

The East African Crude Oil Pipeline Project Company Choice of the United Kingdom as holding jurisdiction



Credit: <https://pumps-africa.com/construction-of-east-african-crude-oil-pipeline-to-begin-in-march/>

1. Introduction

The location of the United Kingdom (“UK”) as the holding jurisdiction for the East African Crude Oil Pipeline (“EACOP”) project company has been a subject of intense debate recently. Either knowingly or unknowingly, it has been submitted incorrectly by some that the incorporation of the EACOP company in the UK not only increases project opacity but also drifts further away the EACOP project from the oversight and control of Uganda and Tanzania considering that the entity will be regulated under UK laws.

The discussion in this article allays the foregoing fears by demonstrating that several capital projects the scale of EACOP are not structured in any way different but also highlight some of the potential reasons for the incorporation of the EACOP holding company in the UK.

2. EACOP project negotiations

The location of the EACOP holding company, we understand, was one of the contentious issues in the negotiations between the Government of Uganda (“GoU”) and the International Oil Companies (“IOCs”) prior to Uganda’s oil project final investment decision (“FID”) in February 2022.

The GoU initially objected to the IOC proposal to domicile the EACOP project company in the UK. It was government’s fear that it would potentially lose out on tax revenues if this entity was not tax resident in Uganda.

A settlement was reached with consensus to incorporate the EACOP project company in the UK but with its head office in Uganda which would ensure that the project company is tax resident in Uganda. An entity is deemed resident for tax purposes if its management and control and place of management is exercised in Uganda.

A tax resident company is taxed by the country in which it is situated on its worldwide income which was Uganda’s irreducible demand.

3. Doing business in East Africa

Though incorporated in the United Kingdom, the EACOP project company also needs to establish presence in both Uganda and Tanzania either by way of incorporation of a subsidiary or registration of a branch to legally undertake business therein.

Indeed, branches of the EACOP project company have been registered in Uganda and Tanzania as the vehicles through which the pipeline business/operations will be conducted. The EACOP (Special Provisions) Act, 2021 enjoins that the EACOP entity in the UK will principally carry-on routine functions in relation to the financing of the project.

The EACOP entities registered in Uganda and Tanzania operate under the respective local laws supplemented by the contractual framework in place between the Governments of Uganda and Tanzania and the international oil companies (“IOCs”). Some of the project related agreements include the Intergovernmental Agreement (“IGA”), the Host Government Agreements (“HGAs”), the Tariff and Transportation Agreement (“TTA”) and the Shareholders Agreement among others.

4. The big picture in negotiations

Project negotiations often abort without the willingness of the parties to compromise to achieve a win-win position. In a project the scale of EACOP, there are several stakeholders with divergent objectives that incidentally must converge for the project to move ahead.

EACOP project protagonists have peddled several falsehoods keen to portray Uganda as disadvantaged by reason of the EACOP company being incorporated in the UK which is not true. Tanzania incidentally hosts over 80% of the pipeline in its territory. If it were to be petty, Tanzania could equally have demanded that the EACOP project company is domiciled in its territory let alone seeking the allocation of over 80% of the pipeline project revenue prorata to the portion of the pipeline that it hosts.

Tanzania however chose the high road cognizant of the other stakeholder interests that needed to be harmonized as well. The pipeline project will open up infrastructure for the northern Tanzania corridor and the port of Tanga is likely to emerge as a strong competitor to the Kenyan port of Mombasa in serving the East African hinterland that will accrue economic benefits for Tanzania.

5. Protection under BITs

To energy project lawyers and transactional advisors, the choice of the UK as the holding jurisdiction for the EACOP holding company does not come as a surprise. The UK has Bilateral Investment Treaties (“BITs”)

with both Uganda and Tanzania. BITs are extremely useful tools available to investors to augment further the protection of their investments in developing countries.

Prior to project sanction, international investors and lenders carry out a comprehensive due diligence of the country's socio-economic, political, legal and fiscal environment the findings of which inform the strategy of managing the risks identified.

Infrastructure projects such as pipelines are not only capital intensive but also have a long-term profile from construction to commissioning and recoupment of spend. Capital outflow is frontloaded and investors need time to recover their capital as well as earn a return on the investment. Project sponsors are vulnerable once the investment is committed because they may not easily exit without financial loss. Governments can equally in the future expropriate such investments or at the least engage in manoeuvres that interfere with the investors' right of enterprise.

Legislation too may be amended imposing additional taxes or increasing operational costs adversely affecting project viability as previously evaluated. International bankers and financiers are also keen on investment protection and may not provide financing unless satisfied that there are sufficient safeguards in place against potential legislative or administrative actions that may eat away project returns affecting its ability to meet debt repayment obligations.

BITs accord protection to foreign investments and investors in the energy sector are conscious of their effectiveness. A BIT represents an international agreement concluded between two states, typically a developed and developing country with the contracting states offering substantive and procedural protection to investors and investments which originate in either state. Under the terms of BITs, investors are able to initiate arbitration claims against host states, without the intervention of their home countries.

BITs can offer investors deterrent protection against potential actions of host countries. A host state

pursuing policy reforms with adverse impact to investments may be reminded by investors of its BIT obligations and the risk of arbitral proceedings if the reforms proceed as conceived. The threat of arbitral proceedings under a BIT can lead to consultations and potentially a change in the policy mooted by the host state.

Upon expropriation of its investment in Venezuela in 2007 by the Government of the late President Hugo Chavez, ExxonMobil commenced arbitral proceedings under the terms of the Netherlands-Venezuela BIT. ExxonMobil had incorporated the holding entity for its Venezuelan investment in the Netherlands. The Government of Uganda has in the recent past faced or been threatened with international arbitration proceedings under the provisions of the relevant BITs.

6. Other tools for investment protection

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7. Conclusion

It must be understood that the EACOP project is the enabler through which the crude oil will reach the international market so that the value of Uganda's upstream project is unlocked. The pipeline project is therefore a low investment return project to preserve the value and wealth of Uganda's oil reserves. The substantial wealth is with the upstream project dealing with the development and production of crude oil where government will take over 70% of the total wealth of the sector. This publication therefore allays fears that incorporation of the EACOP project company in the UK dilutes the value of Uganda's oil project.

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At Deloitte, he lived and worked in Uganda, Kenya, Tanzania and the United Kingdom for over 6 years and subsequently became the firm's chief of staff for the Energy and Resources Industry Group seeing him play a lead advisory role in Uganda, Kenya, Tanzania, Mozambique, South Sudan, Somalia and Ethiopia.

Denis is widely published and a regular commentator in the local, regional and international media and speaker at various forums regarding the taxation and financing of energy projects as well as the protection of large capital projects within the framework of international investment law.

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Bill is a Senior Advisor with Cristal Advocates. He has concentrated on working with energy companies with a particular focus on cross border transactions and M&A since 1989 and is a leading global energy and tax practitioner with wide international experience. Between 1986 and 1998, he worked in London with the UK tax authorities and Big Four accounting firms. From 1998 to 2004, he was based in Kazakhstan working across the Caspian region with Deloitte. He was in the region at the time it was developing its infrastructure for crude oil production with international investment following the collapse of the Soviet Union.

From 2004 to 2008, he worked in Russia where he led Deloitte's oil and gas industry group and established Deloitte's office in Sakhalin. He moved to East Africa in 2009 leading Deloitte's energy and resources industry group in Uganda, Kenya, Tanzania, Rwanda, Ethiopia and Mozambique. He was initially based in Kampala, Uganda later relocating to Dar es Salaam, Tanzania. Bill returned to the UK in 2014 supporting Deloitte UK teams working on outbound projects investing in Africa and was a key member of Deloitte UK's energy and resource practice until his retirement from the firm in September, 2018.

Bill is a graduate of Oxford University and completed his inspectors' training with the UK Inland Revenue in 1989. ■



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John leads the public policy and advocacy practice at the firm and combines unique public and private sector experience.

Prior to joining Cristal Advocates, he had worked as a Private Secretary to the President of the Republic of Uganda. During this time, he participated in several public and private sector engagements that included advising and coordinating activities relating to oil and gas as well as infrastructural projects of national significance. John had earlier worked with the Post Bank Uganda Limited and Shonubi Musoke and Co. Advocates.

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Dickens leads the oil and gas practice at Cristal Advocates. He has an in depth appreciation of Uganda's oil and gas sector having served as the maiden Company Secretary of the Uganda National Oil Company (UNOC) and the Uganda Refinery Holding Company Limited (URHC). UNOC represents the Government of Uganda commercial interests in the oil and gas sector while URHC represents government interests in the refinery project as well as managing the petrol based industrial park.

Dickens was instrumental in UNOC's formation and initial period of operation and also served as its head of Contracts, Negotiations and Advisory until May 2018. Prior to joining UNOC, Dickens was Legal Counsel at the Petroleum Directorate of the Ministry of Energy playing key legal advisory roles on the negotiation and implementation of PSAs, Joint venture and other oil and gas agreements. He was also part of the team that shepherded the process of enacting the current Ugandan oil and gas Legislations and Regulations including the local content requirements.

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He joined Cristal Advocates from Kizza, Tumwesige, and Ssemambo Advocates. He previously worked with the Advocates Coalition for Development and Environment (ACODE). He also undertook a traineeship with the oil and gas division of Webber Wetzel in Johannesburg, South Africa.

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