, 'Dispute Resolution in the International Energy Sector: An overview' (2011) 4 The Journal of World Energy Law 332

[31] Wilson Bahati Kazi and Barbra Beyeza, 'Getting a Good Deal? An analysis of Uganda's Oil Fiscal regime' December 2018 CPRD Working Paper No. 64, 4

[32] AFM Maniruzzaman, 'The issue of Resource Nationalism: Risk Engineering and Dispute Management in the Oil and Gas Industry' (2009) 5 Texas Journal of Oil, Gas and Energy Law 79

it begins. He talks about the resource nationalism of the 1970s and 1980s which started in the early 1970s with the Arab oil embargo when the Arab oil-producing countries reduced exports and raised prices in retaliation for Western support of Israel in the Yom Kippur War, causing a ripple-effect across oil-rich countries.

The article identifies another round of resource nationalism from 2003 to 2008 in oil-rich states which was triggered by amongst other factors, the high demand for energy in emerging economies like China and India and prolonged conflicts between the West and the Middle Eastern countries like Iraq and Iran. All this led to the skyrocketing of energy prices, and enabled resource-rich countries to use energy resources as a strategic weapon. He notes that the fallout of these events was felt across the globe and led to a reignited passion for resource nationalism in countries like Russia, Venezuela, Algeria, Libya, Bolivia, Ecuador, Nigeria, Kazakhstan, and Indonesia.[33]

It is stated in the article that when resource nationalism is fuelled by high energy prices, the state's asserting of control over the activities of IOCs may lead to various disputes between the state and IOCs. And that the state's actions could be tantamount to a breach of contractual rights or creeping expropriation or nationalization. He finds these to be very common disputes. He underscores the positivistic notion of the rule of law as key in protecting foreign investments under the circumstances.[34] He notes that 'protective regime' in the host state's legislation is key to dispute management. Citing Walde he defines the function of law as 'one of 'smoothing'

[33] AFM Maniruzzaman, 'The issue of Resource Nationalism: Risk Engineering and Dispute Management in the Oil and Gas Industry' (2009) 5 Texas Journal of Oil, Gas and Energy Law 79, p.81

[34] AFM Maniruzzaman, 'The issue of Resource Nationalism: Risk Engineering and Dispute Management in the Oil and Gas Industry' (2009) 5 Texas Journal of Oil, Gas and Energy Law 86,p.87

the spikes of volatility between the investor and the host state at the top end of the economic and political cycle.'[35]

The classic example is given of the dispute involving ConocoPhillips, ExxonMobil Corp and the Venezuelan Government in which the 'rule of law' argument was invoked leading to a court award to freeze up to $12 billion of Venezuela's global assets.

Maniruzzaman goes on to state that the provision for an international dispute settlement mechanism such as arbitration or mediation is a safeguard against the apprehension of manipulation of legal systems against IOCs' interests. It can also be a source of stability for the relationship between the parties and may be even more important than the governing law of the contract alone, in the sense that an international arbitral tribunal might interpret the chosen host state's law in light of international law on the basis of various international elements of the contract concerned, and thus could come up with an 'acceptable decision' in the event of a dispute.

In the article Maniruzzaman advises that as a means of IOCs averting legal risk, they should incorporate international law or such other non-national legal systems, rules, and principles as the governing law of their contracts with host states. He notes that these clauses must be drafted carefully.

Maniruzzaman advocates for the progressive taxation/profit-sharing model in taxation of oil and gas resources as one that minimises disputes. The progressive taxation system, he says,

[35] Thomas W. Wälde, 'Renegotiating Acquired Rights in the Oil and Gas Industries: Industry and Political Cycles Meet the Rule of Law', (2008) 1 J. WORLD ENERGY L. & BUS. 55, p.86 as cited in AFM Maniruzzaman, 'The issue of Resource Nationalism: Risk Engineering and Dispute Management in the Oil and Gas Industry' (2009) 5 Texas Journal of Oil, Gas and Energy Law p.90

operates as a built-in fiscal mechanism without needing the parties to a petroleum contract to renegotiate a deal. This saves the time and troubles of renegotiations and avoids disputes.[36]

The article suggests that there need to be mechanisms in place for early detection of grievances or disputes as well as prevention mechanisms. In this respect, IOCs need to be proactive and understand the cultural milieu in which they operate. Early detection mechanisms help to manage situations and then efforts are made to resolve any problem amicably between the parties before it escalates into a dispute.

The paper is important in understanding the nature of the oil resource and the conflicts that it attracts from the resource nationalism perspective. As such the findings of this paper are important to this research.

However, the paper is limited to the perspective of the IOCs or foreign investors and is only concerned with the means at their disposal, He does not address treaty aspects and contends that these are in a different sphere and are interstate matters.

2.2.3 Antilegalistic approaches in tax treaties and interstate matters

With regard to intergovernmental tax disputes, Green[37] investigates antilegalistic approaches to resolving disputes between governments and compares international tax and trade regimes. He notes that tax treaties and trade agreements employ radically different methods of settling intergovernmental disputes. He notes that most bilateral income tax treaties rely exclusively on intergovernmental consultation and negotiation but there is no assurance that these processes

[36] AFM Maniruzzaman, 'The issue of Resource Nationalism: Risk Engineering and Dispute Management in the Oil and Gas Industry' (2009) 5 Texas Journal of Oil, Gas and Energy Law p.98

[37] Robert A. Green, 'Antilegalistic Approaches to Resolving Disputes Between Governments: A Comparison of the International Tax and Trade Regimes' (1998) 23 Yale Journal of International Law 79-137

will produce a resolution. He dismisses the traditional academic position that emphasizes disparity between tax treaties and trade agreements and notes that both have the same underlying goal of facilitating international trade and investment. He draws upon analytical methods developed by international relations theorists to view intergovernmental dispute settlement systems as devices for facilitating international cooperation by changing the political context in which sovereign governments make self-interested decisions.[38]

The article analyses the dispute settlement mechanisms in tax treaties and finds that in most treaties, negotiations and consultations form the main basis for dispute resolution. He notes the nascent trend towards supplementing the dispute resolution mechanisms with voluntary binding arbitration. He notes that in the case of the United States, tax treaty dispute settlement mechanisms are not likely to resolve disputes that raise policy-level conflicts between domestic tax laws and tax treaty obligations. Such disputes are likely to be resolved through diplomatic channels.

Green is of the view that employing less confrontational and more flexible disputes settlement procedures and using international fora such as the OECD for interpreting treaties and monitoring countries' practices are likely to be more suitable means. On the other hand, he notes that the use of confrontational and adversarial processes will undermine relationships and may lead to conspicuous cases of non-compliance. He concludes that a legalistic dispute settlement system is not an ideal model for the resolution of intergovernmental income tax disputes.[39]

[38] Robert A. Green, 'Antilegalistic Approaches to Resolving Disputes Between Governments: A Comparison of the International Tax and Trade Regimes' (1998) 23 Yale Journal of International Law 80

[39] Robert A. Green, 'Antilegalistic Approaches to Resolving Disputes Between Governments: A Comparison of the International Tax and Trade Regimes' (1998) 23 Yale Journal of International Law 139

Green's study above is limited to intergovernmental tax and trade disputes and reviews matters from the context of legal provisions in the United States of America where treaty provisions do not take precedence over domestic law provisions, unlike in Uganda where treaty provisionstake precedence over domestic law provisions. As such a more specific study that would review Uganda's specific legal provisions is necessary.

2.2.4 The principle of non-retroactivity

Vanistendael propounds the principle of non-retroactivity as one of the core elements and limitations on a country's power to make tax laws and policies.[40] Under this, states are urged not to pass tax laws that affect transactions that were concluded at the time the laws are made.[41] This argument was raised in the Heritage Oil case against the Government of Uganda case where the IOC argued that capital gains tax (CGT) was not chargeable on the sale of its interest in oil blocks because CGT in the petroleum tax regime was only introduced after the Production Sharing Agreement had been signed.[42] This argument did not hold as the court found that the tax was due to the government of Uganda. I agree with Vanistendael to the extent that certainty of the relevant tax regime is of paramount importance to investors at the time of making decisions.

Furthermore, fairness and certainty are some of the canons of taxation that must be given due consideration in the making of tax laws and policies.[43] However, the non-retroactivity principle explained above must be construed carefully in a country that is new to a particular sector, in

[40] Frans Vanistendael, 'Legal Framework for Taxation' in Victor Thuronyi, ed *Tax Law Design and Drafting* (1996) International Monetary Fund 24
[41] Ibid
[42] Terrell G. Manyak, 'Oil Governance in Uganda' (2015) 5 Journal of Public Administration and Governance 40, p.50
[43] Ibid

Uganda's case, the oil and gas industry. In this study, I argue that there is a high level of information asymmetry between governments dealing with a new sector on one hand and IOCs that have a wealth of experience.[44] Therefore while the principle of non-retroactivity of tax laws must be respected, the interpretation and application of tax laws and regulations should take into consideration the level of understanding and knowledge available to policy makers and legislators at the time of making the tax laws and policies.

2.2.5 Constraints in Uganda's petroleum tax regime

Cristal Advocates go to great lengths to discuss the constraints in Uganda's oil and gas taxation regime.[45] The authors rightly posit that the government of Uganda and IOCs has failed to agree on tax issues for many years.[46] The tax disputes that have been handled in both local and foreign courts are evidence of this. The authors highlight the capping of recovery on cost oil as one of the fundamental mistakes in Uganda's petroleum taxation regime. The capping of cost oil was introduced in 2010, removed in 2015, only to be returned in the 2017 amendment to the Income Tax Act.[47] Another issue that the authors discuss is ring-fencing. The authors admit that ring-fencing is a common practice in the oil and gas industry although they argue that caution should be taken as it discourages further activities in the sector. In this study, I will show that Uganda- as a new entrant into the oil and gas industry cannot be faulted for adopting best practices that are considered normal world-over.

[44] Wilson Bahati Kazi and Barbra Beyeza, 'Getting a Good Deal? An analysis of Uganda's Oil Fiscal regime' December 2018 CPRD Working Paper No. 64, 4

[45] Cristal Advocates, 'Troublesome Taxation: Is Uganda's Oil Stalling Sector Development?' (August 2019) Cristal Knowledge series

[46] Ibid 2

[47] Ibid 2-5

Cristal Advocates make recommendations that could be implemented to improve the taxation regime in Uganda. These include eliminating capping deductibility of tax to cost oil and exempting some PSA interests from tax.[48] The suggestions apply to the technical aspects of business in the oil and gas sector. However, the authors do not give any recommendations that are specific to improving the dispute resolution mechanisms in Uganda. While a perfect tax system is only illusory and tax disputes will always arise, more so in a capital-intensive sector like the petroleum industry,[49] I will give recommendations aimed at improving the mechanisms for resolving tax disputes in the oil and gas sector.

Sserunjogi et al have a lengthy discussion on litigation and increasing domestic revenue collections in Uganda.[50] They argue that Uganda's unstable tax regime is one of the major causes of income and Value Added Tax (VAT) related disputes. I agree with this position. Nonetheless, I am of the view that constant changes in a system are inevitable given the need to adapt to fast-changing circumstances. Some authors like Avi-Yonah opine that multinational enterprises are most likely to manipulate a tax system to suit their interests.[51]

A tax system that does not or rarely changes for the sake of stability leaves a lot of room for this manipulation. As taxpayers continually make advancements in their business models - many of which aim to mitigate tax liability, it is important for the tax laws to keep up with the changes. As night follows day, tax laws and policies ought to change regularly to keep up with the ever-changing trends. In this study, I will show that regular changes are not special to

[48] Ibid 6

[49] Wilson Bahati Kazi and Barbra Beyeza, 'Getting a Good Deal? An analysis of Uganda's Oil Fiscal regime' December 2018 CPRD Working Paper No. 64, 4

[50] Sserunjogi Brian and Paul Corti Lakuma, 'Court Actions and Boosting Domestic Revenue Mobilisation in Uganda' (March 2019) EPRC Research Series No. 146, 1

[51] Reuven S. Avi-Yonah, 'National Regulation of Multinational Enterprises: An Essay on Comity, Extraterritoriality and Harmonization' (2003) 42 Columbia Journal of Transnational law, 6

Uganda as they are also done in many other countries- if not all, whenever the need arises. However, there is need to draw a line between changes that are absolutely necessary and those that may bring about uncertainty and as such may be overlooked in order to foster a good investment climate without affecting revenue mobilization efforts.

2.3 Dispute Resolution Mechanisms

2.3.1The need for Consensus over dispute resolution systems

According to Gordon et. al., risk management and building of consensus is very important in the handling of disputes.[52] This is re-echoed by Maniruzzaman who presents the view that actors in the oil and gas sector ought to pay attention to their dispute resolution management systems.[53] This entails agreements about how possible disputes will be handled even before the dispute.[54] At the time of negotiating terms of a transaction, the dispute resolution mechanism ought to be agreed upon. Specialists in dispute resolution in the field are therefore an integral part of a negotiation team.[55]

Parties should be aware of the merits and demerits of available modes of solving disagreements which will inform their choice of dispute resolution mechanisms even before the dispute arises for example, the choice between court processes and arbitration.[56] I agree entirely with this

[52] Greg Gordon p. 575
[53] AFM Maniruzzaman, 'The issue of Resource Nationalism: Risk Engineering and Dispute Management in the Oil and Gas Industry' (2009) 5 Texas Journal of Oil and Gas and Energy Law 79, p.90
[54] John P. Bowman, 'Dispute Resolution Planning for the Oil and Gas Industry' (2001) 16 (Issue 2) ICSID Review -Foreign Investment Law Journal 332
[55] Ibid P. 334
[56] Ibid p.335

submission. In this study, I argue that agreed upon dispute resolution mechanisms help to reduce the time that is wasted in choosing a mode of solving a dispute. This is critical in tax disputes where arbitration as a mode of dispute resolution is a murky territory. It is also essential for the oil and gas industry which involves high commercial costs – for instance time spent on determining arbitrability may exponentially increase the cost of a project.

While analysing the oil fiscal regime of Uganda, Kazi et al express the view that the Uganda government has set up the requisite legal and institutional framework for the management of oil revenues.[57] They allude to the training of officials in making assessments and collecting taxes from IOCs.[58] Training of officers of the URA in the intricacies of the oil and gas sector is vital to the administration of the regime and it is commendable that the government has invested in such training. This may help to reduce disputes that arise from mis-assessments brought about by lack of knowledge or misunderstanding of the petroleum business. However, as I have stated above, it is difficult to come up with a foolproof taxation regime for the oil and gas sector. Therefore, I will argue that similar emphasis ought to be placed on the dispute resolution facet of oil and gas tax administration.

2.3.2. Litigation

Connerty has argued that in spite of the increasing utilisation of alternative dispute resolution process in the oil and gas industry, many players still use the court adjudicative processes to

[57] Wilson Bahati Kazi and Barbra Beyeza, 'Getting a Good Deal? An analysis of Uganda's Oil Fiscal Regime' December 2018 CPRD Working Paper No. 64, p.18
[58] Ibid

resolve disputes.[59] This position is exemplified by the Ugandan situation as most of the tax disputes have been decided through the court system.

Sserunjogi **et al** discuss the challenges faced in the litigation mode of resolving tax disputes in Uganda. It is revealed that most cases in the Tax Appeals Tribunal are concluded more than 12 months after filing. [60] This is exacerbated by a lengthy appeal process where a party is dissatisfied with the TAT decision. Other challenges include short term employment contracts for TAT members, limited powers of the registrar of the TAT and lack of autonomy from the Ministry of Finance, Planning and Economic Development. I entirely agree with the authors that these challenges affect the resolution of tax disputes in Uganda. In this study, I show that the inefficiencies in the tax dispute resolution system as discussed have far reaching effects on the oil and gas sector because of its nature such as dependency on international oil prices which makes time more essential than other sectors.

Martin avers that foreign investors are often averse to litigation in local courts which presents a challenge to this mode of resolving tax disputes in the oil and gas sector.[61] I agree with this position. This is often brough about by lack of familiarity with local courts and limited trust in the court system which may be considered inefficient for several reason such as delays and corruption. For this reason, foreign investors may decide to have their disputes litigated in foreign courts that they believe in.[62] I find this applicable to IOC disputes. However, it may not

[59] Anthony Connerty, 'Dispute Resolution in the Oil and Gas Industries' (2002) 20 Journal of energy and Natural Resources Law 144, 148 https://www.tandfonline.com/doi/pdf/10.1080/02646811.2002.11433292?needAccess=true accessed 26 March 2021

[60] Sserunjogi Brian and Paul Corti Lakuma, 'Court Actions and Boosting Domestic Revenue Mobilisation in Uganda' (March 2019) EPRC Research Series No. 146, p.11

[61] Timothy. A. Martin, 'Dispute Resolution in the International Energy Sector: An overview' (2011) 4 The Journal of World Energy Law 332

[62] Ibid

be tenable for disputes involving the government and IOCs, especially tax disputes that relate to domestic taxes.

2.3.3. Alternative Dispute Resolution Mechanisms

Alternative Dispute Resolution mechanisms have been heralded as very important in handling disputes in the natural resources sector. These include mediation, arbitration, expert determination and conciliation. We also look at Mutual Agreement Procedures (MAP).

2.3.3.1 Mediation

Kakooza discusses the option of mediation as one of the viable mechanisms in alternative dispute resolution.[63] He focuses his research on land disputes in Uganda. The paper explores the law and practice regulating mediation in Uganda. It explores the effectiveness of mediation in Uganda by relating it to practices in other jurisdictions.

The paper posits that mediation when compared to litigation is able to provide a more efficient and satisfactory strategy that saves the time of all parties involved. He describes mediation as an interaction between parties where there is a dispute, usually through an intervention by a third party, the mediator, whose assistance is sought by the parties to try and help in resolving the dispute. The mediator will apply various approaches and will be influenced by various factors surrounding the parties and the nature of the dispute. The aim is to yield an outcome

[63] Anthony Conrad Kakooza , 'Land Dispute Settlement in Uganda: Exploring the Efficacy of the Mediation Option' (2007) 5 The Uganda Living Law Journal

that helps the parties resolve the dispute and the mediator is a neutral third party who is there to try and ensure that the parties arrive at a good conclusion.

Kakooza notes that for mediation to be successful, the mediator should be impartial and should be one that is acceptable to all the involved parties. Further, all the parties involved in the dispute should take part in the mediation process. The mediation does not have to resolve the entire dispute but may resolve components of it, narrowing down the areas of dispute.

Kakooza further notes that the complexity of a dispute requires that the mediator is well-versed with the intricacies of the area of dispute otherwise the mediation may fail. He notes that regulations have been developed by the Ugandan Government that seek to make mediation mandatory but notes that coercion may ultimately result in futile attempts where the parties are not ready to talk. He concludes that mediation should apply where a successful outcome is envisaged. Upon resolution of a matter, a mediation agreement is concluded by the parties. The mediation process identified is one of the mechanisms that can be applied in resolving tax disputes in the oil and gas sector in Uganda.

While the article deals with land disputes in Uganda, parallels may be drawn with oil and gas tax disputes and this calls for more specific research into the area.

Maniruzzaman notes that mediation is not yet popular as a third-party dispute resolution mechanism in the context of investor-state disputes and that while it has various advantages over arbitration like cost effectiveness, confidentiality, expediency and flexibility states usually avoid it due to political considerations like political sensitivity.

He suggests that there can be a combination of mediation and arbitration, in the same proceeding and points to a plethora of literature on the *modus operandi* of the combination of

mediation and arbitration which could operate as a twin tool for risk as well as dispute management.[64]

2.3.3.2 Expert Determination

Expert determination has been advanced as one of the ways in which disputes in the oil and gas sector can be resolved.[65] It is argued that expert determination is important for technical aspects of energy disputes.[66] The same argument is re-echoed by Gordon et al. when they say that expert determination is one of the prominent dispute resolution methods in the oil and gas industry.[67] According to Connerty, it is difficult to enforce a decision by an expert as there is no enabling law for such enforcement.[68] This is because it combines both legal and technical aspects of tax law and practice on one hand and industry practices on the other. In this study, I show that expert determination can be used in combination with the existing legal framework for determining disputes in the oil and gas sector such as litigation. One can borrow from the practice of court assessors.

Stultz-Karim writes about expert determination in international oil and gas disputes.[69] The paper states that while expert determination is often the preferred dispute resolution method

[64] AFM Maniruzzaman, 'The issue of Resource Nationalism: Risk Engineering and Dispute Management in the Oil and Gas Industry' (2009) 5 Texas Journal of Oil, Gas and Energy Law 95

[65] Timothy. A. Martin, 338-339

[66] Ibid

[67] Greg Gordon, et al. eds *Oil and Gas Law: Current Practice and Emerging Trends* 2nd ed (Dundee University Press 2011) 597

[68] Anthony Connerty, 'Dispute Resolution in the Oil and Gas Industries' (2002) 20 Journal of Energy and Natural Resources Law 144, p.157 https://www.tandfonline.com/doi/pdf/10.1080/02646811.2002.11433292?needAccess=true accessed 26 March 2021

[69] S.P. Stultz Karim, 'Expert Determination in International Oil and Gas Disputes: The Impact of Lack of Harmonization in Reserves Classifications Systems and Uncertainty in Reserves Estimates' (2007) Paper presented at the 15th Society of Petroleum Engineers Middle East Oil and Gas show and Conference held in Bahrain International Exhibition Centre, Kingdom of Bahrain, 11-14 March 2007

due to the technical nature of issues and the appeal of timeliness when compared to international arbitration, it does not enjoy the same level of recognition or enforceability as an internationals arbitral award. The paper identifies uncertainties that arise in the use of expert determination in oil and gas disputes. The papers points out uncertainties caused by immaturity of international law in the area of expert determination. These uncertainties nonetheless do not do away with the importance and effectiveness of expert determination and he argues that expert determination can be applied more effectively when there is full knowledge of these uncertainties.

In the paper Stultz-Karim asserts that there is a lack of international conventions that support expert determination and that the study of expert determination has traditionally been placed under the rubric of arbitration yet the two systems are distinctly different. Expert determination does not enjoy the same statutory basis as international arbitration and in comparison, arbitration enjoys interim judicial assistance and international law to enforce the arbitral award.

Stultz-Karim further notes that many unanswered legal questions relating to expert determination in international oil and gas disputes lead to uncertainty regarding this dispute resolution mechanism.

The paper addresses expert determination from the point of view of disputes arising out of issues dealing with reserves classifications systems and reserves estimates. The paper does not specifically deal with tax disputes but nonetheless offers an insight into expert determination as a dispute resolution mechanism in the oil and gas sector. This calls for a study that is more specific to oil and gas tax disputes hence the call for this research.

2.3.3.3 Arbitration

Several authors have argued that arbitration is one of the main forms of resolving disputes in the oil and gas sector. These authors include Mohammad,[70] and Gordon et. al. who argue that IOCs prefer the specialized nature of arbitration.[71] On the Ugandan scene, Kakooza joined other authors in the argument that international commercial disputes are best resolved by arbitration as opposed to court adjudicative processes. The advantages of arbitration have beenstated to include party autonomy that allows parties to choose the seat of arbitration[72] and the law applicable and privacy and confidentiality which are considered as important by IOCs.[73] Where arbitration is administered by an arbitration body such as the London Permanent Courtof Arbitration, it has been argued that the respect of the body increases the ease of enforcementof the award.[74] In addition, in comparison to local courts, it is easier to enforce arbitral awards internationally following international rules such as the UNCITRAL Rules.[75]

Arbitration is therefore presented as one of the most efficient ways of resolving disputes in the oil and gas industry. Whereas I agree with the advantages of arbitration over other dispute resolution mechanisms like litigation, it is inapplicable to tax disputes in Uganda by virtue of the current model of PSAs. In this study, I argue that the hardline stance against arbitration in Uganda could be revisited to align with the international trend towards adoption of alternative dispute resolution mechanisms in tax matters such as the Mutual Agreement Procedures and arbitration.

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[70] Alramahi, Mohammad, 'Dispute Resolution in Oil and Gas Contracts' (2011) 3 I.E.L.R 78, 80 https://ssrn.com/abstract=2159702 accessed 26 March 2021

[71] Greg Gordon et al p.600

[72] Ibid

[73] Ibid p.81

[74] John P. Bowman, 'Dispute Resolution Planning for the Oil and Gas Industry' (2001) 16 (Issue 2) ICSID Review -Foreign Investment Law Journal 332, p.336

[75] Ibid

While advocating for arbitration, some scholars have opined that arbitration may impinge on a state's sovereignty which is considered an integral part of the law on taxation.[76] This is because a state is forced to place the jurisdiction to handle tax disputes in the hands of a third party who is not an officer of the state, sometimes even in a foreign country. This is at odds with the fiscal sovereignty theory. I will argue that in that context, sovereignty is not absolute. Where a state enters into a contract with another party, there is an expectation that a dispute could arise. With such an expectation, states are expected to take the means necessary to resolve such dispute.

Internationally, mandatory binding arbitration has been introduced under the Multilateral Instrument that was enacted as part of the of the Base Erosion and Profit Shifting project (BEPS) project. This represents a shift from the pre-BEPS model where the arbitration option was not binding. It is hoped that this will improve the dispute resolution mechanisms under tax treaty law. Uganda is yet to sign the Multilateral Instrument adopted under the BEPS Project. In this paper, I will argue that mandatory binding arbitration is not the best way to go for a country that is yet to have a firm grasp of the technicalities of the oil and gas industry. Arbitration should be an available option rather than one that is mandatory and binding.

Luki reviews the importance of international arbitration in the settlement of disputes in the oil and gas industry.[77] He identifies institutional arbitration which is conducted through the auspices of various institutions which have predetermined sets of rules. He lists institutions like the ICC, UNCITRAL, American Arbitration Association (AAA), the Euro-Arab Chambers of

[76] Lauren Waveney Brazier, 'The Arbitrability Of Investor-State Taxation Disputes In International Commercial Arbitration' (2013) Dissertation presented to the Victoria University of Wellington 23

[77] Bayuasi Nammei Luki, 'Dispute Settlement in The Oil and Gas Industry: Why is International Arbitration Important?' (2016) Vol. 6 No. 4 Journal of Energy Technologies and Policy 30

Commerce (EACC), the London Court of International Arbitration (LCIA), the Netherlands Arbitration Institute (NAI) and the Stockholm Chamber of Commerce (SCC).

Luki also identifies unadministered or ad hoc basis arbitration where the disputants choose their own arbitration procedures and rules without the help of an arbitral institution. The process will be called ad hoc where the parties agree to a procedural framework with special features designed to suit their particular need.

Luki further lists some advantages of arbitration including the fact that an arbitral award is recognized and may be enforced internationally. Also, unlike in litigation, an arbitral award is final and binding and its enforcement may be achieved in different countries. He notes that arbitration also ensures privacy and confidentiality. Parties have the choice of selecting arbitrators with the necessary technical expertise in the specific field of practice. He however notes that while it has always been perceived that arbitration is faster and less costly compared to litigation, concerns are now being raised as to whether this is the case.

In the article, Luki notes further downsides to the arbitration process including costs of the arbitration, limited power of the arbitrators, the difficulty of having three or more parties before a tribunal, delays, communication and language difficulties. Fees and costs may include the expensive hire of conference rooms for hearings and proceedings unlike in litigation where public facilities of the national court system are available.

The article recommends a paradigm shift whereby players in the oil and gas sector should encourage international arbitration as a viable dispute resolution mechanism.

The paper is relevant to the oil and gas sector in as far as it reviews arbitration as one of the dispute resolution mechanisms. Its is however not specific to tax disputes and does not address the intricacies of tax dispute arbitration. As such a more specific study is necessary.

Farah undertakes a review of the proposal for mandatory arbitration of international tax disputes.[78] He states that the Organization of Economic Development and Cooperation ("OECD") amended its Model Convention and Commentary to include mandatory and binding arbitration of tax disputes between two treaty countries that have been unsuccessful in resolving the disputes through negotiations between their tax authorities. He argues that these amendments will not serve the two primary operational goals of income tax treaties; preventing double taxation as well as double non-taxation.

Farah reviews and identifies weaknesses in Mutual Agreement Procedures and states that the MAP lacks the power to compel the competent authorities to resolve disputes and grant relief to the taxpayer. He says it creates a 'quasi duty' but with no actual obligation to settle the dispute.[79] He calls for mandatory arbitration.

In the article, Farah identifies transfer pricing disputes as being common disputes in international taxation in which a taxpayer with cross-border activity will try to allocate income and deductions in a tax favourable manner. The tax authorities may disagree with the taxpayer's allocation and seek to collect tax based on an adjusted allocation. This in turn may cause potential double taxation and the taxpayer can seek relief either at the domestic level or by utilizing the MAP.[80] This is common ground for disputes.

With regard to double taxation disputes, he identifies the 'most elementary and undisputed principles of fiscal justice' which requires a scheme whereby all incomes would be taxed once, and once only. He states that this principal is referred to in the literature as the "Single Tax Principal" and enjoys the support of many countries, academics and organizations.[81]

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[78] Ehab Farah, 'Mandatory Arbitration of International Tax Disputes: A solution in Search of A Problem' (2009) Vol. 9 No. 8 Florida Tax Review pages 703
[79] Ibidp.708
[80] Ibidp.709
[81] Ibid p.711

Under the circumstances, he finds the need for a mandatory and binding dispute resolution mechanism evident. He says that many scholars have suggested mandatory arbitration as a means to address international tax disputes. He argues that mandatory and binding arbitration should be introduced as independent stand-alone provisions which will enhance the effectiveness and efficiency of Mutual Agreement procedures.

The article is mainly concerned with income tax treaties between countries and mainly considers tax affairs between developed countries. The article does not review positions in developing countries and does not consider the peculiarities of the oil and gas sector. This calls for a need for this more specific research.

2.3.3.4 Conciliation

Kakooza[82] also explores other forms of alternative dispute resolution, including conciliation. With specific regard to conciliation, he notes that in Uganda it is provided for under the Arbitration and Conciliation Act. He notes that a conciliator aims to assist parties resolve a matter but does not have powers to enforce it. He notes that there is not enough material on conciliation owing to its private nature.

Decisions in conciliation are arrived at independently and impartially and the conciliator in executing his role is guided by principles of objectivity. The conciliator will conduct the matter in the best manner that he deems fit. Once a settlement is reached, a settlement agreement will be drawn upon and will carry the same weight as an arbitral award. Parties will not be allowed to use information from the proceedings in litigation. A problem identified with this mechanism is that there is no binding power on the parties and there is no guaranteed outcome at the end

[82] Kakooza, Anthony Conrad, Arbitration, Conciliation and Mediation in Uganda: A Focus on the Practical Aspects (June 18, 2010) 7 (No. 2) Uganda Living Law Journal, p.268

of the process. This study is relevant to the oil and gas sector as it reviews a key mechanism that can be applied for oil and gas taxation dispute resolution. The study was however not specific to the oil and gas sector and as such a more specific study is necessary.

2.3.3.5 Mutual Agreement Procedures

Mutual Agreement Procedures (MAP) is a dispute resolution mechanism provided in Article 25 of both the OECD and UN Model Tax Conventions. It is thus available where a Double Tax Agreement exists between two states. The Mutual Agreement Procedure involves discussions by the two tax authorities under a given DTA to solve a dispute submitted by a taxpayer to one of the authorities. Scholars like Avi-Yonah et al. opine that MAP is an effective dispute resolution mechanism for international tax disputes.[83] However, others like Altman are of the view that MAP does not yield many benefits in terms of solving international tax disputes.[84] The OECD in Action 14 of the Base Erosion and Profit Shifting project, titled 'Making Dispute Resolution Mechanisms More Effective' placed emphasis on developing the use of MAP to solve tax treaty disputes. Action 14 has 3 minimum standards which are: i) ensuring that states implement MAP treaty obligations in good faith and in a timely manner ii) administrative processes that prevent disputes and where they are inevitable, timely resolution and iii) ensuring access to MAP for eligible taxpayers.[85]

[83] Reuven S. Avi-Yonah and Hayan Xu 'Evaluating BEPS: A Reconsideration of the Benefits Principle and Proposal for UN Oversight' (2016) 6 Harv Bus L Rev 185, p.233

[84] Zvi Daniel Altman, 'Dispute Resolution Under Tax Treaties' (2005) IBFD 193

[85] OECD, 'OECD/G20 Base Erosion and profit Shifting Project- Making Dispute Resolution Mechanisms more effective: Action 14 Final Report (2015) 9 < https://www.oecd-ilibrary.org/docserver/9789264241633-en.pdf?expires=1594354685&id=id&accname=guest&checksum=162E2A4210CA6D612BA9876DA9CE77B2 > accessed 5 April 2021

In this study I argue that the information sharing with other countries that may be well versed with the petroleum sector will be of great benefit to Uganda. Another advantage of the MAP is that disputes can be nipped in the bud.[86] This is because the MAP mechanism allows for initiation of the process even before there is a substantive dispute. This happens when a state enacts a law that could potentially contravene a provision of a tax treaty. A taxpayer can request for a MAP before there is an actual dispute. This saves time which is of the essence in capital intensive projects that are the norm in the oil and gas industry. In this study, I will argue that the MAP should be given due consideration as dispute resolution mechanism for tax disputes involving a double tax agreement due to its advantages and the need to move with international trends.

2.4. Dispute resolution mechanisms in select countries

2.4.1 Tax dispute resolution mechanisms in Nigeria

Richards reviews tax dispute resolution mechanisms in Nigeria and advocates for the adoption of Alternative Dispute Resolution methods.[87] He states that litigation is the traditional mode of dispute resolution in Nigeria but is not the most effective owing to undue delays and attendant high costs. The use of ADR while encouraged in Nigeria's extant tax policy is not highly regarded by the country's tax authorities. He notes that the Federal Government established a special tax court, the Tax Appeals Tribunal while several states have established State Revenue Courts to adjudicate on tax matters.

Richards notes that economic exigencies demand for an effective and efficient way to resolve tax disputes in every tax system and explores the possibility of adopting tax amnesty schemes

[86] Euromoney Institutional Investor PLC, 'International tax Dispute Resolution-the MLI Conundrum' International Tax Review (14 December 2017), 5

[87] Newman U. Richards, 'An Examination of Tax Dispute Resolution Mechanisms in Nigeria: A Case for the Adoption of Alternative Dispute Resolution Methods' (2017) 1 UNIPORT Law Review, 195www.uniportlawjournals.com

in resolving tax disputes. He examines the different fora and sets out the hierarchy of the courts that hear tax disputes including the tax Appeals Tribunal, the Federal High Court, the State High courts, the Court of Appeal and the Supreme Court.

In pitting ADR against litigation he notes that some of the advantages in contradistinction to litigation are that it encourages the use of experts, allows flexibility in procedure, and is faster in most cases.[88]

The article discusses various modes of ADR including negotiation, mediation and arbitration. With regard to arbitration in Nigeria he states that it is classified into International and municipal arbitration. Municipal Arbitration includes Customary Law Arbitration, Common Law Arbitration and Statutory Arbitration. He notes that the extant tax policy provides that in the event of a tax dispute parties shall leverage all amicable means of dispute resolution including arbitration and only resort to judicial determination as a last resort. [89]

While the tax policy encourages arbitration, he notes that the Nigerian courts have determined that arbitral tribunals have no jurisdiction to determine any dispute with tax implications as this is the preserve of the national courts. He reviews three cases from the Nigerian Court of Appeal that have upheld this position[90] and compares this position to that arrived at by the High Court of Uganda in Heritage Oil and Gas Limited Vs the Uganda Revenue Authority[91] where court found that tax matters are statutory and not contractual and cannot be varied by contractual terms. He also notes that a study of several South American countries like Colombia, Ecuador, Argentina, Peru, Bolivia reveals that their laws do not support the use of arbitration to resolve

[88] Ibid p.201
[89] Ibid p.203-4
[90] Federal Inland Revenue Service v Nigerian National Petroleum Corporation & 4 ors. (2012) 6 TLRN, 1; Esso Petroleum and Production Nigeria Limited & SNEPCO v NNPC, Unreported Appeal No. CA/A/208/2012 delivered on 22 July, 2012; Shell (Nig) Exploration and Production Ltd. &3 ors. v Federal Inland Revenue Service, Unreported Appeal No. CA/A/208/2012 delivered on 31 August, 2012.
[91] (2013) 9 TLRN, 55.

tax disputes. The rationale that is given for this is that taxes are considered an issue of public order and enforceable through courts. He notes though that in international matters countries have embraced International Tax Arbitration in resolving disputes arising from tax treaties.[92]

The paper paints a clear picture of the position of tax dispute resolution mechanisms in Nigeria. It looks at tax disputes in general and is not concerned with the intricacies of the oil and gas industry. While such a study has been done in Nigeria, none has been done in Uganda hence the need for this specific study.

2.4.2 Tax dispute resolution in Rwanda

Mayanja et al carried out research and reviewed tax dispute resolution mechanisms and their effect on taxpayers' compliance in Rwanda.[93]

The research considered a population of 297 from which samples of 170 were selected. The findings from data collected using structured questionnaires and documentation were analysed and a finding was arrived at that there is a significant positive relationship between fairness of tax dispute resolutions and tax compliance. The researchers noted that the appeal committee of the Rwanda Revenue Authority (RRA) does not include external tax experts and is only comprised of internal staff, a situation viewed by Rwandan taxpayers as being suspicious. The study found that resolving tax disputes through administrative procedures other than judicial ones positively impacts tax compliance. The study recommends that the Rwanda Revenue Authority needs to put in place strategies to resolve tax disputes independently from the early stages of the dispute, a strategy that positively influences taxpayer compliance.

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[92] NQ Cruz, 'International Tax Arbitration and the Sovereignty Objection: The South American Perspective,' (2008) 51, Tax Notes Int'l No.6, 534 as cited in Newman U. Richards, 'An Examination of Tax Dispute Resolution Mechanisms in Nigeria: A Case for the Adoption of Alternative Dispute Resolution Methods' (2017) 1 UNIPORT Law Review, 206 www.uniportlawjournals.com

[93] Sazir Nsubuga Mayanja, Kato Mahazi, Twesige Daniel, 'Effect of Tax Dispute Resolution Mechanism on Taxpayer's Compliance: The Case of Rwanda' (2020) 8 (No. 2), Science Journal of Business and Management, Special Issue: Business Policy& Strategic Management, 74

The study looks at tax disputes as an independent variable arising out of amongst others, tax offences, mistakes in computation, tax procedural errors, misinterpretation of tax laws, unjustifiable tax penalties and fines, unreasonable tax assessments and ambiguous provisions in tax laws. These are identified as the driving factors. The study on the other hand looks at tax compliance as the dependent variable comprising of voluntary tax registration, filing tax returns on time, timely payment of tax, positive change in attitudes to taxation including morale and cooperation.[94]

The study concludes that fairness in tax dispute resolution increases transparency to the tax Authority and has a positive impact on taxpayer compliance. It recommends that taxes in dispute should be paid after, rather than during or within the dispute resolution process. It further recommends that tax tribunals or tax courts comprised of tax professionals and lawyers should be created for fair resolution of tax disputes.[95]

2.4.3 Oil and gas disputes in Indonesia

Mills et al review disputes in the oil and gas sector in Indonesia.[96] They articulate the background to the oil and gas industry in Indonesia starting with the pre-colonial era where mining rights, oil and gas included were reserved to the Dutch Colonial Government. Following independence in 1945, natural resources were by Constitution declared to be under State Control. In 1966, a Production Sharing System was introduced which was similar to the system used in Indonesia's agricultural sector. This system was initially found most unpalatable by the major oil companies but upon seeing no viable alternative, the major oil companies soon began to accept the Production Sharing Scheme.

[94] Ibid p.77
[95] Ibid p.81
[96] Karen Mills and Mirza A. Karim, 'Disputes in the Oil and Gas Sector: Indonesia' (2020)3 (No. 1) Journal of World Energy Law and Business 44

Following a 1976 ruling by the United States Internal Revenue Services which reduced the feasibility of further exploration in Indonesia by many US Oil Companies, Indonesia revised its PSAs introducing new terms like after cost recovery and tax, 'profit oil' was to be shared effectively 85%-15%. The current legal regime was passed in 2001 and makes provision for dispute resolution mechanisms. From the outset, the first PSA provided for arbitration. Arbitrators were to be appointed from the technical field related with the dispute and unless otherwise agreed, the arbitration was to be conducted in Indonesia.[97] The current version of The PSA however now calls for *ad hoc* arbitration under UNCITRAL rules with ICSID as the appointing authority.

They further cite various disputes that have arisen in Indonesia's oil and gas sector including Exxon Mobil conflicts, the Cepu matter, the Esso Natuna case and the Lirik case. The article also identifies disputes between foreign contractors and their home state taxing authority.

The article paints a clear picture of the nature of disputes in Indonesia set against a clear background and historical context of the fiscal regime put in place by the Indonesian state. The article however does not delve much into the dispute resolution mechanisms and is not very much concerned with tax disputes. This research will similarly try to capture the background of the oil and gas sector in Uganda as a backdrop to the dispute resolution mechanisms.

2.4.4 Tax dispute resolution mechanism improvement in OECD Countries

Ault reviews resolution of international tax disputes under the OECD with a focus on ways in which this can be improved.[98] He notes that the dramatic increase in international trade and

[97] Ibid p.54
[98] Hugh J Ault, 'Improving the Resolution of International Tax Disputes' (2005) 7 Florida Tax Review 137

investments and related phenomena under Globalization have increased situations from which international tax disputes can arise between taxpayers and governments as well as between governments themselves.

The dispute areas identified include transfer pricing issues, differing income characterisation rules, permanent establishment disagreements and double taxation issues.

Ault notes that under the current circumstances, it is inevitable that the frequency and complexity of international tax disputes will increase and as such the need for robust mechanisms to address them is important. As non-tax barriers to trade and investment are eliminated, tax issues assume greater importance.

He reviews the structural aspects in the current MAP process and in addition reviews other forms of supplementary dispute resolution techniques.

He identifies mediation, advisory opinions and arbitration as forms of supplementary dispute resolution techniques. With regard to advisory opinions he states that model conventions refer to the possibility of a country getting an advisory opinion but points out that there appear to be not many reported cases of this process actually being used.

He concludes by stating that the idea of some more comprehensive dispute process in the international area has been around for a long time but is in fact coming closer to being a reality.

The paper articulates many processes that can be undertaken to improve the dispute resolution processes in the international resolution of tax disputes. It focuses mainly on the Organisation for Economic Co-operation and Development (‘OECD’) Model Convention. The paper is focused on developing countries but carries some lessons that can be learnt. A more specific study is necessary to see how best practices can be adopted hence the need for this research.

2.4.5 Case study of taxation disputes in New Zealand

Glazebrook[99] presents the position from a case study on the handling of taxation disputes in New Zealand. The study notes a decrease in the cases dealt with by the Taxation Review Authority of New Zealand from 2002 to 2008 from 48 to 10 in a year following a change in the system and in procedures. The decline in cases was attributed mainly to effective dispute management. Over the period, cases in the New Zealand High Court dealing with taxation disputes also declined.

The study states that the old New Zealand system is still similar to current Australianprocedures where disputes were initiated by the taxpayer lodging an objection. If the dispute was not resolved in the course of that process, then a taxpayer could seek a review in either theTaxation Review Authority or the High Court by means of a case stated procedure. This is somewhat similar to the current Ugandan process.

Following an organisational review in 1994 some changes to the tax dispute resolution procedures in New Zealand were adopted following concerns that taxation disputes were taking too long to be resolved and that insufficient care was taken to ensure that assessments were correct before they were issued or that the grounds of assessment were sufficiently identified. It had also been suggested that the prevailing process could lead to uncertainty and that the audit and internal dispute resolution mechanisms were not sufficiently separated. Concerns had also been raised regarding the cost of the dispute process. This led to the introduction of an elaborate pre-assessment and pre-litigation phase including a voluntary administrative conference where the parties attempt to resolve issues. It also involves referring the matter to

[99] Justice Susan Glazebrook, Judge of the Supreme Court of New Zealand, 'Taxation Disputes in New Zealand' Paper on case study prepared for Australasian Tax Teachers Association (ATTA) Conference on 22 January 2013 p. 1-24

an Internal Adjudication Unit that reviews the matter independently. There is an aim to keep costs of resolving disputes at a minimum

The marked drop-off in the number of tax cases getting to court can be attributed to the pre-litigation procedures introduced in new Zealand that have led to better decision-making, so that disputes are resolved at an earlier stage.

The New Zealand disputes resolution process has however been criticised for still being slow. The Tax Authority has resisted any attempts to set legislative time frames for completion of the steps by the Commissioner although there are time frames for taxpayers, the breach of which ends the process. Clear timeframes are key in having matters resolved.

The study notes that in New Zealand, a reform that is mooted from time to time is the creation of a specialist tax court or the inclusion of specialist tax judges in the higher courts.

There are several lessons that can be drawn from this study that would benefit the oil and gas sector with regard to management of tax disputes.

2.4.6 Case study of resolving tax disputes by HM Revenue and Customs

In England, Her majesty's Revenue and Customs (HMRC) developed a Litigation and Settlement Strategy[100] which is the framework within which HMRC resolves tax disputes through civil law processes and procedures in accordance with the law. A key part of HMRC's overall customer strategy is to help reduce the likelihood of situations arising which may give rise to a dispute.

[100] HM Revenue & Customs, 'Resolving Tax Disputes, Commentary on the Litigation and Settlement Strategy' 30 October 2017 p. 1-41 accessed from https://www.gov.uk/government/publications/litigation-and-settlement-strategy-lss on 18 August 2021

Various aspects employed play a significant role in helping to minimise disputes, for example well-framed legislation, guidance, rulings and clearances processes. HMRC also takes a risk based approach to compliance work and ensures effective relationship management for large and complex customers like those in the oil and gas sector.

HMRC will seek, wherever possible, to handle disputes non-confrontationally and by working collaboratively with the customer. In the majority of cases handled by HMRC, this has been identified as the most effective and efficient approach. The study finds that working non-confrontationally can offer benefits in terms of effective and efficient tax dispute resolution in all civil cases. The strategy adopts a collaborative approach by all parties which requires them to be open, transparent, and focused on resolving tax disputes.

The strategy adopted by HMRC also ensures that in complex cases, sufficient facts are established and early specialist advice is taken which brings important efficiency savings.

Where it is appropriate, Alternative Dispute Resolution is used either by facilitating agreement between the parties or by helping the parties to prepare for litigation.

Where HMRC believes that it is likely to succeed in litigation and that litigation would be both effective and efficient, it will seek to resolve the dispute by litigation as quickly and efficiently as possible. The decision to litigate a tax dispute will not stop the HMRC from taking steps to ensure an efficient and effective resolution to the dispute. Throughout the dispute resolution process, HMRC will continue to be open to considering the impact of any new information and technical analysis which may be put forward by the customer.

Given the efficiency of HMRC's dispute resolution system, Uganda can draw valuable lessons from this case study for its oil and gas sector.

2.5. Conclusion

Whereas many scholars and experts have written on the topic of dispute resolution in the natural resources sector as illustrated above, not much attention has been paid to the specific aspects of tax disputes in the oil and gas sector in Uganda. This research will therefore consider the peculiar circumstances of Uganda's tax system such as the government's position on non-applicability of arbitration to tax matters and resource constraints of government departments involved in the drafting of policies and administration of the tax system.

CHAPTER THREE: METHODOLOGY

3.1. Introduction

In this chapter, I address the research methodology. I lay out the legal framework which covers the study design, the scope of the research and the population that is covered in the study. This chapter also sets out the sampling method adopted by the study as well as the data collection strategies that were employed. I also lay out my data analysis plan in respect of the documentary review and the interviews. The chapter considers the limitations of the study and the mitigation strategies that I used to overcome these limitations. Lastly, I give the chapter conclusion.

3.2. Legal Context and Research setting

3.2.1. Study Design

This paper uses qualitative research methods to arrive at answers to the problems it sets out to solve. Particularly, I employ the interpretivist approach. This guided me in making conclusions about the experiences and perspectives of the various authors of the literature and interviewees who are the sources of the data for this study.[101] The paper is descriptive. Description is used to bring out the state of the dispute resolution mechanisms for oil and gas tax disputes in Uganda.

Quantitative methods are used to a small extent. Essentially, this entails statistical data from the URA about oil and gas tax disputes for example, how many tax disputes have been brought

[101] Monique Hennick et. al Qualitative Research Methods 2nd ed. (SAGE Publications Ltd 2020) 10

in Uganda, how many have been resolved by what method and the time taken to resolve them. Being that the petroleum sector is relatively nascent; the data involved is limited.

This study relies on primary information from the laws and practices that set out the dispute resolution mechanisms for oil and gas tax disputes in Uganda. These include the laws that specifically apply to tax disputes and those applicable to general disputes but can be used in the petroleum tax regime. The specific laws are the Tax Procedures Code Act and the Tax Appeals Tribunal Act. The general laws include the Arbitration and Conciliation Act. The dispute resolution mechanisms are examined within the context of the various taxes imposed under various laws such as the Income Tax Act,[102] the Value Added Tax Act[103] and the Stamps Act,[104] and The East African Community Customs Management Act.

The Tax Procedures Code Act sets out the procedure that has to be followed by an aggrieved taxpayer from the time an assessment is made by the Uganda Revenue Authority, through the objections process at the office of the Commissioner General, to the decision of the Tax Appeals Tribunal and finally an appeal to the High Court where a taxpayer is dissatisfied with the decision of the TAT.[105]

The Tax Appeals Tribunal Act creates the TAT which has the mandate to hear applications arising from dissatisfaction from taxation decisions of the Commissioner General of the Uganda Revenue Authority.[106] The TAT Act and the Rules made thereunder also sets out the procedure that is followed by the Tribunal in hearing applications before it.

[102] Income Tax Act, Cap 340
[103] Value Added Tax Act, Cap 349
[104] Stamp Duty Act, Act No. 13 of 2014.
[105] Part VII Tax Procedures Code Act, 2014
[106] Section 2 Tax Appeals Tribunal Act, Cap 345

The procedures set out in these laws cited above are analysed within the context of international best practices and consideration of Uganda's circumstances in as far as taxation is concerned.

The petroleum tax disputes that have so far arisen out of Uganda are used as examples. This includes both domestically and internationally handled cases. The experiences in handling these cases were used as reference points in the interviews especially for lawyers that have represented IOCs and members of the TAT that have heard and decided oil and gas disputes.

Five interviews were conducted: two members of the TAT, the head mediator at the TAT, the Registrar at the TAT, the head of the litigation department at the URA and an attorney that has represented IOCs in oil and gas disputes. The interviews gave me a three-dimensional perspective: the tax authority, the IOC and the tax practitioner.

Secondary sources of information such as books, journal articles, newspapers, government-issued documents, and other internet bases literature are also used.

3.2.2. Area of study

The study area is the oil and gas sector in Uganda. More specifically, the research focuses on the dispute resolution mechanisms for tax disputes in the petroleum sector. The study also briefly makes a comparative consideration of the dispute resolution mechanisms for electricity disputes and procurement disputes in Uganda. This is only for purposes of comparison with the oil and gas sector. The study also makes a comparative analysis of the oil and gas dispute resolution methods available in Nigeria, Indonesia, Rwanda and in OECD countries like the United Kingdom and other international jurisdictions. The study also draws on case studies of taxation dispute resolution mechanisms in New Zealand and by Her Majesty's Revenue and Customs (HMRC).

Geographically, while this paper covers the entire territory of Uganda, the document review and interviews were based in Kampala. This is because all the information about the oil and gas sector can be acquired from sources available in Kampala. For instance, the Tax Appeals Tribunal is located in Kampala. The URA and the Ministry of Finance Planning and Economic Development have offices all over Uganda but are headquartered in Kampala where officers of different departments can be met and interviewed. The URA litigation department is specifically centred in Kampala. With regard to the lawyers, the interviews were conducted in Kampala where the offices of the lawyers are located.

3.2.3. Population size

The field work in this study only involved interviews. The study is very specific to a sector that is fairly new to most Ugandans. Therefore, the interviewees were selected from targeted groups of people that have dealt with oil and gas tax disputes. These include lawyers who have represented IOCs in the courts in Uganda and abroad as well as officers of the URA that have information relating to oil and gas disputes. The interviews also involved participants that work with the Tax Appeals Tribunal. The TAT participation included both administrative staff that have information about the general operations of the TAT and members of the Tribunal that have adjudicated over oil and gas tax disputes.

3.3 Sample and sampling techniques

Purposive sampling was employed to determine the interviewees of the study.[107] This is because the area of study is very specific and relatively new. Not many people have had first-hand experiences with oil and gas disputes. The interviewees included an employee of the URA. For the case of lawyers that have represented IOCs, I drew up a list of the law firms that

[107] Monique Hennick et. al Qualitative Research Methods 2nd ed. (SAGE Publications Ltd 2020)

have the experience I seek in the study. Considering the small number, I selected two participants that have an in-depth understanding of the nature of the oil and gas industry and have practical knowledge of the petroleum tax system in Uganda.

3.4. Data Collection Strategy/ Methods

3.4.1. Interview

The research relies on interviews of experts in the oil and gas sector to enable an understanding of the law in practice. In order to extract information, I reached out to persons in the target group and settled for those that were willing to participate in the study. The initial plan was to conduct face to face interviews. However, some of the participants preferred remote interactions due to the prevailing conditions caused by the COVID-19 pandemic and also owing to busy schedules. Therefore, I adopted both physical and tele-interactions. I sent out the interview questions by email. Thereafter, I met with some of the participants while following up telephonically with others. I contacted all interviewees at agreed times and had discussions about the area of study. After the discussions, I thanked the participants and collated the information obtained.

3.4.2 Documentary review

The study involved a review of literature on general aspects of natural resources and the disputes that arise from their utilisation. Specific literature on disputes in the oil and gas sector was also reviewed.

The study also involved a comparative analysis of the Tax Appeals Tribunal Act and the Electricity Disputes Tribunal under the Electricity Act[108] as well as the Public Procurement and

[108] The Electricity Act, Cap 145, Laws of Uganda

Disposal of Public Assets Tribunal under the Public Procurement and Disposal of Public Assets Act. The comparisons to these fora are made in respect of the procedures set out by the laws in handling tax disputes on the one hand and electricity and procurement disputes on the other. The study also makes a comparative analysis of the oil and gas tax dispute resolution mechanisms in Uganda and the United Kingdom and other international jurisdictions.

3.5. Instruments

In conducting the research, I used structured and unstructured interviews. The structured interviews involved a set of questions that was given to the interviewees ahead of the interview. The questions were both general to the administration of tax disputes and the handling of oil and gas tax disputes. The unstructured interviews were a spin-off of the structured interviews as the discussions evolved gradually to include information that was not specifically requested for in the structured interview but found to be necessary.

The interview questions related to personal details of the participants such as the positions they hold and for how long they have had them. After personal questions, the interview guide solicited for information relating to oil and gas tax disputes. For example, following the interview guide, I sought to understand the personal experiences of the interviewees and the challenges that they identified in the process as well as their thoughts on how the processes could be improved.[109]

3.6 Data Analysis plan

For this study, my data analysis plan starts with the research questions for which I seek answers. The literature is organised based on the research questions that it answers. In conducting the research, the review starts with the general literature on natural resources. This includes aspects

[109] Copies of the interview guides are attached as Appendices

that are not part of this study such as minerals. The analysis then moves to the oil and gas sector. Again, these are general aspects meant to give an understanding of the operations of the sector such as intensity of capital sunk in oil and gas exploration and development and the duration of the projects. This will lead me to examine resolution of oil and gas disputes. Oil and gas disputes are diverse as they include matters that are not the subject of this research such as environmental concerns and breach of contract by a party to a Production Sharing Agreement. Finally, I will analyse the dispute resolution mechanisms that specifically apply to oil and gas tax disputes.

With respect to the interviews, I related the information extracted to that from the laws and the secondary literature. Where there was a variance between the information from the interviews and the laws, I considered it a case of the law in the books versus the law in practice- a concept that is not unusual. For cases where practice in Uganda differed from that in other countries, I took this to be the special considerations that are specific to Uganda and have to be borne in mind while making conclusions. In cases where the interviews had varying views, I considered these personal opinions. I agreed with some while rejected others basing on the information that I gathered during the research.

3.7 Ethical considerations

Hennick et. al. argue that there are three core principles in ethical considerations. These are beneficence, respect of persons and justice.[110] Beneficence refers to the benefits that the study presents to the society at large while respect of persons entails observing the welfare of the study participants and paying attention to their wishes.[111] Justice is similar to respect of

[110] Monique Hennick et. al Qualitative Research Methods 2nd ed. (SAGE Publications Ltd 2020) 70
[111] Ibid

persons. It focuses on the fair treatment of the study participants.[112] In this study, the ethical considerations relate to respect of persons and justice, namely, confidentiality and anonymity.

3.7.1. Confidentiality

Petroleum and tax affairs are both areas that are reputed for confidentiality. This confidentiality in many respects in fact entails almost total secrecy. While conducting the interviews, some interviewees intimated that some of the information was confidential. They requested that it is not reflected in the thesis. In order to maintain the confidentiality, I used the information to understand the subject of discussion which informed my conclusions, without necessarily stating the actual information that was divulged.

3.7.2. Anonymity

Some interviewees opted to remain anonymous. Therefore, their personal details will not be disclosed. However, this is not an easy task because the sample size is very limited. Since there are not many people that have actively engaged in oil and gas tax disputes, it may not be difficult for a reader to figure out the potential sources of the information. None the less, information that could lead to the identification of the interviewees that expressed the wish to not be named has been eliminated.

3.8. Limitations of the study

The limitations of this study mainly stem from the covid-19 pandemic and its attendant effect on research in terms of accessing participants and study materials. The confidentiality-or secrecy in the industry also features as a limitation.

[112] Ibid

3.8.1. Face to face interviews

My plan involved face to face interviews as these would build better rapport with the interview and make them more comfortable to share information. However, some interviewees preferred remote interactions due to heavy schedules and Civid-19 risks and restrictions.

In order to overcome this, I embraced electronic means of communication. I contacted some of the interviewees by email and telephone. This sufficed to extract the information that I needed. In a few cases, I met with participants over 'zoom', an internet communication channel and also held informal chats over 'Whatsapp', another trending communication channel.

3.8.2. Obtaining hard copy documents

A few materials were not accessible by soft copy. This meant that I hard to get the hard copies. However, a number of libraries were not readily accessible due to the Covid-19 guidelines issued by the Government of Uganda.

Where there were no readily available original hard copies like books, I made do with other literature that was accessible as copies. Where an author was quoted by another piece of literature, I used the latter in order to get the data I needed.

3.9. Conclusion.

In this chapter, I have delved into the research methodology adopted in this study. This included the study design, scope of work, sampling methods, data collection methods, data analysis plan and the limitations of the study. In the next chapter, I will address the results and findings from the research.

CHAPTER FOUR: RESULTS AND ANALYSIS

4.1 Introduction

This Chapter deals with the results from the primary findings obtained from the interviews and secondary information contained in the literature that was reviewed during the study.

The researcher interviewed key informants who are listed in the attachment appended to the end of the dissertation as Annexure I

Interviews were carried out with people who have all been involved in various taxation disputes in the oil and gas sector.

I l unpacked the findings from the interviews with the above people and from documents and data reviewed. I will summarise the research objectives and the findings in respect of each of the objectives. I will then harmonise the primary and secondary results and thereafter conclude the chapter.

4.2 Recap of research objectives

The main objective of this study is to assess the effectiveness of the dispute resolution mechanisms in place to handle disputes from the oil and gas sector of Uganda. The specific objectives are: i) to examine the various modes of resolving disputes in the oil and gas sector; ii) to examine the bottlenecks that are faced by the government and IOCs in the resolving tax disputes in the oil and gas sector and iii) to suggest recommendations that can improve the

current system of tax dispute resolution in the oil and gas sector. The results presented below are guided by the research questions.

4.3 The Legal and Institutional Framework for resolving disputes in the oil and gas sector in Uganda.

Dispute resolution in Uganda is broadly categorised into two (2) mechanisms: litigation and Alternative Dispute Resolution (ADR). I discuss the findings in relation to these here below. I will discuss both the legal and institutional frameworks.

The section that follows shall review the research findings about the different laws that deal with oil tax disputes, the institutions created and the key challenges that are apparent in the mechanisms created by these laws as well as the challenges faced by the institutions.

In Uganda as in other jurisdictions, taxes are a creature of statute. It is a cardinal principle of tax law that for a tax to be levied, it must be clearly provided for by an Act of Parliament. In Uganda, the same way that any tax payable is provided for by an Act of Parliament, is the same way that institutions that handle tax disputes are provided for. The jurisdiction and power to handle a tax dispute is only derived from an Act of Parliament.

4.3.1 The 1995 Ugandan Constitution as the *grundnorm*

Under the National Objectives and Directive Principles of State Policy the State shall promote and implement energy policies that will ensure that people's basic needs and those of environmental preservation are met.[113] These policies and laws are supposed to be implemented with regard to the Constitutional inalienable right to a fair hearing whenever tax disputes arise.[114]

[113] Objective XXVII of the 1995 Constitution of the Republic of Uganda
[114] Article 28,

It is the mandate of the Parliament of Uganda under the Constitution to make laws to establish the tax tribunals[115]. It is also the duty of parliament to give legislative sanction to taxation and acquisition of loans, in order to finance the work of government.[116]

Parliament has since enacted various laws that govern settlement of disputes in the oil and gas sector of Uganda. These include the Uganda Revenue Authority Act, the Tax Procedures Code Act, the Tax Appeals Tribunal Act, the Income Tax Act, the Value Added Tax Act and the Arbitration and Conciliation Act Cap 4 amongst others.

Furthermore, the Constitution also confers unlimited original jurisdiction on the High Court of Uganda and such appellate and other jurisdiction and it is on this basis that appeals from the Tax Appeals Tribunal are heard.[117]

The 1995 Constitution is very key in oil and gas tax dispute resolution considering that it is the *Grundnorm* out of which arises all rights and obligations that govern tax matters. As earlier articulated by Maniruzzaman[118] the positivistic notion of the rule of law is very key in protecting foreign investments and a 'protective regime' in the host state's legislation is key to dispute management. Maniruzzaman's assertion that the function of law is 'one of 'smoothing' the spikes of volatility between the investor and the host state at the top end of the economic and political cycle is instructive to the situation in Uganda and underscores the importance of the 1995 Constitution.

The laws are enacted by the state and the various institutions are similarly constituted by the state with the aim of achieving fiscal sovereignty.

[115] Artice152(3)
[116] Article 79
[117] Article 139 of the 1995 Constitution and Section 16(1) of the Judicature Act, Cap. 13
[118] AFM Maniruzzaman n. 34

4.3.2 The Uganda Revenue Authority

The Uganda Revenue Authority Act[119] creates and mandates the Uganda Revenue Authority to collect tax. Its authority to collect taxes vis-à-vis provisions in PSAs was examined in the case of *K.M. Enterprises and Others v.s Uganda Revenue Authority*[120] where the Court stated that it is the mandate of URA to collect taxes in accordance with the laws of Uganda and this mandate cannot be overridden or fettered by an agreement. The URA is the first forum where tax disputes are handled through the tax objections process. The URA will also be the face of any dispute between an IOC and the Government of Uganda. Since tax assessments are generated by the URA, most tax disputes emanate from the way this institution handles matters. As can be drawn from the study conducted on Rwanda by Mayanja et al.[121] there is a significant positive relationship between fairness of tax dispute resolutions and tax compliance. In Rwanda it was found that resolving tax disputes through administrative procedures other than judicial ones positively impacts tax compliance. As was recommended for the Rwanda Revenue Authority, the URA also needs to put in place strategies to resolve tax disputes independently from the early stages of the dispute, which strategy positively influences taxpayer compliance.

As such the URA is a key player in the dispute resolution process from the outset. As a statutory enterprise that is answerable to the Ministry of Finance, its set up can be viewed from the fiscal sovereignty perspective.

4.3.3 The Tax Procedures Code Act, 2014 and the objections process

This Act seeks to regulate tax administration procedures in Uganda and seeks to harmonize and consolidate tax procedural laws. The objective of the Act is *inter alia* to adopt uniform

[119] The Uganda Revenue Authority Act, Cap. 196 of the Laws of Uganda
[120] K.M. Enterprises Vs Uganda Revenue Authority, HCCS No.599 of 2001
[121] Sazir Nsubuga Mayanja, Kato Mahazi, Twesige Daniel n. 93

procedures for registration, assessment and collection of domestic taxes. Initially, the procedures to be followed were not harmonised since both the Income Tax Act and the Value Added Tax Act had separate provisions relating to the procedural aspects. This Act repealed various sections in both Acts and made provision for a harmonised structure that can be relied upon for disputes arising out of the Income Tax Act, the Value Added Tax Act and the Excise Duty Act all of which are key Acts in taxing the oil and gas sector. The East African Community Customs Management Act also provides for a similar procedure but this is not the subject of this research.

The Income Tax Act, [122]under Part IXA provides for taxation of petroleum operations in Uganda. It provides for taxation of mining licenses under section 89B, limitations on deductions under section 89C, taxation of petroleum licenses under section 89G, limitation of deductions relating to petroleum operations under section 89GA, taxation of contractors under section 89GG and withholding tax under section 89H. Disputes arising hereunder and under the Value Added tax Act are addressed under the Tax Procedures Code Act.

The Act provides for the first steps in the tax dispute resolution process specifically with regard to Income Tax, Value Added Tax and Excise Duty. Where a taxpayer is dissatisfied with a tax decision such taxpayer may lodge an objection with the Commissioner General within 45 days after receiving notice of the decision.

Once an objection is made to the Commissioner General the Act gives the Commissioner General powers to either affirm, vary or set aside the tax decision being challenged.[123] This represents the first step in the oil tax dispute resolution process.

[122] Cap. 340 Laws of Uganda
[123] Section 24 of the Tax Procedures Code Act

The idea is that if a decision has originated from an officer of the URA, the Commissioner General as the head of the Institution is given the power to consider the objecting views of the taxpayer. The Commissioner General has to make and communicate his decision within 90 days failure of which the taxpayer can choose to elect to treat the commissioner General as having made the decision to allow the objection.

From the interviews held with the interviewees, the challenge that was identified with this specific process is that at the point of objection, the Commissioner General will be acting as a judge in his own cause. As the head of the institution that has raised an assessment, taxpayers will have the perception that the decision made to an objection will be in favour of the URA. Taxpayers are likely to view this as being at odds with the principles of natural justice. A similar challenge was identified by Mayanja et al[124] in Rwanda where it was noted that the appeal committee of the Rwanda Revenue Authority (RRA) does not include external tax experts and is only comprised of internal staff, a situation viewed as being suspicious. External involvement of experts at this stage is a lesson that can be drawn from the Rwandan study.

Comparatively, this could be handled in the same manner articulated by Glazebrook[125] as in New Zealand which introduced an elaborate pre-litigation phase that includes a voluntary administrative conference where the parties attempt to resolve issues raised. This pre-litigation phase in New Zealand also involves referring the matter to an Internal Adjudication Unit within the tax authority that reviews the matter independently. This measure is credited for having reduced the number of tax disputes that end up in litigation and could equally work well for taxation disputes in Uganda's oil and gas sector.

[124] Sazir Nsubuga Mayanja, Kato Mahazi, Twesige Daniel n. 93
[125] Justice Susan Glazebrook n. 99

From the interviews it was identified that the URA is always under pressure to collect tax and meet targets and sometimes this clouds their objectivity which leads to conflict. While this structure may be an affirmation of the fiscal sovereignty theory, it does not augur well when viewed by IOCs from a global economy theory perspective.

Furthermore, in practice, objections are now made through an online process. Many taxpayers have found this online objections process to be complicated and technologically challenging. While this particular challenge may not present in the case of IOCs, it is one that generally paints a bad picture of the dispute resolution process in Uganda.

Another provision that sticks out under this Act and is likely to cause some discomfort with IOCs is the power of the Commissioner General to temporarily close businesses for default in paying tax that is due and payable upon service of a notice.[126] While this provision may seem like an ordinary clause in tax management, it may have a tremendous impact if applied to the oil and gas sector. For example, after commencement of production, any temporary closure of production would have a big impact on the oil and gas sector. As such it would do well to exclude this provision from applying to oil and gas business. As earlier indicated in the study on HMRC,[127] the HMRC always seeks, wherever possible, to handle disputes non-confrontationally and by working collaboratively with the taxpayer. The strategy identified by the HMRC of working non-confrontationally can be adopted by the Uganda oil and gas sector as an effective and efficient strategy that requires a collaborative approach by all parties.

With the aim of minimising disputes, the Act makes provision for private rulings. This is a process in which a taxpayer can request the Commissioner General to give a written private

[126] Section 33 of the Tax Procedures Code Act
[127] Her majesty's Revenue & Customs n. 100

ruling setting out his position regarding the application of a provision in a tax law to a transaction that has been entered into or is proposed to be entered into by a taxpayer.[128] Such a ruling is not binding upon the taxpayer but works to create certainty on the part of the taxpayer as to how a transaction will be treated. This provision is useful to IOCs as they can plan transactions with certainty and avoid tax disputes. This is an antilegalistic approach and drawing from the study by Green[129] such less confrontational and more flexible disputes settlement procedures are suitable means that should be encouraged further. Green notes that the use of confrontational and adversarial processes undermines relationships and may lead to conspicuous cases of non-compliance. Private rulings are a way of ensuring against this and as such a lesson can be drawn from Green's study.

Ault[130] while reviewing the practice in OECD countries also identifies advisory opinions as forms of supplementary dispute resolution techniques and he states that model conventions refer to the possibility of a country getting an advisory opinion. While reported cases of advisory opinions are not widespread, lessons can be drawn from the OECD countries since advisory opinions are akin to private rulings.

The next step in the dispute resolution process following an objection is that where a taxpayer is dissatisfied with the Commissioner's decision, an application for review can be lodged to the Tax Appeals Tribunal within 30 days.

4.3.4 The Tax Appeals Tribunal Act and the tax appeals process

[128] Section 33 of the Tax Procedures Code Act
[129] Robert A. Green n. 37
[130] Hugh J Ault n. 98

This Act[131] provides for the establishment of the Tax Appeals Tribunal[132] which is supposed to review taxation decisions as an independent tribunal.[133] The Act gives the Tribunal powers to either affirm, vary or set aside a taxation decision. The Tribunal may conduct hearings before arriving at a decision. The Tribunal members are appointed by the Minister of Finance.[134]

One notable challenge that was identified and raised in the interviews with the interviewees is that both the Tribunal and the URA are answerable to the Minister of Finance. In fact, monthly reports are submitted to the Minister of Finance with regard to disputes handled at the Tribunal and amounts collected or deemed payable as tax.

Taxpayers may perceive the Tribunal as being merely an extension of the Uganda Revenue Authority with limited independence and a strong likelihood of bias and partiality. In the interviews with the members of the Tribunal, they strongly asserted that they are an independent and impartial body. Legal practitioners interviewed also confirmed this independence and impartiality. In spite of this affirmation of independence by the Tribunal, it cannot however be ruled out that IOCs may not feel comfortable having their tax disputes resolved by a body appointed by the Minister in charge of ensuring the collection of tax. Viewed from the point of view of the state, this arrangement is aligned to the fiscal sovereignty theory but proponents of the global economy theory will be critical to it.

The Tribunal by way of an amendment to the Act,[135] took on a mediation model as the first step before matters proceed to hearing. Each case filed at the Tribunal will now go through mandatory mediation as per the Judicature (Mediation) Rules.[136] This has greatly contributed to the resolution of various tax disputes and is a welcome development for the oil and gas sector

[131] The Tax Appeals Tribunal Act, Cap. 345 of the Laws of Uganda
[132] Section 2 Tax Appeals Tribunal Act Cap. 345
[133] Section 14 Tax Appeals Tribunal Act Cap. 345
[134] Section 4 Tax Appeals Tribunal Act Cap. 345
[135] Of 2018
[136] Of 2013, particularly Section 17A of the Tax Appeals Tribunal Act, Cap. 345 as amended in 2018.

since parties can opt to have oil tax disputes resolved amicably and save time through mediation.

Since the adoption of mandatory mediation at the Tribunal many disputes have been amicably resolved without having to go through the lengthy litigation process.

While mediation is a great tool that can be applied to resolve oil and gas tax disputes, one of the challenges identified from the interviews is that the top decision makers do not attend mediation sessions which renders it ineffective at times.

A further challenge identified from the interviews is that while mediation is a key aspect in dispute resolution, mediators are not prioritized. The remuneration of mediators is not motivating. At the Commercial Court for example, they are reportedly paid UGX. 50,000/- per case, regardless of the number of appearances.

Nonetheless, in spite of these challenges, mediation is turning out to be a workable solution. Last year (2020) at the Tribunal, mediation resolved 72 cases collecting hundreds of billions in tax-more than the amounts collected at litigation stage. Drawing on lessons from Nigeria where Richards[137] notes that the extant tax policy in Nigeria provides that in the event of a tax dispute parties shall leverage all amicable means of dispute resolution and only resort to judicial determination as a last resort, this adoption of mediation is a key development that should be embraced and encouraged further.

Perhaps the most contentious provision in this Act is the provision requiring a deposit of tax pending the determination of an objection. It is a requirement that a taxpayer who has lodged a notice of objection to an assessment shall, pending final resolution of the objection, pay 30 percent of the tax assessed or that part of the tax assessed not in dispute, whichever is greater.[138]

[137] Newman U. Richards n. 89
[138] Section 15 Tax Appeals Tribunal Act Cap. 345

Considering the huge amounts that are usually involved in oil and gas tax disputes, a requirement that a taxpayer deposits 30% before being heard is onerous and may be a fetter to the right to a fair hearing.

Some interviewees viewed this 30% requirement as a provision that is necessary to weed out frivolous and vexatious objections and ensure that only taxpayers that are serious with their objections will proceed with their legal challenges. It is also a provision that ensures that more taxes are collected, which is a good thing for the state. On the other hand however, some of the interviewees were of the view that this provision should be repealed and instead efforts aremade to fast-track the process so that upon final determination, the full tax is paid. This wouldensure that tax is collected legitimately. The literature reviewed in this research did not identifysimilar provisions in OECD country laws requiring 30% deposits prior to tax disputes being heard. The absence of such onerous requirements in oil and gas tax dispute resolution processesin OECD countries is a lesson from which Uganda can learn. The case studies for New Zealandand HM Revenue & Customs also show that the processes adopted do not include this onerousprovision.

With regard to the oil and gas sector, IOCs will definitely be opposed to the application of this provision. From the point of view of IOCs the application of such a provision by the Government amounts to indirect expropriation and a breach of rights under the PSA and is an illegitimate way of collecting tax before determination of the questions in dispute. If challenged along these lines, it is a potential cause of even bigger conflict.

From a global economy theory perspective, this provision puts the country at a disadvantage as it discourages investors and could be a reason for IOCs to choose alternative investment destinations that do not have similar onerous provisions.

A further challenge that was pointed out is that the Tribunal does not have time limits within which to determine a matter that is filed before it. In the case of IOCs this means that they are not able to easily project and determine how long it will take to resolve a dispute that is before the Tribunal. This uncertainty renders the process to be unreliable and unpredictable. Serunjogi et al in their study on the Tribunal found that on average, only 6 cases worth UGX 2.3 Billion were finalized within 12 months of lodgment during the period of the study (2008-2016), which gave a yearly average completion rate as low as 16.6 percent.[139] In fairness to the Tribunal, the Tribunal's Registrar revealed that in more recent years, the Tribunal's efficiency has picked up and a much higher number of cases is handled and resolved at a much faster pace.

The lack of defined timelines is in contrast with Ugandan procurement law provisions which have defined timelines within which to resolve cases. Under the Public Procurement and Disposal of Public Assets Act the PPDA Tribunal has ten working days from receipt of an application for review within which to resolve such application.[140] It would benefit the oil sector if the Act similarly created timelines within which disputes are to be resolved. This challenge was also identified by Glazebrook[141]in New Zealand and reforms to address it are pertinent.

From a global economy theory point of view, this uncertainty puts the country at a disadvantage when weighed against other investment destinations.

[139] Serunjogi Brian &Paul Corti Lakuma, Court Actions and Boosting Domestic Revenue in Uganda, Research series No. 146, The Economic Policy Research Centre (March 2019), page 11
[140] Section 91I(7) of the Public Procurement and Disposal of Public Assets Act No. 1 of 2003 as amended.
[141] Justice Susan Glazebrook n. 99

Once a decision of the Tribunal is made, the next step in the process is an appeal to the High Court. The Act provides for appeals to the High Court from decisions of the tribunal. The appeal may only be made on questions of law and is to be lodged within 30 days from the decision of the Tribunal.[142]

At the time of starting this research, one of the loopholes that had been identified was that the High Court was the court of last resort for tax matters originating from a decision of the Uganda Revenue Authority. There were no provisions in the law for appeals to the Court of Appeal or to the Supreme Court. In fact, the Court of Appeal had determined that a right of appeal is only conferred by an Act of Parliament and Parliament did not deem it fit to confer a right of appeal from a decision of the High Court pursuant to an appeal emanating from a decision of the Tax Appeals Tribunal under the Value Added Tax Act and the Tax Appeals Tribunal Act and therefore the Court of Appeal had no jurisdiction to hear the appeal.[143] The Court of Appeal in an appeal that was lodged by Heritage Oil and Gas Limited Vs Uganda Revenue Authority further stated that there is no statutory provision conferring a right of appeal from a decision of the High Court on appeal from a decisions of the Tax Appeals Tribunal.[144]

What this meant is that oil tax disputes did not have the benefit of being considered by the Court of Appeal and Supreme Court yet by their nature, oil tax disputes involve huge amounts of money and legal questions of great importance and certainly involve issues which require the pronouncement of the highest Courts of the land. To put things in perspective, the biggest legal disputes in the country's history in terms of subject matter have all been oil tax disputes. These disputes however did not have the benefit of being heard by the Court of Appeal or the Supreme Court.

[142] Section 27 Tax Appeals Tribunal Act Cap. 345
[143] Housing Finance Bank Limited Vs URA, Civil Appeal No. 22 of 2012 [2020]
[144] Heritage Oil and Gas Limited vs Uganda Revenue Authority, Court of Appeal Civil Appeal No. 264 of 2018.

As this research progressed however, and in a clear case of the legislators reading this researcher's mind, Parliament enacted an amendment creating a right of appeal to the Court of Appeal and to the Supreme Court in tax matters. It is observed that the newly created opportunity to refer tax disputes to the highest courts will be largely beneficial to the oil and gas sector and will increase the confidence of taxpayers doing business in the oil and gas sector. This aligns well with the global economy theory.

The interviewees all agreed that many of the aspects presented by oil and gas tax matters can be highly technical. While these disputes are highly technical, it is noteworthy that there is no provision that enables the co-option of experts for expert determination of oil tax disputes. The benefit of experts is accordingly excluded in the framework for oil tax dispute resolutions.

In comparison, the Electricity Disputes Tribunal is given the power under its enabling Act to seek technical advice from specialists whose expertise assists in proper determination of issues.[145] There is no similar provision with regard to oil tax disputes. Such expert determination has been referred to as a 'determinative, expert and reliable process, without many of the disadvantages and costs associated with formal arbitration'.[146]

One of the members of the Tribunal interviewed was of the view that co-opting experts would help members make informed decisions but however quickly clarified that the advice of the experts should not be binding on the members. The members ought to be able to make their own decisions and the advice of the experts ought to be only advisory as is the position with court assessors in Uganda.

[145] Section 106(1) Electricity Act, 1999 Cap. 145, laws of Uganda
[146] Greg Gordon, John Patterson and Emre Usenmez (2012), Oil and gas Law-Current practice and Emerging Trends, Dundee university Press, p.598

A view was also expressed that if experts are brought as witnesses, this can sufficiently serve the purpose. Both Martin[147] and Gordon et al[148] argue that expert determination is important for technical aspects of energy disputes and that expert determination is one of the prominent dispute resolution methods in the oil and gas industry. Lessons can be drawn by Uganda from these authors about the importance of the co-option of experts in oil and gas tax dispute resolution.

Financing constraints are another key challenge that was identified in the research. The Tax Appeals Tribunal and the judiciary are not well-funded and this affects operational efficiency in having oil tax disputes resolved. Proper funding would reduce the likelihood of bribery and corruption. Poor financing also leads to lack of experienced personnel taking up roles in the judiciary. A lack of capacity might arise from an insufficient number of judicial personnel or a lack of the needed expertise, and can result in delay and poor quality of the decisions taken.[149] If officers are acting on behalf of the state but are not well-funded, the decisions that they take and implement, if influenced by bribery, cannot be said to achieve fiscal sovereignty. Similarly, from a global economy theory perspective, such decisions would not count for much.

The poor funding further affects the infrastructure that is in place at the Tribunal and the courts. The Tribunal currently does not have equipment and offices appropriate for an institution of its stature. While justice can be achieved even under a mango tree (a common Ugandan euphemism for poor infrastructure), having good infrastructure in place ensures better service delivery and attracts the confidence of players in the oil and gas sector.

[147] Timothy. A. Martin n. 65, 66
[148] Greg Gordon, et al n. 67
[149] Victor Thuranyi &Isabel Espejo, International Monetary Fund: 'How can excessive Volume of tax disputes be dealt with?' (December 2013) p.4

The widespread need for training of personnel charged with both enactment of tax laws and determination of tax disputes was also identified as key. Interviewees pointed out the sometimes confusing language used in drafting tax legislation which opens up room for disputes. Training of legislators would go a long way in mitigating this. In their study on Uganda, Kazi et al[150] allude to the training that has been carried out of URA officials in making assessments and collecting taxes from IOCs which is vital and commendable. As it will help to reduce disputes that arise from mis-assessments brought about by lack of knowledge or misunderstanding of the petroleum business.

4.3.5 Arbitration of Tax Disputes

The Arbitration and Conciliation Act[151] was enacted to provide for international commercial Arbitration, domestic arbitration and the enforcement of foreign arbitral awards. It also defines the law relating to conciliation of disputes.[152]

Arbitration is defined as any arbitration whether administered by an international or domestic institution where there is an arbitration agreement.[153]

The Act establishes the Centre for Arbitration and Dispute Resolution ("CADER")[154] as an appointing authority and arbitration institution[155]. Recently, ICAMEK has also been appointed by the Minister as an appointing authority and arbitration institution. Unfortunately it has been said that, in the past, CADER was not able to effectively perform its services due to inadequate funding.[156] This position still holds to date.

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[150] Wilson Bahati Kazi and Barbra Beyeza n. 57
[151] The Arbitration and Conciliation Act Cap 4, Laws of Uganda
[152] Long title and Section 1, Arbitration and Conciliation Act Cap 4.
[153] Section 2 (b), Arbitration and Conciliation Act, Cap 4.
[154] sections 67 of the Arbitration and Conciliation Act, Cap. 4
[155] Section 68 of the Arbitration and Conciliation Act, Cap. 4
[156] Anthony Conrad K. Kakooza, 'Arbitration, Conciliation and Mediation in Uganda: A focus on the practical aspects', (2009) The Uganda Living Law Journal, a publication of the Uganda Law Reform Commission P.5

The Act also provides for arbitral awards under the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "ICSID Convention") signed by Uganda in March, 1965.[157] It also recognizes the enforcement of the New York Convention Awards under Part III of the Act.

This Act is essential in the oil and gas sector because it opens up the dispute resolution process to other fora outside the traditional court system. This is a key aspect for IOCs that are usually not comfortable with having disputes with the Government determined by Government agencies.

It is noteworthy that the current model PSA excludes taxation disputes from being referred to arbitration and provides that taxation disputes shall be handled in accordance with the laws of Uganda. This works strongly for the argument that oil tax disputes are non-arbitrable. However as is shown below, each case is to be determined on its facts.

Arbitrable disputes in tax may include a claim that a tax measure breaches an investor's right under a contract with a host state, or a claim that a tax measure violates protections in an investment treaty.[158]

The question of whether tax disputes are arbitrable is a key question that has attracted many answers but remains an open and debatable subject.

Aliker et al [159] review the history and infrastructure of arbitration in Uganda and push the position that matters of tax are generally not arbitrable. They however note that the Arbitration and Conciliation Act provides for the resolution of disputes whether contractual or not which

[157] Part IV, sections 45-47 of The Arbitration and Conciliation Act, Cap. 4
[158] Yves Dezalay & Bryant G. Garth, 'Dealing in Virtue: International Commercial Arbitration and Construction of a Transnational Legal Order 9-10, 124,198 (1996)
[159] Philip Bliss Aliker & Michael Mafabi, 'Arbitration in Uganda, History and Infrastructure', World Arbitration Reporter, 1-36

leaves the class of arbitrable matters wide open. They discuss the case of Heritage Oil and Gas Limited *vs* Uganda Revenue Authority where the issue of arbitrability of tax matters was the subject of discussion by the High Court of Uganda.

In the above case, upon Heritage Oil & Gas Limited's (HOGL) disposal of its interests in the PSA to Tullow Oil, the Uganda Revenue Authority raised an assessment for capital gains tax of US$ 434, 925,000. HOGL objected to the assessment and, in accordance with the provisions of the law that required that applications are filed before the Tax Appeals Tribunal, applications were accordingly filed.

The PSA had a clause that provided that 'any dispute' shall be referred to arbitration in accordance with the United Nations Commission for International Trade Law (UNCITRAL) Arbitration Rules. Having filed the applications as required, HOGL applied for a stay of the proceedings and reference of the matter to arbitration under provisions of section 5 of the Arbitration and Conciliation Act. The Tribunal declined to stay the matter and have it referred to arbitration.

On appeal against this decision to the High Court, Justice Obura (as she then was, now Judge of the Court of Appeal) arrived at the finding that section 5 of the Arbitration and Conciliation Act (which provides for stay and reference to arbitration) was inoperable under the circumstances and that tax by inference was excepted from the scope of the relevant arbitration agreement.

In the above matter, this researcher personally represented HOGL before the High Court and made arguments as a proponent for arbitrability of tax disputes. The High Court's decision itself turned on the peculiar circumstances of the case and it is clear that under different facts and circumstances, the issue of arbitrability of tax matters is one that is still debatable.

The High Court's decision was clearly a propounding of the fiscal sovereignty theory. The court in discussing the rationale for choosing the statutory mechanism over the contractual mechanism cited Prof. Bakibinga[160] and stated that this is to enable the Government achieve the objectives of taxation which include raising revenue, achieving economic stability and development as well as bringing about income distribution. The court proffered that taxation is a tool by which the sovereign state extracts finances or funds from its people and property to provide public revenue to support Government expenditures and public expenses. The court further stated that taxation is the most reliable source of funds for most developing economies and as such took the view that subjecting it to the whims and negotiation skills of contractors and Government Officials would create uncertainty and inequity on the amounts payable and cause economic instability.

It should be noted that in spite of the above finding by the court, parallel arbitration proceedings ensued over the same dispute and in which the government participated.

Ultimately, the question of whether a matter is arbitrable or not will be determined on the facts of each specific case and is one that will be left to the arbitration tribunal which is mandated to determine the question of jurisdiction and its competence under the competence-competence doctrine.[161] This is more so when a tax dispute is characterised and 'dressed up' as one of expropriation or of breach of a stabilisation clause in a PSA.

Chaisse notes that an arbitration tribunal in an international investment case does not sit as a court of appeal to the local tax court or administrative body that decides tax cases. She notes that whether a certain tax is applicable is a matter for the courts and administrative bodies of the state, not for the arbitration tribunal. The tribunal will only decide whether the state

[160] Prof. David J. Bakibinga (2006), Revenue Law in Uganda, Fountain Publishers, p.1-4
[161] Philip Bliss Aliker & Michael Mafabi, 'Arbitration in Uganda, History and Infrastructure', World Arbitration Reporter, p.18,19

breached any international obligations as set out in general international law or in the contract between the state and the investor. While it is not the role of the arbitration tribunal to interpret and apply the tax laws of a state to an investor, the way a state applies its tax laws may very well constitute a breach of the obligations of that state under international law. She contends that to that extent, the matter can be both a question for a local tax court (to be decided solely on the tax laws of that state) and for an arbitration tribunal (to be decided on international investment law).[162]

As is evident above, there is an apparent interplay between the two theories of fiscal sovereignty and global economy with officers of the state propounding the former while IOCs push for the latter.

The Investment Code Act also provides for dispute settlement mechanisms between investors and the Government. It states that a dispute not settled through negotiations may be submitted to arbitration as may be mutually agreed by the parties in accordance with the Arbitration and Conciliation Act, the ICSID rules of procedure or within the framework of any bilateral or multilateral agreement on investment protection to which the Government and the country of which the investor is a national are parties.[163] This is another avenue where arbitration can be achieved by IOCs.

The 1958 United Nations Convention on Recognition and Enforcement of Arbitral Awards (the New York Convention) was ratified in 1992. The Arbitration and Conciliation Act Cap 4 under Part III expressly provides for New York Convention Awards and awards between contracting parties that are party to the New York Convention are enforceable and are binding for all

[162] Julien Chaisse, 'Investor-State Arbitration in international Tax Dispute Resolution—A Cut Above Dedicated Tax Dispute Resolution?' (2016) 35 Virginia Tax Review, 220
[163] Section 25, Investment Code Act No. 6 of 2019

purposes on parties in Uganda[164].

The 1965 Convention on Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention) was ratified on 7th June 1966 enabling submission of investment disputes against Uganda for conciliation or arbitration at ICSID. The Arbitration and Conciliation Act Part IV provides for enforcement of ICSID Convention Awards rendered pursuant to the Convention.[165]

ICSID has handled at least two claims involving oil tax disputes though both were withdrawn prior to the arbitration award[166]. These were Tullow Uganda Operations PTY LTD Vs Republic of Uganda ICSID Case No. ARB/12/34 and the case of Total E&P Uganda BV Vs Republic of Uganda ICSID Case No. ARB/15/11.

During the interviews, one of the downsides to arbitration of oil tax disputes in Uganda that was identified is that while the oil reserves are in Uganda, the seat of arbitration chosen may not necessarily be Uganda and the arbitration tribunal chosen may not necessarily consider the nuances of Ugandan law and culture and as such a determination of a tax oil dispute may under these circumstances not factor in Ugandan cultural nuances. Application of the global economy theory tends to present challenges of this nature since local cultural nuances are discarded in favour of more global approaches.

Many interviewees were in favour of arbitration as a quick and effective way of resolving oil and gas tax disputes. International arbitration was however pointed out to be an expensive mode of dispute resolution. Real life experiences with the arbitration process were discussed and it

[164] Section 41
[165] Section 45, Arbitration and Conciliation Act, Cap. 4, Laws of Uganda
[166] Cristal Energy SeriesDisputes in the oil and gas industry: The Case of Uganda (2019)

was clear that requirements like travel of parties and witnesses to foreign countries for arbitration hearings were a costly venture.

The arbitral institutions in place in Uganda are currently not up to the desired standards required or expected of an international arbitration institution. The Centre for Arbitration and Dispute Resolution (CADER) is underfunded, poorly equipped and not well-organized. The institution does not have comprehensive rules similar to what other international institutions have and only relies on a two-page document in the schedule in the Arbitration and Conciliation Act as the Rules of Arbitration. Some of the rules therein are almost incoherent and have been the subject of disputes about their interpretation. While information about CADER should be a readily available for parties to have visibility of the process and benefits of arbitration in Uganda, it is an uphill task to obtain information from CADER, a fact that is indicative of this institution's approach. In fact it has been stated that CADER as an institution is less keen to promote and attract international arbitrations seated in Uganda.[167]

As is recommended by Luki,[168] Uganda needs a paradigm shift whereby players in the oil and gas sector are seen to encourage international arbitration as a viable dispute resolution mechanism.

As articulated by Mills et al[169] Indonesia's first PSA provided for arbitration as a dispute resolution mechanism where arbitrators were to be appointed from the technical field related with the dispute and unless otherwise agreed, the arbitration was to be conducted in Indonesia. Such a clause is necessary in the Ugandan setting as it would ensure technical expertise in

[167] Philip Bliss Aliker, Michael Mafabi, 'Arbitration in Uganda -History and Infrastructure', World Arbitration Reporter, (2019) 2nd Edition, p.8 www.arbitrationlaw.com
[168] Bayuasi Nammei Luki n. 77
[169] Karen Mills and Mirza A. Karim n. 97

arbitration and bring the advantage of home-seated arbitration proceedings to the benefit of the country and the oil and gas sector.

4.3.6 Conciliation

While the Arbitration and Conciliation Act also provides for conciliation, the findings from the interviews conducted and the documents reviewed reveal that this is not a mechanism that has been applied widely in its own right in resolution of tax matters. This is an area in which further research is needed.

4.3.7 Mutual Agreement Procedures

This process mainly relates to the resolution of disputes between states and involves discussions between two states with a DTA to resolve a dispute that has been submitted by a taxpayer in one of the jurisdictions. While this process is provided for in the UN Model Tax Convention, it is not adopted as law in Uganda. From the research conducted, this process has not been applied, neither has the need for it to be applied arisen.

The process may be useful where a state enacts a law that has the potential to breach provisions of a tax treaty. In such a case, an affected taxpayer may put in a request for a MAP before the actual dispute crystallizes. While this process is not applicable law in Uganda, the research findings are that it ought to be considered as a dispute resolution mechanism in line with international trends. This process would serve the country and IOCs well under the global economy theory.

This is another area in which further research is needed.

4.4 Conclusion

In this chapter, I have shown my research findings on the oil and gas tax dispute resolution mechanisms in Uganda. I have reviewed the legal and institutional frameworks and have also identified the challenges presented. I have reviewed the findings from the perspective of both the fiscal sovereignty and global economy theories.

In the next chapter I will make recommendations in light of the above findings.

CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

5.1 INTRODUCTION

Dispute resolution is an essential part of any constitutional legal system that is functioning.[170] This point has been driven home in the preceding chapters. It has been shown that where commercial reserves of oil have been discovered, as in Uganda's case, tax disputes are an inescapable inevitability. To effectively manage the oil resource and to achieve the anticipated gains there have to be effective dispute resolution mechanisms in place. There is a real need for processes and institutions that are fast, effective and cause minimum disruption to working processes and relationships.[171]

It has been shown that tax disputes in the oil and gas sector may arise in various ways. Some of the common causes of disputes include inaccurate assumptions made during a transaction about how a tax should be treated when imposed by the government.[172] Tax disputes may also arise as a result of an ambiguity in the law. This is usually a result of poor drafting during the legislation process. Differences in computations and calculations also commonly give rise to tax disputes. It is common ground that while, on the one hand, the Government will always seek to maximise its tax collection, taxpayers, on the other, will be looking to minimize their tax liability. This divergence in aims inevitably leads to tax disputes. Due to the fact that the

[170] Yitzhak Hadari, Compulsory Arbitration in International Transfer Pricing and Other Double Taxation Disputes' available at http://papers.ssm.com/so13/papers.cfm?abstract-id=1483621 accessed on the 30th of May 2021.
[171] Greg Gordon, John Patterson and Emre Usenmez (2012), Oil and gas Law-Current practice and Emerging Trends, Dundee university Press, p.573
[172] Mark Beeley and Sarah Stockley, "Upstream oil and gas dispute-global Arbitration Review' available on globalabitrationreview.com

amounts in dispute in the oil and gas sector tend to be high, there is an increased significance in how these disputes are dealt with.

Dispute avoidance is also key. Han posits that dispute avoidance is more important than dispute resolution and this largely depends on a comprehensive framework of institutional arrangements, regulation and legal systems. That, in order to increase the predictability of commercial outcomes, avoid and reduce disputes, countries should make joint efforts to design a set of rules, regulations, laws, institutions, including dispute resolution in due course.[173]

Following the findings that have been relayed in the preceding chapter, below, we discuss some of this researcher's proposed recommendations on how the system can generally be improved.

5.2 Discussion of conclusions and recommendations

5.2.1 Goals

The 1995 Constitution, under the National Objectives and Directive Principles of State Policy provides as an objective that the State shall promote and implement energy policies that will ensure that people's basic needs and those of environmental preservation are met.[174]

The Constitution also provides for the non-derogable right to a fair hearing and states that in the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.

The Constitution further provides for principles to be applied by courts in adjudicating matters and states that justice shall be done to all irrespective of their social or economic status; justice

[173] Baoqing Han, 'Dispute Resolution in International Electricity Trade', (2011)Energy Procedia, Science Direct
[174] Objective XXVII of the 1995 Constitution of the Republic of Uganda

shall not be delayed; adequate compensation shall be awarded to victims of wrongs; reconciliation between parties shall be promoted; and substantive justice shall be administered without undue regard to technicalities.[175]

The United Nations in September 2015 declared new global Sustainable Development Goals. Amongst the goals are those relating to energy and to justice. Goal 7 is to 'ensure access to affordable, reliable, sustainable and modern energy for all'. Goal 16 is to "promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels".[176] An improvement in the tax dispute resolution mechanisms in the oil and gas sector would be a step towards achievement of these identified goals.

The two sustainable development goals are relevant to the discussion in this paper as they are intertwined for purposes of achieving justice in the energy sector. An attempt has to be made to achieve these goals for purposes of ensuring the improvement of administration of justice in the oil and gas sector.

The Natural Resource Charter under PRECEPT 4 states that tax regimes and contractual terms should enable the government to realize the full value of its resources consistent with attracting necessary investment. A key aim that is spelt out in the Charter is to Establish transparency, stability, and robustness.[177]

In the global oil and gas sector, the issue of dispute resolution has been prioritized for purposes of ensuring investor confidence and certainty in the sector. Martin posits that the international energy sector, along with its associated construction projects, makes up the largest portfolio of

[175] Article 126 (2) (a-e) of the 1995 Constitution
[176] www.sdgs.un.org/goals, accessed on 30th May 2021 at 1122hrs
[177] The Natural Resource Charter, 2014 Natural Resource Governance Institute, Second Edition p.17,19, www.resourcegovernance.org , www.naturalresourcecharter.org

international commercial and state investment disputes in the world. He states that disputes are a significant risk in any international energy project with regard to how well a party can manage that dispute to get a satisfactory result and that parties need to continually manage such risk from the inception of the deal through to the point when a dispute arises and is eventually resolved.[178] As is shown in figure 1, energy disputes (which include oil and gas disputes) take up a significant portion of international commercial disputes. This calls for prioritisation in the management of such disputes.

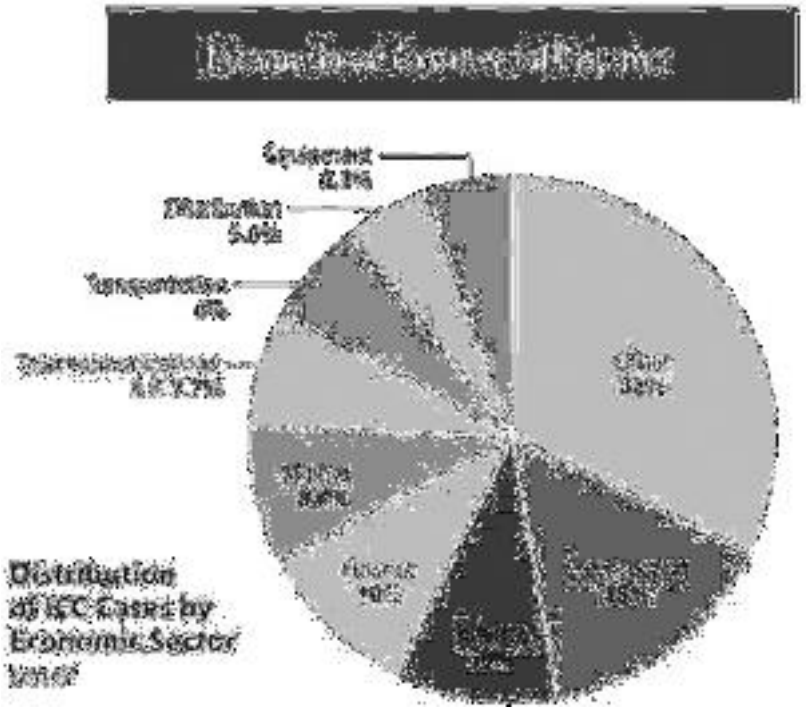

Figure 1: State Investment disputes.[179]

[178] Timothy Martin 'Dispute Resolution in the International Energy Sector: An overview', (2011) 4 (No.4) Journal of World Energy Law and Business, 332

[179] Ibid; and ICC data on international commercial disputes at: <http://www.iccwbo.org/court/arbitration/index.html

It is the provisions pointed out above that form the backbone upon which tax disputes in the oil and gas sector are to be resolved.

The recommendations for improvement in the system must be premised on the above ideals.

5.2.3 Recommendations for improvement

5.2.3.1 Time limits at the Tax Appeals Tribunal

Currently, there is no set time limit in the law within which the Tax Appeals Tribunal should determine a matter before it. This is a lacuna that defeats the objective of certainty in dispute resolution since parties are unable to determine how long their matters will take before being decided by the Tax Appeals Tribunal.

The law needs to set clear time-limits within which the Tax Appeals Tribunal can decide cases brought before it. The Tax Appeals Tribunal Act can be amended to set a clear timeline between the filing of an application in a tax dispute and its final disposal. It is recommended that matters should be determined within 30 days from the date of filing. This would create certainty in the oil and gas sector.

By way of comparison, procurement laws in Uganda make provision for timelines within which a matter should be resolved. Under the Public Procurement and Disposal of Public Assets Act the PPDA Tribunal shall issue a decision within a period of not more than ten working days after receiving an application for review.[180] Such mandatory timelines enacted by Parliament

[180] Section 91I(7) of the Public Procurement and Disposal of Public Assets Act No. 1 of 2003 as amended.

ensure that a matter is resolved by the Tribunal within a set and fixed time and this enhances certainty in the dispute resolution setting.

Alternatively, the Tax Appeals Tribunals (Procedure) Rules[181] can be amended to establish timelines for the Tribunal. Such an amendment would not have to go through the lengthy route of Parliament but can be signed by the Chairman of the Tribunal. A similar amendment was done with regard to timelines in judicial review applications in the Ugandan High Court. In 2019, having realized that it was important for matters relating to the exercise of public powers to be handled expeditiously through judicial review applications before the High Court, the Chief Justice and Chairperson of the Rules Committee amended the Rules relating to judicial review applications and introduced a provision that requires that an application for judicial review shall be disposed of within ninety days from the date of filing the application.[182] This can be used as an applicable example to cater for the issue of timelines at the Tax Appeals Tribunal.

5.2.3.2 Institutional Funding

As earlier observed, justice in tax administration will be easier to deliver where there is sufficient funding. The Government accordingly has to make funding of the oil tax dispute resolution sectors a priority. This would create confidence of the players in the system.

Increased funding can be applied towards technological modernization of the various dispute resolution fora. Since IOCs ordinarily invest in and operate in highly modernized settings, this will be an important step. For IOCs to perceive that there is justice in tax administration in Uganda, the Government must ensure modern settings. Some examples that can easily be

[181] The Tax Appeals Tribunal (Procedure) Rules S.I. No. 50 of 2012
[182] Rule 7B, The Judicature (Judicial Review) (Amendment) Rules, 2019, S.I. No. 32 of 2019

achieved include electronic filing systems and teleconferencing hearing facilities to make remote hearing of disputes possible.

Increased funding can also be applied towards better remuneration of officers at the Uganda Revenue Authority and the Tribunal. This would be key in motivating the said officers.

The increased funding can be sourced in various ways. Suggestions include, filing fees at the Tribunal. Upon filing an application, filing fees for an application could be pegged to the amount of the subject matter in dispute. This would mean that high-level disputes would attract higher filing fees. The fees collected can then be retained by the Tribunal to fund its operations. In the event that a dispute is determined in favour of the taxpayer, such filing fees would be recovered as part of the costs of the application.

Another alternative is to set a small percentage of revenues collected from the oil and gas sector to be set aside and appropriated to tax dispute resolution.

5.2.3.3 Repeal of requirement for 30% deposit

While the Supreme Court[183] has found that it is not unconstitutional, the requirement for a taxpayer to deposit 30% of the tax in dispute pending final determination of a taxation objection is certainly an onerous one.

The provision on the 30% deposit has been the subject of a lot of debate. Recently, the Constitutional Court[184] was of the view that the section is limited to instances where amounts assessed are what is in dispute rather than the principle of whether tax is payable. The court found that the section does not extend to a situation where for example a taxpayer contends

[183] Uganda Projects Implementation and Management Centre Vs Uganda Revenue Authority, Supreme Court Civil Appeal No. 2 of 2009
[184] Fuelex (U) Limited Vs Uganda Revenue Authority, CR No. 03 of 2009

that he is exempted from a tax or where a waiver has been obtained or the objector is not a taxpayer in Uganda or where tax is assessed under a wrong or non-existent law. This authority however does not take precedence over the Supreme Court decision.

The provisions on deposit of 30% of tax in dispute need to be repealed by Parliament with a view to easing the onerous burden that this causes in oil tax disputes.

Another recommended option is the presentation of bonds and guarantees rather than upfront payment of 30% of tax in a dispute before getting a hearing.

5.2.3.4 Independence of the Tribunal

Currently, the Tax Appeals Tribunal is appointed by the Minister of Finance. As earlier observed, this can be a cause for concern with regard to independence of the Tribunal since the Minister of Finance is also charged with ensuring revenue collection.

For purposes of transparency, it is recommended that this role of vetting and appointing tribunal members be assigned to another independent body. This role could be taken on by the Judicial Service Commission.

In PRECEPT 1 of the Natural Resources Charter it is stated that human resource decisions made by government executives and within the institutions themselves should be independent and resistant to political interference in order to develop truly professional capacity. A meritocratic promotion system and a thoughtful human resource policy can instill efficiency and a professional civil service culture.[185]

[185] The Natural Resource Charter, 2014 Natural Resource Governance Institute, Second Edition page 8, www.resourcegovernance.org , www.naturalresourcecharter.org

In order to spread confidence about its independence amongst taxpayers in the oil and gas sector the Tax Appeals Tribunal must also create awareness of its work and must spread its offices out through the various regions of the country. The Ugandan general public needs to be sensitized about how the Tax Appeals Tribunal works. Such an awareness drive would be key to the achievement of justice in the oil and gas sector. It is recommended that regional offices are opened to enable the Tribunal spread out its services.

5.2.3.5 Expert co-option and training

In light of the fact that oil tax disputes are apt to take on a very technical character, it is also recommended that the possibility of co-opting experts in the process of determination of tax disputes is explored.

This goes hand-in-hand with the need to enhance training of officers in the sector to achieve competence.

5.2.3.6 Improvements in arbitration

There are several improvements that can be made to ensure that arbitration becomes a more common and reliable mechanism of oil and gas tax dispute resolution. If disputes are to be determined through international arbitration, there is a demand that the available Ugandan arbitral institutions should have the capacity that is expected of an international arbitration institution.

As earlier established in the research findings, the Center for Arbitration and Dispute Resolution (CADER) is functional but not up to the required or expected standards. As a matter of urgency, comprehensive Rules of Arbitration need to be developed for the institution.

It is also recommended that arbitration clauses in PSAs should be drafted to have Uganda as the seat (and venue) of arbitration rather than providing for foreign-seated arbitrations. On the issue of seat and site selection, Bowman states that the 'selection of the site for arbitration of a domestic oil and gas dispute is usually more a matter of convenience than necessity. However, even in this context the parties' choice of the arbitral site can carry important consequences.'[186]

5.3 Limitations of the study

This research was conducted in the midst of a Covid-19 pandemic. The various restrictions in place, including the standard operating procedures put in place by the Government for health and safety reasons presented a challenge and affected the timely execution of the research.

Due to the sensitive nature of matters in the oil and gas sector, the interviews had to be done carefully, and interviewees chosen with extra care. Access to some of the relevant materials was also limited.

My busy work schedule was also a notable limitation.

5.4 Recommendations for future research

This research did not reveal much about the process of Mutual Agreement Procedures in Uganda, save that it needs to be considered as a relevant dispute resolution procedure in line with international trends. As such further research in this area is recommended.

[186] John P. Bowman, 'Dispute Resolution Planning for the Oil and Gas Industry' (2001) 16 (Issue 2) ICSID Review -Foreign Investment Law Journal 332, p.357
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Furthermore, the conciliation process while provided for in the Arbitration and Conciliation Act has not been applied widely in the resolution of tax disputes. Further research in this area is also recommended.

It is further recommended that further research is undertaken on tax dispute resolution mechanisms through applying the optimal taxation theory and other theories of progressive taxation.

5.4 CONCLUSION

The various tax dispute resolution mechanisms in the oil and gas sector have been reviewed, the challenges therein identified and recommendations on the necessary improvements made.

High level tax disputes are inevitable in Uganda's nascent oil Industry. Economic exigencies demand for an effective and efficient way to resolve tax disputes in every tax system.[187] Even before commencement of oil production, it is noteworthy that the biggest disputes in the history of the country by way of value of subject matter arise from the oil and gas sector and specifically relate to tax. This underscores the importance of this topic. The manner in which Uganda handles and manages these tax disputes will largely contribute to the success of the oil and gas sector. All efforts must accordingly be made to ensure that the challenges identified in the various mechanisms discussed are resolved to ensure justice in oil tax dispute administration.

[187] Newman Richards, 'An examination of tax dispute resolution mechanisms in Nigeria: A case for the adoption of alternative dispute resolution methods', (2017) 1 Uniport Law Review, 196

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APPENDIX I- List of Key Informants

- Dr. Asa Mugenyi, the Chairman of the Tax Appeals Tribunal
- Mr. Siraj Ali, a member of the Tax Appeals Tribunal
- Ms. May Virji, the Head Mediator at the Tax Appeals Tribunal
- Ms. Rachel Kisakye, The Registrar at the Tax Appeals Tribunal
- Mr. George Kallemera, The Commissioner Civil Litigation at the Ministry of Justice-Attorney General's Chambers
- Mr. George Okello, the Assistant Commissioner in charge of Litigation at the Uganda Revenue Authority
- Mr. Bruce Musinguzi- Partner at Kampala Associated Advocates

APPENDIX 2- COPIES OF INTERVIEW QUESTIONS

Interview guide for Mr. Siraj Ali, member of the Tax Appeals Tribunal:

1. What is your role at the TAT?
2. For how long have you been in this role?
3. How many oil and gas tax disputes are you aware of that have been filed at the TAT?
4. How many cases went to hearing resulting in a decision by the TAT?
5. How many cases were resolved before hearing, if any?
6. Are parties open to ADR mechanisms? What is your experience with ADR, if any?
7. How long (on average) does it take the Tribunal to resolve an oil and gas tax dispute?
8. What challenges has the TAT faced in handling oil and gas disputes? (Both administrative and technical).
9. What steps have been taken to address these challenges and are there any outstanding issues that are yet to be resolved?
10. Have TAT members received special training in oil and gas disputes?
11. What is your take on the use of experts in oil and gas tax disputes? Is it viable to have experts be co-opted to assist in resolving tax disputes? Is it viable to have disputes outrightly referred to such experts?
12. In your opinion, is Uganda's current regime for solving petroleum tax disputes sufficient? If not, what changes should be employed to prepare the country for development and production of oil and gas?
13. In light of the huge amounts usually involved in oil and gas taxation disputes, what is your view on the requirement for a 30% deposit before a dispute is entertained?

14. What are some recommendations you would suggest to improve the tax dispute settlement mechanisms currently available in Uganda?

Interview guide for Mr. George Okello the Assistant Commissioner in charge of Litigation at the Uganda Revenue Authority

1. What position do you hold within the URA?
2. For how long have you held this position?
3. For how long have you dealt with tax disputes in the oil and gas sector?
4. What challenges have you faced in dealing with the oil and gas taxation regime?
5. Have these challenges been addressed? If so, how? Are there any outstanding issues with the petroleum tax regime that haven't been addressed?
6. How many significant oil and gas tax disputes are you aware of that have arisen in Uganda?
7. What dispute resolution mechanisms were employed to solve the disputes?
8. How many disputes were solved through litigation?
9. How many disputes were solved using Alternative Dispute Resolution Mechanisms?
10. Did you employ a combination of litigation and ADR in any of the disputes?
11. Why would you choose litigation over ADR and vice versa?
12. What is your take on the skills of URA officers in handling tax disputes specific to the oil and gas sector?
13. What is your take on the skills of Ugandan lawyers in private practice in handling tax disputes in the oil and gas regime?
14. What is your take on the skills of the Tax Appeals Tribunal and Judiciary in handling tax disputes in the oil and gas regime?
15. It has been suggested that International Oil Companies prefer handling their disputes in international fora as opposed to local courts. What is your take on this?

16. In light of the huge amounts usually involved in oil and gas taxation disputes, what is your view on the requirement for a 30% deposit before a dispute is entertained?

Interview guide for Mr. Bruce Musinguzi- Partner at Kampala Associated Advocates

1. What oil and gas tax disputes have you previously handled?
2. What challenges did you face in handling these disputes?
3. Have these challenges been addressed lately? If so, how?
4. Are there any significant issues with the oil and gas taxation regime that you think need to be addressed? Please give some insight into this.
5. What dispute resolution mechanisms were employed to solve the disputes that you were involved in?
6. Do you think Alternative Dispute Resolution Mechanisms are a viable option in resolving oil and gas taxation disputes?
7. Why would you choose litigation over ADR and vice versa?
8. What is your take on the skills of URA officers in handling tax disputes in the oil and gas sector?
9. What is your take on the skills of Ugandan lawyers in private practice in handling tax disputes in the oil and gas sector?
10. What is your take on the skills of the Tax Appeals Tribunal and Judiciary in handling tax disputes in the oil and gas sector?
11. It has been suggested that International oil Companies prefer handling their disputes in international fora as opposed to local courts. What is your take on this?
12. In light of the huge amounts usually involved in oil and gas taxation disputes, what is your view on the requirement for a 30% deposit before a dispute is entertained?
13. What are some recommendations you would suggest to improve the tax dispute settlement mechanisms currently available in Uganda?

Interview guide for Mr. George Kallemera, The Commissioner Civil Litigation at the Ministry of Justice- Attorney General's Chambers

1. What oil and gas tax disputes have you previously handled?
2. What challenges did you face in handling these disputes?
3. Have these challenges been addressed lately? If so, how?
4. Are there any significant issues with the oil and gas taxation regime that you think need to be addressed? Please give some insight into this.
5. What dispute resolution mechanisms were employed to solve the disputes that you were involved in?
6. Do you think Alternative Dispute Resolution Mechanisms are a viable option in resolving oil and gas taxation disputes?
7. Why would you choose litigation over ADR and vice versa?
8. What is your take on the skills of URA officers in handling tax disputes in the oil and gas sector?
9. What is your take on the skills of Ugandan lawyers in private practice in handling tax disputes in the oil and gas sector?
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13. What are some recommendations you would suggest to improve the tax dispute settlement mechanisms currently available in Uganda?