The Role of International Law in Intrastate Oil and Gas Governance in Tanzania

Dissertation

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Declaration

I, Goodluck Kiwory, declare that this thesis submitted for the award of the degree of *Dr. iuris* at the University of Bayreuth has not been previously submitted by me for a degree at this or any other university for the award of a similar degree. I further declare that all sources used, referred to or quoted have been duly acknowledged.

Goodluck Kiwory

Bayreuth, 26.07.2018

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Dedication

To my wife, Fellister Paul Massawe

&

Our children

David, Rayn-Paul Siangicha and Luisa-Charlotte Sia

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The United Nations General Assembly – Res. 3281 (XXIX), Charter of Economic Rights and Duties of States, Dec. 12, 1974.

The United Nations General Assembly – Res. 3016 (XXVII), on Permanent Sovereignty Over Natural Resources of Developing Countries, Dec. 18, 1972.

The United Nations General Assembly – Res. 1803 (XVII), Permanent Sovereignty over Natural Resources, Dec. 14, 1962.

The United Nations General Assembly – Res. 1515 (XV), Concerted Action for Economic Development of Economically less Developed Countries, Dec. 15, 1960.

The United Nations General Assembly – Res 1514 (XV) on Declaration on the Granting of Independence to Colonial Countries and Peoples, Dec. 14, 1960.

The United Nations General Assembly – Res. 626 (VII), Right to Exploit Freely Natural Wealth and Resources, Dec. 21, 1952.

1.2 International Declarations

The Rio Declaration on Environment and Development, Aug 10, 1992.

The Declaration of the United Nations Conference on Human Environment (Stockholm Declaration), June 16, 1972.

1.3 International Treaties

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The African Charter on Human and Peoples' Rights, June 27,1981.

The Agreement Establishing the World Trade Organization, Apr. 15, 1994.

The Articles of Agreement of the International Bank for Reconstruction and Development, Dec. 27, 1945.

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, March 22, 1989.

The Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), Dec. 12, 1974.

The Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, Oct. 14, 1994.

The Convention on Biological Diversity, June 5, 1992.

The Convention for the Protection of the Ozone Layer, March 22, 1985.

The Convention on the Protection and Use of Transboundary Watercourses and International Lakes, March 17, 1992.

The Energy Charter Treaty, Dec. 17, 1994.

The International Covenant on Civil and Political Rights, General Assembly Res. – 2200A (XXI), Dec. 16, 1966.

The International Covenant on Economic, Social and Cultural Rights, General Assembly Res – 2200A (XXI), Dec. 16, 1966.

The Protocol Against Illegal Exploitation of Natural Resources, Nov. 30, 2006. (International Conference on the Great Lakes Region).

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The Protocol on the Establishment of the East African Community Common Market, Nov. 20, 2009.

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The Revised African Convention on the Conservation of Nature and Natural Resources, July 11, 2003.

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The United Nations Charter, June 26, 1945.

The United Nations Convention on the Law of the Sea, Dec. 10, 1982.

The United Nations Framework Convention on Climate Change, May 9, 1992.

2. European Union Directives

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The Directives 2011/16/EU on Administrative Cooperation in the Field of Taxation, Official Journal of the European Union,16 December 2011.

The Directives 2014/107/EU, amending Directive 2011/16/EU as regards Mandatory Exchange of Information in the Field of Taxation, Official Journal of the European Union, 16 December 2014.

The Directive 2014/24/EU on Public Procurement, Official Journal of the European Union, 26 February 2014.

3 National Laws with Extraterritorial Effect

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The Extractive Sector Transparency Measures Act, 2014.

Federal Republic of Germany

The German Accounting Directive Implementing Act (Bilanzrichtlinie-Umsetzungsgesetz (BilRUG) 10 July 2015.

United Kingdom

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The Foreign Account Tax Compliance Act, 2010.

The Foreign Corrupt Practices Act, 1977.

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The Commission on Human Rights and Good Governance Act, No. 7 of 2001.

The Constitution of the United Republic of Tanzania, 1977, Cap. 2, R.E. 2002.

The Customs Tariffs Act, No. 12 of 1976.

The Disaster Management Act, No. 7 of 2015

The Economic Organised Crimes Control Act, Cap. 200, R.E 2002.

The Environmental Management Act, No. 20 of 2004.

The Income Tax Act, No. 11 of 2004.

The Judicature and Application Laws Act, Cap. 358, R.E. 2002.

The Land Act, No. 4 of 1999, or Cap. 113, R.E. 2002.

The Local Government Finance Act, No. 9 of 1982.

The Oil and Gas Revenues Management Act, No. 22 of 2015.

The Mining Act, No. 5 of 1998.

The Natural Wealth and Resources (Permanent Sovereignty) Act No. 5 of 2017.

The Natural Wealth and Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Act, No. 6 of 2017.

The Petroleum Act, No. 21 of 2015.

The Petroleum and (Exploration and Production) Act, No 27 of 1980.

The Prevention and Combating of Corruption Bureau Act, No 11 of 2007

The Public Finance Act, No. 11 of 2008.

The Public Procurement Regulatory Authority Act, No.7 of 2011

The Tanganyika Order-in-Council, 1920,

The Tanzania Extractive Industries (Transparency and Accountability) Act, No. 23 of 2015.

The Tanzania Investment Act, No. 26 of 1997.

The Tanzania Revenue Authority Act, No.11 of 1995, Cap. 399 R.E.2002.

The Value Added Tax Act, No. 5 of 2014.

The Village Land Act, Cap. 114, R.E. 2002.

The Written Laws (Miscellaneous Amendment Act) No. 6 of 2016

4.2 Regulations and Rules

The Parliamentary Standing Rules (2016 edition).

The Environmental Impact Assessment and Audit Regulations, Government Notice No. 349 of 2005.

The Petroleum (Local Content) Regulations 2017, Government Notice No. 197 of 2017.

4.3 Policies

The National Natural Gas Policy, 2013. (Ministry of Energy and Minerals).

The Local Content Policy, 2014. (Ministry of Energy and Minerals).

List of Cases

American Petroleum Institute et al vs Securities and Exchange Commission, Civil Action No. 12 of 2013 District Court for the District of Columbia.

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Asylum Case (Colombia vs. Peru), (1950), I.C.J.

Attorney General of Tanzania vs African Network for Animal Welfare(ANAW), Appeal No. 3 of 2014, East African Court of Justice (EACJ), July 2015.

Barcelona Traction case (Belgium vs. Spain), (1970), I.C.J

Corfu Channel case (the United Kingdom vs. Albania), (1949), I.C.J.

East Timor (Portugal vs Australia), (1995), I.C.J.

Lac Lanoux Case (Spain vs. France) (1957), I.C.J.

Libyan American Oil Co. ("LIAMCO") vs. Libya, 17 I.L.M. 3 (1978), 4 Y.B. COM. ARB. 177, (1979).

Nicaragua vs the United States of America, (1986), I.C.J.

North Seas Continental Shelf Cases, (1969), I.C.J

Occidental Petroleum Corporation and Occidental Exploration and Production Company vs. The Republic of Ecuador, ICSID Case No. ARB/06/11, Award (Oct. 5, 2012).

Texaco Overseas Petroleum and Others vs the Libyan Arab Republic, 17 I.L.M. 1. (1977).

Trail Smelter case (United States vs. Canada), Arbitral Tribunal, 3U.N. Rep. International Arbitral Awards 1905 (1941).

List of Abbreviations

AEOI	Automatic Exchange of Information
AU	African Union
BIT	Bilateral Investment Treaty
CAG	Controller and Auditor General
Cap.	Chapter
CSD	Commission on Sustainable Development
CSR	Corporate Social Responsibility
FCPA	Foreign Corrupt Practices Act
FYDP	Five Years Development Plan
EAC	East African Community
ECOSOC	Economic and Social Council
EIA	Environment Impact Assessment
EITI	Extractive Industries Transparency Initiative
EOIR	Exchange of Information on Request
EU	European Union
EWURA	Energy Water Utilities Regulatory Authority
GDP	Gross Domestic Product
IBRD	International Bank for Reconstruction and Development
ICCPR	International Covenant on Civil and Political Rights

ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IDA	International Development Agency
IFC	International Finance Cooperation
IMF	International Monetary Fund
KPCS	Kimberly Process Certification Scheme
LAAC	Local Authority Accounts Committee
LTPP	Long Term Perspective Plan
MEM	Ministry of Energy and Minerals
MPSA	Model of Production Sharing Agreement
NEMC	National Environmental Management Council
NIEO	New International Economic Order
NOC	National Oil Company
OECD	Organisation for Economic Cooperation and Development
p.	Page
PAC	Public Account Committee
PCCB	Prevention and Combating of Corruption Bureau
pp.	pages
PSA	Production Sharing Agreement

PSNR	Permanent Sovereignty over Natural Resources
PURA	Petroleum Upstream Regulatory Authority
R.E.	Revised Edition
SAP	Structural Adjustment Programme
SEC	Securities Exchange Commission
TANU	Tanganyika African National Unity
TPDC	Tanzania Petroleum Development Cooperation
UN	United Nations
UNCTAD	United Nations Conference on Trade Agreements and Development
UN Doc.	United Nations Document
UNGA-Res	United Nations General Assembly Resolution
UNTS	United Nations Treaty Series
US	United States
USD	United States Dollar
vs	versus
WWI	World War One
WWII	World War Two

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Abstract

International law has played a decisive role during the evolution of interstate natural resource sovereignty and governance. However, there is a call for the setting of international rules which govern the activities of the multinational companies in the host states due to cross-border investments and the mobility of capital across jurisdictions. In addition, the existence of legal, institutional and regulatory frameworks in the oil and gas industry in Tanzania without coordination and harmonisation accounts for the poor governance of the industry.

The study aimed to examine the role of international law on intrastate natural resource governance, in particular, the extent to which it can help to improve governance challenges in the host states. Also, the study examined the legal, institutional and regulatory pitfalls in the oil and gas industry in Tanzania and the means by which they can be improved to enhance extraction of oil and gas resources in an environmentally friendly manner for the sustainable development of the present and future generations.

The findings of the study show that international law has played a decisive role in intrastate natural resource governance. However, the contemporary international and transnational legislative initiatives adopted address intrastate natural resource governance from a narrowed revenue inflow perspective and left other aspects out of their scope. Also, the study shows that the role of international and transnational legislative initiatives is to complement the existing intrastate legislative and regulatory regimes and frameworks.

The study also shows that oil and gas governance in Tanzania is convoluted due to the existence of competing and overlapping legal and regulatory regimes. The regimes are not coordinated and harmonised. The study recommends the harmonisation of the legal regimes and promotion of the international cooperation on exchange of information among states as means of addressing the intrastate natural resource governance challenges.

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CHAPTER ONE

GENERAL INTRODUCTION

1.1 Introduction and Background of the Study

> In the dilapidated Portuguese cocoa plantation houses in Agua Ize, Sao Tome, and Principe, residents gather under a rotting roof to avoid the rain. Above their heads, offering a tantalising glimpse of a world beyond the surrounding dank disrepair, an old election campaign poster hints at the country's anticipated oil boom. "It is now!" says the propaganda of the opposition Party of Democratic Convergence, pledging "better sharing of resources." Domingas da Costa Frota Pereira, an unemployed mother of three children, looks up and laughs: "They would put the money in their own pockets," she says.[1]

The economic development of any state is associated with the ability to extract and govern its endowed natural resources, among others.[2] It is worth noting that the integration of the natural resources industry with other sectors is important in creating synergy between them, thereby stimulating the development of other sectors in a holistic production chain. The natural resource governance is a complex phenomenon in the contemporary world where natural resources are the requisite ingredients for fueling production in the different economic sectors. However, the conditions surrounding the extraction of natural resources are

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[1] Peel Michael, "Oil Curse" Stalks Africa's Newest Petro-State, Financial Times, Jan. 27, 2005, p. 10, cited in Duruigbo Emeka Permanent Sovereignty and Peoples' Ownership of Natural Resources in International Law *38 George Washington Journal of International Law Review*, (2006). p. 33.

[2] Boadway Robin and Keen Michael, Theoretical Perspective on Resources Tax Design, in Philip Daniel *et al* (ed.), *The Taxation of Petroleum and Minerals: Principles, Problems, and Practice*, London and New York, Routledge, (2010), p. 13; See also, Vinuales Jorge, E., Foreign Direct Investment International Investment Law and Natural Resources Governance, in Morgera Elisa and Kalovesi Kati, (eds.), *Research Handbook on International Law and Natural Resources*, Cheltenham, Edward Elgar Publishing Limited, (2016), p. 33.

convoluted. This is exacerbated by the parallel, yet contentious interests between various stakeholders asserting their respective interests.

The stakeholders include states where these resources are located (host states), the home states of the extractive companies, and multinational extractive companies in need of these resources, environmentalists, and the local communities in the areas where these resources are located, among others. The comprehensive study of these contentious interests cannot be understood without resorting to the basic foundation within which the natural resource governance paradigms are premised. The foundation of natural resource governance was developed through the protracted debates between the developing and developed countries under the auspices of the United Nations General Assembly resolutions.

The debates began earnestly after the end of the Second World War (WWII) whereby the developing countries, mostly the Latin American states, were asserting for equitable rights over natural resources located in their respective states. Their main argument was that for many years the developed countries had acquired inequitable interests in the natural resource extraction which were non-beneficial to developing countries. In the 1950's -60's the debates gained momentum from the newly independent states of Africa and Asia, which were jointly and severally asserting for more economic rights.[3] These states argued that most of the natural resource extraction agreements were entered into between the colonial governments (purporting to represent the interests of the people of their respective colonies), on the one hand, and the metropolitan states

[3] Majinge Charles Riziki, The Doctrine of Permanent Sovereignty over Natural Resources in International Law and its Application in Developing Countries: The case of the Mining Sector in Tanzania, *African Yearbook of International Law,* London, Cambridge University Press, (2010), p. 237.

and/or multinational extractive companies, on the other hand. As such, they contended that the said agreements terminated with the colonial rule.[4]

The newly independent states proposed two options, namely, the re-negotiation of the agreements or entering into the new agreements.[5] The proposed options culminated in intensive debates between the developing and developed countries, the latter demanding for respect of the terms of the agreements between the parties and the international law. These debates led to an intensive discussion under the auspices of the United Nations in the 1950's which eventually led to the adoption of various resolutions on the Permanent Sovereignty over Natural Resources (PSNR) as a refined end product.[6]

One of the resolutions which form the basis of the discussion in this study is the United Nations General Assembly Resolution1803 of 1962 on PSNR[7] which provides for the rights and duties of the state asserting it. The resolution provides that the permanent sovereignty over natural resources must be exercised in the

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[4] See Deng Achol, Natural Resources: Heritage of Nation and Mankind *in* Madsen A.G. and Toman, J. (eds.), *The Spirit of Uppsala*, Berlin/New York, Walter de Gruyter Publisher (1984), pp. 308-312.

[5] Brownlie, I., *Principles of Public International Law*, Oxford, Oxford University Press (3rd ed.),(1979), p. 653. See also Makonnen Yilma, *International Law and the New States of Africa: A Study of International Legal Problems of State Succession in the Newly Independent States of East Africa,* Addis Abeba, UNESCO Regional Participation Programme for Africa, *(*1983), pp. 121-22; Turack Daniel, C., International Law and the New States of Africa, *8 Maryland Journal of International Law*,(1984) p.303.

[6] UNGA – Res. 626 (VII), Right to Exploit Freely Natural Wealth and Resources, Dec. 21, 1952, 7 UN – GAOR, Supp. No. 20, p. 18, UN Doc. A/2361; UNGA – Res. 1515 (XV), Concerted Action for Economic Development of Economically less Developed Countries, Dec. 15, 1960, 15 UN – GAOR, Supp. No. 16, p. 9, UN Doc. A/4648; UNGA – Res. 1803 (XVII), Permanent Sovereignty over Natural Resources, Dec. 14, 1962, 17 UN –GAOR, Supp. No. 17, p. 15, UN Doc. A/5217; UNGA – Res. 3016 (XXVII), Permanent Sovereignty Over Natural Resources of Developing Countries, Dec. 18, 1972, 27 UN – GAOR, Supp. No. 30, p. 48, UN Doc. A/8963; see Verwcy W.D., Schrijver N.J., The Taking of Foreign Property under International Law: A New Legal Perspective? *Netherlands Yearbook of International Law, (*1984), p. 31; Elian George, *The Principle of Sovereignty Over Natural Resources,* Netherlands, Martinus Nijihoff Publishers, (1979), p.95.

[7] UNGA – Res. 1803 (XVII), Permanent Sovereignty over Natural Resources, Dec. 14, 1962, 17 UN –GAOR, Supp. No. 17, p. 15, UN Doc. A/5217.

interest of the national development and for the well-being of the people of the state concerned. In addition, the exploration, development, and disposition have to take place in accordance with the rules which the people of the nation freely consider to be necessary or desirable.[8] On the other hand, the states are duty bound to exercise the right of permanent sovereignty over natural resources in the interest of the national development and for the well-being of the people.[9] The foreign investment agreements freely entered into by or between the sovereign states shall be observed in good faith, among others.[10]

The principle of PSNR developed, from its inception, in the context of interstate debates over natural resource governance between the developing and developed countries. In the beginning, the developing countries and newly independent states were interested in formulating the principle of permanent sovereignty over natural resources as wide as possible without the correlative duties. Any attempts to qualify the rights were seen as an unwarranted encroachment of a state's internal affairs which is against the principles of international law.[11] The main focuses of the developing countries and newly independent states were, firstly, to assert control over the ownership of natural

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[8] See Articles (2), (3), (4) and (5) of UNGA – Res. 1803 (XVII), Permanent Sovereignty over Natural Resources, Dec. 14, 1962, 17 UN –GAOR, Supp. No. 17, p. 15, UN Doc. A/5217.

[9] Article 1 UNGA Res. 1803.

[10] Article 8 UNGA-Res. 1803.

[11] Lilian Aponte Miranda, The Role of International Law in Intrastate Natural Resource Allocation: Sovereignty, Human Rights and People Development, 455 *Vanderbilt Journal of Transnational Law*, (2012), pp. 794-95. The author argues that the question of sovereignty in the traditional international law is built around the relationship among States. However, the concept of sovereignty also relates to the exercise of the powers within the State' borders and then concerns the relationship of the States with its peoples; See also Schrijver, N.J., *Sovereignty over Natural Resources: Balancing Rights and Duties*, The Hague, Cambridge University Press, (1997), p.255; For critical analysis see Duruigbo Emeka, Permanent Sovereignty and Peoples' Ownership of Natural Resources in International Law, (2006), p. 92; Schachter Oscar, *Sharing The World's Resources,* New York, Columbia University Press (1977) pp.124-25. He argues that at the international level, the principle of permanent sovereignty has become the focal normative conception used by the states to justify their right to exercise the control over the production and distribution arrangements without being hampered by the international law of state responsibility as it had been traditionally interpreted by the capital-exporting countries.

resources located in their respective countries. Secondly, the utilisation of these resources for the development purpose by reducing the economic dependence from the departing colonial powers. Thirdly, these countries were determined to assert power and control over their natural resources against the unfair dealings of the developed countries and multinational corporations.[12]

The debates were partly developed during the decolonization process, subsequently, as the human right of the people to self-determination. The debate was later developed as the right of developing countries to exercise control over their natural resources, determine the goals and the means through which the economic development could be achieved.[13] The principle of permanent sovereignty over natural resources was incorporated in international human rights instruments like the International Covenant on Civil and Political Rights (ICCPR), 1976 and the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1976,[14] as well as the African Charter on Human and Peoples' Rights, 1981.[15] However, its practical implementation despite these efforts at the

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[12] See Barberi Michele, *Developing Countries and their Natural Resources. From the Elaboration of the Principle of Permanent Sovereignty over Natural Resources to the Creation of Sovereign Wealth Funds*, (2007). p. 3 (unpublished paper) argues that the newly independent states contested application of international law on foreign investments particularly inter-state economic relations and call for promotion of the new international economic order.

[13] Miranda Lilian Aponte, The Role of International Law in Intrastate Natural Resource Allocation, (2012) p. 794; see also Anghie Antony, "The Heart of My Home": Colonialism, Environmental Damage, and the Nauru Case, *34 Harvard International Law Journal,* (1993) p.474,. It is argued that the principle of permanent sovereignty over natural resources was developed to mitigate the claim by the developing countries (by and large, and newly independent countries) against the developed countries on the unfair entitlement over natural resources concessions acquired during colonial period.

[14] G.A. Res. 2200A, U.N. GAOR, 21st Sess., Part I, Art. 1, 2, U.N. Doc. A/6316 (1966) (entered into force Jan. 3, 1976). Article 1, paragraph 2 of both Covenants reads: 'All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

[15] See article 21 (1) to (3) of the African Charter on Human and Peoples' Rights, 1981; also see articles 5 (3) (c), 6 (d) and 7 (2) of the Treaty for the Establishment of the East African Community, 1999.

international and regional level seems paradoxical and could not clarify and/or ease the ambiguity surfacing around the debates over intrastate natural resource governance.

The greatest challenge that is facing the developing countries is how to translate the hard-fought struggle over natural resources sovereignty into the economic development of the people. As rightly noted at the beginning of the debate, the developing countries and newly independent states were demanding for the recognition of their inherent right over the endowed natural resources. As such, the debate was leveraged against the developed countries and the multinational corporations which were, by and large, controlling the substantial shares in the natural resources sector. It was alleged that developed countries had, through dubious agreements, exploited the developing countries' natural resources.[16]

Today, the natural resources in these countries, instead of being a blessing, have turned out to be a curse. The peoples' claims for the benefits derived from the exploitation of the abundant natural resources have, ironically, been directed towards governments. Prof. Chris Peter Maina commented thus;

> It would seem that Africa has gone around in a vicious circle. Thirty years later the continent is back where it began. Multinational corporations, assisted by the local comprador elements are back with vengeance. They do not only control the resources, but they are highly protected by powerful agents in the State and the private sector. This renders the people – for whom the whole war for resources was waged – vulnerable and helpless.[17]

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[16] Dolzer Rudolf, Permanent Sovereignty over Natural Resources and Economic Decolonization, *Human Rights Law Journal* 7 (1986), p. 217.

[17] Peter Chris Maina, Miles Apart but Walking the Same Path: The Right of the People to Control their Natural Wealth and Resources in Nigeria and Tanzania, The Founder's Day Lecture, *Nigerian Institute of Advanced Legal Studies,* Lagos, (2007), p. 12.

For a number of decades now, the main concern is how the political elite in the entire African continent is managing the natural resources. Contrary to the peoples' expectations, what seemingly appears to be a common feature in the continent is the control of the natural resources under exclusive preserve of the governments while the majority of the population is left with few options at their disposal. This is exacerbated, as noted above, by entering into natural resources extraction agreements with the multinational corporations at throw away prices by the post-independent African states. However, this time around, the peoples' enemies are their own leaders and not the developed countries and their respective multinational corporations.[18]

Notwithstanding the increased inflow of direct foreign investments in the continent, statistically, the poverty has increased steadily challenging the relevancy of the foreign investments in the developing countries in general and resource-dependent states, in particular.[19] Apart from the abject poverty striking the continent, as if the devil was born and buried there, natural resources have been sources of intrastate conflicts bedeviling the continent, in particular, in countries endowed with the abundant resources. [20] There is a nexus between the

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[18] For critical discussions on the above issue, see, among others, Alao Abiodun, *The Tragedy of Endowment: Natural Resources and Conflict in Africa*, Rochester, University of Rochester Press, (2007), pp. 120 - 145; See also, Cohen N., The Curse of Black Gold: Oil is Bad News for a Country; Far from Bringing Prosperity, It is the Harbinger of Poverty, Malnutrition and oppressive Government, *New States-Man*, 2 June (2003); See also Date-Bah S.K., Rights of Indigenous People in Relation to Natural Resources Development: An African Perspective, *16 Journal of Energy and Natural Resources Law,* (1998), pp. 389 - 395.

[19] Africa Progress Panel, *Equity in Extractives: Stewarding Africa's Natural Resources for All*, Africa Progress Report, (2013), pp. 46 - 50, noted that foreign direct investments increased as compared to the previous decade, for instance, the major global mining companies increased their investments from USD315 billion in 2007 to USD 480 billion in 2011.

[20] For in-depth discussion, see Dufresne Robert, The Opacity of Oil, Oil Corporations, Internal Violence and International Law, *36 New York University Journal of International Law and Politics,* (2003- 2004), pp. 331 - 354; Okowa Phoebe, N., Natural Resources in Situation of Armed Conflict: Is there a Coherent Framework for Protection? *International Community Law Review* 9 (2007); Majinge Charles Riziki, The Doctrine of Permanent Sovereignty over Natural Resources in International Law and its Application in Developing Countries: The case of the Mining Sector in Tanzania, (2010), pp. 244 - 245. He argues that the challenge is no longer how to protect people's rights against colonial powers, but, firstly, how to secure the demands of the people for

multinational corporations' natural resource extraction activities and the internal violence. For instance, there is evidence of the internal violence in the resources-rich states, allegedly, financed by multinational corporations operating in the respective area. It is noted that most of the insurgent groups across the continent waging war against the legitimate governments spend billions of dollars for the ammunition in an exchange for the natural resources through black markets with impunity.[21] For instance, the blood diamond in Sierra Leone and Liberia, the UNITTA rebels and oil resources in Angola, Sudan oil conflicts which led to the dismemberment of the state into two, namely; Sudan and South Sudan and the Democratic Republic of Congo rebel groups just to mention the few.[22]

There is an intensification of intrastate debates over the natural resource governance, particularly, the distributional concern of the benefits derived from these resources. Also, the contemporary debate challenges the uncontested state's sovereignty claims over the ownership of natural resources by charting out the means of developing ideals that are aimed at distributing the economic benefits to the entire population in the resource-rich states, among others.[23]

As noted in the preceding part, the main focus of the debate was for inequitable distribution of the power and resources among the states. However, the question

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their rightful share in the exploitation of their natural resources against their own government and secondly, against the foreign investors.

[21] Dufresne Robert, The Opacity of Oil, Oil Corporations, Internal Violence and International Law, (2003- 2004) p. 334.

[22] See Okowa Phoebe, N., Natural Resources in Situation of Armed Conflict: Is there a Coherent Framework for Protection? (2007), p. 237; see also Majinge Charles Riziki, The Doctrine of Permanent Sovereignty over Natural Resources in International Law and its Application in Developing Countries, (2010), p. 245.

[23] See Okowa Phoebe, N., Natural Resources in Situation of Armed Conflict: Is there a Coherent Framework for Protection? (2007) p. 246. Arguing that the concept of permanent sovereignty over natural resources has a particular resonance beyond decolonization. It is quite unfortunate that in international law, the governments are not required to be accountable to their people on the use of natural resources. Thus, it is further argued that displacing governments autonomy in determining the destiny of their population is clearly dangerous; See also Roth Brad, R., *Governmental Illegitimacy in International Law,* Oxford, Oxford University Press, (2000), pp. 1 - 69 and pp. 413 - 428; Crawford James, The Right of Peoples: Peoples or Governments? in Crawford James, *The Right of Peoples,* Oxford, Clarendon Press, (1988) pp. 55 - 68**.**

of ownership over natural resources between the states and the people within a confined state's boundaries, among others, never got a deserved attention of the parties which equally, call for an international legal approach.[24] The states and the people were synonymously and interchangeably seen as homogeneous, presumably because the latter constitutes the former. Irrespective, the sovereignty over natural resources is a right of people as well, when the states use and control natural resources in their territory, they have the obligation to do so with the aim to improve the well-being of their people.

Notwithstanding the fact that the international law has for a longtime taken a neutral role (non interference of states' internal affairs) on the intrastate natural resource governance, the contemporary inadequacies and challenges call for the revitalisation of principles of the international law on the intrastate natural resources governance in order to mitigate the occurrence of "the resource curse" or "Dutch disease" in the natural resources-rich states.[25] For instance, the

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[24] Miranda Lilian Aponte, The Role of International Law in Intrastate Natural Resource, (2012) p. 794.

[25] Barbieri, Michele *Developing Countries and their Natural Resources,* (2009), p. 21. He describes 'resources curse' can occur because of strictly economic reasons too. For instance, in several developing countries a dominant primary sector based on the extraction of natural resources discourages investments in other economic sectors which in the beginning are less profitable, but which might provide higher returns than the exploitation of natural resources as soon as they achieve a certain degree of development. Moreover, as the export of massive amounts of natural resources overvalues real exchange rates of developing countries, this undermines international competitiveness of other goods, providing a further incentive to developing countries to specialize in the sectors related to the exploitation of natural resources instead of promoting a greater diversification in their economies. As a result, dependency of developing countries on the exploitation of a few natural resources becomes increasingly entrenched. In such a situation their economy is vulnerable to the changes of world prices of the natural resources they exported, as well as from the possible depletion of the natural resources themselves. See also Paul Stevens and Evelyn Dietsche, Resource curse: An analysis of Causes, Experiences and Possible Ways Forward, *Energy Policy*, (2008), p. 56; Edward Barbier, *Natural Resources and Economic Development*, Cambridge University Press (2005), p. 108; Duruigbo Emeka, Managing Oil Revenues for Socio-Economic Development in Nigeria: The Case for Community-Based Trust Funds, *North Carolina Journal of International Law & Commercial Regulation*; (2004), p. 123; Duruigbo Emeka, The World Bank, Multinational Oil Corporations and the Resource Curse in Africa, *University of Pennsylvania Journal of International Economic Law*, (2005), p. 5; Päivi Lujala *et al*, A Diamond Curse? Civil War and a Lootable Resource; *Journal of Conflict Resolution* (2005); p. 538; Paivi Lujala, Deadly Combat over Natural Resources: Gems, Petroleum, Drugs, and the Severity of Armed Civil Conflict, *Journal of Conflict Resolution*(2009),

increased international integration amongst states brought with it challenges which require an agreed common approach addressing the emerging phenomenon like the environmental concerns caused by the quest for achieving the economic development through the exploitation of natural resources. Therefore, the focus of the principle of PSNR shifted its emphasis by imposing the obligations on states to protect the environment while exploiting their endowed natural resources in a sustainable manner.

The United Republic of Tanzania is not an exception to these overwhelming challenges, bearing in mind the experience in the governance of the mining sector which was opaque. As if lessons were not well learnt, Tanzania is likely to fall into the same trap. Of late, there has been self-proclaimed natural resource sovereignty by the political elites to the detriment of the entire population. To exemplify this assertion, Members of Parliament have, on various occasions, requested for the tabling of oil and gas agreements before the National Assembly but the government has throughout ignored the request. The government has invariably maintained that she cannot table the said concessions before the Parliament because she is bound by confidentiality clauses entrenched in the said agreements. This explanation had not amused the Members of Parliament.

Thus, on 3rd November, 2014, the Chairman of the Parliamentary Public Accounts Committee (PAC), instructed the police officers to arrest the Board Chairman and Acting Director General of Tanzania Petroleum Development Corporation (TPDC), the state-owned corporation that manages the government lion's share in the natural oil and gas industry) for allegedly, failing to submit the oil and gas contracts before the committee.[26] The committee had convened a

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p. 50; Snyder Richard, Does Lootable Wealth Breed Disorder?: A Political Economy of Extraction Framework, *Comparative Political Studies*, (2006) p. 943; Olsson Ola; Diamonds Are a Rebel's Best Friend, *The World Economy* (2006), p. 33.

[26] Top TPDC Officials Released after the Arrest Order Quarried, The Citizen, Tuesday, November 4th 2014; Kizito Makoye, Top Tanzania Official Arrested in Row Over Oil and Gas Contract, Thomson Reuters Foundation, Tuesday, November 4th 2014 available at

meeting and summoned the two officials for the purposes of, among other things, receiving the TPDC's audited accounts for the period ending on 30th June 2013. It is important to note that as a matter of law, a Parliamentary Standing Committee has powers to order any person to appear before it and give evidence or produce any document. This is provided for under section 13(1) of the Parliamentary Immunities, Powers and Privileges Act No. 3 of 1988.

There are no transparency and accountability in the oil and gas industry, despite the enactment of the laws on transparency and accountability. The enacted laws include the Petroleum Act, 2015,[27] the Tanzania Extractive Industry (Transparency and Accountability) Act 2015,[28] and the Oil and Gas Revenue Management Act 2015.[29] There are incidental consequences brought by the exploitation of natural resources like the environmental damages are so alarming. Due to lack of transparency and accountability, the government loses a colossal revenue caused by tax avoidance, tax evasion, and aggressive tax planning schemes. There is also, a reasonable apprehension of corruption in the awarding of natural resources contracts at the expense of the people.

That said, the extraction of natural gas sees the deepening of a range of the legal, political, economic and social challenges. In order to ensure that the natural gas resources will be used sustainably for the benefits of the present and the future generations, key issues of the public debate are; the need for a regulatory environment that fosters transparency during the negotiation and award of the oil and gas extraction contracts and the revenues accruing from the extraction. In addition, there is an importance of balancing the oil and gas production with the conservation of the different exploration areas' unique

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http://news.trust.org//item/20141104074823-je29f/?source=fiOtherNews3 (accessed on 10th April 2018).

[27] The Petroleum Act No. 21 of 2015.

[28] The Tanzania Extractive Industry (Transparency and Accountability) Act No. 23 of 2015.

[29] The Oil and Gas Revenue Management Act No. 22 of 2015.

biodiversities and the wider environmental wellbeing, enforcing the high standards of the corporate responsibility and the compliance on the part of the investing companies to ensure that the anticipation of the wealth from Tanzania's natural gas does not intensify the land insecurity, and other social conflicts.[30] To address the above issues require sound policies, legal and institutional frameworks that will ensure wide public participation and transparency in the decision-making.

1.2 Statement of the Problem

The United Nations General Assembly played a decisive role during the debates on the evolution of the principle over natural resources sovereignty and governance. It created the platform through which states engaged in the debates regarding the equitable utilisation of natural resources. The adoption of the UNGA resolutions was a mile step towards the realisation of equitable interstate natural resource governance. However, the role of international law in the contemporary intrastate natural resource governance has received minimal attention.[31] This is exacerbated by the fact that the oil and gas industry is one of the complex industries to govern due to the nature of contending interests involved and the amount of intensive financial investments required.[32]

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[30] For instance, in the year 2013, there were series of riots, destruction of properties and some incident of death reported in some parts of Mtwara and Lindi where the oil and gas discoveries were made. The statements from the local government officials, law-enforcement agencies such as the judiciary and police, international and national civil society organisations (CSOs), the media, traditional institutions and religious leaders, were clear manifestation of the contention between resource owners and multinational national companies. see also *The East African*, Mtwara Protests Expose Gaps in Oil and Gas, Mineral Laws Management, 3rd February, 2013, *The East African*, Local Turn to Protests for a Larger Share of Mining Revenue, 5th January, 2013.

[31] Schrijver N.J., *Sovereignty over Natural Resources,* (1997), p. 311. For critical discussion see Miranda Lilian Aponte, The Role of International Law in Intrastate Natural Resource, (2012) p 803; Duruigbo Emeka, Permanent Sovereignty and Peoples' Ownership of Natural Resources in International, (2006).

[32] The interests include the host states legitimate desire to generate revenue out of their endowed natural resources, multinational extractive companies, financial institutions desire to generate

The contemporary natural resources governance discourse is not concerned much about who owns the resources, but rather how the states endowed with natural resources can utilise them for their people's benefits. The effective natural resource governance depends on a concerted cooperation of all stakeholders involved. The envisaged cooperation is in two folds. Firstly, is the international and the transnational legal cooperation between the resource-rich states "host states" and the multinational extractive companies' states "home states". Secondly which run from the first, is to address the host states domestic challenges on the policy, legal, and regulatory frameworks and take on board the international and transnational legislative measures to enhance intrastate natural resource governance.

As for the international and transnational legislative measures, the approaches taken by the home states transnational legislative measures on accounting and disclosure and the voluntary initiatives through transparency and accountability are narrow. This is because, their main focus is on the revenue inflow i.e., the disclosure of the payments made by the extractive companies to the host governments.[33] However, natural resource governance is not concerned only with the revenue inflow rather there are other important aspects along the resource value chain, in particular, the oil and gas industry which complete the natural resources governance jigsaw puzzle. These aspects include the allocation of a license permit for extraction, the award of contracts, fiscal regime, and environmental protection, among others.

In addition, the financial investment required in the oil and gas industry is intensive and therefore, cannot be catered for by the local financial institutions. It is rather catered for by the international financial institutions located in the home

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profit from natural resources extraction, and home states of multinational extractive companies and financial institutions desire to generate income from taxation of their respective activities.

[33] See the Dodd Frank Wall Street Reform and Consumer Protection Act 2010 (Dodd-Frank Act - USA); the Directive 2013/34/EU on Accounting and Disclosure; the Extractive Sector Transparency Measures Act 2014 ESTMA - Canada); and the Extractive Industries Transparency Initiatives (EITI).

states of the multinational extractive companies. Also, the multinational extractive companies are complex to manage due to their structural formation. They operate through subsidiaries incorporated in different jurisdictions and some are in the tax havens. The financial investments and the multi-jurisdictional operations call for the setting of the rules regulating and controlling the operations of their respective activities. This is, in particular, without the rules, some of the activities are schemed to stage and facilitate tax avoidance, tax evasion, aggressive tax planning, cross-border corrupt transactions, and money laundering, among others, which fall beyond the host states investigatory and prosecutorial jurisdictions.

At the domestic level, things are not at ease either; there are fragmented and competing intrastate policy, legal, institutional, and regulatory frameworks in the oil and gas industry without clear coordination and harmonisation. Firstly, the national development plans which are implemented through the policies are envisioned towards the National Development Vision-2025 which envisage to make Tanzania a middle-income country. However, the Long Term Perspective Plan, a special purpose vehicle, implementing the National Development Vision 2025 does not seem to be in harmony with the laws and the National Natural Gas Policy 2013 as a necessary driving force.

Secondly, the enactment of the Petroleum Act 2015, the Tanzania Extractive Industry (Transparency and Accountability) Act 2015, and the Oil and Gas Revenues Management Act 2015 for the purpose, supposedly, of updating and consolidating the existing legislation in the oil and gas industry is not in harmony with pre-existed oil and gas legal and regulatory frameworks. For instance, prior to the enactment of these laws, the government had already entered into 28 Production Sharing Agreements (PSAs) with 18 companies over prime oil and gas blocks. Each individual PSA creates its separate legal and regulatory framework of the oil and gas industry along the resource value chain. Therefore, there are parallel and, at times, the possibilities of overlapping applicable legal

and regulatory frameworks, i.e., the enacted legislation and the individual production sharing agreement governing oil and gas industry.[34]

Thirdly, in a wake of the completion of the legal, institutional, and regulatory paradoxes, the National Assembly enacted two legislations, namely the Natural Wealth and Resources (Permanent Sovereignty) Act 2017 and the Natural Wealth and Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Act 2017.[35] The former Act empowers the National Assembly to review all agreements (oil and gas), arrangements for the exploitation, extraction, and the use of natural resources entered by the government [36] while the latter empowers the National Assembly, through resolution, to direct the government to review and re-negotiate the terms of all agreements or arrangements considered by the National Assembly unconscionable.[37] In addition, the Act provides the dichotomous provision to the effect that once the government commence re-negotiation of the terms of the agreement with a party in compliance with the resolution of the National Assembly, whether or not the agreement is reached

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[34] Section 261 (3) of the Petroleum Act 2015 provides that all agreement entered into by using the repealed Petroleum (Exploration and Production) Act, 1980 shall be deemed to have been entered into by using the newly enacted law and shall continue to be in force until lawfully determined. The effect of this law is that there is likelihood of contradictions between the terms contained in the individual Production Sharing Agreements and the provisions of the Petroleum Act in so far as the interpretation and enforcement are concerned. This is, in particular, where the terms contained in Production Sharing Agreements do not comply with the legal requirements provided for under the Petroleum Act. In addition, section 27 of the Tanzania Extractive Industry (Transparency and Accountability) Act 2015 provides that all mineral agreements, production sharing agreements or any other agreements signed prior to coming into operation of the Act, shall be subjected to disclosure required under the Act, except where the information is confidential as may be determined by the Tanzania Extractive Industry Transparency Committee established under the Act. However, the Act does not define information deemed confidential, thus, leaving it to discretionary powers of the committee.

[35] Acts no 5 and 6 of 2017 respectively, It is argued and rightly so, imposition of another regulatory framework over existing one makes investment environment volatile, more so, when the new regulatory regime entrench strict provisions which render the implementation of the regulatory frameworks in the Production Sharing Agreements a nugatory.

[36] See section 12 of the Natural Wealth and Resources (Permanent Sovereignty) Act, No. 5 of 2017.

[37] See sections 4 (1), 5 (1) - (3) and 6 (1) of the Natural Wealth and Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Act, No. 6 of 2017.

between parties, such terms shall cease to have effect and shall be treated as having been expunged from the impugned contract.[38]

Fourthly, the oil and gas are exhaustible resources and deplete with time. Their proper extraction should be a determinant factor for the economic development of the resources-rich states, without which there is a risk that the future generations will not have an opportunity to benefit. Therefore, proceeds generated from the extraction should be invested in other dynamic sectors like the construction of infrastructures, agriculture, and manufacturing industries, among others. Such diversification creates a synergy between the extraction of natural resources for the sustainable development and the intergenerational responsibilities.[39] Equally, oil and gas extraction have impacts on the environment. The environmental damages do not only affect the states in whose territory they occur, but also the world as a whole. Therefore, states have the duty to refrain from using their natural resources in a way which can damage their neighbours and the world environment in general.[40]

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[38] See section 7 (1) of the Natural Wealth and Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Act, No. 6 of 2017. From the wording of the provision, one wonders if there is re-negotiation or review by parties if one of the parties has power than the other and that before the beginning of the review the final result is already pre-determined.

[39] Johnson-Calari Jennifer, Rieltveld Malan, *Sovereign wealth management*; Central Banking publications, (2008), p. 180.

[40] Tarlock Dan, A., Sustainable Development in Latin American Rainforests and the Role of Law: Article: Exclusive Sovereignty Versus Sustainable Development of a Shared Resource: The Dilemma of Latin American Rainforest Management; *Texas International Law Journal*; (1997); p. 43; Maggio Gregory, F., Inter/intra-generational Equity: Current Applications under International Law for Promoting the Sustainable Development of Natural Resources, *Buffalo Environmental Law Journal*, (1997), p. 204.

1.3 Objectives and Significance of the Study

1.3.1 Main Objective

The main objective of this study is to examine how the principle of international laws complement the intrastate policy, legal, institutional, and regulatory frameworks on the natural resource governance, in the oil and gas industry.

1.3.2 Specific Objectives

1. To assess the legal and contractual frameworks between the multinational extractive companies and the government of the United Republic of Tanzania in order to see the extent to which their respective interests adversely affect the performance of natural resources sector contribution to the economy of the state.

2. To examine the Tanzanian policy, legal and institutional frameworks on natural resource governance and identify their respective strengths and weaknesses which have direct impacts on natural resource governance and to propose general and specific legal reforms aimed at enhancing oil and gas industry governance.
3. To explore how best the natural resources can be exploited in an economical and environmentally friendly manner that benefits the people as a whole and in particular the local communities where the natural resources are located and guarantee the sustainable development of the present and the future generations.

1.3.3 Significance of the Study

1. The study widens up the debate and the discourse on the role of international law on natural resource governance and addresses the emerging contemporary issues on intrastate natural resource governance.

2. The study harmonises the legal, institutional, and regulatory frameworks by taking on board the international, transnational legal initiatives and domestic frameworks to enhancing intrastate natural resource governance through a wider participation of the public in terms of ownership and realisation of the benefits from the oil and gas resources.

3. The study adds to the existing literature on the natural resource governance, in particular, the narrowed scope of looking at natural resource governance from a revenue inflow perspective to a widened scope along the oil and gas resource value chain.

4. The study highlights, in the course of discussions, the setbacks and mistakes made in the mining sectors in Tanzania so that the same will be avoided in the future when framing the policy and laws governing the extraction of natural resources in the country.

1.4 Literature Review

Charles Riziki Majinge[41] traces the historical development of the principle of Permanent Sovereignty over Natural Resources from the time when the United General Assembly passed and adopted the resolutions 523 and 626 in January and December 1952 respectively. The two resolutions recognise the importance of natural resources in the developing countries. The developing countries inspired by the Havana Charter,[42] reaffirmed the protection and promotion of foreign investments premise on the terms and conditions determined by the host countries, seeking greater power to control their resources. Further, the need for the optimum utilisation of natural resources, and the quest for the economic sovereignty of the newly independent countries to determine their economic

[41] Majinge Riziki Majinge, The Doctrine of Permanent Sovereignty over Natural Resources in International Law and its Application in Developing Countries, (2010), pp. 235 – 268.

[42] See the Final Act of the Havana Charter on International Trade Organization of 1948.

progress crystallised the debate on the permanent sovereignty over natural resources.[43] The author argues that the principle of PSNR was re-echoed in subsequent declarations and other human rights instruments.[44]

The author adds that the challenge of the developing countries like Tanzania is how they can best exercise the right over sovereignty of their endowed abundant resources with the interests of the people at the centre of the equation. There are contending set of rights and obligations in relation to asserting recognition and respect of their inherent right over their natural resources, on the one hand and the incapacity of African mode of production, which, by and large, rely on the foreign expertise to exploit these resources, the quantity to be exploited and fixing prices for the exploited resources are all outside their control, on the other hand.[45]

It is the author's contention that the liberalisation policies that were put in place by the government of Tanzania to encourage the foreign and domestic investors in the mining sector were onerous. The author underscores that most of these policies were advocated by the World Bank to the African countries by repealing some of the stringent performance-related legislative measures in the mining

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[43] Majinge Riziki Charles, The Doctrine of Permanent Sovereignty over Natural Resources in International Law and its Application in Developing Countries, (2010), p. 236.

[44] Some of the General Assembly resolutions on permanent sovereignty over natural resources include: Resolution 2158 (XXI) of 25 November 1966, 2386 (XXIII) of 19 November 1968, 3016 (XXVII) of 18 December 1972, 3171 (XXVII) of 17 December 1973, 3281 (XXIX) of 12 December 1974, 3202 (S-VI) of 1 May 1974 and 2692 (XXV) of 11 November 1970. See also International Covenant on Civil and Political Rights 999 U.N.T.S. 171, entered into force on 23 March 1976 and International Covenant on Economic Social and Cultural Rights, 993 U.N.T.S. 3, entered into force on 3rd January 1976; See also World Bank, Strategy for African Mining, Technical Paper No. 181, Washington DC, (1992).

[45] For critical discussion see Alao Abiodum, *The Tragedy of Endowment: Natural Resources and Conflict in Africa*, (2007), pp. 120-145. See also, Cohen, N., The Curse of Black Gold: Oil is Bad News for a Country; Far from Bringing Prosperity, It is the Harbinger of Poverty, Malnutrition and oppressive Government, *New States-Man*, 2 June (2003).

industry which were deemed unfriendly to the investors.[46] Subsequently, there were major reforms/overhauls of legislation and policies governing the mining sector in Tanzania, supposedly, to heed to the World Bank advise. The policies and laws which were enacted encouraged tax holidays, low corporate taxation, exemption from customs and sales duties and reduced royalty. The results from these panaceas saw the mining sector contributing insignificantly to the national economy.[47]

The author further cites corrupt practices by the highest government officials as a setback towards the contribution of the mining sector to the economic well-being and sustainable development of the people of Tanzania as a whole. He concludes by calling upon the developing countries to consider acquiring a significant stake in the administration and management of local subsidiaries of the foreign companies. The author argues that Members of Parliament should be involved in the negotiation of these multimillion contracts as the legitimate representative of the people.

The article highlights the application of the principle of PSNR in governing the mining sector in Tanzania. It also highlights the challenges encountered in balancing the interests of the resources endowed countries *vis a vis* foreign extractive investment companies. However, its scope is limited to mineral resources only and excludes the oil and gas resources which are subject of the study. It also does not give the solution on how the principle of international laws can be applied to enhance the intrastate resource governance in the oil and gas industry.

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[46] Majinge Riziki Charles, The Doctrine of Permanent Sovereignty over Natural Resources in International Law and its Application in Developing Countries, (2010), p. 246.

[47] Majinge Riziki Charles, The Doctrine of Permanent Sovereignty over Natural Resources in International Law and its Application in Developing Countries, (2010), p. 249. For further discussion of Tanzania investment in mining industry, see Peter, C.M., Miles Apart but Walking the Same Path: Control of Wealth and Natural Resources – Lessons from Nigeria and Tanzania, (2007).

Adelardus Lubango Kilangi[48] examines the application of the principle of Permanent Sovereignty over Natural Resources in regulating the mining sector in Tanzania. The author expounds the principle by stating that it was developed following the complaint by the resource-rich developing countries regarding inequitable arrangements of the exploitation of their resources against the resource seeking developed countries. The author elaborates the principle by addressing the concerns of the resource-rich countries, thus, the rights to assert ownership of their resources, the right to exploit their resources, the right to manage and control the exploitation of the resources.

The author contends further that Tanzania is endowed with the abundant mineral resources which, if exploited equitably, could lead in the sustainable economic development of the people by improving the essential services in all walks of life. The author argues that the resources-liberal approach that Tanzania has adopted contributes immensely to the poor performance of the mineral sector and thus the application of the principle of permanent sovereignty over natural resources becomes a paradox. The author concludes that if Tanzania wants to benefit from the principle of permanent Sovereignty over natural resources, it should firstly address the issues of capacity, technology and capital in the mineral sector. Addressing above imperative issues must be strongly supported by patriotism and political will.

The work traces the origin of the principle of permanent sovereignty over natural resources and the extent in which it has been applied in regulating the mining industry in Tanzania. Its scope is, however, limited to the mineral resources, whereas the study covers oil and gas resources. Also, it does not cover the aspect of how international laws can be used in mitigating the setback of

[48] Kilangi Adelardus Lubango, *The Principle of Permanent Sovereignty over Natural Resources: Its Application in regulating the Mineral Sector in Tanzania*, University of Dar es Salaam (PhD thesis), (2013).

intrastate laws and regulations on natural resources generally and the oil and gas industry, in particular.

Fernando Loureiro Bastos[49] examines the understanding of international law and its current development in the region of Southern Africa when seeking to appreciate the principle of permanent sovereignty over natural resources. In the course of his examination, he considers the legal and political sovereignty considerations in assessing the principle in the Southern African states. The author elaborates that the models of internationalisation of the management of natural resources within a territory are subject to the sovereignty and jurisdiction of the states. The management of the natural resources, whether onshore or offshore, which does not take into consideration the will of all the states involved is a contradiction of the basic principle of international laws.

The author points out the challenges encountered in appreciating the application of international law in the African region. Firstly, a marginal status that is accorded to the international law as one of the sources of law in the legal systems of African states. Secondly, the reluctance to incorporate international law into the legal systems of the African states. Thirdly, a subordinate position to which the study and research on matters of international law are relegated in African states.

The author concludes that the possibility of moving towards the common resource management system in the region of southern Africa is an illusion. The author gives a reason for his assertion thus; the level of knowledge and dissemination of the contemporary development in international law is relatively low. This is exacerbated by the fact that the pursuit of national interests of states and their political elite requires maintenance of the classical view of sovereignty power granted to states as the subject of international law.

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[49] Bastos Fernando Loureiro, (2013) *A Southern African Approach to the Permanent Sovereignty over Natural Resources and Common Resource Management Systems*, University Siegen, Working Paper 2013/01.

The article examines the application of permanent sovereignty over natural resources in the realm of international law in African states. It highlights the challenges facing many African states in appreciating and realising the principle of permanent sovereignty over natural resources. The article, however, does not address the situation of countries which have incorporated the principle of international laws in their domestic jurisdiction and yet failed to fully realise the management and control of their natural resources.

Emeka Duruigbo[50] argues that the realization of the people's right to natural resources necessitates a de-concentration of the right to the management of the resources from the government, particularly in those countries where the political leaders have consistently demonstrated the inability to manage the resources for the public good. Accordingly, the author proposes a tiered process of the citizen involvement in the management and ownership of the resources in the domestic legal context. This process involves equity participation and ultimately private ownership. The author's article situates aspects of the discussion in the context of Nigeria, a leading oil producer that evidences many of the pathologies of inequitable petroleum development, although the experiences, lessons, and suggestions are applicable to many developing countries which are endowed with natural resources.

The author firstly, revisits the question of the appropriate holders of the right to natural resources under international law, maintaining that the right belongs to the entire population within a country. Secondly, he examines the case for realising and operationalising the peoples' right to natural resources through a system of private ownership. He focuses especially on countries which experience poor and unresponsive leadership, and the vast majority of citizens have no meaningful participation in the formulation of the national economic and

[50] Duruigbo Emeka, Realizing Peoples' Rights to Natural Resources, 12 *The Whitehead Journal of Diplomacy and International Relations, Texas,* (2011), pp. 33 - 100.

social policy that would assure a just distribution of the benefits and burdens of natural resource exploitation.

He presents a set of policy choices that can vastly enhance natural resource governance for the public benefit. In particular, he presents policy prescriptions that emphasize stakeholding and shareholding. The people directly affected by the natural resource development projects should receive, and have an opportunity to manage a portion of the revenues accruing from the development through direct equity participation in the resource development ventures. The author further recommends the modification of the approach under the Texas Relinquishment Act[51] as a possible model for the citizen equity participation. Ultimately, the government should completely surrender ownership of the natural resources under the domestic constitutions and laws.

He concludes that national leaders are unlikely to acquiesce to these changes, thus necessitating the intervention of the international legal and political system to protect the people's right to natural resources. This intervention could take the form of incorporation of the ideas discussed here in the jurisprudence of international tribunals and the formulation of a new convention on natural resources governance.

1.5 Hypotheses

This study is set to test the veracity of the propositions;

1. The role of international law in intrastate natural resource governance in resource-rich states generally and Tanzania, in particular, is decisive. However, the contemporary approach of the international and transnational legislative initiatives on intrastate natural resource governance are narrowed. This is because they focus much on the

[51] The general system of ownership of oil and gas in the United States is that the landowner owns the oil, gas, and minerals that lie beneath his or her land.

revenue inflow and inadvertently ignore other aspects of the resource value chain.

2. The existence of the inadequate policy, legal, institutional and regulatory frameworks without a clear coordination and harmonisation has adversely accounted for the poor intrastate natural resource governance in the oil and gas industry in Tanzania.

1.6 Research Methodology

The study assesses the efficacy of the role of international law on intrastate natural resource governance. The main focus of this study is to examine the extent to which the principles of international law are used to complement the intrastate policies, legal, institutions, and regulatory frameworks affecting natural resources governance. The study notes that the oil and gas industry in Tanzania is relatively new and is still in its infancy stage, therefore, there is no much information written about the performance of the industry. As such, the study relied much on different kinds of literature from various jurisdictions with more or less similar features. In this endeavour, both the domestic and international laws, policies, regulations and other important instruments related to the natural resource governance were reviewed.

1.6.1 Data Collection Methods

In the course of collection of data, two methods were used, namely; documentary review and interviews. The two methods were chosen purposely because of the nature of the study taking into account of the novelty of the issues discussed relating to intrastate natural resource governance.

1.6.1.1 Documentary Review

As indicated in the preceding parts of this study, since the main purpose of this study is to review and assess the efficacy of the role of international law in intrastate natural resource governance, the method helped to gather the

necessary information related to the study and thus contributed immensely the findings of the study. This is because the laws and policies on natural resource governance generally and oil and gas industry, in particular, are in a documentary form.

This method involved collection of data from different libraries, i.e., the University of Dar es salaam Main Library, Faculty of Law Library located at the University of Dar es salaam School of Law Building (HURRU), libraries of the Tanzania-German Centre for Eastern Africa Legal Studies (TGCL), the Attorney General's Chamber particularly Department of Contracts and Treaties, Tanzania Petroleum Development Corporation (TPDC), Tanzania Revenue Authority (International Tax Unit), The Controller and Auditor General Office (CAG) and University of Bayreuth Central Library (*Zentralbibliothek*) and Faculty of Law and Economics Library (*RW-Bibliothek*). The study also reviewed the relevant legislation and commentaries, judicial decisions of the courts and tribunals (and their respective commentaries), books, journal articles, monographs, workshop reports, commission reports, newspapers and other useful materials.

1.6.1.2 Interviews

This method involved the collection of data from the field through semi-structured interviews. Sometimes referred to as a semi-patterned interview, the semi-structured interview address specific issues related to the phenomenon of the study.[52] It is flexible and the arrangements of the questions may be structured to yield considerable and offers multifunctional streams of data. In addition, it offers a potential to address the complexity of the study by understanding the interviewees' knowledge regarding the study phenomenon. Thus, making it easier for the researcher to evaluate and compare informants' statements fairly.

[52] Galletta Anne, *Mastering the Semi-Structured Interview and Beyond: From Research Design to Analysis and Publication*, New York, New York University Press, (2013), p. 24.

The semi-structured interview method was applied in the course of the collection of data and is divided into two categories.

1.6.1.2.1 Government Institutions and Departments

The first category of informants was government officials from ministries, institutions, and departments that are directly linked to the oil and gas sector. In this category, the officials of the following ministries were interviewed; the Ministry of Energy and Minerals, the Ministry of State in the Prime Minister's Office for Investment and Empowerment, the Ministry of Finance, the Ministry of Lands, Housing and Human Settlement Developments, the Ministry of Constitutional and Legal Affairs and the Ministry of State, Vice President's Office – Union and Environment. The Tanzania Petroleum Development Corporation (TPDC), a designate National Oil Company responsible for regulating the performance of oil and gas industry in Tanzania and the custodian of the government lion's share in the industry, the National Environmental Management Council (NEMC), the Prevention and Combating of Corruption Bureau (PCCB), the Attorney General's Chamber, in particular, the Directorate of Contracts and Treaties were visited. The directorate is essential because it is responsible for taking stock of the multilateral and bilateral agreements between the United Republic of Tanzania and the multinational corporations. Also, it acts as the custodian of the international, regional and sub-regional treaties to which Tanzania is a party. Lastly, the Lindi Municipal Council and Mtwara Municipal Council were visited.

1.6.1.2.2 Stakeholders Organisations

The second category of informants interviewed during the study is stakeholders' organisations in the oil and gas sector generally. They include the Lawyers Environmental Action Team (LEAT), a non-governmental organisation devoted to environmental protection and human rights issues related to exploitation of natural resources, the Legal and Human Rights Centre (LHRC), the Land Rights Research and Resources Institute (LARRRI/HAKIARDHI), a non- governmental

organisation established to spearhead the rights to the land of rural and peri-urban based small producers through activist researches, lobbying, and advocacy for policy changes, critical analysis of policies and laws and active participation in policy processes.

1.7 Scope of the Study

The study examines the role of international law in intrastate natural resource governance. However, the focus will be limited to the oil and gas resources which are located in Tanzania mainland. The reason behind is that the United Republic of Tanzania is a union between two sovereign states, the then Republic of Tanganyika and the Revolutionary Council of Zanzibar. Under the Articles of the Union,[53] there are issues that are regarded as matters of common concerns and are regulated by the union government. For the non-union matters, each party, i.e., the Revolutionary Government of Zanzibar and the supposedly Government of Tanzania Mainland (a non-existent government) has exclusive jurisdiction. Notwithstanding the fact that oil and gas resources are union matters under item 15 of the First Schedule to the Constitution of the United Republic of Tanzania, 1977 they have become a hotly contested issue between the governments of Tanzania Mainland, in real sense, the government of United Republic of Tanzania and Revolutionary Government of Zanzibar.[54]

The author states that the discussions and arguments on the policies, legal, institutional and regulatory frameworks put forth in this study reflect the position

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[53] The Articles of the Union of Tanganyika and Zanzibar of April 26,1964 are the basic legal foundation of the existence of the United Republic of Tanzania as an independent sovereign state. The Articles of the Union provides for list of Union Matters which are regulated by the Union Government. The list of the union matters are provided for under the First Schedule to the Constitution of the United Republic of Tanzania, 1977.

[54] The debate culminated amendment of the Constitution of Zanzibar in 2010 which, among others, removed oil and gas in the list of union matters, a move driven by the naivety and blatantly breaching the Constitution of the United Republic of Tanzania, the supreme law of the land, with impunity. For an in-depth discussion of these debates, see Majamba, Hamudi Ismail, Tanzania's Oil and Gas Industry Legal Regime, Management and Access Rights, *19 Recht in Afrika*, (2016). pp. 3 - 23.

of the policies and laws as at and/or before the date of submission of the thesis for examination.

CHAPTER TWO

THE PRINCIPLE OF PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES AS AN ASPECT OF NATURAL RESOURCE GOVERNANCE: A HISTORICAL SURVEY

2.1 Introduction

The principle of permanent sovereignty over natural resources is not a static legal concept. Its evolution has undergone a gradual development in order to accommodate the needs of the changing world. It is safe to state that its main focus shifted depending on the political and economic environment orchestrated by the dynamic economic relation of states. This chapter, therefore, traces the historical evolution of the principle of PSNR in a bid to demonstrate its dynamic character in the context of contemporary natural resource governance.

The historical perspective has it that the development of the principle of PSNR can be divided into three main phases. The first phase runs from the end of the World War II. This phase is characterised by the quest of countries still under the whims of colonial domination and non-self governed territories, including newly independent states and developing countries, to freely dispose of their natural resources in order to support their struggle for the political and economic independence respectively. This phase demonstrated the political character of the principle, that is, the right to self-determination which stems its roots under the UN charter and subsequently in various UNGA resolutions.

The second phase runs from the 1960s to 1990s. In this phase, it is apparently noted that the right to self-determination of the colonial people was achieved as most countries had gained their political independence. The focus of the newly independent states and the developing countries changed to accommodate the new challenges. For instance, how they could best develop their national economy in order to defend both the state sovereignty and the independence. These states advocated for the economic policies aimed at establishing the New

International Economic Order (NIEO) in a bid to generate sufficient means from the exploitation and utilisation of their natural resources for the economic development.

The third phase runs from the 1990s to the present. The last two decades and the advent of the 21st century changed the world political and economic relations significantly. There was a wide integration and the need to accommodate the new emerging trends such as globalisation with its political and economic patterns. Therefore, the right to self-determination for the colonial subjects and the political independence of former colonies was not a purchase of the day. This chapter notes two important aspects at the last part, firstly, the evolutionary character of the principle of PSNR shifting focuses in addressing the changing needs of the international community. Secondly, the unconventional methods through which the principle of PSNR evolved. The principle of PSNR evolved through various United Nations General Assembly Resolutions(UNGARs) and forms part of customary international law. However, equating the principle of PSNR with *jus cogens* is overstretching the principle which would tantamount to it being fluid and unmanageable.

2.2 Prelude to the Principle of Permanent Sovereignty over Natural Resources

Throughout the history of human being, resource exploitation has constantly been the core of his struggle in a bid to conquer nature. The exploitation of the endowed resources from nature helped a person transform from the primitive stage where one could not distinguish the person and the resources to another stage where the person was above the resources. As such, the person controlled and exploited them. The work of the early philosophers like Plato, John Locke, Hugo Grotius [55] expounded in detail how the persons were able to conquer the

[55] See Taylor, A.E., The Laws in Hamilton Edith and Cairns, Hunington, (eds.), *The Collected Work of Plato,* Manchester, Manchester University Press, (1921); John Locke, Second Treatise of

nature and exploited the endowed resources for their personal benefit and the community in general. Their work discussed the sovereignty and its economic aspects. For instance, the economic relationship between the people and their government in governing their endowed resources. They also highlighted what should the people do when their government failed to meet their legitimate expectations.[56]

A property becomes private when it is appropriated through one's labour from the state of nature and improve its value. A person's title is founded on the fact that one has through a work of the hands exploited it from the state of nature thus becomes the beneficial owner exclusively against others. It also argued that the exploitation can be made by many people communally and thus the communal property is created. John Locke stressed a point, thus, for one to establish a title of one's property, one must be able to demonstrate that one has exploited a particular property from the state of nature through one's labour and, therefore, acquires exclusive rights against all others. The ideology of the early philosophers influenced the development of the international law rules on acquisition of territories.[57]

The position held by the early philosophers in relation to controlling and managing natural resources suggests that the capacity of one to exploit natural resources from the state of nature as the determinant factor establishing the right to the property. Accordingly, the thesis does not seem to take into account pre-

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Government, in Two Treatise of Government, Laslett Peter., rev. (ed.), Cambridge & New York, Cambridge University Press, (1988), pp. 429 - 450.

[56] Kendal Willmoore, *John Locke and Doctrine of Majority Rule, Urbana, University of Illinois Press,* (1941), see also Laski Harold, J. *Political Thought in England from Locke to Bentham, London, William & Norgate,* (1920) cited in Tiewul Azadon, S., The Evolution of the Doctrine of Permanent Sovereignty of Natural Resources *15 University of Ghana Law Journal* 55 (1978-1980).

[57] Tiewul Azadon, S., The Evolution of the Doctrine of Permanent Sovereignty of Natural Resources, (1978- 1980). p. 5. He argues that the traditional international law recognised two fundamentals. Firstly, a territory was to be occupied if it belongs to no one and secondly, the occupation must be demonstrated by a physical occupation in order to confer the title. In natural law, the acquisition of territory carried with it ownership of the thing attached to the land.

existing rights of the individual over the property before the acquisition. It further suggests that the ability to exploit resources from the state of nature as an aspect of the resource sovereignty irrespective of the source under which an individual claims the title. Also, it was on the same thesis that the invasion of some territories by the stronger states was justified under the international law on the pretext of sharing and exploiting natural recourses endowed to the humankind in general.

The protection of foreign direct investments was, until the mid of the twentieth century, contained in the bilateral treaties of Friendship, Commerce, and Navigation (FCN). The bilateral treaties established trade relations between states since the eighteenth century. It obliged host states to treat investments in accordance with the international minimum standards and formed part of the customary international law.[58] Understandably, the international community was quite small and homogeneous and, therefore, the states were able to agree on arrays of issues of the basic principles, providing the minimum standards of treatment and protection of foreign investments.[59] The multinational companies with investments in the developing countries or colonies enjoyed the favourable conditions, in particular, the investments involving the exploitation of natural resources. It is argued that most of the proceeds benefited the multinational companies to the detriment of the host states. Therefore, activities of

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[58] Vandevelde, Kenneth, J., A Brief History of International Investment Agreement, *12 U.C. Davis Journal of International Law & Policy,* (2005), p. 159. For instance, in Latin America, there were several bilateral Friendship, Commerce and Navigation Treaties, namely; General Convention of Peace, Amity, Navigation and Commerce between U.S and Colombia, Art. Tenth, Oct, 3, 1824, 8 Stat. 306; Treaty of Peace, Friendship, Commerce, and Navigation, between U.S. and Bolivia., art. 13, May 13, 1858, 12 Stat. 1003; General Treaty of Amity, Commerce, and Consular Privilege, U.S.-El Sal., art. 13th, Dec. 6, 1870, 18 Stat. 725.

[59] Barbieri Michele, *Developing Countries and their Natural Resources,* (2009), p.3. The author argues that as the agreements establishing friendly relations were, at the beginning, vague, their implementation were often strengthened by recourse to diplomatic means or even military invasion compelling the host states to refrain from acts impairing rights of foreign investors. alternatively, forcing host state pay prompt and adequate compensation in case of commission of such acts; See also Brownlie, I., *Principles of Public International Law*, Oxford, Clarendon Press 5th (ed.) (1998), pp. 527 - 528.

multinational companies, aided by the minimum standards of protection accorded to the foreign investors were regarded as the way to impoverish host states and put them in the permanent poverty and subjection.[60]

2.2.1 The Atlantic Charter 1941

The Atlantic Charter was a joint declaration issued by the United States of America and Great Britain on August 14, 1941, declaring their respective aims in the Second World War and outlining a postwar international governance system.[61] The Charter drafted included eight common principles that the United States and Great Britain would be committed to supporting in the postwar world. Both countries agreed not to seek territorial expansion; to seek the liberalization of international trade; to establish the freedom of the seas, and the international labor, economic, and welfare standards. Most importantly, both the United States and Great Britain were committed to supporting the restoration of self-governance for all countries which had been occupied during the war. Although the Atlantic Charter was the non-binding declaration, it was, nonetheless, significant for two reasons. Firstly, it laid out the vision for the postwar world; one that would be characterized by the free exchange of trade, self-determination, disarmament, and collective security. Secondly, the Charter ultimately served as

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[60] Barbieri Michele, Developing Countries and their Natural Resources. (2009) p. 3.

[61] See Newport R.I. Naval War College, *International Law Documents*, Washington, Government Printing House, (1941), pp. 7 - 8. available at https://www.usnwc.edu/getattachment/e0be64b1-9269-4208-a18f-99627a0e37ee/Vol--41---International-Law-Documents--1941.aspx (last accessed on 16th February, 2017) See also Atlantic Charter, Aug. 14, 1941, 55 Stat. 1603, E.A.S. No. 236; Hyde James, N., Permanent Sovereignty over Natural Wealth and Resources *America Journal of International Law*, (1956), pp. 854 – 67; Churchill Winston, *Unrelenting Struggle, London, Cassel & Company LTD,* (1942). pp. 242-43. Interestingly, it will be noted that George Elsey possesses the only copy of the Atlantic Charter signed by both Churchill and Roosevelt. While a naval aide in 1941, he managed to get both leaders separately to sign his personal copy. 128 Oral History by George M. Elsey (1970), pp. 82 - 90, (Harry S. Truman Library, 1974); Gess Karol, Permanent Sovereignty over Natural Resources: Analytical Review of the United Nations Declaration and Its Genesis *13 International & Comparative Law Quarterly*, (1964). pp 398–449; Laing Edward, A., The Contribution of the Atlantic Charter to Human Rights Law and Humanitarian Universalism *26 Willamette Law Review*. (1989-1990) pp. 113 - 115.

an inspiration for the colonial subjects throughout the world to fight for their respective independence.[62]

When one looks at the Charter, would realise that although, it brought some positive post-war impacts. Its main purpose, among others, was to solve the economic crisis of the crumbling European industries devastated by the effects of the Second World War raw material crisis. The effects were, in particular, felt in Great Britain and her closest allies. The foregoing assertion is exemplified under clause 4 of the Charter, which undertook to guarantee the enjoyment by all states, small or great, victors or vanquished of access to equal terms of trade and raw materials of the world which are required for their economic prosperity.[63] It is worth noting that, although the Atlantic Charter was the non-binding declaration of intent, its political significance cannot be underestimated. It is indeed under its auspices that the foundation of the right of self-determination was laid. More so, the doctrine of permanent sovereignty over natural resources was built on it.

2.2.2 The United Nations Charter 1945

The development of the doctrine of permanent sovereignty over natural resources stems its roots under the auspices of the right to self-determination in various provisions of the United Nations Charter.[64] Whereas the preamble of the UN Charter reaffirms faith in the equality of all nations small or large, it also undertakes to promote the social progress and better standards of the life in

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[62] see Tiewul Azadon, A., The Evolution of the Doctrine of Permanent Sovereignty of Natural Resources, (1978- 1981). p. 61.

[63] Stone Julius, The Myths of Planning and Laissez Faire: A Re- Orientation, *18 George Washington Law Review,1* (1949 -1950) p. 13; See also Schrijver N.J., *Sovereignty over Natural Resources,* (1997), p.61.

[64] see Tiewul Azadon, A., The Evolution of the Doctrine of Permanent Sovereignty of Natural Resources, (1978- 1981). p. 61.

larger freedom.[65] The Charter expresses the desire of the United Nations to develop friendly relations among nations based on the principle of equality and self-determination of the people and equality of members.[66] The UN Charter further undertakes to promote the economic and social progress, human rights and the fundamental freedoms with a view of creating a stability condition based on the principle of equal rights and self-determination of the people.[67]

In order to demonstrate the commitment to implement the right to self-determination, the UN Charter enjoins the member states that assumed responsibilities of administering non-self-governing territories to cherish the trust bestowed upon them. The responsibilities entail the advancement of political, social, economic, and education of their respective subjects; treatment against abuses as well as developing a smooth transfer of power to these peoples.[68] Although the provisions in the UN Charter do not expressly provide for the principle of permanent sovereignty over natural resources, the Charter laid the foundation formulated subsequently, in the United Nations General Assembly resolutions.

2.2.3 The Bretton Woods Institutions 1945

The Bretton Woods institutions named after the area where the meetings for the establishment of these institutions were held, gathered forty-four delegates[69]

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[65] Paragraphs 2 and 4 of the United Nations Charter, 1945 respectively.

[66] Articles 1 (2) and 2 (1) of the United Nations Charter, 1945.

[67] Article 55 of the United Nations Charter, 1945.

[68] Articles 73 and 76 (b) of the United Nations Charter, 1945 respectively.

[69] Department of State, Proceedings and Documents of the United Nations Monetary and Financial Conference Vol. I at 5 (1948) [hereinafter referred to as Breeton Woods Conference Vol. I] cited in Wolff Mark J., Failure of the International Monetary Fund and World Bank to Achieve Integral Development: A Critical Assessment of Bretton Woods Institutions, Policies Structures and Governance, *41 Syracuse Journal of International Law and Commerce,* (2013 - 2014) p.77. The forty four countries includes; Australia, Belgium, Bolivia, Brazil, Canada, Chile Colombia, China, Costa Rica Cuba, Czechoslovakia, Dominican Republic, Ecuador, Egypt, El

from the allied nations with the objective of creating institutions through the unified purpose, rules, and policies that will regulate the international monetary system and strengthen international relations which had deteriorated in the World War II.[70] It is worth noting from the outset that the international trading system had collapsed after the World War I and subsequently in the Great Economic Depression of the 1930s. This was caused by the implementation of nationalistic policies by developed countries aimed at protecting the domestic production through the imposition of superfluous import tariffs and lowering export tariffs significantly.[71]

The developing countries and non-self governed territories which, by and large, depended on the export of their locally produced goods were highly devastated by the protectionist policies. They no longer had a secured purchaser of their goods. However, it was not long before the pinch was also felt by the developed countries. Two reasons account for this, firstly, the developed countries had erroneously assumed that they are self-sustained with the locally produced

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Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Honduras, Iceland, India, Iran, Iraq, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Philippines Commonwealth, Poland, Union of South Africa, Union of Soviet Socialist Republics, United Kingdom, United States of America, Uruguay, Venezuela and Yugoslavia.

[70] French Duncan, F., The Role of the State and International Organisations in Reconciling Sustainable Development and Globalisation in Schrijver Nico and Weiss Friedl, (ed.) *International Law and Sustainable Development Principle and Practice*, Laiden, The Nertherlands, Martinus Nihjoff Publishers Vol. 51,(2004), pp. 53, arguing that the 'Bretton Woods' group were to be the three main international financial institutions established after the Second World War, *viz*., the World Bank (formally the International Bank for Reconstruction and Development), the International Monetary Fund and the International Trade Organisation. Only the first two were ever established. The Inter- national Trade Organisation never came into being – with the General Agreement on Tariffs and Trade [GATT 1947] only ever being applied provisionally. However, since the entry into force of the 1994 Uruguay Round, the World Trade Organisation now provides the revised GATT and its related instruments with an institutional structure as was originally envisaged in 1944.

[71] Kent Albert Jones, *Who's Afraid of WTO? Oxford,* Oxford University Press, (2004) p. 68, arguing that the world trading system collapsed partly due to states preference of the bilateral over the multilateral trade agreements. These policies were popularly known as *'beggar thy neighbour'* i,e., government's protectionist mechanism which discourage foreign imports thereby raising tariffs and instituting tariff barrier; usually to reduce domestic unemployment and increased domestic output.

goods and services without necessarily a need for importing goods and services from other countries. Secondly, World War I and the 1930's economic depression had far-reaching economic consequences internally, in particular, in the British Empire.[72]

Due to the destruction of the physical infrastructures during the two wars, the costs for restoration were exorbitantly high. The administrative costs of running her colonies were escalating while the economic capacity to absorb the pressure was deteriorating steadily. Apart from that, the capacity of colonies to produce and supply requisite industrial raw materials was devastated by the war too. With these challenges in mind, the developed countries had to succumb to the pressure and agreed to go back to the drawing board on how they can best balance the world trading system.[73]

Initially, the Great Britain advocated and sought to retain her imperial preferential system of the bilateral trading, while the United States called for an open door policy and the multilateral trading system.[74] Nevertheless, it was fundamentally agreed by all parties that any attempts to create the trading barrier in a bid to finance the reconstruction of devastated Europe against the vanquished states of the World War II are a condition precedent to the preparation of another global

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[72] Vandevelde, Kenneth, J., A Brief History of International Investment Agreement, (2005), pp. 161 - 162.

[73] Schrijver N.J., *Sovereignty over Natural Resources,* (1997), pp.4-6. He argues, for example, the 1947 International Timber Conference of the Food and Agriculture Organization and the 1949 UN Scientific Conference on the Conservation and Effective Utilization of Natural Resources aimed at establishing a system based on equitable utilization of natural resources by all nations. See the preamble of the General Agreement on Tariffs and Trade (1947), in which the contracting parties recognize that their relations in the field of trade and economic endeavour should be conducted with a view to 'developing the full use of the resources of the world and expanding the production and exchange of goods.

[74] Ikenberry John G., The Political Organs of Bretton Woods . A Perspective on Bretton Woods System, in Bordo Michael, D., and Eichengreen Barry, (eds.), *A Retrospective on the Breton Woods System: Lessons for International Monetary Reform,* University of Chicago Press, (1993), p. 156. Britain maintained its position to secure employment and economic stabilization within its borders for its citizen.

disaster.[75] The Bretton Woods meeting resulted in the creation of the International Bank for Reconstruction and Development (IBRD) and the International Monetary Fund (IMF).[76] The purpose of the IBRD is articulated clearly in the articles of agreement as amended from time to time. Article 1 provides the purpose of the bank, thus;

> (i) To assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes, *including the restoration of economies destroyed or disrupted by war*, the reconversion of productive facilities to peacetime needs and *the encouragement of the development of productive facilities and resources in less developed countries*.
>
> (iii) To promote the long-range balanced growth of international trade and the maintenance of equilibrium in balances of payments *by encouraging international investment for the development of the productive resources of members*, thereby assisting in raising productivity, the standard of living and conditions of labor in their territories. [italics are mine]

The purposes of the IBRD under article 1 quoted in *extenso* above fortifies the argument that, from the inception, the developed countries devised an international economic mechanism that will regulate the sharing of the global

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[75] See Ciorciari, John, D., The lawful Scope of Human Rights Criteria in World Credit Decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement, *33 Cornell International Law Journal* (2000) pp. 361-69, arguing the victors were determined not to repeat mistakes of World War one which imposed strenuous economic and political conditions against the vanquished states which eventually culminated aggression hence World War two. The conditions included disarmament policy, deprivation of overseas colonial possession (in particular Germany) and trading barrier among others; See also, Wachtel Paul, Understanding the Old and New Bretton Woods, 6 New York University, Stern School of Business Working Paper No. 2451 (2007) cited in Mark J. Wolff, Failure of the International Monetary Fund and World Bank to Achieve Integral Development, (2013 -2014), p.79.

[76] *See* Articles of Agreement of the International Bank for Reconstruction and Development, Dec. 27, 1945, 60 Stat. 1440, 2 U.N.T.S. 134, *amended as* 16 U.S.T. 1942, 606 U.N.T.S. 294 (Dec. 17, 1965) (establishing the International Bank for Reconstruction and Development (the IBRD).

resources in a peaceful manner. The early attempts were made in 1880's during the Berlin Conference and the partition of Africa.[77] The aftermath was a series of conflicts between the developed states over the strategic natural resource areas. It was not a surprise that one of the immediate causes of World War I were, among others, the antagonistic economic relationship between states orchestrated by a quest to controlling and managing the world natural resources.[78]

Therefore, as stated above, the creation of a global economic body that regulates the world trading system was, undoubtedly, necessary to enable an equitable sharing of the world resources. Although sharing the global resources is not clearly stated in the articles of the Bretton Woods agreement, one can reasonably make inference on various provisions. For instance, an inference can be made in articles relating to the creation of the favourable investment environment and accessibility of the investment capital by the member states.[79] It is worth noting that the timing of the creation of these institutions resonated parallel with other international efforts which had established United Nations Organisation in 1945 (U.N.O) which aimed at promoting and protecting world's peace and security among its member states.

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[77] Schrijver, N.J., The Origin and Development of Permanent Sovereignty over Natural Resources, *Max Planck Encyclopedia of Public International Law*, Laiden and Oxford, (2010), p. 2.

[78] See Boahen Adu, African Perspectives on Development, cited in Haskell Ward*, African Development Reconsidered: New Perspectives from the Continen*t (New York, Phelps-Stokes Institute Publication, (1989), p. 14; See David P. Obrien, Structural Adjustment Programs in Sub-Saharan Africa, *19 Fletcher Forum World Affairs,* (1995), p. 121.

[79] Duruigbo Emeka, The World Bank, Multinational Oil Corporations and Resource Curse in Africa, 26 *University of Pennsylvania Journal of International Economic Law* (2005). pp. 26-7. See also Wadrzyk Mark, E., Is It Appropriate for the World Bank to Promote Democratic Standards in a Borrower Country? *17 Wisconsin International Law Journal* (1999) p. 553; *see also Moris* Halim, The World Bank and Human Rights: Indispensable Partnership or Mismatched Alliance *4 ILSA Journal of International & Comparative Law,* (1997), pp. 178 - 179.

2.3 The Struggle for Political and Economic Sovereignty over Natural Resources between Developed and Developing Countries

From the inception of the debates over the sovereignty over natural resources between the developed countries and the developing and newly independent states were characterised by the economic and political interests. As noted above, the developed countries were interested in accessing and sharing of the world natural resources in a bid to solve the raw material crisis brought by the effects of the World War II.[80] The developing countries were asserting both political and economic rights. The political rights in a sense that states which were still under the colonial domination were struggling to get rid of the colonial whims and regain their independence The economic rights are correlative of the political rights in the sense that the ability to manage and control the endowed resources is grounded on the favourable political environment. It is emphatic argued that without the economic rights, the political rights are nugatory.[81]

The debates took different forms between interested parties. The developed countries used different forums to assert for the equitable sharing of world resources by all. At first, through making use of the provisions of the UN Charter, which succinctly argued member states to allow an access on equal terms of trade on raw materials of the world required for the economic prosperity. Secondly, through making use of the provisions in the Articles of the Bretton Woods Agreements which encouraged international investments and the

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[80] Adede, A.O., Utilization of Shared Natural Resources: Towards a Code of Conduct, *Environmental Policy and Law,* 5 (1979), pp. 66 - 75.

[81] See Tiewul Azadon, S., The Evolution of the Doctrine of Permanent Sovereignty of Natural Resources, (1978- 80), p.63, arguing that the political self determination does not amount to much unless supported by firm economic ties. See also Sohn Luis, B., and Buergenthal Thomas, *International Protection of Human Rights*, Indianapolis, the Bobbs-Merill Company (1973). see also Hyde James, N., Permanent Sovereignty over Natural Wealth and Resources, *50 American Journal of International Law* (1956), p. 857.The delegates who were in favor of some language attempting to formulate a right of economic self-determination argued that, unless a state is the master of its own resources, it cannot exercise the right of political self-determination.

development of productive forces by creating a conducive environment for equitable sharing of world resources.[82]

It was in the interest of the developed countries, particularly, those with strong economic ties with their respective former colonies to address the nationalisation storm which was taking place across the world. Most of the properties which were being nationalised belonged to the multinational companies which had heavily invested in the former colonies. For instance, the nationalisation of Mexican oil in 1938; the Anglo-Iranian Oil Company in the 1950s; the Bolivia Tin Mine in 1951; the United Fruit Company properties in Guatemala, the Suez Canal Company in Egypt in 1956 to mention just a few. Therefore, developed countries led by the former colonial powers sought to protect investments in their respective former colonies.[83]

The developing countries premised their assertion on various provisions of the UN Charter, which, among others, affirm the equal rights of nations large or small and the development of friendly relation among states based on respect of the fundamental principle of equal rights and self-determination of the people.[84] The right to self-determination of the people intensified and strengthened the independence struggles for many non-self governed territories under the colonial domination. It was argued that the decolonisation movements provided a strong platform for the development of international law on natural resource governance. Arguably, the extraction of natural resources was one the main reasons of the colonialism, it was logical, thus during the decolonisation struggles it became vital enabling the people who had lived under the colonial exploitation

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[82] See article 1 of the Agreement of the International Bank for Reconstruction and Development, Dec. 27, 1945, 60 Stat. 1440, 2 U.N.T.S. 134, *amended as* 16 U.S.T. 1942, 606 U.N.T.S. 294 (Dec. 17, 1965) (establishing the International Bank for Reconstruction and Development the "IBRD").

[83] Schrijver N.J., *Sovereignty over Natural Resources*, (1997), p. 4.

[84] See paragraph 2 and 4 of the United Nations Charter, 1945. see also Articles 1 (2), 2 (1), 55, 73 and 76 (b) of the United Nations Charter, 1945.

to now gain their rights to benefit from the extraction of the resources found in their respective territories.[85] The developing countries gave a special importance to the natural resources because of the lack of other competitive economic sectors like manufacturing. In order to promote the economic and social development in these countries, it was imperative to rely on the proceeds from the use of the endowed natural resources without which there were no options for improving the economic conditions for these states.

The newly independent states' concern was that most of the countries which were still under the whims of the colonial domination were deemed to not being able to benefit from their natural resources. Also, it was noted that even for the newly independent states, the contribution of the natural resources sector to their respective economies was negligible. [86] This was exacerbated by the fact that most of the natural resource agreements were inequitably executed between the foreign companies and the former colonial master. As such, terms and conditions were very much in favour of the companies. Therefore, the newly independent states were in favour of the revitalisation of natural resource agreements to make them more equitable.[87]

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[85] Gilbert Jėrėmie, The Right to Freely Dispose of Natural Resources: Utopian or Forgotten Right? *31 Netherlands Quarterly of Human Rights* (2013) p.317. See also Antony Anghie, *Imperialism, Sovereignty and the Making of International Law,* (2007); see also: Gess, Karol, Permanent Sovereignty Over Natural Resources: An Analytical Review of the United Nations Declaration and its Genesis, *13 International & Comparative Law Quarterly,* (1964), pp. 398 – 449.

[86] Peter Chris Maina, Miles Apart but Walking the Same Path: The Right of the People to Control their Natural Wealth and Resources in Nigeria and Tanzania, (2007), pp. 9 - 10.

[87] Schrijver, N.J., *Sovereignty over Natural Resources*, (1997), p.43, argues that the principle was advocated by the developing countries in an effort to secure, for those people still under colonial rule, the benefits arising out of exploitation of natural resources within their territories, and to provide newly independent states with legal shield against infringement of their economic sovereignty as a results of property rights or contractual rights claimed by other countries or foreign companies.

2.3.1 The United Nations General Assembly Resolution (UNGA R.523), 1952

The resolution on the Integrated Economic Development and Commercial Agreements was a milestone through which the principle of PSNR was born. It affirms the right of developing countries to determine freely the use of their natural resources for their national economic interests. The resolution recommends to the members of the United Nations to facilitate through commercial agreements the movement of the machinery, equipment and raw material needed by the developing countries for their economic development and improve the standard of living.[88] It also argues the developing countries make use of the natural resources available for the domestic utilisation and the international trade.[89] However, the resolution puts a restriction in relation to the commercial agreements which contain the economic or political conditions which tend to jeopardise the sovereign rights of the developing countries, including the right to determine their plan for the economic development.[90]

As stated earlier in this part, the resolution is the first instrument at the international level to succinctly recognise the right of the developing countries to independently manage their natural resources. It also imposes correlative obligations to use the natural resources with the view of integrating them with the world economy.[91] Therefore, the resolution is important in three main aspects, firstly, it addresses the long-fought battle by the developing countries on the recognition of their sovereignty over the endowed natural resources located in their respective territories. Secondly, it acknowledges the empowerment of the people as a tool towards enhancing the exploitation of the natural resource.

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[88] See article 1(b)(i) of the United Nations General Assembly Resolution 523 (VI)of 1952.

[89] See article 1(b)(ii) of the United Nations General Assembly Resolution 523 (VI) of 1952.

[90] Proviso under article 1(b)(ii) of the United Nations General Assembly Resolution 523 (VI) 1952.

[91] Warden-Fernandez Janeth, *The Permanent Sovereignty over Natural Resources: How it has been Accommodated within the Evolving Economy*, The Centre for Energy, Petroleum and Mineral Law and Policy (CEPMLP) 2000, p. 3.

Thirdly, it ignores the existing contractual rights and the interests of the multinational companies in favour of the resource-rich states.

2.3.2 The United Nations General Assembly Resolution (UNGA R.626), 1952

The UNGA Resolution 523 was, in the same year, supplemented by UNGA Resolution 626 on the Right to Exploit Freely Natural Wealth and Resources. It starts with a strong affirmation of three important aspects. Firstly, it encourages the developing countries and, in particular, the newly independent states to properly exploit and use their natural wealth and resources.[92] Secondly, it affirms the right of people to freely use and exploit their natural resources as inherent in their sovereignty. Any political and/or economic conditions aimed at curtailing the enjoyment of the right violate the principles enshrined in the United Nations Charter.[93] Thirdly, it was strongly argued that the economic development of underdeveloped countries is one of the requisites for the strengthening of the universal peace and security.[94]

The resolution recommends that states owning the natural resources to exercise their right to freely exploit the natural wealth and resources for the economic progression. It also argues states to pay due regards to the need for maintaining the flow of capital as a condition for security, mutual confidence, and the economic cooperation among nations.[95] It further recommends that the investing states should refrain from any acts which will directly or indirectly interfere with

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[92] See the preamble of the United Nations General Assembly Resolution 626 (VII) of 1952 on the Right to Exploit Freely Natural Wealth and Resources.

[93] See article 2 of the United Nations General Assembly Resolution 626 (VII) of 1952 on the Right to Exploit Freely Natural Wealth and Resources.

[94] Preamble to the United Nations General Assembly Resolution 626 (VII) of 1952 on the Right to Exploit Freely Natural Wealth and Resources.

[95] See article 1 of the United Nations General Assembly Resolution 626 (VII) of 1952 on the Right to Exploit Freely Natural Wealth and Resources.

the sovereignty of a country over her natural resources.[96] The resolution is significant in two important aspects; firstly, it succinctly affirms the sovereignty right of states over their natural resources and secondly, it encourages foreign investments which guaranteed the flow of capital with a spirit to enhancing the international cooperation among nations.

Notwithstanding, the resolution does not seem to, apart from providing the general statements of intent on the management of natural resources by underdeveloped countries, provide some sort of guidelines which the states have to adhere to in relation to intrastate natural resources governance. Equally, vesting the natural resources interests in both the people and the states will, undoubtedly, benefit states to the detriment of the people especially in a situation where there is an irresponsible government.

2.3.3 The United Nations General Assembly Resolution (UNGA Res. 1803), 1962

The most important milestone as far as sovereignty over natural resources is concerned was achieved in 1962 through the adoption of the United Nations General Assembly resolution 1803 (XVIII) on Permanent Sovereignty over Natural Resources. As stated in the preceding part of this chapter, the adoption fortified the principle of PSNR as enunciated by the earlier resolutions. In addition to the principles that were laid down by the earlier resolutions, the resolution sets the minimum principles through which states should adhere to when framing the investment agreements and/or enacting the domestic laws which govern their respective endowed natural resources.

Firstly, it reaffirms the sovereignty of states and the people over their endowed natural wealth and resources as unequivocally stated in the earlier resolutions. Similar to the earlier resolutions, this was no different in respect of vesting

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[96] Article 1 of the United Nations General Assembly Resolution 626 (VII) of 1952 on the Right to Exploit Freely Natural Wealth and Resources.

sovereignty over natural resources to both the states and people without drawing a line.[97] The contemporary challenges regarding unequal distribution of natural resources benefits within confined state boundaries are partly occasioned by this anomaly.

Secondly, it recognises the right of the states and the people to freely determine the rules and conditions governing the exploration, exploitation, and disposition of the endowed natural resources within their borders.[98] It is noted, apparently, from this principle that the duties to determine the rules governing exploration, exploitation, and disposition of natural resources within a state were left entirely to the discretion of the states without correlative obligations of sharing resources in furtherance of the international economic cooperation among nations.

Thirdly, it allows foreign capital investments, presumably, under the spirit of furtherance of the economic cooperation among nations. Notwithstanding, the rules, and conditions governing the admission of the foreign capital, the treatment of sharing of earnings, among others, were to be determined by the national legislation and the international law.[99] Surprisingly, there were no set criteria for the application of laws, in particular, where there is a conflict between the host state and the extractive company. The effect of this principle is a conflict of the applicable laws between international and national laws. More so, where the host state prefers to invoke the application of her national laws, while the foreign company invokes international laws.[100]

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[97] See article 1 of the United Nations General Assembly Resolution 1803 (XVII) of 1962 on Permanent Sovereignty over Natural Resources.

[98] See article 2 of the United Nations General Assembly Resolution 1803 (XVII) of 1962 on Permanent Sovereignty over Natural Resources.

[99] See article 3 of the United Nations General Assembly Resolution 1803 (XVII) of 1962 on Permanent Sovereignty over Natural Resources.

[100] See *Free Zones of Upper Savoy* case, Free Zones of Upper Savoy and the District of Gex Order of 19 August 1929 (Series A, No. 22) Sixth Annual Report of the Permanent Court of International Justice (15 June 1929—15 June 1930), Series E, No. 6, pp. 201–212, in which the

Fourthly, the nationalisation of foreign properties can be undertaken where there is a compelling necessity of the host state and without discriminating the local and foreign investors or different treatment of the investors coming from different foreign states.[101] In cases of compensation, the resolution provides for the appropriate compensation in accordance with the rules applicable in the nationalising states and international law.[102] It is worth noting that the host state is under no obligations to pay the compensation according to the criteria enforced by the investor's home state laws. Irrespectively, the host states will remain bound to respect some minimum standards of fair treatment and non-discrimination under the customary international law.[103]

2.4 Fortifying the Principle of Permanent Sovereignty over Natural Resources through Human Rights Covenants

One of the battles that the newly independent states and developing countries won either by default or design was the inclusion of the principle of natural resources sovereignty in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights

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Permanent Court of International Justice had held that France cannot rely on her own legislation to limit the scope of her international obligations. Similarly, in its advisory opinion in the *Treatment of Polish Nationals in Danzig* case, Jurisdiction of the Courts of Danzig (Pecuniary Claims of Danzig Railway Officials who have Passed into the Polish Service Against the Polish Railways Administration) Advisory Opinion of 3 March 1928 (Series B, No. 15) Fourth Annual Report of the Permanent Court of International Justice (15 June 1927—15 June 1928), Series E, No. 4, pp. 213–219. http://legal.un.org/PCIJsummaries/documents/english/PCIJ_FinalText.pdf. (accessed on 16th January 2016). The Permanent Court of International Justice (PCIJ) had held that a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.

[101] See article 4 of the United Nations General Assembly Resolution 1803 (XVII) of 1962 on Permanent Sovereignty over Natural Resources.

[102] See article 4 of the United Nations General Assembly Resolution 1803 (XVII) of 1962 on Permanent Sovereignty over Natural Resources.

[103] See articles 4 and 8 of the United Nations General Assembly Resolution 1803 (XVII) of 1962 on Permanent Sovereignty over Natural Resources.

(ICESCR).[104] It is indeed 'the win' because of the protracted debates which preceded the adoption of the two covenants which were polarised by the emergence of the two antagonistic groups of the post-World War II. The United States and her closest allies were in favour of civil and political rights during the discussions in the commission on human rights.[105] The USSR leading the socialist block was in favour of economic, social and cultural rights. The polarisation of the views in the ECOSOC splitted the members into two committees each working separately in line with its set of the rights considered essential.

Interestingly, when the two committees submitted their respective reports and the draft covenants, both of them had entrenched an article on the sovereignty of natural resources. Coincidentally, the provisions related to governance of natural resources were inscribed in article 1 (2) of both covenants. It is argued that article 1 of both covenants provides a compromise between the political and economic rights. Whereas paragraph one focuses on the political aspects of self-determination, paragraph two focuses on the economic aspects of self-determination.[106] For clarity, it is pertinent that the article is quoted for ease of reference.

> Article 1 (2) of both the International Covenant on Civil and Political Rights and International Covenant on Economic, Social, and Cultural Rights, 1966 respectively provide;

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[104]International Covenant on Economic, Social and Cultural Rights - Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 and International Covenant on Civil and Political Rights - Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966.

[105] See the Report of the Tenth Session of the Commission on Human Rights, February-April 1954, UN Doc. E/2573, pp. 35-8, paras. 322 - 335.

[106] Gilbert Jérémie, the Right to Freely Dispose of Natural Resources, (2013). p. 321.

> All peoples may, for their own ends, freely dispose of *their natural wealth and resources* without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence. (Emphasis mine).

The embroidery of the identical articles in the two covenants is a groundbreaking in so far as the articulation of the right to self-determination of the people, which encompasses the right of the people to freely dispose of their natural resources is concerned. It should be underscored that the entrenchment of the provisions on natural resources in the covenants resonated with earlier efforts under the auspice of the United Nations General Assembly resolutions which had promulgated resolutions on permanent sovereignty over natural resources in the 1950's and early 1960's. As noted earlier, for the first time, the natural resource sovereignty was entrenched into the international legally binding instruments.

Moreover, unlike the United Nations resolutions which vested the right of permanent sovereignty over natural resources to both people and nations, the covenants vests this right to all the people and there is no reference to the states. It remains unclear whether the reference to "all people" in article 1(2) of the two covenants envisaged the people in a particular polity as a whole. The wording of the articles brings some challenges as far as the implementation of the rights over the sovereignty of natural resources is concerned.

Firstly, the conventional understanding of the international law is that states are the main actors and therefore, they should exercise the right of the permanent sovereignty over natural resources on behalf of the people.[107] The conventional

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[107] Nowak Manfred, *UN Covenant on Civil and Political Rights: CCPR Commentary*, N.P. Engel, (1993), p. 24; See also, Nowak Manfred, *UN Covenant On Civil And Political Rights: CCPR Commentary*, 2nd (ed), Engel, (2005); Gilbert Jérémie, the Right to Freely Dispose of Natural Resources: (2013), p. 322.

understanding of the international law on natural resources sovereignty has throughout been reflected in the earlier UNGA resolutions as an important aspect of the right to self-determination of states under colonial rule. Secondly, the imposition of a duty to the people to respect the obligations arising out of the international economic cooperation based on the principle of international law does not seemingly accept people as one of the actors in the natural resource sovereignty. Thirdly, the articles do not mention the words "permanent sovereignty over natural resources" unlike the UNGA resolutions. With regards to the fact above, both articles use the words the people 'may' and not 'shall' dispose of their natural resources. The wording waters down the right of sovereignty over natural resources from being an absolute right to a discretionary right.

Be it as it may, if one traces the history behind the framing of these articles would appreciate the fact that the drafters had anticipated a danger if the articles were left without restrictions. The eminent fear were that if the exercise of the right of permanent sovereignty over natural resources was left to the people without restrictions, it would sanction unwarranted expropriation or confiscation of the foreign property and would subject the international investment agreements into a unilateral renunciation with impunity.[108]

The protection of the foreign investment was important since the right of self-determination was not intended to be a threat to the foreign investments. It was rather to warn against the foreign exploitation which jeopardise the local population with its own means of substance. The subjection of the exercise of the right of permanent sovereignty over natural resources of the people under the international law obligations had nothing more than ensuring that, in a worst-case scenario, where there are expropriation and/or confiscation of the foreign

[108]see Gilbert Jérémie, *the Right to Freely Dispose of Natural Resources*: (2013), p. 323; see also UNGA: “Annotations on the text of the draft International Covenants on Human Rights”, UN Doc.A/2929 (1955), p. 15, para. 20.

investments, would be adequately protected and compensated.[109] When one looks at the wording and framing of article 1 (2) of the two covenants, would subscribe to the fact that these articles are self-contradictory in terms of exercising the rights of sovereignty over natural resources. The two covenants somehow departed from the UNGA resolutions in relation to providing the right of states to expropriate and confiscate the foreign property, arguably, natural resources were amongst other rights to be covered and therefore, could not be provided in detail.

In addressing the dichotomy indicated above, the drafters of the two covenants ingeniously complemented article 1 (2) of both covenants with bold, spirited articles, to wit, article 47 of the ICCPR and article 25 of the ICESCR respectively. These articles provide verbatim that 'nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources'. If one wants to appreciate article 1(2) of both covenants, one cannot read them independently and in isolation of articles 47 and 25 of the ICCPR and ICESCR respectively.

It is further argued that these articles override article 1(2) of the covenants in order to meet new demands in the wake of the evolution of the international politics and law.[110] Perhaps, a more convincing interpretation argument would be that article 47 and 25 of ICCPR and ICESCR respectively, were aimed at curbing

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[109] Casese Antonio, *Self-Determination of People: A Legal Reappraisal,* Cambridge, Cambridge University Press, (1999), p. 56.

[110] Casese Antonio, *Self-Determination of People,* (1999), p. 57; See Provisional Summary Record (27 October 1966) UN Doc A/C.3/SR.1405, para. 3. As an illustration, during the debate that led to the adoption of article 25 of the ICESCR, the delegate from Ethiopia highlighted that one of the rationales to include such an article was the effort of "underdeveloped countries to seek to protect their resources against the imperialist powers which sought to exploit them under the cloak of technical assistance or international economic co-operation." This statement echoes the position of several other countries supporting the inclusion of article 25, which viewed the restrictions on the rights of peoples to dispose of their own natural resources as a way of ensuring the continuous economic exploitation of such resources. See, Halperin David, Human Rights and Natural Resources 9 *William and Mary Law Review* , (1968), p. 770, demonstrates that articles 25 of ICESCR and 47 of the ICCPR have strong anti-colonialist connotation.

the erosion of peoples' right to freely dispose of their natural resources. The erosion was susceptible to obligations arising from the international economic cooperation based on the mutual benefits and international law.[111]

However, notwithstanding the ingenuity of the drafters entrenching article 47 of the ICCPR and article 25 of the ICESCR as safeguards against the encroachment of the peoples' rights to freely dispose of natural resources in the covenants, their achievements were in so far as the covenants were concerned and not the international law in general. In other words, an obligation arising out of the international law cannot be water downed by invoking the articles. To put this matter clear, both covenants have identical articles which state succinctly that nothing in the covenants can impair the obligations arising out of the United Nations Charter. For purposes of clarity, the two covenants are reproduced here for ease of reference.

Articles 46 and 24 of the ICCPR and ICESCR respectively provide;

> Nothing in the present Covenant shall be interpreted as impairing the provisions of *the Charter of the United Nations* and of the constitutions of the specialized agencies which define the respective responsibilities of the *various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.* (italics mine)

As stated above, the covenants subject themselves to obligations arising from the United Nations Charter and constitutions of any of her specialised agencies. One needs to read Article 103 of the United Nations Charter, which states that obligations under the charter override other international agreements. The position is further elaborated under article 1 of the UN Charter and states that the purposes of the United Nations, among others, include maintenance of

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[111] Dam-de Jong Daniëlla*, International Law and Governance of Natural Resources in Conflict and Post-conflict Situations,* Cambridge University Press, (2015), p. 77.

international peace and security. Any international rights which threat the maintenance of international peace and security must be settled in conformity with the principle of justice and international law.[112]

2.5 Two Steps Forward, Three Steps Back: Moving from a Compromise to a Dichotomy of Natural Resources Sovereignty

In a bid, which one can attribute to the naivety of the developing countries orchestrated by the quest for the quick political and economic development, there was a sudden U-turn from the earlier efforts under the United Nations General Assembly resolutions on sovereignty over natural resources. In fact, this unprecedented development diluted the earlier efforts on the aforementioned subject amongst states which resulted in the adoption of the various UNGA resolutions on sovereignty. It was a compromise in a sense that both parties compromised their respective position for the sake of these resolutions.

In a nutshell, from the inception of the debate on natural resource sovereignty, the major claim from the developing countries and newly independent states was a revitalisation of an inequitable exploitation of their natural resources. The said exploitation of the natural resources had its deep roots from the agreements entered into and/or signed between colonial state, (representing colonial people) and multinational corporations. It was argued by the developing countries that the said agreements were onerous and non-beneficial to them. In order to achieve the economic development, among others, it was found imperative to leverage the existing world economic order. The developing countries were of the view that the existing international economic relationships among states were created and supported by the developed countries. As such, its bearing reflected their respective interests. The international financial institutions such as the World

[112] Dam-de Jong Daniëlla*, International Law and Governance of Natural Resources,* (2015) p. 78.

Bank, International Monetary Fund were impugned for being the instruments which implement the interests of developed countries.[113]

In the early 1970's, there were some efforts in different forums aimed at changing the existing world economic order necessitated by changes in the world economy. The changes had an impact on the overall development perspective of both developed and developing countries. The changes include; the stagnation of world economy, high inflation, increased unemployment in the developed countries, international monetary instability, and the 1973 oil crisis, which resulted in an unprecedented increase of the oil price, just to mention the few.[114] In addition, to worsen the matter, there were radical decisions taken by the developing countries regarding the nationalisation of the foreign investments within their confined boundaries. For instance, the large-scale nationalisation in Chile 1971, Iraq 1972, Libya 1971 and Peru 1974.

At the international level, the developing countries using their broad majority in the United Nations Conference on Trade Agreements and Development (UNCTAD) adopted a resolution[115] which had an effect of legitimising nationalising unilaterally.[116]

Para. 2 reads;

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[113] Barbieri Michele, *Developing Countries and their Natural Resources,* (2009), p. 8.

[114] Schrijver, N.J., *Sovereignty over Natural Resources,* (1997), p. 93.

[115] See the United Nations Doc.TD/B/421 of 5 November 1972.

[116] See Schrijver, N.J., *Sovereignty over Natural Resources,* (1997). p. 94; The resolution was seemingly a solidarity retaliation by developing countries in a bid to support Chile following her vigorous protest which had arose from the Kennecott Case' in which French Court blocked the payment for a shipment of Chilean copper when examining whether the company should have received compensation in respects of its Chile assets which were nationalised. The Kennecott was a United State company which successfully petition for the obstruction of payment on 1250 tons of the shipment of Chilean copper bound to France before the French Court i.e., *Tribunal de Grand Instance,* to obtain the proceeds of the transaction totaling about 1.9 million dollars by claiming, among others, property rights over the cargo. For detailed information about this case see Atimolo Emiko, *Law and Diplomacy in Commodity Economics: A Case Study of Techniques, Cooperation and Conflict in International Public Policy Issues*, Springer, (1981), pp. 257 - 259.

> Reiterates that, in the application of this principle, such measures of nationalization as States may adopt in order to recover their natural resources are the expression of a sovereign power in virtue of which it is for each State *to fix the amount of compensation and the procedure for these measures, and any dispute which may arise in that connection falls within the sole jurisdiction of its courts*, without prejudice to what is set forth in General Assembly Resolution 1803 (XVII) (italics mine).

The resolution, ostensibly, drags back the earlier efforts by steps back by parading the horrible. It unsettled the settled principles which were strenuously achieved on the sovereignty over natural resources. Firstly, the question of nationalisation of the foreign property was settled by setting out non-discrimination criteria overseeing its implementation as provided for under the UNGA resolution 1803, 1962. Secondly, the criteria for determining the amount of compensation in the event of nationalisation of the foreign property were left entirely to the discretion of the nationalising state. Thirdly, any disputes arising from the nationalisation of foreign property or between a foreign investor and host state were to be determined and subjected to national courts with no recourse to the international adjudication.

Apart from the UNCTAD meeting, there was another conference in Algiers, 1973 convened by the non-alignment countries. The conference more or less reiterated deliberations contained in the 1972 UNCTAD conference. The conference had deliberated to give its unreserved support to the application of the principle that nationalisation carried by states is an expression of their sovereignty in order to safeguard their natural resources. Therefore, as a positive

gesture, states are entitled to determine the amount of possible compensation and mode of its payment.[117]

2.5.1 The New International Economic Order

The radical decision taken by the developing countries in a quest to address issues of inequitable sharing of natural resources in their respective territories spearheaded the adoption of the Declaration on the establishment of the New International Economic Order (NIEO).[118] Although the declaration provided a programme of action, among others, for the purpose of the study, paragraph 4(e) of the declaration is of interest. It provides for the principles under which the new international economic order would be founded. As expected, following the radical decisions and declarations which preceded this declaration, it echoed their unprecedented assertion.

Firstly, the right to sovereignty over natural resources was regarded as an inalienable right. The right should be exercised on the understanding that each state has a full permanent sovereignty over its natural resources and its economic activities.[119] The ordinary plain meaning is that this right cannot be subjected to obligations arising from the international law or international business agreements. If the interpretation were correct, then the new international economic order envisaged by the developing states would abrogate all the international investment agreements.

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[117] See Fourth Conference of Heads of State and Government of Non-Aligned Countries (Algiers, 5 - 9 Sept. 1973), Economic Declaration, at 10, 11; See Haight, G.W., The New International Economic Order and the Charter for Economic Rights and Duties of States, *9 International Lawyer*, 4, (1975), pp. 591 - 592.

[118] See United Nations General Assembly Resolution, 6th Special Sess., A/RES/3201 (S-VI), adopted 1 May 1974.

[119] See article 4 (e) of the United Nations General Assembly Resolution 3201 (S-VI) of 1974 on the Declaration of the Establishment of a New International Economic Order.

Secondly, it was envisaged that in a bid to find a suitable way of exploiting states' natural resources, any means suitable to the state's own situation may resort to include the nationalisation of foreign investments.[120] In fact, this approach was seen as a means of equipping nationals as a gesture of expressing the right to full permanent sovereignty over natural resources. The declaration does not seem to address the issue of the amount of compensation in the event of the nationalisation of the foreign investments, presumably, because of the inalienability of the states' control over natural resources.

Thirdly, which runs from the first one are the reduced state obligations regarding the use of their natural resources. In the earlier resolutions, in particular, the UNGA Res. 1803 0f 1962, states were obliged to exercise the right to natural resources sovereignty for the purpose of enhancing their national development and the welfare of the people.

As noted above, the declaration was accompanied by a programme of action which provides measures for its effective implementation. One of the action plans was the adoption of the Charter of Economic Rights and Duties of States.[121] The Charter aimed to establish a new system of international economic relations based on the equity, sovereign equality, and interdependence of interests of the developed and developing countries.[122] Therefore, NIEO did provide for the principles aimed at revitalising the world economic relations. Firstly, one that provides an equal access to the technology and international finances to both the

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[120] See article 4 (e) of the United Nations General Assembly Resolution 3201 (S-VI) of 1974 on the Declaration of the Establishment of a New International Economic Order.

[121] See United Nations General Assembly Resolution 3281 (XXIX) of December 12 1974.

[122] See Chapter I of the United Nations General Assembly Resolution 3281(XXIX) of December 12 1974 on the fundamental principles of international economic relations; Dam-de Jong Daniëlla*, International Law and Governance of Natural Resources,* (2015) p. 39.

developed and developing countries and secondly, all activities of the foreign investments would be regulated and remain under the control of host states.[123]

2.5.2 The Charter of Economic Rights and Duties of State, 1974

As pointed out clearly in the preceding part, the adoption of the Charter of Economic Rights and Duties of States[124] (hereinafter referred in this subpart as the Charter) by the UNGA signified the implementation of the NIEO's action plan. The Charter was adopted through UNGA resolution 3281 (XXIX). The Charter has 34 articles, however, of interests for the purpose of the study are articles 1 and 2 regarding the sovereignty over natural resources. Basically, article 1 reiterates more or less in a similar way on the right of states' of full and permanent sovereignty over natural resources as articulated earlier by the NIEO declaration. Article 2 provides in details how the rights of the sovereignty over natural resources can be exercised. It is profoundly important to quote it verbatim for ease of reference and an appreciation of its ensuing discussion.

Article 2 provides;

> Every State has and shall freely exercise full permanent sovereignty, including possession, use, and disposal, overall its wealth, natural resources, and economic activities.
>
> 2. Each State has the right:
>
> (a) *To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations* and in conformity with its national objectives and

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[123] See Bradlow Daniel, Development Decision-Making and the Content of International Development Law, *Boston College International and Comparative Law Review*, (2004), p. 203; Weston Burns, H., The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth, *American Journal of International Law*; (1981), p. 437.

[124] The United Nations General Assembly Resolution 3281 (XXIX) of December 12 1974.

priorities. No State shall be compelled to grant preferential treatment to foreign investment;

(b) To regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules, and regulations and conform with its economic and social policies. Transnational corporations shall not intervene in the internal affairs of a host State. Every State should, with full regard for its sovereign rights, co-operate with other States in the exercise of the right set forth in this subparagraph;

(c) *To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State* adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. *In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals,* unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means. (italics mine).

As noted in the preceding part, the attitude and the approach taken by the developing countries on the sovereignty over natural resources were a sudden U-turn. The Charter took a radical approach against the foreign investment interests and their states of origin as comparatively demonstrated hereunder. Firstly, whereas, in the UNGA resolution 1803, the nationalisation of foreign investments was allowed under the condition that some standardised non-discrimination measures must be complied with, under the Charter, the right to nationalise foreign investments by the host state could be exercised without

limitations. The host states were free to determine when to exercise the right as they deemed it fit. There was no reference to the international law, thus, any form of regulation and control of the foreign investment activities shall be exclusively dealt with by the domestic laws of the host state.[125]

Secondly, the question of compensation in the event of the nationalisation of the foreign investments was left exclusively to the discretion of the host state. The 1962 UNGA resolution 1803 subjected the payment of an appropriate compensation in accordance with the law applicable in the host state and international law. The Charter provided for the payment of an appropriate compensation in accordance with the principles and standards of the host state. The 1962 UNGA resolution made reference to the international law on the understanding that where the standards and principles of compensation by the host states are on the lower side, recourse would be made to the minimum standards provided for under the international law in respect of the treatment of alien and aliens properties. The discretion accorded to the host state in determining the amount of compensation payable could be exercised arbitrarily. More so, the wording of the Charter used the word 'should' instead of the mandatory 'shall' thus, this discretionary power is enormous and therefore, the host states may decide when to pay the appropriate compensation or not in accordance with their applicable laws which can be enacted in that regard.[126]

For instance, in Texaco *Overseas Petroleum and others v Libyan Arab Republic*,[127] analysing the UNGA resolution 1803, 1962 and the Charter with regards to recourse to the international law, the Arbitrator concluded that due to

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[125] Weston, Burns, H., The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth, (1981), pp. 437 - 475.

[126] Barbieri Michele, *Developing Countries and their Natural Resources,* (2009) p. 9*;* See also Bulajic Milan, *Principles of International Development Law*, Leiden, Martinus Nijhoff Publishers, (1986), p. 108.

[127] *Award on the Merits in Dispute between Texaco Overseas Petroleum Company/California Asiatic Oil Co. and the Government of the Libyan Arab Republic* (Texaco *v.* Libya), 17 ILM 1, paras. 87-91.

unanimity of votes in resolution 1803 on the above subject, it undoubtedly reflected the customary international law contrary to article 2(c) of the Charter relied by the Libyan government permitting the amount of compensation to be determined by its national law which did not find a broad support by various representatives.[128]

Thirdly, which runs from the effects of the first two above, is the settlement of disputes ensuing from the envisaged nationalisation. The Charter stipulated two alternatives. The first one is legal and the second one diplomatic *cum* political. Firstly, the controversies ensuing from the nationalisation would be determined by the tribunals of the host state. Secondly, states may resort to other peaceful means where there is an agreement between them. Thus, the Charter does not provide recourse to the international arbitration or adjudication. There was an interesting argument from the developing countries that subjecting host states to extra-national procedures relating to a dispute arising from the issues related to a compensation would place the states on an equal legal footing with the foreign corporations.

2.6 The Legal Status of the Principle of Permanent Sovereignty over Natural Resources

The difficult path through which the principle of permanent sovereignty over natural resources evolved justifies the difficulties it endured to command its legal recognition. As an adage says 'the end justifies the means' the initial formulation of the principle of sovereignty over natural resources was considered as a political and economic proclamation by the developing countries and the newly independent states. Accordingly, the principle of PSNR aimed at changing the

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[128] See Penrose, E *et al.*, Nationalization of Foreign-Owned Property for a Public Purpose: An Economic Perspective on Appropriate Compensation, *The Modern Law Review*, vol. 55, no. 3, (1992), p. 355; Chatterjee, S.K., The Charter of Economic Rights and Duties of States – An Evaluation after 15 Years, *The International and Comparative Law Quarterly*, vol. 40, no. 3, (1991), p. 674; Malanczuk, Peter, *Akehurst's Modern Introduction to International Law*, 7th (ed.), London, Rautledge, (1997), pp. 236 - 237.

inequitable economic relationship between the developed and developing countries. The above assertion corroborates the protracted debates which ensued prior to the adoption of the first UNGA resolution on states' sovereignty over natural resources.

As pointed out at the beginning of this chapter, there were sets of interests at a crossroad. On the one hand, there was a quest by the developed countries to access reliable and sufficient raw materials for revamping their industries and the provision of a conducive environment for promoting international cooperation through trade.[129] On the other hand, the developing countries and the newly independent states strongly advocated for the decolonisation and sovereignty over their endowed natural resources.[130] To strike the compromise between these contentious interests was not an easy task. As far as the legal recognition of the principle on PSNR is concerned, as stated at the beginning of this part, this was not smooth. This is due to the emergence of divided perspectives which emanated along with the development of the principle on PSNR.

The first perspective represents those who do not accept the fact that the principle of PSNR has attained a status as a norm of the customary international law. Firstly, it casts doubts on the mode in which the principle of PSNR evolved. Ordinarily, in the conventional international law, a new international law norm develops through the conclusion of treaties or the customs of states practice as provided for under article 38 of the Statute of the International Court of Justice.[131] As for the former, a new international law norm would develop, while in the latter, a norm of customary international law would ensue.

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[129] Schrijver N.J., *Sovereignty over Natural Resources,* (1997), pp. 4, 5, and 36.

[130] Vandevelde Kenneth, J., A Brief History of International Investment Agreements, (2005), p. 158; See also Todaro Michael, P., Economic Development in the Third World, New York and London, Longman, (1989), p. 598; Snyder Francis and Slinn Peter (eds.),*The International Law of Development: Comparative Perspectives*, London Butterworth Law Publishers, (1987) p. 13.

[131] See United Nations, *Statute of the International Court of Justice*, 18 April 1946, available at: http://www.refworld.org/docid/3deb4b9c0.html (accessed 22 March 2018).

Whereas, the international law norms developed through the conclusion of treaties poses no difficulties as the guideline procedures are well provided for under the Vienna Convention on the Law of Treaties, of 1969, the development of customary international law norms are complex due to a number of tests they have to comply and satisfy. There is no doubt that the principle on PSNR was neither provided for under the treaty nor manifested by the state's practice. In other words, it evolved through the adoption of the various UNGA resolutions, which are, arguably, not binding.

Secondly, as noted above, the principle was contained in several UNGA resolutions with different thematic assertions. For instance, the first resolution 523 of 1952, put its emphasis on the right of states to freely dispose of their natural wealth and resources. While resolution 626 of 1952 supplemented the first one and reiterated the principles contained in the resolution 523. In addition, it argued the states to respect the sovereignty of each state as a gesture for the maintenance of international peace and security. Dichotomously, the UNGA through resolutions for the establishment of the New International Economic Order (NIEO) and the Charter of Economic Rights and Duties of States came up with a radical formulation of the principle of PSNR. Apart from reiterating the principle as provided for under UNGA resolution 1803, they, unilaterally, relegated the application of international law in favour of the national laws. Therefore, due to the thematic change, it was indeed difficult to understand and appreciate the principle itself let alone its legal status.

It is quite clear that the UNGA resolutions have no binding effect on the members with the exception of issues related to the budget and admission matters.[132] Nonetheless, it is no longer a controversy that certain categories of UNGA

[132] See article 10 - 17 of the Charter of the United Nations,1945; Competence of General Assembly for the Admission of State to the United Nations, 1950 ICJ 4, p. 8. (Advisory opinion); Bleicher, S.A., The Legal Significance of Re-Citation of General Assembly Resolutions, *American Journal of International Law*, vol. 63.(1969), p. 445.

resolutions have a legal effect beyond their status as mere recommendations.[133] For instance, the Declaration on Granting Independence to Colonial Countries and the People,[134] although the UN Charter did not expressly outlaw colonialism, the declaration is the clear manifestation of the legal basis for outlawing colonialism. In addition, the role of the Universal Declaration of Human Rights[135] cannot be underestimated in so far as the promotion of human rights is concerned. It has, since its adoption, inspired the adoption of other binding international instruments such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), among others.

Thirdly, which runs from the first and second, is an assessment of whether the principle of PSNR has complied with benchmark criteria to be a norm of customary international law. The international customary norm arises where there is a uniform and constant state practice over the norm in question.[136] The International Court of Justice (ICJ) expounded this requirement in the *Asylum case*[137] by stating that in characterizing the nature of the customary rule, it has to constitute the expression of a right appertaining to one state and a duty incumbent upon another. There must be some degree of uniformity amongst state practices before a custom could come into existence. However, the ICJ

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[133] Schrijver, N.J., *Sovereignty over Natural Resource,* (1997), pp. 372 - 373.

[134] UNGA Resolution 1514(XV) of 14th December, 1960. Its para. 1 declares the subjugation of people to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment towards promotion of world peace and co operation.

[135] UNG.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

[136] Shaw, M.N., *International Law*, Cambridge, Cambridge University Press, 5th (ed.) (2003), p. 72.

[137] ICJ Reports, 1950, p.266; 17ILR, p. 280; *Asylum Case (Colombia v. Peru)*, ICJ, 20 November 1950, available at http://www.refworld.org/docid/3ae6b6f8c.html (accessed on 10 May 2016).

held that in *the Asylum case*, state practices had been so inconsistent and uncertain to amount to "constant and uniform usage"[138]

It is further argued that once it is established there is the uniform custom of states practice, hence specified usage, and then states behaviour towards a particular rule should be established. A guiding question is how do states regard a certain rule as a moral or political or legal? States regard their acts as a legal obligation when their acts turn into a custom and render them part of the rules of the international law ie., *opinio juris sive necessitatis*.[139] *In the Nicaragua case,*[140] The ICJ held that;

> ... for a new customary law to be formed, not only must the acts concerned amount to a settled practice, but they must be accompanied by the *opinio juris sive necessitatis*. Either the state taking such action or other states in a position to react to it must have behaved so that their conduct is evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i,e, the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis.*

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[138] Shaw, M.N. *International Law*, 5th (ed.) (2003) p.73; See also *North Sea Continental Shelf cases (ICJ Reports, 1969, p.3*. A case on a dispute over the delimitation of continental shelf between Germany, Holland and Denmark whereat, the ICJ stated that states practice have to be extensive and virtually uniform in the sense of the provision invoked. This is indispensable to the formation of the rule of customary international law.

[139] Shaw, M.N. *International Law*, 5th (ed.) (2003) p.80.

[140] (1986) ICJ Reports, pp. 108 - 9; 25 ILM1023 [73]; See also *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands (judgment) general list No. 51& 52 [1969] ICJ 3; 8 ILM 340*, where at, the ICJ remarked 'Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried in such a way, as to be evidence of rule of law requiring it. The need for such a belief. i.e., the existence of a subjective element, is implicit in a very notion of the *opinio juris sive necessitates*. The state concerned must therefore feel that they are conforming to what amounts to a legal obligation.

The critics have it that since the principle of PSNR emanated from unconventional way through which international norms arise, debating whether the principle has attained the status of *opinio juris sive necessitatis* is like overstretching an arm into an itching heart. The arguments put forth in support lay at the very foundation within which the principle of PSNR emanated. Firstly, the protracted debates between states which preceded the adoption of various resolutions negate the existence of uniformity let alone a common understanding of the principle amongst the states. Secondly, the voting among states was sharply divided, each side defending the inclusion of its respective interests. Thirdly, as noted above, due to the thematic change of each resolution adopted, it was difficult for one to determine state practice with respect to the implementation of the principle itself. Therefore, due to the above shortcomings, the critics argued that the principle of PSNR falls short far from being regarded as the norm of customary international law.

The second perspective has it that the points put forth in support of the arguments in the first perspective are shaky and undoubtedly lame. It points out clearly what is seemingly misconception of the principle of PSNR. The Principle of PSNR does not establish a new norm in the international law. In fact, the word 'state sovereignty' is not new in the international law. The United Nations Charter, for instance, recognises the sovereign equality of the member states.[141] The issue, probably, revolves around the pre and post modifying words such as 'permanent' and 'over natural resources'. Arguably, the words connote more of an economic-oriented interpretation than the legal effects in the international law.

The critics have quite ingeniously, fortified their arguments by making the reference to the Charter of Economic Rights and Duties of States and their enabling resolution, i.e., the declaration on the establishment of the New International Economic Order (NIEO) as basic text governing the principle on PSNR. However, both the Charter and NIEO do not abrogate application of the

[141] Article 2 (1) of the United Nations Charter, 1945.

UNGA resolution 1803, which as stated earlier, is a balanced text containing compromise of diverse interests. In fact, to the contrary, the Charter commends the effort so far achieved under resolution 1803.[142]

There have been a number of judicial decisions from the International Court of Justice and arbitral awards pertaining to the recognition of the principle of PSNR as forming part of the customary international law. *In the case of Libyan American Oil Co. (LIAMCO) v Libya,*[143] it was held by the arbitrator that the UNGA resolution 1803, if the anonymous source of law, is an evidence of the recent dominant trend of the international opinion concerning the sovereign rights of the states over natural resources.[144] The position was reiterated in the case of *Texaco v Libya*[145] whereupon, the arbitral award stated that the UNGA resolution 1803 meets the tenets of customary international law since it has received unreserved support from both the developed and developing states.

In the more recent *case of the Armed Activities on the Territory of the Congo (the Democratic Republic of the Congo v. Uganda)*[146] whereupon, the Democratic Republic of Congo (DRC) had brought the case against the Republic of Uganda before the ICJ claiming, among others, the illegal exploitation of Congolese

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[142] Schrijver N.J, *Sovereignty over Natural Resources,* (1997), p. 372; See also Verwey, W. D**.,** The Establishment of a New International Economic Order and the Realization of the Right to Development and Welfare: A Legal Survey, *21 Indian Journal of International and Law*, 21(1981), pp.25 - 27.

[143] Libyan American Oil Co. ("LIAMCO") v. Libya, 17 I.L.M. 3 (1978), 4 Y.B. COM. ARB. 177 (1979).

[144] Ng'ambi Sangwani Patrick, *Resource Nationalism in International Investment Law*, Rautledge, (2015) p. 13. See also Duruigbo Emeka, Permanent Sovereignty and Peoples' Ownership of Natural Resources in International Law*,* (2006), p. 44.

[145] *Award on the Merits in Dispute between Texaco Overseas Petroleum Company/California Asiatic Oil Co. and the Government of the Libyan Arab Republic* (Texaco *v.* Libya), 17 ILM 1, paras. 83-86, 1977; Kerwin, G.J., The Role of the United Nations General Assembly Resolution in Determining Principles of International Law in United States Courts, *Duke Law Journal*, (1983), pp. 883 - 890.

[146] [2006] I.C.J. General List No. 126; See also *East Timor (Portugal v Australia)*, Judgment of 30 June 1995, *ICJ Report 1995*; see the dissenting opinion of Judge Weeramantry, p. 264.

mineral resources. The complained exploitation not only violates the DRC's sovereignty, but also the international law principles on the right to self-determination and, in particular, the principle of permanent sovereignty over natural resources. The ICJ held that;

> ...The Court recalls that the Principle of Permanent Sovereignty over natural resources is expressed in GA resolution 1803 (XVII) of 14th December 1962 and further elaborated in the Declaration on the establishment of a New International Economic Order. (GA Resolution 3201 of 1st May 1974); Charter of Economic Rights and Duties of States (GA Res. 3281 XXIX) of 12 Dec. 1974. While recognizing the importance of this principle, *which is a principle of customary law*..

Although the question as to the legal status of the principle of PSNR was not one of the contested issues in the extract of the ICJ decision quoted above, its legal value cannot be underestimated. This is because the ICJ reiterated the findings of the earlier tribunals regarding the status of the principle of PSNR as unequivocally forming part of the customary international law. The decision is an important milestone in so far as the principle of PSNR is concerned from a mere political claim, as the critics would like to put it,[147] into an acceptable norm of the customary international law.[148] Nevertheless, what appeared strange, is that the court decision ruled out the application of the principle on PSNR in a situation of armed conflicts such as acts of looting, pillage, and exploitation of natural resources by peacekeeping army of a state intervening militarily in another state.

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[147] Weisbrud Mark, A,. The International Court of Justice and the Concept of State Practice, *31 University of Pennsylvania Journal of International Law* (2009), p. 330. The author criticised the ICJ for relying on United Nations General Assembly which lack legal effects.

[148] See Talus Kim, Oil and Gas: International Petroleum Regulation in Elisa Morgera and Kati Kulovesi (ed.), *Research Handbook on International Law and Natural Resources*, Cheltenham, Edward Elgar Publishing Limited, (2016), p. 247.

The decision of the ICJ in the *case of Armed Activities on the Territory of the Congo (supra)* confirmed, on the one hand, that the principle on PSNR forms the norm of customary international law. On the other hand, the supporters of the principle ambitiously expressed the principle as the norm of *jus cogens*. The arguments put forth in support are equally, ambitious. Firstly, their argument stands on the wording of the principle such as 'permanent' 'full' before the word sovereignty over natural resources in the various UNGA resolution on the subject as a clear demonstration of the immutability of the principle of PSNR. They further argued that these words should not be construed in their ordinary sense rather technical sense as inalienable. Nevertheless, this argument is far from commanding an ordinary logic. There is no principle of international law, let alone consensus among the international community, according to which the wording of a particular UNGA resolution would ultimately command its authority. The authority of resolution is analysed by its *travaux preparatoires*[149] as provided for under article 32 of the Vienna Convention on the Law of Treaties, 1969 which is regarded as an aid to the interpretation of international treaties.

Secondly, the entrenchment of identical provisions i.e., articles 25 and 47 of the ICESCR and ICCPR respectively fortified the principle of PSNR by stating that nothing in the present covenants shall be interpreted as impairing the inherent right of the people to enjoy fully their natural wealth and resources. However, these provisions do not demonstrate the immutability of the principle of PSNR as an evidence of attaining the status of *jus cogens*. Firstly, as noted in preceding part of this chapter, the two provisions were further qualified under articles 24 and 46 of the ICESCR and ICCPR respectively to wit, their respective application

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[149] Lord McNair, *The Law of Treaties*, Oxford, Oxford University Press, (1961), Lord McNair who served as judge on the ICJ from 1945 - 1955 defined *travaux preparatoires* as all the documents, such as memoranda, minutes of conferences, and draft of the treaty under negotiation; For thorough understanding of the principle see Ris Martin, Treaty Interpretation and ICJ Recourse to *Travaux Préparatoires*: Towards a Proposed Amendment of Articles 31 and 32 of the Vienna Convention on the Law of Treaties, *14 Boston College International and Comparative Law Review* (1991), p. 111; See also Duruigbo Emeka, Permanent Sovereignty and Peoples' Ownership of Natural Resources in International Law, (2006), p. 42.

would be subjected to some obligations arising under the United Nations Charter. In other words, if there is any obligation arising from the United Nations Charter, then the provisions would not apply to override such obligations. Secondly, in order to appreciate the meaning of *jus cogens*, it is indeed imperative to make reference to the Vienna Convention on the Law of Treaties, 1969 which describes the concept decisively.

Article 53 defines *jus cogens* as follows;

> For the purpose of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

From the definition above, there are three criteria which can be used to determine whether or not the principle of PSNR has attained the status of jus cogens. Firstly, it has to be accepted and recognised as a norm of a general international law otherwise, the concept of *jus cogens* would be fluid and unmanageable[150] The preceding parts of this chapter have undoubtedly demonstrated that the principle of PSNR is a norm of the customary international law. Secondly, the majority of the states must accept and recognise the principle of PSNR as a peremptory norm including the state with a direct interest in the matter in question. In this criterion, there is divided opinion. The *travaux preparatoires* shows that most of the developing countries had virtually supported the principle of PSNR. Nonetheless, most of the developed countries had, forcefully disputed the principle of PSNR and therefore, negating the presence of unanimity of the appreciation of the principle.

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[150] Schrijver, N.J., *Sovereignty over Natural Resource,*(1997), pp. 375 - 376.

Thirdly, no derogation is permitted. This criterion is a surmountable hurdle that negates the principle of PSNR as a norm of *jus cogens*. As noted, an arrangement of the extraction of natural resources between the host states and extractive company is a purely contractual relation. The contract is governed by the terms. It is difficult for the states which have, for instance, willingly entered into a contract in respect of the exploitation of its natural resources to afterward claim that the terms of the contract, infringe the principle of PSNR on account of the exploitation of the country's natural resources which no derogation is permitted.

2.7 Conclusion

The struggle for sovereignty over natural resources of the developing countries and the newly independent states was not achieved easily. This is due to the set of contending interests leveraged by each side. The protracted debates prior to the adoption of various UNGA resolutions of sovereignty over natural resources demonstrate the difficulties it endured to command its legal recognition. At the inception, it evolved as political and economic claims by the developing countries and the newly independent states over their endowed natural resources. Thus, the initial UNGA resolutions were aimed at contesting the inequitable economic relation over the natural resource exploitation between the developed and developing countries. In 1962, the UNGA adopted the landmark resolution 1803 on permanent sovereignty over natural resources. The resolution was not only a milestone towards the sovereignty of the state over natural resources, but also a compromise of sets of contentious interests between the developed and developing countries.

The principle on PSNR was fortified in the international covenants on human rights, to wit, the International Covenants on Civil and Political Rights 1966 and the International Covenant on Economic, Social and Cultural Rights 1966. However, the subsequent efforts, namely, the declaration of the establishment of the New International Economic Order and the Charter of Economic Rights and

Duties of States, instead of strengthening the principle on PSNR, reformulated the principle with more revolutionary force.

As pointed out above, the principle of PSNR evolved as the economic and political claims by the developing countries and the newly independent states to fight for the inequitable economic relations. Due to its dynamic character, it has gradually transformed itself from the political and economic claims into the recognised norm of the customary international law. However, notwithstanding, the principle of PSNR has not attained the status of *jus cogens*.

CHAPTER THREE

INTERNATIONAL LAW AND NATURAL RESOURCE GOVERNANCE: SETTING THE PARADIGM

3.1 Introduction

This chapter commences with a discussion on the definition and the meaning of natural resources. It observes that there is no unanimous and exhaustive definition which covers all natural resources. Thus, a descriptive definition, depending on the scope and application, is adopted. In addition, it notes that natural resources are broadly wide and therefore, the definition(s) help(s) to understand their widened scope for the purpose of formulating their respective policies and law for their effective governance.

It attempts to highlight the protracted debates which ensue between the developed and developing countries over the ownership of natural resources, each standing firm to protect its interests. In that endeavour, the peoples' interests are subsumed and taken care by the state. In addition, it observes that while the international law recognises states as the subject of international law, it is the people in their constituent capacity who create the state thus, the state must serve the people. The guiding trend is that the sovereignty of the state belongs to the people. The exercise of the sovereignty over natural resources of the state is exercised for and on behalf of the people.

Furthermore, it highlights the international legal instruments which fortify the argument that the people are, in their collective polity, the owner of the endowed natural resources within their territory. It notes nonetheless, the right of the people to own the natural resources has not been realised due to mismanagement by the state. The net effect is that the people do not see the tangible benefit from the endowed natural resources despite massive foreign direct investments inflow in the resource-rich states.

It further states the impacts that can be brought by the natural resource exploitation (oil and gas) to the communities living around the extraction areas. The guiding trend is, apart from general revenue that would accrue to the state's coffers, the interests of the communities around the production areas should be given a special priority in terms of the enjoyment of the immediate benefits.

The chapter argues that the contemporary development of international law and, in particular, environmental norms impose a limit on states in exercising the sovereignty over their endowed natural resources. It argues that the international environmental norms which are in place regulate the sovereignty of states in exploiting a wide range of natural resources. Nonetheless, some of the natural resources are sufficiently covered while others are not. It notes that there is no comprehensive environmental framework regulating sovereignty of the state on the extraction of the oil and gas resources. Instead, there are scattered environmental efforts and initiatives established to regulate the oil and gas industry and are administered by different institutions and bodies.

3.2 3.2 Definition and the Scope of Natural Resources under International Law: Setting the Sovereignty Agenda

Natural resources are one of the broad and complex concepts to define. Depending on the field of expertise, it is possible to identify some aspects which can describe what the natural resources entail. For instance, geologists, on the one hand, would define natural resources as a material phenomenon of the nature available to man from nature for his activities which include land, water bodies, and air. Accordingly, the thesis underscores the fact that natural resources are the gift of nature independent of the human creation. Economists, on the other hand, would lean towards the same direction as geologists, but the

emphasis will be on how can the natural resources be of the economic value to the human being.[151]

A broad understanding of the term and perhaps, if one wishes to narrow what is seemingly a wider concept, it is imperative to categorise it into the renewable and non-renewable resources. The categorisation is not a cosmetic but a systematic way of describing each of them for the purpose of addressing their respective policy, economic, environmental, and legal challenges affecting their proper exploitation in a sustainable manner.[152] A brief but thorough description of the two categories is that the renewable resources naturally regenerate to provide new supply units available for use in different intervals, while, the non-renewable resources take millions of years to form and the quantity of which deplete with time when exploited.[153] For instance, oil and gas are the non-renewable resources. Their exploitation depends on the capital investment, technology and price among others, while forests and animals are renewable resources, their renewability and regeneration depend on their level of the use and the decision on their investment and management.[154]

The international legal instruments provide definition(s) of natural resources within their scope of application. Thus, natural resources in general consist of a natural occurrence of nature, such as oil, gas, minerals, fresh water, oceans,

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[151] Ginsburg, N., Natural Resources and Economic Development, *Annals of the Association of American Geographers*, vol. 47, no. 3, (1957), p. 204; Skinner, B.J., "Earth Resources", *Proceedings of the National Academy of Sciences of the United States of America*, vol. 76, no. 9, (1979), pp. 4212 - 4213.

[152] Deere Carolyn, Sustainable International Natural Resources Law in *Sustainable Development Law – Principles, Practices, & Prospects,* M.-C. Cordonier Segger & A. Khalfan (eds.), Oxford, Oxford University Press, (2004), pp. 297 - 298.

[153] Johnson, R.J. *The Dictionary of Human Geography* 2nd (ed.), London, Blackwell, (1986). pp. 408-9; See Schrijver, N. J., *Development without Destruction:* The UN and Global Resources Management, United National Intellectual History Project Series, Laiden and Beijing, (2009), pp. 3 - 4.

[154] Schrijver N.J., *Sovereignty over Natural Resources,* (1997), p 14; See Schrijver, N.J., *Development without Destruction,* (2009), p. 4.

seas, air, forests, soil, genetic material and other biotic components of ecosystems with the actual or potential use or value for humanity.[155] In addition, Article 2 of the 1958 Convention on the Continental Shelf, replicated under Article 77(4) of the 1982 United Nations Convention on the Law of the Sea provides that:

> The natural resources ... consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.

Article III of the African Convention on the Conservation of Nature and Natural Resources 1968[156] the term 'natural resources' means 'renewable resources, that is soil, water, flora, and fauna. Article 2 of the Convention on Biological Diversity, 1992 employs the term 'biological resources' to mean 'genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with the actual or potential use or value for humanity'.

The contemporary global economic integration call for a systematic study and categorisation of resources in order to formulate commonly applicable policies for

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[155] Art. 2, Convention on Biological Diversity, June 5, 1992, 1760 UNTS 79; Art. 77(4), United Nations Convention on the Law of the Sea, December 10, 1982, 1988 UNTS 3; Elian, G. *The Principle of Sovereignty over Natural Resources*, pp. 11-12; Deere, Carolyn, Sustainable International Natural Resources Law in *Sustainable Development Law,* (2004), pp. 297 - 298; Aguiar Miguel Morais, *Does Sustainable Development Constrains a State's Sovereignty Rights over its Natural Resources? Centre for Energy, Petroleum, Mineral Law and Policy (CEPMLP)*, University of Dundee, (2013), p. 3, arguing that natural resources could be used as, all biological –as in non-artificial or men made- resources, which have some economic value and can be traded. From this perspective, it can be said that the principle focus on natural elements such as certain plants to produce medicines, potable water, oil, gas and minerals of all sort such as gold, copper or diamond.

[156] (Algiers Convention) 1001 U.N.T.S. 3; For critical discussion on this Convention see Morne van der Linde, A Review of the African Convention of Nature and Natural Resources, *2 African Human Right Law Journal*, (2002) pp. 33 - 59.

their proper and sustainable exploitation without affecting their natural occurrence. It should be underscored that much as a particular country is endowed with the natural resources, without prejudice to her sovereignty, their proper exploitation should conform to certain international minimum standards agreed by the states as the member of the international community. In this endeavour, the United Nations Convention on the Law of the Sea, 1982 can be inspirational as far as the rights and duties of states in the exploitation of marine resources are concerned. The definitions or rather descriptions provided for in the scattered international conventions do not seem to address the paradox rather, as indicated above, intend to define natural resources within the scope of their application. It is noted that the scope of this study does not intend to cover all natural resources rather the main focus shall be on the non-renewable resources i.e., the oil and gas resources.

3.2.1 Interstate Debates on Sovereignty over Natural Resource Governance: Right of the 'People' or 'States'?

As noted above and in the preceding chapters, the interests of both the developing and developed countries were premised on the control and sharing of the natural resources amongst states respectively. In some instances, the people appeared to be amongst stakeholders and sometimes were apparently obscured and synonymously mixed with states. As such, the question as to whose interests the principle of PSNR serves between the people and the state never seems to get a deserved attention.[157] The earlier resolutions which unveiled

[157] Farmer Alice, Towards a Meaningful Rebirth of Economic Self-Determination: Human Rights Realization in Resource-Rich Countries, *39 New York University Journal of International Law and Policy*, (2007), p. 424; Miranda Lilian Aponte, The Role of International Law in Intrastate Natural Resource, (2012), p. 795.

debates on natural resource sovereignty vested this right to both people and state.[158]

As pointed out at the outset, one of the glaring omissions is the vesting of the natural resources to both the people and the states which undoubtedly benefit the latter to the detriment of the former. This is exacerbated by the recognition advantage which the states enjoy in the traditional international law and therefore, the mentioning of the people as the right bearer is, arguably, regarded a rhetoric without the legal stand.[159]

In addition and quite unfortunate, there is yet another glaring omission of the definition of the people in the UNGA resolutions on the sovereignty of natural resources.[160] To fill in the void, there are, depending on the purpose, evolving divergent views which attempt to describe the 'people'. Accordingly, one thesis describes the people in the context of a sovereign state to refer the sum of all the people who live in a polity.[161] It can also mean, according to the other thesis, the

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[158] See Art. 2 (1), UNGA – Res. 3281 (XXIX), Charter of Economic Rights and Duties of States, Dec. 12, 1974, 29 UN – GAOR, Supp. No. 31, p. 50, UN Doc. A/9631. It is further argued that apart from resolution on right of people still under colonial domination or apartheid, all other post 1962 resources resolutions vested natural resources to states exclusively. It is understood that the shift of emphasis from people to states were part of political and economic emancipation by developing countries in attaining sustainable development.

[159] Dufresne Robert, The Opacity of Oil: Oil Corporations, (2004). p. 356; Duruigbo Emeka, Permanent Sovereignty and Peoples Ownership of Natural Resources in International Law, (2006).p. 46; Gilbert Jėrėmie, The Right to Freely Dispose of Natural Resources, (2013), p. 318; See also Cassese Antonio, *International Law in a Divided World,* Oxford, Clarendon Press, (1986), pp. 376 – 90; *Reparations for Injuries suffered in the Service of the United Nations,* (1949) ICJ 174, p. 179 (Adv. Op., Apr. 11, 1949); Uibopuu, H.J., 'Gedanken zu einem völkerrechtlichen Staatsbegriff' in *Autorität und internationale Ordnung – Aufsätze zum Völkerrecht*, Schreuer, C. (ed.), Berlin, (1979), p. 96*.*

[160] Turack Daniel, C., The African Charter on Human and Peoples' Rights: Some Preliminary Thoughts*, 17 Akron Law Review*, (1984), p. 379; Kingsbury Benedict, Claims by Non-State Groups in International Law, (1992), pp. 499 - 500; See also Schrijver, N.J., *Sovereignty over Natural Resources,* (1997), p. 9, arguing that the term 'people' was meant to refer to those people who had not been able to exercise their right to political self-determination.

[161] Dam-de Jong Daniëlla*, International Law and Governance of Natural Resources,* (2015), p. 66; See also Duruigbo Emeka, Permanent Sovereignty and Peoples Ownership of Natural Resources in International Law, (2006).p. 55; Cassese Antonio, The Self-Determination of

collective persons in a distinctive group within a state. The latter thesis ascribes this category with the indigenous people and/or the members of particular ethnic groups. Some literature ascribes the second thesis with the development of the third generation rights such as the right to self-determination of the people, right to clean environment and arguably, the right of permanent sovereignty over natural resources.[162] In this study, the former interpretation of the term people would be adopted.

3.2.2 The Position of International Legal Instruments and Tribunals with Regards to Interstate Natural Resources Sovereignty

3.2.2.1 The International Human Rights Covenants

The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, 1966 respectively vest natural resources sovereignty to the people under their identical article 1(2). As noted above, if the articles vest the sovereignty over natural resources to the people as they do, two immediate dilemmas ensue. Firstly, the absence of a definition of the people in both covenants, the word people, depending on the interpreter's inclination, may mean the people as a whole constituting a state or the people of the particular group constituting a state. Secondly, the people are not subject of the international law, therefore, cannot be subjected to honour obligations ordinarily of the states arising from the international law.[163]

Peoples*,* In *The International Bill of Human Rights: The Covenant On Civil And Political Rights*, (Louis Henkin (ed.), (1981), p. 94.

[162] Barbieri Michael, *Developing Countries and their Natural Resources,* (2009), p. 16.

[163] Cassese Antonio, *The Self-Determination of Peoples, In* The International Bill of Human Rights: The Covenant on Civil and Political Rights 92, 103 (Louis Henkin (ed.), (1981) cited in Duruigbo Emeka, Permanent Sovereignty and Peoples Ownership of Natural Resources in International Law, (2006), p. 47. It is argued that although the right of free disposal over natural resources and of free determination of the internal political, economic, and social structure are sometimes categorized as peoples' rights (as in Art. 1 para. 2 of the [Human Rights] Covenants of 1966), it is the state which is the subject of these rights. The concept of permanent sovereignty over natural resources and the non-interference rule, which functions as a correlate to the right to free determination of internal policies, do not enable people to claim rights from states, but are

3.2.2.2 African Charter on Human and Peoples' Rights, 1981

Unlike the American Convention on Human Rights and the European Convention on Human Rights which do not seem to address the right of the people to control their natural resources,[164] article 21 (1) and (4) of the African Charter on Human and People Rights[165] vest the right of disposition of the natural wealth and resources to both the states and the people albeit in the same article but in different sub-article.[166] The vesting of the natural resource sovereignty to both the state and the people in the Charter was to take cognizance of the newly emerged third generation rights, which were trending at the time of making the Charter. If the right of sovereignty over natural resources is part of the third generation rights, then it would be rational to assume that the state's right to deal with them creates a reciprocal duty under the international law to use them for the economic development and well-being of the people.[167]

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claimed by states on behalf of people against other states.*;* See also Kunig Philipp, *The Role of "Peoples' Rights" in the African Charter of Human and Peoples' Rights, in* New Perspectives and Conceptions of International Law: an Afro-European Dialogue, Ginther, K., & Benedek, W., (eds.), (1983), p. 165; Gilbert Jėrėmie, The Right to Freely Dispose of Natural Resources, (2013), p. 322.

[164] For critical discussion of the subject see Buergenthal Thomas*,* The American Convention on Human Rights: Illusions and Hopes, *21 Buffalo Law Review* (1971–1972) p.121; Thornberry Patrick, Self-Determination, Minorities, Human Rights: A Review of International Instruments, *38 International Comparative Law Quarterly,* (1989) p. 867; Simpson Brian A.W., *Human Rights and The End of Empire: Britain and the Genesis of the European Convention* (rev. edn.), Oxford, Oxford University Press (2004).

[165] OAU Doc. CAB/LEG/67/3 rev. 5, Uan. 7-19, 1981), *reprinted in* 21 I.L.M. 58 (1982).

[166] Oloka-Onyango John, Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for Peoples' Rights in Africa, 18 *American University International Law Review***,** (2003), p. 890.

[167] Barbieri Michele, *Developing Countries and their Natural Resources,* (2009), p.17; Fuentes Ximena, International Law- Making in the Field of Sustainable Development: The Unequal Competition between Development and the Environment in Schrijver, N.J., and Weiss Friedl (eds.), *International Law and Sustainable Development – Principles and Practice;* Leiden; Martinus Nijhoff Publishers; (2004), p. 29; Bondzie-Simpson Ebow, A Critique of the African Charter on Human and People's Rights*, Howard Law Journal,* (2008), p. 645; Kiwanuka Richard, N., The meaning of “people” in the African Charter of Human and Peoples' Rights, *American Journal of International Law*, (1988); Umozurike, U.O., Current Development: the African Charter on Human and Peoples' Rights; *American Journal of International Law*; (1983), p. 902.

In addition, it is arguable stated that the vesting of the right to both the state and the people was made purposely in order to meet both the internal and external factors of the economic self-determination. It was thought that since the state has the locus in the international law, it would best suit as an intermediary in dealing with the external interests on behalf of the people in a manner which the people cannot do in that regard.[168] Accordingly, the thesis seems to incline in the faulty assumption that the state would, in most cases, represent the interests of the people when dealing with the external economic interests on behalf of the people. In addition, it does not seem to address the issues of convergence and divergence between the people and the state interests since the peoples' interests are not necessarily the state interests and *vice versa*. It is argued that if one equates the people with the state further strengthen the state and subject the interests of the people to those controlling the political power.[169]

3.2.2.3 International Court of Justice and Arbitration Tribunals

As previously noted, the hegemony of the state over natural resources has, under the international law, been assuming a leading role on behalf of the people. This approach has, in most cases, affected the legal interpretation of the right holders. It is not a surprise when most of the legal interpretation approaches of the right lean towards interstate context. If one looks at the UNGA natural resources resolutions, conventions, charters, and treaties would appreciate the above assertion.[170]

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[168] Kiwanuka Richard N., The Meaning of "People" in the African Charter on Human and Peoples' Rights,(1988), p. 95.

[169] Duruigbo Emeka, Permanent Sovereignty and Peoples Ownership of Natural Resources in International, (2006).p. 46; See also Kofele-Kale Ndiva, Patrimonicide: The International Economic Crime of Indigenous Spoliation, *Vanderbilt Journal of Transnational Law,* (1995), p. 56.

[170] See the following treaties which consistently vest the right of permanent sovereignty in state only; Energy Charter Treaty, Dec. 17, (1994), 34 I.L.M. 360, 394 (1995); The United Nations Convention on the Law of the Sea arts. 56, 93, Nov. 16, 1994, 1833 U.N.T.S. 397 (stating that "in the exclusive economic zone, the coastal State has sovereign rights for the purposes of exploring and exploiting, conserving and managing the natural resources" and providing for the "sovereign

Furthermore, even some judicial pronouncements seemed to lean towards the state-centric context of the right over natural resource sovereignty. For instance, in *the LIAMCO case,*[171] the Arbitrator, as previously pointed out at the preceding part, noted that resolution 1803, if not the unanimous source of law, is evidence of a recent dominant trend of states' sovereignty over their natural resources.[172] *In the East Timor case,*[173] in a dissenting opinion, the Judge more or less reiterated the position *in the LIAMCO's case* by arguing each member state of the United Nations to respect each state's right to permanent sovereignty over its natural resources. The interpretational approaches above seem narrow and convey an impression that the state holds the right of sovereignty over natural resources exclusively and relegate the right of the people mischievously. If the above interpretation stands, then, there is a risk that the benefit accruing from the exploitation of natural resources would accrue only to few political elites.

That notwithstanding, in order to understand clearly the right bearer between the state and the people, it is imperative to look at the background of the evolution of the debates over sovereignty over natural resources. It is noted from the documents and *travaux preparatoires*[174] of the debate of PSNR, by and large, the developing countries elaborated their intention of vesting the natural resource

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right of States to exploit their natural resources"); United Nations Framework Convention on Climate Change, Mar. 21, 1994, 1771 U.N.T.S**.** 107; United Nations Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818.

[171] Libyan American Oil Co. (LIAMCO) v. Libya, *reprinted in* 20 I.L.M. 1, 53 (1981).

[172] Ng'ambi Sangwani Patrick, *Resource Nationalism in International Investment Law*, (2015) p. 13.

[173] East Timor (Portugal v. Australia.), 1995 I.C.J. 90 (June 30).

[174] See article 32 of the Vienna Convention on the Law of Treaties, 1969; *Haitian Centers Council, Inc. v. McNary,*969 F.2d 326, 1329-1334 (2d Cir. 1992) The above case defined the term as "the international equivalent of legislative history" of the treaty, consisting of the "preparatory and conclusive circumstances of a treaty; See also Kadish Mark J., Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul, *18 Michigan Journal of International Law*, (1997), p. 590.

sovereignty to both the people and the states.[175] It was intended to prevent if anything comes to the worst, a well-meaning but weak and myopic leadership from weakening the survival of the countries through granting non-beneficial concessionary rights which would seriously jeopardise the country's future.[176] Nico Schrijver elaborates thus;

> This 'etatist' orientation in the evolution, interpretation, and application of the principle of permanent sovereignty can well be understood as part of the economic and political emancipation process of developing countries, but equating peoples and States undoubtedly further strengthens the State and subordinates the rights of the people to the whims of those in power. However, a recent tendency can be discerned indicating that the rights of peoples in a non-colonial context are receiving revived attention ... If this tendency is consolidated, the principle of permanent sovereignty will return to its two roots [which] would certainly be a laudable development, as it implies that States should be instruments to serve the interests of peoples and not vice versa.*[177]*

Therefore, the rejuvenated insistence of the people-centric interpretation against the states over the natural resource sovereignty is not cosmetic, but rather it is the firm affirmation of the mistrust which the people have against their

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[175] See Gess Karol, Permanent Sovereignty over Natural Resources, (1964), pp.406 - 409, Arguing that the representative of Chile at the 17th session of the Permanent Sovereignty Commission noted that it is essential to determine the nature of permanent sovereignty over natural resources and the manner in which it can be exercised and what measure should be taken into account in accordance with the international law.

[176] Hyde James, N., Permanent Sovereignty over Natural Wealth and Resources*, 50 American Journal of International Law*,(1956), pp. 854 - 858; Duruigbo Emeka, Permanent Sovereignty and Peoples Ownership of Natural Resources in International Law, (2006), p. 49.

[177] Schrijver N.J, *Sovereignty over Natural Resources,* (1997), pp. 370 -371; Duruigbo Emeka, Permanent Sovereignty and Peoples Ownership of Natural Resources in International Law, (2006).p. 52; Dam-de Jong Daniëlla*, International Law and Governance of Natural Resources,* (2015), p. 46.

governments.[178] It is, perhaps, absurd and embarrassing to say that the functional meaning of the state and her institutions of governance in the developed countries do not connote the same meaning in the developing countries. The state in the developed world is, in most cases, governed by the firm, systematic and functional institutions of governance whose authorities are derived from the laws. On the contrary, the developing countries' institutions of governance, though derive their authority from the laws, their practical implementation depends on the political elite in power. Thus, the people-centric approach is no more demanding than a qualified state sovereignty characterised by the duties towards its people.[179]

Accordingly, the thesis suggests more transparency and accountability of states, in particular, the distribution of benefits derived from the exploitation of natural resources. In other words, the state control over natural resources should not be used as a sword against the people rather the shield for the people.[180] In the contemporary world where the quest for the exploitation and utilisation of natural resources is increasing, the position of the people in the process is further obscured. The state hegemony is surpassing the people as both *de facto* and *de jure* holder of the right over natural resource sovereignty.[181]

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[178] Dufresne Robert, The Opacity of Oil: Oil Corporations, Internal Violence, and International Law, (2004), p. 356. Argued that As public prerogatives are always exercised through a form of representative body, there is a structural representational gap between peoples, who are the nominal and residual holders of the prerogatives over natural resources, and governmental representatives, who actually exercise the prerogatives.

[179] See Chowdhury Subrata Roy, *Permanent Sovereignty over Natural Resources*, in *Permanent Sovereignty over Natural Resources in International Law*, (Kamal Hossain & Subrata Roy Chowdhury (eds) Pinter, (1984).

[180] Miranda Lilian Aponte The Role of International Law in Intrastate Natural Resource, (2012), p. 805.

[181] For further discussion on the right holders between states and the people see Bastida Elizabeth, Walde Thomas and Warden-Fernandezet Janeth (eds.), *International And Comparative Mineral Law and Policy: Trends and Prospects,* Kluwer Law International, (2005), pp. 1-36; McHarg Aileen, Barton Barry, Bradbrook Adrian and Godden Lee (eds.), *Property and the Law in Energy and Natural Resources,* Oxford University Press, (2010).

It can be argued that the vesting of natural resources in the people was ingeniously thought and planned. This is exacerbated by the contentious debate that preceded the framing of the articles on the sovereignty over natural resources. As noted above, the developing countries insisted of wording the article with the inclusion of the phrase 'permanent sovereignty' in the earlier resolutions and in the International Covenant on human rights as a manifestation of their sovereign right.[182] The developed countries on the other hand strongly opposed the inclusion of the phrase 'permanent sovereignty' of the people. Two reasons were advanced in support. Firstly, vesting the right in the people would create unnecessary hurdles since the people are not the subject of international law and as such, cannot honour obligation arising from international law. Secondly, if the right were vested in the people, it would create unwarranted renunciation of international agreements with impunity.[183]

The developed countries' insistence on vesting natural resource sovereignty to both states and the people paid off on understanding that under the traditional international law, people have no locus,[184] as such, such power would be exercised by the states. The sovereign states have the rights and duties under the international law and therefore, in the spirit of furtherance of international cooperation enshrined in different international legal instruments, states would undoubtedly honour her obligations short of which some political and economic embargos may be imposed. It is emphatically argued that the protracted debates on sovereignty over natural resources emerged as a proper forum to rationally allocate natural resources to the international level between the newly independent states and developed countries. Accordingly, the thesis was perceived as mediating between interstate natural resource allocation which was

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[182] See Gilbert Jėrėmie, The Right to Freely Dispose of Natural Resources, (2013), p. 321.

[183] See Gilbert Jėrėmie, The Right to Freely Dispose of Natural Resources, (2013), pp. 321 - 22.

[184] Miranda Lilian Aponte, The Role of International Law in Intrastate Natural Resource, (2012), p.799; See also Schrijver, N.J., *Sovereignty over Natural Resources,* (1997), p. 58.

incorporated in the exercise of political and economic powers of the newly independent states in the post-colonial legal order.[185]

3.2.3 Interstate Interests on Natural Resources Sovereignty Agenda

3.2.3.1 Developing Countries Right to Political Self-Determination as an Aspect of Natural Resources Sovereignty

Prelude to its entrenchment in the two human rights covenants as one of the important aspects of natural resources governance, there were initial efforts recognising the right. The then president of the United States proposed the inclusion of the right during the drafting of the Covenant of League of Nations, although the idea never featured in the final draft.[186] The second effort was fronted in the Atlantic Charter, 1941[187] which explicitly declared that any territorial changes must be accorded with freely expressed wishes of the peoples concerned and proclaims a right of the people to choose their form of government they want to live in.

The right of self determination current legal recognition is firmly entrenched in the United Nations Charter.[188] Article 1(2) of the Charter provides a general principle within which the new world order is premised. It states, among others, the purpose of the United Nations is to develop friendly relation among nations based on the principle of sovereign equality of states and self-determination of the people. In addition, article 55 of the Charter states that on matters of international economic and social cooperation in the creation of stability and

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[185] Miranda Lilian Aponte, The Role of International Law in Intrastate Natural Resource, (2012), p. 798.

[186] Casese Antonio, *Self-Determination of People: A Legal Reappraisal,* Cambridge University Press, (1999) p. 23.

[187] See Atlantic Charter*, Yearbook of the United Nations*, (1946 - 7), New York, United Nations (1947), p. 2.

[188] Casese Antonio, *Self-Determination of People: A Legal Reappraisal,*(1999) p. 43. Arguing that the adoption of the United Nations Charter marked an important turning point. It signaled the maturity of the right to self determination as apolitical postulate into a legal standard of behaviour.

peaceful conditions for the well-being of the people among nations would be based on the equality of states and self-determination of the people.

The entrenchment of the right in the United Nations Charter confirms the importance of realisation of the right, particularly, to non-self governing and trust territories. As noted above, the initial inclusion of the right viewed the right as a political claim of the people. However, the entrenchment of the right to both international human rights covenants not only confirmed the importance of realisation of this right, but also confirms its human rights character. In other words, the covenants built more solid platform within which the right of self-determination could be asserted with more revolutionary force.

The entrenchment of the right in both covenants signifies that the right is both civil and political as well as economic and social. Article 1 of both covenants provides three important elements which are relevant to the right. Firstly, they state clearly that people have the right to self-determination and determine their political status. It is argued that the exercise of this right is against the external imposition rule. The second corollary right envisages the right of the people to assert the control and disposition of their endowed resources without prejudice to the obligations arising from the international economic cooperation and the international law. Accordingly, the thesis suggests the importance of balancing the exercise of the peoples' right to self-determination and other international obligations.[189] Thirdly, it encourages state parties, including those with responsibilities for the administration of non-self-governing and Trusts territories, to promote the realisation of the right to self-determination in conformity with provisions of the United Nations Charter.

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[189] Farmer Alice, Towards a Meaningful Rebirth of Economic Self-Determination, (2006 - 2007), p. 431. He states that the authority to overseeing natural resources should be therefore, use the endowed natural resources for the benefits of all people. It is further contended that without a right to free disposition, people would not have way of enforcing the use of their collective end. Corollary to that without an explicit provision stating that natural resources have to be used for the benefit of the people, then the right would be a mockery capable of being abused by few in whose hands the political power are vested.

3.2.3.2 Resource Sovereignty as an Aspect of Economic Self-Determination

The right of political self-determination is the corollary of the economic right of self-determination. As pointed out earlier in this part, political right to self-determination is meaningless, if it does not go together with its economical aspect.[190] This is because they are the sets of rights which are interrelated, interdependent hence complement each other. The right of political self-determination cannot, in itself, be enjoyed if the economic part of it is convoluted. Thus, it was not a surprise that after the attainment of independence the newly independent states realised that their political independence is meaningless if it is not supported by the ability to control and determine the mode of utilisation of their endowed natural resources.[191]

In addition, the UNGA resolution 1803, for instance, provided unequivocal that the exercise of the right of permanent sovereignty over natural resources shall be in the interest of the national development and the well-being of the people. It provides further that the exploration, development, and disposition of resources shall be determined by the rules which the peoples and the nations consider necessary and desirable for that purpose.[192]

Like the political aspect of the right of self-determination, the economic aspect was also entrenched in the two international covenants on human rights. Article 1(1) of both covenants provide, not only that the people have right to choose their

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[190] Farmer Alice, Towards, a Meaningful Rebirth of Economic Self-Determination, (2006 - 2007) p.423; See also Oloka-Onyango John, Heretical Reflections on the Right to Self-Determination: Prospects and Problems for a Democratic Global Future in the New Millennium*, 15 American University International Law Review*, (1999), pp. 169 - 170.

[191] Schrijver N.J., *Sovereignty over Natural Resources*, (1997), p. 52; See also UN Doc. A/C.3/SR.645, 27 October 1955, p. 104, para. 11. Whereat, Chile had insisted that the country cannot exercise the right of self determination unless it is a master of its own resources. He added that self determination would be an illusion if the substantive part of the countries resources are in the hands of another state.

[192] See paras. 1 and 2 of the UNGA Res. 1803 on Permanent Sovereignty over Natural Resources, 1962 17 UN –GAOR, Supp. No. 17, p. 15, UN Doc. A/5217.

form of government to achieve the political right, but also should have the economic means necessary to pursue development.[193] Although the exercise of the right was subjected to obligations arising from the international cooperation and the international law, articles 25 and 47 of the ICESCR and ICCPR respectively, strengthen the enjoyment of this right by stating that nothing in the covenants can impair the inherent right of all people to enjoy and utilise freely their natural wealth and resources.[194]

The adoption of the resolution on the establishment of the New International Economic Order (NIEO) and the Charter of Economic Rights and Duties of States justified and supported the actions taken by the developing countries with regards to taking control over natural resources within their respective boundaries and ultimately achieve the economic development.[195] These resolutions fortified the earlier efforts. For instance, when one looks at the provisions of the Charter, as already pointed out at the preceding chapters, they reiterate, by and large, the principle laid down in resolution 1803 albeit with more revolutionary force.[196]

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[193] Dam-de Jong Daniëlla*, International Law and Governance of Natural Resources,* (2015), p. 77.

[194] Casese Antonio, *Self-Determination of People: A Legal Reappraisal,* (1999) p. 57. Arguing that the inclusion of the latter identical articles in both ICCPR and ICESR restated the language of their article 1(2) respectively without reference to international obligation. This endeavour is seen as a triumph for economic self determination over concern of international economic order; see also Farmer Alice, Towards, a Meaningful Rebirth of Economic Self-Determination, (2006 - 2007), pp. 432 - 433.

[195] Vandevelde, Kenneth, J., A Brief History of International Investment Agreements, (2005), p. 158.

[196] See Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), art. 2, U.N. Doc. A/9631 (Dec. 12, 1974) (Every State has and shall freely exercise fully permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activity); Declaration on the Establishment of a New Economic Order, G.A. Res. 3201 (S-VI), 4(e), U.N. Doc. A/9559 (May 1, 1974).

3.2.4 Developed Countries' Agenda

3.2.4.1 Optimum Sharing and Utilization of Global Natural Resources

The aftermath of the WWII witnessed various efforts undertaken by the developed countries to redress the effects of the war. As noted above, raw material supply crisis was an apparent immediate woe to be addressed.[197] These efforts included the creation of the Bretton Woods Institutions in 1945; namely, the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD) now the World Bank. These institutions were established to, among others, assist in the reconstruction and development of territories of the member states and facilitate the investment of capital for the productive purposes and the promotion of private investments.[198] It is noted that before the creation of these institutions, there was no global multilateral institution(s) which regulated the conduct of the global trade and investments.[199]

The establishment of the Bretton Woods Institutions was a long-term plan, amid of this plan, there was an *ad hoc* plan aimed at addressing the immediate raw material supply crisis. The International Timber Conference was convened under the auspices of the United Nations specialised agency on Food and Agriculture Organisation (FAO) in 1948. The conference was convened amid of the acute

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[197] Mark J. Wolff, Failure of the International Monetary Fund & World Bank to Achieve Integral Development: A Critical Historical Assessment of Bretton Woods Institutions Policies, Structures and Governance, *41 Syracuse Journal International Law and Commerce,* (2013- 2014), p. 1; Lee E. Preston and Duane Windsor, *The Rule of the Game in the Global Economy: Policy Regimes for International Business* 2nd (ed.) (1997), pp. 132 - 133.

[198] Wolff Mark J., Failure of the International Monetary Fund and World Bank to Achieve Integral Development, (2013 -2014) p.78. See also Preston Lee, E., & Windsor Duane, (2nd ed.) *The Rules of the Game in the Global Economy: Policy Regimes for International Business*, Springer, (1997), pp. 132 - 133.

[199] Ngaire Woods, Governance in International Organisations: The Case for Reform in the Bretton Woods Institutions, *International and Financial Monetary Issues*, (2008).

shortage of timber supply in Europe.[200] The conference stressed the immediate need for the supply and distribution of timber as short-term measures while the restoration of forests as part of European reconstruction was the long-term plan.[201] The establishment of the Bretton Woods institutions and subsequent conferences of the Food and Agricultural Organisation aimed at facilitating the access of raw materials of the world for the furtherance of economic prosperity of states through international trade and mutual cooperation.

3.2.4.2 Protection of Foreign Investments in Developing Countries

The developing countries and the newly independent states were strongly advocating for the sovereignty over their natural resources. These efforts posed a huge threat to the developed countries. There was a wind of political and economic changes which were taking place across the globe. One of the changes included decolonisation process which was in its full swing. The decolonisation process brought with it challenges which required an instant solution.

Firstly, most of the raw materials were supplied to the developed countries from their respective colonies. Apart from the fact that the colonies were also affected by the WWII, their attaining independence, reduced the dependence from their former colonial master production and economic policies. In addition, the former colonies had the freedom to choose new trade partners with whom to do business with. As such, some of the pre-existing business relations were terminated unilaterally. The unilateral termination of business agreements accounted for the acute shortage of raw materials supply. Furthermore, it was contended by the developing countries that introduction of concepts such as sovereignty over natural resources would give states the virtual monopoly of raw

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[200] See The State of Food and Agriculture: A Survey of World Conditions and Prospects, Washington D.C, 1948, available at http://www.fao.org/docrep/016/ap636e/ap636e.pdf (accessed on 6th June, 2016); Schrijver N.J., *Sovereignty over Natural Resources,* (1997), p. 38.

[201] Schrijver N.J., *Sovereignty over Natural Resources,* (1997), p. 38.

materials which were indispensable to the international community with impunity.[202]

Secondly, the developed countries, in particular, the former colonial masters and their respective multinational corporations were concerned about the fate of the business and investment agreements which were entered into during colonial era. At the advent of granting independence to the colonial states, there was an apparent and legitimate fear about the independence and its aftermath. The fear was apparently felt at the instance of the newly independent state's insistence on abrogating the colonial investment agreements on the date of attaining independence.[203] The developed countries, persistently insisted on the respect of agreements entered into during the colonial era in accordance with the principles of international law, i.e., *pacta sunt servanda*.

The newly independent states were strongly advocating for the abrogation of the colonial agreements as a manifestation of the sovereignty of their state. The argument in support of their assertion was that states and its people could not be deprived of their natural resources which form part of their own existence. In addition, they strenuously disputed the argument put forth by the developed countries in relation to the respect for the international law. They contend that respect of the international law is a mere shield and the desire of the developed countries to maintain their colonial domination and control over their natural resource exploitation.[204]

Thirdly, as noted in the preceding part, the existing political and economic imbalances made the developing countries and the newly independent states to

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[202] Schrijver N.J., *Sovereignty over Natural Resources*, (1997), p. 50.

[203]See Brownlie, I., *Principles of Public International Law*, 3rd ed.(1979), p. 653; See also Makonnen. Y, *International Law and the New States of Africa: A study of International Legal Problems of State Succession in the Newly Independent States of East Africa,* (1983), pp. 121 - 22; Turack Daniel C., International Law and the New States of Africa, (1984), p.303

[204] Schrijver N.J., *Sovereignty over Natural Resources,* (1997), p. 50.

embark on the major economic reforms aimed at asserting the control and use of their endowed natural resources. One of the notable measures adopted was the nationalisation and appropriation of foreign properties as an act of manifestation of their sovereign right. The measures were undertaken under the auspices of the exercise of the right of permanent sovereignty over natural resources. The nationalisation and appropriation measures did not only affect the developed countries in terms of the requisite raw materials supply chain, but also deprived their huge capital investments in the natural resources sector.[205]

3.3 Intrastate Debates on Sovereignty over Natural Resources Governance: Forgotten Agenda?

Throughout the inception of the debates on natural resource sovereignty, intrastate natural resource sovereignty did not receive a deserved attention. The initial debates leaned towards interstate context due to the apparent reasons that existed at the time of evolution of the debate on the natural resource sovereignty. It is argued that the main theme during the evolution of the debates was the ability of the developing countries and the newly independent states to control and exploit their endowed natural resources as a legitimate means to attain the economic development.[206] This was, apart from the right of political self-determination, a manifestation of its corollary right of the economic self-determination. As pointed out in the preceding part, the ability to control and

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[205] Brower Charles N. & Tepe, Jr. John B., The Charter of Economic Rights and Duties of States: A Reflection or a Rejection of International Law?, *9 International Lawyer*, (1975) p. 295; Burns H. Weston, The Charter of Economic Rights and Duties of States and the Deprivation of Foreign Owned Wealth, *75 American Journal of International Law*, (1981), p. 437.

[206] See Vandevelde, Kenneth, J., A Brief History of International Investment Agreements, (2005), p. 158; Todaro Michael P., *Economic Development in the Third World*, New York, London. Longman, (1989), p. 598; Snyder Francis and Slinn Peter, (ed.), *International Law of Development: Comparative Perspectives*, Abington, (1987), p. 13.

exploit natural resources was a priority for most of the developing and the newly independent states.[207]

At the beginning of the evolution of the debates and the earlier UNGA resolutions of sovereignty over natural resources, the right of sovereignty over natural resources was vested to both the states and the people without defining their respective rights and duties. It is argued that the glaring omission strengthened states to the detriment of the people.[208] The interests of the peoples were unilaterally subsumed and taken care of by the state. The taking over was aimed at using the state as a medium through which the rights of the people could be asserted against the external interests and the international community at large.[209] The foregoing assertion is based on the faulty assumption that the state will always act to represent the interests of the people.[210]

There are two apparent challenges which fault the assumption above. Firstly, in the developing countries, apart from a few instances where state represents the interests of the people, governments do not genuinely represent the interest of the people against external interests.[211] This is demonstrated by the granting of

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[207] Barbieri Michele, *Developing Countries and their Natural Resources,* (2009), p. 4.

[208] See Temitope Tunbi Onifade, Peoples-Based Permanent Sovereignty over Natural Resources: Toward Functional Distributive Justice? *16 Human Rights Review*, Springer, (2015), p. 351. Arguing that government hold property on behalf of citizens, precluding the latter from exercising the right on the same. This ends up putting citizens at the mercy of the government.

[209] Chowdhury Subrata Roy, *Permanent Sovereignty over Natural Resources*, in *Permanent Sovereignty over Natural Resources in International Law*, (Kamal Hossain & Subrata Roy Chowdhury (eds) Pinter, (1984) cited in Duruigbo Emeka, Permanent Sovereignty and Peoples Ownership of Natural Resources in International Law, (2006), p. 37.

[210] For further discussion, see Vinuales Jorge E., Foreign Direct Investment: International Investment Law and Natural Resources Governance, (2016), pp. 39 - 40.

[211] Desai Deval and Jarvis Michael, Governance and Accountability in Extractive Industries: Theory and Practice at the World Bank, *30 Journal of Energy and Natural Resources Law*, (2012) p. 105. Arguing that instead of enhancing returns for access to mineral wealth, resources-rich countries tend to build institutional arrangements designed to attend to the needs and demands of corporations, foreign powers and financial institutions with more legitimacy than to citizens; See also Bebbington Anthony, *et al*, Contention and Ambiguity: Mining and the Possibilities of

non-beneficial natural resources investment agreements against multinational corporations at the discretion of the political elite controlling state's institutions of governance. Secondly, the people do not see tangible benefits arising from the exploitation of their natural resources. In other words, there are no trickle-down effects of the benefits accruing from the exploitation of natural resources.[212]

A state is an ideal constituted by the people, among others. The ideal character stems from the fact that it is the people through their collective unity in their respective constituencies who create a state and not vice versa. Therefore, the hegemony which state enjoys as the right holder of sovereignty over natural resources is indeed a trust duty on behalf of the people.[213] As noted above, the contemporary challenges in respect of the state control and exploitation of natural resource call for the revitalisation of intrastate natural resource sovereignty into two main fold; Firstly, the capture of the natural resources by the few political elites who enrich themselves at the detriment of the people. Secondly, the is an unfair distribution of the benefit derived from the exploitation of natural resources, in particular, to the communities where natural resources are located.[214]

Development, *Brooks World Poverty Institute Working Paper 57,* University of Manchester, October,(2008), p. 7.

[212] Hislon Gavin and Maconachie Roy, Good Governance and the Extractive Industries in Sub-Saharan Africa *30 Mineral Processing and Extractive Metallurgy Review (*2009), p. 50*;* Campbell Bonnie, Factoring in Governance is not Enough: Mining Codes in Africa, Policy Reform and Corporate Responsibility, 18 *Minerals and Energy* (2003), p. 2. The authors argue that a case study conducted for sharing of government revenues for Ghana and Tanzania revealed that mining revenues are negligible when compared to those of companies. For example just 1.7 per cent of the value of gold mined by companies from 1990 to 2002 went to the Ghanaian treasury via royalties and corporate income taxes, while in Tanzania, the mining sector remained at two per cent of GDP between 1998 and 2000 while the total value of corporate gold exports increased from USD3.34m to USD120.53m.

[213] Gilbert Jėrėmie Gilbert, The Right to Freely Dispose of Natural Resources, (2013), pp. 322 - 323.

[214] Miranda Lilian Aponte, The Role of International Law in Intrastate Natural Resource, (2012), pp.795 - 796; See also Diallo A., MP for Mwanza Rural, quoted *in* Mwakalebela L. and Kaguo T.,"MPs differ on mining taxes", *Business Times*, Friday 18 March 2000. Accordingly, the MP, representing one of the constituencies where most of mining operations in the United Republic of

The foreign direct investments have increased progressively in Africa generally and Tanzania, in particular, for the last two decades. Surprisingly, the poverty has increased simultaneously along with the investments in-flow thus challenging the relevance of the investments.[215] Nonetheless, this study will not examine the socio-economic relations which created these hurdles because they are beyond the scope of the study. Admittedly, under the traditional international law, issues on how a particular state exploits and distributes income derived from the exploitation of her natural resources is an internal affair which could not be interfered with. The assumption was, as rightly faulted above, the state would use the income derived from the exploitation of such resources for the benefit of the people.

The experience from the resources-rich countries provide a dichotomous view to the effect that states endowed with the natural resources are bedeviled by the poverty and resources related conflicts. For instance, the Democratic Republic of Congo, Angola (during Jonas Savimbi's insurgency), Sierra Leone, Liberia (Charles Taylor's reign) and Sudan(Darfur) substantiate the above assertion. These conflicts do not only affect their respective states, but also have diverse effects on the neighbouring states and the international community as a whole.[216] Therefore, the people struggle over natural resource sovereignty against the developed countries and multinational corporations have changed. The struggles are waged against their own government demanding for transparency and

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Tanzania take place, was quoted complaining that the mining companies employ very few local people, build their own infrastructures and develop their own supply chains connected to their own countries.

[215] Jordan, Philip Paul (ed.), *The Mining Sector in Southern Africa*, Harare, SAPES Books, (1995) at p. 95, arguing that despite the influx of investors in the mining industry, the contribution of this branch to the economy has not substantially changed over the years; See also Kulindwa, Kassim *et al*., *Mining for Sustainable Development in Tanzania*, Dar es Salaam, Dar es Salaam University Press, (2003), p. 65.

[216] See Paul Stevens, Resources Impact- Curse or Blessing? *13 Centre for Energy Petroleum and Mineral Law and Policy Internet Journarl1*, (2003) pp. 1 -14; Duruigbo Emeka, The World Bank, Multinational Oil Corporations, and the Resources Curse in Africa, (2005), p. 2.

accountability on their secured share derived from the exploitation of their natural resources.[217]

There are no binding substantive and procedural international legal measures on intrastate natural resource governance which compel states to utilise the revenue derived from the exploitation of the natural resources for the benefit of the people.[218] The absence of these measures, in particular, at the time when there is an uneven distribution of the benefits derived from the exploitation of natural resources, would lead to the natural resources economic, civil and political-related unrest.[219]

Since state governments are holders of the natural resources on behalf of the people, it would be logically expected to be accountable to the people on how the natural resources are exploited and the benefits distributed from such exploitation. That is unfortunately not the case in most of the developing

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[217] See Majinge Charles Riziki, The Doctrine of Permanent Sovereignty over Natural Resources in International Law and its Application in Developing Countries, (2010), p. 245.

[218] Duruigbo Emeka, Permanent Sovereignty and Peoples Ownership of Natural Resources in International Law, (2006).p. 92; See also Bilder Richard B., International Law and Natural Resource Policies*,* 20 *Natural Resources Journal,* (1980). pp. 480-83. Arguing that it has long been recognized that there is a role, albeit limited, for international law in the management of natural resources for the benefit of all; Umozurike, Oji. U. *The African Charter on Human and Peoples' Rights*, Martinus Nijhoff Publishers, (1997), p. 55. Arguing that for the 'peoples to benefit from the advantages derived from their national resources' an atmosphere must be created that rectifies the shortcomings of economic relations with international monopolies as well as those of internal leadership.

[219] For example, Majinge Charles Riziki, The Doctrine of Permanent Sovereignty over Natural Resources in International Law and its Application in Developing Countries, (2010), p. 259 noted that in Nigeria the Ijaw community issued the Kaiama Declaration in December 1998 which among other demands stated that “all land and natural resources within the Ijaw territory belong to Ijaw communities and are the basis of our survival” available at http://www.unitedijawstates.com/kaiama.html See also the Declaration adopted by the General and Representative Assembly of the Oron Indigenous Ethnic Linguistic Nationality in Nigeria, which among other things demanded that “every region should control its resources 100% from which it will allocate funds for running the Federal Government and to work with other ethnic nationalities for a concrete joint programme of self determination of the people.

countries.[220] Although discussions on the constitutional arrangement of power relation in the states are beyond the scope of this study, nevertheless, some aspects have relevance. The censorship expected of the legislature against the executive arm of the state is very minimal. An illustration from the United Republic of Tanzania would demonstrate this assertion. In February 2007, the then Minister responsible for Minerals and Energy met with the Executive General Manager of Barrick Gold (Tanzania) Ltd. The latter was representing Pangea Minerals Limited, a subsidiary company of Barrick, while the former was representing the government of the United Republic of Tanzania.

It is worth noting that the meeting took place in a private hotel in London. The two met to conclude a multimillion-dollar investment agreement between the Minister, representing the government of the United Republic of Tanzania and the representative of Barrick Gold (Tanzania) Ltd. The company was to be given exclusive rights to extract gold in the area called Buzwagi located in Northwest Tanzania. It was contended by the Minister that the mining company intended to invest more than USD 400 Million in the project. What was more interesting were the provisions of the contract itself, which gave extensive concession to the company to the detriment of the Government and its people.

One of the members of parliament from opposition party proposed to the Speaker of the National Assembly to pass a motion sanctioning the formation of a parliamentary committee to probe three issues, among others. Firstly, why was the agreement signed in a private hotel in London? Secondly, why was the provision of the Income Tax Act, 1973 removed without following the laid down procedure for amendment of laws? and thirdly, why was the Buzwagi investment

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[220] For instance, as it would be expected of the legislature which is, under the doctrine of representative democracy, comprised of the members representing the people, to hold the government accountable on behalf of the people. However, in what one may refer to as a pre-matured democracy in developing states, there is a very fine line between the exercise of the legislative and the executive functions in the sense that they are constituted and interwoven to each other.

agreement signed in London before the Environmental Impact Assessment (EIA) of the project was done as required by the law.[221] The National assembly, after an evasive and unsatisfactory explanation from the respective minister, unanimously, and by the tyranny of numbers, passed a motion suspending the member of parliament who unveiled the saga allegedly for telling lies which undermined the honour of the house.[222]

Where there is a fusion between the government (executive) and legislature, the people are ultimate losers. They, thus, become voiceless and powerless against government policies and plans. The only intralegal remedies available to them are either to recall their members of parliament for none or improper representation, (if at all the right is provided for in the laws) or vote the government out in the next general elections. However, the exercise of these rights in either recourse would be, in most cases, rendered available when most of the damages have already been done. For instance, the exercise of the right to recall will have to be subjected to rigorous procedures, considerable time to be taken to evaluate the appropriateness of taking such measures and suctioned by a body duly constituted in that regard. While the latter recourse would have to wait for the next general elections provided all factors remain constant.

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[221] Peter Chris Maina, Miles Apart but Walking the Same Path: The Right of the People to Control their Natural Wealth and Resources in Nigeria and Tanzania, (2007), p. 42.

[222] See Lissu T. and Curtis M., *A Golden Opportunity? How Tanzania is failing to Benefit from Gold Mining*, A Report Commissioned by the Christian Council of Tanzania(CCT), National Council of Muslims in Tanzania (BAKWATA) and Tanzania Episcopal Conference(TEC), March 2008, available at http://www.uranium-network.org/Mali%20Konferenz/start_htm_files/start_htm_files/A-Golden-Opportunity-LIISSU.pdf (accessed on 28th June, 2016). "Bunge Suspends Zitto, Turns Down his Motion: He had Proposed Formation of a Select Committee to Probe Karamagi," *The Citizen* (Tanzania), 15th August, 2007, p.1; See Chanz, Isaac, "Zitto"s Suspension Draws Public Anger," *The African* (Tanzania), 16th August, 2007, p. 1 where members of the civil society are arguing that MPs and the general public need total freedom of expression within the Constitution which should be respected by all; See Kija Anil, "Natural Resources and Bunge Anarchy," *The Citizen* (Tanzania), 25th September, 2007, p. 8.

3.3.1 International Law Recognition of Sovereignty over Natural Resources as a Right of the People

The rejuvenated elevation of the people sovereignty over natural resources is no more than, as the critics would hurriedly assume as the creation of the right, an affirmation that the people in their constituent polity are the ultimate bearer of the right over their endowed natural resources. As pointed out earlier, the state is just an ideal conduit through which the people in their collective constituencies would conveniently control their natural resources. Similarly, when the state controls the exploitation of natural resources in her respective territory, does that on behalf of the people who through their collective constituencies form the state in that regard.

The basis of the above argument has been sanctified by international legal instruments. Article 1(2) of the both ICCPR and ICESCR 1966 respectively expressly vests the right of sovereignty over natural resources to the people of the state. States parties are expected to make the realisation of this right on behalf of the people.[223] Also, the African Charter on Human and Peoples Rights 1981 vest the right of natural resources sovereignty to all people of the polity. In the recognition of impracticability of the exercise of this right by all people, the African Charter charged the state party to take up this noble role on behalf of the people.[224] Notwithstanding the good intention of the Charter to vest the exercise of this right to the state, the contemporary challenges of intrastate natural resource governance are partly caused by it.

It should be underscored that the contemporary intrastate debate on the natural resources governance does not intend to stripping-off the state control over the natural resources but rather demanding more transparency and accountability on

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[223] Temitope Tunbi Onifade, Peoples-Based Permanent Sovereignty over Natural Resources: Toward Functional Distributive Justice? *16 Human Rights Review*, Springer, (2015), p. 355.

[224] See Article 21 of the African Charter on Human and Peoples' Rights, 1981.

the part of the government regarding the exploitation of natural resources. In addition, to see to it that benefits from such exploitation trickle down to the ordinary people not necessarily in terms of the cash in their pockets but rather positive impacts in their real lives. These include improvement of infrastructures, health services and facilities, education, and provision of adequate supply of clean and safe water, among others.

3.3.2 Sovereignty of Natural Resources as a Right of the Communities where these Resources are Located

Apart from the struggle of intrastate natural resource governance between the state and the people, there are specific issues affecting the communities around the areas where the natural resources are exploited. It is expected that the communities from the resource-rich areas must, practically see the benefits of natural resources exploitation. It should be noted that the local communities referred to in this study do not connote the indigenous people who, quite fortunate, have the distinct legal regime protecting their rights.

As pointed out in this study, if the intrastate natural resources governance never got deserved attention during the debates on natural resources sovereignty, one could imagine the insignificance of issues like the rational allocation and/or distribution of the benefits to the local communities arising from the exploitation of natural resources. It is quite unfortunate that most of the communities in the areas where most of the natural resources are extracted live in abject poverty with a minimum availability of the essential services such as clean water, infrastructures, health services, and facilities just to mention few.

The mining sector of Tanzania would be of aid to demonstrate the above claim. Most of the communities living in areas endowed with the abundant mineral resources are the most poverty-stricken with the minimum access to the essential services such as infrastructures, medical facilities, clean and safe

water, schools, among others.[225] To exemplify this, according to the recent published Financial Report by Acacia, one of the biggest mining companies owning three mining sites in Tanzania showed that, it spent USD 8,469,156 through its Acacia Maendeleo Fund for the local communities development projects. The projects included Health (USD768,914), infrastructure (USD2,583,779), Education (USD2,512,760), water and sanitation (USD1,256,977), livelihood support (USD725,979), donation (USD304,205) and others (USD316,536).[226]

Interestingly, according to the company published Financial statements, Acacia earned a colossal revenue of USD868.1 million out of which the taxation charge was USD73.0 million for 2015, compared to a charge of USD26.0 million in 2014.[227] It should be noted that three of the company subsidiaries namely; Bulyanhulu Gold Mine Limited, Pangea Minerals Limited, and North Mara Gold Mine Limited, are companies with Mining Development Agreements (MDAs) with the government of the United Republic of Tanzania. As such, they are not paying corporate taxes as they are still in loss-making position. The corporate tax is

[225] Lissu T., and Curtis M., *A Golden Opportunity? How Tanzania is failing to Benefit from Gold Mining*, March 2008, available at http://www.uranium-network.org/Mali%20Konferenz/start_htm_files/start_htm_files/A-Golden-Opportunity-LIISSU.pdf (accessed on 28th June, 2016). According to this report, it was argued that community development spending by mining companies with lions share in the industry is deceiving. Their spending are included in their financial statements and thus, deducted as capital expenditures of the mines which means are deducted from taxable income.

[226]see the Acacia Maendeleo Fund available at http://www.acaciamining.com/~/media/Files/A/Acacia/documents/sustainability/2014%20Acacia%20Maendeleo%20Fund%20Report.pdf (accessed on 28th June, 2016).

[227] see the Acacia Financial Annual Account Report for 2015 available at http://www.acaciamining.com/~/media/Files/A/Acacia/reports/2016/2015-acacia-annual-report-accounts.pdf at pp. 36 - 9. (accessed on 28th June, 2016).

based on the company profits earned and since these companies are not making taxable profits, corporate taxes do not arise.[228]

3.4 The Obligation of States under the Principle of Sovereignty over Natural Resources: Emerging Trends and Challenges

Apparently, from the inception of the debate on the development of the principle of PSNR, attention was given to creation of "rights" of the sovereignty over natural resources than "duties" or "obligations." However, during the contentious discussions that paved the way to the adoption of the UNGA resolution 1803 on PSNR, apart from the rights created therein, states were obliged to exercise the right of sovereignty over natural resources in the interest of national development as well as for the well-being of the people of the state concerned.[229] The Charter of Economic Rights and Duties of States imposed the obligations on the state to regulate the international cooperation in relation to the shared natural resources between two or more states. It essentially pleaded the state to take into account the interests of other states in the course of exercising her rights under the principles of PSNR on transboundary resources.[230]

3.4.1 Sovereignty over Natural Resources vis-a-vis Obligation under International Environmental Law Norms

It was rather a coincidence that while the principle of PSNR was evolving, there were similar efforts of developing international environmental norms. The purpose of these norms, among others, were to take into account the fact that, while each state has a right to freely exploit their natural resources, the right

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[228] See the Sixth Report of the Tanzania Extractive Industries Transparency Initiative for the Year ended 30th June 2014.available at https://eiti.org/files/teiti_2014_report.pdf prepared by BDO East Africa and published on 15th November, 2015, at p. 15.

[229] See Art. 1, UNGA – Res. 1803 (XVII), Permanent sovereignty over natural resources, Dec. 14, 1962, 17 UN – GAOR, Supp. No. 17, p. 15, UN Doc. A/5217.

[230] Art. 3, UNGA – Res. 3281 (XXIX), Charter of Economic Rights and Duties of States, Dec. 12, 1974, 29 UN – GAOR, Supp. No. 31, p. 50, UN Doc. A/9631.

should be exercised in an environmentally friendly manner.[231] These efforts resulted in the adoption of declarations containing the international environmental minimum principles for the proper exploitation of natural wealth and resources without adverse effects on the areas in which they are located.

3.4.1.1The Declaration of the United Nations Conference On Human Environment (Stockholm Declaration), 1972

As a prelude to Stockholm Declaration, the rise of environmental concerns and incidental challenges brought by such concerns around the global, called for more regulations on the natural resources exploitation and governance.[232] Therefore, the UN Conference on Human Environment took place in Stockholm in 1972 and adopted the Stockholm Declaration on the Human Environment containing 26 principles.[233] Many of the principles have relevance to the natural resources governance. However, of interest for purpose of the study is principle 21 which, for the first time, placed sovereignty over natural resources in an international environmental context. [234]

Principle 21 reads;

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[231] Thornton, J., & Beckwith, S., *Environmental Law*, London, Sweet & Maxwell, 2nd (ed.), (2004), p. 29; Schrijver, N.J., *Sovereignty over Natural Resources,* (1997), p. 128.

[232] Thornton, J. & Beckwith, S. *Environmental Law*, (2004), p. 29; Rachel Carlson's *Silent Spring,* Boston, Houghton Mifflin, (1962), cited in Schrijver, N.J., *Development without Destruction,* (2009), p. 48, arguing that there were long-term effects of pesticides on birds and other wildlife, especially DDT; excessive economic growth; tanker collisions and oil spills; contamination of water; discharges of harmful chemical waste; testing of nuclear weapons; the pressures of a growing world population; increased pollution; wasteful consumption patterns; and other forms of unrestricted use of the world's natural resources.

[233] See *Report of the United Nations Conference on the Human Environment,* General Assembly document A/CONF.48/14/Rev.1, 16 June 1972; text reproduced in *International Legal Materials (ILM)* 11 (1972), pp. 1416–1420; See also *Report of the United Nations Conference on the Human Environment,* Action Plan for International Cooperation on the Environment; UNGA resolution 2997(XXIX), 15 December, 1972, Institutional and Financial Arrangements for International Environmental Cooperation, on the establishment of United Nations Environmental Programme (UNEP).

[234] Schrijver N.J., *Development without Destruction,* (2009), p. 50; See also Schrijver, N.J., *Sovereignty over Natural Resources*, (1997), p. 123.

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

The principle imposed an obligation on the states to exercise their right of the exploitation of the endowed natural resources without causing environmental damages. Interestingly, the principle leans toward a state-centric approach like the principle of sovereignty over natural resources. One may reasonably assume, that, it is because of the preferential treatment which the states enjoy under the international law. The apparent danger of this approach is based on the faulty assumption that most of the environmental damages occur between states. The reality is most of the environmental damages occur within the state. Therefore, while there are pertinent needs to protect the interstate environmental damages, there are equally demanding obligations to devise intrastate policies preventing environmental damages.

The environmental challenges brought by the increased exploitation of natural resources escalated notwithstanding a wake-up call principles contained in the Stockholm declaration. As pointed out earlier, there were competing interests. On the one hand, the need to protect the environmental damages caused by the exploitation of natural resources and on the other hand, the quest for the exploitation of natural resources as a legitimate means to attain the social and economic development. Therefore, the Stockholm Declaration partly attempted to but could not ameliorate all the environmental challenges. Therefore, a common approach guided by consultations and cooperation was required in

order to prevent the disputes over the use of internationally shared natural resources.[235]

3.4.1.2 The Rio Declaration on Environment and Development, 1992

In 1992, the Earth summit convened and conducted a postmortem of the Stockholm Declaration in a bid to addressing the ensued challenges. The outcome of the meeting witnessed the adoption of a pragmatic declaration on environment and development.[236] Apart from promoting the management of natural resources and conservation of nature, the Rio Declaration addressed the delicate balance between protection of the environment and promotion of economic growth in the developing countries. It is noted that like the Stockholm declaration, the wording of the Rio Declaration was couched in the general terms without addressing the diverse specificities arising from the exploitation of diverse natural resources. In addition, even the post-Rio conventions and implementation measures adopted did not address specific challenges in each natural resources sector.[237]

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[235] Schrijver N.J., *Sovereignty over Natural Resources,* (1997), p. 130.

[236] See Rio Declaration on Environment and Development, *Report of the United Nations Conference on Environment and Development*, Aug. 10, 1992, UN Doc. A/CONF.151/26 (Vol. I); Kuakkonen, T., *International Law and the Environment – Variations on a Theme*, Helsinki (2002), pp. 66, 94; Shaw, M.N., *International Law*, 6th (ed.), Cambridge (2008), p. 853; Preamble, Convention for the Protection of the Ozone Layer, March 22, 1985, 1513 UNTS 293; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, March 22, 1989, 1673 UNTS 125.

[237] United Nations Framework Convention on Climate Change(UFCCC), 9 May 1992, entered into force on 21 March 1994, available at http://unfccc.int/resource/docs/convkp/conveng.pdf and in *International Legal Materials* 31 (1992): 851–853; See also Convention on Biological Diversity, 5 June 1992, available at http://www.cbd.int/ convention/convention.shtml also available in *International Legal Materials(ILM)* 31 (1992).pp. 822–841;the Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 14 October 1994, available at http://www.unccd.int/convention/text/convention.php also available in *United Nations Treaty Series(U.T.S),* New York: United Nations, (1996),1954:3; Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 17 March 1992, available at http://www.unece.org/env/water/pdf/watercon.pdf also available in *United Nations Treaty Series(U.T.S),* New York, United Nations, (1996), 1936: 269.

Admittedly, both conferences and their respective adopted declarations have positive impacts in so far as contemporary environmental conservation is concerned. As noted above, both declarations provided the general framework for environmental conservation by arguing the states to devise policies and laws to that effect. However, both declarations failed to appreciate the broadened scope and the nature of natural resources diversities.

The above international frameworks were homogeneous and incapable of addressing adequately the challenges arising from the diverse natural resources which, due to their nature, required a specific policy addressing their peculiar challenges. The contemporary social and economic activities adversely affect environment without the requisite reciprocal mechanisms to mitigate damages. The development of science and technology in the extractive industry require a sophisticated and comprehensive mechanism to counter the adverse environmental damages brought by them in the exploitation of mineral or oil and gas resources. As noted above, there are post-Rio environmental principles governing other natural resources exploitation such as water, fisheries, forestry and wildlife and atmospheric resources.[238]

Both the Stockholm and Rio declarations impose obligations on states to carry out the implementation of the environmental conservation measures. Nonetheless, the implementation of sound environmental policies depends on the financial capacity of the state concerned. However, the principle of Common but Differentiated Responsibilities (CDR) enjoins developed states, owing to their economic activities which account for the most of the global environmental

[238] See United Nations Framework Convention on Climate Change, May 9, 1992, 1771 UNTS 107, UN Doc. A/AC.237/18 (Part II)/Add.1; The Convention on Biological Diversity, June 5, 1992, 1760 UNTS 79; African Convention on the Conservation of Nature and Natural Resources, Sept. 15, 1968, 1001 UNTS 3; Art. 193, United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 UNTS 3; Chapter IV, Plan of Implementation of the World Summit on Sustainable Development, Sept. 4, 2002, *also available at* http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf (*accessed on 2nd May* 2016); Preamble, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 UNTS 154; Cordonier Segger, M.C. & Khalfan, A. *Sustainable Development Law – Principles, Practices, & Prospects*, Oxford, Oxford University Press, (2004), p. 116.

damages, to contribute more for the environmental amelioration.[239] In addition, as part of the implementation strategy, the developed countries are enjoined to transfer the development assistance along with the environmentally sound technology to the developing countries as part of their contribution towards the maintenance of the global environment.[240]

It is quite unfortunate, that the inability of both declarations and subsequent initiatives to come up with articulate policies detailing states' obligations and the compliance verification measures accounts for the current state of the global environmental crisis. This is exacerbated by the fact that there are no implementation strategies put in place setting the compliance deadlines and the reporting procedures among states.[241] Thus, each state, depending on its own political will, devised its own compliance mechanism at her own pace.

The non-implementation of the environmental sound policies has diverse effect especially, in the developing countries where there are technological and financial capacity constraints. Thus, the quest for income generation, apparently, compel most of the states to exploit the natural resources without paying due regard to the environmental damages. Alternatively, they provide for the general internal policy and legal frameworks without the sound and concrete

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[239] See Principle 7 of the Rio Declaration defines it as follows: “States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

[240] See Principle 7**,** Annex, Rio Declaration on Environment and Development, *Report of the United Nations Conference on Environment and Development*, Aug. 10, 1992, UN Doc. A/CONF.151/26 (Vol. I); Art. 3, United Nations Framework Convention on Climate Change, May 9, 1992, 1771 UNTS 107, UN Doc. A/AC.237/18 (Part II)/Add.1; Kolari, T. The Principle of Common but Differentiated Responsibilities as Contributing to Sustainable Development through Multilateral Environmental Agreements in Bugge, Christian Hans, & Voigt Christina. (eds.) *Sustainable Development in International and National Law*, Europa Law Publishing, Groningen, (2008), p. 252.

[241] Wallace, R.M.M., *International Law,* London, Sweet and Maxwell, 3rd (ed.), (1997),pp. 3-4.

implementation strategies. In some instances, the provisions would be entrenched in the investment agreements and enjoin investors to devise environmental sound strategies in accordance with a particular industrial best practice.[242]

It is stated in Principle 21 and 2 of the Stockholm and Rio Declarations respectively that states are free to utilise their natural resources in accordance with their environmental and development policies. However, it does not mean states are under no obligation when devising policies for the exploitation of their natural resources. In fact, para. 1 of the 1962 Declaration on Permanent Sovereignty over Natural Resources enjoins states to utilise their endowed natural resources for the well-being of the people. The above assertion is echoed under article 1(2) of the ICCPR and ICESCR, 1996 respectively. Article 30 of the Convention on the Economic Rights and Duties of States, 1974 enjoins states to take responsibilities to protect, preserve and enhance the environment for the present and future generations.

3.5 Enforcement of International Environmental Norms

The effective implementation and enforcement of international environmental law and policies do not seem to move apace with the exploitation of natural resources. The continued state of environmental deterioration would camouflage one to reasonably argue that states seem to care much about the exploitation of natural resources than the environmental protection notwithstanding the international environmental policies and laws in place. As noted, most of the international environmental laws evolved through declarations and treaties. The declarations and treaties contain what one will term as 'big empty shell' of inspirational objectives without necessarily creating binding legal norms.

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[242] See article 25 (a) (b) and (e) of the Model of Production Agreement (MPSA) between the Government of the United Republic of Tanzania and Tanzania Petroleum Development Company (TPDC) and ABC 2013, available at http://www.eisourcebook.org/cms/Nov%202013/Tanzania%20Production%20Sharing%20Agreement%202013.pdf (Accessed on 23rd April 2018).

Therefore, the environmental norms are seen as soft laws commanding little respect in the international level let alone at the states' domestic jurisdiction.[243]

Most of these treaties embodied the disputes settlement mechanism. However, the majority of them provide a multi-level disputes settlement forums, namely; the negotiation between parties in dispute, and assistance of a neutral third party, and lastly reference to arbitration or the International Court of Justice (ICJ).[244] The challenge, apart from the inadequacy and multiplicity of forums in the enforcement of environmental disputes, is the state-centric approach taken in most of the treaties. It is argued that to put environmental protection in the hands of states presupposes that most of the environmental damages are interstate oriented.[245] This assumption is fallacious if the intrastate environmental damages are isolated.

However, one could still be optimistic about the contemporary approaches in the field of international environmental law where the international cooperation is

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[243] Kaahwa Wilbert T.K., Towards Sustainable Development in the East African Community, in Schrijver, N.J., and Weiss Friedl (eds.), *International Law and Sustainable Development – Principles and Practice;* Leiden; Martinus Nijhoff Publishers; (2004). p. 631; See also Sands, P., *Principles of International Environmental Law*, Cambridge, Cambridge University Press, (2003), p. 46 - 47.

[244] For example, Article 11 of the Vienna Convention on the Protection of the Ozone Layer provides for mediation and conciliation. Article 19 of the 1991 Madrid Protocol on Environmental Protection to the 1959 Antarctic Treaty includes the possibility of having resort to either an arbitral tribunal or the ICJ. Other treaties provide that the dispute will be submitted either to arbitration or to the ICJ if negotiations have proved unsuccessful. See also Art. 11 of the 1985 Ozone Layer Convention; Art. 20 of the 1989 Basle Convention; Art. 14 of the United Nation Framework Convention for Climate Change, 1992; and Art. 27 of the Convention on Biodiversity, 1992. among others.

[245] This was a position held by arbitral tribunals and International Court of Justice way back before international environmental declarations and treaties came into being and in most cases, environmental damages took interstate perspective. For instance, in the *Trail Smelter case (United States v Canada) 1941*, the Arbitral Tribunal remarked thus; ..under the principles of international law... no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence. See also *the Corfu Channel case (United Kingdom v Albania) 1949; Lac Lanoux Case (Spain v France) 1957; North Seas Continental Shelf Cases ICJ Reports (1969); The Barcelona Traction case (Belgium v Spain) ICJ Reports (1970).*

widely preferred. The efforts towards achieving this are through the stakeholder's inclusive approach whereby there is a hybrid of interstate and intrastate approaches to the environmental conservation. The logic behind these approaches is that the environmental damages have no boundaries in that it can emanate from one state and have adverse effects in another state.

3.6 Exploitation of Natural Resources for Sustainable Development

The concept of sustainable development traces its root from the World Commission on Environment and Development (popularly named after its chairperson, Gro Harlem Brundtland ('Brundtland Commission'). It is thus, defined as the development that meets the needs of the present without compromising the ability of the future generations to meet their own needs.[246] The concept has been broadened to take on board the emerging trends which were not envisaged at the inception. At the inception, it covered the sustainable utilisation of marine and forestry resources by preserving their regenerative capacity for an optimal economic production. Later on, it included both the renewable and non-renewable resources by advocating for the prudent and rational use and the maintenance of productivity of the renewable resources indefinitely.[247]

3.6.1 The World Commission on Environment (Brundtland Commission)

At the outset, the concept of sustainable development took a different dimension at the adoption of the Stockholm Declaration by including protection of nature and environment as part of the rational utilisation of natural resources. After the Stockholm conference, it has struck a compromise on the need to integrate the environmental protection and economic development as an indispensable engine

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[246] World Commission on Environment and Development, *Our Common Future,* Oxford, Oxford University Press, (1987), p.43; See also Schrijver, N.J., The Evolution of Sustainable Development in International Law: Inception, Meaning and Status," *Recueil des Cours de l'Académie de droit international de laHaye* (2007), pp. 366 – 374.

[247] Schrijver, N.J., *Development without Destruction,* (2009), pp. 9 - 10.

to achieve the sustainable development. Without the compromise, assuming the choice of a policy favours the economic development than environmental protection, then water, atmosphere, and biodiversity would be affected by such choice. Therefore, there is a likelihood that nature would, in long run, fail to sustain such a venture. This is exacerbated by the fact that the availability of natural resources whether the renewable or non-renewable, depends on the choice of policies adopted for their exploitation.[248] The policies adopted must, not only take into account the interests and the needs of the present generation but should also bear in mind the ability of the future generation to meet their own needs. In this case, they create a synergy between sustainable development and intergenerational equity.[249]

3.6.2 The Commission on Sustainable Development, 1992

The Rio Declaration on Environment and Development, 1992 broadened the scope of sustainable development by including poverty reduction and economic development for the developing countries. It is important to note that the subsequent post-Rio declaration initiatives were aimed at bringing on board other important aspects so as to approach sustainable development in a comprehensive manner. One of the initiatives worth a mention is the establishment of the Commission on Sustainable Development (CSD)[250] as a

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[248]Winter Gerd, A Fundamental and Two Pillars; The Concept of Sustainable Development 20 Years after the Brundtland Report in Bugge, Christian Hans, & Voigt Christina. (eds.) *Sustainable Development in International and National Law*, Europa Law publishing, Groningen, (2008), p. 28.

[249] See German Federal Government, *Perspektiven für Deustchland: Unsere Strategie für einenachahaltige Entwicklung,* (2002). explaining how the Germany Federal Government had embraced the concept of sustainability quite ingeniously. it states thus; Every generation must solve its own problem rather than passing them on to the next generation. At the same time it must make provision for foreseeable future problems. This applies to conserving natural resource base on which life depends, to economic development and to social cohesion and demographic change.

[250]Institutional Arrangements to Follow Up the United Nations Conference on Environment and Development," General Assembly resolution A/RES/47/191, 22 December 1992; and "Establishment of the Commission on Sustainable Development," ECOSOC document E/1993/207, 12 February 1993.

special body to monitor the implementation of Agenda 21. The CSD reviews reports from states, coordinate sustainable development activities under the auspices of the UN system. In addition, it coordinates technical cooperation and capacity building at the international, regional and national level.[251]

The CSD has been overshadowed by the overwhelming challenges, especially on the natural resources governance. It is noted that the establishment of the CSD was, like many other global initiatives, ambitious with no clear intention to address issues of sustainable development. Two reasons account for this thesis. Firstly, it is impracticable to establish a body with such broad mandates without its respective decentralized regional and sub-regional coordinating units. Its efficacy would fail when one considers, for instance, the peculiarities and challenges each region or sub-region is facing. The challenges are drawn from a broad pool of competing issues such as environmental protection, inter and intragenerational equity, poverty alleviation, among others. Secondly, assuming the first challenge is addressed, the commission's mandate does not confer the power of make binding decisions on the states reporting procedure related to the implementation of the policies on sustainable development.

The handicaps noted above cripple efforts to address the global environmental challenges in a systematic manner. For instance, there is lack of articulate policies on how to equitably exploit the natural resources taking into account their respective environmental aspects and factors affecting their biodiversity occurrences. The holistic approach implemented by the CSD without taking into account the peculiarities of each natural resource fetters its very aim. For instance, the approach towards the exploitation of oil and gas would undoubtedly, differ from wildlife resources because of their peculiarities and ecosystem. Therefore, to attain the sustainable natural resources utilisation, it is indeed rational to appreciate and classify each natural resource and devise their respective policies suitable for the rational and sustainable exploitation.

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[251] Schrijver, N.J., *Development without Destruction,* (2009), p. 119.

Admittedly, the efforts for the sustainable use of natural resources undertaken at the international level through different initiatives despite challenges are indeed commendable. However, it would be rational if these initiatives were devised from the national, sub-regional, regional to international level, i.e., down-top approach. This would, apart from addressing some challenges highlighted above, bring into light the real problem facing resource-rich state in attaining sustainable development.

For instance, a down-top approach of the sustainable development can be inspired by article 3(1) of the Convention for Cooperation in the Protection and Sustainable Development of the Marine and Coastal Environment of the Northeast Pacific, 18th February 2002[252] provides thus;

> "Sustainable development" means the process of progressive change in the quality of life of human beings, which places it as the centre and primary subject of development, by means of economic growth with social equity and the transformation of methods of production and consumption patterns, and which is sustained in the ecological balance and vital support of the region. *This process implies respect for regional, national and local ethnic and cultural diversity, and the full public participation of people in peaceful coexistence and in harmony with nature,* without prejudice to and ensuring the quality of life of future generations.(italics mine).

From the above definition, in order to achieve sustainable development, an integrative approach to the global policy making is indeed inevitable. As noted, the people are at the center of the equation since the concept of sustainable development serves the interest of the people. Firstly, the people determine the methods and quantity of the exploitation of natural resources. Secondly, the

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[252] Available at http://www2.ecolex.org/server2neu.php/libcat/docs/TRE/Full/En/TRE-001350.txt (accessed on 25th July, 2016).

ecological balance and capacity depend on policies and decision made by the people. Thirdly, The Convention recognises the need to reconcile social, economic and environmental policies in order to improve the present generation quality of life in a manner that takes into account the interests of the future generations.[253]

3.7 Conclusion

The interstate sovereignty over natural resources is one of the settled principles in the international law. However, the intrastate natural resources governance pose a new challenge. While under the international law each state is sovereign with the right to decide what to do with its resources, the exercise of that right by the states is not without limitation. The International legal instruments, by default or design, vest the right to both the people and the state. It is noted that equating the people and the state would strengthen the latter to the detriment of the former. This is, in particular, where the state, under the pretext of exercising its sovereignty, misuses the resources to the detriment of the people.

The contemporary challenges of the resources spoliation which face the resource-rich states are caused by the blatant failure of vesting natural resources to the state without the prescribed limitations. States have, almost absolute discretion, to make decisions for the disposition of natural resources without necessarily taking into account the interests of the people with impunity. As a result, the people do not see tangible benefits which accrue from such exploitation yet they cannot hold their government accountable for the mismanagement of their endowed resources.

The principle of sovereignty of natural resources, like any other principle, is not static; therefore, it had to accommodate some of the new emerging trends. There

[253]Marie-Claire, Sustainable Development in International Law in Bugge, Christian Hans, & Voigt Christina. (eds.) *Sustainable Development in International and National Law*, Groningen, Europa Law publishing, (2008), pp.116 - 117.

are obligations imposed on states by the evolving environmental norms. The norms are provided in the Stockholm and the Rio declarations in respect of exploitation of transboundary shared resources. The exploitation of these resources should take into account the interests of the states concerned without damaging the environment. In addition, states are obliged to use the endowed natural resources sustainably to meet both the needs of the present generation without compromising the future generation to meet their own needs. Thus, the obligation creates a synergy between the exploitation of natural resources and sustainable development.

CHAPTER FOUR

CONTEMPORARY DEVELOPMENT OF INTERNATIONAL LAW NORMS ON INTRASTATE NATURAL RESOURCE GOVERNANCE

4.1 Introduction

This chapter commences with an interesting discussion on the contending interests between the state sovereignty and natural resource governance. The guiding trend is that the sovereignty of natural resources belongs to the state in whose territory they are found. However, it argues that the contemporary development of the international environmental law norms impose a limit on states in exercising the right of sovereignty over their endowed natural resources. In addition, it unveils a discussion on a range of issues affecting governance of natural resources in the resource-rich state in translating the endowment into the economic development of the people. It thus, argues that one of the main reasons for such a failure is the mismanagement of resources and the revenue accruing from them. It notes with serious concern how corruption accounts for the mismanagement of natural resources spoliation.

It notes with serious concern that there is no international comprehensive mechanism which governs and regulates natural resources among the stakeholders at the international level. There are, instead, concerted efforts deployed by the home states, the host states, and the extractive companies to enhance intrastate natural resources governance. Accordingly, there are home states legislative initiatives on accounting and disclosure imposed under the Dodd-Frank Wall Street Reform and Consumer Protection Act 2010, the European Directive on Accounting and Disclosure 2013/34EU and Canadian Extractive Sector Transparency Measures Act. In addition, there are transnational corruption legislative initiatives aiming at addressing the corruption in the natural resource governance. Although the substantive rules and the enforcement institutions are not themselves international, nonetheless, they cross borders and affect persons and entities outside their jurisdiction. These

laws include the Foreign Corrupt Practices Act, 1977, and The Convention on Combating Bribery of Foreign Public Officials in International Business Transaction, 1997, among others.

The chapter further examines the role of the international voluntary schemes such as the Extractive Industries Transparency Initiatives (EITI) and Kimberly Process Certification Scheme (KPCS) in enhancing intrastate natural resources governance. The voluntary schemes, though not legally binding, have demonstrated commanding obedience and compliance by the implementing states. It further unveils discussion on the regional and sub-regional initiatives put in place to enhance intrastate natural resources governance. It notes that the earlier initiative was provided for under the African Convention on the Conservation of Nature and Natural Resources of 1968. The Convention provides a general framework for the natural resources management of the continent namely, soil, water, flora, and fauna. It also notes that due to some flaws in the earlier convention, there is a revised African Convention on the Conservation of Nature and Natural Resources of 2003. The Revised Convention widens the scope of natural resources by taking into account the contemporary issues such as the development of international environmental laws and sustainable utilisation of natural resources. However, the revised convention has, to date, not yet entered into force.

The chapter examines the efforts adopted at sub-regional level to enhance intrastate natural resource governance. It notes that the political instability in the great lakes region is partly caused by illegal exploitation of natural resources. The illegal exploitation is used to finance the rebel and insurgent groups fighting against the legitimate governments. The International Conference of Great Lakes Regions adopted a Pact in 2006. The 2006 Pact is supplemented by a Protocol Against Illegal Exploitation of Natural Resources. The protocol establishes a certification mechanism as the means of enhancing transparency in the trading of conflict minerals and curb the illegal conflict mineral from sneaking into the international market.

The chapter further examines the efforts deployed by the East African Community (EAC) on natural resources management. It notes that the EAC Treaty enjoins member state to cooperate in the management of their endowed natural resources for their mutual benefits. In that regards, the member states adopted a Protocol on Environment and Natural Resources Management of 2006. The Protocol details how can member states cooperate in managing environment and natural resources. Unfortunately, to date, the said Protocol has not yet entered into force.

4.2 State Natural Resources Sovereignty vis-a-vis Governance

The state sovereignty has been recognised, since the treaty of Westphalia in 1648, as one of the attributes of statehood. Accordingly, the sovereignty is constituted by the independence with regard to a portion of the globe that state has the right to exercise therein to the exclusion of other states. In other words, it can be regarded as the supreme authority within a territory.[254] The sovereignty of state has, since its inception, formed a fundamental basis of the contemporary international law. The formation of the United Nations with its broad mandate in the international economic cooperation, social, cultural, and humanitarian fields underscore the fundamentals of the state sovereignty. However, the contemporary states' interrelation and interdependence posit that the sovereignty is no longer an absolute right of the individual state.

As noted above, due to the interdependence and dominance of the general and common interests among states, states are bound by rules which are ordinarily not ordered by their will yet binding on them.[255] The thesis is premised on the

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[254] See Schrijver, N.J., *Development without Destruction,* (2009), p. 7; Dan Philpott, "Sovereignty," in *The Stanford Encyclopedia of Philosophy, (*ed.) Edward N. Zalta, available at http://plato.stanford.edu/archives/sum2003/entries/sovereignty/. (accessed on 8th July, 2016).

[255]*Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania),* Separate Opinion by Judge Alvarez, available at http://www.icj-cij.org/docket/files/1/1649.pdf.(accessed on 9th July, 2016); See also Grant, J.P., and Barker, J. C., (eds.), *Parry & Grant Encyclopaedic Dictionary of International Law*, New York, Oceana, (2004), p. 471.

assumption that although the international law recognises the sovereign equality of states as members of the international community, yet there are certain principles of the common good which each individual state must adhere to in order to make the universe habitable. For instance, the protection and conservation of the environment are a fundamental duty of each state damages of which would adversely affect other states. Therefore, the states are enjoined to take reasonable measures to prevent the occurrence of such damages. Apart from the evolving environmental norms which limit states sovereignty for common good, there are other fields worth a mention which equally limit the exercise of the state sovereignty. They include the development of the human rights norms, the regional and sub-regional economic cooperation and integration and the Security Council resolutions for the maintenance of peace and security just to mention the few.

Equally, as noted in the preceding chapters, the exercise of the right of sovereignty over natural resources is a manifestation of state sovereignty. At the inception, it was viewed as an absolute right. Any attempts to limit its enjoyment were seen as an encroachment of the state sovereignty which is against the principles of international law. However, the contemporary states interrelation and in the spirit of protection and conservation of the common good among states in the universe, limit the exercise of the right. The absolute rights which the natural resources-rich states joyously enjoyed over their natural resources are no longer tenable in the contemporary world. The exercise of this right has, increasingly, been limited thereby imposing the duties on states when exercising the right. The imposed duties enjoin states to take reasonable measures when formulating their policies and laws affecting natural resources exploitation and take into account the diverse interests within the state and among the states.

4.3 International Legal and Voluntary Initiatives on Natural Resource Governance: Emerging Trends

Perhaps one of the concepts which has not yet received a deserved attention from the inception of the study is natural resource governance. The reasons behind this deliberate omission are to enable a thorough discussion of other important aspects pertaining to rights and duties of each respective party. The aspects, in turn, form the necessary basis for the meaningful discussion on natural resource governance. Before embarking on the interesting but challenging part of the study, it is imperative to describe the term governance in so far as oil and gas resources are concerned. It can thus be broadly described as a process by which governance is addressed through legal and regulatory frameworks that take on board policy, political and institutional frameworks. The frameworks include the existence of the redistributive tax regime that increases taxes on the resources, the effective and strong human resources, and transparency and accountability.[256] The frameworks are further complemented by other aspects such as the rule of law, democratic decision-making, and respect for fundamental rights and freedom.

It is through governance that one can clearly see the tangible benefit from the oil and gas industry short of which, it becomes an illusion. The effective governance of oil and gas industry is important because of the economic, social, political and environmental effects which may arise if the industry is run short of good governance. For instance, a resource curse phenomenon in the form of stagnation of other economic sectors, inflation, rent-seeking behavior and the

[256] Desai Deval and Michael Michael, Governance and Accountability in Extractive Industries, (2012) p. 108; The authors argue that there has been a handful of initiatives done to improve most of aspects listed above in terms of technical assistance with exception of transparency and accountability. See also Le Billon Philippe, The Political Ecology of War: Natural Resources and Armed Conflicts, *20 Political Geography* (2001) p. 561; World Bank, *Strengthening World Bank Group Engagement on Governance and Anti-corruption,* World Bank, (2007); Collier Paul and Venables Anthony, 'Natural resources and state fragility', Oxford, *Oxcarre Research Paper 31,* (2009).

environmental damages[257] are some of the effects which may ensue although they are not covered in this study.

In addition, the intrastate oil and gas governance is not only concerned with the management of revenue accrued from the exploitation of these resources rather the industry itself raises some complex and cross-cutting issues which go beyond revenue management. These issues include the natural resources politics, land rights, benefits distribution decision i.e., (how much should be consumed now and ring-fenced for the future) and the legitimacy interests among certain groups especially local communities, among others. There is a common consensus that the ultimate end of the frictions among interested groups is the common good of the people.[258]

The most challenging issue in both interstate and intrastate natural resources governance is how to get rid of corruption which accounts for the poor governance of the extractive industry. There is growing tendency of bribing the public officials in resource-rich countries for the benefit of private actors rather than for public good.[259] In the end, the government officials accumulate personal wealth while billions of dollars disappear from the state's coffers with impunity.[260] Corruption costs economic development dearly. In the 1990's, for instance, an estimate of USD148 billion which is equivalent to 25% of the African continent's official GDP went missing through corruption while the majority of citizen live in

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[257] Barbieri, Michele *Developing Countries and their Natural Resources,* (2009), p. 21.

[258] Desai Deval and Jarvis Michael, Governance and Accountability in Extractive Industries, (2012), pp. 107 - 108.

[259] In this study unless the context require otherwise, the term bribery and corruption would be used interchangeably.

[260] See Owens James C., Governmental Failure in Sub-Saharan Africa: The International Community's Options, 43 *Virginia Journal of International Law,* (2003), p. 101; Hartman Jennifer M., Government by Thieves: Revealing the Monsters Behind the Kleptocratic Masks, *24 Syracuse Journal of International Law. & Commerce* (1997), p. 158.

abject poverty.[261] Therefore, this study endeavoured to examine the national and international legal initiatives which strengthen the performance of the oil and gas industry towards the meaningful economic contribution in the states endowed with natural resources.

4.3.1 National and International Legal Responses: Issues and Paradoxes

The exploitation of natural resources touches such a sensitive issue of state sovereignty. Attempts to import the international standards must be taken carefully in order to avoid unnecessary encroachment of the sovereignty of states. However, the sovereignty over natural resources is vested in states on behalf of the people and exercise of the rights therein, must be for the benefits of the people.[262] The paradox arises where a state, under the pretext of exercising its sovereignty, deliberately fail to utilise the natural resources for the benefits of the people. Alternatively, utilise the endowed resources without paying due regards to the sustainable utilisation of the resources. Under the traditional international law, states can be held liable for the violation of the international law within its territory.[263] However, the important roots which account for the poor governance of the natural resources such as, corruption and mismanagement of natural resources, among others, do not seem to be an easy catch in the international law arena. Equally, state responsibilities for natural resources spoliation fall far beyond the scope and mandate of international jurisdiction.

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[261] Open Societies Initiative*, Legal Remedies for the Resource Curse: A Digest of Experience in Using Law to Combat Natural Resource Corruption*, Open Society Justice Initiative, New York, (2005), p.10; See African Union Approves Anti-corruption Policy," *Reuters,* September 19, (2002).

[262] See Articles 1(2) of the International Covenant for Civil and Political Rights (ICCPR), 1966 and International Covenant for Economic, Social and Cultural Rights (ICESCR), 1966. See also UN General Assembly Resolution 1803 on Permanent Sovereignty over Natural Resources (XVII) (1962); UN Convention on Biological Diversity (1992) (Preamble and Art. 3). See generally, Cassese Antonio, *Self-determination of Peoples: A Legal Reappraisal,* Hersch Lauterpacht Memorial Lectures, Cambridge: Cambridge University Press (1998); See also Keenan Patrick J., International Institution and Resource Curse, *3 Penn State Journal of Law and International Affairs,* (2014), pp. 255 - 56.

[263] See Article 1 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts, Annexed to G.A. Res. 56/83, December 12, 2001.

It should be noted that the extractive industry involves different players at different levels of the resources value chain. Some of these players are locals such as the government officials and others internationals such as the multinational corporations and the international financial institutions. The extractive industry operations take place in different geographical locations, political environments and require sophisticated financial investments which cannot be catered for by local financial institutions.[264] Corruption and its incidental vices would equally, spread in a different level of the resources value chain from international to the local level and *vice versa*.[265] It would be in the interests of the people in all resource-rich countries to have the effective global standards for transparency and accountability in the extractive industry.

The standards which would enhance transparency through obliging governments (host and home states) to disclose the relevant resources data to general public, and other stakeholders[266] However, due to the absence of the global governance standards and the contemporary complexities in the intrastate natural resources governance, there are fragmented and scattered national and transnational legal initiatives towards enhancing intra and interstate natural resources governance through a concerted efforts of host states, multinational extractive companies, home state of multinational extractive companies, and international financial

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[264] Open Societies Initiative*, Legal Remedies for the Resource Curse,* (2005), p.10; KPMG Report on *Commodity trading companies — Centralizing trade as a critical success factor*, (2012), observing that many of the world's major oil and gas and mining companies have already established international trading structures to gain competitive advantage, and the trend toward centralized trading is expected to continue.

[265] Equatorial Guinea can illustrate how government officials can loot and launder their illicit money in international financial institutions. See, for example, U.S. Senate Report; *Global Witness* (2004). The report revealed that there were suspicious transactions involving hundreds of millions of dollars by top Equatorial Guinean's officials in prominent banks in Washington D.C. The report also described how US oil and gas companies engaged in business ventures with, and made payments to, the President and his family and associates that raise concerns and profiteering. The combination of state, corporate and banking actors possibly engaged in bribery, embezzlement and money laundering illustrates spoliation and the challenges for legal remedy.

[266] Rees Peter J., Revenue Transparency: Global, not Local Solution, *7 Journal of World Energy Law and Business,* (2014), p. 23.

institutions as well as international non-governmental organisation.[267] These legislative initiatives are aimed at enhancing transparency through accounting and disclosure of payments and combating of the natural resources corrupt transactions.

4.3.1.0 Home State's National Legislative Responses

4.3.1.1 Dodd-Frank Wall Street Reforms and Consumer Protection Act, 2010 (USA)

In a bid to play a home state crucial role in enhancing revenue transparency in the host state (resource-rich state), the United States of America Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act, 2010.[268] The Act, essentially, requires the extractive companies registered under US laws to disclose and publish the payments they make to the government of each country they operate. Section 1504 of the Act, apart from creating financial transparency through disclosure of payments made to governments worldwide, amends section 13[269] of the Securities Exchange Act (SEC), 1934 by adding at

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[267] Al Faruque Abdullah, Transparency in Extractive Revenue in Developing Countries and Economies in Transition: A Review of Emerging Best Practices, *24 Journal of Energy Natural Resources Law*, (2006), p. 68.

[268] See Senator Lugar statement (156 Congress Records. S3816, May 17th, 2010), where he argues that the law came to address a phenomenon known as 'resource curse' whereby oil and gas reserves can be bane and not a blessing for poor countries leading to corruption, wasteful spending, military adventurism and instability when oil and gas money intended for a nation's poor ends up lining the pockets of the rich or is squandered on showcase projects instead of productive investments; See also Ochoa Christiana & Keenan Patrick J., Regulating Information Flows, Regulating Conflict: An Analysis of United States Conflict Minerals Legislation*, 3 Gottingen Journal of International Law*, (2011), pp. 137 - 141.

[269] Section 13 (q) (3) of the Securities Exchange Commission Act directs that to the extent practicable, the Commission shall make available online, to the public, a compilation of the information required to be submitted [in the annual report]. while in enhancing International transparency efforts, section 13 (q) specifies that to the extent practicable, the Commission's rules requiring payment disclosure shall support the commitment of the Federal Government to international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals.

the end a paragraph on disclosure of payments by resource extraction issuers.[270] The payments that are subject to the operative scope of the Act includes, exploration, extraction, processing, export and other significant activities relating to oil, natural gas, and minerals or the acquisition of a license for such activities.[271]

Essentially. section 13 (q) of the Act reflects the US efforts on her foreign policy interests in supporting the global efforts to improve the transparency of payments made in the extractive industries in order to help combat the global corruption and promote accountability. Furthermore, it requires SEC to issue rules implementing the Act not later than 270 days from the date of enactment of the Act.

In pursuance of its mandate, SEC promulgated the Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. 56365 on 12th September 2012. The rules require extraction issuers to include disclosure report for the fiscal year ending 30th September 2013. The scope of the envisaged disclosure includes, among others; the disclosure of the type and total amount covered payments made to each government, the total amount of the payments by category type, the currency used to make the payments, the fiscal period in which the payments were made, the business segments of the resource extraction issuer that made the payments, the government that received the payments and the country in which the government is located and the project to which the payments relate.[272]

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[270] S. 1504 (1) (A) of the Act defines issuer as issuer that is required to file an annual report with the commission and engages in commercial development of oil, natural gas and minerals.

[271] 15 USC §78m (q) (1) (A).

[272] See Taylor Celia R., Disclosure of Payments under the US Dodd-Frank Act: the 'Resource Extraction Rule', *Journal of Energy & Natural Resources Law*, 31:1, (2013), p.58.

However, the rules received fierce critics and resistances from extractive issuers.[273] It was alleged by the extractive issuers that reporting and publication of project reports would put companies' competitively sensitive information into jeopardy. Admittedly, disclosure under the rules may provide some of the information to competitors. However, the rules do not cover disclosure of proprietary trade secrets, for instance, intellectual property rights, which by far fall beyond the operative scope of the envisaged reporting.[274] In addition, it was also argued that project-level reporting is nothing than an additional burden on companies' compliance and administrative costs.

The fierce criticism that clogged the implementation of the SEC rules was the absence of provision exempting the companies from reporting obligation, without which would amount to breaching the laws of another sovereign state. SEC, on the other hand, argued that there are few countries on record which prohibit disclosure of information in respect of the payment made in their favour.[275] Yet, exempting the disclosure of information which is one of the tools to enhancing natural resources governance would water down the very aim of the rules and incentivise some countries to enact the secrecy laws in conspiracy with extractive companies.

Accordingly, the District Court of Columbia was invited to review the propriety of the rule *in the case of American Petroleum Institute, et al vs Securities and Exchange Commission.*[276] The Court found discrepancies in the rules for giving

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[273] Chasan Emily, SEC Doubles Number of Financial Reporting and Audit Cases in Two Years, *Wall Street Journal*, CFO J. (Oct. 22, 2015). For instance, since the promulgation of the SEC rules in 2012, the number of financial reporting and disclosure actions filed in three years had increased progressively to wit, 2013, 68 cases; 2014, 98 cases and 2015, 134 cases respectively.

[274] Taylor Celia R., Disclosure of Payments under the US Dodd-Frank Act, (2013), pp. 61 - 62.

[275] China, Angola, Cameroon and Qatar.

[276] Civil Action No 12 - District Court for the District of Columbia (2nd July, 2013). https://www.sec.gov/rules/final/2013/34-67717-court-decision-vacating-rule.pdf (accessed on 26th August, 2016).

enormous power to SEC to the detriment of investors' interests (companies).Therefore, the Court made two important remarks with regards to the scope of the application of the rules namely; the SEC misinterpreted the Act especially on mandatory public disclosure of the reports and denial of exemption was given without reasonable explanation hence arbitrary.

It is a little bit disappointing to learn that the Court halted the application of the SEC rules. However, it did not mean the rules were rejected in their entirety rather the Court stayed and returned them to SEC for reconsideration of issues raised by extractive companies. Accordingly, the Security of Exchange Commission issued the amended rules in pursuance of the Court order on 26th September 2016 with an expected first compliance date on 30th October 2018. The amended rules try to balance the competing interests between the spirit upon which section 1504 of the Dodd-Frank Act was enacted and the concerns of the resource extraction issuers.

With respect to the exemption from disclosure, the amended SEC rules envisage two important aspects. Firstly, the exemptive relief would be amenable, as opposed to a blanket exemptions approach advanced by extractive issuers, on a case- by- case basis and by using the procedures under the Security and Exchange Commission Act. In addition, the exemption for contracts which may prohibit the disclosure would not be amenable on account that the two-year transition period should be sufficient for the extractive issuers to obtain a necessary modification of existing contracts and make the required disclosure.

Secondly, exemption from disclosure is granted against the exploratory information activities. This is said to mitigate any potential competitive harm the extractive issuers might experience while discharging the disclosure of information duties.[277] However, the exemption envisages payments related to

[277] The Security of Security Commission Disclosure of Payments Proposed Rules and Commentaries, (2016), pp. 120 -123.

exploratory activities if are made as part of the process and all other cases conducted prior to the development or extraction of oil or gas or minerals. It is noted that exploratory phase varies from project to project on account of the geographical area in which exploration is being conducted, type of the resources being sought, among others. The exemption subject to exploration activities is grantable for a period of one year, lapse of which would warrant disclosure of payments as required by the rules.

4.3.1.2 The Directive 2013/34/EU on Accounting and Disclosure

The European Parliament adopted a directive on financial statements, annual financial statements and consolidated financial statements and reports of the certain type of undertaking.[278] The Directive introduces rules for the revenue transparency for companies in the extractive industries based or listed in the European Union. One of the main objectives of introducing the mandatory transparency requirement is to tackle corruption and its incidental vices in the resource-rich yet less developed countries and foster more equitable distribution of the natural resources wealth.[279] The most notable development is a significant shift from omnibus reporting requirement into the project-by-project reporting

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[278] Article 41 (1) of the Directives 2013/34/UE on Accounting and Disclosure of 29th June 2013,. Official Journal of the European Union, defines undertaking in the extractive industry to mean an undertaking with any activity involving the exploration, prospection, discovery, development, and extraction of minerals, oil, natural gas deposits or other materials, within the economic activities listed in Section B, Divisions 05 to 08 of Annex I to Regulation (EC) No 1893/2006 of the European Parliament and of the Council of 20 December 2006 establishing the statistical classification of economic activities NACE Revision 2 (1).

[279] Hughes Carl D., and Pendred Oliver, Let's Be Clear: Compliance with New Transparency Requirements is Going to be Challenging for Resources Companies, *7 Journal of World Energy Law and Business,* No.1 (2014), p.36; See also Rees Peter J., Revenue Transparency: Global, not Local Solution, (2014), p. 21, arguing that for many years, oil and gas reserves turn into being a curse than blessing for poor countries leading to rampant corruption and mismanagement of little that goes into state coffers. Transparency helps the public to know which payments and from which source, were made to government form extractive industries, thus help them to hold the government accountable for their spending; Open Societies Initiative*, Legal Remedies for the Resource Curse,* (2005), p.70; Bellver, A., and Kaufmann, D,. 'Transparenting Transparency' Initial Empirics and Policy Applications", Preliminary draft discussion paper presented at *the IMF Conference on Transparency and Integrity* held on July 6th-7th, (2005); De Renzio, P., Gillies, A., and Heuty, A., Background Paper Commissioned by the Africa Progress Panel, (2013).

obligation which is an equivalent to activities governed by a single contract, concession, lease with a government[280] with which payment liabilities would ensue.[281]For the purpose of the Directive, payment includes; production entitlements; taxes levied on the income, production or profits of companies, excluding taxes levied on consumption such as value added taxes, personal income taxes or sales taxes; royalties; dividends; signature, discovery and production bonuses; licence fees, rental fees, entry fees and other considerations for licences and/or concessions; and payments for infrastructure improvements.[282]

The European Directive does not grant reporting exemption in circumstances where there are foreign laws prohibiting disclosure unless any undertaking[283] governed by law of a member state which is subsidiary or parent undertaking by which the following conditions must be met; firstly, the parent undertaking is subject to the laws of a member state and secondly, the payments to governments made by the undertaking are included in the consolidated report on payments to the governments drawn up by that parent undertaking in accordance with Article 44.[284] The Directive put EUR 100 000 as a threshold for

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[280] Article 41(3) of the Directives 2013/34/UE on Accounting and Disclosure of 29th June 2013, Official Journal of the European Union, define government as any national, regional or local authority of a Member State or of a third country. It includes a department, agency or undertaking controlled by that authority as laid down in Article 22(1) to (6) of this Directive.

[281] Article 42(1) of the Directives 2013/34/UE on Accounting and Disclosure of 29th June 2013, Official Journal of the European Union.

[282] Article 41(5) (a)-(g) of the Directives 2013/34/UE on Accounting and Disclosure of 29th June 2013, Official Journal of the European Union.

[283]Article 41 (1) of the Directives 2013/34/UE on Accounting and Disclosure of 29th June 2013, Official Journal of the European Union, define undertaking active in the extractive industry as an undertaking with any activity involving the exploration, prospection, discovery, development, and extraction of minerals, oil, natural gas deposits or other materials, within the economic activities listed in Section B, Divisions 05 to 08 of Annex I to Regulation (EC) No 1893/2006 of the European Parliament and of the Council of 20 December 2006 establishing the statistical classification of economic activities NACE Revision 2 (1).

[284] Article 42 (2) of the Directives 2013/34/UE on Accounting and Disclosure of 29th June 2013, Official Journal of the European Union.

reporting any payment, whether made as a single payment or series of related payments within a financial year.[285]

The Directive has to be transposed into the national laws of all EU member states by July 2015 in which case member states shall inform the commission of the laws, regulation and administrative provisions put in place to comply with the Directive.[286] In addition, member states shall submit to the Commission text(s) of the main provisions of the national law in compliance with the Directive.[287] Member states are obliged, apart from enacting laws to give effect to the Directive, provide for effective, proportionate and dissuasive infringement penalties applicable in their national laws in accordance with the Directive.[288] However, the Directive set 21st July 2018 as the date for the first review of reporting and compliance by states and companies.[289]

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[285] Article 43 (1) of the Directives 2013/34/UE on Accounting and Disclosure of 29th June 2013, Official Journal of the European Union.

[286] In compliance with EU reporting Directive, the United Kingdom enacted the Companies, Partnership and Groups (Accounts and Reports) Regulations 2014 (SI 2015/980). The 2014 Regulations amend the key components of the UK legal framework for a company's annual report and accounts, namely: the Companies Act 2006 (CA 2006); the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008 (SI 2008/409) (the 'Small Company Accounting Regulations'); and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008 (SI 2008/410) (the 'Accounting Regulations'); Germany enacted the German Accounting Directive Implementing Act (Bilanzrichtlinie-Umsetzungsgesetz (BilRUG) on 10th July 2015; Dutch enacted Financial Statements Guideline (Implementation) Act of 30 September, Bulletin of Acts and Decrees 2015 no. 349 regarding Directive 2013/34/EU; Norway Parliament enacted the Norwegian Regulation Regarding Report on Payments to Government in December 2013 and became operational in 1st January, 2014. to demonstrate her commitment, Statoil, the Norwegian giant company in oil and gas industry published its payments made to various government across various areas of her operations which is available at http://www.statoil.com/no/InvestorCentre/AnnualReport/AnnualReport2014/Documents/DownloadCentreFiles/01_KeyDownloads/2014%20Payments%20to%20governments.pdf (accessed on 4th September, 2016)

[287] Article 53 (1) and (2) of the Directives 2013/34/UE on Accounting and Disclosure of 29th June 2013,. Official Journal of the European Union.

[288] Article 51 of the Directives 2013/34/UE on Accounting and Disclosure of 29th June 2013,. Official Journal of the European Union.

[289] Article 48 of the Directives 2013/34/UE on Accounting and Disclosure of 29th June 2013,. Official Journal of the European Union.

Notwithstanding this noble achievement, the critic has it that the enactment of the Directive by the European Parliament is way far from addressing the natural resources governance. The Directive creates hurdles to the fair business environment for European extractive companies against non-EU members. Two arguments are put forward in support of the thesis. Firstly, it is argued that the Directive would put competitiveness of EU extractive companies into jeopardy when competing against non-EU companies (without mandatory reporting requirement) over a business venture in jurisdictions which prohibit disclosure of information.[290] Secondly, the Directive does not provide exemptions, for instance, where extractive companies have a confidentiality clause in existing or future contracts or for commercially sensitive information.[291]

4.3.1.3 The Extractive Sector Transparency Measures Act (ESTMA), 2014 (Canada)

In 2014 the Canadian Federal Parliament enacted a law on the Extractive Sector Transparency Measures Act, 2014. The objective of the Act is to, among others, implement Canada's international commitments to fight against corruption through the implementation of measure applicable to extractive industry, including imposing reporting obligations with respect to payments made to entities.[292] Accordingly, the reporting obligation applies to an entity that is listed on a stock exchange in Canada; an entity that has a place of business in Canada or has assets in Canada. Also , based on the entity consolidated financial statements, meets at least two of the following conditions for at least one of its two most recent financial years; namely, it has at least $20million (CAD) in assets as of June 16th, 2016 and/or it has at least generated $40 million (CAD)

[290] Rees Peter J., Revenue Transparency: Global, not Local Solution, (2014), p. 29.

[291] Rees Peter J., Revenue Transparency: Global, not Local Solution (2014), p. 30.

[292] Section 6 of the Extractive Sector Transparency Measures Act, 2014

in revenue as of June 16th, 2016, and/or it employs an average of at least 250 employees and any other prescribe entity. [293]

In addition, ESTMA envisages the commercial developments of oil and gas or mineral which are subject to report to include, among others, exploration or extraction of oil and gas, acquisition of the licence, permit, lease, or any other authorisation to carry out exploration or extraction of oil and gas, or minerals.[294] The reporting entity is expected to capture the following payments made namely; taxes (other than consumption taxes and personal income taxes); royalties; fees (including rental fees, regulatory charges, consideration for licence, permits or concession; production entitlements; bonuses (including signature bonuses, discovery and production bonuses; dividends (other than dividend paid to payees as ordinary shareholders; and infrastructure improvement payments.[295]

Furthermore, ESTMA envisages exemption unique to the resources extraction payment disclosure, in that end, ESTMA authorises the Minister of Natural Resources Canada to make regulations affecting, among others, the circumstances in which any provisions of the Act would not apply to entities, payments or payees.[296] However, to date, there are no regulations so far passed in pursuance of the provision which provides for exemptions under the Act.

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[293] See Section 2 of the Extractive Sector Transparency Initiative Act, 2014; See also Section 4 (1) and (2) of the Extractive Sector Transparency Measures Act defines entity that controls another entity is deemed to control any entity that is controlled or deemed to be controlled by the entity.

[294] See Section 2 of the Extractive Sector Transparency Initiative Act, 2014.

[295] See Section 3.1 of the Extraction Sector Transparency Measures Act Guidance, 2016. See also section 3.2 which define payee as any government in Canada or in a foreign state, a body that is established by two or more governments, any trust, board, commission, corporation or body or other authority that is established to exercise or perform, or that exercises or performs, a power, duty or function of a government for a government referred to above or a body referred to above.

[296] See section 23 (1) (b) of the Extractive Sector Transparency Measures Act (ESTMA), 2014.

In a bid to reduce administrative costs regarding reporting, and taking into account of the similar international obligations under which the extractive entities may be subjected to in other jurisdictions, ESTMA envisages waiver by the extractive entities from reporting if the payment required under which, the entities are subjected to, in other jurisdiction achieve the same purposes of the reporting requirement under the Act.[297] The envisaged waiver has to be applied by the extractive entity and the Minister must be satisfied that the requirements of other jurisdiction are an acceptable substitute for the reporting requirements under the Act.

ESTMA also provides that all information which would ordinarily be filed under the Act or those which are waived by the Minister on account of being accepted as a substitute for the Act, are made available to the public. The duration upon which information must be made and remain in public will depend on the manner in which the Minister specifies or for the period specified by regulations or otherwise for a period of five years.[298]

4.3.1.4 The Efficacy of the Home State's Legislative Responses on Financial Reporting and Disclosure in Natural Resource Governance

One may question the relevance of the above legal initiatives in intrastate natural resources governance. Two reasons account for this; firstly, it is true that these laws are enacted by the US Congress, the European Parliament (transposed into the national laws of the member states), and the Canadian Federal Parliament respectively. However, their scope of application is international since they regulate activities of registered and listed US, EU and Canada extractive issuers operating worldwide. Secondly, the listed extractive issuers regulated under these initiatives constitute a lion's share of the global oil and gas exploration and

[297] See Section 10 (1) of the Extractive Sector Transparency Measures Act, 2014.

[298] See Section 12 (1) and (2) of the Extractive Sector Transparency Measures Act, 2014.

production entities.[299] As such, the disclosure and reporting requirements imposed by these legislative initiatives would undoubtedly affect some extractive issuers operating in resource-rich countries and enhance transparency and accountability.

The scope of reporting and disclosure in these legislative initiatives are sufficient as they cover a range of activities, (i.e., along the resources value chain), without which can be used as a conduit through which most of the dubious transactions would go through unnoticed. The Exploration or extraction of oil and gas, acquisition of the licence, permit, lease, or any other authorisation to carry out exploration or extraction of oil and gas, or minerals are initial stages which, as said, most of the costs would have been hidden because of the expertise required.

In addition, these legislative initiatives have, almost, adopted similar stringent rules for exempting extractive issuers from the reporting and disclosure. The extractive issuers have to, in order to benefit from the reporting exemption granted by these legislative initiatives, undergo relatively rigorous administrative procedures. The blanket exemptions which were being sought, for instance, by some of the resources issuers under the Dodd-Frank Act were not accepted and was reflected almost in all the initiatives. Therefore, exemptive relief would be granted on the case- to - case basis. Thus, any attempts to collude with the host state and enact anti- reporting disclosure laws are put to rest.

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[299] Africa Progress Panel, Equity in Extractives: Stewarding Africa's Natural Resources for All, *Africa Progress Report,* (2013), p. 76;See also Sandbrook Jeremy, *Will the New Transparency Reporting Initiatives Impact Corruption in the Extractive Industry?,* Paper Prepared for the International Bar Association's Annual Conference, Washington DC, 16th to 23rd September (2016), p.12, arguing that according to the Revenue Watch Institute, combined, these initiatives will cover around 76% of publicly listed global companies by value, or USD5.8 trillion in market capitalisation.

4.3.1.5 Challenges of the Home State's Legislative Responses on Natural Resources Governance

The legislative initiatives discussed above have some setbacks which act as the hindrances to realise the purpose upon which the initiatives were enthusiastically enacted. However, this does not mean, in any way, the efforts are belittled by the mere facts that there are apparent setbacks affecting their full realisation. Some of the setbacks apply to all of the initiatives while others are specific.

Firstly, the legislative initiatives are aimed at unveiling the extractive issuers financial reports disclosing the payments made to the host government in respect of the natural resource extraction. However, much as the initiatives envisage disclosure of information along the resource value chain, i.e., from contracts, production, and revenue collection, there are issues which are not adequately covered. For instance, the contracts entered into before the commencement of the initiatives are not covered, arguably, the initiatives were adopted to address the future natural resources dealings.

Secondly, the natural resources governance goes far beyond accounting and disclosure of the revenue in-flow to a calculated complex tax avoidance, tax evasion arrangement schemes. In fact, it starts during the negotiation of contracts and pegged within a broader framework of the extractive sector taxation policy which, in most cases, fall beyond the operative scope of the initiatives.[300] For instance, before the commencement of extraction, extractive issuers tend to seek favourable investments environment through fiscal reforms and contractual arrangements with host governments.

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[300] Firger Daniel M., Transparency and the Natural Resource Curse: Examining the New Extraterritorial Information Forcing Rules in the Dodd-Frank Wall Street Reform Act of 2010 41 *Georgetown Journal of International Law*, (2010), p.1043; See also Desai Deval and Jarvis Michael, Governance and Accountability in Extractive Industries, (2012) p.118; Bebbington Anthony, , Contention and Ambiguity: Mining and the Possibilities of Development, *Brooks World Poverty Institute Working Paper* 57, University of Manchester (October, 2008), p. 7.

Examples include tax holidays for a specified period (ranging from 10 -20years), capital allowances, exemption from import and export duties, capitalisation through debt with financial institutions affiliated to the extractive company, and minimum royalties, among others.[301] These are achieved through the conclusion of Bilateral Investment Treaty (BIT) or contract between the host government and a subsidiary of extractive issuers incorporated in low or no- tax jurisdiction.[302] Thus, profit generated from the arrangement is routed through the subsidiary company, as noted above, incorporated in a favourable tax jurisdiction and passes to the holding extractive issuers through the proceeds of high interests loans advanced to subsidiary through capitalisation. Therefore, through these arrangements both Home and host states lose substantial revenue.[303]

Thirdly, as stated above, the legislative initiatives seem to lean towards revenue in-flow, arguably, as an approach to natural resources governance. This approach is not self-sustained in addressing issues pertaining to natural resources governance. Apart from revenue in-flow as one of the aspects of natural resources governance, there are other aspects which complete natural resources governance jigsaw puzzle. For instance, the environmental damages and their respective costs for the amelioration seem to beyond operative scope of these initiatives. Similarly, the issue of sustainable utilisation of natural resources, like quantity of resources exploited *vis-a-vis* revenue generated in order to assess the needs of the present generation and ring-fence part of the revenue generated for the future generations. The reason behind is that the oil and gas resources are non-renewable energy thus deplete when exploited and,

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[301] See Le Billon Philippe, *Extractive Sectors and Illicit Financial Flows,* (2011), pp. 6 - 8.

[302] See Campbell, B. *Corporate Social Responsibility and Development in Africa: Redefining the Roles and Responsibilities of Public and Private Actors in the Mining Sector*, Resources Policy, (2011); See also Lungu, J. *The Politics of Reforming Zambia's Mining Tax Regime*, Johannesburg, Southern African Resource Watch, (2009).

[303] Brown, K., Tax Treaty Shopping and GAAR: MIL (Investments) S.A v The Queen, *66 The University of Toronto Faculty of Law Review*, No. 1. (2008), pp. 33 - 63.

therefore, there must be a mechanism put in place in order to benefit the present and future generations.

4.3.1.6 Challenges of Implementation of Home States' Legislative Responses in the Host States.

The home state's legislative responses on accounting and disclosure of payments and its respective publication for the public consumption are indeed commendable. It is nonetheless, the accounting, disclosure, and publication of payments made by the extractives issuers to the host governments presuppose, in the first place, that the natural resources agreements upon which the payments are made are transparent and accessible to the public. It is unfortunate that most of these agreements are considered sacred accessible to the 'most privileged' few individuals. Tanzania can serve as a case study, representing the countries whose natural resources agreements are considered sacred. In fact, the disclosure of information relating to the administration of oil and gas sector is prohibited under the law.

Section 10 (1) and (4) of the Petroleum (Exploration and Production) Act, 1980 which makes it an offence for anyone who discloses information (oil and gas agreements) under the Act shall, apart from conviction, to a fine not exceeding ten thousand shillings or imprisonment for a term not exceeding two years, or both. However, The Act was repealed and replaced by the Petroleum Act, 2015[304] which more or less retained the above provision with a minor amendment. Sections 89 and 94 of the Petroleum Act 2015 provide that the information relating to petroleum belongs to the government and any disclosure of such information may, in writing, be requested from the minister and any person who contravenes the Act shall apart from conviction, be liable to a fine not exceeding ten million or imprisonment not exceeding two years or both. It is quite unfortunate to note that the envisaged information which can be requested from

[304] The Petroleum Act, No. 21 of 2015.

the minister under the new Act does not cover oil and gas agreements entered under the former (repealed) Act and individual Production Sharing Agreements. This is because these agreements are saved under S. 261 (1) of the new Act.

In addition, notwithstanding the publication of payments made to government by the extractive issuers, yet some extractive companies fall outside the scope of the accounting and disclosure i.e., China, Russia and Australia, among others. [305] For example, companies listed in Australia Securities Exchange but operating in the United Republic of Tanzania like Anglo-Gold Ashanti, Swala Energy, Uranex and Peak Resources LTD do not have to disclose payments made because of the absence of legal requirement obliging them to disclose payments in their home state. Also, it is disappointing that there are no reciprocal host state legislative measures to reciprocate home states legislative initiatives on accounting and disclosure. For instance, the extractive companies which are listed on the Dar es Salaam Stock Exchange (DSE) are not required by law to disclose payments they make to the government from its extractive industries' investments.

4.3.2 Extraterritorial Anti-corruption Legal Responses

As noted in the preceding parts, corruption is not merely a domestic problem of the host state (resource-rich country) but has a strong international dimension. Acts of bribery emanating from one jurisdiction and committed in another jurisdiction clog enforcement of anti-bribery laws in many countries, thus leaving it to the discretion of the prosecution to mount an investigation and prosecute.[306] One of the challenges that slow down the pace is the transnational jurisdiction issue. Whereas in some cases, multinational corporations commit acts of bribery

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[305] Rees Peter J., Revenue Transparency: Global, (2014), pp. 40 - 41; See also Africa Progress Panel, Equity in Extractives: Stewarding Africa's Natural Resources, (2013), p. 76; See also Veit, Peter G., and Easton Catherine, Financial Disclosure and the Canadian Mineral Sector: Lagging Behind or Catching Up? Washington, DC: *Africa Biodiversity Collaborative Group*, (2013).

[306] Open Societies Initiative*, Legal Remedies for the Resource Curse,* (2005), p. 19.

in the resource-rich state (host state), while the proceeds obtained by officials of the host states and multinationals are laundered in the financial institutions of the multinationals' home states. Nonetheless, there are transnational and regional anti-bribery laws and treaties adopted and some of them have been transposed into national laws of the signatory states.[307] Admittedly, the substantive rules and the enforcement institutions are not themselves international, nonetheless, they cross borders and affect the persons and the entities outside their jurisdiction.[308]

4.3.2.1 Foreign Corrupt Practices Act (FCPA) of 1977 (USA)

The United States was the first country to enact Foreign Corrupt Practices Act[309] aimed at preventing the individuals and public corporations from bribing foreign officials abroad.[310] The Act prohibits in a very broad terms, any officer, employee, director or agent of any of listed company making use of emails, any means or instruments of interstate business who corruptly in furtherance of an offer, payment, promise to pay, gift, or promise to give anything of value to any foreign officials for purpose of inducing such official to make decision in his official capacity, in his favour is unlawful and shall amount to bribery.[311] One of the interesting addition is the inclusion of the foreign political parties or officials thereof including any candidate for foreign political office. This is indeed

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[307]See the OECD Anti-Bribery Convention, the Inter-American Convention Against Corruption,1997 and the Council of Europe's Criminal, 2002 and Civil 2003 Conventions on Corruption. In addition, the African Union has ratified a regional corruption convention as are for the South African Development Community (SADC) countries. and the UN Convention Against Corruption, adopted in 2003.

[308] Keenan Patrick J., International Institution and Resource Curse, (2014), p.244; For a full discussion of transnational law, including its international and domestic dimensions and origins, see Koh Harold Hongju, *Why Transnational Law Matters, 24 Pennsylvania International Law Review* (2006), pp.745 - 747.

[309] 15 U.S.C. 78dd *et seq*.

[310] S. 78dd-1 (f) (1) od FCAP, 1977 define "foreign official" as any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

[311] S78dd-1 (a) of the FCPA, 1977.

commendable since it expands the scope of individual who, owing to their official capacity might be induced to make decisions that amount to breaching the Act.[312]

The Act requires corporations to keep books of records that accurately and fairly show their transactions and devise internal accounting controls. This requirement applies to all companies whose securities a listed in the United States and ensure that the information needed to prosecute violations of the FCPA is readily available when and where required.[313] The US Department of Justice (DOJ) is charged with the responsibility of enforcing the FCPA's anti-bribery provisions which include both criminal and civil penalties while SEC has civil jurisdiction over FCPA which includes reporting and disclosure requirements.

The efficacy of the FCPA in enhancing natural resources governance, among others, is the enforcement of FCPA against Riggs Bank. Where at the SEC launched an investigation allegedly for possible violation of the FCPA rules against the payments made to Riggs Bank by the US oil giant company, ExxonMobil in favour of various accounts owned and operated by the Equatorial Guinea President and his associates.[314] The investigation revealed that the Bank was managing and operating more than 60 accounts of Equatorial Guinea, its officials, and family members without complying with the Anti-money laundering obligation. Also, the investigation noted with disappointment that SEC had, on various occasions, reminded the Bank of her obligation to improve its anti-money laundering disclosure services to no avail. Lastly, it was revealed that companies operating in Equatorial Guinea may have contributed to the corrupt practices in the country through making substantial payments to Equatorial Guinea's officials,

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[312] S78dd-2(a)(b) of the FCPA, 1977.

[313] S. 78m(a)(1) and (2) of the FCPA, 1977.

[314]Miren Gutiérrez, “Northern Laundromats for Southern Fat Cats,” *Inter Press News Service Agency,* August 20, 2004;See also Open Societies Initiative*, Legal Remedies for the Resource Curse: A Digest of Experience in Using Law to Combat Natural Resource Corruption*, Open Society Justice Initiative, New York, (2005), pp. 21 - 22.

family members and /or entities controlled by them with the minimum disclosure of their action.[315]

One of the setbacks of the FCPA is the fact that the actual implementation and enforcement of the imposed penalties are paid to the US Treasury instead of compensating the host states affected by the corrupt practices. Admittedly, there are arguments that compensating affected host states will not only, amount to double benefits in addition to the bribe received by their officials thereof but also the affected host states would not see and appreciate the costs of bribery. The arguments above may be addressed by an assessment of the actual loss resulting from the corrupt transaction and then compensate the affected host states for the loss out of the penalty paid. Also, the public or private officials involved must be effectively prosecuted. If both perpetrators receive their respective punishments, it would serve dual purposes; first, the perpetrators of the corrupt transaction would receive their commensurate punishment, and second, the affected country would be compensated for the actual loss resulting from the corrupt transaction.

4.3.2.2 The Convention on Combating Bribery of Foreign Public Officials in International Business Transaction, 1997

In an attempt to establish a corrupt free environment in the international business transaction, the Organisation for Economic Co-operation and Development (OECD) member states[316] adopted a convention establishing criminal liability for a person who bribes a foreign public official for purpose of obtaining an improper advantage. The convention requires parties to impose criminal liability on the

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[315] Permanent Subcommittee on Investigation Report on Money Laundering and Foreign Corruption: Enforcement and Effectiveness of the Patriot Act, Case study Involving Riggs Bank, July, 2014, see http://www.hsgac.senate.gov//imo/media/doc/ACF5F8.pdf?attempt=2 (accessed on 30th August, 2016).

[316] See list of OECD member states available at http://www.oecd.org/about/membersandpartners/list-oecd-member-countries.htm (accessed on 1st September, 2016).

basis applicable to both individuals and corporate persons liable under their statutes.[317] The wording of the article above allows member states to take such measures in accordance with their legal principle and establish the liability of a legal person for bribing foreign public officials.[318] Thus taking necessary measures is left in the discretion member states.

The OECD Convention imposes sanctions on persons found guilty of bribing foreign public officials. It does not, however, prescribe the said sanctions instead it leaves it upon member states to impose punishment in accordance with their applicable punishment as the case may be.[319] In addition, in order to ensure that no one would escape punishment, it imposes civil liability on member states where criminal liability to an artificial person is not available by imposing effective, proportionate non-criminal liability sanction, including monetary compensation for bribery of foreign public officials.[320]

Furthermore, the OECD Convention enjoins the member states to take such measures which would ensure a smooth conduct of investigation and prosecution of the bribery of foreign public officials in accordance with the rules and principles of each member state. In order to combat bribery of the foreign public officials effectively, the member states are enjoined not to use the economic considerations excuses, the potential effect upon relations with another state or the identity of persons involved as reasons for their inability to carry out the enforcement of the Convention [321] In a move to avoid the circumvention of

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[317] Article 2 of the OECD Convention, 1997.

[318] Article 1 (4) (a) of the OECD Convention, 1997 define foreign public official as any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation.

[319] Article 3 (1) of OECD Convention, 1997.

[320] Article 3 (2) of the OECD Convention, 1997.

[321] Article 5 of the OECD Convention, 1997.

statute of limitation, the Convention enjoins the member states to accord an adequate time for carrying out investigation and prosecution of offence of bribery of foreign public officials.[322]

The Convention enjoins each member state to take such measures as within the framework of their laws and regulations regarding the proper maintenance of the books and records, financial statement disclosure, and accounting and auditing standards for the purpose of combating bribery by public officials effectively. Each member states are enjoined to take effective, proportionate and dissuasive civil, administrative and criminal penalties for such omissions, falsifications in relation to books, records, accounts and financial statements of such companies.[323]

The above provisions provide an overview of the OECD Convention in a nutshell by capturing the essential and fundamental aspects which carry out the core substance of the Convention. The relevance of both FCPA 1977 and OECD Convention 1997 to the study stand from the fact that most of the multinational corporations engaging in oil and gas in Tanzania, trace their origin from the US or some of the OECD member states, or the subsidiary of multinational companies listed in the US or one of the OECD member states. The legislative undertaking required from these transnational laws will indeed address the challenges associated with corruption along oil and gas resources value chain and therefore, hold the government, government officials and multinational corporation accountable for natural resources spoliation.

4.3.3 International Voluntary Codes and Standards

The international voluntary code is set of rules agreed upon by the states forming the fundamental principles upon which the contracting states agree to comply

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[322] Article 6 of the OECD Convention, 1997.

[323] Article 8 (1) and (2) of the OECD Convention,1997.

and implement. For quite a long time, the resources-rich states (host states) were not benefiting from their endowment because of the resources spoliation by extractive companies and government officials. Therefore, the governments, the multinational extractive companies, and the civil society cooperated to establish the standards aimed at enhancing accountability, transparency, and quasi-oversight. As noted above, the codes are voluntary schemes which depend on the state governments and the international intergovernmental organisations to implement and enforce. Thus, the efficacy of the voluntary code depends on the will, capacity, and capability of relevant state governments and other stakeholders.

4.3.3.1 Extractive Industries Transparency Initiative (EITI)

An EITI is a voluntary international standard established to improve the natural resources revenue transparency and improved governance through accountability in resource-rich countries. The EITI came to address the resource curse phenomenon whereby, despite the increased natural resources extraction in resource-rich states, there were no tangible benefits from such resources extraction. To the contrary, rampant corruption, natural resources related conflicts thrived while the people continued to live in abject poverty.[324] The EITI was formed in 2003 as a mechanism for promoting governance through the publication and verification of payments by the oil and gas and mining companies and governments receipt from these companies.[325] As noted above, the EITI is voluntary code, thus it has a well-established disclosure framework but its

[324] Short Clare, The Development of the Extractive Transparency Initiative, *Journal of World Energy and Business,* (2014), p. 1.

[325] Ravat Anwar and Kannan Sridar P., (eds.) *Implementing EITI for Impact: A Handbook for Policy Makers and Stakeholders,* The World Bank, (2011), p. xii.

reporting requirement must be determined by the countries which have chosen to implement the EITI standards.[326]

The EITI is premised on twelve fundamental principles aimed to strengthen and create a link between the extraction of natural resources and sustainable development. In that end, the EITI principles, in particular, state a firm belief in the prudent use of natural resources wealth as an important engine for sustainable development and poverty reduction and that improper natural resources management can create economic and social impacts[327]. Also, the principles reaffirm the sovereignty of the state over their natural resources and impose an obligation to the government to manage natural resources for the benefits of the people and in the interests of the national development.[328] In addition, in order to hold the government accountable, the EITI Principles promote public engagement on government revenues and expenditure through transparency by both the government and the extractive companies set in the context of respect for the contract and laws, among others.[329]

As of June 2016, the EITI had 51 implementing countries supported by the coalition governments, extractive companies, and civil society.[330] The information found on the EITI reports serves two purposes. Firstly, it helps the governments to monitor and forecast the revenue from the extractive sector. Secondly, it empowers the people to hold the government accountable for how it spends the revenue. Accordingly, the EITI standards require, apart from the payments made by extractive companies to governments, transparency throughout the resource

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[326] Hughes Carl D., and Pendred Oliver, Let's be Clear: Compliance with New Transparency Requirements is to be Challenging for Resources Companies. (2014), p. 37.

[327] See Principle 1 of EITI 2003.

[328] See Principle 2 of EITI 2003.

[329] See Principle 3, 4, and 5 of EITI 2003.

[330] See list of countries implementing EITI available at https://eiti.org/countries.

value chain. The envisaged transparency includes the disclosure of licensing information, sales by national extractive resources companies, and corporate social responsibility payment made by companies. In addition, the EITI reports should contain contextual information on issues such as tax arrangements, the proportion of government revenue from extracted resources, the quantity of production, likely exhaustion dates, among others. In this regards, these report, apart from informing the people about the contribution of extractive industry to their national economy, will also clear some illusions which come along with the natural resources endowment.

The current EITI operating standards were adopted in 2016. Accordingly, the standards require Multi-Sectoral Groups (MSGs) to set EITI implementation objectives that are linked to EITI principles and reflect the state's priorities for extractive industries.[331] For the proper implementation of the EITI Standards, the MSGs are comprised of the representatives from the government, the extractive companies, and the civil society organisations (CSOs). The MSGs is established to oversee the reports of payments published by the governments and extractive companies and promote the EITI into a broader reform tool in the EITI implementing states. Apart from overseeing published reports, MDGs act as a platform for the dialogue about the management of the implementing states' natural resources.

The implementing countries must undertake validation regularly in order to establish whether the implementation is consistent with EITI Standards.[332] Where the validation verifies that a country has met all requirement of the EITI Board, it will be designated as an EITI compliant. The EITI compliant country will have to maintain and adhere to the EITI principles and standards short of which its compliant status may be withdrawn. Despite the EITI is a voluntary

[331] Requirement 1.4 for EITI Implementing Standards, 2016.

[332] Requirement 1.5 (a) for EITI Implementing Standards, 2016.

undertaking; it has nevertheless enhanced transparency and accountability in extractive industries. The recent trend of admission of the new members is a testimony of the EITI acceptance as a means to enhance natural resources transparency and accountability.[333]

The EITI has even gone further to the extent of requiring implementing countries to disclose and publish contracts which disclose terms that are attached to the extraction of natural resources. [334] The disclosure of terms of the contract is a new development which some transnational legislative initiatives like Dodd-Frank Act EU Directives and ESTMA on accounting and disclosure of payments do not cover. The disclosure of information along the resources value chain such as licensing, contracting, production and revenue accruing from taxes and royalties, among others, will not only strengthen the efficacy of the EITI but also improve natural resources censorship.

4.3.3.2 The Efficacy of EITI on Natural Resources Governance

The EITI candidacy and compliance have arrays of benefits to the host states, extractive companies, and the population at large. For instance, as for the host states, the EITI compliance and candidacy is a positive gesture of the manifestation of a favourable investment climate. It sends a signal to the investors and both local and international financial institutions likely to finance investments that there will be increased transparency, accountability, and governance. As for the investors, doing business in EITI compliant states reduces both political and reputational risks which otherwise are likely to affect the investment by increasing investment costs like risks insurance, among others. As for the people, it is always good when there is transparency regarding extraction of their endowed natural resources and benefits derived therein. This,

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[333] Short Clare, The Development of the Extractive Transparency Initiative, (2014), p. 3.

[334] Requirement 3.12 for EITI Implementing Standard, 2016.

in turn, helps to reduce some illusions which come along with natural resources endowment.[335]

The EITI has contributed and played an inspirational role in the development of transparency as a new global norm of natural resource governance. There are, apart from EITI compliant countries, different national and international mandatory disclosure and reporting legislative frameworks inspired by the EITI.[336] For instance, the enactment of the US Dodd-Frank Act EU Directive 2013/34 the Canada Extractive Sector Transparency Measures Act. In addition, some compliant countries have codified EITI principles and standards into their domestic laws. For instance, Nigeria through the Nigeria Extractive Industries Transparency Initiative Act, 2007 (NEITI) and the Tanzania Extractive Industries (Transparency and Accountability) Act, 2015 (TEITI), to mention but a few.

4.3.3.3 Challenges of Implementing EITI as a Mechanism for Natural Resources Governance

Critics have it that the disclosure of and the publication of contracts along the resource value chain might be an illusion, if, the EITI censorship ends up there without the mandate of going deeper into intricacies of assessing whether compliant countries receive a fair share of rent against the quantity of resource exploited.[337] Equally, although the Multi-Stakeholder Group (MSG) can act as a forum for dialogue among stakeholders, it cannot question and/or hold the implementing countries accountable on how they spend or invest the revenue for development purpose, nor can it question issues such as the distribution of

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[335] Friedman, A. Corporate Operationalising Rio- Principles: Using Successes of Extractive Transparency Initiative to Create Framework for Rio- Implementation, *University of Botswana Law Journal*, 12, (2001), pp. 73 - 86.

[336] For instance, to date, there are 51 compliant and implementing countries across the global out of which 2.05 trillion USD of government revenues have been disclosed in open data format, see *https://eiti.org/data* (accessed on 2nd May 2017).

[337] Deval Desai and Michael Jarvis, Governance and Accountability in Extractive Industries, (2012), p. 120.

benefits, environment conservation, and sustainable utillisation of natural resources, among others.[338] A decision on how the implementing countries spend their income seems beyond the operative scope of the EITI.

The EITI is constrained by a limited mandate. It focuses on transparency and accountability of the compliant and implementing governments over revenue inflows generated through extraction and disposition of oil and gas resources. As stated in the preceding part, the above approach is relatively narrow taking into account of the pertinent issues affecting oil and gas industry. For instance, issues like environmental impacts assessment, communities relocation, inability to monitor and track illicit financial flows i.e., corruption that benefits a select group of individual (local and foreigners) in a resource value chain such as licencing, exploration, development, production, trading and transportation, refining and marketing and ultimately last phase benefits distribution are beyond operative scope of EITI.

The EITI by its very nature is a voluntary arrangement by which the compliant countries undertake to implement its principles and standards. As such, depending on the political will of the implementing country, it may at times, feel obliged to fulfill its EITI obligations or not. The challenge arises where the implementing country deliberately fails to honour her EITI obligations. The remedial measure which can be imposed is suspension of the EITI membership to a non-compliant. This is one of the setbacks that drag the EITI backward as it opens a room for the compliant countries to choose when they can be bound by the EITI principles and standards.

4.3.3.4 Kimberly Process Certification Scheme (KPCS)

Kimberley Process is an industrial-based certification scheme through which the participating countries undertake not to trade in conflict diamond i.e., a diamond

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[338] See Barma Nazneen H., *e tal*, *Rents to Riches?: The Political Economy of Natural Resource-Led Development,* World Bank, (2012), pp. 217 - 236.

that is coming from the rebel-controlled areas. It is designed for the export and import of diamond regime and implemented by the member states through domestic legislation.[339] It was established under the African intergovernmental initiative aimed at addressing rough-conflict diamond production and export. It was noted with serious concerns that during the 1990s, most of the intrastate conflicts in the diamond endowed countries were being financed by diamond which was under the control of rebel and insurgent groups.[340] Thus the representatives of African governments met in South Africa in 2000 with the aim of devising a mechanism for certification of rough-diamond (conflict-free diamond).[341] Accordingly, Kimberly Process regulates import and export of rough diamond with aim eliminating the flow of conflict diamond in the international market worldwide.

The Kimberley Process requires implementing states to take measures, for instance, in cases of shipment of diamond, it has to be parked in the special containers with accompanied duly valid certificates. Apart from that, each member state should make sure that the rebel-conflict diamonds do not sneak into the KPCS system and all diamond dealers' must be registered and certified

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[339] Haufer Virginia, The Kimberley Process Certification Scheme: An Innovation in Global Governance and Conflict Prevention, *89 Journal of Business Ethic*, (2009), p. 404; see also Le Billon Philippe, *Extractive Sectors and Illicit Financial Flows: What Role for Revenue Governance Initiatives?,* Anti-Corruption Resource Centre. No. 12, (2011), p. 16.

[340] See Okowa Phoebe N., Natural Resources in Situation of Armed Conflict: Is there a Coherent Framework for Protection? (2007), pp. 238 - 239, Arguing that for many years, the rebel group in Sierra Leone, Revolutionary United Front (RUF) aided by Liberia government financed its insurgence movements through sale of diamond in exchange of ammunitions to wit, between 1990 and 1999 it was estimated that RUF had earned an approximate of USD200 million dollars each year through illegal diamond sale. Similarly, Angola insurgent group, UNITA led by Jonas Savimbi financed its insurgence movement against the government through sale of oil and mineral resources; See also United Nations General Assembly Resolution 55/56 (2000); UN Security Council Resolutions 1173 (1998) and 1295 (2000) concerning the armed conflict in Angola; Resolution 1306 (2000) concerning the armed conflict in Sierra Leone; and Resolution 1343 (2001) concerning Liberia's involvement in the smuggling of diamonds from Sierra Leone.

[341] As of May 2016, KPCS has 54 participating states with exception of two suspended countries i.e., Venezuela and Central Africa Republic (CAR). See KPCS participants status available at https://www.kimberleyprocess.com/en/2016-kp-participants-list (accessed on 7th September, 2016).

under the KPCS system. The registration of dealers requirement is aimed at minimising possibilities of the conflict diamond from sneaking into international market through a brokerage. Since the inception of the KPCS, it has significantly reduced the rough-conflict diamond from entering the global market. It is estimated that 99 percent of diamond that enters the market is certified as conflict-free.[342] In addition, the KPCS has succeeded in reducing resource-sourced conflicts in countries endowed with natural resources such as Angola, Sierra Leone and partly DRC.

4.3.3.5 The Efficacy of Kimberley Process Certification Scheme

The KPCS has since its establishment, enhanced transparency in the diamond trading whereby the certification process takes into account data on the volume and value of traded diamond valuation before the export and reconciliation with the estimated import value. This reduces possibilities of the tax evasion through under-invoicing. In addition, through the KPCS process, the participating countries' diamond revenues are transparent and known to all participating stakeholders and therefore, it is easy to reconcile the quantity of diamond exported *vis -a- vis* revenue generated. The KPCS does not create binding legal obligations to the implementing member states. Nevertheless, the minimum criteria set to be complied with prior and post-admission are the yardstick to commanding compliance short of which a member state risks suspension from the scheme.[343]

In addition, the KPCS has significantly reduced the illegal diamond from entering into the world diamond market. As noted above, the paperwork involved in the production from the domestic to international levels reduces the possibilities of laundering illegal diamonds. For instance, in 1999, UNITA rebel group in Angola

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[342] See a report by Partnership Africa Canada estimates that prior to 2003 the illegal trade constituted 25% of world trade in rough diamonds (Global Witness and Wexler), 2006.

[343] See Dam De Jong Daniëlla , International Law Governance of Natural Resources, (2015), p. 340.

was said to have received around USD 3-4 million from selling illegal diamonds.[344] However, after the establishment of and operationalisation of KPCS, some countries recorded a significant increase in legitimate export of diamonds. For instance, Sierra Leone, one of the countries bedeviled by her diamonds endowment, recorded an increase in revenue from around USD 26 million in 2001 to around USD 141 million in 2005.[345]

Importantly, KPCS has the support of the UN principal organs, in particular, the United Nations General Assembly and the Security Council. The two organs enthusiastically welcomed the KPCS initiative and encouraged the establishment of international certificate schemes.[346] For instance, the UNGA suggested a need to focus primarily on the national certification schemes of the implementing states in order to promote and ensure widest possible participation.[347] The UN Security Council had actively participated from the inception of the certification scheme and has all along encouraged the member states to enthusiastically support the scheme. Also, it has embraced KPCS in its resolution as a primary way of implementing the sanctions against the states engaged in conflict diamond trading.[348] In addition, the World Trade Organisation (WTO) granted an

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[344] See Fowler, R.R., *Report of Panel of Experts on Violations of Security Council Sanctions against UNITA*, United Nations Security Council, New York, (2000); Haufer Virginia, The Kimberley Process Certification Scheme, (2009), p. 407.

[345] See Haufer Virginiar, The Kimberley Process Certification Scheme, (2009), p. 411; Global Witness and Wexler, P. An Independent Commissioned Review Evaluating the Effectiveness of the Kimberly Process, Global Witness, London, (2006).

[346] UN General Assembly Resolution 55/56 of 1 December 2000 (date of publication 29 January 2001) on the role of diamonds in fuelling conflict: breaking the link between the illicit transaction of rough diamonds and armed conflict as a contribution to prevention and settlement of conflicts, paragraph 10 of the preamble and especially paragraph 5; See also UN Security Council Resolution 1295 (2000), especially paragraph 19.

[347] See, *inter alia* ,UN General Assembly Resolution 56/263 of 13 March 2002; Resolution 57/302 of 15 April 2003; Resolution 58/290 of 14 April 2004 and subsequent resolutions. The most recent resolution is Resolution 66/252 of 25 January 2012.

[348] UN Security Council Resolution 1459 (2003), especially paragraphs 1-3.

exceptionally and rarely waiver to her member participating in KPCS to adopt certain measures to regulate rough diamonds which deviate from WTO rules.[349]

4.3.3.6 Challenges for the Implementation of Kimberley Process Certification Scheme

There are challenges which cripple the KPCS from registering the highest achievement. The KPCS provides a general framework mechanism to address the conflict-diamond. It is expected therefore, the member states will take necessary legislative and administrative measures to implement the KPCS framework in their domestic jurisdiction. However, the weak intrastate institutional governance of some member states impedes the whole purposes. For instance, in some member states, there are rampant corruption practices which impede the internal controls in tracking conflict-diamond from sneaking into the international market. The Democratic Republic of Congo, Angola, Ivory Coast, Central Africa Republic, and Venezuela would demonstrate this assertion.[350]

4.4 Regional and Sub-regional Legislative Responses

4.4.1 African Convention on the Conservation of Nature and Natural Resources, 1968

The African Convention on Conservation of Nature and Natural Resources, also known as Algiers Convention, hereinafter referred to as 'the Convention' was adopted by the former Organisation of African Unity (OAU) on 15th September 1968 and entered into force a year later. The Convention was the first African multilateral treaty to link natural environment and development of the

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[349] Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds, Decision of the WTO General Council of 15 May 2003, *Doc. WT/L/518* (27 May 2003). The waiver was extended in 2006 by General Council Decision of 15 Dec. 2006, *Doc. WT/L/676.*

(19 December 2006) and again in 2012 by General Council Decision of 11 December 2012.

Doc. G/C/W/675/Rev.2. The waiver expires on 31 December 2018.

[350] Haufer Virginia, The Kimberley Process Certification Scheme, (2009), p. 412.

continent.[351] Accordingly, the contracting states are enjoined to adopt the necessary measures which ensure that the conservation, utilisation, and development of soil, water, fauna, and flora resources are in accordance with scientific principles based on the best interest of the people.[352] The natural resources covered were, according to the definition of the natural resource under the Convention, renewable resources such as water, soil, flora, and fauna. Other natural resources like oil, gas, and minerals are beyond the operative scope of the Convention. The Convention inspired member states to make legislative measures giving effect to the provisions of the Convention. For instance, Sierra Leone enacted the Wildlife Conservation Act 26 of 1972, The United Republic of Tanzania enacted the Wildlife Conservation Act, 1974, and Kenya enacted Wildlife Conservation and Management Act 1985, to mention but a few.

However, while the contracting states were encouraged to cooperate in implementing the Convention, they are not required to submit periodic reports on the implementation of the Convention. In addition, apart from the exclusion of non-renewable resources such as mineral, oil and gas, there was no linkage between the exploitation of natural resources and sustainable utilisation of natural resources. Although member states were encouraged to cooperate and use scientific principles, yet there are neither an established secretariat or an administrative body nor any financial mechanisms for implementation of the envisaged cooperation let alone the Convention.

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[351] See Erinosho Bolani, T., The Revised African Convention on the Conservation of Nature and Natural Resources: Prospects for a Comprehensive Treaty for the Management of Africa's Natural Resources, *21 African Journal of International Comparative Law*, (2013), p. 384.

[352] See article 2 of the African Convention on the Conservation of Nature and Natural Resources, 1968.

4.4.2 Revised African Convention on the Conservation of Nature and Natural Resources, 2003

The Revised Convention on the Conservation of Nature and Natural Resources was adopted under the auspices of Article 24(1) of the African Convention on the Conservation of Nature and Natural Resources, 1968.[353] Accordingly, the OAU, taking into account the outcome of the Rio Conference on the Human Environment and Development and other development in the field of environment, requested the International Union for Conservation of Nature (IUCN) and the United Nations Environment Programme to revise the earlier Convention.[354] The Revised Convention strives to enhance the environmental protection and fostering sustainable conservation and utilisation of natural resources. Unlike, the earlier Convention, the envisaged revised convention takes a broader approach to addressing the general and specific issues affecting both the renewable and non-renewable energy.[355]

The Revised Convention argues member state to devise sound measures which ensure the exploitation of natural resources is based on environmental cautious policies which, when used, do not affect the natural resources and the environment in general. To that end, the projects likely to affect the natural resources and environment are subjected to the rigorous environmental impact assessment procedures before the commencement of the project in question and a regular environmental monitoring and auditing.[356] The revised Convention also

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[353] Article 24 (1) of the African Convention on the Conservation of Nature and Natural Resources, 1968, states that after the entry into force, any state party may, at any time, make a request for the revision of part or the whole of the Convention by notification in writing addressed to the Secretary General of the Organisation of the African Unity.

[354] IUCN, An Introduction to the African Convention on the Conservation of Nature and Natural Resources, *Environmental Policy and Law Paper No. 56*, World Conservation Union (2006).

[355] See Article 5 of the Revised African Convention on the Conservation of Nature and Natural Resources, 2003.

[356] See Article 14 of the African Convention on the Conservation of Nature and Natural Resources, 2003.

requires member states to adopt the necessary measures to ensure timely and appropriate dissemination and access to environmental information, public participation in decision-making and access to justice for environmental protection.[357]

The Revised Convention argues the parties to adopt the rules and procedures, and institutional mechanisms to promote and enhance compliance with the provision of the Convention. In that regard, parties are expected to furnish a report containing information on text laws, decree, regulations, and instructions implementing the Convention. The envisaged reports must be submitted to the Secretariat. The Revised Convention has not yet entered into force because of, what may reasonably be called, member states cynical behaviour and lack of political will. To demonstrate the assertion, since the adoption of this convention in 2003, out of the fifteen required ratifications for the Revised Convention entry into force, only thirteen have been secured for the period of fourteen years out of fifty-four signatories state parties.

4.4.3 International Conference on the Great Lakes Region

The International Conference on the Great Lakes Region hereinafter referred to as (ICGLR) is an international organisation of countries of the great African Lake region[358] established to combat the political instability and conflicts which have brought considerable effects and therefore, require concerted efforts to address them in order to promote sustainable development.[359] The ICGLR traces its

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[357] See Article 17 of the Revised African Convention on the Conservation of Nature and Natural Resources, 2003.

[358] Member States are: Republic of Angola, Republic of Burundi, Central African Republic, Republic of Congo, Democratic Republic of Congo, Republic of Kenya, Republic of Rwanda, Republic of Sudan, Republic of Uganda, the United Republic of Tanzania, and Republic of Zambia.

[359] The most notable conflict that have had a cross-border impact are the 1994 Rwandan Genocide which led to the loss of more than 800000 lives, and political instability in Democratic Republic of Congo.

origin from the Security Council Resolutions 1291[360] and 1304[361]. These resolutions called for an international conference on peace, security, democracy, and development in the Great Lakes Region. The Heads of State and Governments of the great lakes region adopted the International Conference on the Great Lakes Region Pact in 2006 and entered into force in 2008. The ICGLR Pact is supplemented and interpreted in details by ten Protocols.[362] The application of the Pact to the member states is based on the principle of non-selectivity in the sense that on entry into force of the Pact all instruments adopted or made under the Pact come into force and bind all the member states. In addition, the member states are required to make necessary legislative measures and transpose the provisions of the protocols into the domestic legislation and put in place respective institutional frameworks in their legal system to facilitate their implementation.

4.4.4 Protocol Against Illegal Exploitation of Natural Resources, 2006

The Protocol Against Illegal Exploitation of Natural Resources hereinafter referred to as (the Protocol) is a comprehensive legislative initiative adopted under the auspices of article 9 of the ICGLR Pact. The Protocol puts to an end the predatory uses of natural resources, in particular, breaking the links between the natural resources revenue and rebel financing. The Protocol envisages, firstly, to promote and strengthen, in each member state, development of the

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[360] See the United Nations Security Council Resolution S/RES/1291 24 February 2000 on the Situation Concerning the Democratic Republic of Congo.

[361]See the United Nations Security Council Resolution S/RES/1304 16 June 2000 on the Situation Concerning the Democratic Republic of Congo.

[362] Protocol on Non-aggression and Mutual Defense in the Great Lakes Region; Protocol on Democracy and Good Governance; Protocol on Judicial Cooperation; Protocol for the Prevention and Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of discrimination; Protocol against the illegal Exploitation of Natural Resources; Protocol on the Specific Reconstruction and Development Zone; Protocol on the Protection and Assistance to Internally Displaced Persons; Protocol on Property Rights of Returning Persons ; Protocol on the Prevention and Suppression of Sexual Violence against Women and Children; Protocol on the Management of Information and Communication

effective mechanisms to prevent, curb and eradicate the illegal exploitation of natural resources. Secondly, to intensify and revitalise cooperation among member states with a view to achieving sustainable measure against illegal exploitation of natural resources. Thirdly, to promote the harmonisation of member states domestic legislation, policies, and procedures against illegal exploitation of natural resources.[363] The Protocol regulates designated minerals such as gold, cassiterite, wolframite, and coltan. These are the four minerals designated as conflict minerals under OECD Due Diligence Guidance and Dodd-Frank Act.

The Protocol enjoins member states to devise the regional mechanism whose objective like, the Kimberly Process, is to establish accredited standards regarding natural resources exploitation including the certification of origin, labeling, supervision, verification, and implementation.[364] Accordingly, the ICGLR Mineral Certification Scheme was adopted under article 11 of the Protocol. The purpose of the Mineral Certification Scheme is to provide for sustainable conflict-free mineral chains between member states in order to eliminate the long sustained armed groups engaged in serious human rights abuses within the confined boundaries of the member states.[365] Also, the Certification Scheme ensures conflict-free mineral chain is free from support from non-state armed groups or public or private security forces that are illegally controlling the mine sites or transportation roots.

The certification Scheme functions effectively through sophisticated mechanisms along the designated mineral value chain. Firstly, it introduces the Chain of Custody Tracking system whereby minerals flow are tracked from certified mine sites, or state from which the mineral originates, and an intermediate trader who

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[363] See Article 2 of the Protocol Against Illegal Exploitation of Natural Resources, 2006.

[364] See Article 11 of the Protocol Against Illegal Exploitation of Natural Resources, 2006.

[365] See Section 1 of the ICGLR Mineral Certification Scheme.

handled the minerals or portion of the minerals between mine site and exporter.[366] Secondly, an Independent Third Party Auditor goes through the documented processes for obtaining records, statements of facts or other relevant information and addresses them objectively. Also, the Independent Third Party Auditor assesses the extent under which the chain of custody requirements standards have been fulfilled.[367] Thirdly, upon certification by the Independent Third Party Auditor, ICGLR Certificate will be issued and certify shipment of designated minerals as being in compliance with the requirements of the ICGLR Mineral Tracking and Certification Scheme.[368]

4.4.4.1. The Efficacy of the Protocol Against Illegal Exploitation of Natural Resources

The Protocol despite being relatively new compared to other earlier initiatives has achieved a remarkable success. For instance, the member states have completed and approved the regional certification manual detailing the guidelines for the implementation of the regional certification mechanism. In addition, the draft of a model law has been completed and has to be customised by the ICGLR member states to give effect to the provisions of the Protocol through the legislative initiative in their domestic jurisdiction.

4.4.4.2 Challenges for the Implementation of the Protocol Against Illegal Exploitation of Natural Resources

Notwithstanding relatively short time since the protocol entered into force, its practical implementation does not go apace with and does not seem to serve the purpose it was established for. This is exacerbated by the fact that the implementation of the certification mechanisms is dependent on the political will

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[366] See Section 1 of the ICGLR Mineral Certification Scheme.

[367] See Section 1 of the ICGLR Mineral Certification Scheme.

[368] See Section 1 of the ICGLR Mineral Certification Scheme.

of the member state. For instance, the commitments to implement the Protocol and its respective mechanism depend on member states' internal legislative measures giving effect to the provisions of the Protocol. To date, there is no any member state that has transposed the provision of the Protocol and its Certification Measures into her own laws. In addition, there is no an established enforceable mechanism in the Protocol against the member states in case of none-compliance.

Also, the divided loyalty is one of the reasons crippling the Protocol and its respective mechanism. Two reasons account for this; firstly, some members are state parties committed to implementing similar initiatives affecting exploitation of natural resources. As such, their due regard is paid to other initiatives and less to the Protocol. For instance, some member states are implementing both the Kimberly Process Certification Scheme and Executive Industries Transparency Initiative. e.g. the United Republic of Tanzania, Angola, Democratic of Congo, Congo, and Zambia. Secondly, the scope of the minerals covered under the protocol is narrow and disinterest some of the member states not endowed with the designated conflict minerals. As noted above, the scope of the initiative is limited to the four minerals found in the Democratic Republic of Congo, Congo, and Angola.

4.4.5 East African Community Legislative Initiatives on Natural Resource Governance

The Treaty for the establishment of East African Community (hereinafter referred to as EAC Treaty) provides for the general principles and framework for the management of natural resources within the community and in each member state. Taking into account of the potentiality of natural resources of the region in fostering economic development of the member states, the EAC Treaty states categorically in its objective the need to promote sustainable utilisation of natural

resources by adopting appropriate policies and legislative measures which would protect the natural environment.[369]

In addition, chapter nineteen and twenty of the EAC Treaty expound in details the envisaged cooperation in the fields of environment and natural resources management. In particular, apart from the cooperation frameworks in marine, wildlife, forests resources, the EAC Treaty promotes a joint cooperation in sustainable exploration and exploitation of mineral resources, coastal and rift valley fossil fuel in an environmental friendly manner.[370] Also the East African Customs Union Protocol, 2004 recognises the inter-linkages and cooperation between customs union and environment and natural resources.[371]

4.4.5.1 Protocol on Environment and Natural Resources Management, 2006

In the furtherance of and implementation of the objectives, the EAC adopted a Protocol on Environment and Natural Resources Management.[372] The Protocol has the objectives of fostering close cooperation for judicious, sustainable and coordinated conservation, protection and utilisation of the environment and natural resources to eradicate poverty thereby improving the well-being of the people.[373] The Protocol addresses the natural resources governance from a sustainable and environmental perspective. In that endeavour, the Protocol enjoins the member states to adopt policies, legislative, and strategic measures

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[369] See Article 5 (3) (c) of the Treat for the Establishment of the East Africa Community, 1999.

[370] See Article 114 (c) of the Treaty for the Establishment of the East Africa Community, 1999.

[371] See Article 38 (1) (a) of the Protocol on the Establishment of East African Customs Union, 2014.

[372] See Protocol on Environment and Natural Resources Management adopted by the member states in 2006 under the mandate of article 151(1) of the Treaty for the establishment of the East Africa Community, 1999 which allow conclusion of protocols necessary to carry out specific objectives of the areas of cooperation.

[373] Ntamubano Wivine Y., *Efforts Towards Natural Resources Governance in East Africa Region*, Paper presented at the Workshop on Governance of Natural Resources in the EAC Region, Nairobi 13th - 15th December, 2012.

which promote sustainable use and management of the environment and natural resources.[374]

In addition, the Protocol commits member states to give effect to the international norms regulating the environmental and natural resource management. The commitment can be achieved through the harmonisation of policies, laws, and strategies of the member states in their national jurisdiction.[375] Also, the protocol promotes cooperation in areas such as management of transboundary resources among the member states, biological diversity, forests and tree resources, wildlife resources, water resources, marine and coastal land resources.[376] The Protocol enjoins member states to devise the common policies and laws fostering sustainable utilisation of mineral and energy resources renewable and non-renewable through the harmonization of policies, laws and common strategies in the region.[377]

The Sectoral Committees on Environment and Natural Resources are established under article 20 of the EAC Treaty and designated to oversee the comprehensive implementation of the Protocol by the member states. The Sectoral Committee is composed of directors or equivalent responsible for water, environment, energy, wildlife, minerals, forestry, fisheries and heads of environment agencies of the partner states.[378] In order to achieve the objectives of the Protocol, member states are enjoined to take appropriate legislative, administrative and enforcement measures, within its competence, to ensure

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[374] See Article 3 and 5 of the Protocol on Environment and Natural Resources, 2006.

[375] Article 6 the Protocol on Environment and Natural Resources, 2006.

[376] See Articles 9 to 16 of the Protocol on Environment and Natural Resources, 2006.

[377] See Articles 17 and 18 of the Protocol on Environment and Natural Resources, 2006.

[378] See Articles 37 of the Protocol on Environment and Natural Resources, 2006.

compliance with the Protocol.[379] The Protocol envisages coming into operation upon ratification and deposit of instruments of ratification by all member states.[380]

4.4.5.2 Impacts of the Protocol on Environment and Natural Resources Management in the EAC

To date, the Protocol has not entered into force for lack of the requisite ratification. However, some member states like the Republic of Kenya and the Republic of Uganda have ratified the Protocol while the United Republic of Tanzania has not ratified the Protocol. The reasons assigned for her non-ratification are that the Protocol contravenes the Protocol on the establishment of the East African Community Common Market, 2009, in particular, access to and use of land which are, accordingly, governed by member states' national policies and laws.[381] In addition, Tanzania was not at ease seeing the Protocol providing for a framework regulating trading and market of mineral, instead of regulating the protection of the environment in mining activities, a mandate exclusively left to each partner states. The inclusion of tourism in the Protocol further skewed the United Republic of Tanzania stance against the Protocol. Tanzania argued that tourism and wildlife management could be best dealt with in a separate instrument which was, accordingly, under negotiation by partner states. Due to the foregoing setbacks, it is difficult to assess the efficacy of the Protocol in managing the environment and natural resources at the community level.

That notwithstanding, *in the recent case of the Attorney General of Tanzania vs African Network for Animal Welfare (ANAW), Appeal No. 3 of 2014*[382] the East

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[379] See Articles 40 of the Protocol on Environment and Natural Resources, 2006.

[380] See Articles 46 of the Protocol on Environment and Natural Resources, 2006.

[381] See Article 15 (1) and (2) of the Protocol on the Establishment of the East African Community Common Market, 2009.

[382] Appeal from part of the judgment of the First Instance Division at Arusha; Jean Bosco Butasi, PJ; Isaac Lenaola, DPJ; and John Mkwawa, J; dated 20th June, 2014 in Reference No. 9 of

African Court of Justice (EACJ) interpreting whether it had jurisdiction to enforce article 114 to 119 of the EAC Treaty in the absence of the Protocol, held that the mandate to interpret provisions of the Treaty is vested in the Court (EACJ). The partner states adhere to live by objectives, undertakings, and standards contained in the EAC Treaty. The EACJ made it clear that the absence of the Protocol on the environment and Natural Resources, cannot in anyway, if, the obligations, undertakings, and standards are contained in the EAC Treaty, deter the Court to give effect to the provision of the Treaty. In addition, EACJ is of the view that articles 111 to 114 of EAC Treaty are self-executing provisions and do not need a protocol for them to come into force. In fact, these provisions form an integral part of the EAC Treaty.

4.5 Conclusion

The home states and international legislative initiatives play a decisive role in natural resource governance, in particular, the mandatory accounting and disclosure of payments made by extractive companies listed in their respective stock markets to the host governments. The accounting and disclosure are made on a project-by-project basis along the resource value chain. It is expected that once the implementation of these initiatives is in full force, it will make it easy to assess the quantity of resources extracted *vis a vis* revenue generated. This will, in turn, help to hold the governments accountable for how they spend the generated income. However, the approaches taken by these legislative initiatives are narrow as far as natural resources governance is concerned. Their main focus is the revenue inflow accruing from the exploitation of natural resources. Thus other aspects such as tax avoidance, tax evasion, environmental issues, and sustainable utilisation of natural resources are not well covered.

Furthermore, the transnational corruption legislative initiatives and the international voluntary schemes play a decisive role in addressing natural

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2010, available at http://eacj.org/wp-content/uploads/2015/08/APPEAL-NO-3-OF-2014-FINAL-31ST-JULY-205-Anwaw.pdf (accessed on 26th March 2018).

resources spoliation by addressing issues of corruption, bribery and money laundering along the resources value chain. As such, for the effective implementation, it is generally opined that the international community should strengthen these efforts and initiatives in order to help the people from resources-rich states benefit from their endowed resources. In particular, with regards to the transnational corruption legislative initiatives, the states are enjoined to strengthen cooperation and exchange of information in order to fight corruption and its incidental vices.

The role of regional and sub-regional in interstate and intrastate natural resources initiatives are somehow convoluted. This is exacerbated by the fact that, apart from the provision of for general frameworks in their areas of operation, their practical implementation is chequered. Firstly, protocols adopted to implement these initiatives are not yet in force due to the lack of requisite instruments for ratification. Secondly, even for the protocol in force, institutions governing their implementation are weak, poorly coordinated and underfunded. Thirdly, the implementation measures which would function better through transposition into national laws of member states are literary not complied with by member states with impunity. Therefore, the problem that hinders the effective natural resources governance in resources-rich states is not lack of legal frameworks rather is the existence of proliferation of several and competing regulatory efforts scattered in different documents without coordination and harmonisation.

CHAPTER FIVE

AN OVERVIEW OF POLICY, LEGAL, INSTITUTIONAL AND REGULATORY FRAMEWORKS OF OIL AND GAS GOVERNANCE IN TANZANIA

5.1 Introduction

The chapter seeks to unveil the discussion of policy, legal and institutional frameworks of the oil and gas governance in Tanzania. In this endeavour, it begins with a general background of natural resource governance in pre and post-independent Tanzania. It notes that there was a change of policies affecting the natural resource governance. For instance, after the independence from the 1960s to 1970s, the government adopted the socialist policy which had the effect of vesting all the major means of production in the control of the state. However, in the 1980's to 1990s the socialist policies failed and paved the way for an introduction of a liberal economy. The liberal economic policies reduced the government control over the economy and open up to the foreign direct investments. It is in this period where the exploration and extraction of mineral, oil, and gas resources were intensified.

The chapter further examines the national development plans which are implemented through the policies and laws. The plans recognise the role of the natural resources, in particular, the oil and gas industry in attaining the Tanzania Development Vision 2025 which aims at transforming Tanzania into a middle-income country. The vision 2025 is being implemented by the Long Term Perspective Plan (LTPP 2011 - 2026) which is being rolled out in three phases of the Five Years Development Plans (FYDPs 2011 - 2016; 2016 - 2021; 2021 - 2016) respectively. The national development plans state that the natural resources belong to the people for the benefits of the present and the future generations.

The chapter further examines the policy, legal and institutional frameworks and note that there are various policies and laws which regulate oil and gas industry.

However, the policies and laws are scattered in different documents, at times, overlapping each other without coordination and harmonisation. Also, it notes that the laws governing oil and gas industry are in two main folds. Firstly, the industry is governed by the individual Production Sharing Agreements (PSAs), which form part of the major findings and discussions of the chapter. Secondly, the Petroleum Act 2015, the Oil and Gas Revenue Management Act 2015, Tanzania Extractive Industry (Transparency and Accountability) Act 2015, the Natural Wealth and Resources (Permanent Sovereignty) Act 2017, and the Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act 2017. However, as stated above, the major findings and discussions are centered around the PSAs and also borrowing a leaf from the policies and laws.

5.2 Prelude to Natural Resource Governance Pre and Post - Tanganyika Independence

Tanzania was one of the front-runners which supported the debates of natural resource sovereignty. Even before attaining its independence from the British colonial power, its nationalistic leaders led by Mwalimu Julius Kambarage Nyerere had strongly resisted the British succession plan. In fact, Nyerere had made it clear the position of the United Republic of Tanzania (the then Tanganyika) with regards to the succession of the colonial natural resources investment agreements. He stated that the bilateral agreements entered into by the departing colonial power would continue for the period of two years unless extended or modified by the mutual consent. The multilateral treaties would continue in effect until they were either terminated or confirmed. His proposal is the infamous 'clean slate doctrine of state succession' or Nyerere doctrine on state succession.[383]

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[383] Makonnen. Y., *International Law and the New States of Africa: A study of International Legal Problems of State Succession in the Newly Independent States of East Africa, (*1983), pp. 121 - 22; See also Turack Daniel C., International Law and the New States of Africa, (1984) p.303;

After the attainment of its independence in 1961, Tanzania realised that the political 'flag' independence from the departing colonial master was an illusion if it did not reflect the people controlling their economy.[384] The independent government had a range of issues to deal with; firstly, to create the new political institutions for handling the social and economic responsibilities of the country's new statehood. Secondly, to maintain the security and protect sovereignty, and thirdly, devise a comprehensive human resource development which would fill-in the vacancies left by colonial bureaucrats.[385]

Therefore, to fill in the void, the new government embarked on the major political, social, and economic reforms aimed at empowering the people. In addition, the then ruling party, Tanganyika African National Unity (TANU) adopted a resolution that envisaged an introduction of the policy of socialism and self-reliance. The adoption of the socialist policy was put in practice by the adoption of the Arusha Declaration in 1967. Due to the lack of competitive public enterprises which brought the money to the public coffers, and mindful of the principles established under the UNGA Res. 1803 on permanent sovereignty over natural resources, the government nationalised all the major means of production which were

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Schrijver N.J., *Sovereignty over Natural Resources,* (1997), pp. 22-33. He argues that the theory of *tabula rasa* is closely related to the 'Nyerere doctrine' named after the Tanganyikan prime minister who in 1961 advocated that newly independent African States should have the right to a 'period of reflection' and the right to review the terms of bilateral treaties within a period of two years from the date of independence. The government of Tanganyika (later incorporated into Tanzania) announced that this would not be applied to multilateral treaties which instead would be reviewed individually. See *Yearbook of the International Law Commission* (1962), vol. II, p.121.

[384] Picard Luis, A., The Challenge of Structural Adjustment, *in Policy Reforms for Sustainable Development in Africa: The Institutional Imperative,* Luis, P. Picard and Michele Garrity, (eds.), Boulder and Co., Rienner Publishers, (1994); Obrien David P., Structural Adjustment Programs in Sub-Saharan Africa, *19 Fletcher Forum World Affairs,* (1995), p. 122. He argues that the independence could not do away with the social and economic relation which were, by and large, tied up with the departing colonial masters. For instance, the production in agriculture was determined by the demand from metropolitan industries, worse still, the means of production were controlled by the metropolitan expatriates. Therefore, in this way, the economic underdevelopment led to the political underdevelopment that enable the colonial economic *status quo* remain.

[385] See Economic and Social Research Foundation, *Petroleum Exploration Study - A Baseline Survey Report,* (2009), p. 10.

controlled by the private entrepreneurs.[386] The government policy toward natural resource governance was protectionist and conservationist. Like the colonial government, which fundamentally placed the natural resources in the hands of the colonial government institutions, the independent government virtually maintained the colonial centralised management of all natural resources. [387]

5.2.1 Post-Arusha Declaration and Natural Resource Governancel

The years that followed the Arusha Declaration (the late 1960s - early 1990) witnessed little activities with regard to the exploitation of natural resources.[388] The country had gone through a period of difficulties. Firstly, there was low economic growth, crippled by an unprecedented rise in the inflation rate to over 40%, while the foreign currency reserve decreased from USD281.8million in 1977 to USD 20.3million in 1980.[389] However, things were to change abruptly to

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[386] See the Arusha Declaration 1967 Part Two (b) enlist the major means of production subject of the nationalisation which included; land, forests, mineral resources, water, oil and electricity, communications, transport, banks, insurance, import and export trade, wholesale business, the steel, machine tools, arms, motor-car, cement, fertilizer factories and textile industries, among others. Also, see Peter Chris Maina, Miles Apart but Walking the Same Path: The Right of the People to Control their Natural Wealth and Resources in Nigeria and Tanzania, (2007), p.31. For matters related to nationalisation see Bolton Dianne, Nationalization – A Road to Socialism? The Lessons of Tanzania, London: Zed Books Ltd., (1985); McHenry, Dean E. Jr., *Limited Choices: The Political Struggle for Socialism in Tanzania*, Boulder and London, Lynne Rienner Publishers, (1994), p. 131; Peter Chris Maina, *Foreign Private Investments in Tanzania: A Study of the Legal Framework*, Konstanz, Hartung-Gorre Verlag, (1989); Clarence Dias, Tanzanian Nationalisation, *4 Cornel international Law Journal* (1970), pp. 63 - 67.

[387] Chachage C.S.L., Magnus Ericcson, and Peter Gibon, *Mining and Structural Adjustment Studies on Zimbabwe and Tanzania,* Nordiska Afrikainstitutet, Uppsala, (1993), p. 89. arguing that commercial gold mining declined rapidly before and soon after independence from three tonnes per annum in the early 1960s to 10 Kg. in the 1970s.

[388] Chachage C.S.L., Magnus Ericcson, and Peter Gibon, *Mining and Structural Adjustment Studies on Zimbabwe and Tanzania*, (1993), p. 96. Accordingly, the official gold production in Tanzania was still low notwithstanding economic reforms undertaken in late 1980s. For instance, notwithstanding the rapid increase in world prices in 1989, total production of gold country-wide was only 116 Kg. The reasons for this is associated with economic reforms of 1960s and 70s which, among others, discouraged foreign direct investments.

[389] See Economic and Social Research Foundation, *Petroleum Exploration Study - A Baseline Survey Report*, (2009), p. 12. Arguing that three factor accounted for this unprecedented fall; firstly, growth in public sector and uncontrolled spending and rampant corruption, secondly, the active involvement of government in the economy through political, social, and economic reforms

accommodate new economic policies engineered by the World Bank's Structural Adjustment Programme (SAP).[390]

Without prejudice to the general understanding of the term natural resources, in this study, it means the minerals and, oil and gas, in particular. The mining was the first natural resources sector to be affected by these changes. The World Bank, through the Mineral Sector Technical Assistance Project for Tanzania, had recommended a significant change of policies and laws to allow the involvement of private sector in the mineral extraction. To heed the World Bank Technical Assistance initiatives, the government of the United Republic of Tanzania embarked on the major policy and legal reforms that were aimed at creating a conducive business environment for the private sector in the new era of market economy.[391]

5.2.2 Economic Liberalisation and its Impacts on Natural Resource Governance

The measures undertaken by the government had far-reaching consequences as far as mining sector is concerned. There were both policy and legislative reforms aimed at getting rid of the unfriendly investment policies and laws. Accordingly, the Tanzania Investment Act, 1997[392] was enacted to provide for a favourable investment climate. The Tanzania Investment Centre was established as a one-stop centre facilitating all investment activities, in particular, the natural resources

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brought by the Arusha Declaration, and thirdly, prolonged bad weather inform of draughts and floods which wracked the country reducing exports and foreign exchange earnings.

[390] World Bank, *Mineral Sector Development Technical Assistance Project: Tanzania*, World Bank, Geneva, (1993). Accordingly, the African governments were encouraged to keep abreast the role of mining in the economic development and, therefore, devise an enabling environment related to the foreign exchange regime, taxation, repatriation of profits, regulatory, and institutional frameworks.

[391] See Peter Chris Maina and Mwakaje Saudin Jacob, *Investments in Tanzania: Some Comments – Some Issues,* Dar es Salaam: Friedrich Ebert Stiftung and Department of International Law of University of Dar es Salaam, (2004).

[392] The Tanzania Investment Act, No. 26 of 1997.

sector.[393] The Mining Act, 1979 enacted to function in a centralised planned economy was overhauled allowing a significant private sector participation in the mineral extraction. The Mining Act, 1998, preceded by the Mineral Policy, 1997, was enacted to reflect the new realities of the global political economy. There were broad incentives granted to investors in a bid to attract foreign investments, such as lower corporate taxes, exemption from customs and sale duties, [394] reduced royalty,[395] increased foreign exchange rates through the retention scheme, among others.[396]

It was remarked that although there is a significant and relatively attractive business environment, Tanzania minerals are siphoned off through smuggling to the extent that some investors regard the country *terra nulli* (nobody's land). This is because the government is said to be overly liberal and generous to the foreign investments.[397] The effect of the generous business environment accorded to the investors is a minimum contribution of the sector to the national economy. The figure from the field will demonstrate the point. According to the annual reports 2000 - 2006 of the two companies having the lion's share in the

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[393] See section 5 of the Tanzania Investment Act, 1997 provides for the objectives of the centre as one-stop centre for investors, as a primary agent of the government, shall coordinate, encourage, promote and facilitate investment in Tanzania and advise the government on investment policy and related matters.

[394] See sections 4A and 4B of the Customs Tariffs Act, 1976 as amended in 1997 whereby mining companies were subjected to 5% import duty on spare parts in the first year of their operation and thereafter zero. In addition, they were entitled to 5% of the import duties for equipment of mining exploration such as explosive, industrial items, lubricants, fuel oil, machinery and vehicle before the anniversary of the mine production after which no custom duty is payable.

[395] Sections 86 and 87 of the Mining Act, 1998 provides that payment of 3% royalty would be calculated as proportion not of the total production value of the minerals but of their net back value, i.e., market value of the minerals minus the costs of transport and smelting or refining.

[396] see Wangwe, Samuel M., Semboja Haji H., and Tibandebage Paula (eds.), *Transitional Economic Policy Options in Tanzania*, Dar es Salaam, Mkuki na Nyota Publishers, (1998), p. 38.

[397] Kulindwa, Kassim et al., *Mining for Sustainable Development in Tanzania*, Dar es Salaam, Dar es Salaam University Press, (2003), p. 56. cited in Peter Chris Maina, Miles Apart but Walking the Same Path: The Right of the People to Control their Natural Wealth and Resources in Nigeria and Tanzania, The Founder's Day Lecture, *Nigerian Institute of Advanced Legal Studies,* Lagos, (2007), p. 34.

mining sector in Tanzania, The AngloGold Ashanti Tanzania Ltd and Barrick Gold Tanzania Ltd reveal that the former paid a total of USD96. 8 million to the treasury while it exported the gold worth USD 1.4 billion while the latter had paid USD 120 million to the treasury and exported gold worth USD 1 billion[398]

5.3 National Development Plan and Natural Resource Governance in Extractive Industry in Tanzania

Apart from the mineral resources, Tanzania is endowed with a natural gas, which offers a unique and exciting chance of alleviating the poverty and create a broad-based development and improved standards of living across the country. Apart from the overwhelming prospects of oil discovery, the exploration activities have recently revealed that Tanzania is endowed with the large quantities of natural gas. The exploration has seen the increase of natural gas reserves from 45 billion cubic feet in 2004 to 57.25 trillion cubic feet as of May 2017 from both onshore and offshore basins.[399] However, despite these discoveries, the international experience point out the challenges which are often faced by the resource-rich developing countries in translating the natural resource wealth into the peace and prosperity.[400]

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[398] Lange S., *Benefit streams from mining in Tanzania: Case studies from Geita and Mererani*, CMI, Norway, (2006); Lissu T. and Curtis M., *A Golden Opportunity? How Tanzania is failing to Benefit from Gold Mining*, March 2008.

[399] Mbise Hosea and Adam I. Zuberi, Policy, Legal and Institutional Frame work for the Petroleum (Oil and Gas) Development in Tanzania, *Conference Paper presented at the 1st Tanzanian Oil and Gas Conference Exhibition,* Mlimani City, Dar es Salaam, 18th -19th October, 2012. See the Budget Speech presented by the Minister for Energy and Mineral in the National Assembly available at https://mem.go.tz/wp-content/uploads/2016/05/19.05.2016hotuba-ya-wizara-ya-NM-ikiwasilishwa-na-mh.-sospeter-muhongo-201617.pdf at page 20 (accessed on 23rd May, 2017). Until 2012, the government had entered into 28 Production Sharing Agreements with 18 Exploration Company.

[400] Petroleum Exploration Study A Baseline Survey Report, *Economic and Social Research Foundation*, 2010; Oil and Gas Laws in Uganda: A Legislators' Guide, Oil Discussion Paper No. 1, *International Alert*, 2011. See also Mbise Hosea and Adam I. Zuberi (2012), Policy, Legal and Institutional Frame work for the Petroleum (Oil and Gas) Development in Tanzania, October, (2012); See also Duruigbo Emeka, The World Bank, Multinational Oil Corporations, and the Resource Curse in Africa, (2005), p. 2.

The effective management of natural resources requires a devised comprehensive national plan that covers a range of issues involved in the resource value chain. The national plan should take a long-term approach, taking into account the fact that extraction of extractive resources takes longer time. Thus, for the effective implementation of the extractive resource governance, there must be a linkage of the decision-making plan from the upper stream, the midstream, and the downstream along the resource value chain.

The national natural resource governance plans in place are envisioned towards the Tanzania Development Vision (TDV) 2025,[401] which envisages making Tanzania a middle-income country. In order to achieve the TDV 2025, the government has adopted 15 years Long Term Perspective Plan[402] (LTPP) 2011 - 2026 as its implementing special purpose vehicle which was rolled out since 2011.[403] With regards to the natural resource governance, oil and gas, in particular, the LTPP envisages the exploration and production of untapped non-renewable resources such as oil and gas through establishing a system of production, procurement, transportation, and distribution that is efficient, sustainable and environmentally friendly.[404] The LTPP is being implemented in three phases of Five Years Development Plan (FYDP) with different thematic

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[401] See the Tanzania Development Vision 2025 available at http://www.mof.go.tz/mofdocs/overarch/vision2025.htm (accessed on 27 March 2018).

[402] See the Long Term Perspective Plan 2011 - 2026 available at http://www.mipango.go.tz/index.php?option=com_docman&task=cat_view&gid=15&Itemid=48 (accessed on 27th March 2018).

[403] The National Development Plans are designed and developed by the government and tabled before the National Assembly under virtue of article 63(3)(c) of the Constitution of the United Republic of Tanzania, 1977 and rule 94 of the Parliamentary Standing Rules 2016 (edition). Basically, the government submits the National Development Plan to the National Assembly for discussion. The National Assembly advises the government how the proposed plan can be effectively implemented in general or specific thematic aspects. See also Chapter Two of the National Natural Gas Policy, 2013 on justification for the Natural Gas Policy which is aligned with the National Development Vision 2025 and Five Years Development Plans 2011 - 2016.

[404] See the Tanzania Long Term Perspective Plan, 2011/2012 - 2025/2026,the Roadmap to a Middle Income Economy, pp. 70 - 71.

assertions. Namely; phase I FYDP (2011 - 2016) Unleashing Growth Potential,[405] phase II (2016 - 2021) Nurturing an Industrial Economy,[406] and phase III (2021 - 2026) Attaining Export Growth and Competitiveness.

Despite the above national plans, there is no comprehensive and specific plan for the governance of natural gas. Two reasons account for this. Firstly, the LTPP implementation plan was adopted in 2010 before the actual appraisal of the quantity of natural gas to the current state thus did not address natural gas governance adequately. Secondly, there is no harmonisation of the FYDP implementation phases. For instance, the current FYDP (2016 - 2021) does not seem to complement the previous one by taking on board the new appraisal of the oil and gas industry and give a policy directive towards its governance.[407] What is seemingly a lost opportunity, it does create a synergy how, for instance, the natural gas, a necessary source of energy, can be used to propel the envisaged industrialisation The oversight is fatal because natural resources

[405] See Phase 1 Five Years Development Plan 2011 - 2016 - Unleashing Growth Potential available at http://www.tzdpg.or.tz/fileadmin/_migrated/content_uploads/FYDP-2012-02-02.pdf (accessed on 27 March 2018)

[406] See Phase 2 Five Years Development Plan 2016 - 2021- Nurturing an Industrialisation for Economic Transformation and Human Development available at http://www.mof.go.tz/mofdocs/msemaji/Five%202016_17_2020_21.pdf (accessed on 27 March 2018).

[407] See for instance, the objectives of the Five Years Development Plan (2016 - 2021), p.2. which is built on three pillars of transformation, namely industrialization, human development, and implementation effectiveness. These pillars are being implemented to achieve the following objectives; build a base for transforming Tanzania into a semi-industrialized nation by 2025, foster development of sustainable productive and export capacities; consolidate Tanzania's strategic geographical location through improving the environment for doing business and positioning the country as a regional production, trade and logistic hub, promote availability of requisite industrial skills (production and trade management, operations, quality assurance, etc.) and skills for other production and services delivery, Accelerate broad-based and inclusive economic growth that reduces poverty substantially and allows shared benefits among the majority of the people through increased productive capacities and job creation especially for the youth and disadvantaged groups; improve quality of life and human wellbeing, foster and strengthen implementation effectiveness, including prioritization, sequencing, integration and alignment of interventions, and intensify and strengthen the role of local actors in planning and implementation.

policies and laws are adopted and enacted to expound and implement these strategic plans.

5.4 Sovereignty and Ownership of Oil and Gas Resources in Tanzania

The Constitution of the United Republic of Tanzania 1977 imposes a duty to every person to protect natural resources of the United Republic, the property of the state authority, all property collectively owned by the people, and also to respect another person's property.[408] Accordingly, the article enjoins the people of the United Republic of Tanzania to take such measures so as to protect the endowed natural resources. The Constitutional provision is in line with the basic international legal instruments which laid down the foundation of the sovereignty over natural resources.[409]

The Petroleum Act [410] vests the radical title in the government. The Act provides that all deposits of petroleum in its natural state are vested in and shall be exclusively managed by the government on behalf of and in trust for the people of Tanzania[411] The Act vests the power to grant petroleum rights to the minister after consultation with the Petroleum Upstream Regulatory Authority (PURA).[412] It goes further by granting exclusive rights over the oil and gas resources to the National Oil Company (NOC).[413]

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[408] See Article 27 of the Constitution of the United Republic of Tanzania 1977, Cap. 2, R.E. 2002.

[409] See article 1 of the UNGA Res. 1803 of 1962 on Permanent Sovereignty over Natural Resources, article 1 (2) of the International Covenant on Civil and Political Right, 1966 and article 1(2) of the International Covenant on Social, Economic, and Cultural Rights, 1966; article 2(1) of the Charter for Economic Rights and Duties of the State, UNGA Res. 3281, 1974, article 21 of the African Charter of Human and Peoples Right, 1981.

[410] The Petroleum Act No. 21 of 2015.

[411] Section 4 (1) of the Petroleum Act, No. 21 of 2015.

[412] See section 44 of the Petroleum Act, No. 21 of 2015.

[413] See section 45 of the Petroleum Act, No. 21 of 2015.

The Land Act and the Village Land Act,[414] which governs all interests in land and its respective tenures declare that all land in Tanzania is a public land vested in the President as trustee for and on behalf of all citizens of Tanzania.[415] However, the occupier of land, under any tenure, has no right to access water, minerals, petroleum resources forming part of or below the surface because the land laws have explicitly restricted such access.[416] As noted above, the Constitution, though impliedly vest the right in the people, the laws enacted to give practical effect to the right pegged it with more restriction than enjoyment. Therefore, from the legal position above, the land and its natural resources are vested in the President as trustee for and on behalf of the people, arguably, exercise of the right to access to and benefits from these resources will depend on how the government devises a workable plan to that effect.

The Natural Wealth and Resources (Permanent Sovereignty) Act 2017[417] proclaims in unequivocal terms that the people of the United Republic of Tanzania have the permanent sovereignty over natural wealth and resources.[418] The Act provides further that the ownership and control over natural wealth and resources vest in the government for and on behalf of the people.[419] In a bid to strongly assert the sovereignty of the people over the natural wealth and resources, the Act appends the UNGA resolution 1803 on Permanent Sovereignty over Natural Resources and the UNGA resolution 3281 the Charter of Economic Rights and Duties of States as the first and second schedules of the

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[414] See the Land Act, No. 4 of 1999, Cap. 113 R.E 2002.

[415] See Sections 3 (1), 4(1), and 22 (2) of the Land Act, Cap 113, R.E. 2002 and section 3 (1) (b) of the Village Land Act, Cap 114, R.E. 2002.

[416] See section 2 of both Land Act and Village Land Act Cap 113 and 114 respectively.

[417] See the Natural Wealth and Resources (Permanent Sovereignty) Act, No. 5 of 2017.

[418] See section 4 (1) of the Natural Wealth and Resources (Permanent Sovereignty) Act, No. 5 of 2017.

[419] See section 4 (2) of the Natural Wealth and Resources (Permanent Sovereignty) Act, No. 5 of 2017.

Act respectively.[420] Also, the Act provides that any agreements for the extraction of natural resources which do not secure the interests of the people shall be unlawful.[421]

In a bid to protect and secure the sovereignty of the people over the natural wealth and resources, the Act prohibits any international adjudication in respect of a dispute arising from the extraction, exploitation, and use of natural wealth and resources. Instead, any dispute arising from the extraction of natural wealth and resources, shall be exclusively determined by the judicial bodies of the United Republic of Tanzania.[422] Interestingly, the Act gives the National Assembly a mandate to review all agreements for the extraction of natural wealth and resources.[423] Once the National Assembly passes a resolution for the review of the agreements, the government shall initiate by engaging the other party to the agreement within 30 days after such resolution.[424] The basis of the review is to get rid of the unconscionable terms which affect the interest of the people.[425]

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[420] See section 4 (2) of the Natural Wealth and Resources (Permanent Sovereignty) Act, No. 5 of 2017.

[421] See section 4 (2) of the Natural Wealth and Resources (Permanent Sovereignty) Act, No. 5 of 2017.

[422] See section 11 (1), (2) and (3) of the Natural Wealth and Resources (Permanent Sovereignty) Act, No. 5 of 2017.

[423] See section 12 of the Natural Wealth and Resources (Permanent Sovereignty) Act, No. 5 of 2017.

[424] See section 6 (1) and (2) of the Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms Act, No. 6 of 2017.

[425] See section 6 (2) and (2) of the Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms Act, No. 6 of 2017 provides for range of terms which can be deemed to be unconscionable namely; any terms aimed at restricting the right of the state to exercise full permanent sovereignty over its wealth and natural resources; any terms restricting the government control over foreign investment in the country; any terms inequitable and onerous to the state, any terms which restrict periodic review of the agreement which purports to last for life; any terms securing preferential treatment of designed to create a separate legal regime to be applied discriminatorily for the benefit of particular investor; any terms depriving the people of the

One of the interesting provisions worth a discussion relate to the outcome of any envisaged re-negotiation of the agreement or arrangement. Accordingly, section 7(1) of the Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act 2017 provides that where the government has initiated an intention to re-negotiate the agreement and other party fail to agree to re-negotiate the unconscionable terms or fail to reach an agreement in respect of the unconscionable term(s) in question, such unconscionable term(s) shall , by operation of the Act, cease to operate and be treated as expunged from the agreement. In addition, the Act provides further that section 7 (1) above shall have an overriding effect over any other law governing the administration of and management of natural wealth and resources.[426]

The two laws, the Natural Wealth and Resources (Permanent Sovereignty) Act 2017 and the Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act 2017 create controversies as far as the natural resource governance is concerned. Firstly, the effect of the re-negotiation of agreement process is pre-determined by the law before the actual process takes place. In other words, the envisaged re-negotiation is just the compliance with the legal requirement before the government imposes its desired terms. Normally, the re-negotiation of agreement means that parties to the agreement willingly and by mutual consent sit together and agree to modify some of the terms in a subsisting agreement for the better performance and the benefits of both parties. However, the wording of section 7(1) does not seem to reflect that, instead, once the re-negotiation of the agreement is commenced, the other party must agree to the government terms, failure of which, render the impugned terms unenforceable.

Tanzania of the economic benefits derived from subjecting natural wealth and resources to beneficiation in the country; any terms which subject the state to the jurisdiction of foreign law and fora, among others.

[426] See section 7 (2) of the Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms Act, No. 6 of 2017.

Secondly, there is a potential and unnecessary conflict of laws. For instance, on the one hand, section 261 of the Petroleum Act 2015 recognises the production sharing agreements (PSAs) entered between the Tanzania Petroleum Development Cooperation (TPDC) on behalf of the government and the extractive companies. The PSA creates a separate legal regime which governs the individual production sharing agreement, i.e., the fiscal regime, environmental conservation, disputes settlement, among others. On the other hand, section 6(2)(e) of the Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act 2017 treats PSAs arrangement as unconscionable thus subject to review. The two laws quoted above are operational yet are not in harmony and therefore, create a potential conflict as far as the oil and gas industry governance is concerned.

5.5 An Overview of Oil and Gas Governance: Transparency and Accountability along Resource Value Chain

Transparency and accountability in the oil and gas governance are the important foundations which ensure that the decision-making environment is holistic along the resource value chain. The two aspects, on the one hand, create confidence to investors, stakeholders, and the people, among others. On the other hand, they help to unveil policy conflicts, prevent self-dealings and corruption. The ultimate effects will be widening of the scope for the public participation in the policy-making which in turn helps to build the public support for policy decisions made by the government affecting natural oil and gas governance. As stated earlier in this chapter, the decisions affecting the governance of oil and gas should take into account the need of present generation without compromising the needs of future generations.[427]

[427] See Policy 2.2 on Pillars of Natural Gas Policy, 2013 which recognises the fact that natural resources is a national resource for the benefit of the present and future generation of Tanzania.

Equally, the decision made over natural resources extraction should not create a burden for the future generation. For instance, natural resources exploitation and production sharing agreements should not be used as the security for the loan advancements because it may be passed to the future generations, in particular, where the loans so advanced are not properly invested in viable economic ventures. This part seeks to unveil the discussion of oil and gas governance along the resources value chain. In this endeavour, both policy, legal, and institutional analysis will be discussed and their respective strength and pitfalls will be, equally, highlighted.

5.5.1 Information on Discovery and Allocation of Licences for Exploration

The Constitution of the United Republic of Tanzania 1977 provides for freedom of expression in seeking, receiving and disseminating information. In order to make this right realisable, the Constitution imposes a duty on the government and its institutions to inform the people of various important events of life and activities of the people and also issues of importance to the society.[428] The information related to the discovery of oil and gas falls within the ambit of this constitutional provision and therefore, the government is enjoined to inform the people of the state of the oil and gas discoveries.

The Petroleum Act 2015[429] hereinafter referred to as the Act provides for the right of the citizens to access data related to the agreements, licenses, and permits granted under the Act through a registry operating under the Petroleum Upstream Regulatory Authority (PURA).[430] The PURA is required, with the approval of the Minister and upon the payment of prescribed fees, to make

[428] Article 18 (a), (b) and (d) of the Constitution of the United Republic of Tanzania, 1977, Cap. 2. R.E. 2002.

[429] The Petroleum Act, No. 21 of 2015.

[430] See section 92 (1) (a) of the Petroleum Act, No. 21 of 2015.

available to the public all details of activities by various players in the oil and gas industry.[431]

Admittedly, if one reads these provisions alone in the isolation of others, would undoubtedly commend the efforts for echoing the constitutional right of the citizens to receive and access information. However, subsequent provisions make a sudden U-turn by classifying the oil and gas data as confidential. Any access of information attempts is weighed against strenuous conditions. Accordingly, the Act provides that data submitted by a license holder shall be confidential and shall not be disclosed to a third party unless the disclosure is authorised by the license holder and upon written authorisation from the minister.[432]

It is apparent that the said non-disclosure is meant against the general public because it does not operate as such if the envisaged disclosure is to be made to the government agents, financial institutions, arbitrators or experts appointed under the Act, and for statistical purposes. [433] To make things worse, the Act creates an offence against any person who contravenes the non-disclosure provisions of information furnished or report submitted by the licence holder or permit holder and shall, on conviction, be liable to pay a fine of not less than ten million shillings.[434]

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[431] See section 91 (2) of the Petroleum Act, No. 21 of 2015.

[432] See section 93 (1) (a) of the Petroleum Act, No. 21 of 2015.

[433] See section 93 (2)(a) and (b) of the Petroleum Act, Act, 21 of 2015.

[434] See section 94 (1) (3) and (4) of the Petroleum Act, 2015; Section 241 of the Petroleum Act 2015 creates offence to any person who without reasonable excuse refuses, delays or fails to produce a document or other information relating to gas operations. This is flimsy excuse provision trying to circumvent access to information by general public on the pretext of public safety. The only difference between the repealed Petroleum and (Exploration and Production) Act 1980 and the Petroleum Act is that the former created offence for contravening disclosure provisions and on conviction a person would be liable to fine not exceeding ten thousand shillings or imprisonment not exceeding two years or both. While the later creates an offence which, on conviction, a person is liable to a fine not exceeding ten million shillings.

In addition, the Energy, Water Utilities Regulatory Authority (EWURA) deals with midstream and downstream of oil and gas value chain. It has a legal mandate to maintain all information in the National Petroleum and Gas Information System (NPGIS), a strategic tool for informing the general public about the status of oil and gas industry in the country. Accordingly, the Petroleum Act imposes an obligation to EWURA to furnish all information on NPGIS to be made available in public except those which protect the security of the state.[435] Although the Act does not impose restrictions as in the upstream, the right of the public to access information is not as absolute as it may seem. The Petroleum Act guarantees access to the oil and gas information by the public so long as it does not conflict with the national security issues. The Act does not, however, define what is the national security, hence leaving it open-ended for an arbitrary interpretation on account of public security when access to the NPGIS information from the public is being sought.[436]

The Tanzania Extractive Industries (Transparency and Accountability) Act (TEITA) 2015[437] promotes access to the oil and gas information without restrictions. In fact, in order to ensure transparency and accountability in the extractive industries, it enjoins the minister to publish on the website or through the media, which is widely accessible all concessions, contracts, and licenses relating to the extractive industry companies.[438] Apart from that, the minister is required to submit a report to the National Assembly not later than twelve months after the closure of the financial year on the implementation of activities under

[435] See section 125 (1) (2), and (5) of the Petroleum Act, No 21 of 2015.

[436] See Majamba Hamudi, I., Tanzania's Oil and Gas Industry Legal Regime, Management and Access Rights, (2016), p. 15.

[437] See the Tanzania Extractive Industries (Transparency and Accountability) Act, No. 22 of 2015.

[438] See section 16 (1) of the Tanzania Extractive Industries (Transparency and Accountability) Act, No. 22 of 2015.

TEITA.[439] Interestingly, TEITA creates an offence for any person arguably, the minister inclusive, who fails to produce a document or any information required under the TEITA and upon conviction shall be liable, in a case of an individual, to a fine of not less than ten million and in a case of a body corporate, a fine of not less than one hundred and fifty million shillings.[440]

The conflicting provisions of both the Petroleum Act and the TEITA with regard to an access to information related to the exploration and allocation of licenses are wanting and raise serious concerns. The history behind the enactment of these laws was fast-tracked under a certificate of urgency. Arguably, the Members of Parliament did not have enough time to seriously look at these laws. However, one could still look at it from a different angle. Two reasons account for this, firstly, when one looks at the transition and saving provisions under the Petroleum Act 2015 will agree with the argument that the Petroleum Act had intended to save all the agreements entered into under the repealed Petroleum (Exploration and Production) Act 1980. In fact, the Petroleum Act provides that the contracts entered into under the repealed Act will continue until lawful determined.[441] Secondly, the Production Sharing Agreements (PSAs) between the government through the Tanzania Petroleum Development Corporation (TPDC) and oil and gas companies have non-disclosure clauses.[442] As such, they are not subject to the disclosure envisaged under the newly enacted laws.

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[439] See section 19 of the Tanzania Extractive Industries (Transparency and Accountability) Act, No. 22 of 2015.

[440] See Section 23 (a) and (b) of the Tanzania Extractive Industries (Transparency and Accountability) Act, No. 22 of 2015; See also section 6(a) and (b) of the Written Laws Miscellaneous Act, No. 6 of 2016 and for further discussion see section 5.6.3.

[441] See section 261 (3) of the Petroleum Act, No. 21 of 2015.

[442] According to the TPDC officials who claimed anonymity said that most of the PSAs contain a rigorous non disclosure clauses. Any attempt by a party to disclose information without the consent of the another party amount to the breach of terms of the agreement.

5.5.2 Information Related to Geological Data and Oil and Gas Contracts

The information related to oil and gas contracts is, like the information of oil and gas discovery and the allocation exploration licenses, governed by the Constitution of the United Republic of Tanzania 1977. In addition, the Petroleum Act 2015 envisages a compulsory subjection of oil and gas interests into a transparent and competitive public tendering process.[443] The section does not state whether the agreement so concluded shall be made available for public scrutiny when, for instance, demanded by cross-sectoral stakeholders. Section 92 of the Act envisages that PURA will make available to the general public the information about oil and gas agreements subject to written approval of the minister.[444] Unlike the access to information on exploration data, the access to contracts is seemingly unrestricted under the Act. This is because the non-disclosure is restricted to information or document submitted to PURA by license holders or permit holders which, arguably, reading the category of restricted disclosure, oil and gas agreements do not fall within.

However, notwithstanding the legal provisions above, the legal framework for the individual oil and gas project in Tanzania is set out in the individual contracts negotiated on a case to case basis with the oil and gas multinational companies. The Production Sharing Agreements (PSAs) govern the individual project and are signed between the Tanzania Petroleum Development Corporation (TPDC), the petroleum state-owned company that manages the government's lion's share in the oil and gas industry, and oil and gas companies. In fact, most of the PSAs examined provide for non-disclosure clauses which one could reasonably say the Petroleum Act 2015 replicates the non-disclosure articles contained in PSAs because most of the PSAs, if not all, were signed prior to the enactment of the Act.

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[443] See Section 49 (1) (b) of the Petroleum Act, No. 21 of 2015.

[444] See section 92 (1) (a) and (d) of the Petroleum Act, No. 21 of 2015.

The publication of the contracts (PSAs) have benefits for both the investors and the host governments. For instance, when the PSAs are made to the public, the officials negotiating contracts would be extra careful to ensure that they protect the interest of the people when making the final deal without which their unreasonable incompetency would be unveiled and put into the public scrutiny. In addition, awareness of the terms contained in PSAs would lay a solid foundation of a trust between the people and contracting parties. This will, in turn, address unreasonable illusions which come along with the natural resources extraction. For the thriving of the oil and gas projects, there is a need to create a harmonious relationship between the people and the oil and gas companies.

In fact, the source of natural resource poor governance and in particular the oil and gas industry commence with the poorly negotiated and drafted contracts. These contracts are preceded by the calculated and systematic policy and legal reform arrangements between the host governments and multinational extractive companies which tend to create broader investment incentives and generous tax exemptions. Two reasons account for the above assertion. Firstly, the knowledge of the geological data is extremely important in assessing the commercial viability of the oil and gas in a particular licensed area. It forms part of the resource value base for the negotiation of the Production Sharing Agreement. The TPDC has legal ownership of all geological data related to the oil and gas resources. These data are generated by survey firms contracted by TPDC or the extractive companies during their exploration activities. The data forms a compulsory package for the bidding and negotiation processes. It appears that the geological data in the oil and gas industry are not centrally managed as a result they are scattered among the extractive companies.

As noted above, the Ministry of Energy and Minerals and TPDC negotiate PSAs with prospective extractive companies without knowing the net resource economical base subject of negotiation. As such, there is a reasonable possibility of undervaluing the resource and consequently getting less lucrative deals. From the 28 PSAs examined, none of them had an appraisal clause of the net

economic value of the oil and gas. The net economic value of the oil and gas is important as it informs the resource-rich state about the prospective earnings, prospective depletion of stocks, and environmental impacts likely to occur by such a project and therefore, determine the appropriate fiscal regime. If the above assessment is not done thoroughly, the expectation of the general public from the oil and gas industry is nothing but an illusion.

Secondly, profit sharing arrangements indicated in the individual PSAs are indeed inviting, however, their respective realisation comes at an exorbitant price to be borne by the oil and gas resources. This is because of the financial constraints, lack of technology and technological know-how. For instance, the costs for prospecting, exploration, and production are determined by the extractive companies albeit under the supervision and approval of the TPDC officials. Nevertheless, due to lack of technology by the TPDC officials, the extractive companies determine the costs at different stages. As such, the costs involved are unrealistic and over inflated.[445] In addition, although the quantity of the oil and gas discovered and the duration of which can be produced is appraised by both parties, yet extractive companies stand in an upper position than the TPDC because they own the technology. Therefore, actual costs incurred in prospecting, exploration, and production determines when and for how long would the profit sharing start flowing to the respective parties after the full recovery of costs incurred by the extractive companies.[446]

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[445] See African Progressive Panel*, Equity in Extractive Stewarding Africa's Natural Resources for All,* (2013), pp. 64 - 65, revealed that the revenues accrued from the extraction of natural resources in some resources rich states were very low compared to the value of exported resources. For instance, in 2011, Zambia exported copper worth USD 10 billion, while the government generated the revenue to the tune of USD 240 million. Similarly, the Guinea's export of the mining products reached USD 1.4 billion, while the revenues generated were USD48 million only.

[446] An observation made by officials from TPDC and Ministry of Energy and Minerals who were both advocating for investment in science and technology as a means of controlling oil and gas industry if the country want to reap a substantial profit from the industry value chain.

5.5.3 Oil and Gas Production Sharing Agreement Fiscal Regime

In order to generate the maximum profit in the oil and gas industry, it is imperative that the government should devise a realistic fiscal regime and administration. The devised fiscal regime should address the need for the effective realisation of the rent from the industry based on expected actual profit made by the extractive companies. Being mindful of the foregoing need, the devised fiscal regime should treat the extractive companies fairly without exerting unnecessary tax burden which is unrealistic and a burdensome to abide by. The contemporary fiscal regime is governed by scattered sub-regimes with different benchmark criteria determining the quantum of payable dues. The regimes are the Production Sharing Agreements (PSAs), the Model of Production Sharing Agreement (MPSA), and the Petroleum Act. However, for purposes of this part, the PSAs form the basis of our focus while borrowing a leaf from the MPSA 2013 and the Petroleum Act because most of, if not all, the oil and gas agreements are governed by individual PSA.

The Production Sharing Agreement is a contract between host government or its designated National Oil Company (NOC) and prospective extractive company whereby the rights of prospection, exploration, and production of oil and gas resources in a specified area for a specified period of time are determined. The PSA, MPSA, and the Petroleum Act designate Tanzania Petroleum Development Corporation (TPDC) as a National Oil Company.[447] The government through the Ministry of Energy and Minerals (MEM) negotiates the terms of a PSA with the prospective extractive company, and upon the successful conclusion of the negotiations, MEM grants the license to TPDC. The TPDC enters into a joint venture or partnership arrangement with the prospective extractive company which, in turn, undertakes the agreed production schedule on behalf of TPDC, its partner in that regard. The TPDC owns the rights to explore the land and to

[447] See section 8 (1) of the Petroleum Act, No. 21 of 2015; See also the Preamble and article 3 of the Model of Production Sharing Agreement, 2013.

develop the resources found therein, whilst the land itself is owned by the state. The oil and gas that is produced under this arrangement are shared between TPDC and the extractive company.[448]

However, before sharing of the revenue and after payment of an appropriate royalty, all expenses incurred shall be fully recovered by the extractive company or contractor as the case may be and in the case of a joint operation between TPDC and contractor by taking and disposing a volume of crude oil and/or natural gas produced and saved from the contracting area.[449] The remaining profit oil/profit gas is shared between TPDC and the contractor according to their respective shares negotiated in the PSA. Accordingly, most of the PSAs envisage sharing of the profit in the following arrangement, to wit, the TPDC profit share ranges between 65% to 85% of the Barrel of oil per Day (BOPD) and/or million standard cubic of gas per day (MMSCFD) while the contractor takes the remaining amount. [450]

There are serious concerns that while the envisaged profit sharing ought to rise on the part of TPDC as the oil or gas production increases and decreases on the part of extractive companies because the latter is presumed to have recouped all of their investment costs before profit sharing. However, the above fact notwithstanding, the PSA between TPDC and Pan African Energy Tanzania Limited (PAET) is structured in a reverse order whereby the TPDC share of revenue decreases as the production increases. *(See Table 1 Profit Sharing in Production Sharing Agreement between TPDC and Pan African Energy Tanzania LTD).*

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[448] See section 44 and 45 of the Petroleum Act, No. 21 of 2015; article 12 (g) (i) (a) and (g) (i) (b) of the Model of Production Agreement, 2013.

[449] See article 12 (a) (b), and (c) of the Model of Production Sharing Agreement, 2013.

[450] See section 44 and 45 of the Petroleum Act, No. 21 of 2015; article 12 (g) (i) (a) and (g) (i) (b) of the Model of Production Agreement, 2013.

5.5.3.1 Variation of Terms in the MPSAs, PSAs and Petroleum Act on Payment of Signature and Production Bonuses

As noted above, the Model of Production Sharing Agreement 2013 and its predecessors are the government negotiating tools but have no binding legal force. As such, in most cases, they are not strictly adhered to during negotiation of the individual PSAs, arguably some of the PSAs were signed before the MPSAs were designed. There are notable variations of the indicative terms in the MPSA against the individual PSAs examined with impunity. For instance, the MPSA envisages the payment of signature bonus[451] and production bonus ranging from USD 2.5 million and USD 5 million respectively. Although the indicated range does not state the determinant factors in arriving at these figures, all of the 28 PSAs examined do not provide for these items notwithstanding it is a best international practice in the oil and gas industry. There is no plausible explanation for these omissions, short of which, as stated earlier in this chapter, reasonable suspicion of corruption, rent-seeking and/or unreasonable incompetence.

5.5.3.2 Variation of Terms in the MPSAs, PSAs and Petroleum Act on Payment of Taxes and Exemptions

Firstly, the oil and gas taxation regimes are governed, like in all other sectors, by the tax laws depending on tax in question. The Production Sharing Agreement provides, apart from contractual terms, the manner in which taxation would be charged in the oil and gas industry. The PSAs provide for its respective tax regime albeit within the framework provided for by the tax laws. However, the PSAs taxation regime unveils administrative challenges as to which organ is

[451] See Wright Charlotte J., and Gallum Rebecca, *Fundamentals of Oil and Gas Accounting*, Tulsa, PennWell Book, (2008), p. 682, defining signature bonus as a lump sum upfront payments by investor to the host government which is evaluated by determining the expected profitability of the potential developments and offers a proportion of that value

responsible to administer these taxes.[452] In other words, so far, there are 28 PSAs thus each PSA represents its own tax regime to be administered by the Tanzania Revenue Authority separately. This is because each individual PSA has a unique tax regime which is different from others. Some PSAs indicate that the income tax and royalties are paid by TPDC on behalf of the extractive companies while other PSAs envisages payment of taxes and royalties would be borne out by TPDC and extractive companies.[453]

For instance, article 12.2 (c) of the PSA between the Pan African Energy Tanzania Limited (PAET) and TPDC provides that TPDC shall discharge its obligation to pay royalties under the Petroleum (Exploration and Production) Act 1980. In addition, article 16 (c) of MPSA 2013 provides that TPDC on behalf of its self and contractor shall discharge the obligation of paying royalty in respect of petroleum or natural gas obtained from the contact area to wit; 12.5% of the onshore areas and 7.5% of the offshore areas of the total crude oil or natural gas prior to the cost oil and/or cost gas recovered. However, the profit share paid by PAET to TPDC does not indicate the percent of royalties for both onshore and offshore of the crude oil and gas. As such, as stated above, the TPDC pays royalty out of its share of profit alone.[454]

Secondly, as noted above, although the PSAs provides for a separate tax regime, the taxation bases and rates are more or less similar to those provided for by the tax legislation. For instance, the corporate income tax (CIT) is charged at 30% of net profit while listed companies 25%. Similarly, the Value Added Tax (VAT) is charged at 18% irrespective of the listing. The individual PSAs provide

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[452] See the First Schedule of the Tanzania Revenue Authority Act, Act No.11 of 1995, Cap. 399 R.E.2002 which vest Tanzania Revenue Authority with responsibilities to administer taxes which include Income Tax Act and Value Added Tax Act, among others, with no reference to PSAs.

[453] See article 16 (c) of the Model of Production Sharing Agreement 2013.

[454] See the Controller and Auditor General Report on Public Authorities and other Public Bodies for Financial Year 2015/16, pp. 111 - 112, available http://www.nao.go.tz/?wpfb_dl=226 (accessed on 1st May 2018).

for a list of exemptions ranging from the import duties, dividends, interest on loans, technical services rendered by the non-residents, branch remittance tax, among others. One of the commendable efforts by the government existing PSAs notwithstanding is the abolition of a series of exemptions granted to extractive companies.

For instance, the Petroleum Act imposes withholding taxes on technical services whereby 5% and 10% is deducted from the payment made to resident and non-resident providers respectively. The management fees, interests on loan are chargeable whereby a party financing oil and gas operation is considered a sub - contractor thus subjected to the interest payment on the loan. [455] Equally to note is 5% and 10% withholding tax on the dividend payable by listed and unlisted extractive companies respectively. However, that notwithstanding, according to article 12.2 (a) of the PSA between PAET and TPDC, the corporate taxes paid by PAET to the Tanzania Revenue Authority (TRA) are recovered from the sales invoices of gas from TPDC. As such, PAET has not been paying corporate taxes as the same are borne by TPDC.[456]

Thirdly, although the MPSA 2008 envisages the payment of additional profit tax, some PSAs signed based on that model do not have provisions for additional profit tax. These PSAs include Swala Oil and Gas Tanzania LTD for Kilosa area, Mother Land Industry LTD for Malagarasi basin, Heritage Rukwa Tanzania LTD for Kyela and Rukwa basins, Petrobras Tanzania LTD for Block 8, and Ndovu Resources LTD for Nyuni. The non-inclusion is not stated and thus raises eyebrows of suspicion of corruption, rent-seeking, and/or unreasonable incompetence with impunity.

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[455] See section 117 (4) (6) and (7) of the Petroleum Act, No. 21 of 2015.

[456] See the Controller and Auditor General Report on Public Authorities and other Public Bodies for Financial Year 2015/16, pp. 110 - 111, available http://www.nao.go.tz/?wpfb_dl=226 (accessed on 1st May 2018).

5.5.3.3 Variation of Terms in the MPSAs, PSAs and Petroleum Act on Costs Recovery Measures

The MPSA 2013 and all its predecessors provide for the cost recovery measures by the contractor. Accordingly, all recoverable expenses incurred by the contractor shall be recovered by taking and disposing of a volume of crude oil or gas produced and saved from the contract area. The recoverable expenses allowed from both onshore and offshore areas are limited in each calendar year to an amount not exceeding the fifty percent (50%).[457] The reason behind is that if the recoverable cost exceeds more than 50%, it reduces the government profit of gas available for the distribution between TPDC and the contractor. However, the examination of some PSAs shows that the negotiated percentage of the cost recovery goes beyond MPSAs' rate by the percentage indicated in brackets. For instance, the PSAs between TPDC and Pan African Energy Tanzania Limited (75% of Songosongo area a variation by 15%), Ophir (72.5% for offshore Block 4 a variation by 22.5%), Dodsal (60% for Ruvu a variation by 10%), Heritage (60% Rukwa Basin and Kyela Basin a variation by 10%).[458]

In addition, some of the PSAs examined do provide a right of possession of recovered movable assets to the contractor. For instance, article18(b) Maurel & Prom Tanzania LTD PSA in Bigwa area, article 17.1 (b) Pan African Energy Tanzania Limited PSA in Songosongo area, article 19 (b) Petrodel Resources LTD PSAs in Kimbiji and Tanga areas, article 20 (b) Ndovu Resources LTD. PSA in Ruvuma basin area, article 19 (b) of Dotsal Hydrocarbon and Resources Tanzania PSA in Ruvuma area, article 19 (b) Ophir Tanzania PSA in Block 4

[457] See also recoverability percent provided for under Modal of Production Sharing Agreements for 1995, 2004, and 2008 whereby under clauses 9(b) and 11(a) and (c), the recoverability percent are 60%, 70% and 50% respectively.

[458] See article 10 for Pan African Energy Tanzania Limited PSA, and article 11 of the Ophir, Dotsal, and Heritage PSAs respectively; See also Controller and Auditor General Report on Public Authorities and other Public Bodies for Financial Year 2015/16.

offshore, and article 21 (b) Petrobras Tanzania LTD PSA in Block 5 offshore just to mention a few.

The right of possession given to the extractive companies under their respective PSAs is nothing than reaping twice. In the first place, all movable assets which are imported and deployed whole and exclusive in the oil and gas operation are treated as capital goods and therefore, fall within the ambit of cost recovery measures governed by each respective PSA. In other words, these assets should devolve to TPDC on the expiration of respective PSAs as the costs of the same have been recovered through the cost recovery measures prior to the sharing of profit.

5.5.4 Oil and Gas Revenue Management for Sustainable Development

Oil and gas are nonrenewable resources and their extraction depletes with time. It is imperative, therefore, to devise a sustainable and prudent decision making against their exploitation. The depletion of the oil and gas is certain. The pertinent issue for consideration would be how we could exploit these resources to cater to the needs of the present generation and sustain the needs of the future generations. This will very much depend on how we make the use of revenue generated from the extraction of these resources. The above consideration must be taken care in the context of balancing the needs of the present generation which are very high and those of the future generations which are yet unknown. In order to address these concerns, the revenue derived from the oil and gas industry must be invested in viable and strategic economic ventures to generate more income at the present and beyond exhaustion of these resources.

The National Natural Gas Policy 2013 envisages the establishment of the Natural Gas Revenue Fund aiming at overseeing the growth of the industry and promoting investment in the strategic projects which unlock the economy for the

present and future generation.[459] Also, the policy envisages setting up a legal and institutional arrangement to manage the fund. Accordingly, the Oil and Gas Revenue Management Act[460] (hereinafter referred to as 'the Act') was enacted to provide for the establishment and management of the Oil and Gas Fund and the framework for the fiscal rule and management of the oil and gas revenues. The Act establishes the Oil and Gas Fund and vests the management of the Fund in the Paymaster General.[461] In addition, the Act envisages the sources of the Fund to be royalties, government profit share, dividends on government participation in oil and gas operations, corporate income tax on exploration, production and development of oil and gas resources and return on investment of the Fund.[462] In order to protect and ensure sustainability of the Fund, the Act prohibits the use of the Fund for the provision of credit to government, public and private entities, collateral or guarantees.[463]

The Act envisages the management and expenditure of the designated oil and gas revenues to be in conformity with fiscal rules of the Fund. The objectives of the fiscal rules are financing the government, financing national oil and gas investments, fiscal stabilisation, and saving for future generations.[464] In order to ensure the stability of the fiscal rules, any change would require the support and approval of not less than two-thirds of the total number of Members of Parliament.[465] The application of fiscal rules is in threefold; firstly, the fiscal rules exclude designated oil and gas revenues from the domestic revenue source in

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[459] See policy 3.1.3 on management of natural gas revenue, National Natural Gas Policy 2013.

[460] The Oil and Gas Revenues Management Act, No. 22 of 2015.

[461] See sections 8 (1) and 10 (1) of the Oil and Gas Revenues Management Act, No. 22 of 2015 respectively.

[462] section 9 (a) - (e) of the Oil and Gas Revenues Management Act, No. 22 of 2015.

[463] sections 11 (a) and (b) of the Oil and Gas Revenues Management Act, No. 22 of 2015

[464] sections 16 (a) - (b) of the Oil and Gas Revenues Management Act, No. 22 of 2015

[465] sections 16 (4) of the Oil and Gas Revenues Management Act, No. 22 of 2015

estimating budget deficit. In other words, oil and gas revenue is not treated as a domestic revenue rather it is used as a part of financing the government. Secondly, the maintenance of fiscal deficit excludes designated oil and gas revenues at 3% of the GDP.

Thirdly, and the most important aspect is the operation of the Fund. All the designated revenue will be deposited into the Revenue Holding Account whereby in any fiscal year at most 3% of GDP shall be transferred to the Consolidated Fund for budgetary use and at least 60% of such transfer is deployed to funding the strategic development and expenditure including the human capital development, in particular, in the science and technology.[466] In addition, any amount of money in the Revenue Holding Account in the excess of 3%of the GDP shall be automatically transferred to the Revenue Saving Account.

Although the establishment of the Fund is still in its early stages, it is indeed a commendable effort for the sustainability of oil and gas industry. The creation of the Fund, apart from financing the general government budget, will finance the strategic investments which benefit the present and the future generations. However, that notwithstanding, the Fund's achievement depends on the performance of the oil and gas industry and the national economic growth. As stated above, the performance of the oil and gas industry depends on its share of the revenue contributed to the national gross domestic product (GDP). Also, looking at the most of the PSAs, it will take a longer time before the actual operationalisation of the Fund because most of the extractive companies are still in the exploratory stages and, therefore, are not paying the requisite taxes and other charges while for those in the actual production, are still recouping exploration and production costs.

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[466] See Section 17 (1) (a), (b) and (c) of the Oil and Gas Revenue Management Act, No. 22 of 2016.

In addition, the contemporary challenges on the government's fiscal deficit are worrisome. The national debt has escalated at a very despicable speed while the economic growth has fallen steadily. The external debt has increased and made it more expensive and risky. For instance, according to the General National Budget 2017/18, the national debt has escalated to the tune of Tanzania shillings 50,806.5 trillion out of which Tanzania shillings 42,883.6 trillion is public debt as of March 2017 which has increased by 9.2% from 39,274.6 as of March 2016.[467] It is opined that the government should coordinate the reorganisation of her fiscal policy, in particular, her expenditure. Also, it is imperative to weigh up options, whether the oil and gas revenues should be invested in the Fund or to reduce the debt. To sum up, it is important that the government devises a workable plan to reduce the fiscal deficit and maintain the debt sustainability, these would, in turn, reduce the debt burden on future generations.

5.6 Crosscutting Oil and Gas Related Issues

5.6.1 Corporate Social Responsibility and Benefits to the Local Community

The Corporate Social Responsibility (CSR) is a commitment by the resource extractive companies operating in the oil and gas endowed areas to share part of the benefits arising from the oil and gas extraction with the community around the area of their operation. In a modern corporate world, the CSR is important as it creates a harmonious working environment for the investors with the reciprocal benefits to the community. It is imperative that the extractive companies engaging in the oil and gas projects contribute to the economic, social, and cultural development of the local communities in their respective areas of operation. Mindful of the importance of the CSR to the social, economic, and cultural development of the local community, the Natural Gas Policy, 2013

[467] See paras. 49 - 51 of the Budget Speech 2017/18 by the Hon. Minister for Finance, available at http://www.mof.go.tz/mofdocs/msemaji/BUDGET%20SPEECH%202017_2018.pdf (accessed on 27th March 2018) stating that the reasons for the increase are apparently monotonous, namely disbursement to the new borrowing and previous committed loans from concessional and non-concessional sources, increased interest arrears from Non-Paris Club bilateral creditors and depreciation of Tanzanian shilling against United State Dollar.

envisages that the government shall ensure that there is a contractual obligation to all investors and contractors in the natural gas activities to undertake prioritized community development programmes. In addition, all extractive companies in the natural gas industry shall submit a credible corporate social responsibility action plan to the appropriate local government authority.[468]

The Petroleum Act provides a replica of the CSR provided for in the Natural Gas Policy 2013.[469] In addition, it enjoins a license holder to prepare and submit the CSR programme to a local government authority for the consideration and approval. The Local government authorities in question are enjoined to prepare the guidelines for the CSR within their localities, oversee the implementation of the same, and provide awareness to the general public on the natural gas project in their areas.[470] The incorporation of the CSR into the law is indeed commendable because, for many years, it was seen as a social gesture on the part of the extractive companies short of which there were no penal sanctions.

Apart from that, the Oil and Gas Revenue Management Act 2015 provides that local government authorities to which the oil and gas projects are implemented shall receive revenue from the service levies as shall be approved by the National Assembly. Accordingly, the Minister for Finance shall, in consultation with the Minister responsible for the Local Government, make the fiscal regulations for the local government to guide the expenditure and saving.[471] From the wording of the legal provisions above, one can deduce it into two main folds, firstly, it is apparent that the government envisages giving the local government authorities in the extractive resource areas the mandate to devise, in collaboration with the extractive company, the CSR. Also, the government

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[468] See paras. 3.1.3 (iii) and 3.1.8 of the Natural Gas Policy 2013.

[469] See section 223 (1) of the Petroleum Act, No. 21 of 2015.

[470] See section 223 (2) and (3) (a) (b) (c) of the Petroleum Act, No. 21 of 2015.

[471] See section 17 (3) and (4) of the Oil and Gas Revenue Act, No. 22 of 2015.

imposes the fiscal expenditure rules on how they spend the revenue generated from the oil and gas industry. Secondly, the government seems to inadvertently ignore the prescribed levy under the Local Government Finance Act 1982 without passing an amendment to that effect. Accordingly, the prescribed levy is charged at 0.3 percent of all monies payable by the corporate entities to a local government authority derived from a turnover net of a value added tax and the excise duty.[472]

Apart from the requirement to pay the service levy imposed by the Local Government Finance Act 1982, both PSAs and MPSA 2013 in force do not have the CSR clauses. In other words, the CSR mandatory requirement provided for under the Petroleum Act 2015 will not apply to the existing 28 PSAs so far in force because they were entered into before the enactment of the Petroleum Act. As such, they will not be subjected to the mandatory provisions of the Petroleum Act. The Petroleum Act provides that all the existing licenses granted or agreement entered for the purpose of carrying out petroleum operations which are in force immediately before the enactment of the Act shall remain in force and effect until lawfully determined.[473] The above position is corroborated by the fact that the local government authorities of Lindi and Mtwara which are the beneficiaries of the CSR have not received any plan for their consideration and approval as required by the law.[474] Equally, the Local authorities have not received service levy for the financial years 2016/17 from the oil and gas companies operating in their respective areas, arguably, some companies are

[472] See section 6 (1) (u) of the Local Government Finance Act, No. 9 of 1982.

[473] See section 261 (3) of the Petroleum Act, No. 21 of 2015.

[474] Interview with Municipal Directors of Lindi and Mtwara held on on 13th and 17th January 2017 respectively.

still in the exploratory stage while those in production are still recouping their investment costs.[475]

The government does not prefer special revenue allocation treatment based on local government authorities' resource proximity on the argument that such treatment would threaten national unity and create unnecessary migratory movements to resources endowed areas. Thus, revenues derived from the oil and gas industry are included as part of the general government budget, which will, in turn, finance different development projects across the country including areas endowed with oil and gas resources.[476] It is opined that the government 's stance is a flaw in two main aspects; firstly, the 0.3 percent of the service levies which the local government authorities are entitled constitutes a very insignificant portion of government revenue from oil and gas industry.

For instance, the government expects to receive the corporate tax, royalties, capital gains tax, value added tax, withholding taxes, payroll taxes, among others. Secondly, the oil and gas resources are non-renewable energy which depletes with time. As such, apart from the displacement of the people paving way for oil and gas investments, the environment of resources endowed areas would be inevitably damaged by the extraction activities. It would be, therefore, fair to ensure that damages so caused are offset in some other ways as far as money can do. In addition, it can create the social instability in resource endowed areas as can be demonstrated by the deadly riots and street battle which broke in 2012 on account of the construction Mtwara - Dar es Salaam gas pipeline.[477]

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[475] According to the Ministry of Energy and Mineral Budget Speech for 2017/18 the service levies were not paid by all oil and gas companies for unknown reasons while the mining companies paid Tanzania shillings 11.27 billion. See pp. 97 and 98 available at https://mem.go.tz/wp-content/uploads/2017/06/HOTUBA-NISHATI-NA-MADINI_NEW.pdf (accessed on 21 June 2017).

[476] Interview with senior official from the Ministry of Finance (Budget Allocation) and Senior official Ministry of Energy and Minerals held on 15th and 20th November, 2016 respectively.

[477] See footnote no 30 on page 12 above.

Apart from inadequate benefits derived from the exploitation of natural resources in their respective area, there are serious effects brought by the extraction of the resources to the local community which, due to the quest for generation of more revenue, are likely to be obscured. The people from the communities in the areas where natural resources are located will eventually feel the direct impacts than others. For instance, the extraction activities require the land to build the necessary infrastructures to enable operation. The demand for land undoubtedly encroaches into the peoples' land. The diverse effects are the alienation of the peoples' arable land. In the worst case scenario, the people will be relocated from their ancestral traditional land, paving the way for extraction of oil and gas with payment of relatively inadequate, and untimely compensation.

In addition to the alienation of the peoples' land, the exploration and production of oil and gas resources in Tanzania take place in both offshore and onshore in southeastern coastal-striped regions of Lindi and Mtwara. As such, the economic activities like agriculture and fishing are highly affected by such activities. This is because the offshore activities disturb the oceanic ecosystem by gas flaring and other gaseous pollutants. The effects of these activities deprive the people who otherwise earned their living through fishing. The agriculture and fishing sectors play dual roles. They are both sources of the food for the families as well as sources of the income from the surplus production. The government and companies operating in the area had promised to compensate the people with money for those whose lands were alienated and further promised to employ them during the commencement of production. However, the extractive industry is a highly specialised sector and require sophisticated expertise, as such, it is not expected to get a person with such expertise in the communities where the exploitation of natural resources is taking place.

5.6.2 Environmental Health and Safety in the Oil and Gas Industry

A decision whether to embark on the extraction of natural resources generally and oil and gas, in particular, is preceded by, apart from the revenue inflow

considerations, the impacts such project would exert on the environment. The oil and gas exploration and production would, undoubtedly, affect the environment both onshore and offshore. For instance, the current exploration, prospection, and production reveal that the total of 534,000km2 will be affected by the extraction of oil and gas activities in Tanzania. Out of this, the inland rift basins and the modern rift system constitute 114,000km2, the coastal and continental shelf basins (onshore and offshore) constitute 280,000km2, and the deep sea basins (300m - 3000m of water depth) constitute 140,000km2 *(See Map of TPDC Exploration and License Status as at December 2016)*. Mindful of the impacts of the effects of oil and gas operations may bring to the environment, the government has in place policies, laws and regulations to ensure that the negative impacts to the environment and the people are highly minimised.

The applicable policies are the National Environmental Policy 1997, the Mining Policy, 2009 and the Natural Gas Policy 2013. However, for the purpose of the study, reference will be made to the Natural Gas Policy 2013 while other policies shall be referred to when need be. Accordingly, the Natural Gas Policy 2013 envisages the government commitment to ensure that the health, safety, environmental, and, biodiversity issues are maintained in all operations of the oil and gas value chain. Also, the government commits to ensure that there is compliance with the health, safety, environmental protection, and best practice in the industry. In addition, the government commits to ensure that the disaster management system is in place by preventing and mitigating the adverse impacts in the natural gas operations.[478]

5.6.2.1 The Environmental Impact Assessment in the Oil and Gas Industry

The Petroleum Act, 2015 promotes in unequivocal terms a high-level compliance with the environmental health and safety in accordance with the technological developments, best petroleum industry practices, the Occupation Health and

[478] See Policy 3.2.3 (i) - (iii) of the Natural Gas Policy 2013.

Safety Act[479] and any other relevant laws in both the upstream and downstream of the oil and gas operations.[480] The Petroleum Act further provides that any license holder or contractor or any other person exercising a right or performing a duty under the Act shall fully comply with the environmental principles and safeguards prescribe under the Environmental Management Act and its regulations.[481] Accordingly, the Environmental Management Act 2004 (hereinafter referred to as EMA) provides for the comprehensive procedures which have to be complied with before embarking on the extraction of natural resources.

The EMA provides that before a right to extract resources is granted to an extractive company, an environmental impact assessment has to be conducted and approved by the National Environmental Management Council (NEMC).[482] Taking into account the fact that the oil and gas operations take place in both onshore and offshore, and may have adverse effects on the people near the extraction sites, the EMA provides that the people of the community involved should fully participate during the Environmental Impact Assessment (EIA) exercise. The envisaged people participation should be through public gathering[483] The rationale behind people participation is that the people need to be informed of the potential benefits and negative impacts of the intended project in question.[484]

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[479] See the Occupation Health and Safety Act, No. 5 of 2003.

[480] See sections 200 (1) and 208(1) and(2) of the Petroleum Act, No. 21 of 2015.

[481] See section 209 (1) and (2) of the Petroleum Act, No. 21 of 2015.

[482] See section 81 (2) of the Environmental Management Act, No. 20 of 2004.

[483] See section 89 (1) and (2) of the Environmental Management Act, No. 20 of 2004; See also regulations 12, 13, 14, 15, 16, and 17 of the Environmental Impact Assessment and Audit Regulations of 2005.

[484] See section 90 of the Environmental Management Act, No. 20 of 2004.

Notwithstanding the legal requirements, the communities near the oil and gas fields in Mtwara and Lindi regions are neither aware of the above mandatory procedure nor were they informed of their requisite participation in the process. It was revealed that although there is, in each urban and district authorities, the environment management committees designated under EMA, namely; Standing Committee on Economic Affairs, Works, and Environment,[485] yet these committees were never consulted during the environmental impact assessment processes if at all EIAs were ever conducted.[486]

It was stated by the committee members that the environmental impact assessments were handled by the NEMC at the national level. It was further revealed that even at the local level, where there are designated Ward Environmental Management Officer and Village Environmental Management Officer, among others, they are completely unaware if at all they had a role to play in the EIA process. In addition, there were no public gatherings convened for the purpose of involving the people in the process as required by the law as it was the case at the municipal council levels.[487]

The EMA gives a mandate to the NEMC to conduct regular monitoring of companies' operation and their impacts on the environment on account that the EIA inability to assess all potential harms to the environment. The envisaged monitoring serves dual purposes, firstly, it ensures a regular monitoring, enhances compliance, and detect any violations of the laws and regulations by

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[485] See section 37 (1) and 38 (1) of the Environmental Management Act, No. 20 of 2004 respectively.

[486] Interview with committee members in Lindi and Mtwara Municipal Authorities conducted on 14th and 18th January 2017 respectively.

[487] Interview with officials from Likongo Village in Lindi on 14 th January 2017, where Liquefied Natural Gas (LNG) plant will be built and officials from Msimbati and Madimba villages where the Mtwara- Dar es Salaam Gas Pipeline originates. The village officials interviewed further revealed that at the different times received delegations of some government officials from the Ministry of Energy and Minerals, Tanzania Petroleum Corporation, National Environmental Management Council and Oil and gas multinational companies who told them that they were assessing the viability of the oil and gas projects in their areas.

the extractive companies. Secondly, it addresses the emerging environmental disasters and accidents which are overlooked during the process of the environmental impact assessment. However, there are serious concerns that the envisaged regular monitoring is not conducted due to the financial and technological constraints, acute shortage of requisite qualified personnel, and lack of the comprehensive coordination mechanism from the national to the village level where most of the extractions take place. For instance, from 2010/11 to 2014/15 NEMC carried only 3 out of 71 inspections on the registered project, which is equivalent to 4%. The inspection was aimed at checking whether the oil and gas companies comply with the prescribed environmental standards. Equally, for the period of five years, i.e., 2010 - 2015 NEMC received a total of 71 environmental impact assessment statements for review out of which only 47 statements were reviewed.[488] *(See Table 2 the State of the Environmental Inspection and Compliance).* Therefore, there is a reasonable possibility that the oil and gas companies have been inflicting environmental damages with impunity.

5.6.2.2 The Disaster Management System in the Oil and Gas Industry

As noted above, the National Natural Gas Policy 2013 envisages the government's commitment to ensure and establish a sound disaster management system akin to the oil and gas industry potential disasters such as the oil spills and hazardous leaks, among others. The EMA provides for the application of the precautionary principle where there is an overwhelming risk of the occurrence of an irreversible environmental disaster. However, there is no clear evidence of the existence of the sound environmental emergency response.

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[488] See Controller and Auditor General Report on the Performance and Specialised Audits for the Period ending 31st March 2017, p. 29; Some of the designated environmental officers complained to have found themselves as such due to their positions. However, they share their sentiments to have not received any specialised training on oil and gas environmental management. In addition, some officials from NEMC and the Vice President Office- Union and Environmental Affairs, particularly, Environment Division were complaining that the Environment annual budget allocation is so minimal which cannot even cater for the necessary office operation let alone facilitating NEMC to conduct regular EIA audit and inspection.

The only measure that was noted is under the Disaster Management Agency, which is relatively new and caters for all disasters. That notwithstanding, under the Petroleum Act 2015, the duty to prepare a disaster management plan is imposed on the side of the license holder. The license holder is required to maintain an effective emergency preparedness with a view to dealing with the accidents and emergencies which may lead to the loss of life, injury, pollution and major damage to property.[489] In addition, a license holder is required to provide the emergency and security facilities readily available and at the disposal of the relevant authorities for redressing the environmental disaster operations.[490]

The above legal proposition, though sound strange, an illustration of the Model of Production Sharing Agreement 2013 would drive the point home. According to article 25(a),(b)(i)(o) of the said MPSA which regulate the health, safety, and environment, oblige an investor in the contracting area to develop a management system designed to ensure compliance with the health, safety and environmental requirements in accordance with the best petroleum industry international practices. However, there is no precise definition or rather unanimous agreed definition of 'best petroleum industry international practices' by all players. Thus, each player in the industry would, depending on its financial capacity, adopts and implements an environmental management system befitting its financial and technological capacity to protect environmental damages. Be it as it may, the obligation to protect and preserve the environment is impliedly and expressly imposed on the state in whose without adequate measures, would be affected directly by any adverse effects arising therein. Therefore, abdication by the state

[489] See sections 202 (1) and (2) and 203 (1) of the Petroleum Act, No. 21 of 2015.

[490] See section 203 (2) of the Petroleum Act, 2015, No. 21 of 2015.

of her obligation to protect the environment is ostensible and indeed a breach of a noble duty bestowed upon the state by the people.[491]

5.6.2.3 The Environmental Rehabilitation after Cessation and Closure of the Oil and Gas Operation

The Petroleum Act 2015 provides a detailed procedure for the closure and cessation of oil and gas operations. The envisaged procedure is a response to addressing the shortcomings in the mining sector.[492] Accordingly, the Petroleum Act envisages that a license holder shall prepare and submit a decommission plan to the Petroleum Upstream Regulatory Authority (PURA) five years prior to the operation closure.[493] Also the Act envisages establishment of the decommission fund by each license holder for the purpose of implementing the decommission plan. The payment into the decommission fund shall commence from the calendar year where the oil and gas activities have reached fifty percent of the aggregate recoverable reserves as determined by an approved

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[491] Lissu T. and Curtis M., *A Golden Opportunity? How Tanzania is failing to Benefit from Gold Mining*, A Report Commissioned by the Christian Council of Tanzania(CCT), National Council of Muslims in Tanzania (BAKWATA) and Tanzania Episcopal Conference(TEC), March (2008); Lugoe F., Aligning and Harmonizing the Livestock and Land use Policies of Tanzania. *The Economic and Social Research Foundation*. Discussion paper 35 (2011), pp. 1–46. In addition, there had been bad experience from the mining sector where huge environmental damages were recorded in areas where the mining activities are conducted. These range from noise pollution caused by the quarrying machines, air pollution, water pollution caused by the discharge of chemicals and other liquid pollutants from mining sites. While mining companies have put in place safety measures to comply with relevant policy and legal provisions and standards, some cases of non-compliance have been reported. For example, between 2005 and 2008 chemical disposals from processing plants at the North Mara Mine to river Tigite in Tarime District created environmental and land hazards that adversely affected the surrounding communities. A study commissioned by Interfaith Committee in 2010 revealed a high concentration of heavy metals in water and soils were far above the World Health Organisation (WHO) acceptable standards affecting social and livelihoods of communities living around the mines.

[492] In the mining sector, there are uncertainties as to who takes environmental rehabilitation responsibilities past the closure of a particular mine. For instance, Buhemba Gold Mine located in Mara region was run jointly between the Government of the United Republic of Tanzania and a South African Rand Gold and was abandoned in 2005. According to the available information from NEMC, there is no entity which has taken up the responsibility of environmental rehabilitation pas the mining operations. This was caused by lack of clear rules in the Mining Development Agreements(MDAs).

[493] See section 188 of the Petroleum Act, No. 21 of 2015.

development plan or five years after commencement of production or on notice of surrender.[494]

Most of the PSAs examined, notwithstanding the variations in terms of the scope of coverage, have clauses on clean up, decommissioning and abandonment of oil and gas operations in their respective contracted areas. However, It is not easy to verify the extent in which the extractive companies have complied with their respective clauses on the decommission plan because most of the companies, with exception of two are in exploratory stages and therefore, their respective decommission plan could not be verified. For instance, the PSA between TPDC and Pan African Energy Tanzania LTD was entered into in 2001. However, the PSA has no clause on the abandonment, field restoration, and decommission plans despite 16 years of its operation and production and 8 years prior to the actual termination.[495] It is yet to be known, in the absence of the plan, which between TPDC and PAET would shoulder the burden and costs associated with the field restoration after the expiry of the PSA in 2025.

5.6.3 Corruption and Abuse of Public Offices in Oil and Gas Industry

As stated in other preceding chapters, corruption and abuse of public offices by the Political Exposed Persons (PEPs)[496] account significantly for the natural resources spoliation in resource-rich developing countries. They deprive the economic development through, apart from using a public office for private gain, reducing the tax revenues by granting unconscionable tax incentives to the extractive multinational companies, discouraging private investments, and

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[494] See section 189 (1) and (3) (a) - (c) of the Petroleum Act, No. 21 of 2015.

[495] see the Controller and Auditor General Report on Public Authorities and Other Bodies for the Financial Year 2015/ 2016, p. 110.

[496] See the Financial Action Task Force (FATF), *Laundering the Proceeds of Corruption*, July (2011), p. 6 defines PEPs as individual who are or have been entrusted with prominent public functions in a country like heads of state, or of government senior politicians, senior government, judicial or military officials, senior executive of state owned corporations and important political party officials.

reducing human capital formation and development. Being mindful of these vices, the Natural Gas Policy 2013 envisages the government's commitment to promote transparency and accountability to the public as well as eliminating all possible elements of corruption in the oil and gas resource value chain. In addition, the government commits to developing transparency and accountability guidelines in the natural gas industry through the enforcement of transparency and accountability to all stakeholders across the industry.[497]

The Petroleum Act 2015 prohibits in unequivocal terms the engagement of public officers responsible for the implementation of the Act to acquire, attempt to acquire or hold interests in a license for petroleum operations, direct or indirect economic interests in an entity carrying on petroleum operations, and direct or indirect shares in body corporate providing services to license holder.[498] In a bid to command the compliance to the provision above, the Petroleum Act creates an offence for contravention of the above legal requirement in which on conviction, a penalty of Tanzanian shillings fifty million is payable or five years imprisonment or both penalty and imprisonment as the case may be.[499]

The Prevention and Combating of Corruption Bureau Act 2007 (hereinafter referred to as PCCB Act)[500] implements the provisions of the Petroleum Act with regard to combating corruption in the oil and gas industry. The PCCB Act establishes a Bureau solely responsible to take necessary measures for the combating and preventing of corruption in the public, parastatal, and private sectors through carrying out the investigation and prosecution of the corrupt

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[497] See policy 3.2.1 of the Natural Gas Policy 2013.

[498] See section 250 (1) (a) - (c) of the Petroleum Act, No. 21 of 2015.

[499] See section 250 (2) of the Petroleum Act, No. 21 of 2015.

[500] Act No. 11 of 2007.

practices.[501] The PCCB Act has specific provisions for the corrupt transaction in contracts which essentially creates an offence to any person offering an advantage to public officials as an inducement to assist in the promotion, execution, or procuring of contracts and vice versa.[502] The Bureau receives an approximate of 5000 complaints a year, out of which 1000 are investigated while 400 go to the courts. However, to date, there is no case filed in relation to corrupt practices from the oil and gas industry.[503]

In addition, in order to combat the grand corruption effectively, the Parliament amended the Economic and Organised Crimes Control Act[504] by establishing the Corruption and Economic Crimes Division of the High Court to determine cases involving corruption and economic offences.[505] Accordingly, the Division has jurisdiction to hear and determine offences under the Tanzania Extractive Industries (Transparency and Accountability) Act 2015 relating to failure to produce documents or information required by the law within the prescribed period and giving false information or report to the committee established under the Act.[506] In addition, the amendment gives jurisdiction to the Economic Crimes

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[501] See sections 5 (1) and 7 of the Prevention and Combating of Corruption Bureau Act, No 11 of 2007.

[502] See section 16 (1) (a) and (b), 16 (2) and 16 (3), and 16 (4) (a) (i) and (ii) of the Prevention and Combating of Corruption Bureau Act, No. 11 of 2007. Accordingly, the provision goes further by prescribing punishment for contravening the Act to wit, on conviction, a fine of not less than Tanzania shillings one million but not more than three million is payable or six months imprisonment or both. In addition to the fine and/or imprisonment, the Court shall order payment to the principal of amount of money or value of advantage received by him or any part of it.

[503] Interview with officials from PCCB investigation and Prosecution department on 14 March 2017.

[504] Cap. 200 R.E. 2002.

[505] See section 6 of the Written Laws (Miscellaneous Amendment) Act No. 6 of 2016 which amended various laws including the Economic Organised Crimes Control Act, Cap. 200, R.E 2002 by establish special division of the High Court dealing with economic organised crimes, among others.

[506] See section 16 (b) of the Written Laws (Miscellaneous Amendment Act) No. 6 of 2016 which adds more offences falling under the jurisdiction of the Economic Crimes Division, in particular, adding item 30 of the First schedule of the Economic Organised Crimes Control Act, Cap. 200,

Division to hear and determine offences under the Oil and Gas Revenue Management Act 2015 relating to misappropriation of the proceeds of oil and gas Fund.[507]

It should be noted that there are other laws and institutions which do not specifically combat corruption *per se* rather are ombudsman in their specific areas of operations hence complement the Prevention and Combating of Corruption Bureau Act. These include the Commission of Human Rights and Good Governance,[508] established to receive complaints from citizens on human rights abuses, contravention of the principles of administrative justice by public officials. The Public Procurement Regulatory Authority established for purposes of preventing corrupt practices in public procurement by setting standards, monitoring procurement practices, and building procurement capacity.[509] The Public Leadership Code of Ethics Act[510] governs the annual disclosure and declaration of assets by the public officials, and elected political leaders. As stated above, these institutions, though do not directly combat corruption like the Corruption Bureau, however, do compliment the Bureau within their areas of operations and therefore, are of great aid in combating corrupt practices in the oil and gas resource value chain.

In order to have the functioning anti-corruption and abuse of public office measures, there must be functioning policies and laws to coordinate inter-ministerial, institutional and departmental sharing of information among

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R.E. 2002 related to offences under sections 23 and 24 of the Tanzania Extractive Industries (Transparency and Accountability) Act No 23 of 2015.

[507] See section 16 (b) of the Written Laws (Miscellaneous Amendment Act) No. 6 of 2016 which adds item 35 of the First schedule of the Economic Organised Crimes Control Act, Cap. 200, R.E. 2002 related to offences under section 21(1) and (2) of the Oil and Gas Revenue Management Act, Cap. 328.

[508] See article 131 of the Constitution of the United Republic of Tanzania, Cap. 2. R.E. 2002; the Commission of Human Rights and Good Governance Act, No. 7 of 2001.

[509] See the Public Procurement Regulatory Authority Act, No.7 of 2011.

[510] Cap. 398 R.E. 2002.

stakeholders. Despite established numerous institutions, there is a dearth of coordination and sharing of information among the anti-corruption and abuse of public office institutions related to oil and gas resource value chain. This is exacerbated by the opacity under which oil and gas production sharing agreements are negotiated and concluded. All oil and gas production sharing agreements have never been made open to the public. As such, it is difficult to assess whether or not the country receives a fair share from the oil and gas industry. Equally, because of the opacity of the terms of the PSAs, it is difficult to tell whether or not there has been corruption involved during the negotiation and conclusion of the PSAs.

There is a serious concern that the institutions above whose role is to oversee the conduct of dealings in the oil and gas industry failed to effectively carry out their bestowed legal roles due to the opacity and lack of the access to the vital information in the oil and gas industry. To make the matter worse, each of these institutions works independently under a false assumption that they are self-sustained without a requisite cooperation with others. As such, each institution is forced to make decisions without a comprehensive understanding how the oil and gas industry operate. It is opined that the broad variations of the terms in most of the PSAs negotiated by the same persons on behalf of the government against multinational extractive companies are a result of the current state of affairs in the oil and gas industry. For instance, the non-inclusion of signature bonus in all 28 PSAs despite being a well-known international best practice in the oil and gas industry, among others, raises suspicion of a 'dirty game'[511]

[511] Interview with Tanzania Extractive Industry Transparency Initiative Secretariat on 10th March 2017, opined that, apart from the ineffective participation of anti-corruption and abuse of office institutions, the role of media to unveil these vices is ostensible and conspicuous absent. This is exacerbated by the opacity of oil and gas industry and the fact that it is relatively new and the media houses have not been able to keep abreast with the developments and dynamics of the oil and gas industry.

5.6.4 Local Contents in Oil and Gas Industry

The oil and gas industry requires an intensive capital and highly skilled workforce due to the nature of its operation which, in most cases, cannot be all catered for by the host states local supply chain. Thus the demand and supply of most of the essential goods and services in the oil and gas industry are procured beyond the precincts of the host states to comply with the highest international set standards. This makes the industry contribute less, apart from the state's share profit, various taxes and fees, in terms of the long-term employment, training, and transfer of technology. To fill in the void, it is envisaged that the industry develops capacities for the citizens of the host state to participate in various natural gas value chain through the employment and training of local forces, securing a significant share in the supply and procurement of goods and services produced by the locals.

Accordingly, in order to address the above shortcomings identified in the preceding part above, the government adopted the Local Content Policy of 2014. The Local Content Policy addresses three key areas, namely; transfer of technology and capacity building, preferential employment of locals, and preferential local procurement of goods and services. To that end, with regards to the transfer of technology and capacity building, the Local Content policy envisages availability of affordable technology, which, goes apace with the human resources development programmes for training of the locals both within and outside the country.[512] With regards to the employment of locals, it envisages the preferential recruitment of the local experts with the requisite knowledge over foreigners in the oil and gas resource value chain and the recruitment of the locals in all semi-skilled required jobs. To that end, the government commits to ensure that, in collaboration with the extractive companies, the implementation of the approved employment and succession

[512] See Policy 3.1 of the Local Content Policy 2014.

plan runs smoothly.[513] With regards to procurement of goods and services, it envisages preferential procurement of local goods and services.[514]

The Petroleum Act 2015 provides for the preferential local procurement of goods or services rendered by the citizens or a local company wholly owned by the citizens. In the case of goods or services which cannot be procured locally, a joint venture between the foreign and local companies is required provided that the local company own at least 25% of the shares.[515] The Petroleum Act provides for the list of the services which must be procured locally; these are insurance, legal, accounts, and health matters. In order to ensure compliance, the Act requires the license holder or contractor to submit, after the grant of a license, to the PURA for approval a procurement plan for a period of five years. In each calendar year, the license holder or contractor to file a report demonstrating the extent under which the local goods and services were procured in accordance with the plan.[516] The Petroleum Act obliges a license holder or contractor to submit to PURA a detailed programme for the recruitment and training of the locals in accordance with an approved local content plan. The local content plan shall provide a training schedule in all phases of oil and gas value chain. The local content plan shall take into consideration the gender, person with disabilities and host communities. In addition, the license holder or

[513] See Policy 3.2 of the Local Content Policy 2014.

[514] See Policy 3.2 of the Local Content Policy 2014.

[515] See section 220 (1) and (2) of the Petroleum Act, No. 21 of 2015; See also regulation 15 (1) and (2) of the Petroleum (Local Content) Regulations 2017, Government Notice (GN) No. 197 of 2017.

[516] See section 220 (4) and (8) of the Petroleum Act, No. 21 of 2015; See also regulation 5 (1) (a) of the Petroleum (Local Content) Regulations 2017, Government Notice (GN) No. 197 of 2017.

contractor shall submit to PURA a report on the execution of the approved programme.[517]

There is a general consensus among the stakeholders that the local content is a means through which the benefits derived from the extraction of oil and gas resources can be distributed to the local population in the different levels of their engagement and participation. However, the adoption of the Local Content Policy 2014 did not go at ease among them. There are complaints of sidelining and/or ignoring the important stakeholders during the consultations prior to the adoption of the policy. Apart from the Ministry of Energy and Minerals (MEM) and some few extractive companies, the involvement of other stakeholders in the process was conspicuous minimal. As such, it defeats the overall objectives of the local content policy as a multi-sectoral tool for enhancing and building local capacity in the oil and gas value chain. For instance, the Local Content Policy 2014 envisages training qualified locals for working along the oil and gas resource value chain. However, due to poor coordination, MEM has shielded input from other stakeholders and focus on training the geologists and engineers while conspicuously isolating other disciplines such as law, economics, finance and accounting, and public administration, among others.[518]

In addition, as stated above and to put the point in perspective, there is a lack of coordination among stakeholders. For instance, the role of the universities and vocational training centers to train the requisite qualified skilled and semi-skilled personnel respectively is ignored in the capacity building plans and programmes. It is opined that the capacity building of these institutions would enhance the sustainable training of required personnel in the oil and gas industry. However, it

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[517] See section 221 of the Petroleum Act, No. 21 of 2015; See also regulations 9 (1), 10 (1), 16 (1) and (2) and 22 (1) and (2) of the Petroleum (Local Content) Regulations 2017, Government Notice (GN) No. 197 of 2017.

[518] The Tanzania Private Sector Foundation (TPSF) opined that sidelining the role of universities and private sectors as important stakeholders throughout the drafting and adoption processes, yet expecting them to train qualified professionals required by the oil and gas industry is a misnomer.

is apparent that institutions in-charge of coordination like the Ministry of Education and Vocational Training and Ministry of Energy and Mineral work independently without the sharing of information related to the capacity building in the oil and gas industry. For instance, out of 22 identified professional skills needed by the oil and gas industry, about 10 professional skills equivalent to 45 percent were not included in the higher learning institutions' curricula. Equally, out of 16 identified technical and vocational skills needed by the oil and natural gas industry, about 11 skills equivalent to 69% were not included in the technical and vocational training curricula[519]. *(See Table 3 the Capacity Building in Universities and Vocational Training).*

The requirement for the local procurement of goods and services by the extractive companies is a commendable effort to distribute the benefits to the local population. The Petroleum Act and its respective regulations impose an obligation to the license holder or contractor to procure their goods or services locally. In the event where the goods and services cannot be procured locally, the foreign entity would enter into a joint venture with a local entity. As stated, while the requirement is commendable, however, without checks and balances, rent-seeking and corrupt practices would ensue. It is opined that the above requirement may force the foreign entities to collude with the locals and establish sham local entities with no other function than extracting rent from the foreign entities as a means to comply with the local content policy by the license holder or contractors and therefore, water down the purpose of the policy.

The extractive companies opined that the compliance with the local content policy is both costly and creates an administrative burden. This is exacerbated by the fact that there are various local content programmes, plans, and reports to be prepared and submit to various appropriate authorities for reviews and

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[519] The United Republic of Tanzania, National Audit Office, *A Report of the Controller and Auditor General of the United Republic of Tanzania on the Performance Audit Report on Produced Graduates in Oil and Natural Gas Industry,* March 2017.

approvals.[520] Also, the submitted documents are constrained by the strict compliance deadline short of which the strenuous measures befall against the license holder or the contractor. The administrative compliance and procedures force the license holder to spend quite considerable time to fulfill the local content requirements and less time in their primary undertakings. In addition, the Petroleum Act and its regulation impose onerous obligations to the license holder and contractor without the reciprocal obligations and accountability mechanisms on the part of public officials for failure to timely perform their obligations.

5.6.5 Oversight of the Oil and Gas Value Chain

The adoption of good policies and laws governing the oil and gas industry is one thing and the oil and gas industry contribution to the economic development of the country is another thing altogether. Admittedly, the opposite might also be the case, if there is a thorough coordination of the two dichotomies. Equally, the performance of the oil and gas industry in Tanzania's economy, albeit the sound policies and laws in place depends on how the industry is coordinated and controlled in general. Without the proper coordination and control throughout the resource value chain, the expected economic contribution of the oil and industry would undoubtedly be an illusion.

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[520] For instance, as indicated above, apart from the report which has to be prepared and submitted for review and approval to PURA under section 220 (1) and (2) of the Petroleum Act, No. 21 of 201 and regulation 15 (1) and (2) of the Petroleum (Local Content) Regulations 2017, Government Notice (GN) No. 197 of 2017 and section 220 (4) and (8) of the Petroleum Act, No. 21 of 2015; See also regulation 5 (1) (a) of the Petroleum (Local Content) Regulations 2017, Government Notice (GN) No. 197 of 2017, a licence holder and/or contractor are obliged to submit annual reports containing information on local content and corporate social responsibility to the Tanzania Extractive Industries (Transparency and Accountability) Committee under section 15 of the Tanzania Extractive Industries (Transparency and Accountability Act, No. 23f 2015.

5.6.5.1 The Controller and Auditor General (CAG)

The National Audit Office under the Controller and Auditor General[521] (hereinafter referred to as CAG) is mandated to audit and report on accounts, financial statements, and financial management of ministries, Independent Departments, Executive Agencies, Public Parastatals (inclusive TPDC as National Oil Company) and other bodies.[522] In addition to the general mandate, the CAG shall, on behalf of the National Assembly, examine, inquire into and audit the account submitted to the CAG's office under the Public finance Act, Local Government Finance Act and any other written laws which confer mandate to him as such.[523] In order to properly and effectively carry out the above mandate, the CAG ensures that, apart from satisfying himself as to the accuracy of the submitted accounts, the submitted accounts are kept in accordance with the acceptable accounting principles and that all expenditure of public money is properly authorized and applied for the purposes for which they are appropriated.[524]

In order to ensure transparency and accountability, the CAG reports are submitted to the President of the United Republic of Tanzania and the appropriate Minister. The report submitted to the President shall be, as soon as practicable, laid in the National Assembly within seven days of the next sitting of the National Assembly.[525] Once the CAG report is tabled before the National Assembly it becomes a public document.[526] Upon laying the CAG report to the

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[521] The Controller and Auditor General is appointed under article 143 of the Constitution of the United Republic of Tanzania 1977 and section 4 (1) of the Public Finance Act, No. 11 of 2008.

[522] See section 5 (c) of the Public Finance Act, No. 11 of 2008.

[523] See section 10 (1) of the Public Finance Act, No. 11 of 2008.

[524] See section 10 (2) (a) - (c) of the Public Finance Act, No. 11 of 2008.

[525] See sections 34 (1) (c) and 34 (2) of the Public Finance Act, No. 11 of 2008.

[526] See section 39 of the Public Finance Act, No 11 of 2008.

National Assembly, the Public Account Committee (PAC) and the Local Authority Accounts Committee (LAAC) discuss the report and prepare their respective reports which may include recommendations and directives to the government ministry, department, agency, parastatal as the case may be.[527]

The CAG report does not end with laying it before the National Assembly, in fact, the recommendations from the PAC and LAAC Committees and those of the National Assembly are taken back to the accounting officers of appropriate portfolios. The accounting officer shall forthwith respond to the CAG, PAC, and LAAC Committee reports and any queries ensuing therein and prepare a plan for remedial actions.[528] The action plan shall be submitted to the Paymaster General who shall forthwith submit the action to the minister who shall lay it before the National Assembly.[529]

The CAG annual reports have been playing a pivotal oversight role in efforts to curbing and combating corruption and the embezzlement of the public funds by revealing the loss of billions of public finances in the central government, local government, and public parastatals. Through forensic and performance audit reports, the CAG has prompted a number of handful political reshuffles whereby cabinet ministers had to step down after their dockets were heavily implicated in its reports. Also, through CAG reports, there has been a number of policy and legislative reforms undertaken to improve the performance of specific sector due to shortcomings identified. For instance, most of the tax incentives which were enjoyed by the mining and oil and gas companies under the tax laws apart from those covered by their respective Mining Development Agreements (MDAs) and Production Sharing Agreements (PSAs) were repealed following the CAG report's recommendation.

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[527] See section 38 (i) and (ii) of the Public Finance Act, No. 11 of 2008.

[528] See section 40 (1) of the Public Finance Act, No. 11 of 2008.

[529] See section 40 (3) of the Public Finance Act, No. 11 of 2008.

However, that notwithstanding, the CAG has been operating with difficulties which hinder the performance of his mandate as provided for by the law. The budgetary constraints are one of the hindrances which clog the effective performance of the CAG office. For instance, a budget of Tanzania Shillings 57.4 billion was approved for the year 2014/15, however, only 35.3 billion was released. Another shocking incident is that of slashing the CAG budget by half in the financial year 2016/17 from Tanzania shillings 63.5 billion sought and approved to Tanzania shillings 32.3 billion.[530] Yet it is the CAG office expected to conduct the forensic and performance audit in all public sectors including embassies and unveil how taxpayers money is spent.

5.6.5.2 The National Assembly

The National Assembly is the principal organ of the United Republic of Tanzania which has the authority, on behalf of the people, to oversee and advises the government and its organs in the discharge of their respective functions.[531] Apart from responding to reports prepared by CAG, it acts as a platform for the general public to air out their concerns. In the discharge of its function, the National Assembly gave a mandate to its two committees, namely, the PAC oversees the central government and public parastatals and the LAAC overseeing the local government authorities. The two committees lead the discussion of the CAG report laid before the National Assembly. Before the amendment of the Parliamentary Standing Order 2016 edition, both committees were chaired by the Members of Parliament from the opposition in order to enhance transparency and accountability. Both Committees have a mandate to discuss and deliberate on the CAG report laid before the National Assembly, in particular, the

[530] See Vote No. 45 of the Schedule to the Appropriation Act, No. 1 of 2016 on Salaries, expenses and development expenditures of the National Audit Office for the Financial Year 2016/17. available at https://www.cabri-sbo.org/en/documents/appropriation-act-2016-1 (accessed on 1st May 2018).

[531] See article 63 (2) of the Constitution of the United Republic of Tanzania 1977.

performance of the ministries, department, agencies, among others, identified as embezzling public funds.[532]

As expected, the National Assembly has played a pivotal oversight role in advising the government on the key policy and legislative reforms aimed at improving the government performance in all sectors. However, the oversight role of the National Assembly in oil and gas sector has not been going at ease due to the capacity and access of the vital information constraints. As for the capacity constraints, admittedly, the oil and gas sector is relatively new in the country. As such, any policy and legislative reforms affecting the industry cannot be adequately deliberated by the Members of Parliament who lack expertise related to the oil and gas industry. This shortfall has been one of the reasons for the poor performance of the oil and gas industry.

The National Assembly has been struggling through its Public Account Committee (PAC) to access the key information like basic statistics related to licenses, declaration of financial interests, and Production Sharing Agreements between TPDC and the extractive companies in vain. Due to this shortfall, an oversight of issues like the fiscal regime in the individual PSAs remains unknown to the National Assembly. Therefore, it is difficult to assess whether the country receives a fair share from oil and gas industry. To exemplify the above assertion, the National Assembly has never been able to access any of the 28 Production Sharing Agreements in oil and gas industry despite several calls. The government has invariably through the Ministry of Energy and Mineral maintained that she could not table the said agreement before the National Assembly due to technical reasons.[533] The effect of the anomaly above is that one cannot give a

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[532] See rules 14 (a) and 15 (a) of the Eighth Schedule of the Parliamentary Standing Orders 2016.

[533] The citizen, Friday, November, 14 2014, *Muhongo: Why Bunge won't see Gas Contract,* The Minister was addressing the media and was quoted saying that 'we have to adhere to government regulations. We cannot subject the contracts to public discussions, because they are

fair and meaningful assessment of the reported payments by the multinational corporations unless the agreement upon which the payments are made is also disclosed in their respective oversight bodies.

5.6.5.3 The Tanzania Extractive Industries (Transparency and Accountability) Committee

The Tanzania Extractive Industries (Transparency and Accountability) Committee, hereinafter referred to as TEIT Committee is established under the Tanzania Extractive Industries (Transparency and Accountability) Act[534] with a duty of ensuring that the benefits of the extractive industries are verified, duly accounted for and prudently utilized for the benefits of the citizens of Tanzania.[535] In order to achieve the above objective, the TEIT Committee has devised the transparency and accountability procedures which require the extractive companies to report and disclose the payments made or revenue due to the government. In addition, the extractive companies are required to disclose to the TEIT Committee the accurate records of the costs of production, capital expenditure at every stage of the investment in oil and gas value chain.[536]

The TEIT Committee upon being furnished with the reports from the extractive companies, it may conduct an investigation of any material discrepancy from the revenue payments and the receipts between the extractive companies and the government and make reconciliation. Where there is a material discrepancy between the payments and the receipt, the TEIT Committee shall refer the matter

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(sic) regulations in place governing them. Even contracts between individuals, like yourself and somebody else must be governed by certain rules'

[534] See section 4 (1) of the Tanzania Extractive Industries (Transparency and Accountability) Act, No. 23 of 2015.

[535] See section 10 (1) of the Tanzania Extractive Industries (Transparency and Accountability) Act, No. 23 of 2015.

[536] See section 10 (2) of the Tanzania Extractive Industries (Transparency and Accountability) Act, No. 23 of 2015.

to the CAG for a thorough investigation.[537] The CAG shall, upon receipt, investigate the matter and prepare a report and submit it to the TIET Committee and the Minister for consideration. The report so submitted shall be further submitted to the relevant authority for compliance and take action in accordance with a recommendation made by CAG.[538]

In furtherance of transparency and accountability in the extractive industries, the TEIT Committee shall ensure that the Minister shall publish in the media, which is widely accessible all concessions, contracts, and licenses related to the extractive industry companies, names of individual shareholders who own interests in extractive companies, implementation of environmental management plans by extractive industries, among others.[539] The Minister shall, as soon as may be practicable lay before the National Assembly a report on the implementation of activities falling under his portfolio.[540] In order to command the compliance of the transparency and accountability, the TEIT Act creates two offences; firstly a failure to produce a document or information required under the Act, which on conviction, an individual or body corporate shall be liable to a fine, not less than ten million and one hundred million shillings respectively. Secondly, giving a false information or report attract a fine, on conviction, not less than one hundred million shillings.[541]

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[537] See section 18 (1) of the Tanzania Extractive Industries (Transparency and Accountability) Act, No. 23 of 2015.

[538] See section 18 (2) of the Tanzania Extractive Industries (Transparency and Accountability) Act, No. 23 of 2015.

[539] See section 16 (1) of the Tanzania Extractive Industries (Transparency and Accountability) Act, No. 23 of 2015.

[540] See section 19 of the Tanzania Extractive Industries (Transparency and Accountability) Act, No. 23 of 2015.

[541] See sections 23 (a) and (b) and 24 (a) - (d) of the Tanzania Extractive Industries (Transparency and Accountability) Act, No. 23 of 2015.

The enactment of the TEIT Act is a commendable step towards achieving a meaningful transparency and accountability in the extractive industry. In fact, Tanzania is one among few African states to have enacted a law in this regard. However, that notwithstanding, there is a tendency of African states to embracing international principles and standards, as a matter of convenience, in order to impress international community and eventually pool in foreign assistance from the donor community without the intention of implementing them. Two reasons account for this assertion.

Firstly, despite Tanzania enacting the Tanzania Extractive Industries (Transparency and Accountability) Act, its participation and commitment in the activities of the industry as one of the key stakeholders is minimal. Under the TEIT Act, the TEIT Committee and its Secretariat are independent body corporate which, despite its corporate status, receives its funding from the government through the Ministry of Energy and Minerals. However, the disbursement of the envisaged funding from the government has not been forthcoming as allocated in the National budget. For instance, in the Financial Year 2015/16, the funding commitment by the government was Tanzania shillings 1.65 billion out of which only 18% disbursed to fund the TEIT Committee and Secretariat activities.[542] Equally, in the Financial Year 2017/18, the Ministry of Energy and Mineral has not allocated any funding for the TEIT Committee and Secretariat.

Secondly, while the whole idea for the establishment of EITI is to have in place an independent body which oversees and promotes transparency and accountability in the extractive industry, the legislative initiative put in place demonstrates quite the opposite. This is because the government has an influence and authority over both the TEIT committee and the Secretariat in

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[542] See EITI International Secretariat, *Validation of Tanzania Report on Initial Data Collection and Stakeholders Consultations,* July (2017), p.18, available at https://eiti.org/sites/default/files/documents/eiti_validation_of_tanzania_ _report_on_initial_data_collection_and_stak.pdf (accessed on 1st May 2018).

terms of appointment of TEIT Chairperson, Committee members and Executive Officer of the Secretariat. The government influence over the TEIT Committee and Secretariat make them submissive, dysfunctional and invisible. Yet they are expected to oversee and ensure that the benefits of the extractive industry are verified, duly accounted for and prudently utilised for the benefits of the people of Tanzania. In addition, the absence of the security of tenure for the Committee members and secretariat compromises the independence of members from taking firm action against the government, among others, on account of reasonable apprehension of losing their respective position. For instance, since the retirement of the first Chairperson since a year ago, there is no substantive appointment for the post instead there is acting chairperson albeit in clear violation of the TEIT Act with impunity.

5.7 Oil and Gas Industry, Institutional Governance Framework

The successful implementation of intrastate natural resource governance and, in particular, the oil and gas resources, depends on a robust institutional set up which is linked along the resource value chain. The institutional set-up shall develop the tools for the operationalisation, enforcement, and monitoring and evaluation of the policies and laws to ensure that the desired outcomes are met. As stated in other parts of the study, the cooperation of institutions charged with overseeing the performance of the oil and gas industry is a key to a successful industry.

The cooperation, apart from the revenue inflow consideration to the economy, should take into account the environmental conservation throughout the resource value chain for the sustainable development of the present and future generations. Mindful of the importance of the oil and gas industry to the economy, the National Natural Gas Policy 2013 requires the government to play a pivotal role in leading other players towards the desired development direction. The government is enjoined to devise the policies, strategies, laws, and

regulations as well to administer their respective implementation.[543] It is opined that the devised institutional set up should create a conducive environment and defined roles for each in order to avoid unnecessary overlapping functions which create both administrative and compliance burdens.

5.7.1 The Minister

The Petroleum Act 2015 confers the minister responsible for petroleum affairs functions to develop, implement, review policies and regulation and set standards for the safety and public health and environment. Also, the Minister is charged with the power to grant, reviewing, suspending and canceling petroleum exploration and development licenses after being advised by the Petroleum Upstream Regulatory Authority (PURA), promotes local participation in the industry, and ensure and sustain transparency in the petroleum sector, among others. [544] In addition to the function conferred, the Minister shall have the power to intervene and take immediate action in any regulated activities which, ordinarily, do not fall under his dockets, such as coordinating emergency response and cases of major accidents, disasters and a shortage of petroleum supply.[545] In order to avoid overlapping of the roles and powers of other institutions, the Minister is enjoined to consult relevant sector ministries in the course of discharging his functions.[546] Furthermore, in a bid to discharge his functions effectively, the Minister receives the technical advice from the

[543] See Policy 5.1.1 of the Natural Gas Policy 2013 which also requires the government to attracts foreign direct investments in capital intensive natural resources projects, participates strategically in natural gas investments, supports national enterprises and Tanzanian to participate actively in the natural gas industry and to strengthens regulatory framework for natural gas industry, among others.

[544] See section 5 (1) (a) - (l) of the Petroleum Act, No. 21 of 2015.

[545] See section 5 (2) of the Petroleum Act, No. 21 of 2015.

[546] See section 5 (3) of the Petroleum Act, No. 21 of 2015.

Commissioner of Petroleum on matters of policies, plans and regulation pertaining to the oil and gas industry.[547]

5.7. 2 The Oil and Gas Advisory Bureau

The Petroleum Act 2015 establishes the Oil and Gas Advisory Bureau as an overall authority and strategically located in the President's office.[548] However, the law does not define powers, composition, qualification of members and the functions of the Bureau. It is argued that the omission is inadvertent because prior to its creation, it was hotly contested for and the compromise was reached by the panel of expert to include the functions of the Bureau nevertheless, the draftsman opted not to follow the advice.[549] The establishment of the Bureau without the defined functions is a disappointment in the contemporary era of transparency and accountability cherished as the basic foundation for oil and gas governance.

5.7.3 The Petroleum Upstream Regulatory Authority (PURA)

The Petroleum Act 2015 establishes the Petroleum Upstream Regulatory Authority (PURA) as a body corporate with perpetual succession and a common seal with its function confined to regulate and monitor the upstream petroleum activities.[550] PURA, apart from its functions, plays dual roles. Firstly, PURA is responsible for advising the Minister during promotion and bidding process of the production sharing agreements and other contractual arrangements, negotiation of production sharing agreements and other contractual arrangements, granting, reviewing, suspending and canceling petroleum exploration licenses,

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[547] See section 6 of the Petroleum Act, No. 21 of 2015

[548] See section 7 of the Petroleum Act, No. 21 of 2015.

[549] Majamba Hamudi Ismail, Tanzania's Oil and Gas Industry Legal Regime, Management and Access Rights, (2016), p. 13.

[550] See section 12 (1) and (2) of the Petroleum Act, No. 21 of 2015.

development licenses and production permit, among others. Secondly, PURA advises the government on proposed development plans, infrastructure development plan and decommission of installation plan submitted by a license holder. [551]

In addition to the above functions, PURA monitors, regulates and supervises petroleum sub-sector, including reserve estimation and measurement of the produced petroleum. Also, PURA promotes local contents and undertakes the administration of the production sharing agreement and other contractual arrangements, among others.[552] PURA is enjoined to exercise and perform its functions in a manner that promote efficiency, economy, and the safety on the part of the license holder, competition in the petroleum sector through a transparent bidding process that ensure fairness and balance of interest of the government and other participants in the industry.[553] In the course of the discharge of its functions PURA shall take into account directions given by the Minister in respect of policy to be observed and implemented.[554]

The administration of PURA is composed of the Board and the Director General. The Petroleum Act establishes the Board of PURA consists of five members who are of moral character, proven integrity and professional competence and is charged with overseeing the operation of PURA.[555] The Petroleum Act provides for the qualifications of the members of the Board to be amongst the persons with qualifications and experience in the petroleum industry in the field of geosciences, law, economics, engineering and finance. The Chairperson of the Board is appointed by the President while other members of the Board are

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[551] See section 13 (1) (a) and (b) of the Petroleum Act, No. 20 of 2015.

[552] See section 13 (2) of the Petroleum Act, No. 20 of 2015.

[553] See section 14 (1) (a) - (e) of the Petroleum Act, No. 21 of 2015.

[554] See section 15 (1) of the Petroleum Act, No. 21 of 2015.

[555] See Section 18 (1) and (2) of the Petroleum Act, No. 21 of 2015.

appointed by the Minister and both appointments shall have regards to gender balance.[556] However, the Petroleum Act does not provide for the tenure of the Board and therefore, it remains unknown if it is an oversight or deliberate. The functions of the Board are the same as those of PURA. In addition, the Board shall review and approve the rules and operating plans, budget, financial statements of PURA. It also provides guidance to the Director General and employees of PURA.[557]

The Director General of PURA is appointed by the President amongst the person possessing the qualifications similar to the PURA Board members and shall hold office for a period of five years and be eligible for reappointment once. The Director General shall be both the accounting officer and chief executive officer of PURA.[558] The function of the Director General is executing PURA policies and programmes, managing property and employees of PURA, among others.[559]

5.7.4 The Energy and Water Utilities Regulatory Authority (EWURA)

The Petroleum Act 2015 designate Energy, Water Utilities Regulatory Authority (EWURA) with duties and powers to oversee and regulate the midstream and downstream petroleum of the natural gas activities.[560] EWURA has the power to grant, refuse, renew, suspend and revoke the license to entities undertaking an operation in the mid and downstream regulated activities. Also, EWURA shall perform the technical, economic and safety regulatory function in respect of petroleum activities.[561] In addition, EWURA has a legal mandate to maintain all

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[556] See section 18 (3) - (5) of the Petroleum Act, No. 21 of 2015.

[557] See section 19 (1) and (2) of the Petroleum Act, No. 21 of 2015.

[558] See section 21 (1), (2) and (6) of the Petroleum Act, No. 21 of 2015.

[559] See section 25 (1) of the Petroleum Act, No. 21 of 2015.

[560] See section 30 (1) of the Petroleum Act, No. 21 of 2015.

[561] See section 31 (1) of the Petroleum Act, No. 21 of 2015.

the information in the National Petroleum and Gas Information System (NPGIS), a strategic national database for informing the public about the status of oil and gas industry.

5.7.5 The National Oil Company

The Petroleum Act 2015 designates the Tanzania Petroleum Development Corporation (TPDC) as a National Oil Company. In that respect, TPDC undertakes all the commercial activities in the upper stream, midstream and downstream of the oil and gas resource value chain. The TPDC represents government interest in the petroleum and natural gas agreements.[562] As stated in other preceding part of the study, the TPDC has been all long charged with the functions of overseeing and actively representing the government interests in the petroleum and gas sector by entering into a joint venture with the multinational extractive companies through production sharing agreements. The Petroleum Act confers functions to TPDC, apart from those originally vested in, to participate in the oil and gas exploration and development projects, developing in-depth expertise in the petroleum industry, own and managing oil and gas infrastructure, and promoting local content including the participation of the Tanzanians in the natural gas value chain, among others.[563]

However, the Petroleum Act does not state what will happen to the dual roles, i.e., commercial and regulatory roles that TPDC has all along played in respect to the subsisting production sharing agreements prior to its enactment. It is opined that from the current state of affairs, the newly established institutions under the Petroleum Act will remain dysfunctional because of this divestiture. This is because TPDC performs both commercial and regulatory roles as provided for under the individual PSA.

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[562] See section 8 (1) of the Petroleum Act, No. 21 of 2015.

[563] See section 10 (1) and (2) of the Petroleum Act, No. 21 of 2015.

Although the newly established institutions are still in their infancy stage in terms of the recruitment of the suitable personnel, there are multi-level institutional command chains which arguably, create duplication of functions and powers among them. For instance, the power of the Minister to give policy directives on any matter related to the oil and gas industry to PURA at the same time the latter Board advises the former on policy and strategic issues in oil and gas industry.[564] It remains unclear as to what will happen when there is a disagreement between the Minister's directives and the advice of the PURA Board since the law is silent.

In addition, there is a duplication of the functions and powers among the established institutions. For instance, the functions and power of National Oil Company, PURA, the Board of PURA, EWURA and the PURA Director General are more or less the same with a slightly different nomenclature. It is opined thus the creation of these institutions with more or less similar function is no more than the addition of administrative costs on the part of the government. It suffices to note that since these institutions regulate oil and gas industry, merging the roles of these institutions into one, apart from those of National Oil Company, would be an ideal as it saves the administrative costs and creates efficiency. The merged institution would save as a one stopping center, which regulates and supervises oil and gas industry.

5.8 Conclusion

The examination and discussion of the policy, legal and institutional framework governing oil and gas industry in Tanzania unearth both the commendable legal developments and the challenging legal issues. The enactment of the specific policies and laws governing oil and gas industry is commended. However, their impending challenges cannot be overlooked. Admittedly, although the Tanzania Development Vision 2025 and its respective long and short-term implementation plans provide a general framework for the country development plan, they do not

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[564] Read for instance, sections 15 (1) and 19 (2) (b) of the Petroleum Act, No. 21 of 2015.

seem to adequately link the oil and gas industry with the envisioned plan. For instance, the current Five Years Development Plan 2016 - 2021 which promotes nurturing of an industrial economy, does not state how the discovery of natural gas would be utilised as a catalyst for the envisaged industrialisation.

Admittedly, the policy and legal frameworks are relatively new in comparison with the existence of the oil and gas industry. As such, most of the Production Sharing Agreements in force are regulated by its respective individual PSA. The individual PSA provides for both the fiscal and administrative regime along the resource value chain. The individual PSA is modeled from the Model of Production Sharing Agreement, a non binding government negotiation tool which provides for the general framework to be reflected in the respective individual PSA. However, there are great variations between the MPSAs and individual PSA clauses with impunity. The enactment of the Natural Wealth and Resources (Permanent Sovereignty) Act 2017 and the Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act 2017 create the potential conflict of laws with the existing legal regimes as far as governance of natural resource governance is concerned.

In addition, the variation of clauses in the individual Production Sharing Agreement is caused by poor negotiated skills crippled by lack of adequate knowledge of the industry, unreasonable incompetence and or a suspicion of corruption on the part of a government negotiation team. Due to the above challenges, despite the abundance of natural gas resource, its meaningful contribution to the national economy will inevitably take longer than anticipated. In addition, the TPDC lack both technology and financial capacity to take a leading role in the oil and gas industry. For instance, TPDC has no means to appraise the net value of the available natural gas and duration with which it can be harnessed. This would, in turn, form the basis of the resource value during the negotiation of individual PSA. Equally, there is no plan that determines the quantity of the resources to be utilised for the present and that of the future generations.

Furthermore, the exploration and production of oil and gas resources are carried out both onshore and offshore thus affect the environment. The environment management plans set by the laws and the individual production sharing agreement provides adequately the environmental compliance measures. However, the institutions bestowed with a mandate to oversee and supervise the compliance are discharging their duties below the required standards. For instance, there has been irregular and/ or no review of the submitted environmental impact assessment report, on-site inspection with impunity. In addition, there is a coordination dearth from the national to the local level on the environmental management issues.

CHAPTER SIX

SYNERGY BETWEEN INTERSTATE AND INTRASTATE LAWS ON NATURAL RESOURCE GOVERNANCE

6.1 Introduction

This chapter commences by noting that for the effective governance of natural resources, the international and domestic legislative initiatives cannot work as singly self-sustained efforts independent of each other. It highlights some areas through which both legislative initiatives can cooperate together to bring the desired changes. To that end, it notes that most of the natural resources governance norms evolve through protracted international debates and eventually attained its status as such through the conclusion of a treaty or as a customary international law. In addition, it highlights the general domestic challenges which face the United Republic of Tanzania and its approach towards the application of international laws and, in particular, its position on the customary international law.

The chapter proceeds to create a synergy between international and domestic legislative initiatives in a bid to enhance natural resource governance in the resources rich states. In the creation of the envisaged synergy, it proposes a widened scope of cooperation between the home states, the multinational extractive companies, and the host states. It appreciates the efforts by the home state legislative initiatives on accounting and disclosure implemented by the USA through Dodd Frank Act, the European Union through Directive 2013/11/EU, and Canada through Extractive Sector Transparency Measures Act. While appreciating these efforts, it suggests the widened scope of the accounting and disclosure to an extended coverage along the resource value chain.

The chapter further highlights corruption as one of the pitfalls which negatively impact the natural resource governance in the extractive industries. It notes that addressing the corrupt transactions in the natural resources industry is complex

due to a syndicate of the major players involved. The players reside in different jurisdictions. It notes that the complex issue is how to address, apart from the domestic legislative challenges, a corrupt transaction partly committed within and outside Tanzania. It thus calls for an international cooperation in the fight against the natural resources cross-jurisdictional corrupt transactions. It proposes to strengthen the co-operation with the international multilateral and transnational legislative initiatives like the United Nations Convention Against Corruption, the OECD Convention on Combating Bribery of Foreign Public Official in International Transaction, the USA Foreign Corrupt Transaction Act, and the United Kingdom Bribery Act respectively.

The Chapter highlights the tax avoidance, tax evasion and aggressive tax planning challenges and their respective impacts on the natural resource governance. It points out, in particular, that the nature of the extractive industries is a high-risked which require the intensive financial investments. There are various stakeholders who assume the risks proportionately. These include the multinational extractive companies through their holding and subsidiary companies situated across jurisdictions and the international financial institutions. The above arrangements call for stricter rules regulating on how they deal with each other without which they can be abused and stage tax avoidance and tax evasion. In addition, it looks at the way the production sharing agreements are negotiated between the host state and the multinational extractive company. It proposes a synergy between the cooperation of international and domestic policy and legislative measures to address these challenges.

6.2 The Position and Application of International Law in Tanzania: Some Issues and Paradoxes

As discussed in various parts of the study, the interstate natural resource governance evolved through the protracted debates between developed and developing countries over the sovereignty over natural resources. In the end, the principle of PSNR evolved into a recognised principle of the international law

regulating the governance of natural resources between states (interstate) and within a state (intrastate).[565] The principle of PSNR is an attribute of the state sovereignty. Nevertheless, the states exercise it on behalf of and for the benefits of the people. Thus the UNGA resolution 1803 on PSNR recognises the fact that natural resources must be exploited for the well-being of the people irrespective of whether the envisaged exploitation is interstates or intrastate.

As noted above, under the international law realm, it is a settled principle that the states have the right and sovereignty over the natural resources located within their confined borders. As such, the states are at liberty to dispose of them when and where necessary. However, right from the beginning of the evolution of the principle of PSNR, the mandate of states to exercise the right of sovereignty over natural resources depends on the condition that such exploitation shall be for the well-being of the people. The contemporary principle of PSNR shifts the focus from the interstates to intrastate perspective, thereby vesting the people as the natural resources right bearers against the states. In other words, the core paradigm shift envisages the state ceding its purported absolute sovereignty over natural resources to a qualified obligation of managing these resources on behalf and for the benefits of the people.[566]

Admittedly, the shift of the focus of the principle of PSNR from interstate to intrastate was not envisioned during its evolution. The earlier debate envisaged to leverage the interstate natural resource governance by equipping the resource-rich states with unfettered control over-endowed resources and

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[565] See Dam De Jong Daniëlla, *International Law Governance of Natural Resources,* (2015), p. 376; Schrijver N.J, *Sovereignty over Natural Resources,* (1997), p. 33; See also Talus Kim, Oil and Gas: International Petroleum Regulation in Elisa Morgera and Kati Kulovesi (ed.), *Research Handbook on International Law and Natural Resources*, Cheltenham, Edward Elgar Publishing Limited, (2016), p. 247; Chowdhury Subrata Roy, *Permanent Sovereignty over Natural Resources*, in *Permanent Sovereignty over Natural Resources in International Law*, (Kamal Hossain & Subrata Roy Chowdhury (eds.) Pinter, (1984).

[566] Miranda Lillian Aponte, The Role of International Law in Intrastate Natural Resource, (2012), p.795; Duruigbo Emeka, Permanent Sovereignty and Peoples Ownership of Natural Resources in International Law, (2006), p. 65.

inadvertently ignored intrastate natural resources governance issues. The contemporary development of natural resource governance imposes an obligation on states to exploit natural resources by balancing the quest to, among others, promotes the economic development, environmental conservation, and the sustainable utilisation of natural resources to cater for the needs of the present and the future generations.

The right of state's sovereignty over natural resources, as noted above, is an established and recognised principle under the international law. However, the application of the principle in the domestic jurisdiction of states is convoluted. This is because of the diverse understanding and perception of the international law by the states. The application of the international law within the territorial boundaries of a state would, in most cases, depend on its constitutional and/or legislative rules put in place in that regard. Whereas, some states have different rules governing the application of a treaty law and customary international law within their domestic jurisdiction, others have a uniform rule governing both. For instance, in some jurisdictions, the international law, regardless of whether or not is a treaty or customary international law apply to the domestic jurisdiction automatically (monist).[567] In other jurisdictions, there are distinct internal legislative procedures, giving effect to the application and enforceability of the treaty law and customary international law within a confined state (dualist).[568]

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[567] See Beemelmans, Hubert, and Treviranus, Hans D., National Treaty Law and Practice: Federal Republic of Germany in Leigh and Blakeslee, National Treaty Law and Practice, (ed.), Washington, DC, *the American Society of International Law*, (1995), p. 43; Shaw M.N., International Law, (2003) p. 155; See also article 25 of the Basic Law of the Federal Republic of Germany which expressly provides that general rules of public international law are integral part of federal law and shall take precedence over the laws and shall directly create rights and duties for the inhabitants of the federal territory.

[568] Meyersfelt Bonita, Domestication of International Standards: The Direction of International Human Rights Law in South Africa, *Constitutional Court Review Conference*, (2013), pp. 400 - 403, arguing that on the one hand, section 231 of the Constitution of the Republic of South Africa 1996 regulates the steps that the executive and the legislature should take into account in order for a treaty to be part of the South African law, namely; the executive signs the treaty, the parliament approves the treaty in order for the treaty to bind the Republic and, the parliament

The application and enforcement of the International law within states' domestic jurisdiction is important because most of the natural resources governance norms emanate from the international treaties while others emanate from the customary international law. The effective implementation of these norms within states' domestic jurisdiction would, undoubtedly, enhances the realisation of intrastate natural resource governance which has been amiss for years. However, some challenges associated with the enforcement of the international law norms hinder the full realisation of the natural resource governance within the state.

For instance, the application and the status of international law in the domestic courts of the United Republic of Tanzania are in two folds. Firstly, the international treaties are well recognised under the Constitution of the United Republic of Tanzania 1977. However, in most cases, they do not apply directly to the domestic courts unless preceded by a legislative process domesticating the application of the ratified international treaty in question (Dualist state).[569]

Secondly, the customary international law, although forms the part and parcel of the international law, does not seem to be on an equal footing with the

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must enact a law to make the treaty in question part of the South African law. On the other hand, section 232 of the same Constitution provides to the effect that a customary international law is the law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament; See also Dugard, J. The Conflict between International Law and South African Law: Another Divisive Factor in South African Society? *2 South African Journal on Human Rights,* (1986); See also article 91 (1) of the Netherlands Constitution 1983 which requires approval of the Parliament before provisions of any treaty become binding, among others.

[569] See article 63 (3) (e) of the Constitution of the United Republic of Tanzania, 1977; For critical discussion on the application of international treaties in Tanzania, see, among others, Murungu Chacha Bhoke, The Place of International Law in Human Rights Litigation in Tanzania, in Magnus Killander (ed.) *International Law and Domestic Human Rights Litigation in Africa*, Pretoria University Law Press (PULP), (2010), pp. 57 - 68; Mwalusanya J. L., The Bill of Right and the Protection of Human Rights: Tanzania Court's Experience, in Bisimba, H.K. and Peter, C.M. (eds.) *Justice and Rule of Law in Tanzania: Selected Judgments and Writings of Justice James Mwalusanya,* Dar es Salaam, Legal and Human Rights Centre, (2005), pp. 624 - 625; Kamanga, K., International Human Rights Law as Reflected in Tanzania's Treaty and Courts Practice, in Binchy, W. and Finnegan, C., *Human Rights, Constitutionalism and the Judiciary: Tanzania and Irish Perspective*, Dublin, Clarus Press, (2006), pp. 53 - 70.

international treaties. Article 63 (3) (e) of the Constitution of the United Republic of Tanzania of 1977 reads;

> For the purposes of discharging its function , the National Assembly may...deliberate upon and ratify all treaties and agreements to which the United Republic is a party and the provision (sic) of which require ratification.

One could reasonably assume, from the wording and interpretation of article 63 (3) (e) of the Constitution of the United Republic of Tanzania above, that it is restricted to the international treaties and agreements to which the United Republic of Tanzania is a party. Except by *ejusdem generis*, the customary international law seems to be beyond the operational scope of the Constitution of the United Republic of Tanzania and therefore, cannot be applied in the domestic courts.[570]

Alternatively, the application of customary international law will depend on whether or not the customary international law in question should have been an acceptable common law principle applicable in England on reception date.[571] In that case, it is applicable and binds the courts in Tanzania under the virtue of section 2 (3) of the Judicature and Application of Laws Act, Cap. 358 R.E 2002. If the foregoing route is pursued then the customary international laws, which can

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[570] If one reads *the Case of D.P.P vs Daudi Pete [1993] T.L.R 22*, where the High Court of the United Republic of Tanzania held, among others, that reference to the international instruments is in order when interpreting the bill of rights of the Constitution of the United Republic of Tanzania, 1977. The foregoing holding was cited with approval by the Court of Appeal of the United Republic of Tanzania *in the case of The Attorney General vs Reverend Christopher Mtikila, Civil Appeal No. 45 of 2009 (Unreported)*. As noted in these two cases and other cases cited therein, one would easily buy the argument that the position and status of the customary international law in domestic jurisdiction is illusory.

[571] 22nd July 1920 is the date when the Received Laws from England were made officially applicable and binding on the High Court of Tanganyika (now Tanzania Mainland) under article 17(2) of the Tanganyika Order -in-Council, 1920 which is now replicated under section 2(3) of The Judicature and Application Laws Act, Cap. 358 R.E. 2002. The Received Laws include: Common Law, Doctrine of Equity, and Statutes of General Application of England, applicable on or before the 22 of July 1920.

be applicable in Tanzanian courts were those applicable in England on the reception date. The immediate challenge is that most of the contemporary international customary norms on natural resource governance evolved post-reception date, hence, have a persuasive value in the courts. The above constitutional and legislative hurdles hinder the application of the international law norms which would otherwise enhance intrastate natural resource governance, hence a call for both constitutional and legislative reforms.

6.3 International Legislative Initiatives on Intrastate Natural Resource Governance

In order to have a functional and meaningful intrastate natural resource governance, the role of the international community cannot be overshadowed. This stems from the fact that the international community constitutes a lion's share of the natural resource export market, capital, and technological know-how. Given the fact above, it is imperative indeed to foster cooperation between the resources-rich states and the international community in a bid to enhance the sustainable economic contribution of the natural resources generally and oil and gas industry in particular.

The international community referred to includes the home states of multinational extractive companies, international non-governmental institutions, international multilateral financial institutions such as the World Bank, International Monetary Fund, and their affiliated institutions, and international donor institutions such as UK's Department for International Development (DFID), Deutsche Gesellschaft für Internationale Zusammenarbeit GmbH (GIZ), USAID, among others. However, for the purpose of the study, the focus is fostering cooperation with the established international, multilateral legislative, and voluntary initiatives. The effective international cooperation envisages setting up of the driving institutional frameworks and lay down its normative scope. The normative rules would be

drafted by which all the parties would undertake to abide by.[572] This part explores the international and transnational legislative initiatives, which can be deployed to enhance the intrastate natural resource governance.

6.3.1 Promoting Reciprocity and Harmonisation of Transnational Laws on Reporting and Disclosure between Home and Resource-rich States (Host States)

As stated in Chapter Four of the study, one of the most challenging issues in natural resource governance generally and, in particular, intrastate oil and gas governance is how to get rid of the natural resources spoliation which accounts for the poor governance of the industry. The perpetrators are constituted by both the locals such as the government officials and the internationals such as the multinational extractive companies and international financial institutions. The latter operate in different political environment and normative rules. Accordingly, the efforts to combat these vices require a concerted international cooperation among states since any self-driven move would not adequately address the challenge.

There is no comprehensive international legislative initiative to combat natural resources spoliation. Instead, there are devised transnational legislative initiative on the revenue accounting and disclosure.[573] The accounting and revenue disclosure serve two purposes. Firstly, at the intrastate level, it informs the people on the quantum of the resource value base which would, in turn, help them to demand for the accountability of the revenue derived from the exploitation of such resources. Secondly, at the international level, it serves as a part of the corporate social responsibility on the part of the multinational

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[572] Leal-Arcas Rafael and Filis Andrew, The Fragmented Governance of Global Energy economy: A Legal-Institutional Analysis, *Journal of World Energy Law and Business*, (2013), p. 360.

[573] Al Faruque Abdullah, Transparency in Extractive Revenue in Developing Countries and Economies in Transition: A Review of Emerging Best Practices, (2006), pp. 103 - 104.

extractive companies' effort in fighting natural resources spoliation in the resource-rich states.

As noted under Chapter Four of the study, it is encouraging indeed to see that more countries are enacting legislation, which imposes a mandatory obligation for the oil and gas and mining companies listed in their jurisdictions to publish the payments made to the governments around the world in consideration of the right to extract the oil, gas, and mineral resources. These legislations have been enacted in the USA through the Dodd-Frank Wall Street Reform and Consumer Protection Act 2010 (Dodd-Frank Wall Act), the Directive 2013/34/EU on Accounting and Disclosure 2013/34/ EU, and the Canadian Extractive Sector Transparency Measures 2014 (ESTMA). The legislative initiatives provide an opportunity for the tripartite cooperation between home states, multinational companies, and host government of resources-rich states to enhance the governance through the accounting and disclosure. For instance, the enactment of ESTMA by Canada provides a leadership role in the effort to strengthen natural resources governance. Canada is one of the leading mining countries with companies listed on the Toronto Stock Exchanges constituting the global mining assets in excess of USD 109 billion. In 2011 alone Canadian companies were involved in more than 330 extractive projects in Africa.[574]

These legislative initiatives oblige the extractive companies operating in the United Republic of Tanzania to publish the payments made to the government on a project-by-project basis. Accordingly, the extractive companies which operate in the United Republic of Tanzania are required to publish, in their respective jurisdiction, the payments made to the government on a project-by-project basis. The extractive companies subject of the legislative initiatives include; Ophir

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[574] Veit Peter G. and Easton Catherine, Financial Disclosure and the Canadian Mineral Sector: Lagging Behind? or Catching Up? Washington, DC: *Africa Biodiversity Collaborative Group*, (2013) p. 2. Available at http://www.abcg.org/action/document/download?document_id=118 (accessed on 29th August 2017); See also Africa Progress Panel, Equity in Extractives Stewarding Africa's Natural Resources for All, *Africa Progress Report,* (2013), p. 76.

Energy, Petra Diamond, Afren, Tullow, Xstrata, BG, and Ndovu Resources listed in London Stock Exchange;[575] while Petrobras, Statoil, Dominion and Anglo-Gold Ashanti are listed on New York Stock Exchange; and African Barrick Gold and Pan African Energy are listed in Toronto and London Stock Exchange.[576] The reports published through these initiatives can be used by the oversight bodies such as the National Assembly, civil society organisations (CSOs), among others, to assess the contribution of natural resources to the economy and hold the government accountable for their actual use. In addition, these reports would be reconciled with those prepared under the Extractive Industry Transparency Initiative (EITI).

To reciprocate the transnational legislative initiatives on accounting and disclosure, the Government of the United Republic of Tanzania enacted the Tanzania Extractive Industry (Transparency and Accountability) Act 2015 (hereinafter referred to as 'TEITA Act'). The TEITA Act broadens the scope of issues covered. Apart from the disclosure of payment made to the government, TEITA Act provides for the disclosure of the accurate record of the costs of production and capital expenditure to the TEIT Committee in every stage of the oil and gas resource value chain.[577] Also, the minister is obliged to publish in the media, which is widely accessible to the public all the contracts, concessions, and licenses related to the extractive industry companies. In addition, the Minister shall publish the names of shareholders having interests in the extractive

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[575] It should be noted that with recent move of Britain exiting the European Union in July, 2016, it would indeed pose some challenges in complying with the EU directives. However, at the moment, one may wish to wait and observe the consequences ensuing as the result of Brexit, in particular, her obligations arising from the EU Directives.

[576] See Tanzania Extractive Industries Transparency and Accountability Report on Disclosure of Beneficial Ownership of the Extractive Companies in Tanzania as at December 2016, available at http://www.teiti.or.tz/wp-content/uploads/2017/07/Report-on-Disclosure-of-Beneficial-Ownership-of-the-Extractive-Companies-in-Tanzania.pdf (accessed on 27th July 2017).

[577] See section 10 (1) of the Tanzania Extractive Industries (Transparency and Accountability) Act, No. 23 of 2015.

companies and their respective shareholding interests and the implementation of environmental management plans.[578]

In a move to enhance the transparency and in the recognition of transnational legislative initiatives in the oil and gas industry, the TEITA Act requires the extractive companies to submit to the TEIT Committee all information on the activities undertaken by a particular extractive company, which is required to be submitted to the foreign or local stock markets.[579] The above-envisaged information helps to compare and reconcile the reports submitted to the TEIT Committee and those submitted under the home states statutory requirements. However, in order to reduce the administrative and compliance costs in the bid to comply with the laws of both the host and home states, it is imperative to harmonise the accounting and disclosure requirements in both the host and home states.

The envisaged harmonisation would not only promote transparency but also enhance compliance. For instance, the Extractive Sector Transparency Measures 2014, the Directive 2013/34 EU and their respective rules acknowledge and recognise as a substitute, equivalent criteria, alternative reports submitted in compliance with the requirement of the laws of other jurisdiction respectively.[580] The host states' legislative measures such as those under the TEITA Act should emulate and harmonise its accounting and

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[578] See section 16 (1) of the Tanzania Extractive Industries (Transparency and Accountability) Act, No. 23 of 2015.

[579] See section 16 (2) of the Tanzania Extractive Industries (Transparency and Accountability) Act, No. 23 of 2015.

[580] See Section 10 (1) of the Extractive Sector Transparency Measures Act, 2014; See article 46 and 47 of the Directive 2013/34 EU on Accounting and Disclosure of 29th June 2013, Official Journal of the European Union, which provides list of criteria to be looked at before a report is considered a substitute report prepared for foreign regulatory purpose. The criteria include: target undertakings, target recipients of payments, payments captured, attribution of payments captured, breakdown of payments captured, triggers for reporting on a consolidated basis, reporting medium, frequency of reporting, and anti-evasion measures.

disclosure requirements with those under the transnational legislative initiatives above.

6.3.1.1 Harmonisation of Penalties Imposed by the Home States and Host States Legislative Initiatives

In a bid to reduce the administrative and compliance costs as noted above, it is imperative, albeit difficult to harmonise the legislative initiatives in so far as the imposition of penalties for the non compliance is concerned. The state of affairs as of now is that each legislative initiative has its own enforcement mechanism. For instance, the EU Accounting Directive imposes an obligation to the member states to impose the penalties on the infringement of the national provisions adopted in accordance with the Directive and shall take the necessary measures to ensure that the imposed penalties are effective, proportionate and, dissuasive.[581]

The Extractive Sector Transparency Measures Act (ESTMA) provides two distinct offences; firstly, for the non compliance with the Act and secondly, for giving misleading statements or information. Both offences are punishable by a summary conviction and a person so convicted is liable to pay a fine of not more than USD250,000 respectively.[582] Tthe Act also lifts the corporate veil and imputes a liability to the officers and directors of an entity found guilty of committing an offence provided that the directors or the officers directed, authorised, assented to, acquiesced in or participated in its commission. It does not matter whether or not the person was prosecuted and convicted of the offence in question.[583]

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[581] See article 51 of the Directives 2013/34 EU on Accounting and Disclosure of 29th June 2013, Official Journal of the European Union.

[582] See section 24 (1) & (2) of the Extractive Sector Transparency Measures Act of 2014.

[583] See section 25 of the Extractive Sector Transparency Measures Act of 2014.

Equally, the TEITA Act provides two offences namely; failure to produce a document or information and giving false information or report. As for the former, a conviction of the individual or body corporate leads into a payment of fine ranging from ten to one hundred million while for the latter, on conviction, a fine of one hundred million Tanzanian shillings is payable irrespective of whether or not the offence is committed by an individual or an entity.[584] Since both the home and host states legislative initiatives provide for the penalties for the non compliance, it is opined indeed to harmonise them in order to recognise the penalties imposed, for instance, by the host states as sufficient to exonerate the non compliant extractive company from the similar penalties in the home state. The logic behind is that the non compliance should not be treated with animosity hence the imposition of retributive penalties.

The penalties should rather serve as a reminder to a non compliant company and therefore, avoid double jeopardy punishment. Of course, there will be some issues as to which state between the host and home would have a precedence over the other in imposing the penalties for the non compliance and whether or not the dues so collected would be shared by both states. It is opined that since the home state legislative initiatives were enacted to fight natural resources spoliation in the resource-rich developing countries, it would be logical to give the priority to the host states to impose penalties unless it is unable and/or unwilling to exercise the right so conferred within a reasonable time. However, any meaningful success of the above undertakings requires a systemic and swift exchange and sharing of information between the host and home states.

[584] See sections 23 (a) and (b) and 24 (a) - (d) of the Tanzania Extractive Industries (Transparency and Accountability) Act, No. 23 of 2015.

6.3.1.2 Promoting and Widening the Scope of Accounting and Disclosure along the Resource Value Chain

As stated in various parts of the study, the accounting and disclosure of the information of the payment made by the extractive companies to the host government are one of the efforts towards enhancing natural resource governance, however, it is not self-sustained. In order to sustain natural resource governance, one has to look at it along the resource value chain links. The links promote governance process as a whole without isolation of a chain link. In fact, they are interlinked and interconnected in the sense that strengthening of one link in the resource value chain may bring undesirable effects to others and thus a holistic approach is desirable. For instance, a well-functioning revenue distribution is of no value, if, the contract subject to such revenue distribution is poorly negotiated as this would have the effects on the amount of taxes and other dues expected in the public coffer.[585]

Equally, a well-functioning accounting and disclosure of the payments made by the extractive companies to the host governments are of no use if, other factors are isolated along the resources value chain. As stated repeatedly in the study, natural resource governance begins at the exploration and discovery stages whereby other activities along the resource value chain would be built on them. Thus the well functioning home and host state legislative initiatives should not strengthen one aspect of the resource value chain to the detriment of others. For instance, apart from the revenue inflow consideration, these initiatives should broaden their scope to include other aspects such as the exploration and licence allocation, oil and gas fiscal regimes disclosure, revenue distribution, government spending, environmental management and sustainable use of oil and gas resources, among others.

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[585] See Desai Deval and Jarvis Michael, Governance and Accountability in Extractive Industries: Theory and Practice at the World Bank, (2015), pp. 114 - 115.

6.3.2 Promoting Reciprocity and Harmonisation of International Cooperation on Anti-Corruption Laws

As noted in Chapter Four of the study, one of the challenges affecting the performance of natural resources governance in general and oil and gas, in particular, is corruption. The corruption affects the decision making along the resource value chain which, in turn, impacts on the expected contribution of the industry in the economy of the host state. In fact, the corrupt practices affect the entire resources value chain i.e., from the awarding of the exploration and prospecting licences, fiscal regime, production, distribution of resources in both the upstream, midstream and downstream of the oil and gas industry. Equally, the corruption can occur outside of the resources value chain, for instance, where the officials are bribed to allow the extractive companies to extract the resources outside concession area with impunity.

Corruption can occur in any economic sector. However, the extractive sector is exposed to a relatively higher degree of the corruption issues because of the huge revenues generated from the disposition of the resources. Due to the huge revenue generated, there is a possibility of loosening political accountability and creating an opportunity for corruption. As noted in the study, the natural resources spoliation involves different players each with a specific task to perform. These range from domestic such as the senior government officials and the local financial institutions and the international extractive companies and international financial institutions.

Given the fact above, the challenges surrounding the corrupt transactions in natural resources surpass the intrastate capacity to address them. The challenges cannot be addressed by the resources-rich states alone without the concerted international and multilateral cooperation regulating the roles and

activities of the foreign companies in the resource-rich states.[586] Transnational cooperation is important because of the fact that the natural resources spoliation is a cross-jurisdictional in nature and therefore, the prosecution of perpetrators in the host states would not, in itself, address the problem if, for instance, the complained crime was committed beyond the host state investigative and prosecutorial jurisdiction.

The jurisdiction of the courts is of crucial consideration before one decides whether or not pursue a corruption case over the natural resources spoliation. Attempts by the host states to overcome the jurisdictional challenges land them into two challenges. Firstly, the host states are constrained by the financial resources and legal expertise to prosecute transnational corruption crimes. Secondly and in the alternative, the prosecution of above-mentioned crimes is discretional and depends on the host states political will to prosecute the perpetrators. Therefore, whatever mechanism adopted by the host and home states severally or jointly, any attempts to exclude cooperation in the transnational legal assistance would tantamount to its own failure. This is necessary, in particular, where the host state courts with jurisdiction fail, unable and/or unwilling to determine the case at hand thus the alternative remedies have to be sought elsewhere preferably at the home states. For instance, an allegation brought against the public officials or the corporate entities are often aligned with the bank secrecy rules of the international financial institutions which, in turn, decline to furnish the requisite information to the investigatory bodies with impunity.[587]

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[586] See Africa Progress Panel, Equity in Extractives Stewarding Africa's Natural Resources for All, (2013), p. 60.

[587] Open Society Justice Initiative, Legal Remedies for the Resources Curse, (2005), p.15.

6.3.2.1 Home State Transnational Anti-Bribery Legislative Initiative

In an effort to combat corruption as one of the means to address the natural resources spoliation and in recognition of the role of the extractive companies in this regard, the United Kingdom and the United States of America enacted the laws addressing the natural resources corrupt transaction by the multinational extractive companies operating in the resource-rich states. Accordingly, the United Kingdom's Bribery Act 2010 provides that any person who bribes a foreign public official is guilty of an offence if he influences that foreign public official with intention of obtaining or retaining business or advantage in the conduct of the business.[588] The US Foreign Corrupt Practices Act 1977 (hereinafter referred to as FCPA) provides that a person commits an offence if he offers to pay, promises to pay, authorises to pay money or anything of value to a foreign official in order to influence any act or decision of the foreign official in their official capacity or to secure any improper advantages in order to obtain or retain business.

Both the Bribery Act and FCPA provide for a wide scope of the envisaged foreign official which include the foreign officials discharging their legislative, administrative, judicial functions or any foreign political party and official thereof, and any candidate for a foreign political office. As noted above, in essence, these transnational laws prohibit the payment to the foreign officials and not to the foreign governments. The companies contemplating contributing or donating to a foreign government should take step ensuring that the money so contributed is not used for the corruption purposes like for personal use and benefit of the individual foreign officials. The rationale behind this prohibition is to discourage the transaction between entities and foreign government on account of foreign official self-profiteering to the detriment of the host governments.

[588] See section 6 (1) and (2) of the Bribery Act 2010, Cap 23.

In a bid to truly combat and prevent the bribery of the foreign officials, these legislative initiatives provide for the transnational applicability. On the one hand, the Bribery Act incriminates perpetrators, instigators and accessories for bribery offences committed or partially committed in the United Kingdom and offences committed abroad by persons with close connection to the United Kingdom. The connection referred to includes the British citizens, citizens of British overseas territories and bodies incorporated under the law of any part of the United Kingdom, and foreign nationals involved in bribery abroad while ordinarily residing in the United Kingdom.[589] On the other hand, the FCPA incriminates US persons and businesses, US and foreign companies listed on stock exchanges in the US or required to file a periodic report with the Securities Exchange Commission (SEC), and certain foreign persons and businesses action while in the territory of the US.

It is commendable to see these initiatives incriminating the individuals and corporate entities for corrupt transactions committed by them within the United States and the United Kingdom and beyond their territorial borders (interstate commerce). They also incriminate corrupt transactions committed by the affiliates of the corporate entities such as the subsidiaries and agents undertaking business on behalf of these entities thus add an immeasurable value in the war against natural resources spoliation. This is, in particular, necessary where, for instance, most of the corrupt transactions involving the government officials take place in jurisdictions with a weak enforcement mechanism and/ or where enforcement agencies are controlled and influenced by the same officials implicated in corrupt transactions. In addition, these legislative initiatives incriminate foreign nationals residing in these states for abuse of office while in

[589] See section 12 of the Bribery Act 2010, Cap. 23.

power through their political influence and launder the ill-gotten money in foreign financial institutions.[590]

The effective functioning of these legislative initiatives requires the interstates mutual legal assistance on the exchange and sharing of information between the host and home states. As noted, corrupt transactions involve players from both the host and home states thus transnational legislative initiatives by the home states should be reciprocated by the similar initiatives from the host states. However, it is noted that the host states do not reciprocate similar efforts as the home states. For instance, some of the hosts state whenever requested to furnish information of officials implicated in the corrupt transactions on the natural resources dealings do not heed, in particular, if the person so implicated is holding a political office.[591] In the absence of the concerted efforts by both players, the fight against natural resources spoliation through corrupt transactions would be illusory. Therefore, the contribution of the natural resources to the economies of the resources-rich states would be negligible and will not contribute to the economic sustainability of the present and future generations.

6.3.2.2 Host States Anti-Bribery Legislative Measures

There are efforts by the host states, in particular, the developing countries of Africa to enact laws and/or adopt the regional or sub-regional anti-bribery legislation in a bid to fighting the natural resources spoliation. These states have enacted the anti-bribery laws across the continent. Equally, the efforts are

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[590]OECD, *Illicit Financial Flows from Developing Countries: Measuring OECD Responses, OECD Report,* (2014), p. 24, noting, for instance, in 2004, Riggs Bank pleaded guilty to money laundering charges and paid a USD 16 million penalty. The bank failed to report suspicious activity by clients in Equatorial Guinea and Chile. Accounts were held, among others, by former dictator Augusto Pinochet.

[591] Open Society Justice Initiative, Legal Remedies for the Resources Curse, (2005), pp. 11 - 12. For instance, in 2004, US investigative machinery requested the government of Equatorial Guinea to furnish information related to the implication of suspicious transactions of Equatorial Guinea's President Teodoro Obiang Nguema Mbasango in US based Riggs Bank to a no avail.

supplemented by the active participation of the African states in signing and ratifying the United Nation Convention Against Corruption of 2003,[592] the African Union Convention on Preventing and Combating Corruption 2003,[593] and Southern African Development Community (SADC) Protocol Against Corruption 2001, among others.

Notwithstanding the above efforts at the regional and sub-regional level and due to the fragility of the political, policy and legislative capacities, the ability of host states to combat natural resources spoliation arising from the corrupt transactions pose a big challenge. For instance, in most host states, the laws, investigatory and prosecutorial institutions which are put in place have the loopholes and are inadequately established. The institutions so established are underfunded thus unable to carry out their bestowed mandate effectively.[594] This is, in particular, where, for instance, some activities of the issues under investigation are to be conducted beyond the host states jurisdictional mandate. In addition, there are issues of gathering of the evidence from the scattered witnesses and documents across different jurisdictions which, call upon a prior interstate legal cooperation and requesting state's legal compliance before the envisaged evidence is gathered. Equally, other wanting issues akin to the

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[592] According to the United Nations Convention against Corruption Signature and Ratification Status as at 12 December 2016 available at https://www.unodc.org/unodc/en/treaties/CAC/signatories.html (accessed on 3rd October 2017) shows that most of the African states are sate party to the UN Convention Against Corruption with exception of Equatorial Guinea, Eritrea, Chad, and Somalia.

[593] The African Union Convention on Preventing and Combating of Corruption shows that out of 55 member states there are 49 member states who affixed their respective signatures out of which 37 member states have ratified the Convention. See https://au.int/sites/default/files/treaties/7786-sl-african_union_convention_on_preventing_and_combating_corruption_9.pdf (accessed on 3rd October 2017).

[594] See The Prevention and Combating of Corruption Bureau Strategic Plan 2018 2022, pp 11 - 12. available at http://www.pccb.go.tz/wp-content/uploads/2017/09/PCCB-STRATEGIC-PLAN.pdf (accessed on 4th April 2018). Accordingly, the PCCB highlights challenges which prevented the effective performance of the bureau to include, among others, lack of fund to conduct investigation, in particular, where the case involve a cross-jurisdictional investigation.

functional anti-bribery legislative measures are the presence of an independent and competent judiciary and active and effective civil society organisation.

The absence of the effective institutional and legislative mechanisms and the fact that natural resources corrupt transactions may take place in either host or home states calls for combating natural resources related corrupt transaction beyond the precinct of the host states. As noted above, most of the mechanisms adopted by the majority of the African states are, apart from the UN Convention Against Corruption, intra Africa legislative initiatives through the African Union and/or sub-regional economic blocks. However, most of the corrupt transactions and their respective hide-out involving natural resources take place beyond African states jurisdictional precincts. As such, without prejudice to the aforementioned African legislative initiatives, a concerted transnational and international mechanisms would effectively and efficiently address the problem of natural resources spoliation in host states.

Given the practical challenges above, a strengthened international mutual cooperation between states on the sharing and exchange of information is plausible towards fighting against the natural resources' spoliation. This can be achieved through the inclusive approach of all stakeholders such as the host states, home states, extractive multinational companies, and international financial institutions. The importance of the international mutual cooperation of exchange and sharing of information between states is in two main folds. Firstly, it furnishes the host states with the requisite information when conducting an investigation on the suspicious corrupt transaction and its respective laundering of proceeds thereof in the home states' financial institutions. Secondly, the natural resources spoliation would be put to a light and thus the perpetrators would be scared because of the apprehension of being traceable.

The international mechanisms however good they may be, they cannot themselves solve the problem without a devised intrastate anti-bribery legislative mechanism. The intrastate mechanisms put in place across the developing

countries govern the corrupt transactions generally. For instance, in Tanzania, the Prevention and Combating of Corruption Bureau Act 2007 (PCCB Act) establishes corruption offence and its enforcement procedures of the offences committed within the United Republic of Tanzania. Also, the PCCB Act provides for the international mutual cooperation for the enforcement of the corruption offences, in particular, where the corrupt transaction to be impugned is partly committed within and outside Tanzania by perpetrators who are not residing in Tanzania.[595] In addition, the natural resources corrupt transactions should be treated and looked at separately by devising the anti-bribery policy and laws akin to the industry. This is because of the nature of stake in question which, involves a significant amount of the state's fortune.

It is opined that apart from the general anti-bribery legislation, there should be put in place specific anti-bribery policies addressing bribery peculiar to the oil and gas industry. Admittedly, the Natural Gas Policy 2013, the Petroleum Act 2015, the Model of Production Sharing Agreement 2013 (MPSA), and the individual Production Sharing Agreement have anti-bribery clauses. However, the question, for instance, how stringent and effective these clauses are indeed difficult to answer. Most of the corrupt transactions are associated with the granting of exploratory rights and the actual signing of production sharing agreements. However, the above understanding is narrow because how, for instance, would one explains for the corrupt transactions along the resource value chain remain beyond the purview of anti-bribery redress. For instance, where an environmental impact assessment compliance certificate is procured through bribery, what will be the fate of the project subject of which the EIA was issued? Therefore, it is indeed imperative to address the corrupt transactions in oil and gas industry beyond granting of exploratory and production rights to a comprehensive resource value chain.

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[595] See sections 4 (2) (c) and 54 of the Prevention and Combating of Corruption Bureau Act No. 11 of 2007.

6.3.2.3 The Role of International Anti-Bribery Legislative Measures

As noted in the preceding part above, natural resources corrupt transactions are the results of the sophisticated arrangements and complex to trace. In most cases, the holding companies use subsidiaries and sham companies registered and or incorporated in jurisdictions with no rigorous anti-bribery laws and in tax heavens. The prosecution of these companies poses challenges due to rigorous cross-jurisdictional barriers which are complex and difficult to surmount. The jurisdictional barriers inevitably call for international mechanisms which, apart from promoting international cooperation in the prosecution of the transnational corrupt transactions, encourage non state parties to join the war in the fight against the transnational corruption.

As noted, addressing the natural resources spoliation is plausible if, there is a concerted international cooperation of all stakeholders. Admittedly, the home and host states legislative measures are pivotal in the bid to addressing the problem. However, these efforts will not adequately address the problem in the absence of other measures. This is, in particular, where the alleged natural resources spoliation involves different actors falling beyond the legal jurisdiction of neither the home states nor host states.[596] Thus more robust and holistic international mechanisms have to be put in place to address these eventualities. It is opined that the concerted international legislative mechanisms have to be strengthened and provide a conducive environment for the prosecution of transnational actors.

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[596] See Open Societies Initiative*, Legal Remedies for the Resource Curse,* (2005), p. 30.There are countries, like China, India, and Brazil which are engaged in natural resources extraction in various parts of the world but fall beyond anti-corruption measures. As of now, the anti- corruption measures are currently enforced against the US, OECD, and European Union companies which create uneven competitive playing field that could eventually, undermine the long-term anti corruption efforts.

Equally, the investigators, prosecutors and courts should be equipped to keep pace with the changing dynamics of natural resources spoliation.[597]

Accordingly, there are several international multilateral treaties and conventions on anti-bribery aiming at preventing, combating and prosecuting transnational corrupt transactions among the member states. For instance, the Organisation for Economic Cooperation and Development (OECD) Convention on Combating of Bribery of Foreign Public Official in International Transaction of 1997 requires the member states to criminalise any person who bribes a foreign official.[598] It also prohibits ratifying states from engaging in bribery when undertaking international business transactions.[599] The Directive 2014/24/EU on Public Procurement provides a legal framework for procurement by public authorities within EU member states. The Directives require public authorities within member states to exclude from participation in public contracts all suppliers who have been subject of conviction on account of involvement in the corrupt transaction, money laundering, and terrorist financing, among others.[600]

It suffices to state that since there is no comprehensive global legislative initiative, both the home, and host states legislative initiatives can broaden the administrative and legal cooperation with other regional economic blocs such as OECD and EU. Through the envisaged cooperation, the existing legislative initiatives from both the host and home states will be supplemented by sharing of vital experiences and exchange of strategies with other regional economic blocs.

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[597] Birdsall Nancy, Dani Rodrik, and Subraiman Arvind, How to Help Poor Countries, *Foreign Affairs*, July/August (2005), p.136; See Open Society Justice Initiative, Legal Remedies for the Resources Curse, (2005), p. 57.

[598] See article 1 (1) of the OECD Convention on Combating of Bribery of Foreign Public Official in International Transaction of (1997).

[599] See article 1 (2) of the OECD Convention on Combating of Bribery of Foreign Public Official in International Transaction of 1997.

[600] See article 57 (1) (b) and (e) of the Directives 2014/24/EU of the European Parliament and of the Council of 28th March 2014 on Public Procurement and repealing Directive 2004/18/EC, Official Journal of the European Union.

Also, some of the challenges highlighted such as cross-jurisdictional barriers can be surmounted through the broadened cooperation.

6.3.3 Promoting Multilateral and Bilateral Cooperation on Exchange of and Sharing of Tax Information

In determining an appropriate fiscal regime, the host states are confronted by a set of competing interests. Firstly, there is a need to attract colossal revenues in order to cater for over pressing basics of the citizens. Secondly, there is also a need to create a conducive environment to attract foreign direct investments from the multinational extractive companies to contribute to the domestic economy, society, and environmental sustainability. To balance the above contending interests is one of the difficult tasks in the natural resource governance. The difficulties arise from the fact that the determination of the value of the revenue generated from the extraction depends on the costs of extraction and the underlining condition in the global markets. Given the facts and the above circumstances, most of the foreign direct investments in the developing countries in the late 1980s and early 1990s came with myriad goals. Firstly, the multinational extractive companies pushed for the policy and legal reforms that would create a favourable investment environment. Secondly, the companies entered into agreements with the host governments containing series of tax exemptions such as the corporation taxes, import duties, withholding taxes and royalties, among others.[601]

The exemptions had negative impacts on the revenue accruing from the natural resources exploitation which would, in turn, contribute to the economic development of the host governments. In order to shed a light of the assertion, in Tanzania, the report of the Controller and Auditor General for the Financial Year

[601] See Africa Progress Panel, Equity in Extractives Stewarding Africa's Natural Resources for All, (2013), p. 63.

2015 - 2016[602] reveals that the review of VAT returns of the five mining companies namely Geita Gold Mine, Bulyanhulu Gold Mine, North Mara Gold Mine, Williamson Diamonds and Pangea Gold Mine for five years from 2012 to 2016 noted significant refunds of VAT to the tune of TZS 1,144 billion. The refunds are the results of the loopholes provided for under section 55(1) of the Value Added Tax Act 2014 which allows zero-rating of VAT when the goods are exported outside Tanzania. The CAG Report also reveals that there is a perpetual reporting of losses by five mining companies with lion's share in the mining industry for the period covering the financial year 2011 - 2016 namely; Geita Gold Mine Tshs. 479 billion, Bulyanhulu Gold Mines LTD Tshs. 6.5 trillion, Pangea Minerals LTD Tshs.2.6 trillion, North Mara Gold Mine Tshs. 547 billion, and Williamson Diamond LTD Tshs. 537 billion.[603]

As noted in the previous parts of the study, the natural resource governance in general and oil and gas, in particular, focus on revenue inflow. In fact, most of the legislative initiatives adopted by either the home or host states focus on the accounting and disclosure by the extractive companies of the payments made to the host government in consideration of the right to extract natural resources. This approach is narrow if, natural resources are expected to make a genuine contribution to the economy of the host states. Admittedly, the revenue inflow is one of the important reasons why a particular natural resource is exploited. However, it is preceded by other aspects along the resource value chain, which ultimately, determine the quantum of the revenue inflow. For instance, the effective fiscal regime in oil and gas industry which, in turn, generate revenue is determined by the clauses contained in the production sharing agreement. Thus

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[602] See the Report of the Controller and Auditor General for the Financial Year 2015 - 2016, pp. 93 - 94, available at http://www.nao.go.tz/?wpfb_dl=226 (accessed on 5th March 2018).

[603] See Lissu, T., and Curtis, M., A Golden Opportunity?: How Tanzania is Failing to Benefit from Gold Mining (2nd ed.) (2008), estimating that Tanzania lost USD25 million over the period of 2005 to 2010 as a result of low royalties rate; See the Controller and Auditor General Report on Public Authorities and Other Bodies for the Financial Year 2015/ 2016, pp .93 - 94

a poorly negotiated agreement would, undoubtedly, generate low income in terms of the royalty, rent and taxes, among others.

In addition, due to the dynamics and complexities of the oil and gas industry, the extractive companies have the possibilities of apportioning and moving the costs and profit from the host states to home states or to a favourable tax jurisdiction. This may happen because of the interdependence and interconnectedness between the oil and gas activities and the demand of the requisite services rendered by the different players. The industry demands both the intensive capital as well as technological investments. Most of these services cannot be catered for by the host states, instead, they are rendered by the international financial institutions in the extractive companies' home states. The challenge with this kind of business arrangements is to ensure that the cross-border extractive companies pay the fair share of taxes out of their revenue to the host states without limiting their tax liabilities through the aggressive tax planning arrangements. [604]

As noted in the previous part of the study, some of the extractive companies are registered and/or incorporated in favourable tax jurisdictions.[605] They engage the service of offshore companies which are commercially affiliates to provide for, almost, all requisite services along the resource value chain. For instance, most of the extractive companies operating in Africa generally and Tanzania, in particular, are incorporated in the traditional tax havens such as the Cayman

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[604] See Interfaith Standing Committee on Economic Justice and the Integrity of Creation (ISCEJIC), *The One Billion Dollar Question Revisited: How Much is Tanzania Now Losing in Potential Tax Revenues* (2nd ED), Dar es Salaam, Jamana Printers, May (2017), p. 13, reveling that according to the US based Global Financial Integrity (GFI), Tanzania has been losing an average of USD 677 million a year caused by trade misinvoicing. available at http://curtisresearch.org/wp-content/uploads/ONE-BILLION-DOLLAR-QUESTION-Final.pdf (accessed on 10th April 2018).

[605] See Tanzania Extractive Industries Transparency and Accountability Report on Disclosure of Beneficial Ownership of the Extractive Companies in Tanzania as at December 2016, available at http://www.teiti.or.tz/wp-content/uploads/2017/07/Report-on-Disclosure-of-Beneficial-Ownership-of-the-Extractive-Companies-in-Tanzania.pdf (accessed on 27th July 2017).

Islands, British Virgin Island and Bermuda. Other extractive companies are registered in jurisdictions with strict banking secrecy rules like Switzerland thus avoid disclosure and provide a hide-out for ill-gotten money.[606] It is estimated that 40% of the extractive companies operating in the host states carry out business through affiliates thereby importing goods and services from an affiliate and securing a financial loan from another.[607]

Accordingly, over-invoicing or mispricing of the essential goods and services is preferred in order to minimise the legitimate tax revenue which would otherwise accrue to the host states. It is estimated that the offshore financial centres host an approximate of USD5 trillion of undeclared financial wealth in 2013. The amount represents the payments received by the multinational corporations from their respective subsidiaries worldwide.[608] It is noted that most of the host states lack human, financial and technical resources to examine the magnitude of commercial relations between extractive companies and their respective associates. [609]

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[606] See Interfaith Standing Committee on Economic Justice and the Integrity of Creation (ISCEJIC), *The One Billion Dollar Question Revisited: How Much is Tanzania Now Losing in Potential Tax Revenue,* May (2017), p. 17. https://www.kirkensnodhjelp.no/globalassets/lanserte-rapporter/2017/one-billion-dollar-question-f.pdf (accessed on 22nd September 2017) noting that some of the companies operating in the mining and oil and gas sector are incorporated in tax heaven jurisdictions, The report note, for example, Acacia Mining is incorporated in UK and has 3 subsidiaries in the Cayman Islands, Mauritius, and Barbados; Petra Diamonds is incorporated in Bermuda; Ophir Energy is incorporated in the UK and has 24 subsidiaries in Jersey, 14 subsidiaries in the British Virgin Islands, 3 in Bermuda and 3 in Delaware; and Statoil is incorporated in Norway and has one subsidiaries in Switzerland.

[607] IMF, OECD, UN and World Bank, *Supporting the Development of More Effective Tax Systems,* A Report to the G20 Development Working Group, OECD, Paris, (2011), p. 32.

[608] See Hekelberg Lukas, Coercion in International Tax Cooperation: Identifying the Prerequisite for Sanction Threat by Great Power, *Review of International Political Economy*, (2016), pp. 511 - 12; See also, Zucman G, Taxing Across Borders: Tracking Personal Wealth and Corporate Profits, *The Journal of Economic Perspectives,* (2014), pp. 121 - 48.

[609] See Africa Progress Panel, Equity in Extractives Stewarding Africa's Natural Resources for All, (2013), p. 65. It is estimated that African continent lost USD38 billion between 2008 - 2010 caused by mispricing.

In order to regulate and control the above arrangements, it requires an international cooperation between the host and home states. The envisaged cooperation is amenable by setting the minimum agreed standards and prescribe their respective scope built around a genuine exchange and sharing of information between the parties. To date, there is no comprehensive international body which establishes the international global standards on cooperation among tax authorities, instead, there are bilateral and multilateral agreements on exchange of and sharing of information based on regional economic blocs.

6.3.3.1 OECD Model Bilateral and Multilateral on Tax Information Exchange Agreements

As capital becomes more mobile, developing countries and in particular natural the resources dependent states, apart from the domestic challenges, face the addition of international challenges. These challenges include the effective taxation of multinational extractive companies, the creation of an effective transfer pricing regime, establishing and using information sharing arrangement to obtain the tax information of their taxpayers from other jurisdictions, and managing the tax incentives for international investments.[610] It is stated that the developing countries are not fulfilling their tax potential. For instance, Sub Sahara African states mobilise less than 17% of their GDP through tax revenues which is far below the minimum level of 20% considered by the United Nations as a minimum threshold to achieve the Millennium Development Goals (MDGs).[611] To address these challenges, tax authorities must rely on the international cooperation for the implementation of the international standards on transparency and exchange of tax information. The transparency and exchange

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[610] Illicit Financial Flows from Developing Countries: Measuring OECD Responses, *Organisation for Economic Cooperation and Development (OECD),* (2014), p. 57.

[611] Illicit Financial Flows from Developing Countries: Measuring OECD Responses, *Organisation for Economic Cooperation and Development (OECD),* (2014), p. 57; See also IMF, OECD, UN and World Bank, *Supporting the Development of More Effective Tax Systems,* A Report to the G20 Development Working Group, OECD, Paris, (2011) p.8; What Will It Take To Achieve the Millennium Development Goals? An International Assessment, UNDP, June 2010, p. 26.

of tax information is a key to ensuring that the corporate and individual taxpayers have no safe haven to hide their respective tax obligations.

The international efforts adopted to address these challenges include the Global Forum on Transparency and Exchange of Information for Tax purposes and bilateral and multilateral agreements between the OECD member states and developing countries. Through these initiatives, it is envisaged that, in order to combat the international tax evasion, avoidance and systematic aggressive tax planning, the tax authorities should give one another unreserved commitment. The commitment can be manifested by giving unrestricted access to and exchange of relevant information with regards to the individuals and extractive companies activities, assets, income and their respective tax obligation paid in a foreign jurisdiction. The envisaged cooperation between states on the exchange of information for tax purposes does not only assist states to enforce the tax laws but also assist developing countries' tax administrations in identifying the potential cases for investigation and help to generate information to respond to the global tax threats and the international aggressive tax schemes.[612]

6.3.3.2 Global Forum on Transparency and Exchange of Information for Tax Purposes

The Global Forum is a multilateral framework in the context of OECD frameworks biding to establish a forum to address the risks of tax administration and compliance posed by the non compliant states. The Global Forum has 147 member states.[613] It establishes standards committed to implementing transparency and the exchange of information for tax purposes by OECD countries and other jurisdictions. The standards are of two types namely, the standards on exchange of information on request (EOIR) and automatic

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[612] IMF, OECD, UN and World Bank, *Supporting the Development of More Effective Tax Systems,* A Report to the G20 Development Working Group, OECD, Paris, (2011) p.32.

[613] http://www.oecd.org/tax/transparency/about-the-global-forum/members/ (accessed on 20th December 2017).

exchange of information (AEOI). These standards are drawn from the OECD Model Agreement on Exchange of Information on Tax Matters 2002 and its commentaries and article 26 of the OECD Model of Tax Convention on Income and Capital as updated in 2012.[614]

As stated above, the Global Forum provides the benchmark criteria for carrying out the international standards on exchange of information for tax purpose which has to be complied with by the implementing states. Firstly, each implementing states must ensure that there is an availability of the reliable, adequate, accurate and up to date information on the identity of legal and beneficial owners of relevant entities[615] and any other arrangement is available to the competent authority in a timely manner. Also, the information about the identity of the legal and beneficial owners is complimented by the availability of a properly kept and up to date accounting records and bank information of each individual or entity.[616] The competent authority complies with the above requirement if it can demonstrate possessing the accounting documentation in respect of an entity such as invoices, contract with its correct income and expenditure. As for bank information, the competent authority should possess information pertaining to the accounts as well as the financial transactional information including the beneficial owners of the accounts.

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[614] Global Forum on Transparency and Exchange of Information for Tax Purposes, Exchange of Information on Request, Handbook for Peer Reviews 2016 - 2020, , OECD, (2016), .p. 4.

[615] The term Relevant Entities and Arrangements includes: a company, foundation, Anstalt and any similar structure, a partnership or other body of persons, a trust or similar arrangement, a collective investment fund or scheme, any person holding assets in a fiduciary capacity and any other entity or arrangement deemed relevant in the case of the specific jurisdiction assessed.

[616] 8 Financial Action Task Force (FATF) defines the term “beneficial owner” as the natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement. Reference to ultimate ownership or control and ultimate effective control refer to situations in which ownership/control is exercised through a chain of ownership or by means of control other than direct control.

Secondly, each member state has a reciprocal right and duty to obtain and provide information that is subject of a request under the exchange of information agreement relating to entities under other jurisdiction. These include information held by the banks and other financial institutions as well as information relative to the ownership of particular entities' interest holders. The member states cannot invoke their own internal restrictive rules, for instance, the bank secrecy rules, and decline to furnish the information requested by another jurisdiction, among others.

Thirdly, each member state undertakes to provide an effective mechanism for the exchange of information and maintain the confidentiality at the highest level. The requested information should only be made accessible to the requesting competent persons and authorities and should be used for the purpose upon which the requesting state specified in the requesting documents unless otherwise agreed between the parties and in accordance with their respective laws.[617] In addition, the exchange of information mechanisms envisages respecting the rights of the taxpayers and third parties respectively. For instance, the requested state should not disclose information which divulges the trade, business, industrial, commercial or professional secrets.[618] The envisaged mechanism should be derived from a double taxation agreement or the tax information exchange agreements and/or domestic laws.[619]

The Global Forum is committed to implementing the agreed standards on transparency and the exchange of tax information through a rigorous Peer

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[617] See Article 8 of OECD Model on Tax Information Exchange Agreement, and Articles 26 (2) of both OECD Model Tax Convention on Income and on Capital as updated in 2012 and United Nations Model Double Taxation Convention between Developed and Developing Countries (The UN Model Convention).

[618] See Articles 26 (3)(b) of both OECD and United Nations Model Tax Conventions and Article 7 of the OECD Model on Tax Information Exchange Agreement.

[619] See Article 26 of the OECD Model Convention and paragraph 15 of its Commentary; See also Article 1 of the OECD Model on Tax Information Exchange Agreement, paragraph 5.4 of the Revised Commentary (2008).

Review process. The process takes place in two phases. Phase one envisages reviewing of the legal and regulatory frameworks of each implementing state, and assesses the extent to which it accommodates the agreed standards.[620] Phase two examines the actual implementation of the established legal and regulatory frameworks in practice. The efficacy of the Peer Review process stems from the fact that since its inception, as of 2016, 122 jurisdictions were assessed on whether or not they comply with the Global Forum standards. It is argued, for instance, from 2005 to 2013 out of 458 exchange of information agreements signed between the developed and developing countries, 360 agreements which are equivalent to 78% were compliant to the Global Forum standards.[621]

In addition, the review process issues both formal and informal recommendations which, in turn, help to stimulate dialogue within peer jurisdictions and influence decision how best can the standards be implemented in the domestic system through strengthening the legal and regulatory frameworks. Also, for new jurisdictions joining the Global Forum such as Tanzania, Niger, Ivory Coast, and Papua New Guinea have been afforded the opportunity to benefit from the technical assistance in order to reform their legal and regulatory frameworks in line with the Global Forum standards.[622] It is to be noted that the United Republic of Tanzania is one of the new implementing jurisdictions, it has expressed her implementation commitment and the first peer review on the exchange of information on request (EIOR) is scheduled for 2019.[623]

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[620] See article 10 of the OECD Model of Tax Information Exchange Agreements.

[621] Exchange of Information on Request, Handbook for Peer Reviews 2016 - 2020, Global Forum on Transparency and Exchange of Information for Tax Purposes, OECD, (2016), p. 11.

[622] Global Forum on Transparency and Exchange of Information for Tax Purposes, 2016 - 2020 Schedule of Reviews, OECD, (accessed on 20th December 2017), p.3. http://www.oecd.org/tax/transparency/about-the-globalforum/publications/schedule-of-reviews.pdf (accessed on 9th January 2018)

[623] The officials from the Tanzania Revenue Authority noted that since joining Global Forum in 2015, policy and legislative reform measures are underway to give effect to the Global Forum standards before the first Peer Review scheduled for 2019; See also Global Forum's Plan for

6.3.3.3 The Efficacy of the Global Forum on Exchange of Information for Tax Purposes

As stated in the preceding part of this chapter, one of the challenges facing developing countries is capacity constraint in the administration and enforcement of tax laws. The Global Forum has created an international platform through which jurisdictions implementing the Global Forum standards on exchange of information for tax purposes get an access and exchange information regarding foreign accounts of their resident's persons in other jurisdiction which would otherwise not be available and assisting them to hide assets and income abroad.

One of the commendable achievements of implementing the Global Forum standards is that there have been positive responses from the stakeholders to the extent that the level of individual voluntary compliance has risen beyond the expectation even before the commencement of the actual implementation of the standards. For instance, it was reported that more than 500,000 individual entities voluntarily disclosed their offshore assets worldwide. The voluntary disclosure of assets assisted in the collection of an additional tax revenue to the tune of 85 billion euros across the implementing jurisdictions.[624] It has also been revealed that the reports in respect of foreign accounts of entities have been shared in various implementing jurisdictions which confirm that the Global Forum complements and mutually reinforces great transparency.

Action for Developing Countries Participation in Automatic Exchange of Tax Information (AEOI),OECD, November 2017. p. 4. available at http://www.oecd.org/tax/transparency/plan-of-action-AEOI-and-developing-countries.pdf (accessed on 11th January 2018).

[624] See Global Forum's Plan for Action for Developing Countries Participation in Automatic Exchange of Tax Information (AEOI),OECD, November (2017). p. 5. available at http://www.oecd.org/tax/transparency/plan-of-action-AEOI-and-developing-countries.pdf (accessed on 11th January 2018).

6.3.3.4 Challenges of Implementation of the Global Forum on Exchange of Tax Information

The implementation of the Global Forum standards such as the exchange of information on request (EOIR) and the automatic exchange of information (AEOI) require transposition of these standards into domestic laws. It can be complemented by the creation of the institutional and administrative infrastructures for carrying out the exchange of information agreements. Also, the most important aspect worth protection while implementing the Global Forum standards is the maintenance of confidentiality of taxpayers' data. To create the above infrastructures require intensive and upfront financial investments.

While the above challenge is seemingly crippling the efforts of the developing country to fully implement the exchange of tax information standards, lack of the political will is another obstacle which drags back the implementation of the Global forum standards. This is, in particular, even where there is technical assistance advanced to create an enabling environment for the exchange of tax information, t without a firm political will of the jurisdiction in question, the efforts would be rendered nugatory. In addition, even if the tax administration officials understand the importance of the exchange of tax information in enhancing the enforcement of the tax laws, the spinning force to move the agenda forward would be how does that agenda echo in the political arena of the state in question. It is opined that for the effective implementation of the exchange of tax information, each jurisdiction is expected to devote adequate resources and put in place necessary infrastructures for the proper implementation and the exchange of tax information.

6.3.3.5 EU Council Directives 2011/16/EU on Administrative Cooperation in the Field of Taxation

The Directive was adopted as a substitute for Directive 77/799/EEC to address the growing concerns among the member states regarding the development of mobility of the taxpayers, increased number of cross-border transactions, and

internationalisation of financial instruments. These concerns make it difficult for the member states to fairly assess the taxpayers' tax obligations. It is estimated that within the European Union member states, around 1 trillion euros of the tax revenue are lost each year as the results of tax avoidance, tax evasion, and aggressive tax plan thereby constituting a threat for business survival and fair competition.[625] The effect of these concerns lead to double taxation as each member state asserted jurisdiction irrespective of whether the tax in question was paid elsewhere but within the EU member states. The double taxation created other challenges such tax fraud and tax evasion which, in turn, reduced the revenue of the member states. Due to these challenges, the member states could not single-handedly manage their internal taxation system without receiving information from other member states.[626]

Accordingly, the Directive envisages an exchange of information by the member states relating to taxpayers within their respective jurisdictions. Thus, exchange of information on request (EIOR) and automatic exchange of information(AEOI) were introduced by the Directive.[627] The exchange of information on request is applicable at the instance of the requesting authority whereby the requested authority[628] furnishes the tax information of a taxpayer as specified in the requesting documents. The Directive prescribes six months as the maximum period within which the requested information must be made available to the

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[625] Bazantova Ilona, The Measures Against Tax Heavens and Unfair Tax Competition*, European Journal of Law and Political Science*, (2015), pp. 98 - 99.

[626] See Paragraphs 1 and 2 of the Preamble to the Directives 2011/16/EU on Administrative Cooperation in the Field of Taxation dated 16th December 2011, Official Journal of the European Union.

[627] See article 5 and 8 of the Directives 2011/16/EU on Administrative Cooperation in the Field of Taxation dated 16th December 2011, Official Journal of the European Union.

[628] See article 3 (1) of the Directives 2011/16/EU on Administrative Cooperation in the Field of Taxation dated 16th December 2011, Official Journal of the European Union. Competent authority of a Member State is defined as the authority which has been designated as such by that Member State. When acting pursuant to this Directive, the central liaison office, a liaison department or a competent official shall also be deemed to be competent authorities by delegation.

requesting state. The category of taxes envisaged cover all taxes of any kind levied by the member states with exception of the value added tax (VAT), customs duties, and excise duties which are essentially covered by other union legislation. [629]

Unlike the exchange of information on request which is essentially triggered by a request, automatic exchange of information bestows an obligation to each competent authority of the member states to communicate on regular basis information regarding tax obligations of a resident of another state within the precinct of its tax jurisdiction. The scope of the category of taxes covered includes the information on income from employment, director's fees, life insurance products, pensions, ownership, and, income from immovable property.[630] In a bid to commanding compliance, the Directive requires each member state to lodge to the Commission on an annual basis a report containing statistics on the volume of automatic exchange of information to the extent possible and set 1st of July 2016 as the due date. Thereafter the Commission shall submit a report to the Council regarding an overview assessment of the statistics and information received and any administrative issues related to the automatic exchange of information and any political challenges thereto. [631]

In a bid to widening up the scope of cooperation, article 19 of the Directive allows a member state to cooperate with a third party state through concluding a bilateral or multilateral agreement(s) with a view to implementing the provisions of the Directive. In fact, the Directive goes further by encouraging member states wishing to widen cooperation with third parties to do so provided that the information obtained from the third party on request shall, equally, be shared by

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[629] See article 5 and 7 (1) of the Directives 2011/16/EU on Administrative Cooperation in the Field of Taxation dated 16th December 2011 Official Journal of the European Union.

[630] See article 8(1) of the Directives 2011/16/EU on Administrative Cooperation in the Field of Taxation dated 16th December 2011 Official Journal of the European Union.

[631] See article 8(4) and (5) of the Directive 2011/16/EU on Administrative Cooperation in the Field of Taxation dated 16th December 2011 Official Journal of the European Union.

other EU member states unreservedly. However, it was noted that conclusion of the parallel and uncoordinated agreements by the member states with the third parties could distort the smooth functioning of the internal market. In addition, the implementation of article 19 of the Directive would lead to a breach of bilateral or multilateral treaty clause(s) on confidentiality if the information obtained through their respective arrangement is shared to the third party.

6.3.3.6 Council Directive 2014/107/EU amending Directive 2011/16/EU as regards Mandatory Exchange of Information in the Field of Taxation

Notwithstanding the Directive 2011/16/EU, the challenges posed by the cross-border tax fraud and tax evasion increased considerably becoming one of the topical issues in European Union and international fora. To address these challenges, the EU had to align its efforts along with other international efforts such as the OECD Global Forum on exchange of information for tax purpose and United States Foreign Account Tax Compliance Act (FATCA) 2010[632] for the purposes of combating tax fraud, tax evasion and aggressive tax planning, among others.[633] The Directive envisaged widening of the scope of automatic exchange of information within the Union in line with the international developments in order to save costs and other administrative burdens for the tax administrators.

Accordingly, the Directive requires the financial institutions of the member states to implement the reporting and due diligence rules which are consistent with those set out by the OECD Common Reporting Standards.[634] The new

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[632] Foreign Account Tax Compliance Act is an act representing US Internal Revenue Code of 1986 (IRC), chapter 4 and was introduced as an amendment of 18 March 2010, enacted as Title V of Public Law 111-147 or the Hiring Incentives to Restore Employment (HIRE) Act.

[633] Para 3 of the Directives 2014/107/EU preamble amending Directive 2011/16/EU as regards Mandatory Exchange of Information in the Field of Taxation on 9th December 2014, Official Journal of the European Union.

[634] See OECD (2018), Standard for Automatic Exchange of Financial Information in Tax Matters - Implementation Handbook - Second Edition, OECD, Paris. http://www.oecd.org/tax/exchange-of-

requirement is meant to limit the opportunities for taxpayers to avoid being reported by shifting their assets to the financial institutions or investing in financial institutions products which are outside the scope of the Directive. Thus, divulging information under the Directive is necessary for the purposes of enabling the member states' tax administrations to identify eligible taxes and their respective taxpayers correctly. While under the Directive 2011/16/EU the mandate to report was imposed on the competent authorities designated as such by the member states, the current Directive, the mandate to report financial information of a reportable taxable person is, in addition, imposed on a resident financial institution in a member state. [635]

6.3.3.7 Strengthening Internal Domestic Measures to Address Policy and Legislative Challenges

Having taken a leaf from the experiences of the various multilateral cooperation on the exchange of tax information above, the effective tax administration system cannot be self-sustained without legal and administrative cooperation. Similarly, for the effective administration of the tax laws to address tax avoidance, tax evasion, and aggressive tax planning in Tanzania, there is a need to bridge both the internal and external legislative measures. The Income Tax Act 2004,[636] in particular, section 128(1) and (6) provides for an international cooperation between the United Republic of Tanzania and another competent authority which is governed by the international agreement to which Tanzania is a party. The envisaged cooperation is in two folds; firstly, the reciprocal administrative assistance for collection in the United Republic of Tanzania an amount of tax

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tax-information/implementation-handbook-standard-for-automatic-exchange-offinancial-account-information-in-tax-matters.htm (accessed on 6th April 2018).

[635] See Section VII(A) No. 3 Annex 1 of the Directive 2014/107/EU amending Directive 2011/16/EU as regards Mandatory Exchange of Information in the Field of Taxation on 9th December 2014, Official Journal of the European Union. The Financial Institutions envisaged include depository institutions, custodial institutions, investment entities, and specified insurance companies.

[636] See the Income Tax Act No. 11 of 2004.

payable by the taxable person under the laws of the other country. Secondly, relief of double taxation and prevention of fiscal evasion. However, the level of international cooperation between the United Republic of Tanzania and other countries is minimal at the moment.[637] Even for the existing international treaties, they are outdated and do not address the current emerging realities in the extractive industry. While external measures can be one of the solutions to address the problem, these measures will not adequately address the problem if, for instance, the house is not in order.

The government should proactively engage and reform its policy and legislative measures to address the contemporary emerging challenges related to tax avoidance, tax evasion and aggressive tax planning in the extractive industry. For instance, in addressing tax avoidance, Tanzania Revenue Authority (TRA) officials should be equipped to understand the laws and their respective loopholes which can be schemed to stage the tax avoidance transactions. Thus, the intensive training of TRA staffs, exchange programmes, internships within and outside the country are no longer an option rather a necessity. As noted in the previous part of the study, operations in extractive industries are so dynamic. For instance, the loophole, say in the production sharing agreement in respect of the fiscal regime used today will not be the same throughout the lifespan of the contract. Therefore, there is a need for the competent persons who can easily pace the dynamics.

In addition, a periodic review of the incentives granted to the extractive companies is vital since the very incentives could be a scheme for tax avoidance. A tax incentive is an investment tool used to attract the foreign investment in the high-risk and the capital-intensive investments like the oil and gas industry. The

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[637] Tanzania has entered into the Income and Capital Tax Treaty with 10 countries namely; Canada (1965), Denmark (1976), Finland (1976), India (1979), Italy (1973), Norway (1976), South Africa (2005), Sweden (1976), Switzerland (1963), and Zambia (1968). For more information about these treaties visit http://www.tra.go.tz/index.php/double-taxation-agreements (accessed on 6th April 2018).

government should grant incentives to the extractive companies for a specified period and/or in phases. This will help the government to make an assessment. on whether the incentives granted serve the purposes upon which they were granted. [638] For instance, the exemption of import duties for machines and equipment should be requested under supervision and monitoring of designated TRA officials. The role of the designated officials is to vet and certify the actual need of procuring the machines and equipment in question unlike now where decision are not vetted. The vetting and certification mechanisms will not only control the granted incentives, but also address the potential abuse of the incentives by extractive companies.

With regards to tax evasion, it is argued that severe punishment should be imposed on extractive companies and individuals found guilty of tax evasion. The said punishment is in two folds. Firstly, apart from the fines, penalties, and sentences imposed to the extractive companies and individuals respectively,[639] the government should, in addition, blacklist the guilty companies and publish their names in public and such information be shared with other partner states. In addition, the government should monitor and where necessary conduct due diligence of the extractive companies in respect of their overall conduct in other jurisdictions before commencing the operations in Tanzania. Secondly, tax evasion in extractive industries is a scheme between the extractive companies and the government officials. As such, all government officials who are found guilty of aiding or abating, apart from their respective jail sentences, should be named and shamed in public and blacklisted for the employment in the public

[638] For instance, section 6 (1) and the schedule of the Value Added Tax Act No. 5 of 2014 provides the list of exemptions for oil and gas industry. The exemptions include, An import of CNG plants equipments, natural gas pipes, transportation and distribution pipes, CNG storage cascades, CNG special transportation vehicles, natural gas metering equipments, CNG refueling of filling, gas receiving units, flare gas system, condensate tanks and leading facility, system piping and pipe rack, condensate stabilizer by a natural gas distributor.

[639] See sections 83 (a) and (b) and 88 (1) and (2) of the Tax Administration Act, No. 10 of 2015 provides for the offence of failure to pay income tax and prescribe the penalties and sentences for individuals and entities respectively.

services. Also, any monies received as inducement should be confiscated by the government.

However, of late, the government stance against tax evasion has taken new form following the Acacia Mining PLC tax bill. On 25th July 2017, TRA served Acacia Mining PLC with a tax bill of USD190 billion alleged to have been taxes evaded for 17 years (2000 - 2017).[640] The tax bill was preceded by an earlier ban on the exportation of gold concentrates alleged to have been under-declared by the company which was unveiled by the Presidential Probe Committee Report. However, the report has never been shared to the general public, it suffices to state that the manner in which the government handled the matter is quite unprecedented. It is unprecedented because the government negotiated the tax bill with the "tax evader" and by-passed the court process. Once the tax bill was served, the Acacia mining disputed the bill and engaged the government through negotiation and held several negotiation sessions. It was later revealed that both parties reach preliminary settlement terms of which have not been shared with the general public.[641]

In order to benefit from the international cooperation on the exchange of tax information, the government should, apart from addressing the pitfalls noted above, establish a platform for the automatic exchange of information between TRA and local financial institutions. As of now, the exchange of information

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[640] See Allan Olingo, Tanzania Slaps Acacia Mining with $190 Billion Tax Bill, *The EastAfrican*, July 25 2017. available at http://www.theeastafrican.co.ke/news/Tanzania-slaps-Acacia-with--190-billion-tax-bill/2558-4030984-35toyqz/index.html (accessed on 7th April 2018); $190 bn Tax Bill on Acacia 'May Hurt Tanzania' *The Citizen*, 'Thursday 27th July 2017. available at http://www.thecitizen.co.tz/News/-190bn-tax-bill-on-Acacia--may-hurt-Tanzania-/1840340-4033796-10o0t1a/index.html (accessed on 7th April 2018).

[641] Barrik and Tanzania Reach an Agreement over Acacia Tax Row, *Tanzania Invest*, October 20th 2017, available at https://www.tanzaniainvest.com/mining/barrick-acacia-tax-row-deal (accessed on 7th March 2018), According to the deal, Acacia will make a payment of USD 300 million to the Government of Tanzania to assist in resolving the outstanding tax claims of USD 190 billion for Acacia allegedly under-reported amounts of gold exports. Overall, the Government's share of economic benefits would be delivered in the form of royalties, taxes, and a 16% free carry interest in the Tanzanian operations.

between these institutions is possible on request where there is a court order directing the financial institutions to divulge certain taxpayers information as evidence in the court proceedings or the court attachment order of taxpayer's bank account and remit a specified amount of money to TRA for settling the tax liabilities.[642] Since the financial institutions are in better position to conduct due diligence of their customers and monitor their transactions, automatic exchange of taxpayer's information will be a remarkable achievement and reciprocate the multilateral cooperation's' efforts. In this endeavour, TRA's International Tax Unit should be strengthened through capacity building to address transfer pricing arrangements in the extractive industries.

6.3.4 Promotion of Multilateral Financial Institutions Performance Standards on Social and Environmental Sustainability

As noted in various part of the study, the extraction of natural resources has set of different contending interests involved. The host states look forward to generating the income to cater for the basics while the multinational extractive companies and financial institutions are, equally, looking forward to making a huge profit as far as possible. Apart from the obligations imposed on the multinational extractive companies' compliance with the domestic and international environmental law standards, the international financial institutions have a role to play to ensuring that the extraction of natural resources goes apace with the environmental conservation and sustainable use of natural resources without which financial resources injected in the extraction of natural resources cannot be recouped.

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[642] See section 48 (4) and (5) of the Banking and Financial Institutions Act, No. 5 of 2006; Sections 138(1) (a) and (d), and 139 (1) (a) - (c) of the Income Tax Act, No. 11 of 2004.

Accordingly, the World Bank Group (WBG) through its affiliates[643] has devised the specific policy of performance standards in the oil and gas industry. The effort is partly aimed at addressing a lack of international comprehensive policy and the law governing the environmental conservation and sustainable exploitation of natural resources in oil and gas industry. The policy enjoins its member states who are the beneficiaries of economic projects funded by the WBG to devise policies that foster environmental conservation in the course of embarking on natural resources extraction ventures. The WBG is mindful of the fact that without the conducive environmental conditions, the funded project would be in jeopardy and thus become unsustainable.[644] Therefore, the WBG has created synergy between the changing needs of its members and the funded development projects and align them with the prevailing economic and social conditions.

To implement the WBG policy standards, the International Finance Corporation (IFC) and Multilateral Investments Guarantee Agency (MIGA) adopted policy standards which provide, among others, before deciding whether or not to fund the investment projects, they will consider the political, financial and reputational risks as well as the risks posed to the environment.[645] In addition, the World Bank has adopted a sustainable development policy which is aimed at improving the

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[643] The World Bank Group comprises of The International Bank for Reconstruction and Development (IBRD) now the International Monetary Fund (IMF), The International Development Association (IDA), the International Finance Corporation (IFC), The International Centre for Settlement of Investments Disputes (ICSID), and Multilateral Investment Guarantee Agency (MIGA).

[644] Oshinebo Evaristus, World Bank and Sustainable Development of Natural Resources in Developing Countries, *27 Journal of Energy and Natural Resources Law*, 2 (2009), pp. 197 - 8; see also Shihata Ibrahim F.I., Human Rights, Development and International Financial Institution, *American Journal of International Law and Policy,* (1992), pp. 31- 33.

[645]International Finance Corporation's Policy on Social and Environmental Sustainability 1st January, 2012, in particular see Performance Standard 1 on the Assessment and Management of Environmental and Social Risks and Impacts available at http://www.ifc.org/wps/wcm/connect/c8f524004a73daeca09afdf998895a12/IFC_Performance_Standards.pdf?MOD=AJPERES (accessed on 5th August, 2016); See also Multilateral Investment Guarantee Agency's Policy on Social and Environmental Sustainability (1 October 2007), available at https://www.miga.org/documents/environ_social_review_021507.pdf (accessed on 5th August 2016).

quality of life of the people through integrating the exploitation of natural resources as a requisite for economic development and protection of regional and global natural resources commons.[646] In fact, the World Bank believes that economic development is inextricably linked with the improvement of environmental practices.

Furthermore, the World Bank requires the prospective borrowers and clients to the projects to be funded to be in a manner that avoids, mitigates or minimises the adverse environmental and social impacts.[647] To ensure that projects are environmentally conscious and sustainable, the World Bank policies require the prospective borrower to undertake the environmental impact assessment of the projects taking into account issues such as biodiversity conservation among others.[648] Apart from conducting an environmental impact assessment, prospective borrowers are enjoined to put in place environmental social management system with project's risks and impacts including monitoring and reporting procedures.[649]

The World Bank initiatives are indeed commendable in so far as articulating policies and performance standards which can foster the sustainable development along with the environmental conservation in the oil and gas industry. However, the critics cast doubts over the compliance level by the borrowers and the clients of the World Bank implementing these policy standards. The borrower may, for instance, indicate to comply with the policies

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[646] World Bank, *Making Sustainable Commitments: An Environmental Strategy for the World Bank* (Washington, DC: World Bank, (2001), pp. 46 - 47.

[647] Oshinebo Evaristus, World Bank and Sustainable Development of Natural Resources in Developing Countries, (2009), p. 201.

[648] See para. 4.0 of World Bank, *Making Sustainable Commitments: An Environmental Strategy for the World Bank* (Washington, DC: World Bank, (2001).

[649]International Finance Corporation's Policy on Social and Environmental Sustainability 1st January, 2012, Performance Standard 1 on Assessment and Management of Environmental and Social Risks and Impacts paragraphs. 30 - 36.

before the release of funding and change afterward with impunity. It was noted that there are some clear violations of the World Bank's policy standards thus water down her enthusiastic drive towards its zeal to promote the natural resources conservation for sustainable development. For instance, the West African Gas Pipeline Project and the Chad-Cameroon Petroleum Development and Pipeline Projects[650] were on record in violations of the WBG safeguards policies such as environmental degradation involuntary displacement of communities around the project areas.[651]

Apart from the WBG initiatives, there are voluntary sustainable development initiatives specifically regulating oil and gas industry worth a mention. The Global Oil and Gas Industry Association for Environmental and Social Issues (IPEACA) and International Association of Oil and Gas Producers (IOGP) established as the voluntary forums for discussion, deliberation on emerging challenges and act as centres for shared knowledge in oil and gas industry. The former comprised of the companies and other stakeholders engaged in the oil and gas industry while the latter, oil-producing states, and other important stakeholders. As noted above, the two initiatives were established separately, however, of late, they have joint collaboration in issues related to addressing sustainability of the environment, health, and safety, climate change and diversification on the use of new energy and communities participation in oil and gas industry. One of their

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[650] For instance, violation of World Bank policy safeguards was apparently witnessed in two recent projects funded by the WBG, namely, The West African Gas Pipeline Project (WAGPP) a company jointly owned by Shell, Chevron, Nigerian National Petroleum Corporation, Volta River Authority of Ghana, *Société Beninoisede GazSA* of Benin Republic and *SociétéTogolaise de GazSA* of Togo where WBG was involved in the project as funders. Chad-Cameroon Petroleum Development and Pipeline Project is jointly financed by the International Finance Corporation (IFC), IBRD, International Development Association (IDA) and the European Investment Bank acting in partnership with ExxonMobil (Esso), Chevron and Petronas Corporation of Malaysia.

[651] See World Bank Inspection Panel, Investigation Report- Ghana: West Africa Gas Project at p.27 available at http://documents.worldbank.org/curated/en/664021468003035202/pdf/367910GH0INSP1R20061 0004.pdf (accessed on 9th August, 2016); For Chad-Cameroon Project see World Bank, *Project Appraisal Document,* Report No: 19343 AFR (13 April 2000) pp.132-35.

recent publications is in Oil and Gas Industry Guidance on Voluntary Sustainability Reporting, 2015.[652]

6.4 Conclusion

The foregoing discussion notes that in order to benefit from the international natural resources legislative norms which, in turn, enhance intrastate natural resources governance, there is a pertinent need to address the legislative pitfalls noted in respect of the application of international laws generally and, in particular, customary international laws in the United Republic of Tanzania. This will, apart from addressing intrastate natural resource governance, help to benefit from the contemporary development in the international law norms on natural resource governance.

In order to have the effective intrastate natural resource governance, the concerted international cooperation between states cannot be overlooked. This stem from the fact that the extraction of natural resources brings together people with diverse interests, namely; host states, multinational extractive companies, international financial institutions. Whereas the host states would like as much as possible to generate sufficient income from their natural resources, multinational companies, and international financial institutions will be equally, looking forward to generating profit out of these high-risked and intensive capital investments. In order to balance these contending interests and for the sustainability of natural resource governance generally and, in particular, oil and gas industry the concerted international cooperation in respect of transparency, accountability, fighting corruption along the resource value chain, exchange and sharing of information in the field of taxation is highly recommended.

Equally, for a sustainable exploitation of natural resources, environment-related issues cannot be overlooked. The extraction of natural resources has impacts on

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[652]See http://www.ipieca.org/publication/oil-and-gas-industry-guidance-voluntary-sustainability-reporting-3rd-edition

the environment in which it is carried on. Thus the concerted legal frameworks should be put in place by all stakeholders involved in order to mitigate the potential impacts to the environment. While appreciating international environmental legislative frameworks, its effective implementation can be carried out, if as noted above, all stakeholders have put in place environmental conservation frameworks. However, the above international legislative measures cannot work effectively if, for instance, the host states domestic measures are not strengthened. This is because the international legislative measures come to compliment the host states domestic measures in a bid to address intrastate natural resource governance.

CHAPTER SEVEN

GENERAL CONCLUSION

The study commences by tracing the development of the principle of permanent sovereignty over natural resources as the basic foundation for interstate natural resource governance. The study was based on two legal premises. The first one is that the role of international law in intrastate natural resource governance in the resource-rich states generally, and Tanzania in particular, is decisive. However, the contemporary approaches of the international and transnational legislative initiatives in intrastate natural resource governance are narrowed. This is because they focus much on the revenue inflow and inadvertently ignore other aspects along the resource value chain like granting of the exploration licences, the award of the contracts and its respective fiscal regime, environmental conservation and the sustainable utilisation of natural resources, among others. The second premise is that inadequate, policy, legal, institutional and regulatory frameworks without a clear coordination and harmonisation have adversely accounted for the poor intrastate natural resource governance in the oil and gas industry in Tanzania.

The study was guided by one general objective and three specific objectives. The general objective of the study was to assess the role of international law in intrastate natural resource governance, in particular the extent to which it can complement the existing intrastate policy, legal, institutional, and regulatory frameworks. The first specific objective was to assess the legal and contractual relationship between the multinational extractive companies and the government of the United Republic of Tanzania and the extent to which their respective interests adversely affect the performance of the natural resources sector contribution to the economy of the state.

The second specific objective was to examine the policy, legal, institutional and regulatory frameworks of natural resources governance and identify their respective strengths and weaknesses which have direct impacts on natural

resource governance and to propose general and specific legal reforms aimed at enhancing the oil and gas industry governance. The third specific objective was to explore how best the natural resources can be exploited in an economical and environmentally friendly manner that benefits the people as a whole and in particular the local communities where the natural resources are located and guarantee the sustainable development of the present and the future generations. The following are the main conclusions:

The development of the principle of permanent sovereignty over natural resources (PSNR) was aimed to regulate the interstate natural resource governance. Although the principle evolved through unconventional way of making the new international law norms, i.e. through various United Nations General Assembly Resolutions (UNGA-Res), it is recognised as an international law norm on interstate natural resources governance. The principle of PSNR was not concerned with intrastate natural resource governance. However, the principle of PSNR has not attained the status of *jus cogens* as some supporters would want to describe it as such (see section 2.6 *supra*).

The silence of the principle of PSNR with regards to addressing the intrastate natural resource governance called for the revitalisation of international law on intrastate natural resources governance. In a bid to ameliorate the situation and taking into account the contemporary challenges brought by cross-border investments and the mobility of capital, the multinational extractive companies' home states adopted international and transnational legislative measures to enhance intrastate natural resource governance in the host states. The legislative measures adopted include the USA Dodd-Frank Act, the Canadian Extractive Sector Transparency Measures Act, the EU Directive 2013/34/EU on accounting and disclosure, and an international voluntary code i.e., the Extractive Industries Transparency Initiative (EITI). The adopted measures address the intrastate natural resource governance pitfalls from a narrowed revenue inflow perspective. In other words, the legislative measures focus on one aspect of the

transparency and accountability of the payment made by the extractive companies to the host governments (see section 4.3.1 *supra*).

The revenue inflow is one of the aspects of the natural resource governance value chain. However, for the effective natural resource governance and before the revenues start flowing to the host states, there are aspects worth a thorough consideration to complete the intrastate natural resource governance jigsaw puzzle. For instance, the process in which the exploration licences are granted, the terms and conditions of the production sharing agreements, the net value of the appraised oil and gas resources, the financial investment costs, sharing of profit gas or profit oil, taxation regime, investment cost recovery measures, environmental protection, local content, corporate social responsibility, among others, are beyond the scope of the legislative measures adopted. The absence of these aspects within the purview of the adopted measures creates other challenges like tax evasion, tax avoidance through overinflating of the investment costs, corruption which, equally, affects the intrastate natural resource governance. These challenges call for the international cooperation amongst the home state, multinational corporation, international financial institutions, and the host states (see sections 4.3.1; 5.5; and 6.3.*supra*)

The multinational extractive companies operate through offshore subsidiaries incorporated in different jurisdictions. Some of the offshore subsidiaries are incorporated in the tax havens where the access of information is obscured. The extractive companies in the host states procure goods and services from the affiliated offshore companies at the inflated prices so as to shift the income to the offshore subsidiaries and minimise the income which would be liable for various taxes in the host states with impunity. As noted above, the mobility of cross-border capital investments calls for the setting of international rules regulating the activities of the multinational extractive companies in the host states (see sections 4.3.1.5; and 6.3.3 *supra)*.

Equally, the study noted that, apart from the taxation challenges posed by cross-border capital investments, the business relationship between the extractive companies and the host states create a door for cross-border corrupt transactions in the natural resources sector. In fact, the study noted that corruption accounts, by and large, for the poor intrastate natural resource governance in the host states. In order to combat corruption in the intrastate natural resources governance, the study noted a need for a concerted cooperation and sharing of information between the host states and the home states of the multinational extractive companies. (see sections 4.3.2 and 6.3.2 *supra*).

The international voluntary measures adopted by the states to enhance natural resource governance like the Extractive Industries Transparency Initiatives (EITI) and Kimberley Process Certification Scheme (KPCS) address natural resources governance from a single aspect. For instance, the EITI focuses on the revenue transparency while KPCS focuses on the control of illegal and uncertified diamond from entering the international market. Similarly, other adopted regional and sub-regional natural resource governance initiatives are poorly established without coordination and harmonisation. These initiatives include the African Convention on Conservation of Nature and Natural Resources, the International Conference on Great Lake Region (ICGLR) and its respective Protocol on Illegal Exploitation of Natural Resources, the East African Community and its Protocol on Environment and Natural Resources Management (see sections 4.3.3; 4.4; and 4.4.5 *supra*).

The study further noted that the oil and gas production sharing agreements (PSAs) between the Tanzania Petroleum Development Cooperation (TPDC) and the extractive companies create a separate legal and administrative regime. Each PSA creates its own separate regime. The PSAs in force were signed and concluded before the enactment of the Petroleum Act 2015, the Tanzania Extractive Industry (Transparency and Accountability) Act 2015, and the Oil and Gas Revenue Management Act 2015. Thus, there is a parallel and at times an

overlap of the application of both the legal and administrative mandates provided for under the PSAs in force and the newly enacted laws regulating the oil and gas industry. In addition, the enactment of the Natural wealth and resources (Permanent sovereignty) Act of 2017 and the Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act of 2017 further complicated the administration of the oil and gas industry. The two legislation superimposed new dichotomous terms on the existing laws and the PSAs without the harmonisation and coordination. (See sections 5.4; 5.6; and 5.8 *supra*).

The Petroleum Act 2015 and the individual PSA provide for the oil and gas industry health, safety and environmental protection frameworks. However, the study noted that there are great variations among the PSAs examined. In some PSAs the obligation to put in place the environmental protection measure is imposed on the extractive companies while others imposed on TPDC. In addition, the study noted that the health, safety and environmental clauses contained in the individual PSA are not abided by the extractive companies let alone the legal provisions of the Petroleum Act 2015. For instance, the PSA between TPDC and PAET impose a duty to PAET to create environmental rehabilitation and decommission fund but to date, the said fund has not be created with impunity (See section 5.6.2 *supra*).

Annexures

Table 1 Profit Sharing between TPDC and Pan African Energy Tanzania LTD

Average Daily Sales		Cumulative Sales of Additional Gas	Share of Proven Section Profit Gas Revenues (%)	
Million Cubic feet per day (mmcfd)		Billion Cubic Feet (BCF)	TPDC	PAET
0 to 20		0 to 125	75	25
Over 20 but less than or equal to 30	OR	Over 125 but less than or equal to 250	70	30
Over 30 but less than or equal to 40		Over 250 but less than or equal to 375	65	35
Over 40 but less than or equal to 50		Over 375 but less than or equal to 500	60	40
Over 50		Over 500	45	55

Source:
Controller and Auditor General Report on Public Authorities and other Bodies 2015/16, p. 105.

Table 2 on the State of the Environmental Inspection and Compliance

Number of registered oil and gas projects versus inspected projects for the period 2010/11 to 2014/15 as reported by National Environmental Management Council (NEMC)

Year	Number of projects registered	Number of projects inspected
2010	11	NIL
2011	11	NIL
2012	18	NIL
2013	7	NIL
2014	16	2
2015	8	1
Total	71	3

Source: CAG Reports on the Environmental Compliance 2016

Table 3 On Capacity Building in Universities and Vocational Training

Comparison of skills needed and one covered in the Higher Learning Institutions

Professional skills needed by the Oil and natural Gas **industry**	Offered by Learning Institutions(√/X)		Learning Institutions Offering the Course
Petroleum Engineering	√		University of Dar Es Salaam and University of Dodoma
Reservoirs Engineering		X	
Production Engineering	√		University of Dar Es Salaam
Utility Engineering		X	
Natural Gas Technologist Engineering		X	
Mechanical Engineering	√		University of Dar Es Salaam
Process/Chemical Engineering	√		University of Dar Es Salaam
Petroleum Geochemistry	√		University of Dar Es Salaam
Petroleum Geology	√		University of Dodoma University of Dar Es Salaam (MRI/ESIS)
Statistic and Database Manageme nt	√		
Oil and Gas Economics		X	
Oil and Gas Accounting	√		University of Dar Es Salaam

Professional skills needed by the Oil and natural Gas **industry**	Offered by Learning Institutions(√/X)		Learning Institutions Offering the Course
Oil and Gas Auditing	√		University of Dar Es Salaam
Oil and Gas Contract Negotiations		X	
Geophysicist engineering		X	
Subsea engineering		X	
Geology Drilling and well Petro Physics		X	
Mechanical engineering	√		University of Dar Es Salaam
Mechatronics		X	
Electrical engineering	√		University of Dar Es Salaam
Health safety and environment (HSE)		X	
Information technology	√		University of Dar Es Salaam, University of Dodoma
Total	**12**	**10**	

Source: Controller and Auditors General Report, 2017

As seen in **Table 1**, out of 22 professional skills needed by the Oil and natural Gas industry about 10 professional skills equivalent to 45 percent were not included in the higher learning institutions' curricula.

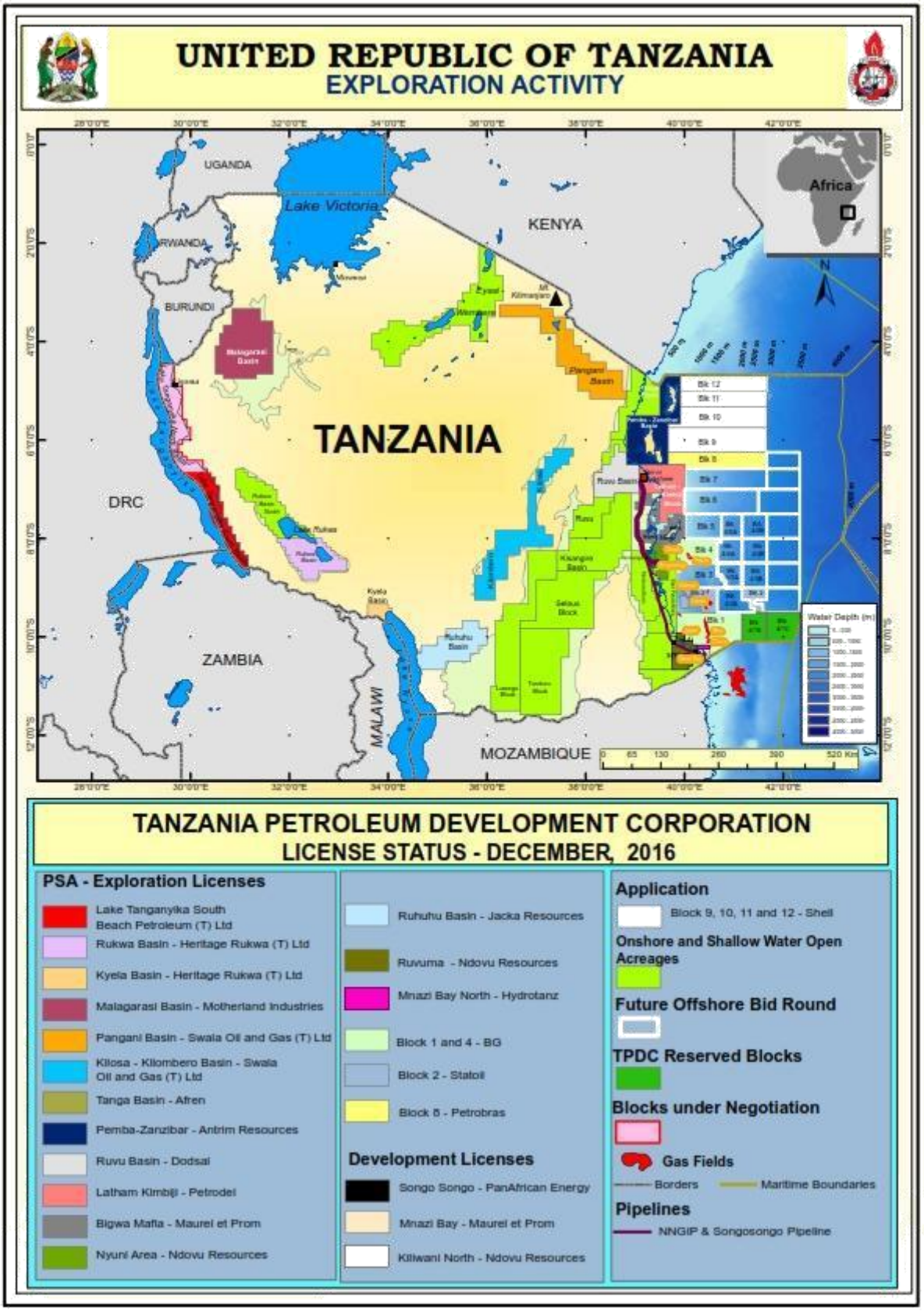
Table 2: Comparison of Technical Skills needed by Oil and natural Gas industry with those covered in the Curricula of the Technical and Vocational Training

Technical and Vocational skills needed by the Oil and natural Gas industry	Offered by Technical /Vocational Training Institutions(√/X)	
Riggers		X
Electrician(Electrician and Electric Trade)	√	
Pipe Fitter		X
Carpenters	√	
Equipment Operator		X
Mobile Crane Operator		X
Concrete Finisher		X
Mechanical Fitter	√	
Sheet metal worker – welder	√	
Industrial Painting	√	
Boiler Maker		X
Scaffolders		X
Insulators (Cryogenic Operators)		X
Oil Drillers		X
Seismic Crew		X
Terminal Operators		X
Total	**5**	**11**

Source: UNCTAD (2012), Extractive Industries: Optimizing Value Retention in host countries

As seen in **Table 3**, out of 16 technical and vocational skills needed by the Oil and natural gas industry, about 11 skills equivalent to 69% were not included in the technical and vocational training curricula.

Map on Tanzania Petroleum Development Corporation Exploration and Licence Status as at 2016



TANZANIA PETROLEUM DEVELOPMENT CORPORATION

SEISMIC SURVEY UNDERTAKEN DURING 2000-2013

AREA	OPERATOR	YEAR	SEISMIC CONTRACTOR	KM. ACQUIRED
Mandawa	Dublin	1999	Polaris Explorer	160
Kisangire	Canop	1999	Polaris Explorer	164.605
Rufiji	Canop	1999	Polaris Explorer	18.750
Deep Sea	WesternGeco	1999/2000	WesternGeco	11,435
Songosongo	PAE	2005	SeaBird Exploration	550
		2009	BGP	9 TZ
Nyuni_E_SSongo	Ndovu/Aminex	2005	SeaBird Exploration	330 Marine
		2006	SeaBird Exploration	435
		2009	BGP	48.275
		2012	Aris	46
Mnazi Bay	Artumas	2005	Grant-Geophysical	400
		2005	Grant-Geophysical	100 marine
		2008	Geokinetics	129
		2008	Geokinetics	14.80
	Maurel&Prom	2012		
Block #1	Ophir	2005	SeaBird Exploration	1,650
		2008	GeoMariner (UPSL)	1,592.025
		2008	GecoDiamond	**610sq.km**
		2010-2011	Fugro GEO BARENTS	**1855sq.km**
		March 2012	Fogro Geo team	**2546sq.km**
Block # 3 & 4	Ophir	2006	GX-Technology	2,663.750
		2008	GeoMariner (UPSL)	2.161.175
		2008	GecoDiamond	**2,950sq.km**
		2010-2011	Furgo Geo Barents	**3500sq.km**
Block # 5 & 6	Petrobras	2006	SeaBird Exploration	5,398.8
		2010	Furgo Geo Barents	**1,700sq.km**
		2012	Polarcus Explorer Green	**1,359sq.km**
Lake Tanganyika South	Beach Petroleum (T) Limited	2012	Fugro Oceansismica S.P.A	2085
Mandawa	Dominion	2006	IMC	325
		2007	Upstream	230
		2008	Upstream	250
Ruvu	Dodsal	2011	Africa Geophysical Survey	718.2
		2012	MV Faraday Vessels	370
		2012		189.9
Kisangire	Dominion	2006	Upstream	175
		2008	Polaris Explorer	190.775
East Pande	Rakgas	2006	SeaBird Exploration	200
		2007	UPSL	115 marine
		2009/2010	UPSL	359.175 TZ
		2010	SeaBird Exploration	1,793 marine
	Ophir	2012	CAR -Geo Caribbean	**2,235 sg.km**
Mtwara & Lindi	Ndovu/Aminex	2007	SeaBird Exploration	334 marine
		2007	BGP	538
Tanga-PembaCh	Petrodel/Afren	2008	Munin Explorer	1,212
		2011	M/V Faraday	751.475
		2011	BGP Challenger	930
		2012	Pacific Explorer	570.533
Kimbiji Offshore	Petrodel	2008	SeaBird Exploration	377.750
Kimbiji Onshore	Heritage	2009	Polaris Explorer	207.850
Latham Offshore	Petrodel	2008	SeaBird Exploration	530.900
		2010	Furgo GEO BARENTS	**655.6sq.km**
Block # 7	Dominion	2007	SeaBird Exploration	4,315
		2010	Furgo GEO BARENTS	**1,235sq.km**
		Feb 3-20-2012	BGP Challenger	**1207.525Sq.km**
Bigwa	Maurel&Prom	2007	Upstream	320
Rufiji Trough,		2008	BGP	550
Rufiji Delta.		2008	BGP	300
Block # 2	Statoil	2008	Furgo	6,184
		2009/2010	BOS Arctic	**1,648sq.km**
Ultra Deep Sea	TPDC	2007	GX-Technology	2,900
		2008	GX-Technology	2,641
		2011	GX-Technology	4645
Mnazibay North	Hydrotanz	25 May - 7June2012	Fugro-Geoteam	**131.297sq.km**

Total **2D** seismic coverage to date: 98155.845 km.
Onshore: 25,875.32 km.
Shelf, Offshore and Inland Lakes: 72280.525 km.
Total **3D** seismic Coverage to date: **21,631.867sq.km** (Deep Sea)

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