

## A TWAAIL Analysis of Foreign Investment and Development-Induced Displacement and Resettlement: Lessons from Uganda's Bujagali Hydroelectric Project

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Too frequently, the study of development-induced displacement and resettlement (DIDR) has consisted of an analysis of the social-legal aspects of displacement and resettlement including the analysis of resettlement policy frameworks, power struggles between different actors, the institutional agencies implementing policy frameworks, the level of participation in decision-making processes and the political motivations driving the displacement and resettlement exercises. There is hardly any literature that analyses DIDR from an investment perspective. Those who have studied large infrastructure projects as part of investment-related debates rarely speak directly to the issue of DIDR. While the social-legal analysis is invariably useful in articulating the challenges associated with DIDR and proposing solutions for the same, it largely underplays the tensions resulting from protecting the interests of those who invest in the projects that cause displacement. This article argues that it is difficult—if not impossible—to comprehensively deal with the challenges posed by DIDR without unpacking the various ways in which the protection of investment interests undermines resettlement and rehabilitation exercises. By documenting and analysing the international legal investment regime along with its domestication in national legal infrastructure, we are able not only to appreciate the imbalances between the protection of investment interests vis-à-vis the interests of project-affected communities, but also to design solutions that take these tensions into account.

Il arrive trop souvent que l'étude des déplacements et des réinstallations provoqués par le développement (DIDR) se confine à une analyse des aspects socio-juridiques de ce phénomène, ce qui comprend l'analyse des cadres stratégiques des réinstallations, les luttes de pouvoir entre les différents acteurs, les agences institutionnelles qui mettent en œuvre les cadres stratégiques, le taux de participation dans les processus décisionnels et les motivations politiques qui sous-tendent les exercices de déplacement et de réinstallation. Il est peu d'ouvrages de doctrine en revanche qui analysent les DIDR selon une perspective d'investissement. Ceux qui ont étudié de vastes projets d'infrastructure dans le cadre de débats reliés aux investissements abordent rarement la question des DIDR. Bien que l'analyse sociojuridique permette d'articuler les défis et enjeux associés aux DIDR et de proposer des solutions pour y répondre, elle minimise dans une large mesure les tensions qui découlent de la protection des intérêts de ceux et celles qui investissent dans les projets qui causent ces mêmes déplacements. Dans cet article, l'auteur soutient qu'il est difficile, voire impossible, de traiter de façon exhaustive les difficultés posées par les DIDR sans révéler les diverses manières dont la protection des intérêts en matière d'investissement mine les efforts de réinstallation et de réadaptation. En documentant et en analysant le régime de droit international encadrant l'investissement ainsi que sa « domestication » au sein d'une infrastructure juridique nationale, nous pouvons non seulement constater les inégalités entre la protection des intérêts en matière d'investissement vis-à-vis des intérêts des communautés concernées par les projets de développement, mais également concevoir des solutions qui prennent ces tensions en compte.

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## I. INTRODUCTION: DEVELOPMENT PROJECTS AS INVESTMENT PROJECTS

Often, when we think about development-induced displacement and resettlement (DIDR) associated with large dams and other large infrastructure projects, we think about the planning, implementation and evaluation tools specific to resettlement and rehabilitation programs. To this end, commentators on DIDR have largely focussed on resettlement policy frameworks,<sup>1</sup> the institutional agencies implementing these policies (including generally the implementation shortfalls),<sup>2</sup> power struggles between the various parties involved,<sup>3</sup> the level of participation of different actors

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- 1 Alan Rew, Eleanor Fisher & Balaji Pandey, "Policy Practices in Development-induced Displacement and Rehabilitation" in Chris de Wet, ed, *Development-Induced Displacement: Problems, Policies and People* (Oxford: Berghahn Books, 2006) 38 at 46 [Rew, Fisher & Pandey, "Policy Practices"]; Michael M Cernea, *Public Policy Responses to Development-Induced Population Displacements* (1996) 31:24 *Economic and Political Weekly* 1515 at 1519, 1521; 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: The World Bank, 2000) 11 at 13 [Cernea, "Risks, Safeguards and Reconstruction"]; Michael M Cernea, "Development's Painful Social Costs: Introductory Study" in S Parasuraman, ed, *The Development Dilemma: Displacement in India* (London: MacMillan Press, 1999) 1 at 20 [Cernea, "Development's Painful Social Costs"].
  - 2 See e.g. Michael M Cernea, "African Involuntary Population Resettlement in a Global Context" (1997) *Environmental Department Papers, Social Assessment Series* at 21-22, online: World Bank <[http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/1997/02/01/000009265\\_3980728144037/Rendered/PDF/multi\\_page.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/1997/02/01/000009265_3980728144037/Rendered/PDF/multi_page.pdf)>; Evaristus Oshionebo, "World Bank and Sustainable Development of Natural Resources in Developing Countries" (2009) 27:2 *Journal of Energy & Natural Resource Law* 193 at 219-20; World Bank, *Involuntary Resettlement Sourcebook: Planning and Implementation in Development Projects* (Washington: International Bank for Reconstruction and Development/World Bank, 2004) at xxv-xxix [*Involuntary Resettlement Sourcebook*]; Rew, Fisher & Pandey, *supra* note 1 at 49-52.
  - 3 See e.g. Usha Ramanathan, "Displacement and the Law" (1996) 31:24 *Economic and Political Weekly* 1486; Dolores Koenig, "Enhancing Local Development in Development-induced Displacement and Resettlement Projects" in de Wet, *supra* note 1 at 105; Theodore E Downing, "Creating Poverty: The Flawed Economic Logic of the World Bank's Revised Involuntary Resettlement Policy" (2002) 12 *Forced Migration Review* 13. See generally Dana Clark, "Resettlement: The World Bank's Assault on the Poor" (2000), online: Centre of International Environmental Law <<http://www.ciel.org/Publications/ResettlementBrief2.pdf>>.

in decision-making<sup>4</sup> and the political motivations surrounding displacement and resettlement initiatives.<sup>5</sup> In other words, too frequently, scholars have confined their analysis of DIDR to activities dealing explicitly with displacement and resettlement, thereby insulating DIDR from the broader considerations pertaining to the projects in question. This article will refer to this as the “dams and development” or “people-centred” perspective.

At the centre of this “dams and development” discourse are people (as opposed to legal persons) and the natural and structural environment, including religious sites, cultural institutions and other shared infrastructural resources. This analysis focuses on the tensions between traditionally weak parties—notably displaced communities—and powerful actors, such as multinational corporations, governments and international organizations, particularly, International Financial Institutions (IFIs).<sup>6</sup> The “dams and development” conversation is also largely dominated by anthropologists, sociologists, environmentalists and political scientists. Where legal scholars have interacted with these projects, it has often been in the context of human rights<sup>7</sup> and the expanding role played by extra-legal methods such as resistance.<sup>8</sup>

There is hardly any literature that analyzes the topic of DIDR from an investment perspective.<sup>9</sup> While undertakings such as large dams and other large infrastructure projects have surfaced in investment-related debates, this discussion is often unrelated to that taking place in DIDR forums. Given that investment-related literature views such projects first and foremost as investments (and increasingly as foreign private investments), this literature takes on a largely property-centred approach. This is the case whether the commentators support or contest the construction and operation of these projects. Those supporting the construction of large infrastructure projects lobby for the protection of investors’ proprietary interests because the investors finance huge amounts, they provide more efficient services than government agencies and their investments release government finances to

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4 See generally World Commission on Dams, *Dams and Development: A New Framework for Decision Making – The Report of the World Commission on Dams* (London, UK: Earthscan Publications, November 2000), online: International Institute for Environment and Development <<http://pubs.iied.org/pdfs/9126IIED.pdf>>; Sanjeev Khagram, *Dams and Development: Transnational Struggles for Water and Power* (New York: Cornell University Press, 2004).

5 See generally Parasuraman, *supra* note 1.

6 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, NY: ME Sharpe, 1995) 3 at 15; Koenig, *supra* note 3 at 118-19.

7 See e.g. Upendra Baxi, “What Happens Next is Up To You: Human Rights at Risk in Dams and Development” (2001) 16:6 Am U Int’l L Rev 1507.

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

9 In this context, the phrase “investment perspective” refers generally to the legal regime governing commercial investments and particularly to the regulation of foreign direct investment.

other public expenditures.<sup>10</sup> These proponents dislocate displacement issues in favour of a healthy business climate. In practice, investors themselves often incorporate the concerns of displaced communities only as part of their risk-factor analysis in order to satisfy conditions for project approval. The investment literature that criticizes such projects draws on literature problematizing investment regimes in general, not on the impact of development projects on displaced communities in particular.<sup>11</sup> 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 (the “dams and development” perspective and the investment perspective) often talk past each other by studying these projects in independent and mutually exclusive camps—as though they deal with two unrelated topics. The literature is 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”<sup>12</sup>—coexist in the same space and dictate the ordering of different interests. Put differently, without interacting simultaneously with these two often conflicting tensions, and without deliberately acknowledging that these tensions overlap in decision-making, the analysis of the challenges to, and proposals for, the improvement of DIDR initiatives becomes somewhat removed from the everyday realities and complexities that characterize such projects.

The present discussion departs from the dominant approach to the study of DIDR and looks at involuntary resettlement for what it actually is: resettlement that results from investments in large infrastructure projects. Since most DIDR literature focuses on a “dams and development” perspective, this article introduces an investment lens to the conversation by temporarily shifting displaced communities from the centre of analysis and replacing them with the investment demands of the projects that cause displacement. The article seeks to answer two questions: first, how does studying DIDR from an investment perspective help us understand the

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10 See Colin Kirkpatrick, David Parker & Yin-Fang Zhang, “Foreign Direct Investment in Infrastructure in Developing Countries: Does Regulation Make a Difference?” (2006) 15:1 *Transnational Corporations* 143; 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” (2007) Public-Private Infrastructure Advisory Facility Working Paper No 4, online: Public-Private Infrastructure Advisory Facility <<http://www.ppiaf.org>>.

11 See e.g. Antony Anghie, “International Financial Institutions” in Christian Reus-Smit, ed, *The Politics of International Law* (Cambridge: Cambridge University Press, 2004) at 217-37; M Sornarajah, *The International Law on Foreign Investment*, 2d ed (Cambridge: Cambridge University Press, 2004) [Sornarajah, *Foreign Investment*]; Antony Anghie, “Time Present and Time Past: Globalization, International Financial Institutions, and the Third World” (2000) 32 *NYUJ Int'l L & Pol* 243 [Anghie, “Time Present and Time Past”].

12 Here, the distinction between “the human” and “the property” is not to suggest that displaced communities have no property interests. In fact, property interests are central to the livelihoods of these communities. Consequently, here, the use of “property” highlights the emphasis that (international) law places on protecting a particular type of property, namely, the proprietary interests of foreign private investors.

marginalized position of displaced communities; and second, how can the knowledge gained from such an understanding be applied to developing mechanisms that incorporate the interests of these communities? A wider question, which is of great interest but is not fully addressed by the present discussion, is: what explains the continued failure of commercial development projects to improve the livelihoods of the poor in Third World countries despite the astronomical amounts that have been invested in these projects by various parties for over more than half a century?

The shift in conceptualizing DIDR from a “dams and development” perspective to an investment perspective produces different but complementary results. When we restrict our analysis of DIDR to the policy framework and implementation mechanisms governing resettlement initiatives, we risk concentrating on the structural and operational implications of the actual displacement and resettlement exercises, to the exclusion of all else. As a result, there is a tendency to propose solutions that downplay the fact that the quality of the resettlement is itself dependant on the significance placed on resettlement relative to other competing interests. The proposed mechanisms for including displaced communities fail to deal comprehensively with the hurdles that lead to their exclusion in the first place. However, when we conceptualize displacement from an investment perspective, we make deliberate efforts to acknowledge the wider networks in which development projects operate and propose solutions that are awake to these realities.

Christopher Gore explored the relationship between Uganda’s decision to construct the Bujagali Hydroelectric Project (the Bujagali Project) and the privatization of public utilities. He argued 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.<sup>13</sup> He maintained 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.”<sup>14</sup> Gore’s analysis is insightful in establishing a strong link between neoliberal investment policies, often advocated by IFIs and the role that these policies play in decisions pertaining to development projects (such as dams). Drawing inspiration from works such as Gore’s, this article both expands the conversation and distinguishes its inquiry by grounding itself in an investment-legal analysis, as opposed to one based principally on the politics of power.<sup>15</sup>

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13 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* (Cape Town: HSRC Press, 2009) 359 at 364.

14 *Ibid* at 382.

15 This, of course, is not to suggest that the law is apolitical. In fact, theories such as Third World Approaches to International Law (TWAIL) explicitly acknowledge the law’s political character. See e.g. Makau Mutua, “What Is TWAIL?” (2000) American Society of International Law, Proceedings of the 94th Annual Meeting 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 insofar as hegemony is concerned.

There is also a growing body of literature that establishes a direct link between “big money” and human rights. This research studies the impact that the legal protection of investment interests (through investment treaties and foreign investment contracts) has on undermining the human rights of vulnerable communities.<sup>16</sup> These scholars argue that the protection given to investors through the international legal investment regime threatens the ability of host states (mainly Third World countries) to introduce laws that ensure social and environmental protection. This human rights approach to the study of investment treaties and contracts lends itself well to an analysis (such as this one) aimed at bridging the gap between the “dams and development” literature and the study of investments *qua* investments. This article employs this literature to further the argument about why it is important to study DIDR from an investment perspective.

The discussion borrows examples from the Bujagali Project for its analysis. The Bujagali Project consists of a 250 megawatts hydropower plant and a 30 meters high rock-filled dam. These are located on the River Nile, just below the Bujagali Falls and about eight kilometres downstream from the existing Nalubaale-Kiira hydropower plants.<sup>17</sup> The complex also involved the construction of a sub-station, 100 kilometres of transmission lines and other associated works.<sup>18</sup> A total area of 238 hectares was needed to construct these facilities.<sup>19</sup> The project sponsors identified 8,700 people who were directly affected by the Bujagali Project, 714 of whom were physically displaced and the rest affected in ways other than physical displacement.<sup>20</sup> Financing was provided by a number of parties. The Bujagali Project's 2007 financial closure provided that the sponsor, Bujagali Energy Limited, would inject US\$190 million in equity.<sup>21</sup> The International Development Association (IDA), International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA)—all World Bank entities—would contribute respectively US\$115 million in the form of an IDA Partial Risk Guarantee, US\$130 million as “A” and “C” Loans and US\$115 million as political risk guarantee.<sup>22</sup>

The Bujagali Project is an example of an investment project because it relies on private capital for its operation, and because the Government of Uganda and

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16 See Part V, below, for more on this topic.

17 The Inspection Panel, *Investigation Report – Uganda: Private Power Generation (Bujagali) Project (Guarantee No. B0130-UG)* (29 August 2008) at 2, online: The World Bank <[http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/FULL\\_September\\_2\\_2008\\_FINAL\\_Red.pdf](http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/FULL_September_2_2008_FINAL_Red.pdf)> [The Inspection Panel, “2008 Report”].

18 *Ibid* at 29-30.

19 *Ibid* at 29.

20 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 (IDA Guarantee No. B0130-UG)* (7 November 2008) at 25, online: The World Bank <[http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/Management\\_Report\\_Nov\\_7\\_FINAL.pdf](http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/Management_Report_Nov_7_FINAL.pdf)>.

21 *Ibid* at 6.

22 *Ibid*.

other project proponents rely on it to boost the country's economic growth. Proponents contend that by expanding electricity supply, the Bujagali Project facilitates the development of an investment climate that will increase productivity, create employment opportunities and ultimately, reduce poverty.<sup>23</sup> 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.<sup>24</sup> In the same breath, they stress the central role of the private sector in supporting and driving the existence of this stable, efficient and expanded network.<sup>25</sup> 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 limited 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 public entities on the one hand, and to reduce dependence on development aid and loans (which are often accompanied by conditions) on the other hand. Reliance on FDI to stimulate economic growth is certainly 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.<sup>26</sup> In addition, host states should establish safeguards to protect the proprietary interests of private capital inflows.<sup>27</sup> 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.<sup>28</sup>

Without denying the potential role of FDI in facilitating economic growth in Third World countries, this article examines how the conditions attached to attracting foreign private investment adversely impact the interests of displaced communities and present additional challenges for DIDR. The article contends that

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23 The World Bank, *Uganda – Bujagali Hydropower Project* (2001) at 1, 3, online: The World Bank <[http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2000/04/13/000094946\\_00032106082737/Rendered/PDF/multi0page.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2000/04/13/000094946_00032106082737/Rendered/PDF/multi0page.pdf)> [The World Bank, "About the Project"]; Tom Nevin, "Battle Lines Drawn over Bujagali Dam," *African Business* 332 (June 2007) 56.

24 The World Bank, "About the Project," *supra* note 23.

25 See Part III, below, for further discussion on this topic.

26 See e.g. Ibrahim FI Shihata, *MIGA and Foreign Investment: Origins, Operations, Policies, and Basic Documents of the Multilateral Investment Guarantee Agency* (Dordrecht, NL: Martinus Nijhoff Publishers, 1988) at 2 [Shihata, *MIGA and Foreign Investment*]; Jacques Morisset, "Foreign Direct Investment in Africa: Policies Also Matter" (1999), World Bank Policy Research Working Paper No 2481 at 19, online: The World Bank <<http://elibrary.worldbank.org/docserver/download/2481.pdf?expires=1351614654&id=id&accname=guest&checksum=1F510F1C86EC3891B5EB86C993CBF53B>>.

27 Shihata, *MIGA and Foreign Investment*, *supra* note 26 at 1.

28 M Sornarajah, "A Law for Need or a Law for Greed?: Restoring the Lost Law in the International Law of Foreign Investment" (2006) 6:4 *International Environmental Agreements* 329 at 331-32 [Sornarajah, "Need or Greed?"].

because the Government of Uganda and its development partners treat the Bujagali Project as critical to the economic growth of the country, they have focused, or have been compelled to focus, on protecting the “deliverers” of this instrument of growth—the project sponsors and private investors. This has forefronted a macro-economic approach to development as the surest means for alleviating poverty and has dislocated the role that proper resettlement and rehabilitation initiatives play in meeting poverty alleviation goals.

The relationship between the protection of investment interests and marginalization of the interests of displaced communities is not a direct one. In other words, investor protection does not automatically translate into poor resettlement and rehabilitation programs. Rather, the legal framework governing projects of this nature provides multiple layers of protection for investors that displace, or make it difficult to incorporate, other stakeholder interests. Consequently, by buttressing legal infrastructure for the benefit of investors, it becomes difficult to provide a corresponding level of protection for displaced communities.<sup>29</sup> Also, the pressure on the Government of Uganda to sustain the hierarchy of investment interests makes it necessary for the former to ensure that alternative methods for including other stakeholders (such as resistance) are suppressed. Lastly, the exercise of documenting these different layers of protection produces a body of knowledge that is useful for drawing comparisons with the framework of protections available to displaced communities. Therefore, if the protections documented here are not sufficient in explaining the marginalization of affected communities, they at least reveal the glaring limitations in protections available to displaced communities when compared with those available to investors. This in itself should provoke us into demanding more meaningful forms of inclusion and more accountability to those displaced by development projects.

The concentration on private investments does not suggest that publicly funded projects do a better job at incorporating displaced communities' interests. Most large dam projects in Africa are government-funded and have registered a series of failures in resettling and rehabilitating displaced people.<sup>30</sup> The poor record

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29 See also Susan Leubuscher, “The Environmental, Social and Human Rights Impacts of Foreign Investment Contracts” (February 2006) at 9, online: Pacific Environment <[http://www.pacificenvironment.org/downloads/The%20Environmental%20Social%20and%20Human%20Rights%20Impacts%20of%20Foreign%20Investment%20Contracts\\_4\\_.pdf](http://www.pacificenvironment.org/downloads/The%20Environmental%20Social%20and%20Human%20Rights%20Impacts%20of%20Foreign%20Investment%20Contracts_4_.pdf)> (where Leubuscher argues, “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”).

30 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 World Bank, *Bank Management Response to Request for Inspection Review of the Uganda Private Power Generation Project (Proposed)* (2007) at 10, online: World Bank Inspection Panel <<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/ManagementResponse.pdf>>. See also Stephen Linaweaver, “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 at 288; Neil Ford, “Unlocking African Hydro Potential,” *International Water Power and Dam Construction Magazine* 59:8 (August 2007) 11.

of resettlement and rehabilitation initiatives is, therefore, not unique to projects sponsored by the private sector. Instead, it 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 for achieving development, at the expense of the local contexts affected by mega projects.<sup>31</sup> The IFIs that dictate development policies in Third World countries continue to rely on the claim that economic growth eventually trickles down to the grassroots and that any negative impacts suffered from neoliberal policies are short-term and a necessary price to pay for development.<sup>32</sup> Consequently, the increasing pressures from globalization and liberalization have spurred improvements in infrastructure at the expense of the accompanying development-induced displacement.<sup>33</sup>

The emphasis on the private sector is largely guided by the increasing role that private actors are playing in Uganda's energy sector.<sup>34</sup> 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."<sup>35</sup> Once projects are financed by the private sector, or are operated using business principles, the key goal appears to shift from being the provision of a public good or service to ensuring that the proprietary interests of the service providers 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 discussion proceeds in seven parts. Part II lays the foundation by providing a background to the neoliberal ideology of powerful states and IFIs, and the ways in which this ideology was and continues to be imposed on countries in the Third World. Part III illustrates the domestication of this neoliberal agenda through the privatization of Uganda's energy sector. In particular, the discussion demonstrates how the enactment of Uganda's *Electricity Act*<sup>36</sup> opened the market to foreign private investors. This is followed by a discussion in Part IV of how the newly liberalized sector was secured through the establishment of a support structure in the form of an Electricity Regulatory Authority (ERA), which was designed to be independent

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31 Rew, Fisher & Pandey, *supra* note 1 at 39. See also Cernea, "Development's Painful Social Costs," *supra* note 1 at 24.

32 See e.g. Joseph E Stiglitz, *Globalization and Its Discontents* (New York: WW Norton & Company, 2003) at 78.

33 Rew, Fisher & Pandey, *supra* note 1 at 39.

34 See Part III, below, for examples of the engagement of the private sector.

35 David A McDonald, "Electric Capitalism: Conceptualising Electricity and Capital Accumulation in (South) Africa" in McDonald, *supra* note 13 at 21.

36 *Electricity Act 1999* (UG), 1999, c 145, online: Office of the Prime Minister: Republic of Uganda <<http://opm.go.ug/assets/media/resources/145/ELECTRICITY%20ACT%201999.pdf>> [*Electricity Act*].

from political interference. Part V demonstrates how investment interests are further concretized and defended through the use of private investment contracts. In Part VI, the article revisits the rationale for protecting private capital, before making the case for an equal need to protect the interests of displaced communities and finally, Part VII is the conclusion.

## II. NEOLIBERALISM AND THE INTERNATIONALIZATION OF PRIVATE PROPERTY RIGHTS

There is an intimate relationship between hydroelectric projects and the spread of neoliberalism. Indeed, 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.<sup>37</sup> Even though electricity, in and of itself, is not responsible for the spread of neoliberal ideology on the continent, it is one example of the manner in which neoliberal ideas have been concretized.<sup>38</sup> In Uganda's case, the World Bank—one of the gatekeepers of neoliberalism—had its first interaction with the country through an IDA credit facility designed to support electric power development.<sup>39</sup>

Neoliberalism is a shorthand label that scholars use to refer to a cluster of market-driven policies, which promote “maximum global integration”<sup>40</sup> and a system of deregulation that depends on the private sector as the engine of economic development.<sup>41</sup> Neoliberal policies are a form of attack on the welfare state in the West and a problematization of the “developmentalist state” in the Third World.<sup>42</sup> The components of neoliberalism include: opening markets to attract FDI; liberalizing trade policies; privatizing state-owned enterprises; emphasizing the legal security of private property rights; deregulating financial markets; and reducing the obligations of the state in the provision of public goods.<sup>43</sup> The concept of neoliberalism should be linked closely to our understanding of ideology because it emphasizes a particular economic order as being essential to attaining development. To this end, some scholars have argued that neoliberalism symbolizes a “re-emergence of

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37 McDonald, *supra* note 13 at 4.

38 *Ibid.*

39 Uganda, “Uganda: Overview,” online: The World Bank <<http://www.worldbank.org>>.

40 Denis O’ Hearn, “Tigers and Transnational Corporations: Pathways from the Periphery?” in Ronaldo Munck & Denis O’Hearn, eds, *Critical Development Theory: Contributions to a New Paradigm* (London, UK: Zed Books, 1999) at 115, 122.

41 Stiglitz, *supra* note 32 at 53; M Sornarajah, “The Clash of Globalisations and the International Law on Foreign Investment: The Simon Reisman Lecture in International Trade Policy” (2003) 10:2 *Canadian Foreign Policy Journal* 1 at 6 [Sornarajah, “The Clash of Globalizations”].

42 Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, And Emancipation* (London, UK: Butterworths, 2002) at 441.

43 See Yujiro Hayami, “From the Washington Consensus to the Post-Washington Consensus: Retrospect and Prospect” (2003) 20:2 *Asian Development Review* 40 at 54; Theodore H Moran, *Harnessing Foreign Direct Investment: Policies for Developed and Developing Countries* (Washington, DC: Brookings Institution Press, 2006) at 1-2 [Moran, *Harnessing Foreign Direct Investment*].

conservatism” as *the way* of knowing and solving the world’s economic problems.<sup>44</sup> Even non-Third World scholars problematize this ideological stance and its “highly selective” Western origins.<sup>45</sup> 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.<sup>46</sup>

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 no longer able to access loans from private lending banks or from the official development programs of capital-rich countries in the West.<sup>47</sup> This was also the time when the interest rates on money owed by Third World countries had skyrocketed, making it difficult for them to borrow “new money.”<sup>48</sup> Worse still, commodity prices had drastically reduced, meaning that developing countries were unable to depend on export earnings from their extractive industries.<sup>49</sup>

The conservative political regimes of the United States President, Ronald Reagan, and the United Kingdom Prime Minister, Margaret Thatcher, became the mouthpieces through which the neoliberal mantra was preached.<sup>50</sup> Thatcher and Reagan opposed big government and supported free markets characterized by deregulation, reduction in taxes, decrease in social expenditure and the removal of trade barriers.<sup>51</sup> Latin America was identified as an example of an economic crisis that resulted from inefficient government enterprises, protectionist investment policies and a poor monetary policy that led to inflation.<sup>52</sup> In contrast, some Asian countries

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44 See e.g. Santos, *supra* note 42 at 441 (where the author argues that neoliberalism resulted in “an ideological tide against the agenda of a gradually expanding inclusion in the social contract ...”).

45 *Ibid* at 445

46 *Ibid.*

47 Sornarajah, *Foreign Investment*, *supra* note 11 at 2; Shibata, *MIGA and Foreign Investment*, *supra* note 26 at 2.

48 See *ibid* at 1-3 (where it has been reported that by 1985, the debt of developing countries exceeded US\$950 billion and by 1986, it was around US\$1 trillion).

49 *Ibid* at 2-3.

50 Stiglitz, *supra* note 32 at 13; Jean-Germain Gros & Olga Prokopovych, *When Reality Contradicts Rhetoric: World Bank Lending Practices in Developing Countries in Historical, Theoretical and Empirical Perspectives* (Dakar, Senegal: Council for the Development of Social Science Research in Africa, 2005) at 22, online: CODESRIA <<http://www.codesria.org/IMG/pdf/Gros.pdf>>.

51 *Ibid.*

52 Stiglitz, *supra* note 32 at 53.

such as China, Malaysia and Singapore were celebrated for their success, which resulted from embracing open-door trade and investment policies.<sup>53</sup> The International Monetary Fund (IMF) and the World Bank were the structures through which neoliberal conditions were used for the development aid given to Third World countries.<sup>54</sup> 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.<sup>55</sup>

These views set the stage for FDI to play a more central role in the economies of Third World countries. In the 1980s and early 1990s the IMF and World Bank introduced what was known as Structural Adjustment Programmes (SAPs) throughout most of Africa.<sup>56</sup> SAPs were introduced under the IMF/World Bank Economic Recovery Program to address the balance of payments crisis, but later were extended to various other sectors, including the electricity sector.<sup>57</sup> The SAPs had a number of conditions, including the reduction in government spending, the privatization of state-owned enterprises, the deregulation of financial markets, the liberalization of trade policies and the cost-recovery of government-provided services.<sup>58</sup> Between 1988 and 1993, there were approximately 2,300 privatization transactions in over 60 developing countries.<sup>59</sup> The World Bank acknowledged that in the short-term, SAPs would negatively impact some Third World people but maintained that this negative impact would be eliminated in the long run.<sup>60</sup> The introduction of SAPs occurred during a time when resistance was weak because there were few, if any, viable alternatives, especially as developing countries needed

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53        Sornarajah, *Foreign Investment*, *supra* note 11 at 2.  
54        Stiglitz, *supra* note 32 at 13; Sornarajah, *Foreign Investment*, *supra* note 11 at 52-53.  
55        Shihata, *MIGA and Foreign Investment*, *supra* note 26 at 3 [footnote omitted].  
56        Rebecca Ghanadan, "Connected Geographies and Struggles over Access: Electricity Commercialisation in Tanzania" in McDonald, *supra* note 13 at 402, 406.  
57        *Ibid* at 406; Sornarajah, "The Clash of Globalisations," *supra* note 41 at 5.  
58        Gros & Prokopovych, *supra* note 50 at 20-21.  
59        Robert Pritchard & Douglas Webb, "Privatization and Private Provision of Infrastructure" in Robert Pritchard, ed, *Economic Development, Foreign Investment and the Law: Issues of Private Sector Involvement, Foreign Investment and the Rule of Law in a New Era* (London, UK: Kluwer Law International, 1996) at 67.  
60        Gros & Prokopovych, *supra* note 50 at 26.

the money to finance their budgets and pay off debts that had accumulated since the 1970s.<sup>61</sup>

In a bid to attract foreign investment, Third World countries also entered into bilateral investment treaties (BITs) with their developed-country counterparts.<sup>62</sup> BITs facilitate the liberalization of foreign investment rules and provide a framework for the protection of the proprietary interests of foreign investors.<sup>63</sup> These agreements included clauses such as the following: (1) investors should be given “national treatment” or the “most favoured nation treatment,” whichever is more favourable; (2) host states should not interfere with investments arbitrarily; (3) expropriation of investment property may not be undertaken in a discriminatory manner and it should be for a public purpose; (4) where property is expropriated, there should be full, adequate and effective compensation; (5) the host state should provide for free transfer of investment capital; and (6) disputes between the host state and investors should be resolved through international arbitration using platforms such as the International Centre for the Settlement of Investment Disputes and the International Chamber of Commerce.<sup>64</sup>

The first BIT was concluded between West Germany and Pakistan in 1959.<sup>65</sup> In the following decades, there was a moderate increase in BITs with no more than approximately 20 BITs per year until the mid-1980s.<sup>66</sup> However, by the late 1980s and throughout the 1990s, the treaties had increased to an average of more than 100 new treaties per year.<sup>67</sup> To officialize the standardization of investment protection internationally, there was a shift in the nature of early BITs, which contained disparate provisions, to later treaties, which “not only contained uniform statements of standards but also had some definite aims” regarding the protection of foreign investment.<sup>68</sup>

As some scholars have observed, in many BITs, the definition of “investments” is so wide that these agreements not only govern “hard investments” (such as physical assets) but also extend to other proprietary interests, including financial assets (such as stocks and bonds) and even contractual obligations (such as those contained in agreements concluded between investors and host

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61 *Ibid* at 17, 28.

62 Sornarajah, *Foreign Investment*, *supra* note 11 at 2.

63 *Ibid.*

64 Paul E Comeaux & N Stephan Kinsella, *Protecting Foreign Investment Under International Law: Legal Aspects of Political Risk* (Dobbs Ferry, NY: Oceana Publications, 1997) at 103; Jeswald W Salacuse, “BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries” (1990) 24:3 *Int’l Law* 655 at 664-73.

65 See *Treaty for Promotion and Protection of Investment*, Pakistan and Germany, 25 November 1959, 457 UNTS 23, online: United Nations Treaty Collection <<http://untreaty.un.org>>; Salacuse, *supra* note 64 at 655.

66 Zachary Elkins, Andrew T Guzman & Beth A Simmons, “Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000” (2006) 60:4 *International Organization* 811 at 814.

67 *Ibid.*

68 Sornarajah, “Need or Greed?,” *supra* note 28 at 337-38.

states).<sup>69</sup> As an extra precaution, the “umbrella clauses” contained in most BITs have the effect of requiring host states to respect their contractual commitments with foreign investors; the failure of which may be tantamount to a breach of the treaty provisions.<sup>70</sup> Conversely, BITs seldom contain provisions enabling host states to impose obligations on foreign investors regarding compliance with human rights standards and sustainable development support.<sup>71</sup> Specifically, the recourse to binding international arbitration means that investors can refuse to comply with—or can claim damages for complying with—new domestic legislation (including legislation on social issues such as displacement), even where the new law applies uniformly to all businesses.<sup>72</sup>

The expansion and sustenance of neoliberalism does not simply rely on establishing open-door policies, but more importantly, relies 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 before turning to the domestication of investor protection starting with the establishment of the World Bank’s International Centre for the Settlement of Investment Disputes (ICSID). ICSID was established in 1966 under the *Convention for the Settlement of Investment Disputes between States and Nationals of Other States* (the Convention).<sup>73</sup> The purpose of the Convention is “to remove major impediments to the free international flows of private investment posed by non-commercial risks

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69 See e.g. Andrew T Guzman, “Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties” (1998) 38:4 Va J Int’l L 639 at 655. See also Penelope Simons, “International Law’s Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights” (2012) 3:1 Journal of Human Rights and the Environment 5 at 22.

70 Lorenzo Cotula, *Investment Contracts and Sustainable Development: How to Make Contracts for Fairer and More Sustainable Natural Resource Investments* (London, UK: International Institute for Environment and Development, 2010) at 14, online: International Institute for Environment and Development <<http://pubs.iied.org/pdfs/17507IIED.pdf>>. See also Jarrod Wong, “Umbrella Clauses in Bilateral Investment Treaties: of Breaches of Contract, Treaty Violations, and the Divide between Developing and Developed Countries in Foreign Investment Disputes” (2006) 14:1 Geo Mason L Rev 135; Katia Yannaca-Small, “Interpretation of the Umbrella Clause in Investment Agreements” in *International Investment Law: Understanding Concepts and Tracking Innovations: A Companion Volume to International Investment Perspectives* (Paris: Organization for Economic Co-Operation and Development, 2008) 101, online: OECD <<http://oecd-ilibrary.org>>; Thomas W Wälde, “The ‘Umbrella’ (or Sanctity of Contract/Pactasunt Servanda) Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases,” online: (2004) 1:4 Transnational Dispute Management at 31 <<http://www.transnational-dispute-management.com>> (for more detailed discussions on umbrella clauses).

71 Simons, *supra* note 69 at 18.

72 John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, HRCOR, 8th Sess, UN Doc A/HRC/8/5 (2008) at 5, online: United Nations Human Rights Council <<http://www.ohchr.org>>; John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, HRCOR, 14th Sess, UN Doc A/HRC/14/27 (2010) at 6, online: United Nations Human Rights Council <<http://www.ohchr.org>>.

73 International Centre for Settlement of Investment Disputes, “Introduction” in *ICSID Convention, Regulations and Rules* (Washington, DC: International Centre for Settlement of Investment Disputes, 2006) at 5, online: International Centre for the Settlement of Investment Disputes <[https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf)> [ICSID, *Convention, Regulations and Rules*].

and the absence of specialized international methods for investment dispute settlement.<sup>74</sup> To this end, ICSID provides a forum for facilitating conciliation and the arbitration of investment disputes between host states and foreign investors.<sup>75</sup> It is comprised of an Administrative Council and a Secretariat, which maintains a panel of conciliators and a panel of arbitrators.<sup>76</sup> These panels listen to and settle disputes arising under BITs and private investment contracts. Their awards are binding on the parties to the dispute and cannot be set aside by the national courts of any of the contracting parties.<sup>77</sup> 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*.<sup>78</sup> Non-institutionalized groups, such as displaced communities, have no *locus standi*.<sup>79</sup> Through ICSID, we are able to trace some of the parallels that neoliberal ideology draws between FDI and the economic development of Third World countries. Sornarajah submits “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 . . . .”<sup>80</sup>

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.<sup>81</sup> 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” industrialized countries instead of developing countries because they were concerned about the political risks associated with investing in the latter.<sup>82</sup> The political risks cited included expropriations of private property, unstable contractual provisions and politicization of energy development.<sup>83</sup> The MIGA was created in 1988 partly in response to this study and in recognition of the need to increase foreign investment inflows through the provision of guarantees against

74 International Centre for the Settlement of Investment Disputes, “About ICSID,” online: International Centre for the Settlement of Investment Disputes <<https://icsid.worldbank.org>>.

75 “Convention on the Settlement of Investment Disputes between States and Nationals of Other States” in ICSID, *Convention, Regulations and Rules*, *supra* note 73, art 1.

76 *Ibid*, art 3.

77 International Centre for Settlement of Investment Disputes, “About ICSID: Dispute Settlement Facilities,” online: International Centre for the Settlement of Investment Disputes <<http://icsid.worldbank.org>>.

78 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 Ibrinke T Odumosu, “Locating Third World Resistance in the International Law on Foreign Investment” (2007) 9 *International Community Law Review* 427 at 429; “Rules of Procedure for Arbitration Proceedings (Arbitration Rules)” in ICSID, *Convention, Regulations and Rules*, *supra* note 73, r 37(2).

79 See generally Odumosu, *supra* note 78 at 427-44 (for a detailed discussion on the treatment of Third World peoples—as opposed to states—in the ICSID proceedings).

80 Sornarajah, “Need or Greed?,” *supra* note 28 at 340-41.

81 See Booz Allen Hamilton Inc, *Report for the World Bank: Energy Project Generation in Lesser Developed Countries*, 1985, cited in Shihata, *MIGA and Foreign Investment*, *supra* note 26 at 16, n 41.

82 *Ibid* at 16.

83 *Ibid*.

political risk.<sup>84</sup> The World Bank felt that the non-commercial risk guarantee provided by MIGA would reassure investors and be instrumental in increasing private capital inflows that were essential to the development of Third World countries.<sup>85</sup> 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 and economic growth would be realized.<sup>86</sup> 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.<sup>87</sup>

What is the impact of this robust international investment protection network on displaced 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 project-affected communities. First, as some Third World scholars have argued, international investment agreements and treaties (such as BITs) result in an enormous expansion of the rights of foreign investors while correspondingly reducing the rights of host states to control the activities of the investors.<sup>88</sup> As a result, these agreements not only usurp the policy-making powers of states but also, in the process, invariably affect the environmental, social and human rights of the displaced communities that the state is supposed to protect.<sup>89</sup> The second disparity relates to the accountability and enforcement mechanisms available to foreign investors vis-à-vis those available to affected communities. As noted in the preceding discussion, ICSID panels have the power to issue binding decisions similar to those of a court of law.<sup>90</sup> Conversely, the World Bank Inspection Panel (the highest forum in the World Bank where displaced communities can submit complaints about the development projects that cause displacement)<sup>91</sup> issues findings that are not binding on the parties to the dispute.<sup>92</sup> Specifically, while the Panel acts as an independent

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84 See generally Shihata, *MIGA and Foreign Investment*, *supra* note 26; Multilateral Investment Guarantee Agency, "About MIGA," online: Multilateral Investment Guarantee Agency <<http://www.miga.org>> [MIGA, "About MIGA"] (for a more in-depth discussion on MIGA).

85 Shihata, *MIGA and Foreign Investment*, *supra* note 26 at 17.

86 *Ibid.* See also MIGA, "About MIGA," *supra* note 84.

87 Multilateral Investment Guarantee Agency, "Guarantees Overview," online: Multilateral Investment Guarantee Agency <<http://www.miga.org>> [MIGA, "Guarantees Overview"].

88 M Sornarajah, "Economic Neoliberalism and the International Law on Foreign Investment" in Antony Anghie et al, eds, *The Third World and International Order: Law, Politics and Globalization* (Leiden, Netherlands: Martinus Nijhoff, 2003) 173.

89 See generally Leubuscher, *supra* note 29.

90 Jan Paulsson, "Dispute Resolution" in Pitchard, ed, *supra* note 59, 209 at 218.

91 The World Bank Inspection Panel, "The Inspection Panel: About Us," online: The Inspection Panel <<http://go.worldbank.org/7RCPYOF0C0>>.

92 See e.g. David Szablowski, *Transnational Law and Local Struggles: Mining, Communities and the World Bank* (Portland, OR: Hart, 2007); Ellen Hey, "The World Bank Inspection Panel: Towards the Recognition of a New Legally Relevant Relationship in International Law" (1997) 2 *Hofstra Law & Policy Symposium* 61 at 70-72; 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* 473 at 497-98.

investigatory and accountability mechanism, it is not a dispute resolution mechanism or a court of law.<sup>93</sup> This means that, unlike the rights attached to ICSID awards, the Inspection Panel findings cannot be enforced for the benefit of displaced communities. The third disparity lies in the legality of the policy instruments available to displaced communities vis-à-vis those provided to private investors. On involuntary resettlement, both the World Bank Operational Policy (OP 4.12)<sup>94</sup> and the IFC Performance Standard (Performance Standard 5)<sup>95</sup> delineate the obligations of borrowers to affected communities in cases of involuntary resettlement resulting from World Bank-financed projects. Displaced communities rely on these provisions to file claims to the Inspection Panel by arguing that the World Bank has failed to comply with its operational policies and procedures in the design, appraisal or implementation of a project, following which the requesters have suffered or are likely to suffer material adverse effects.<sup>96</sup> However, World Bank officials have repeatedly argued that unless these policies are contained in contractual agreements (such as loan documentation), they do not constitute legally binding obligations either under domestic or international law.<sup>97</sup> In other words, displaced communities cannot rely on these instruments to bring legal actions against the World Bank.<sup>98</sup> Compare these with the guarantees signed between the World Bank and foreign investors, which assure the latter that losses relating to political risks will be recovered, harmful acts by host states will be deterred and investment disputes with host states will be resolved in an investor-friendly environment.<sup>99</sup>

Third World countries often face a dilemma—they could insist on their sovereign right to treat investors as they deem fit, however, they are aware that they need this investment to facilitate economic development at home.<sup>100</sup> This explains why, for example, they sign BITs and liberalize their economies.<sup>101</sup> As one author

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93 The World Bank Inspection Panel, “The Inspection Panel: Frequently Asked Questions,” online: The Inspection Panel <<http://go.worldbank.org/7RCPYOF0C0>>. See generally 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 1.

94 See generally, World Bank, *Operational Policy 4.12: Involuntary Resettlement*, online: World Bank <<http://go.worldbank.org/GM0OEIY580>> [World Bank, “OP 4.12”].

95 International Finance Corporation, *IFC Performance Standards on Environmental and Social Sustainability* (Washington, DC: IFC, January 2012), online: International Finance Corporation <<http://www.ifc.org>>.

96 International Bank for Reconstruction and Development and International Development Association, *Resolution No IBRD93-10, Resolution No IDA 93-6: The World Bank Inspection Panel* (22 September 1993) at para 12, online: The Inspection Panel <<http://siteresources.worldbank.org/EXTINSPECTION-PANEL/Resources/ResolutionMarch2005.pdf>> [IBRD and IDA, *The Resolution*].

97 Ibrahim FI Shihata, *The World Bank Inspection Panel: In Practice*, 2d ed (New York, NY: Oxford University Press, 2000) at 241 [Shihata, *Inspection Panel*]; Schlemmer-Schulte, *supra* note 93 at 20; Mac Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law* (Portland, OR: Hart, 2003) at 142-43.

98 Szablowski, *supra* note 92 at 119; Schlemmer-Schulte, *supra* note 93 at 20. See also Shihata, *Inspection Panel*, *supra* note 97 at 234.

99 MIGA, “Guarantees: Overview,” *supra* note 87.

100 Sornarajah, *Foreign Investment*, *supra* note 11 at 24.

101 *Ibid.*

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."<sup>102</sup> The attraction of foreign investment comes with a huge price tag. It demands the establishment of "market-oriented legal systems,"<sup>103</sup> which place restrictions on the powers of the state and limit the possibilities of addressing the interests of other stakeholders such as displaced communities.

If Third World countries are not independently willing to make these legal adjustments, then IFIs dictate the necessary adjustments as conditions for aid.<sup>104</sup> These international institutions determine the broad policy governance framework binding Third World countries internationally and nationally.<sup>105</sup> In fact, Third World scholars maintain that IFIs are the sites where the domestic laws of Third World countries are authored and controlled, leaving these countries only with the power to implement already manufactured laws.<sup>106</sup> The following discussion examines the manner in which the neoliberal agenda has permeated the international level, becoming part and parcel of the domestic realm. At the centre of this permeation and domestication is the powerful tool of law.

### III. PRIVATIZATION: LAYING THE DOMESTIC FOUNDATION FOR PROTECTION OF INVESTMENT INTERESTS

Before delving into the discussion of the domestication of privatization in Uganda, it is perhaps important to reiterate briefly the circumstances that weakened the ability of Third World countries to resist neoliberal policies such as privatization. It has already been noted that the late twentieth century was characterized by a global economic crisis. One of the major causes of this crisis was the phenomenal lending of money to Third World countries by Western commercial banks in the 1960s and 1970s.<sup>107</sup> During that period, Third World countries relied less heavily on financing from IFIs, developed-country governments and foreign investments.<sup>108</sup> It has

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102 *Ibid* at 25.

103 Robert Pritchard, "Introduction: The Contemporary Challenges of Economic Development" in Pritchard, *supra* note 59 at 11. See generally Douglas Webb, "Legal System Reform and Private Sector Development in Developing Countries" in Prichard, *supra* note 59 at 45-65 (for a discussion on the importance of legal sector reform in facilitating the attraction of foreign private investment in developing countries).

104 Obiora Chinedu Okafor, "Re-Conceiving 'Third World' Legitimate Governance Struggles in Our Time: Emergent Imperatives for Rights Activism" (2000) 6 *Buff HRL Rev* 1 at 12.

105 *Ibid* at 18.

106 *Ibid* at 2, 10.

107 Philip M Nichols, "Swapping Debt for Development: A Theoretical Application of Swaps to the Creation of Microenterprise Lending Institutions in Sub-Saharan Africa" (1994) 27:1 *NYUJ Int'l L & Pol* 43 at 50.

108 Allegra G Biggs, "Nibbling Away at the Debt Crisis: Debt-for-Nature Swaps" (1991) 10 *Ann Rev of Banking L* 429 at 432-33.

been reported, for example, that in 1989, the Sub-Saharan African debt equalled 98.3% of its collective gross national product.<sup>109</sup> As evidenced in Part II, the resulting economic crisis posed various challenges for Third World countries. First, access to loans became increasingly difficult. Second, the interest rates on new loans sharply increased. Third, the deteriorating terms of trade made it difficult for these countries to export their primary commodities. Left with few, if any, options, Third World countries turned back to IFIs for assistance and the latter were granted a new lease of life.

The privatization process that was engineered by the World Bank and the IMF through SAPs during 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)*.<sup>110</sup> Under the *PERD Act*, divestment of public enterprises can occur through the following methods: 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.<sup>111</sup> The *PERD Act* divides state-owned enterprises into four classes:<sup>112</sup> those that continue to be fully owned by the government (Class I);<sup>113</sup> those in which the state retains majority shareholding (Class II);<sup>114</sup> those that are totally divested (Class III);<sup>115</sup> and those that are liquidated (Class IV).<sup>116</sup> The Uganda Electricity Board (UEB), formerly a state-owned monopoly generating, distributing and transmitting electricity, was originally categorized as a Class I entity. Later, however, it was transferred to a Class II entity.<sup>117</sup>

Many commentators agree that by the mid-1990s, the UEB was performing poorly<sup>118</sup>—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.<sup>119</sup> Privatization was thus promoted as

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109 Nichols, *supra* note 107 at 50.

110 *The Public Enterprises Reform and Divestiture Act* 1993 (Uganda), c 98, online: Uganda Legal Information Institute <<http://www.ulii.org>> [*PERD Act*]. In 2002, the *Public Enterprises Reform and Divestiture Statute* was converted into the *PERD Act*, which incorporated the existing amendments between 1993 and 2002.

111 *Ibid.*, s 1(g), Schedule II s 7(1).

112 *Ibid.*, s 22(1).

113 *Ibid.*, s 22(1)(a).

114 *Ibid.*, s 22(1)(b).

115 *Ibid.*, s 22(1)(c).

116 *Ibid.*, s 22(1)(d).

117 See *ibid.*, Schedule I, s 44(1) (which give the 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).

118 Gore, *supra* note 13 at 381; National Association of Professional Environmentalists, *A Spot Check on Compliance and Performance of World Bank and African Development Bank in Uganda's Energy Sector: Success or Failure Story?* (Kampala, UG: NAPE-(FOE) Uganda, 2009) at 8, online: NAPE <[http://www.nape.or.ug/lib/ENERGY\\_IFCs\\_Compliance&Performance.pdf](http://www.nape.or.ug/lib/ENERGY_IFCs_Compliance&Performance.pdf)> [NAPE, "Spot Check on Compliance"].

119 Gore, *supra* note 13 at 381.

-serving a number of purposes. By engaging an efficient private sector that operated on business principles, electricity losses—both technical and non-technical—would be significantly reduced.<sup>120</sup> The private sector was also expected to do a better job at debt collection.<sup>121</sup> In addition, private investors would provide the much-needed capital for expanding installed capacity and increasing connections to the grid; something that the government, with its limited resources, could not afford to do.<sup>122</sup> Lastly, injecting private capital would free up government finances to fund other public expenditures such as education, health and agriculture.<sup>123</sup> In 1999, in the spirit of the wider privatization process,<sup>124</sup> the Cabinet of Uganda approved the Power Sector Reform and Privatization Strategy, which was followed by the enactment of the *Electricity Act*.<sup>125</sup>

The *Electricity 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*.<sup>126</sup> To this end, it provided for three main licenses: a generation license,<sup>127</sup> a transmission license<sup>128</sup> and a distribution license.<sup>129</sup> In 2001, UEB was unbundled into the Uganda Electricity Generation Company Limited (UEGCL), Uganda Electricity Distribution Company Limited (UEDCL) and Uganda Electricity Transmission Company Limited (UETCL).<sup>130</sup> The generation and distribution functions would be leased out under long-term concessions while transmission would remain publicly owned.<sup>131</sup> In November 2002, UEGCL was divested to Eskom Enterprises (a foreign-controlled company) under

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- 120 See e.g. John Mugenzi, "Uganda" in MR Bhagavan, ed, *Reforming the Power Sector in Africa* (London, UK: Zed Books, 1999) 145 at 150-51 (where it has been reported that between 1986 and 1995, of the generated electricity dispatched, approximately 20% was lost through technical inefficiencies and another 10% through non-technical means). See also 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 & Dorcas Kayo, eds, *The Regulation of the Power Sector in Africa* (London, UK: Zed Books, 2004) 301 at 304 (stating that between 1995 and 2001, system losses were at an average of about 34%).
- 121 See Mugenzi, *supra* note 120 at 167 (stating that millions of dollars in revenues were lost because UEB was inefficient in collecting payments).
- 122 See *ibid* at 151.
- 123 *Ibid* at 168.
- 124 See generally Geoffrey B Tukahebwa, "Privatization as a Development Policy" in Holger Bernt Hansen & Michael Twaddle, eds, *Developing Uganda* (Oxford: James Currey, 1998) 59 (for a discussion of the shift from public enterprises to privatization in Uganda).
- 125 See Ministry of Energy and Mineral Development, *The Energy Policy for Uganda* (September 2002) at 13, online: MEMD <<http://energyandminerals.go.ug/downloads/EnergyPolicy.pdf>> [2002 Energy Policy].
- 126 *Electricity Act*, *supra* note 36, ss 125, 126; *The Companies Act*, 1961 (Uganda), c 110, online: Uganda Legal Information Institute <<http://www.ulii.org>>.
- 127 *Electricity Act*, *supra* note 36, s 51.
- 128 *Electricity Act*, *supra* note 36, s 53.
- 129 *Electricity Act*, *supra* note 36, s 57.
- 130 *2002 Energy Policy*, *supra* note 125 at 13; Gore, *supra* note 13 at 362.
- 131 *2002 Energy Policy*, *supra* note 125 at 13. See also *Electricity Act*, *supra* note 36, s 122(3) (which states that only the UEB, later renamed UETCL, can be issued with a transmission license).

a concession agreement.<sup>132</sup> Later, in May 2004, UEDCL was also divested through a concession to Umeme Uganda Limited (another foreign-controlled company).<sup>133</sup>

In 2002, the Ministry of Energy and Mineral Development compiled a comprehensive energy policy, the first of its kind in Uganda.<sup>134</sup> Before then, energy sector reforms were guided by annual ministerial statements found in the national budgets.<sup>135</sup> The *2002 Energy Policy* explored the potential of various energy resources in Uganda and identified both the opportunities that these resources presented and the challenges that would be faced in realizing them.<sup>136</sup> Central to the policy was a desire to meet the energy needs of Uganda's population in an environmentally sustainable manner.<sup>137</sup> The policy also noted that, as was the practice in other parts of the world, it was pertinent that the government provide an investment climate conducive to attracting private finance into the sector.<sup>138</sup>

In 2007, the Ministry of Energy published another energy policy.<sup>139</sup> This latter policy focussed on exploring the potential of renewable energy resources including hydro, solar, geothermal, biomass and wind.<sup>140</sup> 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.<sup>141</sup> The impetus for this new policy was comprised of several factors: the recognition that renewable energy technologies had become commercially viable, the unprecedented electricity supply deficit on the national grid, the escalating oil prices on the international market, the extremely low levels of rural electrification and the desire by the government to fulfil its commitment regarding the reduction of greenhouse gas emissions under the Kyoto Protocol.<sup>142</sup> 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.<sup>143</sup>

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132 Eskom Uganda Ltd, "About Us: Our Background," online: Eskom Uganda Ltd <<http://www.eskom.co.ug>>.

133 Africa Institute for Energy Governance, "A Memorandum on Electricity Sector in Uganda," online: AFIEGO <<http://www.afiego.org>>. While Umeme is the main distributor, others such as Ferdult Engineering Services Limited, Kilembe Investments Limited and West Nile Rural Electrification Company have also obtained concessions, some of which are off-grid. See Interview of Engineer Dr Frank Sebbowa, Chief Executive Officer, Electricity Regulatory Authority by Jalia Kangave (3 December 2009) at the Electricity Regulatory Authority Offices, Kampala Uganda [Sebbowa Interview].

134 *2002 Energy Policy*, *supra* note 125 at 3.

135 *Ibid.*

136 For example, hydropower, petroleum, atomic energy and other renewable resources.

137 *2002 Energy Policy*, *supra* note 125 at 5.

138 *Ibid* at 4, 10, 36.

139 Uganda, Ministry of Energy and Mineral Development, *The Renewable Energy Policy for Uganda* (2007), online: Ministry of Energy and Mineral Development <<http://www.rea.or.ug/userfiles/RENEWABLE%20ENERGY%20POLIC9-11-07.pdf>> [2007 *Renewable Energy Policy*].

140 *Ibid.*

141 *Ibid* at 7.

142 *Ibid* at 11-12.

143 *Ibid* at 27.

To achieve its ambitious objectives under the 2002 and 2007 energy policies, the Government of Uganda would rely significantly on the private sector. In the 2002 *Energy Policy*, for example, the Ministry of Energy 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.<sup>144</sup> 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.<sup>145</sup> These aspirations also found support in the fact that the Government of Uganda had liberalized its economy by allowing for the free inflow and outflow of capital, 100% foreign ownership of investment and market-driven exchange rates.<sup>146</sup>

The groundwork had been laid. Uganda's energy sector would now depend significantly on private sector investments for its expansion and sustainability. A number of observations can be made here—first, as Gore noted, there was a close and immediate relationship between the privatization of Uganda's energy sector and the choice of the Bujagali Project as the preferred response to the country's electricity crisis.<sup>147</sup> Privatization, he argued, 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.<sup>148</sup> But of what significance to the present study is the act of privatization? Put differently, how does privatization explain the weaknesses in the resettlement and rehabilitation of communities displaced by large infrastructure projects such as the Bujagali Project? This article argues that the overreliance on the private sector as the "deliverer" of both electricity and economic development demands huge dividends for those involved in the delivery. It dictates an overprotection of private investment at the expense of resettlement and rehabilitation, which become treated as costs external to—not integral to—the investment. In the end, this heavy reliance on privatization allows the law to be commercialized and re-designed for private benefit while the interests of other members of the public (such as displaced communities) are side-lined. Therefore, legal tools become captured for the furtherance of private capital. As one example of the private capture of law and its institutions, the next part of this article 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 Third World people access to basic needs such as healthcare and

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144 2002 *Energy Policy*, *supra* note 125 at 54.

145 2007 *Renewable Energy Policy*, *supra* note 139 at 24.

146 Uganda Investment Authority, "Why Uganda: Investment Guide," online: Uganda Investment Authority <<http://www.ugandainvest.go.ug>>.

147 Gore, *supra* note 13 at 364.

148 *Ibid* at 382.

education.<sup>149</sup> Also, the retrenchments that were part of the privatization of state-owned enterprises resulted in widespread joblessness.<sup>150</sup> In Africa, SAPs failed to achieve economic growth and lower poverty levels.<sup>151</sup> While they initially succeeded in Latin America by enabling countries to recover from the debt crisis, those countries were unable to sustain the success long enough to translate it into economic growth.<sup>152</sup> 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.<sup>153</sup> The Washington Consensus (Consensus)<sup>154</sup> was thus forced to adjust itself. The World Bank, for example, publicly admitted that state actors were important in facilitating and supervising the operations of market actors.<sup>155</sup> The Consensus holders also acknowledged the need for institutional structures to balance the role of the market and the needs of the public.<sup>156</sup> For investments in infrastructure, the recommended 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.<sup>157</sup> To this end, the authorities encourage efficient, low-cost and reliable services.<sup>158</sup> On the other hand, regulatory authorities serve to protect investment interests and improve the investment climate by depoliticising tariff setting, protecting private property rights and increasing transparency in the decision-making regarding operations of the sector in question.<sup>159</sup> For the authorities to operate effectively, they should be independent,<sup>160</sup> technically competent, transparent and have a clear mandate.<sup>161</sup>

In Uganda, the establishment of the 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 energy sector, also provided for the establishment of the ERA.<sup>162</sup> The ERA is tasked *inter alia* with: (1) receiving, processing and approving licenses for generation, transmission and distribution,

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149 Gros & Prokopovych, *supra* note 50 at 28.

150 *Ibid* at 29.

151 Hayami, *supra* note 43 at 41.

152 *Ibid*.

153 *Ibid*.

154 The Washington Consensus is a phrase commonly used in reference 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 e.g. *ibid* at 54; Moran, *Harnessing Foreign Direct Investment*, *supra* note 43 at 1-2.

155 Gros & Prokopovych, *supra* note 50 at 34.

156 See generally Hayami, *supra* note 43 at 40-65.

157 Kirkpatrick, Parker & Zhang, *supra* note 10 at 155.

158 Eberhard, *supra* note 10 at 1. See also Kirkpatrick, Parker & Zhang, *supra* note 10 at 152.

159 Eberhard, *supra* note 10 at 1. See also Kirkpatrick, Parker & Zhang, *supra* note 10 at 152.

160 See Pargal, *supra* note 10 at 9 (which discusses how independence relates not only to freedom from political interference, but also independence from the persons being regulated and from customers).

161 *Ibid* at 8.

162 *Electricity Act*, *supra* note 36, s 5(1).

including prescribing conditions for the use of the licenses; (2) establishing tariff structures and approving rates of charges for electricity services provided by transmission and distribution companies; (3) reviewing the organization of transmission, distribution and generation services to ensure that it facilitates the operation and supply of electricity; (4) developing and enforcing performance standards for service operators; (5) preparing industry reports and gathering information from various service operators; and (6) advising the minister responsible for energy on the need for electricity sector projects.<sup>163</sup>

Even though the ERA's functions consist of representing the interests of both service providers and consumers, its primary purpose—as is the case with most regulatory authorities elsewhere—is to act as a platform for privatization.<sup>164</sup> The establishment of the ERA during the time when the country was privatizing the electricity sector was intended primarily to ensure a smooth and efficient transition from a publicly operated sector to one that would allow private actors to participate with limited political interference. Consequently, while the ERA's mandate includes a requirement that it act as the gatekeeper for consumer protection,<sup>165</sup> its core responsibility arguably lies in facilitating the establishment of a competitive, transparent and efficient environment that will attract investment and sustain the protection of private interests.<sup>166</sup>

Development has been negatively institutionalized. By this I mean that the concept of development has been captured by economically dominant parties to promote their interests at the expense of economically weaker parties. While mainstream approaches to development emphasize the role of legal structural institutions as being *the* determinant path to achieving development,<sup>167</sup> the law has been used too selectively to promote dominant interests.<sup>168</sup> The ERA is one form of such an institution; it facilitates development, or rather facilitates the type of development touted by IFIs, by assuring foreign private investors that their operations will not be frustrated by political interference. To meet this objective, the ERA is designed to be independent from other government agencies in performing its functions.<sup>169</sup> It is also, like those it is meant to protect, established as a corporate body with all the rights and obligations that come with the acquisition of legal title.<sup>170</sup> In other words, it understands and speaks the language of business.

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163 *Ibid*, s 11.

164 See Pritchard & Webb, *supra* note 59 at 80.

165 See e.g. *Electricity Act*, *supra* note 36, s 11(2)(c). ERA attaches conditions to the licenses it issues to service providers, which ensures that tariff charges are fair and that there is reliable electricity supply.

166 See *ibid*, s 11(2)(d).

167 Santos, *supra* note 42 at 445; Joel M Ngugi, "The World Bank and the Ideology of Reform and Development in International Economic Development Discourse" (2006) 14:2 *Cardozo J Int'l & Comp L* 313 at 315. See generally Hayami, *supra* note 43.

168 See e.g. Sundhya Pahuja, "Beheading the Hydra: Legal Positivism and Development," online: (2007) 1 *Law, Social Justice & Global Development* 9 at 3 <[http://www.go.warwick.ac.uk/elj/lgd/2007\\_1/pahuja](http://www.go.warwick.ac.uk/elj/lgd/2007_1/pahuja)>.

169 *Electricity Act*, *supra* note 36, s 17.

170 See *ibid*, s 5

The establishment of the ERA, the privatization of the electricity sector and the utilization of energy policies that rely significantly on private capital do not, perhaps, on their own sufficiently explain why issues pertaining to the interests of displaced communities have often been marginalized. However, these examples do map out areas where the country's development aspirations have been placed, how this produces tensions between the channels of protection carved out for investors and what would have been the requisite protections for project-affected communities. To better appreciate the manner in which the scale 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 jealously guards the proprietary interests of foreign investors.<sup>171</sup> It has reconstructed law universally to treat the right to private property as an absolute right so that any slight infringement creates potential liability for the infringer—normally the host state.<sup>172</sup> 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 Production Sharing Agreements (in extractive industries such as oil, gas and mining).<sup>173</sup> Using these agreements, multinational corporations are empowered to dictate the legal conditions that govern 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.<sup>174</sup> In effect, the agreements constitute another form of "policy making documents" that transcend the private relationship between the contracting parties by impacting public policy issues.<sup>175</sup> To remove them from the purview of domestic law (and host

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171 Sornarajah, "The Clash of Globalisations," *supra* note 41 at 3.

172 *Ibid* at 8-11.

173 Lorenzo Cotula, "Briefing 4: Foreign Investment Contracts," (2007) at 1, online: International Institute for Environment and Development <<http://pubs.iied.org/pdfs/17015IIED.pdf>> [Cotula, "Briefing 4"]; Leubuscher, *supra* note 29 at 1.

174 See generally Kyla Tienhaara, "Mineral Investment and the Regulation of the Environment in Developing Countries: Lessons from Ghana" (2006) 6 *International Environmental Agreements* 371 (for a discussion on how these agreements are detrimental to the protection of the environment in developing countries). See also Cotula, "Briefing 4," *supra* note 173 at 4; Leubuscher, *supra* note 29 at 1.

175 See Lorenzo Cotula, "Regulatory Takings, Stabilization Clauses and Sustainable Development" (Paper delivered at the OECD Global Forum on International Investment VII, Paris, 28 March 2008) at 3, online: Organization for Economic Cooperation and Development <<http://www.oecd.org/dataoecd/45/8/40311122.pdf>> [Cotula, "Regulatory Takings"] (where Cotula argues, for example, that the economic equilibrium clauses contained in agreements entered into by 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). See also Leubuscher, *supra* note 29 at 1; Cotula, "Briefing 4," *supra* note 173 at 3-4.

governments), these contracts contain, *inter alia*, “internationalization clauses” that replace the application of domestic law with international law.<sup>176</sup> Specifically, internationalization clauses provide that in the event of a dispute, the contracting parties should submit to the jurisdiction of an international tribunal instead of a local court in the host state.<sup>177</sup>

Although Third World countries 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.<sup>178</sup> 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.<sup>179</sup> Second, the actions of powerful nations have been endorsed 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 World Bank in compelling the governments of Indonesia and Pakistan to enter into grossly unfair private power deals in the 1990s.<sup>180</sup> The deals dictated that the contracting states 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.<sup>181</sup> Third, multinational corporations, in and of themselves, are powerful actors on the international scene; they wield power and resources that often exceed even that of their home states.<sup>182</sup> This is exemplified in a PPA signed in the 1990s between the Maharashtra State Electricity Board of India and a subsidiary of Enron Corp, Dabhol Power Company (Dabhol Power). Dabhol Power was able to negotiate provisions that significantly shifted its own economic risks to the State Electricity Board.<sup>183</sup> At least

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176 Piero Bernardini, “Development Agreements with Host Governments” in Pritchard, *supra* note 59 at 170.

177 *Ibid.*

178 See Leubuscher, *supra* note 29 at 9.

179 Stiglitz, *supra* note 32 at 71. Stiglitz reports, “There is, in fact, a long history of ‘unfair’ contracts, which Western governments have used their muscle to enforce” (*ibid* [footnote omitted]). See also Sornarajah, “Need or Greed?,” *supra* note 28 at 332–35 (for a discussion on the history of foreign investment protection, including the role of powerful states in seeking protection through the proprietary interests of their nationals).

180 Stiglitz, *supra* note 32 at 71.

181 *Ibid.* See also Gore, *supra* note 13 at 382 (where Gore similarly observes that PPAs 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”).

182 See Sornarajah, *Foreign Investment*, *supra* note 11 at 66–69.

183 See Abhay Mehta, *Power Play: A Study of the Enron Project* (Mumbai: Orient Longman, 2000) at 98–103. See also Prabir Purkayastha & Vijay Prasad, *Enron Blowout: Corporate Capitalism and Theft of the Global Commons* (New Delhi, India: Left Word Books, 2002) at 23–24. The agreement fixed the capacity payments 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 investors 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, the agreement did not penalize the company for things such as delays in construction.

one person has argued that the World Bank registered strong reservations against this project.<sup>184</sup> However, with the support of elitist state officials, the company was able to proceed with it.<sup>185</sup>

As far as the Bujagali Project is concerned, there have been two PPAs. The first one, which is no longer effective, was concluded between AES Nile Power<sup>186</sup> and the UEB (the AES Nile Power-UEB agreement). The second one, which is currently in force, was signed between Bujagali Energy Limited and UETCL (the Bujagali Energy Limited-UETCL agreement) and is available to the public.<sup>187</sup> This second agreement has not been inspected for the purposes of this article. Information relating to the agreement are thus gleaned from the findings contained in a 2008 report by the World Bank Inspection Panel that investigated claims made against the Bujagali Project.<sup>188</sup> For the AES Nile Power-UEB agreement, an electronic copy prepared by Prayas Energy Group is available on the International Rivers' website.<sup>189</sup> While this agreement is no longer in force, studying it is useful in understanding the form and substance of contracts of this nature.<sup>190</sup> In any event, given the inherently monopolistic nature of investments in the electricity sector, it is not uncommon to find various similarities (worldwide) in the regulatory framework of this sector.<sup>191</sup> The discussion that follows draws upon the author's understanding of the provisions within the AES Nile Power-UEB agreement, opinions of experts consulted by the World Bank Inspection Panel in 2001 to 2002 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 thirty-year concession over the completed Bujagali complex, after which the complex would revert to the government.<sup>192</sup> AES Nile Power was responsible for

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184 See Mehta, *supra* note 183 at 42-43 (where Mehta argues that the World Bank raised a number of objections against the project, including the fact that it was not the least expensive 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).

185 *Ibid* at 43-47. See generally Purkayashita & Prasad, *supra* note 183 at ch 2.

186 See International Rivers, "AES Pulls out of Uganda Dam" (13 August 2003), online: International Rivers <<http://www.internationalrivers.org/resources/aes-pulls-out-of-uganda-dam-7423>>. AES Nile Power was the first project sponsor for the Bujagali Project. The company withdrew in August 2003 following local and international activism against the project.

187 See Sebbowa Interview, *supra* note 133. Those wishing to read this agreement can do so at the ERA offices in Kampala, Uganda. However, this may only be done 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.

188 See generally The Inspection Panel, "2008 Report," *supra* note 17.

189 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>> [UEB & AES Nile Power, "Power Purchase Agreement"].

190 See The Inspection Panel, "2008 Report," *supra* note 17 at 129 (where the Panel noted that while there had been some changes to the loan and guarantee structures in the agreement with Bujagali Energy Limited, the contractual agreements (the PPA and Implementation Agreement) signed with the two different sponsors were identical in many respects).

191 Mehta, *supra* note 183 at 22-23.

192 UEB & AES Nile Power, "Power Purchase Agreement," *supra* note 189, s 4.1.

constructing and operating the power plant.<sup>193</sup> Actual generation would depend on hydrological conditions and the dispatch instructions given by UEB.<sup>194</sup> UEB would 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.<sup>195</sup> The 2002 World Bank 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 for 30 years, regardless of whether the power was actually produced or needed.”<sup>196</sup> In other words, the capacity payments made by UEB were fixed and depended on the installed capacity, as opposed to the actual capacity generated. This meant that even if AES Nile Power produced below the agreed capacity, the company would still be paid a pre-determined fixed amount based on the agreed potential. The agreement contained some penalties for below-capacity production resulting from the plant’s underperformance. However, the World Bank Inspection Panel found that these penalties were proportionately low when compared to the impact that the underperformance would have on UEB.<sup>197</sup> For example, in the 2002 report, it was noted that in the event of prolonged underperformance, the costs incurred by UEB to obtain a substitute were considerably high.<sup>198</sup> Thus, the Panel advised that there was a need for better compensation similar to that found in international best practices, where a threshold was set for underperformance; the penalties below which would proportionately escalate or another default remedy would be invoked.<sup>199</sup>

The issue relating to fixed capacity payments also existed 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.”<sup>200</sup> The Panel added that while Bujagali Energy Limited was not in a position to control hydrology, the agreement did not impose a penalty for instances when below-capacity production resulted from reduced plant availability—something that the company could control.<sup>201</sup> This finding is similar to that made by the 2002 Inspection Panel

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193 *Ibid*, s 2.1(a).

194 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) at 9, online: Erklärung von Bern <[http://www.evb.ch/cm\\_data/public/Bujagali\\_Power\\_Purchase\\_Agreement.pdf](http://www.evb.ch/cm_data/public/Bujagali_Power_Purchase_Agreement.pdf)>.

195 *Ibid* at 14.

196 The Inspection Panel, “2008 Report,” *supra* note 17 at 11-12.

197 The Inspection Panel, *Investigation Report – Uganda: Third Power Project (Credit 2268-UG) and the Proposed Bujagali Hydropower Project* (2002) at 56, online: The World Bank <<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/UGANDAIRMainReport.pdf>> [The Inspection Panel, “2002 Report”].

198 *Ibid*.

199 *Ibid*.

200 The Inspection Panel, “2008 Report,” *supra* note 17 at 127.

201 *Ibid*.

and echoes other observations that have been made with regard to unfair terms in investment contracts; where developing countries are forced to uphold agreements that put foreign investor profit before the interests of contracting states and their peoples.<sup>202</sup>

The AES Nile Power-UEB and Bujagali Energy Limited-UETCL agreements raised additional concerns relating to capacity payments. In 2002, the Inspection Panel compared the capacity payment charges found in the AES Nile Power-UEB agreement with those found in a confidential study of over twenty worldwide independent power producers that was conducted in 2000.<sup>203</sup> It found that the payments for the Bujagali Project were relatively higher, even after the related transmission costs were subtracted.<sup>204</sup> Subsequently, when power production was taken over by Bujagali Energy Limited, the Panel found the agreement to be even more unfavourable to the purchaser (UETCL) insofar as the capacity payments were concerned.<sup>205</sup> It 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 (used in the Bujagali Energy Limited-UETCL agreement) significantly shifted the economic risks away from Bujagali Energy Limited and its lenders to UETCL and its guarantors.<sup>206</sup>

Despite the high capacity charges, investors' rights to payments are secured under a variety of payment schemes that provide for multiple recourse methods.<sup>207</sup> For example, in the AES Nile Power-UEB agreement, UEB had to maintain US\$20,000,000 in a liquidity account at all times.<sup>208</sup> 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.<sup>209</sup> Failure to maintain the account amounted to a breach that went to the root of the contract and constituted a "UEB Event of Default" for which the contract could be immediately terminated by AES Nile Power.<sup>210</sup> 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.<sup>211</sup> The amount in this account was equivalent to six months' payment obligations (including principal and interest) and could be drawn upon by AES Nile Power should UEB delay in issuing payments.<sup>212</sup>

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202 See 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*, *supra* note 6 at 135-53.

203 The Inspection Panel, "2002 Report," *supra* note 197 at 57.

204 *Ibid.*

205 The Inspection Panel, "2008 Report," *supra* note 17 at 126.

206 *Ibid.* at 126-27.

207 Prayas, Energy Group, *supra* note 194 at 24.

208 UEB & AES Nile Power, "Power Purchase Agreement," *supra* note 189, s 4.3(d).

209 Prayas, Energy Group, *supra* note 194 at 11.

210 UEB & AES Nile Power, "Power Purchase Agreement," *supra* note 189, s 4.3.

211 Prayas, Energy Group, *supra* note 194 at 12.

212 *Ibid.*

As a further security for payment, the Government of Uganda guaranteed, in an Implementation Agreement it signed with AES Nile Power, that it would pay the company in the event of UEB's default.<sup>213</sup> Furthermore, there was the additional security for payment in the form of a Partial Risk Guarantee from IDA.<sup>214</sup> Similar payment plans and securities can be found in the Bujagali Energy Limited-UETCL agreement. The IDA Partial Risk Guarantee 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.<sup>215</sup> These guarantees, together with the multiple alternatives for securing payment, ensure the ultimate protection of investor profits while undermining the unfair conditions under which the payment sums are attained. The AES Nile Power-UEB agreement contained certain 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.<sup>216</sup> However, critics have argued that the ability to cash in the bonds were circumvented by the various conditional requirements.<sup>217</sup>

The cumulative impact of these agreements is that they transfer the commercial risks from the investor to the power purchaser. In 2008, the World Bank Inspection Panel, basing its advice on a report compiled by an independent energy expert,<sup>218</sup> concluded that:

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 hits 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 embodied 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*

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*Ibid.*

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*Ibid* at 24.

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The Inspection Panel, "2008 Report," *supra* note 17 at 30-31.

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Prayas, Energy Group, *supra* note 194 at 11.

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*Ibid.*

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Graham Hadley is an expert in the energy sector, with experience in both the public and private spheres since the early 1980s. He has worked as Under Secretary in the US Department of Energy, consulted for electricity restructuring and privatization and specialized in the use of Power Purchasing Agreements. See The Inspection Panel, "2008 Report," *supra* note 17 at 229.

*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.*<sup>219</sup>

The preservation of investors' entitlement to (high) payments 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, paying investors at all cost puts pressure on the Government of Uganda to ensure the smooth running of business by suppressing any actions that may destabilize the project (which would ultimately increase its own costs). In other words, because PPAs shift the economic risks of the project onto the government, it must guard itself against further risks, such as public resistance and domestic law reforms.

In foreign investment contracts, a common tool that is used to prevent operational interruptions is the inclusion of stabilization clauses.<sup>220</sup> These clauses refer to "contractual clauses in private contracts between investors and host states that address the issue of changes in law in the host state during the life of the project."<sup>221</sup> Foreign investors and their lenders often see these clauses as necessary for guarding against "sovereign" risks including nationalization, expropriation, nullification of contracts, changes to fiscal aspects of contracts, or changes to environmental and social legislation.<sup>222</sup> Host states, on their part, see these clauses as a way of encouraging FDI because of the assurances they provide for foreign investors.<sup>223</sup> 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 investor.<sup>224</sup> The stabilization clause provides that when such amendments are made, the contract takes precedence.<sup>225</sup> 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.<sup>226</sup> Traditionally, stabilization clauses were limited to addressing the impacts of fiscal changes such as changes in taxes, royalty payments, fees and foreign currency exchange controls.<sup>227</sup> With time, however, these clauses have been expanded to cover a range of aspects, such as barring the introduction of progressive labour laws, restricting changes in legal

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219 *Ibid* at 130-31 [emphasis added].

220 See generally Cotula, "Regulatory Takings," *supra* note 175.

221 Andrea Shemberg, "Stabilization Clauses and Human Rights: A Research Project Conducted for IFC and the United Nations Special Representative to the Secretary General on Business and Human Rights" (11 March 2008), online: Georgetown Law Library <<http://cdm16064.contentdm.oclc.org/cdm/singleitem/collection/p266901coll4/id/2486/rec/18>> at 4.

222 *Ibid.*

223 *Ibid* at 5.

224 Cotula, "Briefing 4," *supra* note 173 at 2; Tienhaara, *supra* note 174 at 381; Bernardini, "Development Agreements with Host Governments," *supra* note 176 at 170.

225 *Ibid* at 171.

226 *Ibid.*

227 Leubuscher, *supra* note 29 at 4.

or regulatory documents (for example, in environmental regulation<sup>228</sup>) and even covering issues of political risk such as war, civil unrest or NGO activity.<sup>229</sup> As a result, a stabilization clause can bar almost any interference that would affect “the smooth running of the contract and its stability.”<sup>230</sup>

Questions of legality, including the extent to which stabilization clauses are binding, attracted a lot of debate in the 1970s and 1980s.<sup>231</sup> However, it is now widely accepted in international law that these clauses are legally binding.<sup>232</sup> Critics have raised concerns over the fact that stabilization clauses restrict the host state’s ability to improve its laws and regulations in the interest of the public.<sup>233</sup> In response, some foreign investment contracts have been adjusted to contain “equilibrium clauses.”<sup>234</sup> These clauses allow the host state to change the laws and regulations affecting a contract as long as the investor is compensated “to the extent that [the] changes alter the financial ‘balance’ of the project.”<sup>235</sup> Therefore, the state is free to make legal changes that impact the agreement as long as it compensates the affected investor for any losses incurred as a result of the changes. Compensation can take various forms including monetary compensation, adjustments to tariffs, extension of concessions and tax reductions.<sup>236</sup> In practice, the requirement to compensate has proven to be prohibitive.

This was the case, for example, in the 2003 International Project Agreement formed 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 state would have to restore the Company and/or the Shareholders to the same or an economically equivalent position that they were before the change.<sup>237</sup> Regulatory change under this agreement was defined to include changes resulting from legislative enactments, court decisions and ratification of international treaties.<sup>238</sup> Similarly, in a Production Sharing Agreement signed between the Government of Uganda and Heritage Oil & Gas Company Limited, the equilibrium clause provided *inter alia* that “if there is any change, or series of changes, in the laws or regulations of Uganda which materially reduces the economic benefits’ of the company, the government must

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228 Tienhaara, *supra* note 174 at 381.

229 Leubuscher, *supra* note 29 at 4-5.

230 *Ibid* at 5.

231 Cotula, “Briefing 4,” *supra* note 173 at 2.

232 *Ibid*.

233 Leubuscher, *supra* note 29 at 5. See generally Cotula, “Regulatory Takings,” *supra* note 175.

234 Cotula, “Briefing 4,” *supra* note 173 at 2; Leubuscher, *supra* note 29 at 5.

235 *Ibid* at 5-6. See also Cotula, “Regulatory Takings,” *supra* note 175 at 6.

236 Shemberg, *supra* note 221 at 6.

237 Cotula, “Briefing 4,” *supra* note 173 at 3 [footnote omitted].

238 *Ibid*.

make substantial economic compensation.”<sup>239</sup> As Susan Leibuscher has argued, such clauses create “a strong financial disincentive against strengthening policies to protect the public interest.”<sup>240</sup>

Another stabilization clause example can be found in the AES Nile Power-UEB PPA. Under that agreement, “any riot, civil commotion...actions associated with or directed against the company (or Contractors) as part of a broader pattern of actions 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.<sup>241</sup> While both parties are 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.<sup>242</sup> Such a defence would, of course, be more readily available to the project sponsor (AES Nile Power), since the company could argue that it did not have political authority to stop riots, civil commotion or insurrection. In contrast, it would be much more difficult for a government to utilize that defence, therefore resulting in a breach of contract that would in turn cause serious financial implications. In relation to such clauses, Leibuscher notes:

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.<sup>243</sup>

In 2008, an empirical study conducted on behalf of the IFC and the United Nations Special Representative to the Secretary General on Business and Human Rights documented a number of findings with regard to the impact of stabilization clauses on human rights.<sup>244</sup> The study examined seventy-six foreign investment contracts and twelve contract models within a wide range of industries in Third World and non-Third World countries. The majority of the contracts were concluded in the 1990s and 2000s. In the study, stabilization clauses were divided into three broad categories: freezing clauses (which freeze the law of the host state with respect to a particular investment project over the life of that project); economic equilibrium clauses (which require the investor to comply with new laws but be compensated for such compliance); and hybrid clauses (which contain aspects of both freezing and equilibrium clauses).<sup>245</sup> Among other things, the study found that, firstly, freezing

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239 Katherine Haywood, “Uganda: Oil Clause Binds Country on Legislation, Says Report” *The Monitor* (11 February 2010) (Lexis).

240 Leibuscher, *supra* note 29 at 6.

241 UEB & AES Nile Power, “Power Purchase Agreement,” *supra* note 189, s 13.1(a)(iii).

242 *Ibid*, s 13.1.

243 Leibuscher, *supra* note 29 at 5.

244 See generally Shemberg, *supra* note 221.

245 *Ibid* at 5-6

clauses were common in contracts formed with non-OECD countries and most prevalent in Sub-Saharan Africa. There were no freezing clauses in OECD-country contracts.<sup>246</sup> Secondly, full economic equilibrium clauses were prevalent in all non-OECD-country contracts. With the exception of two contracts (from one country), the only type of stabilization clause found in contracts formed with OECD countries was limited equilibrium clauses.<sup>247</sup> Thirdly, the limited economic equilibrium clauses found in contracts formed with OECD countries differed significantly from those with non-OECD countries. Specifically, OECD-country contracts contained clauses restricting stabilization to changes in law that were discriminatory toward the investor. In contrast, non-OECD-country contracts contained clauses that stabilized even generally applicable and non-discriminatory social and environmental laws.<sup>248</sup> The study concluded *inter alia* that generally, contracts formed with non-OECD countries were more likely to include social and environmental laws in stabilization clauses than those with OECD countries.<sup>249</sup> Consequently, these clauses may be used to either protect foreign investors from complying with new social and environmental laws or compensate them for their compliance.<sup>250</sup>

The next part of this article solidifies the arguments made in the previous sections by providing the background and rationale for protecting foreign private capital and juxtaposing this against the need for comparable protections for displaced communities. This 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 protections afforded to investors' proprietary interests, should we not be concerned about the lack of comparable protections for affected communities?

## VI. MAKING THE CASE FOR THE NEED TO INCREASE LEGAL PROTECTIONS FOR AFFECTED COMMUNITIES

Before examining the legal protections available to affected communities, it is useful to highlight the explanations given for the need to (over) protect investors' interests, particularly those investing in the construction of large infrastructure.<sup>251</sup> Large infrastructure investments have unique characteristics resulting in their increased exposure to risks. They require significant upfront costs, particularly when compared to most private investments.<sup>252</sup> They often depend on natural resources (in the case

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246 *Ibid* at 17, 22.

247 *Ibid* at 17, 24-25. The author defines "full economic equilibrium clauses" as those clauses that "protect against the financial implications of all changes of law" (*ibid* at 7). These are contrasted with limited economic equilibrium clauses which "have some limitation on the application of the clause" (*ibid* at 8).

248 *Ibid* at 17, 29.

249 *Ibid* at 32-33.

250 *Ibid* at 37.

251 See Leubuscher, *supra* note 29 at 2-3 (for a brief account of the history of protection clauses in investment contracts).

252 Pargal, *supra* note 10 at 3; Shihata, *MIGA and Foreign Investment*, *supra* note 26 at 15.

of the Bujagali Project, a river), owned or controlled by the host state.<sup>253</sup> This means that compared to other investments, those investing in large infrastructure have limited control over their main input. They must wait long gestation periods between the initial investment and the realization of returns.<sup>254</sup> They also generate large revenues in local currency, resulting in higher currency conversion risks.<sup>255</sup> In addition, they are more exposed to political risks, including nationalization, confiscation or expropriation of investment properties.<sup>256</sup> Lastly, because of long gestation periods, large infrastructure investments are subject to more contract renegotiations that may result in: increases in tax rates, fees, royalty payments and penalties; changes in applicable accounting rules, which adversely affect the returns on investment; manipulations of foreign exchange rates; and revisions in regulatory procedures relating to investment agreements.<sup>257</sup> While the aforementioned are potential risks to all foreign investors, projects that do not require large infrastructure investments inject relatively small sums of money into their businesses.<sup>258</sup> Given the smaller amounts invested, these investors can more convincingly threaten to withdraw from the host state or can withhold innovations (such as technological improvements) once contracts are altered.<sup>259</sup>

While the threats to nationalize investors' properties (particularly by Third World countries) have considerably reduced over time,<sup>260</sup> there are still concerns about contract renegotiation that result in what has come to be known as the "obsolescing bargain."<sup>261</sup> Briefly, the "obsolescing bargain" refers to the inability of foreign investors to lobby against new contract terms introduced by host countries because of the huge sums that the investors would have already committed to a project.<sup>262</sup> As the discussion in Part V above illustrates, one of the ways in which investors deter host states from making fundamental changes to originally agreed-upon terms is to insist on the inclusion of stabilization clauses or economic equilibrium clauses in foreign investment contracts. Another strategy employed by investors is to

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253 Leubuscher, *supra* note 29 at 3.

254 Pargal, *supra* note 10 at 3; Shihata, *MIGA and Foreign Investment*, *supra* note 26 at 15.

255 Pargal, *supra* note 10 at 3; Shihata, *MIGA and Foreign Investment*, *supra* note 26 at 15.

256 Moran, *Harnessing Foreign Direct Investment*, *supra* note 43 at 77; Sornarajah, *Foreign Investment*, *supra* note 11 at 22.

257 Moran, *Harnessing Foreign Direct Investment*, *supra* note 43 at 77-78; Leubuscher, *supra* note 29 at 3; Bernardini, *supra* note 176 at 170.

258 Moran, *Harnessing Foreign Direct Investment*, *supra* note 43 at 77.

259 *Ibid.*

260 But see e.g. Comeaux & Kinsella, *supra* note 64 at xxvi. There remain some concerns that certain circumstances could increase the likelihood of nationalization. The reduction in nationalization was largely due to the global economic crisis of the mid 1970s to 1980s, which forced many developing countries to liberalize their economies as part of the conditions imposed by IMF and the World Bank to access aid. It is argued that in the absence of such situations, the return to nationalization cannot be completely disregarded.

261 See Theodore H Moran, *Foreign Direct Investment and Development: The New Policy Agenda for Developing Countries and Economies in Transition* (Washington, DC: Institute for International Economics, 1998) at 142.

262 *Ibid.*

use more highly leveraged syndicates (such as multinational financial institutions) to lend directly to the projects in question.<sup>263</sup> This is how institutions such as MIGA and the IFC become involved in FDI projects.<sup>264</sup> Part I above, for example, details the involvement of IDA, IFC and MIGA in Uganda's Bujagali Project. The deep involvement of the World Bank in this project has significant implications. For one, it increases the chances of Uganda's compliance with the contract provisions—however unfair they may be—so that the country remains in the good books of the World Bank.<sup>265</sup> 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 financing allocates risks and returns using market-based criteria.<sup>266</sup> It therefore does not help that Uganda's credit rating is low because this curtails the country's opportunities for mobilizing private capital.<sup>267</sup> 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.<sup>268</sup> In 2002, for example, World Bank management argued that without Uganda establishing a good credit history and developing its legal and institutional framework, it would be difficult to proportionately increase and transfer risks to the private investor.<sup>269</sup>

The goal of this article is not so much to problematize the existence of a robust legal framework protecting investment interests, even though the over-protection in itself remains a source of concern. 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 at issue. In Uganda, there is no specific legislation dedicated to development-induced displacement. 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 Uganda*,<sup>270</sup> the *Land Act*<sup>271</sup>

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263 *Ibid* at 144.

264 *Ibid*.

265 See also Moran, *Harnessing Foreign Direct Investment*, *supra* note 43 at 80.

266 International Bank for Reconstruction & Development (IBRD) and International Development Association (IDA), *Management Report and Recommendation in Response 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 (Prj No. B 003-UG)* (7 June 2002) at 4, online: The World Bank <<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/UGManagementResponse>> at 4 [IBRD & IDA, 2002 Management Report].

267 *Ibid*. See also Pritchard & Webb, *supra* note 59 at 86-87 (for examples of credit-enhancement mechanisms that are often pursued when the credit-worthiness of a country is in doubt).

268 IBRD & IDA, 2002 Management Report, *supra* note 266.

269 *Ibid* at 25-26.

270 *Constitution of the Republic of Uganda 1995*, 1995, online: Office of the Prime Minister: Republic of Uganda <<http://www.opm.go.ug/assets/media/resources/6/Constitution.pdf>> [*Constitution of the Republic of Uganda*].

271 *Land Act 1998* (UG), 1998, c 227, online: Office of the Prime Minister: Republic of Uganda <<http://www.opm.go.ug/assets/media/resources/225/LAND%20ACT.pdf>> [*Land Act*].

and the *Electricity Act*.<sup>272</sup> These laws provide that where land has been compulsorily acquired in the public interest, the project sponsor has a duty to provide cash compensation (including a disturbance allowance)—based on the market value—to those who have been deprived of their property.<sup>273</sup> In 1995, with the support and influence of the World Bank, the Government of Uganda drafted policy guidelines on the resettlement and rehabilitation of displaced persons.<sup>274</sup> These guidelines were modelled largely on the framework of the World Bank's involuntary resettlement policy.<sup>275</sup> However, for various reasons, these guidelines were never converted into legally binding obligations.<sup>276</sup> This means that the only recourse under domestic law for cases of development-induced displacement is cash compensation.<sup>277</sup>

At the regional level, a convention for the protection of internally displaced people in Africa (the *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa- the Kampala Convention*) was tabled and adopted in October 2009.<sup>278</sup> The *Kampala Convention* came into force in December 2012 once it was ratified by the required minimum of fifteen member states.<sup>279</sup> Article 10 provides that state parties shall, as much as possible, prevent displacement that is caused by projects undertaken by public or private actors. It also states that prior to undertaking such projects, stakeholders should explore alternatives and consult those who will be affected by displacement. It directs state parties to undertake social and environmental assessments prior to embarking on the projects. To ensure that the provisions of the convention are domesticated, Article 3(2) requires that state parties enact or amend their domestic legislation to incorporate their obligations

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272 There is, of course, other legislation that impacts the operations of the project as far as people are concerned, such as employment laws. However, these would be secondary to the aspect of development-induced displacement and as such, do not form part of the present analysis.

273 See *Electricity Act*, *supra* note 36, s 71; *Constitution of the Republic of Uganda*, *supra* note 270, art 26; *Land Act*, *supra* note 271, ss 59, 76.

274 Rew, Fisher & Pandey, "Policy Practices," *supra* note 1 at 46.

275 Alan Rew, Eleanor Fisher & Balaji Pandey, *Addressing Policy Constraints and Improving Outcomes in Development-Induced Displacement and Resettlement Projects*, online: Academia <[http://academia.edu/517295/Addressing\\_policy\\_constraints\\_and\\_improving\\_outcomes\\_in\\_development-induced\\_displacement\\_and\\_resettlement\\_projects](http://academia.edu/517295/Addressing_policy_constraints_and_improving_outcomes_in_development-induced_displacement_and_resettlement_projects)> 22 at para 2.16 [Rew, Fisher & Pandey, "Addressing Policy Constraints"].

276 See *ibid* at para 2.17 (stating that some of the reasons for the "death" of the guidelines were as follows: they garnered little support and were thus given low priority; they were affected by internal politics; and they became outdated following the ministerial restructuring that took place in 1998).

277 Cash compensation has a number of shortcomings. It ignores the loss of access to "informal property" such as collective use rights and access to social networks. It also underplays the significance of start-up costs that are required for survival in new locations. Furthermore, because displaced communities are often vulnerable members of the community who are rarely exposed to large sums of money, it is not uncommon for those who are compensated to be overwhelmed by the huge sums and misuse the money for alcohol, buying old vehicles and financing marriages. See Szablowski, *supra* note 92 at 109-10 (for a discussion of some of the disadvantages of cash compensation).

278 *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)*, 23 October 2009 (entered into force 6 December 2012), online: African Union <<http://www.au.int/en/treaties>> [Kampala Convention].

279 *Ibid*, art17.

under the convention. While the *Kampala Convention* is certainly a step in the right direction, as far as DIDR is concerned, it remains largely lacking due to its failure to provide a comprehensive compensation and rehabilitation package once displacement occurs. Article 12 simply requires that in the event of displacement, state parties should provide those who are displaced with "effective remedies." It does not outline what these remedies should encompass. The *Kampala Convention* also leaves it up to state parties to establish effective legal frameworks that provide "just and fair compensation and other forms of reparation, where appropriate..."<sup>280</sup> If history is any indicator, it shows that state parties have not been eager to establish such frameworks. As such, the *Kampala Convention* should have used more legally binding language.

In recognition of the inadequacies resulting from cash compensation, some financiers (such as the World Bank and African Development Bank) have provided for more comprehensive compensatory packages for the projects that they fund. For example, the World Bank, through its policy on involuntary resettlement, demands land-for-land resettlement when there is physical displacement<sup>281</sup> 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..."<sup>282</sup> The World Bank also requires cash compensation (at replacement cost) for assets lost as a result of physical or economic displacement.<sup>283</sup> These provisions have undoubtedly compelled project sponsors to undertake measures that go beyond the requirements of domestic law, thereby offering more protection to dam-affected communities. However, as previously discussed, there are inherent limitations to the World Bank policy on involuntary resettlement that significantly restrict the extent to which many displaced people in Africa can benefit from comprehensive resettlement and rehabilitation packages.<sup>284</sup> Furthermore, the fact that policies such as the World Bank's involuntary resettlement policy apply only to projects funded by the financing development bank means that without a robust domestic legal regime many displaced people are left with very little protection.

Scholars have documented the manner in which institutions like the World Bank have long interfered with economic activities of Third World countries.<sup>285</sup> In particular, they demonstrate how the World Bank insists on being the ultimate determinant of the "correct path" for arriving at development. To this end, the

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280 *Ibid*, art 12(2).

281 World Bank, "OP 4.12," *supra* note 94 at para 6(b).

282 *Ibid* at para 11 [footnote omitted].

283 *Ibid* at para 6(a)(iii).

284 See generally Jalia Kangave, "Investigating the Failure of Resettlement and Rehabilitation in Development Projects: A Critical Analysis of the World Bank's Policy on Involuntary Resettlement Using Lessons from Uganda's Bujagali Hydroelectric Project" (2012) 45:2 UBC L Rev 329.

285 See e.g. James Thuo Gathii, "Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy" (2000) 98 Mich L Rev 1996; Anghie, "Time Present and Time Past," *supra* note 11 at 277-79; Ngugi, *supra* note 167.

World Bank has aggressively promoted the neoliberal agenda as the surest and only way for Third World countries to achieve development. And while the World Bank, in particular, and international investment laws in general, have recognized the need to protect the assets of multinational corporations, far less attention has been paid to the obligations of these corporations to host states and the communities in which the corporations operate.<sup>286</sup> This means that not only have Third World countries been denied the chance to explore other strategies that may be more suitable to their conditions,<sup>287</sup> they have also been forced into a vicious cycle whereby their vulnerable conditions require them to depend on the World Bank ideology as the only way of knowing and being. In other words, the living conditions of most people in these countries is so desperate, and the pressures from financiers such as the World Bank so demanding, that finding the space, time and resources to explore alternatives becomes difficult, and many times, impossible.

There are many poverty risks associated with displacement. According to the Impoverishment Risks and Reconstruction Model that was designed to guide the World Bank in ensuring that involuntary resettlement risks are prevented, the components of displacement risks are as follows: landlessness, homelessness, marginalization, food insecurity, increased morbidity, loss of access to common property resources and community disarticulation.<sup>288</sup> These risks result in numerous adverse impacts. For example, landlessness negatively affects people's productivity because land is central to the manner in which livelihoods are structured.<sup>289</sup> 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."<sup>290</sup> Displacement increases the risks of joblessness in both rural and urban settings through the loss of work in industry or services, the loss of jobs by landless labourers working on land owned by others, the inability to work on communal assets and the loss of small businesses by those who are self-employed, such as craftsmen and shopkeepers.<sup>291</sup> 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 projects have been completed.<sup>292</sup> 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.<sup>293</sup> In addition, displacement often results in food insecurity due to the decrease in food availability and

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286 Sornarajah, *Foreign Investment*, *supra* note 11 at 171.

287 Ngugi, *supra* note 167 at 313. See also Santos, *supra* note 42 at 451.

288 See Cernea, "Risks, Safeguards and Reconstruction," *supra* note 1 at 20; Amrita Patwardhan, *Dams and Tribal People in India*, online: Keystone Foundation <<http://keystone-foundation.org/download/370>> at 14-23. See also World Bank, "OP 4.12," *supra* note note 93 at paras 1-2.

289 Cernea, *supra* note 288 at 23.

290 *Ibid.*

291 *Ibid* at 24.

292 *Ibid* at 24-25.

293 *Ibid* at 26.

the lengthy time that it takes to rebuild food production in the new resettlement areas.<sup>294</sup> Poverty risks are also tied to the loss of common property and services, especially for the landless and those without assets.<sup>295</sup> Lastly, displacement results in increased morbidity and mortality due to social stress, trauma and relocation-related illnesses.<sup>296</sup>

In March 2007, local NGOs and individuals affected by the Bujagali Project approached the World Bank Inspection Panel requesting it to review the Bujagali Project's compliance with the World Bank policy on a number of issues, including: the environmental and social impacts, the economic feasibility of the project, the transparency in decision-making and the impact that climate change would have on the project's success.<sup>297</sup> In 2008, the Panel published its findings, revealing non-compliance in multiple areas, including a failure to meet a number of the requirements pertaining to involuntary resettlement. The Panel concluded that the socio-economic survey was inaccurate because of flaws in the findings on the social and economic conditions of those displaced.<sup>298</sup> Also, it found that the Assessment of Past Resettlement Activities and Action Plan (APRAP)<sup>299</sup> prepared by Bujagali Energy Limited (as an update of the Resettlement Action Plan initiated by AES Nile Power) did not adequately incorporate the objectives of the World Bank's policy on involuntary resettlement.<sup>300</sup> In addition, the Panel found the Community Development Action Plan (CDAP)<sup>301</sup> prepared by Bujagali Energy Limited to be weak because it focused solely on the short-term and did not commit adequate funding to development projects.<sup>302</sup> The Panel further held that the Bujagali Project failed to consider the poverty risks or mitigate the losses endured by those engaged in fishing and agriculture, thereby failing to restore their livelihoods.<sup>303</sup> It found that the project sponsor had not paid adequate attention to the livelihood risks suffered by vulnerable members of the community.<sup>304</sup> Lastly, the Panel found problems with the consultation strategy of the project sponsor, concluding that it was structurally flawed as it excluded the majority of displaced people from its processes.<sup>305</sup>

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294 *Ibid* at 27.

295 *Ibid* at 29.

296 *Ibid* at 27-28.

297 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/resources/summary-of-inspection-panel-report-on-bujagali-dam-2008-3586>> [Panel FindingsSummary].

298 The Inspection Panel, "2008 Report," *supra* note 17 at 143.

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

300 The Inspection Panel, "2008 Report," *supra* note 17 at 138-39.

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

302 The Inspection Panel, "2008 Report," *supra* note 17 at 160-61.

303 *Ibid* at 147-51.

304 *Ibid* at 153.

305 *Ibid* at 143.

During research for this article, interviews with various members of the affected Bujagali community were conducted, each of whom raised various concerns. They complained that while project sponsors had made a number of promises—jobs at the project site, a market for selling their produce and a technical school—they were left largely unfulfilled.<sup>306</sup> The interviewees reported that employment was often given to outsiders or politically connected individuals instead of the affected community members.<sup>307</sup> Also, instead of constructing a technical school in the community as had originally been promised, the project sponsor hand-picked a few community members to attend a nearby technical school.<sup>308</sup> Other members complained that they had not been given adequate cash compensation for the land that had been acquired from them.<sup>309</sup> Even in cases where they were given replacement land, the land was much smaller than what had been acquired by the developer. Worse still, the replacement land was less fertile than the original land and some of it was situated far from the resettlement area, forcing the women to travel long distances to plant food and collect firewood, which exposed them to safety risks.

Ultimately, while large infrastructure projects may increase macro-economic growth through increased productivity, without comprehensive resettlement and rehabilitation packages, the impoverishment risks resulting from displacement leave a negative footprint that offsets the benefits of the macro-economic growth and creates significant dependency problems. Also, by distorting the livelihoods of displaced people in this manner, it increases their vulnerability and their uncertainties for both themselves and for the future generations that depend on them. There is no intention here to romanticize the pre-displacement conditions of displaced communities. However, as one interviewee (a widow) lamented, displacement certainly exacerbates the conditions of already vulnerable groups in society. She said:

Before the [Bujagali] 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 learned 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

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306 Interviews of Naminya resettlement members and Malindidam-affected communities by Jalia Kangave (18 November 2009) at Jinja, Uganda.

307 *Ibid.* In a separate interview with a Makerere University lecturer who has interacted closely with the Bujagali Project, he revealed that in a bid to reduce costs, the contractor (Salini) had resorted to employing casual labourers from places like northern Uganda and Kabale (in western Uganda) because they were willing work for less money than the local communities. Interview of Dr Emmanuel Kasimbazi (Lecturer, Makerere University Faculty of Law) by Jalia Kangave (23 November 2009) at Makerere University Kampala, Uganda.

308 Interviews, *supra* note 306.

309 *Ibid.*

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.<sup>310</sup>

The World Bank acknowledges the poverty risks associated with displacement and observes the need to treat involuntary resettlement as a development opportunity.<sup>311</sup> However, its legal initiatives do not reflect a commitment to this issue. In comparing the rich legal and institutional infrastructure designed to protect investors with that put in place for displaced communities—both at the domestic and international level—it becomes evident that the World Bank's efforts fall short of treating involuntary resettlement as a development opportunity.<sup>312</sup> Instead, the World Bank and the Government of Uganda continue to rely on the trickle-down effect of the macro-economic growth that is expected to flow from the liberalized and thoroughly protected investment regime. While the World Bank was instrumental in securing the interests of investors by pushing for privatization and the enactment of the *Electricity Act*,<sup>313</sup> it failed to provide equal commitment when it did not push for the enactment of the Ugandan involuntary resettlement policy in 1995, which it had assisted in drafting. The draft involuntary resettlement policy was completed four years before the *Electricity Act* was enacted. The World Bank 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 World Bank's own 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."<sup>314</sup> This means that if the World Bank shared the same vision for bottom-up (people-centred) development that it did for top-down economic development, it would have assisted Uganda in strengthening the legal framework for resettling and rehabilitating displaced communities. Instead, it has opted to treat powerful transnational corporations as the "vulnerable group" that needs protection from hostile Third World countries.

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310 *Ibid.*

311 See World Bank, "OP 4.12," *supra* note 94 at paras 1-2. See generally World Bank, *Involuntary Resettlement Sourcebook*, *supra* note 2.

312 See Sornarajah, *Foreign Investment*, *supra* note 11 at 172. Sornarajah concludes that while there remains widespread consensus on the need to protect the assets of multinational corporations, there has always been disagreements regarding the extent of multinational corporations' obligations. 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" (*ibid.*).

313 Gore, *supra* note 13 at 380.

314 World Bank, "OP 4.12," *supra* note 94 at para 32(a).

## VII. CONCLUSION

This article presents an added lens to the analysis of DIDR by shifting the emphasis from a socio-legal perspective to an investment-centred legal perspective.<sup>315</sup> This approach is useful in understanding the weaknesses in DIDR because it recognizes the purpose for which large infrastructures are supposedly constructed: to facilitate economic growth and development. The pursuit of development has dictated that Third World countries legalize liberalization, establish regulatory authorities, conclude private contracts that impose stringent obligations on them and sign guarantees to attract foreign investment. The increased costs of doing business with the private sector have translated into the externalization and exclusion of most other costs, such as those relating to resettlement and rehabilitation. This robust protection network has also increased pressure on host states and informed the motive for governments to suppress resistance, which would otherwise provide affected communities with alternative means to gain inclusion. 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.<sup>316</sup> 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 Uganda. The way the project was being promoted, it was like a state-owned project. All this compromised [public] participation.<sup>317</sup>

To borrow the words of one scholar, we are experiencing “a crisis of social contractualism.”<sup>318</sup> 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.<sup>319</sup> This has resulted in a “destatization of social regulation” in which political power is sub-contracted and competed for.<sup>320</sup> And while the state

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315 Strictly speaking, there are no binaries between a socio-legal perspective and an investment perspective because the latter is a component of the former. The purpose of this distinction is to differentiate between the “investment perspective” and what this thesis calls the “dams and development perspective.”

316 See Ngugi, *supra* note 167 at 325-26. Ngugi also observes that one of the characteristics of the World Bank’s neoliberal ideology is the “rhetorical opposition to ‘big government’” (*ibid* at 325). He calls it rhetorical because the ideology does not demand a withdrawal from the state. The state continues to intervene in the economy but with the deliberate intention of benefiting particular groups in society.

317 Interview of Geoffrey N Kamese (Programme Officer, Energy/Chemicals & Climate Change, NAPE) by Jalia Kangave (16 November, 2009) at NAPE Offices, Kampala, Uganda.

318 Santos, *supra* note 42 at 450.

319 *Ibid* at 451.

320 *Ibid* at 489.

is not eroded, it has come back in a different capacity; one where it acts merely as a coordinator for the negotiations and competition between different social actors, which enables these powerful actors to reduce "the state into a component of their private sphere."<sup>321</sup> 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 concerns<sup>322</sup> and those displaced as second-rate (global) citizens.

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 has been used sparingly to satisfy a moral obligation by limiting the mechanisms available to displaced communities to soft law operational policies that are not enforceable and an Inspection Panel whose decisions are not binding. Conversely, legal tools have been employed without reservation to protect private investment interests. There is an urgent need to build on the legal protections available to displaced communities if "development projects" are to support and sustain development at the bottom of the chain. We cannot continue to rely on false hope or pretend that economic growth resulting from the efficient operation of the market serves as the perfect substitute for a more targeted approach to development; one 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.

That said, the World 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.<sup>323</sup> It is for this reason that Third World peoples *qua* peoples (as opposed to states) need to generate and push for alternative means of inclusion. 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 neoliberal policies.<sup>324</sup> This demands 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

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321 *Ibid.*

322 Rew, Fisher & Pandey, "Policy Practices," *supra* note 1 at 60-61.

323 See generally Ngugi, *supra* note 167. See also Antony Anghie & B S Chimni, "Third World Approaches to International Law and Individual Responsibility in Internal Conflicts" in Steven R Ratner & Anne-Marie Slaughter, eds, *The Methods of International Law* (Washington, DC: American Society of International Law Studies, 2004) 185 at 190.

324 See e.g. Wolfgang Sachs, "Introduction" in Wolfgang Sachs, ed, *The Development Dictionary: A Guide to Knowledge as Power* (Johannesburg: Zed Books, 1992) 1 at 1.

alternative forms of development that are meaningful to them.<sup>325</sup> 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.”<sup>326</sup> This law was created solely to foster and promote the interests of foreign investors.<sup>327</sup> What is recommended here is a law that protects beneficial foreign investment, while at the same time protecting the interests of displaced communities, the environment and other aspects such as human rights.<sup>328</sup>

Recall also 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 opportunities. In other words, investors, by going to Third World countries, are not engaging in a charity mission. They are looking for a return on investment. For example, in an interview conducted for this article with the CEO of ERA, inquiries were made into the extent to which Uganda’s energy crisis affects its negotiating position. As part of his response, he stated:

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. The 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.<sup>329</sup>

Admittedly, as illustrated in this article, Uganda’s bargaining position is perhaps not as strong as the CEO suggests. However, remembering that investors also have “needs” is important in determining 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

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325 See *ibid* at 1. I am also greatly indebted to my friend Amma Bonsu for the long discussions that we held regarding this issue.

326 Sornarajah, “Need or Greed?,” *supra* note 28 at 351.

327 *Ibid.*

328 *Ibid.*

329 Sebbowa Interview, *supra* note 133.

should be a necessary measure taken into account when evaluating the feasibility of the project. 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 to expand their infrastructure. Uganda promises to host an increasing number of privately sponsored development projects in the coming years, especially given the recent discovery of oil wells in the country.<sup>330</sup> It is also planning a number of large hydropower projects including Karuma (700MW),<sup>331</sup> Ayago South (234MW), Murchison Base (222MW) and Mpanga (144MW).<sup>332</sup> In addition, there are a number of smaller hydro projects being considered including Ishasha (6MW), Buseruka (10MW), Bugoye (13MW), Mpanga (8MW) and Nyagak (3.3MW).<sup>333</sup> While the government has established an Energy Fund to facilitate the development of these projects,<sup>334</sup> most will likely be undertaken through public-private partnerships or solely by the private sector. There is, therefore, a need to ensure that the implementation of development projects does not externalize resettlement and rehabilitation costs.

In addition to IFIs and their elite allies, there is a very economically powerful lobby comprising of multinationals and their sympathizers that will continue to push not only for the construction of large infrastructure projects (on macro-economic terms), but also for the over-protection of the interests of the investors in these projects. The power of multinational corporations to unilaterally influence change cannot be downplayed.<sup>335</sup> Yet, we are also witnessing an era in which grass-roots movements, 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.<sup>336</sup> 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 for the institutionalization and legalization of displaced

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330 See Oil in Uganda, *Oil Timeline*, online: Oil in Uganda <<http://www.oilinuganda.org/categories/oil-timeline>>. 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 also Syda N M Bbumba, "Budget Speech: Financial Year 2009/10" (11 June 2009) online: Ministry of Finance, Planning and Economic Development <<http://www.finance.go.ug/>> at 21-22 (where the Minister of Finance noted that petroleum reserves had grown from 300 million barrels of oil in 2006, when the first oil discovery was made, to 2 billion barrels at the end of 2008-2009).

331 *Ibid* at 20.

332 NAPE, "Spot Check on Compliance," *supra* note 118 at 1.

333 Bbumba, *supra* note 330 at 20.

334 Interview of Engineer Paul Mubiru (Commissioner, Ministry of Energy and Natural Resources) by Jalia Kangave (24 November 2009) at Ministry of Energy Offices, Kampala, Uganda.

335 Sornarajah, *Foreign Investment*, *supra* note 11 at 67.

336 See e.g. Santos, *supra* note 42 at 458; Odumosu, *supra* note 78 at 427-44; Rajagopal, *supra* note 8 at 167; Khagram, *supra* note 4.

communities' interests so that it matches the legal mechanisms protecting investors' interests. They will also need to ensure that the status quo is constantly checked by tireless acts of resistance against pre-established alliances. In the end, the protection of displaced communities should be secured through the following: 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 governments. Demanding these reforms may prove difficult, but acquiring them is not impossible. What is required is sustained commitment and a sense of boldness from the actors internal to institutional legal structures and external communities (both those directly affected and sympathetic allies).