PLATFORM Briefing Paper

The Ugandan Upstream oil law:
A search in vain for accountability and democratic oversight

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This briefing consists of analysis and commentary on Uganda's proposed "*Petroleum (Exploration, Development and Production) Bill – 2011*". The assessment is based on the 29th October 2011 draft.

Platform aims to highlight certain concerns, particularly around the lack of accountability and oversight available to both the Ugandan people and Parliament. However, this briefing does not aim to provide a complete audit, overview or investigation of the draft Bill. Major flaws could have been overlooked and not included in this document.

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Overall Summary

This bill does not create necessary provisions for transparency, parliamentary oversight, consultation or involvement of affected communities, while it does include clauses that restrict information flow and could potentially even threaten public debate.

Most important decisions are left to the discretion of the Minister. Although the Bill does ensure that the Minister will consult with the Petroleum Authority, this means little given that its board is appointed by the Minister. In some cases, approval of the cabinet must be sought.

Oversight and accountability to Parliament of these activities is virtually nil. The only provisions for dialogue with Parliament are that the annual report & accounts of the Petroleum Authority will be submitted to Parliament, and that the Authority will submit an annual statement detailing the monies received from royalties.

This is insufficient to ensure effective governance. Moreover, the Bill does not guarantee Parliament any leverage or the ability to demand answers.

Good practice requires that contracts and petroleum production licenses be approved by Parliament, and listed in parliamentary registers. It is unclear why such procedures are not being followed here.

The Bill fails to guarantee wider transparency. The only commitments are general, ie the Minister shall be "promoting and sustaining transparency in the oil and gas sector" and the Authority "ensure transparency in relation to the activities of the petroleum sector and the Authority". There is a clause to make information available to the public, although it remains at the discretion of the Minister. Given the past experience of Ugandan government attempts to hinder transparency, such commitments remain unpromising without clear and detailed commitments. This is especially so given the restrictions on the publication of data, and the lack of protection for whistle-blowers highlighting wrong-doing.

There is a crucial lack of consultation and involvement of affected communities, or the public as a whole. Although there are a few references to time-periods during which communities can submit objections, this does not equate to the active consultation processes necessary for actual consent. Moreover, there are very limited opportunities for communities to input anyhow, e.g. into petroleum production licenses.

Some of the clauses relating to "offences" have been formulated so that they are vague and general enough that they threaten future public debate on these issues, by creating the potential for a clampdown on those attempting to shine light and share material.

a) The Petroleum Authority of Uganda (Clauses 14-47)

The Bill does not create the basis for accountability to or oversight by Parliament
The Board of Directors are appointed by the Minister. There is no opportunity for nomination hearings. Board members can only be removed by the minister.

The Executive Director is answerable solely to the Board. The Board is answerable solely to the Minister. This also reduces the possibility for Parliamentary oversight. Furthermore, in this situation, independence in very difficult to maintain, despite 18 (2) and 19 (1), giving greater weight to 18 (1) – the primary oversight and examination of the Petroleum Authority's operations is the Minister

There is very limited provision for transparency. 16 (2) (d) states that the Authority will "ensure transparency in relation to the activities of the petroleum sector and the Authority". Yet this stipulation is vague, and there are no further provisions to guarantee actual transparency oper operations.

The only guarantee of any disclosure is in 46 (3) – the Authority's audited annual accounts and an annual report will be submitted to Parliament. This is extremely limited. Especially as there is no guarantee that Parliament must approve these accounts etc.

In fact, the bill focuses on measures that will restrict openness, rather than guarantee it. While punishment for disclosing information is stipulated in clause 37, there is no whistleblowing protection guarantee, to ensure protection for disclosing information of crucial public interest, such as related to corruption or dangerous regulatory failure.

b) National Oil Company (Clauses 48-52)

The Bill stipulates that various plans, budgets and reports be submitted to the Annual General Meeting of the NOC.

However, it is unclear how the AGM will be run. Presumably, the state is the sole shareholder. Thus, there is no guarantee that any of these documents – including the basic annual accounts – will be submitted to Parliament, let alone published publically.

Licensing

c) Opening up New Areas for petroleum activities (Clause 53)

Clause 53 (4) & (5) ensures the public announcement of impact assessments and a 90 day period for parties – including affected communities – to submit concerns in writing. However, this does not mean much without active consultation processes, that solicit and collect input from community members. Expecting hard-to-reach communities to access the impact assessments and produce written responses it unreasonable, and privileges the responses of more powerful and well-connected community members.

The clause does not explain what happens to responses submitted, apart from that they will be "taken into consideration before the Minister declares an area open for petroleum activities".

Good practice is ensuring that there is free, prior, informed consent.

d) Reconnaissance Permits & Petroleum Exploration License (Clauses 54-73)

There is no requirement for companies applying for permits or licenses to submit plans or procedures to prevent social or environmental destruction. Drilling is an extremely dangerous activity with significant risks. Major oil spills, threatening both social and economic livelihoods and the natural environment, were caused during the exploration phase in countries including Nigeria, the USA, Australia and Russia, both onshore and offshore.

Although the Minister will commission an assessment of wider petroleum impacts on the environment prior to opening an area for licensing [Clause 53 (3)], this does not deal with the specific impacts of proposed drilling operations – which will vary according to what is planned.

If companies are not required to submit this information, it becomes impossible for the host government to make a fair appraisal about the ability of competing bids to prevent and mitigate destruction. The Bill only specifies that applicants submit information on their "technical and industrial competence" [Clause 62 (3) (e)] – which does not deal with this issue.

Exploration Licences can be awarded after direct applications, rather than through open & competitive bidding rounds, in certain circumstances. These, according to Clause 59 (2) (c), include the "promotion of national interest" is too vague and general a term to justify "exceptional circumstances", whatever the context. It makes the regulation of "non-exceptional circumstances" rather pointless as it is easy for the executive to dodge – in this case the proposal for a "fair, open and competitive" bidding process for exploration licenses described in Clause 58.

e) Petroleum Production License (Clause 76)

To obtain production Licenses, companies must submit field development plans containing various elements, listed in Clause 76 (3). However, not all of these elements are listed as criteria and restrictions to ultimately guide the Minister's decision, including "effects on land use" and "measures to be taken for the protection of the environment" – the elements most likely to impact on local communities.

On a larger level, why are Petroleum Production Licenses not approved, or at least examined, by Parliament?

f) Fines: Work Practices for Licensees (Clause 90)

Establishing relevant levels for fines for violations is crucial, as described on pages 22-23 of the Contracts Curse report.[1] Otherwise, there is a risk of incentivising bad practice.

Fines or violating the standards set for safety, health, environment and welfare of personnel are capped and limited to 100,000 currency points in Clause 90 (4). This is comparatively low, given the potential costs of an oil spill, and can incentivise cost-cutting – it is often cheaper to prepare to pay the fine rather than ensure best practice. Companies frequently prefer to pay relatively low noncompliance penalties rather than make investments in pollution control. So fines need to be high enough to act as a deterrent.

g) Decommissioning fund (Clause 115)

Funds paid into a decommissioning fund are charged by the oil companies as "operating costs subject to the cost recovery limitation". [Clause 115 (5)] As a result, these costs are presumably largely passed onto the Ugandan state. Depending on what is stipulated in the produciton licence or regulations.

h) Safety zones (Clause 146)

Clause 146 stipulates that "safety zones" will be created around all current and abandoned petroleum facilities, in which "a person shall not carry out unauthorised activity". Such exclusion zones in extraction regions are frequent causes of dispute with local communities – excluded from land they previously used for generating livelihood, transit and living.

The bill makes no reference to any dialogue or consultation in the creation of these exclusionary "safety zones".

i) Commissions of Inquiry (Clause 149)

It is good that the Bill sets out the possibility for a Commission of Inquiry in cases of serious accidents. However, if the commission is appointed by and is answerable to the Minister, that will reduce its power and independence. Especially in cases where the NOC is a joint-partner in oil/gas extraction. Ideally, it would be appointed by Parliament or a body independent of the Executive.

j) Restrictions on transparency / "Availability on information to the public" (Clauses 153-155)

It is good that the Bill states that the Minister may make available agreements, licenses etc to the public. It would be better if this stated "will" that than "may" – such

1 Taimour Lay & Mika Minio-Paluello, "Contracts Curse: Uganda's oil agreements place profit before people", Platform, 2010 http://www.acode-u.org/documents/oildocs/CSCO_oilcurse.pdf

documents are widely published in other countries, and it is increasingly recognised that there is no need for confidentiality in these cases.

Morever, the Bill goes on to lay out several restrictions on transparency and the publication of data. Allowances are made for the demands of foreign stock exchanges, of foreign governments, arbitrators, financial institutions – but no specific allowances are made for the Ugandan people or the Ugandan Parliament

k) Offences (162-163)

Clause 162 is particularly bizarre. It is unclear why there is a need for the insertion of such clauses into this bill.

"Any person who knowingly or recklessly makes a statement or produces a document that is false or misleading in a material particular to the authorised officer engaged in carrying out his or her duties and functions under this Act, commits an offence and is liable on conviction to a fine not exceeding one hundred thousand currency points or imprisonment for a term not exceeding ten years or both."

This clause seems to be designed to be purposefully vague and general, while combined with a very serious punishment. Thus, this clause threatens public engagement and debate in these issues. Particularly, the inclusion of "recklessly" and "misleading" appears dangerous.

This is especially so, given the current lack of transparency and provisions for publication of data or documents. Thus, accurate and materials that are not potentially "misleading" are difficult to come by.

Moreover, the penalties for Ugandan citizens resulting from Clause 163 also appear very severe. For example, an affected community member who is unhappy about a lack of compensation could potentially "molest" or "hinder" an oil company operating near his or her home "without reasonable excuse" – but the threat of imprisonment for 5 years seems extreme.

In comparison, according to clause 168, if a company places false information in its affidavits and reports to the Minister or Authority, it is liable to a maximum of 5,000 currency points.