

**RECONSTITUTING THE ROLE OF LAW IN DEVELOPMENT-INDUCED
DISPLACEMENT AND RESETTLEMENT: LESSONS FROM UGANDA'S
BUJAGALI HYDROELECTRIC PROJECT**

by

JALIA KANGAVE

**A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR THE DEGREE OF**

DOCTOR OF PHILOSOPHY

in

THE FACULTY OF GRADUATE STUDIES

(Law)

THE UNIVERSITY OF BRITISH COLUMBIA

(Vancouver)

July 2011

© Jalia Kangave, 2011

ABSTRACT

Imagine that one morning you wake up and learn that the place you have called home for generations is no longer going to be home. Your house will be demolished and in its place, government or a private developer will construct a dam or put up a residential complex. You have no right to say no because government has eminent domain over your land (or a legal right to compulsorily acquire it in the public interest).

Now imagine that the development will also result in the acquisition of the land on which you grow crops for subsistence and trade. It will close off access to the river where you fetch water for daily household use and catch fish for home consumption and for trade. In other words, this is the land where you live and where you obtain your means of living.

Lastly, imagine that the project area also contains your social, cultural and spiritual being. It is where over time, you have built social capital consisting of relatives and friends: a community network that you can count on for daily survival. It is where your ancestors are buried, the religious and spiritual institutions you subscribe to are located and your cultural ties entrenched.

This is no fiction. And it is not abstract. It is the everyday reality of the millions of people displaced by mega projects such as dams that are built in the name of development. There is a rich body of literature that explores the issue of development-induced displacement and its impact on communities. This thesis builds on that conversation by situating its analysis in law. Throughout the thesis, I trace the silences of law on the one hand and its aggressiveness on the other hand to determine the ways in which formal legal tools have enabled or disabled Project Affected Communities to secure their interests. I also explore how understanding dam projects from an investment perspective can further the understanding of the challenges faced by these communities when striving for inclusive laws and policies. Uganda's Bujagali Hydroelectric Project is used as the case study for the analysis.

PREFACE

Ethics Approval for this research was obtained from the University of British Columbia's Behavioural Research Ethics Board. The Approval Certificate Number is: H09-02038.

TABLE OF CONTENTS

| | |
|---|------------|
| ABSTRACT | ii |
| PREFACE | iii |
| TABLE OF CONTENTS | iv |
| LIST OF ABBREVIATIONS | vi |
| ACKNOWLEDGMENTS..... | vii |
| DEDICATION | ix |
| INTRODUCTION: Through a Legal Lens: Analyzing the Role of Law in Facilitating the Inclusion (and Exclusion) of Project-Affected Communities in Decisions Relating to Large Dam Projects..... | 1 |
| I. Background to the Research Problem | 1 |
| II. Research Questions | 10 |
| III. Thesis Contribution | 12 |
| IV. Chapter Arrangement | 14 |
| CHAPTER 1: Laying the Foundation: Constructing Large Dams, Defining Project-Affected Communities and Establishing the Domestic Legal Framework | 19 |
| I. Introduction | 19 |
| II. Providing Context: A Brief History of Uganda and Background to the Project..... | 22 |
| III. Constructing Meanings and Establishing Boundaries: Who are “Project Affected Communities”? | 32 |
| IV. Displacement under Uganda’s Domestic Legal Framework | 41 |
| V. Conclusion | 50 |
| CHAPTER 2: Setting the Theoretical Groundwork: A TWAIL Critique of International Law and Development | 52 |
| I. Introduction | 52 |
| II. The Foundation: A Synthesis of TWAIL and Critical Development Theory | 54 |
| III. A TWAIL Critique of International Law and Development: Thematic Components. | 61 |
| IV. The Reconstruction Project | 78 |
| V. Methods of the Study | 80 |
| CHAPTER 3: Explaining the Failure of Resettlement Initiatives in Development Projects: A Critical Analysis of the World Bank’s Policy on Involuntary Resettlement | 92 |
| I. Introduction | 92 |
| II. OP 4.12 on Involuntary Resettlement and the Impoverishment, Risks and Reconstruction Model: Landmarks in Resettlement Policy | 98 |
| III. DIDR: Understanding the Theoretical-Practical Disconnect | 107 |
| IV. Reincorporating Policy Analysis: Rhetoric and Reality in OP 4.12 | 113 |

| | |
|---|------------|
| V. Protecting Indigenous Peoples: Operational Policy 4.10..... | 121 |
| VI. Excluding the “Plenty Vulnerable” through Universalizing the Indigenous Mission | 130 |
| VII. Conclusion: An Inquiry into the Legal Implications of OP 4.12 | 138 |
| CHAPTER 4: The Legal Impact of the Operations of the World Bank Inspection Panel: Establishing Patterns of Inclusion and Exclusion of Project-Affected Communities | 148 |
| I. Introduction | 148 |
| II. The World Bank Inspection Panel: Composition, Operation and Procedures | 150 |
| III. The Inspection Panel as a Tool of Inclusion..... | 155 |
| IV. The Limited Capability of the Inspection Panel as a Tool of Inclusion: A Legal Perspective..... | 161 |
| V. Writing Resistance into the Operations of the Inspection Panel | 172 |
| VI. Conclusion..... | 183 |
| CHAPTER 5: The Bujagali Project as an Investment Project: Understanding Involuntary Resettlement from an Investment Perspective | 187 |
| I. Introduction | 187 |
| II. Neo-liberalism and the Internationalization of Private Property Rights..... | 193 |
| III. Privatization: Laying the Foundation for Protection of Investment Interests..... | 204 |
| IV. Institutionalizing the Electricity Sector | 209 |
| V. The Impact of Foreign Investment Contracts: An Analysis of Power Purchase Agreements | 213 |
| VI. In Lieu of a Conclusion: Why Affected Communities Need More Protection under the Law | 228 |
| CHAPTER 6: Recommendations: Increasing Protection of Affected Communities through Legal Reform..... | 242 |
| I. Introduction | 242 |
| II. Recommendations Relating to the Reform of Formal Legal Infrastructure | 248 |
| III. Implementation of Recommendations | 281 |
| IV. Preamble to the Conclusion: The Role of Resistance | 284 |
| CONCLUSION | 286 |
| I. The Role of Law in DIDR: A Recap..... | 286 |
| II. Explaining the Limited Public Resistance against the Bujagali Project: Some Preliminary Thoughts | 287 |
| BIBLIOGRAPHY | 307 |

LIST OF ABBREVIATIONS

| | |
|----------------------|--|
| Affected Communities | Project Affected Communities |
| APRAP | Assessment of Past Resettlement Activities and Action Plan |
| BIT | Bilateral Investment Treaties |
| Bank | World Bank |
| Bujagali Project | Bujagali Hydroelectric Project (the Project) |
| CDAP | Community Development Action Plan |
| DIDR | Development-Induced Displacement and Resettlement |
| FDI | Foreign Direct Investment |
| Government | Government of Uganda |
| IBA | Impact and Benefit Agreements |
| IBRD | International Bank for Reconstruction and Development |
| ICSID | International Centre for Settlement of Investment Disputes |
| IDA | International Development Association |
| IFC | International Finance Corporation |
| IFI | International Financial Institutions |
| IMF | International Monetary Fund |
| Inspection Panel | World Bank Inspection Panel (the Panel) |
| MIGA | Multilateral Investment Guarantee Agency |
| Management | Management of the World Bank |
| NAPE | National Association of Professional Environmentalists |
| OD | Operational Directive |
| OP | Operational Policy |
| PPA | Power Purchase Agreement |
| PERD Act | Public Enterprises Reform and Divestiture Act |
| RAP | Resettlement Action Plan |
| ERA | Electricity Regulatory Authority |
| SAPs | Structural Adjustment Programmes |
| TWAIL | Third World Approaches to International Law |
| UEB | Uganda Electricity Board |
| UEDCL | Uganda Electricity Distribution Company Limited |
| UEGCL | Uganda Electricity Generation Company Limited |
| UETCL | Uganda Electricity Transmission Company Limited |

ACKNOWLEDGMENTS

I thank the Almighty Allah for giving me good health, patience, courage and the perseverance to make it this far.

I have worked with an amazing group of professors whose intellectual guidance and commitment to this project has been invaluable. I am greatly indebted to my supervisor, Professor Natasha Affolder, for her great mentorship, enthusiasm and constant availability for counsel. My supervisory committee members: Professors Ljiljana Biuković, Catherine Dauvergne and Obiora Chinedu Okafor have enriched this thesis through their thought-provoking comments, meticulousness and their diverse expertise and experiences. I also thank my university examiners, professors Karin Mickelson and Matthew Evenden, and my external examiner, Professor Balakrishnan Rajagopal, for their constructive feedback.

I owe great thanks to the Faculty and Staff of UBC Law. I thank the Associate Dean of Graduate Studies, Professor Doug Harris, for providing great leadership. I am grateful to Ms. Joanne Chung, our Graduate Programme Advisor, for her dedication to the program and the support she provided me throughout the years. I also express my gratitude to the staff of the UBC Law Library who provided research assistance. Many thanks also to the Law Foundation of British Columbia, Faculty of Law, Professor Emeritus Charles Bourne (UBC Faculty of Law), the Liu Institute of Global Issues and the University of British Columbia who provided the funding that made this research possible. I thank the Faculty of Graduate Studies for providing administrative support throughout the years.

The discussion in the thesis has been greatly enriched by the contributions of those I interviewed. I owe great thanks to members of the Project-Affected Community at Naminya Resettlement Area, the Malindi Dam-Affected Community and Jaja Budhagaali for sharing their stories with me and allowing me to pass them on. I am grateful for the insights provided by Mr. Kenneth Kakuru (Kakuru & Company Advocates/Greenwatch Uganda); Dr. Emmanuel Kasimbazi (Faculty of Law, Makerere University); Engineer Paul Mubiru (Ministry of Energy & Mineral Development); Mr. Oweyegha Afunaduula (National

Association of Professional Environmentalists - NAPE); Engineer Dr. Frank Sebbowa (Electricity Regulatory Authority); Mr. Kamese Geoffrey (NAPE); Ms. Noreen Nampewo (NAPE) and Mr. Angelo Izama (*The Monitor*). Thank you all very much for making the time to respond to my inquiries.

Professor Kim Brooks (Dalhousie University) has been a mentor and friend for years and I continue to be indebted to her for her intellectual guidance and support. I am grateful for the many friendships that I have made at UBC, which have made the past four years memorable. Special thanks to Ronke, Mosope and Claudia for their constant encouragement and support. To my countless dear friends in different parts of the world, thank you for encouraging me and providing the much-needed support.

My family has always been my rock and I can never thank them enough. Mummy: for being the source of my courage, strength and providing infinite love. My dad: for the support that you have provided over the years. My amazing siblings: Didi, Natasha, Nina, FT, Sarah, Moses and Big Ish, for believing in me always, loving me and making me laugh. Khaila, Jamal, Adam and Amira: for being such huge bundles of joy. And Ebrah: for being my sounding board and making me laugh. To my Vancouver family: Annette, Shiva, Esau, Shawn, Asher and Isaac – your selflessness and kindness have provided a home away from home. You have made this a truly memorable journey.

DEDICATION

To the loving memory of my grandfather:

Hajji Musa Kasule (Abii)

and to my mother:

Hajjati Nuruh Luttah Kasule, forever my inspiration.

INTRODUCTION

Through a Legal Lens: Analyzing the Role of Law in Facilitating the Inclusion (and Exclusion) of Project-Affected Communities in Decisions Relating to Large Dam Projects

I. Background to the Research Problem

Uganda is experiencing an acute energy crisis that has resulted in frequent electricity rationing, diverted government finances from other public expenditure to subsidize the energy sector, threatened the means of livelihood of many, led to erratic increases in electricity tariffs, and increased agitation as those affected become anxious about how long the crisis will last and how much will be lost in the process.¹ As a major part of the solution to the crisis, the Government of Uganda (the Government) – in close consultation with the World Bank (the Bank) – seems to have found its answer in the construction of a large hydropower plant: the Bujagali Hydroelectric Project (the Bujagali Project/the Project). The Bujagali Project is a proposed 250 megawatt run-on-the-river hydroelectric plant designed to provide a reliable source of electricity to customers on the national grid and to expand connectivity to the grid.² Described as the largest private sector investment in East Africa, project proponents contend that once it is commissioned, the Project will provide a cheaper source of energy that will fuel economic growth and development in the country.³

¹ See World Bank, “Bujagali Hydropower Project: About the Project”, online: The World Bank Group<<http://www.worldbank.org/bujagali>> [About the Project]; World Bank, “Bank Management Response to Request for Inspection Panel Review of the IDA-Financed Uganda Third Power Project (Credit 2268-UG) and the Proposed Bujagali Hydropower Project” online: World Bank<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/BUJ_Management_Response_09_12_01.pdf> at 1[2001 Management Response to Request for Inspection]; Christopher Gore, “Electricity and privatisation in Uganda: The origins of the crisis and problems with the response” in David A McDonald, ed., *Electric Capitalism: Recolonising Africa on the Power Grid* (South Africa: HSRC Press, 2008) at 359 [Electricity and Privatisation in Uganda].

² World Bank, About the Project Ibid.

³ World Bank, 2001 Management Response to Request for Inspection supra note 1 at vi.

Critics argue otherwise. They maintain that the generated electricity will be exclusive to a few Ugandans because of its anticipated high price and its inability to expand connectivity as widely as its proponents claim.⁴ Consequently, a majority of Ugandans will remain without access.⁵ Opponents also argue that the Bank and the Government did not adequately explore cheaper alternatives such as solar, geothermal and wind, before approving the Project.⁶ Additionally, they maintain that the Bujagali Project has a number of adverse impacts on local communities including lack of proper resettlement plans for those displaced⁷ and the threats caused by the Project to the rich cultural and spiritual heritage of the Basoga.⁸ Furthermore, they opine that the Project has numerous adverse environmental impacts including submerging highly productive land on the river banks, destroying endemic fisheries and submerging highlands of high biodiversity.⁹ Lastly, they argue that by cordoning off the spectacular Bujagali Falls, the Project will kill the budding tourism industry.¹⁰

⁴ International Rivers, “Stop US-based AES Electric, Ltd. From Damming Uganda’s Bujagali Fall” online: International Rivers<<http://www.internationalrivers.org/en/africa/stop-us-based-aes-electric-ltd-damming-ugandas-bujagali-falls>> [Stop AES Electric].

⁵ Ibid.

⁶ National Association of Professional Environmentalists (NAPE), “Lodging A Claim on the Proposed Bujagali Hydropower Dam and Interconnection Projects in Uganda” (March, 2007) online: World Bank Inspection Panel <<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/InspectionPanelClaim.pdf>> [2007 Request for Inspection] at 5; NAPE, *A Spot Check on Compliance and Performance of World Bank and African Development Bank in Uganda’s Energy Sector: Success or Failure Story?* (Uganda: NAPE-(FOE), 2009) at 1 [A Spot Check on Compliance].

⁷ NAPE, 2007 Request of Inspection Ibid. at 11 & 12; NAPE, *The Unresolved Issues in the Bujagali Project in Uganda: A Lack of Transparency and Public Participation* (National Association of Professional Environmentalists, June 2007) at 4 [The Unresolved Issues in the Bujagali Project].

⁸ NAPE, A Spot Check on Compliance supra note 6 at 9 & 10.

⁹ Tom Nevin, “Battle lines drawn over Bujagali dam” African Business (June 2007) at 57. See also Lori Pottinger et. al., “Letter to World Bank: Outstanding Concerns on Bujagali” (April, 2007) online: International Rivers< <http://www.internationalrivers.org/en/africa/bujagali-dam-uganda/letter-world-bank-outstanding-concerns-bujagali>>.

¹⁰ NAPE, *The Unresolved Issues in the Bujagali Project* supra note 7 at 4. In fact, in April 2010, a local newspaper reported that Bujagali Falls would cease to exist in January 2011 as construction of the power plant neared completion. It also noted that the site at Bujagali Falls had been famous for white water-rafting, bird watching, site seeing and educational trips. See David Mugabe, “Bujagali Falls to Close in January 2011” (9

While the Bujagali Project attracts numerous angles of contestation,¹¹ this thesis focuses on its impact on communities living around the project area i.e. project-affected communities (Affected Communities). Specifically, it inquires into the manner in which law has been employed to facilitate the inclusion or exclusion of the interests of Affected Communities. It also compares the legal framework governing the interests of these communities with that established to protect the proprietary interests of the private investors that construct and operate the dams that cause displacement.

Extant literature about large infrastructure projects such as hydropower plants frequently analyzes these projects from two main perspectives: a “dams and development” perspective on the one hand and an investment perspective on the other hand.¹² Dam literature largely concentrates on the social and environmental impacts of dam construction, economic benefits (or the lack thereof) of dams, and the process of decision-making, particularly the mechanisms put in place to ensure that the different stakeholders are represented in the decision-making process.¹³ At the centre of “dams and development” discourse are “people”, “the environment” and a conflict between traditionally weak parties (such as Affected Communities) and powerful actors (such as multinationals, governments and

April 2010) online: The New Vision <<http://www.newvision.co.ug/D/8/13/715734>>; NAPE), 2007 Request for Inspection supra note 6 at 5.

¹¹ See Chapter One, Part II.

¹² The phrase ‘dams and development’ as used here refers loosely to that literature that makes the case for or against the construction of dams, and literature that illustrates the manner in which grassroots have participated in dam debates – largely through social movements. The ‘investment perspective’ on the other hand concentrates primarily on literature that highlights the concerns of investments in large infrastructure projects.

¹³ See generally World Commission on Dams, *Dams and Development: A New Framework for Decision Making – The Report of the World Commission on Dams*, (Earthscan Publications Limited, November 2005), online: The World Commission on Dams <<http://www.dams.org/docs/report/wcdreport.pdf>> [Dams and Development] and Sanjeev Khagram, *Dams and Development: Transnational Struggles for Water and Power* (Cornell University Press, 2004).

international organizations, particularly, International Financial Institutions (IFIs)).¹⁴ This literature is also largely dominated by anthropologists, sociologists, environmentalists, political scientists, and engineers. Where legal scholars have interacted with these projects, it has often been in the context of human rights¹⁵ and the expanding role played by extra-legal methods such as resistance.¹⁶ It is important to keep this human rights debate alive. However, on its own, the language of human rights is insufficient in contesting the manner in which such projects distribute and allocate rights and responsibilities.¹⁷

The other related – yet often unconnected part of the conversation – takes place in the literature on investments in large infrastructure projects. Because this discourse views these projects first as investments (and increasingly, as private investments) before (or to the exclusion of) anything else, this literature takes a largely property-centred approach. This is the case whether the literature supports or contests the projects in question. For example, those who support such projects lobby for the protection of the proprietary interests of investors on grounds of: the huge amounts involved, the ability of investors to deliver more efficiently than governments and the fact that these investments release government

¹⁴ It is observed here that the apparent divide between traditionally weak parties and those considered powerful is a complex one. As has been noted elsewhere, neither of these actors is homogenous in thought or action and there are often internal struggles and conflicts between these actors. In other words, hegemony is constantly shifting and power shifts exist even within what have often been considered traditionally weak parties. See William F. Fisher, “Development and Resistance in the Narmada Valley” in William F. Fisher, ed., *Toward Sustainable Development: Struggling Over India’s Narmada River* (Armonk: M.E. Sharpe, 1995) at 15 and Dolores Koenig, “Enhancing Local Development in Development-induced Displacement and Resettlement Projects” in Chris De Wet (ed.) *Development-Induced Displacement: Problems, Policies and People* 18 Studies in Forced Migration (Berghahn Books, 2006) at 118 & 119.

¹⁵ See, for example, Upendra Baxi, “What Happens Next is Up To You: Human Rights at Risk in Dams and Development” (2001) 16 *American University International Law Journal* at 1507 – 1529.

¹⁶ See generally Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press, 2003).

¹⁷ David Kennedy, “‘Laws and Developments’: The ‘Rule of Law’ As Development” in John Hatchard & Amanda Perry-Kessaris (eds.) *Law and Development: Facing Complexity in the 21st Century* (United States: Cavendish Publishing, 2003) at 18.

finances to other public expenditures.¹⁸ They dislocate “people issues” in favour of a healthy business climate. In practice, investors themselves often incorporate Affected Communities only as part of their risk-factor analysis and primarily to satisfy conditions for project approval. The investment literature that problematizes such projects resides more in the genre of literature problematizing investments in general (not dams in particular).¹⁹ This literature contests the biased protection of private proprietary interests and the role of law in legitimizing that protection.

Ultimately, these two bodies of literature often talk past each other by studying these projects in independent and mutually exclusive camps – as though they dealt with two totally unrelated aspects. The literature is undeniably invaluable in articulating the challenges and proposing solutions for the issues identified in each category. Yet for the case of involuntary displacement and resettlement, taking such unipolar perspectives invariably underplays the fact that in reality, these tensions – of “the human” and “the property”²⁰ – coexist in the same space and dictate the ordering of different interests. In other words, without interacting simultaneously with these two often conflicting tensions,

¹⁸ Colin Kirkpatrick, David Parker and Yin-Fang Zhang, “Foreign Direct Investment in infrastructure in developing countries: does regulation make a difference?” (2006) 15:1 *Transnational Corporations*; Sheoli Pargal, “Regulation and private sector investment in infrastructure: Evidence from Latin America” (2003) World Bank Policy Research Working Paper 3037; Anton Eberhard, “Infrastructure Regulation in Developing Countries: An Exploration of Hybrid and Transitional Models” Public-Private Infrastructure Advisory Facility Working Paper No. 4 <<http://www-wds.worldbank.org>>.

¹⁹ See, for example, Anthony Anghie, “International Financial Institutions” in Christian Reus Smit (ed.) *The Politics of International Law* (Cambridge University Press, 2004) at 217 – 237; M. Sornarajah, *The International Law on Foreign Investment* 2d ed. (Cambridge University Press, 2004); Anthony Anghie, “Time Present and Time Past: Globalization, International Financial Institutions and the Third World” (2000) 32 *N.Y.U J. Int’l L. & Pol.* at 243 – 290.

²⁰ The distinction between “the human” and “the property” as used here should not be interpreted as suggesting that displaced communities do not have property interests. In fact, property interests are central to the livelihoods of these communities. Consequently, “property” as used here should be seen as highlighting the emphasis that (international) law has placed on protecting a particular type of property, being the proprietary interests of foreign private investors.

without deliberately acknowledging that the tensions overlap in decision-making, the analysis of the challenges to and proposals for improvement become somewhat removed from the everyday realities and complexities of such projects. Therefore, for purposes of dealing with the issue of involuntary resettlement, instead of analyzing these projects as either dam projects or investments in large infrastructure, this thesis studies them for what they actually are: investments in dam (and other development) projects. By breaking the walls between the two, the thesis hopes to:

- (a) understand the tensions surrounding the two perspectives and how these tensions influence the ordering of different interests;
- (b) establish whether the knowledge gleaned from such a merger is helpful in developing systems that incorporate the interests of Affected Communities.

To achieve the above objectives, the thesis uses law as its analytical tool. In practice, law often serves a dual – but conflicting - purpose. On the one hand, it has the potential to further the interests of the less powerful by serving as a “protective shield”.²¹ For example, the international legal order has sometimes empowered Third World states against the domination of the more powerful Western countries.²² At the same time, it has created infrastructure through which Third World peoples can contest the marginalization emanating from their own governments.²³ For example, as illustrated in Chapter Three, soft

²¹ B.S. Chimni, “Third World Approaches to International Law: A Manifesto” in Anthony Anghie, Bhupinder Chimni, Karin Mickelson and Obiora Okafor (eds.) *The Third World and International Order: Law, Politics and Globalization* (Martinus Nijhoff Publishers, 2003) at 72.

²² B.S. Chimni, “International Institutions Today: An Imperial Global State in the Making” (2004) 15:1 *European Journal of International Law* at 6.

²³ *Ibid.*

law has been employed to insist on resettlement plans even in countries that lack regulatory frameworks on the issue of involuntary resettlement.²⁴ Also, the recommendations contained in Chapter Six of this thesis utilize legal tools to propose a framework in which Affected Communities can benefit from development projects.

On the other hand, it is important to acknowledge that law is rarely a neutral arbiter.²⁵ However, by claiming neutrality, rationality and objectiveness, it is often able to legitimate dominant ideas.²⁶ Too frequently, law is the (unjust) process through which ideology is imposed as reality and unsanctioned intervention promoted in the name of even-handedness.²⁷ Law is also the apparatus utilized to snatch (economic) power from Third World peoples and states to place it in the hands of seemingly rational, apolitical and technical IFIs.²⁸ Consequently, if left uncontested, law often buttresses hegemony.²⁹

²⁴ See generally Chapter Three. See also World Bank, "Operational Manual: Operational Policy (OP) 4.12" (December, 2001 - as updated in March, 2007) online: World Bank < <http://web.worldbank.org> > [OP 4.12]; World Bank, "Operational Manual: Operational Policy (OP) 4.10" (July, 2005) online: World Bank < <http://web.worldbank.org> > [OP 4.10].

²⁵ James Thuo Gathii, "Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy" (2000) 98 Mich. L. Review at 2025 [Neoliberalism, Colonialism and International Governance]; Ibironke T. Odumosu, "Locating Third World Resistance in the International Law on Foreign Investment" (2007) 9 International Community Law Review at 440.

²⁶ Chimni, "Third World Approaches to International Law: A Manifesto" supra note 21 at 60.

²⁷ Gathii, "Neoliberalism, Colonialism and International Governance" supra note 25 2026.

²⁸ Chimni, "Third World Approaches to International Law: A Manifesto" supra note 21 at 52; Anghie, "International Financial Institutions" supra note 19 at 223. See also Sundhya Pahuja, "Beheading the Hydra: Legal Positivism and Development" 2007 (1) Law, Social Justice & Global Development Journal (LGD). <http://www.go.warwick.ac.uk/elj/lgd/2007_1/pahuja> at 7; Chimni, "International Institutions Today: An Imperial Global State in the Making" supra note 22 at 1 & 2.

²⁹ Trubek & Galanter argue, for example, that "Legal changes ostensibly designed to reform major areas of social life and achieve developmental goals may in fact be a form of symbolic politics, the effect of which is not to cause change but to defeat it by containing demands for protest, thereby strengthening, rather than weakening groups committed to the status quo." David M. Trubek & Marc Galanter, "Scholars in Self-Enstrangement: Some Reflections on the Crisis in Law and Development Studies in the United States" (1974) Wisconsin Law Review at 1084.

Ultimately, whatever its role (whether positive or negative) in a particular project, the centrality of law cannot be denied. Law is the politics through which the interests of competing parties are formalized and secured. By focussing on a legal approach, this thesis does not claim that the boundaries between law and other issue areas such politics or economics are clear. Neither does it seek to displace or underplay the role of traditional political or economic theories in explaining the issues under review. Importantly, it is conscious of the fact that law is not a substitute for the economically and politically driven development framework but rather, one through which the distribution of those resources is contested and realised.³⁰ As such using a legal lens makes it possible to magnify the interplay of these different factors and actors.³¹ And while the thesis draws attention to the negative aspects of formal legal tools, it does not, by such action, deny the ability of law to reform. To this end, this thesis aspires for a framework in which the greed of a selected few is replaced by the ethics and morality of legal justice. Sornarajah opines, for example:

I speak of a lost law in terms of international law on the basis that the moorings of international law should lie in peace, fairness and justice to the people of the world ... It has been cut off from these moorings in the last few years as a result of the rise of doctrines of neo-conservatism with its emphasis on economic liberalism, democratic governance and use of force to achieve these objectives, if necessary, for the benefit of dominant groups within dominant states. As a result, the true basis of the law has been subverted so that the prosperity of a few could be callously achieved. Clever arguments are made to justify the position. Caught in

³⁰ See Kennedy, “‘Laws and Developments’: The ‘Rule of Law’ As Development” supra note 17 at 18.

³¹ Ibid. at 19 & 20. Kennedy notes at 26 that “... the struggle for development itself – the struggle to grow the pie in the first place – is also and unavoidably a place of political and economic choice. Choices which are contested. Building a legal regime involves choices, choices implicate distributive objectives which contribute to development in different ways.” While Kennedy proposes an analysis of political and economic theories (as opposed to the laws on investment reviewed in this thesis), an analogy can be drawn here between his argument and the one made in this thesis. Kennedy posits that it is important to study economic theories to understand the manner in which law distributes resources. Similarly, it is suggested here that it is necessary to study the investment perspective of dams (through studying the legal infrastructure affecting investment) in order to understand how different interested are represented and what drives the decision-making process.

this vortex of greed, the element of the normative content of law has gone missing in international law.³²

In a bid to uncover the traces of legal (in)justice, the critique in this thesis is loosely divided into three sections (found in Chapters 3, 4 and 5): an investigation of the role of international legal norms in resettling and rehabilitating Affected Communities, an examination of the adequacy of the institutional frameworks that have been established to protect the interests of Affected Communities and how these compare with those established to protect the interests of private investors. In the end, the thread that stitches all the pieces together is the documentation of the hegemonic character of formal legal institutions and how this hegemony can be reversed and reconstructed for the benefit of Affected Communities. My hypothesis is that by studying the domestic and international legal infrastructure governing resettlement issues on the one hand, and understanding the manner in which investment policy largely foregrounds economic liberalization on the other hand, we are able to locate how different interests are prioritized and to design strategies targeted at reconstructing and expanding the margins of inclusion.

The Bujagali Project serves as a case study for wider questions relating to development, law and hegemony. This research is timely because in addition to other large hydropower projects being planned in the country,³³ Uganda promises to host an increasing number of privately sponsored development projects in the coming years, especially given the recent

³² M. Sornarajah, "A law for need or a law for greed?: Restoring the lost law in the international law of foreign investment" (2006) 6 *International Environmental Agreements* at 331.

³³ See Chapter One Part II.

discovery of oil wells in the country.³⁴ Also, large infrastructure and development projects in neighbouring Kenya and Tanzania – and in fact in most of Africa – would benefit from the analysis in this thesis. At the same time, the relevance of the thesis extends to development projects worldwide. While the past thirty years or so have witnessed a considerable decrease and even decommissioning of dam projects in most developed and some developing countries,³⁵ there continue to be other huge development projects that displace large populations.³⁶ Invariably, the questions asked here and the solutions proposed will likely differ by geographical location. However, the central notion of demanding a rethinking of the role of law in guiding social change and promoting counter-hegemonic struggles remains relevant worldwide.

II. Research Questions

This thesis poses the question: In what manner and to what extent has interacting with international and national legal norms and institutions facilitated the inclusion or exclusion

³⁴ Oil exploration activities intensified in 2006 when in January of that year, an Australian oil exploring company – Hardman Resources Limited – discovered oil in western Uganda. In January 2009, two other companies (Tullow Oil and Heritage Oil) that had been involved in the exploration since the initial discovery found what promised to be perhaps the largest oil wells in Africa in western and northern Uganda. See Daily Trust, “Africa’s largest oil wells discovered in Uganda”, online: Daily Trust<http://www.dailytrust.com/index.php?option=com_content&task=view&id=2973&Itemid=15:testset>. Also, in the Government’s 2009/2010 Budget speech, the Minister of Finance noted that petroleum reserves had grown from 300 million barrels of oil in 2006 when the first discovery of oil was made to 2 billion barrels of oil at the end of 2008/2009. See Syda N. M. Bbumba, “Budget Speech: Financial Year 2009/10” (June, 2009) online: Ministry of Finance, Planning & Economic Development <http://www.finance.go.ug/docs/Budget%20Speech_FY2009_10_Final.pdf> at 21 & 22.

³⁵ In 2004, for example, Khagram observed that “Over the past quarter century, opponents of big dams have contributed to the reform, postponement, cancellation, and even decommissioning of these projects in industrialized countries, such as the United States, Sweden, and France; in the former Communist bloc, Soviet successor states and Eastern Europe; and across the third world from Chile to Namibia to Nepal.” Khagram, *Dams and Development: Transnational Struggles for Water and Power* supra note 13 at 2 & 3.

³⁶ Examples of such projects include mineral, oil and gas exploration projects that often displace vulnerable members of communities such as First Nation/Aboriginal communities (indigenous groups); and large housing and commercial development projects which displace the poor.

of the interests of Affected Communities in decisions relating to development projects?

More specifically:

- a) Why is it that, despite the existence of a long-standing World Bank policy on involuntary resettlement, Affected Communities continue to be adversely affected by development-induced displacement and resettlement (DIDR)? Specifically, why have the communities displaced by the Bujagali Project not adequately benefited from the application of this Bank policy?
- b) What is the legal status of the World Bank Inspection Panel (the Inspection Panel/the Panel) and how does this status affect the findings that it makes? What does this mean for the findings that the Panel made in respect of the Bujagali Project?
- c) How do investment decisions, including the conclusion of contracts and enactment of investor-friendly legislation, help us understand, first, how Affected Communities are marginalized, and second, how marginalization can be eliminated or at least reduced?
- d) What is the importance of examining and interrogating projects such as the Bujagali Project from a Third World legal optic?

The wider questions, which are of great interest, but which are not fully answered by this thesis are:

- a) How do we explain the continued failure of commercial development projects to improve livelihoods of the poor in the Third World despite the astronomical amounts that have been invested by different parties?

- b) Given the negative publicity against the Bujagali Project by activist groups, what explains the absence of sustained grassroots opposition to the Project?

III. Thesis Contribution

This thesis contributes to international legal discourse in various ways. First, it extends existing legal analysis of the role that IFIs (such as the World Bank) play in domestic investment and development decisions of Third World countries. Specifically, it locates itself within the rapidly expanding genre of literature known as Third World Approaches to International Law (TWAIL). As illustrated in Chapter Two, TWAIL scholarship unpacks mainstream international law with the aim of exposing its biases and hegemony on the one hand, and reconstructing it to a counter-hegemonic international law on the other hand. It undertakes both tasks by writing a Third World voice – of both states and peoples – into international law. This thesis adds its voice to TWAIL literature by unpacking the manner in which the Bank, through its policy on involuntary resettlement and its neo-liberal economic policies, may protect the interests of economically powerful actors to the detriment of weak Third World peoples.³⁷ To this end, the thesis develops what it calls ‘A TWAIL Critique of International Law and Development’.

Second, by analyzing simultaneously the legal framework governing decisions on investments and dams – or by analyzing dams as investments projects – this thesis produces a nuanced approach to the understanding of the practical realities and complexities involved in designing large infrastructure projects. Christopher Gore has recently explored the

³⁷ See, for example, Anghie, “International Financial Institutions” supra note 19 at 217 – 237.

relationship between privatization and the decision to construct the Bujagali Project by arguing that there is an intimate connection between the privatization of Uganda's energy sector and the Bujagali Project as the preferred response to the country's electricity crisis.³⁸

He maintains that:

the future of the electricity sector did not simply rest on a desire to clean up and improve operational efficiency of the service provider. Public sector reform was part of a much more complex and ambitious vision for sector change reminiscent of the colonial period and the construction of Owen Falls Dam.³⁹

Gore's analysis is insightful in establishing the strong link between neo-liberal policies (such as privatization) advocated by IFIs and the manner in which these policies translate themselves into development projects (such as dams). The thesis draws inspiration from Gore to conceptualize the relationship between investment decisions and the choice of dams as development projects. In addition to expounding on Gore's work, the thesis distinguishes itself by grounding its discussion in a legal analysis (as opposed to one based principally on the politics of power).⁴⁰ The discussion does not provide an in-depth inquiry into the important question of whether the Bujagali Project was the right option for addressing Uganda's energy crisis. Rather, it interrogates the role of law in protecting the interests of the communities affected by the Project by comparing the legal framework governing the latter's interests with that protecting the proprietary interests of investors.

³⁸ Gore, "Electricity and privatisation in Uganda" *supra* note 1 at 364.

³⁹ *Ibid.* at 382.

⁴⁰ This, of course, is not to suggest that the law is apolitical. In fact, the TWAIL theoretical analysis that is applied extensively in the discussion in this thesis explicitly acknowledges law as a political dialectic. See, for example, Makau wa Mutua, "What is TWAIL?" (2000) *American Society of International Law Proceedings* at 31. Yet like TWAILers, the analysis in this thesis will work 'from the law outwards' – that is, it will use legal analysis as the starting point to project the politics of law, especially in as far as hegemony is concerned.

Third, this thesis is symbolic of the diversity that exists even within the category of states and peoples collectively identified as constituting the Third World. As such, it opposes claims of universality and homogeneity by aligning itself with those who see the Third World as a “chorus of voices”.⁴¹ What this means is that there are instances where the thesis acts as a counter-narrative to experiences and solutions found useful in some other parts of the Third World. This is the case, for example, with the way in which the discussion problematizes the construction of indigeneity offered by organizations such as the Bank (Chapter Three). The dynamics of difference is also relevant in making the preliminary observations about why resistance has been largely absent in Uganda (Conclusion).

The study also promises to be policy-relevant and prescriptive. The findings and recommendations made here may be useful to a number of actors including the Government of Uganda and its peoples, social activists in and outside Uganda, international organizations (particularly the World Bank), the investment community and practitioners in international law and development studies.

IV. Chapter Arrangement

The thesis has six chapters and a conclusion. Chapter One lays the foundation for the discussion in the rest of the thesis by providing a brief background on Uganda, describing the Bujagali Project and outlining some of the debates surrounding dam construction. This chapter also contains some definitional work on how Affected Communities have been

⁴¹ See Karen Mickelson, “Rhetoric and Rage: Third World Voices in International Legal Discourse” (1998) 16 *Wisconsin International Law Journal* at 360.

constructed, highlights some of the concerns raised by these communities and details the domestic legal framework governing development-induced displacement.

Chapter Two is the main theoretical and methodological chapter. It employs a combination of TWAIL and critical development theory to establish a theoretical base for analysing the issues raised in the thesis. TWAIL is pertinent to the present analysis for a number of reasons. First, it demonstrates that law is neither apolitical nor neutral. It is a tool used by dominant groups to suppress alternative ways of knowing and being. Second, TWAIL showcases the diversity within the Third World and rejects views that perceive the Third World as a monolithic entity. This means that laws and policies that have a tendency to treat Third World peoples as a block are bound to be ineffective. Third, it acknowledges the differences between Third World states and Third World peoples, observing that it is not in all instances that these states act in the interests of their peoples. Lastly, TWAIL is a theory of resistance. It maps out the contributions of grassroots movements to the remaking and redefining of international legal norms.

Critical development theory is useful in interrogating development as a construction aimed at furthering the interests of dominant groups in the global society. It exposes the biases of development to explain why development projects are largely unsuccessful. Chapter Two combines the theories of TWAIL and critical development to produce what I refer to as a TWAIL Critique of International Law and Development. It then develops themes around this merger that are used to guide the analysis in the rest of the thesis. This chapter also contains a detailed description on the methodology used for the study.

In Chapter Three, one major question is posed: why is it that despite the existence of a long-standing Bank policy on involuntary resettlement, DIDR initiatives have largely failed to benefit Affected Communities? After exploring the various explanations that have been given for the failure of involuntary resettlement initiatives, the discussion examines the provisions of the Bank Policy on involuntary resettlement. The chapter submits that one reason for this failure is that the Bank policy places emphasis on physical resettlement and/or compensation for lost assets, without fully incorporating other long-term impacts of displacement on those affected. It juxtaposes the Bank policy on involuntary resettlement with that on indigenous peoples to illustrate the shortcomings of the former. Lastly, the chapter observes that the legal framework governing the policy is insufficient to secure the interests of Affected Communities.

Following from the Chapter Three analysis of the Bank's operational policies, Chapter Four analyzes the practical application of these policies through the operation of the Inspection Panel. This chapter critically examines the role and powers of the Panel, particularly whether the latter's findings are binding on the parties to a claim. This inquiry is helpful in understanding and establishing the extent to which Affected Communities should rely on the Inspection Panel as a mechanism of inclusion. This chapter also traces how resistance has been used to expand the Panel's margins of inclusion.

Because this thesis promises to introduce an investment perspective to an issue that is too frequently analyzed in non-investment terms, Chapter Five brings investment considerations to the forefront. The introduction of investment issues at this stage in the thesis is

strategically designed to follow the previous discussions that place Affected Communities at the centre. It also flows from the fact that the literature discussing DIDR rarely does so from an investment perspective. Consequently, the “non-investment” literature produces the groundwork on which the investment-centred analysis is made. The chapter examines the relevant domestic and international legal infrastructure noting that often, this infrastructure places emphasis on attraction of private investment and protection of proprietary interests of investors. Because investment interests often run counter to the interests of others (including Affected Communities) placing private investors’ interests ahead of all else means that concerns of Affected Communities are normally side-stepped and/or suppressed.

Chapter Six provides recommendations aimed at ensuring that the planning and execution of development projects incorporate and protect the interests of Affected Communities. It proposes changes to the international legal framework including revising the Bank policy on involuntary resettlement and giving the Inspection Panel powers to produce binding decisions. For the domestic level, the chapter provides a detailed proposal on the enactment of legislation on involuntary resettlement and rehabilitation, including some of the important aspects that should be contained in such legislation. Lastly, it recommends that contracts aimed at protecting Affected Communities should be entered into between project developers and affected communities. As an example of such contracts, it suggests Impact and Benefit Agreements. These agreements are increasingly being used to protect local communities in oil, gas and mining projects in countries such as Canada and Australia and in large housing and infrastructure projects in countries such as the United States.

The Conclusion raises one question for future inquiry: Why is it that despite the numerous claims made against the Bujagali Project, the project has managed to proceed without as much grassroots resistance as has been witnessed in similar projects in other parts of the Third World? Some preliminary explanations are offered, which require further investigation. One is the impact that ethnic cleavages may have on mobilizing resistance. The other is the challenge of establishing a culture of resistance in a country which was ravaged by civil and political wars for more than twenty years after independence.

CHAPTER 1

Laying the Foundation: Constructing Large Dams, Defining Project-Affected Communities and Establishing the Domestic Legal Framework

I. Introduction

By the end of the year 2000, there were approximately 45,000 large dams worldwide.¹ In Africa alone, dams account for approximately one fifth of total electricity generating capacity installed.² This is a significant proportion when one takes into account the fact that most of the total generating capacity is actually concentrated in a few countries such as South Africa (where 90% of the electricity is generated by coal plants) and North Africa (which has converted oil-fired facilities to run gas).³ Most other African countries rely heavily on hydropower plants that were constructed either during the colonial era or shortly thereafter.⁴ In Uganda, for example, it is estimated that 99% of the country's electricity supply is from hydropower.⁵ Elsewhere in the continent, countries are aggressively exploring and exploiting this natural resource. For example, currently, there are more than

¹ World Commission on Dams, *Dams and Development: A New Framework for Decision-Making* (Earthscan Publications Limited, 2000) at ix. Also available online: United Nations Environment Programme <http://www.unep.org/dams/WCD/report/WCD_DAMS%20report.pdf> [Dams and Development].

² It is estimated that dams generate 23,000MW of the 115,000MW total installed capacity. See Neil Ford, "Unlocking African hydro potential" (2007) 59:8 *International Water, Power & Dam Construction* at 11.

³ Ibid.

⁴ Ibid at 11 - 13. Ford notes that in Ethiopia, for example, hydro contributes 670mw out of the total generating capacity of 713mw on the national grid. Elsewhere, Sharife submits that 60% of Africa is dependent on hydroelectricity as a major source of their energy. See Khadija Sharife, "Damnation for Africa's big dams?" (April, 2009) *African Business* at 52.

⁵ Sharife, "Damnation for Africa's big dams?" Ibid. See also Kaijuka who states that hydropower dominates electricity generation in Uganda producing nearly 100 times more than any other source. Elizabeth Kaijuka, "GIS and Rural Electricity Planning in Uganda" (2007) 15:2 *Journal of Cleaner Production* at 216. However, with the electricity crisis in Uganda, the World Bank recently reported that the country had to move from a primarily hydro-based system of generation in 2005 to a situation in 2007 in which at least 45 per cent of generation relies on thermal plants. See World Bank, *Bank Management Response to Request for Inspection Review of the Uganda Private Power Generation Project (Proposed)* (2007) online: World Bank Inspection Panel <<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/ManagementResponse.pdf>> at 3 [2007 Management Response to Request for Inspection].

7500MW of large hydropower projects being built in different parts of Africa.⁶ There is even talk of a mega 45,000MW (US \$ 50 billion worth) Grand Inga Project to be constructed in the Democratic Republic of Congo that would dwarf most – if not all – other projects in the continent and supply electricity not only to the continent but also to the Middle East and Europe.⁷

Each of these statistics has significant implications for the communities living around dam-construction sites. Conservative estimates reveal that each year, about ten million people globally are displaced by large infrastructure projects such as dams, transportation systems or other urban infrastructure.⁸ In 2000, for example, the World Commission on Dams reported that a total of between 40 and 80 million people worldwide had been displaced by large dam projects.⁹ Displacement has resulted in landlessness, loss of livelihoods, disruption of social networks, and destruction of cultural and religious sites.¹⁰ Quite often, those displaced are also the most marginalized members of society in terms of their (in)ability to contest decisions or bargain for more favourable terms – at least as far as formal legal and political frameworks are concerned.

⁶ Norman A. Bishop, “The Key to Africa’s Energy Future” (2008) 60:10 *International Water, Power & Dam Construction* at 19. See also generally, Neil Ford, “Will integration spur dam construction?” (2008) 60:10 *International Water, Power & Dam Construction* at 10 -12 for the variety of large dam projects planned in different parts of Africa, particularly East Africa.

⁷ David A McDonald, “Electric capitalism: Conceptualising electricity and capital accumulation in (South) Africa” in David A McDonald, ed., *Electric Capitalism: Recolonising Africa on the Power Grid* (South Africa: HSRC Press, 2008) at 34 [Electric Capitalism: Conceptualising]; Sharife, “Damnation for Africa’s big dams?” *supra* note 4 at 52.

⁸ Ismail Serageldin, “Involuntary Resettlement in World Bank-Financed Projects: Reducing Impoverishment Risks for the Affected People” in Hari Mohan Mathur (ed.) *Managing Resettlement in India: Approaches, Issues, Experiences* (Oxford University Press, 2006) at 46. See also Michael M Cernea, “Risks, safeguards, and reconstruction: a model for population displacement and resettlement” in Michael M Cernea & Christopher McDowell (eds.) *Risks and Reconstruction: Experiences of Resettlers and Refugees* (Washington DC: The World Bank, 2000) at 11.

⁹ World Commission on Dams, *Dams and Development* *supra* note 1 at 104.

¹⁰ See Part II below and Chapter Three.

The central objective of this thesis is to establish the role that law plays in involuntary resettlement initiatives and to suggest legal reforms in this regard. The discussion utilizes the dominant role of IFIs in funding the construction and operation of large dams,¹¹ to suggest changes in the legal framework of these institutions that will enable better protection for Affected Communities. The questions raised in the thesis are as much a call for a rethinking of the role of law as they are a moral or ethical reminder of the need for concerted efforts to fight against hegemonic structures that frustrate the livelihoods of vulnerable members in our global society. These questions are intended to provoke us into rejecting – or at least feeling uncomfortable about – the manner in which legal tools are used to legitimize the over-protection of private capital to the detriment or at the expense of the protection of the interests of vulnerable groups. The issues explored here are thus as relevant to rural Uganda as they are to urban Canada.

This chapter is divided into five parts. Part II provides a brief background to Uganda's economic, social and political status before embarking on a description of the Bujagali Project. That part concludes with a discussion of some of the debates surrounding dam projects, including the issue of Affected Communities. Part III contains some definitional work on how Affected Communities are constructed and proposes a definition aimed at casting a wider net on who should be included in this definition. This is followed by Part

¹¹ In 1997, for example, Cernea (then a Senior Advisor for Social Policy and Sociology at the World Bank) noted that since 1970, the World Bank had supported the construction of about 350 large dams worldwide. Also, between 1980 and 1995, over 3 million people were displaced by approximately 225 projects that were supported by the Bank. Michael M. Cernea, "African Involuntary Population Resettlement in a Global Context" [Environment Department Papers] Social Assessment Series 045 (February 1997) online: World Bank<<http://www-wds.worldbank.org>> at 13. Similarly, the 2000 Report of the World Commission on Dams noted that of the World Bank-financed projects that result in displacement, large dams constitute 63%. World Commission on Dams, *Dams and Development* supra note 1 at 104.

IV, which discusses the domestic legal framework governing displacement in Uganda before concluding the chapter in Part V.

II. Providing Context: A Brief History of Uganda and Background to the Project

Uganda is a landlocked country located in East Africa. It is bordered by Kenya to the east, Sudan to the north, Democratic Republic of Congo to the west, and Tanzania and Rwanda to the South. It occupies a total surface area of approximately 241,550 square kilometres, with 199,807 square kilometres being covered by land and the remaining 41,743 square kilometres under water and swamps.¹² The country gained independence from Britain in October 1962. Aside from the political strife in the first twenty years following independence, there has been relative peace since the mid-1980s, with the exception of the prolonged civil unrest in northern Uganda, which continues to be an issue of concern.¹³

Uganda's population has been growing exponentially with an increase of almost five times between 1948 and 2002.¹⁴ As at mid-2009, the population was estimated at 30.7 million people.¹⁵ With a growth rate of almost 3.2% per annum, it is projected that by 2025, the country will have a population of approximately 55 million people and 130 million people

¹² Uganda Bureau of Statistics, "General Information on Uganda" online: Uganda Bureau Of Statistics <<http://www.ubos.org/onlinefiles/uploads/ubos/pdf%20documents/general%20information%20on%20uganda.pdf>>.

¹³ See the Conclusion to this thesis for a brief discussion of civil and political unrest in Uganda in the period following independence.

¹⁴ In 1948, the population was estimated at 5 million people. By 2002, it was 24.3million people. See Population Secretariat, *National Population Policy for Social Transformation and Sustainable Development* (2008) online: Population Secretariat, Ministry of Finance, Planning and Economic Development<http://www.popsec.org/publications_7_3950299347.pdf> at 8 [National Policy for Social Transformation].

¹⁵ Uganda Bureau of Statistics, "General Information on Uganda" supra note 12.

in 2050.¹⁶ As of 2006, there were approximately 65 indigenous communities or ethnic groups in the country.¹⁷ Each group has its own customs and norms, and while English is the official language in the country, each indigenous group has its local language.¹⁸ At least 31% of the population live below the poverty line.¹⁹ Despite the high levels of poverty, however, the country boasts of a fairly stable economic growth rate averaging 6% per annum.²⁰ Agriculture is the major source of income, contributing about 38.5% of Gross Domestic Product and providing a livelihood for about 90% of the population.²¹

In 2004, Uganda experienced an energy crisis, a situation that worsened in 2006 when electricity supply fell 22 per cent short of demand, thereby necessitating frequent “load shedding”.²² As a consequence, for some time now, businesses and other consumers have gone without electricity for several hours every day and at times even for days, leading many businesses either to shift production to times when electricity is available or to rely on

¹⁶ Population Secretariat, *National Policy for Social Transformation* supra note 14 at 8.

¹⁷ *Constitution of the Republic of Uganda*, 1995 [As at 15 February 2006], Third Schedule [The Constitution].

¹⁸ Uganda Bureau of Statistics “The 2002 Uganda Population and Housing Census, Economic Characteristics” (October 2006) online: Uganda Bureau of Statistics <<http://www.ubos.org/onlinefiles/uploads/ubos/pdf%20documents/2002%20CensusEconomicXteristicsAnalyticalReport.pdf>> at 1.

¹⁹ Population Secretariat, *National Policy for Social Transformation* supra note 14 at 3.

²⁰ Uganda Investment Authority, “Why Uganda: Uganda – A Distinctly Pro-Business Climate” online: Uganda Investment Authority

<http://www.ugandainvest.com/uia.php?uhpl=why_uganda&&uhpl1=Why%20Uganda>. In fact, in the financial year 2008/09, the country registered a real growth of 7% when compared to the Sub-Saharan average of 2.4%. See Syda N. M. Bbumba, *Budget Speech: Financial Year 2009/10* (June, 2009) online: Ministry of Finance, Planning and Economic Development <http://www.finance.go.ug/docs/Budget%20Speech_FY2009_10_Final.pdf> at 2 [2009/10 Budget Speech].

²¹ Population Secretariat, *National Policy for Social Transformation* supra note 14 at 15.

²² International Bank for Reconstruction & Development (IBRD) and International Development Association (IDA), *Management Report and Recommendation in Response to the Inspection Panel Investigation Report: Uganda Private Power Generation (Bujagali) Project* (2008) online: World Bank Inspection Panel <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/Management_Report_Nov_7_FINAL.pdf> at 1 [Management Response to 2008 Inspection Panel Report]. The Bank defines load shedding to mean “A procedure in which parts of an electric power system are disconnected in an attempt to prevent failure of the entire system due to overloading.”

high-cost back up generators.²³ In 2007, the World Bank reported that the country was losing approximately US\$ 6 million with each month that the commissioning date of the Bujagali Project was delayed.²⁴ As of December 2009, government estimated that it was spending approximately US\$ 50 million²⁵ every year to subsidize the electricity sector.²⁶

The electricity crisis has been attributed to a number of factors²⁷ including an 8 per cent increase in electricity demand that resulted in a surpassing of the supply; a drastic fall in water levels at Lake Victoria,²⁸ which affected the generation capacity at the two existing hydropower plants;²⁹ inefficiency in the distribution system that resulted in losses of both a technical (e.g. transmission losses) and non-technical (e.g. power theft and illegal connections) nature;³⁰ delays in commissioning additional generation capacity; and an increase in world petroleum product prices that resulted in an increase in the cost of

²³ World Bank, 2007 Management Response to Request for Inspection supra note 5 at 3.

²⁴ Ibid.

²⁵ This estimate is based on Bank of Uganda exchange rates of December 1 to 31 of 2009. The rates during that month were somewhere between Uganda Shillings 1,800 – 1900 to the US dollar. For purposes of the estimation, I have used an exchange rate of Shs 1,850 to the US dollar. See Bank of Uganda, “Financial Markets: Major Exchange Rates 2009 (December)” online: Bank of Uganda <http://www.bou.or.ug/bouwebsite/opencms/bou/collateral/download_archive.html?path=/bou/collateral/interbank_forms/&title=Financial%20Markets&subtitle=Major%20Foreign%20Exchange%20Rates&restype=BouInterbankAvgRate&secname=2009&year=2009&month=Dec> [Financial Markets].

²⁶ Interview of Engineer Paul Mubiru (Commissioner, Ministry of Energy & Mineral Development) (24 November, 2009) at Ministry of Energy Offices, Kampala, Uganda.

²⁷ See generally Christopher Gore, “Electricity and privatisation in Uganda: The origins of the crisis and problems with the response” in David A McDonald, ed., *Electric Capitalism: Recolonising Africa on the Power Grid* supra note 7 at 359 [Electricity and privatisation in Uganda]; World Bank, “Bujagali Hydropower Project: About the Project” online: The World Bank Group <<http://www.worldbank.org/bujagali>> [About the Project]; World Bank, 2007 Management Response to Request for Inspection supra note 5 at 2.

²⁸ The fall in water levels was attributed to a number of factors including drought, excessive irrigation and overuse by electricity generation. As a consequence of the low water levels, generation capacity is reported to have reduced significantly from 300MW to 135MW. Gore, Ibid. at 361.

²⁹ Between August 2006 and 2007, for example, the actual generation capacity at Nalubaale-Kiira was 120MW instead of the installed capacity of 380MW. See The Inspection Panel, “Investigation Report – Uganda: Private Power Generation (Bujagali Project (Guarantee No. B0130-UG))” (2008) online: World Bank <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/FULL_September_2_2008_FINAL_Red.pdf> at 16 [2008 Report of the Inspection Panel].

³⁰ In 2002, the total average system losses in Uganda, including technical and non-technical were at 41.5% when compared to an international average of 12%. See Gore, “Electricity and privatisation in Uganda” supra note 27 at 361.

alternative thermal sources. It should also be noted that the political crises of the 1970s and 1980s left public infrastructure in such a poor state³¹ that once relative peace was restored and the economy started booming, demand for electricity quickly surpassed supply.³²

As early as the 1990s, the Government had identified Bujagali Falls as a site for an energy project that would meet the country's medium to long-term energy requirements.³³ In 1997, the Government made its first request to the World Bank for an International Development Association (IDA) Partial Risk Guarantee to support construction of the Bujagali Project.³⁴ At the time, the Project would be sponsored by AES Nile Power (whose majority shareholder was a United States firm – AES Corporation) on a build-own-operate-transfer (BOOT) basis at a cost of US \$582 million.³⁵ On December 18, 2001, the World Bank approved the Partial Risk Guarantee.³⁶ However, partly as a result of local and international activism against the project, in August 2003, AES Nile Power announced that it was discontinuing construction at Bujagali and pulling out of the Project.³⁷ The victory of

³¹ Simon Peter Engorait, "Power Sector Reforms in Uganda: Meeting the Challenge of Increased Private Sector Investments and Increased Electricity Access Among the Poor" in Edward Marandu and Dorcas Kayo, *The Regulation of the Power Sector in Africa* (London: Zed Books, 2004) at 301 [Power Sector Reforms in Uganda].

³² Engorait notes, for example, that after completing the installation of all the turbines at the Owen Falls dam in 1968, it was found that demand still exceeded capacity – both locally and for export. However, plans to expand capacity upstream from the Owen Falls dam were brought to a halt when the country suffered political and economic turmoil between 1971 and 1986. In fact, in addition to the inability to expand capacity, that period did not allow even for the maintenance and smooth operation of the existing energy infrastructure. *Ibid.* at 301 & 302.

³³ The Inspection Panel, "Investigation Report – Uganda: Third Power Project (Credit 2268- UG) and the Proposed Bujagali Hydropower" (2002) online: World Bank <<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/UGANDAIRMainReport.pdf>> at 3 [2002 Report of the Inspection Panel]. In fact, some argue that the site was identified much earlier than this. Gore opines, for example, that as early as the 1920s, there were plans by the colonial government to build a dam at Bujagali. Gore, "Electricity and privatization in Uganda" *supra* note 27 at 383.

³⁴ The Inspection Panel, 2002 Report of the Inspection Panel *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.* at 5.

³⁷ International Rivers, "AES Pulls Out of Uganda Dam" online: International Rivers

project opponents was short-lived. In February 2005, the Government presented a new project design to a group of stakeholders and voted to revive the Project.³⁸ On 30 December 2005, the government concluded a deal with a consortium led by Industrial Promotion Services of the Aga Khan Fund.³⁹ The Project was officially revived. Through Bujagali Energy Limited (the Company), a company jointly owned by Sithe Global Power LLC (a US company) and Industrial Promotion Services, the Project resumed construction. According to the Power Purchase Agreement (PPA), Bujagali Energy Limited will own the project for a 30-year period, after which the facility will revert to government ownership.⁴⁰ The Company contracted Salini Costruttori S.P.A. (Salini) to construct the facility.⁴¹ The latter is also responsible for making all hiring decisions during the construction phase.⁴²

Financial closure of the Project occurred on December 21, 2007 where it was agreed that Bujagali Energy Limited would inject US\$ 190 million in equity; and IDA, International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA) would contribute respectively US\$ 115 million in the form of an IDA Partial Risk Guarantee, US\$

<<http://www.internationalrivers.org/en/africa/aes-pulls-out-uganda-dam>>. International Rivers and NAPE argue that AES pulled out for a number of reasons: performance shortfalls, reports of AES's involvement in corrupt practices relating to the project, social, economic and environmental controversies surrounding the project and the failure to reach financial closure at the Bank. See also National Association of Professional Environmentalists (NAPE), "Lodging A Claim on the Proposed Bujagali Hydropower Dam and Interconnection Projects in Uganda" (March, 2007) online: World Bank Inspection Panel <<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/InspectionPanelClaim.pdf>> at 2 [2007 Request for Inspection]. The World Bank on the other hand maintains that AES withdrew because of delays in implementing the project and a weakening of AES's financial position which was a result of the downturn in the United States markets around that period. World Bank, 2007 Management Response to Request for Inspection supra note 5 at 8.

³⁸ International Rivers, "Bujagali Being Revived: Civil Society Concerns" online: International Rivers <<http://www.internationalrivers.org/en/bujagali-being-revived-read-civil-society-concerns>>.

³⁹ International Rivers, "Bujagali Dam Rises Again in Uganda" online: International Rivers <<http://www.internationalrivers.org/en/africa/bujagali-dam-rises-again-uganda>>.

⁴⁰ Interview of Engineer Paul Mubiru supra note 26.

⁴¹ Bujagali Energy Limited, "Employment Opportunities" online: Bujagali Energy Limited <http://www.bujagali-energy.com/bujagali_contactUs1.htm>.

⁴² Ibid.

130 million as “A” and “C” Loans and US\$ 115 million as political risk guarantee.⁴³ As a temporary measure, in late 2006 and early 2007, the Government commissioned Dubai-based Aggreko International to operate two 50MW thermal generators.⁴⁴ Also, IDA financed an additional 50MW under the Bank-funded Power Sector Development Operation.⁴⁵

The Bujagali Project consists of the construction of a 250MW hydropower plant and a 30meters high rock-filled dam on the River Nile just below Bujagali Falls and about 8 kilometres downstream of the existing Nalubaale-Kiira hydropower plants.⁴⁶ The complex also involves the construction of a sub-station, 100km of transmission lines and other associated works.⁴⁷ A total area of 238 hectares is needed to construct project facilities.⁴⁸ The project sponsors identified 8,700 people as being directly affected by the Bujagali Project, 714 of whom were physically displaced and the rest affected in ways other than physical displacement.⁴⁹ Because this figure relates to “direct” impacts,⁵⁰ and given the fact that it is provided by the project sponsor, there is a likelihood that it is a conservative estimate. Also, while this number may appear small when compared to the hundreds of thousands and even millions of people displaced by dams in countries such as China and India,⁵¹ it is important to keep in mind that for each person displaced, there is a real impact

⁴³ IBRD & IDA, Management Response to 2008 Inspection Panel Report *supra* note 22 at 6.

⁴⁴ Gore, “Electricity and privatisation in Uganda” *supra* note 27 at 363.

⁴⁵ The Inspection Panel, 2008 Report of the Inspection Panel *supra* note 29 at 17.

⁴⁶ *Ibid.* at 29.

⁴⁷ *Ibid.* at 29 & 30.

⁴⁸ *Ibid.* at 29.

⁴⁹ IBRD & IDA, Management Response to 2008 Inspection Panel Report *supra* note 22 at 25.

⁵⁰ See discussion in Part III below.

⁵¹ The World Commission on Dams reported, for example, that between 1950 and 1990, official reports in China indicated that approximately 10.2 million people had been displaced by dams. Independent reports stated that the actual figures were higher with the Yangtze Valley alone displacing about 10 million people.

that distorts a means of livelihood, social network, cultural attachment and even emotional core.⁵²

One can expect that with the country's plans of expanding hydro-generation, the numbers of those displaced by large dams will continue to be on the high side. For starters, the 2002 Energy Policy prepared by the Ministry of Energy and Mineral Development placed the country's hydropower potential at 2000MW.⁵³ So far, only 380MW – excluding Bujagali – has been installed.⁵⁴ In fact, the Ministry of Energy and Mineral Development is unequivocal about the fact that the Bujagali Project has not placed a cap on the exploration of the country's natural resources.⁵⁵ Consequently, all the potential of the Victoria Nile needs to be utilized if access to electricity is to meaningfully increase.⁵⁶ Already, in addition to the Bujagali Project, the Government is reported to be planning other large hydropower

The number of those displaced by dams in China is expected to have increased tremendously following the construction of the Three Gorges. In India, large dams are estimated to have displaced between 16 and 38 million people between 1950 and 1990. See World Commission on Dams, *Dams and Development* supra note 1 at 104. See also Michael M. Cernea, "Involuntary Resettlement in Development Projects: Policy Guidelines in World Bank-financed Projects" World Bank Technical Working Paper No. 80 (Washington, D.C: The World Bank, 1988) at 3 for examples of hundreds of thousands of people displaced by major dams outside Africa [Involuntary Resettlement in Development Projects].

⁵² See also The Inspection Panel, 2002 Report of the Inspection Panel supra note 33 at 76 where the Panel noted that "While the number of those relocated is small relative to most Category A dam projects, dislocation is just as significant to those directly affected by it". Rew et. al. also point out that many times, what appear to be small numbers may still represent a large percentage of a country's population when compared to seemingly larger cases of displacement. Alan Rew, Eleanor Fisher and Balaji Pandley, "Policy Practices in Development-induced Displacement and Rehabilitation" in Chris De Wet (ed.) *Development-Induced Displacement: Problems, Policies and People* Volume 18 Studies in Forced Migration (Berghahn Books, 2006) at 42 [Policy Practices in Development-induced Displacement]. See also Michael M. Cernea, *Ibid.* at 7.

⁵³ Ministry of Energy & Mineral Development, *The Energy Policy for Uganda* (September, 2002) online: Ministry of Energy & Mineral Development <<http://www.energyandminerals.go.ug/pdf/EnergyPolicy.pdf>> at 14 [2002 Energy Policy].

⁵⁴ This includes the 180MW installed at Owen Falls Dam/Nalubaale – the first hydroelectric dam in the country – and the 200MW capacity installed at Owen Falls Extension/Kiira. See Engorait, "Power Sector Reforms in Uganda" supra note 31 at 301 & 302.

⁵⁵ Interview of Engineer Paul Mubiru supra note 26.

⁵⁶ *Ibid.*

projects including Karuma (700MW),⁵⁷ Ayago South (234MW), Murchison Base (222MW) and Mpanga (144MW).⁵⁸

Behind every large dam structure are multiple competing narratives. These include the debate over whether the economic costs of a dam justify it as an option over other alternative sources of energy.⁵⁹ Divisions also persist over the environmental impacts of dams including their impact on forests, fisheries, vegetation and other aspects of biodiversity.⁶⁰ Additionally, there is contention over whether the destruction of burial grounds, cultural/spiritual heritage and tourism sites is an acceptable price to pay for

⁵⁷ Bbumba, “2009/10 Budget Speech” supra note 20 at 20.

⁵⁸ NAPE, *A Spot Check on Compliance and Performance of World Bank and African Development Bank in Uganda’s Energy Sector: Success or Failure Story?* (Uganda: NAPE-(FOE), 2009) at 1 [A Spot Check on Compliance].

⁵⁹ See generally, World Bank, 2007 Management Response to Request for Inspection supra note 5 at 4, 26, 27; NAPE, 2007 Request for Inspection, supra note 37 at 5, 6, 8 & 9; McDonald, “Electric capitalism: Conceptualising” supra note 7 at 3; Sharife, “Damnation for Africa’s big dams?” supra note 4 at 53; Leonard Gentle, “Escom to Eskom: From racial Keynesian capitalism to neo-liberalism (1910 – 1994)” in David A. McDonald (ed.) *Electric Capitalism: Recolonising Africa on the Power Grid* supra note 7 at 52 – 60; Rebecca Ghanadan, “Connected geographies and struggles over access: Electricity commercialisation in Tanzania” in David A. McDonald (ed.) Ibid. at 400 – 436; Terri Hathaway & Lori Pottinger, “The great hydro-rush: The privatisation of Africa’s rivers” in David A. McDonald (ed.) Ibid. at 149 & 152; NAPE, “A Spot Check on Compliance” Ibid. at 1; Stephen Linaweaver, “Falling for AES’s Plan? Uganda Debates Damming the Nile” (June 1999) *Multinational Monitor* at 17; Prayas Energy Group, “The Bujagali Power Purchase Agreement – an Independent Review: A Study of the Techno-Economic Aspects of the Power Purchase Agreement of the Bujagali Hydroelectric Project in Uganda” (November, 2002) online: International Rivers<<http://www.internationalrivers.org/files/bujagalippa-review.pdf>> at 3 & 24.

⁶⁰ Bujagali Energy Limited, “Bujagali Hydropower Project: Environmental Responsibility” online: Bujagali Energy Limited <http://www.bujagali-energy.com/bujagali_environmentalResponsibility1.htm>; World Bank, 2007 Management Response to Request for Inspection supra note 5 at 12, 13, 18; Tom Nevin, “Battle lines drawn over Bujagali dam” *African Business* (June 2007) at 57; Hathaway & Pottinger, “The great hydro-rush: The privatisation of Africa’s rivers” Ibid. at 151; NAPE, 2007 Request for Inspection Ibid. at 3 – 5; Lori Pottinger & Frank Muramuzi, “Letter to the World Bank Regarding Owen Falls Dam and Lake Victoria” (February, 2006) online: International Rivers<<http://www.internationalrivers.org/en/letter-world-bank-regarding-owen-falls-dams-and-lake-victoria>>; NAPE, “A Spot Check on Compliance” Ibid. at 4; Michel Wormser, “World Bank Response to IRN Letter on Bujagali” (June, 2007) online: World Bank <<http://siteresources.worldbank.org/EXTBUJHYDPOWPRO/Resources/ResponseLetterIRN6-07.pdf>>; Lori Pottinger et. al., “Letter to World Bank: Outstanding Concerns on Bujagali” (April, 2007) online: International Rivers<<http://www.internationalrivers.org/en/africa/bujagali-dam-uganda/letter-world-bank-outstanding-concerns-bujagali>>.

expanding the national grid.⁶¹ Then there is the story of the communities affected by these projects in various ways.⁶² These communities, even though rarely benefiting from such projects, bear a disproportionate share of the adverse social and economic project impacts.⁶³ Each of the above narratives presents important questions for inquiry. What animates this thesis, however, is the impact of dam construction on Affected Communities.⁶⁴

In March 2007, local NGOs and individuals in Uganda approached the Inspection Panel requesting it to review the Bujagali Project's compliance with Bank policy on a number of issues including environmental and social impacts, economic feasibility of the Project, transparency in decision making and the impact that climate change would have on the success of the Project.⁶⁵ In 2008, the Panel published its findings, which revealed multiple areas of non-compliance including a failure to meet a number of the requirements pertaining to involuntary resettlement. To begin with, the Panel concluded that there were flaws in the socio-economic survey, which rendered the survey an inaccurate reflection of the social and

⁶¹ Stephen Linaweaver, "Tourism at Bujagali" (January 2001) online: International Rivers<<http://www.internationalrivers.org/en/africa/tourism-bujagali>>; F.C. Oweyegha- Afunaduula, "Bujagali as Ethnocide: Cultural and Spiritual Death of the Indigenous Community of Basoga, Uganda" (June, 2005)online: Oweyegha Afunaduula < <http://www.afuna.o-f.com/articles/BUJAGALI%20AS%20ETHNOCIDE.htm>>; The Inspection Panel, 2008 Report of the Inspection Panel supra note 29 at 163; NAPE, "A Spot Check on Compliance" Ibid. at 9 & 10; World Bank, 2007 Management Response to Request for Inspection supra note 5 at 10; NAPE, *The Unresolved Issues in the Bujagali Project in Uganda: A Lack of Transparency and Public Participation* (National Association of Professional Environmentalists, June 2007) at 4; David Mugabe, "Bujagali Falls to Close in January 2011" (9 April 2010) online: The New Vision< <http://www.newvision.co.ug/D/8/13/715734>>; NAPE, 2007 Request for Inspection supra note 37 at 5.

⁶² World Bank, 2007 Management Response to Request for Inspection supra note 5 at 11, 38, 40 – 43; Nevin, "Battle lines drawn over Bujagali dam" supra note 60 at 57; World Commission on Dams, *Dams and Development* supra note 1 at 102, 107 & 108; NAPE, 2007 Request for Inspection Ibid. at 12.

⁶³ World Commission on Dams, Ibid. at 98.

⁶⁴ In the thesis, the phrase "project-affected communities" (Affected Communities) is used interchangeably with phrases such as displaced persons and dam-affected communities.

⁶⁵ See NAPE, International Rivers and Bank Information Center , "Summary of Key Findings from the Inspection Panel Investigation Report on Bujagali Hydropower Project, Uganda" online: International Rivers<<http://www.internationalrivers.org/en/node/3492>> [Summary of Panel Findings].

economic conditions of those displaced.⁶⁶ Also, it found that the Assessment of Past Resettlement Activities and Action Plan (APRAP)⁶⁷ prepared by Bujagali Energy Limited (as an update of the Resettlement Action Plan initiated by AES Nile Power) did not adequately incorporate the policy objectives of the World Bank's policy on involuntary resettlement.⁶⁸ In addition, the Panel found that the Community Development Action Plan (CDAP)⁶⁹ that Bujagali Energy Limited had prepared was weak because it was targeted more towards the short term than the long term and did not commit adequate funding to development projects.⁷⁰ The Panel further held that the Project failed to mitigate the losses and impoverishment risks threatening those engaged in fishing and agriculture, thereby failing to restore their livelihoods.⁷¹ Related to this was the observation that the project sponsor had not paid adequate attention to the potential livelihood risks suffered by vulnerable members of the community.⁷² Lastly, the Panel problematized the consultation strategy of the project sponsor, concluding that it was structurally flawed since it excluded a majority of the displaced people from its processes.⁷³

These, and other findings gleaned from published literature⁷⁴ and interviews conducted by the researcher, constitute the groundwork for tracing the role of law in incorporating the

⁶⁶ Inspection Panel, 2008 Report of the Inspection Panel supra note 29 at 143.

⁶⁷ Burnside, *Assessment of Past Resettlement Activities and Action Plan* (December, 2006) online: The World Bank <<http://siteresources.worldbank.org/EXTBUJHYDPOWPRO/Resources/HPPSEAAppendixI.pdf>>.

⁶⁸ Inspection Panel, 2008 Report of the Inspection Panel supra note 29 at 138 & 139.

⁶⁹ Burnside, *Community Development Action Plan* (December 2006) online: The World Bank <<http://siteresources.worldbank.org/EXTBUJHYDPOWPRO/Resources/HPPSEAAppendixJ-CDAP.pdf>>.

⁷⁰ Inspection Panel, 2008 Report of the Inspection Panel supra note 29 at 160 & 161.

⁷¹ Ibid. at 147 – 151.

⁷² Ibid. at 153.

⁷³ Ibid. at 143.

⁷⁴ See, for example, Naminya Resettlement Areas, “Unfulfilled Promises by Bujagali Dam Project and problems we are facing at the Naminya Resettlement area” in NAPE, 2007 Request for Inspection supra note 37 at 15 – 20.

concerns of Affected Communities in projects of this nature. The details of the methodology for the interviews are contained in Chapter Two.⁷⁵ However, given the fact that this Chapter deals with the general background to the project and also dedicates a significant segment to defining Affected Communities and highlighting their concerns, it is useful to draw certain references from interview findings. As much as possible, however, the details of interviews have been reserved for the chapters after the methodology chapter.

III. Constructing Meanings and Establishing Boundaries: Who are “Project Affected Communities”?

Defining Affected Communities has significant implications for both project sponsors and affected communities. For project sponsors, identifying these communities is integral to the process of evaluating the project’s performance record.⁷⁶ That is, determining the number of people affected by the project speaks to the overall impact of the project and hence, its feasibility – particularly when compared to other options. The number of people affected and the extent of the impacts also have cost implications depending on the resettlement and rehabilitation requirements under the law in question. For the communities themselves, the construction of who qualifies as a part of the Affected Community is a mechanism of establishing boundaries that distinguish those who will be included in the compensation scheme from those who will be excluded from it.⁷⁷ The process of establishing who is affected determines not only those who should be compensated but also the form and extent (and/or duration) of the compensation. Too frequently, Affected Communities have been

⁷⁵ See Chapter Two, Part V.

⁷⁶ World Commission on Dams, *Dams and Development* supra note 1 at 97.

⁷⁷ See also Frances Cleaver, “Paradoxes of Participation: Questioning Participatory Approaches to Development” (1999) 11 *Journal of International Development* at 603 [Paradoxes of Participation].

perceived in the narrow sense of those physically dislocated by a project.⁷⁸ Such an interpretation is problematic because it ignores other people whose source of livelihood has been disrupted and whose socio-cultural milieu has been destabilized as a result of the project.⁷⁹

One definition of Affected Communities that extends beyond physical displacement can be found in the World Bank policy on involuntary resettlement.⁸⁰ The policy defines displaced people to mean “persons who are affected in any of the ways described in para.3 of [Operational Policy 4.12].”⁸¹ According to that paragraph, displacement covers loss of shelter; loss of assets or access to assets; disruption of means of livelihood; and restriction of access to shared areas such as legally designated parks and protected areas.⁸² It includes “all direct economic and social losses resulting from land taking and restriction of access, together with the consequent compensatory and remedial measures.”⁸³ This definition is helpful because it captures physical, economic and social disruption resulting from development projects.⁸⁴

⁷⁸ World Commission on Dams, *Dams and Development* supra note 1 at 102.

⁷⁹ Examples of these are upstream and downstream communities who, even though not physically dislocated, are destabilized in various ways by dam construction. Ibid. at 102 & 103.

⁸⁰ World Bank, “Operational Manual: Operational Policy (OP) 4.12” (December, 2001 - as updated in March, 2007) online: World Bank < <http://web.worldbank.org> > [OP 4.12].

⁸¹ Ibid. endnote 3.

⁸² Ibid. paragraph 3.

⁸³ World Bank, *Involuntary Resettlement Sourcebook: Planning and Implementation in Development Projects* (International Bank for Reconstruction and Development/World Bank, 2004) at 5 [Involuntary Resettlement Sourcebook].

⁸⁴ This definition is similar to that provided by the World Commission on Dams, which defined displacement as both physical and livelihood displacement (or deprivation). See World Commission on Dams, *Dams and Development* supra note 1 at 102. See also International Finance Corporation (IFC), “Performance Standards on Social and Environmental Sustainability” (April, 2006) online: IFC <[http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/\\$FILE/IFC+Performance+Standards.pdf](http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/$FILE/IFC+Performance+Standards.pdf)>. See particularly, Performance Standard 5: Land Acquisition and Involuntary Resettlement paragraph 1.

Yet even the Bank definition is incomprehensive because it qualifies project impacts by restricting its coverage to “direct” impacts. Prior to Operational Policy (OP) 4.12, there was no distinction between direct and indirect impacts of Bank-assisted investments.⁸⁵ When in 2001, the Bank’s Executive Directors wondered whether such an introduction would not dilute the existing policy,⁸⁶ Bank management (Management) responded that the import was made to clarify a long-standing interpretation of the existing policy.⁸⁷ The policy, Management added, was never intended to cover “all adverse socio-economic impacts of Bank projects – only those directly caused by land taking and restriction of access to legally designated parks and protected areas.”⁸⁸ Management advised that indirect impacts could be dealt with using other mechanisms such as social and environmental assessments.⁸⁹

The introduction of a demarcation between direct and indirect impacts is problematic. Labelling an impact as “direct” connotes tangible and ‘see-able’ cause-effect patterns, when in fact impacts of projects of this nature often extend beyond such patterns. Such a definition risks excluding, for example, the psychological impacts (such as stress and depression) that result from displacement. Also, by qualifying project impacts in this manner, communities such as those living downstream could be excluded since, as observed

⁸⁵ For example, while Operational Directive 4.30 did not explicitly define displacement, Paragraph 3 thereof provided that “The objective of the Bank’s resettlement policy is to ensure that the population displaced by a project receives benefit from it.” World Bank, “The World Bank Operational Manual: Operational Directive 4.30” (June 1990) online: International Finance Corporation <[http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_Resettlement/\\$FILE/OD430_InvoluntaryResettlement.pdf](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_Resettlement/$FILE/OD430_InvoluntaryResettlement.pdf)>

⁸⁶ World Bank, “Conversion of the World Bank’s Policy on Involuntary Resettlement: Substantive Comments from Executive Directors on Draft OP/BP 4.12 dated July 25, 2000” (March 6, 2001) online: The Center for International Environmental Law <<http://www.ciel.org/Publications/Matrix-final.pdf>> paragraphs 24, 27, 29 & 33 [Conversion of the Bank’s Policy on Involuntary Resettlement].

⁸⁷ Ibid. paragraph 27.

⁸⁸ Ibid. paragraph 27.

⁸⁹ James D. Wolfensohn, “OP/BP 4.12, *Involuntary Resettlement* Background Note on the Conversion Process” (September 2001) online: The Center for International Environmental Law <http://www.ciel.org/Publications/wolfensohn_28sep01_memo.pdf> at 2; Ibid. paragraph 29.

by the World Commission on Dams, the impacts on these groups often become evident after dam construction is complete.⁹⁰ Lastly, there is a tendency for solutions associated with direct impacts to be geared towards short-term quick-fix strategies that downplay the long-term consequences of displacement.

It does not help much to move – as suggested by Management – indirect impacts to environmental and social assessments. To begin with, because they affect people, these impacts are likely to be placed on the back burner when assessing environmental concerns, strictly speaking. Even if they were to be incorporated in environmental impacts, their assessment would result in insufficient (if any) protection for those affected. Environmental impact assessments are based on a cost-benefit analysis that weighs the negative impacts of a project against its overall positive (usually economic) benefits.⁹¹ Because they concentrate on net impacts of projects, these impact assessments cannot “guarantee that identified impacts will be mitigated, only that the overall optimal outcomes will be pursued.”⁹² Social assessments are also not without their limitations. Commentators observe that it is often difficult to zero down on what constitutes a social impact.⁹³ Even after they have been identified, there is always contention about which of these impacts should be addressed by the state and which should be attended to by private actors.⁹⁴ Consequently, these impacts are rarely taken seriously by either party.⁹⁵ Further, it has been observed that “where social impact assessments [SIAs] are required, ‘there is seldom a requirement for results of SIAs

⁹⁰ World Commission on Dams, *Dams and Development* supra note 1 at 103.

⁹¹ David Szablowski, *Transnational Law and Local Struggles: Mining, Communities and the World Bank* (Oregon: Hart Publishing, 2007) at 51 [Transnational Law and Local Struggles].

⁹² Ibid.

⁹³ Ibid. at 50 & 51.

⁹⁴ Ibid.

⁹⁵ Ibid. at 51.

to be seriously considered. SIAs often go unread, at least unheeded, and mitigation measures seldom taken seriously’.”⁹⁶

By removing indirect impacts from the policy on involuntary resettlement, these impacts are transferred to a place where they do not really belong and where protection of those affected cannot be guaranteed. It is important to think about impacts in terms of people and their experiences. This means that the exclusion of certain impacts excludes either a group of people or denies some of the adverse impacts that they suffer at the hands of a project. It could also translate into providing short-term as opposed to long term benefits. Whatever the implication, the direct-indirect demarcation results in a further marginalization of otherwise affected peoples. Understandably, some boundaries have to be drawn; many times on a case-by-case basis. Even so, it is better that the blanket definition be wide enough to include an assortment of impacts instead of restricting inclusion from the onset.

This thesis proposes an adoption of the Bank definition of displaced persons with some modification: revising/reverting the policy to one in which the element of “direct” impacts is removed. Even with such an adjustment, the construction of Affected Communities adopted here is artificial and limited in its application.⁹⁷ It is artificial because the discussion restricts itself to “people” without venturing into the institutions to which these people belong. In other words, “Affected Communities” as explored in this thesis does not include institutions relating to cultural heritage and spiritual beliefs, yet these institutions invariably

⁹⁶ Ibid.

⁹⁷ In fact, one author observes that the very act of establishing boundaries undermines the “overlapping, shifting and subjective nature of ‘communities’ and the permeability of boundaries”. Cleaver, “Paradoxes of Participation” *supra* note 77 at 603.

affect people both collectively and individually. One of the activists interviewed argued that one of the shortcomings of the Bujagali Project is that the World Bank and the Government of Uganda have localized the definition of dam-affected people by limiting it to the population living around the project area when in fact there are millions other Basoga who are affected by it – especially from a spiritual-cultural perspective.⁹⁸ A similar attack could be lodged against the boundaries drawn by the definition suggested here. Consequently, by focussing primarily on displacement or involuntary resettlement of communities (as opposed to the communities and their institutions), this thesis is conscious of the fact that it removes itself from the wide impact that the Project has on other aspects that affect the community such as its impact on the Nabamba Budhagali institution: the cultural institution of the Basoga. It is particularly cautious of the fact that Nabamba Budhagali constitutes part of the identity of the Basoga and it is one of the aspects that distinguishes Basoga from other ethnic groups.

The decision to artificially separate displacement as it relates to *communities* from displacement as it relates to *the community's ethno-cultural institutions* is a strategic one. It is driven by the need, first, to comprehensively analyze the issue of involuntary resettlement of people by development projects – irrespective of the relevance of the sites on which these projects are located. Second, the discussion recognizes that cultural heritage and spiritual affiliations are in and of themselves significant issues which warrant independent analysis, despite their connectedness to people issues. Third, such an approach allows the discussion to concentrate on the common values shared by the communities affected by the Project.

⁹⁸ Interview of Oweyegha Afunaduula (Programme Manager, Sustainability School at NAPE) (10 November 2009) at NAPE Offices, Kampala, Uganda.

Concentrating on ethno-specific institutions in cases where the population displaced is diverse could create other categories of divisions and power struggles between those affected. For example, in 2008, the Inspection Panel noted that the Basoga constitute up to 46% of those immediately adjacent to the dam site when compared to 17% Baganda.⁹⁹ The Panel also reported that while there were other ethnic groups around the Project area “the Busoga claim spiritual dominion of both sides of the Nile, its islands and its waterfalls.”¹⁰⁰ Therefore, it is only the Basoga who claim cultural and spiritual heritage to the Bujagali Falls. By removing the (important) component of Budhagali as a cultural institution, the discussion focuses on *peoples qua peoples* and their personal and common assets such as land, businesses, social networks, markets and schools. This focus also allows the definition proposed here to be transplanted to other development projects (such as roads, large housing projects, mining, oil and gas projects) which take place in areas with diverse cultures and in the absence of cultural-specific institutions.

However, the exclusion of ethno-cultural institutions from the discussion should not be read as suggesting a disregard for the communal ethos that often defines the relationships between those displaced. Consequently, this thesis retains the character of the social capital that is entrenched in the associations of those displaced. It adopts a definition of displaced persons that is skewed more towards communal set-ups than it is to individualized ways of being. It recognizes the fact that frequently, these projects are undertaken in rural or semi-urban locations in which those affected rely not simply on agricultural land, but also, on their communal networks for their livelihoods. In other words, they possess “shared identities

⁹⁹ The Inspection Panel, 2008 Report of the Inspection Panel *supra* note 29 at 28.

¹⁰⁰ *Ibid.*

and common institutions that provide the basis for collective actions.”¹⁰¹ Therefore, an “apolitical individualization” of these displaced persons would have the impact of undermining their collective struggles.¹⁰² For example, while economic displacement may result in the unemployment of an individual, it also affects the immediate and extended family (that is, the community of persons) that depend on the individual for subsistence.

At the same time, the choice to use “communities” as opposed to “people/individuals” should not be interpreted as eliminating individual interests all together. For instance, while these communities are largely agro-based and many times hold land interests communally, they can also own land on an individual basis.¹⁰³ It is also difficult – if not impossible – to speak of homogeneous or monolithic communities because even though these persons often act in concert, they also retain their individual identities and interests, which many times conflict with each other. Therefore, the community is not a non-problematic solidarity. It is composed of individuals whose diverse interests result in conflict and power struggles.¹⁰⁴ As one author observed, the community is, “More realistically ... the site of both solidarity and conflict, shifting alliances, power and social structures.”¹⁰⁵ To this end, the inclusive reforms desired in this thesis are both communal and individual.

¹⁰¹ Szablowski, *Transnational Law and Local Struggles* supra note 91 at 138.

¹⁰² See, for example, Cleaver, “Paradoxes of Participation” supra note 77 at 599.

¹⁰³ See, for example, *The Land Act 1998* Cap 227 Laws of Uganda, Part II.

¹⁰⁴ See generally Dolores Koenig, “Enhancing Local Development in Development-induced Displacement and Resettlement Projects” in Chris De Wet (ed.) *Development-Induced Displacement: Problems, Policies and People* supra note 52 at 105 - 140.

¹⁰⁵ Cleaver, “Paradoxes of Participation” supra note 77 at 599. See also pages 605 – 608.

Also, for purposes of this thesis, host communities¹⁰⁶ are not treated as Affected Communities, despite acknowledging the fact that they too are adversely affected by the resettlement of displaced people into their communities. Therefore, while not explored in any material detail here, the thesis recommends that project sponsors should factor host communities' concerns in at an early stage in project planning. The World Bank requires, for example, that hosts should be provided with timely information, consulted and offered opportunities to participate in resettlement planning.¹⁰⁷ In addition, Bank policy requires host communities to be provided with the necessary infrastructure and services to ensure that their lives are not disrupted by resettlement.¹⁰⁸ It is also important that the social and cultural institutions of these communities are preserved.¹⁰⁹

Lastly, the process of identifying Affected Communities should involve the proper identification of the different components of projects. The World Commission on Dams observed that sometimes, affected groups are not compensated because they are not displaced by the core components of a project.¹¹⁰ The chances of exclusion in this manner are perhaps even higher when the different components of the project are being sponsored and/or financed by a variety of institutions that are governed by different policies. In the case of the Bujagali Project, there are two main components: the Bujagali Hydropower Plant (sponsored by Bujagali Energy Limited and financed by the World Bank, among others) and the Bujagali Interconnection Project (implemented by the Uganda Electricity Transmission

¹⁰⁶ Host communities are the communities residing in the resettlement area before resettlement takes place.

¹⁰⁷ World Bank, OP 4.12 *supra* note 80 paragraph 13 (a).

¹⁰⁸ *Ibid.* paragraph 13 (b).

¹⁰⁹ *Ibid.* paragraph 13 (c).

¹¹⁰ World Commission on Dams, *Dams and Development* *supra* note 1 at 105.

Company Limited (UETCL) and financed by the African Development Bank).¹¹¹ The latter consists of the construction of transmission lines from Bujagali substation to different substations including Kawanda, Naluubale and Mutundwe; construction of part of the Bujagali substation, the Kawanda substation and an extension of the Mutundwe substation.¹¹² One of the challenges of arrangements of this nature is in ensuring that resettlement policy is applied fairly and consistently to all the communities affected. Fortunately, in the Bujagali case, the African Development Bank has a policy on involuntary resettlement.¹¹³ Also, when the Bank finances a project, its policy on involuntary resettlement applies to all components of that project irrespective of the source of finances.¹¹⁴ The Bank policy also covers any other activities that are “directly and significantly related to the Bank-assisted project”.¹¹⁵ Problems arise where projects are financed by parties who have no involuntary resettlement policies or whose policies are weak. In such cases, it is helpful if there is a strong domestic policy on resettlement.

IV. Displacement under Uganda’s Domestic Legal Framework

There is no specific legislation on development-induced displacement in Uganda. Instead, the domestic legal regime governing displacement caused by projects such as the Bujagali Project can be found in three main pieces of legislation: the Constitution of the Republic of

¹¹¹ Inspection Panel, 2008 Report of the Inspection Panel Report *supra* note 29 at 30. See also African Development Bank Group, “Bujagali Interconnection Project” online: African Development Bank Group<<http://www.afdb.org/en/projects-operations/project-portfolio/project/p-ug-fa0-002/>>.

¹¹² African Development Bank Group, *Ibid*.

¹¹³ African Development Bank, *Involuntary Resettlement Policy* (November, 2003) online: African Development Bank Group< <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/10000009-EN-BANK-GROUP-INVOLUNTARY-RESETTLEMENT-POLICY.PDF>>. With the exception of some of the recommendations made in Chapter Six, this thesis does not analyze in any material detail the effectiveness of the African Development Bank policy. Neither does it delve into any significant detail on issues surrounding the Interconnection project funded by the African Development Bank.

¹¹⁴ World Bank, OP 4.12 *supra* note 80 paragraph 4.

¹¹⁵ *Ibid*. paragraph 4 (a).

Uganda, the Land Act and the Electricity Act.¹¹⁶ When the Electricity Regulatory Authority (ERA) invites applicants for any license under the Electricity Act – as was the case with Bujagali – the application submitted should contain *inter alia* a statement on the impacts of the proposed project on public interests, and possible mitigation measures.¹¹⁷ In addition, it should disclose the likely impacts of the project on private interests, including interests of landowners and holders of other rights.¹¹⁸ Within forty days of receiving an application, ERA is required to publish the application in the Gazette and at least one widely circulated newspaper.¹¹⁹ In its publication, ERA invites those directly affected by the project to lodge an objection (within thirty days) against granting the project sponsor a licence on personal, environmental or other grounds.¹²⁰ The Act is silent about the procedure to be followed in the event that objections are raised but states that in granting or rejecting an investor's application, ERA takes into account a number of factors, including the energy needs of the country, the impact of a project on social, cultural and recreational life of a community, land use at the project site, the need to protect the environment and natural resources, and other public or private interests that may be affected by the project.¹²¹

Section 34 (1) (j) of the Electricity Act requires that when granting the application for a licence, the ERA should take note of any consents or permits that may be required under any other law. If the licensee requires land other than for maintaining electricity supply lines, she or he needs to apply to the Minister responsible for lands to approve the land

¹¹⁶ There is of course other legislation that impacts on operations of the project as far as people are concerned, such as the Employment Act. However, this legislation is secondary to the aspect of development-induced displacement and as such, does not form part of the present analysis.

¹¹⁷ *The Electricity Act* 1999 section 34 (1) (f).

¹¹⁸ *Ibid.* section 34 (1) (h).

¹¹⁹ *Ibid.* section 36 (1).

¹²⁰ *Ibid.* section 36 (2) (d).

¹²¹ *Ibid.* section 38 (1).

use.¹²² If the Minister is satisfied that the land or right to use land is required for the provision or maintenance of electricity to the public (that is, required in the public interest), the Minister shall pursue the land acquisition in accordance with the provisions of the Constitution, the Land Act and the Land Acquisition Act.¹²³ Articles 26 and 237 of the Constitution are to the effect that no person shall be compulsorily deprived of their property unless such acquisition is in the public interest.¹²⁴ Before acquiring the property, those affected should be promptly given “fair and adequate compensation” and have a right to access courts of law if dissatisfied with the compensation.¹²⁵

Every district in Uganda has a land board,¹²⁶ which compiles, maintains and annually reviews the rates of compensation relating to property.¹²⁷ The provisions of the Land Act pertaining to settlement of disputes relating to compulsory acquisition are instructive of what amounts to “fair and adequate compensation”. Each district has a land tribunal,¹²⁸ which is tasked with resolving land acquisition disputes¹²⁹ including establishing the appropriateness of the compensation paid.¹³⁰ In assessing compensation, the tribunal is guided by the rates compiled by the district land board.¹³¹ It also takes into account: in the case of customary land, the market value of that land;¹³² the value of buildings on the land basing on open market value for urban areas and depreciated replacement costs for rural

¹²² Ibid. section 72 (1).

¹²³ Ibid. section 72 (4).

¹²⁴ *The Constitution* supra note 17, Articles 26 (2) (a) and 237 (2) (a). See also *The Land Act* supra note 103 section 42.

¹²⁵ *The Constitution* Ibid. Article 26 (2) (b).

¹²⁶ *The Land Act* supra note 103 section 56 (1).

¹²⁷ Ibid. section 59 (1) (e) & (f).

¹²⁸ Ibid. section 74 (1)

¹²⁹ Ibid. section 76 (1) (a).

¹³⁰ Ibid. section 76 (1) (b).

¹³¹ Ibid. section 77 (3).

¹³² Ibid. section 77 (1) (a).

areas;¹³³ and the value of standing crops on the land.¹³⁴ In addition to the computed compensation, those displaced should be paid a disturbance allowance equal to 15% of the value of the property.¹³⁵ Where displaced persons are given less than 6 months notice to vacate their property, the disturbance allowance should be 30% of the value of the property.¹³⁶

In 1995, with the support and influence of the Bank, the Government drafted policy guidelines on resettlement and rehabilitation of displaced persons, but these never resulted in any formal binding policy.¹³⁷ What this means is that the only recourse under domestic law for those displaced by projects such as the Bujagali Project is monetary compensation. Those contesting the compensation can file claims with the domestic courts. Often times, the compensation is delayed and even inadequate.¹³⁸ For example, a senior Faculty member at Makerere University who has interacted closely with the project revealed that while assessments for compensation were undertaken in 2001, it was not until 2008/09 that compensation was paid.¹³⁹ Also, even though the Land Act requires the land board to regularly update rates, this exercise is rarely translated into practice despite the fact that the

¹³³ Ibid. section 77 (1) (b).

¹³⁴ Ibid. section 77 (1) (c).

¹³⁵ Ibid. section 77 (2).

¹³⁶ Ibid. section 77 (2).

¹³⁷ Rew et. al., "Policy Practices in Development-induced Displacement" supra note 52 at 46.

¹³⁸ See, for example, Tweyambe Emmy, Kiwanuka Andrew, Namubiru Alice, Tukahumura Rosemary & Judith Nakirya versus Uganda Electricity Transmission Co. Ltd & Joyti Structures Ltd. High Court Civil Suit No. 147 of 2009 [Tweyambe & Others versus UETCL & Joyti]. The World Commission on Dams also observed that often, compensation of those displaced is delayed, with processing times ranging from 5 to 15 years. See World Commission on Dams, *Dams and Development* supra note 1 at 107.

¹³⁹ Interview of Dr. Emmanuel Kasimbazi (Lecturer, Makerere University Faculty of Law) (23 November 2009) at Makerere University Kampala, Uganda.

rates are constantly changing.¹⁴⁰ Consequently, the rates recommended by the land boards are often overtaken by inflation and other changes in the market conditions.¹⁴¹

Elsewhere, it has been argued that one of the problems with cash compensation is that it “neglects entire categories of loss afflicted on disrupted communities.”¹⁴² For example, it ignores the loss of access to “informal property” such as collective use rights and access to social networks that are central to the performance of agricultural production systems.¹⁴³ Cash compensation also underplays the significant start up costs that are required for survival in new locations, such as having to acquire ecological knowledge of the new place for agro-based communities.¹⁴⁴ Lastly, because these communities are rarely exposed to large sums of money, it is not uncommon for those compensated to be overwhelmed by the seemingly huge sums and misuse the money for alcohol, buying old vehicles and financing marriage.¹⁴⁵ In any event, because of rare exposure to huge sums of money, most of these people do not have a saving culture, let alone own bank accounts.

As at the end of 2009, one of the Affected Communities (the Malindi dam-affected community) informed the researcher that they had filed a case in court against Bujagali Energy Limited, but no hearing had yet been conducted.¹⁴⁶ However, in the closely related Bujagali Interconnection Project, five people residing along a corridor on which the UETCL intends to set up high voltage transmission lines filed a suit with the High Court of Uganda

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Szablowski, *Transnational Law and Local Struggles* supra note 91 at 109.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Interview of Dr. Emmanuel Kasimbazi supra note 139.

¹⁴⁶ Interview of members of the Malindi Dam-Affected Community (18 November 2009) at Jinja, Uganda.

on 20 May 2009.¹⁴⁷ The detailed facts of this case are presented at this early point in the thesis because they exemplify the vulnerability that often characterizes displaced communities and reflect the business as usual attitude often taken by project sponsors in responding to Affected Communities' concerns. Because Uganda's domestic legal framework only provides for cash compensation, the remedies requested by the plaintiffs are limited to that compensation. What is important, however, is that the narrative that follows lays the foundation for the discussion in the rest of the thesis by providing a preview to some of the challenges often faced by Affected Communities.

In the UETCL case, the first plaintiff complained that a valuation and survey were undertaken on his land but from the outset, he disagreed with the defendants because he was labelled a non-resident for purposes of their valuation. The second plaintiff complained that first, his land was undervalued. Second, even the little money that had been assessed had not been paid to him despite the fact that a bank account had been opened for him for purposes of payment. Meantime, the plaintiff was not able to use his land because the defendant's workers were constantly digging on it and destroying his crops. The third plaintiff complained that even though the construction of the transmission lines affected her land, she was never consulted on the process and neither was permission sought from her. In addition, the defendants put a caveat on her land.¹⁴⁸ Also, no file was opened by the defendants relating to the valuation or otherwise of her land. The fourth plaintiff submitted that even before her land could be valued, the defendants were already passing transmission lines

¹⁴⁷ Tweyambe & Others versus UETCL & Joyti *supra* note 138.

¹⁴⁸ A caveat serves the purpose of acting as a notice to any third parties that the land is encumbered. Consequently, buyers and other third parties should be aware that the piece of property has other underlying claims and interests.

through it, without her permission. They had also forced her to sign for a compensation amount which was too low considering the location of her land. The documents were in English, a language she did not understand. By the time of filing the application, she had not received a single shilling of the promised compensation. The last plaintiff was also forced to sign for very little compensation for land that was in a very prime area near Kampala. The compensation was not yet paid. To make matters worse, while she was away, the defendants went to her land and destroyed her property. They also threatened to evict her. The plaintiffs prayed for orders by the court that the defendants were liable to compensate them for their crops, property and land; that court should assess and establish the compensation rates that should apply to the property; and that they should be paid damages, interest and costs of the suit.

The first defendant denied all the plaintiffs' claims, contending that all those whose land and developments were affected by the transmission corridor between Mukono and Kampala were adequately compensated for their land, crops and fixtures in accordance with the compensation rates that had been set by the district.¹⁴⁹ Once compensation was made, some plaintiffs granted the defendant easements over their land while others transferred their interests in the land to the defendant. Consequently, the defendant only took possession of that land to which it had been granted easements and transferred interest. Further, the first defendant contended that those plaintiffs who had not been compensated were not entitled to any compensation in the first place. In fact, some had put up fixtures

¹⁴⁹ 1st Defendant's Written Statement of Defence in *Tweyambe & Others versus UETCL & Joyti*, supra note 138.

overnight targeting compensation. Also in the alternative (and without prejudice) the first defendant claimed that the plaintiff's action had been highly exaggerated.

The second defendant started its defence by raising a preliminary objection to the effect that the plaintiffs had no cause of action against the second defendant because the latter had never negotiated nor dealt with the plaintiffs in any transaction relating to the land in question.¹⁵⁰ The defendant argued that it was UETCL's obligation (under a contract signed between the two defendants) to acquire physical and legal possession of the land on which the second defendant would undertake construction of the transmission lines. For this reason, the second defendant claimed that it had been wrongly joined as a party to the suit. The second defendant was subsequently struck off the claim.

On 28 October 2009, the court pronounced a temporary order to the effect that the defendants, their workers or any person claiming through them were restrained from evicting, trespassing and/or interfering with the plaintiffs' rights to quiet possession of their property until the suit was concluded.¹⁵¹ The next day – 29 October 2009 – the parties (with the exception of the first plaintiff) entered a consent judgement against the defendant in which the latter was ordered to pay compensation to the four plaintiffs and costs of the suit within thirty days from the taxation of costs for the suit.¹⁵² As would later be explained, the intervention through court action certainly went a long way in increasing compensation. One of the National Association of Professional Environmentalists' (NAPE) officials interviewed explained, for example, that a plaintiff whose property had been valued at

¹⁵⁰ Written Statement of Defence in Tweyambe & Others versus UETCL & Joyti, Ibid.

¹⁵¹ Temporary Order in Tweyambe & Others versus UETCL & Joyti, Ibid.

¹⁵² Consent Judgement in Tweyambe & Others versus UETCL & Joyti, Ibid.

approximately US \$ 810 (Uganda shillings 1.5 million) ended up getting US \$ 3,812 (Uganda shillings 7,053,474).¹⁵³ Another whose property had been valued at approximately US \$ 18,900 (Uganda shillings 35 million) was awarded approximately US\$ 57,300 (Uganda shillings 106,004,557).¹⁵⁴

The UETCL case highlights some of the challenges faced by persons displaced by development projects. It also demonstrates the centrality of law in constructing boundaries that exclude on the one hand and establishing protective mechanisms on the other hand. The language of the Constitution and the Land Act automatically defined the boundaries within which the court could operate and the remedies that those affected could request. Claims would have to be limited to cash compensation. On a positive note, the court was able to protect the interests of vulnerable groups by providing them with compensation amounts which they might not have been able to negotiate without court intervention. However, court processes are not without their shortcomings. Cases are often delayed. Already, at the time of the interviews, the hearing of the case filed by the Malindi-dam affected community had been adjourned from 9 November 2009 to 4 February 2010.¹⁵⁵ Also, not every displaced person can afford court action meaning that often, many will accept whatever little compensation, if any, that they are given. It is also important to remember the limitations of cash compensation that have been outlined above.

¹⁵³ Interview of Noreen Nampewo (Gender and Community Support Officer, NAPE) (16 November 2009) at NAPE Offices in Kampala, Uganda. The rates are estimated using the Bank of Uganda exchange rates. Bank of Uganda, "Financial Markets" *supra* note 25.

¹⁵⁴ Interview of Nampewo Ibid.

¹⁵⁵ Interview of members of the Malindi Dam-Affected Community *supra* note 146.

In recognition of the inadequacy of cash compensation, some financiers have provided for more comprehensive compensatory packages. For example, the World Bank through its policy on involuntary resettlement demands land-for-land resettlement when there is physical displacement¹⁵⁶ unless “land is not the preferred option of the displaced persons, the provision of land would adversely affect the sustainability of a park or protected area, or sufficient land is not available at a reasonable price”.¹⁵⁷ The Bank also requires cash compensation – at replacement cost – for assets lost as a result of either physical or economic displacement.¹⁵⁸ These World Bank provisions have without doubt compelled project sponsors to undertake measures that go beyond the requirements of domestic law, thereby offering more protection to dam-affected communities. However, as discussed in more detail in Chapter Three, the Bank’s resettlement policy also has its limitations.

V. Conclusion

While the protection of the interests of dam-affected communities is increasingly becoming relevant in development policy initiatives, these interests are still largely placed in the periphery when compared with other aspects of project planning. As one author noted:

In addition to the problems of policy practice, resettlement projects often suffer from a number of mutually reinforcing critical shortages, such as participation, money, manpower, skills and time. Resettlement is all too often seen as an external cost, and is accordingly not planned as a development exercise, with the result that, by default, what should be resettlement with development becomes reduced to relocation with minimal (if any) development.¹⁵⁹

¹⁵⁶ World Bank, OP 4.12 supra note 80 paragraph 6 (b).

¹⁵⁷ Ibid. paragraph 11.

¹⁵⁸ Ibid. paragraph 6 (a) (iii).

¹⁵⁹ Chris de Wet, “Introducing the Issues” in Chris de Wet (ed), *Development-Induced Displacement: Problems, Policies and People* supra note 52 at 10.

Whether the decision to construct the Bujagali Project as a solution to Uganda's energy crisis was the right decision or not is beyond the scope of the analysis in this thesis.¹⁶⁰ What takes centre stage is the extent to which this decision incorporates the interests of Affected Communities. If shortcomings in the process of incorporation and inclusion taint the decision to build the dam as a whole, then the deduction of this thesis is that the Project is bad. In other words, the adverse impacts on these communities are significant enough to warrant their detailed consideration in the overall assessment of project worthiness.¹⁶¹ Yet there can be no suggestion by this deduction that a poor resettlement policy on its own makes the decision to construct a dam a wrong one or vice versa. Such a conclusion only gains legitimacy when channelled through the different filters of the various components of the project and is unlikely to succeed as justification for the unfeasibility of the project when scrutinized independently. Consequently, for strategic purposes, the "people issue" in this thesis is examined independent of the question of whether Bujagali should have been constructed. Such an approach is also useful because it encompasses other projects, which may be sound on purely technical grounds but whose record of dealing with Affected Communities is weak. In the next chapter, the theoretical and methodological framework in which this thesis operates is laid out before reverting to a substantive discussion of the legal issues raised here.

¹⁶⁰ In fact, to be clear, even project opponents are not against the construction of the dam per se, but rather, the manner in which decisions to construct the dam were reached. For example, in 2007, NAPE indicated that it was willing to support Bujagali if certain conditions were met. Conditions included resolving resettlement and compensation claims, relocating the Bujagali shrines before proceeding with the project, obtaining necessary permits from the Directorate of Water and the National Environment Management Authority and establishing a monitoring committee. As to whether an agreement could be reached on how reasonable these conditions were is, of course, a different issue altogether. See NAPE, *The Unresolved Issues in Bujagali* supra note 61 at 9.

¹⁶¹ World Commission on Dams, *Dams and Development* supra note 1 at 98. In fact, costs of resettlement constitute part of the overall cost of the project and form part of the economic analysis (rate of return) of the project as a whole. See Cernea, "Involuntary Resettlement in Development Projects" supra note 51 at 5.

CHAPTER 2

Setting the Theoretical Groundwork: A TWAIL Critique of International Law and Development

I. Introduction

This thesis is about the relationship between development and Third World peoples. It is also about the interaction between these people and the institution of law. And it is as much about the “here and now” as it is about the past and the future of these interactions. How does one pick a theoretical framework that speaks to issues so complex, people so diverse and times both present and past? How does this engagement ensure that the theoretical framework chosen does not, itself, result in the hegemony and exclusion being contested? And how does this theory translate into practical realities?

These questions are in and of themselves complex and do not elicit easy answers. That said, research projects, I believe, are driven as much by a hunger for knowledge as they are by a search within oneself. They are – or should be – as much about the contribution to a general pool of knowledge as they are about a contribution to our personal capital as researchers, as a people. They are personal and impersonal. Public and private. And even as we struggle to draw the line between “us” (the researchers) and “them” (the subjects of our study) we are drawn back in – willingly or unwillingly – by an investment in the subject of our inquiry. This investment has a bearing on the choices that we make about the theoretical and methodological tools to apply to our research. It influences how we interact with available knowledge to produce more knowledge by either contesting what exists, supporting it, expanding on it or seeking to replace it.

Like most other research projects, this thesis is a combination of all these components. It contests universal ways of knowing and being by situating its study in and contextualizing its findings to a particular geographical location. It adds to the voices of and supports the theories that contest these universal truths by documenting alternative truths. And in the process, it replaces or substitutes these understandings by creating alternative meanings. The process of contesting, supporting, adding to and substituting is grounded in two theoretical frameworks: Third World Approaches to International Law (TWAIL) and critical development theory. These theories provide an optic through which to critically analyze the impact of international law and development on Affected Communities in a particular part of the Third World. They also speak to the personal interests of the researcher as self-identifying with that part of the world. I am cautious about the fact that I am an outsider to the communities under study and as such, cannot claim to speak on their behalf. At the same time, my birth and upbringing in Uganda position me as an insider whose personal experiences inform my understanding of and interaction with the issues under investigation. Therefore, mine is a Third World perspective that emanates from being a subject of, observing and questioning development projects and policies. Hence my choice of what I refer to as a TWAIL Critique of International Law and Development.

The chapter proceeds as follows. Part II sets the stage for the rest of the discussion by interweaving the relevant components of TWAIL with those of critical development theory to produce the TWAIL Critique of International Law and Development. In Part III, the components of the combined theories are studied. Three themes are developed. The first discusses the manner in which development has been negatively institutionalized. This is

followed by an illustration of the diversity that characterizes the category “Third World peoples” and a critical analysis of the adverse impacts that result from treating these peoples as a monolithic block. The last theme illustrates how resistance is used by Third World peoples to contest negative institutionalization and universal truths. Part IV contains a discussion on the reconstructive project of TWAIL and critical development literature, concluding with a discussion of how this thesis fits into that reconstructive project. The chapter ends with a discussion of methodology in Part V.

II. The Foundation: A Synthesis of TWAIL and Critical Development Theory

One of the core projects of TWAIL scholarship is the unpacking and understanding of international law from a historical perspective. TWAILers trace mainstream international law back to its colonial origins to demonstrate that it is neither neutral nor universal.¹ Rather, it is a European construction that was imposed on the rest of the World to facilitate colonial administration.² They maintain that this colonial mission was neither temporary nor short-lived.³ Consequently, even though formal colonialism ended, there are important

¹ Makau wa Mutua, “What is TWAIL?” (2000) American Society of International Law Proceedings at 31; James Thuo Gathii, “Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy” (2000) 98 Mich. L. Review at 1997 & 2017 [Neoliberalism, Colonialism and International Governance]; Anthony Anghie, “The Evolution of International Law: colonial and postcolonial realities” in Richard Falk, Balakrishnan Rajagopal and Jacqueline Stevens (eds.) *International Law and the Third World: Reshaping Justice* (New York: Routledge-Cavendish, 2008) 35 – 49 [The Evolution of International Law]; Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004).

² Anthony Anghie & B.S. Chimni, “Third World Approaches to International Law and Individual Responsibility in Internal Conflicts” in Anne Marie Slaughter and Steven R. Ratner (eds) *The Methods of International Law* (American Society of International Law Studies in Transnational Legal Policy, 2004) at 191; Anthony Anghie, “Francisco de Vitoria and the Colonial Origins of International Law” in Eve Darian-Smith & Peter Fitzpatrick (eds.) *Laws of the Postcolonial* (University of Michigan Press, 1999) at 103; Anghie, “The Evolution of International Law” Ibid. at 38 & 42.

³ See generally Anthony Anghie, “Time Present and Time Past: Globalization, International Financial Institutions and the Third World” (2000) 32 N.Y.U J. Int’l L & Pol. at 277 – 279 [Time Present and Time Past].

continuities between “then” and “now” that facilitate the West’s domination over the Rest.⁴ This “cunning of colonialism” manifests itself in various forms⁵ including its reproduction through the post-colonial state⁶ and its influence on other aspects of international law such as the international economic order,⁷ the war on terror,⁸ and aspects of feminism.⁹

As a counter-hegemonic intellectual and political movement, TWAIL engages with and draws inspiration from a number of theories that are critical of the mainstream including postcolonialism, critical race theory, cultural studies, Marxism, feminism, new approaches to international law and critical legal theory.¹⁰ However, while fundamentally oppositional

⁴ See generally Gathii, “Neoliberalism, Colonialism and International Governance” supra note 1 at 2020; Obiora Chinedu Okafor, “Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective” (2005) 43 Osgoode Hall L. J. at 178 [Newness, Imperialism, and International Legal Reform]; Muthucumaraswamy Sornarajah, “Economic Neoliberalism and the International Law on Foreign Investment” in Anthony Anghie, Bhupinder Chimni, Karin Mickelson and Obiora Okafor (eds.) *The Third World and International Order: Law, Politics and Globalization* (Martinus Nijhoff Publishers, 2003) at 173.

⁵ See, for example, Anghie, “Time Present and Time Past” supra note 3 at 277 – 279 for a discussion of the Mandate System of the League of Nations and how it served as a continuation of colonialism primarily in the form of economic subordination.

⁶ See, for example, Gathii, “Neoliberalism, Colonialism and International Governance” supra note 1 at 1996 – 2071; James Thuo Gathii, “Imperialism, Colonialism and International Law” (2007) 54 Buff. L. Rev. at 1013 – 1066.

⁷ Anghie, “Time Present and Time Past” supra note 3 at 243 – 290; B. S. Chimni, “International Institutions Today: An Imperial Global State in the Making” (2004) 15:1 European Journal of International Law at 1 – 37 [International Institutions Today]; Ibironke T. Odumosu, “Locating Third World Resistance in the International Law on Foreign Investment” (2007) 9 International Community Law Review at 427 – 444 [Locating Third World Resistance]; Anthony Anghie, “International Financial Institutions” in Christian Reus Smit (ed.) *The Politics of International Law* (Cambridge University Press, 2004) at 217 – 237.

⁸ Okafor, “Newness, Imperialism, and International Legal Reform” supra note 4 at 171 – 191; Upendra Baxi, “The War on Terror and ‘The War of Terror’: Nomadic Multitudes, Aggressive Incumbents, and the ‘New International Law’ (2005) 43 Osgoode Hall Law Journal at 7 – 43; Upendra Baxi, “Operation Enduring Freedom: Towards a New International Law and Order?” in Anghie et. al, (eds.) *The Third World and International Order: Law, Politics and Globalization* supra note 4 at 31 – 46; Anghie, *Imperialism, Sovereignty and the Making of International Law* supra note 1 at 273 – 309.

⁹ Vasuki Nesiah, “The Ground Beneath Her Feet: TWAIL Feminisms” in Anghie et. al. *The Third World and International Order: Law, Politics and Globalization* Ibid. at 133 – 143; Celestine I. Nyamu, “How Should Human Rights and Development Respond to Cultural Legitimations of Gender Hierarchy in Developing Countries” (2000) 41 Harvard International Law Journal at 381; J.Oloka-Onyango & Sylvia Tamale, “‘The Personal is Political’ or Why Women’s Rights are Indeed Human Rights: An African Perspective in International Feminism” (1995) 17 Hum. Rts. Q. at 691.

¹⁰ Gathii, “Neoliberalism, Colonialism and International Governance” supra note 1 at 1997 & 1998; Okafor, “Newness, Imperialism, and International Legal Reform” supra note 4 at 178.

to particular aspects of international law,¹¹ most TWAIL scholars do not reject international law altogether.¹² Rather, they seek to transform and reconstruct international law from a language fraught with Eurocentric biases to one which captures the dynamics of difference and diversity.¹³ They strive for a counter-hegemonic international law.

TWAIL provides the main theoretical groundwork for the analysis in this thesis. It is useful in explaining why the World Bank's involuntarily resettlement and rehabilitation framework has failed to adequately address the concerns of Affected Communities in the Third World. A TWAIL analysis is also applied to demonstrate that while international law may claim to be neutral, it has established an international economic order in which the proprietary interests of private capital are protected at the expense of the interests of communities displaced by development projects. The analysis contained in this thesis, therefore, adds its voice to TWAIL to support the argument that there are significant continuities and discontinuities between the economic imperialism that was prevalent in the colonial era and the post-colonial neo-liberal globalization that characterizes today's international investment legal order. Also, like TWAIL, this thesis seeks to displace hegemonic

¹¹ Mutua, "What is TWAIL?" supra note 1 at 36; Madhav Khosla, "The TWAIL Discourse: The Emergence of a New Phase" (2007) 9 *International Community Law Review* at 295.

¹² Chimni notes, for example, that while contemporary international law is fraught with injustices against the Third World, it has also been used - albeit marginally - as a "protective shield" by less powerful states. B.S. Chimni, "Third World Approaches to International Law: A Manifesto" in Anghie et. al., *The Third World and International Order: Law, Politics and Globalization* supra note 4 at 72. Similarly, Okafor posits that despite a largely hegemonic international law regime, African countries have managed to obtain some modicum of success (largely through resistance) in areas such as access to essential HIV/AIDS drugs. See Obiora Chinedu Okafor, "Poverty, Agency and Resistance in the Future of International Law: an African Perspective" in Falk, Rajagopal and Stevens *International Law and the Third World: Reshaping Justice* supra note 1 at 105 [Poverty, Agency and Resistance]. I say "most" because, as Okafor observes, there is no monolithic TWAIL theory. Consequently, while some TWAIL scholars seek to reconstruct international law, others are more sceptical of such an effort. Okafor "Newness, Imperialism and International Legal Reform" supra note 4 at 176.

¹³ Anghie and Chimni, "Third World Approaches to International Law and Individual Responsibility" supra note 2 at 186.

international law with an international law that can be used by counter-hegemonic struggles “to advance their own interests, to protect themselves against an oppressive state, to improve their standards of living, and to make their voices heard in the international arena.”¹⁴

To support the TWAIL approach adopted in this thesis, the discussion also engages with the various criticisms that have been lodged against development i.e. critical development theory. Literature criticizing development often steers in one of two directions. There are those calling for the writing of an obituary to development.¹⁵ These scholars reject the whole institution of development on grounds that it has always been a fake, with no real intention of benefiting those it purports to develop.¹⁶ The less radical group contends that the problem is not so much with development as a concept. Rather, the problem is that the rhetoric of development has been used to satisfy the interests of a selected few.¹⁷ Proponents of this latter school of thought suggest that we should rethink the whole concept of development to rid it of its hegemony.¹⁸ Central to this rethinking process is creating mechanisms through which various stakeholders participate in the processes of decision-

¹⁴ Anghie, “Time Present and Time Past” supra note 3 at 243.

¹⁵ Wolfgang Sachs, “Introduction” in Wolfgang Sachs (ed.) *The Development Dictionary* (Johannesburg: University of Witwatersrand Press, 1993) at 1.

¹⁶ Ibid. at 1 - 5; Gustavo Esteva, “Development” in Wolfgang Sachs (ed.) *The Development Dictionary* Ibid at 6 - 25 ; Aturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (New Jersey: Princeton University Press, 1995) 55 – 101; Ruth E. Gordon and Jon H. Sylvester, “Deconstructing Development” (2004) 22 Wisconsin International Law Journal 1-98; Ziauddin Sardar, “Development and the Locations of Eurocentrism,” in Ronaldo Munck and Denis O’Hearn (eds.) *Critical Development Theory: Contributions to a New Paradigm*, (London: Zed Books, 1999) at 44 – 62; Majid Rahnema, “Towards Post-Development: Searching for Signposts, a New Language and New Paradigms,” in . M Rahmena and V. Bawtree (eds.) *Post-Development Reader* (London: Zed Publishers, 1997) at 377-404.

¹⁷ Balakrishnan Rajagopal, “Counter-hegemonic International Law: rethinking human rights and development as a Third World strategy” (2006) 27:5 Third World Quarterly 767 – 783 [Counter-hegemonic International Law]; Vincent Tucker, “The Myth of Development: A Critique of a Eurocentric Discourse,” in Munck & O’Hearn (eds.), *Critical Development Theory: Contributions to a New Paradigm* Ibid. at 1-26 [The Myth of Development].

¹⁸ Rajagopal, Ibid.

making.¹⁹ While the two camps offer different solutions, both agree on the fact that there is a crisis of development. Also, both attribute this crisis to the actions of economically powerful actors including First World nations, international organizations (particularly IFIs) and multinational corporations.

The thesis employs critical development theory as one of the prisms for assessing the impact of large dams on Affected Communities. Many observe that for centuries, large dams have been constructed to symbolize development.²⁰ Dams manifest the ability of human beings to progress from a state of being controlled by nature to one in which humans achieve economic growth (development) by using science and technology to exploit natural resources.²¹ It is perhaps no coincidence then that the phenomenal rise in dam construction globally occurred after World War II:²² around the same time that the “underdeveloped world” was “discovered” by the West.²³ This was also around the time when colonial empire was collapsing, allowing the United States to utilize its newly-gained dominance to

¹⁹ Joseph Stiglitz, “Participation and development: Perspectives from The Comprehensive Development Paradigm” Available at: <<http://siteresources.worldbank.org/CDF/Resources/stiglitzparticipation1999.pdf>>.

²⁰ Khagram posits, for example, that “Behind the intensified and transnationalized struggles over big dams lie deep struggles between competing visions and models of development.” Sanjeev Khagram, *Dams and Development: Transnational Struggles for Water and Power* (Oxford University Press, 2004) at 4. Similarly, the World Commission on Dams concluded in its 2000 report that the debate on dams is a debate about “the very meaning, purpose and pathway of development”. World Commission on Dam, *Dams and Development: A New Framework for Decision Making – The Report of the World Commission on Dams* <<http://www.dams.org/docs/report/wcdreport.pdf>> at 11.

²¹ Khagram, *Ibid.* Dams have been marketed for their development potential including job creation, supporting electricity-intensive industry (and thus increasing productivity) and generating revenue through electricity exports. See, for example, World Commission on Dam, *Ibid.* at 11.

²² World Commission on Dam, *Ibid.* at 9.

²³ See, for example, Sachs “Introduction” *supra* note 15 at 2; Esteva “Development” *supra* note 16 at 7; Tucker, “The Myth of Development” *supra* note 17 at 7; Gordon & Sylvester, “Deconstructing Development” *supra* note 16 at 10.

channel development funds directly through the United States coffers and indirectly through the IFIs that the US had participated in establishing and funding.²⁴

This turn of events defined the new relationship between the West and the Third World moving from one of colonizer-colonized to one of developed-developing/underdeveloped.²⁵ Herein lie the continuities and discontinuities of international law theorized by TWAILers. As colonial administrators handed over power to Third-World elites, they were replaced by IFIs which these post-colonial leaders had to significantly rely on for financing to build their newly independent states.²⁶ The “civilizing mission” that characterized physical colonial occupation thus moved from the political domination of “backward” societies to the economic domination of “backward” societies.²⁷ This economic domination is largely grounded on a need for the Third World to aspire to develop. As one TWAILer observes, “it is impossible to obtain a full understanding of [the complex relationship between international law and the Third World] unless one factors in ... a focus on development discourse as the governing logic of the political, economic, and social life of the Third World ...”²⁸

²⁴ Gordon & Sylvester, *Ibid.* at 11.

²⁵ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press, 2003) at 25 [International Law from Below].

²⁶ *Ibid.* at 26. See also Anghie, “Time Present and Time Past” *supra* note 3 at 276 – 285 where the author draws parallels between the Mandate System of the League of Nations and the World Bank and IMF.

²⁷ Anghie, *Ibid.* at 285.

²⁸ Rajagopal, *International Law from Below* *supra* note 25 at 1. Elsewhere, Mickelson notes that the history of TWAIL is perhaps most visible in international economic law, which had its most notable history in the context of the formation of the United Nations Conference on Trade and Development (UNCTAD) in 1963. At the first session of UNCTAD, the coalition of the Group of 77 was established and it had as one of its most pressing issues the development of a new policy on trade and development. See Karin Mickelson, “Rhetoric and Rage: Third World Voices in International Legal Discourse” (1998) 16: 2 *Wisconsin International Law Journal* at 362, 363 & 375 [Rhetoric and Rage].

Restricting the analysis in this thesis to an application of critical development theory would not serve the purposes of the thesis because the theory does not deal directly with the role of law in facilitating hegemony. At the same time, TWAIL scholarship encompasses a variety of aspects without concentrating solely on the issue of development. A merger of the two is, therefore, necessary. It is referred to here as the TWAIL Critique of International Law and Development. This blend is helpful in unpacking and documenting the legal tools applied by IFIs to favour macro-economic or hegemonic forms of development over people-centred or counter-hegemonic approaches to development. It also helps in contesting the neo-liberal legal institutions established to protect investment interests in the name of development without providing comparable protection to dam-affected communities.²⁹ Like TWAIL, the discussion is cautious of the fact that empire or hegemony does not operate in a vacuum. The ability of mainstream international law and hegemonic development to maintain centre-stage is made possible not solely through the use of force, but also through co-opting its subjects. Rajagopal opines, for example:

Empire is not a geographical concept in the sense of being co-equivalent with the USA and its outliers, but is a hegemonic concept, with a widely variable composition that includes globalisation. ... In fact, the term 'empire' is less helpful than the term 'hegemony' in understanding the historical patterns of domination and the role of international law therein. This is simply because the role of law in international order is not simply a matter of the most powerful countries imposing it on the rest; it is also a matter of the rest of the world internalising the necessity and legitimacy of domination through law.³⁰

²⁹ See generally Germain Gros & Olga Prokopovych "When Reality Contradicts Rhetoric: World Bank Lending Practices in Developing Countries in Historical, Theoretical and Empirical Perspectives" <<http://www.codesria.org/Links/Publications/monographs/Gros.pdf>> [When Reality Contradicts Rhetoric]; Joel M. Ngugi, "The World Bank and The Ideology of Reform and Development in International Economic Development Discourse" (2006) 14 *Cardozo Journal of International and Comparative Law* at 325 [The World Bank and The Ideology of Reform].

³⁰ Rajagopal, "Counter-hegemonic International Law" *supra* note 17 at 771. See also Balakrishnan Rajagopal 'International Law and Social Movements: Challenges of Theorizing Resistance' (2003) 41 *Columbia Journal of Transnational Law* at 427 for the observation that hegemony is not necessarily synonymous with force or

By obtaining assimilation through establishing allies in the Third World, the European origins of international law and development are underplayed. This allows institutions such as the World Bank to exhibit themselves as the “ultimate arbiters of scientific knowledge about how to achieve development” and pose as the “rational-legal bureaucracy” producing expert and independent knowledge.³¹ The apparent neutrality has positioned the World Bank as the frontrunner in development issues and enabled it to continue touting large dams and the protection of the private proprietary interests of dam builders as one of the surest ways of achieving economic development.³² At the same time, this position has enabled the Bank to lead the way in determining the prescription for affected communities through its policies on resettlement. In the discussion that follows, I develop three themes which provide useful guidance for the analysis in the rest of the thesis.

III. A TWAIL Critique of International Law and Development: Thematic Components

The TWAIL Critique of International Law & Development produced in this chapter can be divided into three themes. The first theme revolves around the fact that development has been institutionalized and captured by a few powerful actors to fortify their interests and to justify impositions onto others. The second theme illuminates how the universalization and (mechanical) neutralization of legal norms not only undermines the diversity that characterizes the Third World but also results in the further marginalization of already

violence. Rather, it is about the dominant group producing, reproducing and mobilizing popular consent [International Law and Social Movements].

³¹ Anghie, “International Financial Institutions” supra note 7 at 223. See also Escobar, *Encountering Development: The Making and Unmaking of the Third World* supra note 16 at 26.

³² The World Bank has supported numerous dam initiatives including financing studies on dam construction, lending money for construction of dams, providing technological support for conducting feasibility studies and creating institutional frameworks to assist in the planning and implementing of dam projects. See World Commission on Dams, *Dams and Development* supra note 20 at 171.

vulnerable Third World peoples. The last theme observes how resistance has gained currency as a reaction to the suppression caused by universalizing and institutionalizing legal norms and principles.

a) Negative institutionalization of international law and development

Development and international law have been negatively institutionalized. By this, I mean that these concepts have been used to construct meanings aimed at furthering and imposing the ambitions and projects of powerful actors onto the rest of the world.³³ This institutionalization defines the boundaries of “what is” and “what is not” by using the West as its reference point.³⁴ Its underlying assumption is one of homogeneity in which Third World countries are presumed to aspire to move from a status of developing to one of (Westernized) developed. The institutionalization is theoretical and practical; it is conceptual and structural. It operates through structures and procedures on the one hand and ways of knowing and being on the other hand. These two “institutions” are inextricably linked since the institutional structures and procedures are often the producers or determinants of the ways of knowing and being.

i) Institution as “Structure”

The quintessential structural institution is “the West” as a geographical space, symbolized by a statehood to which the Non-West or Third World should aspire.³⁵ This is the civilizing

³³ See, for example, Tucker, “The Myth of Development” supra note 17 at 13.

³⁴ Esteva, “Development” supra note 16 at 7 and 12.

³⁵ Conceptually, however, it is generally accepted that the West can no longer be confined to a particular geographical space, especially given the manner in which it has proliferated other societies. Still, the West uses scales such as liberalism, secularism, nation-state, civilization and freedom to distinguish itself from the developing world. These concepts have an element of geographical location since they only fit well in certain parts of the world. See Sardar, “Development and the Locations of Eurocentrism” supra note 16 at 44 & 49.

mission. It is obsessed with the “Westernization of the world”.³⁶ In colonial times, it was to be achieved through political control of the “uncivilized” or “backward” societies. In contemporary times, it is embodied in the legacy of the post-colonial state (indirect political control) and imposition of economic policies such as neo-liberalism. While portrayed as neutral and universal, these policies are “planned, directed and controlled by specific international and national *institutions* that act in ideological concert and reflect the view and interests of certain communities, societies and cultures.”³⁷

A material component of this structural institution is the obsession with the creation of formal legal and economic structures.³⁸ Formal legal structures and the establishment of other independent and well functioning institutions have been touted as being essential to achieving economic growth and development.³⁹ In practice, however, these institutions are largely skewed towards a neo-liberal globalization aimed at supporting private capital through protecting private property rights, lowering transaction costs and insisting on the enforcement of contractual obligations.⁴⁰ They are designed to include organized institutionalized actors while excluding disorganized or amorphous non-institutionalized actors.⁴¹ For example, in the international investment regime, structures such as the International Centre for Settlement of Investment Disputes (ICSID) give participatory rights to institutionalized actors such as states, private investors and to a limited extent, non-

³⁶ Sachs, “Introduction” supra note 15 at 4.

³⁷ Gordon & Sylvester, “Deconstructing Development” supra note 16 at 8. [Emphasis mine]

³⁸ Ngugi, “The World Bank and the Ideology of Reform” supra note 29 at 315; See also generally Yujiro Hayami, “From the Washington Consensus to the Post-Washington Consensus: Retrospect and Prospect” (2003) 20: 2 Asian Development Review at 40 [From the Washington Consensus to the Post-Washington Consensus].

³⁹ Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization and Emancipation* (London: Butterworths, 2002) at 445 [Toward a New Legal Common Sense].

⁴⁰ Ibid.

⁴¹ Odumoso, “Locating Third World Resistance” supra 7 at 443.

governmental organizations (NGOs), while denying participation to non-institutionalized groups such as Third World grassroots movements.⁴²

Lastly, structural institutionalization takes the form of actual physical structures. Of particular relevance to the present analysis is the touting of big dams as institutions of progress and development, symbolic of the ability of humans to “harness nature’s forces”.⁴³ It is as such not a coincidence that the World Bank – the international gatekeeper of development – has funded numerous dam projects in the Third World.⁴⁴ The discussion in the thesis engages with a number of structural institutions including the establishment of international institutional structures such as the Inspection Panel and ICSID and domestic structures such as the ERA. As part of its contribution, this thesis interrogates the roles of these institutions to determine if, and to what extent, they serve the interests of Affected Communities.

The institutions of structure are at the centre of deciding what becomes essential and natural to the rest of the universe. As opined in the ensuing discussion, by naturalizing their ways of knowing and being, these structural institutions un-naturalize or abnormalize alternative ways of knowing and being.

⁴² Ibid. at 431.

⁴³ World Commission on Dams, *Dams and Development* supra note 20 at 169. Khagram argues that “This vision equated development as a large-scale, top-down, and technocratic pursuit of economic growth through the intensive exploitation of natural resources.” Khagram, *Dams and Development: Transnational Struggles* supra note 20 at 4.

⁴⁴ World Commission on Dams, Ibid. at 171; Khagram, Ibid. at 7.

ii) Institution as a Way of Knowing and Being

One commentator observes that the dominance of the West rests not in “its economic muscle and technical might” but primarily in its power to define.⁴⁵ It follows that the expansion of structural institutions such as IFIs facilitates the expansion and domestication of mainstream international law.⁴⁶ IFIs produce the knowledge necessary to determining the manner in which poor countries can be “known, specified and intervened upon.”⁴⁷ Through them, a politics of truth is created and maintained but presented as one devoid of political and/or cultural biases.⁴⁸ To this end, Third World scholars opine that IFIs such as the World Bank are ideological.⁴⁹ They are ideological because the recipes that they produce as solutions to Third World development problems are based on misconceptions about the Third World and oversimplifications of what has worked in the West.⁵⁰ In this way, they legitimize “a particular type of society”.⁵¹ For example, the World Bank boasts of “knowing”⁵² determinate ways for achieving economic growth and development.⁵³ The

⁴⁵ Sardar, “Development and the Locations of Eurocentrism” supra note 16 at 44. See also Chimni, “Third World Approaches to International Law: A Manifesto” supra note 12 at 60 for the argument that “... dominant social forces in society maintain their domination not through the use of force but through having their worldview accepted as natural by those over whom domination is exercised.”

⁴⁶ Rajagopal, *International Law from Below* supra note 25 at 40.

⁴⁷ Escobar, *Encountering Development: The Making and Unmaking of the Third World* supra note 16 at 45.

Rajagopal also observes that international institutions have independently played a significant role in formulating policies relating to colonialism and development and it would be wrong to relegate their position as being one of a mere mouthpiece of the interests of powerful states. Rajagopal, *Ibid.* at 47 & 48. See also Chimni, “International Institutions Today” supra note 7 at 1 & 2 for the argument that international institutions (of economic, social and political form) constitute a “nascent global state” in which interests of transnational capital and powerful states are realized.

⁴⁸ Escobar *Encountering Development: The Making and Unmaking of the Third World* supra note 16 at 46 & 52. Escobar maintains that development creates an institutional field from which discourses are produced, recorded, stabilized, modified and put in circulation.

⁴⁹ See generally, Ngugi, “The World Bank and the Ideology of Reform” supra note 29 at 313 – 345.

⁵⁰ *Ibid.* at 316.

⁵¹ *Ibid.* at 320.

⁵² I place emphasis on “knowing” because it is, I argue, a form of institutionalization in which one actor takes the responsibility of “studying” and imposing “solutions” on another, often without meaningfully incorporating the realities of those being studied or without engaging subjects in the capacity of knowledgeable contributors.

⁵³ Ngugi, “The World Bank and the Ideology of Reform” supra note 29 at 315.

Bank packages its development recipes as universal and scientifically determinable, thereby delegitimizing alternative approaches to development.⁵⁴ It maintains that its recipes are superior because of their “dominance while their dominance is explained in terms of their superiority.”⁵⁵ Where the Bank’s policies fail to achieve the promised growth, the failure is blamed on weaknesses in implementation mechanisms.⁵⁶ This is evidenced in Chapter Three, for example, where the World Bank attributes the failure of resettlement and rehabilitation initiatives to poor implementation and inadequate supervision.

However, the fact that the World Bank is ideological does not necessarily translate into a rigid application of its internal rules. It is both an open and a closed system. It is open in the sense that it takes into account criticisms, and closed because the incorporation of and reflection on criticisms does not destabilize its ideological core.⁵⁷ As some have concluded, the Bank remains convinced that it is the ultimate “knower” of (a) what development is, and (b) how to bring about development.⁵⁸ In Chapter Four, this character of the Bank as an open and closed system is exemplified by the manner in which the Bank’s Board of Directors responds to issues raised about the operation of the Inspection Panel.

Law plays a central role in instructing the ways of knowing and being – or at least in legitimizing one way of knowing over another.⁵⁹ For example, the history of the expansion

⁵⁴ Ibid. at 324. See also Anghie, “International Financial Institutions” supra note 7 at 223 for the argument that IFIs exercise a claim to neutrality and independence by presenting “themselves as the ultimate arbiters of scientific knowledge about how to achieve development or monetary stability”.

⁵⁵ Ngugi, Ibid.

⁵⁶ Ibid. at 334.

⁵⁷ Gros & Prokopovych, “When Reality Contradicts Rhetoric” supra note 29 at 18.

⁵⁸ Ibid. at 42.

⁵⁹ Pahuja opines, for example, that one of the “gifts of knowledge” that developed countries claim to give to the developing is that of law. See Sundhya Pahuja, “Beheading the Hydra: Legal Positivism and

of the “law and development project” at institutions such as the Bank reveals a significant reliance on Western legal scholars to guide the planning of development projects and provide personnel to manage the projects.⁶⁰ This had a significant bearing on the construction of meanings because by recruiting scholars especially from the United States, there was a further concentration on westernizing Third World legal systems as a precondition to development.⁶¹ One scholar argues that in fact, there is a transcendental relationship between (positive) law and development.⁶² Each of these concepts is part of a dynamic but stable web of concepts that rely on each other to assert themselves as “self evidently true” or claim universal status.⁶³ To this end, a “proper ‘law’ is one which promotes ‘development’ as a process. And development as an end-point is reached when institutions such as ‘law’ can be found.”⁶⁴

It is difficult to disentangle definitional power from economic prowess. Too frequently, the power to determine “what is” derives from money muscle. Tucker observes, for example, that North American and European universities are able to produce more knowledge than universities in other parts of the world because of their access to huge research grants.⁶⁵ Similarly, Ngugi concludes that one of the reasons why the World Bank is able to maintain its ideological stance is the sheer amount of resources that it has for research, employing

Development” 2007 (1) Law, Social Justice & Global Development Journal (LGD).
<http://www.go.warwick.ac.uk/elj/lgd/2007_1/pahuja> at 3 [Beheading the Hydra].

⁶⁰ David Trubek & Marc Galanter, “Scholars in Self-Enstrangement: Some Reflections on the Crisis in Law and Development Studies in the United States” (1974) *Wisconsin Law Review* 1065. See also Chimni, “Third World Approaches to International Law: A Manifesto” *supra* note 12 at 60 for a discussion of the role of Northern academic institutions in the spread of international law.

⁶¹ Gordon & Sylvester, “Deconstructing Development.” *supra* note 16 at 18.

⁶² Pahuja, “Beheading the Hydra” *supra* note 59 at 3.

⁶³ *Ibid.*

⁶⁴ *Ibid.* at 7.

⁶⁵ Tucker, “The Myth of Development” *supra* note 17 at 13.

competent professionals (particularly economists) and financing and co-financing projects.⁶⁶ Consequently, while many will agree that we can no longer attribute the power to define solely to economic capital, it is counterproductive to deny that these resources do not tip the bargaining power. In investments such as the ones studied in this thesis, economic muscle gives multinationals a voice in defining the terms of business.

The result of negative institutionalization is a naturalization, legitimization, universalization and neutralization of international law and development for the purpose of intervening into the affairs of those who do not comply with this “natural order”.⁶⁷ As the discussion in the thesis will demonstrate, this allows international law to domesticate itself by dislocating local agencies in the making of laws.⁶⁸

b) Diversity of the Third World: countering the universal, neutral and scientific

Both TWAIL and critical development theory pose an ideological challenge to the “imperialism of sameness”.⁶⁹ They contest the image that the West constructs of the Third World as a homogeneous entity defined by poverty, backwardness, filth, corruption and irrationality.⁷⁰ TWAILers agree that the category “Third World” relates to certain geographical spaces that have shared experiences of subordination and marginalization

⁶⁶ Ngugi, “The World Bank and the Ideology of Reform” supra note 29 at 331 – 334.

⁶⁷ Ngugi is of the opinion that the Bank insists on formal legal institutions in order for it to acquire a definitive discourse that rationalizes and justifies its economic intervention in the affairs of developing countries. It becomes responsible for installing the “appropriate” institutions. Ngugi, Ibid. at 319 & 320.

⁶⁸ Okafor, “Poverty, Agency and Resistance” supra note 12 at 100 - 104. See also generally James Thuo Gathii, “A critical appraisal of the NEPAD agenda in the light of Africa’s place in the world trade regime in an era of market centered development” (2003) 13 *Transnational Law and Contemporary Problems* at 179 – 210.

⁶⁹ Upendra Baxi, “What may the ‘Third World’ expect from International Law?” in Falk, Rajagopal and Stevens (eds.) *International Law and the Third World: Reshaping Justice* supra note 1 at 10; Sachs, “Introduction” supra note 15 at 4.

⁷⁰ Gordon & Sylvester, “Deconstructing Development” supra note 16 at 2.

dating back to the colonial era.⁷¹ They also agree that the Third World relates to those parts of the world that are neither European in particular nor Western in general.⁷² However, they maintain that while Third World states and peoples are similar, they are not the same. The Third World consists of a chorus of voices that distinguish the shared similarities from the sameness with which the outside world seeks to understand the former.⁷³

For purposes of this thesis, it is important to underline this dynamics of difference. The critical analysis contained in the thesis demonstrates that a homogenization of Third World peoples is dangerous because the failure to respect diversity results in the further marginalization of Affected Communities. This is because such perceptions ignore the fact that even the ability of different Third World peoples to influence change in the international legal order has not always been the same. Some actors have, for a number of reasons, been able to compel international legal reform in ways that others are yet to achieve or even dream of. For example, in addition to being one of the World Bank's major "clients",⁷⁴ India has also been able to influence institutional reform because of the magnitude of dam-construction in the country.⁷⁵ Also, perhaps because of the country's

⁷¹ Mickelson, "Rhetoric and Rage" supra note 28 at 360; Okafor, "Newness, Imperialism, and International Legal Reform" supra note 4 at 174 & 175.

⁷² Mutua, What is TWAIL? supra note 1 at 35.

⁷³ Mickelson, "Rhetoric and Rage" supra note 28 at 360.

⁷⁴ The Bank lends vast amounts to India when compared to most other developing countries. Darrow notes, for example, that India is one of a small group of Asian countries that have consistently been beneficiaries to IDA's funds. He adds that in fact, the IDA was at one time informally named the "India Development Association". Mac Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law* (USA: Hart Publishing, 2003) at 14 [Between Light and Shadow].

⁷⁵ Khagram reports, for example, that India was one of the leading dam builders in the world in the second half of the twentieth century. Khagram, *Dams and Development: Transnational Struggles* supra note 20 at 29.

huge population, India is one of the pioneers and an internationally significant site for anti-dam movements in the world.⁷⁶ Fox reports that:

Geographically, of the fourteen claims filed during the [Inspection] panel's first five years, almost half involved either Brazil (three claims) or India (three claims, if one includes Nepal's Arun Dam, designed to provide power to India.) Moreover, locally based international and environmental or human rights protests against Bank-funded infrastructure projects have long been especially prominent in Brazil and India, perhaps related to the density of their civil societies.⁷⁷

Sustained resistance breeds institutional reform. The ability of grassroots movements in India to mobilize, sustain and organize resistance has influenced a number of reforms in international institutions such as the Bank. For example, the country's grassroots movements were a catalyst for the establishment of the first ever quasi-independent panel established at the World Bank in September 1993 to review the Bank's compliance with its operational policies and procedures.⁷⁸ This resistance has also informed the reform of the Bank's policies on rehabilitation and resettlement, indigenous peoples, human rights and environmental issues.⁷⁹ Invariably, the resistance has resulted in the production of alternative norms and rules that take cognisance of the plurality of international law's population. However, even where reforms have been made, they are largely restricted to an attempt to understand the particular Third World populations that have compelled the

⁷⁶ Ibid. at 11 – 26.

⁷⁷ Jonathan A. Fox, "The World Bank Inspection Panel: Lessons from the First Five Years" (2000) 6 Global Governance at 291. See also Lori Udall, "The World Bank and Public Accountability: Has Anything Changed?" in Jonathan A. Fox & L. David Brown (eds.) *The Struggle for Accountability: The World Bank, NGOs and Grassroots Movements* (Cambridge, Massachusetts: The MIT Press, 1998) at 396 & 397.

⁷⁸ Rajagopal, *International Law from Below* supra note 25 at 122. See also Khagram, *Dams and Development: Transnational Struggles* supra note 20 at 195.

⁷⁹ Khagram, Ibid. at 194. Khagram posits that as a result of the criticisms regarding high displacement costs in the Narmada Projects, in 1985, the Bank conducted a review of resettlement practices on a portfolio of hydro and agriculture projects over a period of six years. The findings of this review would later contribute to the reform of the Bank's policy on resettlement.

reforms to be made. The result has been a revision of policies that many times continue to treat Third World states as a block and Third World peoples as a homogenous part of this block. Perhaps nowhere is this issue more evident in the thesis than the discussion of the definition of indigenous peoples contained in Chapter Three. As another theoretical contribution to this dynamics of difference, the Conclusion to the thesis maps out an alternative theory of resistance that distinguishes between the experiences of different Third World countries.

Some may interpret this emphasis on the dynamics of difference as reflecting a wider incoherence within TWAIL as a theory.⁸⁰ In response, this thesis joins other TWAILers in maintaining that the Third World is a complex entity. Its existence is defined as much by its multiple similarities as it is by its stark differences. To attempt to reduce it to a uniform, standard and internally consistent entity would be to undermine its on-the-ground realities. As one TWAIL scholar has noted, the Third World is not defined by “the existence and validity of an unproblematic monolithic third-world category.”⁸¹ Rather, it is defined by the shared historical and continuing experiences of subordination⁸² that denote “a unity that transcends the enormous diversity that marks it”.⁸³

⁸⁰ Mickelson observes, for example, that there is a conventional view among legal scholars that the “Third World approach” is neither coherent nor distinctive. She argues against such a position by noting that there is a unifying set of characteristics that correctly identify this Third World approach. Mickelson, “Rhetoric and Rage” supra note 28 at 353.

⁸¹ Okafor, “Newness, Imperialism, and International Legal Reform” supra note 4 at 174. See also Obiora Chinedu Okafor, “Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?” (2008) 10 International Community Law Review at 375 [Critical Third World Approaches to International Law].

⁸² Okafor, “Newness, Imperialism, and International Legal Reform” Ibid. at 174.

⁸³ Anghie & Chimni, ““Third World Approaches to International Law and Individual Responsibility” supra note 2 at 185. See also Chimni, “Third World Approaches to International Law: A Manifesto” supra note 12 at 49; Mickelson, “Rhetoric and Rage” supra note 28 at 412.

What then are the implications of acknowledging the various pockets of diversity that define the Third World? Does not such recognition result in the production of an international law that is uncertain, inconsistent and unable to stand the test of universality? In answering this question, we need to remind ourselves that mainstream international law cannot boast of universal origins. While it is difficult to imagine an international law that is not universal, we need to recall that international law's universal status is quite recent and biased – a product of the imperial expansion which became eminent at the end of the nineteenth century.⁸⁴ The project of universalizing this law was concretized with the recruitment of former colonies as “sovereigns” into the international legal order.⁸⁵

Consequently, if mainstream international law has been certain or consistent, these attributes have largely been as a result of the protracted domination of certain views over others; not as any indicator of either their justness or validity. Also, the ability to claim universal status is not because those affected assent to this law but because a few dominant groups have used various means to impose their ways of knowing and being. As such, by acknowledging diversity even within these formal set-ups, we produce an international law that is consistent with the realities of international law's population. Therefore, instead of a dogmatic insistence on a Eurocentric, “stable” and “consistent” international law, what can be aspired to is a degree of predictability and certainly that takes into account the realities and complexities of those that this international legal regime seeks to govern. This is the counter-hegemonic law that the thesis and TWAILers map out. As one scholar has argued, “Counter-hegemonic globalization is ... a plural project. Herein lies both its strength and its

⁸⁴ Anghie, *Imperialism, Sovereignty and the Making of International Law* supra note 1 at 32.

⁸⁵ Ibid. at 197.

weakness. Such plurality and diversity does not preclude the possibility of communication, mutual understanding and co-operation among the different struggles.”⁸⁶ This counter-hegemonic law by its nature cannot afford to be rigid as it should incorporate and be defined by non-formal systems of law-making, such as resistance.

c) Resistance: writing a counter-hegemonic theory into international law

According to TWAIL scholars, the composition of the “makers of legal change” is quickly expanding.⁸⁷ Whether it be in the sophisticated and highly institutionalized area of the international investment regime⁸⁸ or other issue areas such as democracy, development and environment,⁸⁹ TWAIL scholars insist that we can no longer ignore the role that resistance is playing in transforming and shaping the international legal order.⁹⁰ Resistance is being used by Third World peoples to break the fetishism of institutionalization⁹¹ on the one hand and as a channel for communicating plurality and diversity on the other hand. Consequently, TWAIL scholars encourage other international lawyers to begin seriously engaging with resistance as a source of legal reform.⁹² It is time to write a theory of resistance into the law.⁹³

⁸⁶ Santos, *Toward a New Legal Common Sense* supra note 39 at 459.

⁸⁷ Rajagopal, *International Law from Below* supra note 25 at 167.

⁸⁸ See generally Odumosu, “Locating Third World Resistance” supra note 7.

⁸⁹ Rajagopal *International Law from Below* supra note 25.

⁹⁰ For Chimni, the starting point of TWAIL’s narrative should, in fact be, making resistance an integral part of international law. Chimni, “Third World Approaches to International Law: A Manifesto” supra note 12 at 67. See also generally Balakrishnan Rajagopal, “International Law and Third World Resistance: A Theoretical Inquiry” in Anghie et. al., (eds.) *The Third World and International Order: Law, Politics and Globalization* supra note 4 at 145 – 172.

⁹¹ Rajagopal, “Counter-hegemonic International Law” supra note 17 at 781.

⁹² Rajagopal, *International Law from Below* supra note 25 at 23. Similarly, Odumosu notes that resistance is not new to international law. Hence, if theories of resistance have only recently gained audience, it is not due to the absence of resistance in international. Rather, it is because scholars largely refrained from incorporating it into the law. Odumosu, “Locating Third World Resistance” supra note 7 at 427.

⁹³ See generally, Rajagopal, “International Law and Third World Resistance” supra note 90.

As one TWAILer observes, “Irrespective of the nature it subsequently acquires, the initial process of activism is inherently domestic.”⁹⁴ This is testimony to the fact that hegemony is neither situated in a particular geographical space nor limited to the interaction between Third World and First World nations. Because Third World states many times act counter to the interests of their own peoples, it is equally important to draw a distinction between Third World states and Third World peoples when examining the challenges faced by the latter.⁹⁵ Resistance is the act through which Third World peoples oppose and organize against a ruling elite that prioritizes the interests of capital over true national interests.⁹⁶ As the Conclusion to this thesis reveals, even in countries such as Uganda where resistance was largely absent, the events that have occurred in the last decade suggest that the culture of resistance in the country may be revised.

Perhaps nowhere have the struggles against the “privatization” of law been more prevalent than the area of large dam building. Through transnational movements generated by NGOs, grassroots and social movements, traditionally weak actors have been able to alter the policies and actions of traditionally powerful actors such as IFIs, states and multinational corporations.⁹⁷ Resistance against large dams has facilitated the reconstruction and reform of issue areas in international law including the environment, human rights and indigenous

⁹⁴ Odumosu, “Locating Third World Resistance” supra note 7 at 431.

⁹⁵ TWAIL scholars observe that Third World peoples are increasingly finding it hard to depend on their states because the latter have parcelled out their sovereignty to actors above the state (such as international institutions) and below the state (market actors and NGOs). See Rajagopal, *International Law from Below* supra note 25 at 12; Rajagopal, “International Law and Social Movements” supra note 30 at 419. Similarly, Baxi contends that because the post-colonial state was created in the image of the West, it has furthered the latter’s interest and continued to possess residues of colonialism and oppression. Consequently “Third World (and now post-socialist) state-formative practices and insurgent struggles emerge either as the clones of a resurgent First World or as ‘outlaws’ always entirely worthy of sustainable, and fierce, repression.” Baxi, “What may the ‘Third World’ expect from International Law?” supra note 69 at 9 & 10.

⁹⁶ Chimni, “Third World Approaches to International Law: A Manifesto” supra note 12 at 51.

⁹⁷ See generally Khagram, *Dams and Development: Transnational Struggles* supra note 20.

peoples.⁹⁸ For example, it is grassroots movements that led to the adoption of an internal Bank policy on indigenous peoples in 1982 and a revision of the Bank policies on resettlement and environmental assessment.⁹⁹ Similarly, Chapter Four discusses in detail the contribution of resistance to both the formation of and reforms in the World Bank Inspection Panel. However, as Chapter Five demonstrates, resistance is yet to significantly shift or shake the language of law to protect the interests of Affected Communities in the manner that it protects the interests of private capital.¹⁰⁰

One scholar attributes the success of resistance to three main factors. First, the ability to organize and sustain mobilization, often supported by the presence of democratic political institutions.¹⁰¹ Second, it helps if the norms and principles being advocated by movements are institutionalized in the structures of states, multilateral agencies and multinational corporations.¹⁰² Third, the ability to sustain resistance is encouraged by the emergence of transnational coalitions among actors interested in similar norms and principles.¹⁰³ The discussion in this thesis acts as an expansion of the theories of resistance put forth by Third World scholars. Particularly, the thesis builds on two important ingredients of successful resistance: the role of democratic institutions and the benefits of common/shared values. The existence of democratic institutions is central to the sustenance of resistance. Whether it

⁹⁸ Ibid. at 15. See also David Szablowski, *Transnational Law and Local Struggles: Mining, Communities and the World Bank* (Oregon: Hart Publishing, 2007) at 89 & 90.

⁹⁹ World Commission on Dams, *Dams and Development* supra note 20 at 19.

¹⁰⁰ See also Ibid. at 188 for the argument that the Bank continues to place more emphasis on project planning, design and construction, than it does on issues affecting the environment and people. Elsewhere, commenting on the World Bank's approval culture, Darrow contends that the Bank continues to be obsessed more with loan approval of large projects than it is with the adverse impacts of those projects. In fact, Bank staff seem to be appraised primarily on the number of proposals approved and the amounts involved. Darrow, *Between Light and Shadow* supra note 74 at 197.

¹⁰¹ Khagram, *Dams and Development: Transnational Struggles for Water and Power* supra note 20 at 20.

¹⁰² Ibid. at 15.

¹⁰³ Ibid. at 9.

be at the domestic or the international level, democracy creates a landscape on which actors can mobilize without fear, access information instrumental to such mobilization and publicize their claims through an independent, transparent and fearless media.

The level of democracy often has a bearing on the types of actors that will be involved in acts of resistance. Where there is limited freedom of expression, it is more likely that the voices of grassroots movements will be engulfed in those of institutionalized actors such as NGOs. This does not necessarily mean that the interests of Affected Communities will be overshadowed, even though it increases the risks of such an occurrence.¹⁰⁴ On the plus side, domestic NGOs, especially when working in alliance with like-minded transnational NGOs, increase the avenues through which information can be channelled and protests staged. Also, Affected Communities many times have pressing needs which sometimes force them to discount future benefits for short-term and immediate concessions. That those displaced are often poor groups in society means that sometimes despondence will overtake the will to fight. In other words, ‘something small now is better than an uncertain tomorrow’. Speaking to dilemmas resulting from social exclusion, Santos notes, for example, that:

... the overwhelming majority of the population that experience the consequences of intense social destruction and creation are so busy or pressed to adapt, resist, or simply survive that they fail to ask, let alone answer, complex questions about what they are doing and why. Contrary to what some authors have claimed this is not a period conducive to self-reflexivity.¹⁰⁵

Lastly, there is often a price to pay for engaging in acts of resistance and potential actors must decide whether the risks are worth it. For example, should one risk going to prison for years or should they keep a low profile and look for alternative means of providing for their

¹⁰⁴ Herein lies the importance of “common values” that is discussed shortly.

¹⁰⁵ Santos, *Toward a New Legal Common Sense* supra note 39 at 439.

families? The risks are often considerably reduced when one relinquishes their power to institutionalized actors such as NGOs. Even where Affected Communities decide to resist, it may be that movements will be composed more of those belonging to younger age groups who may not appear to have much to lose but have a lot to gain if acts of resistance are successful.

The sharing of common values also plays a significant role in sustaining resistance. Whether it be for purposes of forging coalitions among NGOs across borders or recruiting domestic participants, “common values” is a currency instrumental both for the initial recruitment of masses and for sustaining their involvement. In fact, common values help with expanding the boundaries of resistance from a domestic framework which may be oppressive to an international landscape (through coalition building with transnational actors) which invariably increases the mechanisms of accountability. Santos notes, for example, that the oppression resulting from neo-liberal globalization “has created the conditions for the counter-hegemonic forces, organizations and movements located in the most disparate regions of the globe to visualize common interests across and beyond the many differences that separate them and to converge in counter-hegemonic struggles embodying separate but related emancipatory social projects.”¹⁰⁶

Numbers, on their own, are perhaps insufficient to translate acts of resistance into tangible reforms. Specifically, writing resistance into law, strictly speaking, demands more than pressure from external forces. Often times, the success of movements is facilitated by support from like-minded people who are internal to the institutions from which reform is

¹⁰⁶ Ibid. at 447.

sought (insiders). In turn, insiders are enabled by the existence of democratic systems in these institutional structures, which allow for at least some reduction of single or dominant narratives. Chapter 4, for example, illustrates how the World Bank has a number of internal mechanisms that allow for alternative narratives including voting rights of member countries, diverse representations on the Board of Directors, internal audits and independent evaluations.¹⁰⁷

IV. The Reconstruction Project

International law and development share a common dilemma. Both are seemingly neutral and universal concepts which can mean different things to different people. One commentator concludes, for example, that development is a vacuum that can be filled with any content and promises of a “higher goal”.¹⁰⁸ He adds that “The term creates a common ground, a ground on which right and left, elites and grassroots fight their battle.”¹⁰⁹ Consequently, it easily lends itself to a variety of issues including poverty, health, basic needs, democracy, sustainable environment and good governance.¹¹⁰ The same can be said about international law. That is why, while they problematize international law, TWAIL scholars also acknowledge its positive contributions.¹¹¹

For similar reasons, the less-radical development critics are of the view that to abandon development would call for denouncing other concepts such as socialism, cooperation and

¹⁰⁷ See Chapter 4 Part V.

¹⁰⁸ Sachs, “Introduction” supra note 15 at 4.

¹⁰⁹ Ibid.

¹¹⁰ Gros & Prokopovych contend that it is this elasticity of the concept and the fact that it can lend itself to many other concepts, that allows institutions such as the World Bank to remain relevant. Gros & Prokopovych, “When Reality Contradicts Rhetoric” supra note 29 at 10.

¹¹¹ See discussion about the positive attributes of the law in the Introduction to the thesis.

democracy since these concepts have also been used as mechanisms of exploitation and domination.¹¹² They recommend instead a critical analysis of development which neither overlooks its positive attributes nor romanticizes the pre-capitalist conditions of those in the Third World.¹¹³ Similarly, TWAIL scholars are cautious of the fact that they are part of a tradition that is “not wholly unworthy of reclamation.”¹¹⁴ Therefore, instead of attempting to set aside international law, they strive to rid it of the remnants of colonialism and other forms of oppression and marginalization.

If we accept that the problem with development and international law is “the negative institution” that has been carved out of them, then we can also agree that the way forward lies not in rejecting these notions. The answer lies in rethinking development and international law to foster counter-hegemonic international and national legal systems. This thesis is part of the reconstruction project of TWAIL and critical development theory. It is not a rejection of large dams as tools for development. It is a rejection of the fact that the construction of these dams has largely been undertaken without providing adequate safety nets for those affected. The thesis is not an attack on the World Bank. Rather, it is an attack on the fact that the Bank has failed to provide Affected Communities with protections similar to those provided for private capital. Lastly, the thesis is not against foreign direct investment. It is against the *laissez faire* attitude that limits the ability of state parties to interfere with investments to further national interests.

¹¹² Tucker, “The Myth of Development” supra note 17 at 15.

¹¹³ Chimni, “Third World Approaches to International Law: A Manifesto” supra note 12 at 64.

¹¹⁴ Mickelson, “Rhetoric and Rage” supra note 28 at 413.

V. Methods of the Study

This thesis applies a variety of analytical methods. These include: TWAIL, textual analysis of primary and secondary documents, interviews and what I call “the method of choosing”. The methodological tools applied in this research serve two main purposes. First, they are pertinent to the process of flagging the various ways in which the voices of Third World peoples are silenced. Second, they facilitate the process of reclaiming those voices. Consequently, the chosen methodologies are useful to furthering the projects of both TWAIL and critical development theory.

a) TWAIL as a method

The question of whether TWAIL is a theory or a method is one that TWAILers have often found themselves having to contend with. Anghie & Chimni point out, for example, that the 1999 American Journal of International Law omitted TWAIL from its Symposium on Methods in international law.¹¹⁵ In 2008, Okafor took on the task of answering the question of whether TWAIL is a theory, method or both.¹¹⁶ Using the *Oxford Dictionary of Current English*’s definition of the word “method”, he concluded that TWAIL is a method because it offers “‘a body of methods used in an activity’, i.e. in the activity of international legal analysis.”¹¹⁷

¹¹⁵ Anghie & Chimni, “Third World Approaches to International Law and Individual Responsibility” supra note 2 at 185.

¹¹⁶ See generally, Okafor, “Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?” supra note 81 at 371 - 378.

¹¹⁷ Ibid. at 377. See also Anghie & Chimni, “Third World Approaches to International Law and Individual Responsibility” supra note 2 at 185.

The analysis undertaken in this thesis utilizes TWAIL as both a theory and a method. As a method, TWAIL is used as a tool for examining the policies of the World Bank, particularly the policies on involuntary resettlement and indigenous peoples. It is a critical examination intended at interrogating and understanding why some aspects of these policies have not been beneficial to communities affected by the Bujagali Project. The method of TWAIL is also applied in understanding the influence of international law on domestic issues such as the liberalization of Uganda's investment climate and the influence that this liberalization has on private contracts such as PPAs. Furthermore, TWAIL's historical approach provides a useful optic through which one can explore the manner in which Uganda's colonial history may influence the culture of resistance in the country.

b) Textual analysis

The bulk of the assessments made in this thesis derive from textual analysis. The discussion engages with primary material including project agreements, court cases, project reports, domestic statutes and World Bank resolutions and policies. Court cases provide some background information on the project, particularly details relating to compensation of Affected Communities and claims filed to request for access to project documents. Only one project agreement (a PPA) is reviewed by the researcher. Confidentiality clauses limited the availability of other project contracts. In fact, the agreement studied was the one signed between the Government and the first project sponsor (AES Nile Power). Even then, this agreement provides useful insights on the strong institutional network that is often used by projects of this nature to protect private proprietary interests. The review of statutes proves important not only for establishing the domestic legal regime governing the Project, but perhaps more importantly, for illustrating the subtle ways in which the legal framework is

designed to lay the foundation for investment protection. The study of World Bank policies and resolutions provides the context for analysing the international legal framework governing involuntary resettlement and rehabilitation.

A major component of the textual analysis of primary material is the detailed study of the reports of the Inspection Panel relating to the Bujagali Project and the responses of World Bank management to the findings of the Panel. The combination of these reports is rich with information on the nature of the project, the debates surrounding the project and the Bank's involvement in the project. Even more useful is the fact that a critical study of the language of these reports allows for a better understanding of the powers of the Inspection Panel, the seriousness with which Bank Management takes the findings of the Panel and the Bank's attitude towards the issue of involuntary resettlement.

I use these reports to lay the foundation for a large part of the analysis in this thesis. For example, the reports contain information on field studies conducted by the Inspection Panel on the Bujagali Project. Consequently, they act as a reference point for making comparisons between my own findings and those of the Inspection Panel. In addition, the Panel's field research fills in the gaps for studies that I was unable, for one reason or another, to undertake.¹¹⁸ I also use these reports to reflect on the correspondence between the Inspection Panel and the Bank and how this speaks to the legal status of the Panel.

¹¹⁸ For example, the Panel has more resources and so could afford to employ more human capital, spend longer periods in the field and even use its position to interact with persons that I was not able to, such as the project sponsor.

A number of secondary materials including books and articles are also studied. The initial textual review consisted of a study of the literature on Foreign Direct Investment (particularly investments in large infrastructure) and scholarship on dams and development. Since the thesis seeks to understand how investment decisions affect dam projects, this original exercise was important in illuminating both the concerns of private investors and the manner in which the concerns are addressed by governments and international organizations. It was also helpful in understanding the multiple angles from which dams are problematized. With this background, the groundwork had been laid for delving deeper into the critical approaches (specifically TWAIL and critical development literature) and reviewing literature on displacement, resettlement and the role of law. All this served the objective of situating the Bujagali Project within the general debates of development and the role of international (and domestic) law.

c) Interviews

A visit was made to Uganda to conduct interviews with project proponents and opponents in November and December of 2009. The interviews were conducted in accordance with the University of British Columbia's Behavioral Research Ethics Board (BREB) Approval.¹¹⁹ With the exception of Affected Communities, the interview scripts and background to the research were sent to potential interviewees at least three weeks before the scheduled interview dates. For Affected Communities, community members were informed of upcoming discussion group meetings a week before the researcher interacted with them. In total, twelve interviews were conducted, with interviewees consisting of:

- Representatives from the Affected Communities;

¹¹⁹ Ethics Approval Number H09-02038.

- Officials from NAPE;
- A lawyer, who is also the Executive Director of Greenwatch, Uganda;
- A Commissioner in the Ministry of Energy and Mineral Development, Uganda;
- The Chief Executive Officer of ERA;
- A journalist who has followed the project closely;
- The spiritual leader of the Basoga (Jaja Budhagaali); and
- A Faculty member from the law school at Makerere University (Uganda), who has engaged with the project on different fronts.

Many of the individuals interviewed were chosen because they have interacted with the Bujagali Project in different capacities over a long period of time. In some cases, interviewees had engaged with the project from its inception. This was the case, for example, for most of the officials at NAPE, for the Greenwatch lawyer, the spiritual leader and the journalist. Others were chosen because of their official public status, which positions them not only as active participants in project decisions but also as part of the policy-making team. Examples of these are the Commissioner in the Energy Ministry and the Chief Executive Officer of ERA. The choice of participants from the Affected Communities was more random. Because of the sensitivity of the subject matter and the suspicion with which communities sometimes treat outsiders, it was important to be introduced by someone who was not a stranger to the community members. I coordinated with NAPE and accompanied a NAPE official on one of her routine follow-up meetings with community members. Approximately one week before the sessions, community members were informed that on that particular follow-up session, there would be a

researcher who was interested in hearing their experiences with the project and asking them some questions. Once the NAPE official finished her follow-up sessions, she introduced me, talked about my research and stepped out. This allowed me to have candid discussions with the members. Two interviews were conducted with different sets of Affected Communities. One was with the Naminya Resettlement Community in Jinja where approximately nine community members were in attendance. The second was with the Malindi Dam-Affected Community (also in Jinja),¹²⁰ which was attended by approximately seven people.

Several attempts were made to interview officials from the project sponsor, Bujagali Energy Limited, with no success. In response to the final interview request, a company official directed me to the Bujagali Energy Limited website. Also, while I started out thinking that I would interview World Bank officials, I found out in the course of both my desk study and field work that there was such a plethora of information published by the Bank that the latter's position dominated the debate. To balance the debate, I placed emphasis on gleaning information from other stakeholders whose narratives are not as widely publicized as those of the Bank. Even then, the Bank's position is represented in the interviews of project proponents such as the Commissioner from the Ministry of Energy and the Chief Executive Officer of ERA.

The interviewees can be divided into four categories: Affected Communities (including Jaja Budhagaali), project proponents (the official from Ministry of Energy and the ERA Chief Executive Officer), activists (NAPE officials and the Greenwatch Executive Director) and

¹²⁰ This group was not physically displaced but is an affected community because they live in an area close to the project site.

independents (the journalist and university lecturer). The interviews with Affected Communities were primarily in the form of a discussion. For the rest of the interviewees, interview questions were designed under several sub-topics. These questions were the same for each interviewee with emphasis being placed on questions relating to the person's expertise during the actual interview sessions. All interviewees, with the exception of participants from the Affected Communities have been identified in this thesis using their names and institutional affiliations. Consent was obtained for making this disclosure. Interviewees did not mind the disclosure because most of them are already vocal about the Project. However, given the sensitivity of the matter and the vulnerability of Affected Communities, this set of interviewees is identified as a block i.e. either as the Naminya Resettlement Community or the Malindi Dam-Affected Community. Even in instances where an individual is quoted, they are not identified by name. The only project-affected person who is identified by name is the spiritual leader, Jaja Budhagaali, who has also frequently expressed his views about the project publicly and who provided consent to the disclosure.

Interview questions revolved around the overall opinion that interviewees had about the Bujagali project; their opinion of the treatment of Affected Communities; what they thought about the findings of the Inspection Panel; their view of the domestic and international legal framework; and how they explain the limited resistance against the project. For Affected Communities, the discussions allowed the communities to talk generally about what they felt about the project and how it affected them. These discussions created a forum in which affected communities could voice their concerns and through which the researcher would

listen first hand not only to their concerns about the project but also what they (had) expected from it. Where relevant, the details of the different interviews are provided in the ensuing chapters. Coming into personal contact with the interviewees also provided the researcher with the opportunity to obtain copies of documents (such as court cases) which were not available online.

The relevance of the interviews cannot be overemphasized. First, these interviews are important in as far as they reaffirmed the findings of previous interviews that had been conducted by the Inspection Panel. These findings are contained in the Inspection Panel reports which form a substantial part of the analysis in the thesis. At the same time, the interviews helped in filling in the gaps where literature is silent or unclear. Second, and perhaps more importantly, interviews put a human face to the Project. Without directly speaking to community members, it would have been difficult to maintain the mental picture that has continued to drive the narrative in this thesis and concretized vindication in the relevance of law. At the same time, these interviews helped to serve another purpose, which at first glance appears to undermine the cause of Affected Communities. The interviews told the story of project proponents (particularly the government), especially the reason why the dam had to be built and why there is no simple answer to an issue so complex. Yet this apparent legitimization of the Project on the part of government is paradoxically the very reason that helps to explain the continued marginalization of affected communities. This is not to say that the reasons for dam building provide justification for placing the concerns of Affected Communities in the margins. However, these reasons help us to understand how these issues end up in the margins.

The refusal of the project sponsor to participate in an interview also reveals a number of things. It mirrors the bigger problem of access to information where private parties are involved and helps to explain why only one project agreement could be obtained for review in this study. By the private sector withdrawing from dialogue in this manner, it becomes difficult for the public to scrutinize the activities of that sector. The withdrawal, combined with the secrecy shrouding private contracts, also empower private investors by enabling them to negotiate stronger protections. Conversely, because the public is unable to access this information or engage in any meaningful discussions with private parties, groups such as Affected Communities are constrained in their ability to negotiate similar protections especially as they do not have much to compare with.

d) The method of “choosing”

Choice is part of methodology. By choosing one project or one aspect of a story over another, one begins the process of picking the tools that are relevant in constructing a research project. So, why the Bujagali Project and why the World Bank?

As a dam, the Bujagali Project is symbolic of the wider project of development. At the same time, the magnificence of dams often stands in stark contrast with the plight of those to be affected through displacement. The Project is also important because it promises to be the largest private investment in East Africa and among the largest in the power sector in Africa.¹²¹ In fact, the World Bank sees it as instrumental to setting the standards that will be

¹²¹ World Bank, *Bank Management Response to Request for Inspection Review of the Uganda Private Power Generation Project (Proposed)* (2007) online: World Bank Inspection Panel <<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/ManagementResponse.pdf>> at 10. See also Stephen Linaweaver, “Catching the Boomerang: EIA, the World Bank, and Excess Accountability: A

emulated – or more accurately, replicated - by other African countries and investors in potential dam projects.¹²² This makes its policies, planning and implementation quite influential in a continent that expects to exponentially grow its hydro capacity.¹²³ Also significant is the fact that Bujagali Falls is an important spiritual and cultural site for the Basoga people of Uganda.¹²⁴ While this thesis does not address the issues of spiritual and cultural institutions, it respects their preservation. Lastly, the decision to use the Project as a case study was made more attractive by the fact that there is a well-resourced and relatively publicized knowledge bank, when compared to many other private (and even public) projects, which are often shrouded in secrecy. The availability of information has in turn allowed knowledge production from activist groups, thereby expanding the knowledge bank.

The decision to focus on just one financier of the project - the World Bank - was driven not only by the billions of dollars that the institution has spent (and continues to spend) in Africa as a region but also for the role that it plays in development projects generally and Uganda's electricity sector in particular. Uganda became a member of the World Bank in 1963, shortly after the country's independence – a relationship that began with the granting of a credit from the World Bank's IDA to Uganda for electric power development.¹²⁵ Because of the political turmoil in the country between 1971 and 1986, the World Bank's

Case Study of the Bujagali Falls Hydropower Project Uganda" (2003) 10 International Journal of Sustainable Development and World Ecology at 288.

¹²² World Bank, *Ibid.* at 8 & 10.

¹²³ See discussion in Chapter One Part I.

¹²⁴ Interview of Oweyegha Afunaduula (Programme Manager, Sustainability School at NAPE) (10 November 2009) at NAPE Offices, Kampala, Uganda.

¹²⁵ World Bank, "Uganda: Overview" online: World Bank <<http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/UGANDAEXTN/0,,menuPK:374945~pagePK:141132~piPK:141121~theSitePK:374864,00.html>>.

involvement in the country was brought to a halt until the mid-1980s when IDA recommended a re-involvement.¹²⁶ In 1988, through the Power III project, IDA provided financing to the tune of US\$125 million to assist with rehabilitating the country's power sector, developing hydro resources and expanding the transmission and distribution system.¹²⁷ Since then, the Bank has been intimately involved in Uganda's energy sector under various initiatives. It was the Bank that pushed for the privatization and commercialization of the Uganda Electricity Board (UEB) in the mid-1990s.¹²⁸ In early 2000, the Bank provided supplemental credit of US\$33 million for the Power III project.¹²⁹ Later, in July 2001, it provided US\$ 62 million to support the installation of units at the Owen Falls Extension and to strengthen the Government's capacity in undertaking power sector reforms, including privatization (Power IV project).¹³⁰ Currently the Bank is involved, among other things, in the Bujagali Project¹³¹ and the country's Rural Electrification Programme.¹³²

Having laid down the theoretical and methodological groundwork, the discussion in the three ensuing chapters reverts to two main questions:

(a) In the absence of a strong domestic legal framework, what mechanisms has the Bank

(a significant player in Uganda's energy sector) established to ensure that the

¹²⁶ The Inspection Panel, "Investigation Report – Uganda: Third Power Project (Credit 2268- UG) and the Proposed Bujagali Hydropower" (2002) online: World Bank <<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/UGANDAIRMMainReport.pdf>> [2002 Report of the Inspection Panel] at 2.

¹²⁷ Ibid.

¹²⁸ Christopher Gore, "Electricity and privatisation in Uganda: The origins of the crisis and problems with the response" in David A McDonald (ed.), *Electric Capitalism: Recolonising Africa on the Power Grid* (South Africa: HSRC Press, 2008) at 362.

¹²⁹ The Inspection Panel, "2002 Report of the Inspection Panel" supra note 126 at 2.

¹³⁰ Ibid. at 3.

¹³¹ See discussion in Chapter One Part II.

¹³² See Rural Electrification Agency, "Financial for REA Projects" online: Rural Electrification Agency – Ministry of Energy and Mineral Development <<http://www.rea.or.ug/?p=site&s=4&pg=30>>.

projects it finances protect the interests of Affected Communities? To what extent have the Bank's initiatives been successful?

- (b) How can analyzing the Bujagali Project using an investment lens enable us first, to appreciate the decision to build the dam; and second, to understand how the process of advancing that decision (“inevitably”)¹³³ moved the interests of Affected Communities to the periphery?

¹³³ I put this word in double parenthesis for purposes of problematizing the notion that for a development project to be successful, a less privileged group of people has to suffer along the way. As will be illustrated in Chapter 3, this does not have to be – and in fact should not be – the case.

CHAPTER 3

Explaining the Failure of Resettlement Initiatives in Development Projects: A Critical Analysis of the World Bank's Policy on Involuntary Resettlement

I. Introduction

That displacement is often an inevitable – and many times a necessary – part of large development projects is now widely accepted in scholarly literature.¹ What has also been acknowledged is the fact that this inevitability does not have to translate into an impoverishment of the people displaced. In fact, many advocate that the planning and implementation of the resettlement and rehabilitation of those displaced and the preparation for and construction of the development project causing the displacement should be undertaken as twin projects. In other words, resettlement and rehabilitation should also be treated as development projects. To this end, there have been various initiatives aimed at ensuring that DIDR is managed in a manner that improves or at least restores the livelihoods of Affected Communities. The World Bank policy on involuntary resettlement – OP 4.12² – is one such initiative. OP 4.12 has been widely celebrated, not only as the first formal set of rules and guidelines on involuntary resettlement, but also as a model worth emulating.³ Described as “perhaps the most progressive international legal document relating

¹ See generally Michael M Cernea, “Risks, safeguards, and reconstruction: a model for population displacement and resettlement” in Michael M Cernea & Christopher McDowell (eds.) *Risks and Reconstruction: Experiences of Resettlers and Refugees* (Washington DC: The World Bank, 2000) at 11 [Risks, Safeguards and Reconstruction]; World Bank, *Involuntary Resettlement Sourcebook: Planning and Implementation in Development Projects* (International Bank for Reconstruction and Development/World Bank, 2004) at xxiv [*Involuntary Resettlement Sourcebook*]; Ismail Serageldin, “Involuntary Resettlement in World Bank-Financed Projects: Reducing Impoverishment Risks for the Affected People” in Hari Mohan Mathur (ed.) *Managing Resettlement in India: Approaches, Issues, Experiences* (Oxford University Press, 2006) at 45 [Involuntary Resettlement in World Bank-Financed Projects].

² World Bank, “Operational Manual: Operational Policy (OP) 4.12” (December, 2001 - as updated in March, 2007) online: World Bank < <http://web.worldbank.org> > [OP 4.12].

³ Serageldin, “Involuntary Resettlement in World Bank-Financed Projects” supra note 1 at 48.

specifically to DIDR”⁴, the policy has been used as a template by national governments and international and regional institutions such as the Organization for Economic Co-operation and Development, the Asian Development Bank, the IMF and the African Development Bank.⁵

Yet despite the policy’s international reputation, along with its widespread application to numerous Bank-financed projects, many communities continue to be adversely affected by development-induced displacement. A number of reasons have been provided to explain the failure of DIDR initiatives including poor planning of resettlement processes, lack of domestic policies to guide resettlement, poor coordination between implementing agencies, absence of political will and commitment, weak institutional structures and the lack of proper monitoring and evaluation mechanisms.⁶ What has received far less attention is a critical analysis of OP 4.12 itself – a task that this chapter takes on.

Drawing examples from Uganda’s Bujagali Project, this chapter contends that one reason why Affected Communities have not been able to benefit from DIDR initiatives undertaken under OP 4.12 lies in the hierarchy or categorization of obligations imposed on the borrower (project sponsor) under that policy. Specifically, the chapter argues that the policy is drafted in such a way that it (implicitly) draws a line between mandatory requirements and those that are desirable (or non-mandatory). The “must do” list consists of *physical* (or land-for-

⁴ Michael Barutciski, “International Law and Development-Induced Displacement and Resettlement” in Chris De Wet (ed.) *Development-Induced Displacement: Problems, Policies and People* 18 Studies in Forced Migration (Berghahn Books, 2006) at 82 [International Law and Development-Induced Displacement].

⁵ Alan Rew, Eleanor Fisher and Balaji Pandley, “Policy Practices in Development-induced Displacement and Rehabilitation” in Chris De Wet (ed.) *Development-Induced Displacement: Problems, Policies and People* Ibid at 40 [Rew et. al, Policy Practices].

⁶ For a detailed discussion of these issues, see Part III below.

land) resettlement and/or compensation for lost assets, while the “can do” list contains other restoration measures geared towards long-term sustainability of displaced communities. That the latter are frequently couched as “good practice” by the Bank de-emphasizes the fact that they become necessary because of the disruption caused by development projects. Additionally, by relegating them to “good practice” measures, borrowers are given the discretion of determining whether they are necessary and the extent to which they are necessary. The divide between the “must do” and “can do” provisions leads to restoration practices that ignore the full and long-term impacts of displacement, thereby resulting in solutions that only part-solve the problem.

It is not easy to fully identify the limitations of OP 4.12 when it is reviewed in isolation. Even harder when one takes into account the fact that this policy is the “trend setter” on involuntary resettlement issues. Critiquing the policy also becomes difficult in the face of the numerous shortcomings that often characterize its practical application. However, given the fact that for many countries – especially in Africa – this policy exists in the absence of any other laws or guidelines on involuntary resettlement, its comprehensiveness and appropriateness become an important subject of inquiry.⁷ To illustrate the limitations of the policy, the chapter employs a variety of methods. First, it provides a historical account of

⁷ In 1997, for example, Cernea observed that while many African countries had laws empowering the state to expropriate land in the name of public interest, an evident gap in these laws was the absence of explicit policies and legal frameworks requiring that those displaced should have their livelihoods restored and their productivity re-established. Michael M. Cernea, “African Involuntary Population Resettlement in a Global Context” Environmental Department Papers, Social Assessment Series 045 (February 1997) online: World Bank < http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/1997/02/01/000009265_3980728144037/Rendered/PDF/multi_page.pdf > at 23 [African Involuntary Population Resettlement]. See also generally Yinka Omorogbe, “The Legal Framework for Public Participation in Decision-making on Mining and Energy Development in Nigeria: Giving Voices to the Voiceless” in Donald Zillman, Alastair Lucas and George (Rock) Pring (eds.) *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford University Press, 2002) at 549 – 587 [The Legal Framework for Public Participation].

the policy, noting the reasons behind its inception. This allows for a high level review of the manner in which its objectives are reflected in the current version of the policy. Second, OP 4.12 is qualitatively evaluated against a model (the Impoverishment, Risks and Reconstruction model), which for a long time has guided (or is intended to guide) the Bank's policy on involuntary resettlement. Such an assessment is helpful in gauging the extent to which the proclaimed intentions of guarding against impoverishment risks are met. Third, OP 4.12 is compared with another policy that deals with "people issues" – OP 4.10 on indigenous peoples. The discussion notes that indigenous peoples have their unique identities that warrant protection. Yet it is this very distinctiveness that calls into question the appropriateness of universalizing the application of this concept in a country such as Uganda (and most of Africa) where many of the Affected Communities would largely be excluded from claiming under the policy. Lastly, the discussion interrogates the legal status of this policy to understand the extent to which Affected Communities can use it as a tool to obtain more inclusion and protection.

Suffice to note from the outset that there is a (theoretical) distinction between operational policies of the core Bank entities (IDA and International Bank for Reconstruction and Development) and the Performance Standards of the IFC. First, perhaps, should be a brief discussion on the structure of the World Bank Group itself.⁸ The World Bank Group is made up of five entities. The core entities are the International Bank for Reconstruction and Development – IBRD (which works with middle-income and creditworthy poorer countries)

⁸ For more information on the World Bank including its membership, financing and activities, see generally World Bank, "The World Bank: Working for a World Free of Poverty" online: The World Bank<<http://www.worldbank.org/>>.

and the IDA (whose focus is on the world's poorest countries).⁹ These entities provide “low-interest loans, interest-free credits and grants” to developing countries for a number of development projects.¹⁰ The work of IBRD and IDA is complemented by three other agencies. There is the IFC, which provides financing to private sector investments in developing countries.¹¹ Then there is the MIGA, which provides political risk insurance to private sector investments in these countries.¹² Lastly, is the ICSID, which acts as a tribunal for hearing international investment disputes.¹³

In the case of operational policies (such as the ones reviewed in this chapter), the borrower is a country, since IDA lends to countries.¹⁴ For IFC's Performance Standards, where reference is made to the borrower or project sponsor, it means a private investor.¹⁵ Technically, since the Bujagali Project is a private project, the obligations of resettlement fall on the project sponsor (Bujagali Energy Limited). However, because financing comes from IDA and IFC,¹⁶ both the IDA's operational policies and IFC's Performance Standards apply to implementation of the Project. The provisions of the two are quite similar. Consequently, the concentration on the Operational Policies here instead of IFC's

⁹ World Bank, “The World Bank: About Us” online: The World Bank
<<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,pagePK:50004410~piPK:36602~theSitePK:29708,00.html>>.

¹⁰ Ibid.

¹¹ International Finance Corporation, “About IFC: What We Do” online: IFC
<<http://www.ifc.org/ifcext/about.nsf/Content/WhatWeDo>>.

¹² Multilateral Investment Guarantee Agency, “About MIGA” online: MIGA
<http://www.miga.org/about/index_sv.cfm?stid=1736>

¹³ International Centre for the Settlement of Investment Disputes, “About ICSID” online: ICSID
<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID_Home>.

¹⁴ World Bank, “What is IDA” online: The World Bank
<<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/IDA/0,,contentMDK:21206704~menuPK:83991~pagePK:51236175~piPK:437394~theSitePK:73154,00.html>>.

¹⁵ International Finance Corporation, “About IFC: What We Do” supra note 11.

¹⁶ See Chapter 1 One, part II.

Performance Standards is largely driven by the fact that the latter's Standards were developed much later and are in fact based largely on IDA's operational policies.¹⁷ It also helps that in the case of the Bujagali Project, IDA's policies have been tested through the complaints filed with the Inspection Panel by local groups and individuals.¹⁸ Even so, the chapter contains a brief review of IFC's Performance Standards.

The discussion in the chapter is divided into seven parts. Part II highlights the key aspects of OP 4.12, including a brief history of the policy, its objectives, persons covered under the policy and what is required of the borrower. That Part also discusses the resettlement model that has reportedly guided the policy. In Part III, the various explanations for the failure of DIDR are discussed before reverting to a critical review of OP 4.12 in Part IV. The discussion in Part IV engages intimately with the Bujagali Project, particularly, the findings of the Inspection Panel. To support the arguments made in Part IV, Part V juxtaposes OP 4.12 with the Bank policy on indigenous peoples – OP 4.10. This is followed by the argument in Part VI that numerous vulnerable people have been excluded from benefiting from development projects by imposing a strict interpretation of indigeneity under OP 4.10

¹⁷ While the first IDA policy on involuntary resettlement was published in 1980 (see Part II below), it was not until 1998 that IFC adopted mandatory safeguard policies, including that on involuntary resettlement. These policies were identical to the text of the IDA and IBRD policies. While IFC reviewed its policies in 2006 to make them more relevant to private investments, the divergence between IFC and IDA/IBRD policies is not a significant one. David Szablowski, *Transnational Law and Local Struggles: Mining, Communities and the World Bank* (Oregon: Hart Publishing, 2007) at 93, 94 & 106 [Transnational Law and Local Struggles].

¹⁸ For a detailed discussion of complaints made by local groups in Uganda, responses by Bank Management and findings of the World Bank Inspection Panel in relation to the extent to which the Project complied with World Bank policies, see generally The Inspection Panel, "Investigation Report – Uganda: Third Power Project (Credit 2268- UG) and the Proposed Bujagali Hydropower" (2002) online: World Bank <<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/UGANDAIRMMainReport.pdf>> [2002 Report of the Inspection Panel]; The Inspection Panel, "Investigation Report – Uganda: Private Power Generation (Bujagali Project (Guarantee No. B0130-UG))" (2008) online: World Bank <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/FULL_September_2_2008_FINAL_Red.pdf> [2008 Report of the Inspection Panel].

without compensating for that shortcoming using a more comprehensive OP 4.12. This chapter ends with a review of the legal status of OP 4.12 in Part VII.

II. OP 4.12¹⁹ on Involuntary Resettlement and the Impoverishment, Risks and Reconstruction Model: Landmarks in Resettlement Policy

a) Bank policy on involuntary resettlement

The first World Bank policy on involuntary resettlement (Operational Manual Statement 2.33) was issued in 1980.²⁰ The Bank hoped that the policy – the first of its kind by any major aid agency – would provide coherence in the treatment of resettlement and ensure that the interests of those affected (both resettled and host communities) were protected.²¹ Before this, involuntary resettlement was handled in an ad-hoc manner, with no clear objectives, inconsistent procedures and inadequate resources.²² Sometimes (particularly in the 1960s and 1970s) resettlement planning was left out of the overall planning for the main Bank-financed projects, thereby making it a problem with which the Bank did not have to deal.²³ Other times, a general provision could be found on resettlement in the project plans but there was no requirement for a detailed resettlement plan.²⁴ Under such circumstances, the Bank was unable to make any reasonable assessments of the size of the relocation, the

¹⁹ See also generally World Bank, “Operational Manual: Bank Policy (BP) 4.12 – Involuntary Resettlement” (December, 2001) online: World Bank<<http://web.worldbank.org>>.

²⁰ The title of the policy was Operational Manual Statement 2.33: Social Issues Associated with Involuntary Resettlement in Bank-Financed Projects. See World Bank, “Environmental and Natural Resources Law: Involuntary Resettlement” online: The World Bank <<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/EXTENVIRONMENTNATRESLAW/0,,contentMDK:20675447~menuPK:1737138~pagePK:148956~piPK:216618~theSitePK:1001743,00.html>> [Environmental and Natural Resources Law].

²¹ Michael M. Cernea, “Involuntary Resettlement in Development Projects: Policy Guidelines in World Bank-financed Projects” World Bank Technical Working Paper No. 80 (Washington, D.C: The World Bank, 1988) at 1 & 2 [Involuntary Resettlement in Development Projects].

²² Ibid. at 1.

²³ Ibid. at 9 & 10.

²⁴ Ibid. at 10.

effectiveness of resettlement provisions (if any) and costs for the same.²⁵ The result was incomplete resettlement designs and underfunding of the resettlement component of many projects.²⁶ The intervention through Operational Manual Statement 2.33 was also rendered necessary because some governments contravened their domestic laws by not paying the compensation required there under.²⁷ Many times, even where compensation was duly paid, impoverishment among those displaced remained glaringly present.²⁸ The new policy statement was thus an effort to ensure that impoverishment as a result of land acquisition and resettlement did not occur in the projects that the Bank financed.²⁹

In 1986, the Bank evaluated its performance under the six-year old policy and reaffirmed the existing policy, with some suggestions from lessons that had been learnt from experience.³⁰ Two years later, in 1988, the Bank's sociology adviser – Michael M. Cernea – drafted a technical paper that was aimed at buttressing the need to treat resettlement as a development project in which the production base and self-sustaining ability of those displaced would be reconstructed.³¹ Shortly after publishing this paper, in June 1990, Operational Manual Statement 2.33 was replaced with Operational Directive 4.30,³² which was later converted into OP 4.12 in December 2001 as part of the wider process of conversion of all the Bank's operational policies to the OP/BP format.³³ The conversion

²⁵ Ibid.

²⁶ Ibid.

²⁷ World Bank, *Involuntary Resettlement Sourcebook* supra note 1 at xxiv.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Cernea, "Involuntary Resettlement in Development Projects" supra note 21 at 2.

³¹ See generally Cernea, Ibid.

³² World Bank, "Environmental and Natural Resources Law" supra note 20.

³³ James D. Wolfensohn, *Memorandum to the Executive Directors: Operational Policy on Involuntary Resettlement*, Draft OP/BP 4.12 (28 September 2001) online: The Center for International Environmental

would retain the key objectives and principles of the policy and remove any ambiguities.³⁴ The Bank reported that in the process of conversion, knowledge that had been gleaned from the implementation of the Directive was incorporated into OP 4.12.³⁵ So, for example, the OP made clear that it applied only to “direct” economic and social impacts – an aspect that Operational Directive 4.30 did not explicitly state.³⁶ Unlike Operational Directive 4.30, OP 4.12 also distinguished between the different categories of displaced persons (those with formal legal rights and those without) and the compensation entitlements of the different categories.³⁷ Also, unlike Operational Directive 4.30 which required preparation of a resettlement plan only when those displaced exceeded 200 people,³⁸ OP 4.12 added that in such cases, there would at least be an abbreviated resettlement plan.³⁹ Lastly, while the policy on involuntary resettlement before 2002 merged policy, principles and procedures, the 2001 conversion made a distinction between principles and standards (OP 4.12) and the Bank’s procedures in relation to that policy (BP 4.12).⁴⁰

Law<http://www.ciel.org/Publications/wolfensohn_28sep01_memo.pdf> at 1 [Memorandum to the Executive Directors]; World Bank, “Environmental and Natural Resources Law” Ibid.

³⁴ See James D. Wolfensohn, “OP/BP 4.12, *Involuntary Resettlement* Background Note on the Conversion Process” (September 2001) online: The Center for International Environmental Law<http://www.ciel.org/Publications/wolfensohn_28sep01_memo.pdf> at 2 – 4 for details on the clarifications made by OP 4.12 and the new aspects it introduced. [Background Note to OP 4.12]

³⁵ Wolfensohn, *Memorandum to the Executive Directors* supra note 33 at 1.

³⁶ World Bank, OP 4.12 supra note 2 paragraph 3. See also Wolfensohn, “Background Note to OP 4.12” supra note 34 at 2.

³⁷ Wolfensohn, Ibid. at 4.

³⁸ World Bank, “The World Bank Operational Manual: Operational Directive 4.30” (June 1990) online: International Finance Corporation <[http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_Resettlement/\\$FILE/OD430_InvoluntaryResettlement.pdf](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_Resettlement/$FILE/OD430_InvoluntaryResettlement.pdf)> paragraph 4 [Operational Directive 4.30].

³⁹ World Bank, OP 4.12 supra note 2 paragraph 25.

⁴⁰ World Bank, *Involuntary Resettlement Sourcebook* supra note 1 at xxiii.

From its very first paragraph, OP 4.12 acknowledges that involuntary resettlement, if not mitigated, can result in social, economic and environmental risks.⁴¹ Consequently, it requires that displacement should be avoided and where avoidance is not possible, resettlement activities should be perceived as sustainable development programs which allow those displaced to share in project benefits and in which livelihoods are improved or at least restored.⁴² The borrower is required to prepare a Resettlement Action Plan (RAP) outlining measures that will be taken to ensure that displaced people are:⁴³ informed about their rights and options pertaining to the resettlement; consulted, offered choices and given technically and economically feasible resettlement alternatives; and provided prompt and effective compensation (at replacement cost) for losses directly attributable to the project.⁴⁴ For those to be physically displaced by the project, the RAP should include measures for resettlement assistance (such as moving allowances) and provide residential housing, housing sites or agricultural sites with a combination of productive potential, location advantages and other factors that are at least equivalent to the old site.⁴⁵ Lastly – where necessary – the RAP should include a framework on how those who have been displaced will be supported in restoring their livelihoods and plans for development assistance including land preparation, credit facilities, training, or job opportunities.⁴⁶ The policy divides displaced peoples into four categories: those who are relocated as a result of loss of

⁴¹ World Bank, OP 4.12 supra note 2 paragraph 1.

⁴² See generally Ibid., paragraph 2.

⁴³ The requirements relating to displacement from legally designated parks and protected areas are somewhat different and do not form part of the discussion in this paper. Briefly, however, when a project restricts access to legally designated parks and protected areas with adverse impacts on those displaced, the borrower should prepare a process framework. The framework is prepared in consultation with the displaced people and should include details on how specific components of the project will be implemented, the criteria for determining the eligibility of displaced persons, measures to assist displaced persons in livelihood improvement or restoration, how sustainability of the park or protected area will be maintained and how conflicts involving displaced persons will be resolved. See Ibid. paragraphs 3 (b), 7, 31 & Annex A paragraphs 26 & 27.

⁴⁴ Ibid. paragraph 6 (a).

⁴⁵ Ibid. paragraph 6 (b).

⁴⁶ Ibid. paragraph 6 (c).

shelter, those who lose assets or access to assets, those who lose income or other means of livelihood and those who lose access to legally designated parks and protected areas.⁴⁷

A sourcebook published by the Bank on involuntary resettlement notes that the policy has three objectives.⁴⁸ First, it strives to improve (or at least restore) the livelihoods of affected people beyond mere compensation for expropriated properties.⁴⁹ Second, its extension to issues beyond compensation for expropriation makes it applicable to a range of people that are adversely affected including renters, sharecroppers and wage-earners.⁵⁰ Third, because it emphasizes improvement or restoration of livelihoods, there is a need for coordinated and long-term strategies that incorporate elaborate risk management.⁵¹ To achieve these objectives, there is a need to involve various actors and to ensure that responsibility is not shifted solely to the affected communities once compensation has been paid.⁵² As a former Bank employee concluded: “In sum, the Bank policy is rooted in the philosophy that aims to make development into an opportunity for resettlers as well, so they can benefit from the process, not lose from it.”⁵³

When one takes into account the fact that Uganda has a weak institutional and legal framework governing DIDR,⁵⁴ the centrality of OP 4.12 in Bank-financed projects becomes

⁴⁷ Ibid. paragraph 3.

⁴⁸ World Bank, *Involuntary Resettlement Sourcebook* supra note 1 at xxiv & xxv. See also World Bank, OP 4.12 supra note 2 paragraph 2.

⁴⁹ World Bank, *Involuntary Resettlement Sourcebook* Ibid. at xxiv.

⁵⁰ Ibid. at xxv.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Serageldin, “Involuntary Resettlement in World Bank-Financed Projects” supra note 1 at 48 & 49. See also Barutciski, “International Law and Development-Induced Displacement” supra note 4 at 82.

⁵⁴ For a detailed discussion of Uganda’s domestic legal framework on development-induced displacement and resettlement, see Chapter 1 One, part IV; Rew et al., “Policy Practices” supra note 5; Alan Rew, Eleanor

more obvious.⁵⁵ As noted in Chapter One, the policy guidelines on resettlement and rehabilitation that were drafted by the country with the guidance of the Bank were never enacted into law or finalized into operative policy.⁵⁶ Consequently, in practice, rehabilitation measures have had to depend on both the awareness and importance that the line ministry undertaking the development deems resettlement appropriate.⁵⁷ Too frequently, many whose land and assets have been compulsorily acquired are offered only monetary compensation.⁵⁸ It thus goes without saying that a Bank policy that demands land-for-land resettlement and/or compensation for lost assets provides significant protection for Affected Communities when compared to the remedies available under domestic law. For example, it is because of this policy that AES Nile Power and later, Bujagali Energy Limited, designed a RAP and APRAP⁵⁹ respectively, that detailed the manner in which those displaced by the Bujagali Project would be resettled and compensated.

There are a number of initiatives in the Bujagali Project which would not have been undertaken in the absence of the Bank policy. To begin with, the RAP prepared by AES

Fisher and Balaji Pandey, *Addressing Policy Constraints and Improving Outcomes in Development-Induced Displacement and Resettlement Projects* (January, 2000) online: Oxford Department of International Development <<http://www.rsc.ox.ac.uk/PDFs/rpolicyconstraintsds00.pdf>> [Addressing Policy Constraints].

⁵⁵ Some developing countries outside Africa have made considerable progress in domesticating resettlement legislation. In India, for example, some states have enacted resettlement and rehabilitation laws, even though these laws are still criticized on their selective application. See, for example, N.C. Saxena, “The Resettlement and Rehabilitation Policy of India” in Hari Mohan Mathur (ed.) *Managing Resettlement in India: Approaches, Issues, Experiences* supra note 1 at 99 – 123; M.K. Ramesh and Francis A. Joseph, “The Karnataka Resettlement of Project Displaced Persons Act, 1987: A Critical Perspective” in Hari Mohan Mathur (ed.) *Ibid.* at 124 – 136. Similarly, China has been praised by some resettlement scholars and practitioners for the country’s “resettlement with development” approach, which some have labeled as “the most progressive in the world”. See, for example, Chris de Wet, “Risk, Complexity and Local Initiative in Forced Resettlement Outcomes” in De Wet (ed.) *Development-Induced Displacement: Problems, Policies and People* supra note 4 at 194 – 195.

⁵⁶ See Chapter One, Part IV.

⁵⁷ Rew et. al., “Policy Practices” supra note 5 at 47.

⁵⁸ Rew et. al., “Addressing Policy Constraints” supra note 54 paragraph 2.9.

⁵⁹ Burnside, *Assessment of Past Resettlement Activities and Action Plan* (December, 2006) online: The World Bank <<http://siteresources.worldbank.org/EXTBUJHYDPOWPRO/Resources/HPPSEAAppendixI.pdf>>.

Nile Power offered those who lost their shelter three options: replacement houses; materials for house construction, including cash value for the labor that would be needed for construction; and cash compensation.⁶⁰ That resettlement (as opposed to cash compensation) was an option is perhaps one of the few ‘firsts’ in Uganda’s displacement history. In fact, as far as housing is concerned, even though those resettled have recently complained about the quality of the houses,⁶¹ both World Bank Inspection Panels investigating the Project agreed that there were significant improvements in the living conditions of resettlement communities when compared with their pre-displacement conditions.⁶² Equally important is the fact that efforts were taken to ensure that those resettled were placed in close proximity to their original homes,⁶³ thereby facilitating the maintenance of social networks. Those who could not be put as close in proximity as would have been desirable were presented with alternative sites and consulted on the choice of where to be resettled.⁶⁴ Also, while the meaningfulness of the consultative processes remains in dispute, there is at least some evidence to support the fact that Affected Communities and their leaders were consulted and that there are even plans for future consultation.⁶⁵ Additionally, as is the requirement of Bank policy, the RAP addresses concerns of people other than those who own land such as renters, sharecroppers and

⁶⁰ The Inspection Panel, 2002 Report of the Inspection Panel *supra* note 18 at 79 & 80.

⁶¹ In an interview conducted by the researcher with the Naminya Resettlement Group, for example, those resettled claimed that while the houses they were given were constructed using “modern” materials and methods, many of the houses later turned out to be sub-standard. In some cases, roofs were already leaking. Also, there were cases where the windows had not been properly installed. There were even cases where windows had never been installed, resulting in ventilation problems. Interview of community members at Naminya Resettlement (18 November 2009) at Jinja, Uganda.

⁶² The Inspection Panel, 2008 Report of the Inspection Panel *supra* note 18 at 154; The Inspection Panel, 2002 Report of the Inspection Panel *supra* note 18 at 90.

⁶³ The Inspection Panel, 2002 Report of the Inspection Panel *Ibid.* at 77.

⁶⁴ *Ibid.* at 78.

⁶⁵ *Ibid.* at 77 & 79. As the 2002 Panel noted, for example, AES – in keeping with Bank requirements, had prepared a Public Consultation and Disclosure Plan. See page 83.

licensees.⁶⁶ Lastly, while noticeably weak, both sponsors designed a CDAP aimed at creating income opportunities, improving livelihoods and acting as a safety net for difficulties that would be suffered as a result of the displacement.⁶⁷

b) The Impoverishment, Risks and Reconstruction model – a summary

The interpretation of the Bank policy on involuntary resettlement since the policy's introduction in 1980 is supposed to be influenced by the Impoverishment, Risks and Reconstruction model that was originally developed by the Bank's first in-house sociologist Michael. M. Cernea.⁶⁸ Central to this model is the need to ensure that impoverishment risks resulting from displacement are prevented and safeguarded against.⁶⁹ The model categorizes displacement risks into eight components:⁷⁰ landlessness,⁷¹ joblessness, homelessness, marginalization, food insecurity, increased morbidity, loss of access to common property resources and community disarticulation. To prevent a pattern of impoverishment, policies need to turn “the model on its head” so that landlessness is prevented by land-based resettlement; joblessness combated with reemployment; homelessness with house reconstruction; marginalization with social inclusion; increased mobility replaced with improved health; food insecurity guarded against using adequate nutrition; loss of access to

⁶⁶ Ibid. at 77.

⁶⁷ Ibid. at 80 & 82.

⁶⁸ Serageldin, “Involuntary Resettlement in World Bank-Financed Projects” supra note 1 at 48.

⁶⁹ Cernea, “Risks, Safeguards and Reconstruction” supra note 1 at 13.

⁷⁰ Ibid. at 20. Patwardhan gives a detailed illustration of the manner in which these different risks have manifested themselves in dam projects in India. See Amrita Patwardhan, “Dams and Tribal People in India” Thematic Review 1.2: Dams, Indigenous Peoples and Vulnerable Ethnic Communities <<http://oldwww.wii.gov.in/eianew/eia/dams%20and%20development/kbase/contrib/soc207.pdf>> at 14 – 23 [Dams and Tribal People].

⁷¹ See also generally Ranjit Nayak, “Risks associated with landlessness: an exploration toward socially friendly displacement and resettlement” in Cernea & McDowell (eds.) *Risks and Reconstruction: Experiences of Resettlers and Refugees* supra note 1 at 79.

community property⁷² and resources with restoration of the same; and social disarticulation overturned by community re-building.⁷³

The model places emphasis simultaneously on preventing risks and implementing reconstructive strategies.⁷⁴ It boasts of four distinct but interlinked functions:⁷⁵

- predictability (using past experience to equip planners with knowledge of likely risks and how to manage them);
- diagnosis (assessing and explaining the socio-economic hazards of an impending displacement by converting the general prognosis into a diagnosis of the situation at hand);
- problem resolution (reversing the problem into a prescription for action); and
- a research function (to guide theory-led fieldwork undertaken by researchers).

The model has been hailed for its practical usefulness especially in as far as it provides a practical planning tool for those implementing resettlement programs.⁷⁶ Its endorsers contend that it transcends property-centered approaches (which concentrate on compensating for lost property) by employing people-centered strategies (which allow the displaced to actively engage in and take charge of the transformation of their livelihoods).⁷⁷

⁷² See generally Dolores Koenig and Tieman Diarra, “The Effects of Resettlement on Access to Common Property Resources” in Cernea & McDowell (eds.) *Risks and Reconstruction: Experiences of Resettlers and Refugees* supra note 1 at 332.

⁷³ Cernea, “Risk, Safeguards and Reconstruction” supra note 1 at 20.

⁷⁴ Ibid.

⁷⁵ Ibid. at 21 & 22.

⁷⁶ Serageldin, “Involuntary Resettlement in World Bank-Financed Projects” supra note 1 at 57. See also Michael M Cernea & Christopher McDowell, “Introduction: Reconstructing resettlers’ and refugees’ livelihoods” in Cernea & McDowell (eds.) *Risks and Reconstruction: Experiences of Resettlers and Refugees* supra note 1 at 5.

⁷⁷ Serageldin, Ibid. at 58.

Its fundamental conceptual framework has distinguished it as the leading tool in the social sciences for formulating policies on resettlement “with a continuously increasing intellectual following.”⁷⁸ It is thus somewhat perplexing that DIDR continues to impoverish communities even in projects funded by the Bank.⁷⁹ A number of explanations have been given for this failure, some of which are discussed below.

III. DIDR: Understanding the Theoretical-Practical Disconnect

Many explanations have been given for the failure of resettlement and rehabilitation programs directed at development-induced displacement. Most of these reasons speak largely to practical hiccups that create hurdles in achieving policy objectives. The World Bank, for example, has attributed the failure of resettlement initiatives to several factors:⁸⁰ project planners do not identify all the adverse impacts of displacement or identify them at a late stage when mitigation is more difficult;⁸¹ designing narrow mitigation plans that overlook opportunities for livelihood improvement; lack of meaningful consultation with displaced peoples; lack of technical, organizational or financial capacity to implement

⁷⁸ Ibid. at 51.

⁷⁹ In 2004, for example, the World Bank noted that while resettlement planning and practice had greatly improved since the 1980s when its first policy entered into force, there were still many challenges that led to unsatisfactory results in both planning and practice. See World Bank, *Involuntary Resettlement Sourcebook* supra note 1 at xxv.

⁸⁰ Ibid. at xxv & xxvi. See also generally World Bank Operations Evaluations Department, “Involuntary Resettlement: the Large Dam Experience” (2000) online: World Bank <<http://www-wds.worldbank.org>>; Cynthia C Cook (ed.), *Involuntary Resettlement in Africa: Selected Papers from a Conference on Environment and Settlement Issues in Africa* World Bank Technical Paper No. 227 (1994) online: World Bank <<http://www-wds.worldbank.org/external>> [Involuntary Resettlement in Africa].

⁸¹ For a discussion of other planning weaknesses such as delays in the planning process, underestimating the number of people affected by projects, planning for the short-term (as opposed to long-term) impacts of displacement and under financing resettlement operations, see Cernea, “African Involuntary Population Resettlement” supra note 7 at 21 & 22.

resettlement plans;⁸² absence of political will and commitment; and changes in conditions in the project area, which make resettlement plans inappropriate, ineffective or obsolete. Additionally, poor planning, including failure to coordinate assignments between the different implementing agencies,⁸³ delays in resettlement planning⁸⁴ and lack of effective monitoring and supervision,⁸⁵ have adversely affected resettlement initiatives.

Some scholars argue that the organizational dynamics in institutional structures also influence the success of resettlement initiatives. Often, resettlement failure can be attributed partly to the manner in which resettlement officials at the bottom of organization structures exercise discretion when undertaking their duties.⁸⁶ These scholars argue that it is at the “bottom of the hill” where all the “messy” and “swampy” detail is found - the point at which outcomes of resettlement policies are determined in reality.⁸⁷ These bottom-level officers usually have the power to delay or speed up individual decisions, to determine who is eligible for resettlement support and to design the formats and procedures of resettlement cases.⁸⁸ It is here, at the point of delivery, that “street level bureaucracy” is exercised, where decisions having a major impact are made and where higher-level administrators are unable to monitor or control the manner in which resettlement decisions are executed.⁸⁹ There are also a number of challenges at the upper level of the ‘delivery chain’ including understaffing of departments, weaknesses in the chain of decision-making and a general

⁸² See also Evaristus Oshionebo, “World Bank and Sustainable Development of Natural Resources in Developing Countries” (2009) 27: 2 *Journal of Energy & Natural Resource Law* at 219 & 220 [World Bank and Sustainable Development].

⁸³ World Bank, *Involuntary Resettlement Sourcebook* supra note 1 at xxvii.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.* at xxix

⁸⁶ Rew et al, “Policy Practices” supra note 5 at 49.

⁸⁷ *Ibid.* at 50 & 51.

⁸⁸ *Ibid.* at 49.

⁸⁹ *Ibid.* at 51.

lack of skill among staff members to deal with people suffering from development-related stress.⁹⁰

The fact that resettlement initiatives often involve more than one government ministry or department means that their success depends on the organizational relations and the work cultures of the implementing agencies involved.⁹¹ In the case of Uganda, for example, five ministries have often been identified as being engaged in resettlement activities.⁹² This cross-section creates dependency problems since the success of the initiative depends on the performance of multiple actors. Dependency relations not only delay decision-making; they are also a potential source of conflict since different ministries have different interests at stake.⁹³ Also, the ministries involved normally have different styles of operation and levels of maturity.⁹⁴ When you combine these factors with interests of other external parties such as donors and private companies, the complexity and difficulty in merging objectives invariably increases.⁹⁵

The absence of domestic policies on resettlement or existence of weak and ambiguous policy frameworks has further exacerbated the problem.⁹⁶ Often times, resettlement and

⁹⁰ Ibid. at 52.

⁹¹ Ibid. at 48.

⁹² The line Ministry in charge of the project; Ministry of Water, Lands and Environment (for valuation, land administration and physical planning); Ministry of Agriculture, Animal Husbandry and Fisheries (for rural development); Ministry of Gender, Labour and Social Development (for social and economic welfare of the population) and Ministry of Disaster Preparedness (to undertake the resettlement action for development projects). See Ibid. at 48.

⁹³ Ibid.

⁹⁴ Rew et. al., "Addressing Policy Constraints" supra note 54 paragraph 2.168.

⁹⁵ Ibid.

⁹⁶ Rew et. al, "Policy Practices" supra note 5 at 46; Cernea, "Risks, Safeguards and Reconstruction" supra note 1 at 13; Michael M Cernea, "Public Policy Responses to Development-Induced Population Displacements" (1996) 31: 24 Economic and Political Weekly at 1519 & 1521; Cernea, "African Involuntary Population Resettlement" supra note 7 at 23.

rehabilitation policy is “too vague to be thought of, even, as ‘bad’ policy.”⁹⁷ This is aggravated by the absence of comprehensive legal structures geared towards defining the rights of affected communities, outlining the obligations of implementing agencies and establishing remedies necessary for reconstructing disrupted livelihoods.⁹⁸ What this means is that frequently, the outcomes of resettlement activities will depend on the relevance attached to the resettlement exercise by those involved.⁹⁹ Even where domestic policies appear strong, lack of political will and commitment have often rendered policies useless.¹⁰⁰

Equally lacking in resettlement planning is an analysis of the manner in which to deal with power struggles between the various parties engaged in resettlement: the displaced and state officials;¹⁰¹ the displaced and host communities; and even within the displaced themselves (the latter being divided along lines of age, gender and class).¹⁰² Koenig argues that on the whole, little attention has been paid to the political aspect of displacement – that is, the manner in which power distribution affects outcomes.¹⁰³ Communities affected by displacement are often already economically and politically weak, and displacement makes them more vulnerable because they are unable to negotiate terms in a manner that wealthier

⁹⁷ Rew et. al. “Policy Practices” Ibid. at 46.

⁹⁸ Michael M. Cernea, “Development’s Painful Social Costs: Introductory Study” in S. Parasuraman *The Development Dilemma: Displacement in India* (The Hague: Institute of Social Studies, 1999) at 20 [Development’s Painful Social Costs].

⁹⁹ Rew et. al., “Addressing Policy Constraints” supra note 54 paragraph 2.15.

¹⁰⁰ See generally, Parasuraman *The Development Dilemma: Displacement in India* supra note 98.

¹⁰¹ For a discussion on power struggles, particularly the manner in which the law concentrates power in the state and its subsequent marginalization of the rights and interests of displaced peoples, see generally Usha Ramanathan, “Displacement and the Law” (June, 1996) *Economic and Political Weekly* at 1486 - 1491.

¹⁰² See generally Dolores Koenig, “Enhancing Local Development in Development-induced Displacement and Resettlement Projects” in Chris De Wet (ed.) *Development-Induced Displacement: Problems, Policies and People* supra note 4 at 118 & 119 [Enhancing Local Development]. For a discussion of the effect of displacement on gender disparities, see also World Commission on Dams, *Dams and Development: A New Framework for Decision-Making* (Earthscan Publications Limited, 2000) at 114 – 116. Also available online: United Nations Environment

Programme<http://www.unep.org/dams/WCD/report/WCD_DAMS%20report.pdf> [Dams and Development].

¹⁰³ Koenig, Ibid. at 106.

people would.¹⁰⁴ In addition, internal power struggles existing between young and old, men and women, and within class structures are often used by powerful actors to divide and conquer, with the result that group interests become sabotaged.¹⁰⁵

Other times, failure has been attributed to weaknesses in the administration of resettlement initiatives by financiers, especially in as far as their supervisory role is concerned. There have been instances, for example, where the World Bank has missed opportunities to better direct or exercise a strong hold over the projects that it funds.¹⁰⁶ For example, in the case of the West African Gas Pipeline Project, the Inspection Panel noted a number of shortcomings in the World Bank Group (WBG)'s undertaking of its supervisory obligations. To begin with, the Panel found that the Bank had not diligently supervised the analysis of the socioeconomic risks associated with the project.¹⁰⁷ In addition, it had failed to ensure that adequate compensation was paid to displaced persons.¹⁰⁸ Worse still, the Bank had permitted involuntary resettlement to begin without ensuring that the development assistance program was in place.¹⁰⁹ Lastly, it did not satisfy itself that the project sponsors were committed and had the capacity to implement the resettlement plan.¹¹⁰ Consequently, some have accused the Bank of failing to supervise the projects it finances, adding that it

¹⁰⁴ Ibid. at 110.

¹⁰⁵ Ibid. at 111.

¹⁰⁶ See, for example, Cernea's discussion of the Bank's "missed opportunities" in directing better resettlement programs under India's Sardar Sarovar Project. Cernea, "Development's Painful Social Costs" *supra* note 98 at 14 -17.

¹⁰⁶ Ibid.

¹⁰⁷ Oshionebo, "World Bank and Sustainable Development" *supra* note 82 at 205.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

has offloaded this responsibility onto borrowers and depended on their good faith for implementation of the same.¹¹¹

On the whole, with the exception of a few commentators, many have de-centered – or perhaps more accurately, removed from the equation – the adverse impact that the World Bank policy itself has on resettlement and rehabilitation. There have been some notable deviations from the dominant position that remains silent on the limitations of the policy. In a brief but punchy article, for example, Downing argues that the major problem with OP 4.12 is that it is geared more towards restoration than it is towards development.¹¹² Also, by requiring sponsors to simply concentrate on the direct social and economic impacts of a project, the policy reduces the responsibility of borrowers by allowing them “an arbitrary ‘direct/indirect’ distinction.”¹¹³ In the process, externalized costs relating to aspects such as health risks, food security and community reintegration, are ignored.¹¹⁴ Downing also argues that OP 4.12 does not require impoverishment risks to be assessed.¹¹⁵ “... [it] merely directs Bank staff to review the risk that the borrower’s resettlement plans will not be inadequately implemented.”¹¹⁶ Such an approach, Downing argues, ignores the impoverishment risks threatening displaced persons.

¹¹¹ Ibid. at 213. See also pages 214 - 216.

¹¹² See generally, Theodore E Downing “Creating poverty: the flawed economic logic of the World Bank’s revised involuntary resettlement policy” (2002) 12 Forced Migration Review at 13 -14 [Creating Poverty]. See also generally Dana Clark, “Resettlement: The World Bank’s Assault on the Poor” (May, 2000) online: Centre of International Environmental Law <<http://www.ciel.org/Publications/ResettlementBrief2.pdf>>.

¹¹³ Downing, Ibid. at 14.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

This chapter builds on the scant literature that problematizes OP 4.12 by assessing the policy through the lens of the Bujagali Project. The ensuing discussion approaches this task through four strategies: analyzing the 2002 and 2008 Inspection Panel findings against the policy, critically reviewing the provisions of the policy itself, comparing the policy with that on indigenous peoples and establishing its legal status.

IV. Reincorporating Policy Analysis: Rhetoric and Reality in OP 4.12

Following claims filed against the Bujagali Project by project opponents, the 2002 and 2008 Inspection Panels¹¹⁷ reported a number of inconsistencies between the World Bank policies on involuntary resettlement¹¹⁸ and the practical realities of the Project. The 2002 Panel Report, for example, noted a disconnect between the RAP prepared by AES Nile Power (which complied substantially with OD 4.30) and how the RAP had been implemented.¹¹⁹ Later in 2008 the Panel concluded that the APRAP was inconsistent with OP 4.12's objectives.¹²⁰ Additionally, the Panel noted that the APRAP circumscribed some of the responsibilities owed to Affected Communities by choosing only the commitments that the Project sponsor was willing to undertake.¹²¹ Both in 2002 and 2008, the Panels observed that there were flaws in the socio-economic surveys, which adversely affected the substance of the resettlement.¹²² Again, in 2002 and 2008, it was concluded that the CDAP was weak

¹¹⁷ In Chapter Four, this thesis undertakes an in-depth discussion of the World Bank Inspection Panel, its roles and powers.

¹¹⁸ I refer to "policies" here because at the time the second request was filed with the Panel, the policy on involuntary resettlement had changed from Operational Directive 4.30 to OP 4.12. However, as the second panel noted in its 2008 report, the change was not material since the overall objectives of the two policies were the same. See World Bank, 2008 Report of the Inspection Panel *supra* note 18 at 138.

¹¹⁹ World Bank, 2002 Report of the Inspection Panel *supra* note 18 at 76.

¹²⁰ See discussion in Chapter One Part II.

¹²¹ World Bank, 2008 Report of the Inspection Panel *supra* note 18 at 139 & 140.

¹²² World Bank, 2002 Report of the Inspection Panel *supra* note 18 at 77 - 78 & 80; and *Ibid.* at 143.

because it focused on providing short-term benefits.¹²³ Lastly, as noted in Chapter One, the 2008 Panel found that: the consultation strategy employed by the project sponsor was inadequate and incomprehensive;¹²⁴ livelihoods of those engaged in agriculture and fishing were not adequately restored;¹²⁵ and the potential livelihood risks of vulnerable communities had been largely ignored.¹²⁶ In the end, the 2008 Panel concluded that the Project had failed to improve or restore in real terms, the livelihoods and standards of living of those displaced in the manner required by OP 4.12.¹²⁷

It is easy to attribute the above failures to weak implementation mechanisms instead of problematizing the policy. Such a conclusion also comes naturally because the Panel makes its decisions starting from the assumption that the Bank policy is itself unproblematic. Indeed, even those requesting for Panel review base their claims on the argument that there is an infringement (read – implementation shortage) of Bank policy.¹²⁸ To be fair, there are often clear translation gaps and weaknesses between policy and practice. To argue otherwise would be unproductive. Yet by excusing the policy from scrutiny, we place a blind spot on weaknesses that cannot be cured even if the policy were to be perfectly implemented. A critical examination of OP 4.12 reveals shortcomings that help to explain, at least in part,

¹²³ World Bank, 2008 Report of the Inspection Panel Ibid at 161; World Bank, 2002 Report of the Inspection Panel Ibid at 82 & 83.

¹²⁴ World Bank, 2008 Report of the Inspection Panel, Ibid. at 143. See also finding at 174 where the Panel concluded that the methodology used to consult on spiritual and cultural issues was structurally flawed because it excluded key players and knowledgeable persons in these issues.

¹²⁵ Ibid. at 151.

¹²⁶ Ibid. at 153.

¹²⁷ Ibid. at 158 & 159.

¹²⁸ The Inspection Panel, “About Us” online: The Inspection Panel
<<http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,menuPK:64129249~pagePK:64132081~piPK:64132052~theSitePK:380794,00.html>>.

why resettlement initiatives have largely failed to benefit or protect the interests of Affected Communities.

To begin with, even though the first paragraph of OP 4.12 explicitly recognizes the impoverishment risks associated with displacement, the requirements for what should be contained in the RAP do not reflect a similar degree of attention given to the mitigation of the different risks identified. Paragraph 6 of the policy – which outlines what should be included in a RAP – can loosely be categorized into two: mandatory requirements and measures that are left to the discretion of the borrower. The mandatory requirements relate to compensation for lost assets, consulting displaced people and informing them of their options, providing replacement property and relocation assistance.¹²⁹ The rest (i.e. supporting the displaced in livelihood restoration and providing development assistance) are left to the discretion of the borrower.¹³⁰ The borrower determines if and the extent to which it is necessary to improve, restore or maintain accessibility to public infrastructure in resettlement sites and gauges the necessity of providing communal resources that replace or are similar to those that existed at old sites (e.g. fishing areas, grazing areas, fuel, or fodder).¹³¹

That the policy covers only “direct economic and social impacts”¹³² is helpful in tracing where emphasis has been placed in practice. As such, even though the Bank has

¹²⁹ World Bank, OP 4.12 supra note 2 paragraph 6 (a) and (b).

¹³⁰ Ibid. paragraph 6 (c).

¹³¹ Ibid. paragraph 13 (b).

¹³² Ibid. paragraph 3.

categorically stated that resettlement should not be restricted to physical relocation¹³³ and even gone ahead to expand the definition of displaced people to include those who have suffered economic displacement,¹³⁴ establishing the “direct” cause-effect link has naturally meant that compensating for the more easily quantifiable impacts such as loss of tangibles is what many borrowers resort to in practice.¹³⁵ In fact, the World Bank sourcebook on involuntary resettlement explains that “‘Direct impact’ means any consequence *immediately* related” to such acquisition.¹³⁶

The same sourcebook distinguishes between “mandatory policy provisions” and what it calls “good practice recommendations”, noting that even “... [Bank team leaders] sometimes find it difficult to differentiate, for borrower counterparts, what precisely the Bank requires of them and what the Bank is asking them to consider.”¹³⁷ The examples of “good practice” found in the sourcebook are quite telling of the mandatory requirements of OP 4.12. Good practice includes: offering landless laborers reemployment options;¹³⁸ improving substandard living conditions;¹³⁹ engaging in non-mandatory but proactive efforts (such as rehabilitation) on behalf of the very poor to ensure that resettlement becomes an integral part of the development process;¹⁴⁰ reaching out to the poorest of the poor in the consultative processes since they may not participate in public forums;¹⁴¹ giving the poorest priority in opportunities generated by the project such as employment or special

¹³³ World Bank, *Involuntary Resettlement Sourcebook* supra note 1 at 5.

¹³⁴ World Bank, OP 4.12 supra note 2 paragraph 3 (a) (iii).

¹³⁵ See also Downing, “Creating Poverty” supra note 112 at 14.

¹³⁶ World Bank, *Involuntary Resettlement Sourcebook* supra note 1 at 4. [Emphasis mine]

¹³⁷ *Ibid.* at xxvi.

¹³⁸ *Ibid.* at 41.

¹³⁹ *Ibid.* at 59.

¹⁴⁰ *Ibid.* at 72.

¹⁴¹ *Ibid.* at 73.

funds;¹⁴² providing very poor households with rehabilitation measures that go beyond income restoration;¹⁴³ and giving the very poor households preference during the hiring process.¹⁴⁴

Ultimately, the policy places emphasis on replicating the pre-displacement (mostly physical) project conditions.¹⁴⁵ The only instances when other forms of restoration (such as employment and opportunities for self-employment) take center stage is when land is not the preferred option to resettlement, when there is no sufficient land available and when provision of land would adversely affect the sustainability of a park or protected area.¹⁴⁶ These forms of restoration act as alternatives to - not additions to – land-based forms of restoration and compensation.¹⁴⁷ In other words, the requirements of the policy are satisfied the minute displaced people are physically relocated and/or offered monetary compensation for lost assets. As such, in the case of the Bujagali Project, while project sponsors had promised Affected Communities at Naminya and Malindi jobs at the site, a market for selling their produce and a technical school, these promises were left largely unfulfilled.¹⁴⁸ Interviewees revealed, for example, that employment was often given to outsiders or

¹⁴² Ibid.

¹⁴³ Ibid. at 74.

¹⁴⁴ Ibid.

¹⁴⁵ Clark asserts that “The Bank has taken the language ‘improve or at least restore’ to mean that it only has to aim for restoration of pre-project standards of living”. See Clark, “Resettlement: The World Bank’s Assault on the Poor” supra note 112 at 2. Cernea maintains that because displacement and resettlement take several years, during which time the incomes of those displaced significantly drop, it is insufficient to restore incomes to the pre-displacement period since that would undermine the fact that people would have grown their incomes if it had not been for the project. Cernea, “African Involuntary Population Resettlement” supra note 7 at 18.

¹⁴⁶ World Bank, OP 4.12 supra note 2 paragraph 11.

¹⁴⁷ See also World Bank, *Involuntary Resettlement Sourcebook* supra note 1 at 51 – 70 where emphasis is placed on land-for-land replacement with all other forms of rehabilitation and restoration such as cash compensation; dividends; annuities; pensions and employment being considered options to land-based restoration.

¹⁴⁸ Interview of community members at Naminya Resettlement and Malindi Dam-Affected Communities supra note 61.

politically connected individuals instead of Affected Communities.¹⁴⁹ Also, instead of constructing a technical school in the community as the project sponsor had originally promised, the latter hand-picked a few community members to attend a nearby technical school.¹⁵⁰ Similarly, in 2008, the Inspection Panel found that once people had been resettled, Bank management failed to follow up on the livelihood risks resulting from the displacement.¹⁵¹ Before this observation, the 2002 Panel had found *inter alia* that there was a significant difference between the RAP and the CDAP, with the former meeting Bank obligations more comprehensively than the latter.¹⁵² Such observations can be attributed partly to the fact that the policy on involuntary resettlement is mostly “soft”, allowing just sufficient camouflage to illustrate that it is aware of the impoverishment risks associated with displacement (paragraph 1), without accompanying such awareness with a comprehensive framework to mitigate against all the risks (paragraph 6).¹⁵³ When one merges the “softness” of this policy with the fact that the duty to prepare, implement and even monitor the RAP (the primary document required by the policy) lies with the

¹⁴⁹ Ibid. In a separate interview with a Makerere University lecturer who has interacted closely with the project, he revealed that in a bid to reduce costs, the contractor (Salini) had resorted to employing casual laborers from places like northern Uganda and Kabale (in western Uganda) because these people were willing to be paid very little money when compared to the pay that was being demanded by local communities. Interview of Dr. Emmanuel Kasimbazi (Lecturer, Makerere University Faculty of Law) (23 November 2009) at Makerere University Kampala, Uganda.

¹⁵⁰ Interview of community members at Naminya Resettlement and Malindi Dam-Affected Communities, Ibid.

¹⁵¹ The Inspection Panel, 2008 Report of the Inspection Panel *supra* note 18 at 150 & 151. It has also been observed elsewhere that “Resettlement programs have predominantly focused on the process of physical relocation rather than on the economic and social development of the displaced and other negatively affected people.” See World Commission on Dams, *Dams and Development* *supra* note 102 at 108.

¹⁵² The Inspection Panel, 2002 Report of the Inspection Panel *supra* note 18 at 79.

¹⁵³ The discretionary nature of the World Bank’s policies generally has been noted elsewhere. Darrow, for example, reports from a 2001 letter written to the IMF and World Bank by UK-based Forest Peoples Program that “... policies are being made so flexible that staff or borrowers can never be accused of having contravened them and therefore never held to account for problems and failures of implementation. Careful examination of safeguard policies undergoing conversion reveals that binding language is being removed and replaced by statements of ‘process’ and expectation rather than ‘requirements’ and preconditions for loan approval. In this way, the compliance with once binding social and environmental provisions is now being left to the discretion and willingness of borrowers.” Mac Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law* (USA: Hart Publishing, 2003) at 199.

borrower,¹⁵⁴ it becomes easier to explain some of the loopholes in the practical application of OP 4.12.¹⁵⁵

The requirement for physical resettlement and compensation at replacement cost should not, however, be taken lightly. Many have been displaced by development projects without the opportunity for resettlement while others are either resettled under very poor conditions or after extremely long periods of time.¹⁵⁶ Also, as illustrated in Chapter One, had the Bujagali Project not been financed by the Bank, the requirements for compensation would likely have been restricted to cash compensation. Worse still, that compensation would have been at market price – not replacement cost.¹⁵⁷ Clearly then, the policy provides the much needed intervention. Yet as Cernea notes:

Displacement implies not only physical eviction from a dwelling, but also the expropriation of productive lands and other assets to make possible an alternative use of the space ... Involuntary displacement is a process of unraveling established human collectivities, existing patterns of social organization, production systems and networks of social services ... Overall, forced displacement of collectivities

¹⁵⁴ Szablowski notes, for example, that the Bank's policy on involuntary resettlement does not even give details on the basic measures that borrowers should take to ensure that local communities participate in decision making. It is left to the borrowers to determine the extent to which they should engage with and consult communities at the time of preparing the RAP. Szablowski, *Transnational Law and Local Struggles* supra note 17 at 115.

¹⁵⁵ Oshionebo contends that one of the reasons why the Bank has failed to alleviate poverty is its failure to properly monitor and supervise its projects, coupled with the fact that preparation, implementation and monitoring of resettlement plans are left to the borrower. Oshionebo, "World Bank and Sustainable Development" supra note 82 at 214.

¹⁵⁶ See some examples of these projects in World Commission on Dams, *Dams and Development* supra note 102 at 105 & 106.

¹⁵⁷ The discussion in Chapter One notes, for example, that while the district land boards in Uganda are supposed to keep tab of the market rates and update them, in practice, the boards do not update the rates as regularly as they should. See Chapter One, part IV. The World Bank defines replacement cost to mean "... the pre-project or pre-displacement, whichever is higher, market value of land of equal productive potential or use located in the vicinity of the affected land, plus the cost of preparing the land to levels similar to those of the affected land, plus the cost of any registration and transfer taxes. For land in urban areas, it is the pre-displacement market value of the land of equal size and use, with similar or improved public infrastructure facilities and services and located in the vicinity of the affected land, plus the cost of any registration and transfer taxes." See World Bank, OP 4.12 supra note 2 Annex A.

causes an economic crisis for all or most of those affected, entails sudden social disarticulation, and sometimes triggers a political crisis as well.¹⁵⁸

A policy that recognizes the impoverishment risks of displacement without paying *equal* attention to safeguards required to mitigate *each* of these risks will invariably contribute to some of the failures identified in Uganda's case. To better appreciate the limitations of OP 4.12, it helps to compare it with another Bank policy – OP 4.10 on Indigenous Peoples. Such a comparison is deemed appropriate first, because both policies deal with people affected by Bank-financed projects. Second, in both the 2002 and 2008 Panel findings, it was concluded that OP 4.10 did not apply to the Bujagali Project because the Basoga do not meet the criteria of “indigenous peoples” found in Bank policy. It did not matter that under Uganda's Constitution, the Basoga are designated as indigenous peoples.¹⁵⁹ The disregard of the Constitution is also interesting since elsewhere, the Bank – in a Legal Note on Indigenous Peoples – has identified Uganda as one of the countries with a constitution that has provisions on the rights of indigenous peoples.¹⁶⁰ Equally interesting is the fact that that same Legal Note frowned upon interference with domestic legal frameworks of sovereign states.¹⁶¹

That said, while constituting an important area of inquiry, the question of whether the Bank should have accepted Uganda's constitutional provision on indigenous peoples does not

¹⁵⁸ Cernea, “Development's Painful Social Costs” *supra* note 98 at 3.

¹⁵⁹ NAPE and others raised a similar concern in their request for review of the Bujagali Project. They asked: “Has the constitution of Uganda changed? Or is the Constitution of Uganda (1995) not relevant to the Bujagali Project?” See NAPE, “Request for Inspection” online: The Inspection Panel <<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/InspectionPanelClaim.pdf>> at 11.

¹⁶⁰ World Bank, “Legal Note on Indigenous Peoples” (April, 2005) online: World Bank <<http://siteresources.worldbank.org/INTINDPEOPLE/Publications/20571167/Legal%20Note.pdf>> at 7 footnote 11.

¹⁶¹ *Ibid.* at 5 & 6.

form the subject of discussion in this chapter. Taking that line of argument would mean that displaced people in other countries without similar provisions in their constitutions would automatically be excluded from the benefits deriving from the policy unless they fit into the Bank definition. Instead, the immediately ensuing discussion answers two questions. First, would more benefits have been enjoyed by those displaced by the Bujagali Project if they had qualified as indigenous peoples? Put another way, does OP 4.10 provide more protection and grant more benefits than the policy on involuntary resettlement? Second, in a continent such as Africa where too frequently those affected by development projects will not fit into the definition of indigenous peoples that is found in OP 4.10, does not the importation of ‘indigeneity’ marginalize majority of the Affected Communities? The second question is perhaps more rhetorical than it is a subject of inquiry.

V. Protecting Indigenous Peoples: Operational Policy 4.10¹⁶²

OP 4.10 requires that before a project displaces indigenous peoples, borrowers should engage the peoples in free, prior and informed consultation,¹⁶³ undertake a social assessment of the impacts (both positive and negative) that the project will have on the peoples¹⁶⁴ and prepare an Indigenous Peoples Plan or Indigenous Peoples Planning Framework in consultation with the people to be affected by the project.¹⁶⁵ The Plan sets out the measures that the borrower will take to ensure that those affected obtain culturally

¹⁶² See also generally World Bank, “Bank Policy (BP) 4.10 – Indigenous Peoples” online: World Bank <<http://web.worldbank.org>> (July, 2005).

¹⁶³ World Bank, “Operational Manual: Operational Policy (OP) 4.10” (July, 2005) online: World Bank <<http://web.worldbank.org>> paragraph 6 [OP 4.10]. Only after such consultation has resulted in broad support for the project can the Bank finance the same. See also paragraphs 10 & 11 for further details on consultation.

¹⁶⁴ Ibid. paragraph 9. See also World Bank, “Operational Manual: OP 4.10, Annex A – Social Assessment” (July, 2005) online: World Bank <<http://web.worldbank.org>>.

¹⁶⁵ World Bank, OP 4.10 Ibid. paragraph 12. For more details on the Indigenous Peoples Plan, see also World Bank, “Operational Manual: OP 4.10, Annex B – Indigenous Peoples Plan” (July, 2005) online: World Bank <<http://web.worldbank.org>>.

appropriate social and economic benefits and states how potential adverse impacts will be avoided, mitigated or compensated for.¹⁶⁶ Where the project involves the commercial development of natural resources (including water, minerals and forests) on lands or territories traditionally owned by indigenous peoples, there is an additional requirement for the Indigenous Peoples Plan to outline measures that will be taken to ensure that affected communities share equitably in project benefits or at a minimum, receive culturally appropriate social and economic benefits comparable to those that would have been enjoyed by any land owner in the event of a commercial development being undertaken on their land.¹⁶⁷

The additional protection provided by the policy to indigenous peoples is necessary given the fact that indigenous peoples are inextricably linked to their lands and resources.¹⁶⁸ Also, because indigenous peoples are normally distinct from dominant groups in national societies, they are often economically, socially and legally vulnerable.¹⁶⁹ The policy notes that there is no universally acceptable definition of indigenous peoples but they are variously referred to as “indigenous ethnic minorities”, “aboriginals”, “hill tribes”, “minority nationalities”, “scheduled tribes” or “tribal groups”.¹⁷⁰ They are a “distinct, vulnerable, social and cultural group” that: self-identifies as indigenous and obtains recognition by others of that status, have a collective attachment to geographically distinct habitats and natural resources in the habitat, have cultural, economic, social and political

¹⁶⁶ World Bank, OP 4.10 Ibid. paragraph 12.

¹⁶⁷ World Bank, OP 4.10 Ibid. paragraph 18.

¹⁶⁸ Ibid. paragraph 2.

¹⁶⁹ Ibid. See also World Commission on Dams, *Dams and Development* supra note 102 at 110; Patwardhan, “Dams and Tribal People in India” supra note 70.

¹⁷⁰ World Bank, OP 4.10 Ibid. paragraph 3.

institutions that are distinct from the dominant society and/or culture, and a language that is distinct from the official language of the country or region.¹⁷¹

OP 4.10 differs from the policy on involuntary resettlement (i.e. OP 4.12) in a number of respects. First, while the opening paragraph of OP 4.12 is evidently aware of the potential economic, social and environmental risks associated with development-induced displacement, it does not immediately offer solutions to mitigate these risks.¹⁷² In contrast, the policy on indigenous people is unequivocal from the onset about the Bank's commitment to poverty reduction and sustainable development, adding that "Bank-financed projects are ... designed to ensure that the Indigenous Peoples receive social and economic benefits that are culturally appropriate and gender and intergenerationally inclusive."¹⁷³ Second, while OP 4.12 only tasks the borrower with preparing a RAP that places emphasis on physical resettlement and compensation, OP 4.10 places an additional obligation on the borrower to prepare a plan aimed at ensuring that affected communities receive social and economic benefits.¹⁷⁴ As the Bank noted about OP 4.10 before it came into effect, the policy "clearly distinguishes between the do no harm provisions, aimed at addressing adverse impacts, and the do good aspects that focus on proactive development measures."¹⁷⁵

¹⁷¹ Ibid. paragraph 4.

¹⁷² Downing makes a similar observation when he states that "OP/BP 4.12 acknowledges impoverishment risks in its first paragraph but fails to propose measures to address them." Downing, "Creating poverty" *supra* note 112 at 13.

¹⁷³ World Bank, OP 4.10 *supra* note 163 paragraph 1.

¹⁷⁴ It should be remembered that where indigenous peoples are concerned, OP 4.10 applies in addition to OP 4.12 on involuntary resettlement. See Ibid. paragraph 20.

¹⁷⁵ World Bank, "Revised Draft Operational Policy/Bank Procedures (OP/BP 4.10) Indigenous Peoples: Issues and Proposals" (April, 2005) online: World Bank <<http://siteresources.worldbank.org/INTINDPEOPLE/Publications/20571164/Issue%20Notes.pdf>> at 4 [Revised Draft Operation Policy on Indigenous Peoples].

It is useful also to briefly review the Performance Standards of the IFC¹⁷⁶ that deal with involuntary resettlement and indigenous peoples. While the requests addressed by the 2002 and 2008 Inspection Panel Reports did not base their claims on these Standards (because they were complaining about IDA, not IFC), these Standards are applicable to the Bujagali Project. To a large extent, IFC's Standards on involuntary resettlement and indigenous peoples echo OP 4.12 and OP 4.10 respectively.¹⁷⁷ Consequently, a detailed review of the Standards is not necessary. However, there are some striking differences that warrant mention.

First, Performance Standard 5 (Involuntary Resettlement) makes an explicit distinction between “physical displacement (relocation or loss of shelter)” and “economic displacement (loss of assets or access to assets that leads to loss of income sources or means of livelihood)”.¹⁷⁸ Such a clear pronouncement arguably lays the foundation for exploring restoration strategies that go beyond “the physical”. Second, the Standard requires the client to design a Social and Environmental Management System which facilitates the implementation of the Standard's requirements.¹⁷⁹ Third, unlike OP 4.12, the Standard explicitly outlines a number of requirements in the event of economic displacement including: compensation for lost assets, compensation for destructed commercial structures including income lost during the transition period, providing additional targeted assistance

¹⁷⁶ International Finance Corporation (IFC), “Performance Standards on Social and Environmental Sustainability” (April, 2006) online: IFC <[http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/\\$FILE/IFC+Performance+Standards.pdf](http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/$FILE/IFC+Performance+Standards.pdf)> [IFC Performance Standards].

¹⁷⁷ IFC Standards came into force in 2006, long after the first World Bank policies were first published. See IFC, “Environmental and Social Standards” online: IFC<<http://www.ifc.org/ifcext/sustainability.nsf/Content/EnvSocStandards>>.

¹⁷⁸ International Finance Corporation, IFC Performance Standards, *supra* note 176 paragraph 1.

¹⁷⁹ *Ibid.* paragraph 4. See also Performance Standard 1 for what should be contained in the Social and Environmental Management System.

and income earning opportunities to the displaced, and transitional support to the economically displaced.¹⁸⁰ Yet despite its explicit distinction between physical and economic displacement, Performance Standard 5 – like OP 4.12 – still leaves the non-quantifiable aspects of restoration largely to the discretion of the sponsor.¹⁸¹ This deficit is particularly poignant when one compares the discretionary nature of some of the requirements under Standard 5 with the requirement of Performance Standard 7 (Indigenous Peoples) that the project sponsor should prepare a “time-bound plan, such as an Indigenous Peoples Development Plan, or a broader community development plan”.¹⁸²

The impact of these distinctions should not be downplayed. In the Bujagali Project, it can be noted that while there are a few differences between some of the findings of the two Inspection Panels, one notable area of convergence was the finding that both AES Nile Power and Bujagali Energy Limited had weak CDAPs. The 2002 Panel reported, for example, that under the CDAP, the Company did not take specific responsibility to generate development projects, the funds earmarked for the plan were immaterial when discounted to the long term, there were no sustainable economic activities scheduled for the period after the construction stage, most of the resources were earmarked for short-term construction projects rather than long-term institution building and the CDAP’s targets were poorly laid

¹⁸⁰ See generally Ibid. Performance Standard 5 paragraph 20.

¹⁸¹ Ibid. paragraphs 8 & 20 and World Bank, OP 4.12 supra note 2 paragraph 6 (c).

¹⁸² IFC, “Performance Standard 7: Indigenous Peoples” supra note 176 paragraph 8. The emphasis on benefits that go beyond compensation and physical resettlement can also be found in paragraphs 9 & 10 of the Standard. See also World Bank, “Legal Note on Indigenous Peoples” supra note 160 at 8 where the document specifically notes that the recommended OP 4.10 would recognize and protect land rights of indigenous peoples by ensuring that they shared in benefits of commercial projects that are undertaken on their lands.

out, making it considerably weak and sketchy.¹⁸³ Management's response to the Panel's findings is quite telling. The Bank responded *inter alia* that

A CDAP is not an instrument required by OD 4.30. It represents an attempt to develop *best practice over and above the safeguard provisions of the OD*, the formal requirements of which were met by the RAP.¹⁸⁴ [Emphasis mine]

It is difficult to imagine a similar response being given to a claim filed by Indigenous Peoples either under OP 4.10 or Performance Standard 7. Indeed, while Bujagali Energy Limited went ahead to prepare a CDAP when it took over the project, the Company highlighted the difference between the CDAP and two other documents: the Social and Environment Assessment and the APRAP. According to the Company, while the latter documents focus on mitigating identified impacts, the CDAP addresses community support that is “*beyond compliance*” and also covers some of the “more indirect impacts”.¹⁸⁵ Recall that OP 4.12 specifically refers to “direct economic and social impacts” confirming the fact that the Company, like Management, perceives the CDAP as one of those “good practice”/non-mandatory requirements. Thus in 2008, the Panel found that the CDAP prepared by Bujagali Energy Limited: lacked specificity in the sustainable development programs that would be carried out under it,¹⁸⁶ put aside an insignificant amount (only 0.4%

¹⁸³ The Inspection Panel, 2002 Report of the Inspection Panel supra note 18 at 80 – 82.

¹⁸⁴ International Bank for Reconstruction and Development & International Development Association, “Management Report and Recommendation to the Inspection Panel Investigation Report: Uganda – Third Power Project (Credit No. 2268-UG), Fourth Power Project (Credit No. 3545-UG) and Bujagali Hydropower Project (PRG No. B 003-UG)” (June, 2002) online: World Bank <<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/UGManagementResponse>> at 27 [2002 Management Response].

¹⁸⁵ Burnside, *Community Development Action Plan* (December 2006) online: The World Bank <<http://siteresources.worldbank.org/EXTBUJHYDPOWPRO/Resources/HPPSEAAppendixJ-CDAP.pdf>> at 4 [Community Development Action Plan]. [Emphasis mine].

¹⁸⁶ The Inspection Panel, 2008 Report of the Inspection Panel supra note 18 at 160. See, for example, the “Strategic Orientation of the BEL CDAP” in Burnside, *Community Development Action Plan*, Ibid at 17.

of the total budget of the project) for the CDAP,¹⁸⁷ did not focus the benefits of the program on displaced people¹⁸⁸ and significantly reduced – both in terms of time and investment resources – what would be committed to the CDAP when compared to the one that had been prepared previously by AES Nile Power.¹⁸⁹

The intimate relationship between indigenous people and their environment and the marginalization widely suffered by indigenous groups has led to the promulgation of a number of international policies seeking to protect them from risks associated with different forms of displacement.¹⁹⁰ These policies are rendered extremely pertinent to the protection of the interests of indigenous peoples who depend significantly on communal resources which are often not secured through legal title – a common prerequisite for compensation in a number of jurisdictions.¹⁹¹ Worse still, national legal frameworks have largely been inadequate in defining or enshrining the interests of indigenous peoples.¹⁹² The statistics of indigenous peoples displaced by development projects in certain parts of the world are quite sobering. The World Commission on Dams reported, for example, that in the Philippines,

¹⁸⁷ Of the US\$ 3.32 million earmarked for community development over a five-year period, US\$ 361,000 was for BEL administration. See The Inspection Panel, 2008 Report of the Inspection Panel, *Ibid.* at 159 & 160.

¹⁸⁸ For example, the Panel noted in 2008 that “While the programs offered by the CDAP are directly available to the displaced people (micro-credit, agricultural extension, small business support, etc.), eligibility criteria do not indicate preference to displaced persons.” *Ibid.* at 160.

¹⁸⁹ The Panel noted, for example, that “The prior project has a US\$ 7.5M phase II CDAP component that is not in the present Project. The CDAP program of the prior project was also a 35 year program, coterminous with the investment itself. In contrast, the present Bujagali Project has been shortened to the five-year construction phase.” See *Ibid.* at 161. See also Burnside, “Community Development Action Plan” *supra* note 185 at 15 & 17 for evidence of reduction in the CDAP program.

¹⁹⁰ Stavropoulou, for example, discusses a variety of international legal norms seeking to protect indigenous peoples’ rights including International Labour Organization (ILO) conventions, the Rio Declaration and the UN Draft Declaration on the Rights of Indigenous Peoples. See generally Maria Stavropoulou, “Indigenous Peoples Displaced from Their Environment: Is There Adequate Protection?” (1994) 5 *Colorado Journal of International Environmental Law & Policy* at 106 - 125.

¹⁹¹ World Commission on Dams, *Dams and Development* *supra* note 102 at 105. See also Cernea, “Risk, Safeguards and Reconstruction” *supra* note 1 at 31 for the assertion that vulnerable groups (such as indigenous and tribal peoples) are more prone to impoverishment risks than the general population is.

¹⁹² World Commission on Dams, *Ibid.* at 111. See generally pages 111 & 112 for evidence of exclusion of indigenous people from benefits of development projects in both developed and developing countries.

almost all large dams were built or proposed to be built on land owned by the country's 6 – 7 million indigenous people.¹⁹³ Similarly, the commission noted that in India, 40 – 50% of those displaced by development projects were indigenous peoples.¹⁹⁴ In fact, “it is estimated that at least twenty per cent of the total tribal population of India have been uprooted and displaced in less than 50 years; and that there is a growing incidence of multiple displacement.”¹⁹⁵ Even in developed countries such as the United States and Canada where the policy on indigenous peoples is rapidly transforming there continues to be marginalization resulting in part from unresolved land claims.¹⁹⁶

It is thus neither odd nor inappropriate that OP 4.10 offers extra protection to indigenous groups. Consequently, this chapter should not be read as suggesting a removal of that protection. Instead, it questions the absence of comparable levels of protection to other vulnerable groups (particularly the poor) found in many parts of the Third World. That these groups are large in number when compared with other groups in society is not synonymous with a “largeness” in ability to influence decisions – socially, economically or politically. In its report, the World Commission on Dams identified a number of vulnerable communities outside indigenous groups: those who were situated downstream from dams, those without land or legal title; and those affected by infrastructure – often the poor.¹⁹⁷ It noted that:

... the direct adverse impacts of dams have fallen disproportionately on *rural dwellers, subsistence farmers*, indigenous peoples, ethnic minorities, and women ... These groups, *who are also often the poorest segments of society, tend to be*

¹⁹³ Ibid. at 110.

¹⁹⁴ Ibid.

¹⁹⁵ Rew et. al., “Addressing Policy Constraints” supra note 54 at paragraph 5.6.

¹⁹⁶ World Commission on Dams, *Dams and Development* supra note 102 at 111.

¹⁹⁷ Ibid. at 105 & 120.

*over-represented in the numbers of people who are displaced from reservoirs sites or lose access to their traditional livelihoods.*¹⁹⁸

The Bank has also identified vulnerable groups to include the poor, adding that vulnerable populations “are often susceptible to hardship and may be less able than other groups to reconstruct their lives after resettlement.”¹⁹⁹ It has also noted that “... displacement disproportionately affects the poor, the less educated, the unskilled, children, the elderly, and people not advantaged by political institutions or power structures. The people in these groups also bear a much more significant risk of severe impoverishment and are less likely to adapt without assistance”.²⁰⁰ Sadly, this recognition has not manifested itself into a more concrete policy that incorporates these concerns. In continents such as Africa, where too frequently the people displaced by development projects are unable to tick the Bank’s “indigenous box” and where significant financing for development projects comes from donor agencies such as the Bank and its affiliates,²⁰¹ the lack of adequate protection renders many DIDR initiatives inadequate.

¹⁹⁸ Ibid. at 124. [Emphasis mine]

¹⁹⁹ World Bank, *Involuntary Resettlement Sourcebook* supra note 1 at 71.

²⁰⁰ Ibid. at 159.

²⁰¹ For example, between 1963 and 2009, the International Development Association (IDA) – the World Bank Group’s fund for low-income countries – estimates that it has spent over \$5.3 billion in loans and credits and over 600m in grants for various development programs in Uganda. As of July 2009, IDA’s total commitment to active projects in the country stood at \$1.5billion. IDA notes that “The focus of the portfolio is on critical infrastructure development and rehabilitation and support to institutional reforms.” See generally IDA, “IDA at Work: Uganda” (July, 2009) online: IDA<<http://siteresources.worldbank.org/IDA/Resources/IDA-Uganda.pdf>>. Also, between 2003 & 2008, International Finance Corporation (IFC) – the World Bank’s private arm - committed approximately \$395m to infrastructure and \$626m to oil, gas, mining & chemicals’ sectors in Africa, in addition to billions in other sectors. In 2008 alone, IFC committed approximately \$1.4 billion in new investments in the continent, a figure that was about the same as what had been invested the previous year. See IFC, “Investing in Sub-Saharan Africa” online: IFC<<http://www.ifc.org/ifcext/africa.nsf/Content/Investments>>. In 2009, Multilateral Investment Guarantee Agency (MIGA) provided \$50.1m in guarantee support for ten projects in Africa. See MIGA, “Regional Overview” online: MIGA<http://www.miga.org/regions/index_sv.cfm>. In Uganda, MIGA support has included a \$39.6m guarantee given to Globeleq Holdings (Conco) Limited in 2007 for an electricity project; \$115m for the Bujagali Project in 2007; \$2.97m given to MILLco Limited for an agribusiness project in 2006; another \$3.11m for agribusiness given to Afriproduce Limited in 2005 and other millions to developments in

VI. Excluding the “Plenty Vulnerable” through Universalizing the Indigenous Mission

In the 2002 and the 2008 Panel Reports, Operational Directive 4.20 and OP 4.10 were respectively invoked in determining whether the policy on indigenous peoples applied to the Basoga.²⁰² World Bank Management responded by stating that the Basoga did not qualify as indigenous people under Bank policy.²⁰³ In 2008, the Panel concluded that:

Although the Basoga people meet some of the criteria necessary to be regarded as indigenous people in the context of Bank-financed projects pursuant to OP 4.10, they are a large and influential group with political, social and economic standing in Uganda’s society, and the Panel did not find any indication that they are regarded as ‘*marginalized and vulnerable segment*’ of the population that is unable to ‘*participate in and benefit from development*.’ **The Panel did not find any evidence that Management violated the provision of the bank’s policy on Indigenous Peoples, with regard to the Basoga people.**²⁰⁴

The Panel did not go for the (quicker) option of arguing that the Basoga are not a ‘distinct’ member of Uganda’s society. Perhaps this can largely be attributed to the fact that distinctiveness in a country such as Uganda (and in many other African countries) is pervasive given the diversity of languages, cultures, physical appearances and even spirituality.²⁰⁵ In fact, a significant part of the project of TWAIL is to express the diversity that defines the Third World and to reject universalizing missions based on homogeneity.²⁰⁶ Chapter One, for example, observes how more than 65 ethnic groups exist in Uganda, each

different sectors including mining. See MIGA, “Projects in Uganda” online: MIGA <http://www.miga.org/regions/index_sv.cfm?stid=1530&country_id=223&hcountrycode=UG>.

²⁰² The Inspection Panel, 2008 Report of the Inspection Panel supra note 18 at 4. See also The Inspection Panel, 2002 Report of the Inspection Panel supra note 18 at 8.

²⁰³ See, for example, The Inspection Panel, 2008 Report of the Inspection Panel, Ibid. at 6; World Bank, “Bank Management Response to Request for Inspection Panel Review of the IDA-Financed Uganda Third Power Project (Credit 2268-UG) and the Proposed Bujagali Hydropower Project” online: World Bank <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/BUJ_Management_Response_09_12_01.pdf> at 50.

²⁰⁴ The Inspection Panel, 2008 Report of the Inspection Panel, Ibid. at 161 & 162 [Emphasis contained in original text].

²⁰⁵ See also Ibid. at 28 where the Panel noted a clear distinction between the Basoga and Baganda.

²⁰⁶ See Chapter Two, Part III (b).

with its own language and cultural attachment.²⁰⁷ It would thus have been difficult for the Panel to resort to arguing that the Basoga are not an indigenous group since they are one of the many ethnic groups in the country. Neither could their attachment to a particular geographic location be denied since as one African author has noted:

In Africa, perhaps more than any other region, a person's identity is closely tied to both land and culture. Cultural homogeneity, which includes strong elements of clan and lineage organization among Africans, tends to be found in geographical areas with varying degrees of agro-ecological potential. ...Given this sociogeographical setting, units of social organization such as the family, lineage, clan, tribe or ethnic group are also territorial units. Such territorial units along with their ecological endowments are viewed as permanent elements in the lives of individual families and communities.²⁰⁸

Lastly, because the Third Schedule to Uganda's Constitution²⁰⁹ explicitly delineates the Basoga as an indigenous people, that again was a line of argument the Panel could not comfortably pursue. In the end, what the Panel was left with was to piggyback on the Basoga's "influential" position and their "large size". Never mind that the same Panel had found that the affected group were a people who "worked small plots of land, as peasant farmers"²¹⁰, who due to poverty, depended on fruits as a substitute for purchased refined sugar²¹¹, many of whose land rights were not reduced to legal title but rather to usufruct rights recognized by others and who would not be able to afford electricity even if their connection to the national grid was subsidized.²¹² The Panel – because it was dealing with a policy that has been traditionally constructed to fit a particular identity, had to fit its finding

²⁰⁷ Chapter One, Part II.

²⁰⁸ Edward K. Mburugu, "Dislocation of Settled Communities in the Development Process: The Case of Kiambere Hydroelectric Project" in Cook (ed.), *Involuntary Resettlement in Africa* supra note 80 at 49.

²⁰⁹ *Constitution of the Republic of Uganda*, 1995 [As at 15 February 2006].

²¹⁰ The Inspection Panel, 2008 Report of the Inspection Panel supra note 18 at 148.

²¹¹ Ibid. at 150.

²¹² Ibid. at 15.

within that historical/traditional association – without borrowing the usual reasons often given for exclusion. The 2002 Panel dealt with this issue in a quick matter-of-fact way, noting that because there were no minorities involved, there was no evidence supporting the application of the indigenous peoples’ policy to the claim at hand.²¹³ To be fair, both Panels – while using different reasons to arrive at the same conclusion – were well within the technical construction of indigenous peoples that has been adopted by the Bank – and even other international organizations.

When one carefully studies the World Commission on Dams Report, reference made therein to indigenous peoples is often in the context of particular regions: Asia (India,²¹⁴ Thailand, Indonesia and Malaysia), Latin America (Chile, Argentina, Mexico, Guatemala, Panama and Colombia) and parts of the West (United States and Canada).²¹⁵ Where reference is made to displaced people in African countries, it is often in the context of the vulnerability and poverty of the affected communities. This can be explained by the fact that the native-settler relationship existing in many parts of the West is largely absent in Africa. Also, the continued marginalization or exclusion of certain groups of people such as tribals or lower castes existing in certain parts of the Third World (such as India and parts of Latin America) does not find much resemblance in the African context.²¹⁶ This of course, is not to suggest that Africa does not have groups that would fit within the definition of indigenous found in

²¹³ The Inspection Panel, 2002 Report of the Inspection Panel supra note 18 at 77.

²¹⁴ In India, for example, it was reported that approximately 8.08% of the population belongs to scheduled tribes. See Patwardhan, “Dams and Tribal People in India” supra note 70 at 2.

²¹⁵ See, for example, World Commission on Dams, *Dams and Development* supra note 102 at 110 - 112 and Chapter 4 of the Report. Also, the World Bank Legal Note on Indigenous Peoples identified 17 countries as having ratified the International Labor Organization (ILO) Convention 169 (Convention Concerning Indigenous and Tribal Peoples in Independent Countries) – 13 of these countries are in Latin America, three in Europe and one in the Pacific. See World Bank, “Legal Note on Indigenous Peoples” supra note 160 at 1 & 2.

²¹⁶ For an insight on tribal communities and the caste system in India, see generally Patwardhan, “Dams and Tribal People in India” supra note 70.

OP 4.10. While such peoples exist (for example, nomadic pastoral societies such as the Maasai of Kenya and Karamojong of Uganda), these groups are not sufficiently representative of the vulnerability that defines a large demographic in African states. One African writer maintains that the manner in which the phrase “indigenous peoples” is used in the West is different from the meaning given to it in many African countries.²¹⁷ She notes, in fact, that this term is hardly ever used in Africa, except within the context of its dictionary meaning.²¹⁸ She adds:

... indigenous rights have no place in any sovereign state that did not experience substantial settlement by European or other populations. To do otherwise would create a situation where some groups could claim to be more indigenous than others. International definitions tend to exclude the minority ethnic groups in the average sovereign state from the definition of indigenous and tribal peoples for this reason. These rights have some basis in areas with settler populations, such as South Africa, and Zimbabwe, where the racist notion of *terra nullius* may have operated to exclude the original ethnic groups from their land. It is totally inapplicable in the majority of African countries, including Nigeria. In a dictionary sense, indigenous people are those who claim to be the original landowners, who have been living on and claiming ownership of the land in question since time immemorial.²¹⁹

Consequently, to impose a (Western-constructed) “indigenous test” in a region such as Africa is to exclude a significant proportion of vulnerable communities who are often the victims of development-induced displacement. What is a more pervasive source of vulnerability in this continent – especially in locations where commercial development projects funded by institutions such as the Bank are found – is a vulnerability resulting from the inability to participate in economic, social and political decision-making, largely because of poverty. This vulnerability is rarely defined by ethnicity but like the indigenous peoples defined in Standard 7, these peoples’ “economic, social and legal status often limits

²¹⁷ Omorogbe, “The Legal Framework for Public Participation” supra note 7 at 568.

²¹⁸ Ibid.

²¹⁹ Ibid. at 569 & 570.

their capacity to defend their interests in, and rights to, lands and cultural resources, and may restrict their ability to participate in and benefit from development.”²²⁰ One critic has boldly opined that the exportation of the concept of “indigenous peoples” to the developing world by developed countries results from an “internal guilt trip” in which the latter dispatch a social contract that they have failed to honor with their own indigenous communities.²²¹ Such an imposition is problematic in many developing countries because “it is not an Indian minority in our countries [that are vulnerable] – it is the overwhelming majority.”²²²

The universalization of indigeneity allows the Bank to appear elsewhere as protecting rights of all resettled communities through a restricted OP 4.12 while in reality excluding many who would have qualified for extra protection if a policy comparable to OP 4.10 was in place. Even though OP 4.12 identifies a number of vulnerable groups (such as those below the poverty line, the landless, the elderly, women, children, indigenous people and ethnic minorities),²²³ only indigenous people are given extra protection.²²⁴ Sanjeev Khagram has argued that the institutionalization of international norms on human rights, indigenous peoples and the environment has shaped and been shaped by social movements, which have enabled historically weak and marginalized actors to transform the activities of powerful

²²⁰ IFC, Performance Standard 7 *supra* note 176 paragraph 1.

²²¹ Hernando De Soto, “Munk Debates 2009: Foreign Aid Does More Harm Than Good” June 1, 2009 online: YouTube
<<http://www.youtube.com/watch?v=I8hgCeN5EwA&feature=Playlist&p=18B608484B45150C&index=0>> (last visited September 2009). This statement was made during a debate about whether aid is good for the developing world.

²²² *Ibid.*

²²³ World Bank, OP 4.12 *supra* note 2 paragraph 8.

²²⁴ There is a policy on gender and development - OP 4.20 but when compared to both OP 4.12 and OP 4.10, this policy is considerably limited. Apart from mentioning the Bank’s commitment to addressing gender disparities, this policy places no specific obligations on project developers. See World Bank, “Operational Manual: OP 4.20 – Gender and Development” (March, 2003) online: World Bank
<<http://web.worldbank.org>>.

actors such as IFIs and multinational corporations.²²⁵ In similar manner, Bank policy has arguably been shaped by the fact that the last two decades have witnessed massive social movements advocating for incorporation of indigenous rights in international and national policies.²²⁶ As the World Commission on Dams noted, “In a context of increasing recognition of the self-determination of indigenous peoples, the principle of free, prior and informed consent to development projects and plans affecting these groups has emerged as the standard to be applied in protecting and promoting their rights in the development process.”²²⁷ These movements, in addition to a much earlier recognition of indigenous peoples by international organizations such as the United Nations²²⁸ explain in part the emphasis placed on indigenous peoples in Bank policy.²²⁹

There is a significant shift that characterizes the Bank’s recognition or endorsement of a community as indigenous, which is largely absent in a mere acknowledgement of a people as displaced or poor. While indigenous people are still considered vulnerable and thus

²²⁵ See generally, Sanjeev Khagram, *Dams and Development: Transnational Struggles for Water and Power* (Ithaca, N.Y: Cornell University Press, 2004).

²²⁶ World Commission on Dams, *Dams and Development* supra note 102 at 112.

²²⁷ Ibid.

²²⁸ See, for example, World Bank, “Legal Note on Indigenous People” supra note 160 at 1 – 3. While the International Labor Organization (an agency of the UN) had a Convention on Indigenous/ Tribal peoples as early as 1957, it is not until 1982 that the World Bank had its first policy on tribal peoples. UN agencies have been particularly active in placing indigenous issues on the front burner and have undertaken numerous initiatives in this regard including naming 1994 – 2004 and 2005 – 2014 “The International Decade of the World’s Indigenous People” and “The Second International Decade of the World’s Indigenous People” respectively. See also Shelton H. Davis, “The World Bank and Indigenous Peoples” online: World Bank < http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2003/11/14/000012009_20031114144132/Rendered/PDF/272050WB0and0Indigenous0Peoples01public1.pdf > at 1 where the author notes that the design and reform of World Bank policy on indigenous peoples took place “in an international context of increasing organization and voice of indigenous peoples and the drafting of new international standards for the treatment of these peoples by agencies such as the International Labor Organization and UN Human Rights Commission.”

²²⁹ Indeed Davis has submitted that one of the reasons that led to the decision to revise Operational Manual Statement 2.34 to Operational Directive 4.20 in 1991 was a series of problems encountered with projects in Brazil and the Sardar Sarovar project in India. See Davis, Ibid. at 9.

requiring protection, this vulnerability takes on a different form – one which demands for systems that will allow for self-determination (such as equitable sharing in project benefits in a manner that any other voluntarily displaced land owner would)²³⁰ as opposed to one which calls for pity and the “helping hand” that is often associated with poor people. This endorsement is also characterized by a shift from being considered helpless to being regarded as propertied and, therefore, both ‘titled’ and ‘entitled’.²³¹ Consequently, upon passing the “indigenous test”, a group moves from being vulnerable and poor to being vulnerable, propertied, cultured and possessing a distinct identity that demands protection. With that recognition comes the ability to negotiate the conditions of title transfer and a requirement for free, prior and informed consultation – as opposed to mere symbolic consultation.²³²

Conversely the labelling of a displaced group as “not indigenous” or poor, results in the construction of poverty as exclusive of all else. In other words, a group that is not endorsed as indigenous is treated as not possessing other attributes that are distinct enough to warrant concrete protection. The vulnerability of that group is thus removed from the right that comes with being owners of title and cultural identity. Their land becomes - at most - viewed as yet another piece of land (in this case, an agricultural piece) which once replaced fulfils the obligation to compensate. This means that while the poor can be land owners, they own land only to the extent to which they need to be compensated for the loss of that

²³⁰ World Bank, OP 4.10, *supra* note 163 paragraph 18.

²³¹ Admittedly, there remain great challenges of establishing issues such as land claims but at least as far as the Bank policies are concerned, by being recognized as indigenous, a certain threshold is met that allows for more protection.

²³² See, for example, World Bank, OP 4.10 *supra* note 163 paragraph 10; IFC, Performance Standard 7 *supra* note 176 Paragraph 8 & 14.

land. As such, they may be ‘titled’ but they are not ‘entitled’. In other words, they are not landowners who can bargain the terms of transfer of title. In this way, poor becomes synonymous with ‘needy’ and attached to the prescription of ‘help’. What may have been an entitlement becomes translated into a handout. As one female interviewee (a single mother) at Naminya lamented:

Before the project, we had our lifestyles, our markets, our gardens, our food. We had plenty of food and our children could fish freely and obtain food. But now, our food resources are limited. We had a lifestyle in which we had learnt how to survive – women would plant beans, banana plantains, maize ... and the markets were nearby. So even women who had no husbands were self-sufficient. We could plant food for our homes and still have some to sell and get money for sending our children to school and buying household necessities such as soap, cooking oil and paraffin. Now even when we plant crops, we do not have a nearby market to sell our produce. With the resettlement, everything has become difficult.²³³

To be clear – and at the risk of sounding repetitive – this chapter is not an attack on indigeneity or OP 4.10 for that matter. By problematizing the relevance of this policy in certain geographical contexts, this chapter does not suggest the removal or even replacement of the policy. Such a proposal would be an absurd denial of the existence of millions of indigenous peoples in different parts of the world.²³⁴ Instead, the chapter recommends that the policy on involuntary resettlement be revised to reflect more the objectives of reducing impoverishment risks and contributing to people development in a manner similar to what is contained in OP 4.10.

²³³ Interview of community members at Naminya Resettlement supra note 61.

²³⁴ As of early 2005, the World Bank estimated that there were approximately 250 million indigenous peoples worldwide. See World Bank, “Revised Draft Operation Policy on Indigenous Peoples” supra note 175 at 1.

VII. Conclusion: An Inquiry into the Legal Implications of OP 4.12

The “celebrity” status acquired by OP 4.12 arises from the fact that first, it is a landmark policy on involuntary resettlement. Second, in jurisdictions where policies on resettlement are lacking or weak, this policy has facilitated better compensation for those displaced. Third, the policy is drafted in such a way that it creates just enough room to throw in a few benefits, which given the vulnerability of many displaced communities, compensates for the absence of domestic restorative strategies without binding the borrower to those obligations. Indeed, the 2008 Inspection Panel Report found that there was no clear way of identifying the promises that had been made under the Project, who had been promised, who was to fulfil the promises and when they would be fulfilled.²³⁵ The nature of OP 4.12 is such that it places emphasis on physical relocation and compensation for lost assets with other forms of restoration taking the character of hand-outs.

As has been noted above, the contribution of OP 4.12 cannot be underplayed. Yet also, the intangible and long-term impacts of displacement of communities from places they have lived for decades and even centuries should not be downplayed. The Bujagali Project case has also revealed that often, it is difficult to provide replacement land that compensates for all the land lost to a project. What happens in practice is a focus on replacing the portion of land on which the people lived (specifically, for home construction) and providing some land on which those displaced can undertake some farming activities. The balance of livelihood restoration often takes the form of cash compensation at replacement cost. For example, members of the Malindi-Dam Affected community complained about a number of

²³⁵ The Inspection Panel, 2008 Report of the Inspection Panel *supra* note 18 at 146 & 147.

things with respect to the land that had been acquired.²³⁶ Community members claimed that they were not given adequate cash compensation for the land taken. They also complained that even in cases where they were given replacement land, it was much smaller than what had been acquired by the developer. Lastly, the replacement land was less fertile than their original land and some of it was situated far from the resettlement area, meaning that the women had to go long distances to plant food and collect firewood, which exposed them to risk.

Given the difficulty of finding comparable land especially in highly populated countries, one can perhaps relate with the challenges faced by project sponsors in obtaining replacement land.²³⁷ It is this same difficulty that creates the demand for alternative forms of long-term sustainability for future generations. Take the example of Uganda where 90% of the population derives its livelihood from agriculture.²³⁸ Note also that the current population growth rate is approximately 3.2% per annum.²³⁹ With a decrease in the land available for agriculture and an increase in population, the pressure on land will increase at a rate much higher than if people had not been the subjects of displacement. Therefore, development projects exacerbate the dilemma. Recall also that because of a poor saving culture, those given cash compensation rarely invest in proper saving schemes that their

²³⁶ Interview with Malindi-Dam Affected Community *supra* note 61.

²³⁷ See Chapter One, Part II. In its 2008 Report, for example, the Inspection Panel noted that while the project sponsor had made significant efforts to give land-for-land replacement, the replacement concentrated on the size of the land replaced instead of its productive potential. Even then, it was not possible to replace all the land of those physically displaced meaning that additional agricultural surface was compensated for in cash. The Panel noted, for example, that “Along the T-line, at Nansana, there was a reduction of 40 percent in agricultural land, with five of the seven households having less land after resettlement.” See The Inspection Panel, 2008 Report of the Inspection Panel *supra* note 18 at 149.

²³⁸ See Chapter One, Part II.

²³⁹ *Ibid.*

future dependants can rely on.²⁴⁰ On the other hand, if resettlement were treated as a development project in real sense, part of the future generation would be enabled to shift to alternative means of livelihood.

Until this point, the discussion has been dedicated to critically dissecting the provisions of OP 4.12 without addressing the legal implications of the policy. If, as illustrated in this chapter, policy is important, what is the legal status of this policy? Put another way, to what extent can Affected Communities rely on this policy to claim and enforce rights? The general rule under customary international law is that a public international organization such as the World Bank enjoys immunity against any legal actions in the performance of its functions, unless it explicitly waives such immunity.²⁴¹ In practice, this waiver has been interpreted narrowly to apply only to transactions between the Bank and those it contracts with such as creditors, debtors and bond holders.²⁴² Even in such contractual agreements, the Bank often maintains immunity against suits in national courts and submits instead to international arbitration.²⁴³ As far as its operational policies are concerned, Bank officials have repeatedly argued that unless these policies are found in contractual agreements (such as loan documentation), they do not constitute legally binding obligations either under domestic or international law.²⁴⁴ They add that even when these policies are contained in such agreements, they constitute a contractual relationship only between the Bank and its

²⁴⁰ See Chapter One, Part IV.

²⁴¹ Ibrahim F. I. Shihata, *The World Bank Inspection Panel: In Practice* (New York: Oxford University Press, 2000) Second Edition at 243.

²⁴² *Ibid.* at 248 - 251.

²⁴³ *Ibid.* at 249.

²⁴⁴ *Ibid.* at 241; Sabine Schlemmer-Schulte, "The World Bank Inspection Panel: A Record of the First International Accountability Mechanism and Its Role for Human Rights" (1999) 6:2 Human Rights Brief [The World Bank Inspection Panel: A Record]. See also Darrow, *Between Light and Shadow* supra note 153 at 143.

borrowers;²⁴⁵ not one between the Bank and the communities affected by the project being financed.²⁴⁶ Consequently, even if it were established that the Bank has failed to comply with its operational policies, that failure does not give third parties (such as Affected Communities) a legal right to sue the Bank for non-compliance.²⁴⁷

Given their non-binding legal nature, what then is the relevance of these policies for Affected Communities? Or as resettlement & rehabilitation specialists Rew et. al. have asked: “Is policy enough to prevent impoverishment as a result of DIDR?”²⁴⁸ Some have argued that while these policies do not give Affected Communities a right of action, one cannot deny that they at least constitute a strong infrastructure of responsibilities and obligations imposed on project sponsors.²⁴⁹ To this end, they are binding in as far as they are mandatory policies, which if not complied with, can result in the cancellation of a loan.²⁵⁰ Others contend that they create indirect legal bonds since findings of non-compliance with the policies can be used to support suits against a borrower in domestic courts.²⁵¹ Lastly, one may argue that these policies are binding because they constitute tools which can be used by these communities to contest the Bank’s non-compliance. Recall that *locus standi* before the Inspection Panel is premised on the fact that there has been a contravention of Bank policy. Consequently, if a claim does not fit into a policy, the requester has no audience. This was evidenced by the inability of claimants to invoke OP 4.10 in the Bujagali Project case. Similarly, Rew et. al. answer their question by noting that:

²⁴⁵ Schlemmer-Schulte, Ibid.

²⁴⁶ Szablowski, *Transnational Law and Local Struggles* supra note 17 at 119.

²⁴⁷ Ibid. Schlemmer-Schulte, supra note 244. See also Shihata, *The World Bank Inspection Panel: In Practice* supra note 241 at 234.

²⁴⁸ Rew et al., “Addressing Policy Constraints” supra note 54 at paragraph 2.6.

²⁴⁹ Szablowski, *Transnational Law and Local Struggles* supra note 17 at 121.

²⁵⁰ Ibid. at 238 & 239.

²⁵¹ Shihata, *The World Bank Inspection Panel: In Practice* supra note 241 at 234.

... policies tend to create 'boundaries' between local people, international experts, bureaucrats, and others involved in a project. These boundaries delineate responsibility but they can also serve to create areas, 'margins', where some people become excluded from reaping project benefits.²⁵²

It is one thing to establish the legal status of OP 4.12 and quite another to determine its effectiveness. The legality of an instrument does not necessarily speak to its effectiveness in influencing behaviour, even though it does play a role. One way of pronouncing on effectiveness is by examining a number of independent but related variables. First, one needs to determine whether the policy is legally binding or not and what this finding translates into. Second, the substance of the policy should be examined to determine if, independent of its legal status, the policy is robust enough to impose clearly defined obligations. Third, establishing effectiveness calls for an inquiry into the enforceability of the policy. These three components are what one scholar refers to as the form, substance and structure of international agreements or international legal obligations.²⁵³

An inquiry into form (or legality) deals with ascertaining whether an obligation is hard law (which is legally binding), soft law (which is not legally binding but possesses some legal characteristics) or simply a political obligation.²⁵⁴ At the very best, OP 4.12 is a form of soft law. One international legal scholar has referred to soft law as "a residual category of norms possessing some legal characteristics but not traditionally defined as international law."²⁵⁵

To be clear, soft law is not legally binding even though over time, it may be solidified into

²⁵² Rew et al., "Addressing Policy Constraints" supra note 54 paragraph 2.6.

²⁵³ See generally Kal Raustiala, "Form and Substance in International Agreements" (2005) 99 Am. J. Int'l L. at 581 – 614. While Raustiala's discussion concentrates on international agreements signed between states, it lends itself well to the analysis of other international legal obligations.

²⁵⁴ Andrew T. Guzman, & Timothy L. Meyer, "International Soft Law" online: University of Georgia Law <http://works.bepress.com/cgi/viewcontent.cgi?article=1004&context=timothy_meyer> at 4.

²⁵⁵ Andrew T. Guzman, *How International Law Works: A Rational Choice Theory* (Oxford University Press, 2008) at 142 [How International Law Works].

legally binding hard law.²⁵⁶ However, like other sources of international law (such as treaties), soft law impacts on the body of international legal rules by influencing state practice, providing evidence of the existing law and/or emerging rules and sometimes, presenting alternatives to hard law instruments.²⁵⁷ It therefore derives its force from the fact that it creates expectations among states regarding their obligations and what they should demand from others.²⁵⁸ It is for this reason that international legal scholars have opined that hard and soft law instruments should not be viewed as distinct legal structures but rather as “different points on a spectrum of commitment.”²⁵⁹ They maintain that it is not that soft law does not result in legal obligations under international law; it is that soft law indicates weaker commitments and thus results in less serious pledges of reputational capital when compared to hard law.²⁶⁰

The legality of an instrument – i.e. whether it is soft or hard law – does not necessarily speak to its substance. A legally binding agreement can still be shallow or imprecise and vice versa for a non-binding instrument.²⁶¹ Questions of substance examine the obligations that an instrument imposes on the relevant parties, including the depth of those

²⁵⁶ See, for example, George (Rock) Pring & Susan Y. Noe, “The Emerging International Law of Public Participation Affecting Global Mining, Energy and Resources Development” in Zillman, Lucas & Pring (eds) *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* supra note 7 at 27; Alan Boyle & Christine Chinkin, *The Making of International Law* (Oxford University Press, 2007) at 212.

²⁵⁷ Boyle & Chinkin, *Ibid.* at 214, 215 & 229.

²⁵⁸ Andrew T Guzman & Timothy L. Meyer, “International Common Law: The Soft Law of International Tribunals” (2009) 9:2 *Chicago Journal of International Law* at 527.

²⁵⁹ Andrew T. Guzman, *How International Law Works* supra note 255 at 144. Guzman & Meyer, “International Soft Law” supra note 254 at 4.

²⁶⁰ Guzman & Meyer, “International Common Law: The Soft Law of International Tribunals” supra note 258 at 519; Boyle & Chinkin, *The Making of International Law* supra note 257 at 215.

²⁶¹ Raustiala, “Form and Substance in International Agreements” supra note 253 at 584.

obligations.²⁶² For example, to what extent does the instrument require the parties to depart from what they would have done in its absence?²⁶³ What changes or steps need to be taken to comply with the policy or law in question?²⁶⁴ One way to inquire into the substance of OP 4.12 is to determine whether the perfect implementation of the policy would result in sufficient protection of the rights of Affected Communities. The discussion has demonstrated that OP 4.12 lacks the core component of treating Affected Communities as *entitled* groups by divorcing proprietary interests from the identities of those displaced. It also leaves a number of critical development issues to the discretion of project sponsors. Consequently, even the perfect implementation of this policy would not guarantee Affected Communities the long-term benefits that would otherwise result from both a recognition of their identity as an entitled group and a replacement of the discretionary provisions of the policy with mandatory requirements.

Lastly, does the soft law nature of OP 4.12 mean that it is enforceable? Another way to phrase this question is to ask whether obtaining compliance with international legal rules is restricted to seeking redress through courts of law or tribunals. Some scholars maintain that the ability of international law to secure compliance does not depend on coercive enforcement mechanisms.²⁶⁵ They contend that while states “have no innate preference for complying with international law” they are rational, self-interested actors who acknowledge the costs of noncompliance and the benefits of complying.²⁶⁶

²⁶² Ibid.

²⁶³ Ibid.

²⁶⁴ Ibid.

²⁶⁵ See generally Guzman, *How International Law Works* supra note 255; Guzman & Meyer, “International Common Law: The Soft Law of International Tribunals” supra note 258 at 515 – 535.

²⁶⁶ Guzman, *How International Law Works* Ibid. at 17.

These scholars propose that three factors drive compliance: reciprocity, reputation and retaliation.²⁶⁷ They refer to this as the rational choice theory. States comply because they count on the compliance of other states both for present and future obligations (reciprocity).²⁶⁸ They also comply in order to generate reputational capital. In other words, a state which is known for its commitment to its international legal commitments is more likely to secure future promises and contracts than one known for reneging on its obligations.²⁶⁹ Lastly, states comply because they fear that noncompliance will result in costly retaliation from other parties.²⁷⁰ Consequently, while the incentives to comply with soft law may be weaker, these three factors act as a mechanism through which compliance is encouraged.²⁷¹

The rational choice theory can be used to explain how policies such as OP 4.12 become enforceable despite their soft law character. The argument would follow that even though the Bank has repeatedly stated that its policies do not constitute legally binding agreements between itself and Affected Communities, the Bank is compelled to comply with policies such as OP 4.12 in order to build a reputation for adhering to its own rules. The reputational capital garnered from such adherence would at least have some influence on how the Bank's "clients" (member states) interact with the policy and what they expect of their counterparts. Also, there is at least some evidence that points, perhaps not so much to reciprocity, but to the policy's influence on the development of similar rules in other institutions. By

²⁶⁷ Ibid. at 33.

²⁶⁸ Ibid at 32.

²⁶⁹ Ibid.

²⁷⁰ Ibid.

²⁷¹ Guzman & Meyer, "International Soft Law" supra note 254 at 5; Guzman, *How International Law Works* Ibid. at 144.

influencing international and regional institutions such as the OECD, the Asian Development Bank, the IMF and the African Development Bank to adopt similar rules,²⁷² OP 4.12 has generated a body of international norms on involuntary resettlement.²⁷³

Even then, it is important to acknowledge that soft law instruments have a reduced compliance pull.²⁷⁴ In fact, some scholars have taken the radical view that there is no such thing as soft law.²⁷⁵ That the notion of soft law does not reflect state practice in negotiating international agreements.²⁷⁶ Those holding this view maintain that when states negotiate agreements, they draw fine lines between what is legally binding and what is not.²⁷⁷ They do not designate “some softer law, some harder law, some not at all legal, and so forth across a demarcated continuum of legality.”²⁷⁸ This precarious position of soft law speaks at least to the limitations surrounding the ability of instruments such as OP 4.12 to sufficiently protect the interests of displaced communities. Even if we were to agree that the legality, structure and substance of OP 4.12 encourage sufficient protection of the interests of Affected Communities, we would still need to ask ourselves how this instrument compares with the protections given to project sponsors under international investment law. The details of this comparison are found in Chapter 5. First, however, the practical application of

²⁷² See discussion in Part I above.

²⁷³ *Ibid.*

²⁷⁴ Guzman & Meyer, “International Common Law: The Soft Law of International Tribunals” *supra* note 258 at 532.

²⁷⁵ Raustiala, for example, calls it “nonlaw”. See Raustiala, “Form and Substance in International Agreements” *supra* note 253 at 588.

²⁷⁶ *Ibid.* at 586.

²⁷⁷ *Ibid.* at 587 & 590.

²⁷⁸ *Ibid.* at 587. For Raustiala, there is no in-between or continuum. An agreement is either legally binding or not, in which case it would simply be a pledge. It should be pointed out, however, that Raustiala’s discussion concentrates on agreements, which are express actions. It does not delve into other aspects of soft law such as rules, guidelines, policies and norms.

policies such as OP 4.12 is tested in the immediately ensuing chapter through the operations of the Inspection Panel.

CHAPTER 4

The Legal Impact of the Operations of the World Bank Inspection Panel: Establishing Patterns of Inclusion and Exclusion of Project-Affected Communities

I. Introduction

Even though, as concluded in the previous chapter, the operational policies and procedures of the World Bank do not constitute a body of hard laws that legally bind the Bank, the latter has established a mechanism (the World Bank Inspection Panel), through which Affected Communities can complain about the Bank's non-compliance with its policies and procedures. To this end, these policies are a form of soft law that can be used by communities to demand accountability from the Bank. The Inspection Panel is the institutional structure through which that accountability is demanded and one of the formal organs that enables Affected Communities to participate in the projects that affect them.

For the Panel to meaningfully operate as a mechanism of inclusion for Affected Communities, it is important that it possess the ability not only to act independently, but also to act as an authority in its own right. It should be able, in other words, to make independent decisions that are binding on the parties to the dispute. This chapter examines the level of independence and extent of authority of the Panel by re-reading the 1993 Resolution establishing the Inspection Panel (the Resolution)¹ using some of the reports and findings of the Panel, opinions of the Bank's legal counsel, experiences of those who have served on the Panel and of others who have interacted with it in one way or the other.

¹ International Bank for Reconstruction and Development (IBRD) and International Development Association (IDA) *Resolution of the Executive Directors (the Board) establishing the Inspection Panel* (No. 93-10 for the IBRD & 93-6 for IDA) (September 22, 1993) online: The Inspection Panel <<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/ResolutionMarch2005.pdf>> [The Resolution].

Specifically, this chapter inquires into the legal status of the Panel in order to establish whether the findings that it makes are mere observations, or whether they result in decisions that can be enforced by one party against the other.

The primary objective of the inquiry at this stage is not to propose reforms to the Panel's Resolution or operations, even though such an outcome would be desirable. Rather, the intention is to highlight the strengths and weaknesses of the Panel with the aim of establishing whether and how Affected Communities should rely on it for furthering their interests. The chapter concludes that while the establishment of the Inspection Panel resulted in the creation of a space in which these communities could directly demand accountability from the Bank, the Panel was never intended to possess the authority to bind the Bank through its findings. While this conclusion has been reached elsewhere, the re-reading of the Panel's Resolution through a TWAIL optic is helpful in furthering the understanding of the inherent restrictions on the Panel's powers and how this translates into limitations for Affected Communities. It also speaks to the selective manner in which legal tools are employed in the international legal regime.

The chapter is divided into six parts. Part II highlights the characteristics of the Inspection Panel, including its history, operations and procedures. This is followed by a discussion in Part III of the strengths of the Panel and how these are useful in facilitating inclusion of Affected Communities. Part IV highlights some of the limitations of the Inspection Panel and what this means for the communities. In Part V, the discussion demonstrates how the Panel's findings gain legitimacy or authority from factors external to itself. Part VI

concludes with a reiteration of the strengths and weaknesses, noting that Affected Communities need to engage with other technologies of inclusion to further their interests.

II. The World Bank Inspection Panel: Composition, Operation and Procedures

The Inspection Panel was created by the International Bank for Reconstruction and Development (IBRD) and the IDA on 22 September 1993.² It commenced operations on 1 August 1994.³ The Panel was to operate for a trial period of two years, after which its performance and relevance would be reviewed.⁴ In 1996, the trial period was terminated, giving the Panel permanent status in the Bank.⁵ By the end of 2009 – fifteen years into its operation – the Panel had received fifty-eight requests for inspection from different parts of the Third World.⁶

The Panel is composed of three members of different nationalities from Bank member countries, who are nominated by the Bank president and appointed by the Board of Executive Directors (the Board/Executive Directors).⁷ Members are appointed on the basis of their integrity, independence from Bank Management, ability to deal fairly and thoroughly with requests, and exposure to development issues and to the living conditions in

² The Inspection Panel, “The Inspection Panel: Panel Resolution and Mandate” online: The Inspection Panel <<http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:20173262~menuPK:64129254~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html>>. See also Ibid. For a detailed account of the processes and composition of the Panel, see Daniel D. Bradlow, “A Test Case for The World Bank” (1996) 11 American University Journal of International Law and Policy at 249 – 253; The Inspection Panel, *Accountability at the World Bank: The Inspection Panel at 15 Years* online: The Inspection Panel <<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/380793-1254158345788/InspectionPanel2009.pdf>> at 23 – 46 [Accountability at the World Bank].

³ Alvaro Umaña (ed), *The World Bank Inspection Panel: The First Four Years (1994-1998)* (Washington, D.C: The World Bank, 1998) at 2 [The World Bank Inspection Panel].

⁴ IBRD & IDA, *The Resolution* supra note 1 paragraph 27. See also Richard E. Bissell, “Institutional and Procedural Aspects of the Inspection Panel” in Gudmundur Alfredsson and Rolf Ring (eds.), *The Inspection Panel of the World Bank: A Different Complaints Procedure* (Kluwer Law International, 2001) at 123.

⁵ Bissell, Ibid.

⁶ The Inspection Panel, *Accountability at the World Bank* supra note 2 at 24.

⁷ IBRD & IDA, *The Resolution* supra note 1 paragraph 2.

developing countries.⁸ Panel members are treated like Bank officials, enjoying the privileges and immunities enjoyed by other Bank staff.⁹ However, there are a number of safeguards in place to ensure that the members are independent from Management. First, a former Bank staff, executive director, alternate or advisor cannot serve on the Panel until two years have elapsed after their employment with the Bank.¹⁰ In addition, once they have served on the Panel, they cannot be employed by the Bank.¹¹ Service on the Panel is limited to a five-year non-renewable term,¹² and Panel members can only be removed from office by Executive Directors, for cause.¹³ Lastly, a Panel member who was involved in any manner in a request under investigation should be disqualified from participating in its hearing.¹⁴

The Panel provides a platform for those affected by Bank-financed projects to request inspection on grounds that, as a result of the Bank's failure to comply with its operational policies and procedures¹⁵ in the design, appraisal and/or implementation of a project, requesters have suffered, or are likely to suffer material adverse effects.¹⁶ Management is given 21 days from the date of registration of the request to provide a response showing

⁸ Ibid. paragraph 4.

⁹ Ibid. paragraph 10.

¹⁰ Ibid. paragraph 5. The word "staff" is defined to include consultants.

¹¹ Ibid. paragraph 10.

¹² Ibid. paragraph 3.

¹³ Ibid. paragraph 8.

¹⁴ Ibid. paragraph 6.

¹⁵ According to the Resolution "operational policies and procedures" include Bank Operational Policies, Bank Procedures and Operational Directives and similar documents. They do not include Guidelines, Best Practices and similar documents." See Ibid. paragraph 12. Shihata explains that "similar documents" refers to policies that were previously in place, such as Operational Manual Statements and Operations Policy Notes. See Ibrahim F. I. Shihata, *The World Bank Inspection Panel: In Practice* (New York: Oxford University Press, 2000) Second Edition at 45.

¹⁶ IBRD & IDA, Ibid. paragraph 12.

how it has complied or intends to comply with the relevant policies and procedures.¹⁷ There are two stages after Management's response. First, the Panel establishes whether the complaint is eligible for a full investigation. Second, if the Board approves, an investigation is undertaken.

In determining whether a complaint should proceed to investigation, the Panel takes a number of factors into account:¹⁸

- It satisfies itself that the affected party consists of two or more persons with common interest, living in the borrower's territory;¹⁹
- The request should demonstrate a violation of Bank policies and procedures which results in harm;²⁰
- Those affected should have brought the complaint to the attention of Management, with the latter failing to adequately address it;²¹
- The request should not relate to procurement;²²
- The loan relating to the project should not have been closed or substantially disbursed;²³
- The subject matter should be one in which the Panel has not previously made a recommendation, except where new issues arise as a result of new evidence or changes in circumstances.²⁴

¹⁷ Ibid. paragraph 18.

¹⁸ See generally IBRD & IDA, *1999 Clarification of the Board's Second Review of the Inspection Panel* Paragraph 9 online: the Inspection Panel
<<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/1999ClarificationoftheBoard.pdf>>
(The 1999 Clarification to the Resolution).

¹⁹ Ibid. paragraph 9 (a).

²⁰ Ibid. paragraph 9 (b).

²¹ Ibid. paragraph 9 (c).

²² Ibid. paragraph 9 (d).

²³ Ibid. paragraph 9 (e).

Within 21 days of receiving Management's response, the Panel makes a recommendation to the Board on whether the request should be investigated.²⁵ The Board considers the Panel's recommendation and approves or declines it.²⁶ The request for inspection, Management's response, the Panel's recommendation and the Board's decision should all be publicized after the Board has made its decision.²⁷

If the Board approves a recommendation for investigation, phase two of the Panel process begins. During its investigation, the Panel is given access to Bank staff who have worked on the project in question, the Director General of the Operations Evaluation Department (now the Independent Evaluation Group), the Internal Auditor and the relevant Bank records.²⁸ The Panel should also consult with the Bank's Legal Department on questions about the Bank's rights and obligations with respect to the request before it.²⁹ Once it concludes its investigation, the Panel prepares and submits a report to the Board and the Bank president, stating the extent to which Bank policies and procedures were complied with, including any harm resulting from non-compliance.³⁰ Within six weeks of receiving the Inspection Panel's report, Management is required to respond and provide recommendations to the Panel's

²⁴ Ibid. paragraph 9 (f).

²⁵ IBRD & IDA *The Resolution* supra note 1 paragraph 19.

²⁶ Where the Panel has recommended an investigation, the Board should approve the Panel's recommendation unless the "technical eligibility criteria" contained in the Clarification to the Resolution has not been met. See IBRD & IDA *The 1999 Clarification to the Resolution* supra note 18 paragraph 9 for what amounts to the "technical eligibility criteria".

²⁷ IBRD & IDA *The Resolution* supra note 1 paragraph. See also IBRD & IDA, *Review of the Resolution Establishing the Inspection Panel: 1996 Clarification of Certain Aspects of the Resolution* online: The Inspection Panel
<<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/1996ReviewResolution.pdf>> (The 1996 Clarification to the Resolution).

²⁸ IBRD & IDA, *The Resolution* supra note 1 paragraph 21.

²⁹ IBRD & IDA, Ibid. paragraph 15. See also IBRD & IDA *The 1996 Clarification to the Resolution* supra note 27; IBRD & IDA. *The 1999 Clarification to the Resolution* supra note 18 paragraph 6.

³⁰ IBRD & IDA, *The Resolution* Ibid. paragraph 22.

findings.³¹ In addition, Management, in consultation with the borrower and affected communities, can prepare an action plan in response to the Panel's findings, and submit this plan with its report.³² Following this, the Board makes a decision, which it communicates to the affected party within two weeks.³³ The Panel's report and Management's response are then publicized.³⁴

The Inspection Panel only has jurisdiction over requests filed in respect to IBRD and IDA operations.³⁵ It does not entertain claims made against the private sector lending arms of the Bank i.e. IFC and MIGA.³⁶ Complaints against the latter two should be filed with the independent Compliance Ombudsman.³⁷ The question of the Inspection Panel's jurisdiction was raised in the 2001 request for inspection that was filed in respect to the Bujagali Project and three other electricity projects being undertaken by the Bank in Uganda.³⁸ Management contended that IDA was involved in the Project through a Partial Risk Guarantee for a private project and it was not clear whether the Resolution establishing the Panel had intended that the latter have jurisdiction over private sector guarantee operations.³⁹ The

³¹ Ibid. paragraph 23.

³² IBRD & IDA *The 1999 Clarification to the Resolution* supra note 18 paragraph 15.

³³ IBRD & IDA *The Resolution* supra note 1 paragraph 23.

³⁴ Ibid. paragraph 25.

³⁵ Ibid. paragraph 28. See also The Inspection Panel, "The Inspection Panel: About Us" online: The Inspection Panel

<<http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,menuPK:64129249~pagePK:64132081~piPK:64132052~theSitePK:380794,00.html>>.

³⁶ Ibrahim F. I. Shihata, "The World Bank Inspection Panel – Its Historical, Legal and Operational Aspects" in Alfredsson and Ring (eds.), *The Inspection Panel of the World Bank: A Different Complaints Procedure* supra note 4 at 17.

³⁷ Compliance Advisor Ombudsman (CAO), "About the CAO" online: Compliance Advisor Ombudsman <<http://www.cao-ombudsman.org/about/>>.

³⁸ The Inspection Panel, "Investigation Report – Uganda: Third Power Project (Credit 2268- UG) and the Proposed Bujagali Hydropower" (2002) online: World Bank <<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/UGANDAIRMMainReport.pdf>> [2002 Report of the Inspection Panel].

³⁹ Ibid. at 11.

Panel responded by noting that in July 1995, the Board confirmed the Panel's jurisdiction over all projects financed by the IBRD and IDA, irrespective of the financing instrument under which such involvement was effected.⁴⁰ The Panel added that this position had been confirmed by both the 1996 Clarification to the Resolution⁴¹ and the Board's approval of the Panel's recommendation to investigate the present case.⁴² The position in this case can be distinguished from the one taken in an earlier request relating to the Pangu/Ralso Hydroelectric Complex in Chile (1995) where the Panel declined to register the claim because the project was funded by IFC, with no IBRD or IDA involvement.⁴³

III. The Inspection Panel as a Tool of Inclusion

The creation of the Inspection Panel was momentous in redefining the manner in which international organizations interact with non-state actors. With the Panel's establishment, the dominant position in international law that non-state parties (particularly individuals) can only act through their states, was significantly punctured.⁴⁴ While non-state actors such as private investors and – to a limited extent – NGOs had for sometime been given locus before international organizations such as international investment tribunals, non-institutionalized groups of people such as Affected Communities continued to be denied

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid. at 12.

⁴³ Bissell contends that the requesters were aware that the Panel did not have jurisdiction over IFC-financed projects but wanted to highlight the need for a similar accountability mechanism for projects funded by IFC and MIGA. See Bissell, "Institutional and Procedural Aspects of the Inspection Panel" supra note 4 at 117.

⁴⁴ Ellen Hey, "The World Bank Inspection Panel: Towards the Recognition of a New Legally Relevant Relationship in International Law" (1997) 2 Hofstra Law and Policy Symposium 62 & 63; David D. Bradlow & Sabine Schlemmer-Schulte, "The World Bank's New Inspection Panel: A Constructive Step in the Transformation of the International Legal Order" (1994) 54 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht (Heidelberg Journal Of International Law) at 395.

audience in such forums.⁴⁵ With the establishment of the Panel, a new order which “defined a legal relationship between the Bank and private actors that is distinct from the relationship the Bank has with its member states”⁴⁶ was created. Under this new arrangement, persons that were not privy to the contracts that were concluded between the Bank and its borrowers could indirectly engage in these agreements on grounds that they had been harmed by the Bank’s failure to comply with its policies and procedures.⁴⁷

The creation of the Panel is particularly important because over time, the Bank’s operations have expanded and evolved to include ‘non-traditional’ economic development projects, which have exponentially increased the population of affected peoples.⁴⁸ Also, the Panel was the first international organ that enabled Affected Communities to hold an international organization accountable for the consequences of its actions.⁴⁹ The creation of the Inspection Panel encouraged other international and regional financial institutions including

⁴⁵ See generally Ibrionke T. Odumosu, “Locating Third World Resistance in the International Law on Foreign Investment” (2007) 9 *International Community Law Review* at 427 – 444 [Locating Third World Resistance].

⁴⁶ Daniel D. Bradlow, “International Organizations and Private Complaints: the Case of the World Bank Inspection Panel” (1994) 34 *Virginia Journal of International Law* at 605 [International Organizations and Private Complaints].

⁴⁷ David Hunter, “Using the World Bank Inspection Panel to Defend the Interests of Project-Affected People” (2003) 4 *Chicago Journal of International Law* at 204.

⁴⁸ Bradlow and Schlemmer-Schulte note, for example, that the Bank’s operations have expanded overtime and moved from being merely dominated by economic concerns to other issues such as the environment, social aspects and good governance. Bradlow & Schlemmer-Schulte, “The World Bank’s New Inspection Panel: A Constructive Step in the Transformation of the International Legal Order” *supra* note 44 at 407 & 408. See also Anthony Anghie, “International Financial Institutions” in Christian Reus Smit (ed.) *The Politics of International Law* (Cambridge University Press, 2004) at 224 & 230.

⁴⁹ Bradlow & Schlemmer-Schulte, *Ibid.* at 402; Hunter, “Using the World Bank Inspection Panel to Defend the Interests of Project-Affected People” *supra* note 47 at 202; Sabine Schlemmer-Schulte, “The World Bank Inspection Panel: A Record of the First International Accountability Mechanism and Its Role for Human Rights” (1999) 6:2 *Human Rights Brief* [The World Bank Inspection Panel: A Record of the First International Accountability Mechanism].

the Asian Development Bank,⁵⁰ Inter-American Development Bank,⁵¹ and the African Development Bank⁵² to set up similar structures.

One of the strengths of the Panel derives from the fact that it is designed to be an independent body. Particularly, it is designed to be independent from Bank Management.⁵³ Still, there continue to be some concerns about the level of this independence. Some have, for example, problematized the requirement that before the Panel proceeds to the second stage of its processes (the investigation stage), it should obtain approval from the Board.⁵⁴ Others are uncomfortable with the requirement that the Panel consult with the Legal Department on the Bank's rights and obligations.⁵⁵ They find the Legal Department's neutrality questionable because this office is often involved in the appraisal of projects that later become the subject matter of the Panel's investigations.⁵⁶ Sometimes, even those filing requests for inspection with the Panel have reservations about its autonomy. In the interviews conducted by the author for the Bujagali Project, for example, one NGO official stated that while the role of the Panel was certainly an important one, they (NGOs) were "aware that being an extension of the Bank, the interests of the Panel were possibly more

⁵⁰ See Asian Development Bank, "Accountability Mechanism" online: Asian Development Bank<<http://www.adb.org/Accountability-Mechanism/default.asp>>.

⁵¹ Inter-American Development Bank, "Independent Consultation and Investigation Mechanism" online: Inter-American Development Bank<<http://www.iadb.org/mici/>>.

⁵² African Development Bank, "Independent Review Mechanism" online: African Development Bank"<<http://www.afdb.org/en/about-us/structure/independent-review-mechanism/>>.

⁵³ See Part II above. See also Bradlow, "International Organizations and Private Complaints" supra note 46 at 573 & 574.; Shihata, *The World Bank Inspection Panel: In Practice* supra note 15 at 90 – 92.

⁵⁴ Lori Udall, "The World Bank and Public Accountability: Has Anything Changed?" in Jonathan A. Fox & L. David Brown (eds.) *The Struggle for Accountability: The World Bank, NGOs and Grassroots Movements* (Cambridge, Massachusetts: The MIT Press, 1998) at 424.

⁵⁵ Hunter, "Using the World Bank Inspection Panel to Defend the Interests of Project-Affected People" supra note 47 at 208; Kathigamar V. S. K. Nathan, "The World Bank Inspection Panel: Court or Quango?" (1995) 12 *Journal of International Arbitration* at 139.

⁵⁶ Udall, "The World Bank and Public Accountability: Has Anything Changed?" supra note 54 at 425.

aligned to the Bank's interests than they were to ours.”⁵⁷ Another maintained that “The Panel is more interdependent than it is independent from the Bank. ... The Panel was never intended to contradict the Bank.”⁵⁸

Despite these concerns, some commentators observe that the initial reservations and scepticism with which requesters (and/or potential requesters) viewed the independence of the Panel seem to be slowly wearing away.⁵⁹ A recent survey in which requesters were asked to rate the Panel's independence on a scale of 1 to 5, with 5 being “completely independent” revealed a significant improvement in the rating, particularly after the 1999 Clarification to the Resolution.⁶⁰ It is helpful that the Panel is able to recruit independent experts to advise on specific technical issues pertaining to a request.⁶¹ This not only serves to augment the Panel's expertise, but also ensures that Panel members do not have to rely purely on the Bank's technical reports when analyzing the issues before them. In its 2007/2008 investigation of the Bujagali Project, for example, the Panel consulted a wide range of experts including an anthropologist, an environmental specialist, a commercial consultant, an economist and a hydrologist.⁶² The Panel itself was composed of Mr. Werner Kiene (a specialist in the design, implementation and assessment of sustainable

⁵⁷ Interview of Kenneth Kakuru (Advocate of High Court of Uganda & Environmental Activist) (12 November 2009) at Kakuru & Co Advocates Chamber, Kampala Uganda.

⁵⁸ Interview of Oweyegha Afunaduula (Programme Manager, Sustainability School at NAPE) (10 November 2009) at NAPE Offices, Kampala, Uganda.

⁵⁹ See, for example, Hunter, “Using the World Bank Inspection Panel to Defend the Interests of Project-Affected People” *supra* note 47 at 207 & 208; Jonathan A. Fox, “The World Bank Inspection Panel: Lessons from the First Five Years” (2000) 6 *Global Governance* at 279.

⁶⁰ Prior to 1999, the average rating was 2.7. Between 1999 and 2004, it increased to 4.8. See The Inspection Panel, *Accountability at the World Bank* *supra* note 2 at 19.

⁶¹ The Inspection Panel, *Operating Procedures of the Inspection Panel – August 1994* (Paragraph 45 (e)) in Shihata, *The World Bank Inspection Panel: In Practice* *supra* note 15 at 295.

⁶² The Inspection Panel, “Investigation Report – Uganda: Private Power Generation (Bujagali Project (Guarantee No. B0130-UG))” (2008) online: World Bank <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/FULL_September_2_2008_FINAL_Red.pdf> [2008 Report of the Inspection Panel] at 7.

development initiatives); Mr. Tongroj Onchan (a professor for 26 years and specialist in rural development, natural resources and environmental management); and Mr. Roberto Lenton (a specialist in water resources and sustainable development).⁶³

Interaction with the Inspection Panel has enabled a number of affected communities to reduce negative impacts of Bank-financed projects and even allowed for access to benefits that would have otherwise been unattainable.⁶⁴ The Bank's reaction to Panel findings has ranged from total withdrawal from projects which were found to be harmful and unfeasible⁶⁵ to reforms in project design and implementation, increased Bank supervision, revision of resettlement plans and increased public participation.⁶⁶ Even in cases where requests did not progress to the investigation stage, the publicity gained as a result of filing a request for inspection was instrumental in facilitating at least some reforms to the projects in question.⁶⁷ At the same time, as a result of the Inspection Panel's processes, governments have been compelled to engage more with, or at least not totally disregard, the concerns of those affected by development projects.⁶⁸

⁶³ Ibid. at 227 & 228.

⁶⁴ Dana Clark and David Hunter, "The World Bank Inspection Panel: Amplifying Citizens Voices for Sustainable Development" in Alfredsson and Ring (eds.), *The Inspection Panel of the World Bank: A Different Complaints Procedure* supra note 4 at 178; Lori Udall, "World Bank Inspection Panel" Contributing Paper (Prepared for Thematic Review V.4: Regulation, Compliance and Implementation Options) <<http://www.dams.org/docs/kbase/contrib/ins208.pdf>> at 5.

⁶⁵ See generally Bradlow, "A Test Case for The World Bank" supra note 2 at 247 - 294. See also Michael Barutciski, "International Law and Development-Induced Displacement and Resettlement" in Chris De Wet (ed.) *Development-Induced Displacement: Problems, Policies and People* Volume 18 Studies in Forced Migration, Berghahn Books (2006) at 90.

⁶⁶ Udall, "World Bank Inspection Panel" supra note 64 at 8; Evaristus Oshionebo, "World Bank and Sustainable Development of Natural Resources in Developing Countries" *Journal of Energy & Natural Resource Law* Vol 27 No 2 (2009) at 210 [World Bank and Sustainable Development].

⁶⁷ Stefanie Ricarda Roos, "The World Bank Inspection Panel in its Seventh Year: An Analysis of its Process, Mandate, and Desirability with Special Reference to the China (Tibet) Case" (2001) 5 *Max Planck Yearbook of United Nations Law* at 514 - 516 [The World Bank Inspection Panel in its Seventh Year]. See also Bradlow, "A Test Case for The World Bank" supra note 2 at 282 - 285.

⁶⁸ Udall, "World Bank Inspection Panel" supra note 64 at 8.

Some of the benefits accruing to Affected Communities as a result of interacting with the Panel can be identified in the case of the Bujagali Project. Following the 2002 report of the Inspection Panel and AES Nile Power's withdrawal from the Project, Management developed a ten-point action plan to address the issues raised. As part of this plan, a number of reforms were made including the launching of a new socio-economic survey in 2007, redesigning the CDAP and increasing the latter's budget by 18% for the five-year period following commencement of construction.⁶⁹ Also, as some members of the Affected Communities reported, had it not been for the intervention of the NAPE, which facilitated the filing of the requests with the Inspection Panel, it is doubtful that those displaced would have attained even the limited level of inclusion that they now enjoy.⁷⁰

Lastly, the Inspection Panel review process has compelled Board members to be more in tune with the projects that they approve for Bank financing.⁷¹ Prior to the establishment of the Panel, it was not uncommon for Board members to interact with projects only at the time of approval of a loan or when a project had attracted public outcry as a result of some controversy.⁷² While the Panel also deals with controversial projects, the fact that Affected Communities can directly approach this organ without having to channel its concerns through the very system that they are complaining about (Bank Management) means that Board members can receive unfiltered complaints directly and more expeditiously.

⁶⁹ International Bank for Reconstruction & Development (IBRD) and International Development Association (IDA), *Management Report and Recommendation in Response to the Inspection Panel Investigation Report: Uganda Private Power Generation (Bujagali) Project* (2008) online: World Bank Inspection Panel <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/Management_Report_Nov_7_FIN_AL.pdf> at 9 [Management Response to 2008 Inspection Panel Report].

⁷⁰ Interview of community members at Naminya Resettlement and Malindi Dam-Affected Communities (18 November 2009) at Jinja, Uganda.

⁷¹ Udall, "World Bank Inspection Panel" supra note 64 at 9; Clark and Hunter, "The World Bank Inspection Panel: Amplifying Citizens Voices for Sustainable Development" supra note 64 at 174 & 175.

⁷² Udall, *Ibid.* at 9.

IV. The Limited Capability of the Inspection Panel as a Tool of Inclusion: A Legal Perspective

The Inspection Panel is an accountability mechanism in the sense that it requires Management to respond to claims filed by Affected Communities about the Bank's non-compliance with its operational policies and procedures. It is also an accountability mechanism because often, requests for inspection result in the adjustment of project design and appraisal, and in the reform of project implementation. However, the Panel is not a dispute resolution organ. It does not, by its findings, bind either the Bank or the Board.⁷³ Neither does it give recommendations on how the Bank can improve compliance.⁷⁴ The nature of its purpose – an investigation panel – means that its findings do not necessarily compel a particular course of action to be taken.

In the case of the Bujagali Project, the 2008 Inspection Panel report observed that the new resettlement plan prepared by Bujagali Energy Limited did not deal with the shortcomings that had been raised by the 2002 Panel report.⁷⁵ The Panel also noted that the flaws in gathering socio-economic data that had been pointed out in 2002 were still present in 2008.⁷⁶ Additionally, the loopholes that had been found in the CDAP in the 2002 Report persisted in 2008 when the Panel revisited the project.⁷⁷ In the words of the Panel, "The fact that the same problems are surfacing with two different sponsors is of concern to the

⁷³ See also David Szablowski, *Transnational Law and Local Struggles: Mining, Communities and the World Bank* (Oregon: Hart Publishing, 2007); Hey, "The World Bank Inspection Panel: Towards the Recognition of a New Legally Relevant Relationship in International Law" *supra* note 44 at 70 & 72; Roos, "The World Bank Inspection Panel in its Seventh Year" *supra* note 67 at 497 & 498.

⁷⁴ The Inspection Panel, *Accountability at the World Bank* *supra* note 2 at 41.

⁷⁵ The Inspection Panel, 2008 Report of the Inspection Panel *supra* note 62 at 138.

⁷⁶ *Ibid.* at 143.

⁷⁷ *Ibid.* at 160 & 161.

Panel.”⁷⁸ It should be added here that the lodging of a claim with the Inspection Panel does not necessarily interfere with the usual business of the Bank. Again in the Bujagali Project case, when NAPE filed its first request for inspection in July 2001, the same Board that approved the Panel’s recommendation for investigation in October 2001 also approved a guarantee facility for the project in December of the same year.⁷⁹ It was not until AES Nile Power withdrew from the project in 2003 that the Board cancelled the IDA guarantee.⁸⁰

Unlike the Inspection Panel, which limits the contents of its investigation report to findings, Management’s response contains recommendations on those findings and an action plan on the way forward.⁸¹ As some have argued, such a requirement “would seem to imply that the Bank’s Management, instead of the Panel, is itself to pronounce on the ways of repairing the wrong.”⁸² In fact, unlike Management’s response to the request for inspection, which is filed with the Panel, the report containing Management’s response to the Panel’s findings is filed directly with the Board. These requirements of the Resolution demonstrate that the creation of the Inspection Panel did not result in a significant shift in accountability. Management remains primarily accountable to states (through the Board), not to people (through their “representative” – the Inspection Panel). Even where Management admits to “serious failures”, it is allowed to provide evidence of its intentions to comply.⁸³ This is

⁷⁸ Ibid. at 161. See a similar observation made in The Inspection Panel, *Accountability at the World Bank* supra note 2 at 68 & 69 with respect to implementation of panel findings in projects in other parts of the world.

⁷⁹ The Inspection Panel, 2008 Report of the Inspection Panel Ibid. at 3 & 10.

⁸⁰ Ibid. at 3.

⁸¹ IBRD & IDA *The Resolution* supra note 1 paragraph 23.

⁸² Hey, “The World Bank Inspection Panel: Towards the Recognition of a New Legally Relevant Relationship in International Law” supra note 44 at 71. See also Hunter, “Using the World Bank Inspection Panel to Defend the Interests of Project-Affected People” supra note 47 at 210 for the argument that the Panel’s recommendations often only provide for short-term change, especially as there is no ongoing monitoring system in place.

⁸³ IBRD & IDA *The 1999 Clarification to the Resolution* supra note 18 paragraph 4.

what happened, for example, in the Rondônia Natural Resources Management Project case in Brazil (the Rondônia Project) that was filed with the Inspection Panel in June 1995.⁸⁴

In the Rondônia Project case, Management admitted to not complying with its policies in some instances and provided details on how it intended to comply.⁸⁵ The Panel was not convinced with this response and having observed from its preliminary assessment that the project was potentially harmful, it recommended to the Board that the project be investigated.⁸⁶ The Board neither approved nor rejected the Panel's recommendation but instead asked it to provide further information on the materiality of the damages and whether the damage resulted from the Bank's failure to comply with its policies.⁸⁷ As the Panel was still conducting this review, Management presented an action plan to the Board indicating how it would reform its operations.⁸⁸ The Panel maintained that the action plan was inadequate and again recommended that the project be investigated.⁸⁹ In response, Management sent the Board another action plan which had been discussed and agreed with the Brazilian authorities.⁹⁰ Following this, the Board decided against a full investigation and instead invited the Panel to participate in a review of the project at a later stage.⁹¹ Even after this review, the Panel raised similar problems of non-compliance but the Board did not request the Panel's further involvement in the project.⁹²

⁸⁴ Umaña (ed), *The World Bank Inspection Panel: The First Four Years (1994-1998)* supra note 3 at 8. See also the discussion of India's NTPC Power Generation Project at 322.

⁸⁵ Ibid. at 319.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Ibid. at 319 & 320.

⁸⁹ Ibid. at 320.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Ibid.

The extent to which the Panel can protect the interests of Affected Communities is further curtailed by the fact that the Panel's mandate does not extend to supervision or monitoring of the projects that it investigates.⁹³ Neither can it, except where new evidence is raised, review requests upon which it has already made findings.⁹⁴ The rationale for this last condition flows from rules similar to those in judicial proceedings where a court should not hear a case on the same facts after it has given its ruling.⁹⁵ However, in as far as it relates to the Inspection Panel, this provision contradicts the fact that the Bank never intended for the Panel to operate like a judicial organ. Also, given the fact that Bank projects take several years to be completed, excluding monitoring and supervision from the Panel's mandate is problematic. It means that Affected Communities have to rely on the same organ (Management) that they are complaining about to do the monitoring and supervision. As numerous cases concluded by the Panel have later revealed, such reliance on Management has proved to be ineffective. In the Democratic Republic of Congo Forest Related Operations project, for example, over one year after Management's post-investigation involvement in the project, the affected communities complained that they were disappointed in Management's implementation of the reforms contained in the latter's action plan.⁹⁶ In particular, they were concerned that the reform process continued to discriminate and totally disregard the interests of the affected Pygmy communities.⁹⁷

⁹³ Oshionebo, "World Bank and Sustainable Development" supra note 66 at 211. See also Schlemmer-Schulte, "The World Bank Inspection Panel: A Record of the First International Accountability Mechanism" supra note 49.

⁹⁴ IBRD & IDA *The 1999 Clarification to the Resolution* supra note 18 paragraph 9 (f).

⁹⁵ Shihata, *The World Bank Inspection Panel: In Practice* supra note 15 at 51.

⁹⁶ The Inspection Panel, *Accountability at the World Bank* supra note 2 at 86. Similar complaints were raised about the Jamuna Bridge Project filed with the Inspection Panel in 1996. See Bissell, "Institutional and Procedural Aspects of the Inspection Panel" supra note 4 at 122.

⁹⁷ The Inspection Panel, *Ibid.* at 86.

However, because the Panel is not allowed to monitor a project, it was unable to make any further investigation into the matter.⁹⁸

The action plans prepared by Management have been found to fall short in various respects. For example, an independent study⁹⁹ analyzing the first decade of operation of the Inspection Panel found that many action plans ignored the Panel's findings.¹⁰⁰ Similarly, the recent report prepared by the Inspection Panel to document its experiences in the 15 years of its operation, noted that many times, requesters complained that Management had not consulted with them when preparing these action plans and where they were consulted, the consultations were not meaningful.¹⁰¹ The requirement that Management should submit its action plan within six weeks of receiving the Panel's report certainly affects the quality of consultation. This period is too short and Management presumably dedicates most of its time to rebutting the Panel's findings instead of undertaking genuine consultation with those affected. Even if genuine consultations were to be undertaken, Affected Communities do not, at the time of consultation, have access to the Inspection Panel's report. As such, they are not in position to establish whether Management is adequately responding to the issues raised by the Panel.¹⁰²

⁹⁸ Ibid.

⁹⁹ This study was commissioned by the then-Executive Secretary of the Inspection Panel, Eduardo Abbott and was conducted by Tess Bridgeman, a former fellow at the Inspection Panel. See Tess Bridgeman, "An Independent Evaluation of the World Bank Inspection Panel: Summary" online: Business and Society Exploring Solutions <http://baseswiki.org/en/An_Independent_Evaluation_of_the_World_Bank_Inspection_Panel,_Tess_Bridgeman,_2007>.

¹⁰⁰ The Inspection Panel, *Accountability at the World Bank* supra note 2 at 41.

¹⁰¹ Ibid. at 56.

¹⁰² Ibid. at 41.

Some may argue that even though the Panel is not able to monitor the progress of the projects being reviewed, once Bank projects are completed, they are reviewed by the Bank's Independent Evaluation Group (formerly, the Operations Evaluation Department). This is an independent department in the Bank tasked with assessing the performance of the projects that the Bank finances.¹⁰³ The problem with this mechanism is that it is post-project (that is, after completion of the project) and is skewed more towards helping Bank staff to learn from past experiences¹⁰⁴ than it is towards reforming a particular project. Hence, while certainly a helpful exercise, this mechanism does not address directly the issues of those who come before the Panel.

Whether the shortcomings raised above are administrative, political or procedural, a central restriction on the Panel's ability to adequately address the needs of Affected Communities is its status as anything other than a court of law or decision-making organ. Because the Panel is neither a judicial or quasi-judicial body, it can determine the extent of non-compliance without ruling on how its findings should be addressed. As one Bank legal counsel stated:

The Inspection Panel Resolution accords people standing before [it] an independent investigatory body or accountability mechanism, but does not give them the remedy of a legal action in a court. People's requests before the Inspection Panel nevertheless ensure that the Bank identifies its failures to comply with its own standards and may eventually lead to the correction of mistakes through decisions of the Board of Executive Directors in fulfillment of its role of supervising Management. Such decisions are, however, not judicial decisions either in favor of or against affected parties.¹⁰⁵

¹⁰³ See generally World Bank, *Independent Evaluation Group: Evaluation for Better Results* online: The World Bank < http://siteresources.worldbank.org/EXTOED/Resources/ieg_brochure.pdf >.

¹⁰⁴ Shihata, "The World Bank Inspection Panel – Its Historical, Legal and Operational Aspects" *supra* note 36 at 12.

¹⁰⁵ Schlemmer-Schulte, "The World Bank Inspection Panel: A Record of the First International Accountability Mechanism" *supra* note 49.

The operation of the Panel is further limited by the fact that it restricts itself to determining the extent to which the Bank complies with *its* operational policies and procedures. The Panel is not allowed to question the reasonableness of these policies or suggest amendments thereto.¹⁰⁶ Even more alarming, there have been allegations that in a bid to erode the Panel's jurisdiction, the Bank has sometimes converted operational policies and procedures into non-mandatory policies (such as guidelines and best practices), which do not form part of the Panel's mandate.¹⁰⁷ Also, the Panel is not supposed to inquire into how or whether the Bank's operations violate aspects of international law or policies.¹⁰⁸ This leaves the Panel operating within very confined boundaries, with its duties effectively relating to establishing facts and then conducting a box-ticking exercise of the Bank's actions against already established standards. The discussion of the Bank's policy on involuntary resettlement in Chapter Three is testimony to the inherent shortcomings that characterize such an approach.

Besides the fact that, as discussed in Chapter Three, the Bank maintains that its policies and procedures do not constitute a legal contract between itself and Affected Communities, there is also the technical difficulty of distinguishing between the responsibilities of the

¹⁰⁶ See also Roos, "The World Bank Inspection Panel in its Seventh Year" *supra* note 67 at 511 & 512; Laurence Boisson de Chazournes, "Compliance with Operational Standards: The Contribution of the World Bank Inspection Panel" in Alfredsson and Ring (eds.), *The Inspection Panel of the World Bank: A Different Complaints Procedure* *supra* note 4 at 81 [Compliance with Operational Standards].

¹⁰⁷ Jan Wouters and Cedric Ryngaert, "Good Governance: Lessons from International Organizations" in D.M. Curtin & R.A. Wessel, *Good Governance and the European Union: Reflections on Concepts, Institutions and Substance* (New York: Intersentia, 2005) at 85. See also Clark and Hunter, "The World Bank Inspection Panel: Amplifying Citizens Voices for Sustainable Development" *supra* note 64 at 185.

¹⁰⁸ Hey notes, for example, that "... the Inspection Panel procedure ... does not resolve the important debate about the extent to which the World Bank is bound by civil and political rights and other human rights law." Hey, "The World Bank Inspection Panel: Towards the Recognition of a New Legally Relevant Relationship in International Law" *supra* note 44 at 70. See also Roos, "The World Bank Inspection Panel in its Seventh Year" *supra* note 67 at 498; Wouters and Ryngaert, *Ibid.* at 85.

Bank and those of the borrower. While the Resolution talks of non-compliance with respect to design, appraisal and/or implementation of projects, the Bank draws a distinction between the design and appraisal of a project (which are treated as the Bank's obligations) and its implementation (which is seen as the borrower's obligation).¹⁰⁹ According to the Bank, its only obligation as far as implementation is concerned is to supervise.¹¹⁰ At the same time, the Bank distinguishes between operational procedures (which it argues are the responsibility of Bank staff) and operational policies (which are addressed primarily to borrowers).¹¹¹

The fragmentation of project components (design and appraisal vis-à-vis implementation) and distinction between policies and procedures allows the Bank not only to truncate the Panel's powers, but also to circumvent the Bank's obligations to Affected Communities. While one may argue that fragmenting the components is intended to respect the sovereignty of borrowing countries by allowing them to own projects,¹¹² in practice, it is difficult to maintain neat compartments in which to place the different components.¹¹³ The compartmentalization also enables the Bank to easily blame project failure on implementation, as illustrated in Chapter Three. Also, the distinction between policies and procedures, coupled with the Bank's constant reminder that these policies and procedures are in any event not contracts with Affected Communities, leaves these communities in a rather precarious situation. Even if they were to establish that the Bank did not comply with

¹⁰⁹ Shihata, *The World Bank Inspection Panel: In Practice* supra note 15 at 36.

¹¹⁰ Ibid. ; The Inspection Panel, *Accountability at the World Bank* supra note 2 at 17.

¹¹¹ Shihata, Ibid. at 47 - 49.

¹¹² See, for example, Bissell, "Institutional and Procedural Aspects of the Inspection Panel" supra note 4 at 113.

¹¹³ Ibid. at 114.

its obligations, because they have no contractual agreement with the Bank, Affected Communities cannot sue on these policies. Lastly, because the communities have no access to the loan agreements in which the responsibilities of borrower and lender are defined, the fragmentation of components makes it more difficult for Affected Communities to determine the extent to which the Bank has fulfilled its obligations.

Let us assume, for purposes of discussion, that loan agreements are available to Affected Communities for inspection. Even in such instances, it would be difficult – if not impossible – for the communities to hold the Bank accountable for its failure to supervise a project. As a former General Counsel of the Bank pointed out, even if it is the responsibility of the Bank to supervise project implementation and impose sanctions where borrowers fail to meet their obligations,¹¹⁴ it is left to the discretion of the Bank to impose the sanctions and failure to do so does not in itself amount to a failure to observe Bank policy.¹¹⁵ The fact that the Bank’s legal department advises the Panel on the Bank’s rights and obligations means that the opinion of the legal counsel cannot be taken lightly.¹¹⁶

In the absence of a legal power to bind the Board or any of the parties to the claim, the manner in which the Board reacts to the Panel’s findings depends not so much on the Panel’s report. Neither does it necessarily depend on Management’s response. Instead, the Board’s reaction is driven by forces external to both Management and the Panel. This should not be interpreted to mean that the Panel’s findings and Management’s response have no bearing on the final decision made by the Board. What it means is that the

¹¹⁴ Shihata, *The World Bank Inspection Panel: In Practice* supra note 15 at 48.

¹¹⁵ Ibid. at 49.

¹¹⁶ IBRD & IDA *The Resolution* supra note 1 paragraph 15.

importance that the Board will attach to either of these reports is significantly influenced by what is happening outside the boundaries of these two organs. As such, it is difficult to determine a priori how the Panel's findings will impact on the course of action to be taken by the Board. In the past, this reaction has been anything but consistent. Because the Panel's findings are not legally binding, the Board's decisions have been organically influenced by factors both external and internal to the Bank. Internally, the Board is influenced by its interaction with Management on the one hand and the dynamics within the boardroom on the other hand. External influence, as discussed shortly, emanates from social movements and pressure from Bank donor countries. The combination of external and internal pressure explains the mixed reactions that the Board has to the Panel's findings. For example, in the first five years of the Panel's operations, these reactions included:

- a) Withdrawing Bank support from the Arun III Hydroelectric project in Nepal after the Panel had concluded that there was significant evidence of non-compliance and the project was not economically feasible;¹¹⁷
- b) Rejecting the Panel's recommendations that the Rondonia Project (Brazil) and Yacyreta Hydroelectric Project (Paraguay) be investigated.¹¹⁸ Instead, the Board opted for desk reviews of the projects;¹¹⁹
- c) Refusing the Panel's proposal for an investigation of India's Singrauli power plant¹²⁰ and instead creating a three-member Monitoring Panel composed of Indian experts after human rights violations and resistance against the project had increased;¹²¹

¹¹⁷ Richard E. Bissell, "Recent Practice of the Inspection Panel of the World Bank" (1997) 91:4 *The American Journal of International Law* at 741.

¹¹⁸ *Ibid.* at 742. See also Umaña (ed), *The World Bank Inspection Panel: The First Four Years (1994-1998)* supra note 3 at 319 – 321.

¹¹⁹ Daniel D. Bradlow, "Lessons from the NGO Campaign Against the Second Review of the World Bank Inspection Panel: a Participant's Perspective" (2001) 7 *ILSA J. Int'l & Comp. L.* at 249 & 250 [Lessons from the NGO Campaign].

- d) Approving the Panel's recommendation not to investigate three cases: the Emergency Power Project (Tanzania, 1995); Jamuna Bridge Project (Bangladesh, 1996); Jute Sector Adjustment Credit (Bangladesh, 1996);¹²² and
- e) Approving the Panel's recommendation for a full investigation of the "Quinghai Project"¹²³ in China.¹²⁴

Ultimately, the only rule-making powers of the Inspection Panel appear to be limited to its making of procedural rules to facilitate its own operations.¹²⁵ This means that Affected Communities should not place huge reliance on the Panel to promote and protect their interests. They have to explore alternative means of effecting change and of giving the Panel's authority new meaning. One alternative of gaining inclusion that is increasingly gaining currency – or perhaps more accurately, gaining formal recognition – is resistance through the mobilization of grassroots movements and NGOs at the local and international level.¹²⁶ Resistance, as TWAILers observe elsewhere,¹²⁷ is increasingly writing itself into the international legal order by informing the decisions of executives of international organizations such as the World Bank. Sometimes, resistance influences the manner in

¹²⁰ Fox, "The World Bank Inspection Panel: Lessons from the First Five Years" supra note 59 at 293.

¹²¹ Ibid.

¹²² Sabine Schlemmer-Schulte, "The Inspection Panel's Case Law" in Alfredsson and Ring (eds.), *The Inspection Panel of the World Bank: A Different Complaints Procedure* supra note 4 at 93 – 103.

¹²³ This refers to the Quinghai component of the *China: Western Poverty Reduction Project* which was the only component of the project which was the subject of the Inspection Panel Review. Roos, "The World Bank Inspection Panel in its Seventh Year" supra note 67 at 476.

¹²⁴ Ibid. at 475.

¹²⁵ Bradlow & Schlemmer-Schulte, "The World Bank's New Inspection Panel: A Constructive Step in the Transformation of the International Legal Order" supra note 44 at 397; de Chazournes, "Compliance with Operational Standards" supra note 106 at 81.

¹²⁶ Odumosu argues, for example, that "Resistance is not a new phenomenon. If theorising resistance has recently gained currency in international legal scholarship, it is not because resistance has not significantly impacted international law, but because international lawyers have largely refrained from engaging resistance as a phenomenon that drives legal change." Odumosu, "Locating Third World Resistance" supra note 45 at 427.

¹²⁷ See discussion in Chapter Two Part III (c).

which the Board interacts with the Panel's findings. Other times, resistance is magnified and facilitated by the findings of the Panel.

V. Writing Resistance into the Operations of the Inspection Panel

This Part of the chapter contends that the weight placed on the findings of the Inspection Panel depends in large part on the politics in the Bank at time the Panel's report is released. This politics is, in turn, either influenced by or gains support from a number of external factors. In the ensuing discussion, the impacts of one such external factor – resistance – are illustrated using four examples: the incidents that led to the creation of the Inspection Panel, the factors that contributed to the Bank's withdrawal from Nepal's Arun III Hydroelectric project, the explanations behind the second review of the Resolution of the Panel and the role of internal dynamics and conflicts. This last example does not constitute an act of resistance, strictly speaking, but is useful in supporting resistance.

The Inspection Panel is a creature of sustained resistance. Its establishment is commonly identified with the site of India's Narmada dam and water projects.¹²⁸ Its driving force: the grassroots movements¹²⁹ and advocacy campaigns by coalitions of NGOs working in close consultation with legislators and representatives of donor governments.¹³⁰ Perhaps the most

¹²⁸ See, generally, Sanjeev Khagram, *Dams and Development: Transnational Struggles for Water and Power* (Ithaca, N.Y: Cornell University Press, 2004); Shihata, *The World Bank Inspection Panel: In Practice* supra note 15 at 5 – 8.

¹²⁹ Ann Armbrrecht Forbes, "The Importance of Being Local: Villages, NGOs, and the World Bank in the Arun Valley, Nepal" (1999) 6: 2 *Identities* at 335 [The Importance of Being Local]; Fox, "The World Bank Inspection Panel: Lessons from the First Five Years" supra note 59 at 290.

¹³⁰ Hunter argues, for example, that "Operationalizing the Panel took the active participation of many different players, but the original vision and conceptualization of the Panel came from outside the World Bank – from critics who were looking for ways to make the Bank accountable to the poor communities it was created to serve." Hunter, "Using the World Bank Inspection Panel to Defend the Interests of Project-Affected People" supra note 47 at 202, 204 & 205; ; Fox, *Ibid.* at 279, 280 & 289; Kristine J. Dunkerton, "The World Bank

direct or immediate link to the Panel's establishment is the Sardar Sarovar dam. The dam, part of India's Narmada projects, was the site of contested debates and struggles for a seven-year period running from 1985 to 1992.¹³¹ The Bank was funding approximately 10 percent of the overall costs of this project.¹³² At the height of resistance, the World Bank appointed an independent commission (the Morse Commission) to determine whether the Bank had complied with its operational directives and guidelines on environment and resettlement.¹³³ The commission found a number of shortcomings. It noted that from the onset, the Bank and the Government of India had not adequately assessed the impact that the project would have on the communities living around the project area.¹³⁴ Neither had they collected sufficient data to enable such an assessment.¹³⁵ The commissioners also found that the Bank did not comply with its policies when it failed to consult affected communities, undermined the concerns of tribal people and those leaving downstream of the dam, disregarded the interests of encroachers, and concentrated primarily on compensating those members of the community that had legal title to land.¹³⁶ It was also observed that the compensation was largely inadequate and that there was disparity in the resettlement and rehabilitation packages offered to oustees living in the different states that were affected by the dam.¹³⁷ The Morse Commission advised that since the issues it had raised were fundamental, the Bank needed to step back from the project to allow for the undertaking of more

Inspection Panel and its Effect on Lending Accountability to Citizens in Borrowing Nations" (1995) 5 University of Baltimore Journal of Environmental Law at 235 & 236.

¹³¹ Udall, "The World Bank and Public Accountability" supra note 54 at 392.

¹³² Shihata, *The World Bank Inspection Panel: In Practice* supra note 15 at 6.

¹³³ Udall, "The World Bank and Public Accountability" supra note 54 at 392. For a comprehensive account of the findings and recommendations of the Morse Commission, see generally Bradford Morse and Thomas Berger, *Sardar Sarovar: Report of the Independent Review* (Resources Futures International Inc., 1992).

¹³⁴ Bradford Morse and Thomas Berger, "Findings and Recommendations of the Independent Review" in William F. Fisher (ed.), *Towards Sustainable Development?: Struggling Over India's Narmada River* (Armonk, NY: M.E. Sharpe, 1995) at 371.

¹³⁵ Ibid. at 376 & 377.

¹³⁶ Ibid. at 371 & 372.

¹³⁷ Ibid. at 372 & 373.

comprehensive human and environmental studies, permit a proper assessment of the studies and enable the formulation of resettlement and rehabilitation policies that would meet the needs of the different oustees.¹³⁸ The commission's report was unequivocal about the fact that to meet these objectives, the Bank would have to suspend construction at the site.¹³⁹

Despite this recommendation, the Bank continued with its operations. In July 1992, a month after it received the Morse Commission Report, the Bank sent a mission to India to investigate the matter further.¹⁴⁰ After its investigations, the mission produced a report on the next steps that should be taken by the Government of India to deal with the recommendations of the Morse Commission.¹⁴¹ The mission's report contained a six-month action plan under which construction would continue, but be tied to conditions relating to improving environmental and resettlement issues.¹⁴² Project opponents, both locally and internationally, perceived this "Next Steps" document as undermining the findings of the Morse Commission and went ahead to stage numerous other acts of resistance such as writing letters to various influential parties, publishing articles in newspapers and speaking at public forums.¹⁴³ Washington-based NGOs pressurized the US Congress to place conditions on the Bank for the United States' contribution to the IDA replenishment.¹⁴⁴ Two reforms were specifically demanded by the NGOs: the creation of an independent appeals mechanism to review the Bank's compliance with its policies and the introduction of a new

¹³⁸ Ibid. at 378.

¹³⁹ Ibid. at 378.

¹⁴⁰ Khagram, *Dams and Development: Transnational Struggles for Water and Power* supra note 128 at 129.

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Udall, "The World Bank and Public Accountability" supra note 54 at 394; Shihata, *The World Bank Inspection Panel: In Practice* supra note 15 at 4.

policy that would allow for increased disclosure and access to Bank information.¹⁴⁵ As a result of this sustained resistance, the Bank stiffened the benchmarks that would need to be satisfied by the Government of India in the six-month period in order to retain the Bank's funding.¹⁴⁶ Towards the end of the six-month period, India voluntarily gave up the funding.¹⁴⁷

What is important to note here is not simply the fact that the Government of India withdrew its application for funding or that the Bank's stiff conditions led to the withdrawal. Perhaps more important is the fact that the findings and recommendations of the Morse Commission Report, on their own, were insufficient to halt business at the Bank with respect to the project. Consequently, it is doubtful whether in the absence of sustained resistance, the Bank's involvement in the project would have been stopped. It is equally important to note that it is around this time that the Bank seriously started considering the establishment of an independent inspection unit. In the ensuing discussion, we witness the role played by resistance once the Inspection Panel was established.

The second example of resistance pertains to the first request that was filed with the Inspection Panel: the Arun III Hydroelectric Project in Nepal, which was filed with the Panel in October 1994.¹⁴⁸ In this case, requesters claimed that the Bank had violated *inter alia* IDA's policies on environmental assessment, involuntary resettlement and indigenous

¹⁴⁵ Umaña (ed), *The World Bank Inspection Panel: The First Four Years (1994-1998)* supra note 3 at 2.

¹⁴⁶ Khagram, *Dams and Development: Transnational Struggles for Water and Power* supra note 128 at 130.

¹⁴⁷ Ibid.

¹⁴⁸ Umaña (ed), *The World Bank Inspection Panel: The First Four Years (1994-1998)* supra note 3 at 7.

peoples.¹⁴⁹ The Panel found numerous shortcomings with the project, many of which were acknowledged by both the Bank and the Nepalese government.¹⁵⁰ Still, because of the commitment that the two parties (the Bank and the Government of Nepal) had to the project, they elected to continue with it despite strong evidence suggesting otherwise.¹⁵¹ Even those US federal agencies that disapproved of the project were concerned about the economic and political hardships that would result from cancelling the project so late in its planning stage.¹⁵² Consequently, the latter favored a strategy that would involve improving implementation as opposed to completely abandoning the project.¹⁵³ It is the sustained resistance mobilized by Nepali activists in alliance with other transnational NGOs such as International Rivers and the Intermediate Technology Group¹⁵⁴ that buttressed the position contained in the Panel's report and contributed to the Bank's decision to withdraw from the project.

The last example of external pressure discussed here relates to the 1999 Clarification of the Resolution.¹⁵⁵ In early 1998, the Board appointed a working group consisting of six Board members to review the Resolution.¹⁵⁶ In December 1998, the working group submitted its report to the Board and the latter scheduled a meeting for January 1999 to discuss the

¹⁴⁹ Ibid.

¹⁵⁰ Opponents identified a number of shortcomings. They argued that the project was consuming the funding that would have been used to invest in other priority sectors. They also contended that the government did not have the capacity (financial, institutional and technical) to implement the project. Also, in addition to the fact that the environmental management of the project had not been properly planned, there would be significant delays in project implementation. Forbes, "The Importance of Being Local" *supra* note 129 at 330.

¹⁵¹ Ibid. at 331 & 332.

¹⁵² These included the Treasury Department, Environmental Protection Agency, Department of Energy, the State Department and USAID. Ibid. at 332 and 340.

¹⁵³ Ibid. at 332.

¹⁵⁴ Ibid. at 333.

¹⁵⁵ See generally Bradlow, "Lessons from the NGO Campaign" *supra* note 119 at 247 – 257.

¹⁵⁶ Ibid. at 251.

working group's recommendations.¹⁵⁷ Before the meeting could be held, the report was leaked to Washington-based NGOs and journalists.¹⁵⁸ NGOs raised three main issues with the report. First, they argued that the working group was attempting to limit the Panel's authority by requiring that the latter should determine the requester's eligibility without considering the facts of the case.¹⁵⁹ In contrast, Management was being allowed to submit an action plan in which it would illustrate how it would comply or was complying with Bank policy.¹⁶⁰ Consequently, NGOs argued that while Management was being given an opportunity to furnish the Board with complete facts and solutions to the problem, the Panel was being denied a chance to delve into the facts. Second, the working group had suggested that the Board should accept the Panel's recommendation of requesters' eligibility unless the latter did not meet the "technical criteria".¹⁶¹ However, because the working group did not define what it meant by "technical criteria", NGOs felt that this left the question of eligibility largely to the discretion of the Board.¹⁶² They feared that this discretion could be abused by Board members exercising personal preferences to determine the requests that should proceed to investigation.¹⁶³ Third, the working group had proposed that in determining the extent to which the Bank's non-compliance results into harm, Panel members should be guided by a determination of what the status of requesters would have been had there been no project.¹⁶⁴ NGOs felt that this proposal essentially resulted in lowering the standards of compliance. They suggested instead that the reference point

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² Ibid. at 252.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

should be what the requesters' status would have been had the Bank complied with its policies and procedures.

Once the report was leaked, Washington-based NGOs contacted the United States Congress and the US representative on the Board to demand that the report be publicized.¹⁶⁵ Upon its public release, the report attracted comments from NGOs, academics, private individuals and politicians in various parts of the world including the United States, Mexico, Brazil and India.¹⁶⁶ In the end, the final version of the report that was presented to the Board and approved in April 1999 had a number of revisions.¹⁶⁷ It had the effect of restricting the first stage of the Panel's process to determining whether, *prima facie*, the requesters had an eligible claim.¹⁶⁸ It also was to the effect that if the Panel recommended an investigation, the Board was bound to adopt the recommendation unless the technical criteria (which were listed) for filing the complaint were not met.¹⁶⁹ Also, instead of submitting a "compliance plan", Management would simply be required to state how it had complied with Bank policies and procedure or illustrate its intention to comply.¹⁷⁰ In other words, Management would not at that first stage, prepare an action plan.

The revised Clarification had important implications for the Panel's operations. To begin with, it significantly reduced the politicization that had marred the process of approving the Panel's recommendation to investigate a request.¹⁷¹ From then on, the Board has approved

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid. at 253.

¹⁶⁹ Ibid. at 254.

¹⁷⁰ Ibid.

¹⁷¹ Udall, "World Bank Inspection Panel" *supra* note 64 at 10 & 11.

all cases in which the Panel has recommended an investigation.¹⁷² The Clarification also discouraged the practice that Management had developed of communicating with the Board on a project before the Panel made its findings including the tendency to draft mini action plans that denied the Panel a chance to investigate the matter.¹⁷³ Lastly, it emphasized the need for meaningful consultation between Affected Communities and Management and introduced a requirement that the borrower should accept the action plan before it was presented to the Board.¹⁷⁴

Achieving success through resistance would be difficult – if not impossible – if demands for change originated only from actors external to the institutions that movements seek to reform. Institutional change is enabled by a combination of both the pressure that pushes for reform from within (“inside reformers”) and the patterns of conflict and contestation that occur on the outside (external pressure groups).¹⁷⁵ To this end, it is important to acknowledge the fact that the Bank is not a homogenous entity and as such, does not speak with a single voice. It has internal pressure groups that lend credence to and support external struggles. Traces of the contributions of these inside reformers can be found in the same examples given above on outside pressure.

First, while the establishment of the Inspection Panel is commonly attributed to factors external to the Bank, there were also internal movements that facilitated or supported

¹⁷² The Inspection Panel, *Accountability at the World Bank* supra note 2 at 28.

¹⁷³ Ibid.

¹⁷⁴ Ibid. at 55.

¹⁷⁵ Fox, “The World Bank Inspection Panel: Lessons from the First Five Years” supra note 59 at 281 - 283.

reform.¹⁷⁶ In 1991, the Bank established a taskforce to conduct a Bank-wide review of the institution's operations. In a 1992 report commonly known in the Bank as the Wapenhans Report, the taskforce revealed that implementation and supervision of Bank-financed projects was unsatisfactory because Bank staff were more interested in increasing the portfolio of borrowers than they were in supervising the projects for which funds had already been disbursed.¹⁷⁷ To improve portfolio management, the taskforce recommended that the role of the Operations Evaluation Department (the Bank's internal review mechanism) should be enhanced.¹⁷⁸ This report resulted, *inter alia*, in the introduction of processes and practices that would ensure that affected communities participated more in Bank-financed projects.¹⁷⁹ One proposal for increasing participation was a recommendation by Management that the Bank should establish an independent inspection process that would investigate the Bank's implementation problems.¹⁸⁰ It was also around this time that the Morse Commission Report was released. Following its release, six executive directors (42 percent of the vote) voted for the Bank's discontinuance of its support for the Narmada project.¹⁸¹ This further catalyzed the need for establishing an independent inspection unit.¹⁸²

¹⁷⁶ Schlemmer-Schulte, "The World Bank Inspection Panel: A Record of the First International Accountability Mechanism" supra note 49; Umaña (ed), *The World Bank Inspection Panel: The First Four Years (1994-1998)* supra note 3 at 1; Shihata, "The World Bank Inspection Panel – Its Historical, Legal and Operational Aspects" supra note 36 at 8 & 9.

¹⁷⁷ Dunkerton, "The World Bank Inspection Panel and its Effect on Lending Accountability to Citizens in Borrowing Nations" supra note 130 at 234 & 235; Schlemmer-Schulte, "The World Bank Inspection Panel: A Record of the First International Accountability Mechanism" supra note 49; Udall, "World Bank Inspection Panel" supra note 64 at 1; Shihata, *The World Bank Inspection Panel: In Practice* supra note 15 at 2 – 4.

¹⁷⁸ Shihata, "The World Bank Inspection Panel – Its Historical, Legal and Operational Aspects" supra note 36 at 9.

¹⁷⁹ Schlemmer-Schulte, "The World Bank Inspection Panel: A Record of the First International Accountability Mechanism" supra note 49; Shihata, "The World Bank Inspection Panel – Its Historical, Legal and Operational Aspects" supra note 36 at 9.

¹⁸⁰ Umaña (ed), *The World Bank Inspection Panel: The First Four Years (1994-1998)* supra note 3 at 1.

¹⁸¹ Udall, "The World Bank and Public Accountability" supra note 54 at 400.

¹⁸² Schlemmer-Schulte, "The World Bank Inspection Panel: A Record of the First International Accountability Mechanism" supra note 49; Udall, "World Bank Inspection Panel" supra note 64 at 1.

In the Arun III project, external pressure was endorsed and buttressed by the actions of some senior Bank officials. For example, the resignation of Martin Karcher, a Division Chief for Population and Human Resources (who had been employed by the Bank for 29 years) sent a strong message to the Bank about the implausibility of the project.¹⁸³ During his time at the Bank and even after his resignation, Karcher expressed strong reservations and misgivings about the project and it was these misgivings that led to his resignation.¹⁸⁴ Similarly, the arrival of a new president at the Bank – James Wolfensohn – who did not have a history with the project was relevant in facilitating internal resistance.¹⁸⁵ It was Wolfensohn, who after receiving the Investigation Report of the Panel, requested another independent review of the project from Maurice Strong, a former Secretary General of the United Nations Conference on Environment and Development.¹⁸⁶ After reviewing the findings of the Panel and Mr. Strong's report, Wolfensohn decided to withdraw the Bank's support for the project.¹⁸⁷

It should also be remembered that the Board is composed of representatives from both lending and borrowing countries. In the past, those representing borrowing countries have been pressured by their governments into resisting investigations, which are perceived as

¹⁸³ Forbes, "The Importance of Being Local" supra note 129 at 331 & 332. See also Jonathan A. Fox & L. David Brown, "Assessing the Impact of NGO Advocacy Campaigns on World Bank Projects and Policies" in Fox & Brown (eds.) *The Struggle for Accountability: The World Bank, NGOs and Grassroots Movements* supra note 54 at 487.

¹⁸⁴ Forbes, *Ibid.* at 332.

¹⁸⁵ *Ibid.* at 333. Wolfensohn, upon receiving the Investigation Report of the Inspection Panel, requested another independent review of the project from an "outsider": Maurice Strong, a former Secretary General of the United Nations Conference on Environment and Development. After reviewing the combined findings of the Panel and Mr. Strong, Wolfensohn announced the Bank's withdrawal from the project. Bradlow, "A Test Case for The World Bank" supra note 2 at 280.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

interfering with borrowers' sovereignty and increasing the latter's liability.¹⁸⁸ On the other hand, lending countries are often divided between those who favor a Panel's independence in its operation and those who do not.¹⁸⁹ When the Board receives a report from the Panel, Board members study it and submit comments and recommendations before proceeding to the meeting at which the report is discussed.¹⁹⁰ These meetings are, therefore, not merely window-dressing exercises that result in a pre-determined course of action. They involve debates about whether to approve the Panel's findings and/or Management's response to the same.¹⁹¹ Sometimes, the Board has demanded that Management do more than it proposes in its action plan or that it be more specific in the recommendations that it makes.¹⁹² As such, boardroom politics and dynamics have a bearing on how the Board will treat the Inspection Panel's report.¹⁹³

Ultimately, whether it be instigated by external forces or otherwise, it is difficult to argue that the Bank does not possess the internal ability to reform. While internal waves may be insufficient on their own to facilitate change, they possess the ingredients necessary to translate the Panel's report from mere findings/opinions to binding conditions that are imposed on Management by the Board. At the same time, external pressure, while unable on its own to explain the reforms in Bank operations, is instrumental in publicizing

¹⁸⁸ Umaña (ed), *The World Bank Inspection Panel: The First Four Years (1994-1998)* supra note 3 at 324. See also Alvaro Umaña, "Some Lessons from the Inspection Panel's Experience" in Alfredsson and Ring (eds.), *The Inspection Panel of the World Bank: A Different Complaints Procedure* supra note 4 at 135.

¹⁸⁹ Umaña (ed), *The World Bank Inspection Panel: The First Four Years (1994-1998)* Ibid. at 325.

¹⁹⁰ The Inspection Panel, *Accountability at the World Bank* supra note 2 at 42.

¹⁹¹ Ibid. at 43.

¹⁹² Ibid.

¹⁹³ Fox, "The World Bank Inspection Panel: Lessons from the First Five Years" supra note 59 at 301 – 305; Wouters and Ryngaert, "Good Governance: Lessons from International Organizations" supra note 107 at 84.

shortcomings and placing them on the top agenda of those who can push for change from both the inside and the outside of the Bank.¹⁹⁴ As Fox concludes:

... the [Arun] case illustrates a broader pattern of institutional change: neither advocates of environmental and social issues within the Bank nor external criticism alone were sufficient to defeat the project; each reinforced the other, with the external critique tipping the balance in an internally divided Bank.¹⁹⁵

VI. Conclusion

Even though restricted in its ability to issue binding decisions, the Panel remains an important formal avenue for channelling the interests of Affected Communities in Bank-financed projects. It has enabled these communities to participate in project reforms through, for example, the Panel's consultations with them during its field visits. It has resulted in affected communities being included in resettlement plans where they were previously excluded.¹⁹⁶ And while its findings might not directly or immediately translate into a positive change in the projects under review, these findings have the potential to influence the development of international and domestic rules that are more in tune with the interests of Affected Communities.¹⁹⁷

¹⁹⁴ Fox & Brown, "Assessing the Impact of NGO Advocacy Campaigns on World Bank Projects and Policies" *supra* note 183 at 489.

¹⁹⁵ *Ibid.*

¹⁹⁶ Umaña, "Some Lessons from the Inspection Panel's Experience" *supra* note 188 at 136.

¹⁹⁷ See also Bradlow, "International Organizations and Private Complaints" *supra* note 46 at 608 – 610. In fact, some have gone as far as arguing that the proceedings before the Panel result in case law, understood in the wider sense. In other words, by the Panel making its findings, Management providing responses, General Counsel providing opinions, and the Board deciding on the matter after internally debating it, a body of jurisprudence is being produced. See generally Schlemmer-Schulte, "The Inspection Panel's Case Law" *supra* note 122 at 87 – 106, particularly at 88 & 89.

As such, it is not that the Panel's findings are totally devoid of legal implications. Rather, their impact is an indirect one.¹⁹⁸ Consequently, while the Panel was never intended to operate as a court of law or even as a quasi-judicial body, its reports and the Management responses that these reports provoke provide "backstage" considerations that inform the manner in which legal rules can be reformed and projects better implemented.¹⁹⁹ Already, the Panel's findings and its interpretations of the Bank's operational policies and procedures have increased (and will continue to increase) awareness and understanding among Bank staff of their obligations under the said policies and procedures.²⁰⁰ Also, because the documents relating to the Panel's processes are publicized, they have the potential to influence developments in a range of issue areas including involuntary resettlement, indigenous peoples, the environment and human rights.²⁰¹ In the same regard, they can influence the development of legal rules around these issue areas.²⁰²

However, the Panel's findings do not, on their own, guarantee any remedy or redress for Affected Communities.²⁰³ To this end, some have argued that the Panel is a relatively "weak quasi-judicial supervisory body" which leaves the final decision-making to the "more

¹⁹⁸ Bradlow, "A Test Case for The World Bank" supra note 2 at 285; Lori Udall, "World Bank Inspection Panel" supra note 64 at 5.

¹⁹⁹ The Inspection Panel, *Accountability at the World Bank* supra note 2 at 11.

²⁰⁰ Roos, "The World Bank Inspection Panel in its Seventh Year" supra note 67 at 520. See also Bradlow, "A Test Case for The World Bank" supra note 2 at 272 & 285.

²⁰¹ For example, during an investigation of a request that was filed in respect of the West Africa Pipeline Project, the Panel examined the human rights situation in Chad and the extent to which human rights violations would impede the implementation of the project and violate Bank policies. In its findings, the Panel challenged the Board to take human rights issues into account, even though this may have been construed as interfering with the manner in which a country handled its political affairs and as such, violating the Bank's own policy on non-interference in political matters. The Inspection Panel, *Accountability at the World Bank* supra note 2 at 50.

²⁰² Bradlow & Schlemmer-Schulte, "The World Bank's New Inspection Panel: A Constructive Step in the Transformation of the International Legal Order" supra note 44 at 404, 405 & 410; Bradlow, "A Test Case for The World Bank" supra note 2 at 288; Schlemmer-Schulte, "The World Bank Inspection Panel: A Record of the First International Accountability Mechanism" supra note 49.

²⁰³ Oshionebo, "World Bank and Sustainable Development" supra note 66 at 212.

politicized Board of Executive Directors”.²⁰⁴ The creation of the Inspection Panel has thus resulted in its serving of two conflicting purposes. On the one hand, by allowing affected communities to approach the Panel directly without having to go through their governments, the Panel is enabled to act as a technology of inclusion and to challenge “key assumptions of national sovereignty”.²⁰⁵ On the other hand, national sovereignty – or perhaps more accurately, the hierarchy of the state – is maintained by preventing the Panel from issuing decisions that bind states. In this way, it is the representatives of nations (the Board) that retain legal authority to make decisions.²⁰⁶ The result is that the Panel provides only *limited participation* and *selective accountability*. Limited, in the sense that while Affected Communities can use it to complain about infringement of Bank policies and procedures, they cannot use it to enforce decisions on non-compliance. Similarly, while the Panel’s findings are “a powerful conclusion that neither the Bank’s Management nor Board can ignore” they do not possess “all the safeguards of a judicial process”.²⁰⁷

The Panel process results in selective accountability in the sense that Bank Management, through its response and action plan, is able to circumvent obligations that it is unwilling to undertake by either opposing the Panel’s findings, including only those findings it is willing to act on or addressing them in the action plans in a manner that is less binding. It is also selective since the accountability to Affected Communities appears to be fulfilled with Management’s response to the Panel’s findings. There is no other independent mechanism to monitor or supervise the Bank’s compliance with the said action plans. On the few

²⁰⁴ Bradlow, “International Organizations and Private Complaints” supra note 46 at 602.

²⁰⁵ Fox, “The World Bank Inspection Panel: Lessons from the First Five Years” supra note 59 at 288.

²⁰⁶ Ibid.

²⁰⁷ Shihata, *The World Bank Inspection Panel: In Practice* supra note 15 at 213.

occasions that the Board has asked the Panel to monitor action plans, this has been outside the scope of the Resolution and these requests have been restricted to fixed (usually short-term) periods or limited to “technical consultations”.²⁰⁸

As Affected Communities approach the Inspection Panel, it is important that they be aware of the fact that the Panel was never intended to override the authority of the Board or even have powers similar to those of the Board. The Panel’s independence and authority are restricted to its “ability to deal thoroughly and fairly with the requests brought to [it]”.²⁰⁹ At least for the foreseeable future, it is unlikely that its powers will be expanded beyond those of a fact-finding body. Until such time when its powers are significantly increased, Affected Communities will have to lower their expectations of the Panel and use it alongside other tools of gaining inclusion. Access to and participation in project decisions will also have to depend, not merely on seeking to reform the international legal framework governing involuntary resettlement, but also in critically engaging with the investment regime that governs the projects that cause displacement. The next chapter is dedicated to analyzing this investment regime. It examines the legal framework for investments such as the Bujagali Project in order to establish how this framework compares with the legal regime governing involuntary resettlement.

²⁰⁸ The Inspection Panel, *Accountability at the World Bank* supra note 2 at 44.

²⁰⁹ IBRD & IDA *The Resolution* supra note 1 paragraph 4.

CHAPTER 5

The Bujagali Project as an Investment Project: Understanding Involuntary Resettlement from an Investment Perspective

I. Introduction

The bulk of the discussion in the preceding chapters concentrates on two things. First, it appraises the domestic laws and international (World Bank) policies governing involuntary resettlement. Second, it evaluates the adequacy of the legal frameworks and institutional structures put in place for Affected Communities to contest shortcomings in the manner in which DIDR is handled. These chapters, in other words, study displacement and resettlement from a perspective that is referred to in the introduction to this thesis as a “dams and development perspective” (or a “people-centred perspective”). The present chapter departs from this perspective by scrutinizing the impact of hydroelectric projects on Affected Communities from an investment perspective. This task is approached by temporarily shifting these communities from the centre of the analysis and replacing them with the investment demands of the projects that cause displacement. In the end, the chapter seeks to answer two main questions. First, how does studying large infrastructure projects from an investment perspective help us understand the marginalization of the interests of Affected Communities? Second, how can the knowledge gained from such an understanding be applied to developing mechanisms that incorporate the interests of these communities?

The shift in conceptualizing the Project from a “dams and development” perspective to an “investment perspective” produces different, but supplementary, results. When we think of the Project solely as a dam project, there is a risk of concentrating on its structural

implications to the exclusion of all else. There is thus the tendency of suggesting solutions targeted at the structure itself including opposing the dam, suggesting that construction be stopped, or – in the case of Affected Communities – suggesting a decrease in the size of the dam to ensure that it displaces as few people as possible. This perspective, when addressing issues pertaining to Affected Communities, tends to focus on developing mechanisms that are more inclusive of their interests, without dealing comprehensively with the hurdles that result in the exclusion in the first place. When we conceptualize such projects from an investment perspective, we make deliberate efforts to become aware of the bigger picture in which the project fits. We become more cautious of the fact that we cannot limit our analyses to dams per se but need to engage with and contest the wider institutional and regulatory frameworks that govern the construction of these dams.

The Bujagali Project is an investment project. It is an investment project in the sense that it relies on private capital for its operation. It is also an investment project in the sense that the Government and other project proponents rely on it to boost the country's economic growth. For example, project proponents contend that by expanding electricity supply, the Project will facilitate the development of an investment climate that will increase productivity, create employment opportunities and ultimately, reduce poverty.¹ As such, they emphasize the fact that Uganda's economic growth depends significantly on the existence of a stable, efficient and expanded electricity supply network, which attracts investors.² In the same

¹ The World Bank, "Uganda Bujagali Hydro Power Project: About the Project" online: The World Bank <<http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/EXTPROJECTSPROGRAMS/EXTBUJHYDPOWPRO/0,,contentMDK:21217616~menuPK:3452894~pagePK:64168427~piPK:64168435~theSitePK:3323560~isCURL:Y,00.html>> [About the Project]; Tom Nevin, "Battle lines drawn over Bujagali dam" (June 2007) *African Business* at 57.

² The World Bank, *Ibid.*

breath, they stress the central role of the private sector in supporting and driving the existence of this stable, efficient and expanded network.³ In the end, private investment is touted as being at the core of the attainment of an efficient and reliable energy sector which is essential to achieving economic growth and development.

The attainment of economic growth and development is not pegged simply to private investment. It is conditioned on the ability of Uganda to attract *foreign private investment* (usually referred to as foreign direct investment or FDI) to replace ineffective publicly operated entities on the one hand and to reduce dependence on development aid and loans (which are often accompanied with conditionalities) on the other hand. Reliance on FDI to stimulate economic growth is not a new phenomenon. Neither is it confined to operations in the energy sector. It flows from the dominant development theory that if Third World countries are to be plunged out of poverty, they should liberalize their economies to encourage substantial increases in capital flows from abroad.⁴ In addition, host states should establish safeguards that protect the proprietary interests of the private capital inflows.⁵ As illustrated in the ensuing discussion, this is a neoliberal view which promotes FDI as being “uniformly beneficial to economic development”, without acknowledging the deleterious effect of some of this investment.⁶

³ See the discussion in Part III below.

⁴ See, for example, Ibrahim F. I. Shihata, *Multilateral Investment Guarantee Agency and Foreign Investment* (Martinus Nijhoff Publishers, 1988) at 2; Jacques Morisset, “Foreign Direct Investment in Africa: Policies Also Matter” (November 1999). World Bank Policy Research Working Paper No. 2481. Also available online SSRN: <<http://ssrn.com>> at 19.

⁵ Shihata, *Ibid.* at 1.

⁶ M. Sornarajah, “A law for need or a law for greed?: Restoring the lost law in the international law of foreign investment” (2006) 6 *International Environmental Agreements* at 331 & 332 [A law for need or a law for greed?].

Without denying the potential role of FDI in facilitating economic growth in Third World countries, this chapter inquires into the manner in which the conditions attached to attracting foreign private investment adversely impact on the interests of Affected Communities. The chapter contends that because the Government treats the Bujagali Project as being critical to the economic growth of the country, it has focussed or been compelled to focus on protecting the “deliverers” of this instrument of growth (i.e. the project sponsors/private investors). This has resulted in the forefronting of a macro-economic approach to development as being the only means of alleviating poverty and a dislocation of the role that proper resettlement and rehabilitation initiatives play in meeting poverty alleviation goals.

The relationship between protection of investment interests and marginalization of Affected Communities is not a direct one. In other words, it is not suggested that investor protection automatically translates into bad resettlement and rehabilitation initiatives. Rather, it is contended that the legal framework governing projects of this nature provides multiple layers of protection for investors, which in the process displace other stakeholder interests. Consequently, by buttressing the legal infrastructure for the benefit of investors, it becomes difficult to provide a corresponding level of protection for Affected Communities.⁷ Also, the pressure on the Government to sustain the hierarchy of investment interests makes it necessary for the former to ensure that alternative methods of demanding inclusion (such as resistance) are suppressed. Lastly, the exercise of documenting these different layers of

⁷ See also Susan Leubuscher, “The Environmental, Social and Human Rights Impacts of Foreign Investment Contracts” online: Pacific Environment<http://www.pacificenvironment.org/downloads/The%20Environmental%20Social%20and%20Human%20Rights%20Impacts%20of%20Foreign%20Investment%20Contracts_4_.pdf> at 9. Leubuscher argues that “Whatever efforts to involve the local project-affected communities of these poorer countries in public policy making is undermined when policies are controlled by the obligations to transnational corporations found in foreign investment contracts.”

protection produces a body of knowledge that is useful in drawing comparisons with the framework of protections available to Affected Communities. Therefore, if the protections documented here are not sufficient in explaining the marginalization of the communities, the examples at least reveal the glaring limitations in protections available to Affected Communities when compared with those available to investors. This in itself should provoke us into demanding more meaningful forms of inclusion and accountability to those displaced by projects of this nature.

The concentration on private investments in this chapter should not be read as suggesting that publicly-funded projects do a better job at incorporating Affected Communities' interests. Most of the dam projects in Africa are government-funded and have registered a series of failures in resettling and rehabilitating those displaced.⁸ The poor record of resettlement and rehabilitation initiatives is thus not one unique to projects sponsored by the private sector. Instead, it is one that can be attributed to the manner in which hydropower and other large infrastructure projects are approached generally. There continues to be an obsession with the role of macro-economic mechanisms of achieving development at the expense of the local contexts that are affected by mega projects such as dams.⁹ The IFIs that dictate policies in Third World countries continue to rely on the claim that economic growth eventually trickles down and that any negative impacts suffered from neo-liberal policies

⁸ The Bujagali Project promises to be one of the largest private sector investments in East Africa and will be among the largest in the power sector in Africa. Most other large dam projects in the continent are publicly owned. See Chapter Two Part V (d). See also Neil Ford, "Unlocking Africa's hydro potential" (2007) 59:8 International Water, Power & Dam Construction at 11 - 13.

⁹ Alan Rew, Eleanor Fisher and Balaji Pandley, "Policy Practices in Development-induced Displacement and Rehabilitation" in Chris De Wet (ed.) *Development-Induced Displacement: Problems, Policies and People* 18 Studies in Forced Migration (Berghahn Books, 2006) at 39 [Policy Practices]. See also Michael M. Cernea, "Development's Painful Social Costs: Introductory Study" in S. Parasuraman *The Development Dilemma: Displacement in India* (The Hague: Institute of Social Studies, 1999) at 24.

are short-term and a necessary price to pay for development.¹⁰ Consequently, the increasing pressures from globalization and liberalization have focussed largely on improvements in infrastructure at the expense of the accompanying development-induced displacement.¹¹

The present emphasis on the private sector is, therefore, one largely guided by the increasing role that this sector is playing in Uganda's energy sector. Even in countries where the energy sectors remain state-run, the state institutions employ "increasingly hard-nosed business principles" that "have created a new ideological and institutional structure that puts its profits – and that of its priority clients – ahead of poverty alleviation and social and environmental justice."¹² Once projects are financed by the private sector or are operated using business principles, the key goal shifts from being the provision of a public good or service to ensuring that the proprietary interests of the service providers and/or their shareholders are secured. The burden on governments to protect this investment is increased when dealing with foreign investors who are protected by a gamut of international legal rules and principles.

The analysis in this chapter is consistent with and acts as an extension of both TWAIL and critical development theory. Specifically, the chapter illustrates that (international) law and development are not neutral. Consequently, the labels and names that we attach to different things matter because they serve particular motives and propel certain interests. In

¹⁰ See, for example, Joseph E. Stiglitz *Globalization and Its Discontents* (W. W. Norton & Company, 2003) at 78.

¹¹ Rew et. al., "Policy Practices" supra note 9 at 39.

¹² David A McDonald, "Electric capitalism: Conceptualising electricity and capital accumulation in (South) Africa" in David A. McDonald (ed.) *Electric Capitalism: Recolonising Africa on the Power Grid* (HSRC Press, 2009) at 21.

“TWAIIian” spirit, the chapter interrogates how international law forefronts the interests of powerful economic actors (such as multinational corporations) without providing comparable protection for the more vulnerable Affected Communities. It also examines the manner in which the concept of development is recruited in furthering these dominant interests.

The chapter proceeds as follows. Part II lays the foundation for the rest of the chapter by providing a background to the neo-liberal ideology of powerful states and IFIs and how this ideology was imposed on countries in the Third World. Part III illustrates the domestication of this neo-liberal agenda through the privatization of Uganda’s energy sector. In particular, the discussion documents how the enactment of Uganda’s *Electricity Act* opened the market for foreign private investors. This is followed by a discussion in Part IV of how the newly liberalized sector was secured with the establishment of a support structure in the form of an Electricity Regulatory Authority that is designed to be independent from political interference. Part V demonstrates how investment interests are further concretized and defended with the use of private investment agreements. In lieu of a conclusion, Part VI revisits the rationale for protecting private capital and makes the case for an equal need for the protection of the interests of displaced communities.

II. Neo-liberalism and the Internationalization of Private Property Rights

There is an intimate relationship between hydroelectric projects and the spread of neo-liberalism. For example, it has been observed that the expansion of the electricity sector in Africa is so integrated with capitalist production that it is difficult to fathom the existence of

capitalism in the absence of an efficient electricity sector.¹³ Even though electricity, in and of itself, is not responsible for the spread of neo-liberal ideology in the continent, it is one example of the manner in which neo-liberal policies have been realized.¹⁴ In Uganda's case, for example, the World Bank – one of the gatekeepers of neo-liberalism – had its first involvement with the country through an IDA credit facility to support electric power development.¹⁵

Neo-liberalism is a short-hand label that scholars use to refer to a cluster of market-driven policies, which promote “maximum global integration”¹⁶ and a system of deregulation that depends on the private sector as the engine of driving economic development.¹⁷ The policies are a form of an attack on the welfare state in the West and a problematization of the “developmentalist state” in the Third World.¹⁸ Some of neo-liberalism's components include: opening markets to attract FDI, liberalization of trade policies, privatization of state-owned enterprises, emphasizing legal security of property rights, deregulation of financial markets and rolling back on the obligations of the state in the provision of public goods.¹⁹ Neo-liberalism should be linked closely to our understanding of ideology because

¹³Ibid. at 4.

¹⁴Ibid.

¹⁵ World Bank, “Uganda: Overview” online: World Bank <<http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/UGANDAEXTN/0,,menuPK:374945~pagePK:141132~piPK:141121~theSitePK:374864,00.html>>.

¹⁶ Denis O' Hearn, “Tigers and Transnational Corporations: Pathways from the Periphery?” in Ronaldo Munck and Denis O'Hearn (eds.) *Critical Development Theory: Contributions to a New Paradigm* (London: Zed Books, 1999) at 115 & 122.

¹⁷ Stiglitz, *Globalization and Its Discontents* supra note 10 at 53; Muthucumaraswamy Sornarajah, “The Clash of Globalisations and the International Law on Foreign Investment” (The Simon Reisman Lecture in International Trade Policy, delivered at the Centre for Trade Policy and Law, Ottawa, 12 September, 2002), (2003) 12:3 Canadian Foreign Policy Journal at 6 [The Clash of Globalisations].

¹⁸ Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization and Emancipation* (London: Butterworths, 2002) at 441.

¹⁹ Yujiro Hayami, “From the Washington Consensus to the Post-Washington Consensus: Retrospect and Prospect” (2003) 20: 2 Asian Development Review at 54 [From the Washington Consensus to the Post-

of the emphasis placed on a particular economic order as being essential for attaining development. In this case, neo-liberalism symbolized a “re-emergence of conservatism” as *the* way of knowing and solving the World’s economic problems.²⁰ Even non-Third World scholars problematize this ideological stance and its “highly selective” Western origins.²¹ In 2002, for example, Santos opined that:

In the last twenty years, neo-liberal hegemonic globalization and the demise of the socialist bloc have in different ways interrupted both the Western and the non-Western legal and political histories, thus creating an institutional void that is being globally filled by a specific version of Western politics – conservatism. Both legal reformism and social revolution have been discredited as well as other legal and political forms existing outside Western Europe and North Atlantic. Moreover, any attempt at articulating alternatives to the hegemonic consensus has been swiftly and efficiently suppressed.²²

This ideology rose to prominence towards the end of the twentieth century during the global recession and at a time when oil-rich developing countries were unable to access loans from private lending banks and official development assistance from capital-rich countries in the West.²³ This was also the time when the interest rates on money owed by Third World countries had sky-rocketed, making it difficult for them to borrow “new money”.²⁴ Also, commodity prices had drastically reduced, meaning that developing countries were unable to depend on export earnings from their extractive industries.²⁵

Washington Consensus]; Theodore H. Moran, *Harnessing Foreign Direct Investment: Policies for Developed and Developing Countries* (Hopkins Fulfillment Services, 2006) at 1 and 2.

²⁰ Santos argues, for example, that neo-liberalism resulted in “an ideological tide against the agenda of a gradually expanding inclusion in the social contract”. See Santos, *Toward a New Legal Common Sense* supra note 18 at 441.

²¹ Ibid. at 445.

²² Ibid. at 445.

²³ M. Sornarajah, *The International Law on Foreign Investment* 2d ed. (Cambridge University Press, 2004) at 2; Shihata, *Multilateral Investment Guarantee Agency and Foreign Investment* supra note 4 at 2.

²⁴ It has been reported that by 1985, the debt of developing countries exceeded US \$ 950 billion and by 1986, it was around one trillion US dollars. Ibid. at 1 - 3.

²⁵ Ibid. at 2 & 3.

The conservative political regimes of the United States President, Ronald Reagan, and the United Kingdom Prime Minister, Margaret Thatcher, became the mouth-pieces through which the neo-liberal mantra would be preached.²⁶ Thatcher and Reagan were against big government and pushed for free markets characterized with deregulation, reduction in taxes, decreasing social expenditure and removing trade barriers.²⁷ Latin America was used as an example of an economic crisis that was the result of inefficient government enterprises, protectionist investment policies and a poor monetary policy that had resulted in inflation.²⁸ In contrast, some Asian states such as China, Malaysia and Singapore were celebrated for their successes resulting from their open-door trade and investment policies.²⁹ The IMF and World Bank were the structures through which neo-liberal conditions would be attached to the development aid given to Third World countries.³⁰ As the World Bank's General Counsel argued in 1988:

It is also increasingly recognized that foreign direct investment has an important role to play in any effective strategy to address the present predicament of developing countries in view of its considerable potential for promoting sustained growth and employment and reducing vulnerability to future deterioration in economic conditions. The ongoing practice of converting external debt into equity participation in the capital of indebted enterprises could be complemented by new flows of non-debt creating equity which contributes to development without aggravating the already excessive debt burden of the countries concerned.³¹

These views set the stage for FDI to play a more central role in the economic growth and development of Third World countries. In the 1980s and early 1990s the IMF and World

²⁶ Stiglitz, *Globalization and Its Discontents* supra note 10 at 13; Jean-Germain Gros & Olga Prokopovych, "When Reality Contradicts Rhetoric: World Bank Lending Practices in Developing Countries in Historical, Theoretical and Empirical Perspectives" <<http://www.codesria.org/Links/Publications/monographs/Gros.pdf>> at 22 [When Reality Contradicts Rhetoric].

²⁷ Gros & Prokopovych, *Ibid.* at 23.

²⁸ Stiglitz, *Globalization and Its Discontents* supra note 10 at 53.

²⁹ M. Sornarajah, *The International Law on Foreign Investment* supra note 23 at 2.

³⁰ Stiglitz, *Globalization and Its Discontents* supra note 10 at 13; Sornarajah, *Ibid.* at 52 & 53.

³¹ Shihata, *Multilateral Investment Guarantee Agency and Foreign Investment* supra note 4 at 3.

Bank introduced what was known as Structural Adjustment Programmes (SAPs) in most of Africa.³² SAPs were introduced under the IMF/World Bank Economic Recovery Programme to deal with the balance of payments crisis, but later extended to various other sectors, including the electricity sector.³³ The SAPs had a number of conditions: reduction in government spending, privatization of state-owned enterprises, deregulation of financial markets, liberalization of trade policies and cost-recovery of government-provided services.³⁴ Between 1988 and 1993, there were approximately 2,300 privatization transactions in over 60 developing countries.³⁵ The World Bank acknowledged that in the short term, SAPs would negatively impact on some Third World peoples but maintained that this negative impact would be eliminated in the long run.³⁶ The introduction of SAPs coincided with a time when resistance was hard because there were few, if any, viable alternatives, especially as developing countries needed the money to finance their budgets and pay off debts (to these same IFIs) that had accumulated in the 1970s.³⁷

In a bid to attract foreign investment, Third World countries also entered into more bilateral investment treaties (BITs) with their developed-country counterparts.³⁸ The first BIT was

³² Rebecca Ghanadan, "Connected Geographies and Struggles over Access: Electricity Commercialisation in Tanzania" in McDonald (ed.) *Electric Capitalism: Recolonising Africa on the Power Grid* supra note 12 at 402 & 406.

³³ Ibid. at 406; Sornarajah, "The Clash of Globalisations and the International Law on Foreign Investment" supra note 17 at 5.

³⁴ Gros & Prokopovych, "When Reality Contradicts Rhetoric" supra note 26 at 20 & 21.

³⁵ Robert Prichard and Douglas Webb, "Privatization and Private Provision of Infrastructure" in Robert Prichard (ed.), *Economic Development, Foreign Investment and the Law: Issues of Private Sector Involvement, Foreign Investment and the Rule of Law in a New Era* (Kluwer Law International and International Bar Association, 1996) at 67.

³⁶ Gros & Prokopovych, "When Reality Contradicts Rhetoric" supra note 26 at 26.

³⁷ Ibid. at 17 & 28.

³⁸ Sornarajah, *The International Law on Foreign Investment* supra note 23 at 2.

concluded between West Germany and Pakistan in 1959.³⁹ There was a moderate increase in BITs in the next decades with not more than approximately twenty BITs per year until the mid-1980s.⁴⁰ However, by the late 1980s and throughout the 1990s, the treaties had increased to an average of more than one hundred new treaties per year.⁴¹ BITs facilitate the liberalization of rules relating to entry of foreign capital into host states and the protection of the proprietary interests of investors.⁴² These agreements will normally include provisions requiring that:⁴³

- investors should be given the “most favoured nation treatment”, and that host states should not interfere with investments arbitrarily;
- investment property should not be expropriated unless the expropriation is done indiscriminately and for a public purpose;
- where property is expropriated, there should be full and adequate compensation;
- the host state should provide for free transfer of investment capital; and
- disputes between the host state and investors should be resolved through international arbitration by bodies such as the ICSID and the International Chamber of Commerce (ICC).

As the above provisions illustrate, at the centre of BITs is the guarded protection of the proprietary interests of foreign investors. In fact, to ensure that this protection was standardized and better assured, there was a shift from the position in early BITs which

³⁹ See *Treaty for Promotion and Protection of Investment* No. 25, 1959, West Germany-Pakistan 457 U.N.T.S. 23; Jeswald W. Salacuse, “BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries” (1990) 24 *The International Lawyer* at 655.

⁴⁰ Zachary Elkins, Andrew T. Guzman & Beth A. Simmons, “Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960 - 2000” (2006) 60 *International Organization* at 814.

⁴¹ *Ibid.* at 814.

⁴² Sornarajah, *The International Law on Foreign Investment* supra note 23 at 2.

⁴³ Paul E. Comeaux & N. Stephan Kinsella, *Protecting Foreign Investment Under International Law: Legal Aspects of Political Risk* (Oceana Publications Inc., 1997) at 103.

contained disparate provisions to the latter treaties which “not only contained uniform statements of standards but also had some definite aims”, particularly in as far as they emphasized liberalization and the protection of foreign investment.⁴⁴

Investors have also often concluded foreign investment contracts with host states. The contracts contain “internationalization clauses” that have the effect of avoiding the application of national law to investments by subjecting them instead to international law.⁴⁵ As such, internationalization clauses provide that in the event of a dispute, the contracting parties will appear before an international tribunal for dispute resolution instead of going to a local court in the host state.⁴⁶

The expansion and sustenance of neo-liberalism relies not simply on establishing open-door policies, but more importantly, on ensuring that the liberalized markets are accompanied with multiple layers of protection for foreign investment at the national and international level. Two more international safeguards will be discussed here before turning to the domestication of investor protection. First, is the World Bank’s establishment of the ICSID. In 1966, ICSID was established under the Convention for the Settlement of Investment Disputes between States and Nationals of Other States (the Convention).⁴⁷ The purpose of the Convention is “to remove major impediments to the free international flows of private investment posed by non-commercial risks and the absence of specialized international

⁴⁴ Sornarajah, “A law for need or a law for greed?” supra note 6 at 337 & 338.

⁴⁵ Piero Bernardini, “Development Agreements with Host Governments” in Prichard (ed.), *Economic Development, Foreign Investment and the Law* supra note 35 at 170.

⁴⁶ Ibid.

⁴⁷ International Centre for the Settlement of Investment Disputes (ICSID), “About ICSID” online: ICSID <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID_Home>.

methods for investment dispute settlement.”⁴⁸ ICSID thus serves as a tribunal for resolving legal disputes between private investors and host states.⁴⁹ It settles disputes that arise under BITs and private investment contracts. Its awards are binding on the parties to the dispute and cannot be set aside by the national courts of any of the contracting parties.⁵⁰ The only people with participatory privileges in ICSID cases are states, private investors and to a limited extent, NGOs, which can participate as *amici curiae*.⁵¹ Non-institutionalized groups such as Affected Communities have no *locus standi*.⁵² Through ICSID, we are able to trace some of the parallels that neo-liberal ideology draws between FDI and the economic development of Third World countries. Sornarajah submits, for example, that “The ICSID Convention justifies the setting up of a dedicated arbitration system for investment disputes by linking the need for international cooperation for economic development with the role of private international investment”.⁵³

The second buffer created by the World Bank to protect foreign private capital is the MIGA. In 1985, the Bank commissioned a study on energy generation in developing countries.⁵⁴ The study, which interviewed 190 executives in 40 energy companies in the United States, Europe and Japan, concluded that private investors preferred to invest in “safe”

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ International Centre for Settlement of Investment Disputes (ICSID), “About ICSID: Dispute Settlement Facilities” online: ICSID <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=RightFrame&FromPage=Dispute%20Settlement%20Facilities&pageName=Disp_settl_facilities>.

⁵¹ Literally translated, this means that NGOs can only participate as “friends of the court”. They can provide the tribunal with useful information relating to the case before it but are not treated as parties to the suit. See Ibironke T. Odumosu, “Locating Third World Resistance in the International Law on Foreign Investment” (2007) 9 International Community Law Review at 429 [Locating Third World Resistance].

⁵² For a detailed discussion of the treatment of Third World peoples (as opposed to states) in the ICSID proceedings, see generally Odumosu, Ibid. at 427 – 444.

⁵³ Sornarajah, “A law for need or a law for greed?” supra note 6 at 340 & 341.

⁵⁴ See Booz, Allen and Hamilton, Inc. *Energy Project Generation in Lesser Developed Countries* (1985) in Shihata, *Multilateral Investment Guarantee Agency and Foreign Investment* supra note 4 at 16 & 27.

industrialized countries instead of developing countries because they were concerned about the political risks associated with investing in the latter.⁵⁵ The political risks cited included expropriations of private property, unstable contract provisions and politicization of energy development.⁵⁶ Partly in response to this study, and in recognition of the need to increase foreign investment inflows through the provision of guarantees against political risk, the MIGA was created in 1988.⁵⁷ The World Bank pointed out that the non-commercial risk guarantee to be provided by MIGA would reassure investors and be instrumental in increasing private capital inflows that were essential to the development of Third World countries.⁵⁸ It further argued that MIGA's establishment would put to rest investors' concerns regarding political risks, meaning that expected returns on investments would be lowered (as a result of reduction in risk exposure) and economic growth would be realized.⁵⁹ MIGA provides insurance against five types of losses: currency transfer restrictions, expropriation, war and civil disturbance, breach of contract, and failure of sovereigns to honour their financial obligations.⁶⁰

What is the impact of this robust international investment protection network on Affected Communities? As stated above, the importance of documenting the various protections serves a number of purposes. For now, one can at least appreciate the disparity between the framework protecting investors and that governing the protection of these communities. First, as some Third World scholars have argued, international investment agreements and

⁵⁵ Shihata, *Ibid.* at 16.

⁵⁶ *Ibid.* at 16.

⁵⁷ For a more in-depth discussion on MIGA, see generally *Ibid.* ; MIGA, "About MIGA" online: Multilateral Investment Guarantee Agency <http://www.miga.org/about/index_sv.cfm?stid=1736>.

⁵⁸ Shihata, *Ibid.* at 17.

⁵⁹ *Ibid.* at 17; MIGA, "About MIGA" *supra* note 57.

⁶⁰ MIGA, "Guarantees Overview" online: Multilateral Investment Guarantee Agency <http://www.miga.org/guarantees/index_sv.cfm>.

treaties (such as BITs) result in an enormous expansion of the rights of foreign investors while at the same time correspondingly reduce the rights of host states to control the activities of the investors.⁶¹ In effect, these agreements usurp the policy-making powers of states and in the process, invariably affect the environmental, social and human rights of the Affected Communities that the state is supposed to protect.⁶² The second disparity relates to the accountability/enforcement mechanisms available to foreign investors vis-à-vis those available to the communities. ICSID has the power to issue binding decisions similar to those of a court of law.⁶³ Conversely, the World Bank Inspection Panel to which Affected Communities submit their requests issues findings that are not binding on the parties in question.⁶⁴ Lastly, we have a policy on involuntary resettlement that the Bank maintains is not a legally binding instrument between itself and Affected Communities.⁶⁵ On the other hand, there are guarantees, which assure investors that losses relating to political risks will be recovered, harmful acts by host states will be deterred and investment disputes with host states resolved in an investor-friendly environment.⁶⁶

Third World countries often face a dilemma. They may insist on their sovereign right to treat investors as they deem fit. However, they also recognize that they need this investment

⁶¹ Muthucumaraswamy Sornarajah, "Economic Neoliberalism and the International Law on Foreign Investment" in Anthony Anghie, Bhupinder Chimni, Karin Mickelson and Obiora Okafor (eds.) *The Third World and International Order: Law, Politics and Globalization* (Martinus Nijhoff Publishers, 2003) at 173.

⁶² See generally Leubuscher, "The Environmental, Social and Human Rights Impacts of Foreign Investment Contracts" *supra* note 7.

⁶³ Jan Paulsson, "Dispute Resolution" in Prichard (ed.), *Economic Development, Foreign Investment and the Law* *supra* note 35 at 218.

⁶⁴ See Chapter Four for a detailed discussion of the operation of the World Bank Inspection Panel and the legal implications of its findings.

⁶⁵ See discussion in Chapter Three Part VII.

⁶⁶ MIGA, "Guarantees: Overview" *supra* note 60.

to facilitate economic development at home.⁶⁷ This explains why, for example, they conclude BITs and liberalize their economies.⁶⁸ As one author concludes, it “was not only because the economic philosophy favoured the liberalisation of foreign investment regimes, but also because there was competition for the limited amount of foreign investment that could flow into those states.”⁶⁹ The attraction of foreign investment comes with a huge price tag. It demands the establishment of “market-oriented legal systems”,⁷⁰ which place restrictions on the powers of the state and limit the possibilities of including other stakeholders.

If Third World countries are not independently willing to make these domestic legal adjustments, then IFIs dictate the necessary adjustments as conditions to aid.⁷¹ These international institutions determine the broad policy governance framework binding Third World states.⁷² In fact, TWAIL scholars opine that IFIs are the sites at which domestic laws of Third World states are authored and controlled, leaving the states only with powers to implement already manufactured laws.⁷³ In the discussion that follows, we examine the manner in which the neo-liberal agenda has permeated the international to become part and parcel of the domestic. At the centre of this permeation and domestication is the powerful tool of law.

⁶⁷ Sornarajah, *The International Law on Foreign Investment* supra note 23 at 24.

⁶⁸ Ibid.

⁶⁹ Ibid. at 25.

⁷⁰ Robert Pritchard, “Introduction: The Contemporary Challenges of Economic Development” in Pritchard (ed.), *Economic Development, Foreign Investment and the Law* supra note 35 at 11. For a discussion on the importance of legal sector reform in facilitating the attraction of foreign private investment in developing countries, see generally Douglas Webb, “Legal System Reform and Private Sector Development in Developing Countries” in Pritchard (ed.), *Economic Development, Foreign Investment and the Law* supra note 35 at 45 – 65.

⁷¹ Obiora Chinedu Okafor, “Re-Conceiving ‘Third World’ Legitimate Governance Struggles in Our Time: Emergent Imperatives for Rights Activism” (2000) 6 Buff. Hum. Rts. L. Review at 12.

⁷² Ibid. at 18.

⁷³ Ibid. at 2 & 10.

III. Privatization: Laying the Foundation for Protection of Investment Interests

The privatization process that was engineered by the World Bank and the IMF through SAPs in the late 1980s and early 1990s was formalized in Uganda in 1993 with the enactment of *The Public Enterprises Reform and Divestiture Statute* (now the *Public Enterprises Reform and Divestiture Act* – PERD Act).⁷⁴ Under the PERD Act, divestment of public enterprises can take a number of forms: offering all or part of the shares of an enterprise; arranging management or employee buyouts; signing leases or concession contracts; converting long-term debt into equity; and offering employee stock ownership plans.⁷⁵ The PERD Act divided state-owned enterprises into four classes:⁷⁶ those that would continue to be fully owned by government (Class I),⁷⁷ those in which the state would retain majority shareholding (Class II),⁷⁸ enterprises that would be totally divested (Class III)⁷⁹ and those that would be liquidated (Class IV).⁸⁰ UEB, which was then the state-owned monopoly generating, distributing and transmitting electricity, was originally categorized as a Class I entity (i.e. one to be retained fully by government).⁸¹ Later, however, it was transferred to Class II (enterprises in which the state retains majority shareholding).⁸²

⁷⁴ In 2002, the Statute was converted into an Act which incorporated amendments that had existed between 1993 and 2002. See *The Public Enterprises Reform and Divestiture Act* 1993, Cap 98 Laws of Uganda [PERD Act].

⁷⁵ Section 1 (g) and Paragraph 7 (1) of the Second Schedule, PERD Act.

⁷⁶ Section 22 (1) PERD Act.

⁷⁷ Section 22 (1) (a) PERD Act.

⁷⁸ Section 22 (1) (b) PERD Act.

⁷⁹ Section 22 (1) (c) PERD Act.

⁸⁰ Section 22 (1) (d) PERD Act.

⁸¹ See *Public Enterprises and Divestiture Statute* 1993, First Schedule.

⁸² Section 44 (1) of the PERD Act gives the responsible Minister the power to amend the Act by either deleting an enterprise or inserting a new enterprise and the power to transfer an enterprise from one class to another.

Many commentators agree that by the mid-1990s, the UEB was performing poorly.⁸³ The number of electricity customers had dropped, many government institutions were not honouring their electricity bills, the billing system was inefficient, there were frequent and highly costly system losses, and there was little commitment to internal change by UEB's management.⁸⁴ Privatization was thus promoted as serving a number of purposes. By engaging an efficient private sector, which operated on business principles, electricity losses – both technical and non-technical – would be significantly reduced.⁸⁵ The private sector was also expected to do a better job at debt collection.⁸⁶ In addition, private investors would provide the much needed capital for expanding installed capacity and increasing connections to the grid; something that government, with its limited resources, could not afford.⁸⁷ Lastly, injecting private capital would enable government finances to be freed up to fund other public expenditures such as education, health and agriculture.⁸⁸ In 1999, in the spirit of the wider privatization process,⁸⁹ the cabinet of Uganda approved the Power Sector

⁸³ Christopher Gore, "Electricity and privatisation in Uganda: The origins of the crisis and problems with the response" in McDonald (ed.) *Electric Capitalism: Recolonising Africa on the Power Grid* supra note 12 at 381 [Electricity and privatisation in Uganda]; National Association of Professional Environmentalists (NAPE), "A Spot Check on Compliance and Performance of World Bank and African Development Bank in Uganda's Energy Sector: Success or Failure Story?" (Kampala, Uganda: NAPE & FoE Uganda, 2009) at 8 [A Spot Check on Compliance and Performance].

⁸⁴ Gore, *Ibid.*

⁸⁵ It has been reported, for example, that between 1986 and 1995, of the generated electricity dispatched, approximately 20 per cent was lost through technical inefficiencies and another 10 per cent through non-technical means. See John Mugenyi, "Uganda" in M R Bhagavan (ed.) *Reforming the Power Sector in Africa* (London & New York: Zed Books Limited, 1999) at 150 & 151. Also, between 1995 and 2001, system losses were at an average of about 34 per cent. See Simon Peter Engorait, "Power Sector Reforms in Uganda: Meeting the Challenge of Increased Private Sector Investments and Increased Electricity Access Among the Poor" in Edward Marandu and Dorcas Kayo, *The Regulation of the Power Sector in Africa* (London: Zed Books, 2004) at 304 [Power Sector Reforms in Uganda].

⁸⁶ Millions of dollars of revenues were lost because UEB was inefficient in collecting payments. See Mugenyi, "Uganda" *Ibid.* at 167.

⁸⁷ *Ibid.* at 151.

⁸⁸ *Ibid.* at 168.

⁸⁹ For a discussion of the shift from public enterprises to privatization in Uganda, see generally Goeffrey B. Tukahebwa, "Privatization as a development policy" in Holger Bernt Hansen & Michael Twaddle (eds.), *Developing Uganda* (Kampala: Fountain Publishers, 1998) at 59 – 72.

Reform and Privatization Strategy, following which the *Electricity Act* (the Act) of 1999 was enacted.⁹⁰

The Act provided that the Minister responsible for electricity could, under the PERD Act, cause the UEB to be succeeded by a company or companies incorporated under the *Companies Act of Uganda*.⁹¹ To this end, it provided for three main licenses: a generation license,⁹² a transmission license⁹³ and a distribution license.⁹⁴ In 2001, UEB was unbundled into the Uganda Electricity Generation Company Limited (UEGCL), Uganda Electricity Distribution Company Limited (UEDCL) and UETCL.⁹⁵ The generation and distribution functions would be leased out under long-term concessions while transmission would remain publicly owned.⁹⁶ In November 2002, UEGCL was divested to Eskom Enterprises (a foreign-controlled company) under a concession agreement.⁹⁷ Later, in May 2004, UEDCL was also divested through a concession to Umeme Uganda Limited (another foreign-controlled company).⁹⁸

⁹⁰ See Ministry of Energy & Mineral Development, *The Energy Policy for Uganda* (September, 2002) online: Ministry of Energy & Mineral Development<<http://www.energyandminerals.go.ug/pdf/EnergyPolicy.pdf>> at 13 [2002 Energy Policy].

⁹¹ *The Electricity Act* 1999 Section 126.

⁹² *Ibid.* section 52.

⁹³ *Ibid.* section 56.

⁹⁴ *Ibid.* section 57.

⁹⁵ Ministry of Energy & Mineral Development, 2002 *Energy Policy* supra note 90 at 13; Gore, “Electricity and privatisation in Uganda” supra note 83 at 362.

⁹⁶ Ministry of Energy & Mineral Development, *Ibid.* at 13. See also Section 123 (3) of the Electricity Act which is to the effect that only the UEB (which was later renamed UETCL) can be issued with a transmission license. *Electricity Act* supra note 91.

⁹⁷ Government of Uganda, “Privatization and Utility Sector Reform Project: Current List of Divested Public Enterprises and other Companies where Government of Uganda had an Interest” online: Uganda Government Public Enterprise Reform and Divestiture Program <<http://www.perds.go.ug/pdf/List%20Of%20Divested%20PEs.pdf?phpMyAdmin=1e35273f8ea8bb99e96526a6e65654c5>> [Privatization and Utility Sector Reform Project].

⁹⁸ *Ibid.* While Umeme is the main distributor, others such as Ferdsult Engineering Services Limited, Kilembe Investments Limited and West Nile Rural Electrification Company have also obtained concessions, some of which are off-grid. Interview of Engineer Dr. Frank Sebbowa (Chief Executive Officer, Electricity Regulatory Authority) (3 December 2009) at Electricity Regulatory Authority Offices, Kampala Uganda.

In 2002, the Government compiled a comprehensive energy policy.⁹⁹ This was the first policy of its kind in Uganda. Before then, energy sector reforms in the country were guided by annual ministerial statements found in national budgets.¹⁰⁰ The 2002 Energy Policy explored the potential of various energy resources in Uganda¹⁰¹ and identified both the opportunities that these resources presented and the challenges that would be faced in realizing their potential. Central to the policy was a desire to meet the energy needs of Uganda's population in an environmentally sustainable manner.¹⁰² The policy also noted that, as was the case in other parts of the world, it was pertinent that the government provide a conducive investment climate to attract private finance into the sector.¹⁰³

In 2007, the Ministry of Energy and Mineral Development published another energy policy.¹⁰⁴ This latter policy focussed on exploring the potential of renewable energy resources including large and mini hydro, solar, geothermal, biomass and wind.¹⁰⁵ Particularly, it aimed at diversifying energy supply resources and increasing the use of modern renewable energy from 4% to 61% of the total energy consumption by 2017.¹⁰⁶ The impetus for this new policy was constituted of several factors: a recognition that renewable energy technologies had become commercially viable, the unprecedented electricity supply deficit on the national grid, escalating oil prices on the international market, extremely low

⁹⁹ Ministry of Energy & Mineral Development, *2002 Energy Policy* supra note 90 at 3.

¹⁰⁰ Ibid.

¹⁰¹ These include hydropower, petroleum, other renewable resources and atomic energy.

¹⁰² Ministry of Energy & Mineral Development, *2002 Energy Policy* supra note 90 at 5.

¹⁰³ Ibid. at 4, 10 & 36.

¹⁰⁴ Ministry of Energy & Mineral Development, *The Renewable Energy Policy for Uganda* (2007) online: Ministry of Energy & Mineral Development <<http://www.energyandminerals.go.ug/pdf/RENEWABLE%20ENERGY%20POLIC9-11-07.pdf>> [2007 Renewable Energy Policy].

¹⁰⁵ Ibid.

¹⁰⁶ Ibid. at 7.

levels of rural electrification and a desire by the government to fulfil its commitment regarding reduction of greenhouse gas emissions under the Kyoto Protocol.¹⁰⁷ It was hoped that such a diversification would also allow for the decentralization of energy supply and facilitate equitable regional distribution of access to electricity – a goal that could not be achieved by pursuing solely central grid-based solutions.¹⁰⁸

To achieve its ambitious objectives under the 2002 and 2007 Energy Policies, the Government intended to rely significantly on the private sector. In the 2002 Energy Policy, for example, the Ministry expected the private sector to fund 68% of the total US\$1.84 billion needed to revamp the sector, with the remaining 32% being provided by public-sector institutions such as the Government and development partners.¹⁰⁹ In its 2007 policy, the Ministry increased its reliance on the private sector by expecting it to fund 86% of the US\$3.5 billion budget.¹¹⁰ These aspirations also found support in the fact that the Government had liberalized its economy by allowing for the free inflow and outflow of capital, 100% foreign ownership of investment and market-driven exchange rates.¹¹¹

The groundwork had been laid. Uganda's energy sector would now depend significantly on private sector investments. A number of observations can be made here. First, as one scholar notes, there was a close and immediate relationship between privatization of Uganda's energy sector and the choice of the Bujagali Project as the preferred response to

¹⁰⁷ Ibid. at 11 & 12.

¹⁰⁸ Ibid. at 27.

¹⁰⁹ Ministry of Energy & Mineral Development, *2002 Energy Policy* supra note 90 at 54.

¹¹⁰ Ministry of Energy & Mineral Development, *2007 Renewable Energy Policy* supra note 104 at 24.

¹¹¹ Uganda Investment Authority, "Why Uganda: Uganda – A Distinctly Pro-Business Climate" online: Uganda Investment Authority < http://www.ugandainvest.com/uia.php?uhpl=why_uganda&&uhpl1=Why%20Uganda>.

the country's electricity crisis.¹¹² Privatization, Gore argues, was not intended solely to clean up UEB's inefficiency, but also to facilitate the private sector in constructing the generation network and distributing electricity.¹¹³ But of what significance to the present study is the act of privatization? Asked another way, how does privatization explain the marginalization of Affected Communities? The over-reliance on the private sector as the 'deliverer' of electricity and development demands huge compensation and rewards for those involved in the delivery. It demands a protection of private investment at the expense of other costs such as resettlement and rehabilitation, which are treated as costs external to – not integral to – the investment. In the end, it requires or necessitates that the law is commercialized and redesigned for private benefit while the interests of other members of the public (such as Affected Communities) are sidelined. As another example of this private capture of the law and its institutions, the next Part discusses another layer of investment protection: the establishment of the ERA.

IV. Institutionalizing the Electricity Sector

The success of SAPs was short-lived. By the late 1990s, these programmes had been condemned for various reasons. The reduction in government spending denied many in the Third World access to basics such as healthcare and education.¹¹⁴ Also, the retrenchments that were part of the privatization of state-owned enterprises resulted into widespread joblessness.¹¹⁵ In Africa, SAPs failed to achieve economic growth or lower poverty

¹¹² Gore, "Electricity and privatisation in Uganda" *supra* note 83 at 364.

¹¹³ *Ibid.* at 382.

¹¹⁴ Gros & Prokopovych, "When Reality Contradicts Rhetoric" *supra* note 26 at 28.

¹¹⁵ *Ibid.* at 29.

levels.¹¹⁶ While they had registered initial success in Latin America by enabling countries to recover from the debt crisis, these countries were not able to sustain the success long enough to translate it into economic growth.¹¹⁷ As a final blow, the success stories of the Asian markets were reversed when the countries were plunged into a financial crisis in the late 1990s.¹¹⁸ The Washington Consensus¹¹⁹ was thus forced to adjust. The Bank, for example, publicly admitted that states were important in facilitating and supervising the operations of market actors.¹²⁰ The Consensus holders also acknowledged the need for institutional structures to balance the role of the market and the needs of the public.¹²¹ For investments in infrastructure, the institutions took the form of regulatory authorities.

Regulatory authorities serve two purposes. On the one hand, they are intended to protect consumers of services offered by natural monopolies (such as the electricity sector) from anti-competitive behaviour such as high tariffs and underperformance.¹²² To this end, the authorities encourage the provision of efficient, low cost and reliable services.¹²³ On the other hand, regulatory authorities serve to protect investment interests and to improve the investment climate by depoliticising tariff-setting, protecting private property rights and

¹¹⁶ Hayami, “From the Washington Consensus to the Post-Washington Consensus” supra note 19 at 41.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ The Washington Consensus is a phrase commonly used to refer to the consensus reached among economists of the World Bank, the IMF and the US Treasury Department about the various – largely neoliberal policies – that should be applied by developing countries to achieve economic growth. See, for example, Ibid. 54; Theodore H. Moran *Harnessing Foreign Direct Investment: Policies for Developed and Developing Countries* supra note 19 at 1 & 2.

¹²⁰ Gros & Prokopovych, “When Reality Contradicts Rhetoric” supra note 26 at 34.

¹²¹ See generally Hayami, “From the Washington Consensus to the Post-Washington Consensus” supra note 19 at 40 – 65.

¹²² Colin Kirkpatrick, David Parker and Yin-Fang Zhang “Foreign Direct Investment in Infrastructure in Developing Countries: Does Regulation Make a Difference?”(UNCTAD, 2006) at 155.

¹²³ Ibid. at 152; Anton Eberhard, “Infrastructure Regulation in Developing Countries: An Exploration of Hybrid and Transitional Models” Public-Private Infrastructure Advisory Facility Working Paper No. 4 <<http://www-wds.worldbank.org>> at 1.

increasing transparency in the making of decisions regarding operations of the sector in question.¹²⁴ For the authorities to operate effectively, they should be independent,¹²⁵ technically competent, transparent, and have a clear mandate.¹²⁶

In Uganda, the establishment of ERA was part and parcel of the process of privatizing the electricity sector. In other words, the *Electricity Act*, which created a space for the unbundling and privatization of the sector also provided for the establishment of ERA.¹²⁷

ERA is tasked *inter alia* with:¹²⁸

- receiving, processing and approving licenses for generation, transmission and distribution, including prescribing conditions for the use of the licenses;
- establishing tariff structures and approving rates of charges for electricity services provided by transmission and distribution companies;
- reviewing the organization of transmission, distribution and generation services to ensure that it facilitates the operation and supply of electricity;
- developing and enforcing performance standards for service operators;
- preparing industry reports and gathering information from various service operators; and
- advising the Minister responsible for energy on the need for electricity sector projects.

¹²⁴ Kirkpatrick et. al., Ibid. at 152; Eberhard, Ibid. at 1.

¹²⁵ Independence does not relate only to freedom from political interference. It also relates to independence from the persons being regulated and from customers. Sheoli Pargal, "Regulation and private sector investment in infrastructure: Evidence from Latin America" World Bank Policy Research Working Paper 3037, April 2003 at 9.

¹²⁶ Ibid. at 8.

¹²⁷ *The Electricity Act* supra note 91 section 5 (1).

¹²⁸ Ibid. section 11.

Even though ERA's functions entail representing the interests of both service providers and consumers, its primary purpose – as is the case with most other regulatory authorities elsewhere – is to act as a platform for privatization.¹²⁹ The establishment of ERA at the time of privatizing the country's electricity sector was intended primarily to ensure the smooth and efficient transition from a publicly operated sector to one which would allow private actors to participate with limited political interference. Consequently, while ERA's mandate includes a requirement that it act as the gatekeeper for consumer protection,¹³⁰ its core responsibility is in facilitating the establishment of a competitive, transparent and efficient environment that will attract investment and sustain the protection of private interests.¹³¹

As argued in Chapter Two, development has been institutionalized. By this, I mean that the concept of development has been captured by economically dominant parties to promote their interests. For example, mainstream approaches to development place emphasis on the role of legal structural institutions as central to the process of achieving a “developed” status.¹³² ERA is one form of such an institution. It facilitates development – or rather, facilitates the type of development touted by IFIs – by creating an additional assurance to (foreign) private investors that their operations will not be frustrated by political interference. To meet this objective, ERA is designed to be independent from other authorities and persons in the performance of its functions and duties.¹³³ It is also – like those it is meant to protect – established as a body corporate with the rights and obligations

¹²⁹ Prichard and Webb, “Privatization and Private Provision of Infrastructure” supra note 35 at 80.

¹³⁰ For example, ERA attaches conditions to the licenses it issues to service providers, it ensures that tariff charges are fair and that there is reliable electricity supply. See, for example, *The Electricity Act* supra note 91 section 12 (2) (c).

¹³¹ Ibid. section 12.

¹³² See discussion in Chapter Two Part IV (a) (i).

¹³³ *The Electricity Act* supra note 91 section 17.

that come with the acquisition of legal title.¹³⁴ In other words, it understands and speaks the language of doing business.

The establishment of ERA, the privatization of the electricity sector and compilation of energy policies that rely significantly on private capital, do not perhaps, on their own, sufficiently explain why issues relating to Affected Communities have been overlooked. They do, however, map out areas where the country's development aspirations have been placed and how this produces discrepancies between the channels of protection carved out for investors vis-à-vis those in place for these communities. To better appreciate the manner in which the balance tips in favour of investors, it is important to analyze another layer of protection: the private agreements that are concluded between investors and government agencies.

V. The Impact of Foreign Investment Contracts: An Analysis of Power Purchase Agreements

International investment law guards jealously the proprietary interests of foreign investors.¹³⁵ It has reconstructed law universally to treat the right to private property as an absolute right so that any slight infringement on that right creates potential liability for the person infringing – normally the host state.¹³⁶ The domestic version of this right is often contained in contracts concluded between foreign investors and host states including Power Purchase Agreements (PPAs) or Concession Agreements (in the energy sector) and

¹³⁴ Ibid. section 5 (2).

¹³⁵ Sornarajah, "The Clash of Globalisations" supra note 17 at 3.

¹³⁶ Ibid. at 8 & 11.

Production Sharing Agreements (in extractive industries such as oil, gas and mining).¹³⁷

Using these agreements, multinational corporations are empowered to drive the legal system that governs their relations with states on the one hand, and restrict the ability of states to protect the social, environmental and human rights of persons affected by the corporations' activities on the other hand.¹³⁸ In effect, the agreements constitute another form of "policy making documents" that transcend the private relationship between the contracting parties by impacting on public policy issues.¹³⁹

Even though Third World states act as sovereigns when entering into these agreements, in truth, the bargaining power between the states and the private investors is unequal for a number of reasons.¹⁴⁰ First, economically powerful states often lobby for the interests of their nationals by pushing Third World countries to sign and uphold "agreements that [are] vastly unfair" to the latter.¹⁴¹ Second, the actions of powerful nations have been endorsed

¹³⁷ Lorenzo Cotula, "Strengthening Citizens' Oversight of Foreign Investment: Investment Law and Sustainable Development" (2007) Sustainable Markets Investment Briefings, Briefing 4 online: International Institute for Environment and Development <<http://pubs.iied.org/pdfs/17015IIED.pdf>> at 1 [Strengthening Citizens' Oversight of Foreign Investment]; Leubuscher, "The Environmental, Social and Human Rights Impacts of Foreign Investment Contracts" *supra* note 7 at 1.

¹³⁸ For a discussion on how these agreements are detrimental to the protection of the environment in developing countries, see generally, Kyla Tienhaara, "Mineral Investment and the Regulation of the Environment in Developing Countries: Lessons from Ghana" (2006) 6 *International Environmental Agreements* at 371 – 394 [Mineral Investment and the Regulation of the Environment in Developing Countries]. See also Cotula, *Ibid.* at 4; Leubuscher, *Ibid.* at 1.

¹³⁹ Cotula argues, for example, that the economic equilibrium clauses contained in agreements entered into between foreign investors and developing countries have the impact of limiting the extent to which host states can adopt new regulation to raise social and environmental standards because these clauses impose high penalties on changes in law. Lorenzo Cotula, "Regulatory Takings, Stabilization Clauses and Sustainable Development" Paper Prepared for the OECD Global Forum on International Investment VII (Paris, 27 – 28 March 2008) online: Organization for Economic Cooperation and Development <<http://www.oecd.org/dataoecd/45/8/40311122.pdf>> at 3. See also Leubuscher, *Ibid.* at 1; Cotula, "Strengthening Citizens' Oversight of Foreign Investment" *Ibid.* at 3 & 4.

¹⁴⁰ Leubuscher, *Ibid.* at 9.

¹⁴¹ Stiglitz, *Globalization and Its Discontents* *supra* note 10 at 71. Stiglitz reports that "There is, in fact, a long history of 'unfair' contracts, which Western governments have used their muscle to enforce." For a discussion of the history of protection of foreign investment including the role of powerful states in seeking the protection

and intensified by IFIs such as the World Bank. Stiglitz, a former Senior Vice President and Chief Economist of the World Bank, for example, exposed the role of the Bank in compelling the governments of Indonesia and Pakistan to enter into grossly unfair private power deals in the 1990s.¹⁴² The deals required the contracting states to commit to purchasing large quantities of electricity from developed-country corporations at very high prices, with high profits to investors and great risks to the states.¹⁴³ Third, multinational corporations, in and of themselves, are powerful actors on the international scene. They wield power and resources that often exceeds even that of their home states.¹⁴⁴ For example, in the PPA signed between the Maharashtra State Electricity Board of India and Dabhol Power Company (Dabhol Power), a subsidiary of Enron Corp in the 1990s, Dabhol Power was able to negotiate provisions that significantly shifted economic risks from itself to the State Electricity Board.¹⁴⁵ At least one person has argued that the World Bank registered

of the proprietary interests of their nationals, see, for example, Sornarajah, “A law for need or a law for greed?” *supra* note 6 at 332 - 335.

¹⁴² Stiglitz, *Ibid.*

¹⁴³ *Ibid.* Gore similarly observes that Power Purchase Agreements force governments “to pay for a set volume of electricity, at a set rate, over a set period of time, whether it can use the electricity generated or not.” Gore, “Electricity and privatisation in Uganda” *supra* note 83 at 382.

¹⁴⁴ Sornarajah, *The International Law on Foreign Investment* *supra* note 23 at 66 – 69.

¹⁴⁵ For example, the agreement fixed the capacity payments to be made to Dabhol Power, irrespective of the amount of electricity that was actually drawn by the Maharashtra State Electricity Board. Also, the formulae used in calculating the capacity charges were such that the interests of the investor were protected by transferring the monetary risks – including conversion and inflation risks – to the state. Lastly, the PPA exempted the company from paying any sales tax or duties on the electricity it sold. This was in addition to the income tax exemptions that the company had managed to obtain from the state government. Yet this same agreement did not penalize the company for things such as delays in construction. See Abhay Mehta, *Power Play: A Study of the Enron Project* (Mumbai: Orient Longman Limited, 2001) at 98 – 103. See also Prabir Purkayashita & Vijay Prashad, *Enron Blowout: Corporate Capitalism and Theft of the Global Commons* (New Delhi, India: LeftWord Books, 2002) at 23 & 24.

strong reservations against this project.¹⁴⁶ However, with the support of elitist state officials the company was able to proceed with it.¹⁴⁷

As far as the Bujagali Project is concerned, there have been two PPAs. The first one (no longer effective) was concluded between AES Nile Power and the UEB (the AES Nile Power-UEB agreement). The second one, which is now in force, is between Bujagali Energy Limited and UETCL (the Bujagali Energy Limited-UETCL agreement) and is publicly available for inspection.¹⁴⁸ I did not get the opportunity to inspect this agreement. Comments in this section relating to this latter agreement are thus gleaned from the findings contained in the 2008 report of the World Bank Inspection Panel.¹⁴⁹ For the AES Nile Power-UEB agreement, a soft copy prepared by Prayas Energy Group from the original hard copy is available on the International Rivers' website.¹⁵⁰ While this agreement is no longer in force, studying it is useful in understanding the nature of provisions often found in contracts of this nature.¹⁵¹ As one author observes, given the inherently monopolistic nature

¹⁴⁶ Mehta argues that the World Bank raised a number of objections against the project including the fact that it was not the least cost option, that the risks of the project offset its environment benefits, the project would place a heavy financial burden on the Maharashtra State Electricity Board and that tariffs would have to be substantially increased to recover the costs of the project. Mehta, *Ibid.* at 42 & 43.

¹⁴⁷ *Ibid.* at 43 – 47. See also generally Purkayashita & Prashad, *Enron Blowout: Corporate Capitalism and Theft of the Global Commons* supra note 145 at 5 – 47.

¹⁴⁸ Those wishing to inspect this agreement can do so at the ERA offices in Kampala, Uganda. However, inspection is only to be conducted within the confines of the offices. Members of the public cannot take the document out of the ERA resource centre or make copies of it. Interview of Sebbowa, supra note 98.

¹⁴⁹ See generally The Inspection Panel, "Investigation Report – Uganda: Private Power Generation (Bujagali Project (Guarantee No. B0130-UG))" (2008) online: World Bank <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/FULL_September_2_2008_FINAL_Red.pdf> [2008 Report of the Inspection Panel].

¹⁵⁰ The Uganda Electricity Board and AES Nile Power Limited, "Power Purchase Agreement Relating to The Bujagali Hydroelectric Project Uganda" online: International Rivers <<http://www.internationalrivers.org/files/bujagalippa.pdf>> [Power Purchase Agreement between UEB and AES Nile Power].

¹⁵¹ In fact, in the 2008 Report of the Inspection Panel, the Panel noted that while there had been some changes in the loan and guarantee structures found in the agreement signed with Bujagali Energy Limited, the contractual agreements such as the PPA and Implementation Agreements signed with the two different

of investments in the electricity sector, it is not uncommon to find various similarities (world wide) in the regulatory framework of this sector.¹⁵² The discussion that follows draws upon the researcher's understanding of the provisions of the AES Nile Power-UEB agreement, opinions of experts consulted by the Inspection Panel in 2001/2 and 2008, and observations from the technical report prepared by Prayas Energy Group.

The AES Nile Power-UEB agreement provided that AES Nile Power would have a 30-year concession over the completed Bujagali complex after which the complex would revert to the Government.¹⁵³ AES Nile Power was responsible for constructing and operating the power plant.¹⁵⁴ Actual generation would depend on hydrological conditions and the dispatch instructions given by UEB.¹⁵⁵ UEB was required to honour the agreed capacity payments irrespective of how much electricity was actually generated and as long as AES Nile Power was still in position to operate the plant.¹⁵⁶ The 2002 Inspection Panel report observed, for example, that the agreement required the government to buy "all the power that could potentially be produced, based on the plant's capacity of 30 years, regardless of whether the power was actually produced or needed."¹⁵⁷ In other words, the capacity payments to be made by UEB were fixed and depended on the installed capacity as opposed to the actual capacity that would be generated. This means that even if AES Nile Power was to produce

sponsors were identical in many respects. See The Inspection Panel, 2008 Report of the Inspection Panel *supra* note 149 at 129.

¹⁵² Mehta, *Power Play: A Study of the Enron Project* *supra* note 145 at 22 & 23.

¹⁵³ UEB & AES Nile Power, Power Purchase Agreement between UEB and AES Nile Power *supra* note 150 Section 4.1.

¹⁵⁴ *Ibid.* Section 2.1 (a).

¹⁵⁵ Prayas, Energy Group, *The Bujagali Power Purchase Agreement – an Independent Review: A Study of the Techno-Economic Aspects of the Power Purchase Agreement of the Bujagali Hydroelectric Project in Uganda* (20 November, 2002) online: International Rivers <<http://www.internationalrivers.org/files/bujagalippa-review.pdf>> at 9 [The Bujagali Power Purchase Agreement – an Independent Review].

¹⁵⁶ *Ibid.* at 14.

¹⁵⁷ The Inspection Panel, 2008 Report of the Inspection Panel *supra* note 149 at 11 & 12.

below the agreed capacity, it would still be paid the fixed payment that had been pre-determined by the parties based on the agreed potential. The agreement contained some penalties for production below capacity as a result of underperformance of the plant. However, these penalties were found to be proportionately low when compared to the impact that the underperformance would have on UEB.¹⁵⁸ For example, in the 2002 Panel report, it was noted that in the event of prolonged underperformance, the costs incurred by UEB to obtain a substitute were considerably high.¹⁵⁹ The Panel thus advised that there was need for better compensation similar to that found in international best practice where a threshold was set for underperformance below which the penalties would proportionately escalate or another default remedy would be invoked.¹⁶⁰

The issue relating to fixed capacity payments was also found to exist in the Bujagali Energy Limited-UETCL agreement. In its 2008 Report, the Inspection Panel noted that “the capacity charge is not related to output, so payment will be the same under low hydrology (when output may be halved) as with high hydrology.”¹⁶¹ The Panel added that while it understood that Bujagali Energy Limited was not in position to control hydrology, the agreement did not impose a corresponding penalty when production below capacity was as a result of reduction in plant availability, which was something that the Company could control.¹⁶² This finding was similar to that contained in the 2002 report of the Inspection Panel. It also echoes observations that have often been made elsewhere about the unfair

¹⁵⁸ The Inspection Panel, “Investigation Report – Uganda: Third Power Project (Credit 2268- UG) and the Proposed Bujagali Hydropower” (2002) online: World Bank <<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/UGANDAIRMainReport.pdf>> at 56 [2002 Report of the Inspection Panel].

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

¹⁶¹ The Inspection Panel, 2008 Report of the Inspection Panel *supra* note 149 at 127.

¹⁶² Ibid.

terms in investment contracts where developing countries are forced to uphold agreements that put the profit of the investors before the interests of the contracting state and its peoples.¹⁶³

Another issue of great concern relating to capacity payments was raised in both the AES Nile Power-UEB agreement and the Bujagali Energy Limited-UETCL agreement. In 2002, the Inspection Panel compared the capacity payment charges found in the AES Nile Power-UEB PPA with those found in a confidential study conducted in 2000 for over 20 Independent Power Producers in other parts of the world.¹⁶⁴ It was found that the capacity costs of the Bujagali Project were relatively higher, even after the related transmission costs were subtracted.¹⁶⁵ Later, when power production was taken over by Bujagali Energy Limited, the Panel found this agreement to be even more unfavourable to the purchaser (UETCL) in as far as the capacity payments were concerned.¹⁶⁶ It was also found that the shift from a maximum capacity charge (which was used in the AES Nile Power-UEB agreement) to a cost-base formula (in the Bujagali Energy Limited-UETCL agreement) significantly shifted the economic risks away from the Company and its lenders to UETCL and its guarantors.¹⁶⁷

¹⁶³ See also generally Shripad Dharmadhikary, "Hydropower at Sardar Sarovar: Is It Necessary, Justified and Affordable?" in William F. Fisher, ed., *Toward Sustainable Development: Struggling Over India's Narmada River* (Armonk: M.E. Sharpe, 1995) at 135 – 153.

¹⁶⁴ The Inspection Panel, 2002 Report of the Inspection Panel *supra* note 158 at 57.

¹⁶⁵ *Ibid.*

¹⁶⁶ The Inspection Panel, 2008 Report of the Inspection Panel *supra* note 149 at 126.

¹⁶⁷ *Ibid.* at 126 & 127.

Despite the high capacity charges, investors' rights to payments are secured under a variety of payment schemes that provide for multiple avenues for recourse.¹⁶⁸ For example, in the AES Nile Power-UEB agreement, at all times, UEB had to maintain US\$20,000,000 in a Liquidity Account.¹⁶⁹ This was a separate account intended to serve as security for payment and the US\$20 million was required to remain on the account until such time when the entire project debt had been paid.¹⁷⁰ Failure to maintain the account amounted to a breach that went to the root of the contract and constituted an Event of Default for which the contract could be immediately terminated by AES Nile Power.¹⁷¹ In addition to the Liquidity Account, UEB was required to replenish a separate Debt Service Reserve Account which was to be operated by a trustee bank.¹⁷² The amount on this account was equivalent to 6 months' payment obligations (including principal and interest) and could be drawn upon by AES Nile Power in the event that UEB delayed to make payment.¹⁷³

As a further security for payment, the Government guaranteed in an Implementation Agreement it signed with AES Nile Power that it would pay the company in the event of UEB's default.¹⁷⁴ There was also the additional security for payment in the form of a Partial Risk Guarantee from IDA.¹⁷⁵ Similar payment plans and securities can be found in the

¹⁶⁸ Prayas Energy Group, The Bujagali Power Purchase Agreement - an Independent Review *supra* note 155 at 24.

¹⁶⁹ UEB & AES Nile Power, Power Purchase Agreement between UEB and AES Nile Power *supra* note 150 section 4.3 (d).

¹⁷⁰ Prayas Energy Group, The Bujagali Power Purchase Agreement - an Independent Review *supra* note 155 at 11.

¹⁷¹ UEB & AES Nile Power, Power Purchase Agreement between UEB and AES Nile Power *supra* note 150 section 4.3 (d).

¹⁷² Prayas, Energy Group, The Bujagali Power Purchase Agreement – an Independent Review *supra* note 155 at 12.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.* at 24.

Bujagali Energy Limited-UETCL agreement. Even without looking specifically at the PPA concluded with Bujagali Energy Limited, it can be found, for example, that there is an IDA Partial Risk Guarantee which assures commercial lenders that in the event of the Government defaulting on its payments, IDA will pay the debt and then recover it – including any expenses – from the Government of Uganda.¹⁷⁶ These guarantees, together with the multiple alternatives for securing payment ensure the ultimate protection of profits of investors while undermining the unfair conditions under which the payment sums are arrived at.

The AES Nile Power-UEB agreement contained some securities for the power purchaser (UEB). It provided for a financing bond and an abandonment bond which UEB could cash in if AES Nile Power failed to achieve financial closure by a given date or in the event that it abandoned the project.¹⁷⁷ However, critics argue that cashing in the bonds remained a remote possibility because of the various conditions that were attached to the encashment.¹⁷⁸

The cumulative impact of these agreements is that they transfer the commercial risks from the investor and lump them onto the power purchaser. In 2008, for example, the Inspection Panel, basing its advice on a report compiled by an independent energy expert,¹⁷⁹ concluded that:

¹⁷⁶ The Inspection Panel, 2008 Report of the Inspection Panel *supra* note 149 at 30 & 31.

¹⁷⁷ Prayas, Energy Group, The Bujagali Power Purchase Agreement – an Independent Review *supra* note 155 at 11.

¹⁷⁸ *Ibid.*

¹⁷⁹ Mr Graham Hadley is an expert in the energy sector with experience from both public and private sector since the early 1980s. He worked as Under Secretary in the US Department of Energy, has consulted for electricity restructuring and privatization and even specialized in the use of Power Purchasing Agreements. See The Inspection Panel, 2008 Report of the Inspection Panel *supra* note 149 at 229.

It is clear from the review of the Project documents that the greatest share of economic risks lies with the power purchaser. The capacity charge may be adjusted upwards if the developer/operator sits unforeseen costs, but not downwards if demand or supply conditions deteriorate for the purchaser. The Panel notes that in fact the lenders especially but also the investors are held harmless against all or most eventualities. ... The Panel observes that the high allocation of risk to the UETCL, the power purchaser, and eventually the GoU [Government of Uganda] increases the possibility that the Project may not achieve the broad objective of sustainable development and poverty reduction embodies in Bank Operational Policies and Procedures. This also increases the possibility of the Bank (IDA) Guarantee being called. *The Panel is concerned that any additional GoU resources that are spent in financing of the development and operation of this Project may lead to decreased resources available for social and other priority development programs.*¹⁸⁰ [Emphasis mine]

The preservation of investors' rights to (high) payments irrespective of the capacity generated speaks to a number of issues. It is a reminder of the over-reliance on investors as the deliverers of development to the country. At the same time, the requirement that investors be paid at whatever cost puts pressure on government to ensure the smooth running of operations by suppressing any actions that may destabilize the project (and as such increase costs to the government). In other words, because PPAs lump the risks of the project onto the Government, it is important that the government ensures that anything that could increase these risks (such as resistance or even changes in the domestic legal framework) is guarded against.

A common approach taken in foreign investment contracts to guard against interruptions with the smooth operation of investments is the inclusion of stabilization clauses in the contracts.¹⁸¹ Under these clauses, the host state is restrained from amending or enacting legislation which has the effect of contradicting the contract and thereby prejudicing the

¹⁸⁰ Ibid. at 130.

¹⁸¹ See generally Cotula, "Regulatory Takings, Stabilization Clauses and Sustainable Development" supra note 139.

investor.¹⁸² The stabilization clause provides that when such amendments are made, the contract takes precedence.¹⁸³ Stabilization clauses also normally stipulate that no modifications should be made to the terms and conditions of the agreement without the mutual consent of the contracting parties.¹⁸⁴ Traditionally, stabilization clauses were limited to providing for fiscal changes such as changes in taxes, royalty payments, fees, and foreign currency exchange controls.¹⁸⁵ With time, however, these clauses have been expanded to cover a range of aspects including barring the introduction of progressive labour laws, changes in legal or regulatory requirements such as in environmental regulation¹⁸⁶ and even covering issues of political risk such as war, civil unrest or NGO activity.¹⁸⁷ In other words, a stabilization clause can bar almost any interference that would affect “the smooth running of the contract and its stability.”¹⁸⁸

The questions of legality and the extent to which stabilization clauses are binding attracted a lot of debate in the 1970s and 1980s.¹⁸⁹ However, it is now widely accepted in international law that these clauses are lawful and legally binding.¹⁹⁰ Critics have raised concern about the fact that stabilization clauses restrict the host state’s ability to improve its laws and

¹⁸² Cotula, “Strengthening Citizens’ Oversight of Foreign Investment” supra note 137 at 2; Tienhaara, “Mineral Investment and the Regulation of the Environment in Developing Countries” supra note 138 at 381; Bernardini, “Development Agreements with Host Governments” supra note 45 at 170.

¹⁸³ Bernardini, *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ Leubuscher, “The Environmental, Social and Human Rights Impacts of Foreign Investment Contracts” supra note 7 at 4.

¹⁸⁶ Tienhaara, “Mineral Investment and the Regulation of the Environment in Developing Countries” supra note 138 at 381.

¹⁸⁷ Leubuscher, “The Environmental, Social and Human Rights Impacts of Foreign Investment Contracts” supra note 7 at 4 & 5.

¹⁸⁸ *Ibid.* at 5.

¹⁸⁹ Cotula, “Strengthening Citizens’ Oversight of Foreign Investment” supra note 137 at 2.

¹⁹⁰ *Ibid.* .

regulations in the public interest.¹⁹¹ In response, some investment contracts have been adjusted to contain what is referred to as “equilibrium clauses”.¹⁹² These clauses allow the host state to change the laws and regulations affecting the contract as long as the investor is compensated “to the extent that these changes alter the financial ‘balance’ of the project.”¹⁹³ Therefore, the state is free to make legal changes that impact on the agreement as long as it compensates the affected investor for the impact of the said changes. In practice, the requirement to compensate has proven to be prohibitive.

This was the case, for example, in the 2003 International Project Agreement concluded between Benin, Ghana, Nigeria and Togo on the one hand and the West African Gas Pipeline Company on the other hand. The Protection Agreement contained an economic equilibrium clause which was to the effect that where regulatory change resulted in a material adverse impact on the company or if it “causes the benefits derived by the Company from the Project [...] or the value of the Company to the shareholders to materially decrease” then the states would have to restore the company and/or the shareholders to the same or an economically equivalent position that they were in before the regulatory change.¹⁹⁴ Regulatory change under this agreement was defined to include changes resulting from legislative enactments, court decisions and ratification of

¹⁹¹ Leubuscher, “The Environmental, Social and Human Rights Impacts of Foreign Investment Contracts” supra note 7 at 5. See also generally Cotula, “Regulatory Takings, Stabilization Clauses and Sustainable Development” supra note 139.

¹⁹² Cotula, “Strengthening Citizens’ Oversight of Foreign Investment” supra note 137 at 2; Leubuscher, *Ibid.* at 5.

¹⁹³ Leubuscher, *Ibid.* at 6; Cotula, “Regulatory Takings, Stabilization Clauses and Sustainable Development” supra note 139 at 6.

¹⁹⁴ Cotula, “Strengthening Citizens’ Oversight of Foreign Investment” supra note 137 at 3.

international treaties.¹⁹⁵ As one author has argued, such clauses create “a strong financial disincentive against strengthening policies to protect the public interest.”¹⁹⁶

Another example of a stabilization clause can be found in the AES Nile Power-UEB PPA. Under that agreement, “any riot, civil commotion ... actions associated with or directed against a company (or Contracts) as part of a broader pattern of action against companies” qualified as a political force majeure event that could be used as justification for a party’s failure to fulfil its obligations under the contract.¹⁹⁷ While both parties were entitled to claim force majeure, the party claiming it should be able to demonstrate that it was unable to prevent, overcome or remedy the act that resulted in non-compliance.¹⁹⁸ Such a defence is more readily available to the private sponsor (AES Nile Power) which can argue that it does not have political authority to stop riots, civil commotion or insurrection. However, it would be much more difficult for an organ of government to utilize that defence, meaning that the event would result in a breach of contract for which there are serious financial implications. Leubuscher notes in relation to such clauses:

Whether ‘volatile resistance,’ or ‘NGO interference,’ causes a government to react with new laws and regulations may make no difference to the drafters of foreign investment contracts: anything that threatens the stability and predictability of an investment can become fair game for a stabilization clause to cover.¹⁹⁹

Another factor that results in the need for the government to suppress acts of resistance stems from obligations that the government makes under contracts with other parties (who

¹⁹⁵ Ibid.

¹⁹⁶ Leubuscher, “The Environmental, Social and Human Rights Impacts of Foreign Investment Contracts” *supra* note 7 at 6.

¹⁹⁷ UEB & AES Nile Power, Power Purchase Agreement between UEB and AES Nile Power *supra* note 150 section 13.1 (a) (iii).

¹⁹⁸ Ibid. section 13. 1.

¹⁹⁹ Leubuscher, “The Environmental, Social and Human Rights Impacts of Foreign Investment Contracts” *supra* note 7 at 5.

are not the project sponsors). For example, under the auspices of the New Partnership for Africa's Development (NEPAD), Uganda promised to intensify its efforts to spearhead the process of exporting cheap hydro to the rest of East Africa.²⁰⁰ The country already entered into contracts to export electricity to Kenya (30MW), Tanzania (9MW) and Rwanda (5MW).²⁰¹ These commitments made it important to expedite the development of the country's hydropower resources.²⁰² At the same time, they create the motive for suppressing any actions that would interfere with the Government's efforts to fulfil its contractual obligations.

Resistance (whatever its justifications) has often been frowned upon and viewed as detrimental to a project's success. In an interview with a Commissioner in the Ministry of Energy, the latter was asked for his opinion on the role of NAPE and International Rivers in regards to the Bujagali Project. He responded, *inter alia*, that:

These groups played a role in the project but in the end, this role was more negative than it was positive. In the first Bujagali [the one run by AES Nile Power], NAPE wrote so many letters to the lenders, urging them not to continue with the project. ... In a way, that kind of attitude pulled us back and I should say it was disadvantageous because when you look at the first Bujagali, the total cost then including financing was about \$550million. But because of these actions and delays, by the time the project sponsor got to tendering out the EPC (Engineering, Procurement and Construction) services, the EPC costs were high because at that time, prices of material like steel, cement and even oil prices were high. Consequently, the costs of the project itself became much higher than it would have been. I see this as a negative impact arising from activism. Well, in some respects, they seem to argue in the interest of communities, but that was a negative impact of their activism. Otherwise, government is committed to environmental and resettlement issues. The people affected by the power plant have already been resettled. For the transmission line, resettlement is ongoing. When NAPE sent

²⁰⁰ Ministry of Energy and Mineral Development, *2002 Energy Policy* supra note 90 at 11. See also Neil Ford, "Will integration spur dam construction?" (October 2008) 60:10 *International Water, Power & Dam Construction* at 11; Neil Ford, "Unlocking African hydro potential" supra note 8 at 12.

²⁰¹ Ministry of Energy & Mineral Development, *Ibid.* at 15.

²⁰² *Ibid.* at 11.

claims to the World Bank and African Development Bank, mitigation plans were put in place and these are being adhered to. There are also monitoring and supervision teams, which come every year from these Banks.²⁰³

It is pertinent to scrutinize the manner in which project proponents allocate blame because it speaks importantly to how these proponents perceive the ordering of the different components of the project. For government, the actions of activists delay the completion of the project and increase its costs – and consequently, delay the country’s development process. It is less relevant that these actions result in more attention being paid to the resettlement of displaced communities because the latter (resettlement) is not perceived as a development opportunity. Rather, it is treated as an external – and inconvenient cost – that is only important in as far as it should be dealt with in a manner that enables the project to proceed.

In the place of a conclusion, the last part of this chapter solidifies the arguments made in the discussion by giving a background for the justifications made for protecting foreign private capital and juxtaposing this against making a case for comparable protections being offered to Affected Communities. This last part seeks to answer one main question. Are the justifications given for protecting investment interests sufficient to explain the marginalization of the interests of other stakeholders? Put another way, considering the attention given to the protection of proprietary interests of investors, should we not be concerned about the lack of comparable protections for Affected Communities?

²⁰³ Interview of Engineer Paul Mubiru (Commissioner, Ministry of Energy & Natural Resources) (24 November, 2009) at Ministry of Energy Offices, Kampala, Uganda.

VI. In Lieu of a Conclusion: Why Affected Communities Need More Protection under the Law

This chapter recommends a momentary shift from the analysis of displacement from a socio-legal perspective to analyzing it from an investment perspective.²⁰⁴ Such an exercise is important because it takes into account the purpose for which large infrastructure is constructed: to facilitate economic growth and development. The pursuit of development has dictated that Third World states legalize liberalization, establish regulatory authorities, conclude private contracts which impose stringent obligations on them and sign guarantees to attract foreign investment. The price of protecting investment, this chapter argues, has made it difficult to incorporate the interests of other stakeholders, such as Affected Communities. This robust protection network has also increased pressure on host states and informed the motive for governments to suppress forms of resistance that interfere with the smooth operation (or expedited completion) of the projects. In the end, the interests of private capital have become the interests of the state, breeding a renewed commitment on the part of the state to protect those private interests. In this way, Government has been privatized.²⁰⁵ As one interviewee observed:

One of the Ministers once said that development is like a bulldozer. If you stand in its way, it crushes you. ... The [Bujagali] Project was politicized and it became impossible for one to differentiate between the investor and the Government of

²⁰⁴ Strictly speaking, there are no binaries between a socio-legal perspective and an investment perspective because the latter is a component of the former. However, this distinction is held steady for purposes of the discussion to differentiate between what this thesis calls the “dams and development perspective” and the “investment perspective”.

²⁰⁵ Ngugi observes that one of the characteristics of the World Bank’s neo-liberal ideology is the “rhetorical opposition to ‘big government’”. He calls it rhetorical because the ideology does not demand a withdrawal of the state. The state continues to intervene in the economy but with the deliberate intention of benefiting particular groups in society. See Joel M. Ngugi, “The World Bank and the Ideology of Reform and Development in International Economic Development Discourse” (2006) 14 *Cardozo Journal of International and Comparative Law* at 325 [The World Bank and the Ideology of Reform].

Uganda. The way the project was being promoted, it was like a state-owned project. All this compromised [public] participation.²⁰⁶

At the same time, the increased costs of doing business with the private sector have translated into externalizing and writing off other costs, such as those relating to resettlement and rehabilitation.

It is useful to understand the background to the various protections given to investors, particularly in the construction of large infrastructure.²⁰⁷ Large investments in infrastructure have unique characteristics that increase their exposure to a variety of risks. To begin with, these investments involve large upfront costs when compared to most other private investments.²⁰⁸ Also, they often depend on natural resources (in this case, a river), owned and/or controlled by the host state.²⁰⁹ This means that, compared to other investments, they have limited control over their main input. Furthermore, those who invest in these projects have to wait for long gestation periods between the initial investment and realizing the returns on investment.²¹⁰ They also generate huge revenues in local currency, which exposes them to greater currency conversion risks.²¹¹ In addition, they are more exposed to political risks including nationalization, confiscation or expropriation of investment

²⁰⁶ Interview of Mr. Geoffrey N. Kamese (Programme Officer, Energy/Chemicals & Climate Change, NAPE) (16 November, 2009) at NAPE Offices, Kampala, Uganda.

²⁰⁷ For a brief account on the history of protection clauses in investment contracts, see Leubuscher, “The Environmental, Social and Human Rights Impacts of Foreign Investment Contracts” supra note 7 at 2 & 3.

²⁰⁸ Pargal, “Regulation and private sector investment in infrastructure: Evidence from Latin America” supra note 125 at 3; Shihata, *Multilateral Investment Guarantee Agency and Foreign Investment* supra note 4 at 15.

²⁰⁹ Leubuscher, “The Environmental, Social and Human Rights Impacts of Foreign Investment Contracts” supra note 7 at 3.

²¹⁰ Pargal, “Regulation and private sector investment in infrastructure: Evidence from Latin America” supra note 125 at 3; Shihata, *Multilateral Investment Guarantee Agency and Foreign Investment* supra note 4 at 15.

²¹¹ Pargal, *Ibid.* ; Shihata, *Ibid.*

properties.²¹² Lastly, because of the long gestation periods, they face the risk of contract renegotiations²¹³ including increases in tax rates, fees, royalties, penalties, changing applicable accounting rules which adversely affects the returns on investment, manipulating foreign exchange rates and revising regulatory provisions of procedures relating to investment agreements.²¹⁴ While the above are potential risks to all foreign investors, when compared to large infrastructure, most other investors inject relatively smaller sums of money into their businesses.²¹⁵ Consequently, the other investors are able to more convincingly threaten withdrawal (or actually withdraw) from the host state or can withhold technological improvements once contracts are altered.²¹⁶

While the threats of nationalizing investors' properties have considerably reduced with time,²¹⁷ there are still concerns about contract renegotiation which result in what has come to be known as the "obsolescing bargain".²¹⁸ Briefly, the "obsolescing bargain" refers to the inability of investors to lobby against new terms of contracts because of the huge sums that have already been invested.²¹⁹ To deter host states from making fundamental changes to originally agreed-upon positions, investors resort to using more highly leveraged syndicates

²¹² Moran, *Harnessing Foreign Direct Investment: Policies for Developed and Developing Countries* supra note 19 at 77; Sornarajah, *The International Law on Foreign Investment* supra note 23 at 22.

²¹³ Moran, *Ibid.*; Bernardini, "Development Agreements with Host Governments" supra note 45 at 170.

²¹⁴ Moran, *Ibid.* at 78; Leubuscher, "The Environmental, Social and Human Rights Impacts of Foreign Investment Contracts" supra note 7 at 3.

²¹⁵ Moran, *Ibid.* at 77.

²¹⁶ *Ibid.*

²¹⁷ However, there remain some concerns that circumstances could arise that increase the likelihood of nationalization. Those who raise these concerns note that the reduction in nationalization was largely because of the global economic crisis of the mid 1970s/80s which forced many developing countries to liberalize their economies as part of the conditions imposed by IMF and World Bank to access aid. They argue that in the absence of such situations, the return to nationalization cannot be totally disregarded. See, for example, Comeaux & Kinsella, *Protecting Foreign Investment Under International Law: Legal Aspects of Political Risk* supra note 43 at xxvi.

²¹⁸ Theodore H. Moran, *Foreign Direct Investment and Development: The New Policy Agenda for Developing Countries and Economies in Transition* (Washington D.C: Institute for International Economics, 1998) at 142.

²¹⁹ *Ibid.*

(such as multinational financial institutions) to lend directly to the projects in question.²²⁰ This is how institutions such as MIGA and the IFC become involved in FDI projects.²²¹ Chapter One provides details of the three organs of the World Bank that are involved in providing financing and guarantees to the Bujagali Project.²²² The deep involvement of the Bank in this project has significant implications. For one thing, it increases the chances of Uganda complying with the contract provisions – however unfair they may be – so that the country remains in the good books of the Bank.²²³ In fact, perhaps more accurately, it removes or at least considerably diminishes the chances of Uganda not complying with its contractual obligations.

There are other strings attached to the use of private finance to fund public projects. Perhaps most important is the fact that private finance allocates risks and returns using market-based criteria.²²⁴ It thus does not help that Uganda's credit rating is low, thus curtailing its opportunities for mobilizing private capital.²²⁵ Generally, once one resorts to the market for financing, project risks become allocated according to the market's perception of the country's credit worthiness.²²⁶ In 2002, for example, World Bank management argued that without the country establishing a good credit history and developing its legal and

²²⁰ Ibid. at 144.

²²¹ Ibid.

²²² See Chapter One Part II.

²²³ Moran, *Harnessing Foreign Direct Investment: Policies for Developed and Developing Countries* supra note 19 at 80.

²²⁴ International Bank for Reconstruction and Development & International Development Association, "Management Report and Recommendation to the Inspection Panel Investigation Report: Uganda – Third Power Project (Credit No. 2268-UG), Fourth Power Project (Credit No. 3545-UG) and Bujagali Hydropower Project (PRG No. B 003-UG)" (June, 2002) online: World Bank <<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/UGManagementResponse>> at 4 [2002 Management Response].

²²⁵ Ibid. at 4. See also Prichard and Webb, "Privatization and Private Provision of Infrastructure" supra note 35 at 86 & 87 for examples of credit-enhancement mechanisms that are often pursued where the credit worthiness of a country is in doubt.

²²⁶ IBRD & IDA, 2002 Management Response supra note 224 at 4.

institutional framework, it would be difficult to proportionately increase and transfer risks to the private investor.²²⁷

The goal of this chapter is not so much to problematize the existence of a robust legal framework protecting investment interests at both the national and international level. Rather, it is the lack of a comparable framework for the protection of the property and livelihoods of those displaced by these projects that is unsettling.²²⁸ TWAILers and other Third World scholars document the long history of the manner in which institutions like the Bank interfere with economic activities of Third World countries.²²⁹ In particular, they illustrate how the Bank insists on defining development and delineating the “correct path” for arriving at development.²³⁰ As demonstrated in this chapter and discussed in even greater detail in the theoretical chapter (Chapter Two), the Bank has aggressively promoted the neo-liberal agenda as the surest and only way for Third World countries to achieve development. In this way, not only have these countries been denied the chance to explore other strategies that may be more suitable to their conditions;²³¹ they have also been caught up in a vicious cycle in which their vulnerable conditions force them to depend on the Bank ideology as the only way of knowing and being.²³² In other words, the living conditions of most of the people in these countries are so desperate and the pressures from financiers such

²²⁷ Ibid. at 25 & 26.

²²⁸ Sornarajah argues, for example, that while international law has recognized the need to protect the assets of multinational corporations, far less attention has been given to the obligations of these corporations to the host states and communities in which these corporations operate. Sornarajah, *The International Law on Foreign Investment* supra note 23 at 171.

²²⁹ James Thuo Gathii, “Neoliberalism, Colonialism and International Governance: Decentering the International Law on Governmental Legitimacy” (2000) 98 Michigan Law Review at 2027 – 2029.

²³⁰ See Chapter Two Part IV (a) (i) & (ii).

²³¹ Joel M. Ngugi, “The World Bank and the Ideology of Reform” supra note 205 at 313. See also Santos, *Toward a New Legal Common Sense* supra note 18 at 451.

²³² See the detailed discussion in Chapter Two Part III.

as the Bank so demanding that finding the space, time and resources to explore alternatives becomes difficult, and many times, impossible. However, the Bank has not achieved its goal of creating a dependent Third World single-handedly. It has managed to essentialize, naturalize and normalize its policies with the help of Third World elites and oppressive Third World governments.²³³

To borrow the words of one scholar, we are experiencing “a crisis of social contractualism”.²³⁴ The position of the state has been replaced by a multitude of contracts which not only possess unfair terms, but whose provisions and conditions also remain private.²³⁵ This has resulted in a “destatization of social regulation” in which political power is sub-contracted and competed for.²³⁶ And while the state is not eroded, it has come back in a different capacity: one in which it acts merely as a co-ordinator of the negotiations and competition between different social actors, with the result that the more powerful actors have reduced “the state into a component of their private sphere.”²³⁷ As the preceding discussion illustrates, this crisis is exemplified by the existence of an entrenched and official legal infrastructure that removes risks from and ensures profits to investors while ignoring the risks faced by those affected directly by development projects. The high costs associated with protecting investors have designated resettlement and rehabilitation as second-order concerns²³⁸ and those displaced as second-rate (global) citizens.

²³³ Ngugi, “The World Bank and the Ideology of Reform” *supra* note 205 at 313. See also Anthony Anghie & B.S. Chimni, “Third World Approaches to International Law and Individual Responsibility in Internal Conflicts” in Anne Marie Slaughter and Steven R. Ratner (eds) *The Methods of International Law* (American Society of International Law Studies in Transnational Legal Policy, 2004) at 190.

²³⁴ Santos, *Toward a New Legal Common Sense* *supra* note 18 at 451.

²³⁵ *Ibid.*

²³⁶ *Ibid.* at 489.

²³⁷ *Ibid.* at 489 & 490.

²³⁸ Rew et. al., “Policy Practices” *supra* note 9 at 60 & 61.

It is pertinent to revisit some of the risks of displacement that are discussed in Chapter Three.²³⁹ According to the Impoverishment Risks and Reconstruction Model that was designed to guide the World Bank in ensuring that resettlement risks are prevented, there are eight components of displacement risks: landlessness, homelessness, marginalization, food insecurity, increased morbidity, loss of access to common property resources and community disarticulation.²⁴⁰ These risks result in numerous adverse impacts. For example, landlessness negatively affects people's productive systems because land is central to the manner in which livelihoods are structured.²⁴¹ Consequently, the loss of land "is the principal form of decapitalization and pauperization of displaced people, as they lose both natural and man-made capital".²⁴² Displacement increases the risks of joblessness in both rural and urban settings through the loss of work in industry or services, loss of jobs by landless labourers working on land owned by others, inability to work on communal assets, and loss of small businesses by the self-employed such as craftsmen and shopkeepers.²⁴³ The impact of joblessness is felt more in the long term since in the short term displaced people are able to work in project-related jobs, which soon disappear once the project is complete.²⁴⁴ There is also the risk of marginalization as families lose economic power due to either an inability to use their skills in the resettlement area or a downsizing of their economic activities.²⁴⁵ In addition, displacement often results in food insecurity which

²³⁹ See Chapter Three Part II.

²⁴⁰ See Chapter Three Part II. See also World Bank, "Operational Manual: Operational Policy (OP) 4.12" (December, 2001 - as updated in March, 2007) online: World Bank < <http://web.worldbank.org> > paragraph 1 & 2 [OP 4.12].

²⁴¹ M. Cernea, "Risks, safeguards, and reconstruction: a model for population displacement and resettlement" in Michael M Cernea & Christopher McDowell (eds.) *Risks and Reconstruction: Experiences of Resettlers and Refugees* (Washington DC: The World Bank, 2000) at 23 [Risks, Safeguards and Reconstruction] at 23.

²⁴² Ibid.

²⁴³ Ibid. at 24.

²⁴⁴ Ibid. at 24 & 25.

²⁴⁵ Ibid. at 26.

emanates from drops in the availability of food and the long time that it takes to rebuild food production capacity in the new resettlement areas.²⁴⁶ Another impoverishment risk is tied to the loss of common property and services, especially for the landless and those without assets.²⁴⁷ Lastly, displacement results in increased morbidity and mortality due to social stress, trauma and relocation-related illnesses.²⁴⁸

Ultimately, large hydroelectric projects may increase macro-economic growth through increased productivity, but without comprehensive resettlement and rehabilitation packages, the impoverishment risks resulting from displacement offset the benefits of the macro-economic growth and create a huge dependency problem. Also, by distorting the livelihoods of displaced people in this manner, their vulnerability increases and uncertainties abound for both themselves and for the future generations that depend on them. There is no intention here to romanticize the pre-displacement conditions of Affected Communities. However, as the interviewee quoted in Chapter Three noted, while their lives were not the best before the project, they had mastered a way of living that was more certain and more secure than the conditions after resettlement.²⁴⁹

The Bank acknowledges the poverty risks of displacement and observes the need to treat involuntary resettlement as a development opportunity.²⁵⁰ However, its legal initiatives do not reflect a commitment to this issue. When you compare the rich legal and institutional infrastructure designed to protect investors with that put in place for Affected Communities

²⁴⁶ Ibid. at 27.

²⁴⁷ Ibid. at 29.

²⁴⁸ Ibid. at 27 & 28.

²⁴⁹ See Chapter Three Part IV.

²⁵⁰ See generally discussion in Chapter Three.

– both at the domestic and international level – it becomes evident that the Bank’s efforts fall short of treating involuntary resettlement as a development opportunity.²⁵¹ Instead, the Bank and Government continue to rely on the trick-down effect of the macro-economic growth that is expected to flow from the liberalized and thoroughly protected investment regime. For example, while the Bank was instrumental in securing the interests of investors by pushing for privatization and the accompanying enactment of the *Electricity Act*,²⁵² the same Bank failed to display equal commitment to the concretization of the 1995 Involuntary Resettlement policy of Uganda, which it had assisted in drafting.²⁵³ The draft Involuntary Resettlement policy was completed four years before the *Electricity Act* was enacted. Bank Management was aware – or is expected to have been aware – that the privatization of this sector would expand electricity generation, thereby increasing the need to protect those that would be displaced by the generation plants and transmission lines constructed. The Bank’s Policy on Involuntary Resettlement allows it to assist borrowers “to assess and strengthen resettlement policies, strategies, legal frameworks, and specific plans at a country, regional, or sectoral level”.²⁵⁴ This means that if Bank Management shared the vision for bottom-up (people) development that it does for top-down economic development, it would have assisted Uganda in strengthening the legal framework for resettling and rehabilitating those displaced. Also, as argued in Chapter Three, the interests of Affected Communities would be better secured by allowing them to enter into agreements similar to those provided for

²⁵¹ See also M. Sornarajah, *The International Law on Foreign Investment* supra note 23 at 172. Sornarajah concludes that despite the widespread mainstream consensus on the need to protect the assets of multinational corporations, there has always been a lack of consensus on the extent of obligations for multinational corporations. Consequently, most obligations owed by multinationals to local communities are in the form of “soft law prescriptions.” He adds that “The same institutions which argued for multilateral codes on investment protection creating rights in multinational corporations were content with calls for voluntary codes of conduct for multinational corporations.”

²⁵² Gore, “Electricity and privatisation in Uganda” supra note 83 at 380.

²⁵³ See Chapter One Part IV.

²⁵⁴ World Bank, OP 4.12 supra note 240 paragraph 32.

under the Bank policy on Indigenous Peoples.²⁵⁵ Instead, the Bank has opted to treat powerful transnational corporations as the “vulnerable group” that needs to be protected from hostile Third World states.

Law is, indeed, a powerful tool of inclusion and exclusion. Whether it is informed by political will or moral obligation, it determines, formalizes and concretizes entitlements. The law – as witnessed in Chapters Three and Four – has been used sparingly to satisfy a moral obligation by limiting the mechanisms available to Affected Communities to soft law provisions which have no direct legally binding effect. Conversely, this chapter details how the law has been employed without reservation to bind parties to the protection of investment interests. There is an urgent need to build on the legal protections available to Affected Communities if “development projects” are to support and sustain development at the bottom. We cannot continue to rely on the false hope or pretend that economic growth resulting from the efficient operation of the market will act as a sufficient substitute for a more targeted approach to development that focuses on those that are displaced by the tools of macro-economic growth. If history teaches us anything, it is that for decades, displaced communities have been exposed to the adverse impacts of these projects without even being able to enjoy the economic benefits that flow from them.

Development critics advise that there is an urgent need particularly for those in the Third World to free themselves from the bondage of waiting for development to be delivered by

²⁵⁵ See discussion in Chapter Three Part V.

neo-liberal policies.²⁵⁶ This requires not only a change in the legal framework governing investment issues, but also a change in mind-set that will empower Third World peoples to design their own methods of arriving at the alternative forms of development that are meaningful for them.²⁵⁷ As one Third World scholar argues, “The law based on the neo-liberal vision that foreign investment by itself will lead to economic development was built on a single policy aim that such investment flows will increase in developing countries if accorded protection through an international regime.”²⁵⁸ This law was created solely to foster and promote the interests of foreign investors.²⁵⁹ What is recommended is a law that protects beneficial foreign investment, while at the same time protecting the interests of Affected Communities, the environment and other aspects such as human rights.²⁶⁰

Recall that while foreign investment can be beneficial to those in the Third World, an investor’s primary motive is profit. Foreign investors look to increase their market share internationally after home-state opportunities are exhausted. They compete over resource-rich Third World-country opportunities. In other words, investors, by going to the Third World, are not engaging in a charity mission. They are looking for a return on investment. For example, in an interview with the Chief Executive Officer (CEO) of ERA, the researcher inquired about how Uganda’s energy crisis affects its negotiating position. As part of his response, the CEO said:

²⁵⁶ See, for example, Wolfgang Sachs, “Introduction” in Wolfgang Sachs (ed.) *The Development Dictionary* (Johannesburg: University of Witwatersrand Press, 1993) at 1.

²⁵⁷ I am greatly indebted to my friend Amma Bonsu for the long discussions that we held regarding this issue. See, for example, Wolfgang Sachs, “Introduction” in Wolfgang Sachs (ed.) *The Development Dictionary* (Johannesburg: University of Witwatersrand Press, 1993) at 1.

²⁵⁸ Sornarajah, “A law for need or a law for greed?” *supra* note 6 at 351.

²⁵⁹ *Ibid.*

²⁶⁰ *Ibid.*

You are making a big assumption that once someone has an electricity shortage they are definitely in a weaker position. But nobody ever negotiates this type of project unless they have a shortage. Private sector will not be interested in coming to a market where there is a surplus. ... In all contracts, there must be a need and capacity to supply to meet the demand. Does this suggest that in all contracts, one party will always be at a disadvantage? If you do not give a developer an opportunity to invest, then the developer has money which is not earning a return on investment so the developer is also at a disadvantage.²⁶¹

Admittedly, as illustrated in this chapter, Uganda's bargaining position is perhaps not as advantageous as the CEO suggests. However, remembering that investors also have "needs" is important in establishing the boundaries of the extent to which investment interests should be protected without short-changing the host state and its people. In the same manner that investors demand protection, Third World peoples should demand protection. If this means that the project will be more costly, then that should be a necessary cost taken into account when evaluating the feasibility of the project against its alternatives. The need to undertake bottom-up approaches to development increases in urgency as Uganda – and other parts of Africa – plan to increase their reliance on foreign investment in the expansion of their infrastructure. Uganda is planning a number of large hydropower projects.²⁶² There are also other smaller hydro projects being planned including Ishasha (6MW), Buseruka (10MW), Bugoye (13MW), Mpanga (8MW) and Nyagak (3.3MW).²⁶³ While the government has established an Energy Fund²⁶⁴ to facilitate the development of these projects, most will likely be undertaken through public-private partnerships or solely by the

²⁶¹ Interview of Engineer Dr. Sebbowa *supra* note 98.

²⁶² See Chapter One Part II.

²⁶³ Syda N. M. Bbumba, "Budget Speech: Financial Year 2009/10" (June, 2009) online: Ministry of Finance, Planning & Economic Development
<http://www.finance.go.ug/docs/Budget%20Speech_FY2009_10_Final.pdf> at 20.

²⁶⁴ Interview of Engineer Mubiru *supra* note 203.

private sector. There is need to ensure that the implementation of these projects and of other development projects does not externalize resettlement and rehabilitation costs.

It is true that in addition to IFIs and their elite allies, there is a very economically powerful lobby comprising of dam proponents that will continue to push not only for the construction of dams, but also for the protection of the interests of the constructors of the dams. The power of multinational corporations to unilaterally influence change cannot be downplayed.²⁶⁵ Yet we are also witnessing an era in which grassroots who have suffered under hegemonic approaches to development are demanding counter-hegemonic approaches that are informing the international legal order in ways that were previously unimaginable.²⁶⁶ These counter-hegemonic struggles will have to continue pushing for the compression and ultimate elimination of the boundaries of exclusion. In the area of development-induced displacement, they should demand an institutionalization and legalization of the interests of Affected Communities that matches the legal gadgets protecting investors' interests. They will also need to ensure that the status quo is constantly checked by tireless acts of resistance that build on alliances that have already been established. In the end, the protection of Affected Communities should be secured through: reforms in the national and international legal regime; resistance at the local and international level; and internal reform within the institutional structures of power such as the World Bank and host government departments. Demanding these reforms may prove difficult but acquiring them is not impossible. What is required is sustained commitment and a boldness of both the actors internal to institutional legal structures and external

²⁶⁵ Sornarajah, *The International Law on Foreign Investment* supra note 23 at 67.

²⁶⁶ See Chapter Two Part IV (c). See also Santos, *Toward a New Legal Common Sense* supra note 18 at 458.

communities (both those directly affected and sympathetic allies). In the next chapter (the recommendation chapter), I expand on the legal proposals suggested in the different chapters of this thesis.

CHAPTER 6

Recommendations: Increasing Protection of Affected Communities through Legal Reform

The ubiquity of displacement and resettlement processes throughout the now industrialized world is a documented, indisputable reality. The difference, however, is that developed countries have strong legal systems and effective grievance mechanisms, and the civil society is generally able to enforce and protect the entitlements of those at risk to be displaced. This ability may not always eliminate discontent and cultural traumas, but can prevent blatant abuses and guards against mass impoverishment at the hand of the state. This difference is important and should not be lost on governments, NGOs, and legal institutions from developing countries.¹

I. Introduction

The main objective of this thesis has been to investigate the manner in which law is used – either directly or indirectly – to distribute rights and responsibilities in large infrastructure projects. The inquiry reveals that while there is some form of legal infrastructure in place to protect the interests of Affected Communities, this infrastructure is either inadequate (such as the domestic legislation governing displacement in Uganda and the provisions of OP 4.12) or is not legally enforceable (such as the findings of the Inspection Panel). The conclusion is, therefore, that if law has been used to protect the interests of Affected Communities, it has been used very sparingly. This canny application of the law has enabled the Government of Uganda and the World Bank to portray an apparent neutrality and commitment to the protection of the interests of vulnerable groups, without putting in place concrete legal frameworks to back that commitment.

¹ Michael M. Cernea, “Development’s Painful Social Costs: Introductory Study” in S. Parasuraman *The Development Dilemma: Displacement in India* (The Hague: Institute of Social Studies, 1999) at 9.

Conversely, there is an impressive array of legal infrastructure that protects the assets and other proprietary interests of those investing in the large development projects that cause displacement. This infrastructure is entrenched, official and designed to provide multiple layers of protection at both the national and international level. At the national level, there is an *Electricity Act* that opens the market to private actors and energy policies that reiterate the need for (and thus justification for protecting) these actors. The domestic regime is institutionalized through an ERA that serves largely to protect investment from political interference and ensure that business operates smoothly and efficiently. Lastly, to fully seal the deal for the protection of (foreign) private investors, Power Purchase Agreements are concluded to secure investors' rights to payment and guard against any interference with investment activities. At the international level, guarantees are signed to buttress and provide assurance for investors' rights to payment, a tribunal established for investors to lodge their complaints, and bilateral treaties negotiated to liberalize the market and again, protect the proprietary interests of investors. Here, the law has not been spared. It has been used directly and purposefully.

To this end, the legal regime governing investments in large dams consists of a robust institutionalized and formalized network of protections. Given the fact that this regime has traditionally promoted the interests of private investors, is it possible that a similar framework can be used for the protection of Affected Communities? In other words, can Affected Communities rely on formal legal rules and institutions to protect their interests? It is the proposal of this chapter that part of the solution to the marginalization of these communities lies in the establishment of an equally robust legal framework that focuses on

the inclusion of their interests. Such a framework on its own is, however, insufficient to ensure that inclusion is both expanded and sustained, meaning that other forms of law-making have to be explored. One alternative to formal legal systems is writing the law through resistance or writing resistance into the law. The ensuing discussion provides detailed recommendations for formal legal reforms before highlighting the importance of alternatives such as resistance.

Consequently, this chapter answers the question: how do we integrate the interests of Affected Communities into projects that are more concerned with meeting the practical needs (of macro-economic development) in a timely and cost-effective manner than they are concerned with empowering the affected communities?² In answering this question the discussion profits from, *inter alia*, interacting with public-participation literature.³ There is a widely held assumption under international (and even national) law that states act on behalf of their peoples. While this assumption is aggressively being contested by actors such as social movements, the view that governments are the proper representatives of their masses remains the official view on the role of state actors. This explains why, for example, it is states (not people) that have audience before international tribunals such as ICSID. It also

² Cleaver notes, for example, that “There is an inherent difficulty in incorporating project concerns with participatory discourses.” See Frances Cleaver, “Paradoxes of Participation: Questioning Participatory Approaches to Development” (1999) 11 *Journal of International Development* at 598 [Paradoxes of Participation].

³ See, for example, Cleaver, *Ibid.* at 597 – 612; Donald N. Zillman, “Introduction to Public Participation in the Twenty-first Century” in Donald Zillman, Alastair Lucas & George (Rock) Pring (eds) *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford University Press, 2002) at 1 – 7 [Introduction to Public Participation]; George (Rock) Pring & Susan Y. Noe, “The Emerging International Law of Public Participation Affecting Global Mining, Energy and Resources Development” in Zillman, Lucas & Pring *Ibid.* at 11 – 76 [The Emerging International Law of Public Participation]; Barry Barton, “Underlying Concepts and Theoretical Issues in Public Participation in Resources Development” in Zillman, Lucas & Pring *Ibid.* at 77 – 120 [Underlying Concepts and Theoretical Issues in Public Participation].

explains why the Board of Directors of the World Bank remains primarily answerable to state parties. At the domestic level, it explains why, for example, the power to levy taxes in the hope of redistributing income is the mandate of government institutions.

Public participation literature reconstructs the “public”. It demonstrates how the understanding of the “who” in the “public” moves from governments being treated as the proper representatives of their citizens,⁴ to governments being viewed as part of the problem, not the solution.⁵ Consequently, the “public” is reconstructed to include land owners and occupiers, local citizens, local governments, municipal governments, indigenous (aboriginal) communities, non-governmental organizations (NGOs), academic institutions, and some private and public organizations.⁶ Similarly, the act of “public participation” has transformed from people simply participating in electing and lobbying their public officials, to being part of the decision-making process.⁷ As some authors argue:

... the most significant form of this broadened public involvement is public participation in decision-making. These public-participation laws serve to inject new ‘players’ – citizens, NGOs, indigenous peoples’ interests, local communities, etc. – and therefore new challenges into one or more stages of developmental decision-making that were previously the province only of the project developer, landowner, financier, and government officialdom. ... These public participation requirements have emerged along two parallel paths. First and older are the ‘environmental impact assessment’ or EIA laws which typically require public consultation as an integral component. Second and more modern are the laws injecting public participation into decision processes other than EIAs or into environmental decision-making generally.⁸

⁴ Zillman, “Introduction to Public Participation” Ibid. at 1.

⁵ Ibid. at 2.

⁶ Alastair R. Lucas, “Canadian Participatory Rights in Mining and Energy Resource Development: The Bridges to Empowerment?” in Zillman, Lucas and Pring supra note 3 at 307 & 308 [Canadian Participatory Rights in Mining and Energy Resource Development].

⁷ Zillman, “Introduction to Public Participation” supra note 3 at 1.

⁸ Pring & Noe, “The Emerging International Law of Public Participation” supra note 3 at 37. See also Barton, “Underlying Concepts and Theoretical Issues in Public Participation” supra note 3 at 80.

Barton summarizes the elements of effective public participation to include: education, access to information, participation in decision-making, transparency in the decision-making process, post-project analysis and monitoring, enforcement and access to independent tribunals for redress.⁹

Commentators observe that the last four to five decades have witnessed a “participation explosion” in which the role of people in their governance has expanded in importance both legally and in practice.¹⁰ As noted above, there has been a shift from large projects being controlled by developers and governments¹¹ to one in which the range of actors has been expanded to include local communities, indigenous peoples, NGOs and citizen advisory boards.¹² As evidence of this shift, international and national laws now incorporate the human element into the financing, planning, licensing and operating of project activities.¹³ For example, international organizations such as the Bank have incorporated public participation into their lending requirements.¹⁴ To this end, some observe that public participation is no-longer a “voluntary public-relations tool or smokescreen” but rather, constitutes a “growing body of legal requirements, nationally and internationally”.¹⁵

Yet others have issued a cautionary note against the blind faith in public participation as a tool of inclusion. Cohen and Uphoff, for example, warned in 1980 – and it stands true to this day – that: “There is a real danger that with growing faddishness and a lot of lip service,

⁹ Barton, *Ibid.* at 79.

¹⁰ Pring & Noe, “The Emerging International Law of Public Participation” *supra* note 3 at 11.

¹¹ Zillman, “Introduction to Public Participation” *supra* note 3 at 2.

¹² Pring & Noe, “The Emerging International Law of Public Participation” *supra* note 3 at 12.

¹³ *Ibid.* at 12.

¹⁴ *Ibid.* at 13.

¹⁵ *Ibid.* at 14.

participation could become drained of substance and its relevance to development programmes disputable.”¹⁶ Similarly, Cleaver observes that while participatory approaches to development are widely hailed as being instrumental to increasing efficiency, effectiveness, democracy and empowerment, there is little evidence to suggest that public participation has either meaningfully improved the conditions of vulnerable peoples or positively contributed to social change.¹⁷ She adds that “Participation has ... become an act of faith in development: something we believe in and rarely question.”¹⁸

Indeed, this thesis has demonstrated how public participation – being the participation of Affected Communities in the projects that affect them – is largely devoid of both legal backing and tangible long-term achievements. It has also illustrated how the rationale for this limited participation rests in the belief that through foreign private investments, economic growth will be achieved and all (including Affected Communities) will benefit. The goal of this thesis is to move Affected Communities from the periphery to the center of participation in order to obtain meaningful development. This chapter recommends some ways in which public participation can regain its “radical, challenging and transformatory edge”.¹⁹

Based on the observations made in previous chapters, a number of proposals are made. The bulk of the proposals in this chapter suggest changes to formal legal infrastructure. First, the chapter recommends an expansion of the definition of displaced persons under OP 4.12 to

¹⁶ John M. Cohen and Norman T. Uphoff, “Participation’s Place in Rural Development: Seeking Clarity through Specificity” (1980) 8 *World Development* at 213 [Participation’s Place in Rural Development].

¹⁷ Cleaver, “Paradoxes of Participation” *supra* note 2 at 597.

¹⁸ *Ibid.*

¹⁹ *Ibid.* at 599.

include as many affected people as possible. The second recommendation is that OP 4.12 should extend its mandatory requirements to include development programs that are over and above land-for-land resettlement. Third, it is recommended that the powers of the Inspection Panel be increased to allow it to issue binding decisions. The fourth proposal to the Government of Uganda is for the enactment of a law on resettlement and rehabilitation. Fifth, the chapter proposes the signing of agreements between project sponsors and Affected Communities (or their representatives) to ensure that the latter benefit from development projects. The discussion then suggests ways in which these reforms should be implemented before concluding with a highlight on the role of resistance.

While some of the recommendations made hereunder invariably have global implications, this chapter should not be read as proposing a hierarchy of global governance mechanisms over national and local-level reform mechanisms. To do so would undermine the importance that this thesis places on home-grown solutions. Consequently, instead of locating the ensuing prescriptions in the field of global governance,²⁰ this chapter proceeds through the legal lens that has formed the centre of the discussion in the rest of the thesis. Particularly, the discussion proposes legal reforms at the international, domestic and local levels to address the different layers of the challenges posed by DIDR.

II. Recommendations Relating to the Reform of Formal Legal Infrastructure

RECOMMENDATION ONE: Amend paragraph 3 of Operational Policy 4.12 to expand the definition of displaced persons by removing the condition that persons have to be *directly* affected by the project.

²⁰ For an introduction to global governance issues see, for example, James N. Rosenau, “Governance in the Twenty-first Century” (1995) 1 *Global Governance* at 13 – 43; Lawrence S. Finkelstein, “What is Global Governance” (1995) 1 *Global Governance* at 367 – 372.

The Bank Policy on Involuntary Resettlement (OP 4.12) covers only economic and social impacts that result *directly* from Bank-assisted projects.²¹ Bank Management defines “direct impact” to include “only those [impacts] directly caused by land taking and restriction of access to legally designated parks and protected areas.”²² Chapter One discusses in detail the shortcomings and injustices contained in qualifying impacts in this manner.²³ Insisting on compensating only for “direct” impacts places an unfair burden on an already vulnerable group to demonstrate a direct link between the impacts they suffer and the project. At the same time, it empowers the project sponsor to rule on whether the impact is “direct” enough. This thesis maintains that the test of an affected person should not be based on whether an impact is direct or indirect. Rather, the test should be whether an impact is suffered as a result of the project.

Irrespective of the “directness” of the impact, project sponsors still have to undertake the exercise of defining boundaries that determine who to compensate, the form of compensation and the extent of compensation. The problem of defining one aspect of the boundaries (directness) at the universal level is that it automatically and immediately excludes certain people who and impacts which lack the tangible and see-able attribute of directness.

²¹ World Bank, “Operational Manual: Operational Policy (OP) 4.12,” (December, 2001 - as updated in March, 2007) online: World Bank< <http://web.worldbank.org>> paragraph 3 [OP 4.12].

²² World Bank, “Conversion of the World Bank’s Policy on Involuntary Resettlement: Substantive Comments from Executive Directors on Draft OP/BP 4.12 dated July 25, 2000” (March 6, 2001) online: The Center for International Environmental Law<<http://www.ciel.org/Publications/Matrix-final.pdf>> paragraph 27.

²³ See Chapter One part III.

For the above reasons and others pointed out in Chapter One,²⁴ this thesis recommends that the Bank reverts to the pre-OP 4.12 position in which no distinction was drawn between whether an impact was directly or indirectly attributed to a Bank-financed project. Therefore, instead of reading as “The policy covers *direct* economic and social impacts ...”, the beginning of paragraph 3 should read “The policy covers economic and social impacts ...”.

RECOMMENDATION TWO: Revise OP 4.12 to make it mandatory for restoration measures to go beyond land-for-land resettlement. The Operational Policy on Indigenous Peoples can provide some guidance in this regard.

Chapter Three concludes that one of the reasons why resettlement and rehabilitation initiatives under Bank-financed projects fail to translate into development opportunities is the fact that OP 4.12 places emphasis on land-for-land resettlement and monetary compensation for lost assets. All other forms of livelihood restoration that can facilitate long-term rehabilitation of displaced people are left largely to the discretion of project sponsors. It is recommended that OP 4.12 be revised to couch all requirements for livelihood restoration in obligatory and non-equivocal language. This will ensure that other livelihood restoration measures such as employment, training and other development assistance become additions to, not replacements of, land-for-land resettlement.

The Bank can draw from the provisions found in the policy on indigenous peoples (OP 4.10) to guide its revision of OP 4.12. OP 4.10 requires, for example, that project sponsors

²⁴ See Chapter One Part III.

should prepare, *inter alia*, an Indigenous Peoples Plan.²⁵ The Plan should indicate the social and economic benefits that will accrue to the community and state how potential adverse impacts will be avoided, mitigated or compensated for.²⁶ If the project involves the commercial development of a natural resource, project sponsors should demonstrate the measures that will be taken to ensure that the affected communities share equitably in project benefits.²⁷

The effect of OP 4.10 is that it demands, through the Indigenous Peoples Plan, other mandatory livelihood restoration measures as additions to physical resettlement and monetary compensation. These requirements are mandatory because the project cannot proceed without documenting and illustrating broad support from the affected indigenous peoples.²⁸ The Indigenous Peoples Plan is one of the mechanisms through which that support is solicited. By importing the additional development requirements of OP 4.10 into the policy on involuntary resettlement, the chances of reducing the impoverishment risks associated with involuntary resettlement will significantly increase. The recommendations made here should also be applied to IFC's Performance Standard 5 on Involuntary Resettlement.

²⁵ World Bank, "Operational Manual: Operational Policy (OP) 4.10" (July, 2005) online: World Bank<<http://web.worldbank.org>> paragraph 12 [OP 4.10].

²⁶ Ibid.

²⁷ Ibid. at paragraph 18.

²⁸ Ibid. at paragraph 11.

ALTERNATIVELY: Expand the definition of indigenous peoples to include other vulnerable groups that depend primarily on land-based modes of production for their livelihoods.

As an alternative to revising OP 4.12 in the manner suggested above, the Bank should consider expanding the definition of indigenous peoples. In its current state, OP 4.10 excludes many vulnerable communities (especially in continents like Africa) because of its adoption of a technical definition of indigeneity that places emphasis on distinctiveness from the majority population. This definition undermines and rejects the numerous African ethnic groups that self-identify as indigenous.²⁹ Furthermore, it excludes communities whose vulnerability is dictated, not by ethnic distinctiveness, but by an inability to defend their political, social and/or economic interests largely because of poverty.

To capture the vulnerable groups in regions such as Africa, the definition of indigenous peoples needs to be revised to include communities that depend primarily on land-based modes of production for their subsistence. However, even such an expansion has inherent inhibitions as it tends not only to exclude many other vulnerable communities that suffer at the hands of development-induced displacement, but also distorts indigeneity as it is understood by most African societies. As one African scholar has argued, many Africans self-identify as indigenous, largely in the dictionary sense of claiming “to be the original landowners, who have been living on and claiming ownership of the land in question since time immemorial.”³⁰

²⁹ In Uganda, for example, the more than 65 ethnic groups in the country are considered indigenous peoples of Uganda. See Chapter 3 Part VI.

³⁰ Yinka Omorogbe, “The Legal Framework for Public Participation in Decision-making on Mining and Energy Development in Nigeria: Giving Voices to the Voiceless” in Zillman, Lucas and Pring *supra* note 3 at 569 & 570 [The Legal Framework for Public Participation].

This results in a predicament. Should the definition of indigenous peoples be left intact by using the recommendations made for OP 4.12 above to cater for the ‘plenty vulnerable’ in Africa? What does the expansion of OP 4.10 to include only land-based communities mean for the rest of the African communities that self-identify as indigenous? Additionally, what does it mean for the other poor and vulnerable people that do not depend on land-based modes of production? These questions have a potential to spark off heated debate and will not be dealt with in this chapter. There is a need to consult with various stakeholders on the way forward. In the interim, it may be better to make revisions to OP 4.12 as the different stakeholders engage in an exploration of defining indigenous peoples in a manner that is more representative of countries in continents such as Africa.

RECOMMENDATION THREE: Increase the World Bank’s accountability to Affected Communities by increasing the powers of the Inspection Panel. Specifically, convert the Panel into a quasi-court, which can make binding decisions.

The conclusion reached in Chapter Four is that the Inspection Panel is a mechanism of accountability only to the extent that it provides Affected Communities with a platform to voice their complaints about the Bank’s failure to comply with its policies and procedures. However, the Panel’s findings bind neither Management nor the Board. Consequently, while the Panel is the only formal Bank-established mechanism in place for Affected Communities to report non-compliance, they are unable to use this forum to obtain any remedial action. Compare this with the Bank-established ICSID where private investors file complaints against host states. ICSID issues decisions, which are not only binding, but which should also not be set aside by the national courts of the contracting parties.³¹

³¹ See Chapter Five Part II.

One way in which the accountability of the Bank to Affected Communities can be increased is by giving the Inspection Panel powers similar to those of ICSID. In other words, the Panel should be converted into a quasi-court which makes decisions that bind the parties to a claim. The conversion of the Panel in this manner will necessitate that at least one of its members be a lawyer.

The suggestion of appointing a lawyer to advise the Inspection Panel is one that has been made to the Bank by NGOs and some academics on a number of occasions.³² The latter argue that there is a conflict of interest when the Legal Department advises the Panel on a claim relating to a project which that department previously participated in approving.³³ They contend that it is difficult to expect the legal department to take a neutral position in such cases.³⁴ The Board of Directors rejected this suggestion by arguing that the Bank's Legal Department is an independent organ, which provides advice to all organs of the Bank without favoring one over the other.³⁵ The Bank's then General Counsel added that in any event, the Legal Department is not involved in preparing Management's response to the claims before the Panel.³⁶ He also noted that the department provides the Panel with advice on matters of principle and does not comment on the merits of the case.³⁷

³² See, for example, David Hunter, "Using the World Bank Inspection Panel to Defend the Interests of Project-Affected People" (2003) 4 Chicago Journal of International Law at 208; Daniel D. Bradlow, "A Test Case for The World Bank" (1996) 11 American University Journal of International Law and Policy at 292.

³³ Hunter, *Ibid*.

³⁴ *Ibid.* ; Bradlow, "A Test Case for The World Bank" *supra* note 32 at 292.

³⁵ Ibrahim F. I. Shihata, *The World Bank Inspection Panel: In Practice* (New York: Oxford University Press, 2000) Second Edition at 173.

³⁶ Ibrahim F. I. Shihata, "The World Bank Inspection Panel – Its Historical, Legal and Operational Aspects" in Gudmundur Alfredsson and Rolf Ring (eds.), *The Inspection Panel of the World Bank: A Different Complaints Procedure* (Kluwer Law International, 2001) at 35.

³⁷ Ibrahim F. I. Shihata, *The World Bank Inspection Panel: In Practice* *supra* note 35 at 173 & 174.

If, however, the Panel is going to be converted into a judicial or quasi-judicial body, its new responsibilities will entail admitting evidence, summoning witnesses, examining the witnesses, interpreting legal documents and rules, adhering to certain rules of procedure and making legally binding decisions. These duties will require at least one legal representative on the Panel team. It is proposed that the membership of the Panel be increased from three to five. Two of those members should be internationally reputable lawyers. These lawyers should possess the other qualities required of Panel members such as having knowledge of development issues, being exposed to living conditions in developing countries, ability to deal fairly and thoroughly with requests, integrity, and independence from Management.³⁸ Being knowledgeable about the Bank's operations and the workings of other development agencies would be an added advantage. The other three members of the Panel should be non-legal members with expertise in the areas of projects financed by the Bank such as sustainable development, environment, engineering, anthropology, economics, agriculture and natural resource development.

One of the challenges of converting the Panel into a semi-court is in ensuring that it remains accessible to Affected Communities. The accessibility envisaged here has two components: monetary accessibility and technical accessibility. The two are closely linked. Currently, the procedures of the Panel are quite informal and thus accessible to lay people such as Affected Communities. Those wishing to make a complaint submit a request in writing, which is

³⁸ International Bank for Reconstruction and Development (IBRD) and International Development Association (IDA) *Resolution of the Executive Directors (the Board) establishing the Inspection Panel* (No. 93-10 for the IBRD & 93-6 for IDA) (September 22, 1993) online: The Inspection Panel <<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/ResolutionMarch2005.pdf>> paragraph 4 [The Resolution].

dated, signed and contains the contact name and address of the requester.³⁹ While there is a suggested format that requesters are encouraged to follow, the Panel does not insist on the form that a request should take.⁴⁰ Even a letter suffices as long as it contains basic information about the project and the concerns of requesters.⁴¹ English is the official language of the Panel but requests can be submitted in any language and the Panel will have them translated.⁴² Also, the Panel acknowledges the fact that requesters may not have access to or be aware of the Bank's policies and so does not require requesters to cite specific policies when filing requests.⁴³ There is no mention of an application fee in regard to the request and so the only costs incurred by requesters appear to be those relating to document preparation and costs of delivering the request.⁴⁴

If the Panel is to be converted into a dispute resolution body such as ICSID, one can anticipate that flexibility of rules and costs relating to the request would be change. For example, the current ICSID rules have formal requirements on the content of a request for arbitration or conciliation proceedings.⁴⁵ In addition to the specific contents to be included in the request, the latter should also be filed in one of the official languages of ICSID, which are English, French and Spanish.⁴⁶ There is also a lodging fee for the request, which at the

³⁹ The Inspection Panel, "How to File a Request for Inspection" online: The Inspection Panel<<http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:21911332~menuPK:566350~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html>>.

⁴⁰ Ibid.

⁴¹ The Inspection Panel, "Frequently Asked Questions" online: The Inspection Panel<<http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:22456783~menuPK:64129479~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html>>.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ The request can be filed at a World Bank country office. In such cases, requesters are encouraged to inform the Panel of such filing via email or other means. Ibid.

⁴⁵ International Centre for the Settlement of Investment Disputes, "How to file a request" online: ICSID<<http://icsid.worldbank.org/ICSID/ICSID/HowToFileReq.jsp>>.

⁴⁶ Ibid.

time of writing this thesis was US \$25,000.⁴⁷ Lastly, there are a variety of procedural rules that have to be adhered to with regard to conciliation and arbitration proceedings.⁴⁸

When transforming the Panel into a court or a quasi-court, consideration will have to be given to the financial and technical implications. There will be a need to establish the kind of rules applicable and the appropriate fees. Because Affected Communities are often poor vulnerable communities, a mechanism will have to be put in place to fund the operation of the newly constituted body. In the interview with the Malindi dam-affected community, for example, community members pointed out that initially, they were not able to file their claims in the Ugandan courts because they could not afford lawyers' fees.⁴⁹ The Bank should consult with various stakeholders on the best way to fund these operations. For example, a system may need to be established where member states contribute a certain fee to the fund over an agreed period of time or depending on the claims from each country. The specifics of this will have to be worked out.

Giving the Panel decision-making powers is important because without redress from it, the only enforcement mechanism available to Affected Communities in Uganda is the local courts, which only have jurisdiction to hear cases relating to cash compensation.⁵⁰ The Bank rules do not give Affected Communities the right to sue the former on its operational policies either in domestic or in international courts.⁵¹ Neither can these communities bring

⁴⁷ Ibid.

⁴⁸ See generally, ICSID, *ICSID Convention, Regulation and Rules* (as amended and Effective April 10, 2006) online: ICSID<<http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/basic-en.htm>>.

⁴⁹ Interview of community members at Malindi Dam-Affected Community (18 November 2009) at Jinja, Uganda [Interview of Malindi Dam-Affected].

⁵⁰ See Chapter One Part IV.

⁵¹ See Chapter Three Part VII.

actions against investors in local courts because of the internationalization clauses contained in Bilateral Investment Treaties.⁵² There may be a concern that increasing the Panel's powers would have the effect of interfering with the country's sovereignty. This concern, while legitimate, is watered down by the fact that already, this sovereignty is interfered with for the benefit of foreign investors through the proceedings of ICSID.⁵³

Recall that the Inspection Panel only receives complaints brought against the IDA and IBRD. Complaints made against IFC and MIGA are filed with an independent Compliance Ombudsman.⁵⁴ Because development projects are increasingly being financed by the private arms of the Bank (MIGA & IFC), it will be necessary that the newly transformed Inspection Panel extends its operations to hearing complaints filed against these private organs.

RECOMMENDATION FOUR: Enact domestic legislation that is specific to the resettlement and rehabilitation of people displaced by development projects.⁵⁵

The African Development Bank observes that:

The majority of the Regional Member Countries governments have adopted laws, regulations and procedures for expropriating land needed for public use and development. The expropriation laws and regulations are clear on the type and valuation of the compensation that must be paid to the affected parties. However,

⁵² See Chapter Five Part II. In fact, Affected Communities are not parties to, and as such cannot sue under these agreements.

⁵³ See Ibid.

⁵⁴ See Chapter 4 Part II.

⁵⁵ The law can cover a number of projects that result in displacement. These include public interest projects such as transport systems (roads, railways and bridges), energy infrastructure, water and sanitation, creation of biodiversity conservation areas, hospitals and schools. Other development projects consist of commercial projects such as mining, oil and gas and large commercial infrastructure such as malls, stadiums and housing estates. For more examples of the projects that can be covered by a resettlement policy or law, see Asian Development Bank, *Handbook on Resettlement: A Guide to Good Practice* (Asian Development Bank, 1998) at 4 & 94.

they are less clear on how to compensate for the land-based resources and economic activities foregone as a result of involuntary resettlement.⁵⁶

Amending the World Bank policy on involuntary resettlement by incorporating the suggestions made in Recommendations One and Two above would reduce the impoverishment risks associated with displacement. However, home-grown policies are superior to international rules given the fact that they are context specific. For example, the test of indigeneity, which is discussed in detail in Chapter Three would not be the subject of contention in a Uganda-specific law where the *Constitution of Uganda* recognizes the country's 65 ethnic groups as indigenous peoples. Also, reforming OP 4.12 would still not address displacement concerns arising from the many other projects that are not financed by the World Bank or other agencies that have resettlement policies. Lastly, even if the Bank were financing the project, it would require the project sponsor to prepare a resettlement plan that conforms to the requirements of the domestic legal framework.⁵⁷ Consequently, there is no adequate substitute for a national law on resettlement and rehabilitation.

A good starting point for Uganda would be to revisit the redundant involuntary resettlement policy that it drafted in 1995. It would be useful, when revising this policy, to draw examples from international (such as the World Bank)⁵⁸, regional (such as the African Development Bank)⁵⁹ and other countries' national policies and laws. One country that has made some headway in this regard is India, which has a national policy on resettlement and

⁵⁶ African Development Bank, "Involuntary Resettlement Policy" (2003) online: African Development Bank<<http://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/10000009-EN-BANK-GROUP-INVOLUNTARY-RESETTLEMENT-POLICY.PDF>> at paragraph 2.1.3.

⁵⁷ See World Bank, OP 4.12 *supra* note 21 Annex A paragraph 7.

⁵⁸ See generally World Bank, OP 4.12 *Ibid*.

⁵⁹ African Development Bank, "Involuntary Resettlement Policy" *supra* note 56.

rehabilitation⁶⁰ and where some states have enacted legislation specific to this issue.⁶¹ In drafting its legislation, Uganda should take note of several factors, some of which are highlighted below.

The legislation should contain a comprehensive definition of displaced persons and outline the impacts of projects that are covered by the law. Specifically, it is important that the law (or underlying policy) takes cognizance of the impoverishment risks that result from displacement. Acknowledging these risks builds the foundation for a policy and law that seek to reverse the risks. As found in other policies (such as OP 4.12), the requirement for undertaking socioeconomic studies is significant for establishing the impacts in any particular project.⁶² The law should require that the project sponsor prepare a resettlement plan. For the contents of this plan, guidance can be obtained from the World Bank⁶³ and African Development Bank⁶⁴ involuntary resettlement policies. The preparation, monitoring, implementation and evaluation of any resettlement plan should involve meaningful consultation with affected communities. At the same time, information regarding resettlement and rehabilitation should be provided to affected communities in a timely manner, widely circulated, and published in a form and language accessible to those affected.

⁶⁰ Government of India, *The National Rehabilitation and Resettlement Policy* (New Delhi: Government of India, Ministry of Rural Development, 2007).

⁶¹ See, for example, Government of Maharashtra, *Maharashtra Project Affected Persons Rehabilitation Act*, Act XI of 2001; Government of Orissa, *Orissa Resettlement and Rehabilitation Policy*, 2006 Doc. No.18040-R & REH-1/06/R.

⁶² See, for example, World Bank, OP 4.12 *supra* note 21 Annex A paragraph 6.

⁶³ World Bank, OP 4.12 *Ibid.* Annex A.

⁶⁴ African Development Bank, “Involuntary Resettlement Policy” *supra* note 56 Annex A & B.

Given the fact that approximately 90% of the country's population relies on agriculture for its livelihood,⁶⁵ emphasis should be placed on land-for-land resettlement as part of the compensation package. Both those with formal legal title and those who may not have formal title (but who have established a claim either through customary law or other recognized form in the *Land Act*) should be provided with replacement land.⁶⁶ Every effort should be taken to ensure that the resettlement land is of productive potential and that the rights of the communities in the replacement land are secured with the speedy issuance of land titles. One of the complaints that was made by the affected communities interviewed was the fact that as at the time of the interview, some of the resettled people had not been issued with land titles and this left them feeling vulnerable.⁶⁷ From the researcher's own experience, it is observed that the land registry often delays the issuance of titles even in private transactions. However, special attention should be given to situations such as displacement which is involuntary.

The law should demand that, as much as possible, the process of resettlement should respect the social networks existing within a community. India's National Policy provides, for example, that when shifting an entire population, the developer should try as much as possible to resettle them in the same area so that they retain their socio-cultural relations.⁶⁸ The resettlement site should also contain comprehensive infrastructure facilities such as roads, schools, markets, healthcare centers, safe drinking water, drainage and sanitation,

⁶⁵ See Chapter One Part II.

⁶⁶ See, for example, African Development Bank, "Involuntary Resettlement Policy" *supra* note 56 at paragraph 3.4.2; World Bank, OP 4.12 *supra* note 21 at paragraph 15.

⁶⁷ Interview of community members at Naminya Resettlement (18 November 2009) at Jinja, Uganda.

⁶⁸ Government of India, *The National Rehabilitation and Resettlement Policy* *supra* note 60 at paragraph 7.22.4.

access to electricity, training centers, recreation centers, children's playgrounds, places for worship and recreation grounds.⁶⁹

This thesis has advocated at length for the importance of a resettlement policy which makes mandatory requirements in respect of other forms of livelihood restoration in addition to land-for-land resettlement. Such requirements include providing employment, training, business development and even revenue-sharing schemes between the project sponsor and the affected communities. In India, for example, the National Rehabilitation and Resettlement Policy requires that the developer should:⁷⁰

- Provide employment to at least one person per nuclear family;
- Arrange training for the affected persons to enable them undertake employment;
- Provide scholarships and other skills' development opportunities;
- Give preferential treatment to affected communities when outsourcing contracts; and
- Provide employment opportunities to landless laborers once the project gets to the construction phase.

In addition, India's National Policy requires the payment of a monthly subsistence (equivalent to twenty-five days' minimum agricultural wages per month) for a one-year period from the time of displacement.⁷¹ It adds that in the case of certain vulnerable

⁶⁹ See, for example, Government of Maharashtra, *Maharashtra Project Affected Persons Rehabilitation Act* supra note 61 at Section 10 (2); Government of India, *The National Rehabilitation and Resettlement Policy* Ibid. at paragraph 7.22.1.

⁷⁰ Government of India, *The National Rehabilitation and Resettlement Policy* Ibid. at paragraph 7.13.1. Similar provisions are found in the Orissa Resettlement and Rehabilitation Policy. See Government of Orissa, *Orissa Resettlement and Rehabilitation Policy* supra note 61 at paragraph 9.

⁷¹ Government of India, *The National Rehabilitation and Resettlement Policy* supra note 60 at paragraph 7.16.

groups⁷² who are not provided with an alternative livelihood or not covered as part of a family, an arrangement should be made to pay annuities in the form of pensions for life.⁷³

Another component of the resettlement and rehabilitation law can be the negotiation of profit-sharing arrangements between the developer and affected communities. For example, in Orissa (India), the state law is to the effect that where the project sponsor does not provide employment to at least one family member in every affected community, the family should be given a one-time cash compensation.⁷⁴ However, the person can opt for up-to 50% of the cash payment to be issued as a convertible preference share or secured bond.⁷⁵

The law should provide protection for vulnerable groups, and for women in particular. Women are the backbone of most agro-based economies. At the same time, they are often among the most vulnerable members of the community.⁷⁶ During the interviews conducted for this thesis, one widow complained that she was unable to get employment at the project site.⁷⁷ At the same time, the project sponsor had failed to open up a market where she could sell her produce to provide for her family. In recognition of the role of women in many African communities, the African Development Bank's involuntary resettlement policy includes a number of provisions aimed at dealing with gender disparities. For example, it

⁷² Vulnerable groups for purposes of this benefit are defined to include the disabled, destitute, orphans, widows, persons over 50 years of age, unmarried girls and abandoned women. Ibid. at paragraph 6.4 (v).

⁷³ Ibid. at paragraph 7.16.

⁷⁴ Government of Orissa, *Orissa Resettlement and Rehabilitation Policy* supra note 61 at paragraph 9 (1) (a).

⁷⁵ Ibid. at paragraph 9 (1) (c). See also Government of India, *The National Rehabilitation and Resettlement Policy* supra note 60 at paragraph 6.23 which is to the effect that where the developer is a company, the affected people shall be given the option of taking up to 20% of the compensation amount due in the form of shares or debentures. It adds that the appropriate government may at its discretion raise this to 50% of the compensation amount.

⁷⁶ See, for example, World Bank, OP 4.12 supra note 21 paragraph 8; African Development Bank, "Involuntary Resettlement Policy" supra note 55 at paragraph 3.3 (c).

⁷⁷ Interview of community members at Naminya Resettlement (18 November 2009) at Jinja, Uganda.

requires that female heads of households should be fairly represented at consultation meetings and consideration should be given to holding separate women's meetings.⁷⁸

Paragraph 3.4.7 of the African Development Bank's policy succinctly highlights both the vulnerability and centrality of women in these societies and an excerpt of it is worth quoting verbatim:

The resettlement plan should also specify safeguards for the quality and quantity of land to be allocated for women in order to ensure means to achieve income generation and food security by an insertion of a specific protocol in the resettlement plan. In the absence of formal legal rights, land titles at the resettlement site or any grants included should be in the name of both spouses, provided this does not contradict the borrower's own laws and legislation. Any compensation payments should be paid into a joint account in the name of both husbands and wives. Unmarried women and elderly sons and daughters should explicitly be included as eligible for compensation for lost land, shelter, livelihoods, and other assets. Women's groups should be involved in resettlement planning, management and operations and in job creation and income generation.

Other vulnerable groups which deserve protection by the law are those below the poverty line, the landless, the elderly, children, orphans, disabled, and minority groups such religious or ethnic minorities.⁷⁹

The law should also contain provisions on the treatment of host communities. It has been observed that often, resettlement has an adverse impact on host communities since it increases pressure on resources.⁸⁰ One of the Ugandan professionals interviewed noted that there were already conflicts between host communities and the resettled communities since

⁷⁸ African Development Bank, "Involuntary Resettlement Policy" supra note 56 at paragraph 3.3 (b).

⁷⁹ Ibid. at paragraph 3.3 (c); World Bank, OP 4.12 supra note 21 at paragraph 8; Government of India, *The National Rehabilitation and Resettlement Policy* supra note 60 at paragraph 6.4 (v).

⁸⁰ African Development Bank, Ibid. at paragraph 3.3 (d).

the former viewed the resettlement process as favoring the “new comers”.⁸¹ Developers should be required to consult with host communities before resettlement, provide them with sufficient information and involve them in the planning, implementation and monitoring of the resettlement exercise.⁸² Lastly, any payments due to the host communities should be disbursed in a timely manner.⁸³

A separate government department should be established to be in charge of resettlement and rehabilitation.⁸⁴ This department may be housed in the Ministry of Lands. The department’s main objective would be to ensure that resettlement and rehabilitation are carried out in accordance with domestic and international legal requirements. One of its duties would be to coordinate between the different line ministries involved in a particular displacement exercise to ensure that delays resulting from having multiple actors are reduced. It would also consult with Affected Communities to register their concerns and inform them of their rights. At the same time, it would participate in monitoring and evaluating the extent to which the project sponsor is fulfilling its obligations. Lastly, it would contribute to the process of making resettlement budgets and prepare annual reports detailing the progress of different resettlement exercises. It is important for mechanisms to be put in place to ensure that this department is independent from both political pressure and any threats of capture by private investors so that it can perform its duties in a neutral manner. Independent audits of the performance of the department; a good remuneration package for its officers; security

⁸¹ Interview of Dr. Emmanuel Kasimbazi (Lecturer, Makerere University Faculty of Law) (23 November 2009) at Makerere University Kampala, Uganda.

⁸² World Bank, OP 4.12 *supra* note 21 at paragraph 13 (b).

⁸³ African Development Bank, “Involuntary Resettlement Policy” *supra* note 56 at paragraph 3.3 (d).

⁸⁴ See, for example, Government of Maharashtra, *Maharashtra Project Affected Persons Rehabilitation Act* *supra* note 61 at Sections 3 – 9; Government of India, *The National Rehabilitation and Resettlement Policy* *supra* note 60 at paragraph 9.1.1.

of tenure; competence and integrity of its officials; and reporting to a body outside the line Ministry are some of the ways in which independence can be encouraged.

Lastly, the law should provide for the establishment of tribunals that will listen to disputes relating to resettlement and rehabilitation. This duty can be performed by the existing land tribunals.⁸⁵ However, officials in these tribunals would have to be given special training in resettlement and rehabilitation matters, including the domestic and international laws and policies relating to the same.

As Uganda draws from experiences of other countries and international agencies, it needs to investigate some of the concerns that have been raised against these policies and laws. Invariably, the law to be enacted should also take into account the economic, social, cultural, geographic and political specifics of Uganda. The process of drafting the policy and its accompanying law should also involve meaningful consultations with a number of stakeholders including:

- Representatives from different government ministries;
- Communities that have been the subject of displacement or those likely to be the subject of future displacement;
- Host communities or those likely to be hosts in the future;
- Representatives of private investors that are engaged in development projects;
- Civil society, particularly NGOs that are active in issue areas;
- Representatives of donor institutions;
- Experts in resettlement and rehabilitation; and

⁸⁵ See Chapter One Part IV.

- Academics.

It is one thing to have a good resettlement and rehabilitation law and quite another to implement it. Political will and commitment is central to translating the provisions of this law into practical realities. Also, because the law covers a wide range of issues without taking into account project-specific conditions, it is necessary to further concretize the protections for Affected Communities through case-by-case negotiations. The next recommendation proposes the conclusion of agreements to serve this purpose.

RECOMMENDATION FIVE: Ensure that Affected Communities derive benefits from and are protected against the adverse impacts of development projects by introducing contractual arrangements between project sponsors and affected communities. One type of agreement that is worth exploring is the Impact and Benefit Agreement.

National legislation on rehabilitation and resettlement addresses displacement concerns at a general – and perhaps even, abstract – level. There is an imperative need for the rights and obligations of Affected Communities and developers to be spelt out on a case-by-case basis. Also, these communities deserve to have their rights secured in a manner similar to that in which rights of private investors are secured (that is, through binding agreements). One way in which to concretize the protection of interests of Affected Communities is to provide for the negotiation of agreements between project sponsors (whether they be public or private parties) and representatives of the communities.⁸⁶ A type of agreement that is increasingly gaining popularity (in certain parts of the world) in relationships between project developers in the resource sector and affected communities is the Impact and Benefit Agreement (IBA).

⁸⁶ See also Terri Hathaway & Lori Pottinger, “The great hydro-rush: The privatisation of Africa’s rivers” in David A. McDonald (ed.) *Electric Capitalism: Recolonising Africa on the Power Grid* (HSRC Press, 2009) at 174.

IBAs⁸⁷ are agreements concluded between representatives of aboriginal (First Nation) communities and natural resource developers. The agreements are intended to manage the impacts associated with resource development and to ensure that aboriginal communities benefit from developments that are being made on their land.⁸⁸ These agreements are increasingly becoming common practice in mineral development projects undertaken in countries such as Canada and Australia.⁸⁹ They boast of a number of short and long-term benefits including providing income to fund services such as education, health and housing; facilitating revenue-generating activities; increasing access to employment, skills training and business development; and promoting public participation in the operation of social, environmental and cultural impacts that a development has on aboriginal land.⁹⁰ On the whole, they empower aboriginal communities by promoting their right to self-determination in relation to their resources. IBAs are not necessarily designed to deal with displacement, even though sometimes they take on this purpose. More commonly, they are concluded as a

⁸⁷ IBAs are referred to variously as socio-economic agreements, benefit agreements, participation agreements, cooperation agreements, good neighbor agreements and sometimes, memorandums of understanding. See Janet Keeping, "Thinking About Benefits Agreements: An Analytical Framework" Northern Minerals Program Working Paper No. 4 (Yellowknife: Canadian Arctic Resources Committee, 1998) online: Canadian Arctic Resources Committee <http://www.carc.org/northern_minerals/NMPWorkingPaper4Keeping.pdf> at 2 – 5 [Thinking About Benefits Agreements]; Lindsay Galbraith, Ben Bradshaw and Murray B. Rutherford, "Towards a new supraregulatory approach to environmental assessment in Northern Canada" (2007) 25:1 Impact Assessment and Project Appraisal at 28 [Towards a new supraregulatory approach].

⁸⁸ Jason Prno, Ben Bradshaw & Dianne Lapierre, "Impact and Benefit Agreements: Are They Working?" (2010) online: Canadian Business Ethics Research Network <http://www.cbern.ca/UserFiles/Servers/Server_625664/File/IBA%20PDF/CIM%202010%20Paper%20-%20Prno,%20Bradshaw%20and%20Lapierre.pdf> at 1 & 3; Keeping, *Ibid.* at 2.

⁸⁹ Ciaran O'Faircheallaigh, "Corporate-Aboriginal Agreements on Mineral Development: The Wider Implications of Contractual Arrangements" (2009) online: Canadian Business Ethics Research Network <<http://www.cbern.ca/kr/One.aspx?objectId=10486981&contextId=677979&lastCat=10486919>> at 2 [Corporate-Aboriginal Agreements on Mineral Development]; Peter D. Cameron & Ernesto Correa, "Towards the Contractual Management of Public-Participation Issues: A Review of Corporate Initiatives" in Zillman, Lucas & Pring (eds) *supra* note 3 at 218 [Towards the Contractual Management of Public-Participation Issues].

⁹⁰ O'Faircheallaigh, *Ibid.* at 3 - 5.

result of a development being made on or adjacent to land owned by aboriginal communities irrespective of whether or not they are physically residing on it.⁹¹

In Canada, IBA-like agreements were originally signed between resource developers (companies) and government agencies (on behalf of the aboriginal community).⁹² The original agreements were often restricted to requiring training for and employment of aboriginal communities.⁹³ However, with the strengthening of the legal status of aboriginal communities through amendments in Canada's Constitution, judicial rulings and settlement of land claims, these communities are now able to enter into agreements in their own name.⁹⁴ Often, the community will be represented by aboriginal development organizations, community chiefs or their band councils.⁹⁵

There is no federal law or policy in Canada requiring the conclusion of IBAs as a precondition to approving a mineral development project.⁹⁶ This has led to the lack of a

⁹¹ For an overview of instances when the need for an IBA arises, see, for example, Steven A. Kennett, "Issues and Options for a Policy on Impact and Benefit Agreements" (1999) online: Canadian Business Ethics Research Network

<<http://cbern.sharpschool.com/kr/One.aspx?objectId=10486954&contextId=677979&lastCat=10486919>> at 13.

⁹² Kennett notes, for example, that the first IBA in the northern territories of Canada (the Nanisivik Agreement) was signed between the Government of Canada and Mineral Resources International Limited on 18 June 1974. Ibid. at 1. See also Keeping, "Thinking About Benefits Agreements" supra note 87 at 5.

⁹³ Kevin O'Reilly & Erin Eacott, "Aboriginal Peoples and Impact and Benefit Agreements: Report of a National Workshop" Northern Minerals Program Working Paper No. 7 (Yellowknife: Canadian Arctic Resources Committee, 1998) online: Canadian Arctic Resources Committee <www.carc.org/northern_minerals/NMPWorkingPaper7OReilly.pdf> at iii [Aboriginal Peoples and Impact and Benefit Agreements].

⁹⁴ Keeping, "Thinking About Benefits Agreements" supra note 87 at 5.

⁹⁵ Irene Sosa and Karyn Keenan, "Impact Benefit Agreements between Aboriginal Communities and Mining Companies: Their Use in Canada" (2001) online: Canadian Environmental Law Association <<http://s.cela.ca/files/uploads/IBAeng.pdf>> at 3 [Impact Benefit Agreements between Aboriginal Communities and Mining Companies].

⁹⁶ Kennett, "Issues and Options for a Policy on Impact and Benefit Agreements" supra note 91 at 15.

clear regulatory framework to govern these agreements at a national level.⁹⁷ Even in the northern part of Canada where IBAs are considered standard practice, the role of law remains somewhat uncertain.⁹⁸ Consequently, the conclusion of IBAs usually depends on the rights that a particular community has to the land and resources, whether those land rights come with any special regulatory requirements, a particular province's treatment of this issue and the relationship between the mining company and the aboriginal community in question.⁹⁹ For example, there have been cases where the signing of land claim agreements or self-government agreements results in a legal requirement to conclude IBAs.¹⁰⁰ Other times, provincial statutes establish conditions which require entering into benefit agreements before companies can proceed with operations.¹⁰¹ Sometimes, the signing of agreements is a condition for granting operating licenses.¹⁰² There have also been instances when the government has insisted on these agreements on an ad hoc basis.¹⁰³ In other cases, indigenous peoples have demanded the signing of IBA-like agreements even in

⁹⁷ O'Reilly & Eacott, "Aboriginal Peoples and Impact and Benefit Agreements" supra note 93 at 15.

⁹⁸ Kennett, "Issues and Options for a Policy on Impact and Benefit Agreements" supra note 91 at 1.

⁹⁹ Sosa and Keenan, "Impact Benefit Agreements between Aboriginal Communities and Mining Companies" supra note 95 at 6.

¹⁰⁰ Perhaps one of the most popular Land Claim Agreements in Canada that provides for IBAs is the Nunavut Land Claim Agreement. This agreement requires the negotiation of an Inuit Impact and Benefit Agreement between the company and the relevant Inuit organization. See Keeping, "Thinking About Benefits Agreements" supra note 87 at 21 & 22. Another land claim agreement containing provisions on IBAs is the Inuvialuit Final Agreement (concluded in the Northwest Territories). See Kennett, "Issues and Options for a Policy on Impact and Benefit Agreements" supra note 91 at 9 – 11.

¹⁰¹ For example, the *Yukon Oil and Gas Act* provides that once a company obtains a license for oil and gas activities, it cannot proceed with its operations unless it has entered into a benefits agreement with either the Minister of Economic Development or the Yukon First Nation, or both, depending on the land rights in the area of operation. Kennett, *Ibid.* at 25.

¹⁰² In northern Saskatchewan, for example, all those interested in undertaking resource development should obtain a surface lease from the provincial government. As one of the conditions of the Surface Lease Agreement, the developer is required to enter into a Human Resource Development Agreement (HRDA) with the province. O'Reilly & Eacott, "Aboriginal Peoples and Impact and Benefit Agreements" supra note 93 at 6.

¹⁰³ This is what happened in the case of the Ekati mine in the Northwest Territories where the Minister of the Department of Indian Affairs and Northern Development conditioned the granting of a water license on the signing of an IBA between BHP and the aboriginal community. Kennett, "Issues and Options for a Policy on Impact and Benefit Agreements" supra note 91 at 1 & 15; Sosa and Keenan, "Impact Benefit Agreements between Aboriginal Communities and Mining Companies" supra note 95 at 7 & 8.

the absence of express legal requirements to that effect.¹⁰⁴ Lastly, companies have sometimes found it beneficial to initiate the process of signing these agreements in order to reduce potential delays to a project, have a good working relationship with the community, or enhance the corporate image of the company.¹⁰⁵ In such cases, companies have signed the agreements for purposes of securing “a social license to operate”.¹⁰⁶

The contents of each agreement vary with the needs and bargaining power of the community in question. However, some common provisions found in IBAs include:¹⁰⁷

- A statement recognizing the land rights of the aboriginal community;
- Provisions on employment including prioritizing the employment of aboriginal communities and setting employment targets;
- Establishing employment support programs such as training, cross-cultural counselling, family assistance programs, and transport between work sites and villages;
- Funding scholarship programs;

¹⁰⁴ See generally Katherine Anne Trebeck, “Tools for the Disempowered? Indigenous Leverage Over Mining Companies” (2007) 42:4 Australian Journal of Political Science at 541 – 562.

¹⁰⁵ Courtney Fidler and Michael Hitch, “Impact and Benefit Agreements: A Contentious Issue for Environmental and Aboriginal Justice” (2007) 35:2 Environments Journal at 57 & 58.

¹⁰⁶ Jason Prno, Ben Bradshaw & Dianne Lapierre, “Impact and Benefit Agreements: Are They Working?” supra note 88 at 3. For example, in the first IBA signed between Little Salmon/Carnacks First Nation Community and BYG Natural Resources Canada, the First Nation community did not have a settled land claim at the time. However, the company found it beneficial to enter into an agreement because this would make it easier to hire local labor. Similarly, an employment agreement signed between the Cree Nation of Mistissini (Canada) and the company INMET was largely due to the good will of the company in supporting the community initiative. O’Reilly & Eacott, “Aboriginal Peoples and Impact and Benefit Agreements” supra note 93 at 8.

¹⁰⁷ See, generally Keeping, “Thinking About Benefits Agreements” supra note 87; Kennett, “Issues and Options for a Policy on Impact and Benefit Agreements” supra note 91 at 7 & 17; Fidler and Hitch, “Impact and Benefit Agreements: A Contentious Issue for Environmental and Aboriginal Justice” supra note 105 at 57 & 61; Prno, Bradshaw & Lapierre, “Impact and Benefit Agreements: Are They Working?” supra note 88 at 3.

- Making revenue-sharing arrangements including equity participation and land-use payments;
- Monitoring environmental impacts of the project;
- Promoting local business enterprises including outsourcing to them and encouraging project subcontractors to do the same;
- Providing financial assistance to small local businesses;
- Holding community workshops on different development opportunities;
- Establishing implementation, monitoring and evaluation committees, which are composed of representatives from both the community and the resource developer;
- Providing for dispute resolution mechanisms;
- Confidentiality clauses; and
- Clauses on the amendment and renegotiation of the agreement.

It is advisable for the language in agreements to vary according to the issue being addressed. For example, where a provision relates to easily quantifiable and determinable aspects such as financial arrangements and environmental commitments, the agreements should contain specific information on the numeric standards to be applied and outline specific penalties for breach of commitments.¹⁰⁸ On the other hand, more flexible terms should be used for aspects that depend on the progress of the project in question, such as the number of employees.¹⁰⁹ This flexibility should not, however, be confused with unequivocal language.

¹⁰⁸ Sosa and Keenan, "Impact Benefit Agreements between Aboriginal Communities and Mining Companies" *supra* note 95 at 18.

¹⁰⁹ *Ibid.* at 18.

IBAs are not without their challenges. First, because many times the bargaining power between aboriginal communities and companies is unequal, negotiations have sometimes resulted in agreements that do not adequately protect the interests of the communities.¹¹⁰ Second, these agreements have been known to be both time-consuming¹¹¹ and expensive.¹¹² Third, the poor implementation of agreements in some cases has prevented aboriginal communities from benefiting from them.¹¹³ Fourth, the confidentiality clauses in these agreements prevent participants from communicating agreement details to the affected communities on whose behalf they negotiate and prevent different communities from learning from each other's experiences.¹¹⁴ Fifth, there is concern that including environmental impact issues in IBAs (which are private and community-specific documents) often waters down regulatory requirements of environmental impact assessments and exposes the community to more risks.¹¹⁵ Sixth, some IBAs have included the unfair condition that once the community has signed the agreement, it should not raise any further objections against the operations of the company.¹¹⁶

¹¹⁰ Keeping, "Thinking About Benefits Agreements" supra note 87 at 5.

¹¹¹ For example, in an agreement that was concluded in March 1997 between Hamersley Iron Pty Limited and Gumala Aboriginal Corporation in Australia (the Tandicoogna Agreement), the preparatory stage for the negotiations took over a year and the formal negotiations lasted for approximately nine months. See Cameron & Correa, "Towards the Contractual Management of Public-Participation Issues" supra note 89 at 225.

¹¹² Expenses include fees for experts such as lawyers, costs for disseminating information to community members, holding committee meetings and travel expenses. Kennett, "Issues and Options for a Policy on Impact and Benefit Agreements" supra note 91 at 18; Sosa and Keenan, "Impact Benefit Agreements between Aboriginal Communities and Mining Companies" supra note 95 at 19.

¹¹³ Kennett, *Ibid.* at 37.

¹¹⁴ O'Reilly & Eacott, "Aboriginal Peoples and Impact and Benefit Agreements" supra note 93 at 19 & 20.

¹¹⁵ See generally Heidi Klein, John Donihee & Gordon Stewart, "Environmental Impact Assessment and Impact benefit Agreements: Creative Tension or Conflict?" (2004) online: Canadian Business Ethics Research Network

<<http://www.cbern.ca/kr/One.aspx?objectId=10486942&contextId=677979&lastCat=10486919>>; Kennett, "Issues and Options for a Policy on Impact and Benefit Agreements" supra note 91 at 42 & 43.

¹¹⁶ O'Reilly & Eacott, "Aboriginal Peoples and Impact and Benefit Agreements" supra note 93 at 16.

There are also industry-specific concerns about these agreements. Some feel that IBAs are being used to down-load governments' responsibilities onto project sponsors.¹¹⁷ Furthermore, companies have complained about the fact that the unclear regulatory framework creates a lot of uncertainty and works against business planning both in terms of time and costs.¹¹⁸ Industry also complains that some communities have unrealistic expectations about the performance of projects and as such demand for benefits that do not match what the project can offer.¹¹⁹ Others view IBAs as an undue interference in the manner in which decisions in the private sector are made.¹²⁰

Despite these shortcomings, many agree that if properly drafted and implemented, IBAs can go a long way in ensuring that vulnerable groups such as aboriginal communities benefit from and are compensated for the impacts that they suffer as a result of resource development on their properties.¹²¹ Similarly, introducing IBA-like agreements in development projects such as large dams has the potential to significantly reduce the impoverishment risks that result from displacement.

¹¹⁷ Some note, for example, that with government cutbacks on spending for social programs and environmental regulation, companies sometimes perceive IBAs as forcing them to provide the social welfare that would otherwise be the responsibility of government. See Sosa and Keenan, "Impact Benefit Agreements between Aboriginal Communities and Mining Companies" supra note 95 at 9. See also generally, Courtney Fidler and Michael Hitch, "Used and Abused: Negotiated Agreements" online: Canadian Business Ethics Research Network <<http://www.cbern.ca/kr/One.aspx?objectId=10486987&contextId=677979&lastCat=10486919>>.

¹¹⁸ Kennett, "Issues and Options for a Policy on Impact and Benefit Agreements" supra note 91 at 40.

¹¹⁹ Ibid.

¹²⁰ Ibid. at 41.

¹²¹ Fidler and Hitch, "Impact and Benefit Agreements: A Contentious Issue for Environmental and Aboriginal Justice" supra note 105 at 64 & 65. See also Prno, Bradshaw & Lapierre, "Impact and Benefit Agreements: Are They Working?" supra note 88 at 4 - 9. For recommendations on how some of the shortcomings can be dealt with, see Kennett, "Issues and Options for a Policy on Impact and Benefit Agreements" supra note 91 at 51 - 58 & 71 - 105; Sosa and Keenan, "Impact Benefit Agreements between Aboriginal Communities and Mining Companies" supra note 95 at 22; O'Faircheallaigh, "Corporate-Aboriginal Agreements on Mineral Development" supra note 89 at 10 - 14.

Admittedly, IBAs have specific historical and contextual relevance.¹²² They are rooted in the long history of the relationship between aboriginal communities and settler communities in which the latter encroached on the lands and other proprietary interests of the former.¹²³ With the more recent recognition of aboriginal rights through judicial proceedings and other legal developments, these communities have settled land claims and acquired some political rights to self-determination, thereby gaining some leverage over their resources.¹²⁴ In fact, the negotiation of the agreements, as demonstrated above, has varied largely with the nature of the rights that a particular aboriginal community has over the land on which the development is planned.¹²⁵

At the risk of over-simplifying the complex history of aboriginal title, I draw here some comparisons between the status of aboriginal peoples and that of communities displaced by development projects in the Third World, particularly Uganda (and arguably much of Africa). To begin with, parallels can be drawn between the rights that aboriginal communities have to land (either through settled land claims or as traditional lands) and the

¹²² For a discussion on the history of the relationship between aboriginal peoples in Canada and the Crown, see, for example, Thomas Isaac & Anthony Knox, "Canadian Aboriginal Law: Creating Certainty in Resource Development" (2004) <http://www.mccarthy.ca/pubs/Resource_development.pdf> [Canadian Aboriginal Law]; Sosa and Keenan, "Impact Benefit Agreements between Aboriginal Communities and Mining Companies" *supra* note 95 at 3 - 7. See also Cameron & Correa, "Towards the Contractual Management of Public-Participation Issues" *supra* note 89 at 223 - 225 for a brief history of aboriginal rights in Australia.

¹²³ Fidler and Hitch, "Impact and Benefit Agreements: A Contentious Issue for Environmental and Aboriginal Justice" *supra* note 105 at 52 & 54.

¹²⁴ *Ibid.* at 51.

¹²⁵ Kennett gives a detailed explanation of the different land rights that aboriginal communities have and how these affect their ability to negotiate IBAs. He notes that in cases where there are settled land claims in which the aboriginal community has the right to both surface and sub-surface land, the community has more powers to insist on IBAs. However, where the surface rights are owned by the community but the subsurface rights belong to the Crown, communities do not have as much leverage in negotiating the compensation. Lastly, in cases where both surface and subsurface rights belong to the Crown and where land claims have not been settled, then the requirements of an IBA will be determined primarily by the Department of Indian Affairs and Northern Development on behalf of the Crown. Kennett, "Issues and Options for a Policy on Impact and Benefit Agreements" *supra* note 91 at 5 & 6.

ownership of land title in Uganda. The aboriginal title to land gives First Nations the communal right to exclusively own, occupy and use the land.¹²⁶ In Uganda, land belongs to the citizens and vests in them according to the land tenure systems recognized under the *Constitution*.¹²⁷ The *Constitution* and *Land Act* provide for four types of land ownership: customary, freehold, mailo and leasehold.¹²⁸ Citizens of Uganda can apply to convert customary and leasehold tenure into freehold.¹²⁹ Freehold tenure entitles one to hold the land in perpetuity with the ability to develop the land for any lawful purposes, enter into transactions on the land¹³⁰ and dispose of the land.¹³¹ The rights of a mailo holder are similar to freehold tenure, with a few exceptions.¹³² What is important to note here is the exclusive ownership in perpetuity that citizens are entitled to, particularly when compared with other types of ownership, such as leaseholds.

Second, the intimate relationship that aboriginal communities have with their natural resources is comparable to that which many dam-affected communities have with the same. Like aboriginal communities,¹³³ many dam-affected communities depend on their land for subsistence farming and on rivers for fishing and water for household use.¹³⁴ Additionally, for both, natural resources often possess either spiritual or cultural attachments. For

¹²⁶ Notably, like in most other jurisdictions, the government reserves the right to infringe on title in certain circumstances, including for public interest. Sosa and Keenan, “Impact Benefit Agreements between Aboriginal Communities and Mining Companies” supra note 95 at 3 & 4; Isaac & Knox, “Canadian Aboriginal Law” supra note 122 at 5 – 7.

¹²⁷ *Constitution of the Republic of Uganda*, 1995, Article 237 (1) [As at 15 February 2006]. See also *The Land Act* 1998 Cap 227 Laws of Uganda, Section 2.

¹²⁸ *Constitution of the Republic of Uganda*, Ibid. Article 237 (3); *The Land Act* Ibid. Section 2.

¹²⁹ *Constitution of the Republic of Uganda*, Ibid. Article 237 (4) (b) and 237 (5).

¹³⁰ These include selling, mortgaging, leasing, sub-dividing and creating other interests on the land. See *The Land Act* supra note 127 Section 3 (2) (b).

¹³¹ Ibid. at Section 3 (2).

¹³² A mailo owner is allowed for example, to separate the ownership of land from the ownership of developments on that land. Ibid. at Section 3 (4) Land Act.

¹³³ Barton, “Underlying Concepts and Theoretical Issues in Public Participation” supra note 3 at 105.

¹³⁴ See generally Chapter Three.

example, the Bujagali Falls has a cultural and spiritual relevance to the Basoga ethnic group.¹³⁵

Third, like Affected Communities, aboriginal communities often suffer disproportionately from the adverse impacts of development projects without being able (in the absence of IBAs) to enjoy the benefits accruing there from.¹³⁶ For example, resource development often results in environmental impacts such as pollution and distorts the natural habitat of wildlife, it exacerbates income inequalities, and sometimes results in displacement, social tensions and family disruptions.¹³⁷ Also, because these two communities often have limited exposure to formal education systems, skills development, access to information and generally poor economic conditions, they are too frequently one of the most vulnerable groups in societies.¹³⁸ In the end, the two constitute the traditionally weak parties whose economic, social and/or political status has historically disabled them from influencing decisions even in the projects that affect them.

It ought to be pointed out that IBA-like agreements are not unique to natural resource projects and aboriginal communities. In the United States, Community Benefit Agreements (CBAs) have been signed between housing developers and community-labor coalitions. CBAs are designed to ensure that housing projects benefit local residents by giving them priority in the hiring process, preferential rental space for local merchants and providing

¹³⁵ Interview of Nabamba Budhagaali (Jaja Budhagaali) (November 18, 2009) at his shrine in Jinja, Uganda.

¹³⁶ See for example, Puno, Bradshaw & Lapierre, "Impact and Benefit Agreements: Are They Working?" *supra* note 88 at 3.

¹³⁷ Sosa and Keenan, "Impact Benefit Agreements between Aboriginal Communities and Mining Companies" *supra* note 95 at 2.

¹³⁸ See, for example, Trebeck, "Tools for the Disempowered? Indigenous Leverage Over Mining Companies" *supra* note 104 at 542 & 543.

affordable housing assistance.¹³⁹ Similarly, the “good neighbour” agreements which were introduced in places like Worcester, Massachusetts in 1978 are increasingly being signed between corporations (including chemical plants, oil refineries and foundries) and groups of citizens to promote sustainable development.¹⁴⁰ In fact, one author has referred to such agreements as the “new vehicle for investment in America’s neighbourhoods”.¹⁴¹ Provisions in these agreements vary but often include: giving the community access to information, giving jobs to locals, rights of affected groups to inspect the facility, pollution prevention and opportunities geared towards fulfilling local economic needs.¹⁴²

Much can be gleaned from the preceding analysis of IBAs. If Uganda is to introduce these agreements to form part of its domestic legal framework, it will have to take into account certain factors. First, for the agreements to become common practice and have consistent application, domestic law should explicitly provide for them. The recommended law on resettlement and rehabilitation would perhaps be the best place to put this requirement. Second, it will be important that government plays some role in these agreements, even where the project sponsor is a private party. This role could be direct, such as a government agency being one of the parties to the agreement. Or it could be indirect, such as the government playing a supervisory role in the negotiation, implementation and/or evaluation of the agreement. In some cases in Canada, it has been noted that even though aboriginal

¹³⁹ See generally Greg LeRoy & Anna Purinton, “Community Benefit Agreements: Ensuring that Urban Development Benefits Everyone” (August 2005) online: Neighborhood Funders Group<www.nfg.org>.

¹⁴⁰ Celia Campbell-Mohn, “The Human Dimension in Twenty-first Century Energy and Natural Resources Development: The New Law of ‘Public Rights’ in Private Development in the United States” in Zillman, Lucas & Pring (eds) *supra* note 3 at 239 [The Human Dimension in Twenty-first Century Energy and Natural Resources Development].

¹⁴¹ David A. Marcello, “Community benefit agreements: new vehicle for investment in America’s neighbourhoods” 39:3 *The Urban Lawyer* (2007) at 657.

¹⁴² Campbell-Mohn, “The Human Dimension in Twenty-first Century Energy and Natural Resources Development” *supra* note 140.

communities are happy to sign IBAs in their own names, they also feel that government involvement in one way or the other is helpful in strengthening the enforceability and implementation of these agreements.¹⁴³ In some cases, the government has signed additional agreements with industry to ensure that it supplements IBAs concluded between communities and resource developers.¹⁴⁴ Third, the national law should provide some guidance on how to determine who will finance the different components of agreements. In Canada, financing has varied from project-to-project with funding sometimes coming from companies, other times from government agencies and other times, both of these parties.¹⁴⁵ Care should be taken to ensure that IBAs are not used by the government to download traditional state responsibilities onto project sponsors.

RECOMMENDATION SIX: Increase the access that Affected Communities and other interested parties have to project information. Furthermore, ensure that information is released in a timely manner, in a language understood by affected communities and is widely circulated.

Proponents of public participation stress the fact that information is central to decision-making and accessing justice.¹⁴⁶ Similarly, it has been observed that successful IBA negotiation depends significantly on the extent to which the community in question has access to the relevant information.¹⁴⁷

¹⁴³ Sosa and Keenan, "Impact Benefit Agreements between Aboriginal Communities and Mining Companies" supra note 95 at 3.

¹⁴⁴ Keeping, "Thinking About Benefits Agreements" supra note 87 at 5.

¹⁴⁵ Sosa and Keenan, "Impact Benefit Agreements between Aboriginal Communities and Mining Companies" supra note 95 at 19; O'Reilly & Eacott, "Aboriginal Peoples and Impact and Benefit Agreements" supra note 93 at 4.

¹⁴⁶ Pring & Noe, "The Emerging International Law of Public Participation" supra note 3 at 29; Barton, "Underlying Concepts and Theoretical Issues in Public Participation" supra note 3 at 79.

¹⁴⁷ Sosa and Keenan, "Impact Benefit Agreements between Aboriginal Communities and Mining Companies" supra note 95 at 18.

Article 41 (1) of the *Constitution of the Republic of Uganda* and Section 5 (1) of the *Access to Information Act*¹⁴⁸ provide that every citizen of Uganda has a right to access information that is in the possession of the state or any other public body¹⁴⁹ unless the release of that information poses a risk to state security or sovereignty or interferes with another person's private rights. Consequently, information can be withheld where it relates to the proprietary interests of a third party or prejudices a third party's commercial competition or puts this party in a disadvantaged position in contractual or commercial negotiations.¹⁵⁰ The only instances where such information can be released are: if it is already publicly available, where the third party consents to its disclosure in writing, or where it relates to an investigation carried out by or on behalf of the state and its disclosure would reveal serious public safety, public health or environmental risks.¹⁵¹

There is often debate, when private parties are involved in the production of a public good, on the extent to which the public should be given access to project information. This debate revolves around where to draw the line between what is public and what part of this information relates to trade or commercial secrets of companies. This issue was raised in the case of the Bujagali Project when Greenwatch (U) Limited, an NGO, sought to obtain (from the Government), the Power Purchase Agreement that was concluded between UEB and AES Nile Power. Access to the agreement was also sought from the World Bank when complainants filed their claim with the Inspection Panel. Bank Management responded that the "Power Purchase Agreement (PPA) is an agreement between the Ugandan Government

¹⁴⁸ *The Access to Information Act, 2005* Laws of Uganda.

¹⁴⁹ A public body is defined to include a government ministry, department, local government, statutory corporation, bodies, commissions or other organs of government. See *Ibid.* at Section 2 (1).

¹⁵⁰ *Ibid.* at Section 27 (1).

¹⁵¹ *Ibid.* at Section 27 (2).

and the private project sponsor ... should the concerned parties agree to disseminate it to the public, IDA would have no objection.”¹⁵² Similarly, in the case of Greenwatch (U) Ltd. vs A.G & Uganda Electricity Transmission Company Limited,¹⁵³ Government argued that it could not produce the agreement because it was a comprehensive document that contained many technical and commercial secrets of the project sponsor. The court held that the state did not have to be a party to an agreement for it to fall under Article 41 of the Constitution. It also noted that just because UETCL was a limited liability company did not mean that it could not act as a government agency under the same article of the Constitution especially as some of its shareholders were citizens of Uganda. Lastly, it held that because the Minister of Energy signed the agreement on behalf of the Republic of Uganda, it was a public document.

Even with this ruling, one can still expect that there will continue to be debates in the future about which project documents or information can be released to the public. It would be helpful if the policy or law on resettlement and rehabilitation provides some guidance on this.

III. Implementation of Recommendations

The recommendations made in part II above cut across international, national and local aspects of the official legal framework proposed for DIDR. For these recommendations to

¹⁵² The Inspection Panel, “Investigation Report – Uganda: Third Power Project (Credit 2268- UG) and the Proposed Bujagali Hydropower” (2002) online: World Bank <<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/UGANDAIRMMainReport.pdf>> at 10.

¹⁵³ Greenwatch (U) Ltd. vs A.G & Uganda Electricity Transmission Company Limited HCCT-00-CV-MC-0139 of 2001.

be effective, the Government has to proactively engage in the reform process instead of relying primarily on international institutions to make such changes. A good starting place would be to review the provisions of the 1995 draft policy on involuntary resettlement to ensure that it incorporates the concerns raised in this thesis and observations made by commentators elsewhere. Given that many African countries are on a mission to expand dam construction and taking into account the fact that there are likely to be notable similarities between the Affected Communities in the continent, the Government would benefit from building strong partnerships with other African states around this issue area. The African Development Bank, which deals with involuntary resettlement through the projects it finances and has context-specific advantage, should also be engaged more as a resource in the consultations regarding DIDR. Similarly, constant dialogue with other Third World countries outside the continent should be encouraged. Lastly, the domestic legal framework should be buttressed through the introduction and implementation of radical bottom-up approaches such as the conclusion of community-centred agreements such as IBAs.

It should be acknowledged, however, that as long as Third World countries continue to significantly rely on foreign investors as the ‘deliverers of development’, one can expect that IFIs will also continue to be deeply involved in the policy and legal decisions of these countries. This is because, while foreign capital may have replaced direct loans and grants from IFIs to Third World governments, IFIs continue to take centre-stage by virtue of their relationship with foreign investors. As observed in Chapter Five, for example, for fear of political risks such as nationalization, confiscation of property and the obsolescing bargain,

investors will continue leveraging their interests by significantly supplementing their equity contributions with IFI loans and the backing of guarantees. At least for the foreseeable future, investors will also continue to rely on internationalization clauses that ensure that arbitration is conducted in jurisdictions outside host states. This means that it is equally important to study and amend international rules pertaining to involuntary resettlement.

Lastly, without practical reforms, changes to legal text on their own are insufficient to result in tangible benefits to Affected Communities. As noted in Chapter Three, for example, the practical implementation of policy requirements has many times been responsible for the failure of resettlement and rehabilitation initiatives. To ensure proper implementation, it is important that initiatives are constantly monitored, evaluated and effectively supervised. At the same time, it is pertinent that there is political will and commitment to proper resettlement and rehabilitation by core actors such as government officials and project financiers, such as IFIs. Sometimes, political will comes from good leadership. Other times – as observed in Chapter Four – it is forced or influenced by the destabilization of the status quo by those who suffer the adverse impacts of these projects or by groups that sympathize with their cause. It is these actors that Third World scholars are increasingly celebrating for their resilience, bravery and commitment.¹⁵⁴ And it is these actors that are writing law from the periphery.

¹⁵⁴ See generally Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press, 2003); Ibrónke T. Odumósú, “Locating Third World Resistance in the International Law on Foreign Investment” (2007) 9 *International Community Law Review* at 427 – 444.

IV. Preamble to the Conclusion: The Role of Resistance

One scholar has asked: “can law be emancipatory? Or, is there a relationship between law and the quest for a good society?”¹⁵⁵ To this, Santos responds that to eradicate the “social fascism”¹⁵⁶ that characterizes neo-liberal globalization, there is need for another law and another politics: “the law and politics of counter-hegemonic globalization and subaltern cosmopolitanism.”¹⁵⁷ These counter-hegemonic struggles oppose both the hegemonic conceptions of neo-liberal globalization and the assumptions of general interests underlying the same.¹⁵⁸

Santos is mindful of the fact that what constitutes ‘law’ in the West is somewhat different from the Non-Western idea of ‘law’.¹⁵⁹ He also underlines the fact that his hypothesis is founded on a western narrative.¹⁶⁰ However, he concludes that the history of the question of whether law can be emancipatory “is probably more western than its future”.¹⁶¹ He therefore encourages the subaltern “West” to ally themselves with the subaltern “rest” in search for more inclusive social systems.¹⁶²

¹⁵⁵ Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization and Emancipation* (London: Butterworths, 2002) at 440.

¹⁵⁶ Santos distinguishes social fascism from the political fascism that existed in the 1930s and 1940s. He coins the term as a reference to the capture of the state by a few private actors to the exclusion of the majority. Ibid. at 453 – 456.

¹⁵⁷ Ibid. at 458.

¹⁵⁸ Ibid. at 459.

¹⁵⁹ Ibid. at 444.

¹⁶⁰ Ibid. at 443.

¹⁶¹ Ibid. at 445.

¹⁶² Ibid. at 458.

The counter-hegemonic law and politics proposed by Santos resonates with TWAIL's aspirations of writing a theory of resistance into law.¹⁶³ Grassroots movements not only contest negative institutionalization but also expand and keep alive formal legal institutions by forcing the latter to respond in ways that ensure that text reflects on-the-ground realities. As far as dam construction is concerned, resistance has been instrumental to the reform of international legal norms and resulted in the formation of institutional legal structures that expand the margins of inclusion.¹⁶⁴ However, when compared to some other countries,¹⁶⁵ the level of resistance against the Bujagali Project has been patchy and is restricted to two main actors: the National Association of Professional Environmentalists (NAPE) and International Rivers. In the conclusion to this thesis, a preliminary investigation is made into what explains this limited resistance.

¹⁶³ See Chapter Two Part III (c).

¹⁶⁴ Ibid.

¹⁶⁵ See, for example, Sanjeev Khagram, *Dams and Development: Transnational Struggles for Water and Power* (Oxford University Press, 2004) at 139 – 176 for a comparative analysis on resistance against large dams in India, Brazil, South Africa, Indonesia and China.

CONCLUSION

I. The Role of Law in DIDR: A Recap

This thesis set out to investigate the role of law in DIDR that results from the construction of large dams. Particularly, it sought to establish the extent to which formal legal institutions protect the interests of Affected Communities. At the same time, it aimed at providing a nuanced understanding of the challenges of DIDR from an investment perspective. To this end, the analysis in the thesis reviewed both international and national legal norms, policies and institutions. It compared the legal architecture put in place to protect the interests of Affected Communities with that available to the foreign private investors that engage in these projects. The findings confirmed the fact that law is rarely a neutral arbiter. In the case of DIDR, the discussion in the thesis exhibited the various ways in which law is used by dominant groups in society to further the interests of a select few at the expense of a vulnerable majority. Even then, the recommendations made in the thesis are to the effect that law, while often used as a tool of suppression or exclusion, possesses the potential to act as a tool of emancipation and inclusion. TWAIL is the theory and one of the methods employed by the thesis to expose the law's notoriety for exclusion on the one hand and to express law's ability to include on the other hand. To this end, TWAIL guided the discussion of parading the hegemonic nature that law often takes and helped to formulate proposals for a counter-hegemonic law.

TWAIL scholars declare, however, that we can no longer speak of a counter-hegemonic law that is oblivious to the sentiments on the streets. In other words, we can no longer ignore the fact that grassroots movements are increasingly playing a role in the authorship of law at

both the domestic and the international level. The Conclusion to this thesis proposes that TWAIL scholars should explore this theory of resistance further especially in as far as it speaks to the dynamics of difference existing within the Third World. This could be done by designing empirical studies targeted at establishing the impact of resistance on law in different parts of the Third World. Presently, as far as large infrastructure projects such as dams are concerned, it would appear that most of this theory of resistance concentrates on documenting experiences in particular parts of the Third World, namely Asia (particularly India) and parts of Latin America (notably Brazil). While these studies are invaluable in validating the role of resistance, they are insufficient in establishing the influence, if any, that resistance has on legal infrastructure in continents such as Africa. As the construction of large dams increases in Africa, such empirical studies will be helpful in elucidating and exploring alternative forms of law-making. The remaining part of the discussion develops a research agenda for future work on the role of resistance.

II. Explaining the Limited Public Resistance against the Bujagali Project: Some Preliminary Thoughts

The war against poverty is threatened by friendly fire. A swarm of media-savvy Western activists has descended upon aid agencies, staging protests to block projects that allegedly exploit the developing world. The protests serve professional agitators by keeping their pet causes in the headlines. But they do not always serve the millions of people who live without clean water or electricity.¹

SEBASTIAN MALLABY, JOURNALIST
THE WASHINGTON POST

Mallaby creates the impression that two small NGOs in Uganda and the U.S. are holding the Bujagali hydropower project – and thus Uganda’s larger national interest – hostage over a waterfall and a small number of uprooted villagers. This is a gross mischaracterization. True, Bujagali Falls is Uganda’s most revered spiritual site, and the villagers deserve to benefit from a project to which they have contributed. But Uganda’s NGO networks and parliamentarians opposed the project primarily because of the high cost, corruption, political arm-twisting, and

¹ Sebastian Mallaby, “NGOs: Fighting Poverty, Hurting the Poor” (2004) *Foreign Policy* at 50.

secrecy that are associated with it. In this context, the membership base of the NGO that coordinates this effort is irrelevant.²

PETER BOSSHARD, POLICY DIRECTOR
INTERNATIONAL RIVERS

I regret that you've chosen to publicly accuse me of trying to cover up something and, more particularly, that you have chosen to ridicule our colleagues in Uganda. My high opinion of NAPE is based on working with them closely for five years. In your brief visit to their office, you determined them to be a "grouplet" with little legitimacy. You say their small membership does not give them "a broad platform from which to oppose electricity for millions." (A point in fact: small grassroots groups are the norm in Uganda, there are no mass-based NGOs there.) First, you are mistaken to imply that NAPE is isolated in its concerns about Bujagali Dam. We have personally met with Ugandan academics, students, members of Parliament, journalists and other local NGOs who express strong misgivings about this specific project. Not all have been willing to be as public with their criticisms as NAPE, because of the President's strong backing of the project and the possible consequences of criticizing it too openly. In fact, some have told us that NAPE's outspokenness on the dam has opened up political space to begin discussing controversial topics and civil society's role in these debates.³

LORI POTTINGER, AFRICA CAMPAIGNS
INTERNATIONAL RIVERS

The role of resistance in facilitating legal reform and in changing the way in which "business is conducted" in large dam projects has been widely documented. Third World scholars now acknowledge that criticisms to ideological mainstreams have to take cognisance of the various contributions that grassroots struggles have made in contesting unjust and oppressive international legal regimes.⁴ For example, a number of scholars attribute the establishment of the Inspection Panel to resistance, particularly against India's Sardar Sarovar Project.⁵ Even the establishment of the World Commission on Dams has been traced back to the collective demands of mass movements against large dams in the

² Peter Bosshard, "International Rivers Response to Sebastian Mallaby's Attacks on NGOs" (5 November 2004) online: International Rivers <<http://www.internationalrivers.org/fr/africa/bujagali-dam-uganda/international-rivers-response-sebastian-mallabys-attacks-ngos>>.

³ Lori Pottinger, "Lori Pottinger Responds to Sebastian Mallaby's Accusations Regarding NGO Secrecy" (30 September 2004) online: International Rivers <<http://www.internationalrivers.org/africa/bujagali-dam-uganda/lori-pottinger-responds-sebastian-mallabys-accusations-regarding-ngo-secr>>.

⁴ B.S. Chimni, "Third World Approaches to International Law: A Manifesto" in Anthony Anghie, Bhupinder Chimni, Karin Mickelson and Obiora Okafor (eds.) *The Third World and International Order: Law, Politics and Globalization* (Martinus Nijhoff Publishers, 2003) at 65.

⁵ See discussion in Chapter Four Part V.

1990s.⁶ And while non-institutionalized groups of individuals do not have the right to participate in the proceedings of international tribunals such as ICSID, the manner in which grassroots movements have contested regulatory norms at the domestic level is shaping the international investment legal regime.⁷ In the end, many Third World scholars agree that were it not for the rise of movements that problematize projects having an impact on human rights, development and environment, it is possible that the adverse impacts resulting from the operations of large multinational corporations in the Third World would remain unchallenged.⁸

At the national level, these movements are increasingly acting as the channels through which social change and legal reform are manufactured. Sanjeev Khagram demonstrates, for example, how grassroots movements against projects such as India's Narmada Dam Projects increased the support for alternative (counter hegemonic) visions to development and encouraged approaches that are more inclusive of interests of traditionally weak and marginalized actors.⁹ It is these various acts of resistance against big dams that influenced the enactment of legislation such as the *Displaced Persons Rehabilitation Act* by the Government of Maharashtra State in India in 1976.¹⁰ Similarly, in Brazil, the de facto moratorium on state-sponsored large dams in the late 1980s has been attributed partly to the

⁶ Balakrishnan Rajagopal, "International Law and Third World Resistance: A Theoretical Inquiry" in Anghie, Chimni, Mickelson and Okafor (eds.) *The Third World and International Order: Law, Politics and Globalization* supra note 4 at 145 & 146.

⁷ See generally Ibrionke T. Odumosu, "Locating Third World Resistance in the International Law on Foreign Investment" (2007) 9 *International Community Law Review* at 427 – 444.

⁸ Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, 2004) Second Edition at 173.

⁹ Sanjeev Khagram, *Dams and Development: Transnational Struggles for Water and Power* (Oxford University Press, 2004) at 4.

¹⁰ *Ibid.* at 62.

activities of groups such as the Brazilian National Movement of Dam-Affected People.¹¹ The same movement is reported to have influenced other institutional reforms in the country, including the enactment of new environmental legislation.¹² Even after Brazil's electricity sector was privatized, grassroots mobilization against privately operated dams resulted in reforms in the manner in which these dams were constructed and sometimes even led to outright withdrawal of private investors or stoppage of the projects.¹³

If this thesis has not dealt extensively with the role of resistance in influencing legal reform, it has at least exemplified how resistance – whatever form it takes – is instrumental in extending the boundaries of inclusion. Chapter Three, for example, implicitly illustrates how the involvement of NGOs such as NAPE enabled Affected Communities to access better compensation packages in the case of the Bujagali Project. It also observes how the international recognition given to issues concerning indigenous peoples' rights is partly as a result of various forms of activism. In Chapter Four, the role of resistance in influencing the establishment and guiding the operations of the Inspection Panel is discussed in some detail. Chapter Five speaks not so much about the presence of resistance as it does about the need for resistance in contesting a legal regime that is unfairly skewed towards protecting interests of private investors. In the end, by exposing the shortcomings of the legal framework in as far as protecting the interests of Affected Communities is concerned, this thesis acknowledges that sometimes, it is necessary to act from the 'outside' of formal legally-sanctioned approaches to be able to reform the 'inside' of these legal structures. This

¹¹ Franklin D. Rothman, "A Comparative Study of Dam-Resistance Campaigns and Environmental Policy in Brazil" (2001) 10 *The Journal of Environmental Development* at 317 [A Comparative Study of Dam-Resistance Campaigns].

¹² *Ibid* at 323.

¹³ See generally *Ibid.* at 317 – 344.

Conclusion provides some insights to explain why resistance against the Bujagali Project has been limited when compared to resistance against similar projects in some other parts of the Third World.¹⁴ It is hoped that the preliminary observations made here will provide interesting opportunities for future research.

It is somewhat misleading to contend, as Sebastian Mallaby does, that opposition against the Bujagali Project has been the pet project of only two NGOs.¹⁵ For example, in August 2000, student representatives from Makerere University (the country's leading and longest standing university) wrote to the World Bank raising several concerns against the Project.¹⁶ Similarly, in the initial stages of the Project, members of Uganda's parliament refused to approve construction on several occasions.¹⁷ In fact, according to the President of Uganda, "The 6th Parliament paralyzed Bujagali for seven years. ... If, however, Parliament had not blocked the progress of Bujagali, by the time AES Nile Power collapsed, the dam would be nearing its completion ..."¹⁸ Consequently, Mallaby's conclusion is simply inaccurate. What is a more accurate description of opposition against the project is the fact that the *frequently publicized* and *persistent* opposition against the Project has come *mainly* from these two actors. In other words, resistance against this project has been limited and patchy,

¹⁴ Gore notes, for example, that "While a handful of protests have taken place over electricity price increases, and newspaper editorials have taken issue with privatization, the exercise has generally not been disrupted by public action." Christopher Gore, "Electricity and privatisation in Uganda: The origins of the crisis and problems with the response" in David A. McDonald (ed.) *Electric Capitalism: Recolonising Africa on the Power Grid* (HSRC Press, 2009) at 379 [Electricity and privatisation in Uganda].

¹⁵ See Mallaby, "NGOs: Fighting Poverty, Hurting the Poor" *supra* note 1.

¹⁶ Asuman Basalirwa, Yudaya Babirye & Francis Kidega, "Uganda Students Express Concerns About Bujagali Dam" (17 August 2000) online: International Rivers <<http://www.internationalrivers.org/africa/ugandan-students-express-concerns-about-bujagali-dam>>.

¹⁷ Lori Pottinger, "Uganda's Bujagali Dam: A Case Study in Corporate Welfare" (2000) online: The Center for International Environmental Law <<http://www.ciel.org/Ifi/ifccaseuganda.html>>; Save Bujagali Crusade, "Hon. Kaijuka's Actions are Not Patriotic: Thumbs Up for Parliament" <<http://www.uganda.co.ug/bujagali/paper5.htm>>.

¹⁸ President of the Republic of Uganda, "Blame loadshedding on FDC, foreigners and drought" online: The New Vision <<http://www.newvisionuganda.info/D/8/459/482069/Blame%20loadshedding%20on%20FDC>>.

but concentrated. By this, I mean that while NAPE and International Rivers have intimately followed and persistently objected to aspects of this project, the participation of other actors has been fluid, both in terms of the composition of the actors and the continued motivation for the actors to remain involved.

The question then for this conclusion is not so much “why there has not been resistance against the Bujagali Project”. Rather, it is why opposition against the Project has not mobilized sustained, organized and widespread resistance outside the “constant participants”. By “constant participants”, I refer here to the two “visible” actors (NAPE and International Rivers). If Affected Communities have been participants, their participation has largely been limited to depending on the more visible actors to voice and make claims on their behalf. In other words, these communities have taken more of a backstage role characterized with a vulnerability resulting from despair, frustration, desperation and sometimes, fear. As observed later in the discussion, this form of participation is not restricted to the manner in which Affected Communities have interacted with the Project. It also applies to the manner in which the masses in Uganda have traditionally interacted with other issues of public interest.

One of the questions posed by the author to some of the interviewees was: “It appears that apart from NAPE and International Rivers, there has been limited public outcry against this project. Why do you think this is so?” The responses to this question varied. However, most interviewees first pointed out that even though it appeared that NAPE and International Rivers were the only active players, other civil society organizations were participating but

most of them did so under the umbrella of NAPE.¹⁹ The rest of the responses given to the question can be divided into two broad categories: factors limiting the participation of the general public and those affecting the participation of Affected Communities.

Interviewees argued that the absence of “real democracy” in Uganda made it difficult for those opposing the project to publicly announce their positions because of fear of the repercussions that would result there from.²⁰ They noted that on a number of occasions, government has labelled project opponents as anti-Movement,²¹ anti-development or economic saboteurs.²² In addition, they opined that the Government exploited the time when the electricity crisis got worse to turn various groups (such as manufacturers, other business owners and donors) against project opponents by arguing that it was the latter’s fault that there was no electricity.²³ An important component of any democracy is the ability of the press to act independently, transparently and without fear. The independence of the press is also central to facilitating successful resistance.²⁴ One interviewee argued that in the case of the Bujagali Project, there was media blockage of the two leading nationally-circulated

¹⁹ Interview of Mr. Geoffrey N. Kamese (Programme Officer, Energy/Chemicals & Climate Change, NAPE) (16 November, 2009) at NAPE Offices, Kampala, Uganda. Similarly, the claims that were lodged with the Inspection Panel relating to the Project were in the names of various actors including NAPE, Save Bujagali Crusade, individuals and other local civil society organizations. See, for example, National Association of Professional Environmentalists (NAPE), “Lodging A Claim on the Proposed Bujagali Hydropower Dam and Interconnection Projects in Uganda” (March, 2007) online: World Bank Inspection Panel <<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/InspectionPanelClaim.pdf>>.

²⁰ Interview of Kamese, Ibid; Interview of Oweyegha Afunaduula (Programme Manager, Sustainability School at NAPE) (10 November 2009) at NAPE Offices, Kampala, Uganda.

²¹ The National Resistance Movement (the Movement) is the ruling political party in Uganda.

²² Interview of Dr. Emmanuel Kasimbazi (Lecturer, Makerere University Faculty of Law) (23 November 2009) at Makerere University Kampala, Uganda. See also Gore, “Electricity and privatisation in Uganda” *supra* note 14 at 379.

²³ Interview of Kenneth Kakuru (Advocate of High Court of Uganda & Environmental Activist) (12 November 2009) at Kakuru & Co Advocates Chamber, Kampala Uganda.

²⁴ See, for example, Khagram, *Dams and Development: Transnational Struggles for Water and Power* *supra* note 9 at 24 & 25.

newspapers.²⁵ The *New Vision* is government-owned while one of the project sponsors – the Aga Khan Foundation – holds shares in the other newspaper, the *Monitor*.²⁶ The interviewee pointed out that particularly after the Aga Khan Foundation’s acquisition of shares in the *Monitor*, it became almost impossible to find any negative press against the Project in the newspapers.²⁷ Resistance has also been undermined by the fact that the majority of the population has no access to electricity and as such has not followed issues relating to the Project – especially if they do not suffer any direct adverse impacts from the same.²⁸ This is exacerbated by the technical nature of the project, which limits the extent to which ordinary lay people can engage in debates surrounding it.²⁹

A number of reasons were provided to explain why Affected Communities are not always at the forefront of resistance. Respondents noted that even though the Basoga have a *Kyabazinga* (King), the *Kyabazinga* institution had failed to mobilize the different categories of Affected Communities to engage collectively with the project.³⁰ In fact, one interviewee accused the *Kyabazinga* institution of receiving bribes from the first project

²⁵ Interview of Kakuru, supra note 23.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid; Interview of Kamese, supra note 19. See also Gore, “Electricity and privatisation in Uganda” supra note 14 at 379. As of 2007, only approximately 9% of the population was connected to the national power grid. See Ministry of Energy & Mineral Development, *The Renewable Energy Policy for Uganda* (2007) online: Ministry of Energy & Mineral Development <<http://www.energyandminerals.go.ug/pdf/RENEWABLE%20ENERGY%20POLIC9-11-07.pdf>> at 27. In fact, some still put this figure at a low of 5%. See, for example, The Inspection Panel, “Investigation Report – Uganda: Private Power Generation (Bujagali Project (Guarantee No. B0130-UG)” (2008) online: World Bank <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/FULL_September_2_2008_FINAL_Red.pdf> at 15; World Bank, “Uganda Bujagali Hydro Power Project: An Energy Strategy for Uganda” online: World Bank <<http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/EXTPROJECTSPROGRAMS/EXTBUJHYDPOWPRO/0,,contentMDK:21217640~menuPK:3323746~pagePK:64168445~piPK:64168309~theSitePK:3323560,00.html>>.

²⁹ Interview of Kamese, Ibid.

³⁰ Interview of Kasimbazi supra note 22.

sponsor (AES Nile Power) in return for giving support to the Project.³¹ He added that even some of the affected individuals had received bribes from the project sponsor. Resistance has also been undermined by the fact that most times, community members are unaware both of the negative impacts of the project and of their rights under domestic and international laws and policies.³² Their vulnerability is exacerbated by their low literacy levels. For example, some communities members explained that the first project sponsor had made many promises which were never documented, but which they believed had been reduced into some form of binding agreements.³³ They later became aware of the fact that there was no written evidence in support of the promises.

Future studies could explore the issue of limited resistance from a TWAIL perspective. One of the questions that may be asked is: how does understanding post-colonial Uganda from a TWAIL perspective help with understanding the manner in which Ugandan citizens interact with their government or how they relate with each other on issues of public concern? Can the insights drawn from such an understanding be useful in explaining the absence of resistance in cases such as the Bujagali Project? Mutua³⁴ and Okafor,³⁵ for example, argue that one of the major limitations of the post-colonial African state is the fact that it was built on Eurocentric conceptions of homogenized statehood. This state model forced together different sub-state groups or ethnicities with diverse and even conflicting identities and cultures under one large centralized state. By doing this, colonial administrators ignored and

³¹ Interview of Afunaduula supra note 20.

³² Interview of Kasimbazi supra note 22.

³³ Interview of community members at Naminya Resettlement (18 November 2009) at Jinja, Uganda.

³⁴ Makau wa Mutua, "Why Redraw the Map of Africa: A moral and Legal Inquiry" (1994-1995) 16 Michigan Journal of International Law at 1113 - 1176.

³⁵ Obiora Chinedu Okafor, "After Martydom: International Law, Sub-state groups and the construction of legitimate statehood in Africa" (2000) 41:2 Harvard International Law Journal at 503 - 528.

undermined the prevalent social and ethnic cleavages defining African people. Okafor and Mutua conclude that the disconnect between the centre and its constituents explains in large part some of the tensions and strife characterizing most of Africa today.

Future research could reveal how, if at all, these socio-ethnic tensions have worked against mobilization of masses in Uganda generally and in relation to the Bujagali Project in particular. One way in which the study could be conducted is by tracing the culture of resistance in Uganda in three blocks of political regimes: the colonial era, the immediate post-colonial era (between 1962 and 1985) and the post-1986 era. The distinction between the immediate post-colonial era and the post-1986 era is important because of the various political landmarks contained in the two block periods. Between 1962 and 1985, the country was free from colonial rule but was fraught with political and civil upheaval. First, there was the 1966 “Buganda Crisis” in which political unrest ensued when the Prime Minister of the newly independent Uganda – Milton Obote – commanded a military force under the leadership of his army ally (Idi Amin) to attack the palace of the *Kabaka* (King of the Baganda).³⁶ This immediately created tensions between the Baganda and Uganda. These tensions continue to manifest themselves in different forms, as will be discussed shortly. The period between 1971 and 1986 was similarly characterized with numerous incidents that resulted in political instability: the overthrow of Milton Obote by his own military commander (Idi Amin); the armed retaliation by Tanzanian soldiers to overthrow Amin and

³⁶ Before this, the Kingdom of Buganda and Obote shared a superficial bond, which began shortly before the 1962 elections following independence. In order to defeat the Democratic Party, the Uganda People’s Congress party (led by Obote) and Kabaka Yekka party (led by the King of Buganda - Mutesa II) formed a coalition which resulted in Obote’s success and later, his nomination of Mutesa II as the president of Uganda. For more details on the 1966 Buganda Crisis, see Buganda, “The 1966 Crisis” online: Buganda <<http://www.buganda.com/crisis66.htm>>; Michael Twaddle & Holdger Bernt Hansen, “Introduction: The Changing State of Uganda” in Holger Bernt Hansen & Michael Twaddle (eds.) *Developing Uganda* (Kampala: Fountain Publishers, 1998) at 1.

the return of Obote to power following controversial elections; and the subsequent overthrow of Obote in 1986 by the National Resistance Movement (NRM/the Movement) led by Yoweri Kaguta Museveni (a former ally of Obote).³⁷ Since 1986, the country has enjoyed relative peace with the exception of the civil strife in northern Uganda that continues to be an issue of concern (“the Northern question”).³⁸

TWAIL could be employed as both a method and a theory to explain how issues such as the “Northern question” and the “Buganda question” impact on the culture of resistance in Uganda. As noted above, the “Buganda question” did not end with the Buganda crisis. In fact, that crisis was perhaps only the beginning of the battles between the centre and Buganda Kingdom. The struggles between the two have continued in different forms with Buganda’s persistent claims for *Ebyaffe*. In its literal sense, *Ebyaffe* is a Luganda³⁹ word meaning “our things” or “our property” and is frequently used by the Baganda to refer to their right to self-determination under a federal system of government.⁴⁰ Part of this claim includes a demand for the return of Buganda Kingdom assets that were expropriated by the Obote I government in 1967 following the Buganda Crisis. Perhaps nowhere (since the Buganda Crisis) did this claim manifest itself in the form of active resistance as it did in an incident in 2009.

³⁷ See Hansen & Twaddle, *Ibid.* at 1 & 2.

³⁸ Population Secretariat, *National Population Policy for Social Transformation and Sustainable Development* (2008) online: Population Secretariat, Ministry of Finance, Planning and Economic Development<http://www.popsec.org/publications_7_3950299347.pdf> at 7.

³⁹ Luganda is the language of the Baganda: one of the ethnic groups in Uganda.

⁴⁰ See, for example, Moses Mulondo, “Mengo lists federo demands” (18 September 2009) online: The New Vision< <http://www.newvision.co.ug/D/8/12/695066>>; John Nagenda, “Mengo shoots own foot again” (18 September 2009) online: The New Vision< <http://www.newvision.co.ug/D/8/20/695031>>.

In September 2009, riots erupted in Kampala (Uganda's capital) and its suburbs after preparations for the *Kabaka* to visit a region known to be part of Buganda (Kayunga) were blocked by government officials.⁴¹ The leader of the minority ethnic group in Kayunga (the Banyala) opposed the visit on grounds that the Buganda Kingdom administration had not informed him of the visit.⁴² Buganda officials felt that the visit had been "unduly politicized" by government.⁴³ The riots were active for two days. At least eleven people were killed, many more injured, property destroyed and business paralyzed in Kampala city and the suburbs.⁴⁴ The government was forced to deploy officials from the police, military police and the Presidential Guard Brigade to curb the riots.⁴⁵ Ethnically-driven sentiments were evident, with reports of some being harassed by rioters because they looked like Banyankole (the ethnic group to which the President of Uganda belongs).⁴⁶

The second example of an ethnic-specific dilemma is the civil war that occurred in northern Uganda for at least two decades, starting in 1986.⁴⁷ For more than twenty years, a rebel group (the Lord's Resistance Army) attacked parts of northern Uganda leading to the killing of thousands of people, displacement of more than two million people from their homes, abducting thousands of children to turn them into child soldiers, raping women, and forcing

⁴¹ Vision Reporter, "Kabaka Mutebi Cancels Kayunga Visit" (11 September 2009) online: The New Vision<<http://www.newvision.co.ug/PA/8/13/694333>>; BBC, "King's supporters riot in Uganda" (10 September 2009) online: BBC<<http://news.bbc.co.uk/2/hi/africa/8249693.stm>>.

⁴² Vision Reporter, Ibid.

⁴³ Ibid.

⁴⁴ Vision Reporters, "Six more dead, Kabaka cancels visit" (11 September 2009) online: The New Vision<<http://www.newvision.co.ug/D/8/12/694334>>.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ However, as some have cautioned, it is somewhat misleading to think of the war as over since "the alleged absence of war and military violence does not equal peace". See, for example, Sverker Finnstrom, *Living with Bad Surroundings: War, History and Everyday Moments in Northern Uganda* (Durham, NC: Duke University Press, 2008) at 12 & 13.

young girls into early marriages.⁴⁸ The “Northern question” has been traced back to the social inequalities and differentiations that the British colonial government bequeathed to Uganda at the time of independence.⁴⁹ Some commentators observe that as part of its divide and rule policy, the British colonial government recruited the army primarily from northern Uganda.⁵⁰ Norbert Mao – one of the presidential candidates for the 2011 elections in Uganda (who also originates from northern Uganda) – concludes thus: “The north saw itself as a military power, while the south saw itself as the civil service reserve. The Northerners thus saw themselves as the group to dominate the army. The gun and the military became the North’s ebyaffe.”⁵¹

This colonial legacy, along with the longest-standing and one of the most brutal civil wars in Uganda’s post-independence history, has been interpreted – or perhaps more accurately, misinterpreted – by some others in Uganda as reflecting on the character of the Acholi (northerners) as an ethnic group. For example, Finnstrom observes that “Still today it is common for people in Kampala and beyond to regard people from northern Uganda as backward and martial”.⁵² He adds that one high-ranking officer in the Uganda army argued that “If anything it is the local *Acholi* soldiers causing the problems. It’s the cultural background of the people here: they are violent. It’s genetic”.⁵³ These stereotypes create an

⁴⁸ See generally Heike Behrend, “Is Alice Lakwena a witch? The Holy Spirit Movement and its fight against evil in the north” in Holger Bernt Hansen & Michael Twaddle (eds.) *Changing Uganda* (Kampala: Fountain Publishers, 2001) at 162 – 177; Erin K. Baines, “The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northern Uganda” (2007) 1:1 *International Journal of Transnational Justice* 91 – 144; Finnstrom, *Living with Bad Surroundings*, Ibid.

⁴⁹ See, for example, Norbert Mao, “British should lead northern Uganda’s reconstruction” (23 February 2009) online: The New Vision <<http://www.newvision.co.ug/D/8/20/672401>>.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Finnstrom, *Living with Bad Surroundings* supra note 47 at 79.

⁵³ Ibid. at 114.

“us” and “them” divide that not only further highlights ethnic cleavages but also suggests that the “Northern question” is a problem only for those in northern Uganda and not for Ugandans as a whole. As a result, one may conclude that the gross abuses of human rights in the north that should have mobilized country-wide resistance continue to be sanctioned by the silence of the rest of the country.

Can these two examples of ethnic-specific concerns be used to explain the absence of resistance against the Project? Recall that the ethnic group that is most directly affected by the dam is that of the Basoga.⁵⁴ The interview with *Nabamba Budhagaali* (the spiritual leader of the Basoga), for example, explained in detail the intimate spiritual relationship between the Basoga and the Bujagali Falls.⁵⁵ One of the interview questions asked by the researcher to project opponents was: “Would you agree that sometimes people feel that this is a Busoga issue and that as long as the rest get electricity, it really does not matter what impacts the project has?” All those asked this question answered in the negative, arguing that it is difficult to reduce the absence of resistance in this case to an ethnic issue. One of the interviewees, Angelo Izama, a journalist who has followed the Bujagali case closely since 2001, added another explanation.⁵⁶ He argued that the problem is not that it is a Busoga issue but rather, the fact that generally, there is still a profound absence of shared values around public issues in Uganda. This means that many times, ethnicity becomes the shared value that is recruited to rally support around a certain issue, as was the case in the September 2009 Buganda riots. He added:

⁵⁴ See Chapter One Part III.

⁵⁵ Interview of Nabamba Budhagaali (Jaja Budhagaali) (November 18, 2009) at his shrine in Jinja, Uganda.

⁵⁶ Interview of Angelo Izama (Journalist, The Daily Monitor) (11 November 2009) at The Daily Monitor offices, Kampala, Uganda.

I feel that the nature of Uganda's legal system is not adequately driven by public pressure. Public pressure derives out of public outrage. Public outrage is by its nature a response to something that offends common values. Those common values must be by their nature commonly held. What is it about the Ugandan body politic to which you can say: these are shared values? And are those shared values then located within the laws? ... Think about it this way: if Bujagali collapsed essentially because of corruption, how come the public pressure was built largely around environmental issues that were driven by a small cluster of Ugandan nationals plugged in to the international outrage against large hydropower projects? The outrage we saw here was just amplified by domestic media. It was never something that the Ugandan public had plugged into. If you want to see the reaction of the Ugandan public you look at the September [2009] riots. Here, one could trace shared values within a large mass – the Baganda. In Buganda, it is about the king and land.⁵⁷

That said, in the last decade - and particularly in the last five years – Uganda has experienced episodes (albeit still few) of public protest against issues that are not restricted to ethnicity. One example of a mass movement that recruited diverse actors was the April 2007 demonstrations against the Government's intended give-away of a third of the Mabira Forest to the Sugar Cooperation of Uganda Limited (SCOUL) for growing sugarcane plantations.⁵⁸ Mabira is the largest natural forest in central Uganda and protestors argued that its deforestation would have numerous adverse environmental impacts.⁵⁹ The public demonstration, which was conducted under the umbrella of the Save Mabira Crusade⁶⁰ brought together hundreds of people including members of civil society organizations, religious groups, cultural leaders, political groups, academics, students, traders, legislators and other men and women acting in their individual capacity.⁶¹ Before the demonstration,

⁵⁷ Ibid.

⁵⁸ See BBC "Deaths in Uganda forest protest" (12 April 2007) online: BBC <<http://news.bbc.co.uk/1/hi/world/africa/6548107.stm>>.

⁵⁹ Frank Muramuzi, "Save Mabira Crusade" online: International Rivers <<http://www.internationalrivers.org/files/SaveMabiraLetter.pdf>>; Save Mabira Crusade, "Citizen Petition to Save Mabira" <<http://www.envalert.org/docs/PetitionOnMabira2.pdf>>.

⁶⁰ This crusade was headed by the environmental NGO, NAPE. See Muramuzi, Ibid.

⁶¹ Oweyegha-Afunaduula, "Save Mabira Crusade Press Statement on Emerging Events Following the April 12 Mabira Demonstration" online: International Rivers <<http://www.internationalrivers.org/africa/save-mabira->

over 4000 people had signed a petition demanding that the Government should not go ahead with the transaction.⁶² In addition, anonymous mobile telephone messages and emails were sent out to several Ugandans asking them to boycott SCOUL sugar.⁶³

Some may argue that even this demonstration was successful in rallying support partly because of ethnic sentiments. SCOUL is owned by the Mehta Group, which is of Indian origin. There were several reports in the newspapers that some demonstrators attacked people of Indian origin, with at least one Indian being killed.⁶⁴ While ethnically-driven motives cannot be ruled out as being a mobilizing factor for some of the demonstrators, the original and official motive for the mobilization was to stop the environmental degradation of an important biodiversity site.⁶⁵ This purpose was also reflected in the various institutional representatives that participated in the demonstration.

Even if one insisted on reducing the Mabira demonstration to an attack on an ethnic group, there are some other examples of protests in which it is difficult to trace ethnic motive. In August 2009, for example, hundreds of angry residents of Mityana (a town in central Uganda) stormed the Mityana hospital following the death of a pregnant woman and her

crusade-press-statement-emerging-events-following-april-12th-mabira-demonstration> [Save Mabira Crusade Press Statement].

⁶² Solomon Muyita, "Uganda: 4000 Sign Petition to Save Mabira Forest" online: Rainforest Portal<<http://www.rainforestportal.org/shared/reader/welcome.aspx?linkid=71620>>.

⁶³ Ibid.

⁶⁴ Gerald Tenywa, Conan Businge & Steven Candia, "Asians attacked in Mabira Forest Demo" (13 April 2007) online: The New Vision<<http://www.newvision.co.ug/D/8/12/559567>>; Uganda Online, "Mabira Forest Giveaway" online: Uganda Online< <http://www.ugandaonline.net/mabira>>; BBC, "Deaths in Uganda forest protest" supra note 62.

⁶⁵ Afunaduula, "Save Mabira Crusade Press Statement" supra note 65.

unborn baby.⁶⁶ The woman died in the labour ward after not receiving medical attention for over seven hours. From the hospital, the mob marched to Mityana town carrying placards which called for the medical officials responsible for the death to be dismissed and demanding explanations from Ministry of Health officials. This incident was reported as the “first time in Uganda’s history that a mob has attacked a hospital.”⁶⁷ Similarly, in late 2009, vendors at one of the markets in Kampala (Kalerwe market) rioted due to the fact that there was too much dust in the area and this was spoiling their produce.⁶⁸ Again, the riot came as a surprise to a government that was not accustomed to such forms of resistance.⁶⁹

These new uprisings, even though still few, sometimes isolated and largely concentrated in urban areas, may be explained by a change in the manner in which people are reacting to the socio-political landscape in today’s Uganda. I refer to this as a “generational issue”. There is the generation of my parents and grandparents who still hold vivid memories of the gruesome experiences of the civil and political wars of the late 1960s to the mid-1980s. For that generation, the “Museveni regime” that came into power in 1986 (and remains to this day) was the saviour because it brought with it the promise of peace. For a generation that witnessed brutal mass killings, suffered emotional trauma and lost most of their material possessions, the return to peace and political stability was the embodiment of the perfect Uganda. As one famous African scholar observed, “On its own admission, the [National Resistance Movement] had a modest vision of change, limited to the realisation of security:

⁶⁶ L. Kagiri and B. Okiror, “Rioters attack Mityana hospital” (21 August 2009) online: The New Vision<<http://www.newvision.co.ug/D/8/12/692058>>.

⁶⁷ Ibid.

⁶⁸ Interview of Izama, *supra* note 56.

⁶⁹ Ibid.

‘at least we can now sleep’”.⁷⁰ For that generation, a new democracy was born and would be treasured. Resistance was not necessary because people felt safe on the streets, they knew that their children were safe at school, gun-shots became a thing of the past and with time, they could return to some form of normalcy, despite the immeasurable and unforgettable loss they had suffered.

There is now a new generation, however. A generation which was either too young to recall the brutality of the previous regimes or was not yet born. This new generation is also composed of those who, though having vivid recollections of the war, are now dissatisfied and becoming impatient with a democracy whose definition is largely confined to political stability. This generation of actors is interested as much in economic security, accountability, environmental sustainability and transparency as it is in political stability. With this understanding, one can begin to re-interpret even the September 2009 riots using a non-ethnic optic. As one of the interviewees noted: “The people who supplied the labour [for resistance] came from the slums of Kampala: a mass of growing underclass without jobs, thereby having a shared despondence. The quarrel between the King and the government provided that opportunity to channel their concerns.”⁷¹ Similarly, another journalist concluded about that same incident: “The problem was never about the Kabaka going to address the youth in Kayunga, or that the Banyala were reluctant to grant him access to his people. The riot, many of the readers wrote, was simply the tip of the larger

⁷⁰ Mahmood Mandani, “Buganda and Uganda at Crossroads” (3rd Annual Abu Mayanja Memorial Lecture, delivered at the Kampala Serena Hotel, 7 August 2009) online: Abu Mayanja Foundation <http://www.abumayanja.org/news.php?prog_id=13>.

⁷¹ Interview of Izama, *supra* note 56.

iceberg that threatens the current [National Resistance Movement] government.”⁷² And while many who contributed to the media debate agreed that there were some ethnic sentiments involved, they also maintained that the September 2009 riots spoke to many other frustrations that Ugandans have including high unemployment among the youth, lack of accountability for the use of public funds, the militarization of the state, high levels of corruption and the poor state of the country’s infrastructure.⁷³

This generation is shaping a new landscape for mobilizing resistance. At its centre are the youth. In the September 2009 riots, for example, the youth had a notable presence.⁷⁴ In addition, the frequent student riots at public and private universities in Uganda in the last ten years are testimony to the fact that this younger generation is engineering the new mode of communicating public dissatisfaction.⁷⁵ To support this generation is the globalization of resistance generally and the formation of alliances between transnational actors who share common interests and values.⁷⁶ Also, as the role of resistance becomes more central to the

⁷² Opiyo Oloya, “The riots were not about Kabaka Mutebi and Kayunga” (22 September 2009) online: The New Vision<<http://www.newvision.co.ug/D/8/20/695436>>.

⁷³ Ibid.

⁷⁴ Vision Reporters, “Three killed in violent Kampala Riots” (September 10, 2009) online: The New Vision<<http://www.newvision.co.ug/PA/8/12/694267>>.

⁷⁵ See, for example, Francis Kagolo, Andante Okanya & B. Asiimwe, “Fatal Shooting Sparks Riots at Makerere” (16 March 2010) online: The New Vision<<http://www.newvision.co.ug/D/8/12/713150>>; F. Ahimbisibwe, Chris Kiwawulo & P. Kareire, “One killed in Makerere varsity riots” (12 November 2005) online: The New Vision<<http://www.newvision.co.ug/PA/8/12/465452>>; BBC, “Exam fee rise sparks Uganda riot” (11 November 2005) online: BBC<<http://news.bbc.co.uk/2/hi/africa/4428692.stm>>; G. Musamali and Pidson Kareire, “Makerere Guild president declared” (28 April 2005) online: The New Vision<<http://www.newvision.co.ug/PA/8/12/431559>>; UG Pulse, “Anti-riot police deployed at Nkumba University” (27 October 2010) online: UGPulse<<http://www.ugpulse.com/articles/daily/news.asp?about=Anti+riot+police+deployed+at+Nkumba+University+&ID=16727>>; Robert Isaur, “Nkumba University Students Demonstrate” (23 February 2005) online: All Africa<<http://allafrica.com/stories/200502221531.html>>.

⁷⁶ As Sornarajah argues, in the same way that globalization has created tools such as investment treaties to promote the sanctity of contract and protection of private property, it has also mobilized like-minded groups around the world to fight against hegemony on issues including environmental degradation, poverty and violation of human rights. Muthucumaraswamy Sornarajah, “The Clash of Globalisations and the International Law on Foreign Investment” (The Simon Reisman Lecture in International Trade Policy, delivered at the

processes of social, political and legal reform in Uganda, we are likely to witness the active participation of non-political parties such as cultural leaders in matters relating to other public interest issues (i.e. non-cultural or non-ethnic issues). In Brazil, for example, religious activists (particularly from the church) have been quite supportive of dam-resistance campaigns.⁷⁷ In Uganda's case, the *Kabaka* participated in the 2007 Mabira Forest issue by offering government an alternative piece of land to give to SCOUL.⁷⁸ When government rejected this offer, the *Kabaka* filed a petition with the Constitutional Court of Uganda requesting that the court block the Government from giving away part of the forest.⁷⁹

It is perhaps too early to determine with any certainty the extent to which these recent acts of resistance have written themselves into law in text. However, it is important that future research starts documenting and mapping out the history of resistance to enable future links to be drawn between these acts and legal reform.

Centre for Trade Policy and Law, Ottawa, 12 September, 2002), (2003) 12:3 Canadian Foreign Policy Journal at 3 & 4.

⁷⁷ Rothman, "A Comparative Study of Dam-Resistance Campaigns" supra note 11 at 327, 328 & 330.

⁷⁸ Al-Mahdi Ssenkibirwa & Robert Mwanje, "Kabaka offers his land to save Mabira" (24 March 2007) online: All Africa <<http://allafrica.com/stories/200703231112.html>>.

⁷⁹ Henry Mukasa, "Kabaka blocks Mabira plans" (9 April 2007) online: The New Vision <<http://www.newvision.co.ug/D/8/12/558361>>.

BIBLIOGRAPHY

PRIMARY MATERIAL

Primary Material: Domestic Legislation

Access to Information Act, 2005 Laws of Uganda.

Constitution of the Republic of Uganda, 1995 [As at 15 February 2006]

Electricity Act, 1999 Laws of Uganda.

Land Act, 1998 Laws of Uganda.

Maharashtra Project Affected Persons Rehabilitation Act, Act XI of 2001, Government of Maharashtra.

Public Enterprises Reform and Divestiture Act 1993, Laws of Uganda.

Primary Material: Domestic Case Law

Greenwatch (U) Ltd. v. A.G & Uganda Electricity Transmission Company Limited HCCT-00-CV-MC-0139 of 2001.

Tweyambe Emmy, Kiwanuka Andrew, Namubiru Alice, Tukahumura Rosemary & Judith Nakirya v. Uganda Electricity Transmission Co. Ltd & Joyti Structures Ltd. High Court Civil Suit No. 147 of 2009

Primary Material: Agreements

The Uganda Electricity Board and AES Nile Power Limited, “Power Purchase Agreement Relating to The Bujagali Hydroelectric Project Uganda” online: International Rivers <<http://www.internationalrivers.org/files/bujagalippa.pdf>>.

Primary Material: Domestic and International Resolutions & Policies

African Development Bank, *Involuntary Resettlement Policy* (November, 2003) online: African Development Bank Group <<http://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/10000009-EN-BANK-GROUP-INVOLUNTARY-RESETTLEMENT-POLICY.PDF>>.

Government of India, *The National Rehabilitation and Resettlement Policy* (New Delhi: Government of India, Ministry of Rural Development, 2007).

Government of Orissa, *Orissa Resettlement and Rehabilitation Policy*, 2006 Doc. No.18040-R & REH-1/06/R.

International Bank for Reconstruction and Development (IBRD) and International Development Association (IDA) *Resolution of the Executive Directors (the Board) establishing the Inspection Panel* (No. 93-10 for the IBRD & 93-6 for IDA) (September 22, 1993) online: The Inspection Panel
<<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/ResolutionMarch2005.pdf>>.

_____. 1999 *Clarification of the Board's Second Review of the Inspection Panel* Paragraph 9 online: the Inspection Panel
<<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/1999ClarificationoftheBoard.pdf>>.

_____. *Review of the Resolution Establishing the Inspection Panel: 1996 Clarification of Certain Aspects of the Resolution* online: The Inspection Panel
<<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/1996ReviewResolution.pdf>>.

Inspection Panel, *The Inspection Panel: Panel Resolution and Mandate* online: The Inspection Panel
<<http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:20173262~menuPK:64129254~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html>>.

International Centre for the Settlement of Investment Disputes (ICSID), *ICSID Convention, Regulation and Rules* (as amended and Effective April 10, 2006) online: ICSID<<http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/basic-en.htm>>.

International Finance Corporation (IFC), *Performance Standards on Social and Environmental Sustainability* (April, 2006) online: IFC
<[http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/\\$FILE/IFC+Performance+Standards.pdf](http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/$FILE/IFC+Performance+Standards.pdf)>.

Ministry of Energy & Mineral Development, *The Renewable Energy Policy for Uganda* (2007) online: Ministry of Energy & Mineral Development
<<http://www.energyandminerals.go.ug/pdf/RENEWABLE%20ENERGY%20POLIC9-11-07.pdf>>.

_____. *The Energy Policy for Uganda* (September, 2002) online: Ministry of Energy & Mineral Development <<http://www.energyandminerals.go.ug/pdf/EnergyPolicy.pdf>>.

World Bank, *Bank Policy 4.10: Indigenous Peoples* online: World Bank
<<http://web.worldbank.org>> (July, 2005).

_____. *Operational Manual: Operational Policy 4.10 – Indigenous Peoples* (July, 2005) online: World Bank<<http://web.worldbank.org>>.

_____. *Operational Manual: Operational Policy 4.20 – Gender and Development* (March, 2003) online: World Bank<<http://web.worldbank.org>>.

_____. *Operational Manual: Operational Policy 4.12 – Involuntary Resettlement* (December, 2001 - as updated in March, 2007) online: World Bank <<http://web.worldbank.org>>.

_____. *Operational Manual: Bank Policy 4.12 – Involuntary Resettlement* (December, 2001) online: World Bank<<http://web.worldbank.org>>.

_____. *Operational Manual: Operational Directive 4.30 – Involuntary Resettlement* (June 1990) online: International Finance Corporation <[http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_Resettlement/\\$FILE/OD430_InvoluntaryResettlement.pdf](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_Resettlement/$FILE/OD430_InvoluntaryResettlement.pdf)>.

Primary Materials: Reports

The Inspection Panel, *Investigation Report – Uganda: Private Power Generation (Bujagali Project (Guarantee No. B0130-UG)* (2008) online: World Bank <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/FULL_September_2_2008_FINAL_Red.pdf>.

_____. *Investigation Report – Uganda: Third Power Project (Credit 2268- UG) and the Proposed Bujagali Hydropower* (2002) online: World Bank <<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/UGANDAIRMainReport.pdf>>.

International Bank for Reconstruction & Development (IBRD) and International Development Association (IDA), *Management Report and Recommendation in Response to the Inspection Panel Investigation Report: Uganda Private Power Generation (Bujagali Project)* (2008) online: World Bank Inspection Panel <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/Management_Report_Nov_7_FINAL.pdf>.

_____. *Management Report and Recommendation to the Inspection Panel Investigation Report: Uganda – Third Power Project (Credit No. 2268-UG), Fourth Power Project (Credit No. 3545-UG) and Bujagali Hydropower Project (PRG No. B 003-UG)* (June, 2002) online: World Bank <<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/UGManagementResponse>>.

Morse, Bradford & Thomas Berger, *Sardar Sarovar: Report of the Independent Review* (Resources Futures International Inc., 1992).

Population Secretariat, *National Population Policy for Social Transformation and Sustainable Development* (2008) online: Population Secretariat, Ministry of Finance, Planning and Economic Development<http://www.popsec.org/publications_7_3950299347.pdf>.

Prayas Energy Group, *The Bujagali Power Purchase Agreement - an Independent Review: A Study of Techno-Economic Aspects of the Power Purchase Agreement of the Bujagali Hydroelectric Project in Uganda* (November 2002) online: International Rivers<<http://www.internationalrivers.org/files/bujagalippa-review.pdf>>.

Rew, Alan, Eleanor Fisher & Balaji Pandey, *Addressing Policy Constraints and Improving Outcomes in Development-Induced Displacement and Resettlement Projects* (January, 2000) online: Oxford Department of International Development <<http://www.rsc.ox.ac.uk/PDFs/rrpolicyconstraintsds00.pdf>>.

World Commission on Dams, *Dams and Development: A New Framework for Decision Making – The Report of the World Commission on Dams*, (Earthscan Publications Limited, November 2005). Also available at: <<http://www.dams.org/docs/report/wcdreport.pdf>>.

SECONDARY MATERIAL

Secondary Material: Books and Chapters of Books

Anghie, Anthony. “The Evolution of International Law: colonial and postcolonial realities” in Richard Falk, Balakrishnan Rajagopal and Jacqueline Stevens (eds.) *International Law and the Third World: Reshaping Justice* (New York: Routledge-Cavendish, 2008).

_____. *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004).

_____. “International Financial Institutions” in Christian Reus Smit (ed.) *The Politics of International Law* (Cambridge University Press, 2004).

_____. “Francisco de Vitoria and the Colonial Origins of International Law” in Eve Darian-Smith & Peter Fitzpatrick (eds.) *Laws of the Postcolonial* (University of Michigan Press, 1999).

Anthony Anghie & B.S. Chimni, “Third World Approaches to International Law and Individual Responsibility in Internal Conflicts” in Anne Marie Slaughter and Steven R. Ratner (eds) *The Methods of International Law* (American Society of International Law Studies in Transnational Legal Policy, 2004).

Asian Development Bank, *Handbook on Resettlement: A Guide to Good Practice* (Asian Development Bank, 1998).

Barton, Barry. "Underlying Concepts and Theoretical Issues in Public Participation in Resources Development" in Donald Zillman, Alastair Lucas & George (Rock) Pring (eds) *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford University Press, 2002).

Barutciski, Michael. "International Law and Development-Induced Displacement and Resettlement" in Chris De Wet (ed.) *Development-Induced Displacement: Problems, Policies and People* Volume 18 Studies in Forced Migration (Berghahn Books, 2006).

Baxi, Upendra. "What may the 'Third World' expect from International Law?" in Richard Falk, Balakrishnan Rajagopal and Jacqueline Stevens (eds.) *International Law and the Third World: Reshaping Justice* (New York: Routledge-Cavendish, 2008).

_____. "Operation Enduring Freedom: Towards a New International Law and Order?" in Anthony Anghie, Bhupinder Chimni, Karin Mickelson and Obiora Okafor (eds.) *The Third World and International Order: Law, Politics and Globalization* (Martinus Nijhoff Publishers, 2003).

Bernardini, Piero. "Development Agreements with Host Governments" in Robert Prichard (ed.), *Economic Development, Foreign Investment and the Law: Issues of Private Sector Involvement, Foreign Investment and the Rule of Law in a New Era* (Kluwer Law International and International Bar Association, 1996).

Bissell, Richard E. "Institutional and Procedural Aspects of the Inspection Panel" in Gudmundur Alfredsson and Rolf Ring (eds.), *The Inspection Panel of the World Bank: A Different Complaints Procedure* (Kluwer Law International, 2001).

Boyle, Alan & Christine Chinkin, *The Making of International Law* (Oxford University Press, 2007).

Cernea, Michael M. "Risks, safeguards, and reconstruction: a model for population displacement and resettlement" in Michael M Cernea & Christopher McDowell (eds.) *Risks and Reconstruction: Experiences of Resettlers and Refugees* (Washington DC: The World Bank, 2000).

_____. "Development's Painful Social Costs: Introductory Study" in S. Parasuraman *The Development Dilemma: Displacement in India* (The Hague: Institute of Social Studies, 1999).

Cernea, Michael M. & Christopher McDowell, "Introduction: Reconstructing resettlers' and refugees' livelihoods" in Michael M Cernea & Christopher McDowell (eds.) *Risks and Reconstruction: Experiences of Resettlers and Refugees* (Washington DC: The World Bank, 2000).

Cameron, Peter D. & Ernesto Correa, "Towards the Contractual Management of Public-Participation Issues: A Review of Corporate Initiatives" in Donald Zillman, Alastair Lucas & George (Rock) Pring (eds) *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford University Press, 2002).

Campbell-Mohn, Celia. "The Human Dimension in Twenty-first Century Energy and Natural Resources Development: The New Law of 'Public Rights' in Private Development in the United States" in Donald Zillman, Alastair Lucas & George (Rock) Pring (eds) *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford University Press, 2002).

Chimni, B.S. "Third World Approaches to International Law: A Manifesto" in Anthony Anghie, Bhupinder Chimni, Karin Mickelson and Obiora Okafor (eds.) *The Third World and International Order: Law, Politics and Globalization* (Martinus Nijhoff Publishers, 2003).

Clark, Dana & David Hunter, "The World Bank Inspection Panel: Amplifying Citizens Voices for Sustainable Development" in Gudmundur Alfredsson and Rolf Ring (eds.), *The Inspection Panel of the World Bank: A Different Complaints Procedure* (Kluwer Law International, 2001).

Comeaux, Paul E. & N. Stephan Kinsella, *Protecting Foreign Investment under International Law: Legal Aspects of Political Risk* (Oceana Publications Inc., 1997).

Darrow, Mac. *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law* (USA: Hart Publishing, 2003).

de Chazournes, Laurence Boisson. "Compliance with Operational Standards: The Contribution of the World Bank Inspection Panel" in Gudmundur Alfredsson and Rolf Ring (eds.), *The Inspection Panel of the World Bank: A Different Complaints Procedure* (Kluwer Law International, 2001).

de Wet, Chris. "Introducing the Issues" in Chris de Wet (ed), *Development-Induced Displacement: Problems, Policies and People* 18 Studies in Forced Migration (Berghahn Books, 2006).

_____. "Risk, Complexity and Local Initiative in Forced Resettlement Outcomes" in Chris de Wet (ed), *Development-Induced Displacement: Problems, Policies and People* 18 Studies in Forced Migration (Berghahn Books, 2006).

Dharmadhikary, Shripad. "Hydropower at Sardar Sarovar: Is It Necessary, Justified and Affordable?" in William F. Fisher, ed., *Toward Sustainable Development: Struggling Over India's Narmada River* (Armonk: M.E. Sharpe, 1995).

Engorait, Simon Peter. "Power Sector Reforms in Uganda: Meeting the Challenge of Increased Private Sector Investments and Increased Electricity Access Among the Poor" in Edward Marandu and Dorcas Kayo, *The Regulation of the Power Sector in Africa* (London: Zed Books, 2004).

Escobar, Arturo. *Encountering Development: The Making and Unmaking of the Third World* (New Jersey: Princeton University Press, 1995).

Esteva, Gustavo. "Development" in Wolfgang Sachs (ed.) *The Development Dictionary* (Johannesburg: University of Witwatersrand Press, 1993).

Fisher, William F. "Development and Resistance in the Narmada Valley" in William F. Fisher, ed., *Toward Sustainable Development: Struggling Over India's Narmada River* (Armonk: M.E. Sharpe, 1995).

Fox, Jonathan A. & L. David Brown, "Assessing the Impact of NGO Advocacy Campaigns on World Bank Projects and Policies" in Jonathan A. Fox & L. David Brown (eds.) *The Struggle for Accountability: The World Bank, NGOs and Grassroots Movements* (Cambridge, Massachusetts: The MIT Press, 1998).

Gentle, Leonard. "Escom to Eskom: From racial Keynesian capitalism to neo-liberalism (1910 – 1994)" in David A. McDonald (ed.) *Electric Capitalism: Recolonising Africa on the Power Grid* (HSRC Press, 2009).

Ghanadan, Rebecca. "Connected geographies and struggles over access: Electricity commercialisation in Tanzania" in David A. McDonald (ed.) *Electric Capitalism: Recolonising Africa on the Power Grid* (HSRC Press, 2009).

Gore, Christopher. "Electricity and privatisation in Uganda: The origins of the crisis and problems with the response" in David A. McDonald (ed.) *Electric Capitalism: Recolonising Africa on the Power Grid* (HSRC Press, 2009).

Guzman, Andrew T. *How International Law Works: A Rational Choice Theory* (Oxford University Press, 2008).

Hansungule, Michelo. "Access to Panel: The Notion of Affected Party, Issues of Collective and Material Interest" in Gudmundur Alfredsson and Rolf Ring (eds.), *The Inspection Panel of the World Bank: A Different Complaints Procedure* (Kluwer Law International, 2001).

Hathaway, Terri & Lori Pottinger, "The great hydro-rush: The privatisation of Africa's rivers" in David A. McDonald (ed.) *Electric Capitalism: Recolonising Africa on the Power Grid* (HSRC Press, 2009).

The Inspection Panel, *Accountability at the World Bank: The Inspection Panel at 15 Years* online: The Inspection Panel

<<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/380793-1254158345788/InspectionPanel2009.pdf>>.

Kennedy, David. “‘Laws and Developments’: The ‘Rule of Law’ As Development” in John Hatchard & Amanda Perry-Kessaris (eds.) *Law and Development: Facing Complexity in the 21st Century* (United States: Cavendish Publishing, 2003).

Khagram, Sanjeev. *Dams and Development: Transnational Struggles for Water and Power* (Ithaca, N.Y: Cornell University Press, 2004).

Koenig, Dolores. “Enhancing Local Development in Development-induced Displacement and Resettlement Projects” in Chris De Wet (ed.) *Development-Induced Displacement: Problems, Policies and People* 18 Studies in Forced Migration (Berghahn Books, 2006).

Koenig, Dolores & Tieman Diarra, “The Effects of Resettlement on Access to Common Property Resources” in Michael M Cernea & Christopher McDowell (eds.) *Risks and Reconstruction: Experiences of Resettlers and Refugees* (Washington DC: The World Bank, 2000).

Lucas, Alastair R. “Canadian Participatory Rights in Mining and Energy Resource Development: The Bridges to Empowerment?” in Donald Zillman, Alastair Lucas & George (Rock) Pring (eds) *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford University Press, 2002).

Mburugu, Edward K. “Dislocation of Settled Communities in the Development Process: The Case of Kiambere Hydroelectric Project” in Cynthia C Cook (ed.), *Involuntary Resettlement in Africa: Selected Papers from a Conference on Environment and Settlement Issues in Africa* World Bank Technical Paper No. 227 (1994) online: World Bank <<http://www-wds.worldbank.org/external>>.

McDonald, David A. “Introduction: The Importance of Being Electric” David A. McDonald (ed.) in *Electric Capitalism: Recolonising Africa on the Power Grid* (HSRC Press, 2009).

_____. “Electric capitalism: Conceptualising electricity and capital accumulation in (South) Africa” in David A. McDonald (ed.) *Electric Capitalism: Recolonising Africa on the Power Grid* (HSRC Press, 2009).

Mehta, Abhay. *Power Play: A Study of the Enron Project* (Mumbai: Orient Longman Limited, 2001).

Moran, Theodore H. *Harnessing Foreign Direct Investment: Policies for Developed and Developing Countries* (Hopkins Fulfillment Services, 2006).

_____. *Foreign Direct Investment and Development: The New Policy Agenda for Developing Countries and Economies in Transition* (Washington D.C: Institute for International Economics, 1998).

Morse, Bradford & Thomas Berger, “Findings and Recommendations of the Independent Review” in William F. Fisher (ed.), *Towards Sustainable Development?: Struggling Over India’s Narmada River* (Armonk, NY: M.E. Sharpe, 1995).

Mugenyzi, John. “Uganda” in M R Bhagavan (ed.) *Reforming the Power Sector in Africa* (London & New York: Zed Books Limited, 1999).

National Association of Professional Environmentalists (NAPE), *A Spot Check on Compliance and Performance of World Bank and African Development Bank in Uganda’s Energy Sector: Success or Failure Story* (Kampala, Uganda: NAPE – FoE Uganda, 2009).

_____. *The Unresolved Issues in the Bujagali Project in Uganda: A Lack of Transparency and Public Participation* (Kampala, Uganda: National Association of Professional Environmentalists, 2007).

Nayak, Ranjit. “Risks associated with landlessness: an exploration toward socially friendly displacement and resettlement” in Michael M Cernea & Christopher McDowell (eds.) *Risks and Reconstruction: Experiences of Resettlers and Refugees* (Washington DC: The World Bank, 2000).

Nesiah, Vasuki. “The Ground Beneath Her Feet: TWAIL Feminisms” in Anthony Anghie, Bhupinder Chimni, Karin Mickelson and Obiora Okafor (eds.) *The Third World and International Order: Law, Politics and Globalization* (Martinus Nijhoff Publishers, 2003).

O’ Hearn, Denis. “Tigers and Transnational Corporations: Pathways from the Periphery?” in Ronaldo Munck and Denis O’Hearn (eds.) *Critical Development Theory: Contributions to a New Paradigm* (London: Zed Books, 1999).

Okafor, Obiora Chinedu. “Poverty, Agency and Resistance in the Future of International Law: an African Perspective” in Richard Falk, Balakrishnan Rajagopal and Jacqueline Stevens (eds.) *International Law and the Third World: Reshaping Justice* (New York: Routledge-Cavendish, 2008).

Omorogbe, Yinka. “The Legal Framework for Public Participation in Decision-making on Mining and Energy Development in Nigeria: Giving Voices to the Voiceless” in Donald Zillman, Alastair Lucas and George (Rock) Pring (eds.) *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford University Press, 2002).

Parra, Antonio R. "The Scope of New Investment Laws and International Instruments" in Robert Prichard (ed.), *Economic Development, Foreign Investment and the Law: Issues of Private Sector Involvement, Foreign Investment and the Rule of Law in a New Era* (Kluwer Law International and International Bar Association, 1996).

Paulsson, Jan. "Dispute Resolution" in Robert Prichard (ed.), *Economic Development, Foreign Investment and the Law: Issues of Private Sector Involvement, Foreign Investment and the Rule of Law in a New Era* (Kluwer Law International and International Bar Association, 1996).

Pring, George (Rock) & Susan Y. Noe , "The Emerging International Law of Public Participation Affecting Global Mining, Energy and Resources Development" in Zillman, Lucas & Pring (eds) *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford University Press, 2002).

Pritchard, Robert. "Introduction: The Contemporary Challenges of Economic Development" in Robert Prichard (ed.), *Economic Development, Foreign Investment and the Law: Issues of Private Sector Involvement, Foreign Investment and the Rule of Law in a New Era* (Kluwer Law International and International Bar Association, 1996).

Prichard, Robert & Douglas Webb, "Privatization and Private Provision of Infrastructure" in Robert Prichard (ed.), *Economic Development, Foreign Investment and the Law: Issues of Private Sector Involvement, Foreign Investment and the Rule of Law in a New Era* (Kluwer Law International and International Bar Association, 1996).

Purkayashta, Prabir & Vijay Prashad, *Enron Blowout: Corporate Capitalism and Theft of the Global Commons* (New Delhi, India: LeftWord Books, 2002).

Rahnema, Majid. "Towards Post-Development: Searching for Signposts, a New Language and New Paradigms," in M Rahmena and V. Bawtree (eds.) *Post-Development Reader* (London: Zed Publishers, 1997).

Rajagopal, Balakrishnan. *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press, 2003).

_____. "International Law and Third World Resistance: A Theoretical Inquiry" in Anthony Anghie, Bhupinder Chimni, Karin Mickelson and Obiora Okafor (eds.) *The Third World and International Order: Law, Politics and Globalization* (Martinus Nijhoff Publishers, 2003).

Ramesh, M.K. & Francis A. Joseph, "The Karnataka Resettlement of Project Displaced Persons Act, 1987: A Critical Perspective" in Hari Mohan Mathur (ed.) *Managing Resettlement in India: Approaches, Issues, Experiences* (Oxford University Press, 2006).

Rew, Alan, Eleanor Fisher & Balaji Pandley, "Policy Practices in Development-induced Displacement and Rehabilitation" in Chris De Wet (ed.) *Development-Induced Displacement: Problems, Policies and People* Volume 18 Studies in Forced Migration (Berghahn Books, 2006).

Sachs, Wolfgang "Introduction" in Wolfgang Sachs (ed.) *The Development Dictionary* (Johannesburg: University of Witwatersrand Press, 1993).

Santos, Boaventura de Sousa. *Toward a New Legal Common Sense: Law, Globalization and Emancipation* (London: Butterworths, 2002).

Sardar, Ziauddin. "Development and the Locations of Eurocentrism," in Ronaldo Munck and Denis O'Hearn (eds.) *Critical Development Theory: Contributions to a New Paradigm*, (London: Zed Books, 1999).

Saxena, N.C. "The Resettlement and Rehabilitation Policy of India" in Hari Mohan Mathur (ed.) *Managing Resettlement in India: Approaches, Issues, Experiences* (Oxford University Press, 2006).

Schlemmer-Schulte, Sabine. "The Inspection Panel's Case Law" in Gudmundur Alfredsson and Rolf Ring (eds.), *The Inspection Panel of the World Bank: A Different Complaints Procedure* (Kluwer Law International, 2001).

Serageldin, Ismail. "Involuntary Resettlement in World Bank-Financed Projects: Reducing Impoverishment Risks for the Affected People" in Hari Mohan Mathur (ed.) *Managing Resettlement in India: Approaches, Issues, Experiences* (Oxford University Press, 2006).

Shihata, Ibrahim F. I. "The World Bank Inspection Panel – Its Historical, Legal and Operational Aspects" in Gudmundur Alfredsson and Rolf Ring (eds.), *The Inspection Panel of the World Bank: A Different Complaints Procedure* (Kluwer Law International, 2001).

_____. *The World Bank Inspection Panel: In Practice* (New York: Oxford University Press, 2000) Second Edition.

_____. *Multilateral Investment Guarantee Agency and Foreign Investment* (Martinus Nijhoff Publishers, 1988).

Sornarajah, M. *The International Law on Foreign Investment* (Cambridge University Press, 2004) Second Edition.

_____. "Economic Neoliberalism and the International Law on Foreign Investment" in Anthony Anghie, Bhupinder Chimni, Karin Mickelson and Obiora Okafor (eds.) *The Third World and International Order: Law, Politics and Globalization* (Martinus Nijhoff Publishers, 2003).

Stiglitz, Joseph E. *Globalization and Its Discontents* (W. W. Norton & Company, 2003).

Szablowski, David. *Transnational Law and Local Struggles: Mining, Communities and the World Bank* (Oregon: Hart Publishing, 2007).

Tucker, Vincent. "The Myth of Development: A Critique of a Eurocentric Discourse," in Ronaldo Munck and Denis O'Hearn (eds.) *Critical Development Theory: Contributions to a New Paradigm*, (London: Zed Books, 1999).

Tukahebwa, Geoffrey B. "Privatization as a development policy" in Holger Bernt Hansen & Michael Twaddle (eds.), *Developing Uganda* (Kampala: Fountain Publishers, 1998).

Twaddle, Michael & Holger Bernt Hansen, "Introduction: The Changing State of Uganda" in Holger Bernt Hansen & Michael Twaddle (eds.) *Developing Uganda* (Kampala: Fountain Publishers, 1998).

Udall, Lori. "The World Bank and Public Accountability: Has Anything Changed?" in Jonathan A. Fox & L. David Brown (eds.) *The Struggle for Accountability: The World Bank, NGOs and Grassroots Movements* (Cambridge, Massachusetts: The MIT Press, 1998).

Umaña, Alvaro "Some Lessons from the Inspection Panel's Experience" in Gudmundur Alfredsson and Rolf Ring (eds.), *The Inspection Panel of the World Bank: A Different Complaints Procedure* (Kluwer Law International, 2001).

_____. (ed), *The World Bank Inspection Panel: The First Four Years (1994-1998)* (Washington, D.C: The World Bank, 1998).

Webb, Douglas. "Legal System Reform and Private Sector Development in Developing Countries" in Robert Prichard (ed.), *Economic Development, Foreign Investment and the Law: Issues of Private Sector Involvement, Foreign Investment and the Rule of Law in a New Era* (Kluwer Law International and International Bar Association, 1996).

World Bank, *Involuntary Resettlement Sourcebook: Planning and Implementation in Development Projects* (International Bank for Reconstruction and Development/World Bank, 2004).

Wouters, Jan & Cedric Ryngaert, "Good Governance: Lessons from International Organizations" in D.M. Curtin & R.A. Wessel, *Good Governance and the European Union: Reflections on Concepts, Institutions and Substance* (New York: Intersentia, 2005).

Zillman, Donald N. "Introduction to Public Participation in the Twenty-first Century" in Donald Zillman, Alastair Lucas & George (Rock) Pring (eds) *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford University Press, 2002).

Secondary Materials: Articles

Anghie, Anthony. "Time Present and Time Past: Globalization, International Financial Institutions and the Third World" (2000) 32 N.Y.U J. Int'l L & Pol. 243.

Baxi, Upendra. "The War on Terror and 'The War of Terror': Nomadic Multitudes, Aggressive Incumbents, and the 'New International Law' (2005) 43 Osgoode Hall Law Journal 7.

_____. "What Happens Next is Up To You: Human Rights at Risk in Dams and Development" (2001) 16 American University International Law Journal 1507.

Bishop, Norman A. "The Key to Africa's Energy Future" (2008) 60:10 International Water, Power & Dam Construction at

Bissell, Richard E. "Recent Practice of the Inspection Panel of the World Bank" (1997) 91:4 The American Journal of International Law 741.

Bradlow, Daniel D. "Lessons from the NGO Campaign Against the Second Review of the World Bank Inspection Panel: a Participant's Perspective" (2001) 7 ILSA J. Int'l & Comp. L. 247.

_____. "A Test Case for the World Bank" (1996) 11 American University Journal of International Law and Policy 247.

_____. "International Organizations and Private Complaints: the Case of the World Bank Inspection Panel" (1994) 34 Virginia Journal of International Law 553.

Bradlow, David D. & Sabine Schlemmer-Schulte, "The World Bank's New Inspection Panel: A Constructive Step in the Transformation of the International Legal Order" (1994) 54 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht (Heidelberg Journal Of International Law) 392.

Bridgeman, Tess. "An Independent Evaluation of the World Bank Inspection Panel: Summary" online: Business and Society Exploring Solutions <http://baseswiki.org/en/An_Independent_Evaluation_of_the_World_Bank_Inspection_Panel,_Tess_Bridgeman,_2007>.

Cernea, Michael M. "African Involuntary Population Resettlement in a Global Context" [Environment Department Papers] Social Assessment Series 045 (February 1997) online: World Bank<<http://www-wds.worldbank.org>>.

_____. "Public Policy Responses to Development-Induced Population Displacements" (1996) 31: 24 Economic and Political Weekly 1515.

_____. “Involuntary Resettlement in Development Projects: Policy Guidelines in World Bank-financed Projects” World Bank Technical Working Paper No. 80 (Washington, D.C: The World Bank, 1988).

Chimni, B.S. “International Institutions Today: An Imperial Global State in the Making” (2004) 15:1 *European Journal of International Law* 1.

Clark, Dana. “Resettlement: The World Bank’s Assault on the Poor” (May, 2000) online: Centre of International Environmental Law
<<http://www.ciel.org/Publications/ResettlementBrief2.pdf>>.

Cleaver, Frances. “Paradoxes of Participation: Questioning Participatory Approaches to Development” (1999) 11 *Journal of International Development* 597.

Cohen, John M. & Norman T. Uphoff, “Participation’s Place in Rural Development: Seeking Clarity through Specificity” (1980) 8 *World Development* 213.

Cotula, Lorenzo. “Regulatory Takings, Stabilization Clauses and Sustainable Development” Paper Prepared for the OECD Global Forum on International Investment VII (Paris, 27 – 28 March 2008) online: Organization for Economic Cooperation and Development
<<http://www.oecd.org/dataoecd/45/8/40311122.pdf>>.

_____. “Strengthening Citizens’ Oversight of Foreign Investment: Investment Law and Sustainable Development” (2007) Sustainable Markets Investment Briefings, Briefing 4 online: International Institute for Environment and Development
<<http://pubs.iied.org/pdfs/17015IIED.pdf>>.

Davis, Shelton H. “The World Bank and Indigenous Peoples” online: World Bank
<http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2003/11/14/000012009_20031114144132/Rendered/PDF/272050WB0and0Indigenous0Peoples01public1.pdf>.

Downing, Theodore E. “Creating poverty: the flawed economic logic of the World Bank’s revised involuntary resettlement policy” (2002) 12 *Forced Migration Review* 13.

Dunkerton, Kristine J. “The World Bank Inspection Panel and its Effect on Lending Accountability to Citizens in Borrowing Nations” (1995) 5 *University of Baltimore Journal of Environmental Law* 226.

Eberhard, Anton. “Infrastructure Regulation in Developing Countries: An Exploration of Hybrid and Transitional Models” Public-Private Infrastructure Advisory Facility Working Paper No. 4 <<http://www-wds.worldbank.org>>.

Elkins, Zachary, Andrew T. Guzman & Beth A. Simmons, “Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960 - 2000” (2006) 60 *International Organization* 811.

Fidler, Courtney & Michael Hitch, "Impact and Benefit Agreements: A Contentious Issue for Environmental and Aboriginal Justice" (2007) 35:2 *Environments Journal* 49.

_____. "Used and Abused: Negotiated Agreements" online: Canadian Business Ethics Research Network
<<http://www.cbern.ca/kr/One.aspx?objectId=10486987&contextId=677979&lastCat=10486919>>.

Forbes, Ann Armbricht. "The Importance of Being Local: Villages, NGOs, and the World Bank in the Arun Valley, Nepal" (1999) 6: 2 *Identities* 319.

Fox, Jonathan. "Advocacy Research and the World Bank: Propositions for Discussion" (2003) 13:5 *Development in Practice* 519.

_____. "The World Bank Inspection Panel: Lessons from the First Five Years" (2000) 6 *Global Governance* 279.

Galbraith, Lindsay, Ben Bradshaw & Murray B. Rutherford, "Towards a new supraneregulatory approach to environmental assessment in Northern Canada" (2007) 25:1 *Impact Assessment and Project Appraisal* 27.

Gathii, James Thuo. "Imperialism, Colonialism and International Law" (2007) 54 *Buff. L. Rev.* 1013.

_____. "Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy" (2000) 98 *Mich. L. Review* 1996.

Gordon, Ruth E. & Jon H. Sylvester, "Deconstructing Development" (2004) 22 *Wisconsin International Law Journal* 1.

Gros, Germain & Olga Prokopovych, "When Reality Contradicts Rhetoric: World Bank Lending Practices in Developing Countries in Historical, Theoretical and Empirical Perspectives" <<http://www.codesria.org/Links/Publications/monographs/Gros.pdf>>.

Guzman, Andrew T. & Timothy L. Meyer, "International Soft Law" online: University of Georgia Law
<http://works.bepress.com/cgi/viewcontent.cgi?article=1004&context=timothy_meyer>.

_____. "International Common Law: The Soft Law of International Tribunals" (2009) 9:2 *Chicago Journal of International Law* 515.

Hayami, Yujiro. "From the Washington Consensus to the Post-Washington Consensus: Retrospect and Prospect" (2003) 20:2 *Asian Development Review* 40.

Hey, Ellen. "The World Bank Inspection Panel: Towards the Recognition of a New Legally Relevant Relationship in International Law" (1997) 2 Hofstra Law and Policy Symposium 61.

Hunter, David. "Using the World Bank Inspection Panel to Defend the Interests of Project-Affected People" (2003) 4 Chicago Journal of International Law 201.

Isaac, Thomas & Anthony Knox, "Canadian Aboriginal Law: Creating Certainty in Resource Development" (2004)
<http://www.mccarthy.ca/pubs/Resource_development.pdf>.

Keeping, Janet. "Thinking About Benefits Agreements: An Analytical Framework" Northern Minerals Program Working Paper No. 4 (Yellowknife: Canadian Arctic Resources Committee, 1998) online: Canadian Arctic Resources Committee
<http://www.carc.org/northern_minerals/NMPWorkingPaper4Keeping.pdf>.

Kennett, Steven A. "Issues and Options for a Policy on Impact and Benefit Agreements" (1999) online: Canadian Business Ethics Research Network
<<http://cbern.sharpschool.com/kr/One.aspx?objectId=10486954&contextId=677979&lastCat=10486919>>.

Khosla, Madhav. "The TWAIL Discourse: The Emergence of a New Phase" (2007) 9 International Community Law Review 295.

Klein, Heidi, John Donihee & Gordon Stewart, "Environmental Impact Assessment and Impact benefit Agreements: Creative Tension or Conflict?" (2004) online: Canadian Business Ethics Research Network
<<http://www.cbern.ca/kr/One.aspx?objectId=10486942&contextId=677979&lastCat=10486919>>.

LeRoy, Greg & Anna Purinton, "Community Benefit Agreements: Ensuring that Urban Development Benefits Everyone" (August 2005) online: Neighborhood Funders Group<www.nfg.org>.

Leubuscher, Susan. "The Environmental, Social and Human Rights Impacts of Foreign Investment Contracts" online: Pacific Environment<http://www.pacificenvironment.org/downloads/The%20Environmental%20Social%20and%20Human%20Rights%20Impacts%20of%20Foreign%20Investment%20Contracts_4_.pdf>.

Linaweaver, Stephen. "Catching the Boomerang: EIA, the World Bank, and Excess Accountability: A Case Study of the Bujagali Falls Hydropower Project Uganda" (2003) 10 International Journal of Sustainable Development and World Ecology 283.

Mallaby, Sebastian. "NGOs: Fighting Poverty, Hurting the Poor" (2004) Foreign Policy 50.

Marcello, David A. "Community benefit agreements: new vehicle for investment in America's neighbourhoods" (2007) 39:3 *The Urban Lawyer* 657.

Mickelson, Karin. "Rhetoric and Rage: Third World Voices in International Legal Discourse" (1998) 16:2 *Wisconsin International Law Journal* 353.

Morisset, Jacques. "Foreign Direct Investment in Africa: Policies Also Matter" (November 1999). World Bank Policy Research Working Paper No. 2481. Also available online SSRN: <<http://ssrn.com>>.

Mutua, Makau. "What is TWAIL?" (2000) *American Society of International Law Proceedings* 31.

_____. "Why Redraw the Map of Africa: A moral and Legal Inquiry" (1994-1995) 16 *Michigan Journal of International Law* 1113.

Nathan, Kathigamar V. S. K. "The World Bank Inspection Panel: Court or Quango?" (1995) 12 *Journal of International Arbitration* 135.

Nevin, Tom. "Battle lines drawn over Bujagali dam" (June 2007) *African Business* 57.

Ngugi, Joel M. "The World Bank and The Ideology of Reform and Development in International Economic Development Discourse" (2006) 14 *Cardozo Journal of International and Comparative Law* 313.

Nyamu, Celestine I. "How Should Human Rights and Development Respond to Cultural Legitimations of Gender Hierarchy in Developing Countries" (2000) 41 *Harvard International Law Journal* 381.

Odumosu, Ibrionke T. "Locating Third World Resistance in the International Law on Foreign Investment" (2007) 9 *International Community Law Review* 427.

O'Faircheallaigh, Ciaran. "Corporate-Aboriginal Agreements on Mineral Development: The Wider Implications of Contractual Arrangements" (2009) online: Canadian Business Ethics Research Network
<<http://www.cbern.ca/kr/One.aspx?objectId=10486981&contextId=677979&lastCat=10486919>>.

Okafor, Obiora Chinedu. "Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?" (2008) 10 *International Community Law Review* 371.

_____. "Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective" (2005) 43 *Osgoode Hall L. J* 171.

_____. "Re-Conceiving 'Third World' Legitimate Governance Struggles in Our Time: Emergent Imperatives for Rights Activism" (2000) 6 *Buff. Hum. Rts. L. Review* 1.

_____. "After Martyrdom: International Law, Sub-state groups and the construction of legitimate statehood in Africa" (2000) 41:2 Harvard International Law Journal 503.

Oloka-Onyango, J. & Sylvia Tamale, "'The Personal is Political' or Why Women's Rights are Indeed Human Rights: An African Perspective in International Feminism" (1995) 17 Hum. Rts. Q. 691.

O'Reilly, Kevin & Erin Eacott, "Aboriginal Peoples and Impact and Benefit Agreements: Report of a National Workshop" Northern Minerals Program Working Paper No. 7 (Yellowknife: Canadian Arctic Resources Committee, 1998) online: Canadian Arctic Resources Committee
<www.carc.org/northern_minerals/NMPWorkingPaper7OReilly.pdf>.

Oshionebo, Evaristus. "World Bank and Sustainable Development of Natural Resources in Developing Countries" (2009) 27:2 Journal of Energy & Natural Resource Law 193.

Oweyegha- Afunaduula, F.C. "Bujagali as Ethnocide: Cultural and Spiritual Death of the Indigenous Community of Basoga, Uganda" (June, 2005) online: Oweyegha Afunaduula
<<http://www.afuna.o-f.com/articles/BUJAGALI%20AS%20ETHNOCIDE.htm>>.

Pahuja, Sundhya. "Beheading the Hydra: Legal Positivism and Development" 2007 (1) Law, Social Justice & Global Development Journal (LGD).
<http://www.go.warwick.ac.uk/elj/lgd/2007_1/pahuja>.

Patwardhan, Amrita. "Dams and Tribal People in India" Thematic Review 1.2: Dams, Indigenous Peoples and Vulnerable Ethnic Communities
<<http://oldwww.wii.gov.in/eianew/eia/dams%20and%20development/kbase/contrib/soc207.pdf>>.

Prno, Jason, Ben Bradshaw & Dianne Lapierre, "Impact and Benefit Agreements: Are They Working?" (2010) online: Canadian Business Ethics Research Network
<http://www.cbern.ca/UserFiles/Servers/Server_625664/File/IBA%20PDF/CIM%202010%20Paper%20-%20Prno,%20Bradshaw%20and%20Lapierre.pdf>.

Rajagopal, Balakrishnan. "Counter-hegemonic International Law: rethinking human rights and development as a Third World strategy" (2006) 27:5 Third World Quarterly 767.

_____. "International Law and Social Movements: Challenges of Theorizing Resistance" (2003) 41 Columbia Journal of Transnational Law 398.

Ramanathan, Usha. "Displacement and the Law" (June, 1996) Economic and Political Weekly 1486.

Raustiala, Kal. "Form and Substance in International Agreements" (2005) 99 Am. J. Int'l L. 581.

Roos, Stefanie Ricarda. "The World Bank Inspection Panel in its Seventh Year: An Analysis of its Process, Mandate, and Desirability with Special Reference to the China (Tibet) Case" (2001) 5 Max Planck Yearbook of United Nations Law 473.

Rothman, Franklin D. "A Comparative Study of Dam-Resistance Campaigns and Environmental Policy in Brazil" (2001) 10 The Journal of Environmental Development 317.

Salacuse, Jeswald W. "BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries" (1990) 24 The International Lawyer 655.

Schlemmer-Schulte, Sabine. "The World Bank Inspection Panel: A Record of the First International Accountability Mechanism and Its Role for Human Rights" (1999) 6:2 Human Rights Brief.

Sornarajah, M. "A law for need or a law for greed?: Restoring the lost law in the international law of foreign investment" (2006) 6 International Environmental Agreements 329.

_____. "The Clash of Globalisations and the International Law on Foreign Investment" (The Simon Reisman Lecture in International Trade Policy, delivered at the Centre for Trade Policy and Law, Ottawa, 12 September, 2002), (2003) 12:3 Canadian Foreign Policy Journal 1.

Sosa, Irene & Karyn Keenan, "Impact Benefit Agreements between Aboriginal Communities and Mining Companies: Their Use in Canada" (2001) online: Canadian Environmental Law Association<<http://s.cela.ca/files/uploads/IBAeng.pdf>>.

Stavropoulou, Maria. "Indigenous Peoples Displaced from Their Environment: Is There Adequate Protection?" (1994) 5 Colorado Journal of International Environmental Law & Policy 105.

Stiglitz, Joseph. "Participation and development: Perspectives from The Comprehensive Development Paradigm" Available at:
<<http://siteresources.worldbank.org/CDF/Resources/stiglitzparticipation1999.pdf>>.

Tienhaara, Kyla. "Mineral Investment and the Regulation of the Environment in Developing Countries: Lessons from Ghana" (2006) 6 International Environmental Agreements 371.

Trebeck, Katherine Anne. "Tools for the Disempowered? Indigenous Leverage Over Mining Companies" (2007) 42:4 Australian Journal of Political Science 541.

Trubek David M. & Marc Galanter, "Scholars in Self-Enstrangement: Some Reflections on the Crisis in Law and Development Studies in the United States" (1974) Wisconsin Law Review 1062.

Udall, Lori. “World Bank Inspection Panel” Contributing Paper (Prepared for Thematic Review V.4: Regulation, Compliance and Implementation Options)
<<http://www.dams.org/docs/kbase/contrib/ins208.pdf>>.

World Bank Operations Evaluations Department, “Involuntary Resettlement: the Large Dam Experience” (2000) online: World Bank <<http://www-wds.worldbank.org>>.

Secondary Materials: Others

African Development Bank Group, “Bujagali Interconnection Project” online: African Development Bank Group<<http://www.afdb.org/en/projects-operations/project-portfolio/project/p-ug-fa0-002/>>.

African Development Bank, “Independent Review Mechanism” online: African Development Bank”<<http://www.afdb.org/en/about-us/structure/independent-review-mechanism/>>.

Asian Development Bank, “Accountability Mechanism” online: Asian Development Bank<<http://www.adb.org/Accountability-Mechanism/default.asp>>.

Basalirwa, Asuman, Yudaya Babirye & Francis Kidega, “Uganda Students Express Concerns About Bujagali Dam” (17 August 2000) online: International Rivers <<http://www.internationalrivers.org/africa/ugandan-students-express-concerns-about-bujagali-dam>>.

Bbumba, Syda N. M. “Budget Speech: Financial Year 2009/10” (June, 2009) online: Ministry of Finance, Planning & Economic Development <http://www.finance.go.ug/docs/Budget%20Speech_FY2009_10_Final.pdf>.

Bosshard, Peter. “International Rivers Response to Sebastian Mallaby’s Attacks on NGOs” (5 November 2004) online: International Rivers <<http://www.internationalrivers.org/fr/africa/bujagali-dam-uganda/international-rivers-response-sebastian-mallabys-attacks-ngos>>.

Burnside, *Assessment of Past Resettlement Activities and Action Plan* (December, 2006) online: The World Bank <<http://siteresources.worldbank.org/EXTBUJHYDPOWPRO/Resources/HPPSEAAppendixI.pdf>>.

_____. *Community Development Action Plan* (December 2006) online: The World Bank <<http://siteresources.worldbank.org/EXTBUJHYDPOWPRO/Resources/HPPSEAAppendixJ-CDAP.pdf>>.

Daily Trust, “Africa’s largest oil wells discovered in Uganda”, online: Daily Trust <http://www.dailytrust.com/index.php?option=com_content&task=view&id=2973&Itemid=15:testset>.

De Soto, Hernando. “Munk Debates 2009: Foreign Aid Does More Harm Than Good” June 1, 2009 online: YouTube <<http://www.youtube.com/watch?v=I8hgCeN5EwA&feature=PlayList&p=18B608484B45150C&index=0>>.

The Inspection Panel, “Summary of Inspection Panel Cases: June 30, 2007” online: The Inspection Panel <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/Summary_of_Inspection_Panel_Cases_%5Bupdated%5D.pdf>.

_____. “The Inspection Panel: About Us” online: The Inspection Panel <<http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,menuPK:64129249~pagePK:64132081~piPK:64132052~theSitePK:380794,00.html>>.

Inter-American Development Bank, “Independent Consultation and Investigation Mechanism” online: Inter-American Development Bank <<http://www.iadb.org/mici/>>.

International Development Association (IDA), “IDA at Work: Uganda” (July, 2009) online: IDA <<http://siteresources.worldbank.org/IDA/Resources/IDA-Uganda.pdf>>.
International Finance Corporation (IFC), “Investing in Sub-Saharan Africa” online: IFC <<http://www.ifc.org/ifcext/africa.nsf/Content/Investments>>.

International Rivers, “Bujagali Dam Rises Again in Uganda” online: International Rivers <<http://www.internationalrivers.org/en/africa/bujagali-dam-rises-again-uganda>>.

_____. “Bujagali Being Revived: Civil Society Concerns” online: International Rivers <<http://www.internationalrivers.org/en/bujagali-being-revived-read-civil-society-concerns>>.

_____. “AES Pulls Out of Uganda Dam” online: International Rivers <<http://www.internationalrivers.org/en/africa/aes-pulls-out-uganda-dam>>.

_____. “Stop US-based AES Electric, Ltd. From Damming Uganda’s Bujagali Fall” online: International Rivers <<http://www.internationalrivers.org/en/africa/stop-us-based-aes-electric-ltd-damming-ugandas-bujagali-falls>>

Mugabe, David. “Bujagali Falls to Close in January 2011” (9 April 2010) online: The New Vision <<http://www.newvision.co.ug/D/8/13/715734>>.

Multilateral Investment Guarantee Agency (MIGA), “Regional Overview” online: MIGA <http://www.miga.org/regions/index_sv.cfm>.

_____. "Projects in Uganda" online: MIGA
<http://www.miga.org/regions/index_sv.cfm?std=1530&country_id=223&hcountrycode=UG>.

National Association of Professional Environmentalists (NAPE), "Lodging A Claim on the Proposed Bujagali Hydropower Dam and Interconnection Projects in Uganda" (March, 2007) online: World Bank Inspection Panel
<<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/InspectionPanelClaim.pdf>>

_____. "Request for Inspection" online: The Inspection Panel
<<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/InspectionPanelClaim.pdf>>.

National Association of Professional Environmentalists, International Rivers & Bank Information Center, "Summary of Key Findings from the Inspection Panel Investigation Report on Bujagali Hydropower Project, Uganda" online: International Rivers<<http://www.internationalrivers.org/en/node/3492>>.

Pottinger, Lori. "Lori Pottinger Responds to Sebastian Mallaby's Accusations Regarding NGO Secrecy" (30 September 2004) online: International Rivers
<<http://www.internationalrivers.org/africa/bujagali-dam-uganda/lori-pottinger-responds-sebastian-mallabys-accusations-regarding-ngo-secr>>.

_____. "Uganda's Bujagali Dam: A Case Study in Corporate Welfare" (2000) online: The Center for International Environmental Law<<http://www.ciel.org/Ifi/ifccaseuganda.html>>.

Pottinger, Lori et. al., "Letter to World Bank: Outstanding Concerns on Bujagali" (April, 2007) online: International Rivers< <http://www.internationalrivers.org/en/africa/bujagali-dam-uganda/letter-world-bank-outstanding-concerns-bujagali>>.

Pottinger, Lori & Frank Muramuzi, "Letter to the World Bank Regarding Owen Falls Dam and Lake Victoria" (February, 2006) online: International Rivers<
<http://www.internationalrivers.org/en/letter-world-bank-regarding-owen-falls-dams-and-lake-victoria>>.

President of the Republic of Uganda, "Blame loadshedding on FDC, foreigners and drought" online: The New Vision
<<http://www.newvisionuganda.info/D/8/459/482069/Blame%20loadshadding%20on%20FDC>>.

Uganda Bureau of Statistics, "General Information on Uganda" online: Uganda Bureau Of Statistics
<<http://www.ubos.org/onlinefiles/uploads/ubos/pdf%20documents/general%20information%20on%20uganda.pdf>>.

_____. “The 2002 Uganda Population and Housing Census, Economic Characteristics” (October 2006) online: Uganda Bureau of Statistics
<<http://www.ubos.org/onlinefiles/uploads/ubos/pdf%20documents/2002%20CensusEconomicXteristicsAnalyticalReport.pdf>>.

Uganda Investment Authority, “Why Uganda: Uganda – A Distinctly Pro-Business Climate” online: Uganda Investment Authority
<http://www.ugandainvest.com/uia.php?uhpl=why_uganda&&uhpl1=Why%20Uganda>.

Wolfensohn, James D. *Memorandum to the Executive Directors: Operational Policy on Involuntary Resettlement*, Draft OP/BP 4.12 (28 September 2001) online: The Center for International Environmental Law
<http://www.ciel.org/Publications/wolfensohn_28sep01_memo.pdf>.

_____. “OP/BP 4.12, Involuntary Resettlement Background Note on the Conversion Process” (September 2001) online: The Center for International Environmental Law
<http://www.ciel.org/Publications/wolfensohn_28sep01_memo.pdf>.

World Bank, “Uganda: Overview” online: World Bank
<<http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/UGANDAEXTN/0,,menuPK:374945~pagePK:141132~piPK:141121~theSitePK:374864,00.html>>.

_____. “Uganda Bujagali Hydro Power Project: An Energy Strategy for Uganda” online: World Bank
<<http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/EXTPROJECTSPROGRAMS/EXTBUJHYDPOWPRO/0,,contentMDK:21217640~menuPK:3323746~pagePK:64168445~piPK:64168309~theSitePK:3323560,00.html>>.

_____. “Bujagali Hydropower Project: About the Project”, online: The World Bank Group
<<http://www.worldbank.org/bujagali>>.

_____. “World Bank Board Discussed Investigation by the Independent Inspection panel of Power Project in Uganda” News Release No. 2009/166/AFR online: The World Bank
<http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:22010397~pagePK:64257043~piPK:437376~theSitePK:4607,00.html?cid=3001_172>.

_____. “Bank Management Response to Request for Inspection Review of the Uganda Private Power Generation Project (Proposed)” (2007) online: World Bank Inspection Panel
<<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/ManagementResponse.pdf>>.

_____. “Legal Note on Indigenous Peoples” (April, 2005) online: World Bank
<<http://siteresources.worldbank.org/INTINDPEOPLE/Publications/20571167/Legal%20Note.pdf>>.

_____. “Revised Draft Operational Policy/Bank Procedures (OP/BP 4.10) Indigenous Peoples: Issues and Proposals” (April, 2005) online: World Bank
<<http://siteresources.worldbank.org/INTINDPEOPLE/Publications/20571164/Issue%20Notes.pdf>>.

_____. “World Bank Board of Directors Approves Management’s Response to Inspection Panel Report on Bujagali Project” Press Release No: 2002/360/AFR online: The World Bank
<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/Uganda_WB_Board_Approves_ManagementResponse.pdf> (June 17, 2002).

_____. “Bank Management Response to Request for Inspection Panel Review of the IDA-Financed Uganda Third Power Project (Credit 2268-UG) and the Proposed Bujagali Hydropower Project” online: World Bank
<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/BUJ_Management_Response_09_12_01.pdf>.

_____. “Independent Evaluation Group: Evaluation for Better Results” online: The World Bank
<http://siteresources.worldbank.org/EXTOED/Resources/ieg_brochure.pdf>.

_____. “Conversion of the World Bank’s Policy on Involuntary Resettlement: Substantive Comments from Executive Directors on Draft OP/BP 4.12 dated July 25, 2000” (March 6, 2001) online: The Center for International Environmental Law
<<http://www.ciel.org/Publications/Matrix-final.pdf>>.

_____. “Environmental and Natural Resources Law: Involuntary Resettlement” online: The World Bank
<<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/EXTENVIRONMENTNATRESLAW/0,,contentMDK:20675447~menuPK:1737138~pagePK:148956~piPK:216618~theSitePK:1001743,00.html>>.

Wormser, Michel. “World Bank Response to IRN Letter on Bujagali” (June, 2007) online: World Bank
<<http://siteresources.worldbank.org/EXTBUJHYDPOWPRO/Resources/ResponseLetterIRN6-07.pdf>>.