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Analysis of the Legal and Institutional Frameworks Regulating Oil and Gas Resources in Tanzania

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ABSTRACT

This study examines the legal and institutional framework regulating oil and gas sector in Tanzania. Oil and gas resources have been considered as the world's valuable resource. For countries to benefit from these

resources, the presence of adequate laws and institutions is of a paramount importance. The analysis on whether or not Tanzania has adequate laws and institutions that regulate oil and gas resources entail thorough review of all necessary legal documents including statutes, legal books, journal articles and policies relating to oil and gas resources in Tanzania. The data were collected through documentary review and interview from informants working in institutions established by the petroleum laws for the respective union and Zanzibar Revolutionary Governments. The findings show that legal and institutional frameworks regulating oil and gas in Tanzania suffer from practical challenges such as: separate governing laws, lack of coordination for established institutions and overlapping powers among institutions governing oil and gas between Union and Revolutionary Government of Zanzibar. The study recommends that laws should be amendment to provide for independent and autonomous institutions, to establish coordinating unit among institutions, harmonization of oil and gas governing laws and instituting transparent and accountable decision-making bodies.

Keywords: *Legal, institutional Frameworks, Oil and Gas Resources, Tanzania*

INTRODUCTION

Oil and gas management is a challenge in developing countries.¹ African countries started managing oil and gas resources soon after independence.² The process of managing oil and gas at the time was faced with challenges as these countries had inadequate laws and institutions to regulate and

¹ David E. Brown. *Africa's Booming Oil and Natural Gas Exploration and Production: National Security Implications for the United States and China*. USA: The Strategic Studies Institute and U.S. Army War College Press, 2013. pp.1-4

² Sangwani Patrick Ng'ambi, "Permanent Sovereignty over Natural Resources and the Sanctity of Contracts. From the Angle of *Lucrum Cessans*," *Loyola University Chicago International Law Review*, volume 12 issue 2, 2015. pp. 2-3, accessed September 16, 2017, <https://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1176&context=lucilr>.

manage these resources.³ The institutional inefficiency, oil extraction facilitated by developed countries, using International oil companies (IOCs), continued to exploit the African natural resources.⁴

As a response, many African countries including Tanzania improved their legal institutions with a view to protecting the new development in the oil and gas sector.⁵ This improvement was further facilitated by United Nations' Resolution Number 1803 (XVII) on Permanent Sovereignty over Natural Resources of 1962. This UN Resolution provides for the ownership and control of natural resources as the right of the peoples and nations to the permanent sovereignty over their natural wealth and resources which must be exercised in the interest of their national development and of the wellbeing of the people of the respective State.⁶

This principle has resulted not only the shift of controlling and managing oil and gas resources from international oil companies to state owned companies,⁷ but also changes in the country's constitutional and regulatory framework for both developed and developing countries.⁸ These changes attracted the attention of scholars to articulate the extent to which the legal and regulatory frameworks can improve, control and manage oil and gas resources in relevant countries.

³ *Ibid.*

⁴ Example of these countries are Nigeria, Angola, Gabon and Chad which have been said to benefit little from oil and gas despite their wealth in these resources.

⁵ Ragnar Torvik. "Petroleum Fund in Tanzania? Other Alternatives May Be Better," Tanzania: *REPOA/ CMI*, Vol.15 Number 10 REPOA Number 46, 2016. Available at <http://www.repoa.or.tz> or <http://www.cmi.no>. (Accessed on January 20, 2018)

⁶ The United Nations General Assembly (UNGA) Resolution 1803 of 1962. See also, Lila Barrera-Hernandez. In *Sovereignty Over Natural Resources under Examination: The Inter-American System for Human Rights and Natural Resource Allocation* Spring, 2006 Reporter 12 Ann. Surv. Int'l & Comp. L.p 43

⁷ Lemony L.M. "The Governance of Petroleum Sector in Tanzania: Institutional Arrangement and The Role of The National Oil Company" *The extractive industries and society*, Elsevier 4, 2017, pp180-190

⁸ Naazneen H. Barma, Kai Kaiser Tuan Minh Le and Lorena Viñuela. *Rents to Riches? The Political Economy of Natural Resource-Led Development*. USA: The World Bank, 2012.

AN OVERVIEW OF OIL & GAS GOVERNANCE IN TANZANIA

Like in other countries in Africa, oil and gas exploration in Tanzania started during the colonial era in 1952.⁹ By that time, the law governing exploration and exploitation was adopted from British colonial administration.¹⁰ After independence, the government faced challenge on how to regulate oil and gas exploration as the colonial government did not leave any local institution responsible for regulating oil and gas exploration. Consequently, the government established the Tanzania Petroleum Development Corporation (TPDC) in 1969¹¹ which later facilitated the discovery of natural gas in the Songo Songo Island in 1974 and Mnazi Bay in 1982.¹²

During the first phase (1952-1965) of the exploration, there were no specific law providing for exploration and exploitation of oil and gas resources in the country until the enactment of the Petroleum (Exploration and Production) Act 1980.¹³ However, the Petroleum Act did not cover the sector comprehensively, it only made provisions for upstream and leaving midstream and downstream unregulated.¹⁴ To address such and other discrepancies, the government in 2008 enacted the Petroleum Act, 2008

⁹ Wilbert, B.K. *et al.* "The Oil and Gas Law Review". In C.B. Strong (Ed.), *Business Law Research*: Chapter 19. United Kingdom: Law Business Research Ltd, 2013.

¹⁰ Hamudi Ismail Majamba Tanzania's Oil and Gas Industry: Legal Regime, Management and Access Rights, *Recht in Afrika – Law in Africa – Droit en Afrique* 19, 2016. pp. 7-8

¹¹ This was established under The Public Corporations Act No.17 of 1969. Through Government Notice No.140 of 30th May 1969 and began operating in 1973. Available at <http://www.tpdc-tz.com/aboutus.php> (accessed on 18 February, 2018)

¹² Wilbert, B.K. *et al.* "The Oil and Gas Law Review". In C.B. Strong (Ed.), *Business Law Research*: United Kingdom: Law Business Research Ltd, 2013.

¹³ The National Natural Gas Policy, 2013, Pp. 1-3

¹⁴ See the part of the preamble on general objective of the Act and The Tanzania National Natural Gas Policy- 2013, pp. 1-2

which provided for *inter alia*, midstream and downstream management.¹⁵ This Act introduced the Energy and Water Utility Regulatory Authority (EWURA) as regulatory authority for midstream and downstream oil and gas operations.¹⁶

While exploration is still in progress, it is estimated that 57 trillion cubic of natural gas has been discovered.¹⁷ The increase in discovery and ongoing natural gas production led to enactment of the Petroleum Act, 2015 which is more comprehensive and establishes more institutions with separated functions.¹⁸ The Act provides for different legal and institutional issues pertinent to the regulation of oil and gas sector in Tanzania including upstream, midstream and downstream activities.

THE REGULATORY FRAMEWORK FOR OIL & GAS IN TANZANIA

The legal and regulatory framework for petroleum resources involves a number of legal instruments in form of principal legislation, subsidiary legislation, regulations, rules, regional and international conventions as well as bilateral and multilateral agreement governing oil and gas exploration operations. It establishes the administration system to be used

¹⁵ See the general objectives of its enactment and section 2 which provides for importation, exportation, transformation, transportation, storage, distribution wholesale trade and retailer sale of petroleum and petroleum products and related activities.

¹⁶ Section 3 of the Petroleum Act, 2008

¹⁷ Mark Henstridge "Understanding the boom Country study—Tanzania" WIDER Working Paper 2018/177. available at <https://www.wider.unu.edu/sites/default/files/Publications/Working-paper/PDF/wp2018-177.pdf>

¹⁸ See part II Act, no. 21 of 2015. Also, see Lemony, L.M., "The Governance of Petroleum Sector in Tanzania: Institutional Arrangement and the Role of the National Oil Company." *The extractive industries and society* 4,2017. p 1-3

by oil and gas producing countries that facilitate the best exploitation of oil and gas resources.¹⁹ Regarding this aspect Hunter indicates that:

petroleum regulatory framework refers to a suite of legislative and policy tools that a state utilises to regulate petroleum exploration and production. Specifically, the regulatory framework encompasses petroleum policy, petroleum legislation, the award of exploration and production licences, the conditions for the award of petroleum licences, and the government management of the extraction of petroleum.²⁰

The oil and gas regulations involve legislative frameworks which are the primary instruments for regulating oil and gas exploitation, contractual arrangements for ensuring state participation in the commercial activities, and fiscal regimes for managing revenue.²¹

Tanzania reformed its oil and gas regulatory framework for the purpose of covering exploration and exploitation oil and gas resources from the upstream, midstream and downstream.²² These efforts have been noticed to have started from 1980s to the present where the country has managed to improve oil and gas regulatory framework in the whole chain from exploration to consumption.²³ In reforming its oil and gas regulatory framework, exploration and production from the upstream, midstream

¹⁹ Douglas Tlogane Mailula, *Protection of Petroleum Resources in Africa: A Comparative Analysis of Oil and Gas Laws of Selected African States* Doctoral Thesis Presented at The University of South Africa, 2013, p. 90.

²⁰ Hunter T 'Comparative Law as an Instrument in Transnational Law: The Example of Petroleum Regulation' 21(3). *Bond Law Review*, 2009, 42 at p.45. If you have not read Hunter the best citation is to cite Douglas only because that is what you are aware of. As quoted by in writing is a sign of laziness. A reader would be asking why did he/she find that author himself/herself to verify truthfulness of the matter he is asserting.????

²¹ Douglas Tlogane Mailula, *Protection of Petroleum Resources in Africa: A Comparative Analysis of Oil and Gas Laws of Selected African States* Doctoral Thesis Presented at The University of South Africa, 2013. P. 91

²² These streams were not comprehensively covered by the Petroleum (Exploration and Production) Act 1980 and the Petroleum Act, 2008

²³ See the Long title of the Petroleum Act, 2015 which provides that the Act was enacted to provide for regulation of upstream, midstream and downstream petroleum activities

and downstream systems were developed in order to meet the commercial relationship of both the government and private investors.²⁴

The provisions on the governance and regulations of oil and gas regulatory can be found in a numerous legislative instrument. However, the discussion focuses on the Constitution of the United Republic of Tanzania, 1977, The Constitution of the Revolutionary Government of Zanzibar, 1984 (Revised in 2010), the Petroleum Act, 2015, The Oil and Gas Revenues Management Act, 2015, Tanzania Extractive Industries (Transparency and Accountability) Act, 2015 and the Oil and Gas (Upstream) Act, 2016 as the main legal instruments with direct bearing to the oil and gas governance.

These legal instruments cater for various issues including basic principles governing natural resources including oil and gas resources, regulating oil and gas resources from upstream to downstream operations and establishment of regulatory institutions, governance of revenue derived from oil and gas operations and to provide mechanism for sustainable use of revenues derived from oil and gas resources. The analysis of oil and gas regulatory framework between the union and Zanzibar Revolutionary governments is hereinafter articulated:

I. THE CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA, 1977 (CHAPTER 2 R.E. 2002)

The constitution as the basic law sets main pillars for protection of national natural resources. The Constitution of the United Republic provides the Government with mandate to ensure that the national wealth and heritage are harnessed, preserved and applied for the common good and against exploitation of one person by another.²⁵ Also, it provides that the use of

²⁴ Rasmus Hundsbaek Pedersen and Peter Bofin. The politics of gas contract negotiations in Tanzania: a review, DIIS -Danish Institute for International Studies working paper 2015: 03, p. 15 available at http://pure.diiis.dk/ws/files/615479/WP_2015_03.pdf (accessed on 16 march 2019)

²⁵ See article 9(c) of the Constitution of the United Republic of Tanzania, 1977

national wealth should be geared towards the eradication of poverty, ignorance and disease.²⁶ It further provides that natural resources belong to the United Republic and are the property of the state authority and collectively owned by the people.²⁷ The Constitution imposes the duty to safeguard the property of the state authority by combating all forms of waste and squander, and to manage natural resources for national economy and be used for the development of the people.²⁸

The Constitution provides the basis for regulating natural resources in Tanzania. It encompasses the principle of national sovereignty over natural resources by providing the State and its persons with obligation to protect and use natural resources.

II. THE PETROLEUM ACT, 2015

The need to improve, control and manage the oil and gas resources led to the enactment of the Petroleum Act. This was due to increase natural gas exploration and discovery which facilitated the need for comprehensive legal framework to regulate the sector.²⁹ The earlier laws including the Petroleum (Exploration and Production) Act 1980 and the Petroleum Act, 2008 were not comprehensive enough to meet the current oil and gas economy because of inadequacy institutional capacity, transparency and accountability and lack of petroleum revenues management systems. The enactment of the Petroleum Act in 2015 intended to address existing weaknesses in the legislative frameworks.

It is one of the ways of reforming the oil and gas sector and enforcing the promulgated National Natural Gas Policy 2013 and Petroleum Policy 2014. The Act was enacted to provide for regulation, administration,

²⁶ *Ibid*, article 9 (i).

²⁷ *Ibid*, article 9 (j) and art. 27(1).

²⁸ *Ibid*, article 27(1) and (2).

²⁹ The Natural Resource Governance Institute Tanzania's "Extractive Sector Legislation: Recommendations for Effective Implementation," 2016. pp.1-5. Accessed on March 14, 2018 <https://resourcegovernance.org/sites/default/files/documents/tanzania-extractive-sector-legislation.pdf>.

supervision of upstream, midstream and downstream petroleum activities, establishment of the Petroleum Upstream Regulatory Authority, to provide for the National Oil Company, to secure the accountability of petroleum entities and to provide for other related matters.³⁰

The Act covers the whole oil and gas supply chain from the upstream to the downstream. The Petroleum Act, is applies for both Tanzania Mainland and Zanzibar while providing for Zanzibar to apply its own law and institutions in governing resources in Tanzania Zanzibar.³¹ The Petroleum Act vests oil and gas resources within territorial boundaries in the United Republic and mandates its exclusively management to the Government on behalf of and in trust for the people of Tanzania.³² Further, the Act provides for administration and regulation of upstream, midstream and downstream activities, establishes responsible institutions, licencing processes and procedures, safety and environment, community involvement and participation, financial control and management and settlement of dispute arising from oil and gas operations.

The Petroleum Act, 2015 singles out the Tanzania Petroleum Development Corporation (TPDC) as the national oil company representing and protecting government commercial interest in the oil and gas economy. The Act has separated institutional functions by establishing several independent institutions. It establishes the Petroleum Upstream Regulatory Authority (PURA) charged with responsibility to manage upstream activities,³³ and Oil and Gas Advisory Bureau with responsibility to advise the Cabinet on very sensitive issues relating to oil and gas industry.³⁴ In terms of scope, this Petroleum Act seems to be more comprehensive compared to the repealed ones.³⁵ However, for controlling, governing and supervision of oil and gas operation the Act applies to Mainland Tanzania as Tanzania Zanzibar is provided with its system.

³⁰ See the Long Title Act, No 21 of 2105

³¹ Section 2 and (2) (b) of the Petroleum Act. No. 21 of 2015

³² *Ibid*, section 4 (1).

³³ *Ibid*, section 11(1).

³⁴ *Ibid*, section 7.

³⁵ The Petroleum (Exploration and Production) Act, 1980 and The Petroleum Act, 2008

III. THE OIL AND GAS REVENUES MANAGEMENT ACT, 2015

The Act provides for the establishment and management of the Oil and Gas Fund, to provide the framework for fiscal rules and management of oil and gas revenues and to establish the mechanism for sustainable use of revenues generated from oil and gas resources. The Act provides for administrative institutions which include the Minister of Finance, the Bank of Tanzania and Portfolio Investment Advisory Board. The functions of the Minister include: to manage oil and gas revenues, to formulate and supervise policy matters of the Fund, and to formulate and monitor broad investment strategies and operation guidelines.³⁶ On the other hand, the functions of the Bank of Tanzania include: to open accounts of the Fund, to operate the Accounts of the Fund, to determine investment strategies, and to report performance of the Fund to the Minister.³⁷ The Portfolio Investment Advisory Board is dedicated to provide advice the Minister on portfolio investment strategy of the Revenue Saving Account of the Fund, to report on the Governance and overall performance of the Revenue Saving Account of the Fund and to make sure that investment consider the current economic conditions and intends to benefit the present and future generations.³⁸

The revenues from the oil and gas are mainly collected by the Tanzania Revenue Authority and the National Oil Company which have been designated as collectors of oil and gas revenues and which, after executing the assigned task, deposit into two separate accounts the collected revenues which are maintained at the Bank of Tanzania, namely the Revenue Holding Account and the Revenue Savings Account respectively.³⁹ The Bank uses the oil and gas funds to facilitate three major objectives, namely: to ensure maintenance of fiscal and macroeconomic

³⁶ Section 4 of the Oil and Gas Revenues Management Act, No. 22 of 2015.

³⁷ *Ibid*, section 5.

³⁸ *Ibid*, section 12 and 13.

³⁹ *Ibid*, section 6 and 7.

stability, to guarantee financing of investment in oil and gas, to enhance social and economic development, and to safeguard resource for future generations.⁴⁰

For the good use of the Fund, the Act restricts the use of the Fund to provide credit to the Government, public enterprises, private sector entities or any other person or entity, to use revenues of the Fund as collateral or guarantees, commitments or other liabilities of any other entity, for rent seeking or corrupt practices, embezzlement or theft.⁴¹ According to the provisions of the Act the revenue and accounts managed are those collected from oil and gas operations taking place in Mainland Tanzania, save for revenue derived from oil and gas resources jointly operated.

IV. THE OIL AND GAS (UPSTREAM) ACT, 2016

The Oil and Gas (Upstream) Act is the main legislation governing oil and gas resources in Zanzibar. The Oil and Gas (Upstream) Act resulted from the enactment of the Petroleum Act, which allows Zanzibar to have her laws and institutions to manage, administer and regulate oil and gas resources.⁴² This flexibility of allowing Zanzibar to have its enactment on oil and gas is explicitly provided in the Petroleum Act where the law allow the enactment of laws, establishment of institutions to regulate oil and gas in Zanzibar and use of revenues thereof.⁴³

The Parliament through the Petroleum Act delegated the management and administrative powers of the Government of the United Republic and the legislative powers of the Parliament over oil and gas resources in Zanzibar to the Revolutionary Government of Zanzibar and House of Representatives. In exercising its powers, the Revolutionary Government of Zanzibar enacted the Oil and Gas (Upstream) Act, 2016, for the management and administration of oil and gas resources within

⁴⁰ *Ibid*, section 8.

⁴¹ *Ibid*, section 11.

⁴² *Ibid*, section 2 (2) and (4) (a) and (b).

⁴³ Section 2(2)(b), 2(4) (b) and 4(2) and (3) of the Petroleum Act. No. 21 of 2015

Zanzibar. The Act provides for the regulation of upstream oil and gas activities, establishment of the Zanzibar Petroleum Upstream Regulatory Authority, the establishment of Zanzibar Petroleum Development Company, and secures the accountability of petroleum entities.⁴⁴

The Oil and Gas (Upstream) Act provides its application to include the oil and gas that exists in the territorial land, islets, internal water, territorial sea, contiguous zone, exclusive economic zone and any other area as extended and recognized by international law from time to time.⁴⁵ This provision indicates that the government of Zanzibar has the powers to issue exploration licences onshore and offshore areas within Tanzania Zanzibar.

The Revolutionary Government of Zanzibar uses its laws and institutions established under the Oil and Gas (Upstream) Act to protect and manage oil and gas resources for the benefit of the people of Zanzibar. The Act provides that:

The entire property in, and the control of petroleum... under any land or territorial waters in Zanzibar...is vested in the government on behalf of the people of Zanzibar, and that, petroleum resource is the public property of the people of Zanzibar and the government shall hold petroleum rights for the benefit of the people of Zanzibar.⁴⁶

The law provisions guarantee the Revolutionary Government of Zanzibar autonomy over the use of oil and gas resources in Tanzania Zanzibar. The oil and gas regulatory framework intend to protect the position of the Constitution of Zanzibar by recognizing Zanzibar and its territory, including the offshore and territorial water and its exclusive economic zone, which also covers the offshore oil and gas resources.⁴⁷

⁴⁴ See the Long Title to the Oil and Gas (Upstream) Act, No.6 of 2016.

⁴⁵ Section 2 of the Oil and Gas (Upstream) Act, No. 6 of 2016.

⁴⁶ *Ibid*, section 4(1), (2).

⁴⁷ *Ibid*, section 2, 3, and s 4

Also, for the practical operation of the oil and gas sector, the Revolutionary government of Zanzibar has established different institutions with separate functions in the governance of oil and gas resources. The established institutions range from the Ministry responsible for petroleum affairs in Zanzibar, the Zanzibar Petroleum Regulatory Authority (ZPRA) and Zanzibar Petroleum Development Company (ZPDC) as major institutions for regulating oil and gas resources in Zanzibar. Thus, the present legal framework provides separate law and institutions regulating oil and gas resources between the Government of the United Republic and Revolutionary Government of Zanzibar.

THE INSTITUTIONAL FRAMEWORK FOR REGULATING OIL & GAS RESOURCES

The legal framework provides for establishment of different institutions responsible for the regulating of oil and gas resources in Tanzania. The established institutions include regulatory institutions and oversight institutions including: the Cabinet, the Oil and Gas Advisory Bureau, the Ministry responsible for petroleum affairs, Tanzania Petroleum Development Company (TPDC), Petroleum Upstream Regulatory Authority (PURA), and the Energy and Water Utilities Regulatory Authority (EWURA) for the Union government catering for Mainland Tanzania.⁴⁸ Institutions for Tanzania Zanzibar include the Zanzibar Revolutionary Council, the Ministry of Petroleum Affairs, Zanzibar Upstream Regulatory Authority (ZPRA) and Zanzibar Petroleum Development Company (ZPDC). The objectives and functions of established institutions are analysed starting with those operating in Mainland Tanzania followed by Tanzania Zanzibar.

⁴⁸ See part II of the Petroleum Act, No 21 of 2015

I. THE CABINET

Unlike it was with the previous legislation, the Petroleum Act, 2015 introduces the Cabinet as institutions responsible for determining oil and gas economy. First, the law provides the Cabinet with the duty to oversee all strategic plans and issuance of directives over the oil and gas economy and vests the Cabinet with final decision over the petroleum economy.⁴⁹ The Act requires the minister when dealing with oil and gas strategic and development plans, to seek guidance, directives and approval from the Cabinet.⁵⁰ The law provides that the Minister responsible for petroleum affairs cannot issue any licence or permit for petroleum activities to any area without first seeking and obtaining approval of the Cabinet.⁵¹

All approvals relating to the development of the oil and gas sector are done by the Cabinet upon advice by the Oil and Gas Advisory Bureau which is stationed at the President's Office.⁵² Therefore, the cabinet is the highest institution for oil and gas development decisions making. It is worth noting that the Cabinet is a constitutional office that is fully mandated to provide advisory functions to the Presidency. It is chaired by the President, and it is composed of the Vice President, the President of Revolutionary Government of Zanzibar, Prime Minister and all Ministers. The Attorney General also attends the Cabinet by virtue of his advisory role to the Government of United Republic of Tanzania in all legal matters.⁵³ Indeed, entrusting the approval of all matters on oil and gas in the Cabinet addresses the issues of transparency and accountability of the process. It limits the Minister's discretionary powers on licensing and other development permits that for long time have been a preserve of the Minister alone. It is an innovative step towards ensuring sustainable governance of oil and gas resources.

⁴⁹ *Ibid*, section 4(3).

⁵⁰ *Ibid*, section 5(3).

⁵¹ *Ibid*, section 33 (1) (7).

⁵² *Ibid*, section 7.

⁵³ Article 54 (1), (2), (3) and (4) of the Constitution of the United Republic of Tanzania, Cap 2 R.E. 2002.

II. OIL & GAS ADVISORY BUREAU

The Petroleum Act 2015 establishes the Oil and Gas Advisory Bureau within the Office of the President.⁵⁴ The Bureau's role is to advise the President and the Cabinet on all economic matters relating to the oil and gas economy.⁵⁵ The establishment of the Oil and Gas Advisory Bureau was to ensure that the President and Cabinet are properly advised before approving any decision relating to oil and gas development. The Bureau was introduced because the final decision on oil and gas development is vested in the Cabinet. The Bureau acts as technical adviser on how the government can invest and benefit from the oil and gas economy. Despite the Oil and Gas Advisory Bureau there are other institutions such as PURA, EWURA, the office of the Commissioner for oil and gas and TPDC which are responsible for oil and gas development on daily basis.

However, these institutions have no advisory roles to the Cabinet. It was necessary that to avoid conflicts of interest, a specific advisory body named Oil and Gas Advisory Bureau had to be established with an advisory role to the Cabinet. Despite establishment of the Bureau and the nature of the office assigned to advise, the composition of the Bureau is not legislated. This might have different implications. On one hand, it gives the President's Office an ample avenue to include any person with prerequisite knowledge, skills and experience in the oil and gas sector to provide such crucial expertise through the Bureau to enhance its advisory role. However, on the other hand, lack of clarity as to the composition of the Bureau may be challenged with regard to its independence and ability to provide the envisaged advice.

⁵⁴ Section 7 of the Petroleum Act No. 21 of 2015.

⁵⁵ *Ibid.*

III. THE MINISTRY RESPONSIBLE FOR PETROLEUM AFFAIRS

The Minister for petroleum affairs is provided with several roles in the petroleum sector. The Minister being the overall supervisor of the industry, is entrusted with the following roles: developing and planning oil and gas policies, taking charge of oil and gas exploration and development licences, entering petroleum agreement on behalf of the government, responsible for formulating and reviewing policies regulating the petroleum industry, and taking care of all administrative and management of the oil and gas sector.⁵⁶ That law also provides the Minister responsible for petroleum affairs with the overall supervision of the oil and gas sector.

Despite being entrusted with all these powers, the Minister cannot exercise those powers in his absolute discretionary manner as it used to be in all previous laws governing extractive industry in Tanzania. The Minister can only exercise major decisions upon seeking and obtaining approval of the Cabinet. This limitation to powers of the Minister for petroleum affairs addresses the shortcoming of the former laws that had entrusted finality on the Minister in terms of decision making. It is not easy for the Minister currently to discretionary handle issues of oil and gas development without considering the interests of the country and its people as the final decision to allow or otherwise must be approved by the Cabinet.

IV. THE TANZANIA PETROLEUM DEVELOPMENT CORPORATION

The Tanzania Petroleum Development Corporation (TPDC) is wholly owned by Government of the United Republic of Tanzania as a parastatal,

⁵⁶ Section 5(1,2) of the Petroleum Act, No. 21 of 2015.

with all its shares held by the Treasury Registrar.⁵⁷ The Petroleum Act provides that TPDC as the national oil company is empowered to undertake Tanzania's commercial aspects of petroleum in the upstream, midstream and downstream operations and participating interests of the Government in the petroleum and natural gas agreements.⁵⁸ Further, the law provides TPDC with exclusive rights over oil and gas value chain and to participate in the development and strategic ownership of natural gas projects on behalf of the Government.⁵⁹ In addition, TPDC is provided with exclusive rights over petroleum resources and company wishing to carry out petroleum operations in Tanzania must do so in a joint venture with TPDC and TPDC has to hold at least 25% of the shareholding.⁶⁰

This approach under the law ensures that Tanzania and its people actively participate in the oil and gas economy. Such participation must entail securing benefits of the oil and gas developmental activities to Tanzanians in the long run. As such national interests in the oil and gas sector are upheld sufficiently under these arrangements.

V. PETROLEUM UPSTREAM REGULATORY AUTHORITY

The Petroleum Act established Petroleum Upstream Regulatory Authority (PURA) to operate the oil and gas upstream exploration and production activities.⁶¹ The law establishes PURA as regulatory authority with its own governing board charged with management and administration of the upstream oil and gas operation.⁶² PURA is empowered with promoting the upstream exploration, processing production sharing agreement and undertaking negotiations of production sharing agreement with IOCs.

⁵⁷ <http://tpdc.co.tz/aboutus.php>

⁵⁸ Section 8 of the Petroleum Act, No. 21 of 2015.

⁵⁹ *Ibid*, section 9.

⁶⁰ *Ibid*, section 45.

⁶¹ *Ibid*, section 11.

⁶² *Ibid*, section 10, 13, 17 and 18.

PURA also, operates as an advisor to the Minister and the government on all oil and gas upstream development plans.⁶³ As such, PURA is a government agency in the upstream operations whose duty is to make sure that the government policy, law and directives are implemented by whoever comes in the sector and making sure that government interests are upheld.⁶⁴ Also, the Act provides PURA with duty to settle all disputes arising from upstream oil and gas operations.

VI. THE ENERGY AND WATER UTILITIES WATER REGULATORY AUTHORITY

The Energy and Water Utilities Water Regulatory Authority (EWURA) is another institution established under the Energy and Water Utilities Water Regulatory Authority Act.⁶⁵ The Petroleum Act recognises EWURA's regulatory powers in respect to mid and downstream petroleum and natural gas activities.⁶⁶ The Authority is responsible for issuance of licences, renewal and cancellation of licences for any company wishing or undertaking mid and downstream oil and gas operation. Also, EWURA has mandate to determine charges, tariffs and fees to be paid in respect of any activities taking place in the mid and downstream.⁶⁷ The other functions include: ensuring economic and safety in the mid and downstream operation, control of petroleum quality and standards, environmental health and safety, protecting government interest, ensuring competition and free access of information to the public.⁶⁸ It is also, responsible for midstream and downstream oil and gas dispute settlement. Although all these institutions are union government institutions in dealing with oil and gas issues, their mandates are only limited to activities

⁶³ *Ibid*, section 12 (1).

⁶⁴ *Ibid*, section 12(2).

⁶⁵ Section 7 of the Energy and Water Utilities Water Regulatory Authority Act Cap 414 of 2001

⁶⁶ Section 29(1) of the Petroleum Act, No. 21 of 2015

⁶⁷ *Ibid*.

⁶⁸ *Ibid*, section 30.

taking place in Mainland Tanzania. They regulate petroleum affairs in respect to operations in Mainland Tanzania as the other part of the Union has its own institutional framework.

OIL & GAS INSTITUTIONS FOR TANZANIA ZANZIBAR

The Oil and Gas (Upstream) Act stipulates the institutional framework that administers the oil and gas industry in Zanzibar. The institutions include the Zanzibar Revolutionary Council, the Ministry of Petroleum Affairs, Zanzibar Upstream Regulatory Authority (ZPRA) and Zanzibar Petroleum Development Company (ZPDC).

I. THE ZANZIBAR REVOLUTIONARY COUNCIL

The oil and gas resources in Zanzibar are vested in the government on behalf of the people of Zanzibar. All exploration decisions have to be approved by the Zanzibar Revolutionary Council.⁶⁹ The Oil and Gas (Upstream) Act provides the Zanzibar Revolutionary Council with the legal duty to approve any area open for petroleum operation in Zanzibar.⁷⁰ The Zanzibar Revolutionary Council must approve all petroleum development agreements entered by the Revolutionary Government of Zanzibar.⁷¹ The Revolutionary Council is also responsible for approving the model production sharing and production sharing agreement prepared by Zanzibar Petroleum Regulatory Authority and submitted to the Zanzibar Revolutionary Council by the Minister.⁷²

The Zanzibar Revolutionary Council is also responsible for approving the tendering process and direct negotiation with the eligible company.⁷³

⁶⁹ Section 4 of the Oil and Gas (Upstream) Act, No.6 of 2016.

⁷⁰ *Ibid*, section 34(1).

⁷¹ *Ibid*. section 48(2).

⁷² *Ibid*, section 48(3).

⁷³ *Ibid*, section 49(3).

Furthermore, the Council is responsible for approving the development licence to be granted by the Minister to the exploration company.⁷⁴ The Council approves the extension of the development licence upon recommendation from the authority and the Minister responsible.⁷⁵ In addition, the bonus payments are determined by the Minister and submitted to the Zanzibar Revolutionary Council for approval. The Oil and Gas (Upstream) Act provide the Revolutionary Government of Zanzibar and Zanzibar Revolutionary Council with powers to determine and approve petroleum development licences, and thus the development and governance of oil and gas resources are entrusted to the authority of the government of Zanzibar. This approach as earlier noted intends to ensure that oil and gas development is not an affair of a single individual but rather the whole government machinery through the Revolutionary Council is involved.

II. MINISTRY RESPONSIBLE FOR PETROLEUM AFFAIRS

The Minister responsible for petroleum affairs is entrusted with supervisory and oversight functions in the petroleum sector. The Minister is empowered to approve the petroleum agreement, grant development licence, renew, suspend or cancel any petroleum exploration or development licence.⁷⁶ The Minister is also responsible for formulating and reviewing regulations in the petroleum industry, approving petroleum agreements, providing pertinent information related to petroleum development before Oversight Committees of the House of Representatives and developing the petroleum-related policies.

The Minister also has a supervisory role in ensuring local participation, accountability, transparency and developing an efficient system of revenues management and tax collection, engaging international

⁷⁴ *Ibid*, section 64(3).

⁷⁵ *Ibid*, section 70(1).

⁷⁶ *Ibid*, section 6(1).

platforms for petroleum investments and data acquisition, facilitating integrated planning between the petroleum sector and other sectors of the economy in Zanzibar and ensuring public awareness and citizen's knowledge on petroleum activities.⁷⁷

The Minister responsible for oil and gas resources in Zanzibar is duty-bound to oversee the development of the oil and gas sector by ensuring that good policies, regulations and institutions are in place to govern oil and gas operations. The Minister's powers are limited to laws governing petroleum in Zanzibar, and he/she is responsible to the government of Zanzibar.

III. ZANZIBAR PETROLEUM REGULATORY AUTHORITY

The Oil and Gas (Upstream) Act provides for the establishment of the Zanzibar Petroleum (Upstream) Regulatory Authority (ZPRA). ZPRA regulates oil and gas upstream operations in Zanzibar. ZPRA is a body of corporate capable of performing its function as an independent legal entity.⁷⁸ Its functions and responsibilities include monitoring and regulating the exploration, development and production of petroleum in Zanzibar.⁷⁹ Also, ZPRA is mandated to advise the Minister on granting licences or cancellation of licences, enforcing the requirements of the licences to the license holder and ensuring that license holders maintain trade practices and fair competition practices.⁸⁰ Participating in the management and assessment of petroleum royalty and profits of oil and gas due to State and ensuring that the company upholds laws, regulations and rules governing exploration contracts.⁸¹ The authority is responsible for developing and submitting a Model of Production Sharing Agreement

⁷⁷ *Ibid*, section 6(2).

⁷⁸ *Ibid*, section 7.

⁷⁹ *Ibid*.

⁸⁰ *Ibid*, section 8.

⁸¹ *Ibid*.

to the Minister to be approved by the Zanzibar Revolutionary Council and used as guidance in the negotiations of any agreement.⁸² In performing its functions ZPRA is accountable to the Board of Directors.⁸³

The Board has oversight and advisory role on policy and strategic issues as well supervisory functions over finance and management of the Authority.⁸⁴ In addition, the board determines the organizational structure of the authority, and it ensures that the authority complies with the laws, rules and guidelines when performing its function as conferred by this Act.⁸⁵ Also, ZPRA is responsible for implementing laws and policies regulating upstream oil and gas resources in Zanzibar and coordinating with other institutions within the United Republic. However, the general aim of ZPRA is to safeguard the interest of the Revolutionary Government of Zanzibar by ensuring that the rules and contracts governing oil and gas operations yield profits and contribute to the Zanzibar economy.

IV. ZANZIBAR PETROLEUM DEVELOPMENT COMPANY

The Zanzibar Petroleum Development Company (ZPDC) is established as a company which the government solely owned under the Oil and Gas (Upstream) Act. The ZPDC participates in the petroleum and gas upstream activities on behalf of the government.⁸⁶ It operates as a company limited by shares held by the government on behalf of the people of Zanzibar.⁸⁷ It also acts on behalf of the government as a commercial entity responsible for protecting national interest in all petroleum activities.⁸⁸

⁸² *Ibid*, section 48(3), (4).

⁸³ *Ibid*, section 12.

⁸⁴ *Ibid*, section 13.

⁸⁵ *Ibid*.

⁸⁶ *Ibid*, section 32(1).

⁸⁷ *Ibid*, section 32(4).

⁸⁸ *Ibid*, section 32(5).

The ZPDC is granted exclusive rights over all petroleum resources in Zanzibar.⁸⁹ It is provided with the right to explore petroleum resources and carry out operations.⁹⁰ Upon advice by the ZPRA and the Minister's consent, the company may enter into partnership with any Tanzanian company or a foreign company to carry out petroleum exploration.⁹¹ Upon entering into a joint petroleum development agreement or partnership with a local or foreign contractor, the ZPDC shall maintain a participating interest of not exceeding twenty-five per cent in the petroleum business.⁹² The ZPDC is considered the sole company is holding government commercial interest in the oil and gas operations in Zanzibar. However, apart from participating in the upstream petroleum activities, the law does not provide whether ZPDC is also responsible for the midstream and downstream oil and gas operation in Zanzibar or not.

The philosophy behind establishing different institutions governing oil and gas resources by the government of the United Republic and the Revolutionary Government of Zanzibar is to have their functions separated.⁹³ Thus, there must be institutions responsible for policymaking, regulatory institutions responsible for supervising oil and gas operations, and national oil companies responsible for participating in commercial operations and protecting government commercial interests. All these intend to ensure sustainable management of oil and gas resources in Tanzania.

It has argued that Tanzania coined this system from Norway, which has developed its oil and gas sector through a well-known Norwegian administrative design of separated functions as the best practice.⁹⁴ Although in Norway, all institutions are consolidated into one

⁸⁹ *Ibid*, section 45(1).

⁹⁰ *Ibid*, section 55(1).

⁹¹ *Ibid*, section 45(4).

⁹² Section 45(5) of the Oil and Gas (Upstream) Act, No.6 of 2016.

⁹³ Thurber MC, Hults DR and Heller PRP, 'Exporting the "Norwegian Model" The effect of administrative design on oil sector performance' (2011) *Energy Policy*, Elsevier Vol. 39, No. 95366-5378.

⁹⁴ Doric B, and Dimovski V, 'Managing Petroleum Sector Performance a Sustainable Administrative Design' *Economic Research- Taylor & Francis Group*, 2018, pp. 121-125.

government, which is different from our case, where there are two distinct governments each have their institutions. The governing laws provide circumstances where institutions operate separately and jointly regarding union and non-union matters. Therefore, oil and gas being union resource institutions with separated functions have to be introduced to facilitate operations without compromising the interest of the United Republic of Tanzania.

LEGAL CHALLENGES IN GOVERNING OIL & GAS RESOURCES IN TANZANIA

The Constitution of the United Republic vests the control and management of natural resources in the authority of the United Republic of Tanzania government. It explains that the natural resources constitute the property of the State authority, which is collectively owned by the people and managed for the national economy.⁹⁵ By the provision of the Constitution, it means that the natural resources should be used by the government of the United Republic and the Revolutionary Government of Zanzibar. However, neither the Constitution nor the governing laws have the provision for natural resource revenue sharing between the government of the United Republic and the Revolutionary Government of Zanzibar. As a result, the Constitution of the Revolutionary Government of Zanzibar via the 2010 constitutional amendments entrusted oil and gas resources to the Zanzibar Revolutionary Government. They claimed that the same should be removed from the union matters because the union laws denied the Revolutionary Government of Zanzibar access to natural resources.⁹⁶ This was preceded by several occasions whereby the government of Zanzibar denied the international oil companies to access

⁹⁵ Article 27(1) and (2) Constitution of the United Republic, 1977.

⁹⁶ Hamudi Ismail Majamba Tanzania's Oil and Gas Industry: Legal Regime, Management and Access Rights, *Recht in Afrika – Law in Africa – Droit en Afrique* 19, 2016. pp. 11-12.

oil and gas exploration in Zanzibar on the ground that the exploration benefits the government of the United Republic for Mainland Tanzania.⁹⁷

It was revealed that there was dissatisfaction on the part of Tanzania Zanzibar even before the enactment of the Petroleum Act, 2015. The Revolutionary Government of Zanzibar was dissatisfied and unhappy with the union laws and institutions because such union laws and institutions denied Zanzibaris' control and powers over natural resources, including oil and gas resources.⁹⁸ As a result, the reforms were expected to give solutions. However, by separating the control and management of oil and gas resources, the laws limit the powers of the government of the United Republic over these resources in Zanzibar,⁹⁹ while the Constitutional powers over the union matters are still vested in the authority of the government of the United Republic.¹⁰⁰

According to the nature of the union and legal system regulating oil and gas resources in Tanzania, it is very difficult for the government of the United Republic and the government of Zanzibar to regulate oil and gas resources without resulting in a resource conflict. This is due to the fact that the regulatory framework has introduced separate laws and institutions that regulate oil and gas resources. At the same time, the Constitution still maintains oil and gas resources under the authority of the government of the United Republic.

It is very difficult to practise a separate system for managing and controlling oil and gas resources between the government of the United Republic and the government of Zanzibar without resulting in conflicts with laws governing the Union.¹⁰¹ It should also be considered that the

⁹⁷ The Oil and Gas Year Tanzania, 'The Who's Who of The Global Energy Industry, A State to Negotiate' (2014),15. [https:// www.theoilandgasyear.com](https://www.theoilandgasyear.com) accessed on 22 January 2018.

⁹⁸ Poncian J, 'Fifty Years of the Union: The Relevance of Religion in the Union and Zanzibar Statehood Debate' *African Review* Vol. 41, No. 1, 2014, 161-181.

⁹⁹ Section 2 (2) (a)(b), 4(2), (3) of the Petroleum Act, No. 21 of 2015 and section 2 and 4 of the Zanzibar Oil and Gas (Upstream) Act, No.6 of 2016

¹⁰⁰ Article 34(3) of the Constitution of the United Republic of Tanzania, 1977.

¹⁰¹ Interview by Gabagambi LC (20 February 2020 to Officers in the Attorney General's office and the National Assembly, Dodoma).

union Constitution has not changed by removing oil and gas from the list of union matters. It was noted that given the interest in the oil and gas resources, regulating oil and gas resources in Tanzania is not one side decision. Still, it requires mutual consensus of the two governments.¹⁰²

The Petroleum Act 2015 and Zanzibar Oil and Gas (Upstream) Act, 2016 are principal laws regulating oil and gas resources in Tanzania, whereby the former mainly applies to Mainland Tanzania in particular with limited applicability to Zanzibar while the latter applies to Tanzania Zanzibar. The Petroleum Act of 2015 provides the Revolutionary Government of Zanzibar with absolute regulatory powers over oil and gas resources, the legislative powers vested in the House of Representatives and the Zanzibar Revolutionary Council is vested with final decision on the oil and gas economy in Zanzibar.¹⁰³

The provisions of the Petroleum Act 2015 allow the Zanzibar government to have its own laws and institutions regulating oil and gas, has led to the Revolutionary Government of Zanzibar to enact Zanzibar Oil and Gas (Upstream) Act, 2016 to regulate oil and gas resources in Zanzibar. The Act declares that the entire property and the control of petroleum in land or territorial waters in Zanzibar are vested in the Government on behalf of the people of Zanzibar, and that, petroleum resource is the public property of the People of Zanzibar and the Government shall hold petroleum rights for the benefit of the People of Zanzibar.¹⁰⁴

It can be argued that these provisions of these laws are contrary to the Constitution of the United Republic of Tanzania which still maintains that oil and gas are union matters.¹⁰⁵ The Constitution provides for the ownership of the oil and gas being vested on the United Republic of Tanzania.

¹⁰² Interview Gabagambi LC (21 January 2020, the Attorney General's Office, Zanzibar)

¹⁰³ Section 2(2) (a), (b), (4) (a)(b) and 4(1), (2). Petroleum Act No. 21 of 2015.

¹⁰⁴ Section 4(1), (2) of the Oil and Gas (Upstream) Act, 2016.

¹⁰⁵ Article 4 and item 15 of the First Schedule to the Constitution of United Republic of Tanzania, 1977.

The Constitution provides further that any law made which is inconsistent with the provisions of the Constitution such law becomes void to the extent of such inconsistency.¹⁰⁶ As such the provisions of section 2, section 4 of the Petroleum Act and section 4(1) and (2) of the Zanzibar Oil and Gas (Upstream) Act, 2016 may be regarded as *ultra-vires* the Constitution of the United Republic of Tanzania.¹⁰⁷ As a result, the provisions of the laws may be contested before the court of law and declared unconstitutional. However, up to date there are not any case instituted to challenge such provisions of the laws governing oil and gas in Tanzania.

The main possible ground for challenging the same is that provision of the Petroleum Act contradicts the Constitution of the United Republic, which vests in the authority of the government of the United Republic all matters provided in the list of union matters, including oil and gas resources.¹⁰⁸ The Constitution of the United Republic provides for the State authority to be exercised by State organs in relation to union matters and non-union matters within the government of the United Republic and the Revolutionary Government of Zanzibar.¹⁰⁹ However, the powers vested in the State organs are limited to matters specified in the list of union matters and those not so listed.¹¹⁰ Moreover, there is no mandatory coordination that exists among the established institutions. Tanzania Zanzibar has its institutions the same as Mainland Tanzania.

Through separate laws and institutions, it becomes difficult for the government of the United Republic to exercise its sovereign rights and powers over oil and gas resources within Tanzania Zanzibar. The reasons are that its authority is limited to Mainland Tanzania and has no power over institutions regulating oil and gas resources in Tanzania Zanzibar.

¹⁰⁶ *Ibid*, article 64(5).

¹⁰⁷ Hamudi Ismail Majamba. Tanzania's Oil and Gas Industry: Legal Regime, Management and Access Rights. *Recht in Afrika – Law in Africa – Droit en Afrique* 19, 2016, pp12-13.

¹⁰⁸ Article rt 34(1) and (3) of the Constitution of the United Republic, 1977.

¹⁰⁹ *Ibid*, article 4(1) and (2).

¹¹⁰ *Ibid*, article 4(3).

Regulating and managing oil and gas resources lacks a harmonized legal and institutional framework that guarantees internal and external sovereignty over the resources.¹¹¹ Thus, the absence of unified legal system governing oil and gas resources has resulted in domestic and international implementation challenges. The governing law provides the government of the United Republic and the Revolutionary Government of Zanzibar with powers to control, use and enter contracts with IOCs even without mutual consent from the government of the United Republic.

Such powers apply to both onshore and offshore oil and gas resources, contrary to the United Nations' Convention on the Law of the Sea, which provides member States of the Convention with powers over offshore resources.¹¹² The sovereignty of the United Republic over offshore oil and gas resources and in the exclusive economic zone is in the sole mandate of government of the United Republic.

When passing laws governing oil and gas resources, it is argued that the legislative organs overlooked internal and external law systems thus resulting in regulatory challenges. It was noted that during the passing of the Petroleum Act, there was pressure from Tanzania Zanzibar on the governance of oil and gas resources. As a result, the legislature passed the law to meet political tensions, which resulted in enacting the law that conflicted with the Constitution.¹¹³

The plain interpretation of the constitutional provisions in relation to the law governing oil and gas resources indicates existence inconsistencies between the Constitution and principal legislation governing oil and gas. The separate system of law has made it difficult as to where the sovereignty over oil and gas resources lies. This is due to the reason that laws regulating oil and gas resources provide the government of the United Republic and the Revolutionary government of Zanzibar with separate powers over oil

¹¹¹ Interview with Bendera IM, conducted by Gabagambi LC (8 January 2020, Dar es Salaam)

¹¹² United Nations Convention on the Law of the Sea of 1982, art 56, 77 and 79

¹¹³ Interview with officer in the Ministry of Energy conducted by Gabagambi LC (6 February, 2020, Dodoma)

and gas resources. Actually, it is the Constitution of the United Republic which determines where the sovereign rights lie. The oil and gas are a union matter under the Constitution though the same is silent on how to govern, develop and manage the same.

Generally, the sovereignty and ownership of oil and gas resources in Tanzania is vested in the United Republic. The right to use and explore oil and gas resources between the Government of the United Republic of Tanzania and the Revolutionary government of Zanzibar is provided under the petroleum laws.¹¹⁴ For example, the Petroleum Act provides that: “The entire property and control over petroleum in any land to which this Act applies are vested in the United Republic and shall be exclusively managed by the Government on behalf of and in trust for the people of Tanzania...”¹¹⁵ It may be argued that legislature misdirected itself by delegating the legislative powers on the list of union matters without following the procedures to alter the list, and the transboundary nature of resources which its governance requires comprehensive laws and institutions.

It was stated that the two governments are called upon to take both legal and political measures to resolve oil and gas-related challenges in Tanzania. The political mechanism is contemplated to be the temporary measure in addressing the oil and gas challenges between the government of the United Republic and the Revolutionary Government of Zanzibar. Although the referred political mechanism is considered a temporary measure, it cannot be ignored for political negotiation. Thus, there is a need for political consensus and harmonization of laws that regulate oil and gas resources between the government of the United Republic and the Revolutionary Government of Zanzibar. Generally, the enactments in 2015 and 2016 on oil and gas in Tanzania reflect the political consensus on addressing the challenge whereby each government have mandate to

¹¹⁴ Interview by Gabagambi LC (21 January 2020, Officers in the Office of Attorney General in Zanzibar)

¹¹⁵ Section 4(1) of the Petroleum Act, No 21 of 2015.

govern and regulate oil and gas within confines of mandates the petroleum laws provide.

INSTITUTIONAL CHALLENGES FACING OIL & GAS SECTOR IN TANZANIA

There exists a dual system of laws and institutions governing oil and gas resources where the government of the United Republic and the Revolutionary Government of Zanzibar.¹¹⁶ In performing their functions, the regulatory institutions implement the laws and policies that are not the same between the two governments. The institutions operate only in one part of the Union depending on which law govern them.

The findings reveal that the institutions established under the Petroleum Act are considered union institutions, although they have no power to operate in Zanzibar. Being one State, oil and gas resources regarded as the union resources, were supposed to be regulated by the union institution for union interests.¹¹⁷ As a result, each institution is seen as superior according to the law to which it is subject, thus leaving the gap on what the Union institution might be in relation to management and control of oil and gas resources.¹¹⁸ Despite the establishment of separate institutions regulating oil and gas resources between the Government of the United Republic of Tanzania and the Revolutionary government of Zanzibar, there is a need to streamline and harmonise the union's internal and external interests. This is due to limited operation of the current union institutions within Mainland Tanzania.¹¹⁹

The analysis reveals despite establishment of various institutions responsible for regulating oil and gas resources, decisions relating to oil

¹¹⁶ Section 2 (2) (a), (b), 4(2), (3) of the Petroleum Act, No. 21 of 2015 and section 2 and 4. Zanzibar Oil and Gas (Upstream) Act, No. 6 of 2016.

¹¹⁷ Interview by Gabagambi LC (17 and 18 March 2020, TPDC and PURA, Dar es Salaam)

¹¹⁸ Interview by Gabagambi LC (16 March 2020, Petroleum Upstream Regulatory Authority)

¹¹⁹ Section 2(2) (a) and (b) of the Petroleum Act, No. 21 of 2015.

and gas operations exclusively entrusted on the Minister and the Cabinet who are vested with the final mandate to decide on strategic issues relating to the oil and gas economy.¹²⁰ Centralizing oil and gas decision making to the Cabinet promotes collective decision making. It is a good practice for a country to have a collective decision making on oil and gas as these resources are limited. It is clear that care must be exercised on strategic investments for their exploration, exploitation and utilization. Indeed, requiring the Minister to submit all strategic investment decisions to Cabinet minimizes excessive discretionary powers that might result in corruption. It is a sign of accountability and transparency to have such collective decision making by the Cabinet. However, subjecting decision making to Cabinet limits the chances for the prospective investors to participate in investment decision making as they have no chance to defend their interests before the cabinet.¹²¹ On the other hand, institutions like the Oil and Gas Advisory Bureau have been established for advising the President on oil and gas economic strategies. However, the law has not provided the composition of members forming the Bureau.

The same is the position to Tanzania Zanzibar where the Minister responsible for petroleum affairs and the Revolutionary Council are entrusted with decision making whereas the final decisions are vested to the Zanzibar Revolutionary Council. The system of using separate institutions to regulate oil and gas resources as supported by the literature is better in countries with a strong legal framework and institutional quality than in countries with the low institutional quality and political stability.¹²² Therefore, Tanzania introduced a separated system of law and institution without first improving the regulatory framework.¹²³

The reason for establishing several institutions was to separate the functions and to improve performance of this highly growing oil and gas

¹²⁰ *Ibid*, section 4(3).

¹²¹ Interview by Gabagambi LC (24 March 2020, Equinox Dar es Salaam)

¹²² Doric B and Dimovski V, 'Managing Petroleum Sector Performance – A Sustainable Administrative Design' *Economic Research*- Taylor & Francis Group, 2018, 121-125.

¹²³ Interview by Gabagambi LC (28 July 2020, Ernest & young, Dar es Salaam)

economy. For the established institutions to work properly and effectively there is a need for close coordination, information sharing and independence from each other.¹²⁴ However, there has been minimum coordination and cooperation among institutions and sometimes there is no direct line of communication in their functions. Thus, there is no mandatory coordination between TPDC, PURA, EWURA and ZPRA and ZPDC, and no coordinating unit established by the regulating system. Their cooperation depends on good will of these institutions. The presence of uncoordinated system has resulted into overlapping of powers, conflict of interests, poor information sharing thus likely to result into mismanagement of resources. The challenges are noted by oversight institutions by noting that insufficient coordination among key shareholders is one of the problems facing institutional performance in the oil and gas sector.¹²⁵

Recent evidence suggests that, the economic development of oil and gas sector requires strong legal institutions, legislature, political institutions, competent economic system, transparency, and committed government.¹²⁶ Also, countries are advised to have strong and competent legal and institutional framework.¹²⁷ Atkinson argues that “resources rich countries with good quality institutions have achieved greater rates of

¹²⁴ Bryan Lee, Kendra Dupuy, “Understanding the Lie of The Land: An Institutional Analysis of Petro-Governance in Tanzania”, *Journal of Energy and Natural Resources Law*, Vol 36, no.1,85-101, 2018, pp. 85-91, accessed on March 10, 2018,<https://www.tandfonline.com/doi/full/10.1080/02646811.2017.1325630?src=recsys>

¹²⁵ Controller and Auditor General, General report on the Performance and Specialised Audits for the period ending 31st March, 2017

¹²⁶ Bryan Lee, Kendra Dupuy, “Understanding the Lie of The Land: An Institutional Analysis of Petro-Governance in Tanzania”, *Journal of Energy and Natural Resources Law*, Vol 36, no.1,85-101, 2018, pp. 85-91, accessed on March 10, 2018,<https://www.tandfonline.com/doi/full/10.1080/02646811.2017.1325630?src=recsys>.

¹²⁷ Andrew N. Onejeme, “The Law of Natural Resources Development: Agreements Between developing Countries and Foreign Investor, ’*Syracuse Journal of International Law and Commerce*, Vol. 5, No. 1(1977): 2,3,4, &13

investment and saving than resource rich countries with poor quality institutions”¹²⁸

However, the law provides institutions with limited powers especially on making final decisions. The powers to make decision have been centralized to the Minister and the Cabinet/Revolutionary Council. Limiting regulatory institutions powers to make decisions might have effects on proper decision making as the same may limit innovativeness and underutilization of knowledge, skills and experience from those managing such institutions.

It is argued that the government need to establish strong institutions to regulate oil and gas resources and these should be independent from any political influence and personal interest.¹²⁹ This allows different institutions to operate the sector and the government should remain the supervisor and policy-making organ. Moreover, there should be policies and laws which promote independence of institutions and make them strong in controlling revenues.¹³⁰ This enables these institutions to make well informed decisions because they have first-hand information about the sector.

It also follows that for the country to benefit from extraction industry, it must be adequately prepared in terms of legal and institutional framework before a decision is made on the oil and gas extraction process.¹³¹ This is by considering fiscal, technological and expatriate

¹²⁸ As quoted in Mark C.Thurber, David R.Hults and Patrick R.P.Heller (2011) Exporting the “Norwegian Model”: The Effect of Administrative Design on Oil Sector Performance, *Energy Policy*, Elsevier Volume 39, Issue 9, September 2011,pp. 5366-5378, doi.org/10.1016/j.enpol.2011.05.027

¹²⁹ Yanko Marcius de Alencar Xavier *Energy Law in Brazil (2015) Oil, Gas and Biofuels* Springer International Publishing Switzerland ISBN 978-3-319-14268-5 (eBook) pp.52-82

¹³⁰ Ragnar Torvik. “Petroleum Fund in Tanzania? Other Alternatives May Be Better,” Tanzania: *REPOA/ CMI*, Vol.15 Number 10 REPOA Number 46. 2016, pp.1-4 Accessed on January 20, 2018, <http://www.repoa.or.tz> or <http://www.cmi.no>.

¹³¹ Humphrey B.P. Moshi. “Opportunities and Challenges for the Extraction of Natural Gas in Tanzania: The Imperative of Adequate Preparedness” Dar es Salaam, Economic and Social Research Foundation (ESRF), Discussion paper No. 48. 2013, pp.

requirements of the oil and gas sector. This is important for the government to deal with international corporations, which have skills, knowledge, technological advancement and negotiation ability. Therefore, the country is supposed to build institutional capacity which will make it benefit from oil and gas economy.¹³²

It is possible for countries with high institutional capacity and strong political institutions to benefit from oil and gas operations as such institutional framework contributes to significant changes to oil and gas reforms.¹³³ It was further advised that where institutional capacity is lacking, it is better to consolidate oil and gas management activities into one regulatory authority. Although it is difficult to control and manage oil and gas investment using only one regulatory authority, separation of functions is more difficult to implement especially where there are limited resources in terms of experts, technology, and financial support.¹³⁴

CONCLUSION

The new petroleum laws regulate upstream, midstream and downstream and better regulatory institutions. This has brought improvement to different established institutions by ensuring that oil and gas development projects are properly managed. However, in practice, there is no proper coordination and communication mechanism among established institutions which may lead to well informed investment decisions.

1-8. Retrieved from <http://www.esrftz.org/pubdetails.php?id=206> (accessed 24th on February,2018)

¹³² Simbakalia J.L., "Challenges Ahead for Tanzania to Build New Capacities for Gas Industry Development," Dar es Salaam, The Economic and Social Research Foundation (ESRF), Paper NO 51, 2013, pp.22-24. Retrieved from <http://www.esrftz.org/pubdetails.php?id=206> (accessed on 14 January, 2018).

¹³³ Mark C.Thurber, David R.Hults and Patrick R.P.Heller. "Exporting the "Norwegian Model": The Effect of Administrative Design on Oil Sector Performance, *Energy Policy Elsevier* Volume 39, Issue 9, September 2011,pp. 5366-5378, doi.org/10.1016/j.enpol.2011.05.027

¹³⁴ *Ibid*

Bearing in mind that oil and gas development involves wide supply chain that covers different stakeholders, this study recommends for harmonized laws, policies and institutions. Oil and gas sector would perform better when the law insists on institutional powers, transparency, when there are effective checks and balance than political decisions. It is submitted here that laws and institutions should focus on development and protection of national commercial interests and the government officials should not use the established institutions for political influence to determine oil and gas economy. Further studies can examine the sovereign rights of oil and gas as shared union resource between Tanzania Mainland and Zanzibar. Also, they may look for minister and cabinet powers over institutional powers in oil and gas decision making.

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