

Avoiding the Resource Curse: Spotlight on Oil in Uganda

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Will new rules from the US Securities and Exchange Commission help bring transparency to Uganda's oil industry?

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Uganda has made significant progress in codifying the rights of access to information (ATI) and participation, and toward putting in place the institutional infrastructure, including a regulatory framework, for the oil sector. Political roll-backs that are re-concentrating power in the executive branch of government and the growing scale of known oil reserves, however, may jeopardize these advances. In this context, the passage of a new law in the United States requiring companies that file annual reports with the U.S. Securities and Exchange Commission (SEC) to disclose the payments they make to host governments for the extraction of oil, natural gas and minerals, could help shore up transparency around investment in Uganda's extractives industry and avoid the failures in governance that have exposed other countries to the "resource curse."

Petrol tanker in Kampala, Uganda 2010 (Alisa Zomer)



INTRODUCTION

On 21 July 2010, U.S. President Barack Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act¹ (hereafter the Wall Street Reform Act). A landmark transparency provision (Section 1504, referred to as the Cardin-Lugar Transparency Provision) near the end of the 2,300+ page Act requires “...each resource extraction issuer to include in an annual report of the resource extraction issuer information relating to any payment made by the resource extraction issuer, a subsidiary of the resource extraction issuer, or an entity under the control of the resource extraction issuer to a foreign government of the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals...”

Twenty-nine of the world’s 32 largest international oil companies² and eight of the world’s 10 largest mining companies are registered and file annual reports with the SEC (Box 1). These companies are engaged in all aspects of work related to oil, natural gas and minerals including exploration, extraction, processing, transportation and export. As a result, the Wall Street Reform Act can bring some much-needed transparency to the extractive resources industry and to the governments of resource-rich nations.

Box 1 | Filing Reports with the SEC

The SEC regulates the U.S. financial sector and is a principal source of information on companies for investors. Many companies file reports with the SEC, although not all registered businesses file annual reports. Many U.S. and foreign companies are registered with the SEC in ways that do not require them to file annual reports, only less-comprehensive reports. Companies must be registered and file annual reports with the SEC in order to trade on US platforms, such as the New York Stock Exchange (NYSE)¹ and NASDAQ.² Some companies trade on both US and foreign platforms such as the London Stock Exchange.³ Other companies are listed only on a foreign exchange and may or may not file annual reports with the SEC.

Sources: Additional information on the NYSE available online at: <http://www.nyse.com/>. Additional information on NASDAQ available online at: <http://www.nasdaq.com/>. Additional information on the London Stock Exchange available online at: <http://www.londonstockexchange.com/home/homepage.htm>.

By requiring the disclosure of payments to governments, the Act—if effectively implemented and enforced³—will make it possible for individuals, institutions and other stakeholders to track public revenues from extractive resources more accurately. Such transparency can help citizens and civil society hold governments accountable, promote good governance and development, and, in doing

Box 2 | What is the Resource Curse?

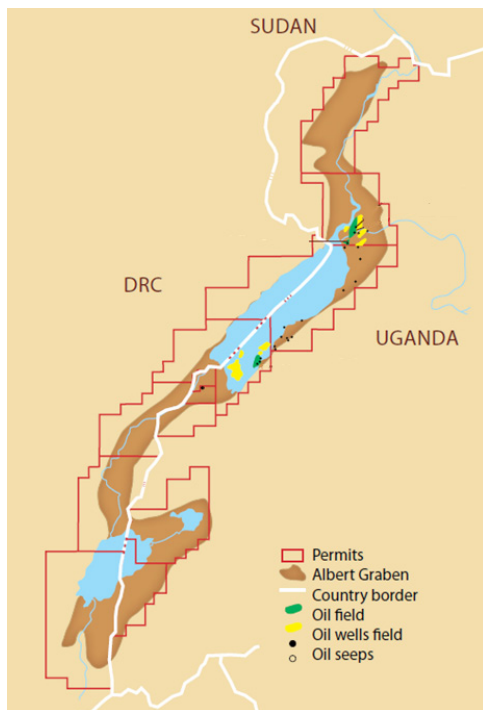
Many of the world’s poor live in countries with significant reserves of oil, natural gas and mineral resources. Despite the abundance of natural resources, especially point-source non-renewable resources (e.g., oil, gas, minerals), a number of these countries tend to experience lower rates of economic growth (e.g., lower GDP per capita) and poorer development outcomes than countries with fewer natural resources. This “resource curse” is attributed to various causes, including: 1) a decline in the competitiveness of other economic sectors (caused by appreciation of the real exchange rate as resource revenues enter an economy); 2) volatility of revenues from the natural resource sector due to exposure to global commodity market swings; 3) government mismanagement of resources; and/or 4) weak, ineffectual, unstable or corrupt institutions (possibly due to the easily diverted actual or anticipated revenue stream from extractive activities).

Sources: Our work/issues – Revenue Transparency, Revenue Watch, online at: <http://www.revenuewatch.org/our-work/issues/revenue-transparency-0>. Ross, Michael L., “The Political Economy of the Resource Curse,” *World Politics* 51 (January 1999), p 297-322, online at: <http://www.sscnet.ucla.edu/polisci/faculty/ross/paper.pdf>.

so, help avoid the “resource curse” (Box 2).

In his address to the United Nations summit⁴ on the Millennium Development Goals in September 2010, President Obama highlighted this provision in the new U.S. law by stating, “We know that countries are more likely to prosper when governments are accountable to their people. So we are leading a global effort to combat corruption—which in many places is the single greatest barrier to prosperity, and which is a profound violation of human rights. That’s why we now require oil, gas and mining companies that raise capital in the United States to disclose all payments they make to foreign governments. And it’s why I urged the G-20 to put corruption on its agenda and make it harder for corrupt officials to steal from their people and stifle their development.”

Figure 1 | Map of Uganda and DRC Oil in the Albertine Graben



Source: World-Class East Africa oil Exploration Play, Africa Oil Corp., Major New East African Analogue, p 4, online at: http://www.africaoilcorp.com/i/pdf/brochure_may09.pdf.

By effectively applying Section 1504 of the Wall Street Reform Act to the activities of companies that operate internationally and file annual reports with the SEC, this law can be put to the test in Uganda, a country that is quickly emerging as one of Africa's petro-states.

NEW OIL DISCOVERIES IN UGANDA

In 2006, commercially-viable quantities of oil were found in the Albertine Graben in western Uganda. The Albertine Graben, the northern portion of the Albertine Rift,⁵ stretches from the border of Uganda, Sudan and the Democratic Republic of Congo (DRC) in the north to Lake Edward on the Uganda-DRC border in the south—a distance of over 500 kilometers and an area of about 23,000 square kilometers.

The Ugandan government has established nine oil prospecting blocks in the Albertine Graben, of which five blocks have been allocated to oil companies for prospecting purposes (Figure 1).⁶ By mid-2009, over \$700 million had been spent on oil exploration in the region. Oil companies have drilled in only three of the nine exploration blocks, but have already found more than 2.5 billion barrels of oil.

Some analysts estimate that Uganda's Albertine Graben may hold more than 6 billion barrels of oil.⁷ Projected production of 100,000 to 150,000 barrels per day would significantly increase revenues for the government and, if well managed and invested, could improve economic growth, reduce poverty and promote development in Uganda. (In 2009, Uganda's Gross Domestic Product was U.S. \$15,736 million.)⁸

But the oil sector can also have significant adverse affects on poor people and local environments. According to the Uganda National Household Survey of 2005/2006,⁹ 84.6% of the population is rural, and 31.1% lives in poverty. Uganda's poor, rural populations, including those that live in the oil districts, depend on land and natural resources for their livelihood. Environmental degradation from the oil sector (*e.g.*, from exploration, extraction, processing and transportation) as well as associated socio-economic developments (*e.g.*, in-migration, new infrastructure, businesses and housing) can result in the loss of livelihoods, displacement and poverty. Ensuring the integrity of ecosystems and natural resources in this region is essential to securing local wellbeing.

The Albertine Rift is also the most species-rich eco-region in Africa and harbors more endemic species than any other area on the continent, including the rare mountain gorilla. Some scientists have estimated that this region is home to 39% of Africa's mammal species, 51% of its bird species, 19% of its amphibian species and 14% of its plant and reptile species. As a result, the Albertine Rift has a large number of protected areas, including fully-protected national parks and multiple-use forest reserves and wildlife sanctuaries. A number of parks are partly or wholly inside the oil blocks and many others that lie outside the blocks will likely be affected by oil development. Oil exploration activities, including drilling (and mining¹⁰), are already taking place in several parks, including Murchison Falls National Park—the largest park in Uganda.

TWO SIDES TO TRANSPARENCY IN UGANDA

Positive Developments

The extent to which Uganda's existing laws and policies will bring transparency and accountability to Uganda's oil industry is unclear. On one hand, Uganda's Constitution,

Access to Information (ATI) Act and other laws are generously pro-disclosed when compared to international standards. Under the Constitution,¹¹ “[e]very citizen has a right of access to information in the possession of the State or any other organ or agency of the State except where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to the privacy of any other person.”

Uganda is one of only six countries in Africa with a comprehensive freedom of information law.¹² The ATI Act¹³ was approved in 2005 and went into effect in 2006. Similar to the Constitution, the ATI Act provides that every citizen has a right of access to government-held information and echoes the same two exceptions: national security or sovereignty, and individual privacy.¹⁴ The government is currently developing regulations to help implement the Act.

Uganda’s National Oil and Gas Policy,¹⁵ approved by Cabinet in February 2008, recognizes that “Openness and access to information are fundamental rights in activities that may positively or negatively impact individuals, communities and states... The policy shall therefore promote high standards of transparency and accountability in licensing, procurement, exploration, development and production operations as well as management of revenues from oil and gas. The policy will also support disclosure of payments and revenues from oil and gas using simple and easily understood principles in line with accepted national and international financial reporting standards.” The Policy is consistent with the internationally-recognized Extractive Industry Transparency Initiative (EITI)¹⁶ disclosure standards. EITI, launched by the United Kingdom in 2002, is a voluntary approach to transparency. It has achieved some success in a few countries, but its overall record is patchy.

Further, public statements on the management and use of oil revenues by Uganda’s President H.E. Yoweri Kaguta Museveni and other senior government officials are consistent with these laws and policies. For example, in his New Year 2010 Address to the Nation,¹⁷ President Museveni spoke of the importance of managing oil revenues to promote economic growth: “[t]he Government recognizes the critical importance of managing oil resources well, to avoid the mistakes many other countries have faced.” He went on to say that “[t]he key element in these legislations

will be to ensure transparency and accountability in the production and utilization of oil resources” (Box 3).

Just days later on 12 January 2010, at a conference of the ruling National Resistance Movement (NRM) party, President Museveni repeated¹⁸ many of these same messages, but added, “Oil money should never be used to pay wages – should never be used for recurrent expenditure or to support consumption. It should be used to create a higher capacity... I do not have the same intoxication with oil as some of the less discerning people seem to. Petroleum is not more important than agriculture, industry, services and a developed human resource.”

Taken together, these laws, policies and statements suggest that Uganda’s oil sector, including oil revenues, will be managed in an open and transparent manner to ensure accountability.

Setbacks and Secrecy

On the other hand, certain developments are disconcerting and warrant attention. In 2005, the 1995 Constitution was amended to provide for a multi-party political system, but it also lifted presidential term limits and vested the rights of all minerals, oil and natural gas in the government (the 1995 Constitution was silent on the ownership of extractive resources). The 2005 constitutional amendment (Section 244(1)) declares, “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...” These resources were vested in the government on the justification that it facilitates extraction and promotes national development.

Following unrest in the oil districts, including confrontation with DRC, both governments established new military bases near Lake Albert. Uganda’s oil fields are protected by Special Forces under the command of Lt. Col. Muhoozi Kainerugaba,¹⁹ the son of President Museveni. Special government permission is now needed to visit the oil sites, even to speak to local authorities or local farmers or herders in the oil districts. Authorization for local NGOs to conduct research, interview local people, take photographs or monitor oil developments is difficult to acquire. Collectively, these developments are worrisome because centralized decision-making authority over high-value natural

Box 3 | President Museveni's Remarks Regarding Uganda's Oil Resources in his Address to the Nation, 31 December 2009

"The development of oil resources will go hand in hand with the continued efforts to develop other sectors of the economy – that is, the diversification of the economy will continue to be among the top priorities of Government in spite of the oil wealth. The Government recognizes the critical importance of managing oil resources well, to avoid the mistakes many other countries have faced.

Hence, Government will ensure that these resources are managed in a manner that facilitates sustainable development and avoids distortions, such as a sharply appreciated exchange rate, which would destroy other sectors of the economy by making them uncompetitive in terms of export. In other words, oil and gas resources will be managed in a manner that is consistent with the macroeconomic framework of the country.

Since oil is a finite resource, oil revenues will be used to develop durable and competitive competencies that will increase productivity in key sectors of the economy. Thus, oil revenues will be invested in key non-oil sectors for productivity enhancement. The key priority sectors for development using oil revenues are as follows:-

1. energy infrastructure including enhancing electricity generation, and transmission capacity and rural electrification;
2. rail transport and major road infrastructure;
3. small, medium and large irrigation schemes to ensure availability of water for agricultural production;
4. science and technology including enhancing technical and vocational education to avail requisite skills for a modern economy.

This means that oil revenues will be ring-fenced to ensure value for money and used mainly for the above-mentioned key priorities countrywide. Oil revenues, therefore, shall not be used for consumption but for durable investments that will benefit future generations. Oil and gas activities will provide opportunities for both forward and backward linkages in the country's quest for industrialization. Having achieved significant progress in the areas of oil exploration, Government is now going to concerted focus on Oil Management issues. I am, therefore, directing the Minister of Finance to lead the coordination of oil management issues forthwith in consultation with the Minister of Energy and the Governor of the Bank of Uganda."

resources, especially the concentration of power over extractive industries, has contributed to the resource curse in other countries.

The Official Secrets Act of 1964,²⁰ which provides for secrecy in matters such as security and defense, was not repealed by the ATI Act and remains in place. This Act creates barriers to citizen access to a broad range of government-held information that many advocates argue does not interfere with the security of the state. Officially, the Minister speaks on behalf of the ministry, and all government officers take an oath prohibiting them from disclosing information that comes to them by virtue of their offices. The Act prescribes severe criminal penalties for the unauthorized disclosure of "secret" or "classified" information by public officers.

As a result of the vague and broad formulation of the Official Secrets Act, public officials regard much of the information held by government agencies as "secret" or "confidential." It creates a presumption that the disclosure of any information by a public official is unauthorized irrespective of the intention behind such disclosure, such that public officials are forced to err on the side of caution

by routinely withholding all information, however trivial. The Act has created a "culture of secrecy" amongst civil servants who are reluctant to disclose information related to government activities.²¹

Also problematic, on 12 May 2010, the first of three new petroleum bills promised by President Museveni was released to the public for review and comments: the Petroleum (Exploration, Development, Production, and Value Addition) Bill. This bill focuses on exploration and extraction while the other bills are expected to address revenue management and reinvestment, among other matters. Ugandan non-governmental organizations, Uganda's Civil Society Coalition on Oil (CSCO), international organizations²² and academics²³ have raised concerns that the Petroleum Bill lacks significant and sufficient checks and balances on the government's authorities over oil, and will lead to corruption and abuse of office.

Advocates have argued²⁴ that the Petroleum Bill includes several provisions that will allow the government to classify important oil sector information as confidential and withhold it from the public domain. These provisions include:



Educating communities in Uganda's Lake Albert Region about the impacts of oil production (Robert Byaruhanga)

Government-held Information. Sections 153 and 155 of the Petroleum Bill itemize certain information that the holder of a license in oil exploration, production, trading, refining, processing, transportation and storage “shall keep at an address in Uganda notified to the Authority,” but not file with the government. This includes information on the quantities of oil and natural gas extracted, produced and consumed or flared.²⁵ Section 153 also provides a separate list of information that must be submitted to the government. It is not clear why all such information is not required to be submitted directly to the government.²⁶ The practice, however, has particular significance because Uganda’s ATI Act only gives citizens a right of ATI that is in the possession of the state or a government authority. The ATI Act does not apply to information held by private citizens or private companies.

Scope of Confidentiality. Section 156 of the Petroleum Bill provides, “subject to confidentiality of the data and commercial interests,” that some information will be made available to the public, including “details of all agreements, licences and any amendments,” licenses and approved field development plans.²⁷ The Petroleum Bill,

however, does not delineate the scope of “confidentiality of the data and commercial interests,” leaving it subject to interpretation by government officials that could prevent disclosure in many cases (given the Official Secrets Act). For example, it is unclear if information regarding production levels, revenue generated by the industry, company payments to government and other oil information would be released to the public.

Confidential Information by Default. Section 156 of the Petroleum Bill states that all information submitted by the license holder to the government “[e]xcept as provided under this Act and the Access to Information Act, 2005” shall be kept confidential.²⁸ This provision creates a presumption of “confidentiality” that places the burden of showing why any requested information should be disclosed on the public. Experience shows that once information is identified as confidential, it becomes exceedingly difficult to argue for reclassification as non-confidential. In contrast, a presumption in favor of disclosure assumes the benefit of releasing information to the public outweighs the costs to government and license holders, and places the burden on the state to justify why withholding it is warranted.

Period of Time. Section 84 of the Petroleum Bill requires that all confidential information be withheld for the period of time as “specified in the license or other agreements.”²⁹ This exemption of records or data for periods of time prescribed in licenses, rather than in legislation, is inconsistent with ATI best practices³⁰ and subjects the disclosure of information to the administrative discretion (potentially unfettered) of individual government officials. Time periods prescribed in law ensure parliamentary determination and oversight.

Penalty for Releasing Information. Section 165 of the Petroleum Bill makes it a crime to release confidential information and provides for criminal penalties: “a fine not exceeding five hundred currency points or imprisonment not exceeding five years or both” (the cost of each point is established in a separate Schedule to allow for regular updating).³¹ This provision establishes a significant penalty for the release of information that in many countries is not classified as confidential and, in fact, is consistently released to the public. As with the Official Secrets Act, it also creates a powerful incentive for government officials to err on the side of withholding information from the public.³²

Many advocates have argued that the ATI provisions in the Petroleum Bill are more restrictive than—and therefore not consistent with—the ATI Act and are not in the spirit of the ATI provisions in the Constitution. Moreover, they assert that the provisions are unnecessary because the Constitution contains existing qualified disclosure exemptions, “where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to the privacy of any other person.”

The ATI Act provides an interpretation and sets forth specific exemptions. Information officers can refuse a request for information in cases that involve the protection of privacy (Section 26), commercial competitiveness (Section 27);³³ duty of confidence (Section 28);³⁴ safety of individuals (Section 29); law enforcement and legal procedures (Section 30); records privileged from production in legal proceedings (Section 31); defense, security and international relations (Section 32); and operations of public bodies (Section 33).

The ATI Act also provides a clear balancing test to determine whether information should be classified as confidential or released to the public. Section 34 provides that information should be released to the public if there is “an imminent or serious public safety, public health or environmental risk” or if “the public interest in the disclosure of the record is greater than the harm contemplated in the provision in question.”³⁵ These standards are consistent with ATI best practice and international norms.

Given the exemptions already provided under the ATI Act, the new confidentiality clauses in the Petroleum Bill must be looked at with close scrutiny. This is particularly important since the exemptions in the Petroleum Bill appear to be more restrictive (in terms of ATI and favoring disclosure) than those articulated in the ATI Act. ATI best practice suggests that additional exemptions should only be included within another law where the restrictions can be justified on the basis of strict tests of legitimacy and necessity. That is, the information must relate to a legitimate purpose or objective set forth in the law. For example, disclosure must threaten to cause substantial harm to a government purpose or objective which outweighs the public interest in access to such information. Advocates have argued that the exemptions in the Petroleum Bill do not meet this test.

ATI IN PRACTICE

The government has not released to the public—or even the Parliament³⁶—important information regarding the oil sector, including the five Production Sharing Agreements (PSAs)³⁷ with the oil exploration companies. The government has argued that the disclosure of information in the PSAs would reduce its negotiating position in the allocation of the remaining oil exploration blocks in the Albertine Graben (due to be allocated in early 2011).³⁸ The government also claims that the PSAs are protected under the trade secrecy provision of the ATI Act and has used this provision to justify its rejection of applications for the release of the PSAs.

To allay public concerns, the government stated that the terms in the PSAs are consistent with international practice and provided a model PSA. Later, however, civil society groups acquired parts of at least one PSA³⁹ and calculated that the terms are not consistent with international norms,

and rather favor the oil company at the expense of the government and the citizens of Uganda. The analysis of at least one private bank (Credit Suisse)⁴⁰ and one private auditing company (Ernst & Young)⁴¹ support this NGO position. As a result, activists have argued that the PSAs should be released to help improve future negotiations.

Of note, the government's reluctance to release the PSAs contrasts sharply with the position of some oil companies operating in Uganda which have no problem with the PSAs being released to the public. Brian Glover, General Manager of Tullow in Uganda, goes even further, suggesting that the government should disclose the PSAs: "as we move closer and closer to production next year, one would like to think that the government would say (it) can make those available."⁴²

At least three pleadings have been filed in court over the release of the oil PSAs; two in the Magistrate Courts and one in the High Court. In the first case heard earlier this year, the Magistrate ruled in favor of the government by declaring the PSAs confidential documents based on the trade secrecy provision of the ATI Act. The judge in the case ruled that the complainants failed to prove that the release of the documents is in the public interest. The two *Daily Monitor*⁴³ reporters, Angelo Izama and Charles Mwanguhya Mpagi (who were denied access to the PSAs by the Solicitor General in 2007, prompting their pleading in court), plan to appeal the decision.⁴⁴

The case in the High Court was filed by Greenwatch,⁴⁵ a public-interest environmental law NGO. Kenneth Kakuru, Greenwatch founder and Executive Director, argues that the release of the PSAs will not "prejudice the security or sovereignty of the State or interfere with the right to the privacy of any other person"—the two exemptions in the Constitution. He also argues that having information about the financial arrangements between the government and oil companies is important from an environmental perspective. In order to protect the constitutional right to a clean and healthy environment, citizens and civil society need the PSAs to assess impacts of the oil projects on the environment and public health. The PSAs will indicate whether or not the commitments made by companies on the environment undersell or over-promise. The case is scheduled to be heard in 2011.

Many advocates are not surprised that the government is withholding the PSAs from the public. In the early 2000s, the government did not release the Power Purchase Agreement (PPA) between the government and Applied Energy System (AES) Nile Power which had been contracted to construct a hydroelectric dam on the Nile River at Bujagali Falls near Jinji. The government argued that the document must be kept secret because of confidentiality and trade secrets.⁴⁶ Greenwatch went to court and, in 2002, the High Court ruled that the PPA did not fall under the two exemptions to freedom of information in the Constitution (at the time, the ATI Act had not been enacted).

Table 1 | Active and Potential Oil Companies in Uganda

Oil Company	Domiciled	Listed on US Platform	SEC Registered	Trades in US	Reports to SEC
Tullow	United Kingdom	No, AIM listed	Yes	Yes, ADRs	Yes, no annual reports
Tower Resources/ Neptune Petroleum	United Kingdom	No, AIM listed	No	No	No
Dominion Petroleum	Bermuda	No, AIM listed	No	No	No
Total S.A.	France	Yes, NYSE listed	Yes	Yes, ADRs	Yes, annual reports
Chinese National Offshore Oil Company (CNOOC)	China	Yes, NYSE listed	Yes	Yes, ADRs	Yes, annual reports

AIM. Alternative Investment Market of the London Stock Exchange
 NYSE. New York Stock Exchange
 ADR. American Depository Receipt issued by US bank

LOOKING TO THE SEC?

Given these developments, civil society groups in Uganda may need to look to the Wall Street Reform Act and the SEC in the United States for information on oil revenues paid to their government. Three oil companies are currently licensed to explore for oil and gas in five blocks in the Albertine Graben (Table 1): Tullow Oil holds Blocks 1, 2 and 3A (including the proven oil reserves over Lake Albert); Neptune Petroleum (Uganda), a subsidiary of Tower Resources, holds Block 5; and Dominion Petroleum holds Block 4B.

Tullow Oil⁴⁷ is a global oil and gas exploration company headquartered in London, United Kingdom. Tullow's primary listing is on the Alternative Investment Market (AIM)—part of the London Stock Exchange⁴⁸ listing smaller companies—and is a constituent of the FTSE 100 Index;⁴⁹ it has a secondary listing on the Irish Stock Exchange. Tullow files some reports with the SEC,⁵⁰ but is not on the list of foreign companies registered and reporting with the SEC and does not file annual reports. Tullow, however, trades in the United States as American Depositary Receipts (ADRs, Box 4); it is an issuer of deposited securities⁵¹ (\$50M) with JPMorgan Chase Bank, N.A.⁵²

Tower Resources⁵³ is a London-based, independent oil and gas company that is listed on the AIM. Dominion⁵⁴ is an independent energy company founded in 2004 and domiciled in Bermuda with a service center in London. Dominion has been listed on the AIM since 2006. Tower and Dominion do not have shares registered under the U.S. Securities Act, are not on the list of foreign companies registered and reporting with the SEC, and do not file reports with the SEC.

Tullow has rights over considerable and promising oil real estate in Africa. Recent exploration successes, especially in Uganda and Ghana, have helped make Tullow Africa's leading independent oil company. With these finds, Tullow is seeking to transform itself from a company involved principally in exploration to one which is also engaged substantially in oil extraction. To speed up the process from exploration to extraction and to acquire the expertise and \$8-10 billion investment needed to develop the Uganda oilfields, Tullow, in early 2010, proposed to sell one-third of its shares in its three blocks to French oil major Total

S.A.,⁵⁵ and another one-third of its shares to the China National Offshore Oil Company (CNOOC).⁵⁶

Box 4 | What is an American Depositary Receipt?

An American Depositary Receipt (ADR) is a negotiable certificate (stock) issued by a US bank representing a specified number of shares in a foreign corporation that is traded on a US exchange, such as the NYSE and NASDAQ. ADRs are issued and sponsored in the US by a depository bank or brokerage firm, and are bought and sold on US financial markets like stocks from US-based companies.

International companies that establish an ADR program have an option to choose from various types of ADRs. Level II (listed) and Level III (offering) depository receipt programs require that the foreign company be listed on the SEC and file annual reports (Un-sponsored and Level I (OTC) ADR programs have only minimal reporting requirements with the SEC).

The stock of many non-US companies trade on US stock exchanges through the use of ADRs. ADRs enable US investors to buy shares in foreign companies without the hazards or inconveniences of cross-border and cross-currency transactions. ADRs carry prices and pay dividends in US dollars.

Sources: American Depositary Receipts, US Securities and Exchange Commission, online at: <http://www.sec.gov/answers/adrs.htm>.

The sale of Tullow shares to Total and CNOOC was held up by a \$408 million capital gains tax issue.⁵⁷ The dispute is in the process of being resolved and it is expected that the Tullow-Total-CNOOC joint venture will be approved by the government. Total is registered and submits annual reports with the SEC, and trades on the NYSE. CNOOC is not on the list of foreign companies registered and reporting with the SEC, but trades in the United States through ADRs⁵⁸ and files annual reports with the SEC (Table 1).⁵⁹

The SEC has 270 days, from 21 July 2010 until April 2011, to develop regulations to help implement Section 1504 of the Wall Street Reform Act. The regulations will also help ensure the reporting requirements are robust and integrated into existing reporting protocols in order to promote seamless compliance. The rule-making process will determine a number of critical issues, especially regarding scope, that will establish which companies will need to

comply with Section 1504 and which companies will be exempt from disclosing the revenue they pay host governments. Several issues are of particular importance for Uganda, including:

- Will all foreign companies that trade in the United States be required to comply with the Wall Street Reform Act?
- Will all companies that file reports with the SEC be required to disclose their payments, or only those that submit annual reports?
- Will qualifying companies be required to disclose project- and local government-level information, or can the information be aggregated?
- Which payments—taxes, fees, royalties and other transactions—must be disclosed in a disaggregated manner?
- Will companies be allowed to file exemptions from submitting certain reports and from making certain disclosures and, if so, under which circumstances can a company file an exemption?

If the U.S. law is narrowly interpreted by the SEC, Tullow, Tower and Dominion may not be required to disclose their payments to the government of Uganda. Total and CNOOC appear to fall under the law, but if Tullow is not required to comply, it is not clear if its partners in the joint venture would have to disclose their payments. Are Total and CNOOC “under the control of the resource extraction issuer” (Tullow)? The SEC must interpret Section 1504 of the Wall Street Reform Act broadly if the current group of companies operating in Uganda will have to disclose their payments to the government.

Oil companies and their associations and lobbyists have begun making their case to the SEC. They argue that disclosure of project-level and country-level information on revenue payments to host governments is competitively sensitive, may raise safety and security concerns, and must respect contracts and host country laws and regulations. They also argue that it would be prohibitively expensive to make such disclosure part of audited financial reports. While new procedures and data collection/analysis tools may be needed to disaggregate information, report on payments to host government and comply with the U.S. law, the promise of transparency and accountability in the

extractive resources sector and of avoiding the resource curse far outweigh any costs associated with developing and implementing new reporting procedures.

Moreover, oil companies have not been clear about how disclosure risks competitiveness. The unit production cost has been noted as a main company concern⁶⁰ regarding competitiveness, but the information needed for competitors to calculate or even estimate such costs does not need to be revealed in order to comply with Section 1504. Moreover, the risks that project-level and country-level information pose to competitiveness are often exaggerated by companies. Research shows that countries which require disclosure of information on payments do not experience a loss of competitiveness and may even have reduced risks.⁶¹ In many cases, much of this information is already known by the competitors through their own networks and dealings with government.

If the SEC regulations establish that Section 1504 of the Wall Street Reform Act does not apply to all or many of the oil companies operating in Uganda, civil society will need to look elsewhere for support. The European Union (EU),⁶² United Kingdom (UK),⁶³ Spain, Canada, Australia, Hong Kong, Shanghai and other places are considering or have passed measures similar to the extractive industry provisions in the Wall Street Reform Act. Stock market rules in the UK are of particular importance to Uganda since Tullow, Tower and Dominion are listed on the AIM of the London Stock Exchange.

Publish What You Pay (PWYP), Revenue Watch Institute⁶⁴ and other organizations are advocating for national stock market listing authorities to require all listed oil, gas and mining companies⁶⁵ to disclose their payments. In the UK and other EU member states, listing regulations are governed by EU rules, although states have the authority to make their own rules. A 2004 EU Transparency Obligations Directive (TOD)⁶⁶ calls on members to promote extractive company disclosure of payments to governments listed on European stock exchanges. Specifically, it states that “[t]he home Member State should encourage issuers whose shares are admitted to trading on a regulated market and whose principal activities lie in the extractive industry to disclose payments to governments in their annual financial report. The home Member State should also encourage an increase

in the transparency of such payments within the framework established at various international financial fora.” This call, however, is not binding or required, although a few member states (including the UK and Spain) have moved towards passing enabling domestic legislation.

In the UK, the Financial Service Authority regulates the financial services industry and is the equivalent of the SEC in the United States. In 2006, the AIM introduced a requirement for all listed extractive companies to “disclose any payments aggregating over £10,000 made to any government or regulatory authority or similar body made by the applicant or on behalf of it, with regards to the acquisition of, or maintenance of its assets.” More recently, a more comprehensive and stronger bill has been discussed. The Financial Services Regulation Bill⁶⁷—the British equivalent of the Wall Street Reform Act—was included in Queen Elizabeth’s Speech on 25 May 2010 and is currently before the Parliament.⁶⁸ In addition to Tullow, Tower and Dominion and Heritage, some of the world’s largest energy

and minerals companies are listed on the London Stock Exchange, including Gazprom, Anglo American and Xstrata. Regulations in the UK would also help ensure a level playing field for SEC-listed companies.

Whether the Wall Street Reform Act provides an opportunity to promote transparency and accountability in Uganda’s oil sector depends in large measure on the SEC regulations to implement Section 1504. If the SEC rule-making process establishes enabling regulations that cast a wide net, it will be an important step in ensuring sound revenue management in Uganda, promoting effective reinvestments, and fighting the corruption that contributes to the disjuncture between resource wealth and poverty reduction. If the SEC rule-making process results in regulations that narrowly interpret the transparency provisions in the Wall Street Reform Act, local NGOs may need look to the UK to help Uganda avoid the resource curse and press the British Parliament to pass the Financial Services Regulation Bill.



Total gas station in Kampala, Uganda 2010 (Alisa Zomer)

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NOTES

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10. Limestone mining is also underway in Dura in Queen Elizabeth National Park, Uganda's second largest protected area.
11. Constitution of Uganda, online at: http://www.ugandaembassy.com/Constitution_of_Uganda.pdf.
12. The six countries are South Africa (2000), Angola (2002), Zimbabwe (2002), Uganda (2006), Ethiopia (2010) and Liberia (2010). Zimbabwe's law, however, has been used primarily to restrict ATI and so is not counted among "true" ATI laws.
13. "Access to Information Act (Uganda)," Human Rights International, 19 July 2005, online at: http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/uganda/uganda_ati_act_2005.pdf.
14. Section 5(1) of the ATI Act provides that "[e]very citizen has a right of access to information and records in the possession of the State or any public body, except where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to the privacy of any other person." Regulations to facilitate administration of the law are currently being prepared.
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 18. "President Museveni Opens NRM Conference In Entebbe, Clarifies On Gay Claims," State House Republic of Uganda, 12 January 2010, online at: <http://statehouse.go.ug/news.php?catId=1&&item=719>.
 19. "Oil companies punch hole in secrecy over agreements," *The Independent*, 5 July 2010, online at: http://www.independent.co.ug/2011/index.php?option=com_content&view=article&id=3125:oil-companies-punch-hole-in-secrecy-over-agreements-&catid=54:business-news&Itemid=172.
 20. Official Secrets Act 1964 (Ch 302), Uganda Legal Information Institute, online at: http://www.ulii.org/ug/legis/consol_act/osa1964156/.
 21. Some advocates have also argued that the Evidence Act of 2000 and the Parliament (Powers and Privileges) Act of 1955 also contradict the ATI Act.
 22. "RWI Comments on Uganda's Draft Petroleum Bill," Revenue Watch Institute, 8 July 2010, online at: <http://www.revenuewatch.org/uganda-petroleum-bill>.
 23. "Comments on the Uganda Petroleum Bill," The Harriman Institute, Columbia University, 18 June 2010, online at: http://www.kwawote.org/fanaka/uploads/Letter_Comments_on_Uganda_Petroleum_Bill_May_2010.pdf.
 24. Edwards, Jocelyn, "Uganda: New Oil Bill Promotes Corruption," *allafrica.com*, 31 May 2010, online at: <http://allafrica.com/stories/201006020721.html>.
 25. Section 153 provides that "(1) [a] holder of a Petroleum Exploration licence and a Petroleum Production Licence shall keep at an address in Uganda notified to the Authority, complete and accurate records containing full particulars" on a large number of oil matters. Section 155 provides an additional list of information that the licensee must "keep at an address in Uganda notified to the Authority." Section 153 also provides that "(3) [a] holder of a licence in crude oil and gas trading, crude oil refining, gas processing, transportation and storage shall keep at an address in Uganda notified to the Authority, complete and accurate records" regarding a similar set of oil matters.
 26. Further, Section 153 provides that another set of information be submitted by a holder of a Petroleum Exploration or Petroleum Production License to the government: "(3) The licensee shall submit to the Authority, in such form as the Authority may direct."
 27. Section 156 provides that "[t]he Minister shall, subject to confidentiality of the data and commercial interests, and in accordance with the Access to Information Act, 2005, make available to the public" including "details of all agreements, licences and any amendments," and approved field development plans.
 28. Section 158 provides that "(1) [e]xcept as provided under this Act and the Access to Information Act, 2005, all data submitted to the Government by a licensee shall be kept confidential and shall not be reproduced or disclosed to third parties by any party under this Act except - (a) in the case of disclosure by the licensee, with the prior written consent of the Government; or (b) in the case of disclosure by the Government prior to the relinquishment of the area to which they relate, with the prior written consent of licensee."
 29. Section 84 provides that "(1)...it shall be a condition in each licence for the licensee to provide the Minister, at such times and in such manner as the Minister may require, full information concerning the licensee's operations and for the inspection of the facilities, records and accounts of the licensee by persons authorised by the Minister. (2)The information submitted to the Minister under subsection (1), shall be treated as confidential for a period as may be specified in the licence or other agreements."
 30. Article 19, "Public's Right to Know: Principles on Freedom of Information Legislation," 1999, online at: <http://www.article19.org/pdfs/standards/righttoknow.pdf>.
 31. Section 165 provides that "(1)...no information furnished, or information in a report submitted under this Act by a licensee shall be disclosed to any person who is not a Minister or an officer in the public service except with the consent of the licensee." And "(3) [a]ny person who contravenes subsection (1) commits an offence and is liable on conviction to a fine not exceeding five hundred currency points or imprisonment not exceeding five years or both."
 32. In many ATI laws, "qualified" means subject to some type of standard that is often evident by the use of terms such as "prejudice" or "significantly effect."
 33. Section 27 provides that "(1)...the information officer shall refuse a request for access to a record if the record contains - (a) proprietary information as defined in section 4; (b) scientific or technical information, the disclosure of which is likely to cause harm to the interests or proper functioning of the public body; or (c) information supplied in confidence by a third party, the disclosure of which could reasonably be expected - (i) to put that third party at a disadvantage in contractual or commercial negotiations; or (ii) to prejudice that third party in commercial competition."
 34. Section 28 provides that "(1)...an information officer - (a) shall refuse a request for access if the disclosure of the record would constitute an action for breach of a duty of confidence owed to a third party in terms of an agreement; or (b) may refuse a request for access to a record of the body if the record consists of information that was supplied in confidence by a third party - (i) the disclosure of which could reasonably be expected

- to prejudice the future supply of similar information, or information from the same source; and (ii) if it is in the public interest that similar information, or information from the same source, should continue to be supplied.”
35. Section 34 provides that “an information officer shall grant a request for access to a record of the public body otherwise prohibited under this Part if - (a) the disclosure of the record would reveal evidence of - (i) a substantial contravention of, or failure to comply with the law; or (ii) an imminent or serious public safety, public health or environmental risk; and (b) the public interest in the disclosure of the record is greater than the harm contemplated in the provision in question.”
 36. 60 members of Parliament have signed a petition for the government to disclose the Production Sharing Agreements. *Ibid*, 19.
 37. Production Sharing Agreements are a common type of contract signed between a government and a resource extraction company (or group of companies) concerning how much of the resource (usually oil) extracted from the country each will receive.
 38. The government expects to resume licensing exploration companies at the end of 2010; at least 60 companies have already expressed interest in bidding for acreage.
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 40. Heritage Oil, Credit Suisse, 22 April 2009, online at: <http://www.scribd.com/doc/15566382/Credit-Suisse-Heritage>.
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 42. *Ibid*, 19.
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 45. Additional information on Greenwatch available online at: <http://www.greenwatch.or.ug/>.
 46. *Ibid*, 44.
 47. Additional information on Tullow Oil available online at: <http://www.tulloil.com/>.
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 50. International Registered and Reporting Companies, U.S. Securities and Exchange Commission, online at: <http://www.sec.gov/divisions/corpfin/internatl/companies.shtml>.
 51. Company search, U.S. Securities and Exchange Commission, online at: <http://www.sec.gov/Archives/edgar/data/1145678/000119380510001133/0001193805-10-001133-index.htm>.
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 55. Additional information on Total Oil available online at: <http://www.total.com/>.
 56. Additional information on China National Offshore Oil Company (CNOOC) available online at: <http://www.cnooc.com.cn/>.
 57. In 2009, Tullow had bought the Ugandan assets—half shares in Blocks 1 and 3A (which includes the 400 million-barrel “Kingfisher” oil field)—from Heritage Oil, a Canadian oil company, for \$1.45 billion. The sale was backed by \$1.4 billion loan from the Royal Bank of Scotland. The Ugandan government said, however, that the transaction is incomplete (and, therefore, the Tullow-Total-CNOOC joint venture could not go forward) until Heritage/Tullow first paid a \$408 million capital gains tax. (Earlier, in September 2006, Australia-based Hardman Resources sold its Ugandan interests to Tullow for \$1.1 billion; the sale was not taxed by the government of Uganda.) The dispute has not been resolved and, in August 2010, the Ugandan government repossessed the Kingfisher oilfield from Tullow (the license had expired in February 2010). As part of the repossession, the Minister of Energy asked Tullow to restore the fields as indicated in the environmental impact assessment. Now there is a push within the Ugandan government to allocate Block 3A to CNOOC or Sinopec Shanghai Petrochemical Co. Ltd. instead of Tullow. Sinopec is on the list of foreign companies registered and reporting with the SEC, files annual reports (Form 20-F) and is listed on the NYSE. It is the first Chinese company to be listed in Hong Kong, New York, London and Shanghai. In August, Sinopec officials travelled to Uganda, presumably to discuss this deal. Angus McCross, Tullow’s Exploration Director, however, says that Tullow’s purchases from Heritage have been completed and the sale of a third each of Blocks 1, 2 and 3A to France’s Total and China’s CNOOC is imminent. He adds that the tax dispute has brought about some project delays but that they would not derail plans to produce Uganda’s first barrel of oil by the fourth quarter of 2011.
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