

**Examining The Role of Professional Knowledge-Intensive Business Services (P- KIBS) in implementing National (Local) Content Requirements (LCRs) in the Petroleum Industry in Tanzania: A comparative Analysis of the Upstream Regulations.**

**BY**

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## **DECLARATION**

I, Sserunkuma Aloysius Kibuuka declare that this Research thesis, except for quotations and references contained in published works, which have all been identified and acknowledged, is entirely my own original work and it has never been submitted/ presented to any higher Institution, either in part or completely for any academic award elsewhere.

Signature.....

Date.....

**APPROVAL**

This is to satisfy that this research thesis was done under my supervision, and it is now ready for submission to the Faculty of Law with my approval.

Signature .....

Date .....

Associate Professor George W. K. L. Kasozi

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## **DEDICATION**

I dedicate this work to my parents – my father the late Mr Joseph Namujirwa, and my mother, Hajat Zuhra Rutabanzibwa.

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I would like to thank the Almighty God for His enduring providence.

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## ABBREVIATIONS

KIBS	: Knowledge Intensive Business Services.
P-KIBS	: Professional KIBS (including legal, accounting and finance consultants)
T-KIBS	: Technical KIBS (including high-tech, mechanical, civil, environment and information engineering)
PSA(s)	: Production Sharing Agreements(s)
Midstream Act	: The Petroleum (Refining, Conversion, Transmission and Midstream storage) Act 2013
The Petroleum (EDP) Act	: The Petroleum (Exploration, Development and Production) Act 2013
NOGP	: Uganda National Oil and Gas Policy (2008)
IOC (s)	: International Oil Companies
National Content (Upstream) Regulations	: Made under the Upstream Act, Statutory Instruments 2016 No. 44.
GDP Product	Gross Domestic Product
LCPs	Local Content Policies.
LCRs	Local Content Requirements.

## Definitions.

### *“National (local) content”*

There are variations in the definition of ‘national (local) content’ under the regulatory frameworks.<sup>1</sup> In this context, we adopt an all-inclusive definition by Sigam et al. *‘The total value added to or created in the local economy through the utilization of local human and material resources and services at all stages of the value chain.’*<sup>2</sup>

**“Local Content Requirements (LCRs)”** Means statutory or contractual obligation for preferential procurement of domestic goods and services, as well as training imposed on international contractors as a measure of implementing LCPs within a general or industry specific legal frameworks. In this case the Petroleum Industry.

**“Legal Services”** means business processes offered by licenced private and public law firms, in relation to conducting due diligence, negotiating/drafting legal agreements, compliance with regulatory requirements, dispute resolution and allied services.

**“Entrepreneur”** and **“Entrepreneurship”** There is no consensus about the definition of ‘entrepreneur’ and ‘entrepreneurship.’ Merriam-Webster dictionary, defines the former as ‘one who organises, manages and assumes the risk of a business or enterprise’; and the latter as ‘the activity of setting up a business, taking on financial risks in the hope of profit.’ In this event we adopt Rusu et al. definition of entrepreneur:

*‘...in the modern sense of a market economy-an entrepreneur is an economic agent assuming an innovative and active behaviour, who deliberately accepts financial risks to develop new projects.’*<sup>3</sup>

**“Local Content Requirements (LCRs)”** Means statutory or contractual obligation for preferential procurement of domestic goods and services, as well as training imposed on international contractors as a measure of implementing LCPs within a general or industry specific legal frameworks. In this case the Petroleum Industry.

**“Legal Services”** means business processes offered by licenced private and public law firms, in relation to conducting due diligence, negotiating/drafting legal agreements, compliance with regulatory requirements, dispute resolution and allied services.

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<sup>1</sup>The Petroleum (Local Content) Regulations, 2017, GN. No. 197 (Tanzania), Reg 3. *‘Local content’ means the quantum of composite value added to, or created in the economy of Tanzania through deliberate utilization of Tanzanian human and material resources and services in the petroleum operations in order to stimulate the development of capabilities of Tanzanians and to encourage local investment and participation;*

<sup>2</sup> Claudine Sigam and Leonardo Garcia, ‘Extractive Industries: Optimizing Value Retention in Host Countries’ (2012) UNCTAD <https://unctad.org> (visited 17 April 2020); Uganda’s Reg. 4 SI 2016 No. 44 adopts this definition.

<sup>3</sup> Sergiu Rusu, Florin Isac, Radu Cureteanu, and Luiela Csorba. ‘Entrepreneurship and entrepreneur: A review of literature concepts.’ (2012) African Journal of Business Management Vol. 6 (10), [3570-3575] 14 March 2012.

**“Legal framework”** the rules, rights and obligations of legal and individual persons and governments as set forth in a readily identifiable source with the authority or force of law.

## LIST OF STATUTES

### A. Tanzania

- i. The Petroleum Act, 2015 Cap.392 [R.E. 2002] Part VIII (Sections 218-224)
- ii. The Companies Act, Cap. 212 [R.E. 2002]
- iii. The Advocates Act, Cap. 341 s 40
- iv. The Tanganyika Law Society Act, Cap. 307
- v. The Business Names (Registration) Act, Cap. 213 [R.E. 2002]
- vi. The Local Content Act, 2015
- vii. The Partnership Act,
- viii. The Natural Wealth (Permanent Sovereignty) Act, 2017
- ix. The Natural Wealth (Review of Unconscionable Terms) Act, 2017

### Subsidiary Legislation

- i. The Petroleum (Local Content) Regulations 2017  
GN. No. 197/2017
- ii. The Advocates' Remuneration and Taxation of  
Costs Rules. GN. No. 515 of 1991

### Policies

- iii. Local Content Policy of Tanzania for Oil and Gas Industry (2014)

### B. Uganda

- i. The Republic of Uganda Constitution 1995; Guiding Principles – ix, x....; Articles; 26, 244 (1),
- ii. The Business Names Registration Act 1918, Cap. 109
- iii. The Advocates Act, Cap, 267
- iv. The Petroleum (Exploration, and Production) Act 1985
- v. The Petroleum (Exploration, Development and Production) Act No. 3/2013; Sections, 9,125, 125 (4) and 183 (3) (x) and (ag)

- vi. The Petroleum (Refining, Conversion, Transmission and Midstream Storage) Act, No.4/2013- sections 5, 53
- vii. The Partnership Act 2010.

### **Statutory Instruments**

- i. Statutory Instruments 2016 No. 44 – Regulations 11 and 12 of the National Content Regulations.
- ii. Statutory Instruments 2016 No. 34 –Regulation 9, 10, 11.
- iii. Advocates (Remuneration & Taxation of Costs) Rules. SI 267-4

### **Policies**

- ii. National Oil and Gas Local Content Policy (2008)
- iii. National Content Policy (2017)
- iv. Build Uganda, Buy Uganda Policy 2014

### **International Treaties**

WTO, Trade Related Aspects of Intellectual Property Rights (TRIPS), 1994

## ABSTRACT

Legal services are part of the **Knowledge-Intensive-Based Services' (KIBS)** sector. International experience places KIBS at the center of developing petroleum projects. Tanzania has adopted Local Content Policies (LCPs) as a means of gaining early participation for domestic industry and services in the supply chain of the emerging industry. However, success of LCPs is dependent upon capacity of domestic enterprises to supply the needs of the technical and capital-intensive industry. Apparently, the implementing frameworks under review rely heavily on command-and-control approaches to achieve the LCP goals.

International experience identifies lack of requisite experience as the major weakness impeding domestic sectors' entry into the industry's supply chain. Moreover, emerging from a weak private sector, policy makers as well as the targeted sector may lack capacity for adequate assessment of the private sector's role within the dynamic changes imposed by the emerging industry.

Focusing on legal services in Tanzania, the research adopted the law as a command theory to examine, how the regulatory framework reflects the role of the legal services relative to existing capacity. An evaluation and comparative analysis of the statutory frameworks reveals apparent lack of focus on capacity building and development of institutional frameworks. Unless there is a shift in the perceived role of the legal services sector, it may suffer from the adverse impact of the emerging industry, thereby failing to facilitate sustainable entrenchment of Local Content Requirements (LCRs).

## CHAPTER ONE

### INTRODUCTION

#### 1. The Legal Services (P-KIBS) role in implementing LCRs in the petroleum industry.

##### 1.1 The nature of the KIBS Sector.

The focus of this research is on legal services as a section of the **Knowledge-Intensive Business Services (KIBS)** sector. '[K]nowledge-intensive service firms undertaking complex operations of an intellectual nature where human capital is the dominant factor.'<sup>4</sup> A sector increasingly gaining attention among policy makers and the academia owing to its remarkable contribution to exponential growth experienced by modern Knowledge-Based Economies.<sup>5</sup>

Although legal services firms offer public services they are not viewed as such.<sup>6</sup> Consequently, the sector does not obtain adequate attention in terms of policy, strategic planning, and public expenditure. Apparently, the obscurity of knowledge-intensive business services, is not limited to Tanzania or developing countries. It is a world-wide phenomenon traced to the treatment of the KIBS sector on the periphery of industry and trade in the economic development debate.<sup>7</sup>

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<sup>4</sup> Emmanuel Muller and David Doloreux, 'The key dimensions of knowledge-intensive business services (KIBS) analysis: a decade of evolution (2007) Fraunhofer Institute Systems and Innovation Research (ISI) [www.econstor.eu](http://www.econstor.eu) (accessed 11 November 2020)

<sup>5</sup> Manja Toivonen, 'Expertise as Business' Long-term development and future prospects of Knowledge- Intensive Business services (KIBS). (2004) Helsinki University of Technology\_ Laboratory of Industrial Management. Doctoral dissertation series 2004/2 [www.tuta.hut.fi](http://www.tuta.hut.fi) ; James R Faulconbridge, 'Business Services: Driving the Knowledge-Based Economy in the UK?' (2010) [www.researchgate](http://www.researchgate); Acheampong T, Ashong M, and Svanikier V C, 'An assessment of local-content policies in oil and gas producing countries' (2016) Journal of World Energy Law and Business, 2016, 9, 282-302 OXFORD; Elena N Zakaharova, Marina V Christova, Marine Z Abesalashivli and Danil V Goneiko, 'The role of the intellectual services sector in the development of innovative processes of the modern << knowledge economy>>' (2019) ESPACIOS Vol. 40 (Issue 40) [27]; Juliana Bomeni Santos, 'Knowledge-intensive business services and innovation performance in Brazil' (2020) Innovation and Management Review Vol. 17. No.1 2020 [58-74]

<sup>6</sup> Hagar Russ, 'Role Of Judicial And Legal Sector Reforms In Business Environment Reform Programmes- A Tanzanian Case Study.' [3] Legal Adviser Business Environment Strengthening Programme for Tanzania (BEST) Ministry of Planning, Economy and Empowerment. [www.businessenvironment.org/dyn/be/doccs/152/Russ.pdf](http://www.businessenvironment.org/dyn/be/doccs/152/Russ.pdf) (accessed 16 December 2021); IDLO, Report on the National Rule of Law Stakeholders Forum "STRENGTHENING THE RULE OF LAW IN TANZANIA" (2015) [www.idlo.int](http://www.idlo.int) (accessed 17 December 2021).

<sup>7</sup> James R Faulconbridge, 'Business Services: Driving the Knowledge-Based Economy in the UK?' (2010) [www.researchgate](http://www.researchgate); George Yarrow and Christopher Decker, 'Assessing the economic Significance of the professional legal services sector in the European Union' (2012); Anupam Khanna, Phyllis Papadavid, Judith Tyson and Dirk Willem te Velde, 'The Role of Services in Economic Transformation \_ With An Application to Kenya' (2016) Supporting Economic Transformation SET <http://set.odi.org.uk> (accessed 27 May 2021).

Therefore, warranting distinctive treatment outside the general basket of entrepreneurs in policy and strategic planning.<sup>8</sup> Moreover, Tanzania's adoption of socialist economic policies since 1967 has had enduring impact on the development of a vibrant private sector.<sup>9</sup> In this event need to identify the sectors' role, relative to its apparent lack of capacity, and consequences if remedial measures are not taken.

While the local content requirements in the emerging petroleum industry, impose a mandatory duty on international contractors to use the exclusive services of domestic legal services, effective participation is contingent upon possession of requisite skills.<sup>10</sup> Commensurate with the needs of the dynamic, technical and capital-intensive industry. Although concerted efforts and investment have and continue to be made towards capacity building, the sector players may not be aware of their role and impact of the emerging industry.

Consequently, the study interrogated the effect of the dual local content framework on the legal services firms' capacity to wake up the redefined role as facilitators and implementing agents rather than mere objects of the law, in the sense of targeted beneficiaries. It evaluated existing legal capacity relative to the different approaches implicit in the contractual self-regulatory regime under the respective PSA as compared to the command-and-control approaches adopted in the statutory regulations. Finally, the research conducted a comparative analysis of the upstream statutory frameworks to approximate the possible impact on the legal firm's ability to recruit and retain human capital in competition with the emerging industry.<sup>11</sup>

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<sup>8</sup> OECD, 'The Knowledge-Based Economy' (1996); James R Faulconbridge, 'Business Services: Driving the Knowledge-Based Economy in the UK?' (2010) [www.researchgate.net](http://www.researchgate.net); George Yarrow and Christopher Decker, 'Assessing the economic Significance of the professional legal services sector in the European Union' (2012); Anupam Khanna, Phyllis Papadavid, Judith Tyson and Dirk Willem te Velde, 'The Role of Services in Economic Transformation \_ With An Application to Kenya' (2016) Supporting Economic Transformation SET <http://set.odi.org.uk> (accessed 27 May 2021).

<sup>9</sup> Dias, Clarence (1970) "Tanzanian Nationalizations: 1967-1970," Cornell International Law Journal: Vol. 4: Iss. 1, Article 4. Available at: <http://scholarship.law.cornell.edu/cilj/vol4/iss1/4>; David Potts, 'Policy Reform and Economic Development in Tanzania, (2008) Bradford Centre for International Development – [www.core.ac.uk](http://www.core.ac.uk); Michael W Hansen, Lars Buur, Anne Mette Kjaer and Ole Therkildsen, 'The Economics and Politics of Local Content in African Extractives; Lessons from Tanzania, Uganda and Mozambique' (2016) Forum for Development Studies 2016, Vol 43, No. 2, 201-228;

<sup>10</sup> Reg.22 The Petroleum (Local Content) Regulations (2017) GN. No. 197

<sup>11</sup> ***Many reports and academia identify the development stage as the peak employment period. For example:*** National oil and gas policy for Uganda, (2008); Uganda, 'Enhancing National Participation in the Oil and Gas Sector' (2011) Petroleum Authority of Uganda <https://pau.go.ug> (accessed 02 February, 2020); Claudine Sigam and Leonardo



## 1. 2 The dual regulatory frameworks.

There are two regulatory frameworks in this context.

(a)- The statutory regimes comprised of the respective laws (“**the statutory**”); and (b)- the contractual self-regulatory, under the respective PSAs as preserved or modified by legislation (“**the contractual**”) regulations.<sup>12</sup>

Although the two regimes are invariably perceived as being complementary, each has a different compliance and enforcement approach.<sup>13</sup> ‘Rules-based’ in the statutory regime reflects the **law as command** theory. In contrast, ‘goals-based’ of the contractual regime, exemplifies **collaborative** approaches.<sup>14</sup> In any event, full compliance ‘will not result in the achievement of regulatory objectives if the rules’ underlying design is flawed.’<sup>15</sup> In the context of weak legislative capacity on the part of underdeveloped economies emphasis on determining which is the most effective approach in different contexts takes greater significance.<sup>16</sup>

To sum up, this research sought to highlight three points. (a) Examining **the role of the legal services firms in implementing LCRs relative to existing capacity.** (b) To evaluate how legal services providers perceive their role, opportunities, and challenges as the exclusive

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Garcia, ‘Extractive Industries: Optimizing Value Retention in Host Countries’ (2012) UNCTAD <https://unctad.org> (visited 17 April, 2020); Silvana Tordo, Michael Warner, Osmel E . Manzano, and Yahya Anouti, ‘Local Content Policies in the Oil and gas Sector’ (2013) World Bank [www.documentrements.worldbank.org](http://www.documentrements.worldbank.org).

<sup>12</sup> Each PSA construed in accordance with its terms; Articles 20 & 21 Tanzania Model PSA 2013. Refer to Article 17 of the 1999 Model PSA [www.resourcecontracts.org](http://www.resourcecontracts.org) (accessed 24 January 2021); Section 125 and Section 183 (3) (x) and (ag) of the Petroleum (EDP)Act; Regs 11 and 12 of the National Content Regulations Statutory Instruments 2016 No. 44 National Content (Upstream) Regulations; Local Content Policy of Tanzania for Oil and Gas Industry (2014) [11].

<sup>13</sup> Uganda, ‘Enhancing National Participation in the Oil and Gas Sector’ (2011) Petroleum Authority of Uganda <https://pau.go.ug> (accessed 02 February, 2020); Sebastiano Rwengabo, ‘*Efficiency, Sustainability and Exit Strategy In The Oil and gas Sector: Lessons from Ecuador for Uganda*’(2017), ACODE Policy Research Series No. 81, 2017; Rwitika Sen, ‘Enhancing local content in Uganda’s oil and gas industry’ , (2018) –unu - wider [www.wider.unu.edu](http://www.wider.unu.edu) > (accessed 10 February, 2020).

<sup>14</sup> Christopher Decker, ‘Goals-Based And Rules-Based Approaches to Regulation’ (2018) BEIS Research Paper Number 8 Department for Business, Energy & Industrial Strategy OXFORD.

<sup>15</sup> OECD, ‘Reducing the Risk of Policy Failure: Challenges for Regulatory Compliance’ (2000) [7]. See also Wendy Mason Burdon and Mohamed Karim Sorour, ‘Institutional Theory and Evolution of “A Legitimate Compliance Culture: The Case of the UK Financial Service Sector.’ (2020) Journal of Business Ethics 162, 47-80

<sup>16</sup> Elijah Doro and Ushehweu Kufakurinani U, ‘Resource Curse or Governance Deficit? The Role of parliament in Uganda’s Oil and Zimbabwe’s Diamonds’ (2018), Journal of Southern African Studies Vol. 44, No. 1, 43-57. See also, Mohsen Mehrara Alhsseini, Sayed Mohammad Sadegh and Duman Bhrumirad, ‘Resource Curse and Institutional Quality in Oil Countries’ (2008) MPRA Paper No. 16456 (2019)

providers of legal services under the Petroleum (Local Content) Regulations.<sup>17</sup> and (c) **A comparative analysis of Upstream statutory frameworks in facilitating the legal service sector's resilience in recruiting and retaining skilled manpower within the dynamic emerging industry.**

Therefore, the Literature Review in Chapter 2 discusses the three points highlighted above. The Third Chapter covers the research Methodology, while Chapter Four gives the findings, analysis, recommendations, and conclusion.

### **1.3 The gap in extant research**

Apparently, economics and social sciences dominate the debate on the emerging industry in the discourse.<sup>18</sup> White observes that 'the economic dimension of oil has dominated debates mainly in economics and political science which have been focused on the **economic and political effects** of the commodity.' Apart from the weak foundations of the local private sector, Tanzania adopts English law and business models.<sup>19</sup> However, English law has since evolved beyond the substance and forms applicable in East Africa.<sup>20</sup> For instance, shifting, albeit gradually from command-and-control to collaborative regulatory approaches.<sup>21</sup> There is a latent gap between the law and business models which have evolved with the dynamic industry in the UK, and the context in East Africa.<sup>22</sup> Despite striking differences in the nature and structure of the Norwegian institutions,

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<sup>17</sup> Reg.22 The Petroleum (Local Content) Regulations (2017) GN. No. 197

<sup>18</sup> Silvana Tordo, Michael Warner, Osmel E. Manzano, and Yahya Anouti, 'Local Content Policies in the Oil and gas Sector' (2013) World Bank [www.documents.worldbank.org](http://www.documents.worldbank.org); Annika White: "An Uncertain Future: Anticipating Oil in Uganda" (2018) Vol. 11 "Gottingen Series in Social and Cultural Anthropology" Gottingen University Press 2018.

<sup>19</sup> Many of the models no longer applicable in the UK.

<sup>20</sup> Greg Gordon, John Paterson and Emre Usenmez, 'Oil and Gas Law On The United Kingdom Continental Shelf: Current Practice and Emerging Trends', in *OIL AND GAS LAW: Current Practice and Emerging Trends* (2011), 2<sup>nd</sup> Ed, Editors Greg Gordon, John Paterson and Emre Usenmez, DUNDEE UNIVERSITY PRESS 2011

<sup>21</sup> Robert Baldwin, Martin Cave, and Martin Lodge. "Understanding *Regulation: Theory, Strategy and Practice*" (2011) Second Edition OXFORD; Ritwika Sen, 'Enhancing Local Content in Uganda's Oil and Gas Industry' (2018) UN WIDER [www.wider.unu.edu](http://www.wider.unu.edu)

<sup>22</sup> Annika White: "An Uncertain Future: Anticipating Oil in Uganda" (2018) Vol. 11 "Gottingen Series in Social and Cultural Anthropology" Gottingen University Press 2018.

relative to East Africa, the LCPs under review, borrow generously from Norway.<sup>23</sup> However, Norway's acclaimed success is linked to its concerted efforts to enhance national adaptive capacity by developing its KIBS sector, including Universities.<sup>24</sup> The local context therefore requires careful analysis of borrowed policies and implementing mechanisms, to fit them into the domestic context. Given the importance given to the KIBS sector in the international discourse, there is a glaring gap relating to local context, in the emerging industry.

#### 1.4 Background of the study

The international petroleum industry concerns production, distribution, strategic management, and control of a rare commodity in competitive and volatile markets.<sup>25</sup> Historically a predominantly private sector driven industry with dramatic impact on the fortunes of producing countries.<sup>26</sup> Inevitably, this character forces political intervention with the industry. It matters not whether the dominant economic model is capitalism, or socialism. There is no exception either whether the political model is democratic, autocratic, or otherwise.<sup>27</sup> However, latent failure to contend with the challenges of the dynamic industry in African resource rich countries is linked to absence robust interdependent institutions.<sup>28</sup> A structural challenge explaining the apparent paradox of

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<sup>23</sup> Abel Kinyondo and Espen Villager, 'Local Content requirements in the petroleum sector in Tanzania: A thorny road from inception to implementation' (2016) CMI Working Paper [10] [www.cmi.no](http://www.cmi.no); Steve Kayizi-Mugerwa, 'Uganda's nascent oil sector: Revenue generation, investor-stakeholder alignment, and public policy' (2020) UN WIDER Working Paper. [www.wider.unu.edu](http://www.wider.unu.edu) (accessed 26 May 2021)

<sup>24</sup> Tina Hunter, 'Law and policy frameworks for local content in the development of petroleum resources: Norwegian and Australian perspectives on cross-sectoral linkage and economic diversification' (2014) *Mineral Economics*, Vol 27 Issue 2-3 [115-126]; Kinyondo et al. (2016) *ibid*.

<sup>25</sup> Ian Bannon and Paul Collier (Eds) "*Natural Resources and Violent Conflict: OPTIONS AND ACTIONS*" (2003) World Bank. [www.documents1.worldbank.org](http://www.documents1.worldbank.org) (accessed 25 June 2021); Bryan Lee and Kendra Dupuy, 'Petro-Governance in Tanzania: Opportunities and Challenges' (2016) CMI BRIEF 15 NUMBER 14 [www.cmi.no](http://www.cmi.no); Michael Ross, 'The Natural Resource Curse: how Wealth Can Make You Poor,' in "*Natural Resources and Violent Conflict. OPTIONS AND ACTIONS*" Ian Bannon and Paul Collier (Eds)The World Bank [ 1] [www.documents1.worldbank.org](http://www.documents1.worldbank.org) (accessed 25 June 2021); Oli Brown and Michael Keating, ' Addressing Natural Resources Conflicts: Working Towards More Effective Resolution of National and Sub-National Resource Disputes' (2015) *Energy Environment and Resources* June 2015 CHATHAM HOUSE The Royal Institute of International Affairs.

<sup>26</sup> Daniel Yergin, *The Prize the Epic Quest for Oil, Money & Power (1991)* SIMON & SCHUSTER NEW YORK LONDON

<sup>27</sup> Greg Gordon, John Paterson and Emre Usenmez, 'Oil and Gas Law On The United Kingdom Continental Shelf: Current Practice and Emerging Trends', in *OIL AND GAS LAW: Current Practice and Emerging Trends*' (2011), 2<sup>nd</sup> Ed, Editors Greg Gordon, John Paterson and Emre Usenmez, DUNDEE UNIVERSITY PRESS 2011

<sup>28</sup> Michael Ross, 'The Natural Resource Curse: how Wealth Can Make You Poor,' in "*Natural Resources and Violent Conflict. OPTIONS AND ACTIONS*" Ian Bannon and Paul Collier (Eds)The World Bank [ 1]

plenty and poverty, also known as the ‘oil curse.’<sup>29</sup> Apparently, while discovery of petroleum is a positive sign of economic and social changes, it also portends dramatic changes which may, unless carefully managed, distort other sectors.

International contractors on behalf of the host state –owner of the petroleum resource, undertake most of the exploration, development, and production.<sup>30</sup> Either through, licences, service contracts, joint ventures and, or production sharing agreements (PSAs).<sup>31</sup> PSAs dominate extraction in the majority of emerging third world producers.<sup>32</sup> Mitigating the adverse effects of the dynamic industry as it interacts with other sectors becomes the most critical task for the host State. This entails delicate management of often opposing interests and contradictory forces beyond the control of the parties to the PSA.<sup>33</sup> An early pointer to the dynamic potential for conflict of laws and jurisdictions governing/regulating the petroleum project, and as such the importance of the legal services sector.

Tanzania has a functional gas industry utilizing the energy for domestic power generation, while gearing up for the export market consequent to new discoveries.<sup>34</sup> However, Tanzania’s post-

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[www.documents1.worldbank.org](http://www.documents1.worldbank.org) (accessed 25 June 2021); Oli Brown and Michael Keating, ‘Addressing Natural Resources Conflicts: Working Towards More Effective Resolution of National and Sub-National Resource Disputes’ (2015) Energy Environment and Resources June 2015 CHATHAM HOUSE The Royal Institute of International Affairs.

<sup>29</sup> *ibid.*

<sup>30</sup> Daniel Yergin, *The Prize the Epic Quest for Oil, Money & Power (1991)* SIMON & SCHUSTER NEW YORK LONDON; Carole Nakhle, ‘Petroleum Taxation: Sharing the Oil wealth: a study of petroleum taxation yesterday, today and tomorrow’ (2008) ROUTLEDGE; Miguel Soares Branco, ‘Product Sharing Agreements – legal blessing or curse for developing countries?’ (2012) *International Energy Review I.E.L.R.* 147; Fabio Solimene, ‘Production-sharing contracts, joint ventures and service contracts: analysis and drafting considerations’ (2014) *International Energy Law Review I, E.L.R.* 173

<sup>31</sup> Miguel Soares Branco, ‘Product Sharing Agreements – legal blessing or curse for developing countries?’ (2012) *International Energy Review I.E.L.R.* 147; Fabio Solimene, ‘Production-sharing contracts, joint ventures and service contracts: analysis and drafting considerations’ (2014) *International Energy Law Review I, E.L.R.* 173.

John Paterson, ‘Production Sharing Agreements in Africa; Sovereignty and Rationality’ (2018) University of Aberdeen School of Law Working Paper series 001/19 Centre for Energy Law.

<sup>32</sup> Kristen Bindemann, ‘Production-Sharing Agreements: An Economic Analysis’ (1999) Oxford Institute for Energy Studies WPM 25; International Alert: Uganda’ Oil and Gas Laws: A Legislators Guide. It is available >[https://www.international-alert.org/sites/default/files/Uganda\\_OilGasLawsLegislatorsGuide\\_EN\\_2011.pdf](https://www.international-alert.org/sites/default/files/Uganda_OilGasLawsLegislatorsGuide_EN_2011.pdf);

John Paterson, ‘Production Sharing Agreements in Africa; Sovereignty and Rationality’ (2018) University of Aberdeen School of Law Working Paper series 001/19 Centre for Energy Law.

<sup>33</sup> Kristen Bindemann, ‘Production-Sharing Agreements: An Economic Analysis’ (1999) Oxford Institute for Energy Studies WPM 25; Lisa E Sachs, Perrine Toledano, Jacky Mandelbaum, With James Otto, ‘Impacts of Fiscal Reforms on Country Attractiveness; learning from the facts’ (2013) [www.scsi.columbia.edu](http://www.scsi.columbia.edu) (accessed 07 January, 2020); Sam Hickey, Abdul-Gafaru Abdulai, Angelo Izama, and Giles Mohan, ‘The politics of governing oil effectively: A comparative study of two new oil-rich states in Africa’, (2015) ESID Working paper No. 54, Manchester: The University of Manchester; Michael W Hansen, Lars Buur, Anne Mette Kjaer and Ole Therkildsen, ‘The Economics and Politics of Local Content in African Extractives; Lessons from Tanzania, Uganda and Mozambique’ (2016) *Forum for Development Studies* 2016, Vol 43, No. 2, 201-228; John Paterson, ‘Production Sharing Agreements in Africa; Sovereignty and Rationality’ (2018) University of Aberdeen School of Law Working Paper series 001/19 Centre for Energy Law.

<sup>34</sup> Local Content Policy of Tanzania for Oil and Gas Industry (2014); Alan R. Roe, ‘Tanzania -from Mining to Oil and Gas’ (2016) UNU-WIDER [www.wider.unu.edu](http://www.wider.unu.edu) (accessed 14 July 2021).

independence experimentation with socialism, had far reaching implications on its capacity to assure certainty and engage international investors, also nurturing the growth of a viable private sector.<sup>35</sup>

In any event absence of institutional structures prior to exploration efforts, in conditions of State Control over the economy, gave a lot of leeway to the executive arm in designing and implementing the initial exploration and development processes.<sup>36</sup> Conditions with inherent tensions between sovereign prerogative to review prior contracts, thereby accentuating the perception of political risk and uncertainty associated with PSAs in developing countries.<sup>37</sup> For the international investor, such conditions justify the inclusion of the much criticised ‘stabilisation clauses’ in subsequent PSAs.<sup>38</sup> A vicious circle of radical changes and higher costs of production diminishing national competitiveness.<sup>39</sup> Moreover, the LCR specifically require international contractors to use domestic legal services. While this presents opportunity to domestic lawyers, it comes at a price. Concerted efforts to improve professional capacity to contend with the industry’s standards and the political (public) perception of what amounts to loyalty (patriotism) to national interests.<sup>40</sup>

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<sup>35</sup> Dias, Clarence (1970) "Tanzanian Nationalizations: 1967-1970," Cornell International Law Journal: Vol. 4: Iss. 1, Article 4. Available at: <http://scholarship.law.cornell.edu/cilj/vol4/iss1/4> ; David Potts, 'Policy Reform and Economic Development in Tanzania, (2008) Bradford Centre for International Development – [www.core.ac.uk](http://www.core.ac.uk); John Paterson, 'Production Sharing Agreements in Africa; Sovereignty and Rationality' (2018) University of Aberdeen School of Law Working Paper series 001/19 Centre for Energy Law; Nicola Woodroffe, Matt Genasci and Thomas Scurfield, 'Tanzania's New Natural Resources Legislation: What Will Change? (2017) Natural resources Governance Institute. [www.esourcegovernance.org](http://www.esourcegovernance.org) (accessed 2019)

<sup>36</sup> Badru Bukonya and Jacqueline Nakaiza, 'How the Political Settlement Shapes Uganda's Deals with International Oil Companies' (2018) CRDP-KU Leuven <https://soc.kuleuven.be> > files; Sam Hickey, Abdul-Gafaru Abdulai, Angelo Izama, and Giles Mohan, 'The politics of governing oil effectively: A comparative study of two new oil-rich states in Africa', (2015) ESID Working paper No. 54, Manchester: The University of Manchester; Michael W Hansen, Lars Buur, Anne Mette Kjaer and Ole Therkildsen, 'The Economics and Politics of Local Content in African Extractives; Lessons from Tanzania, Uganda and Mozambique' (2016) Forum for Development Studies 2016, Vol 43, No. 2, 201-228;

<sup>37</sup> Kristen Bindemann, 'Production-Sharing Agreements: An Economic Analysis' (1999) Oxford Institute for Energy Studies WPM 25; John Paterson, 'Production Sharing Agreements in Africa; Sovereignty and Rationality' (2018) University of Aberdeen School of Law Working Paper series 001/19 Centre for Energy Law.

<sup>38</sup> (n 33)

<sup>39</sup> Thomas Scurfield, Nicola Woodroffe, and Silas Olan'g, 'Localizing Tanzania's Gas Sector: Determining Optimal Policies for an Emerging Producer' (2017) [www.resourcegovernance.org](http://www.resourcegovernance.org) . See also International Alert: Uganda' Oil and Gas Laws: A Legislators Guide. [https://www.international-alert.org/sites/default/files/Uganda\\_OilGasLawsLegislatorsGuide\\_EN\\_2011.pdf](https://www.international-alert.org/sites/default/files/Uganda_OilGasLawsLegislatorsGuide_EN_2011.pdf); Kristen Bindemann, 'Production-Sharing Agreements: An Economic Analysis' (1999) Oxford Institute for Energy Studies WPM 25; Also (n 33).

<sup>40</sup> John Paterson, 'Production Sharing Agreements in Africa; Sovereignty and Rationality' (2018) University of Aberdeen School of Law Working Paper series 001/19 Centre for Energy Law; Nicola Woodroffe, Matt Genasci and Thomas Scurfield, 'Tanzania's New Natural Resources Legislation: What Will Change? (2017) Natural resources Governance Institute. [www.esourcegovernance.org](http://www.esourcegovernance.org) (accessed 2019). Refer also to; Singwani Patrick Ng'ambi, 'Permanent Sovereignty Over natural resources and the sanctity of Contracts, From the Angle of Lucrum Cessans' (2015) Loyola University Chicago, International Law Review Volume 12/ Issue 2 Article 3 2015.

## 1.5 Research Frameworks

Two well-established frameworks –conceptual and theoretical, guide scientific research in academia. Social behaviour, including group dynamics and unique human settings, guide conceptual frameworks. ‘Theoretical’ based on well-established theories in each discipline, is preferred in the discipline of Law because of its concern with practical matters.<sup>41</sup> However, law has its foundations in shifting sands of the interplay of conflicting philosophical debates. In this instance, the perpetual battle between legal positivism and natural law on the role of morality in defining what law is or should be. Admittedly, this research seeks to examine the role of legal service firms (P- KIBS) in terms of visibility, awareness to the dynamic change, capacity, growth, and competition for human resources in the wake of the emerging industry. However, on the theoretical level focus is placed on the interplay of contractual and statutory command-and-control imposed on a weak legal framework.<sup>42</sup> Therefore, structured the research on theoretical frameworks.

### 1.5.1 Theoretical Framework

The legal frameworks under review target the licenced IOCs and contractors. Law as a command theory, helped me to make an objective approximation of the licensed operators’ response as they attempt to comply with the LCRs.<sup>43</sup> From a philosophical perspective of legal positivism, it is the singular duty of Judges to apply the law as is. The corresponding duty of lawyers is to find the law as it is and advise Court and clients accordingly.<sup>44</sup> Subject only to reconciling it with other laws to ensure consistency and predictability.<sup>45</sup>

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<sup>41</sup> John Gardner, ‘Legal Positivism: 5 & 1/2 MYTHS’ (2001) *The American Journal of Jurisprudence* Vol. 46

<sup>42</sup> Hagar Russ, ‘Role Of Judicial And Legal Sector Reforms In Business Environment Reform Programmes- A Tanzanian Case Study.’ [3] Legal Adviser Business Environment Strengthening Programme for Tanzania (BEST) Ministry of Planning, Economy and Empowerment. [www.businessenvironment.org/dyn/bedoccs/152/Russ.pdf](http://www.businessenvironment.org/dyn/bedoccs/152/Russ.pdf) (accessed 16 December 2021); Christopher Decker, ‘Goals-Based And Rules-Based Approaches to Regulation’ (2018) BEIS Research Paper Number 8 Department for Business, Energy & Industrial Strategy OXFORD.

<sup>43</sup> Tanzania has since legislations enacted in 2017 conducted unilateral review of all previous mining contracts. They include the Natural Wealth and Resources (Permanent Sovereignty) Act, 2017. The implications of those changes deserve separate research beyond the scope of this paper. See also Nicola Woodroffe, Matt Genasci and Thomas Scurfield, ‘Tanzania’s New Natural Resources Legislation: What Will Change?’ (2017) Natural resources Governance Institute. [www.esourcegovernance.org](http://www.esourcegovernance.org) (accessed 2019)

<sup>44</sup> Gerald Postema, ‘Law as Command: The Model of Command in Modern Jurisprudence’, *PHILOSOPHICAL ISSUES*, 11 Social, Political, and Legal Philosophy, 2001

<sup>45</sup> Rascoe Pound, ‘Common Law and Legislation’ (1908) *HAVARD LAW REVIEW* Vol. 21, No.6 (April 1908) pp 383-407.



According to Postema, the theory whose origins are attributed to Austin, treats law as ‘an expression of dominion, the power of one will over another will,’ obedience without questioning as to the rationale or justification of the law.<sup>46</sup> Sovereign rule whereby legitimacy of the imposed will lies in the established authority of the legislator. However, Gardner treats Postema’s interpretation of the theory to be rather mistaken.<sup>47</sup> It is a philosophical prescription, providing the means of ascertaining what the law is. Based on the criterion of determining legitimate sources of the law (the legitimate sources rule). This rule does not exclude morality in the law, as urged by its ardent opponents. It is a rule prescribing by who, where, and when morality or rationality become relevant. Therefore, ‘the interpretation of legal norms belongs exclusively to the law-applying stage of legal reasoning, as opposed to the law-making stage.’<sup>48</sup> Ng’ambi argues that the placement of the sovereign in the position of an equal party in the context of the PSA, under the doctrine of sanctity of contract, adds a significant challenge to the theory.<sup>49</sup> That is whether, the sovereign surrenders its prerogative when it enters into contractual arrangements, and how far can command successfully vary the contract or be used to avoid state obligations.<sup>50</sup>

Laws regulating road traffic can help to explain the foregoing arguments. A driver violating the law commits an offence, and in case of conviction is liable to suffer penalty in accordance with the law. Therefore, traffic officers and courts of law enforce the law without question. Similarly, engineers in the Public Works Department are required to use scientific methods to incorporate the legal requirements relating to speed limits and corresponding signs in the design and construction of roads.

While the purpose of the law described above is to ensure the safety of persons, that purpose does not feature expressly in the actions of the persons in the above example. Philosophically, legal positivism asserts that all players described in the above scenario, including the magistrate do not act with the conscious purpose of ensuring safety. However, intrinsically perpetuate the moral purpose of the law by obeying the command. The primary duty of the law enforcement agencies

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<sup>46</sup> (n 44) [487]

<sup>47</sup> John Gardner, ‘Legal Positivism: 5 & 1/2 MYTHS’ (2001) *The American Journal of Jurisprudence* Vol. 46

<sup>48</sup> John Gardner (2001) (n 42) [221]

<sup>49</sup> Singwani Patrick Ng’ambi, ‘Permanent Sovereignty Over natural resources and the sanctity of Contracts, From the Angle of *Lucrum Cessans*’ (2015) *Loyola University Chicago, International Law Review* Volume 12/ Issue 2 Article 3 2015

<sup>50</sup> Miguel Soares Branco, ‘Product Sharing Agreements – legal blessing or curse for developing countries?’ (2012) *International Energy Review I.E.L.R.* 147.

is to establish what the law is, followed by its application to the letter. From that perspective, ‘legal positivists insist on the evaluation of laws, according to their forms (e.g., clarity, certainty, perspectivity, generality, and openness) as opposed to their content.’<sup>51</sup>

On the other hand, the natural law principle posts that the driver, traffic officer, and magistrate in the example, should consciously be aware of the ‘existence of a moral criterion as a conceptually necessary feature of law in all possible legal systems in all possible worlds.’<sup>52</sup> Schaver et al. propagates for distinction of ‘legal decision making’ from other forms or levels of decision-making.<sup>53</sup> For instance formulation of policy or considerations of merits is by the legislature. Therefore, traffic officers and the magistrates should not, in relation to an offending driver, ask the questions, why did you drive above the prescribed speed? Rather, to state the affirmative: **you drove above the speed limit. Your actions are contrary to the law. Here is the evidence.** Evidence established as a legal (process, according to legitimate sources of the law) rather than a social (what was perceived) concept of justice.<sup>54</sup>

In practice, the right position lies somewhere on a continuum between the extreme ends of the positivist and natural law principles. However, the theory may not resolve the apparent tension between legal services providers seeking to perpetuate sanctity of contracts as being a moral duty which serves into public good, and the Political prerogative which seems to perceive ‘public’ good as a dynamic concept which is determined by the immediate exigencies, even as it erodes certainty and predictability as a defining attribute of the rule of law.<sup>55</sup> In any event under the law as command theory it does not matter whether compliance leads to achievement of legislative purpose.<sup>55</sup>

## 1.6 General Objective

The research examines the role of legal services in entrenching LCP objectives, relative to the high standards of the petroleum industry.

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<sup>51</sup> (n 41) [207-208]

<sup>52</sup> Frederick Schaver and Virginia J. Wise, ‘Legal Positivism as Legal Information’ 1997 Cornell Law Review Volume 82 Issue 5 July 1997 Article 7 [1084]

<sup>53</sup> *ibid* [1093]

<sup>54</sup> *Pan African Energy (T) Ltd v TRA* [2021] TZCA 287.

<sup>55</sup> Nicola Woodroffe, Matt Genasci and Thomas Scurfield, ‘Tanzania’s New Natural Resources Legislation: What Will Change?’ (2017) Natural resources Governance Institute. [www.esourcegovernance.org](http://www.esourcegovernance.org) (accessed 2019)



### 1.6.1 Specific research objectives

1. To examine the role the legal service firms (P-KIBS) in entrenching LCR in Tanzania's emerging petroleum industry, relative to its capacity.
2. To evaluate how legal services providers perceive their role, opportunities, and challenges as the exclusive providers of legal services under the Petroleum (Local Content) Regulations.<sup>56</sup>
3. To analyse (comparative analysis) how the upstream (local content) statutory frameworks in Tanzania facilitate the legal services sector role while competing for skilled employees within the dynamic industry.

### 1.6.2 Research Questions

- (a) What is the role of the legal services firms in entrenching LCRs in Tanzania's emerging petroleum industry, relative to its capacity?
- (b) How do the lawyers in Tanzania perceive their role, opportunities, and challenges as the exclusive providers of legal services pursuant to the Petroleum (Local Content) regulatory framework?

Detailed questions are contained in **Appendix A**.

### 1.7 Scope of the study

The KIBS sector has immense potential, in terms of, (a) value addition, (b) retention, in the context of local content aspirations, and (c) the development of a sustainable knowledge-based modern economy expected to outlive or replace the finite resources.<sup>57</sup> The research focuses on the role of P-KIBS as factors for enhancement of LCP aspirations relative to capacity to conform to the industry's standards.

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<sup>56</sup> Reg.22 The Petroleum (Local Content) Regulations (2017) GN. No. 197

<sup>57</sup> Claudine Sigam and Leonardo Garcia, 'Extractive Industries: Optimizing Value Retention in Host Countries' (2012) UNCTAD <https://unctad.org> (visited 17 April 2020)

Field research targeted both inhouse lawyers and advocates within Dar es Salaam and Mwanza, Tanzania's commercial and mining herbs respectively. However, owing to limitations imposed by the Covid-19 pandemic questionnaires were circulated widely via e-mail to include respondents in other fields and areas. However, there was limited response. Consequently, recourse to secondary sources accessible online.

### **1.7.1 Contribution of the study**

Expounding on the role of the domestic Legal Services' sector in Tanzania, highlights existing capacity, relative to the needs of the emerging dynamic industry, which it must serve. It evaluates the factors that may either facilitate or hinder the sector's effective discharge of its role as envisaged by the law. Specifically.

- (a) Inform possible review of the implementing framework with a view to harmonising it with the national legal and institutional frameworks.
- (b) Raise focus on the legal service's role in enhancing national competitiveness. As such a major resource requiring public investment and attention in the formulation of policy and strategy for economic development.
- (d) To expand public awareness and further research on the positive and negative impact of the emerging industry.

## CHAPTER TWO

### LITERATURE REVIEW

#### **2. The Role of the Legal Services (P-KIBS) sector in entrenching national (local) content aspirations.**

##### **2.1.1 Local Content in this context.**

According to Kazzazi et al. ‘local content’ is a form of affirmative action in the context of international trade.<sup>58</sup> A notion that, the economic synergies generated by a targeted industry, require **regulatory interventions**, to **promote value addition** in the domestic economy, to **stimulate national competitive capacity**.<sup>59</sup> While promotion and stimulation are the operative words, achieving competitive capacity being the goal, to what extent can these be achieved within the command-and-control approaches, reflected in the statutory framework? Additionally, emphasis is placed on regulatory interventions. Implicit in that is the importance of a functional legal framework. Adison et al. point out that ‘the task for economic policy is to help keep people alive, enterprises afloat, people in jobs, and households out of poverty.’<sup>60</sup> An integrated approach to sustainable development. A proposition with legal backing in the form of directives and objective principles in the Constitution.<sup>61</sup>

Olawunyi points out that LCRs are used by

‘...rentier States to mitigate and manage social and political risks that may result from rising domestic expectations for better and more equitable distribution of wealth and authority.’<sup>62</sup>

“Rentier” in the sense of economic overdependency on natural resources extraction. In any event lack of knowledge on the industry as suggested by Ross creates fertile ground for political

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<sup>58</sup> Abolfazl Kazzazi and Behrouz Nouri, ‘A conceptual model for local content development in petroleum industry’ (2012) *Management Science Letters* 2 (2012) 2165-2174

<sup>59</sup> *ibid.* See also- Claudine Sigam and Leonardo Garcia, ‘Extractive Industries: Optimizing Value Retention in Host Countries’ (2012) UNCTAD <https://unctad.org> (visited 17 April 2020).

<sup>60</sup> Tony Adison, Kunal Sen, and Finn Tarp, ‘Covid-19: macroeconomic dimensions in the developing world’ (2020) UN WIDER. [www.wider.unu.edu](http://www.wider.unu.edu) > (accessed 26 May 2021).

<sup>61</sup> Articles 8 and 9 of the Constitution of the United Republic of Tanzania, 1977.

<sup>62</sup> Damilola S Olawuyi, ‘Local Content and procurement requirements in oil and gas contracts: Regional trends in the Middle East and North Africa,’ (2017) The Oxford Institute of Energy Studies. University of OXFORD [6].

propaganda and popular dissent against government in rentier states, on allegations of connivance with foreign investors.<sup>63</sup> In the course leading to higher priority to security (military) relative to expenditure on sustainable development. It therefore serves as a warning that even as legal services providers, may view themselves as direct beneficiaries of LCRs, the critical role they must play, pushes them into the dynamic arena of politics beyond the usual rule of law dimensions.

Yet as Potts explains such failure is by far a factor of apparent ineffectiveness of government institutions. In Tanzania's context, massive creation of national enterprises to exert public control over the economy, did not correspond with the existing stock of 'human resources needed to administer the system it had adopted resulting in low levels of technical and managerial efficiency.'<sup>64</sup> A position given credence in various reports regarding the legal sector in Tanzania.<sup>65</sup> By comparison, the drastic expulsion of the Asian community in Uganda as noted by Kayizi-Mugerwa disrupted international import and export supply chains hitherto linked through Asian traders, banks and legal service providers.<sup>66</sup> The resulting bottlenecks in both events, eventually cascading through the entire economy. Paradoxically as noted by Alhosseini et al. similar results arise when abundance of wealth is poured into,

'...inefficient markets, shaky regulatory structure, and weak bureaucracy can lead to devastating results. A vicious circle of rents, political patronage, undermining democratic structures'<sup>67</sup>

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<sup>63</sup> Michael Ross, 'The Natural Resource Curse: how Wealth Can Make You Poor,' in "*Natural Resources and Violent Conflict. OPTIONS AND ACTIONS*" Ian Bannon and Paul Collier (Eds) (2003) The World Bank [24] [www.documents1.worldbank.org](http://www.documents1.worldbank.org) (accessed 25 June 2021)

<sup>64</sup> David Potts, 'Policy Reform and Economic Development in Tanzania, (2008) Bradford Centre for International Development [22] – [www.core.ac.uk](http://www.core.ac.uk)

<sup>65</sup> Hagar Russ, 'Role of Judicial And Legal Sector Reforms In Business Environment Reform Programmes- A Tanzanian Case Study.' [3] Legal Adviser Business Environment Strengthening Programme for Tanzania (BEST) Ministry of Planning, Economy and Empowerment. [www.businessenvironment.org/dyn/bedoccs/152/Russ.pdf](http://www.businessenvironment.org/dyn/bedoccs/152/Russ.pdf) (accessed 16 December 2021); IDLO, Report on the National Rule of Law Stakeholders Forum "STRENGTHENING THE RULE OF LAW IN TANZANIA" (2015) [www.idlo.int](http://www.idlo.int) (accessed 17 December 2021)

<sup>66</sup> Steve Kayizi-Mugerwa, 'Uganda's nascent oil sector: Revenue generation, investor-stakeholder alignment, and public policy' (2020) UN WIDER Working Paper. [www.wider.unu.edu](http://www.wider.unu.edu) (accessed 26 May 2021). See also Bryan Lee and Kendra Dupuy, 'Petro-Governance in Tanzania: Opportunities and Challenges' (2016) CMI BRIEF 15 NUMBER 14 [www.cmi.no](http://www.cmi.no).

<sup>67</sup> Mohsen Mehrara Alhosseini, Sayed Mohammad Sadegh and Duman Bhurmirad, 'Resource Curse and Institutional Quality in Oil Countries' (2008) MPRA Paper No. 16456 (2019). See also, Michael Ross, 'The Natural Resource Curse: how Wealth Can Make You Poor,' in "*Natural Resources and Violent Conflict. OPTIONS AND ACTIONS*" Ian Bannon and Paul Collier (Eds) (2003) The World Bank [24] [www.documents1.worldbank.org](http://www.documents1.worldbank.org) (accessed 25 June 2021)

Apparently, the dynamic context of the emerging industry raises potential for conflict between policy, law, and public expectations.<sup>68</sup> Ross points out that, drastic increase in government revenues, thanks to petroleum exports, relative to tax income from other sectors has a dramatic effect on political governance. Often, ‘negative influence manifested in corruption, state weakness and reduced accountability.’<sup>69</sup> In that context as Ngoasong observes that the advantages offered by LCPs may not be realised in countries with governance and accountability deficits.<sup>70</sup> In the absence of a clear legal framework, uncertainty encourages political patronage.<sup>71</sup> Therefore, legal rights hang on a delicate balance of dynamic and often shifting sands of politics, with a high potential to undermine public trust in the rule of law.<sup>72</sup> For the investor, international law remedies do not give much solace in case of sovereign exercise of its prerogative to nationalise assets belonging to foreign or even domestic enterprises.<sup>73</sup>

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<sup>68</sup> Lisa E Sachs, Perrine Toledano, Jacky Mandelbaum, With James Otto, ‘Impacts of Fiscal Reforms on Country Attractiveness; learning from the facts’ (2013) [www.scsi.columbia.edu](http://www.scsi.columbia.edu) (accessed 07 January, 2020); Sam Hickey, Abdul-Gafaru Abdulai, Angelo Izama, and Giles Mohan, ‘The politics of governing oil effectively: A comparative study of two new oil-rich states in Africa’, (2015) ESID Working paper No. 54, Manchester: The University of Manchester; Michael W Hansen, Lars Buur, Anne Mette Kjaer and Ole Therkildsen, ‘The Economics and Politics of Local Content in African Extractives; Lessons from Tanzania, Uganda and Mozambique’ (2016) *Forum for Development Studies* 2016, Vol 43, No. 2, 201-228; John Paterson, ‘Production Sharing Agreements in Africa; Sovereignty and Rationality’ (2018) University of Aberdeen School of Law Working Paper series 001/19 Centre for Energy Law.

<sup>69</sup> Michael Ross, ‘The Natural Resource Curse: how Wealth Can Make You Poor,’ in “*Natural Resources and Violent Conflict. OPTIONS AND ACTIONS*” Ian Bannon and Paul Collier (Eds) (2003) The World Bank [24] [www.documents1.worldbank.org](http://www.documents1.worldbank.org) (accessed 25 June 2021)

<sup>70</sup> Michael Zisuh Ngoasong, ‘How International oil and gas companies respond to local policies in petroleum producing developing countries: A narrative enquiry’ (2014) *Energy Policy*. Elsevier, 73. pp. 471-479. doi:10.1016/j.enpol.2014.05.048

<sup>71</sup> Sam Hickey, Abdul-Gafaru Abdulai, Angelo Izama, and Giles Mohan, ‘The politics of governing oil effectively: A comparative study of two new oil-rich states in Africa’, (2015) ESID Working paper No. 54, Manchester: The University of Manchester; Michael W Hansen, Lars Buur, Anne Mette Kjaer and Ole Therkildsen, ‘The Economics and Politics of Local Content in African Extractives; Lessons from Tanzania, Uganda and Mozambique’ (2016) *Forum for Development Studies* 2016, Vol 43, No. 2, 201-228

<sup>72</sup> Ian Bannon and Paul Collier (Eds) “*Natural Resources and Violent Conflict: OPTIONS AND ACTIONS*” (2003) World Bank. [www.documents1.worldbank.org](http://www.documents1.worldbank.org) (accessed 25 June 2021).

<sup>73</sup> Dias, Clarence (1970) "Tanzanian Nationalizations: 1967-1970," *Cornell International Law Journal*: Vol. 4: Iss. 1, Article 4. Available at: <http://scholarship.law.cornell.edu/cilj/vol4/iss1/4>; Singwani Patrick Ng’ambi, ‘Permanent Sovereignty Over natural resources and the sanctity of Contracts, From the Angle of *Lucrum Cessans*’ (2015) *Loyola University Chicago, International Law Review* Volume 12/ Issue 2 Article 3 2015; John Paterson, ‘Production Sharing Agreements in Africa; Sovereignty and Rationality’ (2018) University of Aberdeen School of Law Working Paper series 001/19 Centre for Energy Law.

Baldwin et al., argue that in most cases the political agenda and legislative culture exert more influence on regulatory content rather than economic impact assessment.<sup>74</sup> According to Doro et al. in conditions of fledgling democracies, the political agenda is predominantly biased towards retaining power by the ruling party, often with a critical majority so much as to reduce Parliament a mere rubber stamp for executive decisions.<sup>75</sup> A weak legislature may not lay foundation for independent regulatory authority. In that context Article 3(1) of the Constitution of Tanzania, presents a special challenge to free market oriented regulatory frameworks. It preserves ‘Socialism’ as State policy and goal.<sup>76</sup> A position, as urged by Kiyoko, not only contradicts expressed investment promotion policy, but also renders the liberal market, legal framework void to the extent of apparent inconsistency with the Constitution.<sup>77</sup> Conditions giving legal force to executive discretionary powers to override regulatory decisions.<sup>78</sup> In brief, executive power to overturn due process.

Tordo et al. point out that apparently ‘...political imperatives are key drivers, and economic efficiency is often an afterthought.’<sup>79</sup> Inevitably, with far reaching impact on established legal and economic rights upon which investment decisions are made.<sup>80</sup> Remdoo argues that politics is driven by popular demands responding to short-term delivery on electoral promises.<sup>81</sup> Apparently, impeding rational exercise of legislative powers. Sachs et al. observe in relation to petroleum projects, that

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<sup>74</sup> Robert Baldwin, Martin Cave and Martin Lodge, “*Understanding Regulation: Theory, Strategy, and Practice*” (2012) OXFORD 2<sup>nd</sup> Edition.

<sup>75</sup> Elijah Doro and Ushehweu Kufakurinani U, ‘Resource Curse or Governance Deficit? The Role of parliament in Uganda’s Oil and Zimbabwe’s Diamonds’ (2018), *Journal of Southern African Studies* Vol. 44, No. 1, 43-57.

<sup>76</sup> “3. -(1) **The United Republic is a democratic, secular, and socialist state which adheres to multi-party democracy**”.

<sup>77</sup> Oscar Ishengoma Kikoyo, ‘The Impact of Legal Framework On Regulatory Authorities In Tanzania: A Case Study Of The Surface And Marine Transport Regulatory Authority (Sumatra)’ (2014) PHD Thesis Open University of Tanzania.

<sup>78</sup> *ibid*

<sup>79</sup> Silvana Tordo, Michael Warner, Osmel E . Manzano, and Yahya Anouti, ‘Local Content Policies in the Oil and gas Sector’ (2013) [xiii] World Bank [www.documents.worldbank.org](http://www.documents.worldbank.org)

<sup>80</sup> Nicola Woodroffe, Matt Genasci and Thomas Scurfield, ‘Tanzania’s New Natural Resources Legislation: What Will Change?’ (2017) Natural resources Governance Institute. [www.esourcegovernance.org](http://www.esourcegovernance.org) (accessed 2019); John Paterson, ‘Production Sharing Agreements in Africa; Sovereignty and Rationality’ (2018) University of Aberdeen School of Law Working Paper series 001/19 Centre for Energy Law;

<sup>81</sup> Isabelle Remdoo, ‘Designing Local Content Policies in Mineral Rich countries’ (2018) International Forum on Mining, Minerals, Metals and Sustainable Development [4]

‘... the long duration of these large-scale investments compounds a second important feature of extractive industry legal and fiscal frameworks: the terms are necessarily set (in law) or agreed to (in contract) when there is great uncertainty about the economic outcomes of potential investment in the sector...’<sup>82</sup>

Potts points out that, well intended policy, and economic reforms in Tanzania since 1967 impaired the sustainable growth of the private sector.<sup>83</sup> Conditions which as observed earlier, could not nurture, or give foundation of robust interdependent institutions.<sup>84</sup> Diminished competitiveness followed by acute demand for foreign investment. Hence, the fiscal incentives evident in the initial PSAs, to attract investors into the risky petroleum exploration and development projects.<sup>85</sup> Inevitably, the incentives would later be the ostensible reasons justifying agitation for reforms.<sup>86</sup> According to Paterson, the very conditions of uncertainty and unpredictability of future political dynamics, that justify rigorous legal protective mechanisms on the part of investors.<sup>87</sup> Therefore, since LCRs are contingent upon capacity, in terms of technical skills and institutional capacity

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<sup>82</sup> Lisa E Sachs, Perrine Toledano, Jacky Mandelbaum, With James Otto, ‘Impacts of Fiscal Reforms on Country Attractiveness; learning from the facts’ (2013) [www.scsi.columbia.edu](http://www.scsi.columbia.edu) [350] (accessed 07 January, 2020)

<sup>83</sup> David Potts, ‘Policy Reform and Economic Development in Tanzania’, (2008) Bradford Centre for International Development – [www.core.ac.uk](http://www.core.ac.uk) (accessed 15 June 2021)

<sup>84</sup> David Potts, ‘Policy Reform and Development in Tanzania’ (2008) Bradford centre for International Development. [www.core.ac.uk](http://www.core.ac.uk) (accessed 15 June 2021); Claudine Sigam and Leonardo Garcia, ‘Extractive Industries: Optimizing Value Retention in Host Countries’ (2012) UNCTAD <https://unctad.org> (visited 17 April 2020); Hagar Russ, ‘Role of Judicial And Legal Sector Reforms In Business Environment Reform Programmes- A Tanzanian Case Study.’ [3] Legal Adviser Business Environment Strengthening Programme for Tanzania (BEST) Ministry of Planning, Economy and Empowerment. [www.businessenvironment.org/dyn/be\\_doccs/152/Russ.pdf](http://www.businessenvironment.org/dyn/be_doccs/152/Russ.pdf) (accessed 16 December 2021).

See also John L. Bonee III, ‘Implications of Asian Expulsion from Uganda’ (1974) *International Lawyer*, Vol.8. No.1 1974 [136-159].

<sup>85</sup> Carole Nakhle, ‘Petroleum Taxation: Sharing the Oil wealth: a study of petroleum taxation yesterday, today and tomorrow’ (2008) ROUTLEDGE; Lisa E Sachs, Perrine Toledano, Jacky Mandelbaum, With James Otto, ‘Impacts of Fiscal Reforms on Country Attractiveness; learning from the facts’ (2013) [www.scsi.columbia.edu](http://www.scsi.columbia.edu) (accessed 07 January 2020)

<sup>86</sup> Lisa E Sachs, Perrine Toledano, Jacky Mandelbaum, With James Otto, ‘ Impacts of Fiscal Reforms on Country Attractiveness; learning from the facts’ (2013) [www.scsi.columbia.edu](http://www.scsi.columbia.edu) (accessed 07 January, 2020); Sam Hickey, Abdul-Gafaru Abdulai, Angelo Izama, and Giles Mohan, ‘ The politics of governing oil effectively: A comparative study of two new oil-rich states in Africa’, (2015) ESID Working paper No. 54, Manchester: The University of Manchester; Michael W Hansen, Lars Buur, Anne Mette Kjaer and Ole Therkildsen, ‘ The Economics and Politics of Local Content in African Extractives; Lessons from Tanzania, Uganda and Mozambique’ (2016) *Forum for Development Studies* 2016, Vol 43, No. 2, 201-228; John Paterson, ‘Production Sharing Agreements in Africa; Sovereignty and Rationality’ (2018) University of Aberdeen School of Law Working Paper series 001/19 Centre for Energy Law.

<sup>87</sup> John Paterson, ‘Production Sharing Agreements in Africa; Sovereignty and Rationality’ (2018) University of Aberdeen School of Law Working Paper series 001/19 Centre for Energy Law. Refer also to; Singwani Patrick Ng’ambi, ‘Permanent Sovereignty Over natural resources and the sanctity of Contracts, From the Angle of Lucrum Cessans’ (2015) *Loyola University Chicago, International Law Review* Volume 12/ Issue 2 Article 3 2015.

then the private sector is an essential component of the institutions thus warranting nurturing by government, not as a gratuitous function but as a duty implicit in the constitution and state policy.

### 2.1.2 ‘Knowledge’ as the most important national resource.

Zakharova et al., note

*‘...the increased attention to knowledge, which appears as intellectual capital and becomes the immediate productive force and the most important economic resource’.*<sup>88</sup>

Apparently, industrial age bias to scientific research and innovation in reference to patented technology, is giving way to the recognition of ‘professional (business) services as key mediums of innovation.’ Thus ‘the most crucial resource and factor in the formation of the ‘knowledge economy.’<sup>89</sup> Focus on knowledge in a more inclusive way beyond, ‘technological’ in the narrow context of engineering, challenging the historical dichotomy between technical and social sciences. In this context ‘knowledge’ includes the business service side of the petroleum project.

According to Acheampong et al. the narrow ‘technological’ perspective has host countries looking at local content merely as ‘substituting domestically produced goods and services for imported goods and services or creating local employment by replacing domestic labour for foreign labour.’<sup>90</sup> In Tanzania’s context, perceiving the upstream segment as ‘high-tech’ and therefore beyond reach of local enterprise and service providers, discounts the role-played by law and finance in the transactions involved in the project.<sup>91</sup> Additionally, viewing the industry as if it were a one-off discovery, rather than an emerging industry with a high potential for future discoveries. This perpetuates the historical underrating of the role of the private sector including independent world class legal services.

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<sup>88</sup> Elena N Zakharova, Marina V Christova, Marine Z Abesalashivli and Danil V Goneiko, ‘The role of the intellectual services sector in the development of innovative processes of the modern << knowledge economy>> (2019) ESPACIOS Vol. 40 (Issue 40) [27]

<sup>89</sup> *ibid*

<sup>90</sup> Teophil Acheampong, Michael Ashong , and Victoria Svanikier , ‘An assessment of local-content policies in oil and gas producing countries’ (2016) *Journal of World Energy Law and Business*, 2016, 9, 282-302 OXFORD [284]

<sup>91</sup> Local Content Policy of Tanzania for Oil and Gas Industry (2014); Alan R. Roe, ‘Tanzania -from Mining to Oil and Gas’ (2016) UNU-WIDER [www.wider.unu.edu](http://www.wider.unu.edu) (accessed 14 July 2021). George Yarrow and Christopher Decker, ‘Assessing the economic Significance of the professional legal services sector in the European Union’ (2012).



Inevitably, for countries desperately in need of overcoming poverty, industry development cannot wait for local capacity to attain sufficient competitive levels. Yet focusing on short run retention of value may lead to social and political instability.<sup>92</sup> Inevitably, preferential treatment will benefit ‘only a few local entrepreneurs with the technical, financial, and human resources to engage competitively in the oil and gas business.’<sup>93</sup> Inequity and unequal distribution of the benefits, is identified in the discourse as a major factor behind many civil disturbances in underdeveloped natural resources rich countries.<sup>94</sup>

### **2.1.3 Inevitability of LCRs / Necessity of the KIBS sector.**

Once it is established that LCR are an essential component of the emerging industry, then it becomes a necessity to gain understanding of the key implementing agents.<sup>95</sup> Apparently, the KIBS sector is a twin necessity of that process. KIBS ‘potentially act as facilitators, sources and carriers of explicit and tacit knowledge and organisational and technological innovation locally and internationally.’<sup>96</sup> Implicit in that is the ability to integrate processes from the emerging industry into the local economy. Achieved, through innovation, adapting innovative technology – technical and process, to other sectors of the economy. ‘Innovation’ in this sense viewed ‘as a cycle involving interaction between explicit and tacit knowledge.’<sup>97</sup>

Santos offers a useful way to overcome the apparent dichotomy which treats technology and business services as separate parts, rather than interdependent sides of the same coin. He therefore

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<sup>92</sup> Michael Ross, ‘The Natural Resource Curse: how Wealth Can Make You Poor,’ in “*Natural Resources and Violent Conflict. OPTIONS AND ACTIONS*” Ian Bannon and Paul Collier (Eds) (2003) The World Bank [24] [www.documents1.worldbank.org](http://www.documents1.worldbank.org) (accessed 25 June 2021)

<sup>93</sup> Steve Kayizi-Mugerwa, ‘Uganda’s nascent oil sector: Revenue generation, investor-stakeholder alignment, and public policy’ WIDER Working Paper [14] [www.wider.unu.edu](http://www.wider.unu.edu) (accessed 27 May 2021)

<sup>94</sup> Ian Bannon and Paul Collier (Eds) “*Natural Resources and Violent Conflict: OPTIONS AND ACTIONS*” (2003) World Bank. [www.documents1.worldbank.org](http://www.documents1.worldbank.org) (accessed 25 June 2021); Bryan Lee and Kendra Dupuy, ‘Petro-Governance in Tanzania: Opportunities and Challenges’ (2016) CMI BRIEF 15 NUMBER 14 [www.cmi.no](http://www.cmi.no).

<sup>95</sup> Silvana Tordo, Michael Warner, Osmel E. Manzano, and Yahya Anouti, ‘Local Content Policies in the Oil and gas Sector’ (2013) World Bank [www.documents.worldbank.org](http://www.documents.worldbank.org) ; Lisa E Sachs, Perrine Toledano, Jacky Mandelbaum, With James Otto, ‘Impacts of Fiscal Reforms on Country Attractiveness; learning from the facts’ (2013) [www.scsi.columbia.edu](http://www.scsi.columbia.edu) (accessed 07 January, 2020); Bryan Lee and Kendra Dupuy, ‘Petro-Governance in Tanzania: Opportunities and Challenges’ (2016) CMI BRIEF 15 NUMBER 14 [www.cmi.no](http://www.cmi.no)

<sup>96</sup> Preeya Mohan, Eric Strobl and Patrick Kent Watson, ‘Extractive Industries as a platform for the creation of Knowledge Intensive industries: Trinidad and Tobago’s Oil and Gas Service Providers’ (2016) [www.researchgate.net/publications/333644442](http://www.researchgate.net/publications/333644442) [5].

<sup>97</sup> *ibid* [9]

proposes a division of knowledge into two sub-groups of equal standing: professional (p-KIBS) and the technology-based (t-KIBS).<sup>98</sup> Apparently emphasising the centrality of ‘knowledge as embodied in human beings (as “human capital”) and in technology’ in economic development.<sup>99</sup>

According to Mohan et al. KIBS ‘include engineering as well as traditional professional services such as advertising, procurement, legal, accounting, management, consulting, and marketing.’<sup>100</sup> Professional firms (**P-KIBS**), providing regulated public services which are not of a commercial nature.<sup>101</sup> A distinctive business framework, placing P-KIBS outside the purview of mainstream economic policy and development planning.<sup>102</sup> A phenomena with wider implications in Tanzania’s context where there was literally no functional private sector, during the critical period of the discovery of gas in 1974.<sup>103</sup> A consequence of nationalisation of businesses and assets of a relatively small and immature private sector in 1967.<sup>104</sup> Conditions behind the apparent absence of a vibrant private legal services relative to economic growth.<sup>105</sup> To that end a task force set up by the Government in 1993, among others recommended establishment of post-graduate

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<sup>98</sup> Juliana Bomeni Santos, ‘Knowledge –intensive business services and innovation performance in Brazil’ (2016) *Innovation and Management Review* Vol.17. No.1 2020 [58-74]

<sup>99</sup> OECD ‘The Knowledge-Based Economy’ (1996) [8]

<sup>100</sup> (n 96) [5]

<sup>101</sup> George Yarrow and Christopher Decker, ‘Assessing the economic Significance of the professional legal services sector in the European Union’ (2012); Anupam Khanna, Phyllis Papadavid, Judith Tyson and Dirk Willem te Velde, ‘The Role of Services in Economic Transformation \_ With An Application to Kenya’ (2016) Supporting Economic Transformation SET <http://set.odi.org.uk> (accessed 27 May 2021).

<sup>102</sup> OECD, ‘The Knowledge-Based Economy’ (1996); James R Faulconbridge, ‘Business Services: Driving the Knowledge-Based Economy in the UK?’ (2010) [www.researchgate.net](http://www.researchgate.net); George Yarrow and Christopher Decker, ‘Assessing the economic Significance of the professional legal services sector in the European Union’ (2012); Anupam Khanna, Phyllis Papadavid, Judith Tyson and Dirk Willem te Velde, ‘The Role of Services in Economic Transformation \_ With An Application to Kenya’ (2016) Supporting Economic Transformation SET <http://set.odi.org.uk> (accessed 27 May 2021).

<sup>103</sup> David Potts, ‘Policy Reform and Economic Development in Tanzania, (2008) Bradford Centre for International Development – [www.core.ac.uk](http://www.core.ac.uk) ;Oscar Ishengoma Kikoyo, “The Impact Of Legal Framework On Regulatory Authorities In Tanzania: A Case Study Of The Surface And Marine Transport Regulatory Authority (SUMATRA)” (2014) PHD Thesis. Open University of Tanzania; ILO Report, Roadmap Study of the Informal Sector in Mainland Tanzania (2002) [www.ilo.org](http://www.ilo.org) (accessed on 27 May 2021); Claudine Sigam and Leonardo Garcia, ‘Extractive Industries: Optimizing Value Retention in Host Countries’ (2012) UNCTAD <https://unctad.org> (visited 17 April 2020); Hagar Russ, ‘Role Of Judicial And Legal Sector Reforms In Business Environment Reform Programmes- A Tanzanian Case Study.’ Legal Adviser Business Environment Strengthening Programme for Tanzania (BEST) Ministry of Planning, Economy and Empowerment. [www.businessenvironment.org/dyn/be/doccs/152/Russ.pdf](http://www.businessenvironment.org/dyn/be/doccs/152/Russ.pdf) (accessed 16 December 2021)

<sup>104</sup> *ibid.* See also Muwonge Abdu & Obwoma Mouris, and Nambwayo Victoria, (2007) *Enhancing contributions of the informal sector to National development: The case of Uganda* Economic Policy Research Centre <https://www.idea.repec.org>.

<sup>105</sup> IDLO, Report on the National Rule of Law Stakeholders Forum “STRENGTHENING THE RULE OF LAW IN TANZANIA” (2015) [www.idlo.int](http://www.idlo.int) (accessed 17 December 2021).

studies in legal practice.<sup>106</sup> However, financial, and institutional constraints, delayed implementation as late as 2004 as summed up below.

**‘In spite of the initiatives by the legal sector institutions and development partners in recent years, the quality of the legal services available to the people and other entities in Tanzania remains well below standards in most respects.’<sup>107</sup>**

Indeed, the sector policy perceives the private sectors’ role in terms of ‘substantial capital investment and technologies needed for exploration and development...’<sup>108</sup> Apparently excluding the domestic private sector which may lack the requisite technical and financial capital. Inevitably, the private sector’s interface with the emerging dynamic industry is from a position of weakness relative to its exacting standards. Especially for P- KIBS firms whose capital in trade is knowledge, attained over long periods of training. According to Potts ‘[it] takes time for a poorly developed private sector to awaken to the reality of its changed role in the context of rapid reforms or forced adjustments.’<sup>109</sup> The discovery and development of the emerging petroleum industry is in this event the dynamic change amounting to ‘forced adjustments.’<sup>110</sup> A point brought home by Tanzania’s experience in implementing broad based reforms, at a time of dynamic forces externally and internally. For example, the introduction of independent power producers into a highly constrained energy sector without ample reforms to regulate the sector.<sup>111</sup> The dramatic and mostly negative impact of that experience underlines the importance of a sound legal framework as well as experienced legal hands, as a prerequisite for successful entrenchment of reforms.

Additionally, empirical research supports consensus in the discourse that absence of strong institutions, including the rule of law has a direct bearing on apparent failure by the petroleum

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<sup>106</sup> United Republic of Tanzania. LEGAL SECTOR REFORM PROGRAMME (LAW AND ORDER) Medium Term Strategy Fys 2005/2006-2007/2008 Volume I October 204; The Law School of Tanzania was established by an Act passed in 2007. [www.lst.ac.tz](http://www.lst.ac.tz)

<sup>107</sup> ibid

<sup>108</sup> The National gas Policy of Tanzania (2013) [29] <https://tanzania.go.tz>

<sup>109</sup> David Potts, ‘Policy Reform and Economic Development in Tanzania, (2008) Bradford Centre for International Development [32] – [www.core.ac.uk](http://www.core.ac.uk)

<sup>110</sup> ibid

<sup>111</sup> Brian Cooksey, “IPTL, Richmond and “Escrow”: The price of private power procurement in Tanzania” (2017) Africa Research Institute. [www.africaresearchinstitute.org](http://www.africaresearchinstitute.org)

project to deliver sustainable development in many petroleum producing countries.<sup>112</sup> The industry's dynamics challenge installed public and private capacity, in terms of what is achievable relative to public expectations.<sup>113</sup>

LCPs targeting early participation for citizens and their enterprises are among popular means adopted by petroleum producing countries to mitigate and ameliorate expectations.<sup>114</sup> However, successful implementation is contingent upon 'pre-existing capacity among local firms and individuals to supply the industry.'<sup>115</sup> Apparently, lack of requisite technical capacity among local 'entrepreneurs' is the single broad challenge limiting entry into the industry's supply chain.<sup>116</sup> In this case the local content regulations requires mandatory use of local legal services on the part of international contractors.<sup>117</sup> However, most of the operative PSAs in Tanzania were entered into

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<sup>112</sup> Bryan Lee and Kendra Dupuy, 'Petro-Governance in Tanzania: Opportunities and Challenges' (2016) CMI BRIEF 15 NUMBER 14 [www.cmi.no](http://www.cmi.no). See also Silvana Tordo, Michael Warner, Osmel E. Manzano, and Yahya Anouti, 'Local Content Policies in the Oil and gas Sector' (2013) World Bank [www.document.worldbank.org](http://www.document.worldbank.org); Lisa E Sachs, Perrine Toledano, Jacky Mandelbaum, With James Otto, 'Impacts of Fiscal Reforms on Country Attractiveness; learning from the facts' (2013) [www.scsi.columbia.edu](http://www.scsi.columbia.edu) (accessed 07 January, 2020)

<sup>113</sup> Silvana Tordo, Michael Warner, Osmel E . Manzano, and Yahya Anouti, 'Local Content Policies in the Oil and gas Sector' (2013) World Bank [www.document.worldbank.org](http://www.document.worldbank.org)

<sup>114</sup> Theophil Acheampong, Victoria Crystal Svanikier and Maria Ashong, 'An assessment of local-content policies in oil and gas producing countries' (2016) Journal of World Energy Law and Business, 2016, 9, 282-302 OXFORD; Abel Kinyondo and Espen Villager, 'Local Content requirements in the petroleum sector in Tanzania: A thorny road from inception to implementation' (2016) CMI Working Paper [10] [www.cmi.no](http://www.cmi.no); Michael W Hansen, Lars Buur, Anne Mette Kjaer and Ole Therkildsen, 'The Economics and Politics of Local Content in African Extractives; Lessons from Tanzania, Uganda and Mozambique' (2016) Forum for Development Studies 2016, Vol 43, No. 2, 201-228; Steve Kayizi-Mugerwa, 'Uganda's nascent oil sector: Revenue generation, investor-stakeholder alignment, and public policy' (2020) UN WIDER Working Paper. [www.wider.unu.edu](http://www.wider.unu.edu) (accessed 26 May 2021). See also Bryan Lee and Kendra Dupuy, 'Petro-Governance in Tanzania: Opportunities and Challenges' (2016) CMI BRIEF 15 NUMBER 14 [www.cmi.no](http://www.cmi.no)

<sup>115</sup> Ritwika Sen, 'Enhancing Local Content in Uganda's Oil and Gas Industry' (2018) [5] UN WIDER [www.wider.unu.edu](http://www.wider.unu.edu). See also, Silvana Tordo, Michael Warner, Osmel E. Manzano, and Yahya Anouti, 'Local Content Policies in the Oil and gas Sector' (2013) World Bank [www.document.worldbank.org](http://www.document.worldbank.org).

<sup>116</sup> National oil and gas policy for Uganda, (2008); Uganda, 'Enhancing National Participation in the Oil and Gas Sector' (2011) Petroleum Authority of Uganda <https://pau.go.ug> (accessed 02 February, 2020); Claudine Sigam and Leonardo Garcia, 'Extractive Industries: Optimizing Value Retention in Host Countries' (2012) UNCTAD <https://unctad.org> (visited 17 April, 2020); Silvana Tordo, Michael Warner, Osmel E . Manzano, and Yahya Anouti, 'Local Content Policies in the Oil and gas Sector' (2013) World Bank [www.document.worldbank.org](http://www.document.worldbank.org). Lisa E Sachs, PerrineToledano, Jacky Mandelbaum, With James Otto, 'Impacts of Fiscal Reforms on Country Attractiveness; learning from the facts' (2013) [www.scsi.columbia.edu](http://www.scsi.columbia.edu) (accessed 07 January 2020); Jeff Geipel and Dan Hetherington (2018) *Local Content Policy: What Works, What Doesn't Work* DFID BERF. See also <https://assets.publishing.services.gov.uk> > (accessed 06 February 2020); UNCTAD (2016) 11-14.; OECD, 'Local content requirements' [www.oecd.org](http://www.oecd.org) (accessed 17 March 2020).

<sup>117</sup> Reg.22 The Petroleum (Local Content) Regulations (2017) GN. No. 197

prior to the legislative framework. Therefore, while the regulations seem to create opportunity to the domestic legal sector, optimum utilization would be an uphill task in this context.<sup>118</sup>

Mohan et al. state that in practice the IOC (subject of the statutory regulations) sub-contracts its operational tasks to KIBS firms.<sup>119</sup> Russ points out that legal services

**‘...are needed to give business-oriented advice to both the private sector and to governments signing up to a growing number of international trade obligations and opening up markets to, and contracting with, greater numbers of domestic and foreign investors’<sup>120</sup>**

The LCRs in this context specifically target technology owned by the IOCs.<sup>121</sup> A position reflecting apparent disconnect with conventional wisdom that traces ownership of technology to the KIBS sector.<sup>122</sup> Arguably therefore legal services would be key players in facilitating the transfer of intellectual property. However, as Russ points out **‘...a key lesson from Tanzania is that domestic and international business environment reformers do not focus sufficiently on judicial and legal sector reform...’<sup>123</sup>** Confirming the obscurity arising out of historical perception of the KIBS sector, accentuated by the engineering bias implicit in “technical” as used in the industry. Apparently disregarding the “technical” in business processes, an equally important side of the petroleum project especially in conditions of infant institutions. However, the Model PSA 2013, exhibits a big departure in its recognition of business services including legal as areas of mandatory training for local personnel.<sup>124</sup>

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<sup>118</sup> (n 106)

<sup>119</sup> Preeya Mohan, Eric Strobl and Patrick Kent Watson, ‘Extractive Industries as a platform for the creation of Knowledge Intensive industries: Trinidad and Tobago’s Oil and Gas Service Providers’ (2016) [www.researchgate.net/publications/333644442](http://www.researchgate.net/publications/333644442) (accessed 13 November 2020).

<sup>120</sup> Hagar Russ, ‘Role Of Judicial And Legal Sector Reforms In Business Environment Reform Programmes- A Tanzanian Case Study.’ [3] Legal Adviser Business Environment Strengthening Programme for Tanzania (BEST) Ministry of Planning, Economy and Empowerment. [www.businessenvironment.org/dyn/bedoccs/152/Russ.pdf](http://www.businessenvironment.org/dyn/bedoccs/152/Russ.pdf) (accessed 16 December 2021)

<sup>121</sup> Local Content Policy of Tanzania for Oil and Gas Industry (2014); Article 21 of the Tanzania model Production Sharing Agreement, 2013.

<sup>122</sup> Simone Stranbach, ‘Knowledge –Intensive Business Services (KIBS) as drivers of multilevel knowledge dynamics’, (2008) International Journal of Services Technology and Management 10(2): 152-174 [161] [www.researchgate.net](http://www.researchgate.net) (accessed 11 November, 2020); Preeya Mohan, Eric Strobl and Patrick Kent Watson, ‘Extractive Industries as a platform for the creation of Knowledge Intensive industries: Trinidad and Tobago’s Oil and Gas Service Providers’ (2016) [www.researchgate.net/publications/333644442](http://www.researchgate.net/publications/333644442) (accessed 13 November 2020)

<sup>123</sup> (n 120)

<sup>124</sup> Article 21 (d) Tanzania Model PSA 2013.

The choice of the PSA as the default mode of extraction by underdeveloped countries is attributed to absence of strong interdependent institutions to support free market-based models such as licence used in the UK Continental Shelf.<sup>125</sup> Ironically it is the same conditions, which precipitate command-and-control regulatory approaches as the default approach. Inevitably, creating a vicious circle of lack of mutual trust, as private contractors' resort to international dispute resolution to mitigate potential loss in case of State recourse to its sovereign prerogatives to avoid contractual obligations.<sup>126</sup> Often at great cost in terms of financial loss, project delays, political and social instability.<sup>127</sup> This has serious implications on the participation of the domestic legal sector in terms of capacity building, but also gaining the trust of both the public and international investors.

#### 2.1.4 Adverse effects of LCRs.

Dellinger et al., state that on average the good apparent in local content intervention usually assessed in the context of the targeted industry, has far-reaching negative impact on other sectors.<sup>128</sup> Esteves et al. argue that, local content has a tendency of 'drawing away labour from other sectors.'<sup>129</sup> Loss of human capital as experienced workers 'leave their professions to work in the resource sector.'<sup>130</sup> Far reaching implications for the P-KIBS in terms of short, medium,

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<sup>125</sup> Greg Gordon, John Paterson and Emre Usenmez, 'Oil and Gas Law On The United Kingdom Continental Shelf: Current Practice and Emerging Trends', in *OIL AND GAS LAW: Current Practice and Emerging Trends* (2011), 2<sup>nd</sup> Ed, Editors Greg Gordon, John Paterson and Emre Usenmez, DUNDEE UNIVERSITY PRESS 2011; Miguel Soares Branco, 'Product Sharing Agreements – legal blessing or curse for developing countries?' (2012) *International Energy Review I.E.L.R.* 147

<sup>126</sup> Singwani Patrick Ng'ambi, 'Permanent Sovereignty Over natural resources and the sanctity of Contracts, From the Angle of *Lucrum Cessans*' (2015) Loyola University Chicago, *International Law Review* Volume 12/ Issue 2 Article 3 2015 John Paterson, 'Production Sharing Agreements in Africa; Sovereignty and Rationality' (2018) University of Aberdeen School of Law Working Paper series 001/19 Centre for Energy Law.

<sup>127</sup> Bryan Lee and Kendra Dupuy, 'Petro-Governance in Tanzania: Opportunities and Challenges' (2016) CMI BRIEF 15 NUMBER 14 [www.cmi.no](http://www.cmi.no); Brian Cooksey, 'IPTL, Richmond and "Escrow": The price of private power procurement in Tanzania' (2017) Africa Research Institute. [www.africaresearchinstitute.org](http://www.africaresearchinstitute.org)

<sup>128</sup> Hanna Deringer, Fredrik Erixon, Phillip Lamprecht and Erik Van der Marel, 'The economic impact of local content requirements: A case study of Heavy Vehicle' (2018) ECIPE <https://ecipe.org> (accessed January 2020)

<sup>129</sup> Anna Maria Esteves and Mary-Anne Barclay, 'Impact assessment and Project Appraisal' in '*Enhancing the benefits of local content: integrating social and economic impact assessment into procurement strategies*', (2011) [207] [www.ingetaconnect.com /content/beeche/iapa](http://www.ingetaconnect.com/content/beeche/iapa) (accessed on 17 September 2020)

<sup>130</sup> *ibid*



and long-term ability to recruit, train and retain skilled labour in competition with the emerging industry.<sup>131</sup>

Sen observes that successful entrenchment of local content regulations is contingent upon ‘pre-existing capacity among local firms and individuals to supply the industry.’<sup>132</sup> Muhongo, expands the contingency to include ‘stable democracy, rule of law, absorptive capacity, technological awareness, as well as credible and economic climate.’<sup>133</sup> Factors taking dynamic and volatile dimensions exposing international contractors to legal risks ‘in instances whereby it is difficult to find a right fit for required, goods, and services or labour from the available pool of nationals.’<sup>134</sup> In this context delays arising of disputes surrounding interpretation of multiple sector laws with which contractors have to comply.<sup>135</sup> Implicit in this are delays and attendant costs. Therefore, compliance itself introduces an independent cost structure to avoid project implementation delays which may cascade through the entire supply chain.

The frameworks in this event target the high investment at the peak of project construction. Ruqaishi et al, point out that ‘project delay is one of the most common problems in the construction industry worldwide.’<sup>136</sup> Rand et al. state that petroleum projects involve multiple contractors interlinked in a web of supply chain networks.<sup>137</sup> It is these networks which underscore the critical

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<sup>131</sup> Sam Hickey, Abdul-Gafaru Abdulai, Angelo Izama and Giles Mohan, ‘The politics of governing oil effectively: A comparative study of two new oil-rich states in Africa’, (2015) ESID Working Paper No. 54, Manchester: The University of Manchester; Muwonge Abdu & Obwoma Morris, and Nambwayo Victoria, (2007) *Enhancing contributions of the informal sector to National development: The case of Uganda* Economic Policy Research Centre <https://www.idea.repec.org> ; Opoloti M 92017) *Informality Growing Faster than Formality* Economic Policy Research Centre <https://www.eprcug.org>> press-media (accessed December,2019); ILO Report, Roadmap Study of the Informal Sector in Mainland Tanzania. [www.ilo.org](http://www.ilo.org) (accessed on 27 May 2021).

<sup>132</sup> Ritika Sen, ‘Enhancing local content in Uganda’s oil and gas industry’ (2018) [5] –unu - wider [www.wider.unu.edu](http://www.wider.unu.edu) > (accessed 10 February 2020). See also: Silvana Tordo, Michael Warner, Osmel E. Manzano, and Yahya Anouti, ‘Local Content Policies in the Oil and gas Sector’ (2013) World Bank [www.documents.worldbank.org](http://www.documents.worldbank.org) ; Acheampong, T, Ashong M, and Svanikier V C, ‘An assessment of local-content policies in oil and gas producing countries’ (2016) *Journal of World Energy Law and Business*, 2016, 9, 282-302 OXFORD.

<sup>133</sup> Rukonge Sospeter Muhongo, ‘The Different Aspect of Local Content’. (2020) *Energy Justice*: 13-42 published Online 2020 Nov. 3 doi 10.1007/978-3-030-61338-9\_2

<sup>134</sup> Damilola S Olawuyi, ‘Local Content and procurement requirements in oil and gas contracts: Regional trends in the Middle East and North Africa,’ (2017) [7] *The Oxford Institute of Energy Studies*. University of OXFORD

<sup>135</sup> Bryan Lee and Kendra Dupuy, ‘Petro-Governance in Tanzania: Opportunities and Challenges’ (2016) CMI BRIEF 15 NUMBER 14 [www.cmi.no](http://www.cmi.no).

<sup>136</sup> Muhamed Ruqaishi and Hamdi Bashir, ‘Causes of Delay in Construction Projects in the oil and Gas Industry in the Gulf Cooperation Council Countries: A case Study’ (2015) *Journal of Management in Engineering*’ 31 (3):05014017 <https://researchgate.net> (accessed 28 July 2021)

<sup>137</sup> John Rand, Abebe Shimeles, Man Soderbon, and Finn Tarp, (Eds) ‘*Manufacturing Transformation: Comparative Studies of Industrial Development in Africa and Emerging Asia*’ (2016) OXFORD Scholarship Online

role of the KIBS sector in developing the petroleum project. Ideally the above factors ought to inform the choice of the most appropriate regulatory approach. For instance, developing local competency and capacity to improve future effective participation rather than targeting short term benefits. Apparently, capacity building is an independent variable regardless of ownership of the petroleum.<sup>138</sup> Taking a leaf from the Norwegian experience, adopt a sequenced approach to capacity building in a collaborative manner based on mutuality of interest.<sup>139</sup>

### **2.1.5 Mutual interest in successful entrenchment of LCRs.**

According to Olawuyi, the security of the IOCs' investment is to a great degree a factor of their ability to comply with both contractual and statutory obligations.<sup>140</sup> However, Ng'ambi points out the high probability for States invoking sovereignty to override contractual obligations.<sup>141</sup> An OECD report identifies three plausible explanations for non-compliance; (a) subjects' understanding and comprehension of the rules; (b) willingness 'to comply-either because of economic incentives...or pressure from enforcement activities' and, (c) subject's ability 'to comply with the rules.'<sup>142</sup> Arguably, IOCs are well equipped with the aid of legal consultants to comply especially with rule based LCRs. Ostensibly, there would be no incentive for intentional avoidance of local services on the part of the IOCs, or their sub-contractors, and or assigns, provided such services are available and commensurate with demand as provided for in the relevant articles of the PSAs.<sup>143</sup>

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<sup>138</sup> Robert Baldwin, Martin Cave and Martin Lodge, "*Understanding Regulation: Theory, Strategy, and Practice*" (2012) OXFORD 2<sup>nd</sup> Edition

<sup>139</sup> Abel Kinyondo and Espen Villager, 'Local Content requirements in the petroleum sector in Tanzania: A thorny road from inception to implementation' (2016) CMI Working Paper [10] [www.cmi.no](http://www.cmi.no); Steve Kayizi-Mugerwa, 'Uganda's nascent oil sector: Revenue generation, investor-stakeholder alignment, and public policy' (2020) UN WIDER Working Paper. [www.wider.unu.edu](http://www.wider.unu.edu) (accessed 26 May 2021)

<sup>140</sup> Damilola S Olawuyi, 'Local Content and procurement requirements in oil and gas contracts: Regional trends in the Middle East and North Africa,' (2017) The Oxford Institute of Energy Studies. University of OXFORD

<sup>141</sup> Singwani Patrick Ng'ambi, 'Permanent Sovereignty Over natural resources and the sanctity of Contracts, From the Angle of *Lucrum Cessans*' (2015) Loyola University Chicago, International Law Review Volume 12/ Issue 2 Article 3 2015

<sup>142</sup> OECD, 'Reducing the Risk of Policy Failure: Challenges for Regulatory Compliance' (2000) [7]

<sup>143</sup> Articles 20 and 21, Model PSA Between URT and TPDC on one part and [ABC Ltd] 2013



However, Ross suggests that Multinational Corporations engaged in resource extraction are only motivated by the preservation of the status quo if it guarantees returns on investment.<sup>144</sup> He cites the example of continued exploitation of resources in all political circumstances.<sup>145</sup> Meaning that if LCRs can ensure profitability without undue delay the IOCs will support and encourage successful implementation of LCRs. Apparently, adaptation of command-and-control measures serves other purposes, beyond lack of mutuality of interest or unwillingness on the part of IOCs.

According to Olawuyi, in the context of old petroleum producing countries, ‘local employment is consistently among the topmost concerns of nationals and often a central issue driving disputes, grievances and conflict’.<sup>146</sup> A difficult feat relative to the industry’s low rates of employment. In this context, the discovery of petroleum, gives rise to high public ‘expectations, for better and more equitable distribution of wealth and authority’.<sup>147</sup> Given the dynamic conditions in which the industry operates, it becomes an imperative for both the host state and its contractors to seek solutions to meet or try to mitigate public expectations. Both have vested interests in diversifying the economy, to create sustainable creation of jobs. LCRs take on a dynamic purpose beyond what is expressed in the legislation. In the legal and practical context, they also bring on board a class of third-party beneficiaries, without privity or derived rights under the PSAs.

Ross points out that both parties have self-serving interests, which may not coincide with the public interest.<sup>148</sup> The government to retain political power. Assurance of a constant flow of profits for the investor. The solution therefore as suggested by Olawuyi, representing consensus in many reports, is to utilize synergies generated by the industry to diversify the economy to create more jobs.<sup>149</sup> Therefore, in a context where the executive arm retains power to override regulatory

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<sup>144</sup> Michael Ross, ‘The Natural Resource Curse: how Wealth Can Make You Poor,’ in “*Natural Resources and Violent Conflict. OPTIONS AND ACTIONS*” Ian Bannon and Paul Collier (Eds) (2003) The World Bank [www.documents1.worldbank.org](http://www.documents1.worldbank.org) (accessed 25 June 2021)

<sup>145</sup> *ibid* [30]

<sup>146</sup> Damilola S Olawuyi, ‘Local Content and procurement requirements in oil and gas contracts: Regional trends in the Middle East and North Africa,’ (2017) The Oxford Institute of Energy Studies. University of OXFORD [5-6]

<sup>147</sup> *ibid* [6]

<sup>148</sup> (n 151) [30]

<sup>149</sup> Damilola S Olawuyi, ‘Local Content and procurement requirements in oil and gas contracts: Regional trends in the Middle East and North Africa,’ (2017) The Oxford Institute of Energy Studies. University of OXFORD. See also, Claudine Sigam and Leonardo Garcia, ‘Extractive Industries: Optimizing Value Retention in Host Countries’ (2012) UNCTAD <https://unctad.org> (visited 17 April 2020) ;Lisa E Sachs, Perrine Toledano, Jacky Mandelbaum, With James Otto, ‘ Impacts of Fiscal Reforms on Country Attractiveness; learning from the facts’ (2013) [www.scsi.columbia.edu](http://www.scsi.columbia.edu) (accessed 07 January, 2020); Sam Hickey, Abdul-Gafaru Abdulai, Angelo Izama, and Giles

authority, the lawyers face a difficult task. Conditions which undermine the ethical foundations of the legal profession. LCRs therefore portend distortion of the legal services sector in many ways requiring more research. But for now, it may be pertinent to focus on the importance of legal services for an emerging producer and whether the current frameworks facilitate that role.

### **2.1.6 KIBS as contributors to the success of entrenching LCRs.**

Once accepted as critical players towards achieving LCP goals, it becomes necessary to elevate the KIBS firms to the level of essential enablers worth higher ranking in the order of public priorities. As factors in the process rather than the current view which categorises them as beneficiaries under the preferential local content framework. A retrospective study of Trinidad and Tobago, a much older petroleum province, by Mohan et al. highlights two roles for the KIBS firms. First as intermediaries between the technologies accompanying the emerging industry and the recipient economy. Additionally, as a foundation for the development of a post petroleum knowledge-intensive-based modern economy.<sup>150</sup>

The study points out that most tasks in the petroleum chain ‘are difficult and costly and involve the use of highly specialised knowledge, skills, equipment and technology’ provided by KIBS.<sup>151</sup> Muller et al. compliment this view, stating that KIBS ‘undertake complex operations of an intellectual nature where human capital is the dominant factor.’<sup>152</sup> Further that ‘production and supply of knowledge is distinctive from; (i) **entrepreneurship**; (ii) institutional variety; (iii) vertical integration; and (iv) technological cooperation.’<sup>153</sup>

Stranbasch identifies three major characteristics of KIBS:

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Mohan, ‘The politics of governing oil effectively: A comparative study of two new oil-rich states in Africa’, (2015) ESID Working paper No. 54, Manchester: The University of Manchester; Michael W Hansen, Lars Buur, Anne Mette Kjaer and Ole Therkildsen, ‘The Economics and Politics of Local Content in African Extractives; Lessons from Tanzania, Uganda and Mozambique’ (2016) Forum for Development Studies 2016, Vol 43, No. 2, 201-228;

<sup>150</sup> Preeya Mohan, Eric Strobl and Patrick Kent Watson, ‘Extractive Industries as a platform for the creation of Knowledge Intensive industries: Trinidad and Tobago’s Oil and Gas Service Providers’ (2016) [www.researchgate.net/publications/333644442](http://www.researchgate.net/publications/333644442) [21]

<sup>151</sup> *ibid* [18]

<sup>152</sup> Emmanuel Muller and David Doloreux, ‘The key dimensions of knowledge-intensive business services (KIBS) analysis: a decade of evolution (2007) [5] Fraunhofer Institute Systems and Innovation Research (ISI) [www.econstor.eu](http://www.econstor.eu) (accessed 11 November 2020).

<sup>153</sup> *ibid* [11]

- a) Predominantly reliant on ‘*professional knowledge*’.
- b) Generators ‘*of information and knowledge or they use knowledge to produce intermediate services for their client’s production processes;*’ and
- c) ‘*they are of competitive importance and supply primarily to businesses.*’<sup>154</sup>

Therefore, KIBS offer, services induced by demand on a project-to-project basis. This distinction in character, form, and deliverables (products) is very instructive in many ways. Most significantly in this context, although the policy recognises the role of the private sector, the implementing regulations apparently focus more on the benefits accruing to citizens as participants rather than as enablers. A welfare view which detracts attention from the centrality of the contingency nature of participation in the highly technical industry. For instance, Sen commenting on Uganda’s context, observes that,

‘...the contribution to value creation within the national economy is conditioned on the nationality of individuals and the ownership of companies concerned (in spirit).’<sup>155</sup>

### **2.1.7 Redefining the Role of the P-KIBS in facilitating sustainable development.**

There is an apparent shift in basic assumptions at the international level. Ownership of natural resources has so far not delivered sustainable development in many resources’ rich African countries.<sup>156</sup> ‘Knowledge’ is rising as an equally critical if not most important resource, in the context of sustainable development.<sup>157</sup>

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<sup>154</sup> Simone Stranbach, ‘Knowledge –Intensive Business Services (KIBS) as drivers of multilevel knowledge dynamics’, (2008) *International Journal of Services Technology and Management* 10(2): 152-174 [155] [www.researchgate.net](http://www.researchgate.net) (accessed 11 November 2020)

<sup>155</sup> Ritwika Sen, ‘Enhancing Local Content in Uganda’s Oil and Gas Industry’ (2018) UN WIDER [5] [www.wider.unu.edu](http://www.wider.unu.edu) > ;

Claudine Sigam and Leonardo Garcia, ‘Extractive Industries: Optimizing Value Retention in Host Countries’ (2012) UNCTAD <https://unctad.org> (visited 17 April, 2020); Lisa E Sachs, Perrine Toledano, Jacky Mandelbaum, With James Otto, ‘Impacts of Fiscal Reforms on Country Attractiveness; learning from the facts’ (2013) [www.scsi.columbia.edu](http://www.scsi.columbia.edu) (accessed 07 January, 2020); Jeff Geipel and Dan Hetherington (2018) *Local Content Policy: What Works, What Doesn’t Work* DFID BERF. See also <https://assets.publishing.services.gov.uk> > (accessed 06 February, 2020); UNCTAD (2016) 11-14.; OECD, ‘Local content requirements’ [www.oecd.org](http://www.oecd.org) (accessed 17 March 2020).

<sup>156</sup> *ibid*

<sup>157</sup> Asian Development Bank, ‘Moving Towards Knowledge-Based Economies: Asian Experiences’ (2007) ADB.

According to an ADB Report (2007):

*‘Wealth creation through application of human knowledge and creativity is steadily outpacing wealth creation through extraction and processing of natural resources. Knowledge has increasingly become an important means of value creation.’<sup>158</sup>*

This change in thinking necessitates reconsideration of our perception of the KIBS sector and its role in entrenching local content aspirations. For instance, Gwayaka, observes that ‘the focus [of the LCPs] is on transfer of technology by companies engaged in the extractive resource sector’ to the indigenous people, ‘with a hope of assuring them income, employment and ultimately sustainable development.’<sup>159</sup> ‘The focus’ apparently premised on two presumptions; (a) that oil companies and their sub-contractors own the technology relevant to domestic needs; and (b) the domestic economy has the adaptive capacity to transform such technology to its utility.<sup>160</sup> Presumptions clearly overstated when weighed in the context of the preceding discussion.

In the first instance as observed by Mohan et al. since the KIBS firms undertake all major operations, technologies applied in the processes need not be the property of the IOCs.<sup>161</sup> Even without considering the legal hurdles and transactional costs, technologies targeted by the frameworks are specific to the industry. The transfer is in any event to the public sector and as such without much opportunity to trickle down to the private sector.<sup>162</sup>

According to Nseera, ‘the petroleum sector is considered weak in terms of backward and forward linkages.’<sup>163</sup> A view collaborated by the findings in Uganda’s report for enhancement of national

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<sup>158</sup> *ibid* [1]

<sup>159</sup> Peter Maselah Gwayaka, ‘Local Content in Oil and Gas Sector – An Assessment of Uganda’s Legal and Policy Regimes’ (2014) [1] [www.business-humanrights.org](http://www.business-humanrights.org) (accessed 17 September 2020)

<sup>160</sup> Uganda, ‘Enhancing National Participation in the Oil and Gas Sector’ (2011) Petroleum Authority of Uganda <https://pau.go.ug> (accessed 02 February 2020); Claudine Sigam and Leonardo Garcia, ‘Extractive Industries: Optimizing Value Retention in Host Countries’ (2012) UNCTAD <https://unctad.org> (visited 17 April, 2020); Lisa E Sachs, Perrine Toledano, Jacky Mandelbaum, With James Otto, ‘Impacts of Fiscal Reforms on Country Attractiveness; learning from the facts’ (2013) [www.scsi.columbia.edu](http://www.scsi.columbia.edu) (accessed 07 January, 2020); Jeff Geipel and Dan Hetherington (2018) *Local Content Policy: What Works, What Doesn’t Work* DFID BERF. See also <https://assets.publishing.service.gov.uk> > (accessed 06 February, 2020); UNCTAD (2016) 11-14.; OECD, ‘Local content requirements’ [www.oecd.org](http://www.oecd.org) (accessed 17 March 2020).

<sup>161</sup> (n 151).

<sup>162</sup> Sections 220 and 221 of the Petroleum Act, (Tanzania) No. 21 of 2015; Article 21 Model PSA 2013.

<sup>163</sup> Edina Nseera, ‘Understanding the Prospective Local Content in the Petroleum Sector and the Potential Impact of High Energy Prices on Production Sectors and Household Welfare in Uganda’ (2016) African Development Bank Group, Working Paper Series WPS- No-242 [5] [www.afdb.org](http://www.afdb.org) (accessed 10 February 2021)

participation.<sup>164</sup> Kline, observes that the labour structure in the industry is characterised by short-term contracts; consistent with the organisational flexibility; commensurate with its dynamic nature.<sup>165</sup> In the same manner, the construction industry is inherently project based, recruiting experts and labour for shorter and more specific terms.<sup>166</sup> To the contrary, the frameworks in this event seem to presume permanent employment structures for the IOC and its sub-contractors.

Consequently, it becomes an imperative to propagate for focus on ‘local content as the transmission mechanism of the benefits from oil activities to the local economy’ rather than an end.<sup>167</sup> Additionally, as observed by Mohan et al. KIBS should not be viewed merely as commercial suppliers of goods and services to the operators in the oil and gas industry, but ‘... knowledge creating entities, which can help with knowledge transfer and consequently, innovation, productivity and diversification’ of the economy.<sup>168</sup>

Nseera, describes such processes as mutually reinforcing mechanisms established through three important linkages: ‘joint ventures of various types, licensing agreements, and strategic alliances with local partners.’<sup>169</sup> Also, linkages among technological partners, and from the spill over effect.<sup>170</sup> These take place under confidentiality terms within the relevant contracts.<sup>171</sup> Such knowledge, transmitted through direct participation at transactional (business services) and technical levels. As such, the P-KIBS firms require active government support, in terms of gaining experience in the key areas of providing legal and financial services in the upstream segment.<sup>172</sup>

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<sup>164</sup> Uganda, ‘Enhancing National Participation in the Oil and Gas Sector’ (2011) Petroleum Authority of Uganda <https://pau.go.ug> (accessed 02 February 2020)

<sup>165</sup> Patrick Kline, ‘Understanding Sectoral Labor Market Dynamics: An Equilibrium Analysis of the Oil and Gas Field Services Industry’ (2018) eml.berkeley.edu (accessed 21 October 2020)

<sup>166</sup> Strambach, (n 154) [156]

<sup>167</sup> Edina Nseera, (n 163)

<sup>168</sup> Preeya Mohan, Eric Strobl and Patrick Kent Watson, ‘Extractive Industries as a Platform for the Creation of Knowledge Intensive industries: Trinidad and Tobago’s Oil and Gas Service Providers’ (2016) [8] [www.researchgate.net/publications/333644442](http://www.researchgate.net/publications/333644442) (accessed 13 November 2020)

<sup>169</sup> Edina Nseera, (n 163) [7].

<sup>170</sup> *ibid*, Cf UNCTAD (2010).

<sup>171</sup> Article 18 of the 2013 Tanzania Model PSA.

<sup>172</sup> Simone Strambach, ‘Knowledge –Intensive Business Services (KIBS) as drivers of multilevel knowledge dynamics’, (2008) *International Journal of Services Technology and Management* 10(2): 152-174 [161] [www.researchgate.net](http://www.researchgate.net) (accessed 11 November, 2020); Preeya Mohan, Eric Strobl and Patrick Kent Watson, ‘Extractive Industries as a platform for the creation of Knowledge Intensive industries: Trinidad and Tobago’s Oil and Gas Service Providers’ (2016) [www.researchgate.net/publications/333644442](http://www.researchgate.net/publications/333644442) (accessed 13 November 2020)

The discussion above provides a clear framework within which to evaluate the efficacy of the regulations.<sup>173</sup> However, it seems that the prescription of a single business structure –a company incorporated under the Companies Act, does not augur well with the emerging role of the P-KIBs sector.<sup>174</sup> However, the subject is beyond the scope of this study. Suffice to say that transforming P-KIBs into incorporated entities would be a complex exercise touching on a delicate territory of conflict of laws. Which brings us to the impact of the dual framework discussed next.

## **2.3 The impact of the dual regulatory framework in the context of the rule-based and goals-based approaches.**

### **2. 3. 1. Regulations: Tools of Control or Facilitation?**

Hunter, reflecting a contemporary approach recommends the perception of regulations, as positive facilitative forces rather than tools for control.<sup>175</sup> The opposite of the law as a command theory adopted in this research. The petroleum project is in principle governed by the PSAs, many entered prior to the statutory framework.<sup>176</sup> Baldwin et al. assert that ‘the essence of command-and-control regulation is the exercise of influence by imposing standards backed by criminal sanctions.’<sup>177</sup> **‘The force of law is used to prohibit certain forms of conduct, to demand some positive actions or to lay down conditions for entry into a sector.’**<sup>178</sup> In this context the regulations lay down conditions for entry into the projects’ international supply chain. However, as cautioned in

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<sup>173</sup> Tina Hunter, ‘The role of The Regulatory Framework in Encouraging the Sustainable Extraction of Petroleum Resources in Australia and Norway. (2014) the Extractive Industry and Society 1 (1):48-58 March 2014.

<sup>174</sup> Section 219 of the Petroleum Act. 2015 (Tanzania). See also, Reg. 4 Upstream (Local Content) Regulations SI 2016 No. 44 it ‘*means a company incorporated under the Companies Act 2012 and which –*

- (a) provides value addition in Uganda.*
- (b) uses available local raw materials;*
- (c) employs at least 70% Ugandans; and*

*Is approved by the Authority under regulation 9 (4) ”*

<sup>175</sup> Tina Hunter, (n 173).

<sup>176</sup> Bryan Lee and Kendra Dupuy, ‘Petro-Governance in Tanzania: Opportunities and Challenges’ (2016) CMI BRIEF 15 NUMBER 14 www.cmi.no.

<sup>177</sup> Robert Baldwin, Martin Cave and Martin Lodge, “*Understanding Regulation: Theory, Strategy, and Practice*” (2012) OXFORD 2<sup>nd</sup> Edition [106]

<sup>178</sup> *ibid*

the introductory chapter, Hunter, and Baldwin's comments above, must be appreciated in the context of mature economies with strong institutions, therefore a higher resilience and adaptive capacity. A clear contrast with Tanzania's context, where the contingency nature of implementing LCRs, demands a wider dimension for positive actions relative to very low levels of local skills, and immature institutional structure as discussed in the preceding sections.

Apparently, positive action is aligned to collaborative approaches as reflected in the relevant articles of the PSAs.<sup>179</sup> Baldwin et al. make a useful commentary:

'[T]he regulatory aspects of the contract may be incidental to the main purpose, which may be commercial, but the effect is to impose a regulatory standard across all firms contracting with the government.'<sup>180</sup>

In essence therefore in mature jurisdictions self-regulatory contractual regimes serve the same purpose as statutory regulations. Considered in the positivist theoretical distinction between the law making and interpretation stages, the PSA regime presents a law-making stage, and as such the contract and the legal advisers involved may be perceived as assuming a law-making role.<sup>181</sup> According to an OECD report, compliance in the command-and-control context, passes a greater administrative burden on the regulator. Implicit in that is possession of experienced manpower to monitor and enforce compliance. Compliance here 'understood as the adherence to laws, regulations and rules.'<sup>182</sup> However, in a context of emerging conditions superimposed on regulatory uncertainty, the regulatory authorities apparently lack requisite capacity. Which begs the question as to why an emerging producer should assume such obligations.

On the other hand, goals-based (collaborative) approaches impose wider obligations on the contractor to understand, interpret and act in accordance with the spirit of the contract.<sup>183</sup> Which puts the ball in the hands of the KIBS firms as the sub-contractors who assume most of the

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<sup>179</sup> Articles 20 and 21, Model PSA Between URT and TPDC on one part and [ABC Ltd] 2013

<sup>180</sup> (n 177) [117]

<sup>181</sup> Frederick Schaver and Virginia J. Wise, 'Legal Positivism as Legal Information' 1997 Cornell Law Review Volume 82 Issue 5 July 1997 Article 7 [1084]

<sup>182</sup> OECD, 'Reducing the Risk of Policy Failure: Challenges for Regulatory Compliance' (2000).

<sup>183</sup> Christopher Decker, 'Goals-Based And Rules –Based Approaches to Regulation' (2018) BEIS Research Paper Number 8. Department for Business Energy & Industrial Strategy OXFORD; Damilola S Olawuyi, 'Local Content and procurement requirements in oil and gas contracts: Regional trends in the Middle East and North Africa,' (2017) The Oxford Institute of Energy Studies. University of OXFORD

functions. Olawuyi points out that LCRs ‘allocate and share a bundle of rights, obligations and risks between IOCs and the host government.’<sup>184</sup> Baldwin et al. explain that the choice of rule determines enforceability, compliance, and realisation of objectives.<sup>185</sup> The ideal position would have been for all stakeholders to gain a clear understanding of corresponding rights/obligations and enforceability pertaining to each approach. Therefore, capacity to make informed choices at all stages of the life cycle of the petroleum project. Additionally, to inform the design of implementing mechanisms in case of LCRs imposed by legislation. Also need for clarity of contractual terms, as well as certainty in the legislative framework. Implicit in that is the pivotal role of the legal services sector. Necessary service providers in designing, structuring as well as managing contract implementation. A role which cannot be effectively discharged without possession of requisite skills.

Apparently, the emerging industry is so far dominated by political rather than economic considerations.<sup>186</sup> Remdoo warns that LCPs ‘have a strong political appeal, as they respond to popular pressures to deliver on jobs and wealth-creating promises made during political campaigns.’<sup>187</sup> Baldwin et al. point out that political reasons lead to regulations that are widely spread in scope, and lacking in depth, thereby prompting ‘creative compliance’ behaviours.<sup>188</sup> A ‘process whereby those regulated avoid having to break the rules and do so by circumventing the scope of a rule while still breaching the spirit of the rule.’<sup>189</sup> Legitimate responses when considered

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<sup>184</sup> Damilola S Olawuyi, ‘Local Content and procurement requirements in oil and gas contracts: Regional trends in the Middle East and North Africa,’ (2017) The Oxford Institute of Energy Studies. University of OXFORD [7]

<sup>185</sup> (n 108)

<sup>186</sup> Michael W Hansen, Lars Buur, Anne Mette Kjaer and Ole Therkildsen, ‘The Economics and Politics of Local Content in African Extractives; Lessons from Tanzania, Uganda and Mozambique’ (2016) Forum for Development Studies 2016, Vol 43, No. 2, 201-228; Sam Hickey, Abdul-Gafaru Abdulai, Angelo Izama and Giles Mohan, ‘The politics of governing oil effectively: A comparative study of two new oil-rich states in Africa’, (2015) ESID Working Paper No. 54, Manchester: The University of Manchester; Muwonge Abdu & Obwoma Morris, and Nambwayo Victoria, *Enhancing contributions of the informal sector to National development: The case of Uganda* (2007) Economic Policy Research Centre <https://www.idea.repec.org>; John Paterson, ‘Production Sharing Agreements in Africa; Sovereignty and Rationality’ (2018) University of Aberdeen School of Law Working Paper series 001/19 Centre for Energy Law.

<sup>187</sup> Isabelle Remdoo, ‘Designing Local Content Policies in Mineral Rich countries’ (2018) International Forum on Mining, Minerals, Metals and Sustainable Development [4]; see also- Austin Dziwornu Ablo, ‘Actors, networks and assemblages: local content, corruption and politics of SME’s participation in Ghana oil and gas industry’ (2019) IDPR, 41 920 2019 <https://doi.org/10.3828/idpr.2018.33>.

<sup>188</sup> Robert Baldwin, Martin Cave and Martin Lodge, “*Understanding Regulation: Theory, Strategy, and Practice*” (2012) OXFORD 2<sup>nd</sup> Edition [232]

<sup>189</sup> *ibid*



in the context of law as command theory adopted in this study, also the model adopted by the statutory regulations.

Sen raises two pertinent questions: to what extent are ‘local firms integrated into the natural resource value chain?’ And ‘what capabilities do domestic firms’ need to have to enter that chain?’<sup>190</sup> According to Remdoo having ‘a critical mass of viable domestic firms that can function durably in competitive markets’ is prerequisite for successful entrenchment of LCRs.<sup>191</sup> As observed earlier the international context perceives LCRs as temporary measures. Therefore, aimed at giving room to local goods and service providers to gain competitive capacity.<sup>192</sup> treating LCRs as an end in situations of an emerging producer, may hinder cost effective development of the industry. For instance, Tanzania’s business side capacity deficit would arguably transcend what Sen categorises as highly technical ‘industries which are currently beyond the reach of ... domestic industrial capabilities and have limited potential for local content development.’<sup>193</sup> Therefore, while the industry demands legal certainty, there is an apparent disharmony between creating the enabling environment in which business can thrive and retaining government control.<sup>194</sup>

Tanzania has consistently, and more so since 2016 pursued policies identifying industrialisation as the driver of its economic development. Kweka observes that the policy is consistent with wide consensus in the discourse.<sup>195</sup> However, according to Rand et al., ‘African countries have not been able to achieve the required threshold levels of manufacturing...size, structure, and dynamism to help them escape from the vicious circle’ restricting their ‘entry into foreign markets.’<sup>196</sup> While this paper does not attempt to resolve the opposing views on industrialisation in Africa, apparently LCPs target the transfer of the industry’s technology to develop local manufacturing capacity.

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<sup>190</sup> Rwitika Sen, ‘Enhancing local content in Uganda’s oil and gas industry’, (2018) [10] –UNU - WIDER [www.wider.unu.edu](http://www.wider.unu.edu) > (accessed 10 February 2020).

<sup>191</sup> Isabelle Remdoo, ‘Designing Local Content Policies in Mineral Rich countries’ (2018) International Forum on Mining, Minerals, Metals and Sustainable Development [23]

<sup>192</sup> Abolfazl Kazzazi and Behrouz Nouri, ‘A conceptual model for local content development in petroleum industry’ (2012) *Management Science Letters* 2 (2012) 2165-2174

<sup>193</sup> Ritwika Sen, ‘Enhancing Local Content in Uganda’s Oil and Gas Industry’ (2018) UN WIDER [17] [www.wider.unu.edu](http://www.wider.unu.edu) >

<sup>194</sup> Oscar Ishengoma Kikoyo, “The Impact Of Legal Framework On Regulatory Authorities In Tanzania: A Case Study Of The Surface And Marine Transport Regulatory Authority (SUMATRA)” (2014) PHD Thesis. Open University of Tanzania

<sup>195</sup> Josaphat Kweka, ‘Monitoring policies to support industrialization in Tanzania: An Update on policy recommendations.’ (2018) [www.seti.ordi.org/wp-content/uploads](http://www.seti.ordi.org/wp-content/uploads)

<sup>196</sup> John Rand, Abebe Shimeles, Man Soderbon, and Finn Tarp, (Eds) “*Manufacturing Transformation: Comparative Studies of Industrial Development in Africa and Emerging Asia*” (2016) [106] OXFORD Scholarship Online

Additionally, emerging producers are faced with a complex and costly start, relative to the old producers ( Middle East/ North Africa) which inherited the industry as a going concern.<sup>197</sup> Oil companies operating in deserts or other lands without dense populations did not contend with issues of environment protection, nor the political issue of ownership, tax, and equitable distribution of revenues among present and future generations.<sup>198</sup> These are now pertinent issues with a dynamic international dimension of involving international treaties and conventions.

Old producers also enjoyed supply monopolies which facilitated significant profits for reinvestment.<sup>199</sup> Current producers must compete for capital and markets and must be competitive to remain in the volatile commodity market. Apparently, the social justice debate discounts the current costs from the formulation of policy and implementing mechanisms. A view which perceives the incidence of ownership of the petroleum as the most important factor in developing the petroleum project.<sup>200</sup> Apparently, the elasticity of options available to each country, in terms of attracting investment is directly proportional to its ability to deliver its petroleum at the least cost, relative to other producers.<sup>201</sup> A subjective test that does not fit the objectivity sought for

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<sup>197</sup> Daniel Yergin, *The Prize the Epic Quest for Oil, Money & Power (1991)* SIMON & SCHUSTER NEW YORK LONDON. See also, Carole Nakhle, 'Petroleum Taxation: Sharing the Oil wealth: a study of petroleum taxation yesterday, today and tomorrow' (2008) ROUTLEDGE; Miguel Soares Branco, 'Product Sharing Agreements – legal blessing or curse for developing countries?' (2012) *International Energy Review I.E.L.R.* 147; Fabio Solimene, 'Production-sharing contracts, joint ventures and service contracts: analysis and drafting considerations' (2014) *International Energy Law Review I, E.L.R.* 173; Michael Ross, 'The Natural Resource Curse: how Wealth Can Make You Poor,' in "*Natural Resources and Violent Conflict. OPTIONS AND ACTIONS*" Ian Bannon and Paul Collier (Eds)The World Bank [ 30] [www.documents1.worldbank.org](http://www.documents1.worldbank.org) (accessed 25 June 2021)

<sup>198</sup> Daniel Yergin, *The Prize the Epic Quest for Oil, Money & Power (1991)* SIMON & SCHUSTER NEW YORK LONDON.

<sup>199</sup> *ibid*

<sup>200</sup> TeophilAcheampong, Michael Ashong , and Victoria C Svanikier , 'An assessment of local-content policies in oil and gas producing countries' (2016) *Journal of World Energy Law and Business*, 2016, 9, 282-302 OXFORD; Abel Kinyondo and Espen Villager, 'Local Content requirements in the petroleum sector in Tanzania: A thorny road from inception to implementation' (2016) CMI Working Paper [10] [www.cmi.no](http://www.cmi.no); Michael W Hansen, Lars Buur, Anne Mette Kjaer and Ole Therkildsen, ' The Economics and Politics of Local Content in African Extractives; Lessons from Tanzania, Uganda and Mozambique' (2016) *Forum for Development Studies* 2016, Vol 43, No. 2, 201-228; Steve Kayizi-Mugerwa, 'Uganda's nascent oil sector: Revenue generation, investor-stakeholder alignment, and public policy' (2020) UN WIDER Working Paper. [www.wider.unu.edu](http://www.wider.unu.edu) (accessed 26 May 2021). See also Bryan Lee and Kendra Dupuy, 'Petro-Governance in Tanzania: Opportunities and Challenges' (2016) CMI BRIEF 15 NUMBER 14 [www.cmi.no](http://www.cmi.no)

<sup>201</sup> Carole Nakhle, 'Petroleum Taxation: Sharing the Oil wealth: a study of petroleum taxation yesterday, today and tomorrow' (2008) ROUTLEDGE

under the social justice debate. It also challenges the school of thought which propagates the primacy of sovereignty over sanctity of contract. Nakhle, explains:

*‘Exploration and exploitation activities present delicate legal, technical, financial and political problems –any solution requires a balancing act of interest between the host country and its international contractors.’*<sup>202</sup>

Implicit in that argument is the role of negotiating, structuring, and arranging robust legal and financial contracts commensurate with the technical, commercial, and political needs of the project. According to Paterson, reflecting a widely held view, for the investor the most important consideration is certainty and stability within the regulatory and fiscal framework in the foreseeable future.<sup>203</sup> This, considered in the context of legal positivism, is a legitimate expectation, arising out of the contractors’ assumption of investment risks. The moral imperative in that context is, to keep investors motivated to ensure project sustainability.

Therefore, while much attention is given to the technical and political dimensions of the project, the business side – financial and commercial as well as the legal processes involved are almost taken for granted. In a complex and dynamic international industry, such lack of interest in the pivotal role of knowledge and business services in the development of the petroleum industry is conspicuous. Emphasis on political settlement has distracted attention from this important dimension.<sup>204</sup> International experience points to waning popularity of fossil fuels, a shift towards greener fuels and recognition of knowledge as a major resource.<sup>205</sup> A shift which ought to have

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<sup>202</sup> *ibid* [3]

<sup>203</sup> John Paterson, ‘Production Sharing Agreements in Africa; Sovereignty and Rationality’ (2018) University of Aberdeen School of Law Working Paper series 001/19 Centre for Energy Law. See also Carole Nakhle, ‘Petroleum Taxation: Sharing the Oil wealth: a study of petroleum taxation yesterday, today and tomorrow’ (2008) ROUTLEDGE; Kristen Bindemann, ‘Production-Sharing Agreements: An Economic Analysis’ (1999) Oxford Institute for Energy Studies WPM 25; Lisa E Sachs, Perrine Toledano, Jacky Mandelbaum, With James Otto, ‘Impacts of Fiscal Reforms on Country Attractiveness; learning from the facts’ (2013) [www.scsi.columbia.edu](http://www.scsi.columbia.edu) (accessed 07 January, 2020)

<sup>204</sup> (n 200).

<sup>205</sup> OECD, ‘The Knowledge-Based Economy’ (1996); James R Faulconbridge, ‘Business Services: Driving the Knowledge-Based Economy in the UK?’ (2010) [www.researchgate.net](http://www.researchgate.net); George Yarrow and Christopher Decker, ‘Assessing the economic Significance of the professional legal services sector in the European Union’ (2012); Anupam Khanna, Phyllis Papadavid, Judith Tyson and Dirk Willem te Velde, ‘The Role of Services in Economic Transformation – With An Application to Kenya’ (2016) Supporting Economic Transformation SET <http://set.odi.org.uk> (accessed 27 May 2021).

the joint venture partners in the petroleum project, to change perspective towards the role of legal services in entrenching LCRs. Which brings us to the next discussion.

### **2.3. 2 Legal Service (P-KIBS): Obscure lawmakers and facilitators of LCP objectives.**

While international experience identifies the role of P- KIBS, in economic development, it is apparent that it is not yet perceived so in the domestic context. Particularly so for legal services as discussed above. A rather worrying situation when considered in the law making force of the PSA and the dramatic force of the emerging industry on all other sectors.<sup>206</sup> Significantly as pointed out by Yarrow et al. ‘a particularly important relationship between legal services and economic performance stems from roles that legal services play in facilitating and sustaining markets.’<sup>207</sup> Functions associated with entrenching and sustaining the rule of law, legal certainty, and stability of the investment environment. Khanna et al. express similar sentiments in relation to financial services, relative to the sector’s significant contribution to ‘global GDP and trade at 5% of GDP in 2009.’<sup>208</sup> It turns out that the legal and financial implications of the investment structure of the petroleum industry take on a wider dimension than presently discussed in the discourse. In the context of underdeveloped economies, the industry presents a dynamic challenge to existing political, legal, and financial structures, requiring input of local content, beyond the current perception of ‘national participation’.

Apparently, the current debate revolving around LCRs designed to ensure local participation, as a measure of eradicating poverty understates the challenge. Absence of a robust legal framework at the time of integrating the dynamic industry, places legal services in multiple roles. In this context as engineers for a harmonious legal framework, but also law makers. A dynamic challenge to the

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<sup>206</sup> Miguel Soares Branco, ‘Product Sharing Agreements – legal blessing or curse for developing countries?’ (2012) *International Energy Review I.E.L.R.* 147; Fabio Solimene, ‘Production-sharing contracts, joint ventures and service contracts: analysis and drafting considerations’ (2014) *International Energy Law Review I, E.L.R.* 173

<sup>207</sup> George Yarrow and Christopher Decker, ‘Assessing the economic significance of the professional legal services sector in the European Union’ (2012)

<sup>208</sup> Anupam Khanna, Phyllis Rapadaavid, Judith Tyson and Dirk Willem te Velde, ‘The Role of Services in Economic Transformation + With An Application to Kenya’ (2016) *Supporting Economic Transformation SET* [1] <http://set.odi.org.uk> (accessed 27 May 2021).

current rule of law context.<sup>209</sup> Therefore need to shift from the ‘entrepreneurs’ perspective of current capacity building interventions. An imperative when considered in the historical disregard for the services sector ‘in the debate on economic transformation.’<sup>210</sup> According to Mohan et al., ‘knowledge’ that is the stock-in-trade for KIBS is contained in a ‘large amount of intangible assets, which are difficult to evaluate.’<sup>211</sup> This factor presents structural challenges for P-KIBS operating in market and financing frameworks based on tangible commodities or assets. For instance, in case of securing bank loans, performance bonds or proving financial capacity for purposes of bidding for a tender.

Entrepreneurship in its current usage treats the supply of goods and services as a purely commercial function, whereby a participating enterprise is conceptualised as a commercial entity. A conception, which disregards other business structures. For example, the practice of Law is not categorised as ‘a commercial enterprise’ in many commonwealth jurisdictions.<sup>212</sup> This may result in the legal service providers themselves not realising the impact of the apparent exclusion, from the industry’s development programs. Yet it is directly exposed to the industry’s dynamic impact. The current rule of law structure, has lawyers as neutral enforcers of the law, as discussed in the law as command theory, disinterested in the purpose of the law. However, in negotiating a PSA the law-making function becomes imperative if anything to consider its implications within the national legal framework. This changed role challenges the current business structure, when considered in the fused role of advocate and solicitor under the Advocates Act.<sup>213</sup>

To put it in context, the UK has since allowed a departure from the conservative lawyers only partnership model for legal practice, allowing collaboration with non-lawyers in new business models.<sup>214</sup> This has implications on bidding for business in a competitive commercial framework

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<sup>209</sup> United Republic of Tanzania. LEGAL SECTOR REFORM PROGRAMME (LAW AND ORDER) Medium Term Strategy Fys 2005/2006-2007/2008 Volume I October 2014;

<sup>210</sup> Emmanuel Muller and David Doloreux, ‘The key dimensions of knowledge-intensive business services (KIBS) analysis: a decade of evolution (2007) [11] Fraunhofer Institute Systems and Innovation Research (ISI) [www.econstor.eu](http://www.econstor.eu) (accessed 11 November 2020).

<sup>211</sup> Preeya Mohan, Eric Srobl and Patrick Kent Watson, ‘Extractive Industries as a platform for the creation of Knowledge Intensive industries: Trinidad and Tobago’s Oil and Gas Service Providers’ (2016) [21] [www.researchgate.net/publications/333644442](http://www.researchgate.net/publications/333644442) (accessed 13 November 2020)

<sup>212</sup> Pallavi Mohpal, ‘Problems with the Advocates (Amendment) Bill 2017’ (2017) International Journal of Science and Research (IJSR) Volume 6 Issue 6, June 2017 [2066]

<sup>213</sup> S 40 The Advocates Act, Cap.341[ R.E 2002]

<sup>214</sup> Judith A. Mc Morrow, ‘UK Alternative Business Structures for Legal Practice: Emerging Models and lessons for the US.’ (2016) Georgetown Journal of International Law 47, no.2 (2016): 665-711.

as practiced in the petroleum industry. However, the move is strongly resisted by the USA and India Bar Associations, ostensibly because of apprehension of change from ‘self’ to ‘external’ – regulation.<sup>215</sup> The latter perceived as posing a danger to the independence of the lawyer. A fair consideration in the context of primacy of private ownership of property including petroleum in the USA constitution. In the local context it presents a dynamic challenge.

Moreover, as aptly pointed out by Mc Morrow, even under alternative models: ‘[t]he firms itself, not just individual lawyers, is also licenced and regulated.’<sup>216</sup> However, proponents of the revised structures do so from the perspective of consumers’ interests. A perspective placing customers’ (public) interest above the welfare of the professionals.<sup>217</sup> In that sense the service provider becomes accountable not only to his client, but to a wider public consumer. Toivonen, argues that ‘[the] need for advice related to public regulations has increased demand for producer service functions such as accounting and legal services.’<sup>218</sup> This correlates with the argument of this research that legal services provide a regulated public service, and as such deserve to be treated as facilitators rather than mere beneficiaries targeting retention of value from the industry’s economic activities. Admittedly, profits are at the heart of the legal service’s firms, however, the conditions under which such profits are realised are distinguishable from the context of conducting business and investment under a limited liability company or enterprise.<sup>219</sup> However, this subject deserves more focused attention, and therefore warranting further research.

## **Conclusion.**

At a theoretical level, the literature presents evidence of a dramatic shift in the economic status of Knowledge as increasingly the most important resource. A change which has elevated the role of

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<sup>215</sup> Sir David Clementi, Review of the Regulatory Framework for Legal Services in England, and Wales (2004) <https://legalserviceboard.org.uk>

<sup>216</sup> (n 214) [669]

<sup>217</sup> Lord Falconer of Torelon, ‘The Future of Legal Service: Putting Consumers First’ (2005) White Paper

<sup>218</sup> Manja Toivonen, ‘Expertise As Business’ Long-term development and future prospects of Knowledge-Intensive business services (KIBS)’ (2004) Helsinki University of Technology- Laboratory of Industrial Management. Doctoral dissertation Series 2004/2 [www.tufa.hut.fi](http://www.tufa.hut.fi)

<sup>219</sup> Simone Stranbach, ‘Knowledge –Intensive Business Services (KIBS) as drivers of multilevel knowledge dynamics’, (2008) International Journal of Services Technology and Management 10(2): 152-174 [5] [www.researchgate.net](http://www.researchgate.net) (accessed 11 November 2020)

KIBS sector from a historical position of obscurity to the top in the economic development debate. Despite apparent failure by extractive economies to uplift the standards of their citizens conventional wisdom has not yet trickled down to the desks of policy makers in most resource rich but poor, countries. While the discovery of petroleum raises great public expectations for elimination of poverty, the dramatic rise in State revenues from petroleum exports, relative to other sectors tends to distort all other sectors, including governance and rule of law institutions. The sudden shift in power favours the political arm of government, presenting an imbalance with far reaching negative impact on national stability.

Conventional legal structures founded on law as a command theory, must contend with the sheer force of the Petroleum Sharing Agreements (PSA) which apparently make or exert limits on the law-making prerogative of the Host State. Often leading to tensions, uncertainty, and instability. However, the historical treatment of law on the periphery of trade and manufacturing, limits the sectors' ability to perceive its changed role in case of forced reforms or dynamic social, political, and economic changes.

Consequently, while the regulatory framework under review prescribes for exclusive use of domestic legal services, the sectors' interface with the dynamic industry is from a position of inherent weaknesses.

## CHAPTER THREE

### RESEARCH METHODOLOGY

#### 3.1 Research Design

The study adopted a qualitative method that involves both formal and normative aspects of the existing legal frameworks on national (local) participation in the investment opportunities presented by the emerging petroleum sector in Tanzania and Uganda.

The research applied qualitative methods. An interpretive approach seeking participants' 'experiences, understanding and perceptions' to inform the researcher's data instead of statistics.

<sup>220</sup> This provided an in depth understanding of the respondents' experiences and perspectives as interpreted by the researcher. The focus was on professional Knowledge-Intensive Based Services (P-KIBS). A cluster including Engineers, Accountants, Auditors and Lawyers. Accordingly, the research sought to collect data from firms and individual professionals to determine their awareness, of their changed role in the advent of the petroleum industry. It also sought to gauge the opportunities and challenges faced by the sector in terms of capacity building. To that end to assess awareness as to the beneficial rights offered under the frameworks on the one hand, and the role of the KIBS sector in contributing to the sector development on the other. The data was then projected and weighed on the three factors used as the assessment criteria to examine the efficacy of the regulatory framework under review: -

- (a) The role of the KIBS sector in entrenching LCP objectives.
- (b) To examine the P-KIBS firms' perception of their role and limiting factors within the emerging industry.
- (c) To approximate the consequences of labour mobility on the P-KIBS firms' competitiveness for skilled labour within the dynamics of the petroleum industry.

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<sup>220</sup> Nguyen Cao Than, & Tran Thi Le Thanh, "The Interconnection between Interpretive Paradigm and Qualitative Methods in Education". (2015) *American Journal of Educational Science*, 1(2), 24-27.



These are weighed against the LCP broad objectives and implementing mechanisms.

### 3.2 Target Population

We selected the study population according to each country’s peculiar circumstances. We distributed the research questions by e-mail to a select group of respondents. For Uganda from a list of all suppliers in the petroleum sector obtainable from the regulatory authority.<sup>221</sup> In Tanzania, the list of respondents was randomly selected targeting Advocates, Accountants, Universities and Associations of Professional Service Providers. In total about 66 respondents directly, who were also requested to share with their colleagues. The targeted population falls within three broad categories with a corresponding set of questions.<sup>222</sup> The reason for the choice was availability of their contacts and online information providing verifiable data in their specific service category. Adopted as a measure of overcoming the logistical challenges of interacting with such a wide array of respondents in two countries amid the challenges imposed by the Covid-19 pandemic.

### 3.3 Iterative Data Analysis.

It was not easy to have a predetermined sample size in this study as originally designed using Krejcie & Morgan model.<sup>223</sup> The research was instead iterative in nature, depending on the position of the law as perceived by the participants and interrogated by the researcher.<sup>224</sup>

**Table 1: Showing the distribution of the Sample Size**

<i>Category</i>	<i>Population</i>	<i>Sample</i>	<i>Sampling Technique</i>
PAU Approved Suppliers	40	15	Purposive Sampling
Accountants and Auditors	2	1	Purposive sampling
Registrar of Companies	3	3	Purposive sampling
Legal Sector	8	8	Purposive sampling

<sup>221</sup> PAU The National Suppliers Database List 28<sup>th</sup> February 2018 [www.pau.go.ug](http://www.pau.go.ug) (accessed 31 August 2020)

<sup>222</sup> Appendix A

<sup>223</sup> Robert V Krejcie, & Daryle W Morgan, “Determining Sample Size for Research Activity. (1970). “Educational and Psychological Measurement, 30(3), 607-610”.

<sup>224</sup> Prachi Srivastava and Nick Hopwood, “A practical Iterative Framework for Qualitative Data Analysis’ (2009) International Journal of Qualitative Methods 2009, 8 (1)

Universities and Training Institutions	5	4	Random sampling
Associations of Professional Service Providers	3	2	Purposive sampling
Financial Institutions	15	13	Purposive sampling
PAU	2	2	Purposive sampling
Environment Consultants	6	6	Purposive sampling
IT Firms	2	1	Random sampling
Logistics Companies	13	9	Random sampling
High Value Technical Engineering Companies	5	4	Purposive sampling
<b>Total</b>	<b>101</b>	<b>60</b>	

Source: *Primary Data, 2021*

### 3.4 Sampling Techniques

The study targeted respondents based on random and purposive sampling techniques. Random sampling was intended to widen the scope of the participants' selection field. We adopted purposive sampling to correlate with the regulated nature of the frame wok under review. To acquire relevant information on stakeholders' view of the opportunities, challenges, and experience in handling legal matters in the emerging industry. The aim being to capture the P-KIBS perspectives, either as participants, processors of clients' applications, or in contract and dispute management. That way targeting primary and secondary data.

### 3.5 Data Collection Instruments

The study adopted the questionnaire as the primary data collection instrument, with follow up interviews, arising directly from the respondents' answers.

### 3.5.1 Questionnaire

The questionnaire was uniform with similar questions structures in accordance with the respondents' area of specialisation, organisational structure, or category.<sup>225</sup>

### 3.5.2 Interview Guide

The study also used semi-structured interviews, modified according to the responsiveness and depth of understanding of the subject. The target was to obtain detailed information from the respondents while ensuring that the information collected from each interview falls within similar thematic areas. This provided focus and at the same time a degree of flexibility to allow learning from the respondent's experience. All interviews except one, were with respondents, in Dar es Salaam selected from, consultancy firms.

### 3.6 Data Quality Control

*Validity:* According to Leung 'validity in qualitative research means appropriateness of the tools, processes, and data.'<sup>226</sup>The study relied on official and other verifiable data readily available and assessed by the supervisor as to relevance.

*Reliability:* 'The essence of reliability for qualitative research lies with consistency.'<sup>227</sup> Golafshani argues that the burden in the quantitative context, lies on the researcher 'to ensure high consistency of accuracy of the tests and scores.'<sup>228</sup>Consultations with the supervisor ensured quality and reliability, crosschecked with official data available on websites of the relevant institutions, and published reports. A systematic approach maintaining consistency, identification, and correction of errors<sup>229</sup>.

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<sup>225</sup> Appendix A

<sup>226</sup> Lawrence Leung, 'Validity, reliability, and generalizability in qualitative research.' (2015) *Journal of Family Medicine and Primary Care* Volume 4: Issue 3 [324-326] [325].

<sup>227</sup> *ibid* [326]

<sup>228</sup> Nahid Golafshani, 'Understanding Reliability and Validity in Qualitative Research' (2003) *The Qualitative Report* Volume 8 Number 4 Article 6 (12-1-2003)

<sup>229</sup> Janice M Morse, Michael Barret, Maria Mayan, Karin Olson, & Jude Spiers, "Verification strategies for establishing reliability and validity in qualitative research" (2002) *International Journal of Qualitative Methods*, 1(2), 13-22

### **3.7 Data Analysis**

In this case, the study gathered information from individuals, with the information, tested using iterative analysis.

## CHAPTER FOUR

### FINDINGS, ANALYSIS, RECOMMENDATION AND CONCLUSION

#### 4. 1 Findings

##### 4.1.1 What is the role of the legal services firms in entrenching LCRs in Tanzania's emerging petroleum industry, relative to its capacity?

(a) The Duality of the frameworks, coupled with regulatory overlaps presents a wide range of rules the contractors must contend with. Industry regulations, immigration, labour, and other agencies. For instance, Obadia reports that there is an overlap of regulatory authorities in the 'emerging gas sector, TPDC, MEM, PURA, and EWURA' which in turn must work with the Prime Minister's Office and NEEC, TNBC, the Office of the President Oil and Gas Advisory Bureau and the Uongozi Institute.'<sup>230</sup>

(b)The legal services therefore assist both the international and local contractors to comply with the respective requirements. According to the Association of Tanzania Oil and Gas Service Providers (ATOGS) website, it has 77 members.<sup>231</sup> Additionally in terms of benefits and retention of value for the law firms, there is a substantive number of local litigations especially in Tax matters.<sup>232</sup>

(c) There is a discernible ambiguity relating to the structure of entities eligible to participate in the preferential LCR framework. This may not afford local P-KIBS opportunity to utilise the synergies of the emerging industry to gain experience. Yet it exposes the sub-sector to overcrowding in the labour market. In terms of capacity building, the Tanganyika Law Society has mandatory continuing education for all its members conducted through

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<sup>230</sup> Jesse Sarah Obadia, 'Local Content in Tanzania's Gas and Minerals Sectors: Who regulates (2017) CMI BRIEF Volume 16 Number 6. REPOA BRIEF Number 41.

<sup>231</sup> <https://atogs.org/membership-directory/!directory>

<sup>232</sup> *Pan African Energy (T) Ltd. V TRA [2021] TZCA 287*; *Commissioner General TRA v Atomredmetzoloto (ARMZ)* [Consolidated Civil Appeals Nos. 78 & 79 of 2018] (unreported); *Tullow Tanzania BV v The Commissioner General TRA*, [Civil Appeal No. 24 of 2018] (Unreported); *Commissioner General TRA v Aggreko International Projects Ltd.* [ Civil appeal No. 148 of 2018] (Unreported).

seminars, workshops, and conferences in collaboration with other stakeholders.<sup>233</sup> Pursuant to its objects the Society it is well placed to help Government to streamline the legal framework.<sup>234</sup>

4.1.2 How do the lawyers in Tanzania perceive their role, opportunities, and challenges as the exclusive providers of legal services pursuant to the Petroleum (Local Content) regulatory framework?

- (a) True to the findings in the literature, the legal sector is overwhelmed by its current role in trying to strengthen the rule of law institutions. Consequently, lawyers are not yet awake to the significance of the emerging industry and its potential for adverse impact on the sector. Additionally, the ring fencing of domestic legal services in the local content framework presents an opportunity, which could well be taken for granted.
- (b) The industry practice points at preference for a single service provider (one stop centre) in each field.<sup>235</sup> However, the legal services firms are relatively small in terms of staffing, which limits specialisation, amid challenges of recruiting and retaining skilled labour in competition with big companies in a fast-growing economy, with many regulatory challenges. Thus, a high demand for experienced in house lawyers.

## 4. 2 COMPARATIVE ANALYSIS

### 4.2.1 The business structures in the frameworks: Respondents' reaction to this point.

Part A Question 3. **“To what extent has the requirement for incorporation of a company under the Companies Act as prescribed in the Regulatory Frameworks, facilitated, or hindered either you, your firm, or client’s participation in the tendering processes as prescribed?”**

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<sup>233</sup> <https://tls.org.tz>

<sup>234</sup> Section 4 of the TLS Act, [Cap. 307]. The objects for which the Society is established are– (a) to maintain and improve the standards of conduct and learning of the legal profession in Tanzania; (b) to facilitate the acquisition of legal knowledge by members of the legal profession and others; (c) to assist the Government and the Courts in all matters affecting legislation, and the administration and practice of the law in Tanzania; ...

<sup>235</sup> EOI LEGAL SERVICES & BROKERS (DMQP\_13.5\* 17cm) EACOP <https://eacop.com> ;

Response.

All respondents did not consider this as a challenge or hindrance at all. One respondent in Tanzania pointing out that lack of certainty accommodates flexibility in approaches on the part of the licenced operators.

Part B Question 4; **“What are the challenges faced in raising financial capital for education and training purposes from commercial institutions?”**

Response:

*“Financial institutions have slowed down their support due to the pandemic, since 2020 the world at large and specifically Tanzania, financial institutions have been affected, investments have declined due to the high degree of economic uncertainty... Financial capacity constraints have affected pre-financing, [imposing] limitations [o]n providing sufficient bank guarantees to institutions that could help in raising the finances that could help training, education, and research.”*

*‘Private training institutions depend mainly on overdrafts, secured by tuition fee inflows as such financing is for recurrent expenditure rather than capital expenditure’*

*‘The uncertainty and delays in the taking-off for oil production in Uganda has not encouraged subscription for training for the courses offered by local institutions.’*

*‘Many of us who invested heavily in postgraduate studies in oil and gas abroad, are yet to realise value for the huge investment. However, we are happy to pass on our knowledge through part-time training in the workshops organised by the oil companies in collaboration with other stakeholders, such as banks and chambers of commerce industry and trade. The training is so far limited to procurement procedures targeting commercial enterprises.’*

Part C Question.1 **“To what extent does the business structure (Partnership or Company) affect access and cost of finance either through equity or loan?”**

*“...companies have better chances to access the same because the level of trust is higher in companies considering the fact that companies as legal persons, can own assets.”*

### **Analysis**

By large the industry is still perceived in terms of uncertainty, offering prospects for future engagement. The practice of law being a practical matter, many in the field are concerned with the resolution of current rather than anticipatory issues. The interviews were conducted prior to the commencement of the EACOP pipeline project. However, a scrutiny of the request for expression of interest for provision of legal service on the Uganda side of the project reveals the following.

- Targets ‘*law firm, with at least 10 years’ demonstrable experience in providing similar services. A team of at least 10 lawyers with experience in ... commercial, corporate, finance, tax, regulation, land, and litigation.*
- ‘*Adequate financial capacity to undertake the eventual contract*’.<sup>236</sup>

Apparently, the responses would have been different when considered in the context of the advert. While traditional lawyers work is centred on litigation, focusing on a single advocate, not much attention is given to the consultancy side (solicitors’ practice) which may call for collaborative partnerships among lawyers with different fields of specialisation. This has in addition to the adverse impact of absence of a viable private sector as well as strong institutions, may have undermined the evolvement of a culture of cooperation in partnerships, or other business model, in which raising finances to sustain employment of staff on long term basis is a necessity.

As its structure or business model is not a big concern in the ‘Advocate (Barrister) litigation firm model. However, it may not work well in a dynamic industry. At the theoretical level, the issue may be academic in the Tanzanian context. Unlike Uganda, in the former, international contractors are required to procure legal services from local practitioners and firms.’<sup>237</sup>

‘Guidelines For the Registration on the National Supplier Database [(NSD)] for Uganda’s Oil and Gas Sector’ the NSD is a ‘*register of entities and persons with interest to provide goods, works and services to the oil and gas sector in Uganda.*’<sup>238</sup> I believe inclusive of legal services. A lawyer seems to have an option to register either as an individual or as a firm. In that sense the guidelines would be consistent with the legislative mandate given to the Minister under Section 183 of the Petroleum (EDP) Act 2013.<sup>239</sup> However, the EACOP advert disqualifies a single lawyer.

Moreover, it does not resolve the issue of the difference in the two segments.

Pursuant to section 5 of the Petroleum (RCTM) (National Content) Act No. 4 of 2013 the Petroleum Authority of Uganda (PAU) is the implementing authority in respect of the two national

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<sup>236</sup> *ibid*

<sup>237</sup> Reg. 22 Petroleum (Local Content) Regulations GN. No. 197 /2017

<sup>238</sup> Available at [www.pau.go.ug](http://www.pau.go.ug) . It lists the entities to include –company, partnership, sole proprietorship, other entities such as clubs, society, or associations, estate, trusts government body

<sup>239</sup> Section 183 (3) (x) provides: ‘(x) the criteria for approval of competent entities owned by Ugandans for the provision of goods and services’



content frameworks.<sup>240</sup> Unlike section 125 of the PEDP Act, the corresponding section in Act No. 4 is clear in its application of the word ‘entities’ as properly applied in the guidelines.<sup>241</sup> Sections 125 and 183 of the Petroleum (EDP) Act, read together, reveal apparent inconsistency. S 125 (1) recognises and gives preference for ‘services rendered by Ugandan citizens and companies.’ Properly construed, the provision connotes inclusiveness –encompassing all citizens. A construction implicit in the words, ‘...*entities referred to in sub section (1).*’<sup>242</sup> Section 183(3)(x) confirms this view.<sup>243</sup> The sections contemplate ‘**entities**’ owned by citizens of Uganda, inclusive of legal persons whose beneficial ownership is by citizens of Uganda, provided they are duly registered.<sup>244</sup>

The current construction seems to be *ultra vires* the legislative powers delegated to the Minister under Section 183 (3) (x) to the extent that the subsidiary legislation reduces the plurality of ‘entities owned by citizens’ to mean ‘**companies owned by and incorporated under the Companies Act.**’<sup>245</sup> A construction far beyond the clear purpose of the express provisions of the delegating Act – S ‘**183 (3) (x) the criteria for approval of competent entities owned by Ugandans for the provision of goods and services.**’ It would therefore be open to possible Judicial Review.<sup>246</sup>

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<sup>240</sup> The Petroleum (EDP) (National Content) Act, No. 3 (2013) and the Petroleum (RCTM) (National Content) Act No. 4 of 2013

<sup>241</sup> Section 53 (1) provides; ‘(1) *The licensee, its contractors and subcontractors shall give priority to citizens of Uganda and registered entities owned by Ugandans in the provision of goods and services*’

<sup>242</sup> Section 125 (3), Petroleum (EDP) Act, 2013

<sup>243</sup> Section 183 (3) (x) provides: ‘(x) the criteria for approval of competent entities owned by Ugandans for the provision of goods and services’

<sup>244</sup> SI 2016 No.44. Regulation 10 (1) and (2) provide- ‘(1) Every licensee, operator, contractors and subcontractors shall reserve the contracts for goods and services specified in the Schedule to be supplied by Ugandan companies, Ugandan citizens and registered entities. (2) Sub regulation (1) does not preclude Ugandan companies, Ugandan citizens and registered entities from providing goods and services that are not specified in the Schedule.’

<sup>245</sup> Reg. 4 Upstream (Local Content) Regulations SI 2016 No. 44 it ‘*means a company incorporated under the Companies Act 2012 and which –*

- (d) *provides value addition in Uganda.*
- (e) *uses available local raw materials;*
- (f) *employs at least 70% Ugandans; and*

<sup>246</sup> *R.v. Minister of Health, Ex parte Davis (1929) 1 K.B. 618*

In that context, the mandatory term in section 125 (2) in case such services are not locally available, ‘they **shall** be provided by **a company** which has entered into a joint venture with a Ugandan company.’ This may give credence to a reading connecting the elimination of the inclusivity referred to above as stemming from the Act itself.<sup>247</sup> However, the Act does not define ‘company’ which raises issue as to the validity of the definition in the subsidiary legislation.<sup>248</sup> Odgers, relying on among others the decision in *R v Minister of Health* summarises the position as follows.

*“Rules must be read together with their relevant Act; they cannot repeal or contradict express provisions in the Act from which they derive their authority. If the Act is plain the rule must be interpreted so as to be reconciled with it or if it cannot be reconciled the rule must give way to the plain terms of the Act.”*<sup>249</sup>

However, the corresponding subsidiary legislation read together with the Companies Act of 2002, define it to mean a limited liability company.<sup>250</sup>

The position in Tanzania casts a clear contrast. The Petroleum Act,<sup>251</sup> defines ‘company’ to mean ‘a body corporate incorporated under the Companies Act.’<sup>252</sup> The corresponding regulations grant participation to a ‘local company’ defined in terms of citizen ownership of the company.<sup>253</sup> Moreover, the companies Act of Tanzania provides for ‘an incorporated company with or without limited liability.’<sup>254</sup> Theoretically, this could accommodate incorporation of a body of professional entities. The respondents’ response did not consider the implications for professional service providers, whose regulatory frameworks do not accommodate ‘limited liability.’<sup>255</sup> Especially for purposes of capacity building using public resources. The position is not better within the

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<sup>247</sup> The Petroleum (EDP) Act, 2013; See also section 219 of the Petroleum Act, 2015 (Tanzania) –couched in similar terms.

<sup>248</sup> (n 245)

<sup>249</sup> Charles Edwin Odgers, *The Construction of Deeds and Statutes* (1952), 3<sup>rd</sup> Ed [303] Sweet and Maxwell. London.

<sup>250</sup> (n 245)

<sup>251</sup> Of (2015)

<sup>252</sup> Section 3.

<sup>253</sup> The Petroleum (Local Content) Regulations, 2017, GN. No. 197, Reg 3; The Ugandan Act is restricted a company limited by shares, and partnerships limited by shares.

<sup>254</sup> Section 3 of the Companies Act, Cap. 212 [R.E. 2002]

<sup>255</sup> For example, the Accountants and Auditors (Registration) Act Cap. 286 [R.E. 2002] (Tanzania); Reg. 6 of the Advocates Practice Regulations in Uganda, SI 267-2 made under the Advocates Act, Cap. 267, require an advocate to be personally responsible for client’s work. Meaning liability cannot be passed on to the firm or company. And under the said Act and regulations the practice license is granted to an individual advocate.

contractual regime as training specifically targets public entities, and skills development for labour involved in the ‘technical and development’ sections.

#### **4.2.2 The Role of the KIBS sector and the impact of the dual regulatory system?**

Part A

Question 5. (b) “In your opinion are the regulations inclusive of all business entities, e.g., consulting firms organised as partnerships and registered under other laws?”

Part B

Question 3. “**What measures have been put in place to protect other sectors from loss of experienced staff from other sectors owing to labour mobility to the emerging petroleum industry?**”

Response:

Consensus is that there is none. However, since in both countries the emerging industry is yet to take off, the factor is still mostly imaginary than real. For instance, Equinor – a major IOC engaged in the Oil and Gas exploration, development in Tanzania has invested USD 2.1 Million (2010-2017). However, it has only 11 employees in the country.<sup>256</sup> However, the danger is likely to strike suddenly during the peak period.<sup>257</sup>

Part C

Question 3. “**In case of goods and services not being available in the domestic market,**

- (a) **Have the mandatory requirements for joint ventures helped local consulting firms and enterprises to enter joint ventures?**

Response: “*I am not aware of the mechanisms in place however, the local firm in my view ought to be proactive in forging joint ventures. It’s easy for the Government to facilitate the process than perhaps to initiate ventures on their own.*”

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<sup>256</sup> [www.equinor.com](http://www.equinor.com) (accessed 17 July 2021)

<sup>257</sup> EACOP <https://eacop.com>

**(b) To what extent are local firms facilitated in raising financial capital from local banks and financial institutions for purposes of entering joint ventures?**

Response: “Not aware of such facilitation but in terms of accessing the support, usually there is bureaucracy hence it is imperative if clear mechanisms are set to facilitate the process swiftly”

**Analysis.**

As discussed in the literature, form, and legal structure matter when it comes to raising finance. Since a joint venture takes on the form of a new entity, it presents challenges. For instance, a partnership lacks capacity to issue equity shares. Additionally, it may be bogged down by restrictions on ownership of land thereby affecting borrowing and lending restrictions regarding the foreign partners. A case in point is the technical approach to resolving what are clearly commercial disputes. Two cases demonstrate this challenge.<sup>258</sup>

As observed in the previous chapter valuation of intangible assets such as knowledge is a challenge, the situation is not any better in cases where local partners offer land as share in the JV. Often the capital for development exceeds by far the value of land prior to development. At the same time the land value increases because of the improvements, attracting other developers to the area. However, property rights and valuation processes are not certain. Arranging appropriate conveyancing, obtaining necessary approvals from government, and or finance from local and foreign banks becomes a major challenge.

**Box 1.**

**The challenges of Citizen centred ownership to Joint Ventures with foreign partners.**

**In *Oysterbay Villa Limited v Kinondoni Municipal Council & the Attorney General*, the appellant a local company owned by a Tanzanian national (55 %) and Chinese (45 %) had entered a property development joint venture with the 1<sup>st</sup> respondent, a local**

<sup>258</sup> Boxes 1 and 2 respectively. Both cases reflect the technical nature of compliance discussed under the law as a command theory. Evidence of inconsistencies in the legal frameworks within which new business models must operate. Commercial contracts for which lawful consideration had been given by the injured parties face enforcement challenges. Uncertainty, in the context of weak institutions including the legal consultants. It is insightful that in both instances the matters were before the commercial division of the High Court.

government authority.<sup>259</sup> The 1<sup>st</sup> respondent contributed land for its 25 % equity in the JV. The appellant constructed apartment blocks on the land at its cost, constituting its 75 % equity in the JV. The project was duly approved and issued with requisite permits by the Tanzania Investment Centre.<sup>260</sup> It was common ground that the appellant had successfully completed its part of the bargain. The 1<sup>st</sup> appellant had also taken steps to process transfer of ownership of the property to the JV. However, the conveyance hit a snag. The appellant attributed the problem to the 1<sup>st</sup> respondent, hence the suit for specific performance and consequential damages. In its defence the 1<sup>st</sup> respondent pleaded that the 1<sup>st</sup> respondent had misconstrued the contract to the extent that it had demanded for transfer of ownership to the 75 % portion of the suit property.<sup>261</sup> Apparently, the Municipal Council's efforts to finalise the JV were either frustrated by bureaucracy, misapprehension, or outright objection to the project on grounds of citizenship of the JV partner. Additionally, the plaintiffs' suit was caught up in a series of procedural mishaps delaying its determination on merits. The Attorney General sought leave to be heard on appeal as an interested party on grounds that the JV was against public policy. However, the allegation that the shareholders of the plaintiff were not citizens of Tanzania and as such not entitled to 'ownership' of land had not been pleaded. The Appeal was subsequently determined on a point of law, warranting hearing *de novo*. In its judgment (16 July 2021) the High Court upheld the joint venture agreement. It was common ground that the plaintiff had completed the project and had obtained relevant permits since 2008. However, the Attorney General was at all material times opposed to giving effect to the commercial contract and had filed notice of intention to appeal against the decision.

**Box 2.**

**Uganda: Local legislation frustrating international financial solutions for local deficiencies.**

**In *Ham Enterprises Ltd & Others v Diamond Trust Bank (U) Ltd & Another*, the plaintiffs' claim was for refund of monies allegedly wrongfully debited on the plaintiffs' accounts with the 1<sup>st</sup> defendant. According to the defendants, the debits were on account of repayment of monies borrowed from the second defendant a Kenyan Bank at the plaintiffs' request. The plaintiffs' sought to avoid the contract on grounds that the arrangements were void for being contrary to the laws of Uganda. The Kenyan bank was**

<sup>259</sup> *Oysterbay Vilas Limited v Kinondoni Municipal Council and The Attorney General*. Court of Appeal of Tanzania Civil Appeal No. 110 of 2019

<sup>260</sup> Tanzania Investment Act, 1997.

not registered or licenced in Uganda for purposes of lending in Uganda. Financing offered by several lenders (syndicated loans), is a common practice in the banking industry. However, in this event the transactions were held to be illegal. Consequently, the High Court struck out the defendant's written statement of defence and granted the plaintiffs' claim.<sup>262</sup> However, the ruling of the High Court was subsequently set aside on appeal, on procedural grounds returning the matter to the High Court for determination on its merits. Meanwhile the fate of similar syndicated loans is left in limbo.

#### 4.3 Labour Mobility- Impact on KIBS firms.

##### Box 3.

###### The case of Engineer 'Odongo.'

Odongo is a Ugandan Civil Engineer currently working with a German construction company. He graduated from the University of Dar es Salaam in Tanzania. He conducted his undergraduate field research with the Germany company while working on a road project in western Tanzania. Impressed by his performance, they offered him full time employment in Germany. It would have been difficult to obtain a work permit to work in Tanzania owing to local content requirements. At the time of the interview, he and his Tanzanian wife were on holiday in Dar es Salaam. They are both satisfied with their employment abroad, enjoying remuneration and professional satisfaction higher than their counter parts in their countries of origin. Odongo adds competitive value to his employer and Germany in the international construction market.

##### Box 4.

###### The case of 'Josephine': a Tanzanian Advocate.

'Josephine' is one of the respondents to the questionnaire. She was employed by a South African big law firm which had opened a branch in Tanzania in association with local partners. The firm had brought its global experience in servicing the mining industry. In addition to targeting the rapidly growing mining industry, it was also focusing on the prospects of the emerging gas industry. However, in 2017 Tanzania made radical changes in the Mining Legal and Regulatory framework, prompting temporary suspension of investment plans on the part of Multinational Corporations. Especially in the nascent gas

<sup>262</sup> Ham Enterprise Ltd & 2 others v Diamond Trust Bank (U) Limited & Another [2020] UGCOMM 32.

**sector. Consequently, there was a sudden drop in retainers and consultancies in the mining and petroleum sector. Additionally, the local partners could not afford the rentals for the refurbished office premises, forcing reorganisation and downsizing. Apart from the depressed economy, South Africa has strict local content legislation. Josephine could not be transferred to Johannesburg. She was retrenched. At the time of the interview, she was working on a volunteer basis at a local law firm. Many businesses in Tanzania were at the material time facing hard times amid the global economic slowdown owing to the Covid-19 pandemic. She narrates the knock-down effects of the suspension of investment in the gas sector. In anticipation of the boom, several KIBS firms in the international petroleum chain had already opened branches in Dar es salaam. The impact is reflected in the property development landscape in the City. However, the sudden fall in the demand for office and residential accommodation has left a lot of unoccupied space. International KIBS downsized leaving skeleton staff. Termination of long-term leases left landlords, utility companies as well as banks and the real property industry reeling in a sudden drop in revenues, loss of jobs and incomes.**

Although, the discourse tends to project emerging provinces from the blueprint of old oil producers, the trajectory for achieving national participation in the later is distinguishable. For an emerging industry, the State must originate the entire process at its cost. However, since it lacks technical and financial capital, it must collaborate with IOCs. It must therefore ‘seek to enhance two fundamental but competing objectives: secure state control over production and attract foreign investment in the oil sector.’<sup>263</sup>

In the case of nationalisation, the IOCs simply exchanged roles. From private owners to service contractors, hired by the new Sovereign owners. It made sense for the Sovereign to prescribe for detailed succession plans whereby locals would eventually replace expatriate staff. Funds flowing from the ongoing production financing training together with attendant risks.<sup>264</sup> In case of an emerging industry there is no linear process inherent in a takeover of a going concern. The IOC takes the initial investment risks, and as such the Sovereign has no power or means to force availability of jobs in the immediate or foreseeable future.<sup>265</sup> In this context, Tanzania needs to address the necessity of building institutions as the basic infrastructure on which the emerging industry must be built.

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<sup>263</sup> Miguel Soares Branco, ‘Production sharing agreements –legal blessing or curse for developing countries?’ (2012) *International Energy Law Review* 147 [1]

<sup>264</sup> Daniel Yergin (1991) *The Prize the Epic Quest for Oil, Money & Power (1991)* SIMON & SCHUSTER NEW YORK LONDON

<sup>265</sup> Hence a lean employment structure, which gave birth to sub-contracting structure of the international petroleum supply chain. To that extent the undertaking for ensuring a succession plan in the PSA is of little consequence for the IOC. Minimal opportunity for new jobs, rendering prescription for succession plans rather unrealistic.

## RECOMMENDATIONS

- (a) **Host governments** must in the initial stages relax domestic laws relating to employment of foreign experts.<sup>266</sup> This must go hand in hand with the harmonisation of the multisector legal and regulatory framework. A necessary measure to avoid technical compliance, without attaining policy goals.
- (b) While local content requirements are necessary to ameliorate transition to citizen centric policies, governments must revise the current technology centric view of the industry's needs, to include business services. A functional and progressive economy needs to have an efficient and well-trained P-KIBS sector. As observed in the literature review, in practice IOCs hire specialised technical and service providers who do the actual work.<sup>267</sup> Therefore, to acquire new skills and knowledge of the business, policy should target and focus on the operations and business processes of the specialised KIBS. Most of the expense in relation to the project is on the many different services rendered by the specialists in the initial stages of exploration and development. Additionally, capital costs are external such as expenditure on the design and manufacturing of production and transportation equipment. Therefore, it may not be realistic to expect major participation by the locals in the most expensive stage of the industry's investment circle using legislative measures.<sup>268</sup>
- (c) There is no need to prescribe for the business models of participating entities.
- (d) Training should be forward looking. Focusing on future operations in a progressive way commensurate with the industry's growth. By arranging for field attachments at public cost, with the KIBS firms within the international supply chain. Achieved through collaboration reflected in the contractual framework, other than command and control.

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<sup>266</sup> Silvana Tordo, Michael Warner, Osmel E. Manzano, and Yahya Anouti, 'Local Content Policies in the Oil and Gas Sector' (2013) World Bank [www.documents.worldbank.org](http://www.documents.worldbank.org) ; Lisa E Sachs, Perrine Toledano, Jacky Mandelbaum, With James Otto, 'Impacts of Fiscal Reforms on Country Attractiveness; learning from the facts' (2013) [www.scsi.columbia.edu](http://www.scsi.columbia.edu) (accessed 07 January, 2020).

<sup>267</sup> Preeya Mohan, Eric Strobl and Patrick Kent Watson, 'Extractive Industries as a platform for the creation of Knowledge Intensive industries: Trinidad and Tobago's Oil and Gas Service Providers' (2016) [5] [www.researchgate.net/publications/333644442](http://www.researchgate.net/publications/333644442) (accessed 13 November 2020)

<sup>268</sup> Steve Kayizi-Mugerwa, 'Uganda's nascent oil sector: Revenue generation, investor-stakeholder alignment, and public policy' (2020) UN WIDER Working Paper. [www.wider.unu.edu](http://www.wider.unu.edu) (accessed 26 May 2021)



- (e) The research has established that employment opportunities in emerging sectors exposes local labour to linkages in corresponding international supply chains. While this is positive, it weakens national competitiveness. The impact of labour mobility on the business services sector in the advent of the petroleum boom is a critical factor requiring further research to inform policy formulation.

#### **4.5. Conclusion**

This research examined the role of legal services firms, in the context of the Knowledge -Intensive Business Services (KIBS) firms in facilitating petroleum development projects as the industry's implementing agents. The regulatory framework prescribes for exclusive procurement of domestic legal services. The rule of law is by consensus recognised as the basic infrastructure for all social, political, and economic institutions. However, Tanzania's post-independence experimentation with socialist economic models had substantial impact on the growth of the private sector including legal services. Apparently, efforts to re-introduce liberal free market economic principles, including legal and regulatory reforms was hindered by inherent structural problems. A fetter to realistic capacity building commensurate with the immediate and long-term sustainable development needs of the emerging sector while mitigating its adverse effects. For instance, local firm's ability to compete with the petroleum sector for recruitment and retention of local skilled human resources. Additionally, the LCRs implementing framework is beset with inconsistencies within the legal framework, with great potential for undermining peace and stability.

Apparently, skills development in the emerging sector focuses on the technology side of the industry, with little attention to the equally important business processes of the project. Sustainable creation and retention of value from the extractive projects, calls for focus on developing local human capital in the short, medium, and long term. Implicit in this, is the need to have a holistic view of the industry –a systems thinking approach (SFA) requiring collaboration between the public and private sectors.

Legal service providers as well as policy makers are not awake to the dynamic dimensions of the emerging industry. Designed to operate within the law as a command theoretical framework, the legal services firms require urgent review of the institutional framework. It is therefore concluded,

that while the current local content framework may benefit a few local participants, the sector is likely to lose sustainable capacity to recruit and retain skilled labour. There is need therefore, to conduct further research on the importance of the role played by the sector in enhancing national competitiveness.

## APPENDIX

### APPENDIX A QUESTIONNAIRES

#### Master's Dissertation Research Questionnaire:

*My name is Aloysius Sserunkuma Kibuuka Mujulizi. I am currently studying for an LLM degree in Oil and Gas offered by the Uganda Christian University. I am conducting research on.*

*“Local participation in the Oil and Gas Industry’s international supply chain: Examining the role of Knowledge-Intensive Business Services (KIBS) firms in developing local human and financial capital in Tanzania and Uganda, in the context of the Local Content (Upstream) Regulatory Frameworks.”<sup>269</sup>*

*The questionnaire consists of 13 questions divided into three categories –A, B and C. Please choose and respond briefly to the questions in the selected category. All responses will be kept anonymous, and no one will be identifiable in the research. Once complete please email back to [ssealoyus71@gmail.com](mailto:ssealoyus71@gmail.com). Thank you for your participation and expeditious response.*

*Please write your name and profession to show your consent to be part of the research:*

*Name:*

*Profession:*

- A. Auditors, Accountants, Lawyers, Consulting Firms, and individual professionals.**
- 1. What are the technical and consultancy opportunities open to domestic firms in the Upstream Sector of the International oil and gas supply chain?**
  - 2. To what extent are these opportunities accessible by local professionals and their firms?**

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<sup>269</sup> These include Engineering, Legal, Audit and Accounting Consulting firms, Universities, Training and Research Institutions.

3. **To what extent has the requirement for incorporation of a company under the Companies Act as prescribed in the Regulatory Frameworks, facilitated, or hindered either you, your firm, or client's participation in the tendering processes as prescribed?**
4. **What are the key legal challenges encountered by stakeholders while utilizing opportunities and processes involved in the local content (Upstream) framework?**
5. **(a)What are your views on the clarity of the criteria for eligibility to participate under the Local Content Regulations? And (b) In your opinion are the regulations inclusive of all business entities, e.g consulting firms organised as partnerships and registered under other laws?**

**B. [targeted respondents; Regulatory Authorities, Oil Companies; NGOs, Participating enterprises, Training Institutions, Banks, and Financial Institutions]**

**1.To what extent have citizens, been facilitated in making appropriate decisions, regarding:**

- a. Investment in the industry?
- b. Investment in training/skilling local labour and experts

6. **What are the supporting mechanisms available for local Universities and Training Institutions in embarking on research and curriculum development commensurate with the petroleum industry needs?**
7. **What measures have been put in place to protect loss of experienced staff from other sectors owing to labour mobility to the emerging petroleum industry?**
8. **What are the challenges faced in raising financial capital for education and training purposes from Commercial institutions?**
9. **To what extent are Universities and Training institutions supported by public funding under the training component of the Regulatory Framework?**
10. **What measures should be put in place to facilitate research and training?**

**C. All service providers (Construction, Engineering, Logistics, Security, Catering, Accommodation, Legal Practitioners, Accountants, Environment Banks and Financial Institutions, Entrepreneurs, and Regulators)**

**11. To what extent does the business structure (Partnership or Company) affect access and cost of finance either through equity or loans?**

**12. How user friendly are the existing participation mechanisms for local companies? Based on.**

- a) Certainty:
- b) Clarity, ease, and transactional costs.
- c) Dispute Resolution:
- d) Fairness:
- e) Accessibility:

*(Please state friendly or non-friendly)*

**13. In case of goods and services not being available in the domestic market,**

- a) Have the mandatory requirements for joint ventures helped local consulting firms and enterprises to enter joint ventures?
- b) To what extent are local firms facilitated in raising financial capital from local banks and financial institutions for purposes of entering joint ventures?

## APPENDIX C

*Table for determining Sample Size from a given Population*

N	S	N	S	N	S
10	10	220	140	1200	291
15	14	230	144	1300	297
20	19	240	148	1400	302
25	24	250	152	1500	306
30	28	260	155	1600	310
35	32	270	159	1700	313
40	36	280	162	1800	317
45	40	290	165	1900	320
50	44	300	168	2000	322
55	48	320	175	2200	327
60	52	340	181	2400	331
65	56	360	186	2600	335
70	59	380	191	2800	338
75	63	400	198	3000	341
80	66	420	201	2500	346
85	70	440	205	4000	351
90	73	460	210	4500	354
95	76	480	214	5000	357
100	80	500	217	6000	361
110	86	550	226	7000	364
120	92	600	234	8000	367
130	97	650	242	9000	368
140	103	700	248	10000	370
150	108	750	254	15000	375
160	113	800	260	20000	377
170	118	850	265	30000	379
180	123	900	269	40000	380
190	127	950	274	50000	381
200	132	1000	278	75000	382
210	136	1100	285	100000	384

Note: N = population size

S = sample size

## Appendix “D”

### Historical context of exploration activities.

Exploration in Uganda commenced in 1936, leading to confirmation of ‘sedimentary sequences’ in the Albertine Graben in 1959.<sup>270</sup> There was an interlude of transitional politics –colonialism to independence in 1962.<sup>271</sup> On the international plane, a tag of war concerning legal ownership of natural resources dominated the petroleum industry.<sup>272</sup> Until then the IOCs conducted oil production in colonial territories under absolute concessionary terms, without much benefit to the colonised people.<sup>273</sup> However, the exploitive extraction helped to promote petroleum as the lowest cost and mobile form of energy. Elevated to a strategic resource influencing geopolitics in the 20<sup>th</sup> century, it also precipitated agitation for independence in North Africa and the Middle East (‘old producing countries’).<sup>274</sup> In many instances escalating into various forms of resource nationalism, as reflected in arbitral disputes settled during that period.<sup>275</sup> Independent States nationalised assets hitherto owned by IOCs, giving birth to National Oil Companies (NOCs).<sup>276</sup>

A UN resolution confirming the ‘right of peoples to use and exploit the mineral resources inherent in their sovereignty’ settled the legal issue over the ownership of the natural resources.<sup>277</sup> However, the development placed the industry in the dynamic sphere of conflict between international public law of Sovereign States and private law rights.<sup>278</sup> Sovereignty challenging the sanctity of commercial contracts, with potential for expropriation of private assets, thereby influencing the legal structure of the extraction agreements.<sup>279</sup> Political, social, and economic dynamics of the

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<sup>270</sup> History of Petroleum Exploration in Uganda [www.pau.go.ug](http://www.pau.go.ug)

<sup>271</sup> National Oil and Gas Policy for Uganda, 2008.

<sup>272</sup> Burns H Weston, ‘The Charter of Economic Rights and Duties of States and the Deprivation of Foreign owned wealth’, (1981) J. INT’L L. 437; Daniel Yergin, *The Prize the Epic Quest for Oil, Money & Power (1991)* SIMON & SCHUSTER NEW YORK LONDON.

<sup>273</sup> Viewed in retrospect, the extraction was conducted at a great cost to the environment, which helped to deliver the petroleum at very low costs, relative to what the emerging producers must face in the wake of stringent international environment protection and control regimes.

<sup>274</sup> Daniel Yergin, *The Prize the Epic Quest for Oil, Money & Power (1991)* SIMON & SCHUSTER NEW YORK LONDON.

<sup>275</sup> Singwani Patrick Ng’ambi, ‘Permanent Sovereignty Over natural resources and the sanctity of Contracts, From the Angle of *Lucrum Cessans*’ (2015) Loyola University Chicago, International Law Review Volume 12/ Issue 2 Article 3 2015

<sup>276</sup> (n 52)

<sup>277</sup> General Assembly Resolution Number 636 (VII) 1962; Endalew Lijalem Enyew, Application of the Right to Permanent Sovereignty over Natural Resources for Indigenous Peoples: Assessment of Current Legal Developments Arctic Review on Law and Politics Vol. 8, 2017, pp. 222–245; See also Frank Dietrich, Natural Resources, Collective Self Determination, and Secession, Heinrich-Heine-University Düsseldorf DOI: 10.31009/LEAP. 2018.V6.02

<sup>278</sup> (n 64)

<sup>279</sup> Miguel Soares Branco, ‘Product Sharing Agreements – legal blessing or curse for developing countries?’ (2012) International Energy Review I.E.L.R. 147; Fabio Solimene, ‘Production-sharing contracts, joint ventures and service contracts: analysis and drafting considerations’ (2014) International Energy Law Review I, E.L.R. 173.

extractive industry, placing the petroleum project on a delicate line of mistrust and uncertainty.<sup>280</sup> A situation complicated by the long-term nature of the project, thereby creating uncertainty over future projections.<sup>281</sup>

In Uganda, owing to political and constitutional challenges, lasting until the promulgation of the 1995 Constitution, the post-independence period is marked by a prolonged period without exploration or development.<sup>282</sup> The first comprehensive petroleum regulatory framework came into operation in 1985.<sup>283</sup> Consequent to a donor-funded project designed to promote exploration, followed by capacity building measures in 1986.<sup>284</sup> Exclusively for the public sector. For consolidation of State ownership, effective control, participation, industry regulation, entrenching the public trust and management of the revenues. Although establishing the project involves complex legal and financial matters, for which domestic P-KIBS are key players there was no provision for the business service side. The number of PSAs finalised in the period preceding confirmation of commercial viability depicts increase in activities.<sup>285</sup> The earliest evidence of provision for local content under the PSAs is discernible in the 1999 Model PSA.<sup>286</sup> Petroleum and the public trust provision eventually obtained a place in the Constitution of Uganda in 2005.<sup>287</sup>

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<sup>280</sup> Kristen Bindemann, 'Production-Sharing Agreements: An Economic Analysis' (1999) Oxford Institute for Energy Studies WPM 25; International Alert: Uganda' Oil and Gas Laws: A Legislators Guide. [https://www.international-alert.org/sites/default/files/Uganda\\_OilGasLawsLegislatorsGuide\\_EN\\_2011.pdf](https://www.international-alert.org/sites/default/files/Uganda_OilGasLawsLegislatorsGuide_EN_2011.pdf)

<sup>281</sup> The petroleum project presents a paradox of poverty in plenty which dominates the economic and social science debate in the discourse. The background section provides a snapshot of this concept.

<sup>282</sup> National Oil and Gas Policy for Uganda, 2008.

<sup>283</sup> The Petroleum (Exploration and Production) Act 1985. At the time of heightened insecurity and a rebel guerilla war that would lead to the capture of state power by the rebel National Resistance Army (NRM) in January 1986. Sabiti Makara, Lise Rakner and Lars Svasand, 'Turnaround: The national Resistance Movement and Reintroduction of a Multiparty system in Uganda' (2009) *International Political Science Review*, Vol.30. No.2 (March 2009) [185-204] [www.jstor.org/stable/25652898](http://www.jstor.org/stable/25652898) (accessed 16 February 2021)

<sup>284</sup> History of Petroleum Exploration in Uganda [www.pau.go.ug](http://www.pau.go.ug); Sebastiano Rwengabo, 'Efficiency, Sustainability and Exit Strategy In The Oil and gas Sector: Lessons from Ecuador for Uganda' (2017), ACODE Policy Research Series No. 81, 2017

<sup>285</sup> *ibid*

<sup>286</sup> Article 17 of the 1999 Model PSA [www.resourcecontracts.org](http://www.resourcecontracts.org) (accessed 24 January 2021). See also Article 20 of the Tanzania model Production Sharing Agreement, 2013 which is relatively more detailed and unlike its counterpart in the earlier Ugandan Model, it is subject to the law as is and as may be amended. [www.wgei.org](http://www.wgei.org)

<sup>287</sup> Article 244 (1)



Article 244 (1), read together with Art 26, preserves the Legislature's prerogative to review contracts entered into prior to the amendment and enactment of relevant laws.<sup>288</sup>

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<sup>288</sup> Art 244 (1) and (2) (a) of the Constitution provide; '244. 1 Subject to article 26 of this Constitution, the entire property in, and the control of, all minerals and petroleum in, on or under, any land or waters in Uganda are vested in the government on behalf of the Republic of Uganda. 2. a Subject to this article, Parliament shall make laws regulating-  
a. The exploitation of minerals and petroleum;'

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