



Public Access to Government-Private Sector Contracts: The Case of the Bujagali Project Power Purchase Agreement.

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Bujagali Project Power Purchase Agreement.**

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ABBREVIATIONS

AESNP	Applied Energy Services Nile Power
EIA	Environmental Impact Assessment
ERA	Electricity Regulatory Authority
IFC	International Finance Corporation
IRN	International Rivers Network, Berkeley, California, USA
MIGA	Multi Lateral Investment Guarantee Agency
MOU	Memorandum of Understanding
MSEB	Maharashtra State Electricity Board
MW	Mega watts
NAPE	National Association of Professional Environmentalists
NEMA	National Environment Management Authority
PPA	Power Purchase Agreement
Rs.	Rupees
SBC	Save Bujagali Crusade
UEB	Uganda Electricity Board
UETCL	Uganda Electricity Transmission Company Limited

1. INTRODUCTION

The liberalisation of Uganda's economy has led to the privatisation of several government enterprises and firmly placed the private sector in the lead of economic growth in Uganda.

The engagement of the private sector in Uganda is conducted through a series of agreements and contracts that are executed between private entities and the Government of Uganda. Therefore, although the Government is pushing for private sector led growth, it also represents the interests of the people of Uganda expected to do so in their best interests. There is, however, a need to be cautious with this expectation as the interests of both parties often differ. This arises out of the fact that Government used to provide goods and services at a subsidised rate in order to cushion the public from excessive prices as a matter of political expediency. However, private investors provide services based on the need to recoup their investment costs. Additionally, the private sector may not necessarily share the Government's commitment and responsibility to sustainable natural resources utilisation.

In light of these varying interests, it is prudent for both the Government and the private sector to provide adequate information on any proposed projects that are aimed at providing goods and services to the public.

Unfortunately, experience shows that public access to information is still restricted. Often, the justification for limiting public access to information is the need to protect trade secrets and for national security. While these exceptions may be necessary in some instances, their applicability is often stretched unnecessarily, resulting in the denial of the public to their constitutional right to information.

Government departments, public utilities and private enterprises, the custodians of information, continue to work under the basic presumption that all documents, reports and minutes are classified and confidential. More often, governments treat official information as their property, rather than something they hold and keep in trust for the people.

Similarly, private companies deny the public access to information on the internal operations and implementation of their activities. The common defence raised is the need to protect themselves against their competitors who could use their formulae or trade secrets to their economic disadvantage. Such protectionism has resulted in lack of transparency and corporate accountability with the resultant negative effects on the public and the environment.

Access to information is a key component of transparent and accountable governance that allows the public to scrutinise the actions of government and the private sector. It forms the basis for a proper, informed debate on a wide range of issues. It plays a key role in enabling citizens to see what is going on within government, and in exposing corruption and mismanagement of resources.

This policy brief focuses specifically on the general regime of access to agreements executed between the government and the private sector. I shall use two comparative case studies; the Bujagali Hydropower Project Power and the Dabhol Project to reflect the limitations encountered in obtaining access to documents executed between the government and the private sector. The Bujagali Hydropower Project, has been riddled with corruption and lack of transparency of crucial documents that form the basis of the project. The mystery and lack of transparency that has surrounded accessibility to the PPA clearly depicts the deliberate effort made by the government and private sector to deny the public vital information.

I argue that while denial of public access to information may be justified in genuine cases of national security or protection of trade secrets, the Bujagali PPA is a reflection of how such exceptions can be abused and used to cover up the inadequacies and negative impacts of a project. It is further argued that, where the basis of a contract hinges on the supply and consumption of a public good or service, the public has a right to know the nature of the agreement signed between its Government and the private entity.

2. ACCESS TO INFORMATION

"Easily accessible information about government operations enables members of the general public to discover the actual norms guiding governmental behaviour, to monitor the governments compliance with law, to evaluate the quality of its performance, and to object in a more effective way to improper or unacceptable government behaviour."

Arthur E Bonfield¹

2.1. What does the right to information include?

The right to information in Uganda can be categorised in two classes. First, it includes a right to have access to information held by the government and the private sector. This information can, for example, include annual reports, licences, permits, contracts, agreements, file records, registers, maps, drawings and any other documentation that can assist the public in the monitoring and evaluating the activities of the government and private sector.

Secondly, the right to information includes a right to know anything that could affect a person's rights. This means that the government and the private sector have a responsibility to be proactive and give certain types of information without waiting to be asked for it. Such information could include matters concerning both national and regional projects that directly affect peoples' health and livelihoods or their natural resource base.

2.2. Importance of the Right to Information

Information is one of the major sources of social, economic and political power. The level of availability of information to the public determines the quality of decision making process. Freedom of information assists in the promotion and advancement of a number of desirable goals in any society, some of which are listed below.

2.2.1 Transparency

The government is responsible for the management of the state affairs and is expected to act in a transparent manner and utilise any public funds for public good. Unfortunately, corruption, misappropriation of government funds for the benefit of a few, are some of the outcomes of the lack of transparency.

¹ 40 Administrative Law Review iii(1988)

To address these limitations, transparency should be promoted in all dealings that are likely to affect the public. Transparency in the management of government affairs will assist the public to hold people accountable for their mismanagement of public resources.

2.2.2 Accountability

In Uganda, the effective implementation of a decentralized system of governance would thrive best in an environment where the leadership is accountable to the general public and their constituencies that elected them. People ideally should have a right to know what the local and central government is engaged in and a right to inquire for more information from these representatives. A right to information therefore would ensure that people could hold public bodies accountable on a regular basis.

2.2.3 Participation

Because the majority of the activities of the government are carried out for the people, it is only fair that people should be involved in the planning process and must know how activities are being carried out. However, the public can only participate effectively where they have adequate information. The participation of the public in the planning processes often results in the redesigning of a project to suit the local circumstances. Further more, the changes made during the project planning process often reduce project costs and contributes to successful project implementation.

2.2.4 Corruption

Corruption happens because bribery is a method by which companies can gain higher returns: either by winning contracts or concessions which they would not otherwise have won, or by gaining contracts or concessions on more favourable, and profitable terms (Hall; 1999).

Corruption and misappropriation of government funds is a common occurrence in Uganda as reflected in the print media. It is perpetuated by a cross section of persons or corporations that include:

- Large corporations and their representatives who are interested in making quick and large profits from their investments by paying bribes to procure contracts.
- High-ranking government officials and politicians who use their positions to influence the approval of contracts after receiving a "kick back." Often the services of the contractors are sub-standard and result in loss of government revenue and have negative social, economic and environmental effects.

- The bureaucratic systems in government encourage the payment of bribes by the public in return for an expedient approval of a service provided exclusively by the government.
- Government also perpetuates corruption by ignoring the complaints from the public about some government officials and instead of reprimanding them, they are promoted. Under such circumstances, the absence of deterrent measures to curb corruption has contributed to the increase and spread of corruption within government institutions and beyond.

Therefore, access to information is one of the weapons that should be used to fight against corruption and abuse of power by state functionaries. Where the public receives information about proposed projects within a reasonable time before approval, this will promote transparency in the dealings by the government.

Finally, access to information promotes the improvement in the quality of decision-making, it assists in redressing the inherent imbalance in power between the citizen and the state, and strengthens the role of the public in their dealings with government.

3. LEGAL BASIS FOR THE RIGHT TO INFORMATION

The right to information is enshrined in several international and regional instruments. The Party States to these instruments are under an obligation to transform these principles into national legislation. Some of the international instruments that provide for the right to information include:

- Article 19 of the Universal Declaration of Human Rights, 1948 provides that "everyone has a right to freedom of opinion and expression". This right includes freedom to hold opinion without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.
- Article 19(2) of the International Covenant on Civil and Political Rights, 1966 provides that "everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of choice".

At a regional level, the African Charter on Human and People's Rights, 1981 provides that "every individual shall have the right to receive

information"². It further provides that "every individual shall have the right to express and disseminate his opinions within the law"³.

The right to information is increasingly being recognised and states are under an obligation to take practical steps that include the enactment of national legislation to give effect to the right to freedom of information.

Uganda has through the Constitution and some laws enacted general provisions that grant the right to information. Specific legislation on freedom of information is yet to be developed by the legislature.

3.1 The 1995 Constitution

Article 29 of the Constitution provides for the freedom of conscience, expression, movement, religion, assembly and association. These rights are however exercised within the restrictions.

The Constitution specifically provides for the right of access to information under article 41. (1):

"Every citizen has a right of access to information in the possession of the State or any other organ or agency of the State except where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to the privacy of any other person".

The Constitution further assigns the responsibility of making laws prescribing the classes of information and procedure for obtaining access to that information to the Parliament⁴. Although specific legislation on access to information is not yet enacted, various sectoral laws provide for general provisions on access to information.

3.2 The National Environment Management Statute, 1995

The specific right of access to environmental information is provided for under section 86 of the National Environment Management Statute.

While this law is progressive, it does not provide guidelines that set out the access procedures, duration within which such information may be availed, a schedule of prescribed fees as well as redress procedures in case of unjustifiable refusal to provide information.

² Article 9(1) African Charter on Human and People's Rights.

³ Article 9(2) African Charter on Human and People's Rights.

⁴ Article 41(2) Constitution of the Republic of Uganda

The National Environment Management Statute
"S.86 (1) Every person shall have the freedom of access to any information relating to the implementation of this statute submitted to the Authority or lead agency".
"(2) A person desiring the information shall apply to the Authority or a lead agency and may be granted access on the payment of prescribed fees"
"(3) Freedom of access to environmental information does not extend to proprietary information which shall be treated as confidential by the Authority and any lead agency"

In the absence of guidelines on procedures for access to environmental information including enforcement and disclosure requirements such as appeals, the enforcement of right to access environmental information remains a challenge in Uganda.

In comparison, the United States Freedom of Information Act encourages agencies to comply with disclosure requirements. For example, an agency is required to respond within twenty (20) days after receipt of the request except in exceptions circumstances or face the risk of judicially imposed sanctions⁵.

In spite of these challenges, civil society in Uganda has used both formal ⁶ and informal mechanisms to obtain information from public and private institutions.

3.3 The Electricity Act No.6 of 1999.

The reform of the energy sector in Uganda introduced liberalisation and competition in the electricity sector. This sector has attracted foreign investment. Unfortunately, there are set backs in the implementation of some of the proposed hydro power projects as is reflected by the Bujagali hydro power project

Legislation was enacted to cater for the privatisation and regulation of the electricity sector through the Electricity Act. The Act provides for the regulation of the generation, transmission, distribution, sale, export, import and distribution of electrical energy in Uganda. The Act establishes the Electricity Regulatory Authority that succeeded the Uganda Electricity Board.

In the performance of its functions, the Electricity Regulatory Authority(ERA) is expected to be open, promote fair competition and shall

⁵ 552(a)(6)(A)(i) FOIA

⁶ Greenwatch (U) Ltd. Vs the Attorney General, H.C Misc. Application no. 139/2001

be non-discriminatory⁷. In addition, the Authority is obliged to ensure transparency in relation to the activities of the power sector and the Authority⁸ and shall ensure a fair balance on interests of consumers, the Government and participants in the power sector⁹.

The Act attempts to define public documents within the sector. These include all applications for licences and documents related to the resolution of disputes, handling of cases regarding breaches of safety or technical regulations, or any other matter dealt with by the Authority¹⁰.

According to the definition of public documents, the PPA in my view is a public document since it falls within the category of "*any other matter dealt with by the Authority*". This is because the Bujagali project is an electricity generation project that would fall under the mandate of ERA. Further more, the schedule of S. I 77/2001¹¹ lists the PPA executed between U.E.B and AESNP Ltd. dated 08/12/99 and another related documents¹², as the agreements transferred to the ERA. I therefore argue that the PPA is a public document to which the public should have access.

The Electricity Act however provides exceptions to access to the public documents under s.118 (1), thus inhibiting the right of access in the Act. Under s.118 (2), the Authority or on application of a licensee may exempt such documents as it may prescribe from access to the public in order to prevent the revealing of business secrets and other sensitive matters.

This Act thus provides the Authority the discretion to determine the documents that may be released to the public. The blanket exclusion of documents that contain business secrets and other sensitive matters is one of the methods used to deny the public access to information held by government institutions.

⁷ Section 12

⁸ Section 12(2)(f)

⁹ Section 12(2)(g)

¹⁰ Under s.118 (1)

¹¹ The Public Enterprises Reform and Divestiture (Vesting of Undertaking of UEB)(No. 2)

¹² The agreement for land acquisition required for Kawanda switchyard as part of Bujagali Falls project executed by the government, UEB and AES Nile Power dated 17/08/2001.

4. CASE STUDIES

In this section, I will use two comparative case studies that reflect how withholding of information by the government and private sector can prejudice public interest and allow corruption to thrive. Although the case studies are from different jurisdictions, they contain similarities in the project approval process, the limitations on access to information and concealment of vital information with the resultant losses in the implementation of the project.

4.1 THE DABHOL POWER PROJECT

The Dabhol power project located in western India in the Maharashtra State was initiated in 1991 following the approval of private sector involvement in the power sector. At inception, this \$2.9 billion project was the largest foreign investment project in India and one of the largest gas-based independent power projects in the world.

An Enron subsidiary, Dabhol Power Company¹³ set up the project and executed a power purchase agreement with the Maharashtra State Electricity Board (MSEB). This project was controversial from the start and alleged to be characterised with corruption at the highest level¹⁴. Other disputes included the process and content of the agreements, the effects of the project on the community and the cost of power¹⁵.

Financial support initially sought from the World Bank, which evaluated the proposed project and made the following observations¹⁶:

- That the proposed project would produce too much power at too high a cost for the State;
- That the plants power that would be produced from liquid natural gas would cost more than coal;
- That project was not the least cost sequence for power development; and
- That the adverse effects of the economic viability of the project would place a heavy financial burden on MSEB.

¹³ The Dabhol Power Company was a joint venture with Enron holding 65% and General Electric and Bechtel holding 10% each and the MSEB 15%.

¹⁴ The Commerce minister of India Mr. P. Chaddambaram had strongly supported the project in India and abroad. He however did not disclose that he had been paid by Enron to give a legal opinion. Media reported that he had been paid "a substantial fee when he was practicing law in between holding a cabinet position". This Minister was later dismissed. The New York Times dated 03/02/2002 stated that the entire Enron deal was riven with corruption.

¹⁵ Pg. 8. Fact Sheet, Background on Enron's Dabhol Power Project.

¹⁶ Pg.6-7 Ibid

Thus the World Bank declined to provide financial support for the proposed project. The project however managed to obtain funding and guarantees from American and Indian banks¹⁷.

The project evaded some of the provisions of the Electricity (Supply) Act, 1948 that regulates among others the trading procedure of the Board and the generating company. Under chapter V of the Act, the generating company is obliged to prepare a scheme that contains the estimates of the capital expenditure involved, salient features thereof and the benefits that may accrue therefrom, to be published in the Official Gazette of the State concerned and in such local news-papers¹⁸. The public is granted a period of two months within which they can raise queries in respect to the scheme.

The Dabhol Power Company published their thermal generation scheme and received various queries that included the need to know the cost of the power that would be produced. The Power Company never addressed these queries and instead proceeded to sign a power purchase agreement with the Maharashtra State every page of which was marked 'secret'. The PPA required MSEB to purchase all the power generated by the company. In 1994, the cost of power from the project was leaked through the media and it was noted that the power would cost 2.40 rupees and would increase with the increase in the price of the dollar. This resulted in several campaigns by the public that resulted in the review of the project.

The findings of the review of the project in 1995¹⁹ reflected that the process lacked transparency and condemned the absence of competitive bids and noted that Enron was given undue favours and concessions in the project design. The committee report stated that the prices were inflated and would be higher since the contract was based on the U.S dollar thus posing a risk in currency fluctuations on the state. It further noted there were environmental problems and that the project would adversely affect the State on Maharashtra. The findings of the committee resulted in the halting of the construction and cancellation of the project in August 1995.

On the cancellation of the project, Enron initiated arbitration proceedings where it requested for \$300 million. The State in response filed a suit to cancel the agreement on allegations of fraud and

¹⁷ The bank of America, Overseas Private Investment Corporation (OPIC), ABN Amro, a group of Indian Banks and the US Export Import Bank. The US Export Bank provided approximately \$300 million loan out of which \$202 million was outstanding at closure of project, however four Indian Banks have guaranteed the loan thus eliminating the risk to U.S tax payers.

¹⁸ Section 29(2) Electricity Supply Act, 1948

¹⁹ A committee referred to, as the Munde Committee that was composed of Ministers, was constituted to review the process and agreements of the project.

misrepresentation. Both parties were later engaged in negotiations that resulted in the revision of the agreement in 1996 and progress on the project resumed. In 1999, the first phase of the project was completed and the project commenced the supply of power to Maharashtra State.

A year later, the State that had committed to buy the full output of the plant could unfortunately only afford to buy between 10 to 20% of the power. Furthermore, since it had made a commitment to purchase all the power from the plant, it was under a duty under the PPA to pay for the power supply even where it was not consumed. The cost of power was approximately 5 rupees, an excessive cost that resulted in cancellation of the power supplies from Tata Electric companies and the NTPC that were supplying cheaper power at Rs.2 and Rs. 1.30 respectively. At the end of 2000, the State ceased payment of the electricity bills²⁰ and in 2001 sought to cancel the power purchase agreement.

In May 2001, Enron ceased operation of phase I of the power plant and ceased construction of phase II that had reached 90% completion. Deliberate efforts were made by the United States government to negotiate with the Indian government to settle the issues so as to protect any future foreign investments in India. The negotiations were unfortunately overtaken by events when the Parent Corporation, Enron tumbled into financial crisis and filed for bankruptcy in December 2001.

The Indian Government commissioned an inquiry into the Dabhol project and the report published in 2001 condemned the circumstances surrounding the approval of the project and found that *"a severe abuse of governance and lack of transparency marked [the projects] fast track approval"*²¹.

It is observed that the predictions on the excessive cost of electricity made in the early stages of the project that were ignored became a reality and resulted in the loss of revenue for both parties. The power supplied by the Dabhol project was thus far more than what the consumers would pay or the State could afford.

This case study in addition reflects how the denial of information resulted in the exploitation of the public and government by the private investor. Furthermore, the failure to divulge information on the cost of electricity resulted in the exploitation of the public and the failure of the

²⁰ Enron claimed \$64 million in unpaid bills.

²¹ An energy review committee was established with Madhav Godbole former chairman of the MSEB, to review the electricity situation and particular electricity projects, including Dabhol. Fast track projects were power projects of at least 1000-megawatt capacity and were given clearance much faster than normal power projects as a means of attracting foreign investment.

project with enormous loss of investment to the Power Company and the finance institutions.

4.2 THE BUJAGALI HYDROPOWER PROJECT

The major sources of energy in Uganda are petroleum, electricity, wood fuel, and new and renewable sources. Wood fuel, which takes the form of charcoal and firewood, contributes to 80% of total energy utilised in Uganda and provides a source of energy to a majority of the population in Uganda. On the other hand, only 6% of the population in Uganda have access to electricity.²²

The government policy on energy is aimed at expanding access to energy services through the promotion of private sector investment in the development of renewable energy and export of hydropower after the internal demands are met.²³

Positive progress has been made so far with two proposed independent power projects: Bujagali project under the AES Nile Power and Karuma under NORPAK.

The Bujagali hydropower project was instituted in Uganda in October 1994 following the signing of an MOU between the AES Nile Power (AESNP) and the Government of Uganda to supply hydropower. The project objectives included the provision of adequate, reliable and affordable power. The project is aimed at building and operating a 200 MW power plant at Bujagali Falls in Jinja province, Uganda and includes the construction of about 100 km of 220 kV and 132 kV transmission lines and associated substations.

The project was approved by the Parliament in 1999 and was supposed to commence in the first quarter of 2002 and completed in 2005. Although the groundbreaking was conducted at the beginning of 2002, the project is at a standstill.

The project has undergone a series of environmental assessments and the National Environment Management Authority (NEMA) approved the Bujagali hydropower project EIA in November 1999 and the PPA was signed in December 1999.

The project has continued to be subjected to several criticisms that include the lack of transparency and public participation on the potential economic risks of the project, negative social impacts, loss of revenue in tourism industry and the destruction of cultural sites. The project was

²² www.ugnadainvest.com/energy.htm

²³ www.unido-aaitpc.com/unido-aaitpc/uganda/energy

also riddled with allegations of corruption at its inception since the project did not undergo an international bidding process.

There were several flaws in the approval process of the Bujagali project; I will however restrict this policy brief to the sequence of events as they relate to public access to the power purchase agreement.

The chronology of events as they relate to the PPA are tabulated below:

Date	Activity
December 1991	<ul style="list-style-type: none"> ▪ The Bujagali project was first proposed and was supported by the African Development Bank. The Nile Independent Power project was a joint venture between the Madhvani Group of Uganda and the AES, a subsidiary of the US-based AES Corporation ▪ The World Bank Group got involved in 1997, followed by IFC in 1999 and agreed to guarantee the scheme against political and other risks. The grant of the guarantee was attached with the conditionality of the privatisation of the Uganda Electricity Board by the government of Uganda²⁴.
October 1994	The Bujagali Hydro power Project is initiated.
November 1999	<ul style="list-style-type: none"> ▪ The National Environment Management Authority approves the Project EIA.
December 1999	<ul style="list-style-type: none"> ▪ Parliament approves PPA. ▪ The Power Purchase Agreement is signed between AES Nile Power and the Uganda Electricity Board²⁵. ▪ The Implementation agreement was signed between the Uganda government and AESNP.
June 2000	AESNP posts a summary of the implementation agreement and PPA on its website ²⁶ following request by NGOs at an international forum in Washington in 2000.

²⁴ The New Vision, 2 March 1999.

²⁵ The Uganda Electricity Board was privatised and the undertakings were vested in the Uganda Electricity Transmission Company Limited (UETCL). The PPA is one of the contracts transferred to UETCL under - The Public Enterprises Reform & Divestiture (Vesting of Undertaking of UEB)(No.2), S.I No. 77/2001.

²⁶ www.bujagali .com. The summary omits crucial details on the terms of the agreements.

June 2001	<p>Letter of complaint sent to the World Bank Ombudsman by NAPE and SBC²⁷. Several complaints were raised and they included:</p> <ul style="list-style-type: none"> ▪ The potential damage of having a cascade of dams along the River Nile, ▪ The failure to have international bidding process for the project, ▪ The failure to make the PPA between AESNP and the Uganda Government a public document²⁸. <p>NAPE and SBC requested that the PPA should be availed to the public so as to be able to scrutinize the risks involved.</p>
September 2001	<ul style="list-style-type: none"> ▪ MIGA's Compliance Advisor/Ombudsman criticizes the lack of transparency and stated, <i>"If AES wants to maintain a degree of secrecy consistent with a private sector project, perhaps public institutions should not be asked to provide guarantees for or subsidize the undertaking."</i> ▪ Greenwatch requests for a copy of the PPA from the National Environment Management Authority (NEMA). ▪ Greenwatch institutes court action in High Court - Greenwatch (U) Ltd. Vs the Attorney General, Misc. Application no. 139/2001 where Greenwatch sought orders that the PPA is declared a public document, that the refusal by government to release the PPA amounted to a breach of the applicants constitutional right and that the Minister avails the document to the applicant.
October 2001	<p>NEMA responds to letter and advises Greenwatch to contact the Department of Energy in the Ministry of Energy and mineral development.</p>
November 2001	<ul style="list-style-type: none"> ▪ World Bank Inspection Panel visits Uganda to conduct investigations on complaints raised by civil society organisations. ▪ Greenwatch writes letter to the Commissioner Energy Department requesting for the PPA.

²⁷ NAPE and SBC initially raised a complaint in November 2000, but it was considered immature because the EIA report had not yet been released to the World Bank info shop and the role of IFC was not yet established.

²⁸ The complaint stated *"to date, the PPA continues to be a guarded secret and yet its contract will directly affect the ordinary Ugandan. Why is the public being denied access to it? What is there to hide from the population?"*

	<ul style="list-style-type: none"> ▪ Response from Ministry of Energy and Mineral development where they state that <i>"the PPA is a comprehensive document with lot of information including technical and commercial secrets, contains clauses on confidentiality and protection of intellectual property which does not permit the Ministry to make PPA available to the entire public"</i>.
December 2001	World Bank approves IFC and IDA ²⁹ funding of up to \$225 million ³⁰ for the project.
November/Dec 2002	World Bank Inspection Panel visits Uganda and meets stakeholders and conduct further research and verification of complaints raised.
January 2002	Ground breaking ceremony at Bujagali Hydro power project in Jinja.
January 2002	The Kenya Power and Lighting company (KPLC) and the Uganda Electricity Transmission Company (UETC) sign a PPA for the export of 50- 80MW on completion of the 250 MW project that will be commissioned in 2005. ³¹

²⁹ International Development Association (IDA) is the World Bank's concessional lending institution that will provide \$115 million partial risk guarantee to commercial banks.

³⁰ www.ifc.org/bujagali.

³¹ This PPA has not been released to the public. It would be important to consider the agreement since issue of penalties where Uganda does not supply the electricity as agreed.

May 2002	<p>Inspection Panel submits report to World Bank Board.</p> <ul style="list-style-type: none"> ▪ Report echoes complaints raised by civil society and states that the planned project violated five key World Bank policies³². Panel stated that the disclosure of the confidential PPA already signed by the Government and AESNP <i>"was vital if the intent is to place the public in a position to analyse and understand and participate in an informed discussion about the viability of the project."</i> ▪ Inspection Panel makes several suggestions that include the need to make changes to the PPA, parts of which are deemed to be unfavorable to the Government.
June 2002	<ul style="list-style-type: none"> ▪ World Bank delays decision over political risk guarantee of \$250 million for the Bujagali project until 18th June 2002. ▪ Civil society organisations write to the World Bank requesting it to postpone the approval of the project by at least four months and requested for the project contracts (PPA) to be released to the public first. ▪ AES workers sent on leave³³ ▪ World Bank postpones its decision to grant the political risk guarantee.
July 2002	<ul style="list-style-type: none"> ▪ Affidavit in reply dated 11 July 2002 deponed by Mr. Kabagambe Kaliisa³⁴ stated that public access to the PPA was denied because the PPA: <ul style="list-style-type: none"> ❖ Contains sensitive aspects of national security, and its release would prejudice the security of Uganda; ❖ Contains sensitive aspects on the vulnerability of the Uganda power sector, infrastructure or installations both present and future. ❖ The release of the PPA would hamper the ability and credibility of Uganda to attract foreign investment and would form a bad precedent for future foreign investors. ❖ The government undertook not to divulge the agreements; therefore the release would amount to a breach of contract.

³² The Inspection Panel report concluded that the planned dam violates the World Bank's policies on involuntary resettlement, environmental assessment, natural habitats, disclosure of information, and the economic evaluation of investment operations.

³³ The AES Public Relations officer reports in that the workers at the project site were sent on leave. This followed the indefinite suspension of the political risk of \$250 by the World Bank Board. The Monitor dated 23/06/2002

³⁴ The Permanent Secretary in the Ministry of Energy and Mineral Development.

	<ul style="list-style-type: none"> ❖ The other parties to the PPA expressly stated to the Government of Uganda that the documents, commitments and correspondence relating to the PPA should be kept private. Thus the parties are entitled to the right of privacy; ❖ The PPA was between the government and third parties therefore not a public document that should be freely discussed by the public <ul style="list-style-type: none"> ▪ Application filed by GreenWatch is heard in court on 10/07/2002 and the trial Judge requested the Attorney General to supply court with a copy of the PPA. ▪ Letter to the Registrar dated 17/07/02 from the Advocate representing the Attorney General. It stated that <i>"efforts to obtain the PPA were fruitless as it has been discovered that in actual fact there is/was no PPA executed between government and AESNP as alleged... it is not possible for us to produce a non-existent document"</i>. ▪ 29/07/02 - The Monitor reports the existence of the PPA; a copy of which was obtained from the Parliament library by a Member of Parliament and given to Greenwatch.
August 2002	<ul style="list-style-type: none"> ▪ Court informed that PPA exists, but was signed by UEB on behalf of the Government. UEB is added as party to the suit. ▪ State Attorney insists that PPA should not be released to public because it contains issues of national security and trade secrets.
November 2002	<ul style="list-style-type: none"> ▪ Ruling³⁵ by Justice Egonda- Ntende that declared the Power Purchase Agreement and the Implementation Agreement public documents. ▪ A study³⁶ on the technical aspects of the PPA reveals that the capital cost of Bujagali is substantially higher than a similar Indian hydropower project³⁷. It further revealed that Uganda did not get a fair deal in the contract and the project would only add to the debt burden.

³⁵ The court made a ruling in favour of GreenWatch in HCT-00-CV- MC- 0139 of 2001 - Greenwatch (U) Ltd. vs. The Attorney General and Uganda Electricity Transmission Company Ltd.

³⁶ A study on Techno- Economic Aspects of Power Purchase Agreement between AES Nile Power and Uganda Electricity Board was conducted by Prayas, Energy Group, Pune, India for IRN.

³⁷ The Sri Maheshwar Hydro Power project (SMHP) under development in Central India is aimed at the production of 400MW compared to the 200MW by the Bujagali Project. However the cost of the supply and erection of electro -mechanical equipment is US \$118 million for Bujagali and US \$110 million for

The chronology of events are a reflection of the flawed process that involved the absence of transparency, delay in the dissemination of information and limitations in access to information contained in contracts executed between the government and private sector.

The Bujagali process was riddled with political engineering and corruption³⁸. The undue pressures from the government to have the dam built have contributed to the evasion of procedures by the investor and criticism of civil society efforts ³⁹.

Redress was sought at both the international level, through the Inspection Panel and at national level through the High Court. Success has been recorded in both instances with the Panel recommending disclosure of the PPA and the court ruling that the PPA and IA are public documents.

Further information from a study of the Bujagali PPA conducted by an Indian firm Prayas Energy group reveals that the dam was overpriced by \$280 million. These are reflections of the inappropriate choices made in favour of the investor.

The project has however stalled following the indefinite suspension of financial support from the World Bank subsequent to the allegations of corruption⁴⁰ and other related flaws in the project. In addition, the drastic fall in the stocks of the parent company AES has had a negative effect on the financial support that AESNP could receive for the project.

SMHP. There is also a large difference in the capital cost (US\$2.9 Million for Bujagali as against US\$ 1.2 million for SMHP).

³⁸ Veidekke one of the construction firms reportedly paid the former Minister of Energy, and former Alternate Executive Director at the World Bank Richard Kaijuka a bribe of USD10, 000 for the project. Kaijuka dismissed in August 2002 from his job by the Government following the corruption scandal.

³⁹ "Those who are saying World Bank should not give us money, like environmentalists, should know that it will be built, whether it is by the World Bank or ourselves".... President Museveni at the opening of a business forum in the capital Kampala. *New Vision*, 20 June 2002.

⁴⁰ The IFC head, Peter Woicke stated, "Until we are completely confident that all issues of corruption are being addressed, the World Bank Group will not proceed with the financing of this project". Wall Street Journal 04/07/2002.

5. CONCLUSIONS and RECOMMENDATIONS

Public access to contracts or agreements executed between the government and the private sector remains a challenge despite the existence of legislation that is supportive of the right to access.

Apart from the mandatory requirement for some government institutions to provide information to the public, there is an absence of a well-defined institutional structure responsible for attending to public requests or inquiries for information. This has contributed to the escalation in the delays in accessing information held by the government.

The lack of transparency in the dealings by the government and third parties has promoted corruption with the resultant loss of government revenue and has contributed to the perversion of democratic processes and rational decision-making. Foreign investors aim at the maximization of profits and often negatively impact the national natural resource base and the livelihood of the majority of the population.

In light of the above challenges, I wish to provide recommendations that could contribute to the improvement of public access to information.

- **Legislative Reform.**

Laws that contain provisions that restrict access to information should be repealed or amended to reflect the constitutional provisions on access to information.

- **Institutional reform**

Government departments have evolved through a colonial culture that promoted bureaucracy and the need to protect government business. In addition, the traditional paper based storage systems have often resulted into inadequate record keeping. As a result, many requesters are frustrated by the failure of a government official to find a particular record that may have been already destroyed, lost or misplaced. Therefore, there is a need for the establishment of specific departments within the government institutions that specifically handle requests for information, administrative redress and the proactive dissemination of information to the public.

- There is a need the private sector and government to adopt a "right-to know" approach, in the interests of both the holder of the information and the citizen, whereby as much information as possible is automatically published. This will in the long term reduce on the number of individual requests having to be made and adjudicated upon.

- **Promotion of corporate accountability.**

Corporate accountability is a necessary tool in the management of private sector business and is especially relevant to the current situation of increasing economic globalization and the unique position of transnational corporations, which in many cases are legally accountable to no one. There is thus a need for civil society to work in partnership with the private sector in an effort to ensure that the private enterprise acts in socially and environmentally responsible way.

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