

**THE UNIVERSITY OF THE WESTERN CAPE
FACULTY OF LAW**

**LEGAL REFORM OF OIL AND GAS LAW IN
TANZANIA IN RELATION TO FOREIGN DIRECT
INVESTMENT**

**A mini-thesis submitted in partial fulfilment of the
requirements for the award of the Masters of Law
(LLM) Degree in International Trade, Business & Investment
Law in Africa**

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Declaration

I declare that, '**Legal Reform of Oil and Gas Law in Tanzania in Relation to Foreign Direct Investment**' is my own work, has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Joseph Mtebe Tungaraza

Signed:

Professor Patricia Lenaghan

Signed:

Dedication

Fortunatus & Valentina Tungaraza

Acknowledgement

I cannot begin to imagine the possibility of having accomplished this thesis without God, whose grace and providence blessed me beyond measure and gave me the strength to withstand the rigorous demands of academic research. Blessed be His name.

I am also grateful to Prof. Riekie Wandrag, for the wonderful opportunity she has afforded me to pursue this LLM at the University of the Western Cape. Her efforts as the head of the Program to make sure we received lectures from international experts in the field cannot go unnoticed.

To my wonderful supervisor, Prof. Patricia Lenaghan, thank you for the wise counsel. I have never seen such wonderful dedication. Above everything else, I imagine the courage it takes to read and understand a raw work of a non-native English writer. Thank you for 'holding my hand' throughout this process.

My family; you are the most awesome people that ever existed. I wouldn't trade you for any other thing or person. My parents Valentina & Fortunatus Tungaraza, my elder sisters- Elizabeth and Sophia, and my younger brothers, George and Peter.

I would like to thank my employer, the Open University of Tanzania (OUT) for having granted me the study leave to pursue this LLM. My colleagues at the OUT-Mara Regional Centre, Director Madam Flora Kiwonde, Mr Joshua Joel Matiku, Madam Sumi Pastory, Ms Sarah Ezekiel, Ms Sylvia Mnubi and Ms Eunice John. Thank you for being there for me especially during my leave.

To a very special friend, Juliana Ezekiel who has been a pillar to lean on, I am grateful for the love and support. My LLM classmates; I doubt there will be as fulfilled a learning experience as ours. Shout out to you, Pearl Nyakabwa, Sabelo Ngidi, Victoria Weyulu, Ame Chimbombi, Dayne Muller, Marilyn Whale, Sharon Mutsau, Salome-Neema Chapeyama and Buhle Bavuma.

To my friends who encouraged me and who have been more than an inspiration to me, Theresia Numbi, Robert Kusekwa and IsayaMrema; Counsels Banana Biboze, KudaTshiamo, MercyGrace Lameck Kisinza, and Moses Mafuru, and the others who due to space constraints couldn't be mentioned here, I treasure the support and you certainly made life easy.

Before concluding this part, I must admit that I am grateful to Prof. Israel Leeman, for an in-depth editorial assistance, without which this work would undisputedly be wanting in that regard.

Key words

Foreign Direct Investment (FDI); Upstream; Midstream; Downstream; Local Content policy; Liquefied natural gas (LNG); Fair and Equitable treatment (FET); International Minimum Standards; oil and gas; petroleum; Production Sharing Agreement; Service Agreements; Concessions.

ACRONYMS

BITs	Bilateral Investment Treaties
BP	British Petroleum
CERDS	Charter of Economic Rights and Duties of States
EAC	East African Community
ECS	Extended Continental Shelf
EEZ	Exclusive Economic Zone
EIA	Environmental Impact Assessment
FDI	Foreign Direct Investment
GATT	General Agreement on Tariffs and Trade
ICSID	International Centre for the Settlement of Investment Disputes
IOC	International Oil Company
ITO	International Trade Organisation
MAI	Multilateral Agreement on Investment
MAP	Millennium Partnership for the African Recovery Programme
MFN	Most Favoured Nation Treatment
MPSA	Model Production Sharing Agreement
NOC	National Oil Company
OECD	Organisation for Economic Cooperation and Development
OPEC	Organisation of the Petroleum Exporting Countries
PEP	Petroleum (Exploration & Production)
PSA	Production Sharing Agreement
TPDC	Tanzania Petroleum Development Corporation
UN	United Nations
UNGA	United Nations General Assembly
USA	United States of America
WTO	World Trade Organisation

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CHAPTER ONE

GENERAL INTRODUCTION TO OIL AND GAS SECTOR IN TANZANIA

1.1 Introduction

This chapter introduces the oil and gas sector in Tanzania. It revisits the history of the oil and gas exploration activities in the country and the methodologies adopted. It introduces a few key concepts relevant to the sector which are adopted throughout this study. Further, it states the current state of the industry and justifies the need for this study. For a start, part 1.1 identifies some key terms as defined in the national gas policy of Tanzania.

1.2 Definition of key terms

1.2.1 Upstream activities

“Upstream activities include exploration, appraisal, development and production stages of oil and gas operations of wells that recover and bring the crude oil and/or raw natural gas to the delivery point.”¹

1.2. 2 Midstream activities

“Refer to the gathering, compression and processing functions required between the wellhead and the transmission system. Mid-stream facilities and activities are found at any location where natural gas is produced, transported or sold.”²

1.2. 3 Downstream activities

“The marketing and distribution of natural gas and products derived from natural gas. Such products include liquefied petroleum gas (LPG), diesel, plastics, fertilizers, pesticides and pharmaceuticals.”³

¹ Ministry for Energy and Minerals *The National Natural Gas Policy of Tanzania* (2013) VII.

² Ministry for Energy and Minerals *The National Natural Gas Policy of Tanzania* (2013) VI.

³ Ministry for Energy and Minerals *The National Natural Gas Policy of Tanzania* (2013) V.

1.2. 4 Liquefied natural gas (LNG)

“LNG is a liquid form of natural gas, which has been cooled to about minus 162⁰ C (minus 260⁰ F) at normal pressure. The liquefaction converts the gaseous phase into an easily transportable liquid whose volume is approximately 600 times less than the original volume of natural gas.”⁴

1.3 Background to the study

Oil and gas exploration in Tanzania has a long history. The country first started exploration activities in 1952.⁵ However, it is only in 1974 and 1982 that the first natural gas discoveries were made by Ente Nazionale Idrocarburi’s (ENI) subsidiary Azienda Generale Italiana Petroli (AGIP).⁶ These discoveries were made at Songo Songo and Mnazi Bay, respectively.⁷

It was three decades later that commercial production of the first gas discovery commenced. The Songo Songo gas field started to commercially produce in 2004.⁸ The first commercial production was delivered to the country’s capital the same year through a built pipeline.⁹ While efforts to commercially produce the initial discovery were going on, Tanzania never stopped oil and gas exploration.¹⁰ It went on attracting companies to undertake major explorations for oil and gas.¹¹

⁴ Ministry for Energy and Minerals *The National Natural Gas Policy of Tanzania* (2013) V available at http://www.tanzania.go.tz/egov_uploads/documents/Natural_Gas_Policy_-_Approved_sw.pdf (accessed 28 September 2014).

⁵ See foreword to Ministry for Energy and Minerals *The National Natural Gas Policy of Tanzania* (2013) available at http://www.tanzania.go.tz/egov_uploads/documents/Natural_Gas_Policy_-_Approved_sw.pdf (accessed 28 September 2014).

⁶ US Energy Information Administration ‘Emerging East Africa Energy’ (2013) available at http://www.eia.gov/countries/analysisbriefs/East_Africa/eeae.pdf (accessed 28 September 2014).

⁷ See foreword to Ministry for Energy and Minerals *The National Natural Gas Policy of Tanzania* (2013)1.

⁸ Berg M, Agasoster M & Grammeltvedt E ‘Natural Gas in East Africa 2012’ available at <http://www.ipt.ntnu.no/~jsg/undervisning/naturgass/oppgaver/Oppgaver2012/12Berg.pdf> (accessed 05 October 2014).

⁹ US Energy Information Administration ‘Emerging East Africa Energy’ (2013) available at http://www.eia.gov/countries/analysisbriefs/East_Africa/eeae.pdf (accessed 28 September 2014).

¹⁰ Economic and Social Research Foundation *Petroleum Exploration Study, A Baseline Survey Report* (2009) 13.

¹¹ Economic and Social Research Foundation *Petroleum Exploration Study, A Baseline Survey Report* (2009) 13.

Some of these measures involved the 1986 -2009 reforms of political, social, economic and monetary policies with a view to enabling international oil companies, among others, to invest and explore in the petroleum sector for the benefit of all parties. There were also already in place some legal and regulatory frameworks to provide for rules, procedures and authorities that would eventually oversee the oil and gas sector in Tanzania.¹²At this point, the Petroleum (Exploration and Production) Act 27 of 1980¹³ (PEP Act) and the Tanzania Petroleum Development Company (TPDC) were in place.¹⁴

The TPDC is a Tanzanian State corporation through which the Ministry of Energy and Minerals implements its petroleum exploration and development policies.¹⁵ It was established under the Public Corporations Act 17 of 1969¹⁶ by Government Notice 140 of 30 May 1969.¹⁷The Corporation began operations in 1973.¹⁸ TPDC is a wholly owned government parastatal, with all the shares held by the Treasury Registrar.¹⁹

The following two parts of this section give a brief summary of the current situation regarding exploration for, and production of, oil and gas in Tanzania. The first part highlights the number of total discoveries made so far. The second part deals with the economic potential that these discoveries bring about. The third part highlights prospects for oil discovery.

¹² Economic and Social Research Foundation *Petroleum Exploration Study, A Baseline Survey Report* (2009) 13.

¹³ Cap 328 RE 2002. In Tanzania laws are referred to by their Chapter (Cap) in the revised edition (RE) of the laws of Tanzania of 2002.

¹⁴ Economic and Social Research Foundation *Petroleum Exploration Study, A Baseline Survey Report* (2009) 13.

¹⁵Kulthum B *The Natural Gas Sector in Tanzania. Suggestions for a Better Framework to Benefit the Country* (unpublished LLM Thesis, University of Lapland, 2013) 25.

¹⁶ The Act is now repealed and replaced by the Public Corporations Act, Cap 257 R.E.2002.

¹⁷ Available at http://www.tpsc-tz.com/tpdc/About_Us.php (accessed 05 October 2014).

¹⁸ Tanzania Petroleum Development Corporation *30th Annual Report* (2005) 2.

¹⁹ Tanzania Petroleum Development Corporation *30th Annual Report* (2005) 2.

1.3.1 Gas discoveries and their impact

As of June 2013 total onshore and offshore natural gas discoveries had reached about 42.7 trillion cubic feet (being 7.5 billion barrels of oil equivalent (BoE))²⁰ On the other hand, prospects for oil discovery are still increasing.²¹

The oil and gas sector is poised to take Tanzania's economy to the next level, once full production is in place. But until then, benefits of the sector gradually start to be realised, despite a number of challenges. For instance, the Songo Songo gas field is providing gas for power generation input to the national grid, and for some Dar es Salaam manufacturing industries' direct power users.²² The Mnazi Bay gas field, which has been producing since early 2007, is providing power for the southern areas of Mtwara, Lindi, Masasi, Newala and Nachingwea.²³ At the time of writing this thesis, more gas is being discovered.²⁴

1.3.2 Investment potential

It is argued that to commercialise Tanzania's offshore reserves of natural gas will take time. Some estimates are that it will take between seven years and a decade.²⁵ After commercialisation has been achieved, this would be followed by the design and negotiation of investment proposals. If LNG export project were to be realised, the International Monetary Fund (IMF) projects that FDI into Tanzania could be in the US \$20billion - \$30billion range. According to the IMF, the peak level of

²⁰ Ministry for Energy and Minerals *The National Natural Gas Policy* of Tanzania (2013) 1.

²¹ Mugini J 'Tanzania: With gas already in its bag Tanzania's Rift System set to become next oil frontier' *The Daily News* 11 July 2014 available at <http://allafrica.com/stories/201407110285.html> (accessed 01 October 2014).

²² Muhongo S 'Tanzania: An Emerging Energy Producer' available at <http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Africa/260213presentation.pdf> (accessed 05 October 2014).

²³ PWYP 'Tanzania Oil & Gas: Status and Trend Study Report 2013' available at <http://publishwhatyoupay.org/sites/publishwhatyoupay.org/files/Tanzania%20Oil%20and%20Gas%20Trend%20and%20Status%20Report.pdf> (accessed 05 October 2014).

²⁴ Statoil 'Statoil makes its eighth discovery in Block 2 offshore Tanzania' available at http://www.statoil.com/en/NewsAndMedia/News/2015/Pages/30Mar_Tanzania.aspx (accessed 05 April 2015).

²⁵ KPMG 'Oil and Gas in Africa; Africa's Reserves, Potential and Prospects' (2013)17 available at <https://www.kpmg.com/Africa/en/IssuesAndInsights/Articles-Publications/Documents/Oil%20and%20Gas%20in%20Africa.pdf> (accessed 05 October 2014)

investment could be concentrated in the 2017-20 period, with Liquefied Natural Gas (LNG) production starting between 2020 and 2025 and extending over perhaps two decades.

At a price of \$10 per 1000 cubic feet in the Far East export market, Tanzania's export earnings from gas could significantly exceed \$3 billion annually. This is ten per cent of the 2012 gross domestic product.²⁶ Given that potential, it follows that Tanzania's oil and gas sector should be attracting more investment. The only next question would be whether the legal and regulatory framework is couched in a manner that would guarantee a flow of FDI.

1. 3.3 Prospects for oil discovery

While there has been no oil discovered yet, prospects are that Tanzania may become the next oil producer. This is due to the country's geographical location in relation to the East African Rift System (EARS). So far, oil has been discovered in Uganda's Lake Albert and in northern Kenya.²⁷ The relevance of this, according to Ridge, is that Tanzania contains both the western arm and the eastern arm of the EARS in Lake Tanganyika and in Pangani/Eyasi,²⁸ respectively.

1.4 Problem statement

The Charter of Economic Rights and Duties of States (CERDS) of 1964 provides that a State has the right to 'regulate and exercise authority over foreign investment

²⁶ KPMG 'Oil and Gas in Africa; Africa's Reserves, Potential and Prospects' (2013) 17 available at <https://www.kpmg.com/Africa/en/IssuesAndInsights/Articles-Publications/Documents/Oil%20and%20Gas%20in%20Africa.pdf> (accessed 05 October 2014). Note that while oil prices have declined at the end of December 2014 up to March 2015, this has not at all affected gas prices.

²⁷ Mugini J 'Tanzania: with gas already in its bag Tanzania's Rift System set to become next oil frontier' *The Daily News* 11 July 2014 available at <http://allafrica.com/stories/201407110285.html> (accessed 01 October 2014).

²⁸ Mugini J 'Tanzania: with gas already in its bag Tanzania's Rift System set to become next oil frontier' *The Daily News* 11 July 2014 available at <http://allafrica.com/stories/201407110285.html> (accessed 01 October 2014).

within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities.’²⁹

The 1992 World Bank Guidelines on the Treatment of FDI stipulate in Article III(2) that, ‘each State will extend to investments established in its territory by nationals of any other State fair and equitable treatment according to the standards recommended in the Guidelines.’³⁰

The Southern Africa Development Community’s (SADC) Protocol on Finance and Investment provides that Member States of the SADC shall coordinate their investment regimes and co-operate to create a favourable investment climate within the region.³¹ Similarly, the Protocol provides that Member States of the SADC should promote entrepreneurship in industries that specifically attract Foreign Direct Investment (FDI).³² Further, the Protocol directs Member States to collaboratively develop a framework for tax incentives that will draw FDI into the region.³³

Tanzania is a member of the SADC. Its core legal framework for upstream activities is governed by the PEP Act 27 of 1980.³⁴ The Act is the basis for the grant of exploration and development licences for oil and gas. It spells out the broad terms and conditions of the licences and also vests petroleum resources in the government.³⁵

Given the fact that the Act was enacted more than 35 years ago, prior to major recent discoveries and developments, it has necessitated various further policy and legal enactments to fill the gap. Tanzania adopted a new gas policy in 2013.³⁶ There was

²⁹ Article 2 of the CERDS, 1964.

³⁰ Article III (2) of the World Bank Guidelines on the Treatment of Foreign Direct Investment (1992).

³¹ Article 3(1) of the SADC Protocol on Finance and Investment (2006).

³² Article 3 of Annexure 1, the SADC Protocol on Finance and Investment (2006).

³³ Article 4 of Annexure 3, the SADC protocol on Finance and Investment (2006).

³⁴ Cap 328 RE 2002.

³⁵ Kapinga W & Thorns A ‘Tanzania’ in Christopher B (ed) *The Oil and Gas Law Review* (2013) Ch 19 243-258.

³⁶ Ministry for Energy and Minerals *The National Natural Gas Policy of Tanzania* (2013).

the Petroleum Conservation Act of 1981³⁷ which was repealed and replaced by the Petroleum Act, 2008. The Petroleum Act of 2008 was enacted to make provision for the importation, exportation, transportation, transformation, storage and wholesale and retail distribution of petroleum products in a liberalised market, and to provide for related matters.

Nevertheless, the PEP Act 27 of 1980³⁸ remains the main single piece of legislation that directly governs exploration for and production of oil and gas in Tanzania. There is a clear indication that some of the policies might necessitate some amendment to the PEP Act, especially the Petroleum Policy of 2014 which in its first draft already clearly calls for some reforms in the law generally, including the exploration and production law.³⁹

It is certain that none of the changes will totally repeal the PEP Act 27 of 1980, since even the proposed Gas Bill, is only going to apply to midstream and downstream activities, as opposed to upstream activities to which the PEP Act of 1980 applies.⁴⁰

It is because of this background, in addition to the other legal and regulatory frameworks in place, and with prospects of oil discovery, and further gas discovery and production, that there is a need to assess the ability of the PEP Act 27 of 1980 to effectively provide for an investor friendly framework for exploration and production of oil and gas.

Central to this question is the ability of the Act to attract FDI and at the same time benefit the local population. It is important to analyse the way the Act is drafted to interlink with the whole legal framework in attracting FDI. Is Tanzania's Petroleum

³⁷Cap 392 RE 2002

³⁸ Cap 328 RE 2002.

³⁹ Ministry for Energy and Minerals *The National Petroleum Policy of Tanzania- Draft 3 July 2014* (2014) 29.

⁴⁰Kapinga W & Thorns A 'Tanzania' in Christopher B (ed) *The Oil and Gas Law Review* (2013) Ch 19 243-258.

(Exploration and Production) Act 27 of 1980⁴¹ effective, or is it flawed, outdated and superseded by events, making it ineffective in attracting investments?

1.5 Research questions

The overarching question this study answers is:

Does the existing law relating to exploration and production of oil and gas in Tanzania create a friendly FDI framework in the oil and gas sector, and guarantees its protection, or is it flawed, outdated and overtaken by events?

In answering this broad question, an attempt is made to answer the following sub-questions:

- a) What is the current law relating to exploration and production of oil and gas in Tanzania?
- b) Is the law framed in a manner that guarantees the protection of FDI?
- c) What are the emerging issues regarding local population benefits in the oil and gas investments?
- d) Whether the proposed reforms (if any) of the legal framework address the issue of local population benefits without threatening the protection of FDI?

1.6 Objectives

The objective of this study is to analyse the law relating to exploration and production of oil and gas in Tanzania in relation to the protection of FDI. The analysis will be based on the international standards for the protection of FDI. Some of these standards are contained in international instruments⁴² and some of them have attained the status of customary international law.⁴³ Examples of such

⁴¹ Cap 328 RE 2002.

⁴² OECD 'Fair and Equitable Treatment Standard in International Investment (2004) *Working Papers on International Investment Law* 8 available at <http://dx.doi.org/10.1787/675702255435> (accessed 11 October 2014).

⁴³ OECD 'Fair and Equitable Treatment Standard in International Investment (2004) *Working Papers on International Investment Law* 8 available at <http://dx.doi.org/10.1787/675702255435> (accessed 11 October 2014).

standards include: Fair and Equitable Treatment (FET),⁴⁴ Full Protection and Security (FPS),⁴⁵ non-arbitrariness⁴⁶ and non-discrimination, among others.⁴⁷ Some international instruments to be referred to include the 1992 World Bank Guidelines on Treatment of FDI and the CERDS.

1.7 Significance of the study

The study comes at a point where Tanzania has prospects for the discovery of oil. Together with gas, which has already been discovered, it is poised to push the Tanzanian economy to the next level. FDI is indispensable for the country at the moment. This study will identify areas which need to be improved in order to tap FDI for the oil and gas sector.

The study provides a fair assessment of the law and therefore presents an opportunity for policymakers to re-think reforms in the oil and gas sector with a view to creating a more investor friendly framework.

For the international community, especially investors both existing and potential, the study will provide an understanding of the existing framework, and possible investment climate trends in the future.

1.8 Proposed methodology

The study analyses the law relating to exploration for, and production of oil and gas in Tanzania in relation to the protection of FDI. It examines the existing Tanzanian law on oil and gas exploration, on the one hand, and the international minimum standards, on the other, as a comparator, in assessing the protection of FDI. As stated

⁴⁴ Article 11(2) of the Havana Charter of 1948. Fair and Equitable Treatment was also discussed in *Mondev International Ltd v United States of America* (ICSID) unreported case no. ARB (AF)/99/2 (1 October 2002). It was held that FET is customary international law and thus not a prerogative of a host State.

⁴⁵Sornarajah M *The International Law on Foreign Investment* 4 ed (2010) 349-359.

⁴⁶Sornarajah M *The International Law on Foreign Investment* 4 ed (2010) 349-359.

⁴⁷Sornarajah M *The International Law on Foreign Investment* 4 ed (2010) 349-359.

above, some of these standards are contained in international instruments⁴⁸ and some of them have attained the status of customary international law.⁴⁹

This study specifically does not use the SADC Protocol on Finance and Investment of 2006 as a comparator because the Protocol only imposes an obligation on Member States to harmonise their domestic frameworks to create a regional investor friendly climate. It does not specifically provide for standards of protection of FDI.

In addition, this is a desktop and library study. It relies on both published and unpublished materials, taking into account significant primary and secondary sources of information on the issue in addressing the research questions. Various Tanzanian Acts and policies relating to the subject matter are examined.

The secondary sources of information include relevant journal articles, newspaper reports and publications, as well as position papers written by law firms. The study also relies heavily on Internet sources. Speeches and government press releases have also been considered. The study has adopted a descriptive, analytical and exploratory approach. The aim is to build on the existing literature and ongoing debate on the reform of the oil and gas legal framework reforms, particularly placing more emphasis on the impact it is likely to have on attracting and protecting existing and potential FDI.

1.9 Scope and limitations of the study

This study focuses specifically on the provisions of the law relating to exploration for, and production of oil and gas in Tanzania. It deals with the substantive and procedural framework that the law establishes and how it affects FDI. It does not analyse the whole legal framework of Tanzania. While it touches briefly on aspects

⁴⁸ OECD 'Fair and Equitable Treatment Standard in International Investment' (2004) 3 *Working Papers on International Investment Law* 8 available at <http://dx.doi.org/10.1787/675702255435> (accessed 11 October 2014).

⁴⁹ OECD 'Fair and Equitable Treatment Standard in International Investment (2004) 3 *Working Papers on International Investment Law* 8 available at <http://dx.doi.org/10.1787/675702255435> (accessed 11 October 2014).

such as fiscal, regulatory and institutional, these will only be in relation to their interface with the upstream laws, and their impacts on FDI in oil and gas.

Oil and gas is an infant industry in Tanzania. As such, there is little literature regarding the same. However some works have dealt with the analysis of the law on exploration and production of oil and gas, especially in relation to FDI. Furthermore, the oil and gas industry is also a sensitive sector; as a result, obtaining some information has proven to be a challenge, especially access to key contracts such as Production Sharing Agreements (PSAs) which are deemed confidential in Tanzania.⁵⁰

1.10 Overview of chapters.

a) Chapter One

This chapter introduced the study. It further outlined the nature of the study, its significance and methodology.

b) Chapter Two

Chapter Two provides theoretical and conceptual framework of oil and gas law. Various aspects, such as, oil and gas as property under the law, ownership, and definitions, are covered in this chapter.

c) Chapter Three

Chapter Three provides a brief legal and regulatory framework governing investment in oil and gas exploration and production in Tanzania. It introduces the existing law and institutions governing upstream activities. In addition, this chapter analyses provisions of the Petroleum (Exploration and Production) Act 27 of 1980⁵¹ in depth. It discusses the substantive and procedural framework that the Act lays

⁵⁰ The Citizen Reporter 'Investors accuse govt of keeping contracts secret' *The Citizen* 21 September 2014 available at <http://www.thecitizen.co.tz/News/Investors-accuse-govt-of-keeping-contracts-secret/-/1840392/2460416/-/item/0/-/10hp6iuz/-/index.html> (accessed 11 October 2014).

⁵⁰ Cap 328 RE 2002.

⁵¹ Cap 328 RE 2002.

down. It analyses how the Act is framed to interlink with, or to pave way for, other legal and regulatory frameworks governing oil and gas.

d) Chapter Four

This chapter introduces the international minimum standards for protection of FDI. Then it analyses the relationship between the Tanzanian law and protection of FDI in oil and gas using the international standards as enshrined in instruments such as the 1992 World Bank Guidelines on Treatment of Foreign Direct Investment. The chapter presents the challenges to, and achievements of, the Act during the 35 years that it has been in place. It also briefly analyses some of the proposals for reform.

e) Chapter Five

Chapter Five provides some concluding remarks derived from the analysis in the previous chapters. It finally makes a number of recommendations.

CHAPTER TWO

THEORETICAL AND CONCEPTUAL FRAMEWORK OF OIL AND GAS INVESTMENT

2.1 Introduction

This chapter identifies key concepts and theories in relation to investment in oil and gas exploration. The first part (2.2) revisits the meaning of oil and gas generally, and then under the Tanzanian law in part 2.2.1. Next, part 2.3 discusses oil and gas as property under international law, and the ownership of oil and gas as a natural resource. The following two parts, 2.4 and 2.5, respectively, revisit existing global models and theories of ownership and the allocation of rights in oil and gas. This is important to be put into perspective because it is ownership which gives rise to the power of allocation of rights, including investment, and of regulation of investments, in natural resources. Finally, under part 2.6 the chapter attributes these world models to Tanzania and makes an analysis to determine which model the country has adopted. Summing up Chapter Two is part 2.7 which traces the historical development of the allocation of oil and gas rights in Tanzania, and the chapter concludes with a brief analysis summary.

2.2 General definition of oil and gas

The word 'petroleum' is derived from the Latin 'petra' (which means rock) and oleum (which means oil).⁵² It is commonly used to refer to crude oil, but it may also refer to other related hydrocarbons such as methane which is natural gas.⁵³ In this thesis, the terms oil and gas are used interchangeably with petroleum. Likewise, petroleum shall be used to mean both oil⁵⁴ and gas. The reason for this is that according to experts, petroleum is a term that refers to both crude oil and

⁵² OPEC *I need to know: An introduction to the Oil Industry & OPEC* 2 ed (2013) 12.

⁵³ OPEC *I need to know: An introduction to the Oil Industry & OPEC* 2 ed (2013) 12.

⁵⁴ Oil in this sense can be crude oil or refined oil. Crude oil refers to the raw liquid form of extracted hydrocarbons, which is not yet refined to remove other impurities, such as, oxygen, sulphur, nitrogen and heavy metal atoms. Simply put, the form of oil as extracted, before any processes to transform it into refined oil for ordinary consumption. See further: OPEC *I need to know: An introduction to the Oil Industry & OPEC* 2 ed (2013) 12.

gas.⁵⁵ Another reason is that, as shown in the next part (2.2.1), in Tanzania the law applicable to the exploration and production of oil and gas is one and the same, and defines petroleum to mean both oil and gas. However, it is important to take into account that up until the writing of this thesis, petroleum in the strict sense of crude oil has not been discovered yet in Tanzania. However, hydrocarbons in the form of natural gas have already been discovered and production is already ongoing as indicated in chapter one.

For her part, Omorogbe describes petroleum as a mixture of hydro and carbon (hydrocarbon) that occurs under the earth surface primarily within the pore spaces of sedimentary rocks, in liquid, gaseous or solid forms.⁵⁶ When it is found as a solid, it is coal, shale, tar sands or bitumen. When these hydrocarbons are found in liquid form, they are crude oil. On the other hand, when found in gaseous form such as methane, it is the natural gas.⁵⁷ There is literature that mentions petroleum with reference to the latter (crude oil).⁵⁸

2.2.1 Definition of oil and gas under Tanzanian law

There has been a statutory definition of petroleum under the Petroleum (Exploration and Production) Act 27 of 1980 (PEP Act). The Act provides under section 5 that petroleum means;

‘(a) any naturally occurring hydrocarbon, whether in gaseous, liquid or solid state;(b) any naturally occurring mixture of hydrocarbons, whether in gaseous, liquids, or solid state; or(c) any naturally occurring mixture of one more hydrocarbons whether in a gaseous,

⁵⁵ OPEC *I need to know: An introduction to the Oil Industry & OPEC* 2 ed (2013) 12.

⁵⁶ Omorogbe Y *The Oil and Gas Industry: Exploration and Production Contracts* (1997) 5.

⁵⁷ OPEC *I need to know: An introduction to the Oil Industry & OPEC* 2 ed (2013) 12.

⁵⁸ For instance Ojuokaiye defines petroleum in reference to the liquid form of the hydrocarbons, ‘Petroleum or crude oil is a naturally occurring, toxic, flammable liquid consisting of a complex mixture of hydrocarbons of various molecular weights, and other organic compounds that are found in geologic formations beneath the earth's surface.’ See: Ojuokaiye O ‘Oil and Gas Law’ (2011) *National Open University of Nigeria* 19.

liquid, or solid state and any other substance, and includes any petroleum as defined by paragraph (a), (b) or (c) that has been returned to a natural reservoir, but does not include coal, or any substance that may be extracted from coal, or other rock.'

From the above, it appears that the PEP Act gives a broad definition of petroleum, probably to incorporate the diverse technical composition of petroleum as explained in part 2.2 above. There has been criticism, however, that there needs to be a specific and separate definition of gas as a separate subject matter, if not enacting legislation specifically for gas.⁵⁹ However, it would appear that a few other countries have followed this inclusive definition approach, including Nigeria.⁶⁰ However, unlike Tanzania, Nigeria's legislation in addition to defining petroleum broadly, specifically defines natural gas. The Petroleum Act of Nigeria provides that petroleum means 'mineral oil (or any other related hydrocarbon) or natural gas as it exists in its natural state in strata, and it does not include coal or bituminous shales or other stratified deposits from which oil can be extracted by destructive distillation.' Furthermore, crude oil is defined in the Nigerian Act as 'oil in its natural state before it has been refined or treated (excluding water and other foreign substances).'

From these definitions and descriptions of petroleum, it can be said that the term petroleum includes (crude) oil and natural gas, while both oil and gas have similar qualities but are not the same in many of their components.

Finally, as stated in part 2.2 in this study, the terms 'petroleum' and 'oil and gas' are used interchangeably in this thesis too. However, predominantly, reference is made to gas, because, first, oil in its strict definition as crude oil has not been discovered

⁵⁹Ngowi J 'Developing a legal framework for Tanzania's natural gas sector' available at <http://www.ealawchambers.com/News-Blog/Blog/Tanzania-Natural-Gas-Discovery> (accessed 03 November 2014).

⁶⁰Ojuokaiye O 'Oil and Gas Law' (2011) *National Open University of Nigeria* 19.

⁶¹Ojuokaiye O 'Oil and Gas Law' (2011) *National Open University of Nigeria* 19.

yet in Tanzania despite increasing prospects, and secondly, and most importantly, the law governing petroleum and gas exploration and production is one and the same.

2.3 Oil and gas as property under international law

2.3.1 Ownership and control of oil and gas

Ownership rights over oil and gas take various forms and vary from one country to another. The forms are said to depend on countries' social-political and historical backgrounds, and furthermore, their legal systems, and in particular, the laws, which directly impact on the oil and gas industry and the various contracts between companies.⁶²

As said above under section 2.1, the essence therefore of discussing ownership lies in the fact that a legal or regulatory regime provides the rules and procedures governing the allocation, maintenance, transfer and cancellation of oil and gas rights. These also determine forms and rules regulating investments.

2.3.2 The legal concept of ownership of oil and gas in international law

When it comes to ownership of oil and gas the question is always whether private individuals can own the resources or whether they are vested in the sovereign. Legal ownership of natural resources is governed by multiple legal frameworks ranging from international to domestic.⁶³ The United Nations General Assembly (UNGA) Resolution 1803 of 1962 provides that 'the right of the peoples and nations to the permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the wellbeing of the people of the

⁶²Omorogbe Y & Oniemola P 'Property Rights in Oil and Gas under Domanial Regimes' in McHarg A et al (eds) *Property and the Law in Energy and Natural Resources* (2010) 115-139.

⁶³Iwere O 'What effect does the ownership of resources by the Government have on its people: a case study of Nigeria?' available at http://www.dundee.ac.uk/~fcepmlp/2fgateway/2ffiles.php%3ffile%3dcar-11_37_844417759.pdf&ei=x6zwwj3qmmjjo8clgbgh&usg=afqjcnfdspa8ldtie3qhwac1ngto8s8ygyw&sig2=ewoa39fpqjl_rdeezc-nbq/ (accessed 03 November 2014).

state concerned.’⁶⁴ Likewise, the Rio Declaration on Environment and Development provided under Article 2:

‘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 and developmental 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.’⁶⁵

Arguably, the various provisions in international instruments do not encroach on the sovereign powers of States to mandate municipal forms of ownership of natural resources. They also do not, by implication, remove the possibility of a private ownership model of natural resources, such as, oil and gas. There have existed, as a result, multiple international legal theories regarding the ownership of oil and gas.

2.4 General ownership theories relating to oil and gas

There exist three theories under international law regarding the ownership of natural resources, such as, minerals, oil and gas. These theories, namely, the national ownership theory, the absolute ownership theory, and the qualified ownership theory, all revolve around the issue whether the natural resources belong to the State or individuals occupying the area in which the resources are found. In addition, there is the question whether the rights automatically belong to the occupiers or the sovereign.

The next part analyses these three theories in relation to the upstream sector. The need to expound these theories stems from the fact that they determine, in countries where they are applicable, the legal and constitutional rules that deal with natural resources’ tenure, acquisition, holding, transfer, and termination of rights.

⁶⁴ The United Nations General Assembly (UNGA) Resolution 1803 of 1962.

⁶⁵ The Rio Declaration on Environment and Development of 1992.

2.4.1 The national ownership theory, also known as the ‘domanial system’
The national ownership theory is also known as the ‘domanial system.’ This system is one that assigns rights over natural resources to the State.⁶⁶ The theory provides for the vesting of ownership rights in the sovereign. This is the most prevalent system of ownership of minerals. Only a few countries, including the United States (US), are cited as not having adopted this model.⁶⁷ Many others retain sovereign rights over all mineral deposits, including oil and gas. In many of these countries this right is enshrined in legislation and the constitution.⁶⁸ The theory advocates the vesting of complete and total ownership of petroleum resources in the government of the State. Some authors argue that this is an effective theory in terms of attracting foreign direct investment for countries. Countries, such as, Nigeria, South Africa, Bolivia, Venezuela and China, utilise the national ownership theory.⁶⁹ Tanzania follows this approach too. A detailed explanation of Tanzania’s approach is provided in part 2.6 of this chapter.

The ‘domanial system’, as it is referred today, is said to trace its origins from the Roman law. It was first known as the ‘regalian system’ until after the Second Punic War whereby the Roman Empire became the owner of all conquered lands.⁷⁰ Mineral resources came under the ownership of the sovereign, represented by the relevant political authority, which granted permits, licences and leases for exploration and exploitation of mineral resources. According to this system, the ‘dominium

⁶⁶ Wieland P ‘Going beyond panaceas: Escaping Mining conflicts in Resource -Rich countries through Middle -ground policies’ (2013) available at <http://www.nyuelj.org/wp-content/uploads/2013/09/Wieland-for-Printer2.pdf> (accessed 19 January 2015).

⁶⁷ Wieland P ‘Going beyond panaceas: Escaping Mining conflicts in Resource -Rich countries Through Middle-ground policies’ (2013) available at <http://www.nyuelj.org/wp-content/uploads/2013/09/Wieland-for-Printer2.pdf> (accessed 19 January 2015).

⁶⁸ See for instance Article 14 of the Basic Law of Governance 1992 of Saudi Arabia (Royal Order No A/91); Article 6 of the Petroleum Law No. 3/ 2001 of Mozambique; Section 44 (3) of the Constitution of the Federal Republic of Nigeria of 1999 and Article 21 of the Constitution of Kuwait 1962.

⁶⁹ Iwere O ‘What effect does the ownership of resources by the Government have on its people: a case study of Nigeria?’ available at http://www.dundee.ac.uk/~2fcepmlp%2fgateway%2ffiles.php%3ffile%3dcar-11_37_844417759.pdf&ei=x6zwoj3qmmjjo8clgugh&usq=afqjcnfdspa8ldtie3qhwac1ngto8s8ygw&sig2=etvoa39fpqjl_rdeezc-nbq/ (accessed 03 November 2014).

⁷⁰ Omorogbe Y & Oniemola P ‘Property Rights in Oil and Gas under Domanial Regimes’ in McHarg A et al (eds) *Property and the Law in Energy and Natural Resources* (2010) 115-139.

directum' (the dominion of the soil) was vested immediately either in the crown, or in the feudal landlords and was separated from the dominium utile (the possessory title), the right to use and profit from the soil.⁷¹

Further, according to the domanial law system, the State vests mineral resources in itself while the landowners only have a right of compensation for the loss of surface rights.⁷²

2.4.2 Absolute ownership theory

Unlike the national ownership theory, this theory recognises private ownership of oil and gas.⁷³ An analogy can be drawn between this theory and the popular land theory titled '*quicquid plantatur solo, solo cedit*,' which means that he, who owns land, owns that beneath it. In other words, under the absolute ownership theory, the owner of a piece of land owns the oil beneath it.⁷⁴The principle has had long judicial recognition in some countries as well as some states in the US. In the case of *Mitchell v Mosley* (1914) 1 Ch 438 the Court held that 'the grant of the land includes the surface and all that is supra – houses, trees, and the like And all that is infra, i.e. mines earth, clay & co ...'⁷⁵Under the private ownership system, the landowner is vested with discretion and powers to decide what to do with the resources, including whether or not to exploit them. It is up to them to decide whether to 'leave resources unexploited, extract resources themselves, or grant mining rights to third parties through a lease or a sale of a mineral interest.'⁷⁶

⁷¹Omorogbe Y & Oniemola P 'Property Rights in Oil and Gas under Domanial Regimes' in McHarg A et al (eds) *Property and the Law in Energy and Natural Resources* (2010) 115-139

⁷²Omorogbe Y & Oniemola P 'Property Rights in Oil and Gas under Domanial Regimes' in McHarg A et al (eds) *Property and the Law in Energy and Natural Resources* (2010) 115-139

⁷³Iwere O 'What effect does the ownership of resources by the Government have on its people: a case study of Nigeria?' available at http://www.dundee.ac.uk%2fcepmlp%2fgateway%2ffiles.php%3ffile%3dcar-11_37_844417759.pdf&ei=x6zwoj3qmmjjo8clgbgh&usq=afqjcnfdspa8ldtie3qhwac1ngto8s8ygw&sig2=etwoa39fpqjl_rdeezc-nbql (accessed 03 November 2014).

⁷⁴Sprankling JG 'Owning the Centre of the Earth' (2008) 55 *UCLA Law Review* 979.

⁷⁵*Mitchell v Mosley* (1914) 1 Ch 438.

⁷⁶Wieland P 'Going beyond panaceas: Escaping Mining conflicts in Resource -Rich countries Through Middle -Ground policies' (2013) available at <http://www.nyuelj.org/wp-content/uploads/2013/09/Wieland-for-Printer2.pdf> (accessed 19 January 2015).

The theory of absolute ownership is not short of criticisms, too. For example, oil and gas are extracted from hydrocarbon, which is vagrant in nature and straddles different pieces of land. Hence, in such cases it is difficult to place ownership onto a person.

The other drawback is the fact that oil and gas deposits are also found offshore and onshore, such as in continental shelves or exclusive economic zones (EEZ) exclusively owned by States as per the United Nations Convention on the Law of the Sea of 1982.⁷⁷ Hence, it defeats the possibility for private ownership of oil and gas deposits in such areas.

2.4.3 Qualified ownership theory or 'rule of capture'

This theory came about as a result of the inherent shortcomings of the absolute ownership theory. As stated above in 2.4.2, oil and gas are fugacious resources. Therefore, as Wieland⁷⁸ puts it, depending on the subsurface pressures, oil viscosity, and porosity of the rock, they tend to migrate rapidly toward the low pressure area generated by the puncture of the well bore.

This migration allows adjacent landowners to extract what would be their neighbour's oil under the 'absolute ownership' theory.⁷⁹ Therefore, courts in the US stated that property rights in oil and gas are acquired only by capture, that is, by removing them from the ground and thus converting them into personal property. Ultimately, oil and gas belong to the person who recovers them first by drilling on his land, even if that oil and gas may have 'migrated' from under adjoining lands. The courts in the US have recognised that the landowner is privileged to sink as many wells as he desires upon his tract of land and extract therefrom and

⁷⁷Iwere O 'What effect does the ownership of resources by the Government have on its people: a case study of Nigeria?' available at http://www.dundee.ac.uk/~fcepmlp/~fgateway/~ffiles.php/~3ffile/~3dcar-11_37_844417759.pdf&ei=x6zwoj3qmmjjo8clgbgh&usq=afqjcnfdspa8ldtie3qhwac1ngto8s8ygw&sig2=ewoa39fpqjl_rdeezc-nbq/ (accessed 03 November 2014).

⁷⁸Wieland P 'Going beyond panaceas: Escaping Mining conflicts in Resource -Rich countries Through Middle -Ground policies' (2013) available at <http://www.nyuelj.org/wp-content/uploads/2013/09/Wieland-for-Printer2.pdf> (accessed 19 January 2015).

⁷⁹Daintith T *Finder's keepers? How the law of capture shaped the world oil industry* (2010) 35.

appropriate all the oil and gas that he may produce.⁸⁰ This helps somehow to shield landowners from liability arising out of alleged wrongful taking of oil and gas. However, authors have observed that the rule of capture is being watered down over the years by various regulations such as those that seek to promote efficiency, like limiting well drilling. This is so because otherwise the rule of capture would have led, and it did lead already in some parts, to a drilling race, overproduction, depletion of reserves and other inefficiencies.

2.4.4 Principle of permanent sovereignty over natural resources

The principle of permanent sovereignty over natural resources was stated and adopted in the UN General Assembly Resolution 3281 (XXIX), which is referred to as the Charter of Economic Rights and Duties of States (CERDS), of 12 December 1974. The principle of permanent sovereignty over natural resources had been also stated, although not in exact wording, in resolutions prior to the CERDS, such as, Resolution No 2158 (XXI) and Resolution 1803 of 1962. The Organisation of Petroleum Exporting Countries (OPEC)⁸¹ has also insisted, through various policies, on control over oil resources.⁸² In 1968, OPEC issued Resolution XVI.90 which was titled 'Declaratory Statement of Petroleum Policy in Member Countries.'⁸³ According to Omorogbe and Oniemola, this Resolution required Member States to be involved in direct development of their resources or take measures for participation in and control over all aspects of resources operations where they cannot be directly involved in such direct development. Other steps to be taken included the review of

⁸⁰*Elliff v. Texon Drilling Co.* (1948) 210 S.W.2d 558.

⁸¹ OPEC's mandate is to coordinate and unify the petroleum policies of its members and to ensure the stabilisation of oil markets in order to secure an efficient, economic and regular supply of petroleum to consumers, a steady income to producers, and a fair return on capital for those investing in the petroleum industry. See generally; Kyepa D *The World Trade Organisation (WTO) and the Organisation of Petroleum Exporting Countries (OPEC) Mandates: Regulating Production Quotas, Subsidies, and Corruption in Oil Producing Countries-an African Perspective* (unpublished LLD thesis, University of the Western Cape, 2014).

⁸²Omorogbe Y & Oniemola P 'Property Rights in Oil and Gas under Domianial Regimes' in McHarg A et al (eds) *Property and the Law in Energy and Natural Resources* (2010) 115-139.

⁸³Cuervo L 'OPEC from Myth to Reality' (2008)30 *Houston Journal of International Law* available at <http://international.vlex.com/vid/opec-from-myth-to-reality-55460892> (accessed 03 November 2014).

existing concession contracts, the relinquishment of existing concession contracts and the determination of oil pricing by Member States.⁸⁴

From the foregoing, it is clear that oil and gas can be privately owned or can be retained as a sovereign property. Either way, both under private ownership or sovereign ownership, exploration and production rights can be further granted to other parties in preferred different forms, such as, concessions, service or production sharing agreements.

The following part (2.5) discusses the various forms of allocation of oil and gas exploration and production rights. Thereafter, part 2.6 discusses the form of granting exploration rights preferred by Tanzania as per the existing legal framework and practice in the country.

2.5 General global forms of allocation of oil and gas rights

Where States exercise exclusive rights over resources, such as petroleum, as under the domanial regime,⁸⁵ the sovereign grants rights for exploration and production of the State owned oil and gas to public or private entities. On the other hand, even in private ownership of resources, owners tend to forge different agreements for exploration and production of oil and gas resources. These rights can be granted to companies under licences or leases, or contractual arrangements. Contractual arrangements include partnerships, joint ventures, and production sharing agreements, concessions and service agreements. Where ownership is vested on the State, the powers are exercised by a designated head of State or minister in accordance with the law in force.

As indicated in the above paragraph, historically there have emerged different types of oil and gas contracts. However, when it comes to oil and gas exploration and

⁸⁴Omorogbe Y & Oniemola P 'Property Rights in Oil and Gas under Domanial Regimes' in McHarg A et al (eds) Property and the Law in Energy and Natural Resources (2010) 115-139.

⁸⁵ In other regimes where private individual forms of ownership are recognised, it follows that the individuals owning the resources have exclusive rights over their portions. They likewise enter into forms of agreements to grant the rights further to other entities depending on their need and capacities to explore and produce.

production, there have existed three common⁸⁶ contracts, namely, concession agreements, production sharing agreements (PSAs), and service contracts.⁸⁷The discussion below analyses the three peculiar contractual arrangements in the oil and gas sector. These are concession agreements, PSAs and service contracts. The discussion specifically leaves out partnerships and joint ventures as these aren't exclusive to the oil and gas sector, and are governed by general contract law. On the contrary, concessions, PSAs and service contracts have peculiar features which are discussed below.

2.5.1 Concession agreements

Concessions are believed to be the earliest form of arrangement, and did not apply to oil and gas alone but to all other natural resources.⁸⁸ Concessions were granted by the host government to the owner of the land surface rights for the purposes of exploring and producing petroleum from the concession. In return for the right to exploit the concession the holder of the land surface right was obliged to pay a royalty.⁸⁹ Concessions were granted largely in the States where resources were vested in the sovereign or government, such as the continental civil law systems of Europe, Latin and South America, and the Middle East.⁹⁰ Authors agree that early concessions lasted for long periods of time. The most cited example in the literature is the concession which was granted on 28th May 1901 by the Persian government to William Knox D'Arcy to carry out petroleum exploration and production throughout Persia, and was valid for a period of sixty years.⁹¹ In return D'Arcy was

⁸⁶ Other forms may include joint ventures or partnerships, but are not discussed herein as they generally follow the general contract law requirements.

⁸⁷Ghadas Z 'Types and Features of International Petroleum Contracts' (2014) 3 *Kuala Lumpur International Business, Economics and Law Conference* 57-68.

⁸⁸Nakhle C 'Petroleum Fiscal regimes: evolution and challenges' in Daniel P et al (eds.) *The Taxation of Petroleum Minerals* (2010) 32.

⁸⁹Ikenna NE 'International Petroleum Law: Has it Emerged as a distinct Legal Discipline?' (1996) 8 *African Journal of International Comparative Law* 434.

⁹⁰Mgaya R *Petroleum Taxation: A Critical Analysis of Oil and Gas Fiscal Regime in Tanzania* (unpublished Msc thesis, University of Robert Gordon, 2014) 16.

⁹¹Yergin D *The Prize: The Epic Quest for Oil, Money & Power* (2008) 45.

obliged to pay bonuses to the government and 16 per cent of the company's annual profit.⁹²

The main characteristic of the concession system is that the international oil company (IOC) acquires title to petroleum produced at the wellhead and the oil company has to pay royalty and tax only to the host government. The contractor also owns assets and the government or its agents do not monitor operations and expenditure unless the oil company defaults on the payment of taxes.⁹³ The IOC has the right to own the produced petroleum except that it may be required to supply local markets.⁹⁴ Unlike the old concessions, modern concessions consists for short-term periods, and the State has greater control over resource and project management. Modern concessions also comprise various taxes including bonuses, a royalty, income tax and additional profit tax.⁹⁵

The concession agreements gradually paved the way for other evolving modes of exploration and production arrangements. Various reasons are cited for the demise of the concessionary systems, among which are revenue conflicts between investing IOCs and host countries, the rise of crude oil prices in the 1970s, formation of the OPEC, and the emergence of State oil companies.⁹⁶

2.5.2 Service contracts

Under a service contract the IOC explores for and produces petroleum on behalf of the government and is paid a fee for its services, with a possible right to buy a portion of the production.⁹⁷ Guirauden described a service contract as 'a contract by

⁹²Mgaya R *Petroleum Taxation: A Critical Analysis of Oil and Gas Fiscal Regime in Tanzania* (unpublished MSc. thesis, University of Robert Gordon, 2014) 16.

⁹³ Johnston D *International Petroleum Fiscal Systems and Production-Sharing Contracts* (1994) 23.

⁹⁴Tienhaara K 'Foreign Investment Contracts in the Oil & Gas Sector: A Survey of Environmentally Relevant Clauses' (2011) 11 *Sustainable Development Law & Policy* 15-20.

⁹⁵Ghadas Z 'Types and Features of International Petroleum Contracts' (2014) 3 *Kuala Lumpur International Business, Economics and Law Conference* 57-68.

⁹⁶Mgaya R *Petroleum Taxation: A Critical Analysis of Oil and Gas Fiscal Regime in Tanzania* (unpublished MSc thesis, University of Robert Gordon, 2014) 16.

⁹⁷Tienhaara K 'Foreign Investment Contracts in the Oil & Gas Sector: A Survey of Environmentally Relevant Clauses' (2011) 11 *Sustainable Development Law & Policy* 15.

which a contractor who is an IOC undertakes to explore for hydrocarbons at his own risk and expense on behalf of a national oil company (NOC), and by which he is reimbursed and remunerated in cash depending on the success of the exploration.⁹⁸

The main distinction between a service contract and a PSA is that the service contract reimburses the contractor in cash, not in crude oil. The contractor will be paid a cash payment for carrying out the service of producing the petroleum resources. While all production vests in the host State, the contractor (IOC) is required to provide all the capital that is necessary for the exploration and development.⁹⁹ If the exploration efforts were successful, then the contractor recovers the costs through a fee that is based on a percentage of the produced oil. The host State is an owner of the resources and the international oil company acts as a contractor for a national oil company.¹⁰⁰

2.5.3 Production sharing agreements (PSAs)

PSAs are also referred to as production sharing contracts (PSCs). For avoidance of doubt, this thesis uses the term PSA. Under PSAs, an IOC can acquire oil rights for exploration and production through agreement with the State. PSAs are characterised by the following features.

The host State signs up an IOC as a contractor through its enterprises, the national oil company (NOC) or Ministry of Oil.¹⁰¹ Ownership of resources is retained by the host State and concession are not granted to the IOCs. The IOCs are not liable for any related compensation, such as, surface and or proportional royalties, and have no ownership of the petroleum production, but are only allocated the cost of the oil and

⁹⁸Ghadas Z 'Types and Features of International Petroleum Contracts' (2014) 3 *Kuala Lumpur International Business, Economics and Law Conference*57.

⁹⁹ Johnston D *International Petroleum Fiscal Systems and Production-Sharing Contracts* (1994) 12

¹⁰⁰Ghadas Z 'Types and Features of International Petroleum Contracts' (2014) 3 *Kuala Lumpur International Business, Economics and Law Conference* 57.

¹⁰¹Ghadas Z 'Types and Features of International Petroleum Contracts' (2014) 3 *Kuala Lumpur International Business, Economics and Law Conference* 57.

the profit from the oil (See PSA flow chart on page 27) at an agreed location point, usually the connection point between storage and loading facilities.

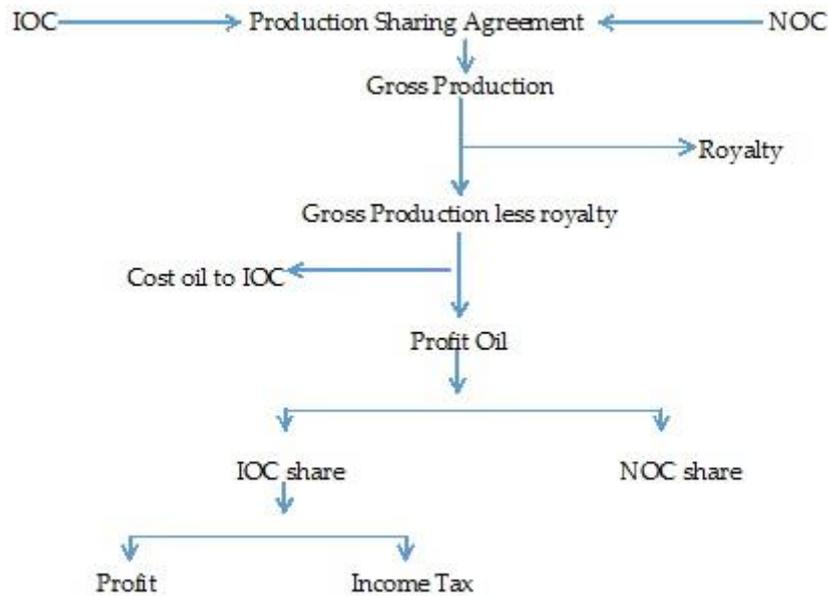
In a PSA the IOC bears the risks of exploration and is often in charge of the operations in, and management of, the contract area. Where oil is discovered in commercial quantities, the IOC is entitled to recoup its investment from the crude oil produced from the contract area. A PSA allows a contractor a quantity of oil to ensure an adequate return on investment and the contractor can dispose of oil to meet its tax and royalty obligations. The portion of oil meant for recouping is called cost recovery, and is normally about 20 to 50 per cent, although it could go even as high as 100 per cent.¹⁰²The remainder is shared between the national oil company (NOC) and the IOC in predetermined portions. The contractor may be allowed to export freely its cost recovery oil and its share of profit oil, however subject to certain restrictions which may exist, such as the right of the host State to purchase at the market price.¹⁰³

The following chart on page 27 summarises how a PSA generally operates as discussed in the above paragraph. In summary, the NOC and the IOC enter into an oil exploration and production agreement where each party participates to the extent they agree in terms of resources and sharing of production. Following gross production of oil, the royalty which goes to the State is deducted. Then the IOC recoups its costs of production in the form of oil (called 'cost oil') from the remaining oil, based on computations agreed in the respective PSA. The remaining oil is deemed to be profit and is therefore split between the IOC and the NOC based on formulas agreed upon and contribution. The IOC is further subject to taxes, such as income tax.

¹⁰²Ghadas Z 'Types and Features of International Petroleum Contracts' (2014) 3 *Kuala Lumpur International Business, Economics and Law Conference* 57.

¹⁰³Taverne B *Petroleum, Industry and Governments: A study of the involvement of industry and governments in the Production and use of Petroleum* 2 ed (2008) 120.

PSA Flow Chart¹⁰⁴



The advantage of PSAs, which may also account for their rationale, is that they do not involve the surrender of the host country’s sovereignty in title to the resources; rather an IOC attains an interest in the oil, which is less than ownership thereof. There’s some slight similarity however between PSAs and service agreements. In both PSAs and service agreements, the host governments’ interests are in many cases represented by the NOC. Both contain provisions to secure the interests of local populations in terms of employment and other local content requirements. Nonetheless, the difference lies in the essence that in a PSA the IOC is more of a partner in the operations and control of the shares and venture, whereas in service agreements the IOC is more of a service contractor who is paid for services rendered.

¹⁰⁴The chart is drawn based on my impression of the general PSA structure. It draws upon aspects from Bindemann K ‘Production-Sharing Agreements: An Economic Analysis’ (1999) *Oxford Institute for Energy Studies WPM 13* and also, Kabwe Z ‘Oil and Gas: Fiscal Challenges of Tanzania’s Production Sharing Agreements (PSAs)’ available at <http://www.thecitizen.co.tz/blob/view/-/2433654/data/818204/-/1228y5ez/-/ZITTO-PSA-OIL.pdf>.

The discussion above highlights the different ways that States allocate oil and gas exploration and production rights. A crucial role is the State's approach to the resources: whether it vests all the resources in itself or whether it recognises private ownership. It can be reasoned, that the choice between concessions, service contracts and PSAs can also be influenced by many factors including whether the country is a newcomer in the industry, hence would like to attract FDI through concessions, or whether the country wants to actively take part in exploration and production, in which case it will employ PSAs and enhance its technical know-how and capital base.

2.6 Ownership and control of oil and gas rights in Tanzania

This part identifies the ownership theory Tanzania has adopted for the oil and gas reserves. Secondly, it analyses the various forms of allocation of rights explained above in part 2.5 as they have historically been applied in Tanzania to date.

2.6.1 Tanzania's 'domanial' regime of ownership of oil and gas

Tanzania seems to be following the national ownership theory in respect of oil and gas resources. The law provides that 'the entire property in and control over petroleum in any land to which this Act applies are vested in the United Republic; but without prejudice to any right to explore for or produce petroleum granted, conferred, acquired or saved by or under this Act.'¹⁰⁵

This position is not a new development as this is an extension of the prevalent spirit of the laws which can be traced back to long before the enactment of the PEP Act in 1980. The former land ordinance which was enacted during the British colonial rule made all land in Tanzania public land vested in the Crown. The most recent Land Act 4 of 1999 retained the position by stating that all land in Tanzania is public land and is vested in the President as a trustee for and on behalf of all Tanzanians.¹⁰⁶ An interesting observation is that even the term 'land' itself is defined under the Land

¹⁰⁵ Section 4 of PEP Act 2002.

¹⁰⁶ Section 4(1) of the Land Act 4 of 1999 (Cap 113 RE 2002).

Act in a manner that excludes natural resources so as to exclude them from the interests an individual can claim to have acquired by virtue of owning or acquiring land rights. The interpretation section of the Land Act provides that land includes;

‘the surface of the earth and the earth below the surface and all substances other than minerals or petroleum forming part of or below the surface, things naturally growing on the land, buildings and other structures permanently affixed to or under land and land covered by water prevalent and would seem to be applicable even in other forms of natural resources such as minerals.’¹⁰⁷

Further, Tanzania has asserted its rights over the continental shelf up to 200 nautical miles in accordance with the Law of the Sea Convention.¹⁰⁸ Currently it is seeking to further extend this zone for the further allowed 150 miles called the Extended Continental Shelf (ECS), beyond the 200 nautical miles provided for in the Convention on the Law of the Sea.¹⁰⁹ This can be interpreted as a quest to further increase the country’s area for exploration, since oil and gas reserves are found both onshore and offshore.

¹⁰⁷ Section 2 of the Land Act 4 of 1999.

¹⁰⁸Tanzania seeks to extend exclusive economic zone’ *The Guardian* 17 January 2012 available at <http://www.ippmedia.com/frontend/index.php?l=37546> (accessed 16 November 2014).

¹⁰⁹Tanzania seeks to extend exclusive economic zone’ *The Guardian* 17 January 2012 available at <http://www.ippmedia.com/frontend/index.php?l=37546> (accessed 16 November 2014).

Prof. Anna Tibaijuka, the Minister for Lands, Housing and Human Settlements Development, at the time, was quoted as saying, in support of the ECS, that, ‘the seabed is an area of massive natural resources, including petroleum and gas, the exploitation of which should respect national boundaries. What we are doing is actually for the interests of the present and future generations’¹¹⁰

The good thing about this legal position is that it ties in with the national ownership theory, making it practicable to vest all the resources in Tanzania in the State. Secondly, it affords the State the right to step in anytime a resource is discovered because essentially, any such resource whether discovered or not belongs to the State. The only shortcoming would relate to this second aspect as it means that the government has a walk-in right and therefore private interests over the land under which resources are found can easily be interfered with.

2.7 Historical development of allocation of oil and gas rights in Tanzania

Tanzania is currently using the PSA model to grant exploration and production rights for oil and gas. However, historically, the country has gone through several forms such as concessions and service agreements, before finally settling for PSAs. Together with the PEP Act, PSAs provide for standards and terms under which exploration and production of oil and gas can be conducted by the IOC. The following part identifies the concessions, service contracts and PSAs the country has entered into since the commencement of exploration and production in the country.

2.7.1 Concession agreements

Tanzania first adopted concession agreements, whereby during the first phase of exploration history in 1952-1964 British Petroleum (BP) and Shell were awarded concessions along the coast of Tanzania (then Tanganyika) including the islands of Unguja, Pemba and Mafia.¹¹¹ These agreements were entered into based on the

¹¹⁰Munyanga M ‘Tanzania seeks extension of its continental shelf’ *EANA* 17 January 2012 available at <http://leananews.org/1701121.htm> (accessed 16 November 2014).

¹¹¹Mgaya R *Petroleum Taxation: A Critical Analysis of Oil and Gas Fiscal Regime in Tanzania* (unpublished MSc. thesis, University of Robert Gordon, 2014).

Mining (Mineral Oil) Ordinance.¹¹² This Act was later repealed and replaced by the Petroleum (Exploration & Production) Act 27 of 1980, which is still the governing Act to date. BP and Shell held exploration acreage along the Coastal Basin including the islands of Zanzibar, Pemba and Mafia. The licensees carried out geological and geophysical surveys which however did not lead to any commercial discoveries. The concession agreements were therefore relinquished in 1964.¹¹³

As explained in depth in Chapter One, the relinquishment of concessions granted to BP led to other IOCs, such as Azienda Generale Italiana Petroli (AGIP) Spa which succeeded BP and Shell.

2.7.2 Service agreements

Then, based on the same Act, AGIP Spa negotiated a service agreement with the government for the same whole area relinquished by BP/Shell.¹¹⁴ AGIP started operations in 1969. The same year, the Tanzania Petroleum Development Corporation (TPDC) was formed to oversee AGIP's operations. This necessitated the amendment of the agreement between AGIP and the government so as to accommodate the TPDC through a PSA. It was the first PSA and marked the beginning of the current PSAs system. AGIP made its first discovery in 1973.

2.7.3 Production sharing agreements

There was an increase in oil and gas exploration activities in the period between 1980 and 1991 and this is attributed to the increase in the oil price and the enactment of the

¹¹²Cap 399 RE 2002.

¹¹³Ledesma D, 'East Africa Gas-Potential for Export' (2013) *The Oxford Institute for Energy Studies* available at

<http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CCYQFjAB&url=http%3A%2F%2Fwww.oxfordenergy.org%2Fwp-content%2Fuploads%2F2013%2F03%2FNG-74.pdf&ei=YONoVJiFOaT9sATunYLABw&usg=AFQjCNEoWdKnJAu4gt9-1uTZUNZsPm7f-A&bvwm=bv.79142246,d.cWc> (accessed 16 November 2014).

¹¹⁴Kilaghane Y 'Tanzania's Model Production Sharing Agreement' available at

<http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Fwww.energy.eac.int%2F%2Ffeapc2005%2Fpdfs%2Fconference%2520proceedings%2FCountry%2520Presentations%2FTanzania%2FModel%2520Production%2520Sharing%2520Agreement%2520%2520Mr.%2520Yona%2520Killagane.pdf&ei=LN9oVOKHBKPGsQTAyYLgDw&usg=AFQjCNEu5ivHTpba-xR40UzzZ - GKgfWqg&bvwm=bv.79142246,d.cWc> (accessed 16 November 2014).

PEP Act in 1980. Following the enactment of the PEP Act the country formally adopted the production sharing agreements. A model production sharing agreement (MPA) was formulated in 1989 as a basis for negotiations for potential investments in exploration and production of oil and gas in 1989.¹¹⁵ There have to date been in place seven MPSAs, the latest ones being the 2008 and 2013 MPSAs. For the offshore, there have been four licensing rounds up to now. The latest round was announced for inviting bids in October 2013.

All in all, a country's choice of one form of agreement over the other is shaped by various factors. For instance, it is argued that concession agreements are generally used by the countries which are non-producers and are newcomers in the oil industry; thus would want to encourage foreign investment in the development of their oil resources.¹¹⁶ So, government grants concessions to attract investors. On the other hand, PSAs are generally used by countries which want to participate more actively in exploration and production, refinery, marketing and distribution. The same applies to service contracts because they are similar to PSAs except for the fact that fees in service contracts are paid in cash whereas in PSAs the fee is paid in oil. Tanzania's choice of PSAs signifies the country's move towards more active participation in exploration and production. The country's active participation is geared to ultimately retain technical know-how and contribute more to local population benefits. This explains the 'national theory' approach adopted by the country, the role of the TPDC as the national oil company, and the recent local

¹¹⁵Kilaghane Y 'Tanzania's Model Production Sharing Agreement' available at <http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Fwww.energy.eac.int%2F%2F2005%2Fpdfs%2Fconference%2520proceedings%2FCountry%2520Presentations%2FTanzania%2FModel%2520Production%2520Sharing%2520Agreement%2520%2520Mr.%2520Yona%2520Killagane.pdf&ei=LN9oVOKHBKPGsQTAYYLgDw&usg=AFQjCNEu5ivHTpba-xR40UzzZ - GKgfWqg&bvm=bv.79142246,d.cWc> (accessed 16 November 2014).

¹¹⁶Junseong Yi 'Merits and Demerits of the Different Types of Petroleum Contracts' available at https://www.google.com.eg/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAA&url=https%3A%2F%2Fwww.knoc.co.kr%2F%2Fservlet%2FDownload%3Fnum%3D6%26fno%3D6%26bid%3DDATA1%26callback%3D%2Fsub05%2Fsub05_5_1.jsp%26ses%3DUSERSESSION&ei=IO_pVIAq0-Vqj46BuA0&usg=AFQjCNG7AcK-zV9JgMbOm-6OPrno5npQtQ&sig2=-5TSPOs3bQW6kINFZrFw (accessed 22 February 2015).

content policy which contains even requirements for local employment and training. Plus, arguably, the experience drawn by the county from the mining sector has influenced preference for PSAs over other forms of arrangements.

2.8 Conclusion.

Chapter Two sought to identify legal theories underlying oil and gas as property under international law, namely, national ownership, private ownership and the rule of capture. It's also been established that Tanzania follows the national ownership theory. Whilst doing so, Tanzania employs PSAs as a vehicle through which it allocates exploration and production rights. The next step therefore, which is what the next chapter explores, is the legal framework underlying the allocation of exploration and production rights through PSAs.

CHAPTER THREE

LEGAL AND INSTITUTIONAL FRAMEWORK FOR OIL AND GAS EXPLORATION AND PRODUCTION

3.1 Introduction

The Petroleum (Exploration & Production) Act 27 of 1980 (PEP Act) is the main law regulating the upstream sector in Tanzania. Despite being a specific energy sector, oil and gas exploration and production is also an economic activity. As with other economic activities there are a number of regulations and laws that directly or indirectly refer to the activity. These include, for instance, the Income Tax Act 11 of 2004, the Fair Competition Act 8 of 2003, the Companies Act 12 of 2002, and the Tanzania Investment Act 26 of 1997.

The PEP Act is the main legislation, however, that specifically deals with exploration and production. For that reason, the analysis in this part is basically centred on the provisions of the Act relevant to foreign direct investment (FDI) in the upstream sector. Briefly, where relevant, the provisions of other legislation are discussed, too.

Chapter Three is divided into three parts. The first part is about the legal framework and highlights relevant substantive provisions. The second part analyses the institutions directly involved with the regulation of the upstream sector. For the purpose of this thesis the Tanzania Petroleum Development Corporation (TPDC), the Commissioner for Petroleum Affairs and the Ministry responsible for petroleum affairs will be discussed. The last part identifies other relevant FDI considerations for the upstream sector.

3.2 The legal framework

3.2.1 The Petroleum (Exploration & Production) Act: Objectives and application

The PEP Act was enacted as Act number 27 of 1980. It was assented to by Tanzania's first president, President Julius Nyerere, on 8th September 1980, and later published under GN 88 of 1981. According to the long title of the Act, the PEP Act was enacted to make provision with respect to exploring for and producing petroleum and for related matters. As stated in Chapter One, petroleum as defined in the Tanzanian

law, and as used in this context, includes both crude oil and gas.¹¹⁷ Even though the Act was enacted in 1980, exploration for oil and gas had already started long before since 1952. Activities were then regulated by the Mining (Mineral Oil) Ordinance Cap 399, which was repealed by the PEP Act in 1980.

PEP Act applies to the Tanzania mainland and Zanzibar. Tanzania is a United Republic comprising two former States, namely, Tanganyika (now Tanzania mainland) and Zanzibar, whose union was born on April 26, 1964. While international sovereignty lies with the union government¹¹⁸, represented by the United Republic of Tanzania, Zanzibar (through the revolutionary government of Zanzibar) retains some sovereignty, and this includes legislative powers on non-union matters¹¹⁹ vested in the representative council of Zanzibar.¹²⁰

The extension of applicability of the Act to Zanzibar may have been deliberate, since Zanzibar is an island and as oil and gas reserves can generally be found offshore or onshore. The Act also applies to, and in respect of, the sea-bed, and subsoil of the continental shelf,¹²¹ which makes all the sea area under the country's jurisdiction eligible for exploration. Despite that logic, and the retention of some legislative powers by Zanzibar, the extension of the Act might not be termed unconstitutional since oil and gas as natural resources are a mandate of the union government. The Constitution of the United Republic of Tanzania, 1977¹²² under article (4) (3) provides for union and non-union matters. The Constitution also lists the union matters in the First Schedule thereto, in which clause 15 specifically lists 'mineral oil resources,

¹¹⁷Section 5 of PEP Act RE 2002

¹¹⁸For further reading on Zanzibar and Tanganyika Union Structure: Ghai Y 'Zanzibar in Tanzania' in Ghai Y & Woodman S (eds) *Practising Self-Government. A comparative study of Autonomous Regions* (2013).

¹¹⁹Article 78 (1) of the Constitution of Zanzibar, 1984.

¹²⁰Haule R 'Torturing the Union? An Examination of the Union of Tanzania and its constitutionality' (2006) 66 *ZaoRV*215 233 available at http://www.zaervo.de/66_2006/66_2006_1_b_215_234.pdf (accessed 15 April 2015).

¹²¹Section 2 of PEP Act RE 2002

¹²²Cap 2 RE 2002

including crude oil or products and natural gas.¹²³ It should be taken into account that currently while writing this thesis, Tanzania is promulgating a new Constitution and Tanzanians are expected to vote for or against the new Draft Constitution in 2015 on a date to be determined by the National Electoral Commission (NEC). The proposed Draft Constitution¹²⁴ which Tanzanians will vote for or against has reduced union matters, and specifically does not mention oil and gas in the list of union matters. In the event the Draft is adopted as the new constitution as it exists, it might have an impact on the current framework, especially legitimacy of the applicability of the PEP Act in Zanzibar. But that is another topic which is not the subject of this thesis.

The PEP Act specifically excludes the application of the provisions of the Act to the search for, or mining of any minerals. The reasoning may be simply because mining, and minerals as defined under section 4 of the Mining Act 14 of 2010¹²⁵, are governed by the provisions of the said Mining Act.¹²⁶

The next discussion analyses a few provisions of the PEP Act relevant to FDI. These are entry requirements and licensing in part 3.2.2; exploration licences in part 3.2.3; development licences in part 3.2.4; assignment of interests (3.2.5); transfer of capital and profits (3.2.6); guarantees against expropriation; production sharing agreements; and finally, confidentiality of the PSAs. It should be taken into account that this discussion does not follow the order in which provisions are listed in the Act. On the contrary, the analysis picks a few provisions that directly have an impact on FDI and leaves out general provisions, such as those providing for day to day administration.

¹²³Clause 15 of the First Schedule to the Constitution of the United Republic of Tanzania, 1977

¹²⁴The draft of the proposed new Constitution of Tanzania can be retrieved at http://www.zanzibar.go.tz/admin/uploads/RASIMU_YA_KATGIBA_INAYOPENDEKEZWA_sw.pdf (accessed 15 April 2015).

¹²⁵Cap 123 RE 2002.

¹²⁶The recent Mining Act was enacted in 2010 and repealed and replaced the Mining Act, 1998.

3.2.2 Entry requirements and licensing

As stated in Chapter Two, Tanzania follows the national ownership theory approach. As such, all petroleum in Tanzania is vested in the United Republic.¹²⁷ It is therefore the Republic that has the exclusive right and it follows that the same can grant rights to investors. This explains why the PEP Act provides to the effect that the exclusivity of the State is without prejudice to any right to explore for or produce petroleum which is granted, conferred or acquired under the PEP Act.¹²⁸ It makes it also an offence for a person to carry exploration and production of petroleum without a licence obtained under Act.¹²⁹

The Act provides for two types of licences, namely an exploration licence¹³⁰ and a development licence.¹³¹ These two licenses are discussed in part 3.2.3 and 3.2.4. As regards to entry requirements, the general rule is that only a Tanzanian citizen can hold an interest in a petroleum licence.¹³² With regard to exploration, an exploration licence can only be granted to a company, companies registered under Tanzania's Companies Act or incorporated by or under a law in force in Tanzania.¹³³

A development licence, on the other hand, is only granted to a body corporate that is a company or a corporation incorporated by or under a law in force in Tanzania.¹³⁴ The wording of this provision may seem to lock out foreign firms from holding petroleum rights in Tanzania. However, the interpretation in actual sense means that foreign firms can acquire petroleum rights, however, subject to their incorporation in the country. The interpretation section of the PEP Act defines corporation to include a body corporate incorporated outside Tanzania. Furthermore, the Companies Act of Tanzania allows for the incorporation of foreign companies seeking to establish a

¹²⁷Section 4 (1) of PEP Act.

¹²⁸Section 4 (2) of PEP Act.

¹²⁹Section 4 (2) of PEP Act.

¹³⁰ Section 21 of PEP Act.

¹³¹ Section 37 of PEP Act.

¹³² Section 13(a) of PEP Act RE 2002

¹³³Section 13 (a), (b) (i), (ii) and (iii).

¹³⁴Section 13 (c) (i) and (ii).

place of business in Tanzania through provision of a certificate of compliance. Also, the essence of the provision was probably to make the government through the TPDC hold an interest in any rights. The practice is that the government of Tanzania, through the Minister for Energy and Minerals, grants a licence to the TPDC, upon an application made, in relation to such area specified in the licence. The TPDC, in turn, holds the licence and engages an exploration company to undertake exploration, development and production activities.¹³⁵ Applications for licences are made to the Minister.¹³⁶

The Minister may enter into an agreement with respect to the grant of a licence, any conditions to be included in the licence so granted, and any other connected matter.¹³⁷ Usually the agreement is entered into by the Minister on behalf of the government of the United Republic of Tanzania, the TPDC as licence holder and the exploration company intending to conduct upstream activities as contractor.¹³⁸ It is clear that the provision above under section 14 is the one from which the government derives the mandate to enter into PSAs with investors.¹³⁹ The following part discusses exploration licences in depth as per Tanzania law.

3.2.3 Exploration licences

The Tanzanian law does not specifically define ‘exploration licence’ or ‘exploration’. Section 5 of PEP Act only says that an exploration license is a license granted under section 21, whereas exploration operations are defined to mean operations for, or in connection with the exploration for petroleum. However, exploration in this context simply means the searching for petroleum under the Act. The United Kingdom’s (UK) Petroleum Licensing (Exploration and Production) (Landward Areas)

¹³⁵Kapinga W & Thorns A, ‘Tanzania’ in Christopher B, (ed) *The Oil and Gas Law Review* (2013) 243-258.

¹³⁶Section 15 of PEP Act.

¹³⁷Section 14 of PEP Act.

¹³⁸Kapinga W & Thorns A, ‘Tanzania’ in Christopher B, (ed) *The Oil and Gas Law Review* (2013) 243-258.

¹³⁹The PSA between The United Republic of Tanzania, the TPDC and Pan-African Energy indicates under Article 2.1 that the PSA constitutes an agreement under Section 14 of the Act. Whereas the ‘Act,’ as defined under the PSA’s Article 1.1 means the Petroleum (Exploration & Production) Act, 1980 of the United Republic of Tanzania.

Regulations 2014 contain similar designation of licences, and provide that 'petroleum exploration and development licence means a licence to search and bore for, and get, petroleum in a landward area.'¹⁴⁰

The Tanzanian law enables the Minister, by notice published in the Government Gazette, to invite applications for the grant of an exploration licence in respect of specific blocks and to establish a deadline by which applications are to be received. The opening of the licensing rounds is a highly publicised event and bid documents are made available to interested parties setting out instructions to be followed by applicants when completing and submitting their bids. Interested parties are to submit, *inter alia*, proposals for work and minimum expenditure¹⁴¹ in respect of the block or blocks specified in the application, give particulars of the financial resources available, technical and industrial qualifications and resources, and submit proposals for the training and employment of citizens of Tanzania.¹⁴² An exploration licence remains in force for four years, starting on and including the date on which it was granted, but the Minister can extend it. The Minister is further required by the Petroleum Act to direct the holder of an area declared to be a petroleum location to carry out investigations and studies to assess the feasibility of the construction, establishment and operation of an industry for the recovery of petroleum in that location. Among the matters to investigate and study is the physical impact of that industry on the environment.¹⁴³

3.2.4 Development licences

A development licence may be granted by the Minister if he is satisfied that a commercial discovery of petroleum has been made.¹⁴⁴ An application for a development licence is made by the TPDC on the contractor's behalf and is required

¹⁴⁰ Regulation 2 of the UK's Petroleum Licensing (Exploration and Production) (Landward Areas) Regulations 2014

¹⁴¹ Section 30 (1) (a) (b) of PEP Act.

¹⁴² Section 36 (b) of PEP Act.

¹⁴³ Section 34 (1)-(3) of PEP Act.

¹⁴⁴ Section 35 (1), (2) (a), (b) of PEP Act.

to include a plan drawn up by the contractor, in consultation with the TPDC, which is designed to ensure maximum recovery of petroleum from the development area concerned in compliance with good oilfield practices.

The application for a development licence is to be made within two years of the date that the relevant blocks are declared to be a 'location.'¹⁴⁵ A location is an area within which a discovery has been made.¹⁴⁶ A development licence is granted for 25 years¹⁴⁷ with the possibility of an extension for a further 20 years.¹⁴⁸ During this time, exclusive rights to carry on exploration and development operations in the development area and to sell or dispose of the petroleum recovered are conferred on the licence holder.¹⁴⁹

3.2.5 Assignment of interests

The Act allows for the assignment or transfer of oil and gas interests upon prior approval in writing from the government of Tanzania through the Minister for Energy and Minerals.¹⁵⁰ Specifically, the Minister is required to approve a transfer of a licence or an instrument by which a legal or equitable interest in, or affecting a licence is created, assigned, effected or dealt with, whether directly or indirectly.

Since the licence is held by the TPDC, where a contractor wishes to assign or transfer any rights under the PSA it is required to obtain prior written consent from the Minister of Energy and Minerals. Such consent is not to be unreasonably withheld or delayed.¹⁵¹

As stated above in 3.1, because of its nature as an economic activity, and the insufficiency of the PEP Act to exhaustively cover every aspect, the oil and gas sector has multiple legal frameworks applying to it. Other legal instruments relevant to the

¹⁴⁵ Section 35 (1) of PEP Act.

¹⁴⁶ Section 33 (1), read together with sections 5 and 43

¹⁴⁷ Section 42 (a) of PEP Act.

¹⁴⁸ Section 42 (b) of PEP Act.

¹⁴⁹ Section 41 (a)-(d) of PEP Act.

¹⁵⁰ Section 54 of the PEP Act

¹⁵¹ Section 54 of PEP Act.

upstream sector include the Tanzania Investment Act (TIA) 26 of 1997, the Value Added Tax Act (VAT) 24 of 1997 and the Income Tax Act 11 of 2004.

The TIA seeks to create a favourable foreign investment climate by granting various incentives, including fiscal. On the other hand, the TIA sets out the minimum criteria that must be met by any prospective foreign investor for them to qualify for a range of incentives under the TIA. There must be a minimum investment of US \$300,000, for which the foreign investor is entitled to 100% control of the Tanzanian entity. Unlike Tanzanian investors, foreign nationals must obtain a permit from the Tanzania Investment Centre (TIC) in order to be able to invest. This may appear discriminatory on the face of it. However, section 2 limits applicability of the TIA Act to, among other entities, a business enterprise which is authorized to conduct exploration or production operations or to construct or operate a pipeline under the Petroleum (Exploration and Production) Act, 1980, or is seeking authorization to conduct any such operations as provided under subsection 2(1) (b) of the Act. However, there may be even stronger requirements attached to foreign investment under other instruments given the nature of oil and gas activities which require strong capital.

3.2.6 Transfer of capital, profits

Section 21 of the TIA, which relates to the transfer of capital, profits, and dividends, also applies to the upstream oil and gas sector. Section 22 of the TIA which relates to the guarantees against expropriation, applies to any business enterprise which holds a mineral right granted under the Mining Act, 1979, or a licence granted under the Petroleum (Exploration and Production) Act, 1980, as though the holder has for the purpose of those provisions been granted a certificate of incentives and protection. Article 33 (b) (iv) of the Model Production Sharing Agreement (MPA) 2013 provides that the contractor shall have the right to freely declare and pay dividends to their shareholders and to remit the same to a place outside Tanzania, under the terms of the Law. The TIA provides that the business enterprise that holds a licence in

accordance with the PEP Act 1980, shall be guaranteed unconditional transferability through any authorised dealer bank in freely convertible currency of net profits or dividends attributable to the investment; the remittance of proceeds (net of all taxes and other obligations) in the event of the sale or liquidation of the business enterprise; or any interest attributable to the investment.

3.2.7 Guarantees against expropriation

One risk of paramount consideration in FDI is usually the risk of expropriation.¹⁵² This would be more important for FDI in Tanzania given the nature of oil and gas rights which as stated in Chapter Two, are vested in the sovereign. Being so, it can arguably be stated that the law affords room for the sovereign to intervene and acquire what belongs to her, for the investor is only granted 'secondary' exploration rights, so to say. The government has on several occasions in the past acquired private land rights for what it termed the 'public interest'¹⁵³, which though allowed under the law subject to compensations, was questionable,¹⁵⁴ so both in terms of purpose and compensation.¹⁵⁵ Although no compulsory acquisition so far has taken place in the oil and gas sector, it is important to have these guarantees in place.¹⁵⁶ The PEP Act is silent, but the various MPSAs (refer to the discussion on MPSAs in parts 2.7.3 and 3.2.8) have contained these guarantees. While the 2008 MPSAs did not provide any stabilisation clause the 2004 model provides a fairly standard clause:¹⁵⁷

¹⁵²Sornarajah M *The International Law on Foreign Investment* 4 ed (2010) 99.

¹⁵³ Section 4 (1) (g) of Land Acquisition Act 6 of 1967 Cap 118 RE 2002.

¹⁵⁴*The Attorney General v Sisi Enterprises Ltd* (2006) 9.

¹⁵⁵ Tungaraza JM *The Legal Standards for Compensation in Compulsory Land Acquisition: Case Study of Dar es Salaam City* (unpublished LLB dissertation, Saint Augustine University of Tanzania, 2012) 24.

¹⁵⁶Mato H 'The Role of Stability and Renegotiation in Transnational Petroleum Agreements' (2012) 1 *Journal of Politics and Law* 33.

¹⁵⁷Deloitte 'The Deloitte Guide to Oil and Gas in East Africa Where potential lies' available at <http://www2.deloitte.com/za/en/misc/search.html#qr=The%20Deloitte%20Guide%20to%20Oil%20and%20Gas%20in%20East%20Africa%20Where%20potential%20lies&i=633&p=1&fr=0> (accessed 16 November 2014).

'If at any time or from time to time there should be a change in legislation or regulations which materially affects the commercial and fiscal benefits afforded by the Contractor under this Contract, the Parties will consult each other and shall agree to such amendments to this Contract as are necessary to restore as near as practicable such commercial benefits which existed under the Contract as of the Effective Date.'

The latest MPA 2013 does not contain a stabilisation clause.

3.2.8 Production sharing agreements

Section 14 of the PEP Act gives mandate for the Minister to enter into an agreement, not inconsistent with the PEP Act, on behalf of the Republic with respect to the grant of a licence.¹⁵⁸ The Act does not specifically provide that a PSA is the type of agreement to be entered into. However, as stated in Chapter One, the enactment of the PEP Act in 1980 implied the government's intention to do away with former types of agreements it had entered into, namely the concession and service agreements. This is evidenced by the establishment of the national oil company, the TPDC, and the requirement that all licences must be granted to a company incorporated locally. Also, the fact that ever since the enactment of the PEP Act, licences are only granted to the TPDC which then enters into PSAs with exploration companies.

So far the approach taken is the enactment of MPSAs which serve as the basis for negotiations regarding the actual PSAs between the Ministry, the TPDC and the investors. As stated in Chapter Two, the first MPA was formulated as a basis for negotiations for potential investments in the exploration and production of oil and gas in 1989.¹⁵⁹ There have to date been in place seven MPSAs, the latest ones being

¹⁵⁸ 'Minister', according to section 5 of the PEP Act refers to the Minister responsible for petroleum affairs. Currently the Minister responsible for petroleum affairs is the Minister for Energy and Minerals.

¹⁵⁹ Kilaghane Y 'Tanzania's Model Production Sharing Agreement' available at <http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Fwww.energy.eac.int%2Fapc2005%2Fpdfs%2Fconfrence%2520proceedings%2FCountry%2520Presenta>

the 2008 and 2013 MPSAs. For the offshore, there have been four licensing rounds up to now. The latest round was announced for inviting bids in October 2013. The MPSAs are quite resourceful as they indicate the state of the industry at a particular moment and terms an investor is likely to be subjected to. This is true given the fact that the PEP Act is non-exhaustive and leaves out key aspects such as fiscal ones. Moreover, PEP Act was enacted 35 years ago; hence might not necessarily reflect industry requirements at the present. Therefore, while for example the PEP Act provides for payment of a royalty,¹⁶⁰ the actual percentage of royalty isn't provided for and would be found in the PSAs.¹⁶¹ According to Tanzania's latest MPA of 2013, the royalty rate is 12.5% for onshore/shelf areas and 7.5% for offshore total crude oil/natural gas production (prior to cost oil and/or cost gas recovery).¹⁶²

There is something in the MPA 2013 that is different from the general structure of PSAs discussed in part 2.5.3. The 2013 MPA obliges the TPDC which is a NOC to pay the royalty. This is a difference because elsewhere it is the foreign oil company that is supposed to pay the royalty.¹⁶³ But the divergence could probably be because in some other countries a foreign oil company is actually granted exploration and development licence. In Tanzania, the TPDC is the one holding the licence. And the PEP Act provides that the registered holder of development licence shall, in accordance with his licence and the Act, pay a royalty in respect of petroleum obtained by him in the development area.¹⁶⁴ Yet again, the confusion is understood because a royalty, though features a lot in modern day PSAs, was generally a feature

[tions%2FTanzania%2FModel%2520Production%2520Sharing%2520Agreement%2520%2520Mr.%2520Yona%2520Killagane.pdf&ei=LN9oVOKHBKPGsQTAYYLgDw&usq=AFQjCNEu5ivHTpba-xR40UzzZ - GKgfWqg&bvm=bv.79142246,d.cWc](#) (accessed 16 November 2014)

¹⁶⁰ Section 81(1) of PEP Act.

¹⁶¹ For detailed analysis of current fiscal regime of oil and gas see Mgaya R *Petroleum Taxation: A Critical Analysis of Oil and Gas Fiscal Regime in Tanzania* (unpublished LLM thesis, University of Robert Gordon, 2014).

¹⁶² The effect of Article 16 (c) of MPA 2013 is that as from 2013 royalties are paid to the government by the TPDC on behalf of itself and the contractor.

¹⁶³ Bindemann K 'Production-Sharing Agreements: An Economic Analysis' (1999) *Oxford Institute for Energy Studies WPM* 7.

¹⁶⁴ Section 81 of the PEP Act.

of concessionary agreements. In concession agreements, the IOC would pay the royalty. The PEP Act doesn't specifically provide whether Tanzania should follow the PSA or concessions route so it could be argued that maybe the intention wasn't to completely do away with concessions. But given the trend since the enactment of the Act, it can be argued to the contrary that the country really wanted to abandon concessionary forms of agreements. Either way, it must have been a move to increase the country's share of earnings from oil and gas, because as it stands, royalties are paid to the government and are calculated on gross production before the IOC deducts cost oil and before profit oil is split between the TPDC and the IOC. It makes the TPDC pay the royalty on behalf of the IOC and itself.

3.2.9 Confidentiality of the PSAs

The only problem at the moment would be the non-disclosure of the actual PSAs. The PEP Act prohibits disclosure of information obtained by any person in connection with the administration of the Act.¹⁶⁵ This has been interpreted to mean the actual PSAs between the Minister, the TPDC and the IOC are confidential. Even Parliamentary Accounts Committee (PAC) was in 2014 denied access to the 26 PSAs it had demanded from the TPDC.¹⁶⁶ The row led to a brief arrest of the TPDC Board Chairman, Michael Mwanda, and the Acting Director General, James Andilile by police on the PAC's orders for the failure of the TPDC to submit PSAs.¹⁶⁷ Speaking in defence of the confidentiality, the Minister for Energy and Minerals at the time, Prof. Sospeter Muhongo, stated:

'We have to adhere to government regulations. We cannot subject the contracts to public discussions, because there are regulations in lace

¹⁶⁵ Section 10 (1) (a)-(g), (2), (3), (4) and (5) of the PEP Act.

¹⁶⁶Kasumuni L 'Muhongo: Why Bunge won't see gas contracts' *The Citizen* 4 November 2014 available at <http://thecitizen.co.tz/news/Muhongo--Why-Bunge-won-t-see-gas-contracts/-/2304482/2521930/-/format/xhtml/-/ci0uimz/-/index.html> (accessed 21 February 2015).

¹⁶⁷Machira P 'No contract is above the law-Ndugai' *The Guardian on Sunday* 9 November 2014 available at <http://www.ippmedia.com/frontend/index.php/?l=73975> (accessed 21 February 2015).

governing them. Even contracts between individuals, like yourself and somebody else must be governed by certain rules.’¹⁶⁸

There has since come to light the PSA between PanAfrican Energy Tanzania Ltd (which had acquired rights over the Songo Songo area), the TPDC and the Minister for Energy and Minerals in 2014.¹⁶⁹ Interestingly, the leaked PSA also contained a confidentiality clause.¹⁷⁰ Likewise, some MPSAs contain confidentiality requirements.¹⁷¹

This is an anomaly that calls for the extractive industries transparency initiative (EITI) which some other countries have already adopted. The EITI is a global standard to promote open and accountable management of natural resources. It seeks to strengthen government and company systems, inform public debate, and enhance trust. In each implementing country it is supported by a coalition of government, companies and civil society working together.¹⁷² Its core aim is ‘to strengthen governance by improving transparency and accountability in the extractives sector’ and it ‘supports improved governance in resource-rich countries through the verification and full publication of company payments and government revenues from oil, gas and mining.’¹⁷³ Further arguments and imperatives for making oil and gas contracts public are discussed in part 5.3.5.

¹⁶⁸Kasumuni L ‘Muhongo: Why Bunge won’t see gas contracts’ *The Citizen* 4 November 2014 available at <http://thecitizen.co.tz/news/Muhongo--Why-Bunge-won-t-see-gas-contracts/-/2304482/2521930/-/format/xhtml/-/ci0uimz/-/index.html> (accessed 21 February 2015).

¹⁶⁹Mtega ‘Is there a contractual obstacle preventing TPDC from providing gas contracts to parliament?’ available at <http://mtega.com/2014/11/is-there-a-contractual-obstacle-preventing-tpdc-from-providing-gas-contracts-to-parliament/> (accessed 21 February 2015). The leakage is attributed to the launching of OpenOil, a repository of publicly available oil and gas contracts. It was also argued that this has been available since 2006 as part of the public filings of PanAfrica’s Canadian parent company, Orca Exploration Group, with Canadian regulators.

¹⁷⁰ Article 14.3 (a) of the PSA between PanAfrican Energy, TPDC and the Minister for energy and Minerals.

¹⁷¹ Articles 16 (e) and 18 (n) of MPSA 2006 and 2008 respectively.

¹⁷²EITI ‘What is the EITI?’ available at <https://eiti.org/eiti> (accessed 05 April 2015).

¹⁷³ For detailed analysis of EITI: Shaxson N ‘Nigeria’s Extractive Industries Transparency Initiative. Just a Glorious Audit?’ (2009) *Royal Institute of International Affairs* 1 available at https://eiti.org/files/NEITI%20Chatham%20house_0.pdf (accessed 05 April 2015).

3.3 Institutional framework

This part discusses the main institutions involved with regulating oil and gas upstream activities, and which are provided for under the Petroleum (Exploration and Production) Act 27 of 1980. Part 3.3.1 discusses the Ministry of Energy and Minerals, whereas parts 3.3.2 and 3.3.3 analyse the role and mandate of the Tanzania Petroleum Development Corporation (TPDC) and the Commissioner for Petroleum Affairs, respectively.

3.3.1 The Ministry of Energy and Minerals

The Ministry of Energy and Minerals co-ordinates and puts in place appropriate policies, laws and regulations and provides for their oversight to ensure sustainable development. The energy department under the Ministry of Energy and Minerals is mandated to administer the legal and fiscal framework for petroleum exploration and production in Tanzania.¹⁷⁴ The PEP Act gives the Minister for Energy enormous powers, including granting licences, and renewing, suspending or cancelling licences for oil and gas exploration or development.¹⁷⁵ It is the Ministry that also formulates policies in the energy and mineral sector, such as, the National Gas Policy and the Local Content Policy.

3.3.2 Tanzania Petroleum Development Corporation (TPDC)

The TPDC is a wholly government owned corporation established under the Public Corporations Act 17 of 1969 which was repealed and replaced by the Public Corporations Act (Cap. 257 R.E.2002 of the Laws of Tanzania), and through GN 140 of 30 May 1969. The TPDC's mission is;

‘ to participate and engage in the exploration, development, production and distribution of oil and gas and related services; to facilitate a fair trading environment; safeguard the national supply of

¹⁷⁴Economic and Social Research Foundation *Petroleum Exploration Study, A Baseline Survey Report* (2009) 60.

¹⁷⁵ Section 14 of PEP Act.

petroleum products; at the same time developing quality and safety standards to protect people, property and the environment.¹⁷⁶

The corporation's objectives as stipulated in the TPDC (Establishment) Order 1969, include: the exploration and production of petroleum; to engage in distribution and storage facilities; to acquire exploration and production rights; to contract, hold equity or participate in oil and gas concessions, franchises and licences; to manage any legal entities delegated to the corporation; and to develop an adequate industrial base for the oil and gas industry.¹⁷⁷ The TPDC's range of functions include: promoting the development and production of the petroleum industry; carrying on the businesses of prospectors, producers, refiners, suppliers and distributors of petroleum; engaging in petroleum prospecting operations (exploration, drilling, testing, appraisal, extraction, producing, treatment, storing, transportation etc.); acquiring, by agreement, and holding interests in any undertaking associated with exploration and prospecting; managing the affairs of any legal entity either transferred or acquired by the Corporation; promoting and monitoring the exploration for oil and gas; developing and producing oil and gas; conducting research and development of the oil and gas industry in the country; managing exploration and production data; and marketing and selling natural gas under a PSA arrangement.¹⁷⁸ Other powers and obligations of the TPDC stem from the PSAs concluded.

The above provisions give the TPDC a wide mandate. The TPDC is the national oil company, but at the same time somehow a regulator. It also, in practice, has the privilege of acquiring all the interests in oil and gas for which it then grants secondary rights to contractors, hence defeating the spirit of the PEP Act which does not expressly give it an exclusive mandate. It can be argued though that this authority is derived from the TPDC (Establishment) Order of 1969 which as stated

¹⁷⁶ Extracted from TPDC's website, <http://www.tpdctz.com/tpdc/> (accessed 22 February 2015).

¹⁷⁷TPDC (Establishment) Order, 1969.

¹⁷⁸Extracted from TPDC's website, <http://www.tpdctz.com/tpdc/> (accessed 22 February 2015).

above entitles the TPDC to acquire interests in licences or participate in equity. The PEP Act only provides that the licence is to be granted to a locally incorporated entity. Also, because the PEP Act does apply to both oil and gas, the TPDC automatically becomes the regulator and national oil and gas company. For example, it has already been argued that the TPDC has roles as both the regulator of upstream operations and as the State oil company and ultimate rights holder, which creates confusion and conflicts of interest.¹⁷⁹ Even the Public Organisations' Accounts Committee (POAC) in 2010 proposed the disbandment of the TPDC into two separate entities, an upstream regulator and a national oil and gas company for both the two parts of the union, namely, Zanzibar and the mainland.¹⁸⁰ As it will be argued in Chapter Four, there is a need to revisit the TPDC's role and mandate.

3.3.3 The Commissioner for Petroleum Affairs

The PEP Act establishes the office of the Commissioner for Petroleum Affairs.¹⁸¹ The Commissioner is appointed by the President of the United Republic of Tanzania and as powers to carry out the general administration of oil and gas exploration and development activities.¹⁸² He is the general administrator. For example, when discovery of oil is made, during exploration, the licence holder is by law required to notify the Commissioner of the discovery.¹⁸³ The Commissioner can issue various directions.¹⁸⁴ Applications for certificates to surrender a block are made to the Commissioner.¹⁸⁵ Among many other functions bestowed on the Commissioner by the PEP Act, the Commissioner is also empowered to resolve some disputes.¹⁸⁶ But the nature of the disputes that the Commissioner is entitled to resolve are limited to

¹⁷⁹Kabwe Z 'Restructuring Tanzania Petroleum Development Corporation (TPDC)' available at <https://zittokabwe.wordpress.com/2011/04/08/restructuring-reforming-tanzania-petroleum-development-corporationtpdc/> (accessed 22 February 2015).

¹⁸⁰Public Organisations' Accounts Committee *The POAC report* 2010.

¹⁸¹ Section 8 (1) of PEP Act.

¹⁸²Economic and Social Research Foundation *Petroleum Exploration Study, A Baseline Survey Report* (2009) 60.

¹⁸³ Section 31 (1) and (2) of PEP Act.

¹⁸⁴ Section 47 (2) of PEP Act.

¹⁸⁵ Section 49 (1) of PEP Act.

¹⁸⁶ Section 76 (1) of PEP Act.

disputes between persons engaged in exploration or development operations, either among themselves or in relation to themselves and third parties (other than the Government) not so engaged,¹⁸⁷ in connection with the boundaries of any exploration area or development area,¹⁸⁸ any act committed or omitted, or alleged to have been committed or omitted, in the course of, or ancillary to, exploration or development operations;¹⁸⁹ the assessment and payment of compensation pursuant to the PEP Act;¹⁹⁰ or any other matter which may be prescribed.¹⁹¹ The Commissioner's decision can be in the form of a decree¹⁹² which has the same force of law as a court decree,¹⁹³ and any aggrieved party is entitled to appeal to the High Court of Tanzania.¹⁹⁴

3.4 Other foreign investment consideration for the upstream sector

3.4.1 Fiscal regime requirements

There are different taxes applicable to the upstream sector. As explained in Chapter Two, PSAs by their nature afford an IOC recovery of investments in exploration and production, called cost recovery, and profit oil which is split between the IOC and the government in the proportions agreed upon in the PSA. In Tanzania the PEP Act does not specify the amount of the royalty to be paid. However, Article 16 (c) of the MPSA 2013, provides that the TPDC agrees to discharge its obligation to pay a royalty by delivering to the government a royalty in the amount of 12.5% for onshore/shelf areas and 7.5% for offshore of total crude oil/natural gas production (prior to cost oil and/or cost gas recovery).¹⁹⁵ After the royalty, the contractor is entitled to deduct cost recovery not exceeding 50%. The remainder is the profit oil which is divided between the TPDC and the IOC as agreed by the parties in the

¹⁸⁷Section 76 (1) of PEP Act.

¹⁸⁸Section 76 (1) (a) of PEP Act.

¹⁸⁹Section 76 (1) (b) of PEP Act.

¹⁹⁰Section 76 (1) (c) of PEP Act.

¹⁹¹Section 76 (1) (d) of PEP Act.

¹⁹² Section 76 (3) of PEP Act.

¹⁹³ Section 77 (1) of PEP Act.

¹⁹⁴Section 78 (1) of PEP Act.

¹⁹⁵ The effect of Article 16 (c) of MPSA 2013 is that from 2013 royalties re paid to the government by TPDC on behalf of itself and the contractor.

PSA.¹⁹⁶ Other taxes applicable include, but are not limited to, income tax, corporate tax, and capital gains tax. The 2013 MPSA also provides for additional profit tax, which though a good thing, isn't provided for either in the PEP Act or other tax statutes, hence putting into question its legitimacy.¹⁹⁷

3.4.2 Environmental requirements

The Environmental Management Act, 2004 (EMA) regulates all environmental matters in Tanzania including the oil and gas sector. The EMA is based on, among others, the precautionary principle, the polluter pays principle and the principle of eco-system integrity. Additionally, regulations have been published pursuant to the EMA including the Environmental Impact Assessment and Audit Regulations, 2005. The EMA requires an environmental impact assessment to be carried out in relation to projects involving oil and gas exploration and development in view of the potential adverse environmental effects such activities may have and in order to mitigate adverse effects by taking appropriate measures.¹⁹⁸ Further, environmental impact assessments are also mandatory for projects involving extraction of oil and natural gas, the construction of offshore and onshore oil and gas pipelines, as well as separation, processing, handling and storage of oil and gas facilities.¹⁹⁹

3.4.3 Local content and training requirements

The local content aspect ties in with the thesis question as to whether the legal framework provides for means to benefit the local population without necessarily encroaching on investors' interests. Tanzania released its Local Content Policy in 2014, which defines local content to mean the 'added value brought to the country in the activities of the oil and gas industry in the United Republic of Tanzania through

¹⁹⁶ Detailed profit oil distribution can be found in the MPSAs including the latest MPSA 2013.

¹⁹⁷ Mgaya R *Petroleum Taxation: A Critical Analysis of Oil and Gas Fiscal Regime in Tanzania* (unpublished MSc thesis, University of Robert Gordon, 2014) 63.

¹⁹⁸ McKenna C 'Conducting oil and gas activities in Tanzania' available at <http://www.cms-cmck.com/Our-Africa-Practice/Documents/conducting-oil-and-gas-in-africa-tanzania.PDF> (accessed 21 February 2015).

¹⁹⁹ McKenna C 'Conducting oil and gas activities in Tanzania' available at <http://www.cms-cmck.com/Our-Africa-Practice/Documents/conducting-oil-and-gas-in-africa-tanzania.PDF> (accessed 21 February 2015).

the participation and development of local Tanzanians and local businesses through national labour, technology, goods, services, capital and research capability.²⁰⁰

The PEP Act provides that an application for an exploration licence should be accompanied by, among other things, proposals with respect to the training and employment of citizens of Tanzania.²⁰¹ The Act does not provide the extent or minimum requirements thereof. Due to that absence, currently, local content requirements emerge from the MPSAs. These provisions generally require a contractor to maximise the use of Tanzanian resources by giving preference to Tanzanian goods, services and materials of acceptable quality and price when compared to non-Tanzanian goods, services and materials; and making maximum use of Tanzanian service companies where the services provided are of a comparable standard and competitive when compared to those provided elsewhere.²⁰²

The MPSA 2013 provides that a contractor shall comply with the government's local content policy in force and as modified from time to time.²⁰³ The MPSA goes on to list a number of local content requirements, including purchasing Tanzanian goods and services, and to make use of Tanzanian service companies and contractors, where services are required.²⁰⁴ The list lists many more items, which shall be discussed in Chapter Four of this thesis. Suffice it here to say that contractors are also required to commit to employing Tanzanian citizens having appropriate qualifications to the maximum extent possible and to commit to a specified minimum amount to be invested annually for the training of Tanzanian citizens. The 2013 MPSA sets this minimum commitment at US\$500,000 annually for each year of the exploration licence, including extensions thereto.²⁰⁵ In the request for

²⁰⁰Ministry for Energy and Minerals *The Local Content Policy of Tanzania for the Oil and Gas Industry* (2014) iii.

²⁰¹ Section 20 (1) (c) (v) of PEP Act.

²⁰²Kapinga W & Thorns A, 'Tanzania' in Christopher B, (ed) *The Oil and Gas Law Review* (2013) chapter 19, 243-258.

²⁰³ Article 20 (a) of MPSA 2013.

²⁰⁴ Article 20 (a)-(p) of MPSA 2013.

²⁰⁵ Article 21 (b) of MPSA 2013.

applications for exploration of the seven offshore blocks and Lake Tanganyika North Block released in October 2013, this figure was non-negotiable.²⁰⁶

Tanzania is a member of the World Trade Organisation (WTO). The WTO Agreement on Trade-Related Investment Measures (TRIMs) prohibits some local content requirements as being contrary to Article III: 4 of the GATT 1994 which states that:

‘the products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.’

This raises issues, which are discussed in Chapter Four of this thesis, regarding validity of Tanzania’s local content requirement in relation to TRIMs.

3.5 Conclusion

Chapter Three has highlighted essential aspects of the Tanzanian legal framework applicable to the upstream sector investment. The foregoing discussion suggests that the PEP Act does not exhaustively cover pertinent issues relevant to the modern day investment in oil and gas exploration and production activities. The inadequacy of the Act to meet changing standards of the upstream sector has necessitated the emergence of different mechanisms to fill in the gap. These as shown partly, and as will be shown in the next chapter, include the MPSAs, other sectorial legislation and policies. There exist to date some lacunae, uncertainty and regulatory ambiguity. For example, the role of the TPDC as a national oil company and a regulator, the legal basis for the preference of PSAs over other contractual arrangements, confidentiality, and local content requirements compatibility with WTO rules. The next two chapters

²⁰⁶Kapinga W & Thorns A, ‘Tanzania’ in Christopher B, (ed) *The Oil and Gas Law Review* (2013) chapter 19, 243-258.

highlight these shortcomings in line with international standards for FDI and propose remedial solutions, respectively.

However, the legal and institutional framework presented above indicates its own peculiar features that respond to local circumstances on the ground. Now that these are highlighted, it is important to look at the global investment standards which provide a yardstick by which Tanzania can assess itself.

CHAPTER FOUR

THE INTERFACE BETWEEN OIL AND GAS LAW AND THE PROTECTION OF FOREIGN INVESTMENT

4.1 Introduction

In Chapter Three, the legal and regulatory framework for oil and gas exploration and production in Tanzania was explored. The Petroleum (Exploration & Production) Act 27 of 1980 (PEP Act) being the main legislation was revisited. Among other things, the entry requirements for foreign direct investment (FDI), licensing and fiscal regime were explored. Likewise, Chapter Three identified the institutional framework that the Act establishes. The conclusion was that the PEP Act falls short of current realities as far as FDI is concerned.

This chapter explores the interface between oil and gas upstream law and the protection of foreign investments. It attempts to provide an answer to the following questions; is the law framed in a manner that guarantees protection of FDI?, and are emerging issues regarding local population benefits (such as the local content requirements) in the oil and gas investments (see part 5.1) investor friendly and consistent with the Agreement on Trade-Related Investment Measures (TRIMs).

In so doing, it attempts to strike a balance between the powers of the state to regulate investments in its territory and affording foreign investments the required minimum protection.

4.2 Foreign investment defined

In *Salini Costruttori S.P.A & Itals Trade S.P.A v Kingdom of Morocco* (2001) ICSID ARB/00/4 it was held that there would be an investment if four elements are satisfied. These are, a contribution, certain duration, participation of risk involved, and lastly, there must be economic development in the host State.²⁰⁷Sornarajah defines foreign investment as ‘transfer of tangible and intangible assets from one

²⁰⁷*Salini Costruttori S.p.A. and Itals trade S.p.A. v. Kingdom of Morocco*, (2001) ICSID ARB/00/4

country to another for the purpose of use in that country to generate wealth under the total or partial control of the owner of the assets.’²⁰⁸

For its part, FDI is described as controlling ownership in a business enterprise in one country by an entity based in another country.²⁰⁹ It would appear that though a form of foreign investment, it is distinguished from other forms of foreign investment in that FDI involves a more active and direct control of the foreign investor in the enterprise set in the foreign country. Countries have a threshold by which investments qualify as FDI based on control and, among other things, the percentage of equity involved or decision making and management.²¹⁰ In Tanzania, despite the requirement for being locally established or incorporation of a subsidiary of the International Oil Company (IOC) in the country, the IOC can still be majority foreign owned. The Model Production Sharing Agreement (MPSA) 2013 provides that when the TPDC is willing to participate in a joint operation, it may contribute and have a participation interest of up to 25 per cent minimum.²¹¹ Therefore, an IOC participation in either the exploration or development phase of oil and gas in Tanzania would *de facto* qualify as a FDI.²¹²

4.3 Powers of States to regulate foreign direct investment (FDI)

State powers to regulate foreign investment are linked to State sovereignty,²¹³ which is a long established customary rule of international law. In some instances, these

²⁰⁸Sornarajah M *The International Law on Foreign Investment* 3 ed (2010) 4.

²⁰⁹UNCTAD ‘Definition of FDI’ available at <http://unctad.org/en/Pages/DIAE/Definitions-of-FDI.aspx> (accessed 11 March 2015).

²¹⁰UNCTAD ‘Definition of FDI’ available at <http://unctad.org/en/Pages/DIAE/Definitions-of-FDI.aspx> (accessed 11 March 2015).

²¹¹Article 10 (b) (i) of the 2013 MPSA. Note also that according to the MPSA, joint operations in this case means the petroleum operations in respect of which the TPDC has elected to contribute expenses.

²¹²In practice, since MPSAs are only a basis for negotiations, therefore actual participation under PSAs might be even below the 25 per cent stipulated in the 2013 MPSA. In fact, the invitation for bids and application for PSAs for Ruhuhu, Kilosa-Kilombero, South Selous, Malagarasi, South Lake Tanganyika, Lake Eyasi-wembere, Lake Manyara and Lake Natron released by the TPDC through tender no. 02 of 2007/2008 indicated a minimum participation by TPDC of 20 per cent.

²¹³Tshiamo K *The Imperatives of Beneficiation Law for Botswana’s Diamond Mining Industry and its Implication for Foreign Investment* (unpublished LLM thesis, University of Pretoria, 2014) 29.

powers have been codified through international instruments, such as, treaties and bilateral agreements. As highlighted in Chapter One, Article 2 of the Charter of Economic Rights and Duties of States (CERDS) recognises as part of permanent sovereignty over natural resources aspects, such as, possession, use and disposal of all the State's wealth, natural resources and economic activities.²¹⁴ According to the CERDS, State powers include 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 priorities.²¹⁵ Moreover, States have powers to regulate and supervise the activities of transnational corporations within their national jurisdictions and to take measures to ensure that such activities comply with their laws, rules and regulations and conform to their economic and social policies²¹⁶; and to nationalise, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures.²¹⁷

It is at this juncture that international standards of treatment of foreign investment become pertinent. Despite the existence of international standards of FDI treatment, foreign investments have experienced varying problems in host countries, including expropriation. It is submitted that the absence of these standards would open door to excessive host State discretion and arbitrary interference with FDI to investors' disadvantage. It is because of this reality that this chapter traces the evolution of these international standards and the extent to which they are applied in Tanzania.

²¹⁴ Article 2 (1) of CERDS.

²¹⁵ Article 2 (2) (a) of CERDS.

²¹⁶ Article 2 (2) (b) of CERDS.

²¹⁷ Article 2 (2) (c) of CERDS.

4.4 Historical development of minimum standards

The International Court of Justice (ICJ) in *Barcelona Traction, Light and Power Company, Ltd (Belgium v Spain)*²¹⁸ ruled regarding the minimum standard of protection of foreign investment that:

‘When State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded to them’.²¹⁹

In the past, foreign investment would be governed by general principles of customary rules of international law and laws of the host State.²²⁰ These host State laws were found to be deficient because they didn’t take into account foreign investors’ interests.²²¹ An example of this would be the rules on the right of a foreign investor to make a monetary transfer from the host State to his home country. Secondly, the rules were vague and subject to different interpretations.²²² Thirdly, the rules did not receive recognition and were not accepted in some parts of the world especially developing countries. But most importantly, it was argued that these principles failed to give the foreign investor an effective enforcement mechanism whenever they had a claim against the host State. The enforcement mechanisms available were to file a claim in the local court or seek recourse for their claim by their home country government.

The inherent shortcomings of States’ laws led to diverging preferences with regard to minimum standards foreign investments should be subjected to. While

²¹⁸*Barcelona Traction, Light and Power Co Case (Belgium v Spain)*, ICJ Reports 1970 paragraph 33.

²¹⁹*Barcelona Traction, Light and Power Co Case (Belgium v Spain)*, ICJ Reports 1970.

²²⁰Vandeveld K ‘A brief history of international investment agreements’ (2005) 12 *University of California Davis Journal of International Law and Policy* 157.

²²¹Vandeveld K ‘A brief history of international investment agreements’ (2005) 12 *University of California Davis Journal of International Law and Policy* 157. See also Salacuse J W ‘Towards a Global Treaty on Foreign Investment: The Search for a Grand Bargain’ in Horn N (ed) *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects* (2004) 51.

²²²Dodge W ‘Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement’ (2006) 39 *Vanderbilt Journal of Transnational Law* 1.

developing countries argued for host State laws to be applied, developed countries wanted foreign investment to be subjected to the international minimum standard of protection principle.²²³

Some States, especially newly independent, and developing were caught in the web to determine whether to adopt international minimum standards which appeared to be both interfering with their sovereignty²²⁴ and affording foreign investors more protection than their own citizens.²²⁵

This led to the emergence of two doctrines, namely, the Calvo doctrine of national treatment and the Hull doctrine.²²⁶ The Calvo doctrine advocated for equal treatment between foreign investment and local investment. The doctrine required aggrieved foreign investors to file their case with the host State courts and the matter to be adjudicated in accordance with the host State laws.²²⁷ Furthermore it required the exclusive subjection of foreigners and their property to the laws and juridical regimes of the State in which they resided or invested.²²⁸ The Calvo doctrine or national treatment principle received a lot of criticism from the developed world, including the United States of America (US), which argued that the Calvo doctrine

²²³Brownlie I *Principles of Public International Law* 7 ed (2008) 519. See also Newcombe A& Paradell L *Law and Practice of Investment Treaties* (2009) 5; see also Kronfol Z *A Protection of Foreign Investment: A study in International Law* (1972) 14.

²²⁴Subedi S P *International Investment Law: Reconciling Policy and Principle* (2008) 8.

²²⁵Kauschal A 'Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime' (2009) 50 *Harvard International Law Journal* 491 500; see also Borchard E, 'The Minimum International standard in the protection of aliens' (1939) *American Society of International Law Proceedings* 33.

²²⁶Newcombe A & Paradell L *Law and Practice of Investment Treaties* (2009) 13.

²²⁷Dolzer R & Schreuer C *Principles of International Investment Law* (2008) 11; see generally Kronfol Z *Protection of Foreign Investment: A study in International Law* (1972) 14; see also Wenhua S 'Is Calvo Dead' (2007) 55 *American Journal of Comparative Law* 123.

²²⁸Detailed analysis of the Calvo doctrine is available in Wenhua S 'Is Calvo Dead' (2007) 55 *American Journal of Comparative Law* 127. See also Verwey W D & Schrijver N J 'The Taking of Foreign Property under International Law: A New Legal Perspective?' (1984) XV *Netherlands Yearbook of International Law* 23.

was contrary to international justice as it advocated for confiscation of foreign properties.²²⁹

The Hull doctrine, on the other hand, advocated for the foreign investor to be treated in accordance with an international law minimum standard of protection.²³⁰ The minimum standard of protection principle required prompt and just compensation in case of expropriation of foreign property by the host State. The Hull doctrine received support from developed countries including international tribunals and courts. By the end of the 1940s the Hull doctrine or minimum standard of protection became so strong that it is considered to have swept away the Calvo doctrine.

International minimum standards have evolved since and have been contained in various international investment instruments. One of the instruments that contains these international standards is the World Bank Guidelines on the Treatment of Foreign Direct Investment, 1992.²³¹ This thesis relies more on the World Bank Guidelines on the Treatment of Foreign Direct Investment, 1992. The reason is that it seems to contain key standards that have been recurring in multiple other instruments, as pointed out in parts 4.4.1 to 4.4.9 below. However, before discussing these standards, there is a need to revisit, albeit briefly, some instruments which contain the international minimum standards. To that end, the discussion below picks a few international instruments which contained international minimum standards provisions, since the League of Nations in 1929.

4.4.1 Convention on the Treatment of Foreigners, 1929.

Article 23 of the League of Nations Covenant empowered the league to make rules in order to ensure equitable treatment for the commerce of all Members of the

²²⁹Subedi S P *International Investment Law: Reconciling Policy and Principle* (2008) 16.

²³⁰Subedi S P *International Investment Law: Reconciling Policy and Principle* (2008) 9. See also Dolzer R & Schreuer C *Principles of International Investment Law* (2008) 11.

²³¹World Bank Guidelines on the Treatment of Foreign Direct Investment, 1992 available at <http://italaw.com/documents/WorldBank.pdf> (accessed 25 March 2015).

League.²³² By virtue of this, it came up with the Draft Convention on the Treatment of Foreigners. The Draft Convention provided for equal protection of foreign investors and nationals. It guaranteed foreigners the rights to exercise civil, judicial and succession rights. The Draft Convention also empowered foreigners to establish themselves in the host State, engage in any business and pursue any occupation.²³³ The Draft Convention did not come into operation for lacking signatures²³⁴

4.4.2 The United Nations (UN) Havana Charter, 1948

Although the Havana Charter never came into force, due to lack of support by the US and other allied States, the Charter remains one of many historical documents in the efforts towards creating a unified international investment law. It came about after the Second World War. The UN organised a conference on trade and employment in Havana, Cuba, from 21st November 1947 to 24th March 1948. It is at this conference that the Charter was born, which provided for the establishment of the International Trade Organisation (ITO).²³⁵ It was expected that the Havana Charter would be enforced through the ITO.²³⁶ The ITO was intended to promote bilateral and multilateral agreements on trade.

Articles 11 and 12 of the Havana Charter provided for foreign investment protection.²³⁷ Article 11 required member countries to respect and protect other Member States' enterprises, skills and capital which existed in their territories.²³⁸ Articles 12 (a) and (b) provided for the need of host States to receive capital flow from other Member States for the purposes of stimulating local economic growth. However the provision left the mandate to the host State to determine the type of

²³² Article 23(e) of the League of Nations Covenant, 1924 available at <http://unispal.un.org/UNISPAL.NSF/0/6CB59816195E58350525654F007624BF> (accessed 05 April 2015).

²³³Newcombe A &Paradell L *Law and Practice of Investment Treaties* (2009) 17.

²³⁴Newcombe A & Paradell L *Law and Practice of Investment Treaties* (2009) 17.

²³⁵ The Havana Charter for an International Trade Organization, 1948.

²³⁶Shenkin S T 'Trade Related Investment Measures in Bilateral Investment Treaties and the GATT: Moving Towards a Multilateral Investment Treaty' (1994) 55*University of Pittsburgh Law Review* 541 555.

²³⁷ United Nations Conference on Trade and Employment, *The Final Act and Related Documents UN Doc E/Conf. 2/78* available at http://www.wto.org/english/docs_e/legal_e/havana_e.pdf (accessed 05 April 2015).

²³⁸ Article 11 of the Havana Charter

investment it would allow in its territory and warned foreign investors not to use their investment to interfere in the internal affairs of the host State.²³⁹

4.4.3 The Abs – Shawcross Draft Convention on Investment Abroad, 1959

A decade after the Havana Charter, efforts culminated in a convention on investment abroad known as the Abs–Shawcross Draft Convention.²⁴⁰ The Draft introduced provisions which provided for minimum protection of investment abroad.²⁴¹ Article II of the Draft Convention, in particular, required each State Party ‘at all times’ to ensure the observance of ‘any undertakings’ which it may have given in relation to investments made by nationals of any other party. The Article was meant to ensure that at all times the host State would be held liable for its measures which affected foreign property regardless of the motive for such a measure.²⁴²

4.4.4 The Organisation for Economic Cooperation and Development (OECD) Draft Convention on the Protection of Foreign Property, 1967

The Draft Convention, under Article 2, imposed an obligation on all Member States to observe an undertaking given in relation to the property of nationals of any other State Party. The Draft however failed to garner enough support within the OECD Member States and as a result it was not opened for signature to the rest of the world.

4.4.5 The New International Economic Order (NIEO), 1974

The declaration of permanent sovereignty over natural resources is said to have spiralled oil price increases in 1973. Taking a leaf from this, developing countries also decided to push for systemic changes in major means of production, with a specific goal being regulation of foreign investment.²⁴³ They introduced an agenda

²³⁹ Article 12(c) of the Havana Charter.

²⁴⁰ Draft Convention on Investments Abroad (Abs–Shawcross Convention), reprinted in UNCTAD, *International Investment Instruments: A Compendium* (2000) Volume V, p. 395.

²⁴¹ For instance, Article I which provides for the Fair and Equal Treatment (FET) standard and Article III which provides for the rule against expropriation.

²⁴² Potts J B ‘Stabilizing the Role of Umbrella Clauses in BITs: Intent, Reliance and Internationalization’ (2011) *Vanderbilt Journal of International Law* 1011.

²⁴³ Kauschal A ‘Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime’ (2009) 50 *Harvard International Law Journal* 492.

demanding a New International Economic Order (NIEO). It was a concern for developing countries that despite the declaration of permanent sovereignty over natural resources, trans-national corporations (TNC) were still controlling the major means of production in their territories and sometimes interfering with the running of internal affairs of host States. The NIEO was adopted by the UN on 1 May 1974.²⁴⁴ Under Articles IV and V, which resembled the CERDS, it provided:

‘in order to safeguard resources, each State is entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization or transfer of ownership to its nationals, this right being an expression of the full permanent sovereignty of the State. No State may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right.’²⁴⁵

4.4.6 The Charter of Economic Rights and Duties of States (CERDS), 1974

The contents and summary of the CERDS is as stated in part 4.3. Suffice it to say that CERDS adopt Calvo’s approach,²⁴⁶ in that it makes foreign investment subject to State regulation and national laws.

4.4.7 The United Nations (UN) Draft Code of Conduct for Transnational Corporations

Article 4 of the NIEO provided for the need to establish two codes of conduct, namely, the Code of Conduct on Technology Transfer and the Code of Conduct for Transnational Corporations. Therefore in 1974 the Economic and Social Council of the UN (ECOSOC) established the Commission on Transnational Corporations (CTC) which was responsible to draft the Code of Conduct for Transnational Corporations.²⁴⁷ The Code was forwarded to the UN ECOSOC on 31 May 1990 for

²⁴⁴UN Resolution 3202 .

²⁴⁵Article 4 of NIEO UN Resolution 3202 (S – VI).

²⁴⁶Sornarajah M *The International Law on Foreign Investment* 3 ed (2010) 131.

²⁴⁷ ECOSOC Resolution 1908(LVII) of 02 August 1974.

approval. Again there were areas of disagreement between developing and developed countries.

Paragraph 48 of the Draft Code provided for host State powers over TNCs. It affirmed a State's right to regulate the entry and establishment of transnational corporations including determining the role that such corporations may play in the economic and social development of the host State. The Code demanded a host State to accord TNCs fair and equitable treatment and to treat a TNC in the same manner as domestic enterprises. In addition, the Code recognised the need for appropriate compensation to be paid in case of expropriation.²⁴⁸

4.4.8 The OECD Multilateral Agreement on Investment (MAI), 1998

In another attempt, the OECD in 1995 introduced the negotiations on a Multilateral Investment Agreement (MAI).²⁴⁹ The negotiations were launched in May 1995 by the Ministerial Council and started four months later in September of the same year. The objectives of the MAI were to reach a broad investment framework with an effective dispute settlement system.²⁵⁰

4.4.9 The World Bank Guidelines on the Treatment of Foreign Direct Investments, 1992.²⁵¹

The Guidelines in principle demand the host State to facilitate the admission of foreign investment into its territory. The Guidelines demand the host State to conduct itself well in the treatment of foreign investment but does not impose any obligation on the part of the foreign investor.

Guideline II empowers the host State to allow or reject the admission of foreign investment. The guideline urges host States to be as open as possible to the foreign

²⁴⁸ Paragraph 55 of the Draft Code.

²⁴⁹ The OECD Multilateral Agreement on Investment Draft available at <http://www1.oecd.org/daf/mai/pdf/ng/ng971r2e.pdf> (accessed 05 April 2015).

²⁵⁰ Preamble to the MAI; Also part III and IV of the Draft MAI, 1998 available at <http://www1.oecd.org/daf/mai/pdf/ng/ng971r2e.pdf> (accessed 05 April 2015).

²⁵¹ World Bank Guidelines on the Treatment of Foreign Direct Investment, 1992 available at <http://italaw.com/documents/WorldBank.pdf> (accessed 25 March 2015).

investors.²⁵² It also entitles the host State to reject the admission of foreign investment on the ground of national security, public health, protection of the environment and public policy issues.²⁵³

Guideline III provides for the general investment protection principles. It requires States to grant foreign investment fair and equitable treatment, and the ability to transfer funds from the territory; provide full protection and security; and to avoid discrimination against foreign investments.²⁵⁴ Guideline IV provides for incidences which may amount to expropriation. The provision is very extensive and includes incidences which in accordance with the normal international customary law principles would not amount to expropriation.²⁵⁵

With regards to dispute settlement, the Guidelines encourage parties to settle their dispute by using the national courts of the host State or by way of independent arbitration. In the case of arbitration, parties are encouraged to use the International Centre for Settlement of Investment Disputes (ICSID)²⁵⁶ where both are members or the additional facility when one party is not a member of the Convention.²⁵⁷

The Guidelines are criticised for being unbalanced as they impose obligations on the host State but do not do the same to foreign investors. Although the primary aim of passing the Guidelines was to promote investments the Guidelines ended up with provisions which aim at protecting investment and not merely promoting it.

²⁵² Guideline II (3) of the World Bank Guidelines on the Treatment of Foreign Direct Investment, 1992 available at <http://italaw.com/documents/WorldBank.pdf> (accessed 25 March 2015).

²⁵³ Guideline II (4) of the World Bank Guidelines on the Treatment of Foreign Direct Investment, 1992 available at <http://italaw.com/documents/WorldBank.pdf> (accessed 25 March 2015).

²⁵⁴ See Guideline III (2), (3) and (6) of the World Bank Guidelines on the Treatment of Foreign Direct Investment, 1992 available at <http://italaw.com/documents/WorldBank.pdf> (accessed 25 March 2015).

²⁵⁵ Subedi S P *International Investment Law: Reconciling Policy and Principle* (2008) 36.

²⁵⁶ ICSID is established through the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) available at https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf (accessed 20 March 2015).

²⁵⁷ See Guideline V (1) – (3) of the World Bank Guidelines on the Treatment of Foreign Direct Investment, 1992 available at <http://italaw.com/documents/WorldBank.pdf> (accessed 25 March 2015).

Having traced the evolution and development of international standards of foreign investment treatment, the next section specifically expounds on the international minimum standards and their applicability to Tanzania's oil and gas sector.

4.5 The international minimum standards in relation to the oil and gas law in Tanzania

According to Sornarajah, there are three instances in which case law on State responsibility provides guidance as to the international minimum standard. These relate to compensation for expropriation, responsibility for destruction or violence by non-State actors, and denial of justice.²⁵⁸ But where there is a treaty on investment which makes reference to an international minimum standard, the treaty conclusively establishes the existence of the standard as between the parties.

To date, most investment treaties refer to standards of treatment such as Fair and Equitable Treatment (FET)²⁵⁹, Full Protection and Security (FPS), non-arbitrariness, and non-discrimination.

Below is a discussion of some of the most important protection measures available to foreign investments, both existing and potential investments. For the purpose of this thesis, the discussion is based on five standards, namely, fair and equitable treatment, full protection and security, non-arbitrariness, non-discrimination and national treatment, and compensable expropriation. The choice of these standards is merely because they recur in various instruments as discussed under the evolution of international standards in parts 4.4.1 to 4.4.9 above.

4.5.1 Fair and equitable treatment (FET)

The Havana Charter for International Trade Organisation (ITO) provided that FDI in host countries was to be accorded fair and equitable treatment.²⁶⁰ Breach of fair and

²⁵⁸Sornarajah M *The International Law on Foreign Investment* 3 ed (2010) 346.

²⁵⁹ Guideline 3, World Bank Guidelines on the Treatment of Foreign Direct Investment, 1992 available at <http://italaw.com/documents/WorldBank.pdf> (accessed 28 March 2015).

²⁶⁰ Article 11 (2) of The Havana Charter for an International Trade Organization, 1948.

equitable treatment can be through lack of due diligence, due process²⁶¹, denial of justice²⁶², and violation of legitimate expectation.²⁶³ The courts' interpretation of fair and equitable treatment is expanding, and as such, other aspects not originally considered part of FET are now deemed part and parcel thereof.²⁶⁴In *Genin v Estonia*, the arbitration tribunal stated that a violation of the fair and equitable principle could be established by acts showing willful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith.²⁶⁵

The government of Tanzania is keen on attracting FDI given the financial and technical constraints on its part to solely engage in the exploration for and production of oil and gas. As such, despite the PEP Act being enacted 35 years ago, Tanzania has no reputation for frustrating oil and gas investors. By 'frustrating,' reference is made to the fact that there has not been a single incident or case where a foreign oil company has complained or lodged a complaint against Tanzania with regard to any violation of FET. Not one complaint, either, on violation of legitimate expectations, denial of justice or lack of due diligence has been lodged against Tanzania in the oil and gas sector. There are instances in other than the oil and gas sector where Tanzania was accused of having breached this standard. But the good thing is that investors have recourse to a legal remedy in such event.

Even though the PEP Act does not specifically mention FET, Tanzania is a party to various bilateral²⁶⁶ and international investment treaties including dispute settlement

²⁶¹Sornarajah M *The International Law on Foreign Investment* 3 ed (2010) 358.

²⁶²Sornarajah M *The International Law on Foreign Investment* 3 ed (2010) 357.

²⁶³*Metalclad v. Mexico* (2000) 5 ICSID Reports 209.

²⁶⁴ In *Biwater Gauff v. Tanzania* which involved an investment in water supply, the Minister's adverse comments as to the operation of the investor were held by the Tribunal to have caused a decline in the relationship between the investor and the government, hence a violation of the FET principle.

²⁶⁵*Genin v Estonia*, ICSID Case No ARB/99/2, Award of 25 June 2001.

²⁶⁶ For instance, the Agreement between the Government of UK and Northern Ireland and the Government of the United Republic of Tanzania for the Promotion and Protection of Investment of 07 January 1994 available at http://unctad.org/sections/dite/ial/docs/bits/tanzania_UK.pdf (accessed 05 April 2015). See also the Agreement between the Government of Republic of Korea and the Government of the United Republic of Tanzania for the Promotion and Protection of Investment available at http://unctad.org/sections/dite/ial/docs/bits/tanzania_Korea.pdf (accessed 05 April 2015).

treaties which guarantee observance of FET, and therefore investor can resort to them should they allege a breach of the FET standard.²⁶⁷For example, the Agreement between the Government of the UK and Northern Ireland and the Government of the United Republic of Tanzania for the Promotion and Protection of Investment of 07 January 1994 (UK-Tanzania BIT) contains the principle of Fair and Equitable Treatment under Article 2. A reference to this provision was made at some point when the country was brought to the ICSID by a foreign investor. Although The UK-Tanzania BIT does not expressly refer to international customary law or international law, it was found in the case of *Biwater Gauff Ltd. v. United Republic of Tanzania*²⁶⁸that the content of such standard is not materially different from customary international law. Further, the Tribunal held that this lack of definition in the treaty gave the Tribunal much latitude in its interpretation. In addition, the Tribunal stated that it must judge the respondent's (Tanzania's) conduct in accordance with the principles of the standard applicable to the case, that is, legitimate expectations; good faith; and transparency, consistency and non-discrimination.²⁶⁹

Suffice it to say that Tanzania is a State Party to member to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, 1965 which establishes the International Centre for Settlement of Investment Disputes

²⁶⁷ Some other bilateral investment treaties Tanzania has entered into include the Agreement between the Government of the United Republic of Tanzania and the Government of the Republic of Finland on the Promotion and Protection of Investments(2001); Treaty between the United Republic of Tanzania and the Federal Republic of Germany concerning the Encouragement and Reciprocal Protection of Investments(1965); Agreement between the Government of the United Republic of Tanzania and the Government of the Italian Republic on the Promotion and Protection of Investments(2001); Agreement on Encouragement and Reciprocal Protection of Investments between the United Republic of Tanzania and the Kingdom of the Netherlands(2002); and the Agreement between the Government of the United Republic of Tanzania and the Government of the Kingdom of Sweden on the Promotion and Reciprocal Protection of Investments(1999).

²⁶⁸ICSID ARB/05/22, Award available at <http://ita.law.uvic.ca/docu-ments/Biwateraward.pdf> (accessed 16 April 2015).

²⁶⁹Para 529 of *Biwater Gauff Ltd. v. United Republic of Tanzania* ICSID ARB/05/22 available at <http://ita.law.uvic.ca/docu-ments/Biwateraward.pdf>(accessed 16 April 2015).

(ICSID).²⁷⁰ As will be discussed in part 4.6.1, Tanzania subjects itself to the ICSID's jurisdiction, which gives investors recourse should there be allegations of violation of the FET standard in the oil and gas sector.

4.5.2 Full protection and security (FPS)

In the case of *Biwater Gauff Ltd. v. United Republic of Tanzania*²⁷¹, the ICSID held that the FPS standard is afforded when a State guarantees a stable and secure physical, commercial, and legal environment. For example, in that case, the Tribunal found that Tanzania's seizure of City Water's offices and the deportation of City Water staff violated Tanzania's obligation to provide a safe environment for foreign investors.²⁷²

The fact that the standard is 'full' protection means it covers even a State's failure to prevent actions by third parties, and extends to organs and representatives of the State itself.²⁷³ In another case, it was held that the standard imposes:

'an obligation of vigilance and care by the State under international law comprising a duty of due diligence for prevention of wrongful injuries inflicted by third parties to persons or property of aliens in its territory, or if not successful for the repression and punishment of such injuries'.²⁷⁴

The summary of the above decisions is that the host government is responsible to protect foreign investment from commercial, physical and legal risks. Also, the government can be held liable for the violation of FET by third parties that are attributable to the State. The host State is required to provide FPS for foreign investments from risks, such as violence.

²⁷⁰Article 1 (1) of the ICSID Convention

²⁷¹ICSID ARB/05/22, Award available at <http://ita.law.uvic.ca/documents/Biwateraward.pdf> (accessed 16 April 2015).

²⁷²Schill SW *International Investment Law and Comparative Public Law* (2010) 198.

²⁷³ Laird AI et al 'International Investment Law and Arbitration: 2012 in Review' in Bjorklund A (ed) *Yearbook on International Investment Law & Policy 2012-2013*(2014) 161.

²⁷⁴Para 272 of *Ulysseas Inc v The Republic of Ecuador* (UNCITRAL), Final Award, 12 June 2012.

Over the years, FPS has been extended in practice to providing a legal framework that offers legal protection against the above risks to investors. Substantive provisions protecting investments and appropriate procedures enabling investors to vindicate their rights are now envisaged. In the case of *Noble Ventures v Romania* it was held that Romania was required to provide Noble Ventures with ‘full protection and security’ which required Romania to enforce its laws and grant police protection to foreign investments in Romania.²⁷⁵

The PEP Act does not contain a provision that specifically refers to FPS. However, FPS can be assessed through the general vast country’s legal framework, with protection of properties by law, and how institutions, such as, the Police or courts, guarantee the private property rights of investors. There hasn’t been an incident where oil and gas investors have lodged a complaint for breach of this standard. It is however submitted that since Tanzania is a party to various bilateral and international agreements as stipulated in part 4.5.2, it shows her commitment to adhering to FPS.

For Tanzania, concerns that local communities do not benefit from gas exploration and development contracts have at one point culminated in chaos which put gas exploration companies at the risk of violence. However, the chaos did not escalate because it was rapidly contained by the government.²⁷⁶

4.5.3 Non-arbitrariness

The case law definition of the non-arbitrariness standard can be found in the *Elettronica Sicula S.p.a* case, where it was held that a measure is arbitrary if it is done with ‘wilful disregard of due process of law, an act which shocks or at least surprises a sense of judicial propriety.’²⁷⁷ Further, in another case, non-arbitrary was linked

²⁷⁵Subedi S P *International Investment Law: Reconciling Policy and Principle* (2008) 67.

²⁷⁶ The Citizen Reporter ‘Tanzania battles deadly protests over billion-dollar gas project’ *The Citizen* 28 January 2013 4.

²⁷⁷*Elettronica Sicula S.p.a United States of America v Italy* (ICJ) 1989

to procedural irregularity and or bad faith.²⁷⁸ The relevance of these cases is that they provide a general interpretation of non-arbitrariness as an international minimum standard by which Tanzania's PEP Act can be assessed.

The PEP Act was enacted in 1980, prior to current discoveries and developments in the oil and gas industry in the world and in Tanzania. As such there are some aspects that might be relevant today in the industry but are not covered under the Act or the supplementing legal framework as they could not have been foreseen.

One relevant example is the Additional Profit Tax. This is a tax based on the net cash flow from the development area.²⁷⁹ While the PEP Act only provides for payment of a royalty by a holder of a development licence, other legislation, such as the Income Tax Act, provides a whole spectrum of taxes to be paid. No legislation however provide for an Additional Profit Tax. Nonetheless, the 2013 Model Production Sharing Agreement (MPSA) introduces payment of the Additional Profit Tax.²⁸⁰ As stated in the discussion in part 3.2.8, the MPSAs indicate the country's position and form a basis for terms of the actual Production Sharing Agreements (PSAs) with investors, subject to negotiations and agreements. One actual PSA in this respect is between PanAfrican Energy and the government of Tanzania relating to Songo Songo gas field in Dar es Salaam, and it also contains an Additional Profit Tax clause.²⁸¹ The relevance of this PSA is that, if it is indeed the genuine copy, it conclusively depicts the actual terms of the PSAs entered to by the government and investors, because as a general rule these PSAs are confidential and the MPSAs do not necessarily reflect what the investor and the government will come to agree to at the end of contractual negotiations.

²⁷⁸Genin Eastern Credit Ltd v Republic of Estonia (ICJ) 2001.

²⁷⁹Mgaya R *Petroleum Taxation: A Critical Analysis of Oil and Gas Fiscal Regime in Tanzania* (unpublished Msc thesis, University of Robert Gordon, 2014) 55.

²⁸⁰ Article 17 (a) of the MPSA 2013.

²⁸¹Article 13.1 (a) of the PSA between government of Tanzania and the Pan African Energy relating to Songo Songo gas field in Dar es Salaam.

Because there is no legal basis for this tax, it makes it questionable whether the government is or would be able to enforce this tax²⁸² and whether the inclusion of this specific tax isn't in violation of the non-arbitrariness standard.

4.5.4 Non-discrimination and national treatment²⁸³

The basis of national treatment is non-discrimination between the foreign investor and a local investor conducting similar business.²⁸⁴ To determine the existence of discrimination, a comparison is usually made between two types of investor operating in the same sector and competing with each other. If a national who operates in like circumstances is treated better, without justification, the principle of non-discrimination is said to be breached. The objective of the national treatment principle is to address discrimination on the basis of the nationality of the owner of an investment. National treatment, as defined in a United Nations Conference on Trade and Development (UNCTAD) report, means that a host country extends to foreign investors treatment that is at least as favourable as the treatment that it accords to national investors in like circumstances.²⁸⁵

The PEP Act does not contain a non-discrimination provision and neither does the 2013 MPSA. However, the paramount question would be: are the IOCs treated any less favourably compared to local oil companies? First of all, until recently there was no local oil company.²⁸⁶ It makes it impossible to reach a conclusion that there has been any violation of the national treatment and non-discrimination standard as there were no local companies to compare their treatment to. The position might be different should one consider the Tanzania Petroleum Development Corporation (TPDC), the national and government owned oil company, as a comparison entity.

²⁸²Mgaya R *Petroleum Taxation: A Critical Analysis of Oil and Gas Fiscal Regime in Tanzania* (unpublished Msc thesis, University of Robert Gordon, 2014) 55.

²⁸³ Guideline III (6) of the World Bank Guidelines on the Treatment of Foreign Direct Investment, 1992. Available at <http://italaw.com/documents/WorldBank.pdf> (accessed 28 March 2015).

²⁸⁴Sornarajah M *The International Law on Foreign Investment* 3 ed (2010) 337.

²⁸⁵UNCTAD 'Most-Favoured-Nation Treatment' (1999) *UNCTAD Series on Issues in International Investment Agreements* 1.

²⁸⁶ At the time of writing this thesis, there is one local company involved in the oil and gas sector.

While the PEP Act, as discussed in Chapter Three provides for the granting of licences to companies irrespective of whether government owned or not, the practice on the ground that a licence is granted only to the TPDC which then enters into a PSA with investors, including an IOC, raises an argument that the TPDC is treated more favourably than foreign oil companies in the country.

However, the nature and roles of the TPDC makes it impossible to reach that conclusion. This is so because the TPDC's role has been reduced to that of a mere regulator and not as an actual competitor but as a partner in the respective PSAs. This is so because the TPDC only holds interests, and does not directly engage in exploration and production. It enters into a PSA and can sometimes participate, in which case its participation, as discussed in part 4.2, is through these foreign companies and is capped, depending on the terms of the PSA. Thus, as discussed in part 5.3.3, it would be better to disband the TPDC into separate bodies to distinguish the roles of a regulator and national oil company from being exercised by one and the same entity. Furthermore, establishing two separate entities, one performing the role of national regulator and another being the national oil company will increase the efficiency. Finally, there will no risks of discriminatory treatment against the IOCs since the regulator will not be, at the same time, the competitor.

4.5.5 Compensable expropriation

Expropriation refers to measures taken by a State the effect of which is to deprive the investor of the use and benefit of his investments. The taking of property, depending on the form, is sometimes called nationalisation or creeping expropriation.²⁸⁷ Creeping expropriation may refer to 'slow and progressive measures adopted to initiate attrition of ownership and control rights.'²⁸⁸

The PEP Act does not contain provisions on expropriation or nationalisation. It can therefore be said that currently in Tanzania the International Oil Companies (IOCs)

²⁸⁷Sornarajah M *The International Law on Foreign Investment* 3 ed (2010) 368.

²⁸⁸*Tecmed v. Mexico* (2006) 10 ICSID Reports 54.

are guaranteed against expropriation because the law does not directly or indirectly allow the government to expropriate. Plus, because currently the licences are in practice issued to the TPDC which then enters into PSAs with the IOCs, there is no way the government can expropriate rights already belonging to the State. The risks would be in the invested properties not the licence, in which case the law applicable will squarely protect private property rights. The Constitution provides for the right to own private property and the protection of the same under the law.²⁸⁹ The Constitution also provides that it is unlawful for any person to be deprived of his property for the purposes of nationalisation or any other purposes without the authority of a law which makes provision for fair and adequate compensation.²⁹⁰ The only other way the government can indirectly expropriate would be through compulsory land acquisition through the Land Acquisition Act which allows the President to acquire land for a public purpose or public interest.²⁹¹ However, the Land Acquisition Act read together with the constitution and the Land Act also demands adequate, prompt, full and fair compensation.²⁹² But again, it is not possible for the government to invoke this law to expropriate because foreigners are not allowed to own land in Tanzania according to the law,²⁹³ except for investment in which case they can be granted derivative rights.²⁹⁴ Companies whose majority shareholders or owners are non-citizens are also deemed to be non-citizens or a foreign company.²⁹⁵ This means technically that investors cannot be expropriated of their land rights based on these provisions because the land itself does not belong to

²⁸⁹ Article 24 (1) of the Constitution of the United Republic of Tanzania.

²⁹⁰ Article 24 (2) of the Constitution of the United Republic of Tanzania.

²⁹¹ Section 4 (1) (g) of Land Acquisition Act 6 of 1967 Cap 118 RE 2002.

²⁹² Section 3(1) (g) of the Land Act 1999.

²⁹³ Section 20 (1) of the Land Act provides that 'for avoidance of doubt, a non-citizen shall not be allocated or granted land unless it is for investment purposes under the Tanzania Investment Act Cap. 38.'

²⁹⁴ Section 20 (2) of the Land Act provides that 'Land to be designated for investment purposes under subsection (1) of this section shall be identified, gazetted and allocated to the Tanzania Investment Centre which shall create derivative rights to investors.'

²⁹⁵Section 20 (4) of the Land Act 1999.

the investor but the government. Investors would only be entitled to improvements over the land. But that is a topic not relevant to this thesis.

A more pertinent question would be whether there are guarantees that laws might not change in the future, or that nothing will happen that might amount to indirect expropriation. Given the above, there is a need to have a specific State commitment under the PEP Act to guarantee that no expropriation shall be legally supported, or if need be, subject to compensation based on international standards. This also calls for another more viable option, which is to have stabilisation clauses, and to internationalise these clauses to make the State's obligations international commitments.

Historically, Tanzania exercised direct expropriation after formally adopting socialism,²⁹⁶ through the Arusha Declaration of 1967. At the time, the country also enacted the Nationalisation Act 2 of 1967 which empowered the State to expropriate various enterprises for public purposes.²⁹⁷ A number of enterprises were affected, including banks. But in all fairness, it should also be pointed out that this expropriation then was legal, as it followed due legal procedures, it was for public purposes and compensation was paid,²⁹⁸ which are the requirements for a lawful expropriation.

The discussion above in parts 4.5.1 to 4.5.5 highlighted international minimum standards of FDI protection and compared adherence thereto under the Tanzania oil and gas law. While the PEP Act has not categorically provided for these standards in exact wording, similar provisions were found to exist in PSAs and Tanzania's international commitments through bilateral and international investment agreements it has entered into. On the other hand, in practice Tanzania is doing well,

²⁹⁶ Although in practice Tanzania is regarded since the 1990s reforms as not being a socialist State, the Constitution of the United Republic of Tanzania of 1977 which is still in use to date maintains under Article 3(1) that Tanzania is a 'democratic, secular, socialist State'.

²⁹⁷Maina CP 'Foreign Investments in Tanzania: The Mainland and Zanzibar' (1994) 23.

²⁹⁸Kimaro LM '*Examination of the effectiveness of the regulation of Foreign Direct Investment in Tanzania*' (unpublished LLM thesis, University of Pretoria, 2014) 36.

since there has never been an incident or allegation of violation of these standards in the oil and gas sector. However, the country could do better in some aspects, especially through legal reforms to address either the lacunae or meet the new demands warranted by the evolution of the sector, such as the Additional Profit Tax aspect, and the regulatory role of the TPDC.

The foregoing discussion has shown how the law is silent on some aspects. On the other hand, even if the law wasn't silent, it is submitted that a host State will respect its commitment only to the extent it's willing to. The next (4.6) part therefore discusses transforming a country's commitments under investment contracts into an international obligation, which affords FDI a better safeguard.

4.6 Internationalisation of PSAs

There are three ways suggested for the protection of investment agreements between foreign investors and a host State. These include the adoption of a stabilisation clause, and internationalisation of the agreements through clauses dealing with choice of law, and independent arbitration. Stabilisation clauses under Tanzanian law have been discussed in part 3.2.7. This part therefore discusses below the two remaining aspects, namely, choice of law and independent arbitration, respectively.

4.6.1 Independent arbitration

As said above, with regards to dispute settlement, the World Bank Guidelines on the Treatment of Foreign Direct Investments, 1992²⁹⁹ encourages parties to settle their dispute by using the national courts of the host State or by way of independent arbitration. In the case of arbitration parties are encouraged to use the ICSID where both are parties to, or the additional facility when one party is not a party to, the Convention.³⁰⁰

²⁹⁹ World Bank Guidelines on the Treatment of Foreign Direct Investment, 1992 available at <http://italaw.com/documents/WorldBank.pdf> (accessed 28 March 2015).

³⁰⁰ Guideline V (1) – (3) of the World Bank Guidelines on the Treatment of Foreign Direct Investment, 1992 available at <http://italaw.com/documents/WorldBank.pdf> (accessed 28 March 2015).

In addition to being simpler, cheaper and binding, arbitration means that neither the host State nor the foreign investor will subject the determination of their rights and obligations to the courts of the other party's state of nationality.³⁰¹ This is well summed up by the English Court of Appeal in the case of *Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs, Government of Pakistan*³⁰² where it was held that:

'one of the attractions of international arbitration is that it gives the parties the power to insulate the proceedings from the local jurisdiction.'

The PEP Act does not make any reference to arbitration and is therefore silent on the matter. Therefore it falls for the Tanzanian government and the IOC to negotiate and agree in the respective PSA whether they prefer arbitration, and if so, the mode and forum.

The 2013 MPSA provides that disputes shall be resolved in accordance with the International Chamber of Commerce Rules of Conciliation and Arbitration (ICC Rules).³⁰³ The decision of the arbitrators is final; it is binding on the parties and will be enforceable under the United Republic of Tanzania's laws.³⁰⁴ The place of arbitration, however, is envisaged to be Dar es Salaam, in the United Republic of Tanzania,³⁰⁵ and the applicable law shall be the law of the United Republic of Tanzania.³⁰⁶

However, Tanzania is also a Member State of the ICSID; hence parties can resolve in their PSA to arbitration under ICSID Rules of Procedure for Arbitration Proceedings. This is actually the approach adopted in the PSA between Tanzania and Pan African

³⁰¹ Brower C & Lillich R *International Arbitration in the 21st Century, Towards Judicialisation and Uniformity?* (1994) i.

³⁰² [2011] 1 AC 763. The relevance of this case is the Court's acknowledgement of the importance of international arbitration as opposed to local dispute settlement mechanisms.

³⁰³ Article 28 (d) of the MPSA 2013.

³⁰⁴ Article 28 (d) of the MPSA 2013.

³⁰⁵ Article 28 (e) of the MPSA 2013.

³⁰⁶ Article 28 (e) of the MPSA 2013.

Energy.³⁰⁷ The TPDC is an agency of the government, and pursuant to the Implementation Agreement, it was designated to the Centre by the government in accordance with Article 25(1) of the ICSID Convention.

In accordance with Article 25(3) of the ICSID Convention, and pursuant to the Implementation Agreement, the Tanzanian government, the PSA reads, had given its approval to the TPDC's consent to submit the PSA to arbitration under the ICSID Convention.³⁰⁸ This PSA also provides that if jurisdictional requirements of the ICSID are not met, then the dispute can be resolved in accordance with the ICC Rules. While this PSA provides that the place of arbitration shall be Dar es Salaam, Tanzania, it still allows the affected party to opt arbitration outside of Tanzania, in which event the arbitration shall be conducted in London, England, and the party requiring arbitration outside Tanzania shall pay the travel and related costs of all parties.³⁰⁹ This is commendable because it offers flexibility to the investor, although it can also be argued that it indirectly coerces the foreign investor to resort to Tanzania as the place of arbitration to avoid costs he will have to incur for both parties. To secure independence of the arbitrator, the PSA also provides that no arbitrator shall be a national of the jurisdiction of any party to the PSA. Further, he shall not be a national of the jurisdiction of any shareholder or group of shareholders holding more than 10 per cent of the aggregate equity interest in Songas;³¹⁰ or the jurisdiction of the ultimate parent company of any such shareholder of Songas; nor shall any

³⁰⁷ Article 27 (4) (a) of the PSA between government of Tanzania and the Pan African Energy relating to Songo Songo gas field in Dar es Salaam 2001.

³⁰⁸ Article 27 (4) (a) of the PSA between government of Tanzania and the Pan African Energy relating to Songo Songo gas field in Dar es Salaam.

³⁰⁹ Article 27 (4) (c) of the PSA between government of Tanzania and the Pan African Energy relating to Songo Songo gas field in Dar es Salaam.

³¹⁰ Songas is a company jointly owned by shareholders including the Tanzania Petroleum Development Corporation (TPDC). Songas was assigned exclusive rights the by TPDC to explore, develop and sell the natural gas of the Songo Songo gas field. Under this PSA project which converts gas to electricity for usage, PanAfrican Energy is the operator. Therefore the relevance of this provision is to remove the possibility of bias that may arise from an arbitrator who has an interest by virtue of being a national of the same country as the entity.

such arbitrator be an employee, agent or contractor or former employee, agent or contractor of any party.³¹¹

4.6.2 Choice of law clause

In the case of *British Petroleum Co Ltd v Libyan Arab Republic*³¹² the concept of choice of law was linked to the principle of autonomy. The principle of autonomy means that parties have the freedom to determine how they want the disputes to be resolved, and is contained in different wording in different instruments.³¹³

It is observed that subjecting the contracts to the host State's law comes with risks, such as, instability and the fact that the State's contractual commitments are as reliable as its continuing willingness to abide thereby.³¹⁴ As such, the way to safeguard a foreign investor would be to subject the contract to international law or general principles of law. But most effective, is to attribute the contracts to international law and not the laws of the host States, thereby constituting international commitments for the host State.³¹⁵ It gives parties the means to adopt a neutral legal system which may lead to stability in the investment agreement. It has actually proven helpful to investors in many instances, including in the cases of *Libyan American Oil Company v Libyan Arab Republic*³¹⁶ and *Texas Overseas Petroleum Co & California Asiatic Oil Co Ltd v Libyan Arab Republic*.³¹⁷ In these two cases, although Libya relied on national law in nationalising the IOCs' investments, there were clauses in the contracts to the effect that Libyan law would be valid to the extent that it was compliant with international law and the commitments of the Libyan government thereto.

³¹¹ Article 27 (4) (d) of the PSA between government of Tanzania and the Pan African Energy relating to Songo Songo gas field in Dar es Salaam.

³¹² (1979) 53 ILR 297.

³¹³ Article 19 (1) of the UNCITRAL Model Law provides that 'subject to the provision of this Law, the Parties are free to agree on the procedure to be followed by arbitral tribunal in conducting the proceedings.' Likewise, the United Kingdom's Arbitration Act, 1996 section 1 (b) provides that parties have the freedom to decide how they want their disputes resolved.

³¹⁴ Herdegen M *Principles of International Economic Law* (2013) 377.

³¹⁵ Herdegen M *Principles of International Economic Law* (2013) 377.

³¹⁶ (1981) 20 ILM 1.

³¹⁷ (1978) 17 ILM 1.

In Tanzania the PEP Act provides that Commissioner for Petroleum Affairs will have powers to determine disputes between the parties either among themselves or in relation to themselves and third parties³¹⁸, and appeals therefrom will lie to the High Court of Tanzania.³¹⁹ It does not indicate the law applicable, which means that the law applicable should be the one the parties have agreed upon in their respective PSAs and that in the absence of that, local law may be applicable.³²⁰ But noticeable is the fact that the Commissioner's power to hear dispute excludes those disputes in which the government is a party, which means an IOC has a choice of law and forum applicable in a dispute with the government subject to the PSA entered.

But if the 2013 MPSA should be anything to rely on, then Tanzania prefers Tanzanian law to be applicable. The 2013 MPSA's Article 29 states: 'This Agreement shall be governed by, interpreted and construed in accordance with the Laws of the United Republic of Tanzania.' It could be argued that the 2013 MPSA is just a model forming the basis for negotiation and therefore might not reflect the reality in the actual PSAs entered into. Nevertheless, the leaked PSA between the Tanzanian government and PanAfrican Energy also provided for the Tanzanian law to be the applicable law.³²¹

The above discussion highlights the protection of host State's commitments to FDI, and guarantees of this protection through subjecting the commitments to international law and legal recourse. This is done through choice of law clauses, independent arbitration and stabilisation clauses. Based on the MPSAs and Tanzania's PSA with PanAfrican Energy which has come into public domain as

³¹⁸ Section 76 (1) of the PEP Act.

³¹⁹ Section 78 (1) of the PEP Act.

³²⁰ In one incident a Tanzanian businessman sued three IOCs in the High Court of Tanzania for allegedly having been coerced by the three respondent firms to surrender his interests in three gas blocks and to receive undervalued consideration of 7.5 million US dollars. See Kapama F 'Court summons three foreign oil companies' *Daily News* 29 June 2014 3. Available at <http://archive.dailynews.co.tz/index.php/local-news/33101-court-summons-three-foreign-oil-companies> (accessed 27th March 2015).

³²¹ Article 28.5 of the PSA with PanAfrican Energy.

discussed in part 3.2.9, Tanzania has shown willingness to subject itself to international arbitration. As for choice of law, Tanzania still indicates her intention for the local law to be applicable to govern the interpretation of her FDI contracts.

4.7 Local content as an emerging issue in oil and gas investment in Tanzania

This part discusses the local content requirements in Tanzania's oil and gas sector in its relation to the country's commitments under international law, particularly the World Trade Organisation (WTO). It answers the third research question of this thesis, which is about striking a balance between local population benefits in the oil and gas sector and FDI.

One of the issues at the moment is the local population benefits in the oil and gas sector in Tanzania.³²² One way by which the authorities have sought to address this issue is through adoption of local content requirements.³²³ Local content has a wide meaning, but in the oil and gas sector, it refers to an intervention by a national government aimed at ensuring that the majority of the goods and services required at each stage of the oil and gas value chain are locally supplied.³²⁴ It covers aspects, such as, employment of locals, and sourcing of locally produced goods and services.

A number of countries already have local content rules and legislation, including, for instance, Nigeria. Part 4.7.1 below discusses the proposals for local content requirements currently being advocated for in Tanzania. It should be noted that unlike Nigeria and a few other countries, Tanzania does not have a local content Act in place yet. It is believed that the Local Content Policy, whose first draft was released in 2014, might lead to the enactment of a local content Act in the near future. Should it be so, it is proper to assess whether this Act will be compatible with the country's obligations under the WTO.

³²²Howell N 'Tanzania Publishes First Draft of a Long-Awaited Local Content Policy' available at <http://www.kslaw.com/library/newsletters/EnergyNewsletter/2014/July/article2.html> (accessed 17 April 2015).

³²³Ministry of Energy and Minerals *The Local Content Policy of Tanzania for Oil and Gas Industry* (2014)

³²⁴Easo J & Wallace A 'Understanding Local Content Policies in Africa's Petroleum Sector' available at <http://www.andrewskurth.com/pressroom-publications-1154.html> (accessed 17 April 2015).

4.7.1 Tanzania's local content requirements in relation to the Agreement on Trade and Investment Related Measures (TRIMs) and other standards.

The Local Content Policy draft that was released in 2014 defines local content as;

‘the added value brought to the country in the activities of the oil and gas industry in the United Republic of Tanzania through the participation and development of local Tanzanians and local businesses through national labour, technology, goods, services, capital and research capability.’³²⁵

Local content as a policy in the oil and gas industry is said to have originated from the North Sea early in the 1970s and took the form of import restrictions and or the creation of national oil companies. The major objectives for adopting Local Content Policies were the transfer of technology, provision of local job opportunities, creation of backward and forward linkages, and increase in ownership and control.³²⁶

Tanzania does not have a local content Act yet but it is putting in place the Local Content Policy which might necessitate future amendments to incorporate the same. The first draft of the Policy was released in April 2014. The Policy itself only identifies issues and sets out Policy statements. It does not contain the actual requirements. The Policy does not have force of law because there is no legislation. However, currently, the local content requirements can be found in the MPSAs, including the latest one of 2013. Although MPSAs are just models put forward by the government which form the basis of PSA negotiations with investors, they indicate the country's position at the moment. Likewise, this part makes reference to the local content requirements found in the PSA between Tanzania and PanAfrica Energy, as these give an indication of the government's position at the moment.

³²⁵ Ministry of Energy and Minerals *The Local Content Policy of Tanzania for Oil and Gas Industry* (2014) iii.

³²⁶ Ado R 'Local Content Policy and the WTO Rules of Trade Related Investment Measures (TRIMs): The Pros and Cons' (2013) *International Journal of Business and Management Studies* 138.

The latest MPSA that was released in 2013, as discussed under 3.3.3, contain a number of local content rules including the requirement that a contractor should maximise the use of Tanzanian goods, services and materials of acceptable quality and price; and the employment of Tanzanians with appropriate qualifications to the maximum extent possible; and to commit an amount annually for the training of Tanzanian citizens.³²⁷

4.7.2 Tanzania's Local Content Policy *vis-à-vis* the Agreement on Trade and Investment Related Measures (TRIMs)

This part analyses the compatibility of Tanzania's local content requirements with the TRIMs. In so doing, it analyses the relevant provisions and case law, and compares the same with Tanzania's local content rules.

Article 2.1 of the TRIMs requires Members not to apply any trade related measure that is inconsistent with the provisions of Article III (national treatment of imported products) or Article XI (prohibition of quantitative restrictions on imports or exports) of the General Agreement on Tariffs and Trade (GATT) 1994.

National treatment requires that foreign goods should be treated not less favourably than local goods.³²⁸ On the other hand, import restrictions, foreign exchange balancing, and domestic sales violate Article XI of the GATT, 1994 on quantitative restrictions, and therefore are prohibited as well. Therefore it is important to analyse to what extent local content provisions violate these WTO rules.

The TRIMs contains an illustrative annex of measures that are not compatible with the GATT Articles III and XI. Measures violating Article III include local content measures which require the purchase or use by an enterprise of products of domestic origin or domestic source (local content requirements) while paragraph 1(b) covers trade-balancing the TRIMs, which limit the purchase or use of imported products by

³²⁷ Articles 20, 21 of the MPSA 2013.

³²⁸ Article III: 4 of GATT, 1994.

an enterprise to an amount related to the volume or value of local products that it exports.³²⁹

In 2013, the WTO's appellate body had an opportunity to make the finding regarding compatibility of the local content requirements with the TRIMs and the GATT in a case involving local content requirements set by Canada. In that case, it was established that in May 2009, the Ontario Provincial Government in Canada established a Feed-in Tariff (FIT) program for electricity generated from renewable energy sources, such as, solar and wind power. In the FIT program, the Ontario government required electricity generators participating in the program to utilise power generation equipment to which was added at least a certain percentage of value (including material procurements and assembly) in terms of the Province's local content requirements. Therefore, solar panels or other equipment exported by Japanese companies to Ontario received less favourable treatment than those locally produced.³³⁰

The appellate body in the case above found that that the local content requirements accorded preferential treatment to products made in Ontario by requiring the purchase or use of products from domestic sources, which is prohibited in the illustrative list of the TRIMs Agreement. The appellate body found further that Canada was in breach of its national treatment obligation under the GATT Article III and the TRIMs Agreement Article II. The next paragraphs resort to answer the question whether Tanzania's local content requirements violate the TRIMs and the GATT.

³²⁹Para 1 (a) and Para 2(a) of Annex to TRIMs.

³³⁰WT/DS426 - Canada — Measures Relating to the Feed-in Tariff Program. See also; WTO 'Release of WTO Appellate Body Report on certain Local Content Requirements under the Feed-in Tariff Program in Ontario, Canada' available at http://www.meti.go.jp/english/press/2013/0507_01.html (accessed 17 April 2015).

First of all, the local content requirements that were found to be incompatible with the TRIMs and the GATT in the Canadian case above are distinguishable from Tanzania's local content requirements.

While in the Canadian case it touched on some form of tariff, in Tanzania's case there is no tariff involved. Secondly, in addition to the absence of a tariff, there is also not any other incentive given by the government for the purchase of local goods, in which case it is difficult to argue that local goods are treated any better. Finally, even the way that the MPSA is structured, although it imposes an obligation for an investor to purchase local goods, does not make it illegal for an investor to import the same, at least according to the wording of the provisions and the absence of tariffs. Below is a provision extracted from the Model Production Sharing Agreement of 2013:

'The contractor shall ...purchase Tanzanian goods, services and materials provided such goods and materials are of certified standard and quality in accordance with Tanzania authorities namely Tanzania Bureau of Standards, Tanzania goods and Drugs Authority or any other relevant authority established and operating under the Law'³³¹

Likewise, these local content requirements do not impose a quantitative limitation on goods and neither do they put a quota on goods to be imported, which makes them Article XI compliant. It would be proper to argue that as they exist currently, the local content requirements in Tanzania are more of a 'gentleman's agreement' than a legal obligation a breach of which might give rise to a cause of action. For instance, below is an excerpt from the PSA between Tanzania and PanAfrican Energy:

'PanAfrican Tanzania shall give preference to the purchase of Tanzanian goods and materials; provided, however, that such goods and materials are of an

³³¹Article 20 (2) of the 2013 MPSA.

acceptable quality and are available on a timely basis in the quantity required, on competitive terms.³³²

It would be of assistance to compare the local content provisions in Tanzania with Nigeria, the latter being the biggest oil producer in Africa. As said in part 4.7, a number of countries have local content legislation covering oil and gas sector, including Nigeria. The Nigerian Oil and Gas Content Development Act of 2010 provides, for example, that:

‘Subject to section 7 of this Act, the Nigerian Content Plan submitted to the Board by an operator shall contain a detailed plan, satisfactory to the Board, setting out how the operators and their contractors will give first consideration to Nigerian good and services, including specific examples showing how first consideration is considered and assessed by the operator in its evaluation of bids for goods and services required for the project.’³³³

The provision in the Tanzanian framework that is closest to the Nigerian provision above would be Article 20 (k) (i) and (ii) of the 2013 MPSA, which provides:

‘The contractor shall also provide to TPDC together with the annual work programme and budgets required under Articles 5 and 7a list of all projects to be undertaken as well as all goods and services that are required for the conduct of Petroleum Operations’

The difference between the Tanzanian provision and the Nigerian Provision is that while the Nigerian provision has statutory force because it is an Act of Parliament, the Tanzanian provision is found in the Model Contract and does not derive legal force from the law as there is no legislation in place. Secondly, while the Nigerian Act uses words such as ‘first consideration, exclusive consideration and Nigerian operators,’ the Tanzanian framework only uses contractor. Also, while there are

³³² Article 15 (2) of the PSA between the government of Tanzania and Pan African Energy relating to the Songo Songo gas field in Dar es Salaam 2001.

³³³ Section 12 of the Nigerian Oil and Gas Content Development Act 2010

instances where the Model PSA uses Tanzanian goods and services, the same can be argued to be saved by another provision which imposes a 'non-discrimination' requirement. Article 20 (e) of the MPSA 2013 provides:

'A contractor shall ...Upon purchase of goods, services or materials, follow an efficient, open, transparent, non-discriminatory and competitive purchasing and award procedure in accordance with the Law and Best International Petroleum Industry Practices and submit the relevant procurement plan to TPDC for review'

While the Nigerian Local Content Act contains provisions that are considered to be contrary to the TRIMs provisions,³³⁴ there has not been brought to the Dispute Settlement Mechanism of the WTO any complaint against Nigeria by any State. Given the analysis above that Tanzania's local content requirements are less stringent than Nigeria's, it follows therefore that no legal implication might arise for the country for the same. However, the country just needs to enact legislation to give effect to the provisions in the Model PSA, and from which PSAs can derive their legitimacy or legal basis.

The argument above regarding Tanzania's local content requirements in goods can also be made in relation to the provisions for the local content relating to service suppliers. But these service aspects of the local content requirements do call for an analysis of whether these local content requirements in service supply are compatible with the General Agreement on Trade in Services (GATS), from which this thesis desists given that service is a wholly different sector. Suffice it to argue here that Tanzania has made commitments only in respect of tourism and travel

³³⁴Odujinrin & Adefulu 'Does the Nigerian Oil and Gas Industry Content Development Act Conflict with the Country's International Treaty Obligations? Available at <http://www.odujinrinadefulu.com/documents/Does%20Nigeria%27s%20local%20content%20legislation%20breach%20its%20international%20obligations.pdf> (accessed 17 April 2015).

related services;³³⁵ hence is not likely to be violating its commitments under the GATS in the oil and gas sector. Likewise, other aspects of Tanzania's local content requirements, such as the employment of nationals, have been purposely left out in this discussion as they do not relate to the TRIMs. This is so because Article 1 provides that the TRIMs applies to measures relating to the trade in goods.

Finally, it should be pointed out that as the situation stands currently, the local content requirements hardly, if at all, violate the TRIMs and the GATT. This is so because there is no law that makes it mandatory or imposes sanctions for local content requirements; hence they do not have a legal basis other than contractual, and are not enforceable in that sense. As for those found in the MPSAs it can be argued that they merely provide an indication of the government's willingness to have local content requirements incorporated in the PSAs, in which case it is solely a contractual negotiation issue altogether.

If anything, the PEP Act only provides for the employment of nationals. It says that an application for a development licence should be accompanied by detailed proposals with respect to the training and employment of citizens of Tanzania.³³⁶ Tanzania needs therefore to enact a local content Act, and frame the provisions in a manner that is not discriminatory as discussed above. In addition to being WTO compliant, having legislation in place will make the country compliant with a non-arbitrary standard as discussed in part 4.5.3 above.

4.8. Conclusion

This chapter has analysed the legal framework governing investment in oil and gas in Tanzania in comparison to international standards of foreign investment treatment. The underlying discussion centered on the PEP Act provisions as supplemented with provisions in the MPSAs and actual PSAs. There are aspects in

³³⁵https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=%28%40Symbol%3d+gats%2fsc%2f%29+and+%28%28+%40Title%3d+tanzania+%29+or+%28%40CountryConcerned%3d+tanzania%29%29&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true.

³³⁶Section 37 (b) of the PEP Act.

which the Tanzanian legal framework is doing better, such as subjecting itself to international and independent arbitration. Also, Tanzania's local content requirements as existing currently do not conflict with the TRIMs. There are also aspects in which Tanzania could do better than currently, including for example, enacting a specific and comprehensive local content legislation, so that the requirements are not implemented arbitrarily, or amending the law to recognise Additional Profit Tax. The fact that the PEP Act was enacted 35 years ago means it has not been able to capture recent developments in the oil and gas industry globally and locally. An example is the local content requirements which have only surfaced in the African oil and gas context recently, taking into account that even Nigeria, which is Africa's biggest oil producer, only enacted its Local Content Act in 2010.

The next chapter provides in details the areas Tanzania could improve on. Being the last chapter, it revisits the previous chapters (1-4) and concludes in summary the findings. Most importantly, Chapter Five calls for the enactment of comprehensive upstream oil and gas legislation to provide for modern and a more relevant framework.³³⁷

³³⁷ For further analysis and imperatives on specific comprehensive petroleum legislations in the continent see Mailula D '*Protection of Petroleum Resources in Africa*' (unpublished LLD thesis, University of South Africa, 2013) 404.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

It is undisputed that the discovery of oil and gas might have a big impact on Tanzania's economy, which happens to be among the poorest economies in the world to date, and is still that of a least developed country. At the time of writing this thesis, more natural gas is being discovered in the country while major international oil companies (IOCs) are still busy exploring for oil.³³⁸ As discussed in part 1.3.3 in Chapter One, prospects are even higher now than ever before since the commencement of exploration. It is thus only fair to put in place mechanisms, both legal and institutional, to ensure that the country taps the natural resource wealth, and the local population does benefit therefrom.

However, while such is the aim, Tanzania has insufficient technical know-how and wealth to invest in an industry that is known for demanding intensive capital and which comes with risks, such as the fact that despite such investments oil and gas might not be discovered. Not to mention other country risks, such as political and legal. It is at this point that foreign investment becomes inevitable. But at the same time, foreign investors need assurances to mitigate the risks involved. That is why the need to balance local population interests and foreign investment risks comes into question.

This investigation sought to look into the law relating to foreign direct investment (FDI) in oil and gas in Tanzania. Among other things, it looked at the framework the PEP Act laid down, and the practice on the ground. The main question was whether the law, being enacted 35 years ago, does provide for an investor friendly regime while at the same time guaranteeing local population benefits. The measure was the international standards of foreign investment treatment. Other questions, such as

³³⁸See part 1.3.1.

whether the recent developments in the industry are well captured in the Act, have been tackled.

5.2 Summary of conclusions

This study sought to provide an opportunity for policymakers in Tanzania to revisit the FDI legal framework by presenting a fair analysis of the strengths and weaknesses of the law. The aim was to contribute to the little literature on oil and gas law in Tanzania, especially in relation to FDI. Chapter One provided an introduction to this study and the imperatives for having in place good legislation for oil and gas in the country.

Chapter Two revisited the theories and conceptual framework underlying investment in oil and gas. First it discussed the concept of oil and gas as property under the law. To that end, the meaning of oil and gas generally was given³³⁹, and then under the Tanzanian law.³⁴⁰ It was found that petroleum is a general term that technically means hydrocarbons found under the earth surface which can be in the form of gas, or liquid. When they're in liquid form they are referred to as crude oil, and when they're in gaseous form they are referred to as natural gas. So it was found that Tanzania's law adopts this approach and uses the same legislation to govern oil and gas since they're technically subsets of the same thing, that is, petroleum.

The second part³⁴¹ of Chapter Two discusses existing global models of ownership of, and allocation of rights in, oil and gas. This is because ownership gives rise to allocation of rights and regulation of investments. It was observed that Tanzania uses the national ownership theory, which vests all the natural resources in the form of oil and gas, whether discovered already or not, in the State. This explains the practice that licences are now granted to the national oil company, the Tanzania

³³⁹ See Section 2.2

³⁴⁰ See Section 2.2.1

³⁴¹ Section 2.4.

Petroleum Development Corporation (TPDC) which then enters into production sharing agreements (PSAs) with international oil companies (IOCs). While the chapter traced the history of contracts the country entered into, namely, concessions, service agreements, and lately PSAs, it was clear that the Petroleum (Exploration & Production) Act (PEP Act) is silent on the form of contract to be entered into. The country has decided, for instance, to only use PSAs currently but it is not clear what the legal basis is for the preference for PSAs over other contracts, such as concessions and service agreements, since the Act does not specifically provide therefor. This is why the Act needs to be revisited to capture these aspects. If the country has decided that the PSA is the agreement that best covers the country's interest, then the Act should state to that effect.

Chapter Three identified the legal and institutional framework governing oil and gas investment in Tanzania. For the legal framework, this thesis centred mostly on the PEP Act which is the core legislation analysed in this thesis. It revisited the applicability of the Act³⁴², and entry requirements for FDI.³⁴³ The findings in this part are the fact that the PEP Act clearly portrays the State's interest to retain control over natural oil and gas resources. On the other hand, having been enacted 35 years ago, the Act does not cover many aspects and is silent in crucial aspects, such as fiscal, some of which are supplemented by other pieces of legislation, and PSAs, and some of which are left untouched. For example, while the Act provides that a holder of licence is to pay a royalty, it is unclear in the Act what the rate is, although as established in the various PSAs the rate is known. Further, the Additional Profit tax is neither provided for in the PEP Act nor the Income Tax Act, which raises issues as to its legitimacy. There is a need to amend the Act to cover these aspects, or enact new comprehensive legislation for the oil and gas upstream sector in the country.

³⁴² See Section 3.2.1

³⁴³ See Section 3.2.2

Chapter Four examined the interface between the PEP Act and the protection of FDI in the oil and gas sector. It argued that there is a need to strike a balance between the powers of the State to regulate FDI to guarantee local population benefits, and protection of the same. States derive regulation powers from, among other things, the Charter of Economic Rights and Duties of States (CERDS) and General Assembly Resolution 1803 (XVII) (1962) on permanent sovereignty over natural resources.

The discussion compared the Tanzanian law to international minimum standards of protection of foreign investment. While the Tanzanian law has been found to be in no breach of international standards, there were some areas in which the country could have done better. Standards, such as, fair and equitable treatment, non-discrimination, full protection and security and non-arbitrariness, were revisited. Tanzania has entered into several bilateral investment treaties and is a State Party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965).

In some areas in which Tanzania could do better include, for example, the regulatory ambiguity of the role of TPDC, and the proposed reforms on local content requirements. The TPDC should either be a strict national oil company and competitor on an equal footing with other oil companies, or remain a regulator with no participation interest at all. Or another legal entity should be set up to demarcate the roles. As for the local content requirements, first of all, the legitimacy of these requirements was raised because currently Tanzania does not have a local content law but only the first draft of a Local Content Policy. Should the policy lead to the enactment of legislation, there is a need to cushion it in a manner that does not violate the country's obligations under the Agreement on Trade Related Investment Measures (TRIMS).³⁴⁴

³⁴⁴ See discussion under part 4.7.2

5.3 Recommendations

From the foregoing, it is clear that the PEP Act has been a piece of legislation that the country could not do without for the past thirty-five years. However, the Act is outdated and falls short in properly addressing recent developments in the oil and gas industry, especially developments in the regulation of FDI. In particular these are regarding the following aspects; regulatory ambiguity; local content requirements; the role of the TPDC; confidentiality of PSAs; and the legal basis for the preference of PSAs over other forms of contract. The following part proposes solutions for these aspects.

5.3.1 Regulatory ambiguity

The PEP Act should be amended to cover the issue of an independent regulator. If the new gas policy will lead to an Act, then the new gas legislation should address the establishment of the authority that will be responsible for regulating the natural gas industry in the upstream sector. There should be a clear demarcation of the authority regulating gas industries and the activities of the Tanzania Petroleum Development Corporation (TPDC) which presently acts as the regulator. Under section 3 of the Energy and Water Utilities Regulatory Authority (EWURA) Act, No 11 of 2001, natural gas transmission and distribution (downstream) falls under EWURA. However, the EWURA appears to have no power to regulate upstream activities which must be well regulated. The Gas Act should address this situation clearly or, since the Gas Act is likely to cover only the downstream sector, the PEP Act should be amended to address the situation.

5.3.2 Local content requirements

To give a legal basis for the local content requirements either the PEP Act should be reformed to incorporate the same, or a new local content Act should be enacted. This will safeguard local population benefits which are increasingly becoming a concern not only in Tanzania but also in other oil and gas rich countries in Africa. This will rid FDI in oil and gas from insecurity and guarantee full security as the

local population will not consider FDI as acting against their interests. But, the Act needs to be drafted in a way that does not threaten FDI and violate the TRIMs.³⁴⁵

5.3.3 TPDC's interests and participation in the licences

Under the existing regime the TPDC holds an interest in any undertaking, enterprise or project related to the exploration for, and production of, petroleum. This needs to be contained in the PEP Act. As the PEP Act is the main legislation, and it only provides for the issuing of licences to entities incorporated in the country, it is questionable from where the TPDC derives the power to hold licences and interests in every exploration or development licence. TPDC Establishment Order of 1966, as discussed in part 3.3.2 gives the Corporation a wide mandate including acquiring interests in oil and gas. This is in no way to say that the TPDC should not hold interests for the country in oil and gas, but whatever interests it does hold need to trace their legitimacy from the law, especially the main legislation. The law needs to be stated with such a clarity as to leave no doubt.

5.3.4 Legitimacy of PSAs

It is understood why Tanzania may prefer PSAs over concession agreements or service agreements which it has since stopped entering into. PSAs seem to capture well the interests of the country to benefit from foreign investors' know-how and capital while retaining some technology and know-how for its own citizens. PSAs also seem to be the preferred form of agreement in oil and gas exploration and production currently in the world. But the PEP Act does not contain any provision to that effect. The Act only gives powers to the Minister to enter into an agreement on behalf of the United Republic but it does not name the sort of contracts to be entered into. The Act may be hailed as it gives the government discretion, to pick any form of agreement and abandon some types of agreements if it finds them no longer capturing the country's interests. But at the same time, it makes it appear to be an arbitrary move; hence contrary to the non-arbitrariness standard. If in the 1970s the

³⁴⁵ See Section 4.7.2

country used concessions, and in the 1980s there were service contracts, and there is no clear legal basis for these, it doesn't guarantee that the country will not adopt other forms of contract in the future. It doesn't portray the country's commitment to stability. The Act should state whether it is concessions, service agreements or PSAs.

5.3.5 Extractive Industry Transparency Initiative (EITI)

As indicated in Chapter Three, the PEP Act prohibits disclosure of information, which has been construed to mean that the contents of PSAs between the government and IOCs are a top secret.³⁴⁶ It is this kind of confidentiality that partly raises fears among the local population that they may not be benefitting from the natural resources as they should. This brings about ill-will against investors which takes away guarantees against violence and of security of the investors' property. Such confidentiality points out that the Act has not been able to capture developments in the industry whereby governments are adopting transparency initiatives in the extractive industries.

It is suggested that oil and gas contracts should be public. Since the State is entering into these contracts for and on behalf of the citizens, it is only fair to make them accessible. Provisions that criminalise disclosure of contracts and making them accessible to the public should be swept away.

5.3.6 Adoption of comprehensive sector-specific legislation

There is a need to have one comprehensive piece of legislation that comprises all the aspects relevant to oil and gas as presented in this thesis. Currently, oil and gas in Tanzania is regulated by different frameworks. As such there is no single piece of legislation that covers the sector exhaustively without relying on other pieces of legislation to come in aid. According to experts, Tanzania is not a sole case. Variations do exist between different States, both developed and developing, with regard to the regulatory regimes relating to petroleum exploration and production. The regulatory framework in various petroleum producing countries can be

³⁴⁶ See section 3.2.9.

categorised into three systems, namely, a general legislation or sector-specific legislative system, an individually negotiated agreement system, and a hybrid system.

One advantage of the general legislation or sector-specific legislation system is that the legislation provides for predetermined conditions under which the rights to explore for and exploit petroleum resources are granted. It could be standard licences, or leases, royalties or any other relevant elements. It also allows for the inclusion of broad government policy and objectives. It does also help to promote transparency, and accountability in the administration of the regulatory regime.

5.4 Overall conclusion

In conclusion, it is clear that the Petroleum (Exploration & Production) Act, No 27 of 1980, was a milestone in oil and gas exploration in Tanzania. The enactment of the legislation has over the years helped the evolution of the oil and gas industry in the country and has shaped the direction in which the country is heading at the moment.

However, as pointed out in this study, while the Act may have served, and may still be serving, the country, the purpose for which it was enacted, there have been developments in the industry that have emerged since, and having overtaken by the Act, haven't been properly captured by the same. Most especially on FDI in the oil and gas sector, Act, there are some lacunae not covered by the Act, other legislation and the PSAs.

It is therefore the proposition of this study that the law should be reformed to properly address local content requirements, the regulatory framework, the role of the Tanzania Petroleum Development Corporation, and the confidentiality of PSAs. Finally, the law should address production sharing agreements as the preferred form of allocating oil and gas rights in the country.

For the least developed economy that is about to see the light at the end of the tunnel, these reforms are indispensable, especially for policymakers. It can only be hoped that the current wave of reforms will look into the suggestions made above.

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