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ANALYSIS OF THE LEGAL FRAMEWORK FOR STATE PARTICIPATION IN THE PETROLEUM INDUSTRY: A CASE OF NAMIBIA

A Research Paper submitted in partial fulfilment of the requirement for the Degree of Master of Laws

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DECLARATION CERTIFICATION

I, AINNA VILENGI KAUNDU, declare that this Mini-Dissertation which is hereby submitted for the award of Legum Magister (LL.M) in Trade and Investment at International Development Law Unit, Faculty of Law, University of Pretoria, is my original work and reference is made for the works of others. It has not been previously submitted for the award of a degree at this or any other tertiary institution.

Signed in Pretoria on this 31st May 2012

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LIST OF ACRONYMS

NNPC	Nigerian National Petroleum Corporation
UNCTAD	united Nations Conference on Trade and Development
NOC	National Oil Company
IOC	International Oil Company
NAMCOR	National Petroleum Corporation of Namibia
UNCLOS	United Nations Convention on the Law of Sea
GATS	General Agreement on Trade in Services
FDI	Foreign Direct Investment
NFI	New Forms of Investment

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CHAPTER 1

RESEARCH BACKGROUND

1.0. INTRODUCTION

The Namibian legal framework[1] for participation in the extractive industries is the scope of the Research[2]. Extractive industries can be defined as processes that involve different activities that lead to the extraction of raw materials (such as petroleum[3]) from the earth, processing and utilization by consumers.[4] Extractive Industries comprise of petroleum and mining industry.[5] The petroleum industry is the focus of the Research. Activities in a petroleum industry are grouped into three main segments, namely, upstream, midstream and downstream.[6] The Study is limited to the upstream segment, and thus reference to petroleum industry herein means exploration for petroleum resources. The use of exploration herein means exploration and production.

The Research entails an analysis of the legal framework and the role of the State in the exploration of petroleum resources. The choice for the extent of the state's role, whether regulatory or participatory, should be in line with the national development objective. The regulatory role of governments is becoming an acceptable norm, even to the proponents of the free market.[7] In the

[1] The use of the terms legal framework and legal regime in this Paper bears the same meaning and is subject to be used interchangeably.
[2] The use of the terms Research, Paper, and Study, is accorded the same meaning and is subject to be used interchangeably.
[3] A generic name for hydrocarbons, including crude oil, natural gas liquids, natural gas and their products.The word petroleum comes from the Latin Petra, meaning "rock,"and oleum, meaning "oil." It is generally described as a thick, flammable, yellow-to-black mixture of gaseous, liquid, and solid hydrocarbons that occurs naturally beneath the earth's surface, can be separated into fractions including natural gas, gasoline, naphtha, kerosene, fuel and lubricating oils, paraffin wax, and asphalt and is used as raw material for a wide variety of derivative products. American Heritage Dictionary. http://petroleumgeology.org/petexpl.cfm. Accessed 20 February 2012.
[4] Claudine Sigam and Leonardo Garcia, Extractive Industries: Optimizing Value Retention in Host Countries. UNCTAD, Geneva. New York and Geneva 2012.
[5] Extractive Industry Review Definitions. International Finance Corporation . http://www.ifc.org/ifcext/oeg.nsf/Content/EIE_definitions .accessed 18 June 2012.
[6] Upstream comprises exploration, development and production; midstream covers transportation and storage; and downstream includes manufacturing of products through oil refining, gas processing and petrochemical processes, as well as the selling of these products to the various consumer markets. Claudine Sigam and Leonardo Garcia, Extractive Industries: Optimizing Value Retention in Host Countries. UNCTAD, Geneva. New York and Geneva 2012.
[7] United States of America and the United Kingdom, the main advocates for free markets and deregulation have both admitted the need for increased role of government regulation in the banking sector. T Hunter Legal Regulatory Framework for the Sustainable Extraction of Australian Offshore Petroleum Resources: a Critical Functional Analysis PhD Thesis,
University of Bergen, (2010), 82

petroleum industry, government regulation can be described as minimal intervention[8], regulatory intervention[9] or participatory intervention.[10] The Paper does not necessarily consider regulatory role of the State in general, but the analysis is confined to the government participation as an active player in the development of the industry. Thus, participatory intervention is the focus of the Research. The other forms of regulations, namely, minimal and regulatory intervention do not fall within the ambits of the analysis. The Research does not consider the taxation system for exploitation petroleum resources.

The analysis of the Research is narrowed to State participation in Namibian petroleum industry. The Research seeks to examine whether the legal framework for exploration for petroleum resources promotes State participation. State participation is herein defined as the commercial involvement of a state through the national oil company (NOC) in the exploration[11] of petroleum resources.[12] The use of the words petroleum and oil and hydrocarbon, in this Study, is accorded the same meaning and is subject to be used interchangeably, and does not include gas.

Participation in the petroleum industry is determined by the country's philosophy on ownership of petroleum resources, the legal framework which is either concessionary or contractual and the system of the allocation of petroleum exploration rights. These elements, which are also interrelated, will be considered in this analysis.

1.1. BACKGROUND INFORMATION

After more than 40 years of intensive data acquisition, the Namibian State[13] announced that, petroleum exploration operations have located drillable targets.[14] Geological studies show that Namibia has a similar geological architecture to the other hydrocarbon[15] rich areas in

[8] This is the North American system of petroleum regulation, used in United States of America and Canada. See T Hunter (2010) above, 85
[9] This is the North Sea system of petroleum regulation used in Norway. See T Hunter (2010) above, 85
[10] Used in Norway. T Hunter (2010) above, 85
[11] The meaning of exploration is herein includes both exploration and production of offshore petroleum.
[12] http://www.themixoilandwater.com/2012/01/state-participation-in-petroleum.html accessed 16 June 2012.
[13] The term State herein refers to the government, a self-governing political entity, which exercises effective sovereignty over its territory and population. Webster Online Dictionaryhttp://www.merriam-webster.com/dictionary/state, accessed 13 March 2012. The Term "the State" within the confines of the Research means the Namibian State, unless otherwise indicated. The use of the terms "the Government", "the Country" and the "State" is accorded the same meaning and is subject to be used interchangeably.
[14]Ministerial Briefing Statement made in Parliament, by the Minister of Mine and Energy, on the 6th July 2011 concerning the Petroleum Exploration activities during 2011/2012 (Hereinafter referred to as Ministerial Briefing [July 2011]).
[15] The use of the words oil and petroleum and hydrocarbon is accorded the same meaning and subject to be used interchangeably.

South East America and Western Africa.[16] This is attributed to the common geographical history.[17] Before the super-continent of Gondwana[18] broke up during the Cretaceous Period[19], the Namibian western basins are said to have been adjacent to what are now the oil rich Santos and Campos basins of Brazil.[20] Modern geochemical analysis indicates the presence of hydrocarbons with similar fingerprints or geochemistry to those present in the aforesaid basins in Brazil.[21]

The State is optimistic that with the volume of data available, opportunities for petroleum discovery have increased tremendously.[22] Drilling is then expected to commence between 2011 and 2012 with 6 to 8 wells identified as targets.[23] While no commercially viable hydrocarbon has been proven yet, the current development sets offshore Namibia as a potential petroleum producing country.

1.2. BRIEF GLOBAL HISTORY OF THE USE OF PETROLEUM

Small amounts of petroleum have been used throughout history since the ancient times.[24]According to the young earth creationists' theory, oil was formed after the flood[25] as a result of huge amounts of pressure on a huge amount of dead organic matter.[26] Some theorists

[16] Countries such as Oil Exploration in Namibia: A boost for development Speech by H.E. Neville M. Gertze, Ambassador
Berlin, January 31, 2012 (Hereinafter referred to as "Gertze, M. Neville"). http://www.safri.de/newsupload/847_2012516_141515_Ambassador's%20Speech%20on%20Oil%20Exploration%20in%20Namibia.pdf Ambassador Gertze was speaking at a breakfast meeting held in Germany.
[17]Gertze M. Neville (above).
[18]According to the theory, Gondwana was the great southern landmass that formed as a result of the division of a much larger supercontinent known as Pangea about 250 million years ago. This Gondwanan supercontinent is said to have consisted of present day landmasses: Africa, South America, India, Madagascar, Australia and New Zealand. The other section of Pangea, known as Laurasia, comprised what are now Europe, Asia and North America. See the theory developed in 1912 by Alfred Wegener. The origin of continents and oceans / translated from the third German edition by J. G. A. Skerl. http://www.parks.tas.gov.au/file.aspx?id=655. This Paper disagrees with this theory. The Author supports the theory of the young earth creationists who hold the view that the earth is about 6000 years, and was created by God according to the accounts of the Bible. http://www.nwcreation.net/ageyoung.html.
[19]During the Cretaceous, according to the theory, most continents were widely separated with the formation and drifting of North America, Eurasia, South America, Africa, Antarctica, Australia and India.http://www.bernardharrisonandfriends.com/pdfs/continental.pdf.
[20]Gertze M. Neville (above).
[21]Gertze M. Neville (above).Other direct and indirect indications of the presence of hydrocarbons, the Government is convinced; include the occurrence of gas chimneys, irregularities of amplitude and gas escape features on seismic images, satellite seepages in offshore Namibia, and the existence of carbonates and reef mounds possibly associated to leaking of hydrocarbons.
[22]Ministerial Briefing (July 2011).
[23]Ministerial Briefing (July 2011).
[24]http://www.pafko.com/history/h_petro.html. Accessed on 20 February 2012
[25]The flood account in the time of Noah as recorded in Chapter 7 of Genesis, Bible.
[26]Hinton J. Ridiculous KJV Bible Corrections: The Pitch of Noah's Ark. http://av1611.com/kjbp/ridiculous-kjv-bible-corrections/The-Pitch-of-Noahs-Ark.html accessed 29 May 2012

hold that the pitch that Noah used on the Ark[27] was a petroleum product.[28] The latter view claims that the petroleum product pre-existed the flood and was used to make the Ark seaworthy.[29]The Babylonians, Assyrians, and Persians, the Research has found, used petroleum to pave their streets and hold their walls and buildings together.[30] The use of naturally occurring oil had widespread in China and Central Asia for centuries.[31]From medicine to jet fuel, the oil industry has not only powered progress, but transformed the world.[32] The commercial importance of the petroleum industry was widely recognised from the early 20th Century, when international combustion engines and the emerging automotive industry contributed to the prolonged boom in oil demand.[33] It was the First World War that established the importance of oil as a strategic raw material.[34] The war provided a powerful stimulus to the growth of the United States petroleum industry. [35]

1.3. GLOBAL HISTORY OF INDUSTRY PARTICIPATION IN PETROLEUM EXPLORATION AND PRODUCTION

1.3.1 Pre-1900 Era

From the ancient days up to the mid-Nineteenth century, oil was mainly collected when it occurred naturally at the surface.[36] In 1859, the first commercially successful modern oil well was drilled in Titusville, Pennsylvania in the United States of America (USA).[37] Since then, the industry was characterized by privately-owned oil companies (POCs) and entrepreneurs.[38]

[27]Genesis 6:14, the Bible (New King James Version)
[28]Hinton J. Ridiculous KJV Bible Corrections: The Pitch of Noah's Ark….this view presupposing that petroleum existed before the flood.
[29]http://www.pafko.com/history/h_petro.html. Accessed on 20 February 2012
[30]http://www.pafko.com/history/h_petro.html. Accessed on 20 February 2012
[31]Tordo Silvana, with Brandon S. Tracy, and Noora Arfaa National Oil Companies and Value Creation, World Bank Working Paper, March 2011, 27
[32]http://www.oil150.com/ at 20 February 2012.American Indians used petroleum for paint, fuel, and medicine. Desert nomads used it to treat camels for mange. Ancient Persians and Sumatrans also believed petroleum had medicinal value. In the 19th Century jars of petroleum were sold as miracle tonic able for ailment.http://www.pafko.com/history/h_petro.html. Accessed on 20 February 2012
[33]Tordo (2011) above, 27
[34] Hossain kammal, 2
[35] Hossain Kammal, 2
[36]Tordo S (2011) above, 27
[37]Tordo S (2011) above, 27. Colonel Edwin Drake drilled the first successful commercial well http://www.pafko.com/history/h_petro.htmlAccessed on 20 February 2012.
[38]The Standard Oil Company founded by John D. Rockerfeller in 1870 as a refining company in United States dominated the industry for decades. This was followed by the discovery of oil in Texas in 1901 led to the founding of oil companies such as the Gulf Oil Company, which opened the first filling station in the world in Pittsburgh in 1913Tordo S (2011) above, 27

Unlike USA, petroleum exploration and production was a state monopoly in Russia and Caspian.[39] Before 1900, American companies had no foreign oil production.

1.3.2 Colonial Era

The British and the Dutch companies took earlier initiatives in the development of foreign petroleum in colonies, taking advantage of the protection of home countries.[40] As oil became an increasingly important strategic commodity, governments took an interest in the oil industry.[41] The colonial powers started to set up national oil companies (NOCs) or participate in existing oil companies.[42] The aim for this move was to control the domestic markets and upstream operations abroad, usually within their respective colonial domains.[43] This was the earliest form of foreign investment[44] in natural resources. Foreign investment in natural resources was necessary to ensure the raw material for production in the Western states.[45] The cycle of trade during the colonial period was to transfer resources from the colonies to the metropolitan states so that they could be used to fuel industries in these states.[46] During this era, it was held that the legal framework of the host country could not be applied to the foreign companies since they were already subject to the law in their home country.[47]

Early scholars such as Grotius[48] and Vattel[49] supported the above position. The argument was based on the assumption that these foreign companies carried the law of the country of their nationality with them wherever they went and were as a result not subject to local law.[50] The

[39] The British Government had actively aided the grant of a concession in Iran to a British group in 1901. Once oil was struck in the concession area in 1908, the Anglo-Persian Oil Company, later to be known as British Petroleum (BP) was formed in 1909. The Royal Dutch Company and the Shell Transport and Trading Company started business in 1890 in the Dutch East Indies (Indonesia). By 1907, the two companies had merged and expanded into countries such as Venezuela in 1910, Egypt in 1911, Trinidad and Mexico in 1913. Tordo Silvana, 28.
[40] Tordo Silava, 28
[41] Tordo Silvana, 28
[42] Tordo Silavana, 28.
[43] Tordo Silvana, 28. In 1914 the government of the United Kingdom obtained a 51 percent ownership stake in Anglo-Persian Oil Company, which later became British Petroleum (BP).
[44] Foreign investment is the transfer of tangible or intangible assets from one country into another for the purpose of their use in that country to generate wealth under the total or partial control of the owner of the assets. Sornarajah M. (2004). The International Law on Foreign Investment. Second edition. Cambridge University Press. 7
[45] Sornarajah (2004), 7
[46] Sornarajah
[47] Subedi, P. Surya (2008). International Investment Law: Reconciling Policy and Principle. Hart Publishing. Oxford and Portland, Oregon, 7
[48] H Grotius, De Jure Belli ac Pacis Tres (rev edn, 1946), reprinted in (1925) 3 (2) The Classics of International Law, 385 (F. Kelsey, Trans), as cited in Subedi, P. Surya (2008). International Investment Law: Reconciling Policy and Principle. Hart Publishing. Oxford and Portland, Oregon, 7
[49] E de Vattel, the Law of Nations 174 (J Chitty ed, 1852), as cited in Subedi above
[50] Subedi, P. Surya (2008). International Investment Law: Reconciling Policy and Principle. Hart Publishing. Oxford and Portland, Oregon, 7

implication was that their assets could not be expropriated or nationalised through legislation enacted by the host country.[51] Since the law was considered inferior, it could not apply to the foreigners, who were subject to the superior body of laws of their home country. [52]

The early oil companies used concession agreements to tie up production in large areas of land for considerable periods of time.[53] The concession agreements often had the effect of transfer of sovereign powers over vast tracts of land, to the foreign corporation for long periods of time, for payments of royalty calculated on the quality of oil produced at a fixed rate.[54]

1.3.3 National Sovereignty over Natural Resource Era

The development of National Oil Companies in developing countries began in the 1920s. Latin America, which had been independent since the eviction of the Spanish colonial force in 1821, led the way in the establishment of NOCs.[55] Mexico's state petroleum firm (Pemex) was set up in 1938 to take over the operations of foreign private firms in the country.[56] According to Tordo (2011), this was the first large-scale expropriation/nationalization within the petroleum sector.[57] But it was only until 1960s that sovereign ownership of the natural resources gained prominence.[58]

During the 1930s, there was a geographic shift in global oil production, due to the significant discoveries made in Middle-East in Bahrain.[59] IOCs formed private consortia that controlled virtually all production in the Middle East.[60] The increased number in petroleum discoveries strengthened the bargaining position of the Middle East countries relative to the IOCs.[61] In 1959, two world's major oil exporting countries met in Cairo, resulting in a 'gentlemen agreement' to consult with one another on issues of common interest.[62] The agreement

[51] Subedi, P. Surya (2008). International Investment Law: Reconciling Policy and Principle. Hart Publishing. Oxford and Portland, Oregon, 7
[52] Subedi, P. Surya (2008). International Investment Law: Reconciling Policy and Principle. Hart Publishing. Oxford and Portland, Oregon, 7
[53] Sornarajah (2004), 7
[54] Sornarajah (2004), 7. In the Aminoil Arbitration, the concession which was made in 1948 was to last for 60 years. The royalty was fixed at two shillings (8GBP) and six pence per barrel of oil.
[55] Sornarajah (2004), 7. In the Aminoil Arbitration, the concession which was made in 1948 was to last for 60 years. The royalty was fixed at two shillings (8GBP) and six pence per barrel of oil.
[56] Tordo Silvana
[57] Tordo Silvana
[58] Tordo Silvana
[59] Tordo Silvana
[60] Tordo Silvana
[61] Tordo Silvana
[62] Tordo Silvana

recommended the creation of NOCs to ensure direct state participation in the petroleum industry.[63] In 1960 the Organization of the Petroleum Exporting Countries (OPEC)[64] was formed, which emphasised equity participation and host country ownership. The policy encouraged OPEC members to develop their hydrocarbon resources directly. By the end of 1960s, new concessions, particularly in OPEC countries, was subject to equity participation of up to Fifty per cent in favour of host governments or the NOCs.[65]

The assertion of sovereignty over natural resources, reflected in national policies, was supported by the doctrine of "Permanent Sovereignty over Natural Resources". The doctrine was affirmed by the United Nations General Assembly, first in its Resolution No. 1803 (XVII) in 1962[66] and then in a more comprehensive form in Resolution No. 2518 (XXI) in 1966. [67] The latter resolution while reaffirming "the inalienable right of all countries to exercise permanent sovereignty over their natural resources in the interest of their natural development": and that "United Nations should undertake a maximum concerted effort to channel its activities so as to enable all countries to exercise that right fully. Such an effort should help in achieving the maximum possible development of the natural resources of the developing countries and in strengthening their ability to undertake the development themselves. [68]

The legal framework of host country became applicable to the foreign companies. This era saw the introduction of what Charles Oman[69] refers to as New Forms of Investments (NFIs). NFIs are inter-corporate international business operations that lie in a grey area between arms-length trade and traditional FDI. They include joint-equity ventures and inter-firm contractual arrangements.[70] The legal framework for NFIs is the the Production Sharing Contracts (PSCs), joint venture and risk service contracts.[71]

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[63] Tordo Silvana
[64] Founding member states are Iran, Iraq, Kuwait, Saudi Arabia and Venezuela.
[65] Founding member states are Iran, Iraq, Kuwait, Saudi Arabia and Venezuela.
[66] http://cil.nus.edu.sg/rp/il/pdf/1962%20General%20Assembly%20Resolution%20On%20Permanent%20Sovereignty%20Over%20Natural%20Resources-pdf.pdf
[67] United Nations Yearbook, 1966. http://untreaty.un.org/cod/UNJuridicalYearbook/pdfs/english/ByVolume/1966/chpIII.pdf
[68] United Nations Yearbook, 1966. http://untreaty.un.org/cod/UNJuridicalYearbook/pdfs/english/ByVolume/1966/chpIII.pdf
[69] New Forms of Investment in developing country industries: mining, petrochemicals, automobiles, textiles, food. Paris: Organization for Economic Co-operation and Development. Development Centre, 1989. Page 10
[70] New Forms of Investment in developing country industries: mining, petrochemicals, automobiles, textiles, food. Paris: Organization for Economic Co-operation and Development. Development Centre, 1989. 9
[71] Sulaimanov, 9

However, even the above arrangement was not satisfactory to the oil-producing states. During the first half of the 1970s there was a wave of compulsory equity participation and outright nationalization.[72]

1.3.4 Post Oil shock of 1980s Era

In the early 1980s the dramatic increase in real interest rates, the debt crisis followed by low oil prices triggered pressures of reform in the several countries with dominant NOCs.[73] Many developing countries no longer regarded New Forms of Investment as being more advantageous than FDI.[74] Host countries also realised that though the control of the natural resources sector by foreign corporations was broken, the command of technology and capital that these corporations had made them significant players.[75] Alliances with foreign corporations was thus necessary to operate the sector, as these foreign corporations possessed the technology and risk capital necessary for the exploration and production, exploitation of the resources. [76] The era coincided with trade liberalization agenda of the World Trade Organization (WTO).[77] Petroleum sector was opened up to IOCs participation.[78]

1.3.5 Development since 2000

The liberalization agenda which commenced in the late 1980 continued to gain momentum.[79] The economic and political agenda of the market liberalization and privatization have since continued to influence national policies and legal frameworks.[80] The privatized net-importers NOCs have adopted the nature of IOCs and are pursuing acquisitions of overseas petroleum

[72] New Forms of Investment in developing country industries: mining, petrochemicals, automobiles, textiles, food. Paris: Organization for Economic Co-operation and Development. Development Centre, 1989. 9
[73] New Forms of Investment in developing country industries: mining, petrochemicals, automobiles, textiles, food. Paris: Organization for Economic Co-operation and Development. Development Centre, 1989. 9
[74] For some governments, the severity of debt crisis was such that they could not afford the 'luxury' of trying to enhance host-country control over investment through local ownership; what they needed was investment, regardless of ownership.
[75] Sornorajah, 43
[76] Sornorajah, 43
[77] New Forms of Investment in developing country industries: mining, petrochemicals, automobiles, textiles, food. Paris: Organization for Economic Co-operation and Development. Development Centre, 1989. 9
[78] New Forms of Investment in developing country industries: mining, petrochemicals, automobiles, textiles, food. Paris: Organization for Economic Co-operation and Development. Development Centre, 1989. 9
[79] New Forms of Investment in developing country industries: mining, petrochemicals, automobiles, textiles, food. Paris: Organization for Economic Co-operation and Development. Development Centre, 1989. 9
[80] Since the turn of the millennium several countries, such as China, Brazil, India, Pakistan, Norway and Japan, have partially privatized their NOCs. Tordo Silavana, 34

sources.[81] The millennium is characterized by participation of both IOCs and NOCs in petroleum industry is currently.

1.4. GLOBAL PETROLEUM RESOURCES OWNERSHIP PHILOSOPHY

Natural resource philosophy, in many instances reflected constitutions influence the legal framework for development of petroleum resources.[82] As a general rule, the systems of law governing petroleum can be divided into three basic categories, namely, 'Regalia', individual ownership and citizens ownership.

The first system is known as "*Regalia*", which means rights belonging to the monarch (the state).[83] Under this legal system, all petroleum resources below the surface of the earth are owned by the state.[84] In some countries, the state may give to private parties the right to explore for, and exploit, petroleum resources.[85] Under the second system, the ownership of petroleum below the surface is an integral part the ownership of the land above it.[86] In such case, the owner of land also possesses the full right of ownership of the minerals lying beneath the surface of such land.[87] The third system places ownership of petroleum resources below the surface of the land in the people of the country. The ownership is neither transferable nor assignable to a private person.[88] Some countries apply a combination of these

[81] Tordo Silvana. PETROBAS (Brazilian National Oil Company) is one of the IOCs with interest to explore for petroleum in Namibia. Ministerial Briefing Statement made in Parliament, by the Minister of Mine and Energy, on the 6th July 2011 concerning the Petroleum Exploration activities during 2011/2012 (Hereinafter referred to as Ministerial Briefing [July 2011]).
[82] M A Karim & K Mills Indonesian Legal Framework in the Oil, Gas, Energy and Mining Sectors; Including Dispute Resolution .KarimSyah Law Firm, Jakarta http://www.arbitralwomen.org/files/publication/4907092548666.pdf
[83] M A Karim & K Mills Indonesian Legal Framework in the Oil, Gas, Energy and Mining Sectors; Including Dispute Resolution .KarimSyah Law Firm, Jakarta http://www.arbitralwomen.org/files/publication/4907092548666.pdf
[84] M A Karim & K Mills Indonesian Legal Framework in the Oil, Gas, Energy and Mining Sectors; Including Dispute Resolution .KarimSyah Law Firm, Jakarta http://www.arbitralwomen.org/files/publication/4907092548666.pdf
[85] The system is applied in Australia. With a few minor exceptions, in general Australia recognises the separation of the rights over the land from rights in the minerals below the surface. [85] M A Karim & K Mills Indonesian Legal Framework in the Oil, Gas, Energy and Mining Sectors; Including Dispute Resolution .KarimSyah Law Firm, Jakarta http://www.arbitralwomen.org/files/publication/4907092548666.pdf
[86] M A Karim & K Mills Indonesian Legal Framework in the Oil, Gas, Energy and Mining Sectors; Including Dispute Resolution .KarimSyah Law Firm, Jakarta http://www.arbitralwomen.org/files/publication/4907092548666.pdf
[87] This system is applied in the United States of America and in some parts of Australia. In such jurisdictions, any individual who owns land automatically becomes the owner of any petroleum found. Karim (above)
[88] Indonesia applies this system, whereby the state, as custodian for the Indonesian people, holds these rights in trust and administers the exploration and exploitation of these exploration rights. In this case exploration and exploitation may be directly carried out by the state or state enterprises, or by private parties based upon some nature of joint operating contract. Karim (above)

systems, or may allow their political subdivisions to determine which system is to be applied.[89]

1.5. OVERVIEW OF THE GLOBAL LEGAL FRAMEWORK FOR PETROLEUM EXPLORATION RIGHTS

Governments and oil companies negotiate their interests in one of the two basic systems, namely, concessionary systems and contractual systems.[90] The fundamental difference between concessionary and contractual systems relates to the ownership of the natural resources. [91] The Anglo-Saxon and the French concepts of ownership of mineral wealth are the root beginnings of the systems. [92]

The Concession Agreement is the oldest of international agreements and is sometimes referred to as a licence agreement, or as a tax and royalty agreement.[93] Concessionary system allows private ownership of natural resources. [94] The USA is the perfect example where

[89] In Australia, for example, although generally the system of Regalia is applied, in some states, such as Tasmania and Western Australia, the land owner is recognized as the owner of the petroleum resources, while in others, such as Victoria, exploitation of petroleum is permitted to be undertaken directly by the private sector. Karim (above)

[90] Johnston Daniel, (1994 International Petroleum Fiscal Systems and Production Sharing Contracts), 21. http://books.google.com.na/books?id=LnzTg_xkCycC&pg=PA290&lpg=PA290&dq=International+Petroleum+Fiscal+Systems+and+Production+Sharing+Contracts+(1994),+25.&source=bl&ots=N-9rk62t_0&sig=jTybDppMTAzMyIj-K4aKCNczYOA&hl=en&sa=X&ei=w3LbT426FNO1hAeM1rGGCg&ved=0CF8Q6AEwAw#v=onepage&q=International%20Petroleum%20Fiscal%20Systems%20and%20Production%20Sharing%20Contracts%20(1994)%2C%2025.&f=false see also Tordo Silvana. Fiscal Systems for hydrocarbons. World Bank Working Paper no. 123 , 7 http://siteresources.worldbank.org/INTOGMC/Resources/fiscal_systems_for_hydrocarbons.pdf

[91] Tordo Silvana. Fiscal Systems for hydrocarbons. World Bank Working Paper no. 123 , 8 http://siteresources.worldbank.org/INTOGMC/Resources/fiscal_systems_for_hydrocarbons.pdf

[92] Johnston Daniel, (1994 International Petroleum Fiscal Systems and Production Sharing Contracts), 21. http://books.google.com.na/books?id=LnzTg_xkCycC&pg=PA290&lpg=PA290&dq=International+Petroleum+Fiscal+Systems+and+Production+Sharing+Contracts+(1994),+25.&source=bl&ots=N-9rk62t_0&sig=jTybDppMTAzMyIj-K4aKCNczYOA&hl=en&sa=X&ei=w3LbT426FNO1hAeM1rGGCg&ved=0CF8Q6AEwAw#v=onepage&q=International%20Petroleum%20Fiscal%20Systems%20and%20Production%20Sharing%20Contracts%20(1994)%2C%2025.&f=false

[93] Tiny Kiluange The JDZ Model PSC: A Legal Analysis http://www.juristep.com/doc/jda_model_psc.pdf , 4

[94] Johnston Daniel, (1994 International Petroleum Fiscal Systems and Production Sharing Contracts), 21. http://books.google.com.na/books?id=LnzTg_xkCycC&pg=PA290&lpg=PA290&dq=International+Petroleum+Fiscal+Systems+and+Production+Sharing+Contracts+(1994),+25.&source=bl&ots=N-9rk62t_0&sig=jTybDppMTAzMyIj-K4aKCNczYOA&hl=en&sa=X&ei=w3LbT426FNO1hAeM1rGGCg&ved=0CF8Q6AEwAw#v=onepage&q=International%20Petroleum%20Fiscal%20Systems%20and%20Production%20Sharing%20Contracts%20(1994)%2C%2025.&f=false

individuals may own mineral rights. [95] This concept of ownership comes from Anglo-Saxon legal tradition.[96]

Under concessionary agreement, the title to hydrocarbons passes to the investor at the borehole.[97] The state receives royalties and taxes in compensation for the use of the resource by the investor. [98] Title to and ownership of equipment and installation permanently affixed to the ground and/or destined for exploration and production of hydrocarbons generally passes to the state at the expiry, or termination, of the concession (whichever is earlier). [99] The investor is typically responsible for abandonment. [100] An important characteristic of the concession systems is that since legislative power is a state prerogative, the state remains at considerable liberty to modify at any time those terms and conditions that are not negotiated but fixed by legislation.[101]

Under a contractual system, the government retains ownership of minerals.[102] Companies have the right to receive a share of production or revenues from the sale of oil and gas in

[95] Johnston Daniel, (1994 International Petroleum Fiscal Systems and Production Sharing Contracts), 21. http://books.google.com.na/books?id=LnzTg_xkCycC&pg=PA290&lpg=PA290&dq=International+Petroleum+Fiscal+Systems+and+Production+Sharing+Contracts+(1994),+25.&source=bl&ots=N-9rk62t_0&sig=jTybDppMTAzMyIj-K4aKCNczYOA&hl=en&sa=X&ei=w3LbT426FNO1hAeM1rGGCg&ved=0CF8Q6AEwAw#v=onepage&q=International%20Petroleum%20Fiscal%20Systems%20and%20Production%20Sharing%20Contracts%20(1994)%2C%2025.&f=false

[96] Johnston Daniel, (1994 International Petroleum Fiscal Systems and Production Sharing Contracts), 21. http://books.google.com.na/books?id=LnzTg_xkCycC&pg=PA290&lpg=PA290&dq=International+Petroleum+Fiscal+Systems+and+Production+Sharing+Contracts+(1994),+25.&source=bl&ots=N-9rk62t_0&sig=jTybDppMTAzMyIj-K4aKCNczYOA&hl=en&sa=X&ei=w3LbT426FNO1hAeM1rGGCg&ved=0CF8Q6AEwAw#v=onepage&q=International%20Petroleum%20Fiscal%20Systems%20and%20Production%20Sharing%20Contracts%20(1994)%2C%2025.&f=false

[97] Tordo Silvana. Fiscal Systems for hydrocarbons. World Bank Working Paper no. 123 , 8 http://siteresources.worldbank.org/INTOGMC/Resources/fiscal_systems_for_hydrocarbons.pdf

[98] Tordo Silvana. Fiscal Systems for hydrocarbons. World Bank Working Paper no. 123 , 8 http://siteresources.worldbank.org/INTOGMC/Resources/fiscal_systems_for_hydrocarbons.pdf

[99] Tordo Silvana. Fiscal Systems for hydrocarbons. World Bank Working Paper no. 123 , 8 http://siteresources.worldbank.org/INTOGMC/Resources/fiscal_systems_for_hydrocarbons.pdf

[100] Tordo Silvana. Fiscal Systems for hydrocarbons. World Bank Working Paper no. 123 , 8 http://siteresources.worldbank.org/INTOGMC/Resources/fiscal_systems_for_hydrocarbons.pdf

[101] Moss Guiditta Cordero, 'Contract or Licence? Regulation of Petroleum Investment in Russia and the Role of Foreign Legal Advice' (1998) 3-11 CEPMLP Internet Journal http://www.dundee.ac.uk/cepmlp/journal/html/vol3/article3-11.html

[102] Johnston Daniel, (1994 International Petroleum Fiscal Systems and Production Sharing Contracts), 21. http://books.google.com.na/books?id=LnzTg_xkCycC&pg=PA290&lpg=PA290&dq=International+Petroleum+Fiscal+Systems+and+Production+Sharing+Contracts+(1994),+25.&source=bl&ots=N-9rk62t_0&sig=jTybDppMTAzMyIj-K4aKCNczYOA&hl=en&sa=X&ei=w3LbT426FNO1hAeM1rGGCg&ved=0CF8Q6AEwAw#v=onepage&q=International%20Petroleum%20Fiscal%20Systems%20and%20Production%20Sharing%20Contracts%20(1994)%2C%2025.&f=false

accordance with a production sharing contract (PSC) or a service contract.[103] Production sharing is rooted in the Napoleonic era.[104] It is a French legal concept of the ownership of minerals, with the effect that that mineral wealth should not be owned by individuals but by the state for the benefit of all citizens.[105]

The philosophy is embodied in the 1945 Indonesian Constitution Article 33, which states,

> 'All the natural wealth on land and in waters is under the jurisdiction of the state and should be used for the benefit and welfare of the people.'[106]

In the Petroleum industry, Indonesia is the pioneer of the PSC. [107] The first PSC was entered into between Independent Indonesia American Petroleum Company (IIAPCO) and Indonesian National Oil and Gas Company (Permina)[108], back in August 1966.[109] The investor acquires the ownership of its share of production only at the delivery point.[110] Title to and ownership of equipment and installation permanently affixed to the ground and/or destined for exploration and production of hydrocarbons generally passes to the state

[103] Johnston Daniel, (1994 International Petroleum Fiscal Systems and Production Sharing Contracts), 21. http://books.google.com.na/books?id=LnzTg_xkCycC&pg=PA290&lpg=PA290&dq=International+Petroleum+Fiscal+Systems+and+Production+Sharing+Contracts+(1994),+25.&source=bl&ots=N-9rk62t_0&sig=jTybDppMTAzMyIj-K4aKCNczYOA&hl=en&sa=X&ei=w3LbT426FNO1hAeM1rGGCg&ved=0CF8Q6AEwAw#v=onepage&q=International%20Petroleum%20Fiscal%20Systems%20and%20Production%20Sharing%20Contracts%20(1994)%2C%2025.&f=false

[104] Johnston Daniel, (1994 International Petroleum Fiscal Systems and Production Sharing Contracts), 22. http://books.google.com.na/books?id=LnzTg_xkCycC&pg=PA290&lpg=PA290&dq=International+Petroleum+Fiscal+Systems+and+Production+Sharing+Contracts+(1994),+25.&source=bl&ots=N-9rk62t_0&sig=jTybDppMTAzMyIj-K4aKCNczYOA&hl=en&sa=X&ei=w3LbT426FNO1hAeM1rGGCg&ved=0CF8Q6AEwAw#v=onepage&q=International%20Petroleum%20Fiscal%20Systems%20and%20Production%20Sharing%20Contracts%20(1994)%2C%2025.&f=false

[105] Johnston Daniel, (1994 International Petroleum Fiscal Systems and Production Sharing Contracts), 22. http://books.google.com.na/books?id=LnzTg_xkCycC&pg=PA290&lpg=PA290&dq=International+Petroleum+Fiscal+Systems+and+Production+Sharing+Contracts+(1994),+25.&source=bl&ots=N-9rk62t_0&sig=jTybDppMTAzMyIj-K4aKCNczYOA&hl=en&sa=X&ei=w3LbT426FNO1hAeM1rGGCg&ved=0CF8Q6AEwAw#v=onepage&q=International%20Petroleum%20Fiscal%20Systems%20and%20Production%20Sharing%20Contracts%20(1994)%2C%2025.&f=false

[106] Article 33(2). http://www.icrc.org/ihl-nat.nsf/162d151af444ded44125673e00508141/3a69554e629a07f8c125708c004898aa/$FILE/Constitution%20-%20Indonesia%20-%20EN.pdf

[107] Johnston Daniel, (1994 International Petroleum Fiscal Systems and Production Sharing Contracts), 22. http://books.google.com.na/books?id=LnzTg_xkCycC&pg=PA290&lpg=PA290&dq=International+Petroleum+Fiscal+Systems+and+Production+Sharing+Contracts+(1994),+25.&source=bl&ots=N-9rk62t_0&sig=jTybDppMTAzMyIj-K4aKCNczYOA&hl=en&sa=X&ei=w3LbT426FNO1hAeM1rGGCg&ved=0CF8Q6AEwAw#v=onepage&q=International%20Petroleum%20Fiscal%20Systems%20and%20Production%20Sharing%20Contracts%20(1994)%2C%2025.&f=false

[108] Perusahaan Minyak Nasional

[109] Tiny Kiluange The JDZ Model PSC: A Legal Analysis http://www.juristep.com/doc/jda_model_psc.pdf , 2

[110] Tordo Silvana. Fiscal Systems for hydrocarbons. World Bank Working Paper no. 123 , 8 http://siteresources.worldbank.org/INTOGMC/Resources/fiscal_systems_for_hydrocarbons.pdf

immediately.[111] Furthermore, unless specific provisions have been included in the contract (or in the relevant legislation) the government (or the national oil company, "NOC") is typically legally responsible for abandonment.[112] Since then, PSCs have been popular in many oil-producing countries, especially in the developing world.[113]

1.6. ALLOCATION OF PETROLEUM EXPLORATION RIGHTS

The systems for allocation of petroleum exploration rights can be grouped under two main categories, namely open-door systems and licensing rounds.[114] Open-door systems are awarded as a result of negotiations between the government and interested investors, through solicited or unsolicited expression of interest.[115] Whereas, licensing rounds can either be through an administrative procedures or auctions.[116] Under administrative procedures, licences are allocated through an administrative adjudication process on the basis of a set of criteria defined by the government.[117] With auction, licences are allocated to the highest bidder.[118]

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[111] Tordo Silvana. Fiscal Systems for hydrocarbons. World Bank Working Paper no. 123 , 8 http://siteresources.worldbank.org/INTOGMC/Resources/fiscal_systems_for_hydrocarbons.pdf
[112] Tordo Silvana. Fiscal Systems for hydrocarbons. World Bank Working Paper no. 123 , 8 http://siteresources.worldbank.org/INTOGMC/Resources/fiscal_systems_for_hydrocarbons.pdf
[113] Tiny Kiluange The JDZ Model PSC: A Legal Analysis http://www.juristep.com/doc/jda_model_psc.pdf , 2. Nigeria, Egypt and Chile also use the PSC system.
[114] Tordo Silvana, Johnston David & Johnston Daniel. (2010). Petroleum Exploration and production Rights: Allocation Strategies and Design Issues. World Bank Working Paper No. 179 World Bank Publications. 12 http://books.google.com.na/books?id=8XwUPWVAl74C&pg=PA13&lpg=PA13&dq=concessionary,+psc&source=bl&ots=AgEGOUqk5O&sig=s6W0OIvB6It8aJhN3TFylGK6D5c&hl=en&sa=X&ei=QTPbT_z6MYam0AWc5K3MCg&sqi=2&ved=0CGIQ6AEwCA#v=onepage&q=concessionary%2C%20psc&f=false
[115] Tordo Silvana, Johnston David & Johnston Daniel. (2010). Petroleum Exploration and production Rights: Allocation Strategies and Design Issues. World Bank Publications. 12 http://books.google.com.na/books?id=8XwUPWVAl74C&pg=PA13&lpg=PA13&dq=concessionary,+psc&source=bl&ots=AgEGOUqk5O&sig=s6W0OIvB6It8aJhN3TFylGK6D5c&hl=en&sa=X&ei=QTPbT_z6MYam0AWc5K3MCg&sqi=2&ved=0CGIQ6AEwCA#v=onepage&q=concessionary%2C%20psc&f=false
[116] Tordo Silvana, Johnston David & Johnston Daniel. (2010). Petroleum Exploration and production Rights: Allocation Strategies and Design Issues. World Bank Publications. 12 http://books.google.com.na/books?id=8XwUPWVAl74C&pg=PA13&lpg=PA13&dq=concessionary,+psc&source=bl&ots=AgEGOUqk5O&sig=s6W0OIvB6It8aJhN3TFylGK6D5c&hl=en&sa=X&ei=QTPbT_z6MYam0AWc5K3MCg&sqi=2&ved=0CGIQ6AEwCA#v=onepage&q=concessionary%2C%20psc&f=false
[117] Tordo Silvana, Johnston David & Johnston Daniel. (2010). Petroleum Exploration and production Rights: Allocation Strategies and Design Issues. World Bank Publications. 12 http://books.google.com.na/books?id=8XwUPWVAl74C&pg=PA13&lpg=PA13&dq=concessionary,+psc&source=bl&ots=AgEGOUqk5O&sig=s6W0OIvB6It8aJhN3TFylGK6D5c&hl=en&sa=X&ei=QTPbT_z6MYam0AWc5K3MCg&sqi=2&ved=0CGIQ6AEwCA#v=onepage&q=concessionary%2C%20psc&f=false
[118] Tordo Silvana, Johnston David & Johnston Daniel. (2010). Petroleum Exploration and production Rights: Allocation Strategies and Design Issues. World Bank Publications. 12 http://books.google.com.na/books?id=8XwUPWVAl74C&pg=PA13&lpg=PA13&dq=concessionary,+psc&source=bl&ots=AgEGOUqk5O&sig=s6W0OIvB6It8aJhN3TFylGK6D5c&hl=en&sa=X&ei=QTPbT_z6MYam0AWc5K3MCg&sqi=2&ved=0CGIQ6AEwCA#v=onepage&q=concessionary%2C%20psc&f=false

1.7. OVERVIEW OF NAMIBIAN EXPLORATION FOR PETROLEUM

The Namibian upstream petroleum sector is underdeveloped.[119] The initial offshore exploration phase took place from the late 1960's to the early 1970's and one well was drilled during this time, Kudu 9A-1, which was the discovery well for the giant Kudu gas field. No further exploration for hydrocarbons was done by international oil companies until after Namibia became independent in 1990. This is attributed to the occupation of Namibia by South Africa until 1990, which curtailed investment in exploration activities.

1.8. RESEARCH PROBLEM

The legal framework determines the extent to which IOCs are to be involved and the type of arrangement under which IOCs are to be invited to commit their capital and their capabilities to petroleum development.[120] The legal framework also defines the extent of the role of state, whether the state is limited to defining law and policy and performing regulatory functions, or whether the state participate in petroleum operations through a national oil company. [121]

At the heart of exploitation of natural resources[122] is the quest of sustainable development.[123] Discovery of petroleum resources presents great opportunities for economic, technical and social development.[124] Nevertheless, the exploration and exploitation of the petroleum resources pose various challenges to the states.[125] These challenges have been identified to be of technical, political, regulatory and economic character.[126] While these challenges, which are alluded in Section 1.12 (literature review), have an important bearing upon the topic at

[119] http://www.namcor.com.na accessed
[120] Hossain Kammal, 32
[121] Hossain Kammal, 32
[122] Natural Resources are Natural assets (raw materials) occurring in nature that can be used for economic production or consumption. They are naturally occurring assets that provide use benefits through the provision of raw materials and energy used in economic activity (or that may provide such benefits one day) and that are subject primarily to quantitative depletion through human use. Natural resources encompass mineral and energy resources, soil resources, water resources and biological resources. For purposes of this Paper, the use of the term is confined to mean non-renewable energy resources or petroleum resources. OECD Glossary of Statistical Terms http://stats.oecd.org/glossary/detail.asp?ID=1740. Accessed 24 May 2012
[123] T Hunter (2010). The World Commission on Environment and Development defines sustainable development as 'development which meets the needs of the present without compromising the ability of future generations to meet their own needs'. See Report of the World Commission on Environment and Development UN GAOR 96th Plan mtg, UN Doc A/Res/42/187(1987) http://www.un.org/documents/ga/res/42/ares42-187.htm
[124] Hunter (2010) above.
[125] Hunter (2010) above.
[126] Natural resources wealth in the developing world is found in countries such as Nigeria, Iraq, and Angola—known more for corruption, conflict, human rights abuses, and authoritarian rule than for good governance or successful poverty-reduction programs. Ed by M Humphreys et al, (Eds) Escaping the Resource Curse New York: Columbia University Press, 2007. 408. Reviewed by Kaysie Brown http://www.wilsoncenter.org/sites/default/files/ECSPReport13_Brown.pdf

hand, they do not fall within the ambits of the Research. Reference thereto is only made for purposes of laying a foundation for the Research.

Relevant to the Research is the challenge concerning the development of the petroleum industry. This specific challenge arises from the nature of the industry itself. The industry is characterized by large-scale, knowledge based and capital intensive, high risk investments, requiring high amounts of skill and sophisticated technology. [127] These financial and technical challenges, and the international character of the petroleum industry, have led to development of large international oil companies (IOCs)[128] with the capacity to respond to the challenges.[129] Whilst many developing countries at the time of discovery of their natural resources are said to be ill prepared to carry out exploration on their own,[130] the IOCs have had years of experience and preparation to develop the industry. Even with the creation of National Oil Companies to ensure participation of states in the industry, NOCs do not possess the necessary resources and are thus unable to carry out exploration operation on their own.[131] Therefore, the participation of IOCs in the exploration for petroleum resources is a necessity, especially in developing countries.[132]

For this reason, Namibia has embarked upon aggressive promotion of the hydrocarbon potential, aimed at attracting foreign investors.[133] According to Ambassador Gertze, the International Oil Companies ("IOC") will play a vital role in the development of the resources.[134] The Ambassador also emphasised the need to establish a mutually beneficial relationship between the State and the IOC in the development of the resources.[135]

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[127] OPEC Bulletin (2011). African Oil: Local expertise wanted.
http://www.opec.org/opec_web/static_files_project/media/downloads/publications/ob102011.pdf
[128] International Oil Companies or IOC means private or state-owned international oil company. The Use of the Terms "International Oil Company or IOC", "Foreign Oil Company", "Private Oil Company" and "foreign Investor" is accorded the same meaning and is subject to be used interchangeably in this Research.
[129] Hunter Tina. Legal Regulatory Framework for the Sustainable Extraction of Australian Offshore Petroleum Resources: A Critical Functional Analysis. PhD thesis, University of Bergen 2010
[130] OPEC Bulletin (2011)
http://www.opec.org/opec_web/static_files_project/media/downloads/publications/ob102011.pdf
[131] There are some exceptions to the rule among smaller, more advanced economies such Brazil, Norway and Malaysia.
http://www.globalization101.org/webadmin/editor/editor/fckeditor.html?InstanceName=FCKeditor1&Toolbar=Default#9 accessed 11 November 2011
[132] The major players in the Nigerian upstream are Shell, ExxonMobil, Chevron/Texaco, TotalElfFina Elf and Agip. These IOCs account for 97% of Nigeria's oil reserves and production. O Akinjide-Balogun Nigeria: Legal Framework of the Nigerian Petroleum Industry. (2001). (website).
[133] Ambassador Gerzte shared at a breakfast meeting in Germany.
[134] Gertze
[135] Gertze

The Author acknowledges that Namibia's upstream petroleum industry is underdeveloped. Therefore, the priority for petroleum industry development is to ensure maximum exploration. Among the resources required in exploration for petroleum resources are risk capital, technology and expertise, and marketing outlets.[136] The Author further admits that Namibia is currently not in a position to adequately supply the resources necessary. On the other hand, the International Oil Companies have the necessary financial and technical capacity to develop the industry. The participation of IOCs is, therefore, vital to the development of the Namibian petroleum industry.

It is therefore evident that, in order to promote maximum exploration, the legal framework must attract the interests of IOCs. As a potential new entrant into the global petroleum industry, conventional wisdom dictates that the legal framework must enable Namibia to effectively compete for IOCs at the international arena. Whilst liberalization of the petroleum industry is a necessity, states have been accused of having compromised on the national development objectives in the process.[137] Studies reveal that African oil producing countries fail to use their natural resources to contribute towards their national development objectives.[138] This is attributed mainly to petroleum legal frameworks that are designed primarily to promote and attract investments and have not evolved with changing global dynamics and national interests.[139] Such legal frameworks have the potential of limiting the industry participation to IOCs. The Research considers this position to be a threat to the national development objective envisaged in Vision 2030.

In terms of Vision 2030, Namibia shall be a prosperous and industrialised Nation, developed by her human resources.[140] The legal framework for petroleum exploration is a critical tool towards attaining the Vision 2030[141]. It is further expected, according to Vision 2030, that Namibia's non-renewable natural resources be strategically exploited and optimally

[136] Hossain K, 58
[137] Oil and Gas in Africa African Development Bank and the African Union 2009 http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Full%20Document%20-%20Oil%20and%20Gas%20in%20Africa.pdf
[138] Oil and Gas in Africa African Development Bank and the African Union 2009 http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Full%20Document%20-%20Oil%20and%20Gas%20in%20Africa.pdf
[139] Oil and Gas in Africa African Development Bank and the African Union 2009
[140] Vision 2030 Policy Framework (2004), 38
[141] Also herein referred to as the 'National Development Objective' or 'National Long Term Goal, or the Vision.

beneficiated, providing equitable opportunities for all Namibians to participate in the industry, while ensuring that environmental impacts are minimised, and investments resulting from petroleum exploration are made to develop other, sustainable industries and human capital for long-term national development.[142] The Author submits that in order to contribute towards attainment of Vision 2030, State participation in the petroleum industry is imperative. This necessitates an examination of the Namibian legal framework to ensure that the pressure to attract IOCs does not result into an impediment to the attainment of Vision 2030.

1.9. RESEARCH STATEMENT

The Author submits that participation of both the IOCs and the State in the petroleum industry is necessary in order for the industry to effectively contribute towards the attainment of Vision 2030. The Author is of the view that development of a national oil company is necessary to ensure State participation. The development of the NOCs requires the knowledge and financial base from the IOCs. Author further submits that mandatory participation in the exploration is necessary to ensure NOC benefits from the knowledge and financial base of the IOCs.

1.10. RESEARCH QUESTIONS

The primary question in the Research is whether the legal framework of Petroleum Exploration promotes State participation in the petroleum industry. In order to effectively explore the legal issue, the Research will scrutinize the following sub-questions:

> What is the current legal framework for industry participation in exploration of petroleum resources in Namibia?
>
> Does the legal framework promote participation of the National Oil Company in the exploration for petroleum resources?
>
> What is an effective legal framework to ensure mutual industry participation of the State and IOCs?

[142] Policy Framework (2004), 162

1.11. SIGNIFICANCE OF THE STUDY

With the possibility of Namibia becoming a petroleum producer, proactive measures must be put in place in order to respond appropriately to the discovered resources. Former President[143] and Founding Father[144], Dr Sam Nujoma profoundly stated that,

"As we march forward in implementing the programmes of this Vision, we should be prepared to ask ourselves, from time to time, if we are truly on course and on time."[145]

This is Research is a response to the call of His Excellency, reflecting on the question whether we are truly on course. The Research thus embarks to discover whether the legal framework for petroleum exploration is truly on course and on time. The Research analyses whether the legal regime serves as a catalyst that would connect Namibia to the realization of Vision 2030.

In addition the aforesaid, the Study makes a modest contribution to the already existing wealth of academic writing on the legal framework of petroleum exploration. Even though the focus is on petroleum industry, the Study is intended to make meaningful contribution to the legal framework of extractive industry in particular and natural resources in general. Namibia is picked as the case study, but the analyses and recommendations are relevant to natural resources endowed countries in general.

1.12. LITERATURE REVIEW

Wealth of literature on petroleum industry has been published, especially from economic, environmental and social impact perspective. Economists have contributed immensely to the development of literature on this subject. Various studies by international organizations have also contributed to knowledge in this sphere.

Volume of literature duly expound on economic challenges famously known as "resource curse"[146] and "Dutch disease"[147]. While the Dutch disease originated from the experience of

[143] 1990-2005
[144] Conferment of Status of Founding Father of the Namibian Nation Act 16 of 2005
[145] Foreword for Namibian Vision 2030: Policy Framework for Long-Term National Development Main Document, 2004; P.14

the Netherlands, seemingly this natural resource curse has mainly affected developing countries. [148] In fact, studies have suggested that developed countries may be immune to the curse.[149]

In the study *Inverted Development and Oil Producers in sub-Saharan Africa,* Sahu found that, in theory the oil wealth is a boon to economy.[150]However, the study has found that in sub- Saharan Africa it has created and fostered repressive, corrupt, incompetent and unaccountable governments that inhibit development. [151] Oil wealth has failed to be a cure or alleviated poverty but instead has generated massive corruption, political instability, civil war and enormous environmental damages. [152] Resource boom in these countries nearly always accompanied the decline in economy. [153] Oil wealth has held back the development of other export industries. [154] In African countries the standard of living has nearly always declined in oil producing countries.

In addition to the challenges alluded to above, studies have shown that the African Region is yet to overcome, *inter alia*, poverty, political instability and imbalance power between foreign investors and the country in contract negotiation. [155] while there is evidence of countries that have managed their natural resources (gold and diamonds, for example) in

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[146] This refers to the negative growth and development outcomes associated with minerals and petroleum-led development. In its narrowest sense, it is the inverse relationship between high levels of natural resource dependence and growth rates. The concept is attributed to the famous natural resource curse thesis by Richard Auty (1990) and expanded upon by, Jeffrey D. Sachs and Andrew M. Warner (1995 and 1999). Escaping the Resource Curse Edited by Macartan Humphreys, Jeffrey D. Sachs, and Joseph E. Stiglitz New York: Columbia University Press, 2007. 408 pages.
Reviewed by KAYSIE BROWN http://www.wilsoncenter.org/sites/default/files/ECSPReport13_Brown.pdf

[147] Named after the negative effects of the North Sea oil boom on industrial production in the Netherlands, this phenomenon occurs when resource booms cause real exchange rates to rise and labour and capital to migrate to the booming sector. This results in higher costs and reduced competitiveness for domestically produced goods and services, effectively "crowding out" previously productive sectors. Escaping the Resource Curse Edited by Macartan Humphreys, Jeffrey D. Sachs, and Joseph E. StiglitzNew York: Columbia University Press, 2007. 408 pages.
Reviewed by KAYSIE BROWN http://www.wilsoncenter.org/sites/default/files/ECSPReport13_Brown.pdf

[148]ErlingRøed Larsen (2003): Are Rich Countries Immune to the Resource Curse? Evidence from Norway's Management of Its Oil Riches http://futurechallenges.org/study/are-rich-countries-immune-to-the-resource-curse-evidence-from-norways-management-of-its-oil-riches/

[149]ErlingRøed Larsen (2003): Are Rich Countries Immune to the Resource Curse? Evidence from Norway's Management of Its Oil Riches http://futurechallenges.org/study/are-rich-countries-immune-to-the-resource-curse-evidence-from-norways-management-of-its-oil-riches/

[150] http://www.mu.ac.in/arts/social_science/african_studies/sahuwp.pdf

[151] http://www.mu.ac.in/arts/social_science/african_studies/sahuwp.pdf

[152] http://www.mu.ac.in/arts/social_science/african_studies/sahuwp.pdf

[153] http://www.mu.ac.in/arts/social_science/african_studies/sahuwp.pdf

[154] http://www.mu.ac.in/arts/social_science/african_studies/sahuwp.pdf

[155]Joint study by the African Development Bank and the African Union. Oil and Gas in Africa. Oxford university press.
(2009)http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Full%20Document%20-%20Oil%20and%20Gas%20in%20Africa.pdf

ways that have benefited their populations (Botswana, Namibia, South Africa), the continent has yet to see success stories in the case of petroleum.[156]

Furthermore, Petroleum development and consumption have always been associated with various impacts on the environment and societies.[157] The production, transport and use of oil and gas hydrocarbons can cause serious environmental damage such as damage to habitats and biodiversity, regional air pollution, forest degradation, marine pollution and climate change.[158] Apart from the traditional challenges mentioned above, a number of new issues have recently emerged from natural resources industries, including socio-economic issues, cultural impacts, indigenous people, and human rights issues.[159]

Solutions have been proposed to remedy the challenges above, ranging from separation of regulatory and supervisory role from commercial interest, creation of a competent authority (Agency cooperation and coordination), transparent and competitive bidding and licensing procedure, unified progressive fiscal regime, and limited role for NOC.[160] In addition to the aforementioned, accountability and transparency in the management of the resources revenue have been suggested to be remedies for the challenges above.[161]

Hunter (2010) in her thesis, *Legal Regulatory Framework for the Sustainable Extraction of Australian Offshore Petroleum Resources: a Critical Functional Analysis*, makes analysis of

[156]Joint study by the African Development Bank and the African Union. Oil and Gas in Africa. Oxford university press.
(2009)http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Full%20Document%20-%20Oil%20and%20Gas%20in%20Africa.pdf
[157] Gao Zhiguo. Environmental Regulation of the Oil and Gas Industries.
http://www.dundee.ac.uk/cepmlp/journal/html/vol2/article2-11.html. (hereinafter referred to as Gao Zhiguo) Accessed 12 October 2011
[158] Gao Zhiguo. Environmental Regulation of the Oil and Gas Industries.
http://www.dundee.ac.uk/cepmlp/journal/html/vol2/article2-11.html. (hereinafter referred to as Gao Zhiguo) Accessed 12 October 2011
[159] Gao Zhiguo. Environmental Regulation of the Oil and Gas Industries.
http://www.dundee.ac.uk/cepmlp/journal/html/vol2/article2-11.html. (hereinafter referred to as Gao Zhiguo) Accessed 12 October 2011
[160] Onorato William T. Legal frameworks used to foster petroleum development.
http://www.un.org.kh/undp/images/stories/special-pages/extractive-industries/docs/legal_frameworks_eng.pdf . Norway is generally regarded as the benchmark for an effective legal framework for petroleum exploration and production. Thurber, M.C., et al., Exporting the ''Norwegian Model'': The effect of administrative design on oil sector performance. Energy Policy (2011), www.10.1016/j.enpol.2011.05.027
[161] Escaping the Resource Curse Edited by Macartan Humphreys, Jeffrey D. Sachs, and Joseph E. StiglitzNew York: Columbia University Press, 2007. 408 pages.
Reviewed by KAYSIE BROWN http://www.wilsoncenter.org/sites/default/files/ECSPReport13_Brown.pdf

the sustainable socio-economic extraction of Australia's offshore petroleum resources.[162] In extracting petroleum resources, Hunter (2010) suggests that, there is a necessity for a state and private oil companies to enter into a long-term relationship to be able to exploit these resources. Hunter (2010) recognises that this relationship brings many challenges: political, regulatory, economic, commercial and technological. The challenges were considered in light of the tension that occurs between the commercial imperatives of private oil companies to generate profit, and the socio-economic imperatives of the Sate to ensure sustainability for future generations. Hunter (2010) considers these challenges in Australia, analysing whether petroleum resources have been sustainably developed. The thesis focuses on how Norway has been able to utilise the legal regulatory framework to encourage sustainable socio-economic development of petroleum resources for the benefit of all of Norwegian society.

According to the World Bank Working Paper, *National Oil Companies and Value Creation* by Tordo *et al* (2011)[163], a company's ability to create value is affected by the organization and governance of the sector in which it operates, which in essence is the result of policy decisions by the government. Some policies, such as industry participation, licensing and petroleum contracts, taxation, depletion of reserves, and policies designed to increase the economic and developmental impact of the petroleum sector, affect value creation more directly than other. The Working Paper also emphasised the relevance of Local content policies petroleum producing countries, and the role that NOCs often play in their implementation.

According to a report done by UNCTAD[164], in 2010, 6 out of the 10 largest companies in terms of revenues were from the energy and mining sectors. These companies have enjoyed record profits over the past few years, fuelled by significant and sustained rise in commodity prices. Paradoxically, in developing countries where these extractions occur, the majority of the people still remain in poverty. This disproportionate distribution of benefits arising from economic activity created by the extractive industry suggest that the industry operates as an enclave in the host country with limited linkages to the broader economy. This gap between the profits of operating companies and local economic benefits is likely to widen if resource

[162] T Hunter Legal Regulatory Framework for the Sustainable Extraction of Australian Offshore Petroleum Resources: a Critical Functional Analysis PhD Thesis,
University of Bergen, (2010) 9.
[163] S Tordo et al National Oil Companies and Value Creation (2011)
[164] Claudine Sigam and Leonardo Garcia, EXTRACTIVE INDUSTRIES: OPTIMIZING VALUE RETENTION IN HOST COUNTRIES. UNCTAD, Geneva. New York and Geneva 2012

owners do not put appropriate policies in place to capture and retain value created from the industry.

Minerals and hydrocarbons are finite resources. Developing countries rich in these resources are therefore seeking for strategies to harness the opportunities created with the extractive industries to support sustainable economic development. One such strategy is by setting local content rules that will foster the development of an industrial and manufacturing capacity in host countries. In order for this new capacity to be sustainable, it should be competitive *vis a vis* the foreign suppliers of goods and services otherwise, it will also fade away when the resources run out. The local content regulations should therefore contribute to enhancing competitiveness and ensure forward, backward and horizontal linkages are created with the rest of the local economy.

Stiglitz in his work, *what is the role of the state* by Joseph E. Stiglitz, in their dealings with the global extractive industries, governments frequently fail to get full value for their resources.[165] The key problem is private sector parties have interests to maximize their revenues and to minimize those accruing to the country. According to Stiglitz, it is sometimes better to keep oil wealth in the ground than sell it badly. The key problem is private sector parties have interests to maximize their revenues and minimize those accruing to the country. Stiglitz, in mitigating these threats, proposes transparency in handling the agreements between state and the IOCs. In addition to transparency, he encourages state ownership of the resources.

Hossain (1979) in his book, *Law and Policy in Petroleum Development*[166] , points out those governments have increasingly made provision for state participation in petroleum development arrangements. He suggests that a government committed to petroleum development must adopt a strategy which would harness the maximum of resources needed for this purpose, and ensure that if petroleum were discovered the maximum benefits resulting from such discovery would accrue to the national economy. To formulate a strategy, Hossain (1979) suggests the governments ought to identify objectives for the development of petroleum, the resources required, and the alternative sources from which these might secured. The resources required, according to Hossain, are risk capital, technological and

[165] Chapter 2: what is the role of the state. 22 http://www.cenet.org.cn/userfiles/2008-5-8/20080508031711836.pdf
[166] Hossain Kamal (1979) Law and Policy in Petroleum Development , Nichols Publishing Company, New York 213

managerial skills, and marketing outlets. Bulk of these resources would be provided by multinational oil companies. In order to obtain these on the best of the terms, governments must be aware of alternative sources which they may be able to draw upon, and of the practical steps that they can take to improve their bargaining position in negotiations with the oil companies.[167]

Sornarajah (2004) in his book, *The International Law on Foreign Investment*, addressed the history of the legal framework for foreign investment in natural resources. According to Sornarajah (2004), one of the earliest forms of foreign investments can be found in the colonial era of human history, when oil was transferred from depended states to the colonial masters.[168] As soon as the process of liberalization from the colonial oppression begun, the new independent countries started to strive not only for the complete removal of the political supremacy of the empire, but also for the total control over their resources. In the 18th and 19th centuries, investment law was largely made in the context of colonial expansion. Such investment did not need protection as the colonial legal systems were integrated with those of the imperial powers and the imperial systems gave sufficient protection for the investments which went into the colonies. Foreign investment in natural resources was necessary to ensure the raw material for production in the Western states. The cycle of trade during the colonial period was to transfer resources from the colonies to the metropolitan states so that they could be converted into manufactured products or used to fuel industries in these states. [169]

Oman (1989), in his book, *New Forms of Investment in developing country industries: mining, petrochemicals, automobiles, textiles, food*, has identified two broad categories of international corporate business operations from the immediate post war period to the 1970s, namely, arms-length sales transactions (e.g. trade) and foreign direct investment (FDI).[170] Oman identifies another form of investment which he terms, New Forms of Investment (NFI). NFIs are inter-corporate international business operations that lie in a grey area between arms-length trade and traditional FDI. They include joint-equity ventures and inter-

[167] Hossain Kamal (1979) Law and Policy in Petroleum Development , Nichols Publishing Company, New York, 58
[168] Sornarajah, M. The International Law on Foreign Investment. Cambridge: Cambridge University Press., 40
[169] Sornarajah, M. The International Law on Foreign Investment. Cambridge: Cambridge University Press., 40
[170] C Oman New Forms of Investment in developing country industries: mining, petrochemicals, automobiles, textiles, food. Paris: Organization for Economic Co-operation and Development. Development Centre, 1989. Page 10

firm contractual arrangements.[171] The legal framework for NFIs is the the Production Sharing Contracts (PSCs), joint venture and risk service contracts.[172]

Sulaimanov (2011) In his thesis, *Balancing State and Investor Interest in International Petroleum Contracts: Comparison of Legislations in Kazakhstan and Other Central Asian Countries,* writes that mobilization of foreign investment is one of the effective tools used by many developing countries with the goal to foster the activity of their oil production industry.[173] The success of this initiative highly depends on the so-called "investment climate" of a country. The potential; investors in deciding whether to invest in a particular country, looks at several keys, such as the financial worth of the oil resources; the political stability and the legislative framework governing the general investment possibilities and natural resources extraction policies. The legislative solution to achieve a proper investment climate lays in the possibility to draft and enforce such international petroleum agreements that can protect both the interest of host state as well as the interest of the foreign investor.

Cotula (2010) is of the view that increased investment may create new opportunities to promote sustainable development and improve living standards in recipient countries, for example via economic growth and increased government revenues.[174] For poorer countries with relatively abundant natural resources, incoming investors may bring capital, technology, infrastructure, know-how and market access, which may play an important role in catalysing economic development. And in some of the poorest countries, natural resources may constitute one of the few sectors that can be of interest to outside investors.

However, even Cotula (2010), concedes that foreign investment in natural resource does not necessarily result in sustainable development. At least the past natural resources investments have either failed to contribute to sustainable development, or have even undermined its pursuit. This is mainly demonstrated by the notion of 'resource curse'. Desired economic

[171] Sulaimanov R. Balancing State and Investor Interest in International Petroleum Contracts: Comparison of Legislations in Kazakhstan and Other Central Asian Countries. LLM Thesis (2011), 1 www.etd.ceu.hu/2011/sulaimanov_ruslan.pdf
[172] Sulaimanov R. Balancing State and Investor Interest in International Petroleum Contracts: Comparison of Legislations in Kazakhstan and Other Central Asian Countries. LLM Thesis (2011), 1 www.etd.ceu.hu/2011/sulaimanov_ruslan.pdf
[173] Sulaimanov R. Balancing State and Investor Interest in International Petroleum Contracts: Comparison of Legislations in Kazakhstan and Other Central Asian Countries. LLM Thesis (2011), 1 www.etd.ceu.hu/2011/sulaimanov_ruslan.pdf
[174] Cotula, L. (2010) Investment contracts and sustainable development: How to make contracts for fairer and more sustainable natural resource investments, Natural Resource Issues No. 20. IIED, London. http://pubs.iied.org/pdfs/17507IIED.pdf, 1

opportunities may not be realised if investment plans are not properly implemented, dealings with local businesses are limited, employment is mainly temporary or seasonal and government revenues are constrained by tax breaks and other financial incentives that host governments grant to investors. If public revenues generated by investments are misused, they contribute little to sustainable development.

In addition, economics is only one aspect of sustainable development. To achieve goals like poverty reduction and environmental sustainability, economic factors need to be balanced with social and environmental considerations.

The goal of every state, according to Onorato, has always been to create socio-economic conditions that will alleviate poverty through the wise and prudent utilization of its petroleum wealth. The main objective of any state is to exploit the petroleum in a manner which is both sustainable and optimizes state funds.[175] The international oil companies seek to explore and produce under a stable, predictable petroleum regime which allows them the rights both to convert their profits into convertible currency and to arbitrate their disputes with the host country in a neutral, international forum.[176]

Petroleum development and consumption have always been associated with various impacts on the environment and societies. [177] Studies show that the country with a multi-statutory framework, the industry is overwhelmed by a host of relevant laws and acts, plus very often a number of regulators**[178]**. Scholars have thus called for introduction of integrated petroleum environmental regulations.[179]

Kent Nnadozie[180] is of the view that government bears the responsibility to establish a regulatory framework that minimizes dangers imposed by the petroleum industry. Such regulation should not impose excessive cost burdens on the industry and thus jeopardizing its economic viability.[181] On the other hand the operators have a duty to adopt such measures to complement the government efforts.[182] Nnadozie advocates for the market-based approach

[175] W T Onorato UNDP discussion Paper. Legal Frameworks used to foster petroleum development. http://www.un.org.kh/undp/images/stories/special-pages/extractive-industries/docs/legal_frameworks_eng.pdf
[176] Onorato. T William (above)
[177]Gao Zhiguo
[178]Gao Zhighuo
[179]Gao Zhighuo
[180]"Environmental Regulation of the Oil and Gas Industry in Nigeria" International Environmental Law and Policy In Africa (hereinafter referred to as Kent Nnadozie)
[181] Kent Nnadozie
[182] Kent Nnadozie

and voluntary initiatives over command-control to ensure compliance with environmental obligations. The role of government in setting and enforcing regulations is vital to minimizing the potential environmental impact.[183] The guideline also supports the trends towards performance-based regulations, rather than the traditional command and control approach, as an effective environmental management tool.[184]

According to Sumudu, while global climate change originated as an environmental problem, it now impinges on every aspect of human life with implications for international economy, public health, social issues such as migration, loss of livelihood and, ultimately, threatening international peace and security.[185] Scholars have then been debating on the issue of liability of climate change.[186] Jurisdictions such as United States of America have civil litigations for climate change. This could create another jurisprudence regarding liability as it is ordinary known under law of delict.

1.13. METHODOLOGY

The Research was conducted through desktop review. Primary and secondary materials formed the substance for analysis.

1.14. LIMITATION OF THE STUDY

The analyses in this Study are limited to the legal framework for state participation in petroleum exploration and do not necessarily consider the economic, social and environmental impact. The analyses are further confined to the legal provisions relevant to participation in the development of the industry, and do not cover the overall legal, regulatory and institutional framework for petroleum exploration and production.

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[183] According to the joint guidelines prepared by Oil Industry International Exploration and Production and United Nations Environment Program (1997) and on Environmental management in oil and gas exploration and production: an overview of issues and management approaches. http://www.ogp.org.uk/pubs/254.pdf (hereinafter referred to as UNEP {1997})

[184] UNEP 1997

[185] Sumudu Atapattu: Climate change, Equity and Differentiated Responsibilities: Does the Present Climate Regime Favor Developing Countries? Prepared for the Conference on "Climate Law in Developing Countries post-2012: North and South Perspectives" organized by IUCN Law Academy, University of Ottawa, September 26-28, 2008.
http://www.google.co.za/url?sa=t&rct=j&q=climate+change+liability:+david+hunter&source=web&cd=27&ved=0CGcQFjAGOBQ&url=http%3A%2F%2Fwww.iucnael.org%2Fen%2Fdocuments%2Fdoc_download%2F73-atapattu-climate-change-equity-and-differentiated-responsibilities-.html&ei=U23bTru6DoXj4QTrqNjYBg&usg=AFQjCNEmgie6JSDtL-x3_EQULeLnImfFow&sig2=ZrJ3df1d2l0XZ-R1_SoK4g

[186] Hunter, D &Salzman, J. Negligence in the Air: The Duty of Care in Climate- Change Litigation. http://lsr.nellco.org/cgi/viewcontent.cgi?article=1095&context=duke_fs

The term “exploration” within the ambits of this Research covers the upstream activities of exploration of petroleum. The midstream and downstream activities do not form part of the deliberations in this Research. The Study is limited to exploration for offshore petroleum resources in Namibia. Petroleum within the ambits of this Research means any liquid or solid hydrocarbon existing in a natural condition in the earth's crust and includes any liquid or solid hydrocarbon which has in any manner been returned to such natural condition.

1.15. OUTLINE OF CHAPTERS

The study is presented in five chapters, which include recommendations and conclusion.

Chapter one provides an introduction, problem statement and research questions, objectives and justification of the study, and methodology to the Study. It will provide a brief global historical background of the legal framework governing participation in the development petroleum industry.

Chapter 2 will provide an overview of the legal framework for petroleum for industry participation in Namibia.

In Chapter 3, the Research will provide an analysis of the awarding of licences and promotion of state participation.

Chapter 4 will contain conclusion and recommendations.

CHAPTER 2:
LEGAL FRAMEWORK FOR EXPLORATION FOR PETROLEUM AND INDUSTRY PARTICIPATION

2.0. INTRODUCTION

The legal framework determines the extent to which IOCs are to be involved and the type of arrangement under which IOCs are to be invited to commit their capital and their capabilities to petroleum development.[187] Similarly, the legal framework also defines the extent of the role of state, whether the state is limited to defining law and policy, hence, performing regulatory functions, or whether the state participate in petroleum operations through a national oil company.[188] The legal framework shapes the industry structure and defines the legal basis for operations. This Chapter provides an overview of the legal framework for participation in the petroleum industry in Namibia.

The development of offshore petroleum resources in Namibia is impacted by international and National laws. International law provides a framework for establishing national ownership or control of offshore areas. National Laws confirms the ownership and control stated under International Law and provide for the governance and regulation of, and participation in the development activities. The National legal framework governing exploration for petroleum resources in Namibia is set out in Petroleum Exploration and Production Act[189] (hereinafter referred to as "Petroleum Act' or "the Act"); Regulations to Petroleum Act; the Petroleum Taxation Act[190]; Petroleum Exploration and Production Amendment Act[191] and the Model Petroleum Agreement 1998.

In every new petroleum province, there is a fundamental need for a well-designed petroleum policy and law to govern the development of the industry.[192] The Namibian legal framework covered under this Chapter consists of the policy framework, national laws and international laws. The Chapter seeks to provide the legal framework for industry participation in the exploration for petroleum. The use of the term 'exploration' herein means both exploration and production.

[187] Hossain Kammal, 32
[188] K Hossain, 32
[189] Act 2 of 1991
[190] Act of 1991
[191] Act 2 of 1993
[192] Onorato, T. William. Legal Frameworks used to foster petroleum development.

2.1. POLICY FRAMEWORK FOR INDUSTRY PARTICIPATION

2.1.1 VISION 2030

Since the drafting and acceptance of the National Constitution,[193] Namibia's Vision 2030 (herein also referred to as the Vision or the National long term goal) is one of the most important initiatives undertaken in the Country.[194] Vision 2030 is "a vision that will take Namibia from the present into the future; a vision that will guide us to make deliberate efforts to improve the quality of life of our people to the level of their counterparts in the developed world by the year 2030".[195]

Vision 2030 comprises of the main vision, which is supported by sub-visions that are sector specific, such as the non-renewable natural resources. In terms of the Vision, Namibia shall be a prosperous and industrialised Nation, developed by her human resources, enjoying peace, harmony and political stability in 2030.[196]

The Vision 2030 which was formulated in 2004 did not expressly provide for exploration for petroleum resources. This is because the drafters of the Vision did not foresee Namibia's potential to discover petroleum resources. Therefore, the Vision was formulated from the perspective of a petroleum importer, rather than a possible producer or even exporter. However, it has provided direction for exploitation of non-renewable natural resources. Although the sub-vision for the extractive industry specifically referred to mining, the same is equally true for petroleum industry.

By the year 2030, it is expected that Namibia's petroleum resources are strategically exploited and optimally beneficiated, providing equitable opportunities for all Namibians to participate in the industry, while ensuring that environmental impacts are minimised, and investments resulting from petroleum exploration and production are made to develop other, sustainable industries and human capital for long-term national development.[197]

[193] Act 1 of 1990
[194] Preface to Namibia Vision 2030 Policy Framework for Long-Term National Development Main Document (2004), 13 by Immanuel Ngatjizeko, Director General of National Planning Commission.
[195] Founding Father of the Nation, Dr. Sam Nujoma (January 1998), in his statement to the Cabinet. Cited in Namibia Vision 2030 Policy Framework for Long-Term National Development Main Document (2004), 19. The Vision provides a long term alternative policy scenarios on the future course of development in Namibia at different points in time up until the target year 2030, 20
[196] Vision 2030 Policy Framework (2004), 38
[197] Policy Framework (2004), 162

2.1.2 WHITE PAPER ON ENERGY POLICY

The White Paper is a statement of intent and a detailed policy plan which often forms the basis of legislation. It is debated and adopted by Parliament and approved by Cabinet.[198] Policy sets out the goals and planned activities of a ministry and department but it may be necessary to pass a law to enable government to put in place the necessary institutional and legal frameworks to achieve their aims. Laws must be guided by current government policy.

Namibian Government adopted the White Paper on Energy Policy (Policy) in May 1998. The Policy covers renewable and non-renewable energy. The goals of the Energy Policy are to have effective energy sector governance, security of supply, social upliftment, investment and growth, economic competitiveness and efficiency and sustainability. The aforementioned goals serve as a framework for the energy policy.

The Namibian upstream policy aims to attract adequate foreign investment in exploration and production given the low level of previous exploration, lack of knowledge as regards Namibia's petroleum prospectively and the limited capacity of the local oil and gas exploration and production sector.[199] According to the Policy, Namibia prefers exploration activities to be carried out by the International Oil Companies, rather than the National Oil Company.[200] The aim for exploration and production, as laid out in the Policy, is to attract and retain IOCs. [201] The role of the State is limited to economic benefits. However, in the event that the State chooses to compete with the IOCs, it will be on clear, transparent, stable and fair terms. [202] Where the state does compete with other players in oil and gas exploration and production, this will be by means of commercialised state company treated on the same terms as other player.[203]

Exploration and production operations have potential effects of accidents and poor operating practices, which can be harmful to the environment and the potential for further exploiting the hydrocarbon resource.[204] Therefore, only IOCs demonstrating acceptable international track records in exploration, with adequate financial and technical capacity to fulfil their work commitments according to standard based on international best practice, will be

[198] The Policy and law making process. http://www.etu.org.za/toolbox/docs/govern/policy.html
[199] White Paper on Energy Policy, 1998 (Energy Policy), 28
[200] Energy Policy (above), 30
[201] White Paper on Energy Policy, 1998 (Energy Policy), 28
[202] White Paper on Energy Policy, 1998 (Energy Policy), 28
[203] Energy Policy (above), 30
[204] Energy Policy (above), 30

awarded licenses.[205] Criteria for exploration best practice, health and safety standards and acceptable track records will be established and applied transparency.[206]

The awarding of licences is based on competitive terms to ensure that investment in the petroleum industry is maximized. Therefore the process of bidding and negotiations terms is to be done with the necessary degree of transparency, stability and flexibility.[207]

Criteria for legal and fiscal terms

Criteria for the legal and fiscal terms are:

Making use of legal and fiscal terms, government will endeavour to achieve a balance between extracting the maximum benefit from petroleum resources for the benefit of Namibia and attracting adequate investment. [208]

The Ministry of Mine and Energy is responsible for deciding on the nature of the legal and fiscal terms and NAMCOR, while it does not participate in exploration and production, will play an advisory role. These terms will be formulated and publicised in a manner, which allows Namibia to compete effectively in the international arena for exploration and production investment. Terms will ensure that prospective acreage is actively explored and relinquished. Production terms will be set so as to realise the maximum possible economic rent for Namibia. In this regard, the recovery of petroleum will be conducted in such a manner so as to ensure that the maximum amount can be extracted as is economically viable.

In assessing the distribution of economic rent, the Ministry will need to take into account the interests of Namibia and those of potential exploration and production companies. The terms should encourage and sustain investment so that a win-win situation is established for Namibia and these companies. To date indigenous or localised expertise in this sector is limited. This capacity must be developed in tandem with the development of the industry.

Exploration and production licences will require licensees to fund training of Namibian citizens and development of institutions to an appropriate level so that they can play an active role in all aspects of the development and governance of the industry.

[205] Energy Policy (above), 30
[206] Energy Policy (above), 30
[207] Energy Policy (above), 30
[208] Energy Policy (above), 31

2.2. LEGAL FRAMEWORK FOR INDUSTRY PARTICIPATION: OWNERSHIP

Petroleum resources belong to the state, except if they are otherwise lawfully owned. The Constitution of Namibia[209] provides that 'Land, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State if they are not otherwise lawfully owned.'[210]

The provision implies that petroleum resources can be owned by private persons. The State's ownership of petroleum resources is limited to the resources not lawfully owned. Petroleum resources can be lawfully owned under the production licence issued in terms of Petroleum Act. Production licence gives exclusive right to the holder of the licence to sell or otherwise dispose of petroleum recovered within the licensed block.[211] In fact, once a production licence is issued for a block, the State loses ownership of the particular block.

In spite of the conditional State ownership of the natural resources, Namibia still falls under the '*Regalia'* legal system. Under this system, the petroleum resources can be developed either by the State itself or private oil companies (IOCs). Therefore, participation in the petroleum industry is open to both the State and the companies (IOCs).

2.3. TYPES OF EXPLORATION RIGHTS

The preceding Section discussed Namibian philosophy for ownership of petroleum resources. According to the Constitution, ownership vests in the State. However, the ownership is limited to the petroleum resources not lawfully owned. It was found that petroleum resources can be privately owned by a holder of production licence.[212]

Ownership comes with rights of exploitation of the resources, which is confirmed in the Petroleum Act[213]. Section 2, provides that,

'Subject to any right conferred under any provision of this Act, all rights in relation to the reconnaissance or exploration for, production and disposal of, and the exercise of control over, petroleum vests, notwithstanding any right of ownership of any person in relation to any land under which petroleum is found, in the State.'

[209] Act 1 of 1990
[210] Article 100 of the Constitution.
[211] Section of 44 of Petroleum Act.
[212] Section 44 of Petroleum Act
[213] No. 2 of 1991.

This principle is also enshrined under International Law. According to Article 193 of the United Nations Conference on the Law of the Sea,

'States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.'[214]

All rights to explore for petroleum primarily vest in the State, regardless of the owner of the land under which petroleum is found, subject to the exploration and production right conferred in terms of the Petroleum Act. This provision alludes to two kinds of rights; the rights of the State as owner of the resources and the rights conferred under the provision of the Act. It is then inferred that the requirements for participation in the petroleum industry depends on whether it is the State or holder of a right conferred in terms of the provisions of the Petroleum Act. The right to participate in the petroleum industry is thus vested in the State or the holder of the licence. The Paper will now look at the legal framework for state participation and the legal framework governing the conferring of the rights of exploration below.

2.3.1 LEGAL FRAMEWORK FOR STATE PARTICIPATION IN THE PETROLEUM INDUSTRY

The Namibian State is the owner of the petroleum resources, except for resources otherwise lawfully owned.[215] Rights of exploration primarily vests in the State in relation to exploration and production petroleum resources, subject to exploration right conferred under Petroleum Act. The State has opted to exercise its rights of exploration for petroleum resources only through a commercialized legal entity.[216] The National Petroleum Corporation of Namibia (PTY) Ltd (herein after referred to as 'NAMCOR'), was established for that purpose. NAMCOR is a legally enacted entity with limited liability under the Namibian Companies Act[217]. The Government of the Republic of Namibia is its sole shareholder. NAMCOR's functions are, *inter alia*, to carry out exploration operations when required by the Minister[218]

[214] Adopted on 30 April 1982
[215] Article 100 of the Constitution of the Republic of Namibia and Article 193 of UNCLOS
[216] Energy Policy (above), 30.
[217] Act 61 of 1973.
[218] Minister of mines and Energy. Section 8(1)(a)

or carry out exploration operations on behalf of the State.[219] NAMCOR, when carrying out the exploration operations required by the Minister, is deemed to be the holder of licence.[220] It then follows that when carrying out the exploration required by the Minister, NAMCOR is exempted from the requirement of a licence conferred in terms of Petroleum Act.[221]

Carrying out explorations at the instruction of the Minister is one of the scenarios under which NAMCOR can act. NAMCOR can also carry out exploration on its own or on behalf of the State. While NAMCOR is deemed to be holder of licence in the instance that the exploration operations required by the minister are carried out, the Act is silent in the case of explorations conducted on behalf of the State.[222] The Research is unable to establish the difference between explorations on behalf of the State and those conducted when required by the Minister.[223] It can however be inferred that both explorations done on behalf of the State and those required by the Minister are conducted in the name of the State, and NAMCOR is exempted from the licence requirement. NAMCOR is, nonetheless, required to hold a licence in the instance that exploration is carried on its own behalf as a company.[224]

Notwithstanding the provisions of the Petroleum Act referred to above, the Namibian White Paper on Energy Policy provides that where NAMCOR competes with other players in exploration, it will be treated on the same terms as other player.[225] The provision of the Policy suggests that NAMCOR even when carrying out explorations operations when required by the Minister will be treated as any other company. This therefore means NAMCOR will not be deemed to be holder of a licence as provided in Section 8 (3) of Petroleum Act. The Policy was only formulated Seven years after the Petroleum Act became law, and the said position is not incorporated in the Petroleum Act. Therefore, the provisions of Petroleum Act are still applicable. Nevertheless, this position is worth noting, because it reflects the direction Namibia is moving towards in the petroleum industry.

[219] Section 8(1)(c).
[220] Section 8(3).
[221] Section 8(1)(b)and ((c)
[222] Section 8(1)(c)
[223] Perhaps the explorations done on behalf of the State are those NAMCOR initiates on its own, without the request from the Minister, but of which the cost and profit accrues to the State.
[224] Section 8(b)
[225] Energy Policy (above), 30

2.3.2 RIGHTS CONFERRED IN TERMS OF PETROLEUM ACT

In respect of the rights conferred under the provisions of Petroleum Act, exploration licence can only be issued or transferred to a legal entity (company).[226] It is thus concluded that, in terms of Petroleum Act, NAMCOR (on behalf of the State or when required by the Minister) and the holder of the licence have the right to participate in the exploration for petroleum. Although NAMCOR is empowered, in terms of Petroleum Act, to undertake the full range of upstream activities, Namibia currently prefers exploration and production activities to be carried out by the private sector.[227]

2.4. PROHIBITION ON CARRYING OUT EXPLORATION WITHOUT LICENCE

Section 9 stipulates that,

'Subject to the provisions of this Act, no person shall carry out any ...exploration and production operations for petroleum in or upon any land in Namibia, except under and in accordance with a licence.'[228]

Whether or not the State is included in this provision depends on the meaning of a 'person'. Should the meaning include the State, it would be correct to conclude that the State also requires a licence to conduct exploration operations. The provision does not make exceptions. This is in contrast to the Norwegian legal framework which accords exclusive right of exploration to the Norwegian State.[229] The Norwegian law expressly exempt Norwegian State from the requirement of a licence to conduct petroleum activities.[230] Norwegian State has absolute right to explore for petroleum resources without a licence. It can therefore be argued that if the Namibian Legislature intended to exempt the State from the requirement of a licence as a prerequisite for exploration, it would have expressly provided for it. If this interpretation be correct, it would be a paradox that the owner of petroleum resources, vested with the right to explore, is prohibited from carrying out the exploration, except under a licence. The Author is of the view that the legislatures could not have intended to include the State in the definition of 'person'.

[226] Section 10
[227] Energy Policy (above), 30.
[228] Section 9 (1)(a) of Petroleum Act
[229] Section 1-1 of the Petroleum Activities Act 29 of 1996
[230] Section 1-3 of the Petroleum Activities Act

Although Petroleum Act does not provide for the definition of a 'person', it can be construed from provisions of Section 8, which stipulates the functions of NAMCOR. The functions of NAMCOR are, *inter alia*, to carry out exploration operations when required by the Minister[231] or carry out exploration operations on its own behalf.[232] NAMCOR, when carrying out the exploration operations required by the Minister, is deemed to be the holder of licence.[233] It then follows that NAMCOR when carrying out the exploration required by the Minister, does not necessary hold the licence conferred in terms of the Petroleum Act, but is deemed to be holder.[234] However NAMCOR, when carrying out explorations on its own, is required to have a licence. This indicates that the State is not conferred a licence, but is deemed to be a holder thereof. Therefore, the Research concludes that the State is exempted from the prohibition of Section 9. The State thus does not require the licences to carry out exploration operations. This is true for NAMCOR only when carrying out explorations required by the Minister. With exception of the State or NAMCOR (when acting on the instruction of the Minister), companies (including NAMCOR when acting on its own) are prohibited from carrying out operations without the appropriate licence. What constitutes an appropriate licence will be deliberated on below.

2.5. LICENCES

As discussed in Section 2.3.2, Except for the State or NAMCOR when required by the Minister, no company can carry out exploration operations without a licence conferred in terms of the Petroleum Act. A licence, according to Petroleum Act, means a reconnaissance licence, exploration licence or a production licence.[235] The analysis in this Paper are confined to exploration and production licence. Reference to exploration licence, unless specifically indicated, shall include production licence. Exploration licence can only be issued or transferred to a legal entity (company).[236] Therefore, only legal entities are eligible to apply for an exploration licence.

[231] Minister of mines and Energy. Section 8(1)(a)(i)
[232] Section 8(1)(b).
[233] Section 8(3).
[234] Section 8(1)(b)and ((c)
[235] Definitions, Section 1 of Petroleum Act
[236] Section 10

2.5.1. APPLICATION FOR EXPLORATION AND PRODUCTION LICENCE

Since an exploration licence can only be granted to a company, only companies are thus eligible to apply for a licence. An application[237] for the granting of a licence is made to the Commissioner for Petroleum Affairs[238], in a form determined by the Minister[239] and shall be accompanied by a fee of N$15 000.[240] The Minister has discretion to either grant on such terms and conditions as determined by him/her or refuse to grant the application.[241]

The Minister may after receipt of the application request, by notice in writing, such information as the Minister deems necessary to enable him or her to determine who has controlling interest in the affairs of the company.[242] The Minister may also, by notice in writing, request for such other information as may be specified in such notice as the Minister deems necessary for purposes of considering such applications.[243] The Minister may also require the applicant to publish such particulars of the application.[244]

2.5.2. CONSIDERATION FOR APPLICATION FOR A LICENCE

In order to enable the Minister to consider the application for exploration licence, the Minister may cause such investigations or negotiations to be made or undertaken.[245] The Minister may also require the applicant to carry out or cause to be carried out such environmental impact studies as specified in the notice.[246] The notice by the Minister may also require the applicant to furnish the Minister with such proposals, by way of alteration to or in addition to proposals set out in the application.[247]

In considering the application and the conditions subject to which such application shall be granted, the Minister takes into account the need to conserve and protect the natural resources

[237] Use of application, unless otherwise specified, refers to application for exploration and production licence
[238] Appointed by the Minister subject to the laws governing public service. Section 3 (1) (a)
[239] Minister of Mines and Energy.
[240] Section 11 (1). Also applicable to application for renewal, transfer of a licence and approval of the Minister ceding or assigning an interest in the licence or to be joined as a joint holder of a licence.
[241] Section 11(2) of Petroleum Act
[242] Section 12(1)(a)(i) of Petroleum Act
[243] Section 12(1)(a)(ii) of Petroleum Act
[244] Section 12(1)(b)
[245] Section 12 (a) of Petroleum Act
[246] Section 12 (b) (i) of Petroleum Act
[247] Section 12(b)(ii) of Petroleum Act

in or on the block or blocks to which the application relates and in adjoining and neighbouring land.[248]

Whilst the Act stipulates the requirements for a production licence, it does not specify same for exploration[249] licence. However, the requirements for exploration can be deduced from the Energy Policy and the requirements for production licence. The Energy Policy indicates that the following requirements must be met, namely, a company must demonstrate acceptable international track records in exploration and production; have adequate financial and technical capacity to fulfil commitments and operate according to standards based on international best practice.[250]

For a production licence, the Act states that, except for the exploration licence holder, the application for production licence shall not be granted unless the Namely, the proposed programme of the production operations and of the processing of the petroleum in question of the company in question will ensure the efficient, beneficial and timely use of the petroleum resources in questions; and the company in question has the technical and financial ability and experience in the petroleum industry to carry out production operations.[251] The exploration licence holders are not required to meet the conditions stated for a production licence. This is an indication that the same requirements must have been met at the application for exploration licence. It is thus concluded that the same requirements applicable for both exploration and production licence.

Exploration[252]licence authorizes the holder to carry on exclusively exploration operations in the block or blocks to which it relates subject to such terms and conditions and in such block or blocks as specified in the licence.[253] An exploration licence is valid for four years, subject to renewal for another two years. Production licence grants the holder the right to carry on production on the block or blocks to which the licence relates and sells or otherwise dispose of petroleum recovered within such block or blocks.[254]

[248] Section 12(3)
[249] Reference to exploration here excludes production.
[250] Energy Policy (above), 29
[251] Section 47(2)(a)
[252] Reference to exploration here excludes production
[253] Section 29 of Petroleum Act
[254] Section 44 (1)(a) & (b)

2.5.3. PETROLEUM AGREEMENT AND CONDITIONS

The Minister, in granting a license, does so subject to conditions. Such conditions are in practice contained in the Model Petroleum Agreement as regards an exploration and production license. There are also a few mandatory statutory conditions, which are set out in section 14 of the Petroleum Act. These relate to the licensee giving preference to qualified Namibian citizens in its recruitment of employees.

The Minister is required by section 13 of the Petroleum Act to enter into a petroleum agreement with an applicant for a petroleum exploration license before he/she grants such license. In order to facilitate the discharge of this statutory obligation, the Government has prepared and published a Model Petroleum Agreement to serve as a basis of negotiation with applicants for exploration licenses.

Among the more important clauses in the Model Petroleum Agreement is one that gives an applicant for an exploration license a right to the grant of an initial exploration license for a period not to exceed four years. This may be renewed for further periods not exceeding two years on each occasion. In general, an exploration license may be renewed only twice. The Act permits the Minister to extend the initial exploration period and the renewal periods by up to 12 months each, where a licensee shows good cause to him. This discretion is intended to enable the Minister to respond to the operational exigencies of particular licensees.

The Model makes provision also for an applicant for a license to commit to a minimum exploration work program. The contents of the work program must be stated in the initial application and is a biddable item under the following negotiations. The Government will negotiate specially tailored work programs for each area in respect of which it grants a license. Also biddable are the second and third tier rates of the Additional Profits Tax and the Training and Education Fee and the negotiated figures on these items are inserted into the relevant clauses in the Model.

The Model sets out the procedure to be followed by a licensee on discovery of petroleum. The licensee is forthwith to inform the Commissioner for Petroleum Affairs and then to evaluate the discovery to determine whether it is of potential commercial interest. If it is, the licensee has to take steps to appraise the discovery in accordance with an appraisal program in conformance with the requirements of the Agreement. It is expected that implementation

of the appraisal program should be completed within two years although upon good cause shown to the Commissioner he may extend the period.

2.6. LICENCING AND CONCESSIONARY SYSTEM

Concessions are contracts whereby the government grants the investor the exclusive right to exploit natural resources or run utilities or other public services in a given area for a specified period of time, in exchange for payment of royalties, taxation and fees. Concession contracts do not in principle involve collaboration in production activities: the investor runs operations and the government receives revenues. But local partners may be involved in production under local content provisions that can be included in the concession.[255]

The state can also use its licensing system to shape industry structure. For example, it can decide on the frequency and area coverage of any licensing (whether by auction or negotiated deal), set up economic incentives for participation, or impose conditions such as mandatory involvement of the state.[256]

2.7. SYSTEM FOR AWARDING OF LICENCES

The systems for allocation of petroleum exploration rights can be grouped under two main categories, namely open-door systems and licensing rounds.[257] Open-door systems are awarded as a result of negotiations between the government and interested investors, through solicited or unsolicited expression of interest.[258] Whereas, licensing rounds can either be through an administrative procedures or auctions.[259] Under administrative procedures,

[255] Cotula, L. (2010) Investment contracts and sustainable development: How to make contracts for fairer and more sustainable natural resource investments, Natural Resource Issues No. 20. IIED, London.
[256] Tordo Silvana, Brandon S. Tracy and Noora Arfaa (2011) National Oil Companies and Value Creation. World bank Working paper
[257] Tordo Silvana, Johnston David & Johnston Daniel. (2010). Petroleum Exploration and production Rights: Allocation Strategies and Design Issues. World Bank Working Paper No. 179 World Bank Publications. 12 http://books.google.com.na/books?id=8XwUPWVAl74C&pg=PA13&lpg=PA13&dq=concessionary,+psc&source=bl&ots=AgEGOUqk5O&sig=s6W0OIvB6It8aJhN3TFylGK6D5c&hl=en&sa=X&ei=QTPbT_z6MYam0AWc5K3MCg&sqi=2&ved=0CGIQ6AEwCA#v=onepage&q=concessionary%2C%20psc&f=false
[258] Tordo Silvana, Johnston David & Johnston Daniel. (2010). Petroleum Exploration and production Rights: Allocation Strategies and Design Issues. World Bank Publications. 12 http://books.google.com.na/books?id=8XwUPWVAl74C&pg=PA13&lpg=PA13&dq=concessionary,+psc&source=bl&ots=AgEGOUqk5O&sig=s6W0OIvB6It8aJhN3TFylGK6D5c&hl=en&sa=X&ei=QTPbT_z6MYam0AWc5K3MCg&sqi=2&ved=0CGIQ6AEwCA#v=onepage&q=concessionary%2C%20psc&f=false
[259] Tordo Silvana, Johnston David & Johnston Daniel. (2010). Petroleum Exploration and production Rights: Allocation Strategies and Design Issues. World Bank Publications. 12 http://books.google.com.na/books?id=8XwUPWVAl74C&pg=PA13&lpg=PA13&dq=concessionary,+psc&sour

licences are allocated through an administrative adjudication process on the basis of a set of criteria defined by the government.[260] With auction, licences are allocated to the highest bidder.[261]

Section 31 of Petroleum Act gives the Minister discretionary powers, whenever he/she deems it necessary or expedient in the public interest or the petroleum industry, invite applications for the grant of an exploration licence in respect of any block or blocks by notice in the Gazette. [262] The Minister may specify in such notice a period within which any application may be made and the terms and conditions subject to which any such applications may be made. [263] Namibia uses open licensing system.

2.8. CONCLUSION

The legal framework for the development of the petroleum industry promotes liberalization of the services in the industry. The legal framework promotes the participation International Oil Companies, and hence promotes exploration. The State has opted to participate through the National Oil Company, NAMCOR. Chapter 3 will examine whether the legal framework promotes the participation of the NOC.

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[260] Tordo Silvana, Johnston David & Johnston Daniel. (2010). Petroleum Exploration and production Rights: Allocation Strategies and Design Issues. World Bank Publications. 12 http://books.google.com.na/books?id=8XwUPWVAl74C&pg=PA13&lpg=PA13&dq=concessionary,+psc&source=bl&ots=AgEGOUqk5O&sig=s6W0OIvB6It8aJhN3TFylGK6D5c&hl=en&sa=X&ei=QTPbT_z6MYam0AWc5K3MCg&sqi=2&ved=0CGIQ6AEwCA#v=onepage&q=concessionary%2C%20psc&f=false

[261] Tordo Silvana, Johnston David & Johnston Daniel. (2010). Petroleum Exploration and production Rights: Allocation Strategies and Design Issues. World Bank Publications. 12 http://books.google.com.na/books?id=8XwUPWVAl74C&pg=PA13&lpg=PA13&dq=concessionary,+psc&source=bl&ots=AgEGOUqk5O&sig=s6W0OIvB6It8aJhN3TFylGK6D5c&hl=en&sa=X&ei=QTPbT_z6MYam0AWc5K3MCg&sqi=2&ved=0CGIQ6AEwCA#v=onepage&q=concessionary%2C%20psc&f=false

[262] Section 31 of Petroleum Act 1991

[263] Section 31 of Petroleum Act 1991

CHAPTER 3

CRITICAL ANALYSIS OF THE LEGAL FRAMEWORK AND STATE PARTICIPATION

3.0. INTRODUCTION

Approximately two billion dollars a day of petroleum are traded worldwide, which makes petroleum the largest single item in the balance of payments and exchanges between nations.[264] Petroleum represents the larger share in total energy use for most net exporters and net importers. [265] While petroleum taxes are a major source of income for more than 90 countries in the world, poor countries net importers are more vulnerable to price increases than most industrialized economies.[266] Unlike most commodities, petroleum is a major factor in international politics and socio-economic development.[267] These characteristics of the petroleum sector largely explain why many producing and importing countries have, at least at some point during the course of history, opted for direct state intervention rather than more liberal governance regimes.[268]

National Oil Companies (NOCs) control approximately 90 per cent of the World's oil reserves and 75 per cent of production.[269] Petroleum Intelligence Weekly ranks 18 NOCs among the top 25 oil and gas reserves holders and producers.[270] In addition, an estimated 60 per cent of the world's undiscovered reserves lie in countries where NOCs have privileged access to reserves[271]. As such, NOCs are of great consequence to their country's

[264] S L Tordo. National Oil Companies and value creation. 2011. The International Bank for Reconstruction and Development/The World Bank
[265] S L Tordo. National Oil Companies and value creation. 2011. The International Bank for Reconstruction and Development/The World Bank
[266] S L Tordo. National Oil Companies and value creation. 2011. The International Bank for Reconstruction and Development/The World Bank
[267] S L Tordo. National Oil Companies and value creation. 2011. The International Bank for Reconstruction and Development/The World Bank
[268] S L Tordo. National Oil Companies and value creation. 2011. The International Bank for Reconstruction and Development/The World Bank
[269] S L Tordo. National Oil Companies and value creation. 2011. The International Bank for Reconstruction and Development/The World Bank,
[270] S L Tordo. National Oil Companies and value creation. 2011. The International Bank for Reconstruction and Development/The World Bank
[271] S L Tordo. National Oil Companies and value creation. 2011. The International Bank for Reconstruction and Development/The World Bank

economy, to importing countries' energy security, and to the stability of petroleum markets. [272]

The reason for the creation of a National Oil Company is to ensure direct state participation within the oil industry.[273] When adopting a policy of participatory intervention, the State still maintains all of its duties as regulator, but also assumes the role of entrepreneur.[274] By entering the industry, the State acquires greater control of the petroleum activities, gaining expertise and inside information, exerting regulatory influence on offshore activities from both inside and out, in addition to the taxation revenues.[275] NAMCOR Participation is necessary to advance the attainment of the objectives set out in Vision 2030. The Chapter will analyse whether the legal framework promotes participation of the National Petroleum Corporation of Namibia (NAMCOR) in the exploration of petroleum resources.

3.1. STATE PARTICIPATION IN PETROLEUM INDUSTRY

The Namibian State is the owner of the petroleum resources, provided the resources are not otherwise lawfully owned.[276] The rights of exploration is primarily vested in the State, expect for the rights conferred in terms of Petroleum Act.[277] The State has opted to exercise its rights of exploration for petroleum resources only through a commercialized legal entity.[278] The formation and functions of the legal entity is discussed below under Section 2.2.

3.2. NATIONAL PETROLEUM CORPORATION OF NAMIBIA

The National Petroleum Corporation of Namibia (PTY) Ltd (herein after referred to as 'NAMCOR'), is a legally enacted entity with limited liability under the Namibian Companies Act of 1973. The Government of the Republic of Namibia is its sole shareholder. Therefore, participation of NAMCOR is in effect participation of the State. The Petroleum Exploration

[272] S L Tordo. National Oil Companies and value creation. 2011. The International Bank for Reconstruction and Development/The World Bank
[273] Hossain Kamal (1979)
[274] T Hunter
[275] T Hunter (2010)
[276] Article 100 of Constitution of the Republic of Namibia and Article 193 of UNCLOS
[277] Section 2 of Petroleum Act and Article 193 of UNCLOS
[278] Energy Policy (above), 30.

and Production Act[279] (hereinafter referred to as 'Petroleum Act' or 'the Act'), stipulates various functions of NAMCOR, as discussed below.

3.2.1 FUNCTIONS OF NAMCOR

The functions of NAMCOR according to Petroleum Act can be summed up in three, namely, exploration and production (herein referred to as 'exploration', unless otherwise indicated); promotion and advisory and regulatory role. NAMCOR has the right to carry out reconnaissance, exploration and production operations either on its own or in partnership with other organisations in the industry. Its main business is to ensure the optimum exploitation of Namibia's petroleum resources and meaningful Namibian participation in resulting business developments in petroleum related exploration activities.[280]

The company also acts as advisor to the Ministry of Mines and Energy and assists it in monitoring the exploration activities of licensees. [281] In exercising this role the company is tasked with advising the Ministry of Mines and Energy on policy issues regarding the upstream petroleum industry and monitoring the petroleum activities of oil companies operating within Namibia. [282] NAMCOR has since independence facilitated the signing of several petroleum agreements with international oil companies. [283]

In respect of promotion, this is an activity that requires the active marketing or promotion of the hydrocarbon potential of the Namibian acreage to local and international oil exploration and production companies. [284] Having identified prospects and leads with potential for accumulating hydrocarbons and having carried out all necessary petroleum geological and geophysical work required, such acreage is offered to local and international oil companies. The institutional role of NAMCOR is to actively promote the hydrocarbon potential of Namibia.

[279] Act 2 of 1991
[280] NAMCOR Official website http://www.namcor.com.na/about-us
[281] NAMCOR Official website http://www.namcor.com.na/about-us
[282] NAMCOR Official website http://www.namcor.com.na/about-us
[283] NAMCOR Official website http://www.namcor.com.na/about-us
[284] NAMCOR Official website http://www.namcor.com.na/about-us

3.2.2 NAMCOR FUNCTIONS AND PARTICIPATION IN THE PETROLEUM INDUSTRY

The Paper will now analyse whether or not the functions promote participation of NAMCOR in the exploration of petroleum resources. In order to determine whether the current functions promote NAMCOR participation in the petroleum industry, the management model in the petroleum industry will be considered.

There are mainly two management models, namely, the "Norwegian Model" and the consolidated management Model. The Norwegian Model is characterized by a separation of functions consisting of a national oil company engaged in commercial hydrocarbon operations only; a government ministry to help set policy; and a regulatory body to provide oversight and technical expertise.[285] Under the consolidated management model, the policy, regulatory, and commercial functions are consolidated in a single entity and is vested in the national oil company.[286]

The Ministry of Mines and Energy (the Ministry), in Namibia, is responsible for the development of policy, legislation and regulations.[287] NAMCOR play institutional roles of regulatory, supervisory and promotion nature. At the same time, NAMCOR is also responsible to carry out exploration operations. Although the Ministry is responsible for formulation of policy and legal framework, NAMCOR as the advisor of the Ministry plays the role of policy maker as well. It is thus evident that Namibia employs the consolidated management model approach. This is justified by the relatively small upstream sector and insufficient human resources. Does consolidated management model advance NAMCOR's participation in the petroleum industry?

Since 1972, Norway has separated policy, regulatory, and commercial functions in the government's administration of petroleum development.[288] On the whole, Norway's story of

[285] Thurber, M., Hults, D., Heller, P.R.P, The Limits of Institutional Design in Oil Sector Governance: Exporting the "Norwegian Model" (Stanford, CA, United States of America: PESD, Stanford University, 2010) http://www.eisourcebook.org/457_ThurberTheLimitsofInstitutionalDesigninOilSectorGovernance.html
[286] Angola employs the consolidated management model. Thurber, M., Hults, D., Heller, P.R.P, The Limits of Institutional Design in Oil Sector Governance: Exporting the "Norwegian Model" (Stanford, CA, United States of America: PESD, Stanford University, 2010) http://www.eisourcebook.org/457_ThurberTheLimitsofInstitutionalDesigninOilSectorGovernance.html
[287] White Paper on Energy Policy, 28
[288] Thurber, M.C., et al., Exporting the ''Norwegian Model'': The effect of administrative design on oil sector performance. Energy Policy (2011), doi:10.1016/j.enpol.2011.05.027

petroleum development has been a positive one. [289] The separation of functions approach is identified as one of the elements which contributed to the success of the development of Norway petroleum industry. [290] However, studies have demonstrated that separation of functions is not a prerequisite to successful oil sector development. [291] Countries where separation of functions has worked are characterized by the combination of high institutional capacity and robust political competition. [292] Where institutional capacity is lacking, better outcomes may result from consolidating commercial, policy, and regulatory functions until such capacity has further developed. [293]

The Author, is of the view consolidated management model does not promote transparency and accountability. In the case of NAMCOR, the functions create a conflict of interest, and this model is thus not supported herein. The Author submits that separation of functions is essential to promote NAMCOR participation in the petroleum industry. Various functions means divided priorities and split financial resources and robs NAMCOR of the capacity to build capacity and expertise. This will as a result hinder NAMCOR from maximizing opportunities to actively participate in the exploration of petroleum industry. Therefore, the Research finds that the management model for the petroleum industry does not promote NAMCOR's participation in the exploration for petroleum resources. The Author proposes that the functions be streamlined to enable NAMCOR to focus on exploration operations and the regulatory and supervisory functions be transferred to another government agency.

In various jurisdictions, such as Brazil and Indonesia, regulatory and supervisory and administration of petroleum sector is vested in an independent government agency.[294]

[289] Thurber, M.C., et al., Exporting the ''Norwegian Model'': The effect of administrative design on oil sector performance. Energy Policy (2011), doi:10.1016/j.enpol.2011.05.027
[290] Thurber, M.C., et al., Exporting the ''Norwegian Model'': The effect of administrative design on oil sector performance. Energy Policy (2011), doi:10.1016/j.enpol.2011.05.027
[291] Thurber, M.C., et al., Exporting the ''Norwegian Model'': The effect of administrative design on oil sector performance. Energy Policy (2011), doi:10.1016/j.enpol.2011.05.027
[292] Thurber, M.C., et al., Exporting the ''Norwegian Model'': The effect of administrative design on oil sector performance. Energy Policy (2011), doi:10.1016/j.enpol.2011.05.027
[293] Thurber, M.C., et al., Exporting the ''Norwegian Model'': The effect of administrative design on oil sector performance. Energy Policy (2011), doi:10.1016/j.enpol.2011.05.027
[294] Indonesia's Migas and Brazil's National Agency of Petroleum, Natural Gas and Biofuels (ANP) W T Onorato. Legal frameworks used to foster petroleum development http://www.un.org.kh/undp/images/stories/special-pages/extractive-industries/docs/legal_frameworks_eng.pdf

3.3. LEGAL FRAMEWORK FOR NAMCOR PARTICIPATION IN THE EXPLORATION FOR PETROLEUM

In Chapter 2, the Paper looked at the legal framework for participation in the exploration for, and production of petroleum resources. The Research found that the legal framework allows participation of both the Namibian State through its National Oil Company and International Oil Companies. The Research further found that the legal framework does not necessarily discriminate between NAMCOR and the IOC, except when NAMCOR is carrying on exploration operations at the Minister's instruction, in which case NAMCOR is deemed to be holder of a licence.

3.3.1 EXPLORATIONS REQUIRED BY THE MINISTER

The Act provides that when carrying out exploration operations required by the Minister, NAMCOR is deemed to be holder of exploration licence.[295] It is thus implied that NAMCOR can carry out exploration without an exploration licence and is exempted from the application requirements. The Paper will now analyse whether this provision promote participation of NAMCOR in the petroleum industry. By law, NAMCOR is deemed to be holder of exploration licence. Therefore, NAMCOR whenever required by the Minister will not have to submit the application, which is subject to certain requirements. In other words, NAMCOR will not need to meet the requirements before carrying out explorations. This provision, on the face of it, promotes participation of NAMCOR in the petroleum industry.

However, this automatic right of exploration is limited to when required by the Minister. Meaning, the Minister must require NAMCOR to carry out exploration operations. The Act further limits the power of the Minister to require NAMCOR to perform exploration operations subject to the following conditions, namely, that it is in the public interest that exploration operations be carried out by NAMCOR and that NAMCOR has financial and technical ability and capacity to carry out such operation.[296] The Minister will not require NAMCOR to carry out exploration operations unless, he/she is satisfied that it is in the public interest that NAMCOR carry out the operations. Secondly, the Minister must be satisfied that NAMCOR has the financial and technical ability and capacity to carry out the operations.

[295] Section 8(3)
[296] Section 8(4)(c)

Both conditions must be met, before the Minister can require NAMCOR to carry out exploration operations.

Public Interest is not defined under Petroleum Act. Public interest does not have a fixed definition. It has been defined as a common concern among citizens in the management and affairs of local, state, and national government, anything affecting the rights, health, or finances of the public at large.[297] For purposes of this Paper, Public Interest means socio-economic benefits for the Namibian whilst protecting the environment. To satisfy the condition of public interest, it must be demonstrated that it would be in the interest of the public, economically, socially and environmentally, that NAMCOR carry out the exploration operations. In other, it must be demonstrated that there is socio-economic benefits without compromising environmental protection.

The second condition is the financial and technical ability and capacity to carry out the operations. It is inferred from the provision that NAMCOR should have sufficient financial resources to enable it to carry out the exploration and production operations. Sufficient financial resources for the operations means financial resources to cover the cost involved, which is estimated by some to be USD$10 - 30 Million for typical Shallow shelf oil wells (e.g., North Sea) and while deep water wells can cost up to USD$100 million plus. When commercial exploitation ends, the decommissioning of production installations starts, which involves the removal of buildings and equipment, the restoration of the site to environmentally-sound conditions, the implementation of measures to encourage site re-vegetation, and the continued monitoring of the site after closure. In addition to the financial resources, NAMCOR should have technical ability and capacity. This requires the right technology and qualified human resources necessary for exploration.

Unless all the conditions above are satisfied with, the Minister cannot require NAMCOR to carry out the exploration operations. The industry is characterized by large-scale, knowledge based and capital intensive, high risk investments, requiring high amounts of skill and sophisticated technology. [298] Even with the creation of National Oil Companies to ensure participation of states in the industry, NOCs do not possess the necessary resources and are

[297] The Free Dictionary. http://legal-dictionary.thefreedictionary.com/Public+Interest
[298] OPEC Bulletin (2011). African Oil: Local expertise wanted.
http://www.opec.org/opec_web/static_files_project/media/downloads/publications/ob102011.pdf

thus unable to carry out exploration operation on their own.[299] It is highly unlikely that NAMCOR would meet all the three conditions without partnership with International Oil Company.

NAMCOR, when required by the Minister, is allowed to carry out the operations on its own or together with any other company.[300] Whilst it may be a challenge for NAMCOR to have the required financial and technical resources, the international character of the petroleum industry, have led to development of IOCs[301] with the capacity to respond to the challenges.[302] Whilst NAMCOR may be ill prepared to carry out exploration on its own,[303] the IOCs have had years of experience and preparation to develop the industry. NOCs in general do not possess the IOCs and are thus unable to carry out exploration operation on their own.[304] Therefore, partnership with IOCs is necessary to ensure that conditions are satisfied.

NAMCOR is exempted from meeting the requirements set for application for exploration. In essence, NAMCOR is given preferential treatment over IOCs. However, before the provision can be utilized, the three conditions discussed above must be met. The preceding paragraph demonstrated that for the three conditions to be satisfied with, partnership with an IOC is a necessity. It is thus concluded that, participation of NAMCOR in the petroleum industry is promoted subject to partnership with an IOC.

3.3.2 EXPLORATIONS BY NAMCOR ON BEHALF OF THE STATE

In addition to the exploration operations carried out when required by the Minister, NAMCOR can also act on behalf of the State. Whilst the Act explicitly states that NAMCOR

[299] There are some exceptions to the rule among smaller, more advanced economies such Brazil, Norway and Malaysia.
http://www.globalization101.org/webadmin/editor/editor/fckeditor.html?InstanceName=FCKeditor1&Toolbar=Default#9 accessed 11 November 2011
[300] Section 8(1)(i)
[301] International Oil Companies or IOC means private or state-owned international oil company. The Use of the Terms "International Oil Company or IOC", "Foreign Oil Company", "Private Oil Company" and "foreign Investor" is accorded the same meaning and is subject to be used interchangeably in this Research.
[302] Hunter Tina. Legal Regulatory Framework for the Sustainable Extraction of Australian Offshore Petroleum Resources: A Critical Functional Analysis. PhD thesis, University of Bergen 2010
[303] OPEC Bulletin (2011)
http://www.opec.org/opec_web/static_files_project/media/downloads/publications/ob102011.pdf
[304] There are some exceptions to the rule among smaller, more advanced economies such Brazil, Norway and Malaysia.
http://www.globalization101.org/webadmin/editor/editor/fckeditor.html?InstanceName=FCKeditor1&Toolbar=Default#9 accessed 11 November 2011

when carrying out exploration operations required by the Minister is deemed to be holder of exploration licence, the Act is silent with respect to acting on behalf of the State. The Act does not indicate whether or not a licence is required as in the case when NAMCOR acts on its own as a company. The distinction, if any, is important to draw, because it has consequences with respect to exploration rights.

The State is defined as the government, a self-governing political entity, which exercises effective sovereignty over its territory and population.[305] The main organs of the Namibian State are the Executive, the Legislature and the Judiciary.[306] The executive power of the Republic of Namibia vests in the President and the Cabinet.[307] a minister, as part of the cabinet is an organ of State. Therefore, it can be concluded that the State in terms of this provision means Minister. Should this interpretation be correct, the analysis under Section 3.3.2 will become applicable.

However, from the wording of Section 8, it is not absurd to draw a distinction between exploration operations carried out on behalf of the State and those required by the Minister. Whilst section 8(4) provides for conditions that must be satisfied before the Minister can require NAMCOR to carry out operations, the Act is silent in the case of NAMCOR carrying out operations on behalf of the State. Whilst the Act expressly provides that NAMCOR, when carrying out exploration required by the Minister, is deemed to be holder of exploration licence, the Act is silent in respect of explorations carried out on behalf of the State. It could then be interpreted that the Legislature could not have intended to treat the two scenarios as one. In which case, it would be implied that NAMCOR will require a licence, although the Act does not expressly state so, unlike the case where NAMCOR is acting on its own behalf.

Whether or not this provision promotes NAMCOR participation in the petroleum industry depends on the prevailing interpretation of provision. Should the latter view be correct and assumed that NAMCOR requires a licence, then it will be treated as if NAMCOR acted on its own behalf, as per analysis below.

[305] Webster Online Dictionaryhttp://www.merriam-webster.com/dictionary/state, accessed 13 March 2012.
[306] Article 2(3) of the Namibian Constitution
[307] Article 27(2)

3.3.3 EXPLORATIONS BY NAMCOR ON ITS OWN OR TOGETHER WITH ANY OTHER COMPANY

In addition to exploration operations carried out when required by the Minister, and those done on behalf of the State, NAMCOR can carry out explorations on its own or together with any other company.[308] Petroleum Act provides that NAMCOR requires a licence when carrying out operations in terms of this provision.[309] NAMCOR in this case cannot carry out exploration operations without a licence.[310] In this case, NAMCOR is treated like any other applicant, and must satisfy the licence requirements before it can be issued with a licence.

Whilst the Act stipulates the requirements for a production licence, it does not specify same for exploration[311] licence. However, the requirements for exploration can be deduced from the Energy Policy and the requirements for production licence. The Energy Policy indicates that the following requirements must be met, namely, a company must demonstrate acceptable international track records in exploration and production; have adequate financial and technical capacity to fulfil commitments and operate according to standards based on international best practice.*[312]*

For a production licence, the Act states that, except for the exploration licence holder, the application for production licence shall not be granted unless the Namely, the proposed programme of the production operations and of the processing of the petroleum in question of the company in question will ensure the efficient, beneficial and timely use of the petroleum resources in questions; and the company in question has the technical and financial ability and experience in the petroleum industry to carry out production operations.[313] The exploration licence holders are not required to meet the conditions stated for a production licence. This is an indication that the same requirements must have been met at the application for exploration licence. It is thus concluded that the same requirements applicable for both exploration and production licence.

It is highly unlikely that NAMCOR would meet the requirements for exploration licence on its own.The industry is characterized by large-scale, knowledge based and capital intensive,

[308] Section 8(1)(b) of Petroleum Act
[309] Section 8(1)(b) of Petroleum Act
[310] Section 9 of Petroleum Act
[311] Reference to exploration here excludes production.
[312] Energy Policy (above), 29
[313] Section 47(2)(a)

high risk investments, requiring high amounts of skill and sophisticated technology. [314] Literature reveals that even with the creation of National Oil Companies to ensure participation of states in the industry, NOCs do not possess the necessary resources and are thus unable to carry out exploration operation on their own.[315] Therefore, partnership with IOC is necessary to ensure that NAMCOR meets the requirement for exploration licence.

3.4. LEGAL FRAMEWORK FOR PARTNERSHIP WITH IOCs

Norwegian legal framework successfully combined the development of a state-owned oil company and extensive participation by the IOCs to create an industry and transform the economy.[316] The Norwegian framework recognized the opportunity to harness the knowledge base learned from the IOCs from the very start of developing the Norwegian Continental Shelf. [317] The framework facilitated the early development of Statoil through the use of extensive preferential terms that removed exploration risks. [318] Statoil as a result of licensing requirements, held an interest in most, if not all licences, projects and producing fields.[319] Preferential treatment in accessing the resource base was important to ensure survivability of Statoil in the early years[320].

The Norwegian State reserves a specified share of a licence granted under the Petroleum Law and in the joint venture established by a joint operating agreement in accordance with the

[314] OPEC Bulletin (2011). African Oil: Local expertise wanted. http://www.opec.org/opec_web/static_files_project/media/downloads/publications/ob102011.pdf
[315] There are some exceptions to the rule among smaller, more advanced economies such Brazil, Norway and Malaysia. http://www.globalization101.org/webadmin/editor/editor/fckeditor.html?InstanceName=FCKeditor1&Toolbar=Default#9 accessed 11 November 2011
[316] R Gordon & T S Tenvoll Statoil: A Study in Political Entrepreneurship 2007 The JAMES A. BAKER III Institute for Public Policy of Rice University http://www.bakerinstitute.org/programs/energy-forum/publications/docs/NOCs/Papers/NOC_Statoil_Gordon-Stenvoll.pdf
[317] R Gordon & T S Tenvoll Statoil: A Study in Political Entrepreneurship 2007 The JAMES A. BAKER III Institute for Public Policy of Rice University http://www.bakerinstitute.org/programs/energy-forum/publications/docs/NOCs/Papers/NOC_Statoil_Gordon-Stenvoll.pdf
[318] R Gordon & T S Tenvoll Statoil: A Study in Political Entrepreneurship 2007 The JAMES A. BAKER III Institute for Public Policy of Rice University http://www.bakerinstitute.org/programs/energy-forum/publications/docs/NOCs/Papers/NOC_Statoil_Gordon-Stenvoll.pdf
[319] R Gordon & T S Tenvoll Statoil: A Study in Political Entrepreneurship 2007 The JAMES A. BAKER III Institute for Public Policy of Rice University http://www.bakerinstitute.org/programs/energy-forum/publications/docs/NOCs/Papers/NOC_Statoil_Gordon-Stenvoll.pdf
[320] R Gordon & T S Tenvoll Statoil: A Study in Political Entrepreneurship 2007 The JAMES A. BAKER III Institute for Public Policy of Rice University http://www.bakerinstitute.org/programs/energy-forum/publications/docs/NOCs/Papers/NOC_Statoil_Gordon-Stenvoll.pdf

licence.[321] King has discretion to decide the participation of Norwegian State in exploration activities.[322] The Petroleum Law in Nigeria, like Norway, grants the Minister discretionary powers to impose conditions of state participation on a licence.[323]

Namibian legal framework, on the other hand, does not provide for participation of NAMCOR as a condition imposed on a licence. The Namibian law does not give the State discretionary powers to decide on NAMCOR participation as a condition for granting the licence. Therefore, joint cooperation agreements with NAMCOR are neither mandatory nor discretionary. NAMCOR does not have the backing of the legal framework to ensure partnership with IOCs. Lack of such mandatory or discretionary legal provision hampers negatively the possibilities of partnership of NAMCOR and IOCs.

The possibility formation of partnership between IOCs and NAMCOR is thus left to negotiations. The outcomes of negotiations do not guarantee partnership, and normally favours the party with strong bargaining position. Generally the IOCs have stronger bargaining position due to their capacity and expertise in the industry. Negotiations then, cannot be relied upon as a tool to promote NAMCOR's participation in the petroleum industry. Therefore, absence of legal provision for mandatory or discretionary power pertaining to partnership between NAMCOR and IOCs is an impediment to NAMCOR's participation in the petroleum industry. As demonstrated earlier, partnership with IOCs is essential for NAMCOR to participate in the petroleum industry.

3.5. AWARDING OF LICENCE AND NAMCOR PARTICIPATION IN THE PETROLEUM INDUSTRY

In Section 3.4, the Research found that partnership with NAMCOR is not a condition for granting the licence. The Paper will now proceed to consider treatment of NOC at the awarding licences. Pemex, Mexican National Oil Company, had monopolistic rights for exploration.[324] This position provided the framework for building a significant asset base and production expertise. [325] IOCs were precluded the participation, which has deprived Pemex

[321] Section 11-1 of Petroleum Activities Act 1996 (NORWAY)
[322] Section 3-6 of Petroleum Activities Act 1996 (NORWAY)

[323] Section 35 (a) of Petroleum Act Chapter P10 (Nigeria)

[324] S Tordo
[325] S Tordo

of access to world-class technologies and managerial expertise. [326] Angolan Sonangol also holds exclusive[327] mining rights. Unlike Permex, Sonangol can enter into associations with IOCs.

NAMCOR does not hold the monopolistic right for exploration. NAMCOR, except when carrying out explorations operations required by the Minister, is treated the same as any other applicant. There is no preferential treatment accorded to NAMCOR. NAMCOR is required to compete with IOCs for the awarding of exploration licences. This position, the Author argues is a stumbling block for NAMCOR's participation in the exploration for petroleum resources. Jurisdictions such as Angola provide preferential treatment to their National Oil Companies. Preferential treatment in a form such as monopolistic rights for exploration, provided the IOCs are permitted to participate, leads to partnerships between NOCs and IOCs. The IOCs do not have an option but to enter into partnership with the NOC. This can be termed as mandatory participation of NOCs.

Namibia Legal framework does not provide for monopolistic rights in favour of NAMCOR. This, the Author argues, fails to promote participation of NAMCOR in the petroleum industry. Since participation of NAMCOR in the petroleum industry requires partnership with IOCs, failure to provide for mandatory participation of NAMCOR in the exploration for petroleum resources, limits NAMCOR's participation altogether.

3.6. CONCLUSION

The current legal framework for exploration for petroleum resources does not promote NAMCOR's participation in the petroleum industry. Firstly, the Research finds that NAMCOR in addition to explorations has other various functions, ranging from regulatory, supervisory to advisory. Therefore, the Research holds that consolidated management model for the petroleum industry does not promote NAMCOR's participation in the exploration for petroleum resources. The Author proposes that the functions be streamlined to enable NAMCOR to focus on exploration operations. The regulatory and supervisory functions must

[326] S Tordo
[327] Article 4 of Petroleum Activities Law (Angola)

be transferred to another government agency. The focus on exploration is necessary to ensure that the limited resources is not disbursed amongst various functions, but that NAMCOR can focus on building capacity and expertise as a National Oil Company.

Secondly, NAMCOR is required to compete for exploration rights like any other IOC. The Author submits that NAMCOR is not able to compete under the same terms for exploration licence. Therefore, NAMCOR will not participate in the exploration for petroleum resources under the current legal framework.

The Author argues that in order to ensure participation, NAMCOR requires partnership of IOC. Partnership with IOC provides NAMCOR with the opportunity to harness the knowledge base, technical and financial resources of the IOCs. Therefore, the Author argues that, the legal framework must create a favourable environment for such partnership. The Legal framework, the Author submits, must provide for preferential terms in favour of NAMCOR, in the form of, partnership participation as a condition for awarding licenses and/or monopolistic rights to vest in NAMCOR with the option of partnership with IOC. The Author submits that, mandatory or discretionary powers for granting of licences must be vested in the Minister or the Competent Authority.

CHAPTER 4:

RECOMMENDATIONS AND CONCLUSION

The Research concludes that the current legal framework does not promote state (NAMCOR) participation, and thus does not advance the National Objective as outlined in Vision 2030. . In terms of the Vision, Namibia shall be a prosperous and industrialised Nation, developed by her human resources, enjoying peace, harmony and political stability in 2030.[328] It is further expected, according to Vision 2030, that Namibia's non-renewable natural resources be strategically exploited and optimally beneficiated, providing equitable opportunities for all Namibians to participate in the industry.[329] The Author submits that in order to contribute towards attainment of Vision 2030, State participation in the petroleum industry is imperative. This necessitates an examination of the Namibian legal framework to ensure that the pressure to attract IOCs does not result into an impediment to the attainment of Vision 2030.

The Research finds that the legal framework promotes the participation of International Oil Companies, which the Author admits is necessary to maximize exploration. The legal framework has created a favourable environment for participation of IOCs. The legal framework has not provided for partnership between NAMCOR and IOCs to ensure, NAMCOR benefits from the wealth of resources IOCs have had years to build.

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[328] Vision 2030 Policy Framework (2004), 38
[329] Policy Framework (2004), 162

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The Author thus recommend for law reform in this respect. The legal framework, the Author recommends, must be amended to be line with the National Objectives as well as come to par with the trends in the international petroleum industry.

The Petroleum Exploration and Production Act must be amended to streamline the functions of NAMCOR and limit them to explorations and productions operation. Furthermore, the Petroleum Act must be amended to provide for preferential terms for the awarding of licences in favour of NAMCOR.

BIBLIOGRAPHY

POLICY FRAMEWORK

Namibia Vision 2030

White Paper on Energy Policy

LEGISLATION

Namibian Legislation

Namibian Constitution Act 1 of 1990

Petroleum (Exploration and Production) Act 2 of 1991

Regulations to Petroleum (Exploration and Production) Act 2 of 1991

Petroleum (Taxation) Act, 1991

Petroleum Laws Amendment Act, 1998

Model Petroleum Agreement 1998

Petroleum (Exploration and Production) Amendment Act 2 Of 1993

Angolan Legislation

Petroleum Activities Law

Norwegian Legislation

Petroleum Activities Law 72 of 1996

Nigerian Legislation

Petroleum Act Chapter P10 (Chapter 350 LFN 1990)

BOOKS

Chaytor Beatrice &Gray Kevin R "Environmental Regulation of the Oil and Gas Industry in Nigeria" *International Environemental Law and Policy In Africa*: Kluwer Academic Publishers, Dordrecht

Emiri Festus & Gowon Deinduomo (2009) *Law and Petroleum Industry in Nigeria: current challenges (Essays in honor of Justice kateAbiri),* malthouse Press Limited, lagos

Faure Michael &PeetersMarjan (2001).*Climate change liability*: Publisher Cheltenham, UK .

Hossain Kamal (1979) *Law and Policy in Petroleum Development:* Frances Pinter (publishers) Ltd London, Nichols Publishing Company New York

Humphreys M et al, (Eds) *Escaping the Resource Curse* New York: Columbia University Press, 2007. 408. Reviewed by Kaysie Brown http://www.wilsoncenter.org/sites/default/files/ECSPReport13_Brown.pdf

Jacqueline Lang Weaver, 'Sustainable Development in the Petroleum Sector' (2003) in Adrian Bradbrook and Richard L Ottinger (eds), Energy Law and Sustainable Development (2003) IUCN Environment Policy and Law Paper No. 47, 45.

Johnston Daniel, (1994 *International Petroleum Fiscal Systems and Production Sharing Contracts*), http://books.google.com.na/books?id=LnzTg_xkCycC&pg=PA290&lpg=PA290&dq=International+Petroleum+Fiscal+Systems+and+Production+Sharing+Contracts+(1994),+25.&source=bl&ots=N-9rk62t_0&sig=jTybDppMTAzMyIj-K4aKCNczYOA&hl=en&sa=X&ei=w3LbT426FNO1hAeM1rGGCg&ved=0CF8Q6AEwAw#v=onepage&q=International%20Petroleum%20Fiscal%20Systems%20and%20Production%20Sharing%20Contracts%20(1994)%2C%2025.&f=false

Keto David B. (1978) *Law and Offshore Oil Development: North Sea Experience:*preaferplublishers, New York,

Oman C (1989) *New Forms of Investment in developing country industries: mining, petrochemicals, automobiles, textiles, food. Paris: Organization for Economic Co-operation and Development*. Development Centre

Peeters Marjan & Deketelaere Kurt (2006).*EU climate change policy : the challenge of new regulatory initiatives*: Publisher Cheltenham, UK .

Rajamani Lavanya (2006) *Differential treatment in international environmental law*: Oxford University Press Inc New York

Stephens Tim (2009) *International Courts and Environemental Protection*: Cambridge University Press, Cambridge.

Sornarajah M. (2004). *The International Law on Foreign Investment*. Second edition. Cambridge University Press

Subedi, P. Surya (2008). *International Investment Law: Reconciling Policy and Principle*. Hart Publishing. Oxford and Portland, Oregon

Tordo Silvana, Johnston David & Johnston Daniel. (2010). *Petroleum Exploration and production Rights: Allocation Strategies and Design Issues*. World Bank Working Paper No. 179 World Bank Publications. 12 http://books.google.com.na/books?id=8XwUPWVAl74C&pg=PA13&lpg=PA13&dq=concessionary,+psc&source=bl&ots=AgEGOUqk5O&sig=s6W0OIvB6It8aJhN3TFylGK6D5c&hl=en&sa=X&ei=QTPbT_z6MYam0AWc5K3MCg&sqi=2&ved=0CGIQ6AEwCA#v=onepage&q=concessionary%2C%20psc&f=false

Wold Chris, Hunter David &Powere Melissa (2009) *Climate change and the law*: LexisNexis Matthew Bender.

.

THESIS

T Hunter Legal (2010) *Regulatory Framework for the Sustainable Extraction of Australian Offshore Petroleum Resources: a Critical Functional Analysis PhD Thesis,* University of Bergen, http://www.google.com.na/url?sa=t&rct=j&q=hunter%20tina%20()petroleum%20thesis&source=web&cd=4&ved=0CFUQFjAD&url=http%3A%2F%2Fepublications.bond.edu.au%2Fcgi%2Fviewcontent.cgi%3Farticle%3D1353%26context%3Dlaw_pubs&ei=strtT47cH8ODhQfn3aD2DA&usg=AFQjCNGazKBhzCFvTJQMT5pD-x4ZJ7eGEQ

Sulaimanov R. (2011) *Balancing State and Investor Interest in International Petroleum Contracts: Comparison of Legislations in Kazakhstan and Other Central Asian Countries*. LLM Thesis www.etd.ceu.hu/2011/sulaimanov_ruslan.pdf

ARTICLES

Gao Zhiguo.*Environmental Regulation of the Oil and Gas Industries*.http://www.dundee.ac.uk/cepmlp/journal/html/vol2/article2-11.html

Hunter, D &Salzman, J. Negligence in the Air: The Duty of Care in Climate- Change Litigation. http://lsr.nellco.org/cgi/viewcontent.cgi?article=1095&context=duke_fs

Kiluange T The JDZ Model PSC: A Legal Analysis
http://www.juristep.com/doc/jda_model_psc.pdf ,

Cordero M S, '*Contract or Licence? Regulation of Petroleum Investment in Russia and the Role of Foreign Legal Advice' (*1998) 3-11 *CEPMLP Internet Journal*
http://www.dundee.ac.uk/cepmlp/journal/html/vol3/article3-11.html

Lange Glenn-Marie (2003) *National wealth, natural capital and sustainable development in Namibia* DEA Research Discussion Paper.http://www.the-eis.com/data/RDPs/RDP56.pdf

Larsen ErlingRøed (2003) *Are Rich Countries Immune to the Resource Curse? Evidence from Norway's Management of Its Oil Riches* http://futurechallenges.org/study/are-rich-countries-immune-to-the-resource-curse-evidence-from-norways-management-of-its-oil-riches/

Mirza A. Karim and Karen Mills *Indonesian Legal Framework in the Oil, Gas, Energy and Mining Sectors; Including Dispute Resolution* .KarimSyah Law Firm, Jakarta
http://www.arbitralwomen.org/files/publication/4907092548666.pdf

Richard Gordon & Thomas S Tenvoll (2007), *Statoil: A Study in Political Entrepreneurship.* the JAMES A. BAKER III Institute for Public Policy of Rice University

Sahu Manendra. A Study on Inverted Development and Oil producers in sub-Saharan Africa, University of Mumbai http://www.mu.ac.in/arts/social_science/african_studies/sahuwp.pdf

Sumudu Atapattu (2008) *Climate change, Equity and Differentiated Responsibilities: Does the Present Climate Regime Favor Developing Countries? Prepared for the Conference on "Climate Law in Developing Countries post-2012: North and South Perspectives"* organized by IUCN Law Academy, University of Ottawa, September 26-28, 2008.

http://www.google.co.za/url?sa=t&rct=j&q=climate+change+liability:+david+hunter&source=web&cd=27&ved=0CGcQFjAGOBQ&url=http%3A%2F%2Fwww.iucnael.org%2Fen%2Fdocuments%2Fdoc_download%2F73-atapattu-climate-change-equity-and-differentiated-responsibilities-.html&ei=U23bTru6DoXj4QTrqNjYBg&usg=AFQjCNEmgie6JSDtL-x3_EQULeLnImfFow&sig2=ZrJ3df1d2l0XZ-R1_SoK4g

Tordo S. Fiscal Systems for hydrocarbons. World Bank Working Paper no. 123 , 8 http://siteresources.worldbank.org/INTOGMC/Resources/fiscal_systems_for_hydrocarbons.pdf

STUDIES AND GUIDELINES

Joint guidelines prepared by Oil Industry International Exploration and Production and United Nations Environment Program (1997) and on Environmental management in oil and gas exploration and production: an overview of issues and management approaches. http://www.ogp.org.uk/pubs/254.pdf

Joint study by the African Development Bank and the African Union: Oil and Gas in Africa (2009) Oxford University press http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Full%20Document%20-%20Oil%20and%20Gas%20in%20Africa.pdf

Claudine Sigam and Leonardo Garcia (2012). *Extractive Industries: Optimizing Value Retention in Host Countries*. UNCTAD, Geneva. New York and Geneva.