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COMMUNITY PARTICIPATION IN ENVIRONMENTAL AND SOCIAL IMPACT ASSESSMENT IN THE OIL SECTOR OF SOUTH SUDAN: A LEGAL ANALYSIS

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Abstract

Environmental and Social Impact Assessment (ESIA) is a key requirement for oil and gas prospecting and production companies. It is important for the preservation of both the environment and the social needs of host communities and the furtherance of the broad ends of environmental protection. Neglecting or failing to adequately involve the host communities where oil and gas prospecting and production activities are carried out leaves a gap in the understanding of the concerns of host communities in an attempt to protect their rights to a healthy environment as guaranteed under the Transitional Constitution. The study applied the doctrinal method of research, combining the analytical method with the PRISMA (Preferred Reporting Items for Systematic Reviews and Meta-Analyses) Method, covering the systematic collection of legal materials for a doctrinal legal analysis. The importance of adopting the PRISMA method is to enable a comprehensive finding of relevant applicable legal resources, and reduce the chances of bias in the selection. The study used primary and secondary resources, involving a systematic collection with a full appraisal of current legal, policy, and scholarly literature on the prescription of conduct of Environmental and Social Impact Assessment (ESIA) by oil companies and engagement of host communities in South Sudan. The Transnational Constitution of South Sudan[4] and the Petroleum Act[5] on environmental protection, including the Ministry of Petroleum and Environmental Protection Agency, [6] were considered. The study adopted PRISMA's four-phase procedure: identification, screening, eligibility, and inclusion in the collection and compilation of research reports from notable institutions, textbooks, and articles from key databases of peer-reviewed journals. The study found that engagement of host communities in the process of conducting ESIA is germane for proper assessment and determination of the most appropriate steps and conditions required for providing what host communities need to ameliorate the negative impacts of activities of oil companies. Despite legal provisions mandating the conduct of ESIA as a condition precedent to granting a licence for oil and production, host community participatory safeguards in ESIA are lacking, notwithstanding that they suffer the direct consequences of oil operations, including environmental degradation and social disruptions. The study suggests that promotion and strengthening of host community participatory mechanisms and institutional capacities in the process of ESIA will enhance environmental protection and reduce social disruptions in host communities in South Sudan.

Key Words: Host Communities, Stakeholders, Environmental and Social Impact Assessment, South Sudan's Oil and Gas Industry

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[4] 2011 (as amended).
[5] Petroleum Act, South Sudan, 2012.
[6] Petroleum Act, 2012, section 4 (2).

1. Introduction

Environmental and social impact assessment has drawn significant scholarly attention over time. Environment and social impact assessment, or ESIA, is the evaluation of foreseeable and predictable impacts of a proposed activity on the surroundings and social conditions of the host community.[7] ESIA is a tool that guides decision-making in choosing one alternative over several other alternatives for a project in order to preserve the environment and minimize social disruptions to the host community.[8] It is taken as one of the most vital policy methods of tackling environmental and socially related dangers that come with exploitation, production, and other key development projects such as construction, large-scale agriculture, and mining. Over time, ESIA has been a required process to protect the environment.[9] The notion of ESIA, which first began in developed countries like the US, Canada and Australia,[10] has become a universally embraced standard.[11]

ESIA, as a regulatory tool, is entrenched in the laws of South Sudan.[12] However, its practical implementation, especially in the engagement of host communities, remains a challenge. Generally, there are several factors affecting the quality of ESIA. These include: legislation and institutional features, participatory mechanisms for host communities, timeliness and sufficiency of allocated time for conclusion.

2. Methodology

The study adopted a doctrinal method of research, embodying analytical methods with the PRISMA (Preferred Reporting Items for Systematic Reviews and Meta-analyses) Method. This involved a systematic gathering of resource materials for doctrinal legal analysis. The essence of applying the PRISMA method is to ensure a comprehensive search for relevant applicable legal resources and reduce the chances of bias in the selection. The study applied primary and secondary resources, comprising a methodical gathering and full evaluation of up-to-date legal, policy, and scholarly literature on the prescription of conduct of ESIA by oil and gas companies and the engagement of host communities. Transnational Constitution of South Sudan, 2011, and provisions of the Petroleum Act, 2012, on environmental protection were considered. Adopting PRISMA's four-phase procedure: identification, screening, eligibility, and inclusion; in the collection and compilation of search reports from notable institutions, textbooks and articles from key databases of peer-reviewed journals, ensured clarity, credibility, and diligence in the systematic examination of laws, institutions, policies and literature to identify gaps in the laws and practices, regulatory overlaps and challenges, including chances for positive projections to advance solutions to resolving the challenges.

3. Conceptual Framework

This study is built around two important concepts, namely environmental and social impact assessment (ESIA) and stakeholder engagement and community participation. This study is essentially an analysis of how the legal and regulatory frameworks in South Sudan promote stakeholder engagement and community participation in the conduct of environmental and social impact assessment by oil companies operating in the country. A brief examination of the key terms will bring clarity and context to the discussion that ensues.

3.1 Environmental and Social Impact Assessment (ESIA)

Environmental and Social Impact Assessment is a methodological process for ascertaining, foreseeing, and assessing environmental and social impacts of proposed projects before it takes off, for the purpose of advancing measures to lessen the negative effects of the project on both the environment and the host community.[13] The Precautionary principle of international environmental law provides the foundation for environmental protection and sustainable development in general, but more fundamentally, the need for environmental impact assessment. It

[7] Centre for Science and Environment "Understanding EIA" available at https://www.cseindia.org/understanding-eia-383#:~:text=Evolution%20of%20EIA,-EIA%20is%20one&text=EIA%20as%20a%20mandatory%20regulatory,Zealand%20(1973%2D74). Visited on 07-09-24.

[8] Ibid.

[9] Ibid.

[10] Ibid.

[11] Taylor Francis "The Quality of EIA Systems and Economic Growth in Countries Participating in Belt and Road Initiative" https://www.tandfonline.com/doi/full/10.1080/14615517.2020.1818520 accessed on 25-09-24.

[12] Section 59 (1) of the Petroleum Act provides generally that The Ministry, in consultation with the ministry responsible for the environment, shall initiate and coordinate a strategic environmental assessment prior to the opening of a new area pursuant to Section 15 of this Act.

[13] United Nations Environment Programme, *Environmental Impact Assessment Training Resourse Manual* (2nd edn, UNEP 2002) 1.

embodies the prospective principle of law, which encourages acting early to prevent environmental damage. Being a prospective measure, the precautionary principle can be defined as environmental protection based on precaution, even where there is no clear evidence of harm or risk from an activity.[14] As Renn clarifies, "principle should be considered as 'a state of mind' which helps decision-makers to be more sensitive to uncertainties, ambiguities and ignorance related to development." [15] The confluence between environmental impact assessment as an environmental policy tool and the precautionary principle lies in the common purpose of risk mitigation because they identify and reduce the uncertainties and negative impacts associated with oil and gas production.[16] In the final analysis, it can be said that "EIA as an environmental policy tool can promote the pursuit and the application of the precautionary principle. In addition, uncertainty analysis and risk communication in EIA could benefit from a shift towards more collaborative knowledge-making."[17] But this can only be achieved where there is active stakeholder engagement and community participation.

3.2 Stakeholders Engagement

Stakeholder engagement is the process of seeking the opinions and involvement of individuals and groups deemed to be affected by a project in a community due to their closeness to the project operations and reliance on natural resources in the host community. From the outset, it is important to note that community participation is greatly desirable, as it is considered an integral part of the assessment procedure. Hence, stakeholder engagement and community participation in ESIA are commonly deemed to foster democratic policy-making and to render ESIA more effective.[18] Community participation in the Environmental and Social Impact Assessment (ESIA) process is regarded not only as a regulatory requirement but also as a vital mechanism for fostering constructive and sustainable relationships between oil companies operating in a given area and the host communities. This helps build trust and maintain amicable relationships between businesses and host communities.

4. Legal Framework for Environmental and Social Impact Assessment in South Sudan

This is discussed first under the Constitution and then under the Petroleum Act, 2012.

4.1 Transitional Constitution of South Sudan, 2011

The constitutional foundation for environmental protection in South Sudan is provided under Article 41 of the Transitional Constitution, 2011, which expresses that: "Every person or community shall have the right to a clean and healthy environment." This also implies the right of community participation in environmental and social impact assessments (ESIA). By explicitly granting the "right to a clean and healthy environment" to both individuals and communities, the framework implies that collective groups must be involved in decision-making processes that affect their surroundings. This right is reinforced by the general "obligation to protect the environment" under Article 41 (2), which empowers citizens to act as stewards for present and future generations by identifying risks during assessment phases. Furthermore, the mandate for the state to implement measures that "secure ecologically sustainable development" while promoting "social development" under Article 41 (3) provides the legal justification for ESIA frameworks that prioritize community consultation to prevent pollution and safeguard biodiversity.

4.2 Petroleum Act, 2012

The legislative framework on ESIA is largely contained in the Petroleum Act, which mandates the Ministry of Petroleum to involve affectedcommunities[19] in all petroleum and gas projects during environmental and social impact assessment.[20] This provision operationalizes article 175 (2) (f) of the Transitional Constitution, which stipulates that the functions of the Minister of Petroleum include "ensuring that all petroleum and gas projects be subjected to environmental and social impact assessment." The Petroleum Act espouses this constitutional provision

[14] Bell S, McGillivray D. *Environmental law*. 6th ed. (Oxford: Oxford University Press, 2006)
[15] Renn O. Risk governance. In: Coping with uncertainty in a complex world. (London: Earthscan,2008) 455.
[16] De Sadeleer N. Environmental principles. From political slogans to legal rules. (Oxford: Oxford University Press, 2002)
[17] Kimmo Jalava et al "The precautionary principle and management of uncertainties in EIAs – analysis of waste incineration cases in Finland" https://doi.org/10.1080/14615517.2013.821769 visited on 15/07-26.
[18] Glucker Anne et al. "Public participation in environmental impact assessment: why, who and how?" (2013) 43 *Environmental Impact Assessment Review* 104.
[19] Petroleum Act, 2012, section 32
[20] Petroleum Act, Section 59.

by crafting out five (5) key activities for which ESIA is required. This includes: reconnaissance activities – after an area has been opened for petroleum activities, exploration drilling, development and production, construction of a transportation system, and decommissioning.[21] In addition to the automatically listed activities under Section 59 (2) (a) – (f), the Minister may require an ESIA for other oil and gas projects not on the list. This is in cases where petroleum activities are likely to have a significant social or environmental impact.[22]

At the institutional level, the draft Environmental Protection Bill (2013) envisages the Ministry responsible for environmental matters playing a central role in the ESIA process, in its capacity as the "lead agency" on environmental issues.[23] However, a similar role is assigned to the Ministry of Petroleum under the Petroleum Act, thus risking potential regulatory overlap when the Environmental Bill is eventually passed into law. This is one of the major challenges to the realization of the policy rationale behind ESIA and other regulatory facets. The lack of cooperation between the two ministries worsens the situation. An empirical survey conducted by the Sudd Institute in 2015 gives a graphic illustration of this problem in that "the Ministry of Environment sometimes does not know what the Ministry of Petroleum is doing to address petroleum environmental impacts."[24] Officials of the Ministry of Environment maintain that "sometimes the Environment Ministry officials are not allowed to get access to the oilfields unless permitted by the Petroleum Ministry."[25] There are several other challenges affecting the practice of ESIA. Based on the experience of India, authors[26] identified the major challenges of the practice of EIA to include: a) control of EIAs by project proponents, b) absence of an independent institutional setup to conduct and monitor EIAs and management plan implementation, c) absence of cumulative EIA provisions in the law, and d) absence of effective quality control of EIA processes.[27]

The above can be said to be challenges facing ESIA practice globally. As rightly observed, therefore, 'issues debated worldwide with respect to ESIAs involve scope, quality, methods (e.g., how to capture and integrate complex interactions), public participation, and actions after the decision stage (e.g., monitoring of impacts).'[28] The section below delves into the niceties of the key challenges militating against effective compliance with ESIA requirements.

4 Challenges in the Engagement and Participation of Host Communities as Stakeholders in Environmental and Social Impact Assessment in South Sudan

Community participation in environmental and social impact assessments of oil and gas activities is a universal imperative for natural resource governance and environmental risk mitigation. South Sudan appears to have a laid-down legal and regulatory framework that promotes stakeholder engagement and community participation riding on the provisions of the Constitution and the Petroleum Act. However, certain challenges continue to militate against the effective realization of these legal and regulatory mandates.

i. Lack of proper stakeholder engagement

Stakeholder engagement is critical for achieving the aim of assessing environmental impact. Stakeholder engagement particularly entails the involvement of local communities. This must be done correctly with a view to garnering valuable local knowledge and concerns for informed decision-making. The Petroleum Act of South Sudan[29] prioritizes local community engagement in the course of environmental impact assessment. Section 59 (4) (b) provides for consultation with the public, including local communities.

[21] Ibid section 59 (1) & (2) (a) – (f).
[22] Ibid Section 59 (2) (f).
[23] Draft Environmental Protection Act (2013), Chapter-IV, section 20.
[24] Nhial Tiitmamer "Understanding the Enforcement of Environmental Provisions of Petroleum Act 2012 and Why Environmental Ruin Continues" (2015) Sudd Institute Policy Brief Paper 14.
[25] Ibid.
[26] Eman A Badr, Ahmed A Zahran and Matthew Cashmore, 'Benchmarking Performance: Environmental Impact Statements in Egypt' (2004) 24(3) *Environmental Impact Assessment Review* 229.
[27] Arun PR 'Environmental Impact Assessment: Challenges and Opportunities' Conference: Proceedings of the National Seminar on Environmental Management and its Future Perspectives At: MES Mampad Volume: 1 2013 51.
[28] Glasson, John, Riki Therivel, and Andrew Chadwick *Introduction to environmental impact Assessment*, 3rd ed. (London: Rutledge 2005) 6.
[29] Petroleum Act, 2012.

Despite the clear provisions of the law on local community engagement in ESIA, many assessments fail to engage local communities correctly.[30] This sometimes leads to mistrust and resistance to projects.[31] This problem was highlighted in lawsuits. For instance, in the Ugandan case of Advocates *Coalition for Development and Environment vAttorney-General*[32], objections were made against the Ugandan government's issuance of a sugar cane growing permit to Kakira Sugar Works Ltd in Butamira Forest Reserve without the conduct of an EIA, claiming that the livelihoods of the local communities were affected. The case raised an issue of public trust, which the court thoroughly analyzed, holding that it was breached by the government.

In South Sudan, public participation in ESIA is very crucial due to the country's volatile nature stemming from the trauma of protracted conflicts. Consequently, involving the public in the process of ESIA is important in reducing and preventing public outcry and clashes.[33] Despite efforts being made to engage stakeholders, it has been pointed out that carrying the public along in the ESIA process looks unilateral and haphazard,[34] leading to poor representation of the real interests of the community at large.[35]

It is, therefore, submitted that a more inclusive approach to public participation be adopted, including Local government leaders and members from across different groups of the local community. It is equally important to involve the hospital management of the medical institutions situated within the environs of the project. This can contribute to an understanding of the major health challenges of the locals and to an appreciation of the aftermath of the oil and gas project in the host community. Other critical stakeholders include civil society organizations interested in the protection of the environment and central government ministries and agencies responsible for the environment and petroleum. In all, it is important to have an all-encompassing stakeholder participation in matters of environmental impact assessment.

ii. Weak regulatory/institutional capacities

Environmental impact assessment is not usually tied to a single regulatory framework. There are usually many laws accompanied by their administering authorities with potential overlap in functions. The Ministry of Petroleum is mandated to work with the Ministry of Environment to ensure the conduct of an environmental assessment before establishing new areas for the exploration and development of oil and gas.[36] As rightly observed, there is a clash of duties between environmental and petroleum regulatory agencies under the laws.[37] Authors have attributed poor observance and implementation of regulations governing the environment to existing conflicting laws on duties that are replicated in the regulatory bodies.[38] The first challenge is that these are not specialised environmental bodies, and the obvious weakness in the lack of requisite technical capacity to oversee effective environmental and social impact assessment is a major concern. Accordingly, the lack of specialized and technical expertise has been decried as a major obstacle to achieving the desired protection of the environment in South Sudan's petroleum industry.[39] Contemporary literature highlights that authorities around the world battle several challenges that distort their performance in the conduct of environmental impact assessment (EIA).[40] In South Sudan, the weak regulatory capacity is attributed to several interconnected factors, such as a lack of needed resources and capacity, with synergy to enforce regulations effectively. This is exacerbated by the lack of a specialised body with adequate funding to ensure proper implementation of ESIA guidelines.

[30] CorpSeed 'Challenges and Solutions in Environmental Impact Assessment' <https://www.corpseed.com/knowledge-centre/challenges-and-solutions-in-environmental-impact-assessment> accessed on 28-11-24.
[31] Ibid.
[32] Misc. Cause No. 0100 of 2004.
[33] Obadia Kyetuza Bishoge Benatus Norbert Mvile (n.26) 11.
[34] Ibid 13.
[35] Ibid 13.
[36] Petroleum Act, South Sudan, section 59(1)
[37] Cleverline T Brown 'Effective Environmental Compliance and Enforcement in Nigeria: Motivation, Challenges and Prospects. African Journal of Law & Criminology' (2021) 11 (1) *African Journal of Law & Criminology* 102.
[38] Ambituuni A, J Amezaga and E Emeseh, 'Analysis of Safety and Environmental Regulations for Downstream Petroleum Industry Operations in Nigeria: Problems and Prospects' (2014) *9 Environmental Law Development* 43.
[39] Nhial (n 36).
[40] Mehreen Khan, Muhammad Nawaz Chaudhry, Sajid Rashid Ahmad, Samia Saif · Asim Mehmoo 'Performance of EIA authority and effectiveness of EIA system in Pakistan' (2020) 81*Environmental Impact Assessment Review 7.*

Another factor that greatly affects the environmental regulatory process in South Sudan is political instability and conflicts. This has negatively impacted the governance system in general, including the architecture and infrastructure of environmental governance. Generally, instability undermines the government's ability to focus on long-term sustainable development issues, such as environmental protection. Resource constraints and political and economic pressures are yet another set of inhibiting factors. It is noted that weak enforcement of the law has contributed to breeding a laissez-faire attitude, thus allowing investors to corrupt the host communities and damage the environment.[41] On the side of oil companies, the hesitancy to comply with environmental regulations is attributed to cost reasons.[42] This means compliance can only be achieved when they [oil companies] are compelled by the authorities, contrary to what is obtainable in South Sudan due to weak regulatory institutions.[43] A combination of factors contributes to the lack of strong regulatory institutions. This includes limited technical expertise, corruption and patronage, and lack of monitoring mechanisms on the activities of multinational corporations at the micro level, which concomitantly hinder successful enforcement of environmental law in the petroleum industry.[44]

The enforcement strength of the home country against bad corporate behaviour is equally weak. Consequently, there is a need for effective enforcement in regulating corporate behaviour.[45] Putting this into perspective, researchers have drawn a comparison between environmental law compliance in developing countries and developed countries, pointing out greater compliance in developed countries than in developing countries.[46] This can be stretched further to explain the relevance of environmental protection in political ideologies in most developed countries.[47]

Nevertheless, while addressing the question of environmental protection, political will becomes an important ingredient, the lack of which may be adverse. Political will not only entails ratification of international treaties and the gamut of legislation on environmental protection but also the actual implementation thereof. It also requires the protection of environmental defenders from various attacks.[48] In East Africa, environmental rights defenders are "paying the price" for their advocacy, including the criminalisation of land and environmental rights defenders in East Africa by both the state and business entities.[49] Adequate resource allocation to environmental protection institutions and timely response to environmental hazards further demonstrate political will in addressing environmental problems. For instance, during the Obama administration, which had come under intense pressure over the administration's response to the oil spill in the Gulf of Mexico, clean-up efforts and over $20 billion in compensation to claimants, including hotel owners, tour operators and other businesses, were undertaken.[50] This kind of action is particularly important in South Sudan, with weak institutions prone to regulatory capture, where government agencies that are supposed to protect the public interest from multinational oil companies turn around to offer regulatory shields to the same oil companies. The above-highlighted problems contribute to weakness in the regulatory/institutional capacity to engage with host communities for ESIA.

iii. Limited Awareness and Capacity

Many host communities lack sufficient knowledge and understanding regarding the processes involved in Environmental and Social Impact Assessment, including the nature of operations of the oil industry. This ignorance contributes to a lack of appreciation and participation by host community members in the process of engagement.

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[41] Mawa Moses Alafi Saturlino 'Oil Exploration And Its Effects On The Environment And Pastoralist Communities In The Upper Nile Region of South Sudan' European University Institute Policy Brief (2023) 1.

[42] Ibid.

[43] Ibid.

[44] Ibid.

[45] Wang, F., Xu, S., Sun, J., & Cullinan, C. 'Corporate Tax Avoidance: a Literature Review and Research Agenda.' (2019) 34 (4) *Journal of Economic Surveys* 793-811.

[46] Patrick Oputa Odil et al. 'The Role of Environmental Policies in Shaping Oil And Gas Operations: A Comparative Review of Africa And The USA' (2024) 5 (2) *Engineering Science & Technology Journal* 570.

[47] Neumayer E. 'The environment, left-wing political orientation and ecological economics' (2004) 51(3–4):*Ecological Economics.* 167–175

[48] Maria Emilia L C 'Political Will: The Missing Ingredient in Protecting the Environment and Environmental Defenders' <https://www.ejiltalk.org/political-will-the-missing-ingredient-in-protecting-the-environment-and-environmental-defenders/> accessed on 08-01-25.

[49] Ivan Okuda 'Paying the Price: A Study on Criminalization of Land and Environmental Rights Defenders in East Africa' a Technical Report Prepared for the International Land Coalition, Rights and Resources Initiative, and Open Society Initiative for Eastern Africa (2021) 51.

[50] Asia-Pacific 'Obama swims in Gulf, says beaches open for business' <https://www.chinadaily.com.cn/world/2010-08/16/content_11156282.htm> accessed on 07-01-25.

iv. Political Instability

The current political instability from conflicts and insecurity contributes to disruptions and hindrances to smooth host community engagement. This has negatively impacted the governance system in general, including the architecture and infrastructure of environmental governance. Generally, instability undermines the government's ability to focus on long-term sustainable development issues, such as environmental protection.

v. Power Imbalances

In the process of decision-making, community voices are usually silenced in favour of state and corporate actors who are more sophisticated. Hence, creating disaffection and apathy, which discourages the local community from participating in engagements that would have benefited them and overall environmental protection.

vi. Legacy Issues and Mistrusts

There is mistrust by host communities against the state and corporations due to historical accounts of previous failures of the state to adequately compensate for environmental damage. This creates disenchantment and discouragement in the host community to participate in engagement due to a lack of trust in a positive outcome.

5 Recommendations

Host community engagement in the process of ESIA is key in effectively addressing environmental and social challenges that may face a host community due to the adverse effects of an oil and gas project. Community engagement is capable of building trust and acceptance, minimizing the risks of conflicts and operational disruptions of the project by the host community. The study makes the following recommendations for effective host community engagement:

a. Conduct Public consultations to provide access to the host community to express their concerns and influence project designs and execution. Host communities, being indigenous occupiers, usually possess helpful knowledge in respect of the land use system, diverse socio-cultural practices, and the ecosystem, which can add value to the authenticity of the process and report of the Environmental and Social Impact Assessment.

b. Create Stakeholder Engagement Plans covering a structured form of communication and feedback between the host community and the companies. This helps the process of ascertaining social and environmental risks such as displacements, health hazards, and environmental pollution.

c. Disputes/Grievances Resolution Mechanisms/Platforms should be established to handle host community grievances or complaints for effective resolution and to avoid escalation.

d. The host community members should be incorporated into the company's monitoring architecture and execution of the project to participate in the monitoring of the execution of the project, which will encourage trust, transparency and accountability. This can promote equity and benefit sharing by the community from oil projects through employment opportunities, social service provisions, and infrastructure such as roads, schools, and hospitals.

e. Oil and gas companies should engage in securing voluntary and informed consent in dealing with host communities. This will ensure a good understanding and acceptance.

f. Oil and gas companies should also apply the practice of inclusive participation in their engagement so that all members and groups of the community are carried along in the process of engagement. Youth, women, and vulnerable groups must be represented in the process of decision-making that touches on the community.

6 Conclusion

It is worthy to note that proper engagement of host communities in the process of ESIA is vital for the development and sustainability of South Sudan's oil and gas industry. The legal framework governing host community engagement needs to be strengthened to improve participatory engagement and empower the regulatory institutions with the capacity to effectively engage host communities in ESIA for environmental protection and sustainability of South Sudan's oil and gas industry.

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