IMPLICATIONS OF THE INTERNATIONAL PRINCIPLE OF PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES: WITH REFLECTION TO THE INVESTMENT AGREEMENTS FOR THE EXPLOITATION OF NATURAL RESOURCES IN TANZANIA'S OIL AND GAS INDUSTRY

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ABSTRACT

This article discusses the primacy of the international fundamental principle of permanent sovereignty over natural resources on legal framework perspective. The study focuses on the implications emanated from the application and development of the international principle of permanent sovereignty over natural resources in the rich- resource countries with specific focus to the investment agreements of Oil and Gas industry in Tanzania.

Despite of political independence achievements of numerous rich-resource countries from their colonial masters after the end of Second World War (WWII), numerous rich-resource countries asserted the principle of sovereignty over natural resource emerged with association to the right of self-determination. The newly independent States considered the colonial investment agreements as a threat to their permanent sovereignty over natural resources because those agreements granted excessive areas of land for long period to a single company without giving the host States adequate authority to control the activities of the natural resources[i]

The application of the principle of sovereignty over natural resources transformed the appropriate direction of the oil and gas producing countries towards gaining the powers and control of their own oil and gas resources[ii] In this vein, the resource rich-countries proclaimed the right to control and manage their resources by revisiting the investment agreements for the purpose of ensuring the benefits and profits accrued from the resources to be used to raise the living standard of their people and facilitate development in their own respective countries.

This study scrutinizes a notable part of the significant implications of the international principle of permanent sovereignty over natural resources in the light of investment agreements relating to oil and gas in Tanzania. In the course of discussion, the article examines the reflection of the investment agreements in the course of exploitation of natural wealth and resources in Tanzania's Oil and Gas Industry and thoroughly discusses the genesis and development of the concept of permanent sovereignty over natural resources through legal and diplomatic forums of the United Nations.

Keywords: Permanent Sovereignty over Natural Resources, Natural Wealth and Resources, Investment Agreements, Oil and Gas Industry, Right to self-determination, Control and Manage Oil and Gas Resources, Production Sharing Agreement.

INTRODUCTION

Sovereignty over natural resources has extensive consequences in term of economic, politics and legal aspects[iii]. It is specifically rotated during the demands of foreign capital by the developing counties from the developed countries. Basing on the fact that most of developing countries, irrespective of their rich endowment of numerous natural resources and wealth, they could not meet their adequate needs of capital generated from their internal sources[iv]. The foreign capital in the developing countries is inquired and seriously needed to subsidize the demands of economic development in various sectors including oil and gas, extractive industries, infrastructural diversification and agriculture.

During the struggle period of the developing countries for the foreign capital, their political and economic situations had tremendously changed due to the emerged conflicts on the arrangement for ownership and disposal of natural resources as well as the foreign investment against the developed countries[v]. The terms and conditions imposed by the developed countries over the assistances offered to the developing countries had also sporadically intensified which among other things resulted difficulties and negative impacts to the welfare of the economic and politics of developing countries. At this juncture, the clashes between rich endowed resource-countries and foreign countries over the availability of foreign capital, diversification of foreign investment over natural resources and wealth intensified to the maximum level. At this level, there emerged the notion of permanent sovereignty over natural resources and the respective right to investment agreements[vi].

Investment agreements encompass the distributions of resource exploitation and development rights to an investor, in return for considerations of employment, royalties, revenues and infrastructural development between the respective parties specifically the rich resource - countries and foreign countries[vii]. In the normal circumstances, the framework of natural contracts or investment agreements in many jurisdictions are mostly related, however, in other context the natural resource contracts vary between one another depending upon the numerous factors such as the variations of economic sectors and commodities like as oil, gas and mining, coffee and cocoa, diversity of domestic laws and the category of parties[viii]. [ix]. It is an essential point to note that, the natural resource agreements are pivotal instruments which set out the right and duties between the investors and the rich resource countries in the allocation of natural resources exploitation and rights of developments in the exchanged considerations in the era of foreign capital transfer and foreign investment in the globe.

The permanent sovereignty over natural resources is denoted as the principle of international law which was advanced by the international community during decolonization period and years of independence to the newly independent states and former colonial masters especially during 1950s, 1960s, and 1970s.[x] The principle of permanent sovereignty over natural resources was initial referred to the deliberations of human rights issues in the United Nations forums based on the formulations of human rights and fundamental freedom issues. In the sequences of formulating the principle of self-determination as the basic foundation of human rights, the concept of permanent sovereignty over natural resources flourished as an indication for economic self-determination. It is contended that, the purpose of the principle was to temperate the exploitation of natural resources in the universe between the colonial masters (developed countries) and developing countries (former colonies) on the arrangement of natural resource exploitation in their countries which was strongly alleged to be unfair and undemocratic[xi].

GENESIS, OBJECTS AND DEVELOPMENT OF THE CONCEPT OF PERMANENT OF SOVERIGNTY OVER NATURAL RESOURCES (PSNR)

An Overview of the Genesis and Objects of PSNR

Generally, the term Permanent Sovereignty over Natural Resources signifies the right of all States or people to dispose freely of the natural resources, of any kind, originated within their geographical jurisdictions including oil, gas and mining and many other natural resources[xii]. The principle is also recognized as the fundamental principle in contemporary international law. It is stated that after World War II period (1940s), the principle of permanent sovereignty over natural resources emerged and grew as the new principle of international economic law which was facilitated by the anxieties of scarcity and ideal utilization of natural resources in the Europe and Western Countries. The challenges of anxiety scarcity of raw materials experienced the European and Western countries made them to move into overseas and grabbing the wealth and raw materials for their technological industries in the developing countries[xiii].

Thereafter since the early 1950s, the principle of permanent sovereignty over natural resources was supported by the developing countries in the efforts of securing benefits from the exploitation of natural resources emanated within their territories and to lay down the legal protection against all kind of violation over the infringement of economic sovereignty pioneered and administered by the foreign companies arose in property rights or even contractual rights relations in the developing countries[xiv]. The same inferences are coincided by Kilangi[xv], Magogo[xvi] and Majinge[xvii] that the principle of permanent sovereignty over natural resource was developed by the international law through plentiful resolutions of the United Nations General Assembly. Again, during early 1950s the principle was advocated for decolonization movements between the former colonies and developing countries against their colonial masters of Europe and other Western countries.

Most of the former colonies became irritated because of their natural resources were continued to be exploited and misused by the foreign investors in the way which did not benefit the former colonies to the maximum and satisfactorily level. In all cases, the newly independent states asserted on the control and manage their natural resource for accelerating economic development of their countries. The newly independent states further argued that the political independence for their countries would be meaningless and unfruitful as long as their natural resources including minerals and petroleum were controlled and dominated by the foreigners[xviii].

During the 19th century the expansion of colonial domination was largely driven by the aspiration of the colonizing of European countries to exploit the rich resource –countries of

other parts of the world especially the developing countries[xix]. That is to say the colonial countries involved in the extensive exploitation of the potential natural resources of their colonies by granting investment agreements to their extractive corporations on the favourable terms. Most of the investments were exercised by colonial states' companies originated from or affiliated from European powers to explore and deplete the natural resources from their colonies. For example, the 'Mineral Regulation (Oil) Ordinance' of 1907 which was enacted by the British for Nigeria, evidently stipulated that only British companies, or companies controlled by the British subjects could explore within the country[xx].

The international principle of permanent sovereignty over natural resources altered the path of resource rich-countries towards the road of gaining extensive powers and influences in the world business and investment[xxi]. For instances, it is quantified that the oil producing countries of the Middle East and other parts of the world inquired to review and effect the concession agreements. Also it is reported that during the end of 1951 a 50/50 formula for the division of profit between producing countries and concessionaire companies established[xxii].

The right to PSNR started as a reaction to the irresponsible exploitation of the natural resources and wealth of the people during colonial domination by the colonialists and their respective corporations. Meanwhile people in the colonies and developing countries living under the colonial domination decided to appeal for the principle of PSNR to acquire equal and fair benefits emanated from the natural resources, the newly independent developing States used the PSNR to regain their control over their natural resources occupied by the colonial masters and to safeguarding themselves away from economic colonization.[xxiii] On the other words, the newly independent States disallowed the argument of the colonial states that the right to PSNR had to conform with the doctrine of state of succession and *Puncta Sunt Servanda*, which necessitated the newly independent States to honour concessionary rights that western corporations had acquired prior independence regardless of their willingness[xxiv]. In this context, the newly independent States upheld that PSNR to amend or modify the colonial period agreements in order to change their lives and acquire the sovereignty of their natural wealth and resources only upon the express consent and wish of the new State respectively[xxv].

In a nutshell, the genesis of the principle of PSNR originated for the purpose of strengthening the colonial peoples and their newly independent states emanated from their significant concerns and proclamations to control and manage their own natural resources without external interference from the colonial administration and their companies[xxvi]. Therefore, the

preliminary subjects of the permanent sovereignty over natural resources were the right to self-determination and the newly independent developing States. However, it is noted that during and even after the period of independence, the right of PSNR became a right of all States notwithstanding of their ranks or status.

DEVELOPMENT OF PSNR THROUGH LEGAL AND DIPLOMATIC UNITED NATIONS FORUMS

As indicated in this paper that the principle of permanent sovereignty over natural resources was advocated by the people under the colonial dominations to secure benefits and profits arising from the exploitation of their natural resources in their local territories and to prevent violations of their economic sovereignty in the matters of property of rights or contractual rights from the other States or foreign companies in the early period of 1950s.

In this scenario, it is noted that the PSNR qualified to be the principle of customary international law centred on a series of resolutions of the General Assembly of the United Nations[xxvii]. The resolutions were declared during the era of 1950s, 1960s and 1970s including but not limited to i) the Resolution 626 (VII), Right to exploit freely natural wealth and resources, of 21 December, 1952; ii) the Resolution 1803 (XVII), Permanent sovereignty over natural resources, of 14 December, 1962; iii) the Resolution 3016 (XXVII), Permanent sovereignty over natural resources of developing countries, of 18 December 1972; iv) the Declaration on the Establishment of a New International Economic Order, Resolution 3201 (S.VI), of 1 May 1974; and v) the Charter of Economic Rights and Duties of States, Resolution 3281 (XXIX), of 12 December 1974[xxviii].

It is stated that the basic rationality of the agreement for the principle of permanent of sovereignty over natural resources to be quantified as the customary international law is notably justified when it is applied under international, arbitration, national court decisions, government decrees and many other diplomatic forums. For example, the principle was declared by the International Court of Justice (ICJ) in its respectable decision on Democratic Republic of Congo[xxix] and East Timor[xxx].

On the other side, the historical background indicates that the development of the principle of permanent sovereignty over natural resources was also contributed by the assertions of the UN

General Assembly through abundant resolutions of the United Nations and the legal and diplomatic forums[xxxi] as outlined hereunder: -

1. *The Human Rights Commission and Resolution 626 (VII) of 21st December, 1952*

It is further indicated that principle of permanent sovereignty over natural resources was initial addressed in 1952 in the Human Rights Commission of the United Nations instigated by the proposal from Chile into the following effect:

> *"The right of the peoples to self-determination should also include permanent sovereignty over their natural resource and wealth and that in no case might a people be deprived of its own means of subsistence on the grounds of any rights that might from any other States[xxxii]".*

Again, it is mentioned that the General Assembly at its 6th session in 1952 emphasised the right of the Third World Countries to determine freely the use of their wealth and natural resources in order to further the realization of their plans of economic development[xxxiii]. The fact of this right is substantiated when the General Assembly Resolution 626 (VII) of 21 December, 1952 was approved. It is recognised that:

> *"All member states, in the existence of their right freely to sue and exploit their natural wealth and resources wherever deemed desirable by them for their own progress and economic development, to have the due regard, consistently with their sovereignty, to the need for maintaining the flow of capital in condition of security, mutual confidence and economic co-operation among nations[xxxiv]".*

It is further recommended that:

> *"All member states to refrain from any act, direct, or indirect, designed to impede the exercise of the sovereignty of any state over its natural resources"[xxxv].*

Although the industrialized countries voted against this resolution on the reasons that it did not entail any provision that restrain the state powers to confiscate private property or for the recognition of the rights of foreign investors in the eyes of international law such as international agreement and treaties[xxxvi]. But the demands which were enshrined in the proclamation continued to exceed to the maximum level and motivated the aspirations among people of the developing countries to meet the objects of sovereignty of their economic natural resources against external interferences of the metropolitan states and their foreign companies.

During this period the PSNR developed along with reactions of the international events intended to seize and take over sovereignty of natural resources for the solely benefit of people in their developing countries irrespective of foreign influences from rich and developed countries. In other words, such events are referred as the nationalization movements from the developing countries. For example, there emerged numerous sensitive national cases such as the Government of Guatemala used the resolution of UN General Assembly to support the argument of sovereignty by taking over the property of the United Fruit Company in Guatemala[xxxvii], Civil Tribunal of Rome in supporting the Iranian Oil Nationalization law. The other nationalization confrontations which took place on the ground political processes in escalating the voices of sovereignty over natural resources were Suez Canal Company (1956), Dutch property in Indonesia (1958), the Chilean copper industry (1972) and the Libyan oil industry (1971-4)[xxxviii].

2. *Resolution 1314 (XIII) of 12 December, 1958*

This Resolution advocated the recommendation concerning International respects for the right of people as nations to self-determination[xxxix]. It depicted the affirmation of the right as expressed in the draft of Human Rights Covenants. In other words, through the composed Commission of the studying the modality of applying the right of sovereignty of natural resources at national and international arena, the resolution set up an umbrella of the permanent sovereignty over natural resources under the respect of rights and duties of the individuals and the State at International level in the ownership and control of the natural resources. Under general perspective, the resolution continued to boost the needs and necessities of the economic co-operation at international level among the underdeveloped countries[xl].

3. *Resolution 1515 (XV) of 15 December, 1960*

Like as other resolutions of the UN General Assembly, this resolution also put emphasis on the respect of the sovereignty right of every State and people in the exploitation, disposition and exploration and of their natural resource and wealth under the basic foundation of the right of self-determination[xli]. Much emphasis was directed to the economic development poor countries that their sovereign right on disposition of their wealth and natural resources should be respected in compliance with the rights and duties under the international law.[xlii]

4. ***Resolution 1803 (XVII) of 14 December, 1962***

This resolution was adopted by the General Assembly and it put emphasis on the inalienable rights of all States to freely dispose of their natural resources and wealth. The resolution also placed emphasis on the right of peoples and nations to permanent sovereignty over natural resources to be exercised in the interests of their national development and the welfare of the people of their respective State[xliii]. Moreover, the resolution strongly emphasized the respect of States on the equality principles and sovereignty of the endowed natural resources, nationalization and expropriation of foreign property based on the appropriate compensation and in their respective jurisdictions[xliv].

5. ***Resolution 2158 (XXI) of 25th November, 1966***

This resolution affirmed the important roles of foreign capital irrespective whether public or private in contributing to the development of exploitation of natural resources[xlv]. Also the resolution put strong highlights on the foreign investment to be undertaken in accordance to the legislations and regulations of the developing national development. Moreover, the resolution affirmed the inalienable rights in exercising the sovereignty of natural resources and the developing countries should increase more share in the initiatives of enterprises managed under foreign capital to ensure appropriate benefits and development for their countries.

Moreover, the resolution declares that whenever the authorization is granted on the exploration, development and disposition of natural resources, the capital imported and earnings on that capital shall be governed by the related terms and conditions by the national legislation in force, and by international law[xlvi]. And the profits derived from the course of investment must be shared in proportions freely agreed prior in each case between the investors and the developing countries without any kind of impairment.

6. ***Resolution 3201 and 3202: The New International Economic Order (NIEO) 1st May, 1974***

This declaration is stated to focus on the establishment of a New International Economic Order. It provides that the charter of Economic Rights and Duties of States (CERDS) to establish strong instrument towards the establishment of an outstanding system grounded on sovereignty equality and interdependence and equity of interests between the rich and poor countries on international economic relations arena[xlvii]. Moreover, the resolution highlighted on equity,

sovereign equality, interdependence, common interest and cooperation among all States in the world without regarding their economic status and geographical position in order to reduce the widening gap between the rich and poor countries[xlviii]. Paragraph 4(e) of the Resolution provides that:

"Full permanent sovereignty over natural resources and all economic activities. In order to safeguard these 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 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"[xlix].

7. *Resolution 3281 (XXIX) of December 1974: the Charter of Economic Rights and Duties of States (CERDS)*

This charter was approved by the General Assembly on 12th December, 1974 for the purpose of protecting economic rights specifically of the developing countries[l]. The charter consists of 15 principles pertaining to the economics, politics and many other international relations matters including but not limited to sovereignty, territorial integrity and political independence of states, sovereignty equality of all States; Non-intervention; mutual and equitable benefit; equal rights and self-determination of peoples; peaceful settlement of disputes; fulfilment in good faith of international obligations; respect of human rights and fundamental freedoms; No attempt to seek hegemony and spheres of influence; and International cooperation for development[li].

It should be noted that, the approved charter had pressurised freely exercise of permanent sovereignty over natural resources[lii]. It declared that every state has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic accomplishments.

All in all, the General Assembly of the United Nations set up numerous resolutions to ensure the right of permanent sovereignty over natural resources to all States in the globe with specific attention of the freely disposition of wealth and natural resources to individuals in the developing countries who are endowed with numerous wealth and natural resources. In addition to that, the resolutions of the General Assembly put further emphasis on the freedom of economic development between the rich or developed countries and poor or developing

countries by declaring that all States have the right to associate in organizations of primary commodity producers in order to develop their national economies, to achieve stable financing for their development and assist in the promotion of sustained growth of the world economy in accelerating development of the developing countries.

THE PERMANENT SOVERIGNTY OVER NATURAL RESOURCES AT REGIONAL LEVEL

The African Charter on Human and Peoples' Rights elucidates for the rights of peoples to permanent sovereignty over natural resources. The Charter identifies that all people have unquestionable and inalienable right to self-determination[liii]. In other words, it amounts that all people are free to dispose their wealth and natural resources[liv]. The right for resources exploitation shall be exercised in the exclusive interests of the people. The Charter declares that the power of resource exploitation is aligned to the people of the respective jurisdictions and in case of dispossession of their wealth and natural resources an adequate, effective and prompt compensation should be awarded to restore their original position.

The rights of permanent sovereignty over natural resources are also provided under the instruments of International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). The instruments affirm that permanent sovereignty over natural resources should be utilized for the sake of increasing the economic and technological advancement of the developing countries. The ICESCR[lv] together with ICCPR[lvi] provide that all people should freely dispose of their natural wealth and resources should align with principle of mutual benefits and without any kind of bias or interference arising out from the international economic cooperation.

Moreover, the principle of permanent sovereignty over natural resources was incorporated in the Declaration on the Establishment of a New Economic Order (NIEO) and the Programme of Action on the Establishment of a New Economic Order in 1974[lvii].

ESSENTIAL FEATURES OF THE PRINCIPLE OF PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES

As has been expounded above in the international and regional instruments, the principle of permanent sovereignty over natural resources originated along with numerous rights and obligations. These rights and obligations of permanent sovereignty over natural resources are amalgamated with some essential features contributed to the formulations and development of the investment agreements over sovereignty and control of natural wealth and resources.

Ng'ambi describes the control arrangement of natural resources for the rich- resource countries encompass the attributes of rights and duties namely the right to freely dispose of natural resources, the right to explore and exploit natural resources freely, the right to use natural resources for development, the right to regulate foreign investment, and the right to settle disputes on the basis of national law[lviii]. In the same vein, Kilangi analyses the arrangements of control natural resources for the rich- resource countries involve the attributes of rights and obligations namely the right to manage and control the exploitation of natural resources, freedom to exploit natural resources and right to benefit from the exploitation of natural resources[lix].

The Right to manage and control the exploitation of natural resources

This liberty to control and manage the exploitation of natural resources is vested to the states of the respective natural resources[lx]. The right is attributable as the salient feature of integrated from the principle of permanent sovereignty over natural resources. This right is further categorically into numerous sub-components including the right to enact laws and by-laws to administer the exploitation of natural resources with in the territory of land and establishing restraints and interdiction, the right to utilize the natural resources for development, processing and marketing of the country's natural resources, the right to regulate the foreign investment including importation of foreign capital and the working upon the capital for the purpose of exploiting natural resources. This principle also asserts an obligation to the international institutions to use contractual agreements under international law to administer investment[lxi].

The other sub-component attribute is the right of a country bestowed natural resources to nationalize or transfer such resources to its people for the purpose of their exploitation. This right is associated with an obligation of discharging consideration of public utility, public security, or national interests that help to restore the original position of an aggrieved investor

or individual. And the last sub-component feature is matter of dispute settlement[lxii]. In general perspective, the international law specifies that whenever their disagreement the principles of international law direct to apply the law of the national jurisdiction. Sometimes, negotiation and arbitration are applicable depending upon the nature of the investment agreement[lxiii].

Freedom to Exploit Natural Resources

The fundamental freedom to exploit natural resources is accessible to the countries endowed with natural resources. The significant focus under freedom to exploit natural resources is associated with flourishing the peoples' standard of living and accelerates their development in the country. The exploitation of natural resources in principle is expected to be utilized with an exclusive purpose of speeding up and sustaining the standard living of people and development of their country in particular[lxiv]. In other words, permanent sovereignty over natural resources implies the requirement for exploitation of natural resources to be undertaken freely by the people of respective territory or state without any external force or foreign influence supporting and facilitate industrial and economic development.

Right to benefit from the exploitation of natural resources

The people's right to benefit from the exploitation of their natural resources is assured under the principle of permanent sovereignty over natural resource[lxv]. In other words, it means that the principle of permanent sovereignty over natural resource assert the development of less-developed countries. The basis of this right is emanated from notion of creating connection of the exploitation of natural resources of the less developed countries and their strategies towards economic development in association to their national development goals.

In summary, the extent of sovereignty and control over natural wealth and resources depend upon the extent of the state assertiveness in exploiting the natural resources for the development of her people and the state in particular. The inherent salient feature of the permanent sovereignty over natural resources including the freedom of to exploit natural resources, right to benefit from the exploitation of natural resources, right to manage and control the exploitation of natural resources, right to regulate foreign capital and investment and the right to process marketing accrued from the natural resources exploitation under the international investment law contributed to the development investment contractual agreements which reinforced the sovereignty and control of natural wealth and resources specifically between the underdeveloped and developed countries.

IMPLICATIONS OF THE PRINCIPLE OF PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES

As indicated in this paper that a conclusion of numerous United Nations Resolutions around 1952 and 1974 provided the basic foundation for further dialogue of the international principle of permanent of sovereignty over natural resources. The magnitude of this development amounted high changes on the degree of dominance and control of the foreign enterprises in the third world countries. In other words, the host countries vehemently alleged to exercise control of their natural wealth and resources for the solely benefit of their countries and their original indigenous people.

The application of the principle of permanent sovereignty over natural resources had resulted the various implications and changes in the course of world economic and trade cooperation among the developed and developing countries. It altered the nature of traditional concession agreements, producing consequences in the areas of the revision and amendment of concession agreements; the duration of concession agreements; relinquishment; State participation; the law and practice of nationalization; the widespread establishment of national oil companies; the settlement of disputes; compensation for expropriation; the emergence of a new petroleum laws and of new types of investment agreements[lxvi].

Modification and Amendment of Concession or License Agreements

The rich resource-countries strongly appealed for modification and amendment of all categories of old contracts which were branded with a high degree of economic domination and control by the foreign oil companies over natural resources of the producing countries[lxvii]. It should be noted that, the concession agreements are sometimes referred license agreements, they are oldest and widely practised contract system which began to exist since the 19th century[lxviii]. It was advanced when the United States of America began to explore oil resources. The developing countries specifically the producing countries appealed for the renegotiation to modify and undergo amendment of the concession agreements by focusing the ground of the principle of permanent sovereignty over natural wealth and resources. In general perspective, the producing countries fascinated their demands on the necessity of securing control of their natural resources and wealth.

Duration of the Concession Agreements

The fundamental foundation of license agreements was of a long duration period which typically found to be awkward and non-beneficial in the eyes of the oil producing and other rich- natural resources countries. The concession agreements offered highly protection of a long period of time to the foreign countries over the exploitation of resources and wealth of the rich natural resource-countries. The rich- natural resources countries used the concept of permanent sovereignty over natural resources to assert changes of concession agreements as they claimed the unreasonableness and unfairness of the long duration in the concession agreements with little or no benefit at all to their own resources in their respective countries. For instance, according to the oil concession of 1934, Kuwait granted a concession right to run for a period of 75 years[lxix].

Relinquishment

It is stated that the old concession agreements signed prior 1950s have the attribute of covering the whole territory of the country without relinquishment provision[lxx]. For instance, the D'Arcy agreement Anglo-Persian Oil Company of 1901 covered the whole of Iran except of northern provinces of Asterabad, Khorasan, Azerbaijan, Gilan and Mazanderan[lxxi]. The agreement was realized to grant the largest parts of the country. As a matter of fact, later on the producing countries applied the principle of permanent sovereignty over natural resources to demand the foreign countries to delineate their areas of operations and also to accept the relinquishment of land resources which require adequate time to be developed or could never be developed. At this juncture, some producing countries entered into negotiation with foreign oil companies for relinquishment, and others resorted to unilateral action[lxxii]. For instance, the Saudi Arabia government decided to enter into negotiations with *Aramco* for the relinquishment objectives over the exclusive area of the company which was not further explored by the company.

State of Participation

The traditional oil concession agreements did not specify an opportunity for changes to be carried out in their provisions[lxxiii]. This condition enabled the oil companies to counterattack any amendments for their concession agreements according to the principle of the sanctity of contract. The doctrine of sanctity of contract essentially means that the parties are free to enter into contracts on terms and conditions that are freely determined by those parties, and once the state established that the agreement was indeed freely entered into, it has no choice but to

enforce it accordingly[lxxiv]. This doctrine was later on recognized under international investment law. As a result of this conduct, the rich-resource countries were not able to exchange their concerns with the foreign oil companies about the extent of oil production volume, management of corporations, oil prices and even international policies which govern oil business in order to protect the benefit of their people and sustain development of the countries[lxxv]. Therefore, the tradition oil concession agreements did neither help nor benefit the welfare of the producing countries but enriched and deepened richness and wealth of the foreign companies.

On the other side, the foreign oil companies recognized in principle the rights of people to participation at the climax point of struggling for permanent sovereignty over natural resources and re-negotiations of the traditional concession agreements from the rich-resource countries and many other oil producing countries. It is indicated that between the period of 1950 and 1960 the attribute of State participation in the oil and gas sectors with collaboration of foreign oil companies including but not limited to the participation in sharing profit, administering international oil policy, oil prices and even entering into joint-ventures between national oil companies and foreign companies[lxxvi]. The traditional concession agreements undergone modifications and major amendment by providing substantial state participation even to the extent of sometimes holding the majority stake which opened the opportunities of control and management of the national oil companies to the largest equity partnership in the sector.

Nationalization

The development process of permanent sovereignty over natural resources contributed to the rise of nationalism in most developing and rich-resource countries[lxxvii]. The nationalism movements facilitated the nationalization of foreign oil companies. In other words, the producer States fortified the foreign oil companies to accept the renegotiation of concession agreements in order to enhance control and autonomy of the ownership over the natural resources under the condition of appropriate and adequate compensation. In these circumstances, the rich-resources countries and producers States invoked the compliance of the right of permanent sovereignty over their natural wealth and resources.

With consideration of the attributes of permanent sovereignty over natural resources, one cannot reject that nationalization of foreign companies emerged and developed as a result of nationalization movements which was generated by the implications of the principle of

permanent sovereignty over natural wealth and resources in numerous part of the world. For instance, the case of Saudi Aramco of Saudi Arabia which was nationalized from the Arabian-American Oil Company during the 1970s. This Company was initially managed and owned by the Standard Oil of California and Texaco; and *Petroleos de Venezuela S.A* (PDVSA) which was nationalized in 1976 in Venezuela[lxxviii].

In addition to the nationalization of foreign oil companies, national oil companies began to emerge in most rich-resource countries and other producing countries. These National Oil Companies were established with specific objective of increasing autonomy of ownership natural wealth and resource for the benefit of the States and their people. In other words, the rich-resource countries intended to eliminate their economic dependence and domination from the foreign oil companies specifically during the post-colonial resource nationalism rule. For instance, Tanzania Petroleum Development Corporation (TPDC) was established to implement its petroleum exploration and development policies and all other related activities in the industry[lxxix], the Uganda National Oil Company (UNOC) was established to handle the Government of Uganda's commercial interests in the petroleum sector and to ensure the effective exploitation of resources[lxxx] and the National Oil Corporation of Kenya (NOCK) was set up to provide greater control of the petroleum sector to boost up economic performance[lxxxi]. The corporation was mandated among others, to engage and supply the upstream oil and gas exploration, midstream petroleum infrastructure and downstream marketing petroleum products for the benefit of the country.

In a nutshell, coinciding with this development of national oil companies, they represent the State in all joint ventures business relating to the oil and gas industry. Such level of development could exercise greater control over natural resources and involvement of people and their governments in the respective oil and gas industry.

Compensation

Generally, it obvious understood that where an individual, corporation or even a state breaches a contract, there is an obligation to compensate the other party to the contract. The issue of compensation is debateable one and yet there is no unanimous consensus among the international law scholars on the precise definition of the term and standards attributed to the aggrieved individual, corporation or state over the expropriated property[lxxxii]. However, the right of compensation depends upon the circumstances associated under nationalization. The

international principle of permanent sovereignty over natural wealth and resources is attributable with recognition of adequate, fair, effective and prompt compensation by the nationalizing States to the foreign investors who were the owners and managers of oil companies in which their properties were expropriated by the rich-resource countries and other producing states. Ng'ambi is on the view that the standards of compensation propounded under international law are classified under two different standards namely the full or appropriate compensation and the hull principle of compensation[lxxxiii].

The full or appropriate compensation entails that the compensation should be determined on case-to-case basis. All relevant circumstances and figures that might be seemed appropriate should be properly considered in arriving the conclusion of the compensation matter[lxxxiv]. On the other side, the Hull Principle of Compensation provides that the compensation ought to be prompt, fair, adequate and effective. It connotes that there should be no delays in compensating the investor for expropriated property and the currency of the compensation should be convertible and there should be no restriction on its repatriation. The term adequate is very much essential because it describes that the lost profits (*lucrum cessans*) have to be paid. For instance, the standards were applied by the European Court of Human Rights (ECHR) when asserted the right of nationalization to be inseparable to the determination of the amount of compensation that ought to be paid to the investor in the case of *Lithgow v. United Kingdom*[lxxxv].

The award of *Lucrum Cessans* originated from the purpose of compensating the investor is to wipe out all the consequences of the expropriatory act and to re-establish the situation that would have existed if the host government had taken the action it did. In other words, it means that award of compensation includes lost future profits by projecting the net cash flow for a certain time of period into the future and then discounting it back to the present value as of the date of breach. For instance, the compensation awarded to Lena Goldfields Ltd in *Lena Goldfields Ltd v USSR*[lxxxvi] .

Generally, it should be noted both two international divergent standards of compensation shared the objective of awarding the compensation for a nationalizing state. The unanimous and exclusive objective of compensation under the standard of international law is to put or restore the investor in the same position as if his property had not been expropriated. Therefore, it involves paying full market value for the nationalized property including future expected profits.

Settlement of Disputes

The development of permanent sovereignty over natural resources also contributed to the implication settlement of disputes under international investment arena. The newer petroleum regulations and concession agreements provides for an avenue over disputes which may arise between the State and foreign oil company to be governed in accordance to the law of the State and within the jurisdiction[lxxxvii]. It is further described that any investment contract should incorporate provisions for dealing with disputes, and the modality of dispute settlement should be explicitly stated. Under these circumstances, investors and the producing countries should be given clear consideration to the type of dispute settlement that will best protect the interests of the parties and the perception of the governing laws to suit appreciated and efficient resolution of disputes[lxxxviii]. In these contexts, the concession agreement provisions of numerous jurisdictions such as Kuwait, Libya and Sierra Leone underwent amendments to accommodate settlement of disputes in accordance to national laws and rules of international law[lxxxix]. A typical example is found under the oil concession agreement between the governments of Sierra Leone and America Company Tenessee Sierra Leone Incorporated (1962) provides that:

> *"This agreement shall be governed by and interpreted in accordance with the laws of Sierra Leone and such principles and rules of international law as may be relevant and the arbitrators and umpire shall base the award upon these laws, principles and rules"*[xc].

Moreover, the principle of disputes settlement continued to be recognized and applicable to date under international investment contract in adjudicating disputes occurring in the course in the implementation of investment business. Sometimes the parties may refer to arbitration approach in the determination of disputes settlement. The arbitral tribunal may apply the rules of laws specified by the parties with pursuant to a contractual dispute resolution[xci]. The same approach of arbitration to a contractual dispute resolution is provided under the East African Community Court of Justice (EACJ) for the objective of fostering cooperation between the member states[xcii]. The general principle under settlement of disputes as an implication of the principle of permanent sovereignty over natural resources is that all disputes arising between the governments and investors shall fall and be adjudicated exclusively within the jurisdiction of the competent national courts or any specialized courts[xciii].

In conclusion, it should be understood that though the settlement of disputes remains to be an implication of the development of the concept of permanent sovereignty over natural wealth and resources. However, it continues to be recognized and consequently applied into the oil concession agreements and other international natural resources investment agreements.

RESOLVING THE CONTENTION QUESTION OF WHO OWNS THE RIGHT TO PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES: PEOPLE OR STATE?

Under the study of the principle of permanent sovereignty over natural resources has envisaged with controversial contention as to whom vested to, between the State and the people. The relevant question is originated because of the perceptions of eligibility for ownership of the natural resources among the leaders of developing states who decided to own and utilize the natural resources endowed in their respective nations for their own interests without paying priority of their ordinary and marginalized people[xciv]. Again, the other reason contributing to this controversial debate is generated from the lacunae and gaps of the United Nations resolutions. Some of the United Nations resolutions specify full exercise of the right of permanent sovereignty over natural wealth and resources to the States[xcv] and other resolutions specify the exercise of the right of sovereignty over natural resources to the people[xcvi] while the other resolutions specify that the exercise of the right of permanent sovereignty over natural resource is vested to both the State and people[xcvii].

Kilangi[xcviii] and Enyew[xcix] describe three school of thoughts in respect of the contentious question of who owns the right of permanent sovereignty over natural wealth and resources namely that the right of PSNR is bestowed to the state only, that the right of PSNR belongs to the people, and the right of PSNR is vested to both the state and people.

The first school of thought embraces the position that, the right of permanent sovereignty over natural resources is bestowed to the state. This approach is grounded on the declaration of numerous international instruments and the juristic opinions of permanent Sovereignty over natural resources which qualify the right of permanent sovereignty over natural resources to belong to the States only[c]. The second school of thought embraces that the right of permanent sovereignty over natural resources is bestowed to the people. This approach is also grounded

by the international instruments and other scholarly writings which attribute the right of permanent sovereignty over natural resource to be vested exclusively in people[ci]. On the third school of thought, it is asserted that the permanent sovereignty over natural resources vested to both the states and the people. Likewise, other school of thoughts, this school of thought is also referred to the legal instruments to maintain the notion that the right of PSNR is attributable to both the state and people[cii].

From the above analysis pertaining to the school of thoughts over the right of permanent sovereignty over natural resource, it is observed that the right of PSNR is derived from the decent principle of the self-determination, and it is reaffirmed that the genesis of self-determination principle is emanated from the people. In other words, the right to PSNR can be deduced to belong to people of the territory.

The author of this manuscript views that permanent sovereignty over natural resources is the right centred to the people as a whole. However, due to the impracticability for the people to exercise this right directly, thus it is exercised on their behalf by their related government of the State. In the same vein, it is cautioned to utilize and enjoy the right of permanent sovereignty over natural resources for the majority peoples' benefits and public interests. The government officials including politicians, elites and other influential people who run the government should not misuse the right of permanent sovereignty over natural resources for their personal interests.

REFLECTION OF THE INVESTMENT AGREEMENTS IN THE EXPLOITATION OF NATURAL RESOURCES IN TANZANIA'S OIL AND GAS INDUSTRY

The law of Contract Act is the law which governs matters of contract in Tanzania.[ciii] The Act provides for the legal relations and general principles relating to the pertinent issues of contract including communication, acceptance and revocation of proposals[civ], voidable contracts and void agreements[cv], contingency contracts[cvi], performance of contracts[cvii], certain relations resembling those created by contract[cviii], consequences of breach of contract[cix], indemnity and guarantee[cx], bailment[cxi], agency[cxii] and matters of partnership[cxiii].

For the case of Tanzania Zanzibar, matters of contract are separately governed by Law of Contract Decree.[cxiv] This decree provides pertinent matters of the law relating to contracts in the jurisdiction of Tanzania Zanzibar. Although the decree became a comprehensive contract legal instrument for past duration as it covered pertinent issues of contract law such as communication, acceptance and revocation of proposals[cxv], voidable contracts and void agreements[cxvi], contingent contracts[cxvii], performance of contract and consequences of breach of contract[cxviii], partnership[cxix] and many other related contract provisions. However, it became ineffective law of contract for the existing time. The reason is that the contract decree does neither incorporate nor addresses emerging issues related to the development and changes of science and technology. A typical example can be referred to the e-contract and sovereignty over natural resources issues are not addressed in the contract decree. Such relevant gaps and many other challenges disqualify the effectiveness of the contract decree.

Notwithstanding of divergent in application of the law which govern and regulate contract matters in Mainland Tanzania and Tanzania Zanzibar. But appropriate and best practices remain that both two legal instruments namely the Law of Contract Act[cxx] and the Law of Contract Decree[cxxi] are originated and apply the principles based on common- law system evolved from the British traditions and norms.

Authorized Institutions for entering into Oil and Gas Agreements

The Tanzania Petroleum Development Corporation (TPDC) is an authorized national oil company to matters of Oil and Gas Agreements under the Ministry responsible for Energy in Tanzania[cxxii]. As other national oil companies in the world, TPDC is mandated to promote and monitor the exploration for oil and gas, to contract, hold equity and participate in the oil concession, franchises and licenses, to develop and produce oil and gas to develop an adequate industrial base for the oil industry, to undertake trading in petroleum and to advise the government on petroleum related issues.

A part from that, with consideration of specific and exclusive legal separation of the institutions empowered to govern matters of oil and gas in Tanzania Zanzibar, the Zanzibar Petroleum Development Company (ZPDC) is an authorized company in developing and managing issues of oil and gas in the exclusive the jurisdiction of Tanzania Zanzibar[cxxiii]. The ZPDC is registered company under the laws of Zanzibar, limited shares and all of which are to be held by the Revolutionary Government of Zanzibar on behalf of the people of Zanzibar[cxxiv]. The mandate

of exclusive operation and regulating issues of oil and gas for Tanzania Zanzibar is emanated according to the Petroleum Act of the United Republic of Tanzania[cxxv]. The Act confers power of operating petroleum activities and matters, midstream and downstream which are undertaken within Tanzania Zanzibar to be governed in accordance to the laws and institutions of Tanzania Zanzibar. However, in the meantime the pertinent issue of mineral oil resources, including crude oil other categories of oil or products and natural gas ideally remains to be a union matter in the United Republic of Tanzania[cxxvi].

Therefore, as indicated in the above analysis it is clearly observed that the issues of entering into agreements with a contractor or with any person relating to petroleum activities (oil and gas matters) in the stages of exploration, development and production are managed by two separate entities in the United Republic of Tanzania namely the Tanzania Petroleum Corporation (TPDC) to the Mainland Tanzania for the benefits of Tanzanians[cxxvii] and the Zanzibar Petroleum Development Company(ZPDC) to the solely exclusive jurisdiction of Tanzania Zanzibar for the benefits of the Zanzibar people[cxxviii]. These institutions may specifically enter into agreements with contractor or any person on the matters of granting of a license, conditions for granting, revoking and renewing a license, conduct by a person performing petroleum activities on behalf of any person to whom a license is granted and any other incidental matters.

Model of Agreements in Oil and Gas Sectors in Tanzania

The United Republic of Tanzania uses the Production Sharing Agreement (PSA) as a model production sharing agreement in the matters of oil and gas. PSA is a contractual arrangement for petroleum activities including at both stages of exploration, development and production[cxxix]. It is indicated that Tanzania transformed from the use of concessionary and service agreements into PSAs since 1969[cxxx]. At this period Tanzania was far ahead in the progressive framework for resources and wealth management which was contrary to her neighbours of East Africa countries namely Kenya and Uganda. This context attributes the fact of negotiation of terms and conditions between the national oil company with foreign oil companies and corporation which intend to undertake the exploration and development of oil and gas activities in Tanzania.

The Production Sharing Agreement (PSA) in oil and gas contracts is normally concluded between the investor and the host state (a state-owned national oil company)[cxxxi]. In this type

of contract, the investor usually provides financial and technical services to the national oil company such as funds for exploration, development and production. On the other hand, the investor receives a share of the oil profit. The best experience indicates that the sharing is based contractually accepted formulae. Additionally, the investor is also required to pay bonuses at the specified time such as during the contract signature, oil discovery and production stages.

The model of Production Sharing Agreement is a basic outline for distributing the risks, costs, and benefits of an investment project between the investor and the host government[cxxxii]. It serves as the basic contractual document for negotiations between the government of Tanzania through TPDC for the case of Mainland Tanzania and ZPDC for the case of Tanzania Zanzibar with foreign companies. It articulates terms and conditions for undertaking the petroleum exploration such as regulatory issues of taxes, profits sharing, royalties, license rentals, production and signature bonus.

On the other hand, it is indicated that Tanzania underwent three Model Production Sharing Agreements (MPSA) dated 2004, 2008 and 2013[cxxxiii]. However, the 2004 MPSA seems to be the basic foundation for many of the PSAs which effect in the meantime under various blocks.

Like as two other MPSAs, the 2008 provides terms relating to exploration programmes, annual charges, taxation charges, royalties and issues of consultation and arbitration in the course of implementation of the agreement. The 2013 MPSA seems to be comprehensive document for the exploration activities which necessitate and imply favourable terms on the control and ownership of wealth and resources for the benefits of the people of Tanzania in numerous areas like as on fiscal terms and minimum TPDC equity entitlement and bonuses. In these circumstances, though some other key stakeholders of oil and gas industry alleged these terms and conditions to be so tightened for their own insights and interests[cxxxiv].

In summary from the above analysis, it is clearly deduced that the model of Production Sharing Agreement (PSA) in the jurisdiction of Tanzania qualifies to be identified as a significant implication of the international principle of permanent sovereignty over natural resource under petroleum industry because of the specified favourable terms such as issues of local content, employment, training and transfer of technology, profits sharing, bonuses and matters taxation. These terms intend to imply the control, management and use of the natural wealth and resources located in the territory for benefits the people of Tanzania and accelerate their level of economic development.

CONCLUSION

The main aim of this article is to discuss the implications of the international principle of permanent sovereignty over natural resources in the light of investment agreements in the exploitation of natural wealth and resources of Tanzania's oil and gas. In the past decades the investment agreements which govern natural resources including oil and gas have been very feeble and unstable. Thus, for the investment agreements to be well strong and stable there should be a necessity to reconsider and adopt effectively the rights and obligations of the permanent sovereignty over natural wealth and resources including right to benefit from the exploitation of natural resources, right to freely dispose of natural resources, the right to explore and exploit natural resources freely, the right to use natural resources for development, the right to regulate foreign investment and the right to settle disputes on the basis of national laws of Tanzania or international law upon mutual acceptable investment agreements.

Additionally, due to the fact that the resolutions relating to permanent sovereignty over natural resources resulted the significance consequence of the rights and duties among the resource rich-countries and investors existed under international law including the right to control and manage natural wealth and resources. Therefore, the principle of permanent sovereignty over natural resources stands to be genuine and lawful as it has been accepted and enforced by numerous international courts of Justice such as in the *East Timor Case*[cxxxv] and in the case *Congo v. Uganda* [cxxxvi]. In the case of *Congo v. Uganda* the ICJ vehemently declared that the principle of permanent sovereignty over natural resource stands as a principle of customary law. The evidence indicates that the principle of permanent sovereignty over natural resource is strongly recognized under international law. Therefore, by the exercise of this sovereignty the states including Tanzania can freely enter into investment agreements including the production sharing agreements (PSA) or any other type of investment agreements with foreign investors freely and without any kind of intimidation or foreign interference in accordance to the provisions of law governing oil and gas industry and other natural resources investment.

The rights and obligations associated from the principle of permanent sovereignty over natural resource should be effectively applicable by those developing countries including Tanzania in oil and gas industry in order to increase economic and technological advancement in facilitating development for the existing and the future generations.

All in all, the growth and advancement of the country's development always depends upon the economic policies and other related sectors in exploiting her natural wealth and resources. Therefore, it is a prerequisite tool for the countries specifically the rich-resource countries and other developing countries to reconsider, adopt and apply the rights and duties emanated from the principle of permanent sovereignty over natural wealth and resources in accordance to their mother laws and regulations in their respective jurisdictions as well as the regional and international instruments.

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