PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES IN TANZANIA AND PUBLIC PARTICIPATION IN DECISION MAKING: A CASE STUDY IN THE EXTRACIVE INDUSTRY

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CERTIFICATION

The undersigned certify that they have read and hereby recommend and approve for acceptance by the Open University of Tanzania a thesis entitled; "**Permanent Sovereignty over Natural Resources in Tanzania and Public Participation in Decision Making: A Case Study in the Extractive Industry**" in fulfilment of the requirements for the degree of Doctor of Philosophy in Law (PhD).

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DEDICATION

To my father Pastory Kamuntu (the late) and my mother Yulitha Kokuleba (the late), my wife Febronia and my children Giovanni and Giovanna.

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I remain solely responsible for any errors or shortcomings in this thesis.

ABSTRACT

The desire for resource rich countries to ensure that resources are exploited and utilized for the benefit of the people and economic growth of those states gave rise to the principle of Permanent Sovereignty over Natural Resources (PSNR) and its underlying right to participate in decision making. The principle is incorporated in various binding international and regional instruments. However, this principle has been contested by capitalist states since its inception. Being a resource rich country, Tanzania adopted the principle of PSNR in her laws in order to ensure public participation in decision making, including access to investment contracts and access to judicial and administrative remedies. Nonetheless, the government has not taken significant steps to implement the requirements of public participation in the decision-making process. There is no scholarly work that has been conducted to determine reasons why provisions of PSNR and Public Participation have not been realized and possible effects of PSNR legislation on foreign investment, a gap that this study sought to fill in. Thus, this study analyzes provisions on PSNR in Tanzania with special focus to non-state actors' participation in the decision making. The study has applied people-centred and people-stated based approaches in accomplishment of the study objectives. Data was gathered and presented mainly using doctrinal method, supplemented by empirical and legal comparative methods. This study has established that laws in Tanzania do not adequately guarantee participation of non-state actors in the decision-making process, including non- disclosure of natural resource agreements. Further, it has been found out that laws and institutions on PSNR partly violate investors' rights as guaranteed by the international laws and international investment agreements. This study recommends for amendment of existing laws in order to promote participation of both state and non-state actors in the decision-making process.

Keywords: *Sovereignty, Natural Resources, Public Participation, Decision Making.*

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LIST OF ABREVIATIONS

ACHPR	African Charter on Human and Peoples Rights 1981
ACT	Alliance for Change and Transparency
AU	African Union
Cap	Chapter
CCM	Chama cha Mapinduzi
CERDS	Charter of Economic Rights and Duties of States
CPC	Civil Procedure Code
CSOs	Civil Society Organizations
CSR	Corporate Social Responsibility
CURT	Constitution of the United Republic of Tanzania 1977 (as amended)
EAC	East African Community
Ed(s)	Editor(s)
EIA	Environmental Impact Assessment
EIS	Environmental Impact Statement
EMA	Environmental Management Act
EU	European Union
EWURA	Energy and Water Utilities Regulatory Authority
FDI	Foreign Direct Investment
Ibid	ibidem
ICC	International Chamber of Commerce
ICC	International Criminal Court
ICCPR	International Covenant on Civil, Political and Cultural Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights

ICSID	International Convention on Settlement of Investment Disputes
IGO	International Governmental Organizations
IMTC	Inter Ministerial Technical Committee
LCC	Local Content Committee
MDAs	Mining Development Agreements
NCCR	National Convention for Construction and Reform
NEMC	National Environmental management Council
NGOs	Non Governmental Organizations
NIEO	New International Economic Order
No	Number
P(p)	Page(s)
PSAs	Production Sharing Agreement
PSNR	Permanent Sovereignty over Natural Resources
PURA	Petroleum Upstream Regulatory Authority
R.E	Revised Edition
Res.	Resolution
S(s)	Section(s)
SADC	Southern African Development Community
SCU	Supreme Court of Uganda
SDGs	Sustainable Development Goals
TEITI	Tanzania Extractive Industries Transparency Initiative
TLS	Tanganyika Law Society
TLR	Tanzania Law Report
UDHR	Universal Declaration of Human Rights

UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNGA	United Nations General Assembly
UNHCR	United Nations High Commission for Refugees
WFP	World Food Programme
WWI & WWII	First World War & Second World War
ZLR	Zimbabwe Law Report

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the Problem

Natural Resource is an area that is so sensitive throughout the World. It has contributed to the First World War (WWI), Second World War (WWII) and civil wars across the globe. The expansionism policies and colonialism were ruthlessly executed on thirst for resources by developed countries. Consequently, UN was formed and a lot of international instruments[1] adopted. Since its establishment, the UN has focused on ensuring all states retain their independence including freedom to exploit their own resources subject to their laws and policies. However, from practical point of view states cannot exploit their resources in exclusion of foreign investments, which smoothly operate through international investment contracts and treaties. Largely, exploitation of resources in Africa is dominated by foreign investors through multinational companies. If resource exploitation is not properly managed, states may witness a 'resource curse' through resource conflicts such as civil wars and extreme poverty.[2]

Generally, the Principle of Permanent Sovereignty over Natural Resources (hereinafter referred to as PSNR) was developed due to a number of socio-economic Generally, the Principle of Permanent Sovereignty over Natural Resources (hereinafter referred to as PSNR) was developed due to a number of socio-economic

[1] These include United Nations Charter, Universal Declaration of Human Rights 1948, the ICCPR and ICSECR 1966.

[2] Gilbert, J., The Right to Freely Dispose of Natural Resources: Utopia or Forgotten Right? Quarterly of Human Rights, Vol.31/2 of 2013, p.315.

factors at global level which affected relationship between developed states and developing states.

Such factors included: scarcity and optimum utilization of resources; promotion and protection of foreign investments abroad; nationalization of means of production and demand of economic independence by developing states.[3] Furthermore, the deterioration of trade terms, need to reinforce the principle of non-interference in internal affairs and protection of people's right to self-determination influenced the development of the PSNR.[4] Since its inception, there has been conflicting interpretation, application and implementation of PSNR due to diverging interests it seeks to protect.

The developing countries at different times have evoked the principle of Permanent Sovereignty over Natural Resources (PSNR) so as to avoid 'resource curse' and 'alter inequitable arrangements' between them and foreign investors.[5] On the other hand, developed states have used the principle to protect their foreign investments whereby host state exercises the right to expropriate or nationalize properties by demanding prompt, adequate and effective compensation.[6]Initially, the doctrine was developed in 1950s after the Second World War in order to protect the interests of the 'peoples and nations' in the underdeveloped states, particularly in Latin America,

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[3]Schrijver, N.I., Sovereignty Over Natural Resources: Balancing Rights and Duties, University of Groningen, pp.5-6.
[4]ibid.
[5]Schrijver, N.I., Sovereignty Over Natural Resources: Balancing Rights and Duties, University of Groningen, p.21.
[6]ibid.,p.278.

Asia and Africa. They challenged validity of concession agreements signed between the governments and investors, which were unfavorable to them.[7] Moreover, in the 1960s the right to PSNR became vital to the decolonization movement through adoption of the Declaration on the Granting of Independence to Colonial Countries and Peoples, United Nations General Assembly (UNGA) Res.1514 of 1960.[8] At this juncture the subject of the right to PSNR was said to be the 'developing countries' which had right to benefit from exploitation of resources found within their territories.

Nevertheless, in 1962 the General Assembly adopted Resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources[9] which recognized PSNR as inalienable right of all states for 'their national interests and respect of their economic independence.' This Declaration is considered by some scholars to be the best balance of the states' sovereignty and duties under international law.[10] This is because it acknowledges limitation on states' sovereignty over natural resources through securing peoples' interests. On the other hand, the right to PSNR was amplified in the 1974 Declaration on the Establishment of a New International Economic Order whereby states were obliged to have respect for the 'full permanent

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[7] Pereira, R. &Orla, G., Permanent Sovereignty over natural Resources in the 21st Century: Natural Resource Governance and the Right to Self-determination of Indigenous Peoples under International Law, Melbourne Journal of International Law, Vol.14 of 2013, p.5.

[8] Declaration on the Granting of Independence to Colonial Countries and Peoples, Resolution 1514 (XV) of 1960, adopted on 14th December 1960 at 947th Plenary Meeting.

[9] UNGA Resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources, New York; 14th December 1962

[10] Schrijver, N.I., Sovereignty Over Natural Resources: Balancing Rights and Duties, University of Groningen, 2008, p.354.

sovereignty of every state over its natural resources and economic activities.'[11] The idea here was to achieve effective political independence of states.

Nevertheless, some western countries continued to dominate developing countries in the 1970s and 1980s such as South Africa; hence the principle of PSNR was used to protect territories under foreign occupation.[12] At this stage the scope of the right to PSNR was solely confined to states. The United Nations General Assembly adopted the Charter of Economic Rights and Duties of States, 1974[13] whereby states were vested with right to nationalize foreign investments in accordance with host state's law, and subject to payment of compensation as determined by the state organs. As a way of safeguarding state's sovereign right to natural resources the Charter required all disputes to be determined by local courts or tribunals.

Apart from the Charter of Economic Rights and Duties of States, there are other instruments which recognize the right of the state to PSNR including; the Convention on the Law of the Sea 1982, Vienna Convention on Succession of States in Respect of State Property, Archives and Debt 1983,[14] and the Convention on Biological Diversity 1993.[15] Notwithstanding, the subject matter of PSNR was further expanded to cover fundamental right of peoples to self-determination. This right is contained in the International Covenant on Civil and Political Rights, 1966

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[11] United Nations General Assembly Resolution 3201, 1 May 1974, UN Doc A/RES/S-6/3201, Para 4(e).

[12] Schrijver, N.I., Sovereignty Over Natural Resources: Balancing Rights and Duties, University of Groningen, 2008, p.8.

[13] UNGA Resolution 3281 (XXIX) December 12, 1974.

[14] This was adopted on 8th April 1983, but not yet in force.

[15] This was adopted on 5th June 1992.

(ICCPR) and International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR).[16]

With development of international human rights, it was clearly stipulated that 'non-state actors and communities' are vested with the right to freely dispose of their natural wealth and resources.[17] Similar protection was extended to minority groups, particularly the 'indigenous people'[18] who also have right to freely own and dispose their natural wealth and resources. This human approach recognizes the link between the principle of PSNR and right to self-determination on ownership and control of natural resources.[19]

Nevertheless, there are variations on the construction as to who enjoys the right to PSNR at international level depending on the circumstance of each case. This is because there is no consensus as to the legality of principle of PSNR. While some scholars argue that PSNR is part of the customary international law, others hold that there is no treaty which could signify uniformity and consistence among states. The existing evidence of the principle is declarations which constitute non-binding instruments.[20] However, some scholars regard the PSNR as a norm of international law which binds states regardless of ratification.[21]Moreover, the international courts

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[16] Refer to common article 1(2) of both the ICCPR and ICESCR 1966.

[17] Gilbert, J., the *Right to Freely Dispose of Natural Resources: Utopia or Forgotten Right*, Quarterly of Human Rights, Vol.31/2 of 2013, pp.328-329.

[18] Article 32 of the UN Declaration on the Rights of Indigenous Peoples of 2001.

[19] Pereira R. &Orla, G., *Permanent Sovereignty over natural Resources in the 21st Century: Natural Resource Governance and the Right to Self-determination of Indigenous Peoples under International Law*, Melbourne Journal of International Law, Vol.14 of 2013.

[20]Kiwory, G., *The Role of International Law in Intrastate Oil and Gas Governance in Tanzania, PhD Thesis, University of Bayreuth, 2018, pp.62-64.*

[21]ibid. pp.68-69pp.62-68.

and tribunals have used the PSNR to address conflicts between states and investors which resulted from nationalization of foreign properties by host state.[22] Hence, a principle of PSNR is an important principle which is recognized and enforced by judicial organs.

Nationally, Tanzania has applied the principle of PSNR by incorporating the public trust doctrine in the natural resources' laws. Initially, the colonial government adopted laws to the effect that natural resources were owned by the public through the governor and later on the President, who was a trustee.[23] This applied to forest, wildlife and water resources which were considered to be part of public land, hence owned by the public under the trusteeship of the President. The President's obligations arising out of the public trust doctrine is to deal with the required resource, in a manner consistent with interests of the beneficiaries, and not to have any beneficial interest in the natural resources.[24]

With regard to minerals, the colonial government through the Tanganyika Order in Council, declared all mines and minerals on any lands in the occupation of any native tribe, unless one possessed the mining right, to be vested to the Governor.[25] Specific legislations were adopted to govern the exploitation processes. The Mining Ordinance 1920 was supportive of small-scale mining by natives and Somalis while

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[22] A good example is the case of Libyan American Oil Co.(LIAMCO) vs.Libya, 17 I.L.M. 3 (1978), 4 Y.B. COM. ARB.177 (1979); Texaco Overseas Petroleum Company/California Asiatic Oil Co. and the Government of the Libyan Arab Republic (Texaco v. Libya), 17 ILM 1, paras. 83-86, 1977.

[23] For example, ss.3 and 4 of the Land Ordinance 1923 declared all land to be public land, and the Governor (later the President) was the administrator, for and on behalf of the natives of Tanganyika.

[24] A.G vs. Lohay Akoonay and Joseph Lohay (1995) TLR 80.

[25] Article 8(3) of the Tanganyika Order in Council 1920.

the Mining Ordinance of 1929 was supportive of large-scale mining by private firms in association with the government.[26] Every license holder including local people was required to pay a prescribed fee.

The Mining Ordinance of 1929 which was amended in 1931 continued to guide mining activities during independent Tanganyika. It was supplemented by the Investment and Protection Act 1963 which restricted repatriation of earnings from Tanganyika without seeking a requisite clearance status. Later, the government adopted the Gemstone Industry (Development and Promotion) Act in 1967, which illegalized smuggling of gemstones to neighboring countries particularly Kenya.

The Mining Act of 1979 repealed the 1929 Ordinance but still vested ownership of all mineral resources in the State. This Act was accompanied with Petroleum (Exploration and Production) Act, 1980, the Mining (Royalty) Regulations of 1989 and the National Investment (Promotion and Protection) Act of 1990[27] which established the Investment Promotion Centre (IPC). At this stage mining industry was significantly deregulated with a complete exclusion of the government monopoly in mining operations.

The Mining Act of 1979 was repealed and replaced by the Mining Act No.5 of 1998 following adoption of the Tanzania Mining Policy of 1997.The Act vested the right to own minerals in the United Republic of Tanzania,[28] although the general

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[26] For example, s.28 of the Mining Ordinance 1929 limited the number of alluvial claims that could be held by an individual prospector.
[27] Act No.10 of 1990.
[28] Mining Act 1998, s.5 (repealed.)

management of the law was vested to the Minister responsible for Mining Affairs and the Commissioner for Minerals. The Minister could conclude agreement and issue mining license for and on behalf of the United Republic of Tanzania; [29] issue mining license,[30] subject to consent of the government.[31] The holder of the mineral right was required to pay reasonable and fair compensation to the land occupiers for any damage or loss of properties.[32]

Further, the Minister for Minerals was vested final powers to determine applications for and grant of all forms of licenses,[33]and powers to enter into binding agreements with investor containing fiscal stability clauses. Furthermore, the government through the Written Laws (Miscellaneous Amendments) Act, 1999 repealed s.10 (2) of the Mining Act 1998 by providing a provision which tended to freeze the law with respect to the range and applicable rates of royalties, taxes, and other dues at the effective date of agreement. Generally, the Mining Act 1998 neglected the role of the citizens in the exploitation of resources; instead, it protected investors through confidentiality provisions, stabilized agreements and subjecting disputes to foreign law and fora.

The above state of events necessitated repeal of the Mining Act of 1998 by the Mining Act of 2010. This was preceded by a number of investigations commissioned

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[29] *Mining Act*, s.10 (repealed)

[30] Mining license was issued in different forms such as prospecting license, special mining license, retention license, mining license, a processing license, and so forth.

[31] Mining Act 1998 s. 95(1)(a) and (b) (repealed).

[32] *ibid.*, s.96(3).

[33] These included prospecting licenses, retention licenses, special mining licenses, mining licenses, gemstone mining license.

by the government as a result of peoples' outcry and disappointments.[34] The Act granted exclusive small scale mining license for all minerals including gemstone to Tanzanians,[35] and grant a Special Mining License on condition that a state participates in any mining operations,[36] and develop standard model for MDAs subject to review after every five years.[37] It further required the mining entities to give preference to local procurement of goods and services, [38] and extend fair compensation for relocated population.[39]

Despite the above state based regulatory mechanisms, people were still unhappy over the way these mineral resources were being exploited, particularly gold, gemstones, oil and gas.[40] Some of the complaints included lack of transparency and accountability; loss of revenue caused by tax avoidance, tax evasion, and aggressive tax planning schemes; and reasonable apprehension of corruption in the awarding of natural resources contracts at the expense of the people. Thus, the government of Tanzania enacted three pieces of legislations which sought to improve the natural resource ownership model in the country. These laws include: the Natural Wealth and Resources (Permanent Sovereignty) Act, 2017; the Natural Wealth and

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[34] These include: Committee to Investigate the Conflict between AFGEM and Small-scale Miners in Mererani (the Mboma Committee), 2002; Committee to Review Mining Development Agreements and Fiscal Regime for the Mineral Sector (Masha Committee), 2006; Government Committee o Negotiate with Mining Companies (The Bukuku Committee), 2006; and the Presidential Committee on Mining Review (The Bomani Committee), 2008.

[35] Mining Act 2010, s.8 (2).

[36] ibid., s.10 (1) and (2).

[37] ibid.,, ss.10 (4) and 12.

[38] ibid.,, ss.10 (4 (e), 44(v) and 49(h).

[39] ibid.,, s.97.

[40] Most of the complaints are documented in the report titled: UNITED REPUBLIC OF TANZANIA (2008), "Report of the Presidential Mining Review Committee to Advise the Government on Oversight of the Mining Sector", Vol. 2, April 2008, popularly known as the 'Bomani Report'. The committee was appointed by the president of the United Republic of Tanzania to make a review of the mining sector in Tanzania.

Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Act, 2017 and the Written Laws (Miscellaneous Amendment) Act No.7 of 2017.

Other Acts enacted to improve natural resource governance include: The Petroleum Act 2015; the Tanzania Extractive Industry (Transparency and Accountability) Act 2015; the Oil and Gas Revenues Management Act 2015; and the amendment of the Mining Act 2010 [41] through the Written Laws (Miscellaneous Amendments) (No.2) Act, 2019. The government has further adopted a number of regulations to govern mineral trading and local content matters.[42] Finally, the government adopted the Arbitration Act of 2020 and the Tanzania Investment Act of 2022 in order to regulate settlement of international investments. All the above enactments seek to entrench the principle of PSNR in Tanzania in order to achieve full and effective exploitation and utilization of the natural resources for the people of Tanzania, in a way that respects international investment laws. Thus, this thesis explores how the principle of PSNR and Public Participation in Tanzania is reflected in the laws governing extractive industry.

1.2 Statement of the Research Problem

Tanzania enacted a number of pieces of legislation which seek to ensure that natural wealth and natural resources are exploited for the benefit of the people and the state at large. Unlike the old regime which had a number of weaknesses, the new laws

[41] Cap 123 R.E. 2018.

[42] Such regulations include: the Mining (Minerals and Mineral Concentrates Trading) (Amendments) Regulations, GN No.138 of 2019; The Mining (Local Content) (Amendments) Regulations, GN No. 139 of 2019; the Tanzania Extractive Industries (Transparency and Accountability) (General) Regulations, GN No.141 of 2019; the Mining (Diamond Trading) Regulations, GN No.137 of 2019; the Mining (Mineral Beneficiation) (Amendments) Regulations, GN No.136 of 2019; the Mining (Mirerani Controlled Area), GN No.135 of 2019.

specifically implement the well-established international principle of Permanent Sovereignty over Natural Resources on areas of resource ownership and control, admission of and control of investors' activities, revenue sharing and revenue export, renegotiation and review of investment contracts, and dispute settlement mechanism.

Specifically, the laws declare the sovereignty over natural wealth and resources to be vested into the people of Tanzania and managed by the government for the benefit of the people and the state. Both the people and the government of the United Republic of Tanzania have right to take part in the extraction, exploitation or acquisition of natural wealth and resources.[43] However, administratively it is the President who is given the mandate to control the extraction, exploitation and use of the resources, for the benefit of the people, and independence and self-reliance of the people of the United Republic of Tanzania.[44] Short of the above things, agreements or arrangements on exploitation of natural wealth and resources would be regarded as unlawful.[45]

Notably, the National Assembly is given mandate to pass resolution(s) with respect to review and renegotiation of both new and existing contracts in order to tackle unconscionable terms.[46] The government is legally bound to convene negotiation process with the investor within 30 days of the resolution. Such process should not exceed 90 days from the date of service of the notice of negotiation, unless otherwise

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[43] Natural Wealth and Resources (Permanent Sovereignty) Act, 2017, s.8.
[44] ibid., ss. 4 and 5.
[45] *ibid*, s.6.
[46] Natural Wealth and Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Act, 2017, ss.4 and 5.

extended by mutual agreement.[47] However, to date there is no any evidence showing that negotiated agreements have been laid down to the National Assembly as per requirements of the law. Hence the law would be said either to be ineffective to make the government accountable to the Parliament or contains unrealistic promises incapable of performance.

On the other hand, the law clearly states that where agreement is not reached or there is refusal by investor to renegotiate, then the unconscionable terms contained in the previous agreement cease to have effect, hence be expunged.[48] This provision if applied strictly may give rise to unilateral change of contractual obligations, contrary to the binding commitment by states and investors to observe the terms in good faith. Such unilateral change of contracts has given to rise of investment disputes whereby people of Tanzania have been sued before international tribunals for breach of international investment principles which guarantee fair treatment of non-nationals, in which case invoking provisions of the state law is not acceptable.

On the other hand, the Permanent Sovereignty Act 2017 declares the immunity of the state's acts arising from exercise of its sovereignty from legal proceedings in any foreign court or tribunal,[49] and subjects all investment disputes in the extractive sector to be adjudicated by judicial bodies or other organs in the United Republic of Tanzania.[50] This means disputes from extractive sector can be resolved through international arbitration provided the seat of arbitration and the applicable law is

[47] *ibid.,* s.6.
[48] ibid., s.7.
[49] ibid., s.11(1).
[50] *ibid.,* s.11 (2) as amended by s.100 of the Arbitration Act 2020.

Tanzania. Nevertheless, the Tanzania Investment Act 2022[51] permits application of international bodies including the ICSID or other treaty-based mechanisms for settlement of investment disputes. Except for disputes from the mining and petroleum projects which are excluded from the application of Tanzania Investment Act 2022.[52] These three legislations governing investment in the natural resources are likely to pose a challenge in the interpretation and application of international investment forum clauses contained in the bilateral investment treaties signed by Tanzania which potentially could be regarded to be unconscionable terms under the law.[53]

Furthermore, the laws governing PSNR which seek to guarantee public participation in the decision making, particularly during the negotiation, monitoring and enforcement of mining contracts, are not well articulated. This is partly owing to lack of mandatory and binding provisions on public engagement; existence of unreasonable and restrictive provisions on access to natural resource related information and discretionary powers vested in the politically-one party composed organs responsible for natural resource governance. Despite legal requirement on involvement of National Assembly in the conclusion of binding agreements, it has not been effective enough to make the government accountable to the people due to its composition and political differences.[54]

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[51] Tanzania Investment Act 2022, s.33(2) (b) and (c)
[52] Ibid., s.2(1) (a) and (b).
[53] Natural Wealth and Resources (Review and Renegotiation of unconscionable Terms) Act, 2017, s. 6(2).
[54]Japhace P. & Henry M.K., *Transparency initiatives and Tanzania's extractive industry governance,*

Therefore, it is necessary to explore how the laws governing PSNR in the extractive sector adequately and effectively promotes state sovereignty over resources and public participation in the decision making in a way that respects peoples' right to self-determination and investor's right to fair treatment under international and domestic investment law.

1.3 Literature Review

The matter of permanent sovereignty over natural resources has been controversial among many scholars. The discussion has been centered in the area of subject and object of the right of PSNR, and the implication of the principle towards exercise of state authority over natural resources. The first group of authors has discussed the rationale for development of the Principle of PSNR. Schrijver[55] discusses how the right to PSNR has been vested to different personalities depending on the prevailing circumstances.

Essentially the right to PSNR was vested to the colonial states, but later it was vested to developing independent states, the peoples, indigenous peoples, and territories under foreign domination. The subject matter of the right to PSNR was ownership and control of natural wealth.[56] Both sovereign states and the peoples have the right to dispose freely of natural resources, right to explore and exploit natural resources, and right to use natural resources for national development.

Development Studies Research, 2018, Open Access Journal, Routledge Taylor & Francis Online, Volume 5, Issue No.1, pp.114-115. (accessed at https://www.tandfonline.com/doi/pdf/10.1080/21665095.2018.1486219?needAccess=true).

[55]Schrijver, N.I., *Sovereignty over Natural Resources: Balancing Rights & Duties*, University of Groningen, 2008.

[56]*ibid*., pp.5-23.

Further, states and peoples have right to regulate foreign investment; right to manage natural resources pursuant to national environmental policy; right to equitable share in benefits of trans boundary natural resources, and the right to expropriate or nationalize foreign investments.[57]Notwithstanding, states have duty to exercise right of PSNR for the development and wellbeing of the people; duty to respect for the rights and interests of indigenous peoples; and the duty to cooperate for international development.[58] Similarly, states have general duty to respect in good faith international commitment arising from treaties,[59] and duty to effect prompt, fair and adequate compensation upon nationalization of foreign assets.

On the other hand, Kilangi[60] discusses the dichotomy problem related with the construction of the principle of the PSNR. He discusses rights associated with PSNR to include: right to assert ownership of natural resources; right to manage and control exploitation of natural resources; freedom to exploit resources by state; and right to benefit from exploitation of the resources. These rights may be vested to the state, or state and the people, or the people depending on the approach adopted by the country.[61] Furthermore, the author explores approaches for implementation of the PSNR namely: resource-nationalism approach, resource-liberalism approach *and* the via media approach.[62] The choice of the approach depends on utility value of each

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[57]Schrijver, N.I., *Sovereignty over Natural Resources: Balancing Rights & Duties*, University of Groningen, 2008, pp.244-278.
[58]*ibid.*, pp.292-306.
[59] This is technically known as principle of *pacta sunt servanda.*
[60]Kilangi, *A., The Principle of Permanent Sovereignty over Natural Resources: Its Doctrinal and Theoretical Quagmires*, Jomo Kenyatta University Law Journal.
[61] These approaches are known as statist approach, state-people centred approach and the people – centred approach respectively.
[62] These approaches seek to implement the rights and duties underlined under the principle of PSNR

and the context of each state.

On another account Rugemeleza[63] discusses the legal implication of the public trust doctrine in natural resource exploitation in Tanzania. Under this doctrine, the government holds the resources as a trustee for benefit of people. It has the fiduciary duty to use care and skill to protect interests of the people; duty to furnish information to the public; duty to act prudently, diligently and in good faith.[64] The author observes that lack of public oversight and non-involvement of people in the management of resources leads to conflict between local people and investors on one hand, and disputes between government and investors on the other hand.[65] Finally, the author recommends for review of the law to promote active participation of the people in management of resources, and access to information.

However, despite significant discussion of the principle of PSNR and its underlined rights and duties, Schrijver, Kilangi and Rugemeleza have not discussed how the principle of PSNR can be used to protect rights of the local people to participate in the natural resource governance. Similarly, they have not explained the role and mandate of the local people in decision making process, and how the same can be invoked to validate or invalidate agreements on natural resource exploitation, a gap that has been covered in the course of this study.

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depending on the interest of the respective state. While the resource-nationalism approach focuses on enforcing state's rights, the resource-liberalism approach focuses on enforcing state's duties. The via media approach seeks to balance the rights and duties of the state.

[63]Rugemeleza, N., *Management of Natural Resources in Tanzania: Is the Public Trust Doctrine of Any Relevance* (available at http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/1405/nshalar042400.pdf?Square=1 , retrieved on 28th January 2019 at 11.00 am.

[64]ibid., p.3.

[65]ibid., pp.8-13.

The second group of authors has described PSNR as one of the instruments towards attaining sustainable development in the state. Generally, the concept of sustainable development seeks to ensure that the exploitation of natural resources benefits the needs of the current generation but without hindering needs of the future generation. According to Dalal, *et al*. (eds.),[66] sustainable development is a knowledge-intensive based subject which requires a continually updated understanding, application and reviewing of many issues, through integrated and interdisciplinary environmental assessment and participation of people.[67] Similarly, Beder[68] observes that the concept of sustainable development is used to limit the economic growth by incorporating natural resource exploitation with environmental protection. The author argues that achieving sustainable development requires adoption of common goals on economic development and environmental protection.

On the other hand, Voigt[69] discusses the controversy on the application of sustainable development principle in the developed and developing countries. While the former uses the principle to prevent developing countries from harnessing their resources on their own choice, the latter urge the western states to reduce emission by reducing number of industries and adopting appropriate technology. The author discusses the key principles of sustainable development including: equity and eradication of poverty; common but differentiated responsibility; precautionary

[66]Dalal, B. *et al*., (eds)., *Stakeholders Dialogues on Sustainable Development Strategies: Lessons, Opportunities and Developing Country Case Studies*, Environmental Planning Issues, International Institute for Environment and Development, London; No.26 of 2002.

[67]*ibid.*, pp.19-24.

[68]Beder, S., *Environmental principles and Policies: An Interdisciplinary Introduction* (available on amazon.com).

[69] Voigt, C., *Sustainable Development as a Principle of International Law: Resolving Conflicts between Climate Measures and WTO Law*; Martinus Nijhoff Publishers, Boston; 2009, pp. 11-30.

approach to human health; natural resources and ecosystems. Other principles include: public participation and access to information and justice; good governance; and integration and interrelationship of human rights, social, economic and environmental matters.

Likewise, Marie & Judge (eds.)[70] discusses the principle of sustainable development in that it entails sustainable use of resources, respect for the earth and consideration of its people for the past, present and the future. It entails procedural elements related to consultations between environment and socio-economic decision makers, transparency, participation of civil society and major stakeholders, and impact assessment.[71]

Similarly, Jayashankar[72] discusses the principle on sustainable development in India on what he calls 'conflict between development and environment.' He calls upon the court to consider sustainable development principle when hearing and determining reviews of government actions.[73] Unlike Jayashankar, Thornton and Beckwith[74] argue that the principle of sustainable development is regarded as 'an economic or political, rather than legal concept. Its implementation is through adoption of appropriate and specific laws. However, the above literature has not discussed how the local people in a particular state can be involved in the exploitation of natural

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[70]Marie,C. & Judge, H.E (eds)., *Sustainable Development: Principles in the Decisions of International Courts and Tribunals*, 1992-2012; Routledge Taylor & Francis group, London; 2017.
[71]*ibid*, p.8.
[72]Jayashankar, P. J., *Environmental Law;* Pacific Books International, Delhi, 2011.
[73]*ibid*, pp.51-61.
[74] Thornton J., and Beckwith, S., *Environmental Law;* Second Edition, Thomson Sweet & Maxwell, 2004; pp.12-13.

resources in order to achieve sustainable development. Furthermore, the authors do not discuss how the local people in developing countries can enforce their right to participate in the exploitation of natural resources. These key issues have been addressed in the course of this study.

The third group of authors has described the principle of PSNR as the exercise of civil and political right to self-determination which is accommodated under common article 1(2) of ICCPR and ICESCR. Jeremie[75] discusses how the right to self-determination is used to ensure peoples' right to freely dispose of natural wealth and resources. He argues that a sovereign state enjoys right to own and control natural resources subject to promotion of national development and interests of the peoples. He explicitly holds that interests and wellbeing of the people is a limitation of state's permanent sovereignty over natural resources. Accordingly, the government which exercises de jure and de facto authority has power to revise laws so as to protect the interests of the local people by ensuring there is fairer disposition of natural wealth.

Pereira & Gough[76] expresses the how the right to self-determination of indigenous peoples can be instrumental in natural resource governance. States' claim to sovereignty over natural resources can be put to test when local communities at individual or group level claim resource right to natural resources as exercise of peoples' right to self-determination. The author describes how indigenous peoples

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[75]Jeremie, G., *The Right to Freely Dispose of Natural Resources: Utopia or Forgotten Right?,* pp.315-336.

[76] Pereira, R. & Gough O., Permanent *Sovereignty over Natural Resources in the 21st Century: Natural Resource Governance and the Right to Self-determination of Indigenous People under International Law*, Melbourne Journal of International Law, Vol.14 of 2013.

can invoke the right to self-determination to challenge the validity of investment contracts which appear to favour investor's interests over national interests. Accordingly, the state is obliged to promote peoples' participation in the implementation of legislative and administrative measures that affect them.[77]

On the other hand, Kilangi[78] discusses the implication of extractive industry to the promotion of human rights in the country. Specifically, he points out that exploitation of resources usually leads to human rights violations including: denial of peoples' participation in exploitation of resources, abuse of child and labour rights, and expulsion of people. The author observes that a key right in the extractive industry is the right to self-determination which comprise of the inalienable right to development.[79] As a manifestation of the right to self-determination, people have the right to participate in the decision making and right to participate in the affairs of the state. The author observes that such desire may be achieved if people have access to information and there is involvement of local people at all levels of natural resource development.[80]

However, none of the above authors explain legal actions and measures (at individual and collective levels) that can be taken by the local people in order to enforce their right to self-determination when natural resources agreements concluded do not achieve sustainable development, a gap that has been covered in

[77] This is technically known as 'internal self determination.'

[78] Kilangi, A., *Role of International Law and Institutions in Facilitating Proper Governance and Management of Extractive Industries in Africa: Notable Development as Observed from Tanzania's Vantage Point* (Unpublished), pp.1-18.

[79] *ibid.,* p.17.

[80] *Ibid.,* p.18.

the course of this study.

The fourth group of authors has argued that state sovereignty over resources can be excluded or limited through stability clauses in investment contracts. Mato[81] discusses the implication of the stability clause in an investment contract on the host state's sovereignty. The logic for such clause is to entrench government commitment to protect investors in long-term investment agreements such as concessions, joint venture agreements and production sharing agreements, which are capital intensive, high tech and high-risk projects. The author describes how stability clauses have been construed before international courts by taking precedence over any state's enactments through invoking doctrine of estoppel and *pacta sunt servanda* principle.

Mato observes further that states will be able to review the agreement when a renegotiation clause is put in place and such exercise must be done in good faith and without affecting equilibrium of the agreement.[82] On the other hand, Cameron[83] holds that stability clauses play two roles: attracting investors but without compromising its competence to regulate the exploitation of resources, and securing investor's interests against change of future laws by the host state. Nevertheless, state may enact new law provided it enters into negotiation with investors in order to ensure economic equilibrium of the parties at the time of contracting.[84]

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[81]Mato, T. H., *The Role of Stability and Renegotiation in Transnational Petroleum Agreements;* Journal of Politics and Law, Vol.5 No.1, March 2012.
[82]*ibid*, p.35.
[83] Cameron, P.D., *Stabilization in Investment Contracts and Changes of Rules in Host Countries: Tools for Oil & Gas Investors*, Association of International Petroleum Negotiators (AIPN), Final Report (5th July 2006).
[84]Cameron, P.D., *Stabilization in Investment Contracts and Changes of Rules in Host Countries: Tools*

Cameron argues further that matters pertaining to environmental protection, health and safety issues, and other matters of public concern, may not be covered by the stability clauses.[85] These areas of investment contract are presumed to be known by the investor, whom through a duty of due diligence is bound to make prior analysis of the investment conditions in the host state. Like Mato, the author avers that host state may adopt new law provided such changes ensure fair and equitable treatment of investors,[86] and a mutual agreement which ensures economic equilibrium of the parties is maintained, including payment of damages and/or compensation.[87]

Similarly, Manirozzaman[88] explains how stabilization clauses oust the jurisdiction of the state to legislate on specific matters covered by the investment contract. This is because investment contract is regarded as special law which is supreme to laws made by Parliament, and such contract may be governed by international law or general principles of international law. Such situations are designed to restrict the host state to enact laws which seek to alter or change the contractual obligations of the parties.[89] The author further observes that the state's legislative powers cannot be limited by contract, except through negotiation in order to preserve economic

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for Oil & Gas Investors, Association of International Petroleum Negotiators, p.32.

[85] *ibid*., p.79.

[86] The author expresses that principle of fair and equitable treatment of investors (non-nationals) includes freedom against abuse of government power and observance of principles of good governance such as transparency, protection of investor's legitimate expectation, freedom from coercion and restraint, due process of law, procedural propriety and good faith.

[87] Cameron, P. D*; op.cit.* Chapter Four: Enforcement of Stability Provisions, pp.54-71.

[88] Manirozzaman, A.F.M., *The Pursuit of Stability in international energy investment contracts: A Critical appraisal of the emerging trends*, Journal of World Energy Law & Business, Vol.1, No.2 of 2008.

[89] Manirozzaman, A.F.M., *The Pursuit of Stability in international energy investment contracts: A Critical appraisal of the emerging trends*, Journal of World Energy Law & Business, Vol.1, No.2 of 2008, pp.121-124.

equilibrium of the parties and subject to fair and equitable treatment of investors, including payment of damages.[90]

The use of stability clauses appears to have been preferred in Africa in different forms. Gehne& Romulo [91] express three types of stability clauses which have been used to limit sovereignty of the state over natural resources, namely: freezing clauses (also called classic approach), economic equilibrium clauses and hybrid clauses.[92] Unlike freezing clauses which are mostly favoured by states in the Sub-Sahara, the economic equilibrium clause respects sovereignty of state over natural resources though it appears to be costly in terms of damages and compensation involved.[93] Moreover, none of the above authors have explained significantly how the host state may justify its change of law for protection of internationally protected peoples' right to participate in the natural resource governance. Similarly, the authors do not discuss the legal implication of the reforms of the law in Tanzania to the existing contract and liability of the state thereto, a gap that has been covered in the course of this study.

On the other hand, the fifth group of authors has explained the implication of investment regulation to the state and peoples' sovereignty over natural resources. Kilangi[94] expounds on the key areas of investment regulation which have been

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[90]*ibid*., p.144.
[91]Gehne, K. & Romulo, B., *Stabilization Clauses in International Investment Law: Beyond Balancing and Fair and Equitable Treatment*, Swiss National Centre of Competence in Research, Working Paper Bo.2013/46.
[92]ibid., p.3.
[93]*ibid*., p.4.
[94]Kilangi, A., *Attempts to Develop a Multilateral Legal Framework on Investment: Lessons for Africa*

addressed by international investment law. Such areas which affect principle of PSNR include: admission and treatment of investment; management of corporations; regulation of flow of capital and exportation of profits; and dispute settlement framework. These areas which were formerly provided for by customary international law are now codified in the treaties. Consequently, state parties are obliged to respect investment contracts and acquired rights in good faith, ensure fair and equitable treatment to foreign investors and non-abuse of rights, including access to international courts.[95]

Similarly, the Institute for Human Rights and Business (IHRB)[96] discusses fundamental rights that must be considered when regulating investments in the extractive industry. The states and investors are required to uphold basic values, including: community participation and access to information; labour associated rights; right to property' right to fair compensation in case of displacement, and equality of all people before the law.[97] The author further describes rights specific to indigenous persons, inter alia, the right of participation and self-determination which are contained in 'the principles of consultation and free, prior and informed consent.'[98] The author avers that some of these values have been accommodated in

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in the Context of its Extractive Industry (Unpublished).

[95] The internationalists provide that legal relationship arising out of investment contracts (including stability clauses) between foreign investors and the state is governed by international law since states and individuals are subjects of international law.

[96] IHRB., *Human Rights in Tanzania Extractive Sector-Exploring the Terrain;* (December 2016), available at www.ihrb.org/focus-areas/commodities/human-rights-in-tanzania-extractive-sector-exploring -the-terrain

[97] *ibid*, pp.26-28.

[98] IHRB., *Human Rights in Tanzania Extractive Sector-Exploring the Terrain;* (December 2016), available at www.ihrb.org/focus-areas/commodities/human-rights-in-tanzania-extractive-sector-

Tanzania by adopting the local content policy[99] which seeks to encourage corporate social responsibility.[100]

On the other hand, Ombera[101] discusses the legal reforms in the regulation of investment in the extractive sector. The author discusses how liberal principles on trade and investment were crafted to encourage private investments in developing countries. Such principles include a principle of fair and equitable treatment of investors, non-discrimination principles, and ICSID compulsory arbitration or conciliation.[102] The author discusses that new reforms vest resources into the people and the state; prevents foreign dispute settlement processes and subjects agreements to review and renegotiation. [103] He concludes by pointing out that the reforms are likely to affect state's obligation under international investment law, including: breach of terms of stability clauses, confidentiality and trade secrets, and fair access to arbitration tribunals.[104]

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exploring -the-terrain, pp.34-36.

[98] This is known as Local Content Policy of Tanzania, which follows enactment of the Petroleum Act 2015, Oil and Gas Revenue Management Act, 2015 and the Extractive Industries (Transparency and Accountability) Act, 2015. These legislations were made to ensure the exploitation of oil and natural gas benefits the people of Tanzania.

[98]IHRB., *op.cit,* pp.40-44.

[98]Rugemeleza, N., *Management of Natural Resources in Tanzania: Is the Public Trust Doctrine of Any Relevance* (available at http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/1405/nshalar042400.pdf? Square=1, retrieved on 28th January 2019 at 11.00 am.

[98]Ombera, J.S., Liberal Rules on Trade and Investment and the False Promise in Developing Countries: A Tanzanian Perspective, IJA Journal, Volume 1, Issue No.11, June 2018; ISSN 2467-4680.

[98]ibid., pp.35-36.

[99] This is known as Local Content Policy of Tanzania, which follows enactment of the Petroleum Act 2015, Oil and Gas Revenue Management Act, 2015 and the Extractive Industries (Transparency and Accountability) Act, 2015. These legislations were made to ensure the exploitation of oil and natural gas benefits the people of Tanzania.

[100]Ombera, J.S., Liberal Rules on Trade and Investment and the False Promise in Developing Countries: A Tanzanian Perspective, pp.40-44.

[101]ibid.

[102]ibid., pp.35-36.

[103]ibid., p.39.

[104]Ombera, J.S., Liberal Rules on Trade and Investment and the False Promise in Developing Countries: A

Despite the enumeration of rights and issues to be regarded in the investment regulation, Kilangi, IHRB and Ombera do not express how the government of Tanzania can protect its people's right to self-determination in the investment laws and regulations, and how people may enforce right to public participation in order to attain sustainable development, a gap that has been covered in this study.

The firth group of academic scholars discusses the right to self-determination in terms of public participation in the natural resource governance. Every state is at liberty to design models for engaging people in the decision making. Donald [105] explains that rational elitist model gives bureaucrats the chance to make decisions on behalf of the people because they are believed to possess appropriate knowledge and skills to pursue any problem and maximize societal utility. This means that elected leaders are perceived to know the problems of the society; hence better placed to determine solutions for the people. However, Sebola[106] argues that there cannot be an expert claiming to represent the public's interests rather than the general public.

On the other hand, Lowry[107] submits that pluralist model is suitable for citizen engagement because it affords social groups (such as trade unions, business entities, religious groups, government agencies, professional associations, and so forth) an

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Tanzanian Perspective, pp.37-40.

[105] Donald, N.Z. et al (eds)., Underlying Concepts and Theoretical Issues in Public Participation in Resource Development in Human Rights in Natural resource Development: Public Participation in the Sustainable Development of Mining and Energy, Oxford University Press, New York (2002), p. 85.

[106]Sebola, M.P., Communication in the South African Public Participation Process: The Effectiveness of Communication Tools, 9 African Journal of Public Affairs, 6 (2017), 27.

[107]Lowry, A.L., Achieving Justice Through Public Participation: Measuring the Effectiveness of New York's Enhanced Public Participation Plan for Environmental Justice Communities, Maxwell School of Citizenship and Public Affairs, Unpublished PhD Thesis, Syracuse University (2013). p. 20.

opportunity to influence policy making process. This is also supported by William[108] who avers that the pluralist political system seeks to accommodate interests of salient groups in the society without affecting the ability of the state and community to secure collective interests. Similarly, Richard[109] argues that pluralism accepts that a good government must have the Parliament, Judges and Bureaucrats who balance each other; but such government should not neglect the contribution of ideas, knowledge and experience by a plurality of interest groups. This means every person, natural or legal, must be involved in the decision-making process.

Conversely, Claus[110] argues in favour of the liberal model whereby the state would be required to protect its citizens and natural resources, within the limits set by the law, in a way that guarantees basic rights and liberties, and promotes fair competition among different political parties through periodic general elections and free media. However, Frank[111] discourages liberalism since it protects majority political interests (also known as majority tyranny) over minority rights, and limits citizen participation in elections where politicians are selected to represent people in the decision-making fora.

Moreover, Parkins[112] supports the use of participatory democracy model which considers public participation as an opportunity for 'public debate, personal

[108] William, N.E., Pluralism and Distrust: How Courts can Support Democracy by Lowering the Stakes of Politics, 14 *The Yale Law Journal*, (2005), p. 1293.
[109] Richard, B., Liberalism and Pluralism: An Introduction, Routledge Taylor & Francis Group, London and New York (2002), p. 4.
[110] Claus, O., Crisis and Innovation of Liberal Democracy: Can Deliberation Be Institutionalized? 47 Czech Sociological Review 3, (2011), pp. 453-456.
[111] Frank, C., Theories of Democracy: A Critical introduction; Routledge Taylor & Francis Group, London & New York (2002), p. 53.
[112]Parkins, J.R., & Mitchell, R.E., Public Participation as Pubic Debate: A Deliberate Turn in Natural Resource Management, Society and Natural Resources; *18 Taylor & Francis Group,* (2005), p.532.

reflection and informed public opinion' each affected person, political representatives and other stakeholders have an opportunity to influence the final decision. However, none of the above scholars has explained how the above models could be useful in protecting the right of the people to participate in the decision-making process in developing states, particularly Tanzania, a gap that has been filled in this thesis.

Conclusively, the existing literatures presuppose that the principle of PSNR is relevant on matters of ownership, control and use of natural wealth and resources. They explain the roles of the state to exploit these resources for and on behalf of the people. However, the issue of access to, control and ownership of natural resources for sustainable development by the local population appears to have been ignored by the scholars. This study therefore intends to fill the gap on how the laws and institutions adopting the principle of PSNR in Tanzania involve state and non-state actors in the natural resource decision making process.

1.4 Research Objectives

1.4.1 General Objective

The main objective of this study is to find out how the principle of PSNR in Tanzania's extractive laws is used to safeguard the local people's right to natural resources without attracting state liability under international and national law.

1.4.2 Specific Objectives

(i) To examine the existing legal gaps in the extractive laws governing Public Participation in the decision-making process in Tanzania.

(ii) To evaluate the effects of legal provisions governing PSNR on the validity and enforcement of the existing and new investment agreements under national and international laws

(iii) To propose amendment or enactment of laws that conform to standards governing PSNR and Public Participation in the decision-making as stipulated under various international and regional instruments.

1.5 Research Questions

(i) How does the law in the extractive industry protect the right of the people to participate in the decision-making process in Tanzania?

(ii) What are the effects of provisions governing PSNR on the validity and enforcement of the existing and new investment agreements under national and international laws?

(iii) Which measures and mechanisms should be taken in order to safeguard State's right to PSNR and effective public participation in the decision-making process as guaranteed under different regional and international instruments?

1.6 Significance of Study

Generally, this study has analyzed the notion of PSNR and Public Participation in the extractive laws of the United Republic of Tanzania from a state-people based and people-based approaches. This was achieved through comparison of the international standards and best practices in the extractive industry against national standards. Thus, the study has expounded on the need for the inclusion of the people in the exploitation and management of the natural resources so as to avoid a resource curse

phenomenon in the United Republic of Tanzania. Specifically, the study will be beneficial to the legislative and the executive arms of the government as it has proposed a new approach towards adoption of the internationally recognized principle of PSNR in the domestic laws without compromising the interests of investors and sustainable development of the local people.

Secondly the knowledge generated from the study will be helpful in establishing tools for ensuring sustainable exploitation of resources in Tanzania. On the part of the government there is a need to revise its laws and policies so as to effectively exercise its sovereign resources rights without affecting investor's rights to fair treatment under international investment laws. Similarly, the government will also need to amend its laws governing public engagement in the decision-making process in order to effectively guarantee people's right to participate to be involved in the resource governance. On the part of non-state actors including NGOs, this study will act as a tool to advocate for policy and legal reforms and raising awareness to the people on matters of natural resource governance.

Finally, the study is important to members of academia including lecturers and students in the higher learning institutions as it will act as learning material in the studies related to natural resource laws, especially Mining Law and Petroleum Law. Further, the study is important to other researchers within Tanzania and outside Tanzania as it sets foundation for further researches in the area of natural resources regulation with a view to ensure that resources in developing states are exploited for sustainable development of the people and the state.

1.7 Research Methodology of the Study

This study has basically applied doctrinal research methods supplemented by empirical and comparative methods. This is because the study seeks to address the questions around the implementation of the principle of PSNR and Public Participation in Tanzania by examining the laws, relevant institutions, international instruments, precedent and practical experience which regulate the extractive industry.

1.7.1 Doctrinal Research Methodology

Doctrinal research (also known as black-letter research) mainly focuses on court judgments and statutes to explain a particular legal topic by a distinctive mode of analysis to authoritative texts that consist of primary and secondary sources. [113]One of its assumptions is that 'the character of legal scholarship is derived from law itself.'[114] Doctrinal method is the most preferred for this study because the primary data was obtained from legislations through reading relevant sources. The intention of the researcher here was to locate, collect the law (legislation or case law) and apply it to specific set of material facts in view of solving legal problem.[115]

Secondly, the nature of study is descriptive in nature revolving around interpretation and application of principle of PSNR. This demands application of interpretation

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[113]McConville, M., and Chui, W.H (eds)., *Research Methods for Law*, Edinburgh University Press, 2007, pp.3-4.
[114]ibid., p.4.
[115] McGrath, J.E., *Methodology Matters: Doing Research in the Behavioral and Social Sciences*, in Baecker R.M *et al.(*eds)., Readings in Human-Computer Interaction: Toward the Year 2000, Morgan Kaufmann Publishers, 1995,USA, p. 154.

techniques such as deductive and inductive reasoning, which are purely doctrinal in nature. The type of data, method of data collection and data analysis techniques that has been used do not require generation of numbers for analysis purposes. Consequently, the study collected data through documentary review of existing legal materials.

To appreciate the questions on how the extractive laws in Tanzania accommodate the right of the people to participate in the exploitation of resources, the study used both primary and secondary data. The primary data was acquired from different pieces of legislation (principal and subsidiary) and case laws on the principle of PSNR and Public Participation at local and international levels. The researcher employed historical, analytical and applied perspective approaches in examining various laws governing exploitation of natural resources in Tanzania.[116]

The researcher critically analyzed how the laws in the extractive industry in Tanzania have been invoked to protect the peoples' right to own and exploit resources since independence to the current situation. Thus, the historical background and situations which necessitated the enactment of particular provisions was considered and analysis made. The focus was to determine the mischief and the spirit of particular natural resource enactments in the mining sector in Tanzania, and whether the laws address the current problems relating to people inclusion in the natural resource exploitation processes.

[116]Kiunsi, H.B., Transfer Pricing in East Africa: Tanzania and Kenya in Comparative Analysis, PhD Thesis, The Open University of Tanzania, Tanzania, 2017, p.22.

The researcher used different libraries both physical and online libraries for the purpose of locating different laws, journal articles, books, commentaries, Hansards, policies, newspapers, magazine, and judicial decisions of local and international courts or tribunals. These literary works were accessed at the libraries and book stores, including: The Open University of Tanzania Library, University of Dar es salaam Library, the Tumaini University Library, the Tanzania Commission for Human Rights and Good Governance Library, Law Reform Commission of Tanzania Library, the Tanganyika Library, the LHRC Library and the Library of the Lawyers Environmental Action Team.

The qualitative data collected through doctrinal method was then analyzed through deductive reasoning and use of canons of statutory interpretation, particularly the golden and mischief rules, in order to substantiate the interpretation and application of the principle of PSNR in the extractive laws and the extent of public participation in the exploitation of mineral and petroleum resources in Tanzania.

1.7.2 Empirical Legal Research Methodology

As earlier stated the main research methodology that has been used in this study is doctrinal research, but it was complimented by empirical legal research. At times, both methods can be used concurrently to examine legal issues.[117] According to Epstein and King empirical research is based on observations of the world (data) which may be historical or contemporary, anthropological, interpretive, sociological,

[117] Burns, K. and Hutchinson. T., *The Impact of Empirical Facts on Legal Scholarship and Legal Research Training*, the Law Teacher, 2009, Vol.43, No.2, pp.166-168.

economic, legal or political. As long as the facts have something to do with the world, they are data, and as long as research involves data that is observed or desired, it is empirical.[118] It deals with the externalities affecting the operation of law; it reveals and explains the practices and procedures of legal, regulatory, redress and dispute resolution systems and the impact of legal phenomena on a range of social institutions, business and citizens.[119] Generally, empirical legal research looks at the impact of the law in practice, how effective the law and the legal system have been in dealing with the social and economic problems facing the society.[120]

(i) Data collection methods

Since the study seeks to identify the strength and weaknesses of the extractive laws in relation to principle of PSNR and effective peoples' participation in the natural resource's exploitation in Tanzania, the researcher applied key informant interview and questionnaire techniques in order to get information from respondents in the field. Interview was used as a tool to collect data mainly from legal experts in the area of Mining and Petroleum laws. Because of its flexibility the researcher was able to get detailed information in respect of the problem through raising additional questions and rephrasing questions in order to obtain accurate data. On the other hand, questionnaire was used to respondents whose availability for interview was impossible due to various reasons known to them.

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[118] Epstein, L. and King, G., *Empirical Research and the Goals of Legal Scholarship: The Rules of Inference*, University of Chicago Law Review, 2002, Vol.69, No.1, 2002, pp.2-3; also seeMcConville, M., and Chui, W.H (eds), *Research Methods for Law*, Edinburgh University Press, 2007, p.18.

[119]Makulilo, A. B., Protection of Personal Data in Sub-Saharan Africa, PhD Thesis, University of Bremen, 2012 p.54.

[120] Wilson, G., *Comparative Legal Scholarship*, in McConville, M., and Chui, W.H (eds), *Research Methods for Law*, Edinburgh University Press, 2007, p.87.

(ii) Population Sample and sample size

The researcher prepared and circulated structured questionnaires to the total target population of about 100 respondents. These include: legal practitioners, members of academia, government employees, members of political parties, members from civil society organizations, judicial officers, local leaders and the general public. Specifically, the researcher administered questionnaire to the respondents as follows: 3 employees from Tanzania Petroleum Development Corporation (TPDC);5 State Attorneys; 3 members of the TEITA Committee; 5 employees from the Ministry of Law and Constitutional Affairs;5 employees from the Ministry of Minerals and 3 employees from the Tanzania Investment Centre (TIC). Furthermore, researcher supplied questionnaire to 5 Judicial Officers; 3 Members of Political Parties; 10 legal experts; and 20 members of the local community.

Other key respondents from the Civil Society Organizations (CSOs) who were provided with questionnaire include: Haki Rasilimali Tanzania (5); Lawyers Environmental Action Team (LEAT) (3); Legal and Human Rights Centre-LHRC (3); Tanzania Policy Forum (3); Tanzania Women Lawyers Action -TAWLA (3); Tanganyika Law Society-TLS (5); Tanzania Relief Initiative (TRI) (3) and members of academia (10). However, out of 100 target population, only 70 were able to fill in and return the questionnaire to the researcher.

These provided relevant and useful information regarding legal challenges likely to be encountered in the course of implementing the principle of PSNR in Tanzania and possible reforms required to address the identified challenges. A copy of the questionnaire addressing key components of the principle of PSNR and Public

Participation is attached at the end of this thesis, and hereby marked Annexture A. Furthermore, the researcher was able to obtain relevant documents from some of the above institutions which were relevant in this study.

On the other hand, due to covid-19 situations and respondent's availability, the researcher conducted interview to five (5) distinguished legal experts in the area of natural resources laws and senior members of academia from the Law School of Tanzania, University of Dar es Salaam and Tumaini University Dar es Salaam College (TUDARCo). The researcher was able to identify the veracity of the responses through observing respondent's demeanor. Thus, the sample size of this study is 75 which were sufficient to provide data necessary to address main thematic areas of this thesis. Notwithstanding, the researcher intended to conduct interview to at least 10 members of the national assembly, but due to political situation that prevailed during collection of data, it was impossible to physically meet the MPs. However, this fact did not impede gathering of key information from this group as the researcher was able to extract key data from various Hansards of the national assembly that was held at Dodoma on 3rd July 2017.

Specifically, the study referred to the contributions from the then members of the national assembly who participated during the discussion of the Permanent Sovereignty Bill (now the Act) in the year 2017. These include: Hon.Palesso Cecilia, Hon. Emmanuel Mwakasaka, Hon. John Mnyika, Hon. Godless Lema, Hon. Riziki Mngwali, Hon. Zitto Zuberi Kabwe, Prof.Palamagamba Kabudi, and Hon. Doto Mashaka Biteko.Other MPs whose views have been used include: Hon.John Heche, Hoh.Japhet Hasunga, Hon.Jenester Mhagama, Hon.Ummy Ally Mwalimu,

Hon.Joseph Msukuma, Hon.Deo Sanga, Hon.Ester Mmasi, Hon.Peter Serukamba, and Hon.Mansoor Hiran.

Furthermore, the researcher had the advantage of going through opinions from the Joint Parliamentary Committee comprising of four distinct committees, namely: Committee for Energy and Minerals, Committee for Legal and Constitutional Affairs, Committee for Land, Natural Resources and Tourism, and Committee for Bylaws. These committees comprised of ninety-seven (97) MPs from both ruling party (CCM) and opposition party (CHADEMA, ACT Wazalendo and NCCR-Mageuzi). Generally, the Hansards provided the researcher primary information concerning diverging views, ideas and interpretations by the peoples' representatives when passing various laws, especially the Natural Wealth and Resources (Permanent Sovereignty) Act of 2017 and the Natural Wealth and Resources (Review and Renegotiation of Unconscionable Terms) Act of 2017. Thus, it was a primary source of data which helped the researcher to determine mischief and the intention of the Parliament when enacting the above two laws.

The researcher selected the above respondents using two techniques. The selection of government institutions and other non-state actors was purposefully done given the nature of the study. Thus, selection of respondents from the group of legal experts, legal practitioners, members of academia, members of political parties, members from CSOs and professional bodies was done using purposive sampling techniques. This is because data collected from these groups was dependent on the understanding of the laws and institutions governing natural resource exploitation in Tanzania. Conversely, the selection of members of the community and non-senior

government employees was done using random sampling. This is because the researcher did not possess ability to assess whether or not the respondent had requisite knowledge and skills in laws governing exploitation of natural resources.

Generally, the information collected through empirical research was summarized in the researcher's note book and analyzed through qualitative methods by subjecting the research questions to the facts (data) obtained from the field to resolve the problem. The researcher analyzed specific data by describing the attributes and justification thereof towards addressing formulated research questions. The statistical data is not provided since the nature of the questions was descriptive in nature.

1.7.3 Comparative Research Method

Comparative method is an instrument of improving domestic law and legal doctrine, or an instrument of learning and understanding of the law, which seeks to determine the systematic evolution of particular principles at specific regional and international levels, and how the principle applies in particular legal order, with a view of assessing common areas and gaps for improvement.[121] Comparative study is relevant for interpretation of national laws, legal reforms by offering suggestions for future developments, providing warnings of possible difficulties, and analyzing the national law critically in order to amend or adopt a legitimate law. [122] It is important for harmonization and unification of laws in particular countries with more or less

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[121] Mark Van Hoecke., *Methodology of Comparative Legal Research*, June 2015, pp.1- 2, accessed at https://www.researchgate.net/publication/291373684, on 4th October 2019 at 2.30 pm.

[122] Wilson, G., 'Comparative Legal Scholarship' in Chui, W.H and McConville, M., (eds), *Research Methods for Law*, Edinburgh University Press, 2010, p.87.

similar internal dynamics.[123]

Comparative research was used in this study to address the research question concerning mechanisms that would safeguard local peoples' right to exploit resources without compromising international principles on investors' protection. This study has referred to instruments providing for principle of PSNR and public participation at international and regional levels. The idea was to identify legal instruments that can be used to safeguard the local peoples' right to participation in Tanzania considering the accepted international standards. As regards public participation, this study has referred to binding and non-binding instruments including: Universal Declaration of Human Rights; International Covenant on Civil and Political Rights; UN Framework Convention on Climatic Change; Convention on Biological Diversity; the Rio Declaration on Environment and Development; and the UN Convention to Combat Desertification in Those Countries Experiencing Serious Drought and or Desertification Particularly in Africa.

More instruments that have been used to assess standards on public participation include: the African Charter on Peoples' Rights; the Agenda 21; the World Charter for Nature; the EAC Protocol on Environment and Natural Resource Management, and the UNECE Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (known as Aarhus Convention). Given its comprehensiveness on basic aspects of public participation,

[123] Bell, J., Legal Research and the Distinctiveness of Comparative Law , in Mark Van Hoecke and Francois Ost (eds), European Academy of Legal Theory Monograph Series, Vol.9 of 2011, at p.157.

and universal recognition and acceptance, this study has used the Aarhus Convention as a model law for assessment of the laws of Tanzania on public participation in the natural resource decision making process. The purpose was to evaluate whether or not the laws in Tanzania meet the prescribed international standards on public participation in the management of environmental resources.

On the other hand, the study has referred to various instruments providing for principle of PSNR since 1950s to the modern time, comprising of both binding and non-binding instruments. These include: the General Assembly Resolution (GAR) 626 (VII) of 1952 on the Right to Exploit Freely Natural Wealth and Resources, of 21 December 1952;GAR 2158 (XXI) of 1966 on PSNR;GAR 3201 (S-VI) on the Declaration on the Establishment of a New International Economic Order of 1974; GAR 3281 (XXIX) on the Charter of Economic Rights and Duties of States of 1974;and GAR 3517 (XXX) of 15 December 1975;[124] and the Rio Declaration on Environment and Development of 14 June 1992.[125] Other instruments used in this study include: the ICCPR, ICESCR and ACHPR.

All the above instruments were assessed along historical factors which prevailed at the material time which appear to affect interpretation and application of the principle of PSNR in the developing world. The idea was to synchronize how the principle of PSNR has been used to protect the right of the people to participate in

[124]This was Midterm Review and Appraisal of Progress in the Implementation of the International Development Strategy for the Second United Nations Development Decade, in which all 'countries' are called upon to take appropriate state measures to secure their right to PSNR.

[125] This Declaration affirms the fact that states have sovereign rights to exploit natural resources in accordance with the UN Charter and principles of international law, including the duty not to cause damage to neighbouring states.

the natural resource governance in the resource rich countries. Basically, data collected through comparative method was analyzed by qualitative means considering the cultural context of law, and the relevance of such international standards in our country. The data collected was then analyzed through deductive and inductive reasoning in order to establish the legal rules which may be used to improve the laws of Tanzania governing participation of people in the natural resource governance.

1.8 Scope of the Study

Although the principle of PSNR covers all types of natural resources, the scope of this study was limited to assessment of the laws and institutions governing adoption of PSNR and Public Participation in the Mining and Petroleum sectors in Tanzania. The choice of the mineral and petroleum resources was influenced by the ongoing government initiatives to link the extractive sector to industrialization strategies in order to achieve the desired economic growth.

Further, the two sets of resources are more or less similar in the sense that they carry common attributes, including but not limited to: exhaustibility; price volatility; capital and high tech intensive; involving complex web of stakeholders; mostly dominated by foreign companies; commonly affected by information asymmetry between investors and host states, resource curse and environmental risks. Similarly, both Mining and Petroleum are governed by the laws with common features and they are both affected by the PSNR provisions. Thus, the study has looked at the legislative and institutional framework governing adoption of PSNR and Public Participation in the Extractive Industry in Tanzania.

1.9 Limitation of the Study

This study was faced with few limitations that did not affect the quality of the work. First, there are limited local literatures in the area of permanent sovereignty over natural resources; hence the researcher used literature from other jurisdictions to fill in the gap. Basically, published works in the international journals have assisted to know standards and interpretation of various international instruments governing principle of PSNR.

Secondly, due to COVID 19 pandemic, the researcher largely used questionnaires as a method of data collection. Interview was only used for few people who were readily available and willing to discuss issues with the researcher. Consequently, not all respondents were able to return questionnaire to the researcher. However, this did not negatively affect the data collection exercise because the information collected from the respondents was complimented with primary information collected from the Parliamentary Hansards which was useful in assessing views, attitudes and perceptions of Members of Parliament and responsible sectoral ministers during legislative making debate.

1.10 Ethical Considerations

The researcher considered and complied with ethical considerations in this study. These ethical issues include obtaining informed consent of the respondents. The questionnaire provided respondents with freedom to skip questions or personal particulars. Further, the research observed principle of anonymity and confidentiality, save where identity of persons was within the public domain.

However, for published work source of information has been acknowledged in order to avoid plagiarism and for academic fairness to authors.

1.11 Structure of the Thesis

The thesis comprises of six chapters. The first chapter entails the general introduction to the study. The second chapter provides theoretical foundations of the principle of PSNR. It addresses concepts, approaches and theories governing the principle of PSNR and Public Participation in the decision making. The third chapter presents a discussion of international and regional instruments, precedents and empirical literature on principle of PSNR and Public Participation.

The forth chapter present an analysis of the legal framework governing the principle of PSNR and Public Participation in Tanzania. This covers discussion of laws that expressly provide for the principle of PSNR and laws that impliedly cover some aspects of the principle of PSNR, particularly substantive rights and duties related to public participation, access to information and access to justice. The fifth chapter evaluates the legal implications of the existing legal framework governing PSNR to the validity and enforcement of investment agreements. This chapter provides analysis of the challenges which may be encountered in the course of implementation of PSNR provisions. The last chapter provides for summary, conclusion and recommendation.

CHAPTER TWO

THE THEORETICAL FOUNDATIONS OF THE PRINCIPLE OF PSNR AND PUBLIC PARTICIPATION IN DECISION MAKING

2.1 Introduction

The Permanent Sovereignty over Natural Resources is one of the oldest principles that were developed by the international community in order to safeguard the states' political autonomy and economic independence. The notion of independence implies a number of things, including right of the state to exercise jurisdiction over its territory, permanent population, and duty not to intervene in the internal affairs of the other state. [126] It also refers to the ability of the state to provide for its own wellbeing and development without any foreign domination, subject to their laws and policies.

However, the exercise of the right to PSNR has been vested to different actors depending on the circumstances prevailing in a particular time. This has given rise to serious debate on the object and substance of the principle of PSNR leading to disputes on the content of the principle. This chapter explains historical origins of the principle of PSNR and addresses various concepts, theories and approaches governing PSNR and Public Participation as applied under this study.

2.2 The Origin of the Principle of PSNR

The doctrine of PSNR can be traced way back since the days of Justinian whereby the public was believed to possess inviolable rights in certain natural resources, particularly those properties regarded as common properties for all, including air,

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[126] Malcom Shaw, N., *International Law*, Sixth Edition, Cambridge University Press, 2008, p.212.

running water, sea and its shores.[127] Originally, members of the public used to protect public property against degradation and destruction through law suits. Later, the public trust doctrine was developed and applied both in England and United States, to ensure that private use of the common property was not contrary to the public interest.[128]With development of colonialism, there was widespread of the usage of the doctrine of public trust in different parts of the world, including Tanzania. Through article 8(3) of the Tanganyika Order in Council 1920, all-natural resources, including petroleum and minerals on any lands in Tanganyika, were declared to be vested to the Governor.

Under the public trust doctrine, the government held the common resources as a trustee for benefit of people, in which case the government had the fiduciary duty to use care and skill to protect interests of the people; duty to furnish information to the public; duty to act prudently, diligently and in good faith.[129] Apart from this doctrine which lawfully vested rights to state to regulate control of resources, other means such as military conquest, discovery and occupations were used to claim sovereign rights over resources.[130]

Basing on the freedom of navigation, trade and commerce advocated at the time, the colonial governments concluded non reciprocal treaties, concessions and contracts

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[127] Richard, J.L., *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, Iowa Law Review, Volume 71 of 1986 (republished by Georgetown University in 2010), at pp.632.
[128] Ibid., p.633-635.
[129]Rugemeleza, N., *Management of Natural Resources in Tanzania: Is the Public Trust Doctrine of Any Relevance*? p.3.
[130] Petra, G., *Sovereignty over Natural Resources-A Normative Interpretation*, Cambridge University Press 2019, pp.14-15.

which granted exclusive extra-territorial property rights to European sovereigns, companies or private individuals.[131] Petra[132] argues that systems of ownership of resources established during colonial administration had 'fundamental injustices including injustice of violence and destruction of rights of others; injustice of exclusion and radical inequality in distribution of opportunities, benefits and burdens. Thus, colonial injustices and inequitable agreements impacted the struggle for political autonomy and economic freedom in the colonies, Tanzania inclusive, through advocating for the principle of PSNR.

On the other hand, the principle of PSNR is associated with change of relationship between developed states and newly independent states due to a number of socio-economic factors at global level, such as: scarcity and optimum utilization of resources; promotion and protection of foreign investments abroad; nationalization of means of production and demand of economic independence by developing states.[133] Furthermore, the deterioration of trade terms, need to reinforce the principle of non-interference in internal affairs and protection of people's right to self-determination influenced the development of the PSNR.[134]Thus, the principle of PSNR was invoked by colonies and later newly independent states in order to claim equal right to own natural resources, 'an implied right to collective self-determination.'[135] This is what Abdullah &Alam[136]call 'economic sovereignty and

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[131] Petra, G., *Sovereignty over Natural Resources-A Normative Interpretation*, Cambridge University Press 2019, p.15.
[132]*Ibid*.,, pp.15-16.
[133]Schrijver, N.I; *Sovereignty Over Natural Resources: Balancing Rights and Duties*, University of Groningen, pp.5-6.
[134]*ibid.*
[135] Petra, G., *Sovereignty over Natural Resources-A Normative Interpretation*, Cambridge University Press 2019,

formulation of the right to self-determination.'

Principally, the efforts to codify the principle of PSNR have been described by various scholars to have begun from 1950s to 1990s through different phases. Each phase is characterized by particular political and economic conditions that existed in states. Miranda[137]explores origin of PSNR into two phases: a period from 1950s to 1960s which is characterized by decolonization movements to achieve political self-determination and economic independence, and a period after 1960s characterized by emergence of the human right dimensions of the right to PSNR. On the other hand, Abdullah &Alam[138]explain the origin of the principle of PSNR into three phases. The first phase is from 1952 to 1962 which is characterized by development of resolutions on the need for developing states to freely dispose of their natural wealth.

The second phase runs from 1962 to 1974 characterized by need to achieve a new international economic order for realization of economic justice.[139] The third phase starts from the late1970s to 1990s characterized by renegotiation of agreements and conclusion of bilateral treaties in order to attract foreign investments.[140] Sangwani[141] explains the origin of PSNR into four phases. The first Phase runs from 1952 to the

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at p.16.

[136]Abdullah, A.F. &Alam, S., *From Sovereignty to Self Determination: Emergence of Collective Rights of Indigeneous Peoples in Natural Resource Management*, The Georgetown Environmental Law Review, Vol.32 issue No.59 of 2019, p.62.

[137]Miranda, L.A., The *Role of International Law in Intrastate Natural Resource Allocation: Sovereignty, Human Rights and Peoples-Based Development*, Vanderbilt Journal of Transnational Law, Vol.45 of 2012, pp.793-794.

[138]Abdullah, A.F. &Alam, S., *op.cit.*, p.65.

[139]*ibid.*, pp.65 -66.

[140]*ibid*., p.66.

[141]Sangwani, P.N., *Permanent Sovereignty over Natural Resources and the Sanctity of Contracts, From the Angle of Lucrum Cessans*, Loyola University Chicago International Law Review, Vol.12 Issue 2 of 2015.

adoption of UNGA Resolution 1803 (XVII) in 1962. The second phase runs from 1962 to 1973 which constitute of reaffirmation of the principles propounded in Resolution 1803 (XVII) of 1962.[142] The third phase is the adoption of the Charter of Economic Rights and Duties of States (hereinafter referred to as CERDS) 1974. The fourth stage is what the author has called 'the aftermath of 1974' which constituted the integration of liberal and neo-liberal policies in the economic development processes.[143]

Unlike the above three authors, Fritz[144] elaborates the origin of the principle of PSNR in only two phases. The first phase covers a period from 1952 to 1962 which is characterized by the desire of the peoples and state to achieve full and absolute sovereignty over their natural resources. The second phase covers the period after 1962 which is characterized by the reaffirmation of Resolution 1803 (XVII) and political demand for economic sovereignty.[145] This author views the issue of sovereignty over natural resources in the two perspectives: as a tool for realization of political autonomy (self-governance) and as a bargaining aid to achieve economic self-determination. However, the author's analysis is limited to state's power to nationalize foreign properties and the need to pay compensation, leaving out human rights perspectives of the principle of PSNR.

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[142]Sangwani, P.N., *Permanent Sovereignty over Natural Resources and the Sanctity of Contracts, From the Angle of Lucrum Cessans*, Loyola University Chicago International Law Review, Vol.12 Issue 2 of 2015, pp. 155-156.
[143] *Ibid*., pp.156-157
[144] Fritz, V., *The Principle of PSNR and the Nationalization of Foreign Interests*, The Comparative and International Law Journal of Southern Africa, Vol.21 No.1 of March, 1988.
[145]*Ibid*., pp.78-79.

On the other hand, Schrijver discusses the origin of the principle of PSNR in approximately five phases. The author calls the first phase 'formative years' which covers a period from 1945 to 1962 whereby newly independent states championed for decolonization and economic independence.[146] The purpose of proponents of the PSNR led by Chile was to raise a voice for the international community to recognize states' sovereignty and right of the peoples to self-determination. The second phase comprise of a period between 1963-1970, where states now vigorously pursued the implementation of the PSNR for their economic development and redistribution of wealth and power between developing nations and industrialized European states or companies.[147]

The period from 1963 to 1970 was characterized by nationalization of properties by newly independent states for 'public purposes' and the need to pay adequate, prompt and reasonable compensation to foreign properties. This is what has been called by various authors as 'reaffirming the UNGA Resolution 1803(XVII) of 1962.' Furthermore, the author presents a third phase as the one running from 1971 to 1974 which is characterized by the demand for a New International Economic Order (NIEO). The result of this struggle gave rise to the adoption of CERDS of 1974[148].

The fourth phase covers a period from 1975 to 1990s which was dominated by human rights instruments on right to self-determination. Basically, the incorporation

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[146]Schrijver, N.J., *Sovereignty Over Natural Resources: Balancing Rights and Duties*, University of Groningen, 1995, pp.32-74.
[147] Ibid.,pp.76-86.
[148]*Ibid*., pp.86-103.

of peoples' right to self-determination as an aspect of the principle of PSNR was done through article 1(2) of both International Covenant on Civil and Political Rights, 1966 (1CCPR) and International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR). However, these instruments came into force on 23rd March 1976. From this time the right of peoples to PSNR including indigenous people and local communities became an important aspect in the field of natural resource exploitation. Furthermore, the principle of PSNR was also integrated into the environmental conservation strategies in order to achieve sustainable development, by imposing duties on states' power to exploit resources.[149]

The author represents the fifth stage as a shift from nationalism to pragmatism. It covers a period from 1990s onwards where now the world experienced what is termed as 'globalization'. The United Nations through financial institutions such as World Bank and International Monetary Fund advocated for free trade. The developing states were required to exercise the right to PSNR in accordance with their national laws but without compromising state obligations arising from international investment laws. The liberal principles such as multiparty democracy, *pacta sunt servanda,* treatment of foreign investors according to the minimum international standards, were made part and parcel of economic policies.[150]

Thus, a discussion of the origin of the principle of PSNR differs from one scholar to another depending on the nature and purpose of the study. However, there are

[149]Schrijver, N.J., *Sovereignty Over Natural Resources: Balancing Rights and Duties*, University of Groningen, 1995, pp.116-121.
[150]Schrijver, N.J., *Sovereignty Over Natural Resources: Balancing Rights and Duties*, University of Groningen, 1995, pp.161-180.

common things that appear in every scholarly work, particularly on areas of sovereignty of the people to dispose freely the natural resources as expressed in various international instruments. These instruments will be discussed further in chapter three of this thesis.

2.3 Key Concepts

The principle of PSNR is composed of three important terminologies, namely: 'permanent sovereignty' and 'natural resources.' These terms have collectively been used by scholars to signify economic and political independence of states over resources. Nevertheless, each term has its own legal connotation as explained hereunder.

(i) Permanent Sovereignty

The term 'Permanent' is defined in the Black's Law Dictionary to mean 'fixed, continuing, lasting, stable, enduring, not subject to change. '[151] Similarly, the Oxford English Dictionary defines it to mean 'lasting or intending to last or remain unchanged indefinitely.'[152]On the other hand, the Longman Dictionary of Contemporary English defines the term 'permanent' to mean 'existing perpetually; everlasting; intended to exist without change; never ending; eternal.'[153] This implies that the substance of the PSNR is eternally vested into right-holders and that it cannot be taken away. It signifies that the right to exploit natural resources is 'inalienable'

[151] Black, C.H., *Black's Law Dictionary,* Revised 4th Edition, West Publishing Co, 1968, p.1297 (available at http://heimatundrecht.de/sites/default/files/dokumente/Black%27sLaw4th.pdf).
[152] This was accessed at https://www.lexico.com/definition/permanent, on 12th July 2021 at 10:50 a.m.
[153] This was accessed at https://www.ldoceonline.com/dictionary/permanent on 12th July 2021 at 10: 55 am.

and ‘inherent’. This means that substance of PSNR is not created by the statute or treaty, but rather reaffirmed. Thus, this term is used in this study to mean that the power of a sovereign entity to exploit its own resources is always unlimited and endless.

On the other hand, the term ‘Sovereignty’ is both a political and legal concept which expresses ‘the autonomous nature of the state’s political power and its specific mode of operation in a distinctively juristic form.’[154] The political attribute of the concept ‘sovereignty’ which changes from one period to another affects interpretation of the principle of PSNR. Generally, sovereignty concerns with right of the people to political and economic self-determination. However, scholars define it differently by relating the concept to the juristic nature of the state, its organizational structures, and levels of democracy in the state.

Yolanda & Vincent[155] and John [156]define sovereignty in terms of its four attributes. First, it refers to the power of state to legislate, adjudicate and enforce laws over the people, things and events occurring within its territorial limits. Secondly, it means the capacity of the state to regulate movement across its borders without external interference. Thirdly; it signifies legal identity of the state to represent the people under international law; and finally, it signifies state’s freedom to make its foreign policy choices. On the other hand, Celia[157] traditionally defines ‘sovereignty ‘as the

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[154]Loughlin, M., *The Erosion of Sovereignty*, Netherlands Journal of Legal Philosophy, Volume 45 Issue No.2 of 2016, p.62.
[155]Yolanda, T. & Vincent, O.N., *The International Law Principle of Permanent Sovereignty over Natural Resources as an Instrument for Development: The Case of Zimbabwean Diamonds*, African Journal of Legal Studies, Martinus Nijihoff Publishers, Volume 6 of 2013, p.73.
[156]John, J. H., *Sovereignty-Modern: A New Approach to an Outdated Concept*, The American Journal of International Law, Volume 97 of 2003, p.786.
[157]Celia, R.T., *A Modest Proposal: Statehood and Sovereignty in a Global Age*; U.Pa. Journal of International Economic Law,

ability to exercise exclusive jurisdiction over citizens of the state, equality with other states and power to structure policies' for international relations.

The above presuppositions present a state-centric model of sovereignty which is based on the 'principle of external independence, internal authority, and ultimate legal supremacy of the state.'[158]Accordingly, the State is regarded as the only primary actor and true representation of the sovereign rights and duties under international law enjoying absolute, inviolable and unlimited 'highest authority' over other non-state actors within its territorial boundaries.[159] This means that the supreme political authority enjoys autonomous power over all affairs of the state (both internal and external affairs).

Nevertheless, the above approach has been criticized for being insufficient to explain the existing socio-political and economic realities in the world today. Under the existing legal order, power enjoyed by states is partly allocated to other non-state actors such as individuals, companies and international organizations through different ways, such as: investment contracts and bilateral agreements, recognition of universal human rights in the binding international instruments; adoption of international investment principles, and so forth.[160]States must exercise their sovereignty in 'accordance with international law' and must fulfill international and contractual obligations in good faith, breach of which has legal consequences on the

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volume 18 Issue No.3 of 1997, p.752.

[158]Loughlin, M., *The Erosion of Sovereignty*, Netherlands Journal of Legal Philosophy, Volume 45 Issue No.2 of 2016, p.60.

[159]Bhalla, G., &Sameeksha, C., *Sovereignty in the Modern Context: How Far Have We Come*? Journal of International Relations and Foreign Policy, Volume 2 Issue 2 of June 2014, pp.148-149.

[160]*ibid*., pp.153-160; also see Celia, R.T., *op.cit.*, p.749 and p.753.

state.

For example, where a state violates provisions on use of force under article 2(4) of the UN Charter, or where there is gross violation of human rights by state as to cause humanitarian crisis, the Security Council may take collective military measures to remedy the situation. However, the integration of liberal principles of democracy and good governance in order to fight abuse of powers by the political elites has also changed the content of the notion of sovereignty. John[161]and Wilson[162]argue that sovereignty in the recent years refers to questions about allocation of government decision-making power in the state, distribution of power within governmental and non-governmental institutions and the sovereignty of the people.

On another account Wilson[163] and Robert[164] agree that the ultimate sovereignty belongs to the people or citizens in a particular polity under which government powers are limited by the constitutional principles on the rule of law, including parliamentary supremacy and respect for human rights. This is what has been referred by Kurt[165] as 'popular sovereignty' in which legitimacy of government's actions depends on the will of the people which courts should seek to protect through judicial review. Most of state constitutions contain provisions providing that the sovereign power is vested to the people through their democratically elected

[161]John, H.J., *Sovereignty-Modern: A New Approach to an Outdated Concept*, The American Journal of International Law, Volume 97 of 2003, pp.786-793.
[162]Wilson, R. H., *Constantly Approximating Popular Sovereignty: Seven Fundamental Principles of Constitutional Law*, William & Mary Bill of Rights Journal, Volume 19 Issue No.2 of 2010, p.295.
[163]*ibid*., pp.305-306.
[164] Robert, F.A., Sovereignty, *Human Rights and Self-Determination: The Meaning of International Law*, Fordham International Law Journal, Volume 24 Issue no.5 of 2000, pp.1488-1493.
[165]Kurt, T.L., *Originalism, Popular Sovereignty and Reverse Stare Decisis*, Virginia Law Review, volume 93 of 2007, pp.1444-1446.

representatives.

Furthermore, a set of provisions safeguarding the rights and freedoms of the people, supremacy of the Parliament, Rule of Law, Independence of Judiciary and Ministerial Responsibility, are incorporated in most constitutions in order to ensure that a state is governed in accordance with the will of the people (also known as *grund norm.*) Robert [166] argues that any act which undermines the sovereignty of the people constitutes a threat to the peoples' right to self-determination.

The above people-based approach on sovereignty is desirable for analysis of the principle of PSNR in developing states on three main grounds. First, it underscores the power of the political elites, who claim to exercise sovereignty of the state in unlimited way, leading to abuse of power and occasioning of 'resource curse.' Accordingly, state officials would be required to conclude agreements on natural resources in accordance with the national law. Secondly, it vests ultimate authority to the people through 'intermediaries' to make decisions for the benefit of the people. For example, the national assembly and other people-accountable institutions would be able to scrutinize government affairs including enacting laws, reviewing agreements and government audited accounts and allocation of budget for development purposes.

Thirdly, it affords non-state actors such as Non-Governmental Organizations (NGOs), Community-Based Organizations (CBOs) and professional bodies, an

[166]Robert, F.A., *Sovereignty, Human Rights and Self-Determination: The Meaning of International Law*, Fordham International Law Journal, Volume 24 Issue no.5 of 2000, p.1486.

opportunity to influence legislative and policy decisions through public participation mechanisms, including public hearing, referendum, public surveys, and judicial review. This means that every person (natural or legal) who is likely to be affected by the government decision is given an equal opportunity to participate in the decision-making process. Since the government of Tanzania incorporated the principle of PSNR in which Members of Parliament and other stakeholders are involved in the natural resource governance, then this study applies the people-centric approach on sovereignty discussing the adoption of the principle of PSNR in Tanzania's extractive laws.

(ii) Natural Resource

The term 'natural resource' forms the object of the principle of PSNR. This term is defined differently depending on the field of study. Schrijver[167] defines it as 'supplies drawn from natural wealth which may be either renewable or non-renewable and which can be used to satisfy the needs of human beings and other living species.' This means natural resource is part of the 'natural wealth' which is defined as 'wealth of our planet, such as land, soil, forests, wetlands, natural harbours, rivers, lakes, beaches, seas and oceans, flora and wildlife, rainfall and other beneficial climatic conditions, including the sun, the wind and natural sources of energy.'[168]

On the other hand, the law of Tanzania refers to the concept as 'natural wealth and resources.' Section 3 of the Natural Wealth and Resources (Permanent Sovereignty)

[167]Schrijver, N.J., *Sovereignty Over Natural Resources: Balancing Rights and Duties*, University of Groningen, 1995, pp.18-19.
[168] ibid., p.15.

Act 2017[169]defines the concept to mean the following:

> *"All materials or substances occurring in nature such as soil, subsoil, gaseous and water resources' and flora, fauna, genetic resources, aquatic resources, micro-organisms, air space, rivers, lakes and maritime space, including the Tanzania's territorial sea and the continental shelf, living and nonliving resources in the Exclusive Economic Zone which can be extracted' exploited or acquired and used for economic gain whether processed or not".*

The above definition is somewhat general and may be confusing if applied in this study. Therefore, for purposes of this study the term 'natural resource' is used interchangeably with 'natural wealth' to signify minerals and petroleum. This is because the study squarely addresses how the principle of PSNR and Public Participation has been adopted in Tanzania's laws governing exploitation of minerals and petroleum. Laws governing other forms of natural resources such as land, forests, ports, marine resources, animals and so forth are not covered in this study.

(iii) Peoples

This terminology is very important when discussing the principle of PSNR in international and domestic laws. It has been used by various scholars to mean different but related concepts. Miranda,[170] Kiwanuka[171] and Gittleman[172] argue that during colonialism the term 'peoples' was used interchangeably with 'states.' Later it was used to signify 'states under colonial domination,' or 'a portion of population

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[169] Act No.5 of 2017.

[170]Miranda, L.A., *The Role of International Law in Intrastate Natural Resource Allocation: Sovereignty, Human Rights and Peoples-Based Development*, Vanderbilt Journal of Transnational Law, Vol.45 of 2012, p.805.

[171]Kiwanuka, R.N., *The Meaning of 'people' in the African Charter on Human and Peoples' Rights*, American Law Journal of International Law, Volume 2 of 1988, pp.100-101.

[172]Gittleman , R., *The African Charter on Human and Peoples' Rights: A legal Analysis,* Virginia Law Journal of International Law, Volume 22 of 1981, p.682.

such as 'indigenous peoples' and 'tribal groups' or 'the whole of the population in the particular state.' Similarly, Schrijver[173]discusses that initially the term 'peoples' was used to refer to 'people under colonial rule' who had not yet been able to exercise their right to economic self-determination. This represents an old notion of the term 'peoples' as used in the decolonization process.

However, Schrijver [174] argues that in the modern times the concept of PSNR in relation to 'peoples' is used to protect 'indigenous people' in the form of free, prior and informed consent as provided under article 32 of the UN Declaration on the Right of Indigenous Peoples of 2001. On the other hand, Duruigbo[175] observes that the concept 'peoples' refers to the 'entire population of a country' after the end of colonial rule. Since the basis of this thesis is to critically discuss the adoption of the principle of PSNR in Tanzania, then the modern approach will be used in this study to signify all the people of Tanzania including local communities where extraction of minerals, oil and gas is conducted.

(iv) Public Participation

This term has been defined by a number of scholars in different ways considering existing theoretical principles. Judith and David[176] observe that public participation is a multi-way interaction in which citizens and other players work and talk in both

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[173]Schrijver, N.J., *Sovereignty Over Natural Resources: Balancing Rights and Duties*, University of Groningen, 1995, p.9.

[174]*ibid.*, pp.328-329.

[175]Duruigbo, E., *Permanent Sovereignty over Natural Resources in International Law*, George Washington International Law Review, Volume 38 of 2006, p.53.

[176]Judith, E.I. and David, E.B., *Reframing Public Participation: Strategies for the 21st Century*, Planning Theory & Practice, Vol. 5 No.4, Routledge Taylor and Francis Group, December 2004 (accessed at https://escholarship.org/content/qt4gr9b2v5/qt4gr9b2v5.pdf, on 20 February 2020).

formal and informal settings in order to influence action in the public arena before conclusion is reached.[177] On the other hand, Kathryn and John[178] observe that public participation is a direct or indirect involvement through representation of concerned stakeholders in decision making concerning policies, plans, or programs. These categories of stakeholders include persons, groups or organizations which may influence or be affected by the decisions.[179]

Otto and Arron[180] regard public participation as the practice of consulting and involving members of the public, including interested and affected individuals, organizations and government entities, in the setting of the agenda, decision making and policy –forming activities of an institution.[181] Nevertheless, Lowry[182] presents a more technical definition of public participation as systems structured to provide members of the public with a forum to state their preferences and ensure that experts know and consider relevant facts in order to achieve qualitative sound decisions.[183] It is a way to develop policies and plans by educating citizens on the issue, uncovering shared interests and developing consensus around shared solutions.[184]

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[177]Judith, E.I. and David, E.B., *Reframing Public Participation: Strategies for the 21st Century*, Planning Theory & Practice, Vol. 5 No.4, Routledge Taylor and Francis Group, December 2004, p.428.

[178] Kathryn, S.Q & John, M.B., *Theories of Public Participation in Governance*, Handbook of Governance, 2016 (accessed at https://www.researchgate.net/publication/282733927 on 24 February 2020).

[179]*ibid*., p.1.

[180]Otto, S., and Arron, H., *Developing Global Public Participation (1): Global Public Participation at the United Nations* (accessed at https://acuns.org/wp-content/uploads/2013/01/Otto-Spijkers-Global-Public-Participation-at-The-United-Nations-15-5-2014.pdf, on 8th February 2020 at 12:16 hours.

[181]*Ibid*., p.4.

[182]Lowry, A.L., Achieving Justice Through Public Participation: Measuring the Effectiveness of New York's Enhanced Public Participation Plan for Environmental Justice Communities, Maxwell School of Citizenship and Public Affairs, a Thesis Submitted in Partial Fulfillment of the requirements for the degree of Doctor of Philosophy in Social Science of Syracuse University , May 2013 (accessed at https://surface.syr.edu/cgi/viewcontent.cgi?article=1181&context=socsci_etd, on 24th March 2020 at 1:26 hours.

[183]*ibid*., p.3.

[184]*ibid*.

Likewise, Rowe & Frewer [185] define public participation as group of procedures which are designed to consult, involve and inform the public and those to be affected by decision, to provide input into that decision.[186] This is based on the argument that public participation is 'public good' that should be maximized through participatory methods, in order to 'produce laws and policies directly related to the peoples' needs.'[187] Thus, for purposes of this study public participation is expressed as a process in which state and non-state actors likely to be affected by the law, plan and policies have equal opportunity to be involved in the decision making process. It is therefore an involvement of the people and different entities (public or private) in the policy and legislative processes, including negotiation of arrangements or agreements concerning with exploration, exploitation and distribution of natural resources benefits.

2.4 Approaches to PSNR

The principle of PSNR entails undisputed bundle of rights and duties which must be exercised in the course of its implementation and interpretation by courts. However, the most controversial issue is as to who may enjoy or claim rights over natural resources. This is what is known as 'subjects of the principle of PSNR' or 'beneficiaries of the principle of PSNR.' Basically, there are three approaches which explain legal personalities that possess capacity to realize resource rights, namely: state-based approach, people-based approach and people-state based approach.

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[185] Rowe, G., &Frewer, L.I., *Public Participation Methods: A Framework for Evaluation*, Science technology & Human Values, Vol. 25 No.1 (Winter), 2000.
[186] *ibid.*, p.512.
[187] Roger, S., *Public Participation: The Political Challenge in Southern Africa*, Journal of African Elections, Volume 9 Issue No.1 of 2010, p.10.

According to Armstrong[188]there are seven conditions for actual realization of the sovereign resource rights, namely: access to resource; ability to withdraw or remove resource units for one's use; and alienation of resource including the right to sell the resource and derive the income from selling resources.[189]

The above three constitute resource rights that allow the respective agent to derive benefits from resources. The author further provides for other supportive rights which include: right of exclusion; right to management of resources; right to regulate alienation and right to regulate income, including imposing of taxes.[190] Accordingly, a subject of the principle of PSNR should be able to exercise the above seven inherent rights of ownership over resources, including ability to dispose of resource for sustainable development. The idea of 'subject of the principle of PSNR' is one of international law, but any state may adopt any of the existing models to implement the principle of PSNR in the domestic legal regime. These approaches to PSNR and the legal implications are discussed below.

2.4.1The People-Centred Approach

This approach is based on improvement-based model where the agent of the principle of PSNR asserts right over resources on the ground of improvements or value added on that particular resource.[191] This is through acts or omissions which seek to preserve or improve the quality or values of particular resources. For

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[188] Armstrong Chris; *Against Permanent Sovereignty Over Natural Resources*, Politics, Philosophy & Economics' Sage Publications, Volume 14 Issue No.2 of 2015.
[189]*ibid*., p.132.
[190]*ibid.*
[191]Armstrong Chris; *Against Permanent Sovereignty Over Natural Resources*, Politics, Philosophy & Economics' Sage Publications, Volume 14 Issue No.2 of 2015, p.134.

examples: cultivating on lands, digging wells, constructing houses on land, planting of trees, protecting a particular resource from unlawful encroachment, creation of national parks or game reserves and so forth. These activities which in most cases are conducted by the people in the community add value on the property (land) worthy to be claimed and compensated for. Hence, non-state actors including indigenous persons and local community possess special rights through 'value addition chain,' which entitles them special claim over natural resource over states. This is because people came into existence before the formation of modern states.

Historically, before coming of colonialism people in East Africa were organized into 'kingdoms', which were by then independent.[192] This is to say, natural resources pre-existed the modern states created as a result of Berlin Conference. Thus, it is logically viable to say that people in the modern states, Tanzania inclusive, are the really owners of the natural resources, as an inheritance from their ancestral fathers, who participated in the decolonization process. This approach is supported by various distinguished scholars in the field of natural resource governance. Miranda[193] argues that the right to PSNR is vested in both the 'peoples 'of a state (the whole population) and the indigenous peoples existing in the particular state. She thus regards 'people' as sovereign right bearers' vis-à-vis the state.[194]

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[192] Examples of pre-colonial states or kingdoms include: Karagwe, Ankole, Buhaya, Kiziba, Kyamutwara, Ihangiro (now parts of Tanzania); Bunyoro, Buganda, Tooro, Kigezi, Rwenzururu, Busoga, Lango, Acholi, Karamoja, Bukedi, Bugisu (now part of Uganda).

[193] Miranda, L.A., *The Role of International Law in Intrastate Natural Resource Allocation, Sovereignty, Human Rights and Peoples-Based Development*, Vanderbilt Journal of Transnational Law, Vol.45 of 2012.

[194] Miranda, L.A., *The Role of International Law in Intrastate Natural Resource Allocation, Sovereignty, Human Rights and Peoples-Based Development*, Vanderbilt Journal of Transnational Law, Vol.45 of 2012, p.795.

Further, the author compares people in the modern states with the 'peoples' during decolonization process, in the sense that people in the developing states are still colonized economically by the governments in power. People still suffer unfair and unequal economic arrangements and thus need protection against oppressive governments.[195]She further argues that sovereignty enjoyed by the state is not the same sovereignty enjoyed by the people in the post-colonial era where people have been subjected to unequal distribution of development gains. Thus, vesting sovereign rights to marginalized population gives the people distributional power over natural resource vis-à-vis democratically elected leaders.[196]

Likewise, Alice[197] shares the same view that the principle of PSNR in the modern times is related to economic self-determination, where all people must participate in the exploitation of natural resources. It is concerned with internal democratic participation as opposed to creation of states.[198] Alice further argues that the right to PSNR in the world today cannot be separated from economic liberalism, which seeks to uphold people's participation in the exploitation of resources. Hence, citizens need to participate in the disposition process and sharing of proceeds for their own ends through democratic participation and self-governance, but without challenging the states' existence or territorial integrity.[199]

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[195]*ibid*., pp.807-808.

[196]*ibid*., p.808; also see Enyew, E.L., *Application of the Right to Permanent Sovereignty over Natural Resources for Indigenous Peoples: Assessment of Current Developments*, Arctic Review on Law and Politics, Volume 8 of November 2017, p.229.

[197] Alice, F., *Towards a Meaningful Rebirth of Economic Self-Determination: Human Rights Realization in Resource Rich Countries*, International Law and Politics, volume 39 of 2006.

[198]*ibid*., p.419.

[199]Alice, F., *Towards a Meaningful Rebirth of Economic Self-Determination: Human Rights Realization in Resource Rich Countries*, International Law and Politics, volume 39 of 2006., pp.432-443; also see Nanda,

Generally, the people-centred approach on the right to PSNR appears to be favourable in the African countries on number of reasons. First, there is an increasing demand of democratization in African continent and need to involve the people in the development process, in order to achieve Sustainable Development Goals (SDGs) by 2030.[200]As correctly argued by Loughlin[201] the ultimate sovereign authority is 'the people' which is the bearer of unlimited 'constituent power.'[202]

It is important to appreciate the inclusivity of the people in the natural resource exploitation. Some governments in Africa have been renegotiating natural resource agreements and arrangements by placing the people at the centre through democratically elected representatives. The whole idea of reviewing the existing agreements is to ensure that natural resources are exploited and used for the national economic growth and for the benefit of the people. Examples of countries that have renegotiated the mining agreements in Africa include: Democratic Republic of Congo,[203] Liberia,[204] Central African Republic (2009), Sierra Leone (2011), Guinea (2011) and Malawi (2011). The experience from these countries has shown that renegotiation of long-term contract is a pragmatic way to mitigate unpredictable investment risks and preserve contractual relationships.

V.P., *Self-Determination under International Law: Validity of Claims to Secede*, Case Western Reserve Journal of International Law, Volume 13 Issue 2 of 1981, pp.263-265.

[200] There are seventeen (17) Sustainable development Goals 2030 which inter alia, include: reduction of poverty and hunger; promoting good health and gender equality; provision of inclusive & equitable education and clean water; achieving sustainable economic growth and use of clean energy; and promoting sustainable cities and communities.

[201]Loughlin, M., *The Erosion of Sovereignty*, Netherlands Journal of Legal Philosophy, Volume 45 Issue No.2 of 2016.

[202]*ibid*., p.61.

[203] DRC renegotiated 61 mining agreements in 2007 and 2008, which were signed by the state owned Gecamines and foreign companies between 1996 and 2006 (See African Development Bank Group., *Gold Mining in Africa: Maximizing Economic Returns for Countries, Working Paper Series No.147 of March 2012, p.14).*

[204] The government of Liberia reviewed about 105 concession agreements in the year 2006 which were signed in the country between 2003 and 2006. Out of 105 agreements, 36 were recommended for cancellation, and 14 agreements for negotiation. About 30 of the reviewed agreements were improved (Source: African Development Bank Group., *Gold Mining in Africa: Maximizing Economic Returns for Countries, Working Paper Series No.147 of March 2012, at p.15*

Secondly, people-centred approach is likely to counteract abuse of power by government leaders and ensures equitable distribution of resources. Petra[205]observes that exploiting resources by governments in the interest of a small group (foreign companies or political leaders) while excluding the vast majority (the people) from enjoying benefits, is an abuse of power and it is unjust.'[206] Most governments in the resource-rich countries are accused of being unable to represent interests of the people; instead they have extremely violated peoples' rights and contributed to extreme poverty.[207] Thus, the only remedy to distributional inequalities and justice is through involvement of people through social groups, professional bodies, and other stakeholders.

Thirdly, the people-based approach seeks to safeguard basic human rights and development of the people. Yolanda & Vincent[208] state that development must not been seen only as economic progress in the form of infrastructure, but it must be determined with reference to its impact on the people.[209] As stated earlier on, governments have failed to represent interests of the people, instead used their exclusive power over resources to the detriment of the people, including mismanagement and embezzlement of public money;[210] evictions without compensation, and poverty due to poor social services and deaths.

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[205]Petra, G., *Sovereignty over Natural Resources-A Normative Interpretation*, Cambridge University Press 2019.
[206]*ibid*., p.35.
[207] Alice, F., *Towards a Meaningful Rebirth of Economic Self-Determination*: *Human Rights Realization in Resource Rich Countries*; International Law and Politics, volume 39 of 2006, pp.444-447
[208]Yolanda, T. & Vincent, O.N., *The International Law Principle of Permanent Sovereignty over Natural Resources as an Instrument for Development: The Case of Zimbabwean Diamonds*, African Journal of Legal Studies, Martinus Nijihoff Publishers, Volume 6 of 2013.
[209]*ibid*., pp.86-87.
[210] Different global reports show that African leaders possess large sums of money in the foreign banks and a lot of properties and wealth in the foreign countries. Tanzania has witnessed the same situation where in 2005 some of political leaders were accused of misuse of public money (refer to the Richmond and escrow scandals)

Generally, states are advised to adopt legislative and administrative measures in order to safeguard the right of the peoples and achieve 'good governance.' This is well articulated by Duruigbo who says as follows:

> *"The right of peoples to sovereignty over natural resources imports an entitlement to demand that governments manage these resources to the maximum benefit of the people. It has been correctly observed that (if) the phrase 'rights of peoples' has any independent meaning, it must confer rights on peoples against their own government… Primarily, this duty would restrain irresponsible use and management of resources by public officials and positively utilize the resources for peoples' benefits."*[211]

Similarly, Miranda[212] supports the people-centred approach since PSNR is used by non-state actors as 'backdoor' to peoples' claims over right to own resources. The author argues that PSNR is mostly applied in the intrastate natural resource allocation, seeking to regulate 'domestic relationship between governments and their nationals.' Since this thesis seeks to address how the right of the local people to participate in natural resource exploitation is reflected and practiced in Tanzania, this approach has been used to accomplish this task as shown in chapter four of this thesis.

2.4.2 People-State Based Approach

This approach is also called 'a people-state school' under which right to PSNR accrues jointly to the states and the people. [213] It is based on what Armstrong calls 'attachment-based special claims.' This approach assumes that the agent would claim ownership because such a resource is located in the designated boundary or territory,

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[211]Duruigbo, E., *Permanent Sovereignty and Peoples' Ownership of Natural Resources in International Law*, George Washington International Law Review, Volume 38 of 2006, p.67.

[212]Miranda, L.A., *The Role of International Law in Intrastate Natural Resource Allocation: Sovereignty, Human Rights and Peoples-Based Development*, Vanderbilt Journal of Transnational Law, Vol.45 of 2012, p.810.

[213]Kilangi, *A., The Principle of Permanent Sovereignty over Natural Resources: Its Doctrinal and Theoretical Quagmires*, Jomo Kenyatta University Law Journal, p.11.

which is under their strict control.[214] This means that, a state asserts ownership of all resources located in its territorial jurisdiction, whereas the people including indigenous peoples would rightfully claim ownership of resources in their communities.

Generally, this approach takes into consideration both state and non-state actors such as individuals, including indigenous peoples, corporate entities, and civil societies as subjects of international law. By nature, the operation of extractive industries throughout the value chains usually entails involvement of various stakeholders, including companies (private and public), government agencies, civil society organizations and the local communities. On the other hand, production process involves private companies as independent producers or junior mining companies, independent refiners, pipeline companies, service providers, transport, storage and trading companies. The state-owned companies, local indigenous companies, financial institutions (banks and insurance companies) and other stakeholders are usually integrated in the value chain through local content provisions.[215]

Each of the above stakeholders has legitimate expectations depending on their interests, positions, and alliances; hence they need to be involved in the natural resource governance. The classical international law regarded states as only the subjects of international law, so long as requirements for statehood existed, namely: permanent population, defined boundary, effective government and the capacity of an

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[214]Armstrong Chris; *Against Permanent Sovereignty Over Natural Resources; Politics, Philosophy & Economics*' Sage Publications, Volume 14 Issue No.2 of 2015, pp.136-137.

[215] Claudine, S. & Leonardo, G., *Extractive Industries: Optimizing Value Retention in Host Countries*, United Nations Conference on Trade and Development (UNCTAD), New York and Geneva, 2012, p.6.

entity to enter into foreign relations.[216] However, other essential attributes of statehood in the world today includes: independence, equality, autonomy, territorial authority and integrity, impermeability and intelligibility.[217]

Moreover, in the modern international law jurisprudence, non-state actors have also been regarded as subjects of international law, since they are also affected by the rule of law.[218]The issue as to whether corporate entities are subject of international law has been addressed by scholars. Jose[219]observes that corporations have been major 'international law actors' or 'de facto subjects' and influenced the making of treaties governing trade, investment, antitrust, intellectual property, labour, environmental protection and dispute settlement.[220] The author submits that a number of international investment regimes, including ICSID Convention, confer rights (*locus standi*) on corporations to bring their own claims against host states in the international courts; hence entitled to provisions of a due process.[221]

On the other hand, individuals have been subjects of international law since the famous Nuremberg trials after WWII, whereby thousands of people were tried, convicted and executed for war crimes. Since then, a number of human rights instruments at international and regional levels have been adopted to establish

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[216] Article 1 of the Montevideo Convention of 1933; also see Celia, R.T., *A Modest Proposal: Statehood and Sovereignty in a Global Age*, U.Pa. Journal of International Economic Law, Volume 18 Issue No.3 of 1997, p.751.

[217] Celia, R.T., *op.cit.*, pp.756-764; also see Loughlin, M., *The Erosion of Sovereignty*, Netherlands Journal of Legal Philosophy, Volume 45 Issue no.2 of 2016, p.61.

[218]Nijman, J.E., Non-*state actors and the International Rule of Law: Revisiting the 'realist theory' of International Legal Personality*, Amsterdam Center for International Law, Research Paper Series, 2010, pp.5-11 (also published in Noortmann , M (ed) *Non-state actors in International Law, Politics and Governance Series* – 2010).

[219]Jose, E.A., Are Corporations '*Subjects of International Law*?' Santa Clara Journal of International Law, Volume 9 Issue 1, January 2011.

[220]ibid., pp.5-12.

[221] Jose, E.A., Are Corporations '*Subjects of International Law*?' Santa Clara Journal of International Law, Volume 9 Issue 1, January 2011, p.14.

individual rights and obligations, enforcement procedures and remedies. It has been argued that individual rights and freedoms in treaties are not created by states, but states only confirm their existence and protect them.[222] This argument is supported by Janis[223] who says that 'it is wrong both in terms of describing reality and in terms of preferential expression, for the theory of international law to hold that individuals are outside the ambit of international law rules. Individuals are and should be within this realm.'[224]

Apart from natural and legal persons, a number of efforts have been undertaken by the international community to protect special groups of individuals, known as 'indigenous peoples.' The need for such protection arises from injustices that they face in the course of exercising their right to self-determination, which is accommodated in the international instruments.[225] The ground for such protection is based on the relationship with the land and the natural resources that the indigenous and tribal peoples have used traditionally, and which are necessary for their physical and cultural survival. This helps to ensure that the indigenous and tribal peoples continue to enjoy their traditional way of life and that their cultural identity, social structure, economic system, customs, beliefs and distinctive traditions are respected, guaranteed and protected by the States.

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[222] Eduardo, S., *NGOs: Legitimate Subjects of International Law*, Leiden University Press, 2012, p.275.
[223] Janis, M.W., *individuals as Subjects of International Law*, Cornell International Law Journal, Volume 17 Issue 61 of 1984.
[224] *ibid*., p.74.
[225] Mainly there are two UN instruments: The United Nations Declaration on the Rights of Indigenous Peoples of 2007 and ILO Convention on the Indigenous and Tribal Peoples Convention (No.169) of 1989.

It is on the above justifications that international instruments and tribunals have mandatorily required participation and inclusion of the indigenous people on matters that may affect their enjoyment to natural resources. However, the contentious issue is on what constitutes an 'indigenous group' for purposes of the right to self-determination. So far there is no common definition of what comprises 'indigenous people, but scholars, experts and judges have established key features of an indigenous community. Once it is established that a particular group meets such criteria, and then anyone who belongs into the group would be considered to be an indigenous person.

The United Nations Special Rapporteur on Minorities defined indigenous peoples as: 'Indigenous communities, peoples and nations which having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop, and transmit to future generations, their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems'[226]

On the other hand, the African Commission on Human and Peoples' Rights through its Working Group on Indigenous Populations/Communities adopted three criteria to

[226]Report of the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities E/CNA/Sub.2/1986/7/AddA, para. 379.

identify indigenous population. The first criterion is self-identification of the group basing on common values and tradition. Secondly, such population must exhibit a special attachment to and use of their traditional land, which is of fundamental importance for their collective physical and cultural survival as peoples. Thirdly, the population must be facing a state of subjugation, marginalization, dispossession, exclusion, or discrimination because they have different cultures, ways of life or mode of production than the national hegemonic and dominant model.[227]

Nevertheless, in the case of *African Commission on Human and Peoples' Rights vs. Republic of Kenya,*[228] the African Court on Human and Peoples' Rights outlined relevant factors to be considered when determining an indigenous community. These factors to be considered are: the presence of priority in time with respect to the occupation and use of a specific territory; a voluntary perpetuation of cultural distinctiveness, which may include aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions; self-identification as well as recognition by other groups, or by State authorities that they are a distinct collectivity; and an experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist.

Thus, from the above definitions an indigenous group of people would comprise of the society whose socio-cultural and economic ways of life depends on nature, particularly: agricultural activities, hunting and gathering of fruits, and whose

[227] Advisory Opinion of The African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples, adopted by The African Commission on Human and Peoples' Rights at its 41st Ordinary Session Held in May 2007 in Accra, Ghana, p. 4.
[228] Application No.006/2012(Judgment) of 26 May 2017, para.107.

traditional belief is squarely connected with the environment. Since most cases of people that have been considered to be indigenous people by the international tribunals appear to live in forests where there are animals, plants and minerals, it can be assumed that indigenous people should form a distinct traditional society which has not been modernized. However, the principle of PSNR as applied in the human rights and environmental law jurisprudence, regard the indigenous peoples to include members of the local community who need protection from unlawful and arbitrary acts of the state.

The last but not least are Non-Governmental Organizations (NGOs) which are accorded equal rights and obligations similar to what is provided to the International Government Organizations (IGOS) such as World Health Organizations (WHO), World Food Program (WFP), United Nations High Commission for Refugees (UNHCR), and so forth.[229] This is because of their contribution towards protecting human rights and provision of social assistance to the people. NGOs are created by the subjects of international law (states or individuals), through legitimate instruments such as treaties and constitutions duly registered by host states, in order to express peoples' opinions, including ability to institute a claim before the international and local courts, for and on behalf of the people.[230] Thus, civil societies are subjects of international law, capable of possessing rights and obligations.

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[229] Eduardo, S., *NGOs: Legitimate Subjects of International Law*, Leiden University Press, 2012, p.277.

[230] There is a good number of scenarios under which IGOs and NGOs have instituted cases before international tribunals for protection of peoples' rights to PSNR, e.g., *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council vs. Kenya*, 276/2003, African Commission on Human and Peoples' Rights, February 4 2010; *African Commission on Human and Peoples' Rights vs. Kenya*, 006/202, May 26 2017.

Principally, the people-state approach recognizes the fact that notion of 'sovereignty' represents both 'sovereignty of the state' and 'sovereignty of the people'. The former signifies 'supremacy of the representative government 'and the latter signifies 'supremacy of the people.'[231] However, it has been argued by scholars that the state and the people are different holders of the right to sovereignty over natural resources. Substantively, a state is merely a medium (intermediary) through which people exercise their rights under international law.[232]Crawford[233] explains that the right of state is not synonymous with rights of the people,[234] while Yolanda& Vincent argue that the right to PSNR accrues primarily to the people, but exercised through the state.[235]

Basically, vesting right to freely exploit resources into two sovereign entities may give rise to complexities. There is the possibility of conflict happening where each of the two personalities decides to exercise control over natural resources. While a state would be exercising jurisdictional enforcement powers over properties within its borders, people including indigenous people could be claiming inherent right to PSNR. This obviously would cause what Alice[236] calls 'competition between people

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[231] James, E.C., *The Limits of Popular Sovereignty: Using the Initiative Power to Control Legislative Procedure*, California Law Review, Volume 74 Issue No. 2 of 1986, p.492.

[232] Yolanda, T. & Vincent, O.N., The International Law Principle of Permanent Sovereignty over Natural Resources as an Instrument for Development: The Case of Zimbabwean Diamonds, African Journal of Legal Studies, Martinus Nijihoff Publishers, Volume 6 of 2013, pp.77-78.

[233]Crawford, J., *The Rights of Peoples: 'Peoples or Governments'?* Bulletin of the Australian Society of Legal Philosophy, Volume 9 of 1985.

[234]ibid., pp.136-137.

[235] Yolanda, T. & Vincent, O.N., *The International Law Principle of Permanent Sovereignty over Natural Resources as an Instrument for Development: The Case of Zimbabwean Diamonds*, African Journal of Legal Studies, Martinus Nijihoff Publishers, Volume 6 of 2013, p.78.

[236]Alice, F., Towards *a Meaningful Rebirth of Economic Self-Determination: Human Rights Realization in Resource Rich Countries*, International Law and Politics, volume 39 of 2006.

and states for control of resources.'[237]

On the other hand, the people-state based approach is likely to be inapplicable in most African states where boundaries were arbitrarily set by colonial masters; the communities are more heterogenic and exists cross border natural and physical resources, such as forests, Lakes, and Mountains. Some areas in East Africa are inhabited by people with different culture and origin, who may not have common history in the respective resource. Thus, invoking PSNR to protect indigenous rights could be objectionable by the state as it may lead to tribalism, violation of constitutional right against discrimination, and disruption of peace. The struggles between people *inter se* and the government could result in what Abdullah &Alam[238] call a 'launching pad for secession'[239]

This approach is relevant to this study on adoption of the principle of PSNR in Tanzania whereby natural resources are said to be owned by the people of Tanzania but the control and management of resources is vested into the President as the trustee for and on behalf of the people. That is to say, both people and the President have concurrent sovereign powers to manage resources. However, supreme legislative and policy authority over resources is exercised by the President subject to involvement of non-state actors.

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[237] *ibid*., p.144.
[238] Abdullah, A.F. &Alam, S., From Sovereignty to Self Determination: Emergence of Collective Rights of Indigenous Peoples in Natural Resource Management, The Georgetown Environmental Law Review, Vol.32 issue No.59 of 2019
[239] ibid., p.70

Therefore, both people-centred approach and people-state based approach are relevant and they have been applied in this study in assessing how state and non-state actors are being involved in the management of natural resources, including negotiation and renegotiation of agreements or arrangements, enforcement of agreements and dispute settlement mechanisms. The main purpose is to ensure that natural resources are exploited for the benefit of the people but without causing unfair treatment and/or hardships to other non-state actors including mining companies, financial institutions and members of the local community.

2.4.3 The Functionalist Claims Approach

This kind of approach is addressed by Kilangi, A., in what he calls 'a statist approach' in which the right to dispose of natural resources is vested in the state. [240] It vests right to the state as an entity with executive roles over control and ownership of the natural resources. The state as a custodian of the public interest is empowered to take legal and administrative measures to ensure effective control of the resources. This would enable the state to exercise lawful and legitimate roles, including maintenance of peace and unity, and protection of individuals' basic rights and freedoms.[241]

The state-based approach considers cognizance of the principle under international law which regards state as the sole primary subject of international law to whom natural resource are vested and which the international community recognizes as a

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[240]Kilangi, A., *The Principle of Permanent Sovereignty over Natural Resources: Its Doctrinal and Theoretical Quagmires,* Jomo Kenyatta University Law Journal.

[241]Armstrong Chris; *Against Permanent Sovereignty Over Natural Resources; Politics, Philosophy & Economics',* Sage Publications, Volume 14 Issue No.2 of 2015, pp.139-140.

'sovereign entity.' States have power to regulate the conduct and consequences of activities within their territorial limits, including enactment of laws governing natural resource exploitation. Even, where stabilization clauses are inserted in the agreements to limit state's power to enact or change laws, it has been observed by courts that the host state is always vested with powers and authority to change laws so as to reflect change in the market forces, economic growth of the country and best interests of the people. The above position was observed in the case of *Government of State of Kuwait vs. the American Independent Oil Company*[242]whereby the arbitral tribunal refused to regard the 'stabilization clause' as an outright prohibition of nationalization throughout the period of concession.

Generally, international tribunals have maintained that the state has inherent right to freely dispose natural resources, including nationalization of foreign property. In the case of *TEXACO vs. Libya*,[243] the arbitrator observed that under international law territorial sovereignty conferred upon the State 'an exclusive competence to organize as it wishes the economic structures of its territory and to introduce therein any reforms which may seem to be desirable to it.' It was further observed that it was an 'essential prerogative of sovereignty for the constitutionally authorized authorities of the State to choose and build freely an economic and social system'.

The similar view was also articulated in the case of *Libyan American Oil Co. (LIAMCO) vs. Libya*[244]when the arbitrator observed that Resolution 1803 (XVII)

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[242] 21 I.L.M at 1008.
[243]17 *ILM* (1978), pp. 3–37, para. 59; also, in 53 *ILR*, p. 389.
[244]17 I.L.M. 3 (1978).

provide the duty on other states to respect the host states' sovereign right to dispose of their wealth and natural resources, which was regarded as the evidence of the recent dominant trend of international opinion concerning the sovereign right of States over their natural resources. Nevertheless, the court observed that states, when exploiting natural resources, should abide to the Charter of the United Nations and the principles of international law. Such decision tally with what Schrijver calls 'balancing Rights and Duties in an increasingly interdependently world' as he explains the power of the state to limit its sovereign right to PSNR by concluding agreements on resource exploitation, which must be observed in 'good faith.'[245]

The above position is also shared by Sangwani[246] who avers that the principle of sanctity of contract is always used by international tribunals as an estoppel against states' unilateral sovereign acts which may be used to negate contractual investor's 'legitimate expectations, the breach of which attracts compensation.'[247] This matter is intensively addressed under chapter five of this thesis. Basically, the strict application of statist approach serves a number of objectives. First, it protects resources against unscrupulous multinational corporations and foreign domination.[248] As stated earlier in this work, developing states have for a long witnessed unfair financial natural resource arrangement, and the mining activities have not benefitted states and the people, leading into what has been termed as 'resource curse.'

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[245]Schrijver, N.J., *Sovereignty Over Natural Resources: Balancing Rights and Duties*, University of Groningen, 1995, pp.244-292.
[246]Sangwani, P.N., *Permanent Sovereignty over Natural Resources and the Sanctity of Contracts, From the Angle of Lucrum Cessans*, Loyola University Chicago International Law Review, Vol.12 Issue 2 of 2015.
[247]ibid., pp.160-165.
[248] Yolanda, T. & Vincent, O.N., *The International Law Principle of Permanent Sovereignty over Natural Resources as an Instrument for Development: The Case of Zimbabwean Diamonds*, African Journal of Legal Studies, Martinus Nijihoff Publishers, Volume 6 of 2013, p.77.

Thus, vesting resource rights to the state ensures that investors conduct their affairs in a way that promotes national growth because the state has different mechanisms to monitor and ensure compliance, such as statutory institutions (ministries and agencies), laws and policies, and criminal justice, including police and courts. Fernando[249] argues that placing resource right to the state as an entity ensures that 'central planners make decisions on behalf of the people' and that the state is able 'to address unjustified grab of resources by those in power.' However, this could be possible where strong and public accountable institutions have been put in place.

The second argument in favour of statist approach is that vesting resource rights to states is a form of guarantee to the investors. Under classical international law, the people's interest is expressed by the head of a particular state or any authorized person in accordance with state law. The role of the state is to define public interest in the legal, policy and contractual documents. Under international investment law it is a principle that once the state official concludes an agreement with an investor, it constitutes the 'special law 'binding on the parties. This means that once a host state concludes a bilateral investment agreement providing for investor protection, it would be obliged to respect provisions of agreement in good faith, breach of which may give rise to compensation claims.

Another reason for this approach is that under public international law framework it is the state and not individuals that would be held liable for any breach of the

[249]Fernando, R.T., *Revising International Law: A Liberal Account of Natural Resources*, San Diego Law Review, Volume 52 Issue No.5 of 2015, p.1134.

agreement. Concluding an agreement with the state is one of the ways of securing investors' interests because it is certain as who would be accountable for any loss that may be suffered in case a 'public act' including change of the law leading to financial loss. It is an established principle of law that any state may adopt laws to govern the natural resources but such laws should not be contrary to provisions of international law, particularly those concerned with treatment of aliens or foreign property.[250] As a result, a foreign state will always and constantly invoke protective principle and take diplomatic protection [251] by instituting a suit against a defaulting sovereign state in order to safeguard interests of its nationals abroad.[252] This means that the statist approach takes cognizance of general principles of international law governing responsibility of states for wrongful acts.

However, despite its good objectives, the statist approach is not viable for the study at hand on three main reasons. First, the notion of subjects of principle of PSNR as understood today is no longer limited to states, but it is shared to other non-state actors including corporate entities, individuals, indigenous people, insurgents and belligerents, civil society organizations and so forth. Generally, the above non-state actors have sovereign right to participate in the natural resource governance. This is because any given extractive project involves a lot of stakeholders including national governments, local governments, companies including state-owned companies and their shareholders. It may also involve sub-contractors, international financial

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[250] Shaw, Malcom N., *International Law*, 6th edition, Cambridge University Press, 2008, p.650.

[251] Diplomatic protection includes consular action, negotiation, mediation, judicial and arbitral proceedings, economic pressures, a retort, reprisals, severance of diplomatic relations (Malcom, N., supra, at pp.808-810).

[252] The statist approach was applied in the case of Diallo (Guinea vs. Democratic Republic of the Congo), ICJ Reports, 2007, para.39; also, Mavrommatis Palestine Concessions case, PCIJ, Series A, No.2, 1924, p.12.

institutions and regional development agencies and other global consumers. Each of the above would claim sovereignty over resource depending on their specific interests in the extractive project.

Secondly, the laws seeking to implement the principle of PSNR in Tanzania clearly provide that people are the owners of resources and state through the President as a trustee. This means the law in Tanzania clearly adopts people-centred approach whereby the government simply exercises management functions, for and on behalf of the people. This makes the statist approach inappropriate for this study. Thirdly, Tanzania has concluded a number of international treaties and commercial agreements which partly limit its ability to regulate certain matters through international foreign investment agreements and laws. A good example of limitation is usually expressed through stability clauses in investment contracts whereby host states limit their power to change laws and various fiscal arrangements to the date when the agreement was signed. On the aforementioned factors, this study has not applied the statist approach in analyzing the adoption of the principle of PSNR in Tanzania's extractive laws.

2.5 Models on Adoption of PSNR

The principle of PSNR involves a number of entitlements which subjects of PSNR may claim for effective realization of right to self-determination. Basically, PSNR may be adopted by focusing on rights to the exclusion of duties, or by asserting duties with less emphasis on rights, or on a balance of both rights and duties. Each of these three models attracts different legal consequences on states and non-state actors as explained hereunder. The first model is known as resource nationalism or resource -

sovereignty model whereby states evoke the right-based approach to exercise right to PSNR. Here state asserts control over the resource by limiting power of foreign companies over resources.

Ideally, the term 'resource nationalism' is generally used to refer to a policy used by a resource-rich country to ensure maximum revenues from its natural resources; guarantee equitable sharing of the profits from its oil resources and ensure that natural resources are not depleted too quickly for the long-run benefit of consumers.[253]Thus, resource nationalism is the host government policy to assert greater state control over its natural resources located on its territory, mostly from multinational companies, for strategic and economic reasons. This policy objective can be manifested in different ways. Kilangi[254] explains features of resource nationalism to include: strict control over development, processing and marketing of resources; restrictions on exploitation of resources; control of capital importation; nationalization; and compulsory use of national law in dispute settlement.[255]

Other features of resource nationalism include: renegotiation or cancellation of existing natural resource contracts; joint venture sharing by nationals; stringent regulation of local content and restriction on exports of natural resource products.[256]

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[253]Sajjad, M.J. & Maniruzzaman, AFM., *Resource Nationalism Specter Hovers Over the Oil Industry: The Transnational Corporate Strategy to Tackle Resource Nationalism Risks*, The Journal of Applied Business Research, Volume 32 No.2 of March/April 2016, p.388.; also see Ward, H., *Resource Nationalism and sustainable Development: A Primer and Key Issues*, International Institute for Environment and Development, Working Paper of March 2009, p.14.

[254]Kilangi, A., *The Principle of Permanent Sovereignty over Natural Resources: Its Doctrinal and Theoretical Quagmires*, Jomo Kenyatta University Law Journal.

[255]Kilangi, A., *The Principle of Permanent Sovereignty over Natural Resources: Its Doctrinal and Theoretical Quagmires*, Jomo Kenyatta University Law Journal, p.13.

[256]*ibid*., p.14.

Furthermore, Ward[257] lists more attributes of resource nationalism to include: rejection of particular kinds of governance frameworks considered less favorable to the state; rapid increases in taxes payable by natural resource companies; reservation of specified quantities of natural resources on public interest, and compulsory corporate social responsibility.[258]

The second model for adoption of PSNR is known as resource-liberalism whereby the state exploits resources with much emphasis on duties enshrined under the principle of PSNR. This model is also known as resource privatism, or investment liberalism, or resource globalization. It seeks to implement duties existing in the principle of PSNR and respect of contracts entered between states and foreign companies, in good faith. It reflects liberalism and neo-liberalism policies which regard state regulation of the economy as a necessary evil and encourage self-regulation of the market. Kilangi explains justification for this approach to be increased interdependency in the world economy, whereby states are duty bound to cooperate for international global development, and fulfill the obligations concerning expropriation of properties, including payment of prompt and adequate compensation, and access to justice.[259]

Usually resource liberalism model is mostly supported by the industrialized states for reasons relating to investor protection in the host state, including the right of the parties to refer disputes to international forum, particularly international tribunals.

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[257]Ward, H., *Resource Nationalism and sustainable Development: A Primer and Key Issues*, International Institute for Environment and Development, Working Paper of March 2009.

[258]ibid., pp.8-9.

[259]Ward, H., *Resource Nationalism and sustainable Development: A Primer and Key Issues*, International Institute for Environment and Development, Working Paper of March 2009, pp.16-17.

Conversely, resource nationalism model is mostly preferred by the resource rich countries which seek to exploit their resources for the economic development of states and welfare of the people. However, under the existing global economic conditions, a more neutral position is required in order to balance the economic interests of states and investors in natural resource rich countries.

The impact of resource nationalism policies in Tanzania's extractive industries cannot be overstated as some mining companies were forced to suspend their operations. This has adversely affected the economy of the state; hence there is a need to devise other mechanisms which would safeguard interests of the state without affecting investor's legitimate interests. Kilangi suggests that a neutral position could be achieved if state's sovereignty is exercised in accordance with international law, an approach he has called via media approach.[260]

Thus, this study employs the via media model to assess how the principle of PSNR ought to be implemented in Tanzania so that the state is able to exercise sovereign resource rights in accordance with the underlined duties, including duty on fair treatment of investors and respect of international investment law. This approach is more appropriate for this study that seeks to ensure that rights of the people over natural resources are exercised without affecting the interests of other non-state actors including investors. The idea is to avoid as much as possible investment disputes and ensure inclusive economic growth.

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[260] *ibid*., p.17.

2.6 Public Participation Theories

The issue of public participation in the natural resource governance is paramount for actual and effective realization of the principle of PSNR. As previously explained, state and non-state actors are subjects of the principle of PSNR; hence they must be involved in the decision-making process. Principally, public participation plays a vital role in the governance of extractive industry. First, it is recognition of basic human rights regarding democracy and procedural justice.[261] Through public participation, every person in is given an opportunity to influence policy formulations, enactments, plans and other development programs. This certainly influences commitment to decisions by the people, promotes confidence in the institutions and public support.[262]

Secondly, allowing people and other stakeholders to air out their views and opinions improves the quality of policies, laws and plans by providing practical experiences, local knowledge and ideas which complements that of the experts or sponsoring institution.[263] Rowe & Frewer[264] and Renn [265]argue that though experts have technical expertise (data base and analysis) and laypersons may appear to be

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[261] Rowe, G., &Frewer, L.I., Public *Participation Methods: A Framework for Evaluation*, Science technology & Human Values, Vol. 25 No.1 (Winter), 2000, p.512.

[262] Lawrence, R., &Deagen, D., *Choosing Public Participation Methods for Natural Resources: A Context –Specific Guide;* Society and Natural Resources , Taylor & Francis, 2001 at p.862; see also Otto, S., and Arron, H., *Developing Global Public Participation (1): Global Public Participation at the United Nations* (accessed at https://acuns.org/wp-content/uploads/2013/01/Otto-Spijkers-Global-Public-Participation-at-The-United-Nations-15-5-2014.pdf, p.8.

[263] Otto, S., and Arron, H., *Developing Global Public Participation (1): Global Public Participation at the United Nations* (accessed at https://acuns.org/wp-content/uploads/2013/01/Otto-Spijkers-Global-Public-Participation-at-The-United-Nations-15-5-2014.pdf, p.7; also see Kathryn, S.Q.,& John, M.B., *Theories of Public Participation in Governance*, Handbook of Governance, 2016 (accessed at https://www.researchgate.net/ publication/282733927), p.3.

[264] Rowe, G., &Frewer, L.I., *Public Participation Methods: A Framework for Evaluation*, Science technology & Human Values, Vol. 25 No.1 (Winter), 2000, p.512.

[265]Renn, O., et al., *Public Participation in Decision Making: A Three Step Procedure*, Democracy and Policy Sciences, Vol.26, No.3, August 1993, Kluwer Academic Publishers, Netherlands, p.189.

ignorant, yet the general public may play a great role in risk management because they are potential victims and beneficiaries of different programs, and holders of public values and preferences. Thus, with a combined and collective solution from experts, stakeholders and citizens, quality and effective decision is more plausible and participant satisfaction[266] is guaranteed.

Thirdly, public participation engender public trust towards the government, enhances accountability and transparency. These are important aspects that are concerned with disclosure of information including agreements to the public which acts as a watch dog over government activities. Various governments have been accused of failing to respond to public needs and interests leading to reduced or lack of confidence.[267] Through public participation experts, bureaucrats, social groups, companies and citizens are able to share different information among themselves. This is likely to promote social learning, resolve conflicts that may arise and strengthen the relationship between the government and the community.[268]

Fourth, public participation ensures redistribution of resources and wealth between two right holders: state and the peoples. As argued by Robert[269] and James[270]

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[266]Participant satisfaction is one of the ways of evaluating public participation whereby decision is the result of integration of interests of all groups and persons who are likely to affected (see Coglianese, C., *Is Satisfaction Success? Evaluating Public Participation in Regulatory Policymaking*, Harvard University, John F. Kennedy School of Government, Working Paper Series. 10.2139/ssrn.331420, accessed at https://www.researchgate.net/publication/4895066_Is_Satisfaction_Success_Evaluating_Public_Participation_in_Regulatory_Policymaking , on 8 February , 2020.

[267]Cramton, Roger, C., *The Why, Where and How of Broadened Public Participation in the Administrative Process*, Cornell Law Faculty Publications, Paper 960 of 1972, at p.525 and p.528.

[268] Rebecca, M., *Public Participation in Energy and Natural Resources Development: A Theory and Criteria for Evaluation*, Canadian Institute of Resources Law, December 2010, p.12.

[269] Robert, F.A., *Sovereignty, Human Rights and Self Determination: The Meaning of International Law*, Fordham

sovereignty of the state which is protected through the concept of supremacy of the representative government, is distinct from sovereignty of the people which is protected through the concept of supremacy of the people. The actual balance of the state's sovereignty and peoples' sovereignty is likely to be achieved through promotion of public participation.

Therefore, one cannot discuss the adoption of the principle of PSNR in isolation with guaranteeing right of self-determination. These two phenomena are interdependent as they focus on autonomy of the people on matters of natural resource governance. The practical issue that may face states in promoting public participation is deciding on the model appropriate for collecting views from stakeholders. Basically, designing public participation model is influenced by the existing theories on public participation. The following are the theories which may be applied by the state in adopting laws and policies providing for public participation. This study seeks to adopt theories that ensure that persons in the state (natural or legal) are involved in the decision-making process so long as decision made is likely to affect their resource rights.

(i) Rational elitism

This is sometimes known as Progressive or Managerial theory. It is one of the earliest theories which put much emphasis on the experts as decision makers for the benefit of the society. The rational elitists (administrators) are believed to possess appropriate

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International Law Journal, Volume 24 Issue No.5 of 2000, p.1482.

[270] James, E.C., *The Limits of Popular Sovereignty: Using the Initiative Power to Control Legislative Procedure*, California Law Review, Volume 74 Issue No. 2 of 1986, p.492.

knowledge and skills to pursue any problem and maximize societal utility.[271] Further, it is also believed by rational elitists that the bureaucracy of an executive agency comprised of scientists, analysts, and policy professionals is inevitable because of the set organization structures.[272] Their experience and knowledge is used to legitimize policy decisions and interpretations of what later is said to public interest. This kind of thinking affects the level and extent of peoples' involvement since managers are perceived to know the problems of the society than any other person or group; hence do not see the value of people participating in the decision-making processes.

Moreover, this theory is criticized for hindering democracy as it limits people's ability to hold the government agency accountable for its actions. Although it is regarded as good way to protect administrators against biasness, yet it is a barrier to public participation. Since it is a top-down decision-making process, citizens and other stakeholders are considered as 'spectators of the political game.'[273] However, Sebola argues that in the world of today 'no expert should claim to represent the public's interests rather than the public's legitimate claim which can only be achieved through public participation.'[274]

On the contrary, a sound and strong public participation model should be the one which regards 'the people' as the centre of public policy decision making.[275]Since

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[271] Donald, N.Z. et al (eds)., *Underlying Concepts and Theoretical Issues in Public Participation in Resource Development and Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy*, Oxford University Press, New York, 2002, p.85.
[272]ibid.,
[273] Peter, B. & Hansen, J., *Democratic Theory and Citizen Participation: democracy models in the evaluation of public participation in Science and technology*, Science and Public Policy, Volume 38 No.8 of October 2011, pp.590-591.
[274]Sebola, M.P., *Communication in the South African Public Participation Process: The Effectiveness of Communication Tools*, African Journal of Public Affairs, Volume 9 Number 6 of 2017, p.27.
[275]*Ibid*., p.26.

rational elitism does not meet the above credentials, it cannot be used to involve all subjects of the principle of PSNR in the decision-making process. It does not promote interaction between the government and public; rather it centers decision making power to the technocrats.

(ii) Pluralism

This theory centers on the role of self-interested groups in the decision-making process. It affords social groups such as trade unions, business entities, religious groups, government agencies, professional associations, and so forth an opportunity to influence policy making process; hence it places less emphasis on the state.[276] A pluralist political system seeks to accommodate interests of salient groups in the society without affecting the ability of the state and community to secure collective interests.[277]

This theory originates from the utilitarianism belief whereby each person, group or entity is given the chance to maximize happiness in the society. The public interest is determined considering preferences of different social groups outside the political system. As correctly argued by Lowry there is no rational elitist who can objectively determine preferences of any individual or group, but each group strives to influence

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[276]Lowry, A.L., *Achieving Justice Through Public Participation: Measuring the Effectiveness of New York's Enhanced Public Participation Plan for Environmental Justice Communities*, Maxwell School of Citizenship and Public Affairs, a Thesis Submitted in Partial Fulfillment of the requirements for the degree of Doctor of Philosophy in Social Science of Syracuse University , May 2013, p.20; also see Donald, N.Z. *et al* (eds)., *Underlying Concepts and Theoretical Issues in Public Participation in Resource Development and Human Rights* in *Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy*, Oxford University Press, New York, 2002, p.91.

[277] William, N.E., *Pluralism and Distrust: How Courts can Support Democracy by Lowering the Stakes of Politics*, The Yale Law Journal, Vol.114 of 2005, p.1293.

the outcome.[278]

Furthermore, pluralism accepts the fact that a good government must have the Parliament, Judges and Bureaucrats who balance each other, but it should not neglect the contribution of ideas, knowledge and experience by a plurality of interest groups.[279] These social groups would compete in order to get representation in the decision making organs.[280] On the other hand, this approach advocates for direct involvement of the public in safeguarding public interest and good governance, as a complimentary to ministerial responsibility. Thus, politics is regarded as a bargaining process between the government and representatives of different social groupings.[281]

This model is advantageous in the exercise of the right to self-determination in developing states on three main reasons. First, it ensures transparency in decision making process and increases accountability.[282] Different interest groups do represent public interest through expert opinion, public scrutiny and rational judgment considering facts exposed to them by administrators and information within their

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[278] Lowry, A.L., *op cit*., p.91.

[279] Donald, N.Z. et al (eds)., Underlying Concepts and Theoretical Issues in Public Participation in Resource Development and Human Rights in *Natural resource Development: Public Participation in the Sustainable Development of Mining and Energy*, Oxford University Press, New York, 2002, p.92.

[280] Richard, B., *Liberalism and Pluralism: An Introduction*, Routledge Taylor & Francis Group, London and New York, 2002, p.4.

[281] Peter, B. & Hansen, J., *Democratic Theory and Citizen Participation: democracy models in the evaluation of public participation in Science and technology*, Science and Public Policy, Volume 38 No.8 of October 2011, p.591.

[282] Lowry, A.L., *Achieving Justice Through Public Participation: Measuring the Effectiveness of New York's Enhanced Public Participation Plan for Environmental Justice Communities*, Maxwell School of Citizenship and Public Affairs, a Thesis Submitted in Partial Fulfillment of the requirements for the degree of Doctor of Philosophy in Social Science of Syracuse University, May 2013, p.20.

parameters. Therefore, it could be submitted that pluralistic model safeguards procedural justice through access to process and participation of every interested group.

Secondly, it is likely to generate rational decisions as participants are given prior notice, gather information and give comments to improve the decision, including critical analysis of the potential impacts and mitigation measures. The decision makers then would gather necessary information to make legitimate and fairer decision.[283] This interaction and tolerance among the administrators, social groups and members of public is likely to promote cooperation and unity among the participants, leading to high level of public compliance and project support.

Moreover, not every social group is always interested in the subject matter under discussion or is endowed with resources to effectively participate in the process. Every social group established in a particular locality has its own objectives and areas of operation; hence participation may be limited on the areas of daily practice. At times, social groups in the developing world do represent interests of the funding institutions and therefore fail to clearly articulate the public interest. These kinds of NGOs may threaten national stability by promoting capitalist ideologies; hence States end up applying strict compliance rules.

Similarly, pluralist theory on public participation is criticized for being dynamic and fragile, since the nature and composition of the relevant social groups change from

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[283]ibid., p.21; also see Nancy, P.S., *Public participation in Environmental Decision making at the New Millennium: Structuring New Spheres of Public Influence*, Boston College Environmental Affairs law Review, Vol.16 Issue No.2 of 1999, p.268.

one time to another.[284] Further, it has been argued that strong and well-established social groups may prevent weak or new entrants from taking part in the decision-making process in order to maintain their *status quo*. This may cause administrators to disregard presentation of the weak groups or otherwise consider their ideas as a 'social pollution of the society.'[285] Finally, these struggles between different groups may cause conflict in the society due to misunderstandings on what constitutes a public interest. This may lead to applications for judicial review by the minority groups whereby courts would be invited to strictly enforce neutral rules of political engagement and through a due process provisions.[286]

Despite the above challenges, pluralist theory is relevant in African countries whereby governments have embarked on economic policies and strategies which seek to industrialize the continent through increasing natural resource production and revenue collection. Thus, this theory is relevant when discussing adoption of the principle of PSNR in Tanzania. This aspect of plurality in the natural resource governance in Tanzanian laws is discussed under chapter four of this thesis.

(iii) Liberalism

This is a western thought about democracy which was essentially developed to counteract absolute power of the monarchies or church over individual rights. The power of the governing class of elites was limited through consent of the governed

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[284] William, N. E., *Pluralism and Distrust: How Courts can Support Democracy by Lowering the Stakes of Politics*, The Yale Law Journal, Vol.114 of 2005, p.1295.

[285] ibid, p.1296.

[286] ibid., p.1301

class, law, constitution and through separation of powers. [287] This theory was first developed by John Stuart Mill in the mid-19th C, and later supported by other philosophers such as Locke, Montesquieu and Jeremy Bentham. Under this theory, citizens are involved in public affairs through elections, representative institutions of government and through public debate protected through equal rights provisions, including freedom of expression and assembly.[288]

Similarly, law is regarded as an important instrument for protection of basic rights and liberties against arbitrary acts of the government, and setting an independent judiciary which provides interpretation of laws enacted by the Legislature. [289] Furthermore, the principles of natural justice and equal rights to liberty are secured through universal, general laws which are produced by a relevant constitutional framework and democratic institutions.[290] On the other hand, liberal democracy is also characterized by four basic elements: stateness, rule of law, political competition and accountability. The state should be able to protect its citizens and natural resources, within the limits set by the law, in a way that guarantees basic rights and liberties, and promotes fair competition among different political parties through periodic general elections, free media and political equality.[291]

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[287] Donald, N.Z. et al (eds)., Underlying Concepts and Theoretical Issues in Public Participation in Resource Development and Human Rights in *Natural resource Development: Public Participation in the Sustainable Development of Mining and Energy*, Oxford University Press, New York, 2002, p.87.
[288] *ibid*., pp.87-88.
[289] *ibid*., p.89.
[290] Richard, B., *Liberalism and Pluralism: Toward a politics of compromise*, Routledge Taylor & Francis Group, London & New York, 2001, p.1.
[291] Claus, O.,*Crisis and Innovation of Liberal Democracy: Can Deliberation Be Institutionalized*?, Czech Sociological Review, Volume 47 No.3 of 2011, pp.453-456; also see Robert, A., *Moral Foundations of Liberal Democracy, Secular Reasons and Liberal Neutrality toward the Good*, Notre Dame Journal of Law, Ethics & Policy, Volume 19 Issue No.1 of 2012, p.199.

However, liberal democracy is criticized for not accommodating plurality of local customs and social values within a particular society. It regards citizens as 'passive' subjects over political elites.[292] It only protects majority political interests (also known as majority tyranny) and downgrades minority rights.[293] On the other hand, general election is no longer a true representation of the political will because of the nature of election process. Studies show that the world today is experiencing decline in electoral turn out, lowest interest in voting and citizens' reluctance in joining political parties and increased mistrust of the politicians.[294]

Similarly, liberal democracy is challenged for being 'a mask for bourgeois domination' against members of the community experiencing extreme inequality, poverty and injustices. It has reduced citizens into spectators while encouraging secrecy of government actions and manipulation of public opinion.[295] Given this unquestionable fact, Claus[296] observes that a different framework would be needed to promote public participation in the world facing 'apathy, cynicism and sense of powerlessness.'

Notwithstanding, some of African elites argue that liberal democracy based on multi-partism is Western value oriented and inappropriate for African conditions. Instead, they supported (and still support) one party democracy on reasons of unity, equality

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[292]Sebola, M.P., *Communication in the South African Public Participation Process: The Effectiveness of Communication Tools*, African Journal of Public Affairs, Volume 9 Number 6 of 2017, p.27.
[293] Frank, C., *Theories of Democracy: A Critical introduction*, Routledge Taylor & Francis Group, London & New York, 2002, p.53.
[294] Claus, O., op.cit., p.458.
[295]Sandbrook, R., Liberal Democracy in Africa: A Socialist-Revisionist Perspective, Canadian Journal of African Studies, Taylor & Francis Ltd, Volume 22 No.2 of 1988, p.248.
[296]Claus, O., supra n.279.

and consensus, and respect of human rights.[297] This is still the case in most African states such as Ethiopia, Tanzania, South Africa and Uganda, where political process is still dominated by the political parties that actively participated in the decolonization process. However, such argument is not viable in the globalized world today whereby state policies and laws are influenced by international politics including multi-partism.

This view is supported by the prominent scholar Peter[298] who argues that democracy in the modern times is the one where people must have the right to assemble peacefully and discuss their affairs freely must be able to communicate their ideas in larger forums involving other organized groups seeking to influence state action. Then, the state must listen to them and implement their ideas, not shove policies down their throats without debate.[299] Logically, the author suggests that government should not impose decisions on people, unless such decisions have been debated and agreed upon by all subjects of principle of PSNR.

This means that participation of state and non-state actors in the decision-making process, either individually or through organized groups could be the true manifestation of the right to self-determination in the world today. Thus, states must set in place laws and policies that allow people and other stakeholders to give out their opinions. To make it more clear, political representatives such as MPs and the

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[297] Peter, Anyang' Nyong'o, Africa: *The Failure of One-Party Rule; Journal of Democracy*, Volume 3 Number 1, January 1992 (republished by Johns Hopkins University Press), p.91.
[298] *ibid*., p.93.
[299] *ibid*.

President must not make and implement laws, policies, plans, and agreements unless such decisions have been agreed upon by the people or groups representing peoples' interests. It could be argued that the liberal democracy model in modern states must be applied in collaboration with other models that guarantee participation of other non-political representatives.

Thus, this study applies partly some principles of liberal democracy concerning with participation of political representatives and other state organs in the management of natural resources. However, this model is supported with pluralistic model because the latter promotes participation of the people and other stakeholders in the decision-making process. This is because one of the objectives of study was to analyze how the law domesticating the principle of PSNR protects the right of the people to participate in the natural resource decision making process in Tanzania. For accomplishment of this task, pluralistic model has been used as a main theory supported with other models including liberal democracy model and deliberative democracy model which is explained in the coming paragraphs.

(iv) Deliberative Democracy theory (Participatory democracy theory)

This regards public participation as opportunity for 'public debate, personal reflection and informed public opinion.'[300] The citizens meet in different ways, discuss, debate and challenge rules and norms that guide the society. Basically, deliberative democracy is built on three fundamental norms, namely: publicity, reciprocity and

[300]Parkins, J.R., & Mitchell, R.E., *Public Participation as Pubic Debate: A Deliberate Turn in Natural Resource Management, Society and Natural Resources*, Taylor & Francis Group, Volume 18 of 2005, p.532.

accountability.[301] Different scholars support this theory due to its high chances of promoting discussion and debates. Lowry[302] observes that deliberative democracy is a means to achieve the common good (also known as common public interest) participants are able to persuade each other and establish whether or not certain decision is just and legitimate (also known as accountability).

Likewise, Parkins & Mitchell[303] argue that where there is distrust between individuals and institutions, involvement of the general public in the decision making is necessary. They argue that trusting those with knowledge and authority is likely to make citizen 'less scrutinizing, less critical, and less aware of abuse and exploitation.' This means public participation in the decision-making process is one of the safeguards against state bureaucracy.

On the other hand, deliberative democracy model promotes diversity and procedural justice. Kathryn& John[304] argue that through debates and discussions a wide range of legitimate interests is taken on board, including interests of disadvantaged people through social groups. They further argue that deliberative democracy embodies democratic values of fairness, transparency, openness to public input, and equity which finally ensure legitimacy of decisions, and public support. Similarly, Peter & Hansen[305] observe that participatory democracy is an instrument towards developing

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[301]Lowry, A.L., *Achieving Justice Through Public Participation: Measuring the Effectiveness of New York's Enhanced Public Participation Plan for Environmental Justice Communities*, Maxwell School of Citizenship and Public Affairs, a Thesis Submitted in Partial Fulfillment of the requirements for the degree of Doctor of Philosophy in Social Science of Syracuse University, May 2013, p.16.

[302]*ibid*., p.15.

[303] Parkins, J.R., & Mitchell, R.E., *Public Participation as Pubic Debate: A Deliberate Turn in Natural Resource Management, Society and Natural Resources*, Taylor & Francis Group, Volume 18 of 2005, pp.536-538.

[304]Kathryn, S.Q.,& John, M.B., *Theories of Public Participation in Governance*, Handbook of Governance, 2016 (accessed at https://www.researchgate.net/publication/282733927 on 24 February 2020), pp.4-5.

[305]Peter, B. & Hansen, J., *Democratic Theory and Citizen Participation: democracy models in the*

viable solutions to problems by advancing the quality of political debates.[306] This means that deliberative democracy is among theories that guarantee participation of wide range of participants including interests of disadvantaged people and members of the local communities.

Moreover, for effective participation of people, certain conditions must exist in the particular society, namely: the ability of participants to make rational arguments and the ability to communicate their preferences. These two aspects are articulated through 'Habermas Theory of Communicative action and Ethics' in what is called 'fairness' and 'competence.' The first criterion of fairness is concerned with equality of all participants in articulation of rational claims, interests and interpretation. [307]Ideally, this suggests that every person must have an equal chance to influence the final decision if public participation has to be fair.

According to Webler, T. & Tuler, S.,[308] fairness is achieved when four things do exist: presence or peoples' attendance; initiate discourse or make statements; participating in the discussion including asking for clarification, challenging, answering and arguing; and participating in the decision making including resolving disagreements and bringing about closure. Impliedly, these aspects are related to

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evaluation of public participation in Science and technology, Science and Public Policy, Volume 38 No.8 of October 2011.

[306]*ibid*., p.591.

[307]Peter, B. & Hansen, J., *Democratic Theory and Citizen Participation: democracy models in the evaluation of public participation in Science and technology*, Science and Public Policy, Volume 38 No.8 of October 2011, pp.14-18.

[308]Webler, T., &Tuler, S., *Fairness and Competence in Citizen Participation: Theoretical Reflections from a Case Study*, Administration & Society, SAGE Publications, Vol. 32 No.5 of November, 2000, pp.569-570; also see Rebecca, M., *Public Participation in Energy and Natural Resources Development: A Theory and Criteria for Evaluation*, Canadian Institute of Resources Law, December 2010, p.20.

access to the process, transparency in decision making process and access to justice. These four elements of fairness are basic attributes of the right to participate in the public affairs, which is a legal matter under international and national laws as explained in chapter three of this thesis.

The second criterion for effective participation of people is competence. This refers to ability of participants to communicate and reach a mutual agreement or consensus. It squarely concerns with access to information and knowledge; interpretations and methods of resolving dispute that may arise.[309] Basically, competence requires participants to acquire fundamental skills including skills of listening, communicating, self-reflecting and consensus building.[310] This would also require mastery of language used for communication, applicable rules and integration of societal values into rational decision making.

Despite its relevance, the deliberative democracy has been criticized by various scholars on many grounds. Judith & David[311] have criticized it for causing delays in the implementation of projects, programs and plans and for resulting into bad decisions where people fail to make a rational judgment due to their limited knowledge. Similarly, the cost for public participation is so high. The more people involved, the more money is spent for consultation. On the other hand, Sebola[312]

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[309]Webler, T. & Tuler, S., *Fairness and Competence in Citizen Participation: Theoretical Reflections from a Case Study*, Administration & Society, SAGE Publications, Vol. 32 No.5 of November, 2000, p.568 and p.578.
[310]*ibid*., p.22.
[311]Judith, E.I. and David, E.B., *Reframing Public Participation: Strategies for the 21st Century, Planning Theory&Practice*, Routledge Taylor and Francis Group, Vol. 5 No.4, , December 2004 (accessed at https://escholarship.org/content/qt4gr9b2v5/qt4gr9b2v5.pdf, on 20 February 2020), p.420.
[312]Sebola, M.P., *Communication in the South African Public Participation Process: The Effectiveness of Communication Tools*, African Journal of Public Affairs, Volume 9 Number 6 of 2017, p.28.

outlines a number of challenges which face the deliberative democracy, such as, lack of understanding of the policy process, lack of access to information, poor representation of the rural communities, poor relation between the government and local communities, time and policy timelines.

Regardless of the above short comings, deliberative democracy theory is highly practicable and relevant in this study when discussing participation of local people in public affairs at the local government levels. The laws governing administration of local governments in Tanzania[313] require people to participate in the village or mtaa meetings in order to deliberate on various developmental matters. The detailed analysis of these laws requiring participation of the local people in the decision making is covered under chapter four of this thesis.

Conclusively, this study has utilized various democratic theories in addressing how people in a particular state are likely to be involved in the decision making. The study has mostly applied pluralism and participatory democracy theories which place people at the centre of the decision-making process. On the other hand, liberalism theory has only been applied to the extent of engaging the National Assembly and other politically-driven institutions in the decision-making process. These theories have been used as tools for assessing adequacy of the laws governing participation of the people of Tanzania and other stakeholders in the natural resource decision making.

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[313] These laws include the Local Government (Urban Authorities) Act, Cap 288 R.E 2010 and the Local Government (District Authorities) Act No.7 of 1982.

The purpose is to ensure that people of Tanzania who are the beneficiaries and victims of state's acts or omissions, are given actual power to manage natural resource exploitation. As rightly observed by Rebecca[314] law should transfer power to people and give them autonomy to make their own decisions and the state must guarantee peoples' right to self-determination through provisions on compulsory consultation and access to information. The next part explores generally various forms that are used to involve people and other stakeholders in the decision-making process. The section applies such methods as long as they are capable of being applied in Tanzania to engage state and non-state actors in the natural resource decision making.

2.7 Forms of Public Participation

As previously discussed public participation involves procedures and steps designed to consult, inform and extract public input into particular decision. There are different ways in which subjects of the principle of PSNR can be consulted, namely: public hearings/inquiries, referendum, public opinion surveys (also community surveys), consensus conferences, citizen's jury, workshops and focus groups. [315] However, other forms of public participation include: community forum, opinion poll, public meetings, planning cells, social audits, and so forth.[316]Some of these methods look similar in terms of their operations.

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[314] Rebecca, M., *Public Participation in Energy and Natural Resources Development: A Theory and Criteria for Evaluation*, Canadian Institute of Resources Law, December 2010.

[315] Rowe, G., &Frewer, L.I., *Public Participation Methods: A Framework for Evaluation, Science technology & Human Values,* Vol. 25 No.1 (Winter), 2000.

[316] New Economics Foundation (NEF); *Participation Works: 21 Techniques of Community Participation for the 21st Century,* First Edition, United Kingdom, 1998, pp.7-58; also see Rowe, G., &Frewer, L.J., *A Typology of Public Engagement Mechanisms; Science, Technology & Human Values*, Sage Publications, Volume 30 Issue No.2 of 2005, pp.256-260.

Basically, each state has discretion to adopt any mechanism for public participation purposes as such matters are usually regulated by domestic law. The selections of the methods to be used depend on the nature of subject matter, total number of people to be consulted, time and financial resources available. From the existing literature and state practices, the most common methods applied in procuring participation include: public hearing, referendum, workshops and public opinion polls. Usually, these methods may be applied to solicit information from the public before, during or after implementation of the particular decision. Thus, it is important to understand the differences of these methods of public participation techniques and how each of these methods is applied.

(i) Referendum

Different scholars define the term 'referendum' in relation to the expression of the will of people (also known as popular sovereignty). Florin[317] observes that referendum is a way to fortify democratic element and support democratic constitutional systems through direct participation of the people. Similarly, Maija[318] regards referendum as a form of direct democracy which seeks to represent 'the will of the majority' and ensure legitimacy of government actions. Ideally, the proponents of 'referendum' consider representative democracy as diminishing the will of the people and promoting the will of the state.

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[317]Florin, L.U., *Legitimation of the Referendum-The Standard Mechanism of Participatory Democracy*, Western University of Arad (Romania), Journal of Legal Studies, 2017, pp.84-85.

[318]Maija, T.S., *Theories of Referendum and the Analysis of Agenda-Setting*, PhD Thesis, The London School of Economics and Political Science, 1997, p.272.

Generally, referendum as a 'source of authority' and 'legitimacy' involves voting by people in favour or against proposed laws, policies or agenda. The process is mostly used on matters that cannot be decided upon by the representatives through conventional ways. For example, referendum is used on matters such as founding of new states; creation and amendment of new constitution; sub-state autonomy, and treaty-making processes in respect of accession, dissent or exit.[319] Generally, referendum may be commissioned by the Parliament; certain number of citizens through popular initiative; or it may be regulated by the Constitution as part of control of legislative process.[320]

Basically, the legal-based referenda such as constitutional referendum for creation and amendment of the constitution or adoption of treaty[321] are governed by defined rules and procedures; whereas on-legal forms of referendum do not have specific rules of procedures but they must be conducted in a way that safeguards public participation in the issue-framing, campaigning and voting processes. Looking at state practices and existing scholarly works referred in this part, it may be argued that referendum concerns with change of state laws or policies of fundamental importance to the public or on matters that affect existence of states, for example, where a part of the state claims autonomy (independence) from the existing unitary state or republic.

This means that referendum is hardly used on ordinary management issues by states

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[319] Tierney, S., *Reflections on Referendum*, International Institute for Democracy and Electoral Assistance, International IDEA Discussion Paper 5 of 2018, pp.9-10.

[320]Maija, T.S., *Theories of Referendum and the Analysis of Agenda-Setting*, PhD Thesis, The London School of Economics and Political Science, 1997, pp.16-17

[321] Tierney, S., *Reflections on Referendum*, International Institute for Democracy and Electoral Assistance, International IDEA Discussion Paper 5 of 2018, pp.9-10.

due to the risks it poses to the stability of states. Tierney[322] points out risks associated with referendum such as conflicts on membership of the referendum and on who have right to vote; disputes on the majority required, and whether decision is binding; issues of ethnicity, citizenship and nationalistic sentiments. On the other hand, Maija[323] criticizes referendum as being 'too simplistic', 'misleading' and 'inconsistent' with modern democratic theories. He argues that the simple majority rule is not necessarily the best decision-making rule because of its 'decision making costs'.

Further, the author argues that there is likelihood for government in power to influence the agenda in order to maintain a status quo against supporters of proposed reforms; hence result into failure to reach a required quorum or compromise.[324] On the aforementioned reasons, it may be argued that referendum is 'honey in the beehive.' Although it is a legitimate form of public participation, referendum is highly susceptible to political manipulations; hence it will not be suitable for this study.

(ii) Public Hearing (Enquiry)

This is traditional way of public engagement which involves conducting of public meetings with the general population at a place open to each participant. Usually, each member of the public who has an interest in the subject matter is invited to

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[322] ibid., pp.16-17

[323] Maija, T.S., *Theories of Referendum and the Analysis of Agenda-Setting, PhD Thesis*, The London School of Economics and Political Science, 1997, pp.24-25.

[324] Maija, T.S., *Theories of Referendum and the Analysis of Agenda-Setting, PhD Thesis*, The London School of Economics and Political Science, 1997, pp.26-27.

attend through notification which informs them l public purpose, place and venue for the meeting. The experts in collaboration with community leaders regulate proceedings. Basically, public hearing serves three main functions, namely: acquiring public opinion and peoples' attitude on the project (known as information function); exchange of necessary data or information among the participants (known as interactive function) and preventing opposition, obstruction or frustration from general public.[325]

It is important to note that each member of the public has equal chance of participating in the discussions. However, the readiness to deliberate depends on the relationship of an individual with the subject matter. Heberlein[326] provides three categories of people who take part in public hearing. The first group comprise of professional experts including engineers, lawyers, legislators, professors, and other interest groups, who actively discuss issues basing on their knowledge and skills. The second group comprise of private citizens (including civil societies and community-based organizations) who are direct victims of the intended project, Programme, policy or law. The third category covers individuals who are ignorant of the subject matter, and unaware of the 'behavioural norms of the hearing.'

Basically, the above classification of participants implies that there is likelihood of high level of participation in the first and second groups because of their expertise and knowledge in the subject matter. While professionals possess theoretical

[325]Heberlein, T.A., *Some Observations on Alternative Mechanisms for Public Involvement: The Hearing, Public opinion Poll, The Workshop and the Quasi-Experiment*, Natural Resource Journal, Volume 16 Issue No.1 of 1976

[326]Ibid., pp.202-203.

knowledge and skills on the matter, the private citizens possess practical experience of the impact of the intended project, policy or law on the society and environment. They can articulate issues clearly; hence they have high chances for influencing decisions.

On the other hand, the ignorant individuals have fewer chances to influence decision because of their inability to articulate issues due to limited knowledge and inability to master the language. Heberlein[327] cautions on the reluctance of most individuals to attend meetings as they are 'unable to stand in front of the large group of people and express themselves'; reasons relating to competing demands on an individuals' time and role requirements'; and lack of interest and technical know how.

Despite the above challenges, public hearing is very important when discussing principle of PSNR in Tanzania. It has purposely been used to explore participation of people in natural resource decision making process in Tanzania on two main reasons. First, Public hearing is already accommodated in some legislative and administrative measures. Similarly, it is customarily used for collection of public views during legislative drafting process whereby the responsible ministry is required to consult all stakeholders who are likely to be affected by the enactment, before it prepares a draft bill for submission to the Cabinet and the national assembly. However, the most critical issue is whether public hearing is mandatory and inclusive to meet the desired public participation goals. This matter is critically addressed in chapter four of this thesis.

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[327] *Ibid*., p.202.

(iii) Public Opinion Poll

This is also known as community survey. It involves collection of information through conducting interviews and administering questionnaire. Here experts prepare set of questions (closed ended or open ended) in a language understood by the public; administer the questionnaire to the representatives of the society, who then fill in responses according to instructions attached. Similarly, interviews (particularly telephone interview) may be conducted in order to get public views on the subject matter.[328] For easy administration of public opinion polls, set of questions prepared should be simple, clear, unambiguous, relevant and related to the subject matter. After collection of necessary information, data is then processed and analyzed using computer-based statistical methods.[329]

Generally, respondents are selected using appropriate sampling technique, especially random sampling, where every person has an equal chance of inclusion. It is worth noting that public opinion poll requires specialized expertise in research in order to get relevant information from selected sample which would represent ideas, opinion and attitude of the general public. Unlike public hearing where people-turn out is low, public opinion poll experience high rate of participation because there is limited physical contact between experts and members of community. Nevertheless, the accuracy and reliability of information collected through public opinion polls has been questioned in many states.

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[328]Heberlein, T.A., Some *Observations on Alternative Mechanisms for Public Involvement: The Hearing, Public opinion Poll, The Workshop and the Quasi-Experiment*, Natural Resource Journal, Volume 16 Issue No.1 of 1976, p.204.

[329] ibid.

This is because researchers have discretion to present and analyze information collected in a way that it meets the sponsor's interests. Like referendum, public opinion polls can easily be manipulated by politicians or western countries by implanting puppets in the group of surveyors or otherwise corrupt them in order to reach a conclusion to their own advantage. This may likely lead to misrepresentation and incite politically-driven violence in the African countries. This is supported by various scholars and members of the community who have discredited findings from public opinion polls especially in elections; hence tainted opinion results as undesirable and unrealistic.

Makulilo, [330] agrees that public opinion poll in election if done scientifically and impartially would project 'voting intentions of the electorate in a democratic society' and 'provide candidates with necessary information' on voters' support in order to improve their campaign strategies.[331] He observes further that it provides accountability measures and gives leaders an opportunity for feedback from citizens.[332] Moreover, the author observes that opinion poll findings have been regarded as 'unrealistic', 'biased' and 'unscientific' on ground of motivation, methods used and influence of the governments, which have led to distorted and falsified conclusions.[333] The author's main argument is built on two sets of

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[330]Makulilo, A.B., Poll-"Pollution"? : *The Politics of Numbers in the 2013 Election in Kenya*, African Review, Volume 40 Issue No.2 of 2013.

[331] ibid., p.1.

[332]Makulilo, A.B., "*Where have all researchers gone?" Use and abuse of polls for the 2010 elections in Tanzania*, International Journal of Peace and Development Studies, Volume 3 Issue No.3 of 2012, p.35.

[333]Makulilo, A.B., *Poll-"Pollution"? : The Politics of Numbers in the 2013 Election in Kenya*, African Review, Volume 40 Issue No.2 of 2013, pp.2-4; also see Makulilo, A.B., "*Where have all researchers gone?" Use and abuse of polls for the 2010 elections in Tanzania*, International Journal of Peace and Development Studies,

evidences. First, number of opinion polls conducted in Tanzania Mainland and Zanzibar[334] Kenya,[335] and Zambia between 2005 and 2013, the findings of which did not tally with actual final results.

Secondly, the empirical studies conducted by other scholars such as Traugott (1987), Collins (1988), Crespi (1988); Perry (1979) and Jowell, *et al*., (1993) who explained factors which affect accuracy and quality of opinion polls to include but not limited to: 'the sampling frames and the procedures used to select respondents; the questions asked and the response mechanisms employed; the interviewers' characteristics; the timing of polls; honest of answers from every respondent; the identification of likely voters, and the treatment of undecided respondents.'[336] These problems imply that public opinion polls need to be undertaken by professional experts or firms that have required expertise and tools for analyzing political related information.

The list of problems of public opinion polls is further extended by Moore[337] who shows three critical issues that affect utility of polls, namely: ignoring non-opinion;

Volume 3 Issue No.3 of 2012, pp.35-38; also see Creighton, J.L., *The Public Participation Handbook: Making Better Decisions Through Citizen Involvement*, John Wiley & Sons Inc., San Francisco, 2005, p.130.

[334] Ipso Synovate (a market oriented international company) Opinion Polls conducted in Tanzania during the 2010 general election had projected a voter turnout of 83% (contrary to actual turnout of 42.8%, the findings of which did not include respondents from Zanzibar; whereas the Tanzania Citizens' Information Bureau (TCIB) projected that an opposition leader could win the presidential post, using mismatching number of respondents (contrary to the actual results whereby the ruling party's presidential nominee worn election.) The same period also witnessed two unpublished opinion polls conducted in Zanzibar by the Research and Education for Democracy in Tanzania (REDET) on what Makulilo, A.B (supra) calls 'fear that the ruling party would use it at the expense of the opposition.'

[335] Except for opinion polls on constitutional referendum in 2010 whereby three survey companies (Infotrak, Strategic PR and Ipso Synovate) estimated similar results that majority of voters ranging from 58% to 67% would vote in favour of a new constitution, there is bundle of evidence which shows varying estimates in the general election opinion polls in Kenya, whereby peoples' choices is based on ethnicity and tribalism (See Kiambi, D.M., *Journalists'Level ofKnowledge on Empirical Research and Opinion Polling: A Study of Kenyan journalist;*Faculty Publications, College of Journalism & Mass Communication (published by University of Nebraska-Lincoln), 2019, pp.7-9; also see Makulilo, A.B., Poll-"Pollution"? : The Politics of Numbers in the 2013 Election in Kenya, African Review, Volume 40 Issue No.2 of 2013, pp.12-22.)

[336] Makulilo, A.B., Poll-*"Pollution"? : The Politics of Numbers in the 2013 Election in Kenya*, African Review, Volume 40 Issue No.2 of 2013, pp.6-7; and pp.8-11.

[337] Moore, D.W., *Contemporary Issues with Public Policy Polls*, Survey Practice, Volume 4 Issue No.4 of 2011, pp.1-5.

not accounting for intensity of opinion and failing to differentiate between hypothetical and actual opinion. Basically, the author shows that analysis of opinion polls by pollsters normally underscores the value of responses from citizens who appear to have no knowledge of the issue in question or not formed any opinion at all. Kiambi[338], argues that accuracy of opinion polls could be ensured if media reporters possessed skills relating to analysis of opinion polls including concept of 'margin of errors.'

Basing on the above factors, it could be submitted that unless opinion polls are done scientifically, by people with required research knowledge and skills,[339] and in a regulated environment, it would appear that this technique is not suitable for realization of peoples' right to participate in the natural resource decision making in developing states. Therefore, public opinion poll as one of the means to engage people in the decision making has not been applied in this study because there is no specific legal framework providing for the same.

(iv) Workshops and consensus conference (also known as citizens jury)

These mechanisms involve conducting in-house meetings between experts and a limited number of representatives. The primary goal is to bring the public and planners together in serious discussion panels, whereby participants get opportunity to ask questions and obtain clarifications. The proceedings and conclusions of the

[338]Kiambi, D.M., *Journalists' Level of Knowledge on Empirical Research and Opinion Polling: A Study of Kenyan journalist,* Faculty Publications, College of Journalism & Mass Communication (published by University of Nebraska-Lincoln), 2019, pp.2-21.

[339] A good example of lack of research skills by those conducting public opinion polls is shown by Makulilo, A.B., who criticizes a consultant of Ipsos Synovate, one Thomas Wolf, who failed to appreciate his scholarly work based on scientific analysis of opinion polls in Kenya (See Makulilo, A.B., "*Are you the white man from Steadman?! Your work is very good!" A Reply to Thomas P. Wolf,* African Review Volume 41 Issue No.2 of 2014, pp.222-259*).*

workshops are later published in a report or press conference which is not binding on the government, but provides public views on the specific agenda. Though they appear to be similar, these mechanisms have differences in terms of application.

Generally, workshop is a highly interactive meeting (involving twenty-five people or fewer) which is used for completion of specific technical task or assignment, e.g., discussing on a policy reform, introduction of new technology, or training sessions, on which participants (mostly organized groups) get opportunity to interact with experts (facilitators).[340] Workshop is mainly used to share government plans or strategies and get opinion from stakeholders. The extent of interaction between experts and participants during workshop is very high compared to public hearing. Workshop is mostly used in Tanzania for training and information exchange purposes.

On the other hand, consensus conference or citizens' jury is a form of committee comprising of members of the public (usually not exceeding 16) randomly selected to match a cross-section of the respective community, in terms of age, gender, education, profession, and geography.[341] It is formed in order to look into the matter of policy (often a controversial scientific or technological topic) as per information disclosed in the terms of reference. The process is usually preceded by the education phase (disclosure of subject matter), followed by three to four days of panel

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[340] Creighton, J.L., *The Public Participation Handbook: Making Better Decisions Through Citizen Involvement*, John Wiley & Sons Inc., San Francisco, 2005, p.134 & p.140; also see Heberlein, T.A., *Some Observations on Alternative Mechanisms for Public Involvement: The Hearing, Public opinion Poll, The Workshop and the Quasi-Experiment*; Natural Resource Journal, Volume 16 Issue No.1 of 1976, pp.206-207.

[341] Huitena, D, *et al*., *The Nature of the beast: Are Citizens' Juries deliberative or pluralist*? , Springer Science & Business Media, LLC, 2007, p.40.

deliberations.[342]

Generally, jurors (or participants) have power to gather information of their own, including summoning and cross-examining expert witnesses and other people who may contain relevant facts. Then participants would proceed to scrutinize and discuss key issues raised between themselves and moderator(s); and make conclusions and recommendations to the commissioning body.[343] Basically, this technique is used in USA and European countries as part of participatory technological assessment. Moreover, African countries hardly applies workshop for public participation purposes, rather it is an administrative instrument used as a means of sharing information and conducting capacity building. Thus, this study does not apply workshops in assessing public participation in decision making in Tanzania.

2.8 Conclusion

This chapter has pointed out theoretical foundation on the principle of PSNR. It has specifically covered concepts, theories and relevant models that are relevant in discussing the adoption of the principle of PSNR. Furthermore, the chapter has also explained theories and forms of public participation that could be used in Tanzania to implement the right of non-state actors to participate in the natural resource governance. Our prime goal is to ensure that all beneficiaries of the principle of PSNR including members of the National Assembly, state organs, mining companies,

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[342] Creighton, J.L., *The Public Participation Handbook: Making Better Decisions Through Citizen Involvement*, John Wiley & Sons Inc., San Francisco, 2005, pp.109-111.

[343] Rachel, I., *Use of Citizens' Juries to Address Complex Biothical Challenges,* John Willey & Sons Ltd, 2016, p.2; also see Huitena, D, *et al., The Nature of the beast: Are Citizens' Juries deliberative or pluralist?* , Springer Science & Business Media, LLC, 2007, p.40.

local people and civil society organizations, are effectively involved in the decision-making process. This would ensure that natural resources are exploited by the state without compromising investors' legitimate interests.

The next chapter explores various international and regional instruments providing for the principle of PSNR including peoples' right to participate in the decision-making process. The chapter *inter alia* covers rights and duties vested to the subjects of the principle of PSNR, the legality and enforceability of the principle of PSNR by international tribunals.

CHAPTER THREE

INTERNATIONAL AND REGIONAL INSTRUMENTS GOVERNING PSNR AND PUBLIC PARTICIPATION IN THE DECISION MAKING

3.1 Introduction

PSNR is one of the economic law principles that were developed by the international community since early 1950s. The main purpose of the principle was to propagate for economic and political autonomy of newly independent states as against domination by foreign European states. Though contended by industrialized states, PSNR is now a developed principle of international law which can be enforced in courts of law. States and the people have capacity to use the principle of PSNR for development of their natural resources, subject to their national laws and policies. Moreover, the exercise of sovereign rights must be in conformity with underlined duties including investor and environmental protection.

This chapter looks at various international and regional instruments providing for PSNR and the right to public participation in the decision-making process. It also expresses various rights and duties which states must observe in the course of exploiting their natural resources as prescribed by international instruments and international tribunals. This seeks to explain limits or boundaries within which states may implement the principle of PSNR in their territories for the benefit of the people and the state, without compromising state's obligations under international investment law.

3.2 International Instruments on PSNR and Public Participation in Decision Making

As explained earlier, the principle of PSNR including right to participate in decision making, is expressed in various binding and non-binding instruments. Some of the instruments were adopted by the United Nations (UN) through Resolutions and Treaties governing human rights and environmental protection. These UN efforts to promulgate the principle of PSNR were also recognized in various regional systems including the African Union (AU), European Union (EU), East African Community (EAC), and Southern African Development Community (SADC). Thus, international law governing principle of PSNR in Tanzania entails both instruments adopted under the umbrella of UN and specific regional economic integrations. These instruments provide for peoples' right to self-determination namely: participation in the decision-making fora, access to information and access to justice for denial of participatory rights.

3.2.1 UN-based Non-Binding Instruments on PSNR and Public Participation in Decision Making

(a) Non-binding instruments on PSNR

This contains instruments stipulating binding and non-binding obligations on states exercising PSNR as a human right issue and an environmental issue. Beginning with PSNR as human right issue, there are number of UN Resolutions and Treaties providing for the right of the people and the state to exploit their natural resources for the benefit of the people and the state. Principally, UN Resolutions are adopted by the UN General Assembly (hereinafter referred to as UNGA), an organ

comprising of representatives (heads of states) from states party to the UN. Tanzania being a state party to the UN would be bound by these resolutions so long as they are adopted by states in accordance with the majority rule.

As explained in chapter two of this thesis, there are several resolutions adopted by the UNGA since 1950s to 1970s which proclaims the principle of PSNR. The first resolution is known as UNGA Resolution 523 of 1952.[344] This is the first attempt by the international community to recognize the right of the developing countries to manage their natural resources independently. It calls upon members of the UN through commercial agreements to facilitate the movement of machineries, equipments and raw materials for economic development of the developing states and their people.[345] Furthermore, it obliges developing countries to make use of the natural resources available in their territories for domestic consumption and international trade; but integrate such resources to global economy. [346]

Basically, this Resolution is relevant to this study because it acknowledges the right of developing states to exploit their natural resources without any foreign intervention. It also calls for harmonization of contractual agreements for the economic development of host states. This means that investment agreements should not be used as a tool to protect investors' rights and interests and disregard interest of the state and the people, one of the issues covered under this study.

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[344] UNGA Resolution 523 (VI) of January 1952.
[345]ibid., article 1(b)(i).
[346] ibid., article 1(b) (ii).

The second UN Resolution on PSNR is the UNGA Resolution 626 (VII) on the Right to Exploit Natural Wealth and Resources of 1952. This is the supplement to the first resolution. It affirms the right of newly independent states to exploit their natural resources freely; hence any attempt to curtail the exercise of this right is regarded as violation of the principles of the United Nations Charter, including preservation of universal peace and security. [347] Similarly, it urges host states to exercise resource rights in a way that maintains flow of capital as a condition for security, mutual trust and economic cooperation among states.[348] This implies that the host state should regulate and control financial matters of mining companies without affecting flow of capital to and from the host state.

Furthermore, it obliges investing states to abstain from doing acts which would interfere with sovereignty of the state over natural resources.[349] Impliedly, investors and their corresponding states must not interfere in the domestic affairs of the host state, a well-established principle of international law. Basically, the UNGA Resolution 626 (VII) of 1952 is relevant to this study as it affirms rights of states over natural resources and promotes foreign investment through provisions which guarantee flow of capital, aspects that are covered in various parts of this thesis.

The third UN Resolution on PSNR is the UNGA Resolution 1803(XVII) on Permanent Sovereignty over Natural Resources of 1962.[350] This is the most

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[347] UNGA Resolution 626(VII) of 1952, articles 1 and 2.
[348] *ibid*., article 1.
[349] *ibid.*
[350] UNGA Resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources, New York; 14th

celebrated Resolution that provides for conditions to be taken in account by states when adopting the principle of PSNR or when negotiating an investment agreement on natural resource exploitation. Like its predecessors, this Resolution still vests resource rights to both the state and the people.[351] Further, it vests power to the state and the people to freely determine rules and conditions governing natural resource exploration, exploitation and disposition, in accordance with state laws and policies.[352] This suggests that in any investment agreement concerning with development of natural resources, the host state and investors must choose the law of the host state to be the governing law of the contract.

On the other hand, it permits nationalization of foreign properties where it is necessary to do so in accordance with the national law, provided it does not discriminate foreign and local investors, and the host state pays appropriate compensation.[353] This denotes that the host state is under obligation to respect minimum standards of fair treatment and non-discrimination of investors as prescribed under international law. Hence, the resource-rich state ought to exercise the right to PSNR according to both the national law and international principles on protection of investors.

Thus, UNGA Resolution 1803 (XVII) of 1962 is important in this study as it allows resource rich-states to nationalize foreign properties on any reason that may be justified by the government of the day. It also permits such nationalization to be

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December 1962.
[351] *ibid*., article 1.
[352] Ibid., article 2.
[353] Ibid., article 4.

governed by the law of the host state. Finally, it allows the host state to determine the amount of compensation payable to both foreign and local investors for expropriation of vested property rights. Similarly, UNGA Resolution 1803 (XVII) of 1962 is now part of the law of Tanzania through article 4(3) of the Natural Wealth and Resources (Permanent Sovereignty) Act of 2017, read together with the First Schedule to this Act. Hence, it is relevant when discussing adoption of the principle of PSNR in Tanzania as clearly explained in chapter four of this thesis.

The fourth important UN non-binding effort to fortify the principle of PSNR is the Charter of Economic Rights and Duties of States, 1974 (hereinafter referred to as CERDS).[354] This was one of the action plans for implementation of the Declaration on the Establishment of New International Economic Order (NIEO) of May 1974[355] whereby developing states sought to exercise full permanent sovereignty over natural resources. Basically, the NIEO regarded right to sovereignty over natural resources as inalienable right; hence developing states could not be subjected to obligations arising from international law or international investment agreement.[356] This could entitle developing states the unquestionable opportunity to breach investment agreements that developing states had concluded with investors through nationalization of foreign properties.

Essentially, Chapter 1 of CERDS provides for principles of international economic relations, including sovereignty equality of all states; non-intervention; mutual and

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[354] This is also referred to as the UNGA Resolution 3281(XXIX) on the Fundamental Principles of International Economic Relations of December 12, 1974.

[355] This is also referred to as UNGA Resolution 3201 (S-VI) on the Declaration of the Establishment of a New International Economic Order of 1974.

[356] Kiwori, G., *The Role of International Law in Intrastate Oil and Gas Governance in Tanzania*, PhD Thesis, the University of Bayreuth, 2018, p.57.

equitable benefit; equal rights and self-determination of peoples; respect for human rights; fulfillment in good faith of international relations; promotion of international social justice and peaceful settlement of disputes. The principle of PSNR is proclaimed in article 1 whereby every state is entitled to sovereign and inalienable right to choose its economic, socio-political and cultural system in accordance with the will of the people and without any form of external intervention. Furthermore, article 2(1) restates that states shall freely exercise full permanent sovereignty over resources, including possession, use and disposition of natural resources.

This entitles the state the right to regulate and exercise authority over foreign investments in accordance with national laws; right to regulate and supervise all economic activities of transnational corporations within its territorial borders; and right to nationalize, expropriate or transfer ownership of foreign property, subject to payment of appropriate compensation.[357] Accordingly, these sovereign acts must be carried out using the law of the host state, including settlement of disputes arising thereto. Like the UNGA Resolution 1803 (XVII) of 1962, CERDS is now part of the law of Tanzania through article 4(3) of the Natural Wealth and Resources (Permanent Sovereignty) Act of 2017, read together with the Second Schedule to this Act.

However, there are substantive differences between the UNGA Resolution 1803(XVII) of 1962 and CERDS, 1974. Whereas the former allowed states to nationalize foreign property subject to some standards on non-discrimination of

[357] CERDS, article 2(2).

foreign investors, the latter permits host state to exercise sovereign right on unlimited basis since there is no obligation on state to observe such standards as per international law. Secondly, the standard on compensation for nationalization is different in the sense that under the UNGA Resolution 1803(XVII) of 1962 states are compelled to pay appropriate compensation in accordance with national laws and international law; whereas CERDS lives the matter of compensation to the discretion of the state and subject to national law of host state. This means that there is no avenue for protection of investors' rights if denied by the host state since recourse to international arbitration or adjudication is not provided for.

Thus, the inclusion of both UNGA Resolution 1803(XVII) of 1962 and CERDS as part of the law of Tanzania presents a chance for the government to adopt the principle of PSNR in a way that best protects the interests of the state. It further provides a room of contradicting legal arrangements which may lead to violation of principle on equal treatment of non-nationals. These aspects are fully addressed in chapter five of this thesis which explores on the legal challenges arising from adoption of the principle of PSNR in Tanzania.

(b) Non-binding instruments on Public Participation in Decision Making

Apart from specific resolutions providing for the principle of PSNR, there are other resolutions that address similar matter through the notion of public participation. As explained in chapter two, PSNR involves the right of the people to participate in the decision making, a realization of peoples' right to self-determination. Both human rights-related declarations and environmental declarations consider the issue of public participation as essential instrument for complete realization of the right to

PSNR. The first non-binding instrument governing public participation is the famous Universal Declaration of Human Rights (UDHR) of 1948 whereby article 21 provides for peoples' right to participate in government affairs. Specifically, article 21(1) of UDHR provides that 'everyone has the right to take part in the government of his country, directly or through freely chosen representatives.'

This means that people may take part in the decision-making process through direct involvement of each citizen (known as direct democracy) or through their own representatives (known as representative democracy). Generally, the 'take part clause' under article 21(1) represents a number of deliberative political processes, including participation in rule-making and general consultations in administrative processes.[358] However, the list of activities in which people may take part is not exhaustive; hence it can be argued that consultations during conclusion and renegotiation of mining agreements, legislative drafting and participation in environmental management, are part of political processes envisaged by the 'take part clause.'

On the other hand, article 21(3) of UDHR provides that the 'will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.' This is known as an 'election clause' in which people express their will by appointing their own representatives. This aspect of universal and equal suffrage which is conducted in a

[358]Fabienne, P., *The Human Right to Political Participation*, Journal of Ethics & Social Philosophy, Volume 7 Issue No.1 of 2013, p.11

periodic and genuine election implies that the government of the day should be selected by the people from a wide range of contestants, who would then be accountable to the people through their representatives.

It could be argued that article 21(3) of UDHR eliminates any possibility of recognizing authoritarian form of governance since the basis of legitimacy is the will of the people. On the other hand, the UDHR addresses aspect of information, which is important element for public participation. Article 19 of the UDHR provides that 'everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.' Unlike provision of article 21 which applies to citizens alone, article 19 gives right to information to everyone living in the territory.

The second non-binding instrument providing for participatory rights include the Rio Declaration on Environment and Development of 1992. Principle 10 of this Declaration provides *inter alia* that 'environmental issues are best handled with the participation of all concerned citizens, at the relevant level' and that 'each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes.' Furthermore, States are obliged to facilitate and encourage public participation by making information widely available and ensuring 'effective access to judicial and administrative proceedings, including redress and remedy.'

Thus, principle 10 of Rio Declaration imposes an obligation on the state to provide for public participation in their national framework, including access to information

and access to justice. On the other hand, Rio Declaration contain specific provisions which provide for participation of specific group of people within a particular state. Principle 20 of Rio Declaration provides for full participation of women who have a vital role in environmental management and development. Further, Principle 21 of Rio Declaration provides for participation of the youth, and principle 22 provides for participation of indigenous people, their communities and other local communities who have a vital role in natural resource management and development because of their knowledge and traditional practices. Ideally, Rio Declaration regards public participation as a vital tool for the sustainable economic development in a particular state.

The third non-binding instrument governing public participation is commonly known as 'Agenda 21'.[359] Specifically, Chapter 23 of Agenda 21 calls for full public participation by all social groups, including women, youth, indigenous people and local communities in policy-making and decision-making in order to achieve sustainable development. It further provides that there is need of individuals, groups and organizations to participate in environmental impact assessment procedures and to know about and participate in decisions, particularly those which potentially affect the communities in which they live and work.

Similarly, Chapter 25 provides that it is imperative for youths from all parts of the world to participate actively in all relevant levels of decision-making processes because it affects their lives today and has implications for their futures. It further

[359]United Nations Conference on Environment & Development, Rio de Janeiro, Brazil, 3 to 14 June 1992, AGENDA21. Agenda 21 is an international framework agreement for pushing for global sustainable development that was endorsed by national governments, including the Tanzanian Government, at the 1992 Rio Earth Summit.

requires each country, in consultation with its youth communities, to establish a process for dialogue promotion between the youth community and government at all levels and to establish mechanisms that permit youth access to information and provide them with the opportunity to present their perspectives on government decisions.

Furthermore, Chapter 26 of Agenda 21 emphatically provides for 'active participation of indigenous people and their communities in the national formulation of policies, laws and programs relating to resource management and other development processes that may affect them.' Similarly, Chapter 27 stresses on the need to strengthen the Role of Non-Governmental Organizations, which play a vital role in the shaping and implementation of participatory democracy due the fact that NGOs are well-established and possess diverse experience, expertise and capacity in fields of sustainable development.

Apart from youth and indigenous people, the Agenda 21 also provides for participation of local authorities under chapter 28 whereby states are called upon to establish local policies; implement national and sub national policies; educate, mobilize and respond to the public needs in order to promote sustainable development. Further, Chapter 29 provides for participation of workers and trade union in protection of the working environment and the related natural environment, and promotion of socially responsible and economic development.

Finally, Chapter 30 provides for the role of business and industry**,** including transnational corporations, towards environmental management. It is emphasized

that business entities should carry out environmental audits and assessments of compliance; promote and implement self-regulations, including use of economic instruments, and improvement of production systems through technologies and processes that utilize resources more efficiently and produce less wastes. Thus, the provisions of Agenda 21 described out above clearly provide the international efforts to engage a wide range of non-state actors in the sustainable development agenda. Basically, this framework of stakeholders provided in the Agenda 21 could be useful for Tanzania when adopting its laws on public participation in the decision-making process.

The fourth non-binding instrument providing for public participation is the Draft International Covenant on Environment and Development.[360] Article 15(4), (5) and (6) of this Draft Covenant proclaims that state parties must ensure effective participation of all persons during decision making processes at the local, national and international levels regarding activities, measures, plans, programs and policies that may have a significant effect on the environment. It also obliges state parties to ensure that all persons, including indigenous peoples, local communities and marginalized groups, have a right of effective access to administrative and judicial procedures, including redress and remedies. This involves the opportunity to challenge acts or omissions by public authorities or public persons, which contravene national or international environmental law.

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[360]This was prepared by the Environmental Law Programme of IUCN, International Union for Conservation of Nature and Natural Resources as contribution towards the 2030 Agenda for Sustainable Development adopted by the UN General Assembly on 27th September 2015.

The fifth instrument that partly incorporates the principle of public participation is the Declaration on the Right to Development,[361] whereby article 1(1) provides to the effect that 'the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.' Furthermore, article 2 and 3 of this Declaration require the member States to formulate 'appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, based on their active, free and meaningful participation in development and in the fair distribution of the benefits resulting there from.'

The sixth non-binding instrument incorporating the principle of public participation in management of environmental resources is the Draft Principles on Human Rights and the Environment[362]whereby principle 18proclaims that 'all persons have the right to active, free, and meaningful participation in planning and decision-making activities and processes that may have an impact on the environment and development. This includes the right to a prior assessment of the environmental, developmental and human rights consequences of proposed actions.' Similarly, principle 15 provides that 'all persons have the right to information concerning the environment, including information on actions and courses of conduct that may

[361]General Assembly Resolution A/RES/41/128, adopted by the United Nations General Assembly on 4th December 1986.

[362]E/CN.4/Sub.2/1994/9, Annex I, of 1994. This is the first international instrument that comprehensively addresses the linkage between human rights and the environment. It was prepared by the international group of experts on human rights and environmental protection convened at the United Nations in Geneva.

affect the environment.

The seventh instrument expressing non-binding commitment to public participation is the Paris Agreement under the United Nations Framework Convention on Climate Change (hereinafter referred to as 'Paris Agreement').[363] Its preamble expresses the importance of public participation and public access to information to the climate change issues and acknowledges that it is essential that both States and non-State actors are involved in these issues. Similarly, article 6(8) (b) specifies that the role of private actors in the implementation of national climate change measures should be strengthened.

Furthermore, article 7(5) of the Paris Agreement stipulates that public participation is to be included in adaptation measures, which should address vulnerable groups, indigenous people and local communities. State Parties are called upon to cooperate and take appropriate measures in strengthening public participation and public access to information, [364] and state parties should adopt procedures and modalities to enhance transparency in their actions.[365] Thus, the Paris Agreement considers participation of non-state actors necessary in the struggle against negative impacts of greenhouse gases.

Generally, the above seven mentioned frameworks provide statements by UN member states to ensure public participation in decision making process. Though not

[363] The Paris Agreement under the United Nations Framework Convention on Climate Change, article20(1)and article 21(1) provide that the convention will be opened for signature until April 22, 2016. Since then, the Agreement was open for ratification. It will enter into force one month after it has been ratified by at least 55 States.
[364] Paris Agreement, article 12.
[365] *ibid*., article 13.

legally binding, but they provide basis for recognizing public participation as a principle of international law. This is because public participation has been endorsed by states (Tanzania inclusive) in the domestic law and it has played an important role in the democratization of environmental decision making in absence of treaty norms or customary norms.[366]

Like the principle of PSNR which is accommodated in UNGA Resolutions, the principle of public participation is recognized in various UN declarations explained above. Thus, they are relevant in the analysis of the principle of PSNR and Public Participation in Tanzania whereby one of the goals of this study is to establish the extent to which people participate in the management and disposition of natural resources. They set essential factors to be considered when addressing the issue of public participation in the decision making in Tanzania.

3.2.2 UN-Based Binding International Instruments on PSNR and Public Participation

Apart from the UN-based resolutions and initiatives, there are binding instruments which provide for the principle of PSNR including the right of the people to participate in the exercise of PSNR. The first two binding UN instruments on PSNR are the International Covenant on Civil and Political Rights, 1966 (hereinafter referred to as ICCPR) and the International Covenant on Economic, Social and Cultural Rights 1966 (hereinafter referred to as ICESCR). These two instruments

[366]Jeroen, B., Public Participation as a General Principle in International Environmental Law: Its Current Status and Real Impact, National Taiwan University Law Review, Volume 11 Issue No.2 of 2016, pp.248-258.

provide the principle of PSNR in the same way under what is known as common article 1(2). Basically article 1(2) of both the ICCPR and ICESCR read as:

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

The above provision vests right of PSNR to the peoples to freely dispose of natural resources for their own ends. The people have the right to participate in the exploitation of the resources in order to achieve desired development goals. This appears to be an inherent right which cannot be limited or otherwise deprived as it provides that in no case may people be deprived of its means of subsistence. This can be deduced from reading provisions of article 47 of ICCPR and article 25 of ICESCR which collectively provides that the covenants should not be interpreted to impair the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources. By implication, these provisions regard PSNR as an inviolable and absolute right vested into all peoples.

Moreover, reading subsequent phrase 'without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law', it is apparent that sovereignty over natural resources is limited. This is because peoples' exercise of their right to PSNR should be consistent with obligations arising from international economic obligations. This signifies that peoples must respect contractual or treaty-based obligations which concern with exploitation of natural resources, basing upon the principle of mutual benefit, and international law. The call to respect contracts and treaties which people in their collective efforts to freely dispose their resources conclude with investors is an indication that peoples' right to PSNR is not absolute.

The above view is shared by other scholars such as Alice[367] who observes that the common article 1(2) of ICCPR and ICESCR implies two things: the ability of the people to freely dispose of their natural resources, and the need to utilize proceeds realized from selling natural resources for the welfare (or interest) of the people, in accordance with international law. Another way to establish the meaning of the common article 1(2) is to look at the history of the instruments at the time of their drafting and competing interests sought to be accommodated. While developing states sought to invoke the principle of PSNR to achieve political autonomy and economic independence, the developed world looked for means to limit the power of the peoples to claim absolute immunity for unilateral abrogation of concession agreements, by payment of compensation for nationalized properties.

These diverging interests preoccupied the world since 1950s to 1966 when drafting of these covenants were completed. Thus, the interpretation of article 1(2) of ICCPR and ICESCR must take cognizance of the UNGA Resolutions on PSNR which were adopted before the year 1964, which stressed on the need to exercise PSNR in accordance with international agreements. This view is supported by David[368] who argues *inter alia* that:

> *"While the concepts of economic cooperation and mutual benefit expressed in Covenant Articles 1, paragraph 2, are by no means the main thrust of Resolutions 1803 (XVII) and 2158 (XXI), these concepts are integral parts of the resolutions; indeed, each is clearly seeking to attract foreign developmental capital to the developing countries, and would hardly discourage investment by a policy, express or implied, of non-cooperation or arbitrary confiscation."*[369]

On the other hand, ICCPR contains key provisions protecting right of the people to participate in the decision making, including access to information and access to judicial

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[367] Alice, F., *Towards a Meaningful Rebirth of Economic Self-Determination: Human Rights Realization in Resource Rich Countries*, International Law and Politics, volume 39 of 2006, pp.430-431; also see Enyew, E.L., *Application of the Right to Permanent Sovereignty over Natural Resources for Indigenous Peoples: Assessment of Current Developments,* Arctic Review on Law and Politics, Volume 8 of November 2017, p.226.

[368] David, J.H., *Human Rights and Natural Resources*, William & Mary Law Review, Volume 9 Issue 3 of 1968.

[369] ibid., pp.773-774.

remedies. Article 25 of ICCPR provides, *inter alia*, that 'every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.'

This implies that ICCPR accommodates both direct participation of citizens in the decision making processes, and for situations where direct citizen involvement is not possible, then representatives should be selected through periodic elections in which case every person will have a right to vote and to be elected.[370] Basically, the substance of article 25 of ICCPR is expanded by the General Comment No.25 which was adopted by the Committee for Human Rights at its 1510th Meeting of 12 July 1996.[371] Paragraph 5 of General Comment No.25 provides that the conduct of public affairs, referred to in article 25(a), relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels.

Nevertheless, paragraph 6 of General Comment No.25 provides for the manner in which citizens may participate in public affairs, including being members of

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[370]This is similar to article 23 of the American Convention on Human Rights which also provides for the right to participate in government affairs, either directly or through freely chosen representatives, who get selected vide genuine periodic elections.

[371]General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25): 12/07/96.CCPR/C/21/Rev.1/Add.7, General Comment No. 25. (General Comments).

legislative bodies; holding executive office; participating in a referendum or other electoral process; participating directly in popular assemblies which have the power to make decisions about local or national issues. It is further emphasized that where a mode of direct participation by citizens is established, no distinction should be made between citizens as regards their participation and no unreasonable restrictions should be imposed. This suggests that every citizen has an equal chance of participating in the decision-making process, except where the state law imposes restrictions that are considered necessary in a democratic society and subject to standard of proportionality and reasonableness.

Furthermore, paragraph 8 of the General Comment No.25 provides that citizens may also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. Another participation right protected by ICCPR is access to information. Article 19 of the ICCPR proclaims that **'**everyone shall have the right to freedom of expression; this right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.' Basically, both ICCPR and ICESCR express obligations that are binding on reason that the two instruments were ratified by the United Republic of Tanzania on11th June 1976; hence relevant in discussion on peoples' right to PSNR including right to participate in the decision making.

The third UN binding instrument providing for peoples' right to participate in decision making is the Convention on Biological Diversity (referred to as CBD) of 1992. Under article 14(1) (a) of the CBD, it is provided that 'each Contracting Party,

as far as possible and as appropriate, shall introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures.'

Basically, the above provision provides for public participation in the process of conducting EIA where project proponents are always required to engage people in establishing positive and negative impacts of the proposed project in the surrounding environment (which may be physical, economic, social, cultural, political or biological). Tanzania signed the CBD on 12th June 1992 and ratified it 8th March 1996. Thus, it is bound by article 14(1) (a) of CBD because it is a signatory and state party to the Convention through ratification made under article 63(3)(e) of the Constitution of the United Republic of Tanzania.

The fourth and fifth UN binding instruments providing for public participation in management of environmental resources are the World Charter for Nature 1982[372] and the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (hereinafter referred to as Desertification Convention respectively. [373] Principle 23 of the World Charter for Nature 1982 provides that all persons, in accordance with their national legislation, have the opportunity to participate, individually or with others, in

[372]General Assembly Resolution A/Res/37/7 adopted by the United Nations General Assembly at the 48th Plenary meeting, 28 October 1982.
[373] This was adopted on 14th October 1994, and came into force on 26 December 1996.

the formulation of decisions of direct concern to their environment.

It also necessitates member states to guarantee access to means of redress when their environment has suffered damage or degradation. These two aspects are important in protection of the right of the people to PSNR because they provide for participation of people and other stakeholders in management of resources and define remedial measures for denial of participation rights. Similarly, the Desertification Convention provides that full participation of men and women, NGOs, and "other major groups" in the society is crucial for the effectiveness of the efforts to combat and mitigate desertification and its effects. Article 3(a) and 5(d) of this Convention endorse involvement of local populations and communities in the desertification and drought mitigation measures. Furthermore, article 19(a) demands State parties to promote capacity-building through full participation of local people and cooperation with NGOs and local organizations. Basically, the Desertification Convention acknowledges the importance of public participation in combating desertification and building upon the knowledge, experiences, and capacities of local stakeholders.

The sixth UN binding instrument providing for sovereignty of the people over natural resources is the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, commonly known as the Aarhus Convention.[374] Essentially, UNECE is one of five commissions of the United Nations that was established in 1947 in order to promote pan-European

[374]This Convention was signed on 25th June 1998 and entered into force on 30th October 2001. It has been ratified by almost all European States and some Central-Asian States such as Azerbaijan and Kazakhstan. The European Union (EU) is also a party to it; hence the Convention applies to the governing bodies of E.U including the Commission, the Parliament and the Council.

economic integration. To date, UNECE includes member states in Europe, North America and Asia. Generally, the Aarhus Convention is the only environmental agreement that is completely dedicated to public participation as envisaged under Principle 10 of the Rio Declaration because it covers all three elements of the principle of public participation.

It is clearly provided that each state party must take necessary legislative, regulatory and other measures to ensure public participation and access to justice; provide proper enforcement measures; establish and maintain a clear, transparent and consistent framework to implement the provisions of the Convention. [375] Similarly, each party must endeavor to ensure that officials and authorities assist and provide guidance to the public [376] in seeking access to information; facilitating participation in decision-making and in seeking access to justice in environmental matters, including: promoting environmental education and environmental awareness among the public, and providing for appropriate recognition of and support to associations, organizations or groups promoting environmental protection.[377]

Furthermore, the Aarhus Convention provides for access to environmental information[378] to the public, subject to application by the concerned applicant,

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[375] The Aarhus Convention, article 3(1).

[376] The term 'public' is defined under article 2(4) to mean 'one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups.'

[377] The Aarhus Convention, articles 3(2), (3) and (4).

[378] The term 'environmental information' is defined under article 2(3) of the Aarhus Convention to mean 'any information in written, visual, aural, electronic or any other material form on: (a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements; (b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programs, affecting or likely to affect the elements of

without imposing requirements of charges or disclosure of any interest, and within reasonable time, not later than two months.[379] However, a request for information may be refused if it is unreasonable, constitutes privileged and confidential information under national law. These grounds for refusal of information include: national defense and public security, criminal justice, trade secrets and intellectual property rights.[380]

On the other hand, the state parties are obliged to collect, store and disseminate information through such means as use of registers, files, reports, and electronic information systems which should be easily accessible to the members of the public.[381] Different environmental information such as conventions, legislations, environmental policies, agreements, and other form of information envisaged under article 2(3), should be published regularly in a way that can easily be understood by the public concerned.[382] This means that the state parties have both duty to provide information to the public on demand and duty to process information concerning government institutions in the form easily retrieved by the people. Hence, it seeks to guarantee access to information to all the people in the community.

Furthermore, the State parties are required to facilitate public participation in the drafting of 'plans, programs and policies relating to the environment' and during the

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the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making; (c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above.

[379]The Aarhus Convention, article 4(1) (2) and (3).

[380]*ibid*., article 4(4).

[381]*ibid*., article 5(1), (2) and (3).

[382]*ibid.*, articles 5(4), (5), (6) and (7).

preparation of 'executive regulations' or 'generally applicable legally binding normative instruments.'[383] This is done through publishing proposed enactments within reasonable time and the 'public concerned'[384] must be able to make comments directly or through representative consultative bodies. Similarly, state parties must guarantee access to and provide judicial review for matters that affect participation rights before a court or 'another independent and impartial body established by law.'[385] Furthermore, state must adopt laws which prescribe procedures to challenge illegal decisions and provide adequate, equitable and effective remedies, including appropriate injunctive relief.[386]

Finally, the Aarhus Convention provides for 'Meeting of the Parties' in order to discuss the implementation of the Convention, whereby NGOs are allowed to participate in these meetings as observers; hence they have no right to vote.[387] The inclusion of NGOs in the meeting of state parties is recognition of these institutions as representatives of the interests of the people. This is similar to the Inter-American Convention for the Protection and Conservation of Sea Turtles (hereinafter 'Inter-American Sea Turtle Convention') which permits international organizations, NGOs, and scientific institutions with recognized expertise to participate at the meetings of the Convection's Conferences of Parties (COP) and through consultative committees.[388]

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[383] ibid., articles 7 and 8.
[384] The term 'public concerned' is defined under article 2(5) to mean the public affected or likely to be affected by, or having an interest in, the environmental decision-making, including non-governmental organizations promoting environmental protection and meeting any requirements under national law.
[385] *ibid.*, article 9 (1).
[386] *ibid.*, article 9(2) (3) and (4).
[387] *ibid.*, articles 10(5) and 11.
[388] The Inter-American Convention for the Protection and Conservation of Sea Turtles of 1996 (it entered

Principally, the Aarhus Convention presents a comprehensive legal framework governing public participation for it completely covers all three pillars of principle of public participation namely: access to information, participation in the decision making and access to justice. Basically, access to information entails two things: availability of information which involves collecting and updating relevant information, and mechanisms to provide information to the public which involves application procedures, time limit and reasonable costs.[389] Whereas access to justice entail provisions on access to administrative and judicial review, including: prescription of the procedure and provision of prompt, adequate and effective compensation.[390]

These aspects are extensively covered by the Aarhus Convention through provision on review procedures with respect to information requests;[391] review procedures with respect to specific (project-type) decisions which are subject to public participation requirements;[392] and challenges to breaches of environmental law in general.[393] Basically, the purpose of review in this case is not to interfere with decision makers' discretion but examine the regularity of the decision-making procedure.[394]

On the other hand, participation in the decision making process implies that individuals, groups, organizations, local and indigenous community have opportunity

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into force in 2001, articles V (6) and VII (1) and (2).

[389] Jeroen, B., *Public Participation as a General Principle in International Environmental Law: Its Current Status and Real Impact*, National Taiwan University Law Review, Volume 11 Issue No.2 of 2016, p.231

[390] ibid., pp.232-233.

[391] The Aarhus Convention, article 9(1).

[392] ibid., article 9(2).

[393] ibid., article 9(3).

[394] Jeroen, B., Public Participation as a General Principle in International Environmental Law: Its Current Status and Real Impact, National Taiwan University Law Review, Volume 11 Issue No.2 of 2016, p.233.

to share their views and interests in the making of decisions.[395] This is covered through timely and effective notification of the public concerned and reasonable timeframes for participation in determination of license applications [396] preparation of plans and programs relating to the environment, and preparation of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment. [397]

Basically, the Aarhus Convention is relevant in this study on two reasons. First, it represents an initiative by the international community through the United Nations Economic Commission for Europe, a subset of the United Nations Economic and Social Council, to formulate an instrument for protection of good governance and human rights in the utilization of environmental resources. It is an evidence of uniform and generally acceptable principles on public participation as practiced by most states (Tanzania inclusive) which has been accommodated in several treaties binding on Tanzania. Thus, it would be argued that Aarhus Convention is a document that endorses a principle of public participation as one of the general principles of international law recognized and applied in Tanzania in the natural resource management.

Secondly, the Aarhus Convention is open for accession not only by the European Union Member States but also by other States which are members of the United Nations, including Tanzania. Thus, accommodating it in this study would help to

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[395] ibid., pp.230-231.
[396] The Aarhus Convention, article 6 read together with Annex 1 to the Convention.
[397] ibid., article 7.

raise a concern and need to domesticate it and improve the laws of Tanzania in order to effectively guarantee the peoples' right to PSNR. Basing on these two reasons this study applies the Aarhus Convention as a modal law for assessment of the law on public participation in natural resource decision making in Mainland Tanzania.

Thus, UN regime has multiple instruments adopted under the auspice of the assembly of heads of states (UNGA) affirming the principle of state sovereignty over natural resources. These initiatives either in the form of declarations or conventions are only evidences of the existence of the principle of PSNR, which is both a human right issue and an environmental right issue. States party to the UN (Tanzania inclusive) is under the obligation to protect and promote peoples' sovereignty over natural resources, a rule of international law that is binding on all states.

On the other hand, the initiatives to respect peoples' right to natural resources undertaken by UN organs have also been adopted by various regional economic integrations. This makes us believe that the principle of PSNR is not a concern of the UN but a global concern for economic growth of states, sustainable development of the people and preservation of world peace and security. Some of these regional efforts to contain the principle of PSNR in their areas of integration are explained bellow.

3.3 Regional – Based Instruments on PSNR and Public Participation in the Decision Making

There are numerous instruments that have been adopted by various regional bodies on matters of sovereignty of state and the people to freely exploit their natural

resources. However, only few of those treaties that are relevant to Tanzania are discussed. The first regional instrument providing for PSNR is the African Charter on Human and Peoples Rights 1981 (to be referred to as ACHPR). This is an instrument providing for peoples' rights in African perspective which was adopted by the African Union on 27th June 1981, ratified by Tanzania on 9th March 1984 and its enforcement in Tanzania began on 21st October 1986.Hence, ACHPR forms part of the law of Tanzania. Basically, ACHPR provides for the right of the people to PSNR and associated participation rights. Article 20 (1) of the ACHPR provides that all people shall have unquestionable and inalienable right to self-determination, including right to freely determine their political status and pursue their economic and social development according to their freely chosen policies.

This right to self-determination referred under article 20(1) entitles the African states and the people who were colonized the power to use any means recognized under international law in order to achieve political and economic freedom.[398] It means that the spirit of article 20 is generally to fight against all forms of colonial domination in African continent in the same way as the principle of PSNR. Moreover, a specific provision on sovereignty over natural resources is enshrined under Article 21 of the ACHPR, which provides to the effect that 'all peoples shall freely dispose of their wealth and natural resources' but in a way that safeguards 'exclusive interest of the people.'

[398] Article 20(2) and (3) of the ACHPR.

Like article 1(2) of the ICCPR and ICESCR, the ACHHPR reiterates the rule that right of the people to PSNR shall not be deprived of it in any way including payment of adequate compensation for any loss. However, the people are obliged to respect obligations arising from international economic cooperation based on mutual respect, equitable exchange and the principles of international law.[399] That is to say, sovereignty of people over resources is limited by international law and agreements on economic cooperation, including investment agreements.

Generally, articles 20 read together with article 21 of the ACHPR serves the same purpose of article 1(2) of ICCPR and ICESCR as they vest rights to the people to freely dispose of their natural resources. The only difference between the two instruments is that ACHPR still vests rights to state parties to freely dispose of natural resources, individually or collectively, for strengthening the African unity and solidarity, including elimination of foreign economic exploitation by multinational companies.[400] This means that the ACHPR gives power to African states to adopt consulted and collective economic measures aiming at protecting states against exploitative foreign domination.

On the other hand, the ACHPR provides for the right of citizens to participate in decision making. Article 13(1) provides that 'every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.' This provision is more or less similar to those of ICCPR in the sense that the notion of public

[399] Article 21(3) of ACHPR.
[400] Article 21(4) and (5) of ACHPR.

participation may be exercised individually or collectively through a representative.

The second regional instrument relevant to Tanzania is the East Africa Community Protocol on Environment and Natural Resources Management of 2006 (hereinafter referred to as EAC Protocol)[401]. This Protocol governs the Partner States [402] in the management of environment and natural resources over areas within their jurisdiction, including transboundary environment and natural resources.[403] Essentially it contains certain principles that govern its application , including: the principle of co-operation in the management of environment and natural resources; the principle of sustainable development; the principle of public participation in the development of policies, plans, processes and activities; and the principle of prior informed consent or notification in cases of activities with transboundary impacts.[404]

Other principles include: information sharing; the principles of strategic environmental assessment and environmental impact assessment of projects, policies and activities; the principle of the unity and coherence of shared ecosystems; the principle of gender equality; and the principle of state responsibility.[405] Furthermore, partner states must also manage the environment and natural resources in accordance with the principles set out in articles 5, 6, 7, and 8 of the Treaty.[406] This means that

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[401] EAC Protocol on Environment and Natural Resource, 3rd April 2006.

[402] These include: United Republic of Tanzania, Kenya, Uganda, Rwanda, Burundi and South Sudan.

[403] This includes: transboundary natural resources, biological diversity and genetic resources, forest and tree resources, wildlife, water, wetlands, coastal and marine, fisheries, minerals, energy, mountainous ecosystems, land, rangelands, public participation, access to information and justice and tourism (refer to article 3 of the EAC Protocol on Environment and Natural Resource Management, 2006).

[404] EAC Protocol on Environment and Natural Resource Management, 2006, article 4(2).

[405] *ibid.*

[406] *ibid*., article 4(1).

states have sovereignty to exploit their endowed natural resources on condition that they engage people in the decision making and further international relations.

The EAC Protocol specifically requires the Partner States to adopt common policies, laws and programs relating to access to information, justice and the participation of the public in environmental and natural resource management.[407] Furthermore, Partner States are directed to create an environment conducive for the participation of civil society and non- governmental organizations, the public, local communities and private sector on environment and natural resource management.[408] On the other hand, partner states are encouraged to ensure that officials and public authorities assist the public to gain access to information and facilitate their participation in environmental management; promote environmental education and environmental awareness among the public.[409]

Furthermore, partner states must ensure that persons exercising their rights in conformity with the provisions of EAC Protocol are not discriminated; grant due process and equal treatment in administrative and judicial proceedings to all persons who may be affected by environmentally harmful activities in the territory of any of the Partner States.[410] The EAC Protocol is relevant to this study on two reasons. First, Tanzania is one of the partner states against which the instrument is expected to apply. Even though this protocol has not been ratified, Tanzania participated fully in

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[407] EAC Protocol on Environment and Natural Resource Management, 2006, article 34(a).
[408] *ibid*., article 34(b).
[409] *ibid*., article 34(d).
[410] *ibid.*

its preparation and signed it on 3rd April 2006. It is only the Republic of Uganda and the Republic of Kenya that signed and ratified the protocol in 2010 and 2011 respectively; hence the Protocol is not yet in force.

Notwithstanding, Tanzania has the binding obligation to ensure sustainable utilization of resources, promote mutual people-centred development and strengthen partnerships with the private sector and civil society in order to achieve sustainable socio-economic and political development.[411] Furthermore, Tanzania has the obligation to promote good governance including adherence to principles of democracy, rule of law and accountability; ensure equitable distribution of resources and international cooperation.[412]These aspects are also partly covered under article 4(1) of the EAC Protocol.

Basically, the Treaty for the Establishment of the East African Community was ratified by Tanzania *vide* The Act of the Community.[413]Thus, these provisions carry the same weight as though the EAC Protocol is ratified. Secondly, article 6(d) of the EAC Treaty mandates state parties to recognize, promote and protect human and people's rights in accordance with the provisions of the ACHPR. This means that Tanzania is legally bound to adopt laws and policies for realization of the peoples' right to sovereignty over natural resources and other participatory rights as guaranteed by the ACHPR. Therefore, the EAC Protocol is relevant to this study on

[411] The Treaty for Establishment of the East African Community 1999, article 5(3)(c), (d) and (g).
[412]*ibid*., article 6.
[413] Cap. 411 R.E 2009.

adoption of the principle of PSNR in Tanzania.

Generally, the principle of PSNR and Public Participation are among the principles which are recognized and entrenched in various international and regional instruments. It essentially carries bundle of rights and duties which the government must observe, including: obligation not to discriminate foreign investors and obligation to accord fair and equitable treatment to foreigners.

Furthermore, international instruments require host governments to pay prompt, adequate and effective compensation to foreigners upon expropriation of properties for public purpose. With regard to self-determination, the government of the host state has the obligation to respect, protect and fulfil fundamental human rights including right to participate in the decision making. This could be done through protection against abuses of rights by third parties; acting with due diligence in order to avoid infringement of rights and taking efforts to provide access to judicial and non-judicial remedies.

Hence, it is important to express the rights and duties arising from the principle of PSNR and how the same principle is enforceable under international law. These aspects are important for better implementation of PSNR and Public Participation in Tanzania, the subject matter of this thesis. The next part seeks to show how the principle of PSNR has been interpreted by international jurists and applied by the international courts. It therefore shows set of rights and duties which are vested to the host state when exercising sovereign right to natural resources as prescribed by various international and regional instruments.

3.4 The Substance and Enforceability of the Principle of PSNR under International Law

3.4.1 PSNR Rights under International Law

As explained earlier on, PSNR is centred on the exercise of the right to self-determination, which basically deals with economic independence and political autonomy. This is also regarded as economic self-determination and political self-determination respectively. However, since the right to self-determination is the right of a people to determine their own destiny; hence it could be used to refer to internal and external self-determination. Externally, it means sovereignty of the people (collectively) to exploit its resources without interference by other states. Internally, it means the right of the people to be involved in the disposition of natural resources, for the common good of the people.

Basically, the principle of PSNR has a wider range of rights and duties which can be exercised by the subjects of the principle of PSNR, namely: states, peoples including indigenous people and members of the local community, and investors. Similar, the principle of PSNR entrenches duties on states, peoples and the investors which may be enforced against any holder of the principle of PSNR. This part critically provides for rights underlined in the principle of PSNR as elucidated by various scholars in the field of law.

(i) The Right to Dispose Freely of Natural resources within the limits of national jurisdiction

This refers to the power of the people through democratically authorized authority of the state to determine how resources should be exploited for the development of the

people. It entails the capacity of the state to enter into international agreements with investors for disposition of resources.[414] This involves the ability of the state to enact laws which stipulate conditions and procedures for grant of mining license and the power to suspend or cancel the same licenses. States, for and on behalf of the people, may enter into MDAs and PSAs with foreign companies on how resource should be exploited. The conditions agreed between the state and the investors would be binding on the parties, to the extent that sovereignty of the state is safeguarded.

As previously shown, the right to dispose freely of natural resources is 'inherent' and cannot be limited by law or agreement because it is 'permanent' and cannot be transferred to a private party or other state. Any purported arrangement through stability clauses or otherwise by freezing provisions of the state law will be regarded as 'void' and 'ineffective.' This was well confirmed in the *Aminoil Award* (1982) and *LIAMCO Award* (1977) whereby it was observed that natural resources are property of the states and that state sovereignty to dispose of wealth and natural resources as recognized in the international law must be respected. Thus, the state's sovereignty over resources cannot be limited, except through self-imposed agreements which are valid for a particular period of time.

Schjver[415] argues that a state is always vested with power to amend or change the law if it appears to be against interests of the people or it derogates state sovereignty. This means that even where states conclude agreements with stabilization clauses,

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[414]Schrijver, N.J., *Sovereignty Over Natural Resources: Balancing Rights and Duties*, University of Groningen, 1995, p.246.
[415]ibid., p.248.

such clause cannot affect the power of the state to amend or change the laws where such agreement is prejudicial to state interests. This view is also supported by Manirozzaman[416] who explains that state's exercise of sovereign authority in the public interest, cannot be denied regardless of stability clauses in the investment agreements.[417] Similarly, Katja, & Brillo[418] agree that stabilization clauses do not affect state's sovereign power to regulate and control its natural resources, but breach of which may lead to compensation claims by investors.[419]

Moreover, states are bound to observe the stability clause provisions basing on the principle of *pacta sunt servanda* under international law. Generally, stabilization clause consists of set of mechanisms which are entrenched in the contract with a view of maintaining specific economic and legal conditions that are considered essential and crucial for validity of the contract.[420] States and investors conclude agreements with stability clauses for various reasons. From investor's perspective, stability clause acts as risk mitigation tool against unilateral sovereign prerogatives,[421] and change of investment conditions which affect the cost-benefit equilibrium of the investment.[422] On the other hand, host states use stabilization clauses as an incentive to attract

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[416]Manirozzaman, A.F.M., *The Pursuit of Stability in international energy investment contracts: A Critical appraisal of the emerging trends*, Journal of World Energy Law & Business, Vol.1, No.2 of 2008.

[417]ibid., p.136.

[418]Katja G., &Brillo R., *Stabilization Clauses in International investment Laws: Beyond Balancing and Fair and Equitable Treatment*, Swiss National Centre of Competence in Research, Working Paper No.2013/46 of January 2014.

[419]ibid., p.11.

[420]Faruque A.,*Validity and Efficacy of Stabilization Clauses: Legal Protection vs Functional Value*, Journal of International Arbitration, Vol. 23, No.4 of 2006, pp.317-318.

[421]Such acts may include change of law, nationalization, expropriation and nullification of contracts by law.

[422]Katja G., &Brillo R., *Stabilization Clauses in International investment Laws: Beyond Balancing and Fair and Equitable Treatment*, Swiss National Centre of Competence in Research, Working Paper No.2013/46 of January 2014, p.5.

foreign investments in different sectors, particularly the extractive industry.[423]

The existence of diverse interests between investors and host states has given rise to different interpretation of the validity of stability clauses, which seek to limit the state's legislative sovereignty over natural resources. There are two schools of thought on the construction of stability clauses and the effect thereto. The first school is capitalist- based theory of internationalization of stability contract, which argues that presence of stability clause gives it an international character.[424] This makes the stability clause to be regarded as a distinct clause setting up independent obligation under international law.[425]

On the other hand, the second approach with regard to construction of stability clauses is known as the sovereignty approach which is based on '*relocalisation of contracts.'* Its main preposition is that states have inherent and unrestricted powers to dispose of their natural wealth and resources located within their territories. Accordingly, the stability clause should be interpreted and construed in accordance with national law of the host state. Where the stabilization clause provides for matters that contravene fundamental principles of the host state, such clause will have no legal effect. Thus, any purported freezing effect of the stability clause will not be regarded as a manifestation of the host state's intention to provide immunity to the

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[423] ibid.

[424]Faruque A.,*Validity and Efficacy of Stabilization Clauses: Legal Protection vs. Functional Value,* Journal of International Arbitration, Vol. 23, No.4 of 2006, p.328; See also Manirozzaman, A.F.M; *The Pursuit of Stability in international energy investment contracts: A Critical appraisal of the emerging trends,* Journal of World Energy Law & Business, Vol.1, No.2 of 2008, pp.136-137.

[425]Manirozzaman, A.F.M; *The Pursuit of Stability in international energy investment contracts: A Critical appraisal of the emerging trends,* Journal of World Energy Law & Business, Vol.1, No.2 of 2008, p.137.

investors' operations. Instead, the investor will be assumed to have made appropriate due diligence and feasibility study, including political risks,[426] before it decided to invest in a country.[427]

This approach squarely respects sovereignty of the people and the states to freely dispose of their natural wealth and resources. It is the most favoured approach among resource-rich countries whereby investment conditions are determined by the national law. This is because most aspects of PSAs and MDAs such as matters of recruitment of expatriate staff, employment of local labour, customs and exchange regulations, income tax and other forms of charges, and regulation of capital flow, are governed by the law of the host state.[428] Based on this understanding, any stability clause in an international contract which contravenes a 'rule of internal law of fundamental importance' should be regarded as invalid and hence unenforceable.

Basically, these two approaches have been taken on account when discussing the legal and practical challenges likely to be encountered in the course of implementation of the principle of PSNR in Tanzania under chapter five of this thesis. The idea is to see to it that international investment agreements which are concluded under valid states' authority are implemented in a way that safeguards interests of the contracting parties.

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[426] The political risks include change of political environment, amendment of laws, change of fiscal regimes, rebellious movements alongside mining areas, conflicts with members of the community, and so forth.

[427] Katja, G. & Brillo R., *Stabilization Clauses in International investment Laws: Beyond Balancing and Fair and Equitable Treatment*, Swiss National Centre of Competence in Research, Working Paper No.2013/46 of January 2014, p.25.

[428] Faruque A., *Validity and Efficacy of Stabilization Clauses: Legal Protection vs. Functional Value*, Journal of International Arbitration, Vol. 23, No.4 of 2006, p.329.

(ii)The Right to manage and Use Natural Resources for national development

Essentially this concerns the right to regulate internal use patterns and transform natural resources into meaningful development. Every state has its own policies, plans and goals on how resources should be exploited and used for development of the state and the people at large. As discussed earlier, developing states and newly independent states in 1950s and 1970s struggled in order to secure and increase their share in the administration of mining companies; hence ensure equitable sharing of profits. This desire still exists in the modern African states which seek to supervise and control exploitation activities for public interests through setting in place administrative machineries, tools for monitoring and evaluation, compliance and enforcement.

Throughout the natural resource development stages, the state has the right to exercise effective control over mining companies. This could be achieved where a state has controlling shares in the mining enterprises, be it local or foreign. Where it is established that there is no equitable share of the proceeds, the state has the right to nationalize the said property for public purpose. Schjver[429] argues that the right to expropriate or nationalize foreign investment is only used as an important tool of economic policy by both developed and developing states and that such right cannot be surrendered.[430]

The right to nationalize or expropriate properties could be done through enacting a law which takes away the share of investors in an enterprise and vests it wholly or

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[429]Schrijver, N.J., *Sovereignty over Natural Resources: Balancing Rights and Duties*, University of Groningen, 1995.
[430]*ibid*., p.273.

partly to the state or otherwise to a state-owned company. Generally, the right of every state to expropriate property for its economic and industrial needs is recognized as a norm of customary international law, subject to payment of compensation.[431] However, such powers may be limited through treaties and investment agreements on natural resource exploitation. As stated elsewhere, developing states can hardly exploit resources without collaboration with foreign investors.

As a matter of international investment law, the capital importing countries always require host states to protect properties vested in the foreign entities against confiscation by host states. This is guaranteed through provision on compensation or indemnification. On the other hand, independent states contest that lawful exercise of sovereign rights does not give rise to compensation claims, especially for expropriation of a general nature.[432] This means a state would be able to pay compensation to a foreign investor where the national law requires payment of compensation to both national and non-nationals. This means where host state does not pay compensation to nationals, then investors receive no compensation as well. Hence, a foreign investment company would be entitled to compensation in accordance with 'equal treatment provisions' of the expropriating country, except where there is agreement to the contrary.

Moreover, this approach has been challenged for violating the right to private property, which is considered as one of the inviolable rights under international

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[431] Amir, R., *Compensation for Expropriated Property in Recent International Law*, Villanova Law Review, Volume 14 Issue No.2 of 1969, p.200; also, Francis, N.J.S.J., *The Protection of Foreign Property under Customary International Law*, Boston College Law Review, Volume 6 Issue 3 of 1965, p.398.

[432] *ibid*., p.202.

law.[433] The proponents of private property rights argue that non-nationals should be paid compensation on the basis of violation of minimum international standards. This means the foreign investor should receive compensation regardless of the treatment accorded to nationals of the host state.[434] Consequently, the host state may be sued for breach of contractual obligations leading to payment of damages, including restitution in kind or payment of monetary damages.[435] This is a customary international law norm based on the natural law principles and a rule on unjust enrichment or wrongful deprivation of private property.[436]

Different scholars have discussed the issue of expropriation by states and the duty arising there from. Edward[437]observes that where a state has granted a right of property to a private person, any act to the contrary would amount to denial of justice for which a state becomes internationally responsible. Similarly, Francis[438] observes that the right of state to expropriate alien property is accompanied by payment of 'adequate, effective and prompt compensation', lack of which would amount to confiscation of property by the state. Furthermore, Allan[439] says that a duty of state to pay appropriate compensation is a limitation to the sovereign right to expropriate properties.

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[433] Edward, D. Re., *The Nationalization of Foreign Owned Property*, Minnesota Law Review, Volume 36 of 1952, p.342.
[434] Amir, R., Compensation *for Expropriated Property in Recent International Law*, Villanova Law Review, Volume 14 Issue No.2 of 1969, p.205.
[435] Francis, N.J.S.J., The Protection of Foreign Property under Customary International Law, Boston College Law Review, Volume 6 Issue 3 of 1965, p.411.
[436] Edward, D. Re., *The Nationalization of Foreign Owned Property*, Minnesota Law Review, Volume 36 of 1952, p.329; also, Francis, N.J.S.J., *The Protection of Foreign Property Under Customary International Law*, Boston College Law Review, Volume 6 Issue No.3 of 1965, p.401.
[437]Edward, D. Re., supra n.433, p.327.
[438]Francis, N.J., *op.cit.*, p.400.
[439]Allan, H.N., The *Chilean Copper Nationalization: The Foundation for a Standard of 'Appropriate Compensation*, Buffalo Law Review, Volume 23 No.3 of 1974, p.770.

Basically, the above approach is reflected in the provisions of UNGA Resolution 1803 (XVII) of 1962 which requires compensation to be paid in accordance with the rules of expropriating state and in accordance with international law. Therefore, this approach has been used to assess the legal and practical challenges likely to be encountered in the course of implementation of the principle of PSNR in Tanzania under chapter five of this thesis.

(iii)The Right to exploit natural resource freely and regulate foreign investments

This deals with control and admission of foreign investment in the course of exploiting natural resources. Principally, the state has the right to determine and control the prospecting, exploration, development, exploitation and marketing of resources in accordance with national laws.[440] Basically, the right to regulate has two distinct elements: regulation of foreign investment to support domestic development priorities and linkages; and protection of the public welfare from possible negative impacts of foreign investments.[441] A state cannot adopt the principle of PSNR, without exercising the right to regulate foreign investments which is a necessary evil.

As expressed elsewhere in this work, most resource-rich countries are unable to exploit minerals and petroleum given the fact that exploration, extraction and processing of raw materials require a lot of capital, high technology and skilled personnel. Thus, states would invite companies from the capitalistic states to invest in the extractive industries, enter into agreements and monitor performance of the

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[440]Schjver, N.J, *Sovereignty over Natural Resources: Balancing Rights and Duties*, University of Groningen, 1995, p.249.

[441] Howard, M.,'*The right of States to Regulate and International Investment Law*: A comment' in The Development Dimension of FDI: Policy and Rule-Making Perspectives, Proceedings of the Expert Meeting held in Geneva from 6 to 8 November 2002, UNCTAD, Geneva 2003, p.216 .

contracts. These investment agreements and treaties then become main instruments governing the contractual relationship between investors and states.

Notwithstanding investment agreements, the host state is always vested with the right to regulate and control activities of foreign investors through state-based mechanisms. Sornarajah[442] argues that the right to regulate foreign investment is inherent in the territorial sovereignty of the State. Basically, matters regulated under the state authority may include: control of exportation of raw materials and repatriation of income; compulsory disclosure of financial statements, payment of taxes and royalties at rate specified in the national laws; corporate social responsibility; issues on local content and dispute settlement. Some of these issues may be regulated by the investment agreements concluded between a state and investor. However, these agreements do not affect the right of the state to regulate investors, rather they set 'restrictions which ought to be applied as an exception to the general right to regulate,' and only when it is demonstrably 'in the public interest to do so.'[443]

This implies that a treaty or investment agreement will be applied in management and regulation of natural resources so long as the state accommodates it under national law and such treaty is not inconsistent with the public interest. This might lead to conflict between international investment law and national law which may affect the contractual rights and vested rights. As rightly argued by Sornarajah[444] there is need

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[442]Sornarajah, M., '*Right to Regulate and Safeguards'* in 'The Development Dimension of FDI: Policy and Rule-Making Perspectives, Proceedings of the Expert Meeting held in Geneva from 6 to 8 November 2002, UNCTAD, Geneva 2003, p.205

[443] Howard, M.,' *The right of States to Regulate and International Investment Law: A* comment' in The Development Dimension of FDI: Policy and Rule-Making Perspectives; Proceedings of the Expert Meeting held in Geneva from 6 to 8 November 2002, UNCTAD, Geneva 2003, p.216.

[444]Sornarajah, M., '*Right to Regulate and Safeguards'* in 'The Development Dimension of FDI: Policy and Rule-Making

to set a balance of international investment law and right to regulate foreign investments in order to ensure equal treatment of foreigners through protection of investments from expropriation and compulsory exhaustion of local remedies. [445]

Basically, the right to exploit natural resources and the right to regulate foreign investment becomes tested when a dispute arises. Whereas investors would seek to enforce provisions of the agreements or treaty by referring the dispute to arbitral tribunals seating in the foreign countries in accordance with the arbitration agreement, resource-rich countries would seek to enforce provisions of the agreements in the local courts. Generally, the arbitration clause is a separate agreement which vests power to the arbitrators to determine all matters falling under the contract, including determination of preliminary issues. The role of the national court in this case is to support the arbitral process; facilitate recognition and enforcement of arbitration agreements and awards, in accordance with the national laws.[446]

Most investors in the extractive sector prefer international dispute framework over domestic framework on a range of factors including biasness and prejudices. Essentially, the investors' unwillingness to resort to local courts is based on possibility of the state to influence decisions or awards. This is partly influenced by the fact that every international dispute entails political and legal aspects.[447]Julian[448] argues

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Perspectives, Proceedings of the Expert Meeting held in Geneva from 6 to 8 November 2002, pp.206-209.

[445]Julian, L.D.M., *Does National Court Involvement Undermine the International Arbitration Processes*? , The American University International Law Review, Volume 24 Issue No.3 of 2009.

[446]*ibid.*, pp.490-492.

[447]Maria, A. G., *Balancing The State's Right to Regulate with Foreign Investment Protection: A Perspective Considering Investment Disputes in the South American Region*, Groningen Journal of International Law, volume 6, Issue No.1 of 2018, p.116.

that parties to agreement resort to international arbitration because national courts become 'unacceptable, unsuitable, or inappropriate' in the determination of state-investor dispute. Instead, the author urges national courts in the host state to take a 'back seat' or take a 'hands-off approach' because 'parochialism' is inevitable in national courts.[449] This means court's involvement in the determination of state-investor dispute would be regarded as illegitimate and deliberately done in order to protect their nationals and protect national commercial or jurisdictional interests.

Similarly, Christopher[450] supports the above view by saying that the purpose of investor-state arbitration is to evade the use of local courts which is seen by investors as 'lacking objectivity,' causing delays and additional expenses to investors.[451] This is because national courts are often bound to apply domestic law even when such law falls short of the international standards, and that governments in host states are not able to compromise their sovereignty.[452] It therefore shows that foreign investors do not have confidence in the national justice systems on what appears to be a potential conflict of interest by local courts or tribunals which affects independence of judges and arbitrators. To them, reference of investment disputes to international fora is inevitable and the only means to ensure that justice is not only done but seen to be done.

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[448]Julian, L.D.M., *Does National Court Involvement Undermine the International Arbitration Processes?* The American University International Law Review, Volume 24 Issue No.3 of 2009, p.49.
[449]*ibid*., pp.494-537.
[450]Christopher, S., *Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration,* The Law and Practice of International Courts and Tribunals, 2005.
[451]*ibid*., p.1.
[452]*ibid*.

Conversely, the host state's fear in the international dispute fora is based on the assumption that foreign arbitral tribunals or courts serve the imperialistic interests only. They seek to protect foreign companies' property rights and disregard state and peoples' interests. Hence, host states invoke the principle of PSNR to prevent encroachment of state's sovereignty rights. The existing international tribunals such as ICSID and ICC have been challenged on several grounds, such as: lack of legitimacy; lack of arbitrator's accountability; excessive costs on the state; lack of transparency; lack of independence; lack of clear appeal procedures and inconsistence in the issued awards.[453]

The above factors caused some developing states such as: Argentina, Bolivia, Venezuela, Ecuador, and Nicaragua to embrace again the Calvo Doctrine in order to protect state sovereignty over international cooperation.[454] This application of Calvo doctrine in the international investment regime today is the desire of host state to insist on the exhaustion of local remedies before one opts to international arbitration. Initially, the exhaustion of local remedy principle was abandoned under both the New York Convention and ICSID Convention, under which resource-rich countries (Tanzania inclusive) have been victims of irrational awards.

Basically, the Calvo doctrine has been reintroduced by host states in three ways. First, through a provision in a contract which require mandatory use of domestic remedies

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[453]Supnik, K. M., *Making Amends: Amending the ICSID Convention to Reconcile Competing Interests in International Investment Law*, Duke Law Journal Volume 59 of 2009, p.355; also see Maria, A. G., *Balancing the State's Right to Regulate with Foreign Investment Protection: A Perspective Considering Investment Disputes in the South American Region*, Groningen Journal of International Law, volume 6, Issue No.1 of 2018, pp.115-116.

[454] Supnik, K. M., S*upra.,* p.355-357; see also Jia Liu; *Developing States Challenge ICSID,* International Conference on Education, Management and Social Science (ICEMSS) 2013 , pp.149-150.

for a certain period of time (let's say 12 months) before resorting to arbitration.[455] Secondly, a domestic forum selection clause in a contract requiring disputes arising from the contract to be taken to national courts or tribunals.[456] Thirdly, resort to domestic courts as a substantive requirement of international standards. This is established where justice is sought and denied in the national courts.[457] On her part, Tanzania appears to have partly reintroduced the Calvo doctrine through a law that subjects disputes concerning PSNR in the extractive industry to only forum in Tanzania using national laws.

Nevertheless, the revival of the Calvo doctrine by the host states has adverse impacts on foreign investments as it may be considered as denial of investors' right to justice, including access to international tribunals.[458] As rightly argued by Schjver[459] host states (Tanzania inclusive) should exercise their right to regulate and exercise authority over foreign investment, consistent to overriding provisions of international law incorporated in the investment treaties (both bilateral and multilateral investment treaties). The legal implication of calvo doctrine as partly entrenched under the laws of Tanzania is addressed under chapter five of this thesis.

3.4.2 PSNR Duties under International Law

The Principle of PSNR entails a number of obligations which developing states and the people must comply in order to lawfully exercise their right to PSNR. The

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[455] Christopher, S., *Calvo's Grand children: The Return of Local Remedies in Investment Arbitration,* The Law and Practice of International Courts and Tribunals, 2005, pp.2-4.
[456] *Ibid*., pp.5-10.
[457] *Ibid*., pp.13-15.
[458] *Ibid*., p.16.
[459] Schrijver, N.J., *Sovereignty over Natural Resources: Balancing Rights and Duties*, University of Groningen, 1995, pp.264-266.

principle entails two sets of state obligations: duties owed to the people in the particular state and duties owed to investors. This ensures that PSNR is exercised for the benefit of the people, in a manner that does not violate international investment law on investors' protection. The following are duties that states must abide to in order to exercise the right to PSNR for sustainable development of the people.

(a) The people-based duties

Generally, the state as juristic person has an overriding duty to exploit natural resources for national development and welfare of the people. The state has an obligation to ensure that natural resources are exploited and used for the benefit of the people in the particular state. This obligation is clearly expressed in different UNGA Resolution on PSNR. First, UNGA Resolution 523 (VI) of 12 January 1952 required natural resources to be utilized for the domestic needs of the underdeveloped countries, economic development and improvement of standards of living.[460]Secondly, UNGA Resolution 626 (VII) of 21 December 1952 required member states to exploit resources 'wherever deemed desirable by them for their own progress and economic development'.[461]

Similarly, the UNGA Resolution 1803 (XVII) of 1962 provided *inter alia*, that the right of peoples and nations to PSNR must be exercised in the 'interest of their national development and the well-being of the people of the State concerned.'[462] These three UNGA Resolutions stress the role of the state to ensure that all the people

[460] UNGA Resolution 523 (VI) of 1952, paragraph 1.
[461] UNGA Resolution 626 (VII) of 1952, paragraph 1.
[462] UNGA Resolution 1803 (VII) of 1962, paragraph 1.

in the state benefit from resource exploitation. Furthermore, the duty of the state towards people's welfare is also reflected under article 1 of both ICCPR and ICESCR, and article 21 of the ACHPR which provide that right to PSNR shall be exercised in the exclusive interest of the people, and that in no case shall a people be deprived of it'. This means that states should exercise their right to self-determination for realization of desired socio-economic benefits of the people.

Notwithstanding national development, the state organs must also ensure that peoples' right to self-determination is preserved. The government is called upon to respect the rights and interests of minority groups, including indigenous population, through active peoples' participation in the exploitation process. As discussed earlier on, the state should obtain free and informed consent of the people prior to the approval of any development project affecting their lands, territories and resources, and they must be fully compensated in case of compulsory acquisition.

More importantly, the state has duty to provide the public affordable, effective and timely access to information. The general environmental principles require the state to conduct environmental impact assessment before it implements any development project in order to establish socio-economic and environmental impacts, and develop mitigation measures. The government has the duty to facilitate public participation in decision making process, and provide access to judicial and administrative remedies for violation of right to participation.[463] Thus, an issue concerning public participation

[463] John, H. K., *Framework Principles on Human Rights and the Environment,* UN Special Reporter on Human Rights and the Environment, United Nations Human Rights Special Procedures, 2018, pp.10-14.

in the exploitation of natural resources is paramount for attaining national development and welfare of the people.

Basically, national development and welfare of the people is secured through proper planning and execution of agreements and investment treaties which safeguard public interest over investors' interests. However, most of the resource-rich states are said to have not benefitted from most bilateral investment treaties (BITs) due to the unfavorable terms contained in those agreements. For example, some BITs give excessive power to investors to control domestic assets; lead to loss of revenue through free repatriation of money to foreign states; hinder technological development and local employment through importation of technology and expatriates.[464] Some other terms in the BITs undermine local governance in the host state; divert public funds to cover legal fees, administrative charges and monetary compensations awarded by tribunals; affect development of local markets; and reduce flow of Foreign Direct Investment (FDI).[465]

Generally, the above named factors reflect most attributes of BITs in African states which protect foreign investors in terms of compensation for expropriation; freedom from discriminatory measures; free capital repatriation; equitable treatment and foreign arbitration of disputes.[466] The determination of investor-state dispute through

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[464] Joshua, B., *How Developing Countries Can Adapt Current Bilateral Investment Treaties to Provide Benefits to Their Domestic Economies*, The Global Business Law Review, Volume 1 of 2011, pp.190-192; also see Florence, S.A., *The Protection of Foreign Direct investments in Developing and Emerging Markets through the Instrumentality of Arbitration: Fair Game*, Florida A & M University Law Review, Volume 9 Issue No.1 of 2013, pp.53-55.

[465] ibid.

[466] Joshua, B.., *How Developing Countries Can Adapt Current Bilateral Investment Treaties to Provide*

arbitration exposes sovereign states to litigations, claims for unbearable monetary damages, and erosion of sovereign right to natural resources.[467] The inability of BITs to promote socio-economic development of the developing states has given rise to dissatisfaction over foreign investors and rejection of international investment laws as binding norms.

Among the arguments against the investment rules include: non participation of developing states in the development of these investment norms; the role of international institutions in preparation of the standards which solely protects investors; and the fact that such standards violate the law of equality of nations.[468] Consequently, some developing states have unilaterally withdrawn from various investment treaties; revised the agreements and /or amended their laws by invalidating agreements or arrangements which contravene local laws, in order to ensure equitable distribution of wealth and effective use of resources for national development and welfare of the people.

It can be affirmed that host state has duty to act reasonably and diligently when exercising sovereign right to PSNR in order to ensure that resources are exploited and used for national development and welfare of the people, including allowing people

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Benefits to Their Domestic Economies, The Global Business Law Review, Volume 1 of 2011, p.190.

[467] Florence, S.A., *The Protection of Foreign Direct investments in Developing and Emerging Markets through the Instrumentality of Arbitration: Fair Game*, Florida A & M University Law Review, Volume 9 Issue No.1 of 2013, pp.75-77.

[468] Francesco, S.& Paolo, V., *Africanizing Bilateral Investment Treaties (BITS): Some Case Studies and Future Prospects of a pro-active African Approach to International Investment*, State Practice & International Law Journal (SPILJ), Volume 2 Issue No.2 of 2015, pp.5-6; also see Lebero, R.K., *The International Law Framework for Foreign Investment Protection: An Analysis of African Treaty Practic*e, PhD Thesis, School of Law, University of Glasgow, 2012, p.26.

in the country to participate in the decision-making process. Thus, the sovereign act such as expropriation of foreign property or change of law is likely to be justified when the state is able to prove that such acts were undertaken for public purpose including national development and welfare of the people. The public purpose rule is important when addressing the issue on adoption of the principle of PSNR in Tanzania in chapter four of this thesis.

(b) Investor-based duties

The state and the people have the right to exploit resources in a way that promotes international cooperation and respect foreign investors' right to property. Before the principle of PSNR was fully developed, the colonial government used 'gun boat diplomacy' and imperial laws to grant fair and equitable treatment to foreign companies, including right to exclusive control of resources. [469] Further, colonial governments executed bilateral agreements for protection of foreign investors without approval or consent of traditional chiefs. For example, it is reported that the British Protectorate of Tanganyika concluded seventeen (17) agreements without consent of traditional chiefs.[470] This implies that during colonial period foreign investors reaped the fruits from African soil without any sweat through fair and equitable treatment standards.

However, upon attaining independence, developing states under the support of the Soviet Union, Communist China and Non-Aligned Movement (NAM) denounced

[469]Lebero, R.K., The International Law Framework for Foreign Investment Protection: An Analysis of African Treaty Practice, PhD Thesis, School of Law, University of Glasgow, 2012, pp.20-22
[470] Seaton, E.E. &Maliti, S.T., *Tanzania Treaty Practice*, Oxford University Press, 1973, p.66.

western principles on international minimum standards. Such standards challenged by developing states included: payment of full, prompt and effective compensation in the event of expropriation of properties; affording preferential treatment to foreign investments, and access to an independent judiciary.[471] Instead, the host states championed for recognition of right to nationalization without any obligation to pay compensation, as one of the recognized grounds for economic reforms under international law.[472]

Moreover, because of the necessity of FDI in the host state and the imposition of state duty to cooperate for global development, there was a need to adopt certain safeguards on investors' protection through provisions of UNGA Resolution 1803 (XVII) of 1962, particularly paragraph 4, which provides as:

> *"Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication."* ***(Emphasis is mine).***

The above provision provides for investor's right to appropriate compensation and right to due process of law, including use of international arbitration after exhaustion of local remedies. Furthermore, UNGA Resolution 1803 (XVII) of 1962 also recognized the ability of states to conclude investment agreements as part of

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[471]Schwarzenberg, G., *Foreign Investment and International Law*, Stevens & Sons, 1969, pp.2-23.
[472]Lebero, R.K., *The International Law Framework for Foreign Investment Protection: An Analysis of African Treaty Practice*, PhD Thesis, School of Law, University of Glasgow, 2012, p.36.

international collaboration on natural resource exploitation. Nevertheless, the host state is free to determine investment conditions using its laws, which must not be inconsistent with norms of international law enshrined under the BITS. This commitment is reflected under paragraph 8 of UNGA Resolution 1803 (XVII) of 1962 which reads as follows:

> *"Foreign investment agreements freely entered into by or between sovereign States shall be observed in good faith*; States and international organizations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the *Charter and the principles set forth in the present Resolution."* (Emphasis is mine.)

The above provision implies that host state has competence to conclude BITs with foreign states for benefit of investors. However, it is duty bound to observe principles enshrined in the UN Charter, including promotion of international cooperation in addressing international socio-economic and cultural concerns of global importance.[473] Generally, international investment agreements define substantive and procedural investor's rights which states promise to respect and protect for the whole period of investment. The substantive rights cover state promises relating to: payment of adequate compensation upon expropriation; free flow of capital (also known as capital repatriation); non-discrimination of investors; fair and equitable treatment; equality of treatment in accordance with minimum standards required by customary international law.[474]

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[473] See the UN Charter, articles 1(3), 55 and 56; also see the ACHPR, article 21(3); the ICESCR, article 2(1).

[474] Florence, S.A., *The Protection of Foreign Direct investments in Developing and Emerging Markets through the Instrumentality of Arbitration: Fair Game*, Florida A & M University Law Review, Volume 9 Issue No.1 of 2013, p.56; also Susan, D.F., *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, Fordham Law Review, Volume 73 Issue No.4 of 2005, pp.1530-1532; also see Joshua, B., *How Developing Countries*

Ideally, the above-mentioned aspects seek to protect foreign investments against arbitrary acts of states that practically endanger investors' property rights. Marcela[475] asserts that an investment treaty essentially limits sovereign right to natural resource as it guarantees the investor certain standards of treatment, including: national treatment standard, most-favoured nations, fair and equitable treatment and standard on compensation. [476] These four cardinal principles of investment law are regarded as norms of international development law [477] and norms of customary international law;[478] hence binding on all states.

Basically, the 'standard of fair and equitable treatment' is used to refer to the notions of minimum standards of treatment and treatment of most favoured nations, which are used to protect legitimate expectations of the investors, including: stability of the law, administrative conduct, and contractual relationship; non-discrimination; equity; transparency; due process and rule of law. [479] Rudolf[480] relates the standard of fair and equitable treatment to notions of due process, denial of justice, transparency, good faith, public participation and prohibition of discrimination. These standards may be used as tools of good governance the breach of which may lead to

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can Adapt Current Bilateral Investment Treaties to Provide Benefits to Their Domestic Economies, The Global Business Law Review, Volume 1 of 2011, p.190.

[475]Marcela, K.B., *Fair and Equitable Treatment: An Evolving Standard*, Max Planck Yearbook of United Nations Law, Volume 10 of 2006.

[476]ibid., pp.618-619.

[477] Edward, K., *Emerging International Development Law and Traditional International Law*: Congruence or Cleavage; GA Journal of International and Comparative Law, Volume 17 of 1987, pp.435-436.

[478] Marcela, K.B., *Fair and Equitable Treatment: An Evolving Standard*, Max Planck Yearbook of United Nations Law, Volume 10 of 2006, p.620.

[479] Roland, K., '*Fair and Equitable Treatment' in International Investment Law*, Cambridge Studies in International and Comparative Law, Cambridge University Press, 2011, pp.150-205

[480]Rudolf, D., *Fair and Equitable Treatment: A Key Standard in Investment Treaties,* The International Lawyer, Volume 39 Issue No.1 of 2005, pp.93-100; also see Marcela, K., *Fair and Equitable Treatment: An Evolving Standard*, Max Planck Yearbook of United Nations Law, Volume 10 of 2006, pp.619-680.

compensation claims.[481]

However, the validity and enforceability of these principles in the developing states has remained to be controversial and questionable on various reasons, such as contingent nature of the standards which change from one case to another;[482] lack of clear definition of these standards under the host state law or international law leading to conflicting decisions, and the existence of BITS which address specific investment matters.[483]

On the other hand, investment treaties stipulate procedural rights of investors in case a state breaches substantive provisions of the agreement. Essentially, the procedural provisions concern with mechanisms to enforce rights.[484] It concerns with stipulation of the forum to redress alleged wrongs, including arbitration in a neutral *ad hoc* or institutional tribunal or litigation under domestic courts. Basically, investment disputes may arise from breach of bilateral agreement or investment contract, which may constitute different courses of action, determinable by either the same court or two different courts depending on the choice of the governing law by the parties.[485] This is why states and investors are advised to draft clear and unambiguous dispute settlement clause in order to minimize chances of jurisdictional conflicts and

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[481] Marcela, K.B., *Fair and Equitable Treatment: An Evolving Standard*, Max Planck Yearbook of United Nations Law, Volume 10 of 2006, pp.678-680.
[482] *ibid*., p.620.
[483] Lebero, R.K., *The International Law Framework for Foreign Investment Protection: An Analysis of African Treaty Practice*, PhD Thesis, School of Law, University of Glasgow, 2012, pp.170-172.
[484] Florence, S.A., *The Protection of Foreign Direct investments in Developing and Emerging Markets through the Instrumentality of Arbitration: Fair Game*, Florida A& M University Law Review, Volume 9 Issue No.1 of 2013, p.58.
[485] Florence, S.A., *The Protection of Foreign Direct investments in Developing and Emerging Markets through the Instrumentality of Arbitration: Fair Game*, Florida A& M University Law Review, Volume 9 Issue No.1 of 2013, pp.59-61.

possibility of occasioning conflicting decisions.

On the basis of discussion above, it can be submitted that effective exercise of the right to PSNR by the state, must consider the well-established duties owed to the people in a particular state and the investors. While the sovereign state has power to manage and regulate exploitation of natural resources, it has an overriding duty to ensure that peoples' welfare and national development are guaranteed through proper allocation and distribution of revenue arising from natural resource exploitation. However, the host state must strive to achieve the public interest without contravening its existing obligations on investors' protection arising from international investment treaties and international law.

Therefore, the adoption of the principle of PSNR in Tanzania must consider the rights vested in both the state and the people as entrenched in various international and regional instruments governing human rights and environmental protection. On the other hand, Tanzania must exercise her sovereign rights for the benefit of the people, but without affecting state's obligation on protection of investor's interests and vested contractual rights under international investment law. These aspects are partly addressed in the subsequent chapters of this thesis.

3.4.3 Enforceability of PSNR under International Law

As discussed earlier on, the principle of PSNR is a tool which developing states sought to invoke in order to ensure equality of states on matters of natural resource exploitation, in order to achieve economic growth and development of the people. Since its development in 1950s, there has been diverging interpretation on whether or

not the principle of PSNR is binding on its subjects. This has been caused on what Kiwory[486] has called 'the difficult path through which the principle of permanent sovereignty over natural resources evolved.[487]

On one hand, the developed states sought to retain some form of control on natural resources through protection of foreign investments, and hence limit the state's sovereign powers on nationalization or expropriation of properties. On the other hand, newly independent states and other developing states expressed their willingness to reclaim their right to self-governance and economic independence. These conflicting interests dominated the deliberations during adoption of UN Resolutions on PSNR and have greatly affected the interpretation and implementation of the principle of PSNR.

Some scholars argue that the principle of PSNR is a norm of general principle of international law and others regard it as norm of customary international law. The first school of thought regards the principle of PSNR as one of the 'universally recognized principles' applicable to all states since it proclaims the inherent right of equality of states. Enyew[488] observes that all states regardless of whether they are newly independent, developing or developed are holders of the right to PSNR as an integral part of states sovereignty and political independence as enshrined under

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[486]Kiwori, G., *The Role of International Law in Intrastate Oil and Gas Governance in Tanzania*, PhD Thesis, the University of Bayreuth, 2018.
[487]*ibid*., p.62.
[488]Enyew, E.L., *Application of the Right to Permanent Sovereignty over Natural Resources for Indigenous Peoples: Assessment of Current Developments*, Arctic Review on Law and Politics, Volume 8 of November 2017.

article 2 of the UN Charter.[489]

Generally, articles 1 and 2 of the UN Charter provide for prohibition on use of force against territorial integrity or political independence of any state, the breach of which amounts to violation of peremptory norms of international law (also known as jus cogens norm).Basically, these provisions entrench the principle of PSNR by requiring states to respect sovereignty of other states and imposing a duty on states not to interfere in the internal affairs of another state, except through collective efforts sanctioned by the Security Council, on grounds of maintaining world peace and security, or on humanitarian grounds. Legally speaking, the principles enshrined under articles 1 and 2 of the UN Charter on state sovereignty are binding on all states regardless of consent to be bound by treaty.[490]

Similarly, Magogo[491] argues that the principle of PSNR is now considered as a nom of *jus cogens* since it is used in different fields of international law, including international economic law, international environmental law and Law of the Sea.[492] Likewise, Cassese[493] and Brownlie[494] assert that self-determination is a legal principle which has achieved *jus cogens* status from which states cannot derogate. Similarly,

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[489]*ibid*., p.225.

[490]Mark W. J., *Nature of Jus Cogens*, 3 Connecticut Journal of International Law, Volume 3 of 1988, p.362.

[491]Magogo, T.D., *The Principle of Permanent Sovereignty Over Natural Resources (PSNR) vis -a -vis Benefits from Extractive Investment Arrangements: A Highlight on Natural Resources Investment Arrangements*, International Journal of Legal Developments and Allied Issues, Volume 6 Issue 1 of January 2020.

[492]Magogo, T.D., *The Principle of Permanent Sovereignty Over Natural Resources (PSNR) vis -a -vis Benefits from Extractive Investment Arrangements: A Highlight on Natural Resources Investment Arrangements*, International Journal of Legal Developments and Allied Issues, Volume 6 Issue 1 of January 2020, pp.13-15.

[493]Cassese, A., *International Law*, Oxford University Press, 2nd Edition, 2005, pp.202-203.

[494]Brownlie, Principles of Public International Law, Oxford University Press, 7th Edition, 2008, p.511.

Schjver[495] argues that the principle of PSNR contains elements such as prohibition of appropriation without compensation and inherent right of states and people to self-determination which are regarded as jus cogens norms.[496]

On the other hand, Pereira & Orla[497] argue that the principle of PSNR is a norm of international law since it is widely accepted by large majority of states and it is a prerequisite for economic development.[498] Generally, this school regards PSNR as one of the jus cogens norm containing a principle of international law which is binding on all states regardless of whether it has ratified relevant international and regional instruments on the matter. It means that no state can conclude an agreement or treaty to the contrary, unless a new norm develops to replace the old norm. This rule is articulated under article 53 of the Vienna Convention on the Law of Treaties (VCLT) which reads as:

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

The above position is also articulated by Kamrul[499] who argues that any rule contrary to the notion of *jus cogens* is regarded as void, because it opposes the fundamental norms of international public policy.[500] Similarly, Mark[501] argues that jus cogens norms

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[495]Schrijver, N.J., *Sovereignty Over Natural Resources: Balancing Rights and Duties*, University of Groningen, 1995
[496]ibid., pp.221-222.
[497]Pereira, R. &Orla, G., *Permanent Sovereignty over natural Resources in the 21st Century: Natural Resource Governance and the Right to Self-determination of Indigenous Peoples under International Law*, Melbourne Journal of International Law, Vol.14 of 2013.
[498]*ibid*., pp.462-464.
[499]Kamrul, H., *The Concept of Jus Cogens and the Obligation Under the U.N. Charter*, Santa Clara Journal of International Law, Volume 3 Issue No.1 of 2005.
[500]*ibid*., p.74.
[501]Mark W. J., *Nature of Jus Cogens*, 3 Connecticut Journal of International Law, Volume 3 of 1988.

comprise of 'rules with a permanence which even treaties cannot supersede,'[502] and 'constitute a basis for the community's legal system.'[503] Principally, jus cogens norms limit the ability of states to create or change existing international law rules; prevent states from violating the same rules and ensure stability of international legal system.

From the above scholarly submissions, it can be argued that PSNR is regarded as a norm of international law on two main reasons. First, it meets criteria for being recognized as a jus cogens norm: 'it is accepted and recognized by the international community of states as a whole, as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'[504] This is evidenced through UNGA Resolutions, UN Charter, different international and regional treaties which provide for human rights issues and environmental protection as earlier explained. The same position was also observed in the case *Legal Consequences for States of the Continued Presence of South Africa in Namibia (S. W. Africa) notwithstanding Security Council Resolution 276,*[505] whereby Judge Ammoun regarded the right of self-determination as a 'norm of the nature *of jus cogens,* derogation from which is not permissible under any circumstances.'

Secondly, the principles of PSNR and jus cogens norm serve the same and similar purposes: maintenance of world peace and promotion of social justices. Generally, jus cogens is used to safeguard interests fundamental to the international society, such as:

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[502] *ibid*., p.361.
[503] *ibid.,* p.362.
[504] See article 53 of Vienna Convention on the Law of Treaties; also see Kamrul, H., *The Concept of Jus Cogens and the Obligation Under The U.N. Charter*, Santa Clara Journal of International Law, Volume 3 Issue No.1 of 2005, p.76
[505] 1970 LCJ 3, 304, (Ammoun, J., Separate Opinion).

peace and security, respect for human rights, prohibition of genocide, right to life, prohibition against use of force, prohibition of torture, prohibition of apartheid, and so forth.[506] Similarly, the principle of PSNR ensures equitable distribution of benefits between states and the peoples, respect of individual and collective rights, and safeguarding state's political autonomy and economic independence. Thus, PSNR and jus cogens norms are fundamental norms for preservation of UN values on equality of states and equality of all persons without discrimination.

The second school of thought regards the principle of PSNR as a norm of customary international law. The argument here is centred on the fact that UN Resolutions, particularly UNGA Resolution 1803(XVII) of 1962, signifies the proclamation of states practice concerning rights of states by the developed states, developing states and newly independent states. This is due to the fact that the Resolution was adopted by the General Assembly which is an appropriate organ for formulation and expression of the practice of states pertaining to international law, through voting procedure.[507] This view is supported by several scholars in the field of international law. Yolanda& Vincent[508] argue that Resolutions unanimously adopted by the General Assembly are not legally binding, but they are reliable sources of state practice showing the level of acceptance of the principle of PSNR.[509]

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[506]Karen, P., *Jus Cogens: Compelling the Law of Human Rights*, Hastings International &Comparative Law Review, Volume 12 of 1989, pp.430-443; Christenson, G. A., "*Jus Cogens: Guarding Interests Fundamental to International Society*" Virginia Journal of International Law, Volume 28 of 1988, pp.616-618.

[507]Sangwani, P.N., *Permanent Sovereignty over Natural Resources and the Sanctity of Contracts, From the Angle of Lucrum Cessans*, Loyola University Chicago International Law Review, Vol.12 Issue 2 of 2015, p.158.

[508]Yolanda, T. & Vincent, O.N., *The International Law Principle of Permanent Sovereignty over Natural Resources as an Instrument for Development: The Case of Zimbabwean Diamonds*, African Journal of Legal Studies, Martinus Nijihoff Publishers, Volume 6 of 2013.

[509]*ibid*., p.81.

This is also supported by Nanda[510] who avers that the process involved in the deliberations where each state gets equal opportunity to express her will and finally approving it through voting by member states, is equated to *opinion juris* and state practice, which are the key factors towards development of customary international law.[511] Basically, the UNGA is an organ which may be equated with the House of Assembly in the national legal system, since it expresses aspirations which are generally acceptable by the states concerned. Therefore, UNGA Resolutions, like state legislations, judicial decisions and diplomatic correspondences, is treated as evidence of the practice of member states concerning a particular norm of international law,[512] which if accepted by states as comprising binding legal obligations, and then it becomes a norm of customary international law.

On this regard, the UNGA does not create a custom among states but only represents binding state practices as perceived and applied by member states. This view is also shared by Schjver[513] who argue that the 1962 UNGA Resolution could be placed in the category of declaratory resolutions which formulates a new opinion *juris communis* with respect to the principle of PSNR.[514] Moreover, since the Resolution 1803 (XVII) of 1962 was adopted by 87 votes against 2 votes, it could be argued that such unanimous voting signified consent by states to be bound. It actually represented a coincidence of interest between developed and developing states, and an affirmation

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[510]Nanda, V.P., *Self-Determination under International Law: Validity of Claims to Secede*, Case Western Reserve Journal of International Law, Volume 13 Issue 2 of 1981.
[511]ibid, p.259.
[512] Andre de Rocha Ferreira, et al., *Formation and Evidence of Customary International Law*; UFRGS Model United Nations Journal, Volume 1 of 2013, p.188.
[513]Schrijver, N.J., Sovereignty Over Natural Resources: Balancing Rights and Duties, University of Groningen, 1995.
[514]ibid., p.82.

on a need of the international community to cooperate in order to achieve sustainable development.

On the basis of the majority-rule principle which is used to pass decisions during UNGA meetings it is clearly shown that there was 'consensus' or 'meeting of minds' among states when adopting Resolution 1803 (XVII). However, the majority rule cannot be applied to other UNGA Resolutions which were adopted by the minimum number of participating member states. As a principle, customary international law finds its source in the wide spread consistent and general practice of states, which is accepted by all or most of states as a legally binding norm. This study has shown that except for Resolution 1803 (XVII) of 1962, there is no other UNGA resolution concerning PSNR which has received majority support from both developed and developing states.

Similarly, international tribunals have maintained the same position that PSNR is a norm of customary international law, when determining lawfulness or legitimacy of the nationalization of foreign properties by developing states. In *Texaco Overseas Petroleum and others vs. Libyan Arab Republic*,[515] the arbitrator held that the respondent had right to PSNR incorporated in the UNGA Resolution 1803 of 1962, which was now regarded as customary international law since it was adopted by the unanimous majority votes of members present. On the other hand, in the case involving two African states, Uganda and Congo, famous known as the *case of*

[515] 17 *ILM* (1978), pp. 3–37, para. 59; also, in 53*ILR*, p. 389.

Armed Activities on the Territory of the Congo, [516] the International Court of Justice (ICJ) confirmed that the principle of PSNR formed the norm of customary international law.

Notwithstanding the relevance of PSNR as a norm of customary international law, there are a number of critics who argue that the principle falls short of the legal requirements. The first objection is based on the mandate of the UNGA. It has been argued that the UNGA resolutions have no legal effect and they cannot bind member states, unless backed by the actions of the United Nations Security Council (UNSC), or otherwise ratified by a state through legislative process. This view is supported by some scholars. Roozbeh[517] observes that many of the UNGA Resolutions are 'aspirational in nature and are not intended to be embraced fully and unconditionally by those states voting for them.'[518] Jack & Eric[519] argue that a form of approval of the UNGA Resolution is required to show the belief that a state is bound by a particular norm. [520]

The above arguments suggest that UNGA Resolutions requires states to take specific measures in accordance with national laws to domesticate obligations and rights arising from the respective resolutions. This view appears to be more applicable to international and regional treaties that accommodate the principle of PSNR which

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[516] *Armed Activities on the Territory of the Congo (the Democratic Republic of the Congo vs. Uganda)* (2006) I.C.J. General List No. 126.

[517] Roozbeh, B.B., *Customary International Law in the 21st Century: Old Challenges and New Debates*, The European journal of International Law, Volume 21 No.1 of 2010.

[518] Franck, *Appraisals of the ICJ's Decision: Nicaragua vs. United States (Merits)*, American Journal of International Law, Volume 81 of 1987, p.119.

[519] Jack, L.G. & Eric, A.P., *A Theory of Customary International Law*, The University of Chicago Law Review.

[520] Jack, L.G. & Eric, A.P., *A Theory of Customary International Law*, The University of Chicago Law Review, p.1118.

have been ratified by most states in the developed and developing world through Acts of Parliament and Constitutions.

The second objection is based on the conditions for development of a norm into international customary law. Generally, before a custom comes into existence, there must be a degree of constant and uniform usage of the particular practice. As observed earlier, the deliberations for adoption of Resolution 1803 (XVII) was faced with diverging views on what constituted sovereignty of the people and states over their natural resources, particularly on the subjects of PSNR and content of the principle of PSNR. This controversy among members of the UNGA shows that at the time of adoption of the principle of PSNR there was no similar and uniform understanding among states. This could imply that there was no uniform usage at the time of adoption. Worse still, the principle of PSNR is still developing further to address intrastate resource allocation which depends on the respective states' administrative and tenure systems.

On the other hand, the element of *opinio juris* is said to be lacking, particularly on those states that did not participate in the voting (absentees) and those states that had not attained independence at the time of adoption. Different scholars have shown that the issue of belief to be bound is 'mysterious' and dependent on 'a political institution' in which it is difficult to ascertain the intention to be bound.[521] Similarly, at the material time the concept of PSNR was still growing and it was being opposed

[521] Jack, L.G. & Eric, A.P., *A Theory of Customary International Law*, The University of Chicago Law Review, p.1118; see also Roozbeh, B.B., Customary International Law in the 21st Century: Old Challenges and New Debates, The European journal of International Law, Volume 21 No.1 of 2010, p.182.

by developed states because it was prejudicial to their economic interests. This is still the case today whereby to a large extent the principle is supported by developing countries, although developed states invoke provisions on fair treatment of non-citizen as per international investment laws.

Thus, given the opposition of the principle of PSNR and non-participation of other states, it is unlikely to argue that the Resolution 1803 (XVII) signified the intention of the international legal order to be so bound. A form of evidence (express or implied) is needed to show the intention of the state to be bound by the principle of PSNR. This legal position was discussed in the case of *Nicaragua vs. United States of America*[522] where the court stated as follows:

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

Notwithstanding the controversy on enforceability of the principle of PSNR, it is undisputed truth that a principle of PSNR is one of the principles considered to be binding on all states. It is entrenched in different UN Resolutions, bilateral and multilateral treaties, constitutions of many independent states, principal and subsidiary legislations governing natural resources in each state. Furthermore, international and national courts continue to apply the principle of PSNR in solving investment and trade disputes, and towards protection of right of people to internal

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[522]1986 ICJ Reports, pp. 108 –109.

self-determination.

More importantly, Tanzania adopted the UNGA Resolution 1803 (XVII) of 1962 as part of her laws through the provisions of the Natural Wealth and Resources (Permanent Sovereignty) Act of 2017.This is the proof that Tanzania has domesticated the PSNR as one of her binding international customary norms. Therefore, it is a binding principle which is used to ensure that agreements or arrangements concluded by the government are fair and equitable enough to promote economic growth of the people and the state. The adoption of the principle of PSNR in Tanzania's extractive laws is critically covered under chapter four of this thesis.

3.5 Conclusion

This chapter has expounded on the development of PSNR as a principle of international law. It has established that PSNR is one of the principles that have been accommodated in various UNGA Resolutions and treaties governing human rights and environmental rights. Some of these instruments are prescribed under the UN mandate and various regional economic integrations. Notwithstanding various diversities on its development, the principle of PSNR is nothing but bundle of rights and duties which states and courts must observe when applying and interpreting it in the domestic legal regime.

Furthermore, this chapter has addressed various obligations binding on host states when exercising sovereign right to PSNR, including obligation to promote public participation in the decision making and respecting international investment principles on protection of foreign investments. The breach of these state obligations

implied in the principle of PSNR may constitute a breach of the principle of PSNR, a binding principle of international law and customary international law. Tanzania is obliged to exercise the principle of PSNR in line with the international standards explained in this chapter. The next chapter presents an analysis on adoption of the principle of PSNR in Tanzania. Essentially, it contains a discussion on various laws that expressly and impliedly provide for the rights of the state and the people to PSNR in Mainland Tanzania. Specifically, it shows how the subjects of the principle of PSNR actively participate in the natural resource decision making process.

CHAPTER FOUR

LEGAL AND INSTITUTIONAL FRAMEWORK GOVERNING PSNR AND PUBLIC PARTICIPATION IN THE DECISION MAKING IN MAINLAND TANZANIA

4.1 Introduction

The adoption of PSNR in Tanzania seeks to recognize the ability of both the state (through the government) and the people to manage and control the exploitation of natural resources. As discussed earlier, the government which appears to be 'an agent' of the people usually controls investments in the extractive sector by enacting laws and enforcing laws. Thus, the government usually negotiates or renegotiates agreements and finally concludes agreements with investors on exploitation of the natural resources. Moreover, when disputes arise, local and international courts would be approached by the parties seeking for interpretation of the laws and international investment agreements. In case of any liability, the host state would be required to pay compensation and damages for loss suffered by investors according to the national laws which are consistent with international law.

This means that Tanzanian laws governing the principle of PSNR must be construed in line with the international laws governing PSNR, including requirements on investor protection. Likewise, as part of natural resource governance, non-state actors must be involved in the decision making in order to minimize state exposure to risks, including liability for breaches of investment contracts. On the basis of these legal postulates, this chapter explores various laws and institutions in the extractive industry which expressly and impliedly provide for the principle of PSNR and Public

Participation in Tanzania. Each piece of legislation has been discussed separately because of the fact that every law addresses PSNR and Public Participation from a different perspective. Further, this approach offers the researcher a wider avenue of exploring on the strengths and weaknesses of particular legislation providing for the principle of PSNR and Public Participation in Tanzania; hence offering maximum possibility of pointing out specific legal issues arising from each law.

4.2 The Legal Framework on PSNR and Public Participation in Mainland Tanzania

4.2.1 The Constitution of the United Republic of Tanzania [523]

This is the *grund norm* stipulating principles for administration of the state. The Constitution of the United Republic of Tanzania (hereinafter referred to as CURT) among other provisions establishes three main organs: executive, parliament and judiciary. According to the doctrine of separation of power each of these organs is duty bound to exercise its powers in accordance with the constitutional principles, including rule of law and independence of judiciary. [524] The Parliament is responsible for enactment of the laws; the executive enforces the laws and the judiciary interprets laws.

Basically, the CURT has various provisions which entrench the principle of PSNR and directs each citizen and state organs to take reasonable and lawful actions to safeguard the state's economic, socio-cultural and economic independence.

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[523] Cap 2 R.E 2010.

[524] Shivji, I., et al., Constitutional and Legal System of Tanzania: A Civics Sourcebook, Mkuki na Nyota Publishers, Dar es Salaam, 2004, p.42; also see Musa, S., Public Law in East Africa, Law Africa Publishers, 2013, pp.20-22.

Beginning with citizens of Tanzania, article 27(1) of CURT obliges every natural or legal person to protect the natural resources of the United Republic including property of the state authority, and all property collectively owned by the people. It further requires every person to safeguard state and public properties by combating all forms of waste and squander and participating in collective management of resources for national economic interests and welfare of the people.[525] This provision is an express acknowledgement of the authority of the people in Tanzania over natural resource management.

In addition, every citizen of Tanzania has the duty to protect, preserve and maintain the independence and sovereignty of the nation.[526] Additionally, every person has a right to seek, receive and disseminate information regardless of national boundaries; and a right to be informed of various important events of life and activities in the society.[527] Impliedly, the above provisions mean that every citizen of Tanzania has the right to take part in the management of natural resources, including getting adequate information concerning natural resources in the country.

Similarly, the CURT gives power to the state authorities to take legislative and administrative measures which seek to ensure public interests in the exploitation and utilization of natural resources, including imposing restriction on disclosure of confidential information. [528] Similarly, the state organs must ensure that sovereignty of the people prevails in its actions, by promoting public participation in the affairs

[525] The Constitution of the United Republic of Tanzania, article 27(2).
[526] Ibid., article 28.
[527] *ibid*., article 18 (b) and (d).
[528] *ibid*., article 30(2) (b) and (d).

of the government, ensuring welfare of the people and accountability to the people.[529]

In this context the state must ensure equal treatment of all people including foreign investors without any form of discrimination on basis of nationality or other human related conditions. This includes the duty to take legislative measures to ensure right to fair hearing and right of appeal or other legal remedy against decision of the court or agency.[530] Similarly, the state is directed to promote principles of justice, democracy and socialism; and ensure that natural wealth is exploited for national development and welfare of the people.[531] Finally, it requires the state ensure that natural resources are used for development of the people, particularly towards eradication of poverty, ignorance and disease.[532]

The CURT further provides for aspects relating to access to information, especially freedom of expression and right to information. Article 18 provides that every person has a freedom of opinion and expression of his ideas; and a right to seek, receive and, or disseminate information regardless of national boundaries. Furthermore, it provides that every person has the freedom to communicate and a freedom with protection from interference from his communication, and a right to be informed at all times of various important events of life, activities of the people and issues of importance to the society. This means that every person's right to information, including freedom to communicate and access to information are constitutional

[529]The Constitution of the United Republic of Tanzania., article 8(1)(a), (b), (c) and (d).
[530]*ibid.*, article 13.
[531] Ibid., article 9(h), (j), (k)
[532] Ibid., article 9(i)

rights enforceable under the Basic Rights and Duties (Enforcement) Act of 1992.[533]

However, the right to seek, receive or disseminate information regardless of frontiers is not absolute. A person is obliged to respect freedom of others and observe other conditions imposed by the state through specific legislations. The grounds for imposing limitations on freedom of information and freedom of expression as per article 30 (2) of the CURT include: national defence, public safety, public peace, public morality, public health, rural and urban development planning, the exploitation and utilization of minerals or the increase and development of property of any other interests for the purposes of enhancing the public benefit. Furthermore, a state may limit exercise of these rights on the grounds related to protection of reputation of people involved in the legal proceedings, privacy of persons, national interest or public interest, and execution of judgment.

Basically, some of the above factors are similar to the conditions prescribed in the international instruments, particularly: article 19 of the Universal Declaration of Human Rights of 1948, article 19(3) of the ICCPR,[534] and article 10(2) of the European Union Convention for the Protection of Human Rights and Fundamental Freedoms 1950.[535] Thus, the limitations prescribed under article 30(1) and (2) of the CURT may be said to be lawful, provided these limitations are established to be

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[533]This Act was amended through the Written Laws (Miscellaneous Amendments) Act No.3 of 2020.

[534] The grounds for limitation of human rights under this Convention include: respect of the rights or reputations of others; and protection of national security or of public order (ordre public), or of public health or morals.

[535]The grounds for state intervention under this Convention include: national security, territorial integrity or public safety, prevention of disorder or crime, protection of health or morals, protection of the reputation or rights of others, preventing the disclosure of information received in confidence, or maintaining the authority and impartiality of the judiciary.

necessary and reasonable in a democratic society. These standards prescribed under international human rights instruments are essential when construing validity of limitations imposed by the state.

Unfortunately, these limitations imposed under the state authority are not defined by the CURT. This means that Tanzania may resort to interpretation by national and international courts, international instruments and distinguished scholarly works in order to determine the legitimacy of state acts. Basically, these are regarded as external aids to statutory interpretation which would be interceded in order to determine whether or not a particular state limitation measure is reasonable, appropriate, proportionate and necessary in a democratic society.[536]

Therefore, the CURT sets minimum standards for adoption of the principle of PSNR in three ways. First, it fully acknowledges both sovereignty of the state and sovereignty of the people over natural resources. It recognizes states and the people as the subjects of the principle of PSNR, whereby people participate in the decision-making process through democratically elected representatives and other constitutional bodies. Secondly, it guarantees people of Tanzania freedom to seek and receive information essential for their sociopolitical and economic development. Notably, access to natural resource information is vital for effective participation of the people in the natural resource decision making.

Thirdly, CURT provides for policy directives on how natural resources must be managed for the benefit of the people of Tanzania, especially eradication of poverty.

[536]This task is accommodated in subsequent paragraphs of this chapter.

Fourthly, it vests authority to the government through the National Assembly to adopt legislations on how resources should be exploited and used for the economic development and welfare of the people, including allocation and approving of government budget. Basically, this is a liberal democracy model of making the government accountable to the people.

Fifthly, the CURT guarantees every person, including a foreigner investor, a right to equality before the law, including access to court and access to effective judicial remedies. This implies that where an investor's rights under the investment agreements have been breached by the state, then the former must have unrestricted opportunity to challenge the decision before an impartial tribunal, including local and international tribunals according to the investment agreements. Similarly, citizens must be able to take legal action to court in order to protect their collective right to property, including ability to file a public interest suit.

Basically, the above five factors constitute constitutional safeguards which must be adhered to by the government when enacting, enforcing and interpreting laws adopting the principle of PSNR. As a cardinal principal of constitutional law, any legislation made by the Parliament must be consistent with the provisions of the Constitution, short of which would be regarded by the court as null and void.

4.2.2 The Natural Wealth and Resources (Permanent Sovereignty) Act[537]

This is an important legislation which expressly provides for the principle of PSNR in Tanzania. It was adopted by the government in order to implement the

[537] Act No.5 of 2017.

international principle of PSNR as entrenched in various international instruments. Basically, the Natural Wealth and Resources (Permanent Sovereignty) Act 2017 (hereinafter referred to as Permanent Sovereignty Act 2017) domesticates the UNGA Resolution 1803 (XVII) of 1962 and the UNGA Resolution 3281(XXIX) 1974 under section 4(3) read together with the First and Second Schedule to the Act.[538] By principles of statutory interpretation in Tanzania, instruments contained in the schedules, together with any notes thereto, is part of the written law.[539] Thus, the above two UNGA Resolutions form part and parcel of the Permanent Sovereignty Act 2017.

Impliedly, this means that interpretation and application of the above UNGA Resolutions as explained under chapter three of this thesis is relevant to the discussion of the adoption of the principle of PSNR in Tanzania. Similarly, decisions by the international courts or tribunals discussed with regard to these two Resolutions are also important to Tanzania. They could be used by courts as external aid of statutory interpretation in Tanzania. On the other hand, the Permanent Sovereignty Act accommodates article 17 of the UDHR and article 21 of the ACHPR in a preambular statement.

Principally, any instrument contained in the preamble is part of the law of Tanzania, but only with regard to construction of the purpose and object of the law.[540] This means that the interpretation and application of the principle of PSNR under the

[538]These two instruments are entrenched under s.4 (3) of the Natural Wealth and Resources (Permanent Sovereignty) Act, No.5 of 2017, read together with the First Schedule and the Second Schedule to the same Act.

[539] Interpretation of Laws Act, Cap.1 R.E 2010, s.25 (2).

[540]Interpretation of Laws Act, Cap.1 R.E 2010, s.25(1).

above two articles as explained in chapter three is relevant when analyzing adoption of the principle of PSNR in Tanzania. The above legal postulates imply that the government of Tanzania is obliged to exercise sovereign right to PSNR in a way that does not contravene or compromise its obligations under international law.

Furthermore, the Permanent Sovereignty Act 2017 proclaims that the natural resources belong to the people and the state, but controlled by the government, on behalf of the people and the United Republic of Tanzania.[541] The government of the day under the leadership of the President manages all activities relating to exploration of natural resources, on behalf of the people.[542] This means sovereign rights to natural resources, including the right to dispose freely of natural resources within the limits of national jurisdiction; the right to manage and use natural resources for national development, and the right to regulate foreign investment, are exercised by the government on behalf of the people.

Unlike other properties, natural resources are inalienable properties which shall always remain the state property, but vested in the President as a trustee, on behalf of the people of Tanzania. [543] This means that mining right cannot be disposed of or otherwise transferred to any other person without government's authorization in the form of agreement or license. As a general condition, every arrangement or agreement entered by the government would be regarded as lawful so long as it secures the interests of the people and the United Republic of Tanzania, and it

[541] The Natural Wealth and Resources (Permanent Sovereignty) Act, No.5 of 2017, s.4(1) and (2).
[542] *ibid*., s.5(3) and (4).
[543] *ibid*., s.5(1) and (2).

safeguards independence and self-reliance of the people of Tanzania.[544] Both judicial and administrative bodies are required to take note of these legal requirements, when exercising their functions[545] and the government should ensure equitable share in any agreement or arrangement, for the benefit of the people.[546]

This is a deliberate integration of the people-centric approach of PSNR which is codified under the UNGA Resolution 1803 (XVII) of 1962 and the Charter of Economic Rights and Duties of States (CERDS) of 1974,[547] that gives states authority to regulate foreign investments, including nationalization of properties, for the welfare of the people. Furthermore, this Act places the 'welfare of the people' and 'interests of the state' at the centre of the review of unconscionable terms as the basis for review of natural resource agreements or arrangements. Thus, it may be argued that the 'welfare of the people' doctrine in Tanzania can be used as a justification for review and renegotiation of long-term investment agreements which contain unconscionable terms. Nevertheless, the review exercise must be preceded by the Resolution passed by the National Assembly requiring the government to take administrative steps to address the anomalies.[548]

Furthermore, the Act sets in place two other control measures in order to safeguard welfare of the people in the natural resource agreements or arrangements. First, it limits disputes concerning sovereign right to natural resource from being determined

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[544]The Natural Wealth and Resources (Permanent Sovereignty) Act No.5 of 2017, s.6(1) and (2).
[545]Ibid., s.7.
[546]*ibid*., s.8.
[547]*ibid*., s.4(3).
[548]*ibid.*, s.12.

by foreign courts or tribunals. Instead, only judicial bodies and other organs in Tanzania have jurisdiction to adjudicate disputes concerning sovereignty of the state using the laws of Tanzania.[549] Basically, parties to any mining or petroleum agreement or arrangement are legally obliged to adopt a dispute settlement clause which acknowledges and incorporates domestic or international arbitration on two conditions, namely: the place of arbitration must be Tanzania and the law applicable should be the law of Tanzania.[550] This argument is based on the fact that any agreement to refer a dispute to a foreign court outside the United Republic of Tanzania, although valid under the Permanent Sovereignty Act 2017, Arbitration Act 2020 and the Tanzania Investment Act 2022, it would still be construed by the national assembly, court or tribunal to be unconscionable within the meaning of s.6 (2) of the Natural Wealth and Resources (Review and Renegotiation of Unconscionable Terms) Act of 2017. This matter is elaborated more in details under chapter five of this thesis.

Secondly, the Minister responsible for legal affairs is given mandate to make regulations for implementation of provisions on PSNR. This is an important provision which seeks to set regulations on how the principal Act on PSNR could be implemented. Basically, the Minister for Legal Affairs issued the Regulations prescribing code of conduct to all investors and other contractors as explained hereunder. However, some of the provisions of the Permanent Sovereignty Act

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[549]The Natural Wealth and Resources (Permanent Sovereignty) Act, s.11(1) and (2) as amended by s.100 of the Arbitration Act 2020.

[550]*ibid.*, s.11(3).

appear to be contrary to the international standards so domesticated; hence it may contribute to the rise of investment disputes and claims for compensation. Its legal implications on the people and foreign investments are addressed under chapter five of this thesis.

4.2.3 The Natural Wealth and Resources (Permanent Sovereignty (Code of Conduct for Investors in Natural Wealth and Resources) Regulations[551]

This regulation was issued by the Minister on 31st January 2020.It prescribe investors' obligation to comply with laws, policies, regulations, decisions made therefrom and interpretation by the Attorney General concerning PSNR in Tanzania.[552] Basically, every person bound by this Code, including legal entities, consultants, contractors, investors and their employees are required to conduct their businesses in good faith, transparently, in the general interest and for the welfare of the people of Tanzania.[553]

The investor, in particular, is required to conduct the business diligently by not engaging in acts or omissions likely to result into corruption, unfair trade practices, conflict of interest, human rights and workers' rights violations, and compliance of provisions on non-discrimination and occupational health and safety.[554] Similarly, the investor has the duty to respect child rights; environmental law and environmental standards; competition rules and fair business practice including price

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[551] GN. No.58 of 2020.
[552] *ibid*., regulation 5(1) and (2).
[553] *ibid*., regulation 6.
[554] GN. No.58 of 2020, regulations 7, 8, 9 10 and 11.

fixing and market sharing.[555] Further, the investor must conduct periodic reviews for purposes of determining compliance with the code of conduct, investment agreements and laws.[556] This may be supplemented by the state-based auditing and monitoring evaluation, and corrective measures.[557]

For effective compliance of the code by investors and other market players in the extractive industry, the regulations devise three mechanisms. First, it proclaims that the code of conduct shall be implied in every arrangement or agreement with investors, and shall be disclosed by the investor on conspicuous place.[558] Literally, this means that the provisions of the Code of Conduct comprise implied fundamental terms to any agreement or arrangement between the government, investors and third parties. There is no need of express reference to the provisions of the code of conduct since it automatically binds investors. This explains the reason why the government has powers to terminate business relationship without notice where an investor commits serious or repeated violations of the Code and fails to take appropriate corrective measures within reasonable time.[559]

Secondly, it entrenches a principle on presumption of knowledge of the law whereby it is clearly stated that every investor together with its affiliate, employee or a third party is presumed to know the code at the beginning of engagement or

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[555] *ibid.,* regulations 12, 13 and 14.
[556] *ibid*., regulation 16.
[557] *ibid*., regulation 17.
[558] *ibid.*, regulation 18(1) and (2).
[559] *ibid.*, regulation 19(3).

employment.[560] This precludes investors and their authorized agents from claiming ignorance of the law as a defence for violation of the provisions of the code of conduct. Principally, no person can use ignorance of law as an excuse for commission of an offence, except where the law declares ignorance of the law to be an element of an offence. [561]

Thirdly, it is mandatory for every investor to sign an integrity pledge as a commitment to abide with ethical business practice for best interest of the people, including fight against corruption in the extractive sector.[562] An integrity pledge is a sworn statement by the investor through its representatives expressing commitment to be bound by the provisions of the Code of Conduct.[563] This means that investors would be liable for damages in case of breach of ethical rules leading to loss on the part of government. Thus, it can be concluded that the principle of PSNR in Tanzania has been adopted through legislative enactments which domesticates the international law standards on PSNR.

4.2.4 The Natural Wealth and Resources Contracts (Review and Renegotiation of unconscionable Terms) Act[564]

This Act is made to implement the state policy directives under articles 8(1) and 9(f) read together with article 27 of the CURT. Basically, it vests power to the National Assembly to pass resolution for renegotiation and review of natural resource

[560]GN No.58 of 2020, regulation 18(3).
[561] Penal Code, Cap 16 R.E 2010, s.8.
[562] GN No.58 of 2020, regulation 21.
[563] The integrity pledge document is contained in the Schedule to GN No.58 of 2020.
[564] Act No.6 of 2017.

agreements or arrangements which appear to be prejudicial to the interests of the people and the state. Principally, the National Assembly is seized with powers to control acts of the executive arm of the government, by asking questions to the Ministers, approving government plans and budgets, enacting laws for implementation of development plans and ratifying international agreements.[565]

On realization of the peoples' right to PSNR, the National Assembly is obliged to pass a resolution requiring the government to initiate renegotiation of agreements or arrangements which appear to contain unconscionable terms.[566] It should be noted that the power to pass resolution for review or renegotiation purposes concerns both new and past natural resource agreements and arrangements which carries unconscionable provisions.[567] Basically, unconscionability of investment terms depends on the effect of the provisions to the sovereign right to regulate, manage and control natural resource exploitation. This means before setting aside agreements with unconscionable terms, one need to assess the purpose of a given clause to the sovereignty of Tanzania.

Section 6 (2)[568] lists down several factors that could be used by courts to determine unconscionability of investment agreements. Among these factors include: provisions of agreements which in effect restrict the right of the State to exercise full permanent sovereignty over its resources and economic activity; excludes state authority over foreign investment and transnational corporations within the country;

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[565] Constitution of United Republic of Tanzania, 1977, article 63 (2).
[566] Act No.6 of 2017, s.5(2).
[567] *ibid*., s.5(3).
[568] Act No.6 of 2017.

and limits periodic review of long-term arrangement or agreement. Furthermore, unconscionable terms may include provisions that secure preferential and discriminatory treatment in favour of investors; deprive local people the right to economic benefits; subject the State to the jurisdiction of foreign laws and fora and undermine the welfare of the people.

Basically, the above phraseology of unconscionable terms reflects the resource nationalism approach on adoption of the principle of PSNR which seeks to ensure strict state control over natural resources. Nevertheless, if construed literally, it may lead to breach of state obligations on protection of non-nationals and on settlement of investment disputes as provided under international investment law. Thus, courts in Tanzania would need to adopt other mechanisms of statutory interpretation in order to avoid possible conflict of laws that may arise. This legal dilemma is addressed in chapter five of this thesis.

However, the requirement to lay down mining /petroleum agreements or arrangements before the national assembly has positive impact as it seeks to promote transparency and accountability of the government to the people. For quite some time investment agreements in Tanzania were treated as ‘confidential information’; hence no any person except top government officials had access to these agreements. Thus, allowing people’s representatives to pass through and advise the government is a good attempt of promoting public participation in the natural resource decision making. Legally speaking, once a resolution has been passed by the National Assembly, the government through the Minister of Legal Affairs has an obligation to convene renegotiation process by giving notice to the respective investor informing

them of government's intention to review or renegotiate agreements or arrangements.

Basically, disclosure of mining /petroleum agreements or arrangements must be done within 30 days of the resolution of the National Assembly. Literally, one could argue that people's wishes expressed through the National Assembly resolution must be adhered to by the government. However, it is doubtful if the above purpose could be achieved. This is because the National Assembly is not legally obliged to pass resolution for renegotiation or review of unconscionable terms. Section 5(2)[569] applies the word 'may' to signify discretion on the National Assembly to pass a resolution for matters to be subjected to review or renegotiation process. According to s.53 (1) of the Interpretation of Laws Act[570] it is clearly stated that 'where in a written law the word 'may' is used in conferring power, then such word shall be interpreted to imply that power so conferred may be exercised or not at discretion.'

The effect of discretionary powers is that the body vested with authority to make a decision is given freedom to decide any particular question based on their own opinions; but they must comply with principles of justice and rule of law. [571] Principally, discretion entails power to make decisions that 'cannot be determined to be right or wrong in any objective way.'[572] This could lead to different interpretations on matters that deserve to be laid down before the National

[569] Act No.6 of 2017.
[570]Cap. 1 R.E 2010.
[571]Birute, P., *Legislative Discretionary Powers of the Executive Institutions in the field of Regulation of Higher Education in Lithuania*, Jurisprudence, Volume 18 Issue 2 of 2011, p.549.
[572] Grey. J.H., *Discretion in Administrative Law*, Osgood Hall Law Journal, Volume 17 No.1 of April 1979, p. 107.

Assembly. This reasonable fear on discretionary powers was articulated by Lord Diplock in the case of *Secretary of State for Education and Science vs. Tameside Metropolitan Borough Council* [573] where he observed that the concept of administrative discretion involves 'a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred.'

This suggests that discretion involves freedom to act or not to act in a particular way depending on the prevailing circumstances. Mensah[574] avers that any authority vested with discretionary powers has right to choose between various options; create broad standards for achieving chosen option; vary general standards in appropriate situations to meet set objectives, within the legal and political framework.[575] This signifies that the National Assembly is given independence to determine which matters should be laid down before it in accordance with its own parliamentary rules. Moreover, as correctly argued by Grey[576] these discretionary powers must be exercised cautiously in good faith, uninfluenced by irrelevant motives, reasonably performed and within statutory bounds of discretion.[577]

The above standards are relatively hard to be achieved in the National Assembly of the United Republic of Tanzania. Generally, the Assembly appears to be highly influenced by the party politics based on party manifesto which limits member's autonomy. Further, the political agenda in the Assembly is set by the ruling party

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[573] (1977) A.C 1014 at 1064.
[574] Mensah, K.B., *Legal Control of Discretionary Powers in Ghana: Lessons from English Administrative Law Theory*, Africa Focus, Volume 14 No.2 of 1998.
[575] *ibid*., p.122.
[576] Grey. J.H., *Discretion in Administrative Law*, Osgoode Hall Law Journal, Volume 17 No.1 of April 1979.
[577] *ibid*.,, pp.114-120.

which forms government of the day. Notwithstanding, discretionary powers have also been criticized for affecting legitimacy and legality of decisions made since there is high possibility for arbitrary decisions which may be passed on irrelevant factors.[578] Furthermore, procedural unfairness and lack of clear guidance usually affect certainty and predictability of rules, regulations, and government plans.[579]

However, the above uncertainties may be resolved if the exercise of discretionary powers by administrative bodies could be subjected to control by courts through judicial review. Grey argues that administrative decisions can be successfully reviewed on the ground of refusal to exercise its powers or failure to exercise discretion in accordance with law.[580] Moreover, bona fide exercise of discretionary powers by the National Assembly, reasonably discharged upon consideration of relevant factors, can hardly be challenged by courts. This is because the legislature has discretion in implementing its functions; hence subjecting its resolutions to judicial review may affect peoples' will and undermine democracy.

If the above position is upheld, then it is prudent if s.5(2) [581] should have applied the word 'shall' instead of 'will' in order to impose an obligation on the National Assembly to exercise its role of advising the government by passing resolution accordingly. This would be in line with s.53 (2) of the Interpretation of Laws Act[582] which provides that 'where in a written law the word "shall" is used in conferring a

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[578] Mensah, K.B., *Legal Control of Discretionary Powers in Ghana: Lessons from English Administrative Law Theory,* Africa Focus, Volume 14 No.2 of 1998, pp.123-124.
[579] *ibid*., p.124.
[580] *ibid*., p.114.
[581] Act No.6 of 2017.
[582] Cap 1 R.E 2010.

function; such word shall be interpreted to mean that the function so conferred must be performed.' This could guarantee effective participation of the people in the natural resource governance through the national assembly.

It is reported that the government of Tanzania had, by February 2020, revised about thirteen (13) Petroleum Sharing Agreements (PSAs); 102 agreements between investors and public corporations; 70 loan and grant agreements and some other agreements, including power purchase agreements, bilateral and multilateral agreements.[583] The disclosure of these agreements to the national assembly must be done in accordance with the procedures laid down under GN No.57 of 2020 explained hereunder.

4.2.5 The Natural Wealth and Resources Contracts (Review and Renegotiation of Unconscionable Terms) Regulations[584]

This legislation provides for procedures to review and renegotiate agreements. Basically, all agreements or arrangement concerning minerals and petroleum must be reviewed and renegotiated as earlier discussed. However, it appears that certain arrangements or agreements concluded by the government before the coming into force of GN No.57 of 2020. Regulation 13 provides that all negotiation arrangements or agreements concluded before the coming into operation of these Regulations 'shall continue and be concluded as if these Regulations had not been made.' This means that agreements or arrangements renegotiated by the government since 2017

[583] This was stated by the A.G in his speech to the President of the United Republic of Tanzania, during commemoration of the Law Day, on 5th February 2020 (see the speech on: youtube.com/watch=M3QMute6291, accessed on 19th June 2020 at 07.30 am.
[584] GN No.57 of 2020.

to the end of December 2019 are exempted from disclosure requirements.

Basically, exempting such agreements that have been renegotiated under the mandate of the Parent Act from being disclosed to the National Assembly appears to deliberately defeat the purpose for which the law was enacted. However, the exemption of such agreements may be an attempt by the government to comply with international rules governing protection of investors' rights. Basically, regulation 13 could be justified on two reasons. First, the need for the government to respect the *pacta sunt servanda* rule with regard to the agreements concluded with investors before the new regulations came into force. Disclosing such agreements could lead to breach of state obligation on confidentiality of trade secrets, act that is actionable under international law.

Secondly, such agreements or arrangements concluded before entry into force of new regulations would be protected on the basis of the rule expressed in the Latin maxim '*Lexprospicit non respicit*', that is law looks forward not back. This principle provides that a new substantive law cannot be used to affect existing proprietary rights under the old law or create a new duty or obligation, unless expressly stated by the law. This view is supported by a number of scholars on different grounds. Elmer[585] argues that retrospective laws which impair vested rights of the parties are considered to be 'contrary to justice' and constitute violation of the 'social compact' on which the legal system is built.[586]

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[585]Elmer, S.E., *The Rule against Retroactive Legislation: A Basic Principle of Jurisprudence,* Minnesota Law Review, 1936.
[586]*ibid*., pp.782-789.

Whereas Sampford[587] argue that retrospective laws are not laws since they are 'undemocratic', 'against human rights' and 'they do not comply with the rule of law. These arguments are further supported by Fisch[588] who avers that application of laws retrospectively is likely to disrupt the legal equilibrium, affect uniformity and consistent use of laws, which altogether hinder predictability of laws, one of the essential components of rule of law.[589] Therefore, exemption of agreements concluded before the coming into force of the regulations is generally tenable under both national and international laws. It is a clear evidence of investor protection by the state.

Nevertheless, there is still need for the government to disclose these agreements to the national assembly for validity and accountability purposes. This is because one of the mischiefs which the state sought to cure through enactment of the Parent Acts was to uncover unfair contractual terms contained in the investment agreements which were treated as confidential government documents under the old regime. On the other hand, disclosure of agreements is only procedural and not substantive requirement; hence it cannot affect vested rights of the parties. The general principles on retrospectivity of law do allow or permit procedural enactments to cover past conducts, so long as vested rights are not extinguished.

On reasons stated above, it is submitted that mining/petroleum agreements or arrangements concluded before and after the coming into force of GN No.57 of 2020

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[587]Sampford, C, *et al.*, *Retrospectivity and the Rule of Law*, Oxford Online Publishers,2012.
[588]Fisch, J.E., *Retroactivity and Legal Change: An Equilibrium Approach*, Harvard Law Review, Volume 110 of 1997.
[589]*ibid*., pp.1056-1106.

should be laid down before the national assembly. This could align with the intention of the Parliament when enacting Act No.5 of 2017 and Act No.6 of 2017 which was to ensure that people's representatives are involved in the natural resource development stages, particularly on review and renegotiation of agreements. The mechanisms in which these agreements could be laid down before the National Assembly without affecting state obligations arising from investment agreements are explained in the subsequent parts of this thesis.

Basically, passing of the resolution is the initial stage for renegotiation or review of natural resource agreements. Section 5(1) of Act No.6 of 2017 requires the government to disclose all agreements or arrangements before the national assembly. Moreover, it should be noted that for purposes of review of agreements by the national assembly the government does not disclose the whole agreement or arrangement *in verbatim*. The procedure for disclosure of agreements or arrangements begins with ministry or institution responsible for entry into negotiation by preparing a report concerning the agreement or arrangement. This report is then submitted to the Minister responsible for Legal Affairs for purposes of review and assessment. [590]

Secondly, the Minister for Legal Affairs proceeds to review and assess if the report complies with provisions of article 8(1),[591] article 9(i)[592] and article 27[593] of the

[590] The Natural Wealth and Resources Contracts (Review and Renegotiation of Unconscionable Terms) Regulations, GN No.57 of 2020, regulation 8(1).
[591] This provision provides for fundamental principles of democracy and social justice, namely: sovereignty of the people, accountability, participation of people in the affairs of the government, and welfare of the people principle.
[592] This provision directs the state to ensure that natural resources should be utilized for the development of the people, particularly reduction of poverty, ignorance and diseases.

CURT and provisions of Act No.6 of 2020.[594]This is to ensure that a report of agreement submitted to him or her promotes development of the people and sovereignty of the state over natural resources. Thirdly, the report and other information related to the agreement or arrangement is submitted by the Minister to the Cabinet for consideration, deliberation and preparation of the Cabinet resolution on the report.[595] The fourth step requires the Minister for Legal Affairs, upon directives of the Cabinet and within six (6) sitting days of the national assembly, to lay the cabinet resolution before the House of Representatives for determination.[596]

Usually, government acts including bills, are presented to the office of the Speaker through the Clerk of the Assembly. Thereafter, the government proposals would be tabled to members of the National Assembly, who would deliberate on the matters according to the prescribed parliamentary procedures. Basically, Parliamentary debates are governed by the Standing Orders of the Parliament of the United Republic of Tanzania, 2020 (to be referred to as Parliamentary Standing Orders) in which people-accountable institutions such as NGOs, CBOs and professional bodies are invited to give comments and proposals on the intended government action. Generally, the Parliamentary Standing Orders is an important instrument when addressing issue on public participation in the decision-making process; hence it is independently addressed in the subsequent paragraphs of this chapter.

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[593] This provision provides for the duty of every person to protect natural resources, state property and collectively held property, and ensure that properties are properly managed.

[594] The Natural Wealth and Resources Contracts (Review and Renegotiation of Unconscionable Terms) Regulations, GN No.57 of 2020, regulation 8(2).

[595] *ibid*., regulation 8(3).

[596] *ibid*., regulation 8(4).

Once members of the house have completed the discussions then the National Assembly passes the resolution advising the government on the terms which need to be renegotiated. Literally, this would mark the final stage of the review process by the national assembly. Thereafter, the government is required to implement the resolutions passed by the National Assembly within 30 days of the resolution by issuing an investor a notice of intention to renegotiate the respective agreement. The Minister for Legal Affairs must inform the investor nature of unconscionability and intention to expunge such terms in case of failure to renegotiate by an investor.[597]

Basically, the national assembly resolution is implemented immediately after it has been passed. The Minister for Legal Affairs is required within seven days from the day the resolution was passed, and upon receipt of the extract of the resolution, to notify the Minister responsible for specific natural resource sector, on the need to renegotiate the agreement or arrangement as specified in the notice.[598] The Minister for Legal Affairs informs the responsible Minister of the need to renegotiate by filling in NWR Form-N.3 as prescribed in the Third Schedule.[599] Its contents include the following: the name of the responsible Ministry, Department or Agency; the specific resolution of the national assembly; date when it was passed; time within which renegotiation must be conducted; the purpose and scope of renegotiation, and finally the signature of the Minister for Legal Affairs.

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[597] The Natural Wealth and Resources Contracts (Review and Renegotiation of Unconscionable Terms) Act, 2017, s.6 (1) and (3).
[598] GN No.57 of 2020, regulation 9(1).
[599] *ibid*., regulation 9(2).

Having received the government instructions, the Minister responsible for entry into any natural resource arrangement or agreement performs two main roles. First, he or she is obliged to issue a notice of renegotiation to the other party through NWR Form-N.4 as prescribed in the Third Schedule.[600] Its contents include: particulars of the investors (name and address); the name of the person commissioned by the government to enter into renegotiation agreements; the specific agreement subject to renegotiation or specific registration number; parties to the agreement sought to be renegotiated; description of unconscionable terms, and the signature of the responsible Minister. The Schedule of the arrangement prepared by the Minister should be attached; hence it forms part of the notice. This means the investor is given reasonable notice as it sufficiently provides for substance of proposed renegotiation by the government; hence giving investor reasonable time to prepare for discussion.

Secondly, the responsible sectoral minister, as soon as he or she receives notice from the Minister for Legal Affairs, is required as soon as possible to appoint a renegotiation team after consultation with the Attorney General.[601] Generally, all terms and conditions of appointment, including renegotiation guidelines, are developed by the responsible sector Minister, except matters of allowances in which there is a requirement for approval by the Minister for Finance.[602] This stage is very crucial for effective negotiation of business deals, which practically require involvement of state and non-state actors who have knowledge, skills and experience

[600] *ibid.*, regulation 9(3).
[601] GN No.57 of 2020, regulation 10(1).
[602] *ibid.*, regulation 10(3(and (4).

in the specific sector.

Regulation 10(2) of GN No.6 of 2020 requires the Minister to appoint members of renegotiation team from people with skills, experience, ethics and knowledge relevant to the subject matter of negotiation. This provision attempts to address the problems relating to negotiation of complex investment agreements which faced the country for good number of years. Diversity in composition of negotiating teams encourages professionalism and gives an opportunity of each member complementing each other and sharing knowledge and expertise. Furthermore, the inclusion of 'ethics' as one of the qualifications for being a team member is commended since negotiation of natural resource agreements in developing states has for long time been tainted with corruption. However, the provision does not define the minimum and maximum number of members required in a negotiating team and specific professions or occupations in which they must belong.

It is possible for a particular Minister in one sector to form a team full of engineers, or lawyers, or managers or politicians, who may not be able to address certain fundamental aspects of social sciences. For consistence, certainty and provision of margin of appreciation, it would be reasonable for the law to define professional areas of expertise, and the minimum number of members in a negotiating team. Similarly, it is also possible for the Minister to constitute a negotiating team of members only from the government sector; hence excluding contribution of other key stakeholders from the private sector. The inclusion of members from private sector and community-based organizations, including women right associations is likely to influence negotiation positively on two main grounds.

One, the private sector is endowed with a lot of qualified human resources who have participated in negotiation of large commercial transactions. Thus, they understand most business and technical aspects relating to natural resource exploitation. On the other hand, the civil societies and community-based organizations are highly informed of the societal needs from different angles, including aspects of local content, human rights, corporate social responsibility, and so forth. Thus, their involvement during actual negotiation of agreements could guarantee maximum benefits to the people of Tanzania and the country at large.

Two, the involvement of members from the private sector and groups of CSOs during renegotiation process could ensure transparency in government affairs. As previously pointed out, some international investment agreements emphasize on confidentiality of trade secrets as guaranteed under various international instruments, including the most celebrated Aarhus Convention. Thus, in order to ensure access of information to the public concerning certain investment arrangements which under ordinary circumstances could not be disclosed by the government, then it could be prudent to allow people –based institutions to participate in actual negotiation.

The fear that involvement of people-based groups could affect the state duty to observe the duty to secrecy appear to be addressed under paras 6.3(c), 6.4 (b), and paras (j) and (k) of the Code of Conduct and Confidentiality Form,[603] in which members of the negotiating team are strictly prohibited to disclose any information

[603] See Guidelines for Renegotiation of Unconscionable Terms, contained in the Fourth Schedule to the Regulations. These Guidelines are made by the Minister for Constitutional and Legal Affairs under regulation10 (3), GN No.57 of 2020.

that they may acquire during renegotiation process, unless disclosure is permitted by the Team Leader. As a matter of law, certain information cannot be disclosed to the public on some prescribed lawful reasons such as national security, public health, protection of commercial-in-confidence, and so forth.

The third step involves preparation and actual renegotiation of natural resource agreements or arrangements by the negotiating team. As soon as the renegotiation team is formed, then it is required to develop a schedule of renegotiation and share it with the other party (investor). Essentially, the period of renegotiation should not exceed 90 days, unless it is extended by mutual agreement, subject to approval by the Minister.[604] An application for extension of renegotiation period is made through NWR Form-N.5 as provided in the Third Schedule to the Regulations.[605] This application for extension of time must clearly show the number of days sought to be extended; the purpose for extension; a declaration showing the name and position of the applicant, signature and date; decision of the Minister to approve or disapprove and the signature.

Additionally, the renegotiation exercise must comply with prescribed rules of conduct, which requires government negotiation team to abstain from convening formal meetings unless the expected results outweighs costs of meetings;[606] avoid making unnecessary concessions to reach an agreement; and each party to the team

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[604] The Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act, 2017, s.6 (4) read together with GN No.57 of 2020, regulation 11(1).
[605] GN No.57 of 2020, regulation 11(2).
[606] Rule 11(5) of GN No.57 of 2020 provides that the costs for renegotiation shall be met by the Ministry responsible for the agreement subject to renegotiation.

playing his or her prescribed roles. [607] This seeks to ensure that negotiations are focused, simple and less expensive and completed within time. For effective negotiation, members of negotiation team are called upon to observe the code of conduct. Specifically, they should maintain confidentiality; be ethical at all times; maintain open mind; resolve internal conflicts away from the negotiation room; and ensure that essential terms are actually agreed.[608]

Similarly, members of the team must ensure that negotiation process is transparent, documented and undertaken in a fair and equitable manner, including disclosing all relevant information, keeping such information as commercial-in- confidence, and maintaining rule on conflict of interest. [609] The above rules stipulating code of conduct is an important tool of negotiation which seeks to build investor-confidence to government negotiators and ensure best interests of the people. At the end of negotiation process, the parties must sign a renegotiation summary as shown under NWR Form-N.6,[610] showing the dates on which renegotiation is signed; parties to agreement; particulars of the renegotiated agreement; description of unconscionable terms that have not been settled and grounds for non-settlement; names, signature and official seal of the government institution (Ministry, Department or Authority) and that of the other party (investor).

The fourth step involves reporting of negotiation results to the relevant ministries. The team leader is required to submit a draft report to the Permanent Secretary of the

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[607] Guidelines for Renegotiation of Unconscionable Terms on the Fourth Schedule to GN No.57 of 2020, rule 6(1),
[608] *ibid*., rule 6(5).
[609] Guidelines for Renegotiation of Unconscionable Terms on the Fourth Schedule to GN No.57 of 2020, rule 6(4)
[610] *ibid.*, regulation 11(4).

responsible sector Ministry;[611] Chief Secretary; Permanent Secretary responsible for Legal Affairs; Permanent Secretary responsible for investments; Permanent Secretary responsible for Local Government; Permanent Secretary responsible for Labour; Permanent Secretary responsible for Home Affairs, and the Deputy Attorney General.[612] This is because natural resource agreement negotiation is a multisectoral issue which affects different policy holders; hence they must be aware of the terms agreed upon by the renegotiation team.

Generally, the draft report of renegotiated term(s) should include information relating to: all renegotiation undertaken, and the outcomes; any variations of term(s) resulting from renegotiation, and possible management strategies; post renegotiation risks identified and proposed management strategies. Further, the draft report should also show concessions agreed to or renegotiated which vary the prior concluded agreement or arrangement; summary of final offer and benefits achieved by renegotiation to the country, and any other matters the team thinks would be relevant to the government.[613]

The fifth stage involves stakeholders meeting. After the report is submitted to the government ministries as explained above, then the Permanent Secretary of the Ministry responsible for arrangement or agreement must prepare the stakeholder's meeting for deliberation of the report. It is assumed that at this stage different CBOs,

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[611] *ibid*., rule 12(1).
[612] *ibid.*, rule 10(2).
[613] Guidelines for Renegotiation of Unconscionable Terms on the Fourth Schedule to GN No.57 of 2020, rule 10(1).

NGOs, professional associations, religious institutions and other interested groups, can appear for discussion of the draft report. However, regulation 12 of GN No.57 of 2017 does not define who the stakeholders are for purposes of discussing the report. Furthermore, it does not provide for the stakeholders meeting procedures; duties and roles of stakeholders; neither does it define the mandate of stakeholders meeting and the nature of information concerning renegotiated agreement which can be disclosed to the public.

It can be correctly argued that mere discussion of the draft report alone is meaningless if the end result of the discussion is not legally stated. Regulation 12(2) of the Regulations merely speaks of the adoption of the report by the stakeholders, as one of the requirements for submission of the draft report to the respective sectoral Minister for concurrence. Basically, lack of specific provision on appointment of stakeholders and procedures for the meeting is likely to affect the right of the people to participate in the decision-making process. This is because all important aspects of stakeholders meeting are purely left in the discretion of the government. As correctly argued by Mensah[614] unchecked and uncontrolled discretionary powers may affect participation of people, equality and justice which are considered to be fundamental values of democracy and good governance.[615] This area needs to be addressed in order to guarantee people's right to participate in the natural resource decision making process in Tanzania.

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[614]Mensah, K.B., *Legal Control of Discretionary Powers in Ghana: Lessons from English Administrative Law Theory,* Africa Focus, Volume 14 No.2 of 1998.
[615]*ibid.* p.125.

The sixth stage entails submission of the adopted stakeholders draft report by the Permanent Secretary of the responsible Ministry to the Minister for concurrence.[616] However, it is not clearly stated what is likely to happen if stakeholders do not adopt the draft report for failure to meet people's legitimate expectations. Similarly, there is no requirement for the Permanent Secretary to submit minutes of the stakeholders meeting, which may need to be accommodated in the draft report. This further expose public participation to the whims of the government, which mostly may dispense the requirement of stakeholders under what is commonly known as 'certificate of urgency.'

The seventh stage entails determination of the final draft report by the Cabinet. The Minister responsible for the agreement, upon concurrence, must cause a final report to be prepared and submitted to the Minister responsible for Legal Affairs, who upon concurrence of the report shall submit it to the Cabinet in accordance with applicable cabinet procedures.[617] It should be noted that the Minister responsible for Legal Affairs has the duty to ensure that the final report complies with conditions under regulation 8(2) of GN No.57 of 2020.

After completion of cabinet procedures, the President of the United Republic of Tanzania must issue a certificate, upon which the Minister responsible for Legal Affairs shall submit the report on the outcome of renegotiation to the National Assembly, not later than 30 days from the date renegotiation report was signed. [618] Basically, the President's certificate marks the end of the renegotiation process and executive approval. However, the law is silent on the appropriate procedure to be used by the national assembly in reviewing the agreements.

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[616] GN No.57 of 2020, regulation 11(2).
[617] GN No.57 of 2020, regulation 12(3).
[618] *ibid*., regulation 12(4).

This could reasonably infer that the review process is either done in accordance with normal rules of the house, the Parliamentary Standing Orders 2016, or there should be specific rules adopted by the house to govern the review matter.

A good example of the national assembly approval process is Ghana where after negotiation and executive approval, the agreement is submitted to the Parliament. Then, the respective parliamentary committee is given the respective agreement and the draft technical report for review purposes. The Committee then prepares the report which is then tabled before the members of the national assembly for the plenary debate and approval. Thereafter, the approved agreement is submitted back to the government for ratification.[619] This means the government in Ghana cannot sign a natural resource agreement unless and until it has been approved by the Parliament.

Once the renegotiation and review process are complete, then the agreement must be registered. The law provides that every natural resource arrangement or agreement is required to be registered by Director responsible for the natural wealth in the Ministry, who is designated as the Registrar of Natural Wealth and Resources Arrangements or Agreements.[620] The key roles of the Registrar includes: keeping and maintaining a register established under regulation 5(1); register all natural wealth arrangements and agreements; review and recommend harmonization of the extractive laws and policies; and make follow up on the renegotiation process of arrangements or agreements.[621] Other functions include: developing tools for

[619] Natural Resource Governance Institute (NRGI), Parliamentary Guide for Approval of Natural Resource Contracts in Tunisia, May, 2016, p.14.
[620] GN No.57 of 2020, regulation 6(1).
[621] *ibid.*, regulation 6(2).

monitoring and evaluation purposes; carrying out monitoring and evaluation on the utilization of natural wealth and resources; and carrying out regular assessment of the extractive regime in relation to the constitutional requirements.[622]

Generally, the law imposes a duty on any person responsible with natural resources and resources to register agreement or arrangement. Such person must make an application to the Registrar within the stipulated time after entry into force of the Regulations (60 days for the old agreements or arrangement and 30 days for new agreements or arrangements.)[623] Basically, the application is filed under NWR Form-N.1 prescribed in the First Schedule,[624] whose contents include: address of the Minister (Legal Affairs); description of the agreement or arrangement, including name of the parties, date on which the agreement or arrangement was concluded, subject matter, value or consideration in Tanzanian Shillings, the life span of the agreement (when it commences and when it ends); and signature and official seal of the applicant.

Once the application has been duly filed, the Registrar shall proceed to register an agreement or arrangement by assigning a registration number to signify the identity of the arrangement or agreement in all transactions and correspondences concerning the agreement or arrangement.[625] The Registrar must also enter particulars on adherence of corporate social responsibility, local content, royalty in percentage, and category of licence, as indicated in NWR Form-N.2 on the Second Schedule to the

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[622] Articles 8(1), 9(i) and 27 of the Constitution of the United Republic of Tanzania, 1977.
[623] GN No.57 of 2020, regulation 7(2) (a) and (b).
[624] *ibid.*, regulation 7(1).
[625] GN No.57 of 2020, regulation 7(3).

Regulations. Having been registered, the agreement or arrangement becomes a prima facie evidence of the fact that terms and conditions therein were concluded by the parties. Where the dispute arises, the registered agreement or arrangement can be used to prove or disprove alleged facts before the court or tribunal.

On the other hand, any interested person can have access to information in the agreement or arrangement within the prescribed limitations, upon request and payment of fees. Unlike the old regime where natural resource agreements were among confidential information, this provision ensures that people of Tanzania and investors have access to information related to natural resource agreements. This tally with standards set by the national and international instruments on access to information, including: the CURT; the Access to Information Act, 2016; Aarhus Convention; ICCPR and ACHPR.

Thus, Act No6 of 2017 read together with GN No.57 of 2020 adopt the negotiation and review procedures which safeguards national interests and welfare of the people. It offers a more transparent and inclusive state-people based model of investment contract negotiations in the extractive sector in Tanzania which guarantees minimum but reasonable disclosure of investment agreements to the public. The model basically eliminates the old bureaucratic model whereby contract negotiation was purely reserved to the Ministers in collaboration with the office of the Attorney General which gave rise to dubious agreements.

Therefore, is submitted that such state-people based model for renegotiation of agreements should be adapted to other development sectors, such as transportation

sector, telecommunication sector, health and laboratory related sectors and other service-oriented agreements in which public money is involved. This is because the new model is built on good values, including: professionalism, integrity, transparency, interdependency and accountability of government officials. Furthermore, the new model engages the private sector in the decision-making process for matters of public concern. Possibly this strengthens the fight against corruption and abuse of public office in order to ensure national development and welfare of the people.

4.2.6 The Tanzania Extractive Industries Act and its Regulations[626]

This legislation establishes the Tanzania Extractive Industries (Transparency and Accountability) Committee (hereinafter referred to as TEITA Committee) which is an independent government body responsible for promoting and enhancing transparency and accountability in the extractive sector.[627]Its members include the Chairperson appointed by the President of the United Republic of Tanzania, and other fifteen (15) members appointed by the Minister responsible for mining, oil and gas from designated offices, namely: government entities (5), industry companies (5) and civil societies (5).[628]

Generally, representatives from extractive industry companies and civil societies are appointed by the respective organizations and submitted to the Minister for announcement. This is a good provision which seeks to promote public participation

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[626] The Tanzania Extractive Industries (Transparency and Accountability) (General) Regulations, GN No.141 of 2019
[627] The Transparency and Accountability Act, s.4(1) and (2).
[628] *ibid*., s.5(1) and (2).

by giving freedom to respective associations to constitute the Committee through selection of participants of their own choice, according to their own procedures. Nevertheless, the law is silent as to which extractive industry companies and civil societies would be selected for composing TEITA Committee. Tanzania has quite reasonable number of CSOs; hence the manner in which representatives from CSOs could be selected from all parts of the country must be known.

It is possible for members to be selected from well-known and established institutions which may be located in urban areas; hence leaving CSOs in rural areas where actual mining activities are conducted from being represented. As discussed under chapter two of this thesis, fairness rule of public participation demand that procedure for selection of participants must be clearly known to the affected persons. Thus, lack of well-known procedures may affect participation of CSOs which do not possess reasonable influence in the society. There is a need to make participation of CSOs, religious institutions, professional bodies and the anti-corruption bodies as open and inclusive as possible to achieve maximum participation of people. This is addressed under chapter six of this thesis.

Similarly, the government entities which compose the TEITA Committee, with exception of the Attorney General, Chairperson and the Executive Secretary, are not defined. Nevertheless, the government has its own procedures for appointment of its officers, which usually involves the Public Service Commission and other state-based search committees. A good example is section 6 (1) of Transparency and Accountability Act which establishes a Nomination Committee whose membership is predetermined, with except of two members from extractive industry company.

The function of this Committee is to nominate, subject to advertisement, persons for appointment as Chairperson of the TEITA Committee (appointed by the President) and the Executive Secretary of the Committee (appointed by the Minister).[629] There is need for specific provision which expressly constitute members of the TEITA Committee in order to achieve the desired transparency goals.

Generally, the TEITA Committee is responsible for ensuring that benefits of extractive industry are verified, accounted for and prudently used for the benefit of citizens of Tanzania. Its specific functions include: developing a framework for transparency and accountability in company reporting and disclosure; requiring accurate account of money by extractive companies and statutory recipients; and promoting effective citizen participation and awareness of matters concerning roles of extractive companies to the socio-economic development.[630] In order to discharge its functions properly, the law stipulates procedures to be followed by companies, statutory recipients and the Minister.

First, the extractive companies qualifying for reconciliation are required to submit to the Committee their annual reports containing information on local content, corporate social responsibility and capital expenditure.[631] Whereas, statutory recipients are also required to submit information and data relating to taxes and other charges made to the government. Secondly, after submission of reports, the Independent Reconciler makes an assessment to determine material discrepancy

[629]The Transparency and Accountability Act, s.7.
[630]The Transparency and Accountability Act, s.10(1) and (2).
[631]*ibid*., ss.14 and 15.

between payments and receipts, and prepares a reconciliation report. The procedure for data conciliation includes: appointment of independent administrator, lodging request for information from extractive companies, submission of information and data in form of soft and hard copies in a prescribed format within 14 days, storage and reconciliation of data within 6 months.[632]

For authenticity purposes, information submitted by extractive industries through a prescribed form should be signed by senior official from the company.[633] Should such information appear to be false or otherwise be misleading as to destruct the TEITA Committee from doing its functions, then a responsible person would be liable, on conviction to a fine not less than 100 million shillings.[634] Thirdly, after completion of reconciliation exercise, a report is prepared and submitted to the Controller and Auditor General (CAG) within 14 days for investigation purposes. The CAG must prepare the audit report in accordance with accounting standards and submit the same to the TEITA Committee and the Minister.[635]

Fourth, the Committee must forward the investigation report to the Minister for action, in which relevant authorities must within 30 working days, prepare and forward implementation report to the Committee.[636]Upon receiving implementation report, the TEITA Committee must submit the report to the Minister within 14 working days for consideration and publication.[637] The last stage is submission of the

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[632] Tanzania Extractive Industries (Transparency and Accountability) (General) Regulations 2019, regulation 5.
[633]Tanzania Extractive Industries (Transparency and Accountability) (General) Regulations 2019, regulation 8.
[634] The Transparency and Accountability Act, s.24(a), (b) and (c).
[635]*ibid*., s. 17(5) and s.18(1).
[636]*ibid.*, s.18(3).
[637]*ibid.*, s.18(5).

report to the National Assembly. The Minister is required within 12 months after the end of financial year to lay before the National Assembly a report on the implementation of the activities.[638] This gives members of the National Assembly a chance to deliberate on how the Committee discharges its responsibilities, including measures that the government has taken to implement disclosure of agreements and arrangements.

Unlike deliberation of cabinet resolution on review of unconscionable terms whereby the National Assembly's resolution is binding on the government, the Transparency and Accountability Act 2015 is silent on the power of the National Assembly when discussing the government report submitted under this Act. This lacuna is likely to affect accountability and transparency of the government on two main reasons. First, the government is at liberty to disclose certain information considered to be confidential; hence not subject to disclosure. Legally speaking, the government may withhold classified information on lawful reasons as provided under provisions of the Access to Information Act of 2016, to be described later in this chapter.

Furthermore, the TEITA Committee which has powers, upon application by any party to the contract, to determine information which need not be disclosed by extractive companies and statutory recipients,[639] is a public body and its composition and that of its Secretariat is determined by the President and the respective Minister.

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[638] *ibid.*, s.19.

[639] The Transparency and Accountability Act, s.27 read together with the Tanzania Extractive Industries (Transparency and Accountability) (General) Regulations 2019, regulation 13.

This automatically subjects members of the Committee to the public servant's code of ethics which sanction non-disclosure of public information; hence affecting effective peoples' participation in the decision-making process.

There is material evidence to show that the government is skeptical to disclosing contracts and other classified information. The TEITI Committee, Chairman Ludovick Utouh, observed that by August 2019 the government had disclosed only nine (9) PSAs in Oil and Gas, and that it was yet to disclose mining contract documents.[640] The justification for non-disclosure of mining agreements was expressed by the then Commissioner for mining in Tanzania, Dr. Athanus Mashengeki, who was quoted to have made the following remarks:

> *"Most companies do not want to disclose their contracts. Contracts are mostly considered as confidential documents; which are not supposed to be disclosed to stakeholders such as some government representatives including ministries, parliamentarians and members of the civil society."*[641]

The above represents attitude of most investors in the extractive industry. Unfortunately, the same character is shared by some government leaders in Africa, who enact laws to restrict disclosure of certain documents on reasons related to national security, public interest and other related factors. The laws providing for right to information in Tanzania are also discussed in the subsequent paragraphs of this thesis.

Secondly, the TEITA Committee does not have mechanisms to enforce its recommendations and decisions. Essentially, the Committee is required to be an

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[640]Haki Rasilimali; Contract *Transparency as a Drive for Extractive Sector Development*, in the Extractive Insights – Transparency, Accountability and Economy, News Letter, Volume 2 of October, 2019, p.3.
[641]*ibid.*, p.2.

oversight body for promoting and enhancing transparency and accountability in the extractive industry. However, it does not possess enforcement powers in case where extractive companies or statutory recipients refuse to disclose information to the TEITA Committee. These two factors may hinder good natural resource governance for the benefit of the people. There is need to strengthen capacity of the TEITA Committee so as to make extractive companies and statutory recipients accountable to the people of Tanzania, who are the ultimate holders of the right to PSNR.

4.2.7 The Mining Act [642]its Regulations[643]

This is the main legislation which governs mining activities in Mainland Tanzania. It declares the entire property in all minerals (both on land and sea) to be the property of the United Republic of Tanzania but under the President as a trustee for the people.[644] Moreover, the government exercises control over resources through mining licenses and ownership of shares in the mining company.[645]This means the government of Tanzania controls activities of a mining company through conditions attached to specific mining license and by acquiring shares in the mining company (be it local or foreign).

Moreover to ensure that mining agreements or arrangements conform to the required sovereignty standards under the Permanent Sovereignty Act of 2017, first the Mining

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[642] Cap 123 R.E 2018

[643] The Mining (Local Content) Regulations, GN No.3 of 2018 as amended by the Mining (Local Content) (Amendments) Regulations, 2019.

[644] Cap 123 R.E 2018, s.5(1) and (2).

[645] ibid. ss.10 and 11 provide for two types of state shares in the extractive business: non-dilutable free carried interest shares of not less than 16% and 50% of the share capital of the mining company commensurate with total tax expenditure incurred by the government in favour of a mining company.

Act clearly stipulates that the government must review and renegotiate all developments agreements concluded prior 2018.[646] Secondly, the Mining Act establishes the Mining Commission which is responsible for implementation of local content plan, corporate social responsibility, auditing of quality and quantity of minerals, sort and assess value of minerals produced under this Act.[647]

Thirdly, the Mining Act incorporates a right of the people to participate in the decision making directly or through representatives in the respective local government authorities. Basically, the holder of mining license is obliged to exercise mineral rights, subject to written consent of the responsible Minister, in consultation with appropriate local government including Village Council, and written consent of the lawful occupier of the land (in case the license covers lands lawfully occupied by citizens).[648]

The above provision signifies that there is paramount duty on part of the investor to ensure that both people (being victims) and local government where the mining site is located do participate in the natural resource decision making. However, where in the opinion of the Minister and upon advice by the Commission it appears that consent is unreasonably withheld, the Minister may dispense with requirement of consent.[649] This provision of the law has legal consequence on the right of the people to PSNR. First, it gives discretionary powers to the Minister to dispense requirement of consent. Secondly, it does not define as to what may constitute 'unreasonable

[646] *ibid.*, s.11(1).
[647] Cap 123 R.E 2018, ss.21 and 22.
[648] *ibid*., s.95(1)(a) and (b).
[649] *ibid*., s.95(1)(b).

withholding of consent' by local government and lawful occupiers. This is because there are no clear guidelines to show when an authority or person may be said to have unreasonably withheld consent.

Instead, the Mining Act 2018 vests discretionary powers to the Minister in collaboration with the Mining Commission to determine incidences or situations where it may be adjudged that consent was unreasonably withheld, leading to uncertainty, unpredictability and conflict of interest phenomena. For example, assume the basis for withholding consent is dissatisfaction with compensation package, and then the Commission advises the Minister to disregard consent requirement. The Commission will be said to have compromised their position with regard to settlement of compensation claims under the provision of s.119 of the Mining Act of 2018.

Historically, most disputes between members of local communities and mining companies revolved around compensation claims whereby people complain of receiving inadequate compensation for interfering with right to exclusive ownership of land. For example, in a report published by the Institute of Human Rights and Business in 2016 showed that about 44 members of the local community in the Southern part of Tanzania whose land was acquired for construction of gas transportation pipeline were 'grossly under compensated.[650]' It was further argued that compensation 'was not based on negotiation between a willing buyer and

[650] Institute for Human Rights and Business (IHRB); *Human Rights in Tanzania's Extractive Sector: Exploring the Terrain*" (December 2016), available atwww.ihrb.org/focusareas/commodities/human-rights-in-tanzanias-extractive-sector-exploring-the-terrain, p.61.

willing seller' but based on government valuation without prior consultation.[651]

This is why under the current provisions of the Mining Act 2018 the holder of a mining license has obligation to exercise mineral right reasonably and fairly, so as not to affect rights of the occupier of land, including payment of fair and reasonable compensation in respect of disturbances and damage to crops, trees, stocks and buildings.[652] Where it is established that a mineral right cannot be exercised without affecting interests of land over which mineral right is extended, then the mineral right holder must observe three main requirements, namely: advise the occupier to vacate the area, consult with respective local government authority for amendment of the land use plan, and submit a proposed plan on compensation, relocation and resettlement which must be fair and reasonable according to market value of the land.[653]

Furthermore, the Mining Act 2018 protects right of the people to PSNR through participation in the preparation of Local Content and Corporate Social Responsibility. Basically, participation in the two processes is governed by two regulations: GN No.3 of 2018 and GN No.197 of 2017respectively. Beginning with local content, every investor or contractor in extractive industry (Mining and Petroleum) is required to give preference to locally produced goods or services rendered by indigenous companies or firms. [654] By principle, participation of people in the preparation of local content plan is an important component of every mining

[651] *ibid.*, p.62.
[652] Cap 123 R.E 2018, ss.96 (1), (2) and (3).
[653] *ibid.*, s.97 (1) and (2).
[654] ibid., s.102 read together with the Mining (Local Content) Regulations, GN No.3 of 2018, regulation 8.

and petroleum activities engaged by the licensee, investor or contractor in Tanzania.[655]

Basically, components of the local content plan in Tanzania are provided under regulation 12 of GN No.3 of 2018 and regulation 11 of GN No.197 of 2017. Accordingly, the components include: preference to services locally available such as legal services and financial services; priority in employment and training of Tanzanians; preference to locally produced products which meet specified standards; technological transfer and research promotion.[656]However, the investor must strive to meet the minimum standard levels specified in the First Schedule or as may be prescribed by the Minister in consultation with the Commission.[657]

The Minister responsible for mining must at all times ensure that views of stakeholders have been sought during preparation of local content.[658]I t is a binding rule that every holder of a mining license is required to prepare and submit local content plan (long term and annual plans) to the Mining Commission, which must within 7 days submit the same to the Local Content Committee (hereinafter referred to as LCC) established under regulation 5(1) of GN No.3 of 2018.[659]Then, the LCC

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[655] GN No.3 of 2018, regulation 7 and the Petroleum (Local Content) Regulations, GN No.197 of 2017, regulation 6.

[656] For more details of local content provisions, refer to GN No.3 of 2018, regulation 20 (employment and training), regulation 21 (succession plan), regulation 24 (research and development), regulations 26 -29 (technology transfer), regulations 30-31 (insurance services), regulation 32-33 (legal services) and regulations 34-36 (local financial services). See also GN No.197 of 2017, regulations 8, 13, 15, 17, 21, 22, 23, 24, 26, 27, 28 and 31.

[657] GN No.3 of 2018, regulation 13(1) and (4).

[658]*ibid*., regulation 13(5) as amended by the Mining (Local Content) (Amendments) Regulations, 2019.

[659]*ibid*., regulation 10.

must within 25working days review, assess and give its reasoned recommendations to the Commission on whether to approve the plan or not.[660]

Nevertheless, under GN No.197 of 2017 the local content plan is submitted either to Petroleum Upstream Regulatory Authority (hereinafter known as PURA) or Energy and Water Utilities Regulatory Authority (hereinafter known as EWURA), which must within 28 working days review and assess the plan accordingly.[661] The decision to approve or disapprove the plan including the revised one must be communicated to the investor within 60 days, after which the plan would be presumed to have been approved.[662]

However, under GN No.3 of 2018, the Mining Commission is legally bound to communicate its decisions (approval) to the investor within 7 days in case the local content plan meets the standards. But, where the plan does not meet standards, then the Commission must notify the investor its decision stating reasons for rejecting the plan, in which case the applicant will be entitled to opportunity to make corrections and resubmit the revised plan within 14 working days.[663] This means that there are two regimes for approval of local content plans. The Commission deals with companies involved in the extraction of minerals whereas EWURA and PURA deal with companies dealing with petroleum operations.

It is important to note that during review or assessment of local content plans, the relevant authorities (PURA or EWURA or Mining Commission) 'may' provide

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[660] *ibid.*, regulation 11 (1), (2) and (3).
[661] GN No.197 of 2017, regulations 9 and 10(1).
[662] *ibid.*, regulation 10(4) and (5).
[663] *ibid.*, regulation 11(6) and (7) .

persons involved in the mining industry or any other person who is likely to be affected by the decision, a reasonable opportunity to be heard, and any representation provided will be taken into account by the responsible authority.[664] It could be argued that the local content regulations recognize and protect participation of state and non-state actors in the review and assessment of local content. This is a progressive effort by the government of Tanzania to recognize and protect sovereignty of the people over natural resources.

However, it can be argued that regulation 11(4) of GN No.3 of 2018 does not adequately promote public participation in the review or assessment of local content on two reasons. First, based on statutory interpretation the use of the word 'may' signifies discretionary power on the authority to regard or disregard issue of public participation. This means that LCC may dispense with requirement of participation leading to denial of a right to be heard. However, this is not the case with regulation 10(2) of GN No.197 of 2017 whereby the word used is 'shall' to mean that EWURA or PURA has an obligation to engage persons from petroleum industry or other affected persons in the review and assessment process. This means there is need for harmonization of the two regulations to make public participation in preparation of local content a mandatory requirement.

Secondly, it is not clear as to which category of person is 'likely to be affected by the decision' and the manner in which these affected persons may be informed on the subject matter, date and place of the meeting. These issues are important for

[664] GN No.3 of 2018, regulation 11(4) and GN No.197 of 2017, regulation 10(2)(a) and (b).

effective realization of the right to participate in the decision-making process. This problem may be solved by adopting public participation provisions under the Environment Management Act as clearly discussed in the next paragraphs of this chapter.

Thirdly, the composition of the institutions responsible with local content promotion does not ensure people representation at different government levels. For example, the majority of LCC members comprise of representatives from the central government and one member from the Tanzania Private Sector Foundation. Similarly, EWURA, PURA and the Mining Commission are state-based organizations members of which are appointed by the President of Tanzania in collaboration with Minister. This means that non-state actors including CSOs, CBOs and professional bodies do not participate in the review of local content plans. As earlier shown; there is need for clear definition of participants and clear rules which make their participation mandatory, including access to administrative law remedies for violation of this right.

On the other hand, the law also provides for participation of people in the preparation of Corporate Social Responsibility (CSR) plans. Basically, the procedure for preparation of local content does apply to CSR plans. However, s.105 (1) of the Mining Act, 2018 contains mandatory provision on involvement of local government authorities in the preparation of CSR plan. Basically, the mineral right holder must jointly agree and prepare CSR plan in consultation with Minister responsible for Local Government Authorities and Minister of Finance. The CSR plan must reflect the environmental, social, economic and cultural demands of respective local

government,[665] and it must be deliberated and approved by the latter in accordance with its guidelines.[666] The local government is also responsible for implementation of CSR and raising awareness to the public.[667]

On the other hand, the Mining Act 2018 protects the right of the people to seek judicial remedies in case of any dispute arising from exploitation of resources. Basically, the Act establishes a system for resolving disputes between mining operators and the people. Any person who sustains loss or harm arising from mining operations may apply to the Tanzania Mining Commission for necessary orders. Legally, the Mining Commission has jurisdiction to determine disputes between investors and local people in the mining areas revolving around actual amount of compensation payable as a result of destruction of crops, trees, buildings, stock or works; boundaries of any area subject to mineral right; and dispute over use or erection of any pump, line of pipes, or priority over use of water.[668]

Principally, any person whose right in the above areas has been violated by the holder of a mining right has a *locus standi* to refer such dispute to the Mining Commission for determination. [669] The Mining Commission is vested with discretionary powers to make necessary orders for effective redressing harm or loss caused to the victim.[670] This implies that the Mining Commission has quasi-judicial powers to determine any amount of compensation to be paid to victims depending on

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[665] The Mining Act 2018, s.105(2).
[666] *ibid*., s.105(3) and (4).
[667] *ibid.*, s.105(4).
[668] ibid., ss.96(3) and 119(1).
[669] ibid., s.96(4).
[670] ibid., s.119(2).

the circumstance of each case and according to its own rules of procedure. Section 122 of the Mining Act gives the Commission power to make rules prescribing for initiation and conduct of proceedings. This is a good provision which does not set pecuniary jurisdiction over matters that can be tried by the Commission; hence enabling every claim to be determined by the Commission.

Furthermore, the Commission may enforce its decisions by making an application to a court where the subject matter is located, as long as such court is presided over by a Resident Magistrate.[671] The court would then proceed to enforce the order as if that order was made by that court, subject to payment of appropriate fees. [672] However, where a person is aggrieved by the decision of the Mining Commission, he or she may 'appeal' to the High Court of Tanzania within the period of 30 days from the date the decision or order was made.[673]

Apart from the above administrative judicial process, there is a court-based mechanism to seek for compensation in relation to damages caused by pollution. Generally, every license holder must conduct mining operations within limits set by the environmental laws; failure of which would lead to strict liability. Specifically, s.109 (1) of the Mining Act (as revised in 2018) imposes liability on license holder for 'pollution damage without regard to fault.' This means that the holder of a license will be held liable for pollution regardless of whether or not there was an intention to cause pollution. Similarly, where pollution damage results from

[671]The Mining Act 2018, s.120 (1).
[672]*ibid.*, s.120(2) and (3).
[673]*ibid.*, s.121.

unlicensed mining operations then the party conducting the operations and any person who is aware or ought to be aware of such operations, will jointly be held liable.[674]

However, where it is proved that pollution damage was contributed by the inevitable act of nature (God) or other factors beyond the control of the license holder, then the latter's liability would be reduced taking into account the circumstance of each case.[675] On the other hand, the license holder may file a suit claiming compensation from any person who actually caused damage, except the exempted persons who acted reasonably and prudently.[676] This means that a victim of pollution would take action against the license holder, who may apply to join the person who actually caused pollution, by way of third party procedure. The license holder in this case will be entitled to indemnification from the third party in case of any liability for pollution damage.

Basically, suits for compensation from pollution are instituted in the civil courts as in any civil suits. Any person who becomes a victim of pollution from mining operations may institute a suit for compensation before a competent court in the area where damage is caused or where discharge takes place.[677] The term 'competent court' is determined taking into account ordinary pecuniary jurisdictional rules prescribed in the Magistrate's Courts Act.[678] Generally, a claim for compensation not

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[674] Mining Act 2018, s.110
[675] *ibid.,* s.109(2).
[676] *ibid.,* ss.111 and 112.
[677] *ibid.,* s.113.
[678] Cap 11 R.E 2020.

exceeding 30 million shillings should be filed to the Primary Court (as a court of first instance),[679] whereas claims not exceeding 200 million shillings must be filed to the District Court.[680] This implies that the High Court of Tanzania will have jurisdiction to determine claims for compensation above 200 million shillings.

Principally, pecuniary jurisdiction of the courts is determined by considering the value of the amount specifically pleaded by the party in the pleadings (also known as substantive claim) and not general damages which are awarded at courts discretion. This principle was first established by the Court of Appeal of Tanzania in the case of *Prof. Ibrahim Lipumba vs. Zuberi Juma Mzee*,[681] and reapplied by the High Court of Tanzania (Dar es Salaam) in the case of *MS Tanzania –China Friendship vs. Our Lady of Usambara Sisters.*[682] This implies that the victim of pollution damage must assess the extent of damage suffered and then plead compensation equal to the value of the loss or injury suffered by him. This is what would form the basis for determination of pecuniary jurisdiction of the court.

Nevertheless, the above principle on determination of pecuniary jurisdiction of courts was substantially improved by the Court of Appeal of Tanzania in the case of *Peter Joseph Kibirika and Another vs. Patrick Aloyce Mlingi*[683] where it was observed that the courts in Tanzania can now entertain and determine suits based solely on the amount of general damages as claimed and assessed by the plaintiff.

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[679]Cap 11 R.E 2020, s.18 (1)(a)(iii) as amended by s.20 of the Witten Laws (Miscellaneous Amendment) Act, 2016.
[680]*ibid.,* s.40 (2) (b) as amended by s.22 of the Witten Laws (Miscellaneous Amendment) Act, 2016.
[681] (2004) TLR 381.
[682] (2006) TLR 70.
[683] Civil Appeal No.37 of 2009, Court of Appeal of Tanzania at Tabora (Unreported).

This position presents a departure from its previous position expressed in Prof. Lipumba's case in which pecuniary jurisdiction was determinable through specific damages claimed by the party.

Conclusively, the Mining Act 2018 and its regulations partly protect the right of the people to participate in the natural resource decision making, including participation of local government leaders in the preparation and enforcement of both Local content and CSR plans. Further, the Mining Act 2018 gives local people an opportunity to challenge investors' acts that affect their rights to property and right to clean environment. However, it appears that there is minimal protection of the right of the people to participate in the preparation of local content and CSR plans. Hence there is a need to harmonize provisions of the law in order to make participation of state and non-state actors in the decision-making mandatory, inclusive and binding on the state organs. This matter is addressed under chapter six of this thesis.

4.2.8 The Environmental Management Act (EMA) [684] and its Regulations[685]

This is a crucial instrument which provides for fundamental principles and general framework on sustainable exploitation of environmental resources, including minerals and petroleum. It requires courts, tribunals and administrative organs to consider various principles of environmental management when making administrative and judicial decisions. These principles include: principle of public

[684] Cap 191 R.E 2010

[685] The Environmental Impact Assessment and Audit Regulations of 2005 and Environmental (Registration of Environmental Experts) Regulations, 2005as amended by Environmental Management (Environmental Impact Assessment and Audit) (Amendment) Regulations, 2018.

participation in the development policies, plans and processes; principle of access to justice; principle of access to environmental information, polluter pay principle and precautionary principle.[686] Furthermore, it is emphasized that both environment and natural resources should be used sustainably for poverty reduction and social economic development.[687]

The above principles of sustainable development are proclaimed in various international instruments, including Rio Declaration and Stockholm Declaration. Basically, EMA does not contain an express provision providing for the principle of PSNR in Tanzania. However, the accommodated principles have direct link to key attributes of PSNR. For example: a principle of access to justice is related to ability of a person to seek for judicial and administrative remedies; a principle of public participation signifies a right to be involved in the decision-making process; and the principle of access to environmental information implies a right of access to information related to natural resources. As explained earlier on, these are three main types of procedural rights implied under the principle of PSNR.

Generally, public participation is guaranteed through a number of provisions which require investors to engage members of the public in different activities, particularly during Environmental Impact Assessment (EIA). The law requires every project proponent or developer to undertake EIA study prior to the commencement or financing of any project, including mining and petroleum activities.[688] Similarly, the

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[686] Environmental Management Act, Cap 191 R.E 2010, s.5 (3) (d) and (e), and s.7 (3) (e) (f) and (g).
[687] *ibid.*, s.7(3)(i).
[688] Cap 191 R.E 2010, s.81(1), (2) read together with the Environmental Impact Assessment and Audit

project developer is also obliged to conduct Environmental Auditing order to determine environmental compliance levels in the course of implementation of projects.[689] Both EIA and environmental audit are conducted through different stages in which various persons are involved in environmental assessment.

Basically, there are four categories of people that participate in environmental assessment processes, namely: a project proponent, experts, stakeholders (individuals, groups of people and or institutions with interest or likely to be affected by an issue)[690] and administrators. On the part of experts, s.83 (1) of EMA proclaims that only experts or firms of experts registered by the National Environmental Council (NEMC) shall be competent to conduct EIA. These experts are responsible for technical related activities such as: assisting the investor to fill in environmental assessment registration form (Form No.1);[691] preparation of project briefing (Form No.2);[692] preparation of scoping report (Form No.4) and the terms of reference.[693]

Furthermore, experts are responsible for conducting EIA study according to the laid down procedures;[694] preparation of the Environmental Impact Statement containing relevant information as prescribed by law; and terms of reference (TORs).[695] Similarly, the procedure for conducting environmental audit appear to be the same

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Regulations of 2005 (as amended in 2018), regulation 14 (1), (2) and (3).

[689] Environmental Impact Assessment and Audit Regulations of 2005 (as amended in 2018), regulation 46.

[690] NEMC., *Environmental Impact Assessment Training Manual in Tanzania*, Revised Version 4, March 2005, p.34.

[691] The contents of the application for EIA certificate depends on the type of project intended to be undertaken by the project proponent as provided under regulations 6, 8 and 10 of the Environmental Management (Environmental Impact Assessment and Audit) (Amendment) Regulations, 2018.

[692] EIA and Audit Regulations 2005 (as amended in 2018), regulations 6 and 7.

[693] *ibid*., regulations 10, 11, 12 and 13.

[694] *ibid*., regulations 14, 15 and 16, read together with Fourth Schedule to the Environmental Management (Environmental Impact Assessment and Audit (Amendments) Regulations, 2018.

[695] EIA and Audit Regulations 2005 (as amended in 2018),., regulations 18, 19 and 20.

in the sense that it involves registration, approval of terms, environmental assessment, review, recommendations of technical advisory committee, submission to the Minister of the report, approval and grant of certificate.[696]

On the other hand, NEMC being an administrator is responsible for approval of the screening report, project brief, and review of Environmental Impact Statement (EIS) report within 60 days following its submission.[697] Moreover, the review process is preceded with on project site visit by NEMC representatives and other key stakeholders for purposes of consulting with members of the community.[698] Basically, any interested person may attend at a meeting in person or through representative and make presentations which are not frivolous or vexatious.[699] Further, the law stipulates that all public hearings shall be non-judicial; conducted in informal and in non-adversarial format; and that shall not strictly adhere to the rules of law, procedure and evidence as applied by courts.[700] This is a good provision which ensures that public meetings are simple and accessible by all people in the society.

Nevertheless, the requirement on public meeting may be watered down since NEMC is given power within 30 days of receipt of EIS statement to determine whether or not to convene a meeting review purposes.[701] There are two circumstances under

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[696] *ibid.*, regulations 46 to 56, read together with NEMC Procedures for Carrying out Environmental Impact Assessment and Audit, 2005.

[697] The EIS contains information on the proposed project and related activities, place of project, description of legislative and institutional framework, objectives of the project, technology and processes involved, products or byproducts generated the effects of the project and mitigation measures, and other information outlined under regulation 18 of EIA and Audit Regulations 2005.

[698] *ibid.*, regulation 17.

[699] *ibid.*, regulation 29.

[700] *ibid.*, regulation 28 .

[701] Cap 191 R.E 2010, s.90(1) and (2) read together with EIA and Audit Regulations 2005, regulation 26(1).

which NEMC may decide to convene public hearing, namely: where hearing shall enable it to make fair and just decisions and where it is necessary for protection of environment.[702] This signifies that NEMC may dispense with a requirement on public hearing as it deems fit.

However, where NEMC decides to convene public hearing then it has an obligation to display and make available all relevant documents, reports and written submissions (comments) during and after review process.[703] It must also receive submissions and comments (written or oral) from any interested party; ask questions and answers on environmental impact of the project.[704] It is important to note that a review process by NEMC may be done in collaboration with cross sectoral technical advisory committee (composed of not less than 12 specialists at national and local government levels) as it may deem fit.[705]

Furthermore, the project proponent in collaboration with NEMC are obliged to provide at least one-week notification (both in Kiswahili and English languages) of date and venue (convenient to participants) of intended meetings. This should be done through at least one daily newspaper with national circulation, one newspaper of local circulation, television and other means of mass communication.[706] Similarly, NEMC is responsible for appointing a presiding qualified person who will perform different roles, including: being chairperson of the meeting; determining rules of

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[702] EIA and Audit Regulations 2005, regulation 26(2).
[703] Cap 191 R.E 2010, s.90(3).
[704] EIA and Audit Regulations 2005, regulation 26(3).
[705] Cap 191 R.E 2010, , ss.87 and 88, read together with EIA and Audit Regulations 2005, regulation 22.
[706] EIA and Audit Regulations 2005, regulation 27(3) and (4).

procedure; ensuring that record of public opinion is taken; preparing the report and submitting it to the Director General within 14 days after completion of the meeting.[707]

Apart from supervisory roles played by NEMC, the Minister for Environmental Matters is also responsible for ensuring that public hearing has been conducted. Before the Minister issues a certificate of EIA under regulation 34, NEMC must first submit to him or her recommendations and review report of the EIS.[708] Then, the Minister shall proceed to make decision in writing on EIS within 30 days and must state reasons for the decision.[709] Moreover, the Minister's decision to approve, disapprove or approve EIS subject to certain conditions, must take into account the following information: validity of the EIS statement; comments made by relevant ministries, institutions and other interested persons; report of the person presiding at a public hearing and NEMC recommendations.[710] This means that the Minister of Environmental matters cannot exercise his powers in contravention of peoples' views, recommendations of other government institutions and expert opinions.

Thus, it could be argued that public participation is adequately guaranteed under EMA on four main grounds. First, the law defines clearly the roles and obligations of each recognized person/authority interested in the subject matter of EIA. There is wider range of participants compared to other areas of natural resource development. This promotes accountability, certainty and predictability of administrative process

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[707] *ibid.*, regulation 27(2), (6) and (7) read together with EMA, s.90(3).
[708] *ibid.*, regulation 30 read together with EMA, s.90.
[709] EIA and Audit Regulations 2005, regulation 31 read together with EMA, s.92.
[710] *ibid.*, regulations 32 and 33.

in environmental resource management. Secondly, EMA imposes an obligation to both NEMC and project proponent to disclose relevant information, including project documents to the public. This is relevant for effective deliberation of the project issues.

Thirdly, EMA guarantees freedom of expression of participants by making the hearing process as informal, simple, independent and open as possible through restricting the use of ordinary principles of law governing procedure and evidence. This ensures that all people interested in the subject matter (knowledgeable and illiterate) give their views either orally or in written form. Fourth, EMA makes it mandatory for the government through NEMC to engage people and experts in the EIA process before undertaking any development project under type A, B1 and B2.[711] This signifies that all projects in the extractive sector will engage members of the public and other stakeholders in the decision making from the early stage of developing the project.

The last but not least, is that public opinions, including opinions by experts and NEMC, appear to be binding on the Minister who is obliged to consider presentations and recommendations put forward by people and other stakeholders. The end result of EIA is a certificate which cannot be granted unless EIS is supported by NEMC. This makes the EIA process a more meaningful tool of expressing peoples' right to PSNR since people participate in the assessment of the

[711]S.81(1) of EMA and its schedule, read together with Regulation 5(1) and the First Schedule to the Environmental Management (Environmental Impact Assessment and Audit) (Amendment) Regulations, 2018 lists down petroleum, mining and extractive industry among activities in which EIA is mandatory.

impacts of the mining and petroleum operations including economic, socio-cultural and technological benefits.

Apart from participation in EIA process explained above, EMA requires the Government or Parliament to engage people and other stakeholders when making administrative and legislative decisions that may affect the environment, especially during designing of environmental policies, strategies, plans, and programs; and enactment of laws and regulations. [712] Generally, government organs must provide relevant information to the public before decisions are made; issue notice of intention to make decisions and invite people to make their presentations both orally or in written form, and provide access to information.[713] To ensure effective participation in the administrative and legislative decision making process, the law requires NEMC and other relevant authorities to establish mechanisms for collecting and responding to public comments, concerns and questions, including public debates, public hearing and information desks.[714]

On the other hand, EMA provides for institutions for settlement of environmental related disputes. Basically, disputes arising from implementation of the provisions of EMA and its regulations must be addressed by two institutions, namely: the Environmental Appeals Tribunal (referred to as EAT) established under s.204 (1) of EMA and the High Court of Tanzania as per s.209 of EMA. The EAT is comprised of the Chairman (appointed by the President), advocate of the High Court of

[712] Cap 191 R.E 2010, s.178 (1) and (2).
[713] *ibid.*, s.178(3) and (4).
[714] *ibid*., s.178 (5).

Tanzania as recommended by Tanganyika Law Society, one member with knowledge and experience on environmental law, and two other members with distinguished professional competence in the field of environmental management.

Basically, the above four members constituting the EAT are appointed by the Minister responsible for Environmental matters, and serve for a period of 3 years subject to reappointment for another term.[715]The EAT has jurisdiction to hear and determine any matter referred to it by any person who is aggrieved by the decision or omission by the Minister, the imposition of or failure to impose any condition, limitation or restriction issued under the law ,and decision of the Minister to approve or disapprove an environmental impact statement.[716] This means every decision made by the Minister or NEMC may be challenged before the EAT, provided it is referred within 30 days from the date when cause of action arose.

Generally, on determination of appeals the EAT has power to confirm, vary or set aside the order, notice, direction or decision complained about; or make other orders as it may deem fit depending on the circumstance of each case, including orders as to costs.[717] Appeals are presided over by the Chairman or other person elected for that purpose, in collaboration with two members of the tribunal who then constitute a quorum.[718] Basically, the EAT dispute settlement framework appears to safeguard access to justice on three grounds. First, it gives an opportunity to any person whose right has been violated by administrative authorities to challenge the decision or

[715] Cap 191 R.E 2010, s.204 (2) and (3).
[716] *ibid*., s.206(2).
[717] Cap 191 R.E 2010, s.206(3)and (4).
[718] *ibid.*, s.207(1) and (2).

order before the tribunal.

Secondly, it provides a right to legal representation since s.207 (5) of EMA allows an aggrieved person to appear in person or by an advocate or personal representative. Thirdly, the procedure of EAT is simple and accessible to all people. This is because the EAT is given power to regulate its own proceedings and disregard criminal and civil procedural rules, and provisions of Tanzania Evidence Act, 1967. [719] Furthermore, the EAT is given power to summon witnesses, take evidence on oath, and make orders for production of documents or discovery of information.[720]

On the other hand, decision of the EAT is binding on the parties to the case. Section 208 of EMA gives power to the tribunal to issue a binding award considering what transpired during the hearing, and it must then notify parties of the award and the time in which parties should comply with the orders. Principally, the award issued by the EAT is enforced just like any other order of the court. This means a person seeking for assistance in enforcement of the award must comply with the provisions of Order XXI, rule 10 and 11 of the Civil Procedure Code (CPC).[721]A person must apply for execution to the court which passed the decree or seeking to enforce the decree, and point out clearly a mode of execution of decree.

It must be noted that a court is under duty to make specific order for the execution of decree in the mode applied for as per Order XXI, rule 15(4) of the CPC.[722] The

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[719] *ibid.*, s.207(4).
[720] *ibid*. s.207(6).
[721] Cap 33 R.E 2010.
[722] This was also observed in the case of *MS Sykes Insurance Consultants Co. Ltd vs. MS SAM Construction*

execution process should be preceded by the 14 days' notice to the defaulter as per rule 4 of the Court Brokers Rules.[723]Nevertheless, any person aggrieved by the decision of the EAT may appeal to the High Court of Tanzania whose decision shall be final.[724] Basically, the law requires an appeal from the EAT to the High Court to squarely be based on matters of law, lodged within 30 days from when decision was made, and that such an appeal must be determined by a panel of three (3) judges. [725]

The above provision has two important legal effects with regard to access to justice. First, it restricts the right of appeal to the Court of Appeal of Tanzania, which is the highest court of the land. Secondly, it limits the opportunity of the person aggrieved by the award to challenge decisions where there was an error of fact. This may adversely affect peoples' right to seek for effective judicial remedies; hence there is a need for amendment in order to guarantee an opportunity to challenge the award to the highest court of the land.

Conclusively, Environmental Management Act is an important legislation providing for framework on sustainable utilization of natural resources. It provides for principles of environmental management including public participation, access to information and access to judicial remedies, which are key aspects of the principle of PSNR. Basically, holders of the principle of PSNR and investors have obligation to participate in the protection of environment, including taking a legal action in order

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Co.Ltd, Civil Revision No.8 of 2012 (Unreported).

[723] Court Brokers and Process Servers (Appointment, Remuneration and Discipline) Rules, 1997 GN 315 of 1997 as amended by GN 763 of 1997.

[724] Cap 191 R.E 2010, s.209(3).

[725] *ibid.*, s.209(1) and (2).

to stop the damage and claim compensation for pollution. Failure by the investor to protect the environment may constitute a ground for revocation or suspension of mining right in Tanzania. Thus, EMA is one of the essential laws which impliedly adopt the principle of PSNR in Tanzania, the subject matter of this study.

4.2.9 The Standing Orders of the Parliament of the United Republic of Tanzania[726]

This is an important tool for realization of the peoples' right to self-determination in Tanzania. It was adopted by the Parliament of Tanzania, in recognition of public participation in the legislative making process. Basically, Order 84(2) provides that a respective Parliamentary Committee[727] shall issue a public hearing notice or invitation letter to any interested person to appear and give comments on the proposed bill. The similar provision is reiterated under Order 117(9) of the Standing Orders which states that affairs of the committee, including public hearing shall be conducted in a transparent manner in order to collect views, opinion and advice from stakeholders for improving the matter being addressed by the committee. Thus, the Parliament is under obligation to ensure that members of the public (individually or

[726] GN No.626 of 7th August 2020 supplemented by Supplement No.4, GN No.37A of 2023.

[727] Order 1-15 of the Eighth Supplement to the Standing Orders of the Parliament of the United Republic of Tanzania (known as Nyongeza ya Nane ya Kanuni za Kudumu za Bunge) establishes four categories of parliamentary committees. These include: House Keeping Committees (comprise of Steering Committee, Standing Orders Committee, Parliamentary Privileges, Ethics and Powers Committee); Sector Committees (comprise of Agriculture, Livestock and Water Committee; Infrastructure Development Committee; Energy and Minerals Committee; Industries, Trade and Environmental Committee; Constitutional and Legal Affairs Committee; Administration and Local Government Affairs Committee; Social Services and Community Development Committee; Land, Natural Resource and Tourism Committee; Foreign Affairs, Defence and Security Committee, and Subsidiary Legislations Committee); Crosscutting Committees (comprise of Budget Committee and HIV and AIDS Committee) and Watchdog Committees (comprise of Public Accounts Committee, Local Authorities Accounts Committee and Public Investments Committee).

collectively through civil societies) participate in the legislative making.

However, the Parliamentary Standing Orders exclude certain affairs from this requirement. Basically, public participation is not extended or applied in affairs of the committee which have been initiated by the speaker, affairs under parliamentary enquiry (investigation), and affairs of committees formed for special purposes. [728] Other affairs which are conducted under strict confidence include those of designated committees, namely: Parliamentary Privileges, Ethics and Powers Committee; Foreign Affairs, Defense and Security Committee; Public Accounts Committee, and Local Authorities Accounts Committee.[729] This is to say, these committees will not communicate their affairs to the public, unless issue involved are not regarded as sensitive, in which partial disclosure of information may be allowed.[730]

Hence, the National Assembly still recognizes the right of non-state actors, such as CSOs, CBOs and professional bodies, to actively participate in the law-making process through public hearing as per Order 84(2) and Order 117(9) of the Standing Orders. These provisions were implemented by adopting two guidelines providing for public hearing procedures. These guidelines are known as: 'Mwongozo wa Kusikiliza Maoni ya Wadau, Machi 2018' (hereinafter referred to as Public Hearing Guidelines, March 2018) and 'Mwongozo wa Uhusishwaji wa Asasi za Kiraia

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[728] Seventh Supplement to the Standing Orders of the Parliament of Tanzania, 2016, Order 3 (1)(a) - (f) (*in Swahili: Kanuniya 3(1)(a) -(f) ya Nyongeza ya Saba ya Kanuni za Kudumuza Bunge 2016).*
[729] *ibid.,* Order 3(2).
[730] *ibid.,* Order 4(1), (2) and (3).

(AZAKI) Katika Shughuli za Kamati za Bunge, Machi 2018' (hereinafter referred to as the Civil Society Organizations' (CSOs) Participation in Parliamentary Committee Meetings Guideline, March 2018).

Basically, public hearing at the level of the Committee is done through defined steps. The first requirement is seeking for speaker's approval to conduct public hearing. According to both guidelines, it is the Speaker, who has the overall power to approve public hearing requests; power to appoint the Chairperson and Members of the Committee. Generally, the Clerk of the Assembly, the Chairperson of the Committee and Secretary of the Committee jointly control and manage public hearing process, by ensuring that participants give out their views and comments in an orderly manner.[731] The second stage involves determination of potential participants (stakeholders) considering their availability, knowledge and experiences in the subject matter.

Thirdly, the Secretary of the Committee must draft the schedule for the meeting showing the agenda, time and place for the meeting. The time set for the public hearing meeting should not interfere with parliamentary sessions, public holidays or any religious events. Fourth, Secretary of the Committee must then provide notice of the intended public hearing stipulating the subject matter of hearing, date and place; and ways in which participants could air out their views. The fifth stage involves actual hearing process whereby participants would be required to attend the meeting at their own costs, fill in the attendance register, wear descent attire and express their

[731] The Public Hearing Guidelines of March 2018, pp.8-14.

opinions in appropriate language.[732]

The public hearing meetings are controlled by the Chairperson of the Committee, who must ensure that each participant is given an opportunity to freely express his or her own ideas, within time allocated and in accordance with prescribed limits by the Standing Orders. The committee representative explains the purpose of the proposed legislation or plan in the appropriate language (Kiswahili or English) and participants are given time to make their contributions. The Members of the Committee have the opportunity to raise questions and seek clarification from participants.[733] It should be noted that everything discussed during public hearing would be recorded for the parliament consumption, but cannot be disclosed to the public because of the confidentiality of proceedings.[734]

Generally, the four steps mentioned above have been used by the Parliament of the United Republic of Tanzania to obtain comments from interested members of public and interested groups in the society. This acquaints Members of the Committee with sufficient knowledge to make critical and constructive debates for purposes of improving the proposed bill. However, the public hearing process convened by the office of Speaker is faced with number of challenges. First, the two Guidelines used for purposes of public participation are not legally enforceable since they were not made under any enabling principal or subsidiary legislation including the Standing

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[732]The Public Hearing Guidelines of March 2018, pp.15-24; also see the Civil Society Organizations' (CSOs) Participation in Parliamentary Committee Meetings Guideline of March 2018, pp.12-17.

[733] The Public Hearing Guidelines of March 2018, pp.23-25.

[734] The Civil Society Organizations' (CSOs) Participation in Parliamentary Committee Meetings Guideline, of March 2018, pp.15-16.

Orders. They were only prepared by the Parliament in collaboration with UNDP as initiative for good governance.

Basically, these Guidelines are instructional materials and they do not impose an obligation on the Members of the Committee or the Parliament to take on board views and comments received from stakeholders. By reading the provisions of the Standing Orders and the two guidelines explained above, it is evident that the Parliament is required to hold public hearing process, but it is not bound in any way by the decisions from the process. This is because the purposes of public hearing at the level of the Committee is to get public opinion on a specific issue; establish public acceptance of the matter; promote compliance and cooperation between the government and the people.[735] Thus, public hearing conducted by the Committee is not meant to actively engage citizens in decision making, rather it seeks to meet the statutory requirement on public consultations.

Secondly, public hearing is still dependent on the discretion of the Speaker of the National Assembly, who is given powers to either approve or disapprove public hearing meetings.[736] This provision which vests general administrative powers of the speaker to control committee meetings is an important provision, but it needs to be exercised judiciously and reasonably in order to realize desired goals. On the other hand, the Speaker is given powers to exclude certain matters from being discussed by stakeholders, as he or she deems fit. This makes public hearing at the will of the Speaker, who practically appears to be accountable to the highest political

[735] Public Hearing Guidelines, 2018, pp.4-7.
[736] GN No.626 of 2020, Order 117(3).

party leadership, including the President of the United Republic of Tanzania.

Thirdly, there are certain affairs of designated committees which cannot be subjected to public hearing because they are regarded as confidential and sensitive issues. This is likely to prevent interested persons from influencing decisions of the Parliament in the areas previously stated, which may lead to lack of accountability, transparency and good governance. If not strictly controlled, it is possible that bad laws, policies, plans and agreements may be made to shield or benefit certain government leaders or hide corrupt transactions on ground of peace and security. For some time now, there has been a tendency by some government officials in Tanzania to hide corrupt transactions in the umbrella of 'military purposes' which tarnish the image of our security forces.

For example, on 23rd January 2020, the then President of United Republic of Tanzania, the late Dr. John Joseph Pombe Magufuli, sacked the then Minister of Home Affairs and then Deputy Commissioner General for the Tanzania Fire and Rescue Force, for entering into a dubious contract which could cost the nation over Shs.1 Trillion (453 million USD) without involving the Ministry of Finance or the Parliament. Had it not been for the highest integrity of the President, such a transaction could not have been known by the people since it could have been treated as confidential on grounds of 'national security.' This suggests that there is a need to engage Members of Parliament and some stakeholders even on affairs that fall within the designated four committees mentioned above.

Fourth, there is still a challenge of certain bills to be absolutely excluded from public hearing processes. The President of the United Republic of Tanzania is vested

powers to present particular bills under signed certificate of urgency.[737] Such a bill is only presented to the Parliamentary Standing Committee on Leadership for deliberation in short notice.[738] As a principle bills presented under certificate of urgency are not be published in the government gazette as required under Order 80(1) of the Standing Orders. This is likely to affect public participation in legislative making. Majamba[739] argues that 'all bills under certificate of urgency are hardly subjected to public scrutiny; hence the standing order 'fail(s) to consider the rights of citizens to scrutinize and give comments/views on a proposed law that targets them.'[740]

Notwithstanding justification on ground of emergences, fast tracking of bills under certificate of urgency denies people of their democratic right to participate in the decision-making process. Chuwa[741] observes that procedure of making law under certificate of urgency 'is undemocratic and it can only be justified in the case of the actual urgency' and that such laws 'lack political legitimacy because of non-participation of Members of Parliament and other stakeholders.'[742] This could turn the Parliament 'to be a rubber stamp of Government decisions.'

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[737] GN No.626 of 2020, Order 80(4).

[738] *ibid.*, Order 80(5) and (6).

[739] Majamba, H.I; *The Paradox of the Legislative Drafting Process in Tanzania*, Statute Law Review, Volume 00,No.00 of 2007 (retrieved from https://www.academia.edu/31623532/The_Paradox_of_the_Legislative_Drafting_Process_in_Tanzania, on 7th July 2020 at 10.30 am.

[740] *ibid.*, p.7.

[741] Chuwa, N.P., Legislative *Drafting in Tanzania Mainland: Problems and Challe*nges, LL.M Dissertation, University of Dar-es-Salaam,2012.

[742] Chuwa, N.P., Legislative *Drafting in Tanzania Mainland: Problems and Challe*nges, LL.M Dissertation, University of Dar-es-Salaam,2012, p.46; also cited by Majamba, H.I; *The Paradox of the Legislative Drafting Process in Tanzania*, Statute Law Review, Volume 00, No.00 of 2007, p.7.

On the basis of the above factors, it is evident that the existing parliamentary rules only strengthen the power of the peoples' representatives in the decision making. The rules do not protect the right of the people to participate in legislative making as explained above. There is need for legal reforms in order to guarantee non-state actors in Tanzania to participate in the law-making processes. This is because the victims of most laws are not Members of Parliament, but the people and other non-governmental institutions. This could guarantee more the interests of the state and the welfare of the people; therefore, address the existing political situation in Tanzania.

4.2.10 The Local Government (Urban Authorities) Act[743] and the Local Government (District Authorities) Act [744]

These are important legislations which create linkages between local governments and central government. These two legislations provide for common matters of administration of local government, including direct participation of people in the decision-making process; hence they are discussed together. Basically, local government is established in each region, district, urban area and villages in the United Republic of Tanzania.[745]

The purpose of establishing local government is to transfer authority from central government to the local people in order to participate in development activities; ensure enforcement of law and public safety of the people, and consolidate

[743] Cap 288 R.E 2010
[744] Act No.7 of 1982.
[745] Cap 2 R.E 2010, article 145

democracy within its areas.[746] The establishment of local government was preceded by the adoption of the Local Government Reform Agenda in 1996 which *inter alia* focused at enhancing accountability and transparency of government institutions and civic participation.[747]

Essentially, people reside in the village and urban/town communities in the respective district and urban authorities respectively. Therefore, people have the right to participate in the decision making for matters that affect them in their areas of residence. This may be exercised through their representatives or directly through public meetings. Generally, the Minister responsible for local government has the statutory duty to ensure meaningful involvement and participation by the people in the making and implementation of decisions on matters that affect their livelihood and well-being.[748] Furthermore, the Minister is required to discharge his duties by embracing principles of participatory democracy as enshrined under the constitution and written laws, and ensure local government accountability to the people.[749]

To ensure effective management, the Minister may by notice in the government gazette, and after consultation with the President, divide the urban authority into wards, mitaa or village consisting of number of households as determined by the authority.[750] Each Mtaa, Village or Kitongoji have a chairman who is elected by adult members of the Mtaa or Village.[751] The Chairman presides over meetings and

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[746] ibid., article 146(1) and (2).
[747] Mwandulusya, K, A., *Selected Experiences of the Use of the Village Assembly in the Governance at the Grassroots Levels in Ludewa District Council in Tanzania,* Journal of Public Administration and Governance, volume 7 Issue No.2 of 2017, p.2.
[748] Cap 288 R.E 2010, s.4 (1)(b).
[749] *ibid.,* s.4(2) and (3).
[750] Cap 288 R.E 2010, s. 16(1) and (3).
[751] *ibid.,* s.16(4).

ensures that minutes of meeting are prepared and submitted to the Ward Development Committee (hereinafter WDC),[752] which is established under s. 20 (1). The WDC is vested with authority to take necessary actions to implement decisions and policies of urban authority; initiate any tasks or venture designed to ensure welfare of the people; and formulate proposals for making by laws in the respective ward.[753]

The above functions are similarly vested to the village council established under s.19 of the Act, and urban authorities (town council, municipal council or city council) established under s.24 of the Act. The village council is mainly composed of not less than 15 but not more than 25 elected members comprising of chairperson, chairman of all vitongoji, village executive officer, and other members including women. Similarly, the urban authority is constituted by members of Parliament from the given locality, women members proposed by political parties, three members appointed by the Minister representing special groups and three members from among residents of the municipality.[754] The meetings of the village council and urban authorities are open to the public and the press, and their respective minutes shall be open for inspection by members at reasonable time and upon payment of fee.[755]

On the other hand, s.24 of the Local Government (District Authorities) Act establishes the village assembly which must conduct at least four meetings in a year.

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[752] *ibid.*, s.16(6), s.18(1) (2).
[753] *ibid.*, s.21.
[754] *ibid.*, s.24.
[755] Cap 288 R.E 2010, s.39 and s.41.

Among its functions include: policy and by-laws making; approving decisions passed by the village council; electing village representatives into a village council; removing members of the village council at the general meeting and receiving report from the village council regarding various development activities.[756] Nevertheless, both the Local Government (Urban Authorities) Act and Local Government (District Authorities) Act do not contain specific provisions on direct citizen participation. The only level of participation is through elected representatives mostly representing political parties' interests.

Unlike the Parliament, the urban authorities and district authorities do not have specific legal framework for citizen participation in the natural resource decision making mechanisms. One of the reports published by Action for Democracy and Local Government shows that majority of the local government leaders are not aware of contracts signed between investors and government, policies and laws governing extractive sector, particularly areas of corporate social responsibility, local content and environmental matters.[757] Ten years ago, in a study by Massoi & Norman it was shown that decentralization of administrative functions in Tanzania was done without complete or full devolution of powers to the people, and that community involvement in the planning process was inadequate.[758]

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[756] The Local Government (District Authorities) Act No.7 of 1982, s.146.

[757] Action for Democracy and Local Government (ADLG); '*Local Government Leaders Unaware of Extractive policies and Regulations'*, in the Extractive Insights-Transparency, Accountability and Economy, Volume 2 October 2019, p.16; also see Mwandulusya, K, A., *Selected Experiences of the Use of the Village Assembly in the Governance at the Grassroots Levels in Ludewa District Council in Tanzania*, Journal of Public Administration and Governance, volume 7 Issue No.2 of 2017, pp.6-8.

[758] Massoi, L. & Norman, A.S., *Decentralization by devolution in Tanzania: Reflections on Community Involvement in the Planning Process in Kizota Ward in Dodoma*, Journal of Public Administration and Policy Research, Volume 1 Issue No.7 of 2009, pp.133-137.

The above presents evidence on challenges which citizens face in the course of exercising their right to participate in the decision-making process. Hence, there is need to raise public awareness on various aspects of laws and policies, particularly extractive laws, in order to effectively engage people of Tanzania in the natural resource decision making process. Ways that may be adopted for purposes of addressing awareness problems are presented in chapter six of this thesis.

4.2.10 The Petroleum Act and its Regulations[759]

This Act governs exploitation of oil and gas in Mainland Tanzania. S.4 (1) of the Petroleum Act of 2015 declares the entire property and control over petroleum shall be vested in the United Republic of Tanzania, but managed by the government on behalf of the people. This means petroleum is a public property which is held by the President as a trustee. Moreover, the strategic oversight and directions over oil and gas economy is vested to the Cabinet.[760] This is a policy function which ordinarily is vested to the government ministries and agencies.

Furthermore, this law establishes two authorities to regulate petroleum exploitation, namely: the Petroleum Upstream Regulatory Authority (PURA)[761] and Energy and Water Utilities Regulatory Authority (EWURA).[762] The former is responsible for management of the upstream operations while the latter is responsible for regulating midstream and downstream petroleum and natural gas activities. Specifically, PURA is vested powers to advise the Minister on promotion of PSAs or other contractual

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[759] The Petroleum (Local Content) Regulations, GN No.197 of 2017.
[760] The Petroleum Act of 2015, s.4(2).
[761] Petroleum Act 2015, s.11(1).
[762] *ibid.,* s.29(1).

agreements; negotiate PSAs and other arrangements; grant, renew or cancel licenses. It is also responsible for analyze, disseminate and issue information relating to petroleum industry, promote local content provisions and maintain continued dialogue with all stakeholders in the industry.[763]

On the other hand, EWURA is responsible for promotion of maximum participation of Tanzanians in the petroleum value chain, and encourage use of local goods and services produced and available in Tanzania. Similarly, it is responsible for gathering and provision of information relating to regulated activities.[764] This means both PURA and EWURA have responsibility to ensure that principle of PSNR is implemented in Tanzania by promoting maximum participation of the local people in the natural resource ownership and management, especially during preparation and approval of the Local Content plan and CSR plan. This has already been addressed when discussing the provisions of the Mining Act 2018.

4.2.11 The Access to Information Act

As explained earlier, effective citizen participation in the decision making for extractive sector depends on availability and disclosure of information concerning beneficial owners, resource contracts and revenues. Thus, Access to Information Act is a framework law which intends to regulate issues pertaining to access to information by defining information which can be disclosed to the public. It also prescribes conditions and procedure for disclosure of information to the public. Principally, the Act seeks to give effect to the citizen's right of access to

[763] *ibid.*, s.12(1) and (2).
[764] *ibid.*, s.30 (2).

information; impose duty to information holders to disclose information to the public in compliance with principles of accountability, transparency and public participation; and provide protection to persons who disclose information in good faith.[765] These five areas which are implied in the principle of PSNR and Public Participation appear to be realized in various provisions of this Act as explained hereunder.

First, the Access to Information Act 2016 partly guarantees peoples' access to information. It proclaims that every person has a right of access to information which is under the control of information holders, who must disclose such information subject to request by the applicant and within limits set by the law.[766] This section attempts to recognize a constitutional right to information under article 18 of CURT which concerns a right to information. Nevertheless, this purported right of access to information appears to be watered down in other subsequent provisions providing for withholding certain information considered to be 'exempt information' or information which if disclosed may be against the 'public interest.'[767]

Generally, the exempt information is any information which when disclosed would undermine defense, international relations and national security[768]; impede due process of law or endanger safety of others; undermine lawful investigation by

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[765] The Access to Information Act, 2016, s.4(a)-(e).
[766] *ibid*., s.5(1) and (2).
[767] The Access to Information Act, s.6(1)(a) and (b).
[768] See s.6(3) of the Access to Information Act, 2016 defines different types of information relating to national security including military strategy, doctrine, capacity, intelligence operations or activities, scientific or technological/economic matters relating to national security, and so forth.

enforcement agency; invade privacy of an individual or infringe commercial interests.[769] Other grounds for non-disclosure include: when data of court proceedings is likely to be distorted or dramatized before conclusion of proceedings or when information may damage holder's position in any contemplated legal proceedings.[770] These mentioned grounds for withholding information tally with general limitation standards of human rights as prescribed under article 30(1) and (2) (a)-(f) of the CURT.

Nevertheless, there are some grounds for withholding information which may have an impact to peoples' sovereign right to self-determination, a key attribute of the principle of PSNR. Section 6(2) (g) and (i) of the Access to Information Act 2016 restricts disclosure of information that is likely to hinder or cause substantial harm to the government to manage the economy or undermine cabinet records and those of its committees. Basically, this provision may affect government accountability to the people in different ways. One, the Act does not state what sort of information may lead to substantial harm to the government ability to manage the economy. Neither does it prescribe tests that may be used by reviewers of decision to determine the nature of harm likely to be caused by disclosure of information. Similarly, the phrase 'substantial harm 'is ambiguous and subjective. Its interpretation may differ from one person to another depending on the level of one's abstraction using different principles of statutory interpretation, logic and legal reasoning.

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[769] *ibid*., s.6(2) (a)-(f).
[770] *ibid*., s.6(2)(h) and (j).

Two, the provision tends to ignore the role of the people and other stakeholders in the management of the economy. Generally, the government has the duty to manage the economy of the country through its institutions. However, the world economy today is largely owned by private entities whereby the role of government is to issue policies and guidelines which govern conduct and operations of different market players. There must be an inclusive process in which the government must collaborate with other stakeholders in the management of the economy. This would require sharing of information, expertise and technologies among different market players, including researchers, media, economic analysts, civil societies, and public institutions.

Thus, there is a need for the government to describe clearly the substance of the grounds for limitation of freedom of information, in order to ensure adequate disclosure of information necessary for effective participation of each stakeholder in the economy. Under international law, there are three tests used to assess whether limitations imposed on a right are acceptable. The first on the list is that restriction must be 'provided by the law', in the sense that it must be reasonable, accessible, precisely worded and unambiguous.[771]Reading exclusionary provisions of the Access to Information Act, it is obvious that the law has a number of unambiguous phrases which would lead to arbitrary application and enforcement by state organs.

Similarly, the Act needs to be applied by an independent body, free of any political, commercial or other unwarranted influences in order to provide safeguards against

[771] Principles 15, 16, 17 and 18 of the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and political Rights, 1966.

abuse. This does not appear to be true with the Access to Information Act which does not establish an independent body but vests administration powers to the head of particular department and the Minister of Legal Affairs, who is a political figure with duty to protect government interests. On the other hand, the Act needs to clearly set out the remedy against or mechanism for challenging illegal or abusive application of the limitation or restrictions. This is partly provided since the Access to Information Act provides for the avenue of challenging denial of access to information by the information holders. This is addressed later under this part.

The second test for determination of validity of restrictions is that limitations imposed are required to be 'necessary' and 'proportionate' to the pressing and legitimate social aims.[772] This is done by establishing a direct and immediate connection between freedom of expression and the threat likely to be caused. Here, the government has the burden of proving that the benefit of protecting public interest outweighs the harm caused by restricting right to information; hence reasonable.[773] It is doubtful if the said limitations in the Act are necessary and proportionate to the legitimate social needs of the people of Tanzania.

The last but not least is that the limitations imposed under the state authority should not affect or impair democratic functioning of the society. [774] Ideally, there are different types of democracy models used in various states as discussed in chapter

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[772] Principle 10 of the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and political Rights, 1966

[773]Mvungi, S., *Remedies for Infringement of Constitutional Rights in Tanzania* in Sendoro, E. et al.(eds); Sengondo Mvungi Breathing the Constitution, Legal and Human Rights Centre, *2014, p.329.*

[774] Principles 19, 20 and 21 of the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and political Rights, 1966.

two of this thesis. As explained earlier on, Tanzania applies various models including pluralism, liberalism and direct democracy in order to realize public participation in decision making. Regardless of the model adopted that people must be given an opportunity to deliberate on matters that affect them within the existing institutional set up. It is without any doubt that some restrictions in the Access to Information Act falls short of this requirement. Hence there is need to amend the law in order to meet the international standards explained above.

The second feature of the Access to Information Act is an obligation to provide information to the people. As previously shown, the exercise of sovereign right to PSNR is subject to certain people-based duties, including duty to furnish information related to natural resources. Section 7 of the Access to Information Act requires information holder to appoint information officers who shall deal with applicant's request for information. Basically, the information officer or head of an institution, as case may be, is required to maintain record of information under his or her custody for a period not less than 30 years from the date it was generated or it came under their control.[775]

Furthermore, every information holder must publish basic information describing the institution, its officers, and category of information in their custody.[776] This means that every institution that is a subject to this Act has the duty to designate a particular officer who will be responsible for providing information to the applicants. However, it appears that the duty to provide information is limited to the public

[775] The Access to Information Act, s.8(1) and (2).
[776] ibid., s.9(1).

institutions or private bodies in the Mainland Tanzania that are registered under laws of Tanzania which utilize public funds or contain information which is significant to public interest.[777] This provision is likely to affect the right of the people to access information in Tanzania on two reasons.

One, it is clearly stated that private institutions which do not utilize public funds have no obligation to provide information to the public because such institutions are not within the scope of the law. Assume one is conducting a study or research that involves private owned mining companies, it could be argued that such institution would be under no duty to disclose any information to the applicant, notwithstanding its relevance to the applicant. Two, it is also stated that private institutions would be required to disclose information considered to be of significant public interest. However, the Act does not define the term 'public interest'; neither does it provide criteria that may be used to assess the public utility of the information. As discussed earlier on, issues of public interest have not been defined under domestic and international law since they are purely public policy issues which can only be justified by the government.

The above mentioned factors are likely to affect citizen's constitutional right to information namely: right to seek, receive and, or disseminate information regardless of national boundaries, and right to be informed at all times of various important events of life and activities of the people and also of issues of importance to the

[777]ibid., s.2(1) and (2)(a) and (b).

society.[778] It should be noted that every institution (public or private) has the duty to promote and safeguard human rights and freedoms, particularly freedom of expression and right to information, which are considered to be a corner stone of peoples' right to self-determination in any country.

The above statement on the duty to protect and safeguard freedom of expression was expressed by the Ugandan Supreme Court in the case of *Charles Onyango-Obbo and another vs. Attorney General,*[779] where the Court had the following to say:

> *"Protection of the fundamental human rights therefore, is a primary objective f every democratic constitution, and as such is an essential characteristic of democracy. In particular, protection of the right to freedom of expression is of great significance to democracy. It is the bedrock of democratic governance. Meaningful participation of the governed in their governance, which is the hallmark of democracy, is only assured through optimal exercise of the freedom of expression." (Emphasis mine)*

The similar reasoning was also adopted by the Zimbabwean Supreme Court in the case of *Chavunduka vs. Minister of Home Affairs*[780] which provided four key values for protection of freedom of expression in a state: it helps an individual to obtain self-assessment; assist in discovery of truth and promoting political participation; strengthens capacity of an individual to participate in decision making and provides mechanism to establish a reasonable balance between stability and change. This means protection of freedom of expression is directly related with ability of the people to exercise their right to participate in the decision making. Conversely, restriction of freedom of expression is denial of peoples' right to self-determination as

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[778]Cap 2 R.E 2010, article 18(b) and (d).
[779](2004) 1 EA 265 (SCU), 270.
[780] (2000) 1 ZLR 552 (S).

guaranteed by international instruments governing PSNR.

The above view was also shared by the Supreme Court of India, in *Ghandi vs. Union of India*[781] where the court clearly established the link between freedom of expression and peoples' right to participation in decision making (democracy):

> "Democracy is based essentially on a free debate and open discussion for that is the only corrective of government action in a democratic set up. *If democracy means government of the people by the people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussion of public matters is absolutely essential*." (Emphasis is mine).

Thus, the above decisions proclaimed by supreme courts from the stated common law countries, it is no doubt that protection of freedom of expression and access to information has a direct impact on citizen ability to exercise their right to PSNR, including right to participate in the decision-making process. Public institutions and other state organs should be able to provide information to the people so that they can actively participate in the decision-making process.

The third attribute of the Access to Information Act is the prescription of procedural requirements for access to information. Basically, access to information is a right dependent upon fulfillment of certain legal requirements as follows. One, lodge an application by filling in prescribed form clearly stating sufficient details of the information sought, including names and address of the applicant.[782] This application may be made in writing where the text is delivered by hand, post or electronically; or

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[781](1978) 2 SCR 621.

[782] The Access to Information Act, 2016, s.10(1) and (2).

any legible form as prescribed by the regulations.[783] However, where an application for information is made orally, information officer must reduce the request in writing in the prescribed form and issue a copy of the request to the applicant.[784] The latter mechanism is desirable for people with challenges such as disability or illiteracy; hence it guarantees the people an equal access to information without any form of discrimination.

Two, the information holder must then notify the applicant on whether information sought exists and whether access to such information would be granted. This notice should be given to the applicant within a period not exceeding 30 days after such request was received.[785] Nevertheless, if information sought is not within his or her custody, the person to whom application is made must within 7 days after receiving the request, transfer it to the appropriate person, including third parties, who should respond within prescribed time.[786] Three, the information holder must proceed to give access to information, including documents so far as disclosure of such information is not prohibited by the law.[787]

Generally, access to information can be granted through provision of a hard copy, soft copy in electronic means, audio, visual images or provision of a written transcript of the words recorded.[788] The person who receives information has the duty to use the information properly. Any form of distortion of information is

[783] *ibid.*, s.10(3)
[784] *ibid.*, s.10(4)
[785] *ibid.*, s.11(1) and (2)
[786] *ibid.*, ss.13 and 15.
[787] The Access to Information Act., s.12.
[788] *ibid.*, s.17(1).

punishable by imprisonment for a term not less than two years but not exceeding five years.[789] Similarly, any person who discloses information in good faith believing that such information is true will be protected regardless of threat to healthy, safety or environment.[790]

On the other hand, the information holder may refuse to give access to information, either partly or wholly, if disclosure would be against the provisions of the law, including the National Security Act.[791] The information holder must notify the applicant in writing and state reasons for refusal and inform the applicant available avenue for review of the decision.[792] Moreover, the information holder is permitted to defer the provisions of access to information pending determination of judicial or administrative action or expiry of specified period, where doing so is reasonable in the interest of public.[793] The information holder must inform the applicant of decision and reasons for deferment of provisions on access to information.[794]

Generally, the above provisions partially guarantee peoples' right to information in Tanzania. On one hand, the law stipulates on the right of the people to get information by following up the procedures. On the other hand, the information holder is given wide range to determine which information should be published or disclosed through exemption or exclusionary provisions. To make it worse, the law still retains the requirements of the National Security Act 1970 as one of the grounds

[789] *ibid.*, s.18(1) and (2).
[790] *ibid.*, s.23.
[791] *ibid.*, s.17(3) (a), (b) and (c).
[792] *ibid.*, s.14 (a), (b) and (c).
[793] *ibid.*, s.16(1).
[794] *ibid.*, s.16(2).

for refusal of information, breach of which attracts punitive remedies.

Basically, National Security Act 1970 contains provisions relating to national security, including espionage, sabotage and other activities prejudicial to the interests of the United Republic of Tanzania which are punishable without regard to state of mind. Specifically, section 5 of the National Security Act 1970 makes it an offence punishable by imprisonment for a term not exceeding twenty years to any person who communicates any classified information without authorization of the Minister. It means there is no way one would get access to classified information unless one is an authorized person or such information is declassified by the Minister responsible with national security.

Unfortunately to date there is no any objective criterion for determination of classified information; hence making it hard to understand what sort of information would be disclosed without contravening the National Security Act 1970.With such a law incorporated into the Access to Information Act 2016, it is doubtful to argue if the intention of the Parliament was to guarantee people unfettered access to information in Tanzania. Impliedly, it means the requirement to lay down reviewed or renegotiated agreements before the National Assembly as required by the Permanent Sovereignty Act 2017 and the Natural Wealth and Resources (Review and Renegotiation of Unconscionable Terms) Act 2017 can hardly be achieved. This matter is addressed under chapter five of this thesis.

Apart from provisions on access to information, the Act provides for specific administrative and judicial processes that could be taken to protect the right to

information. Basically, where the applicant is aggrieved by the decision of the information holder refusing access or deferment of access provision, one may apply for review of decision to appropriate forum, including head of the institution, Minister responsible for Legal Affairs and the High Court of Tanzania (in some instances). Principally, the applicant for information who is aggrieved by refusal of access to information must first apply for review to the head of the institution, who must determine the matter within 30 days in accordance with procedures within a particular institution.[795] This is an initial process in which the information holder is given an opportunity to assess the correctness of the decision made by the subordinate staff within the institution.

Secondly, if the applicant is not satisfied by the decision of the head of institution, he or she may within 30 days of receiving a decision, appeal to the Minister responsible for Legal Affairs, whose decision shall be treated as final and conclusive.[796] Literally, this section provides the Minister for Legal Affairs with quasi-judicial powers to resolve conflicts involving access to information which originate from information holders. This is an acceptable practice whereby an administrative body in a state is given power to determine remedies for denial of access to information as reflected under the Aarhus Convention explained under chapter three.

However, the finality provision under s.19(3) of the Act seeking to oust jurisdiction of the ordinary courts, particularly the High Court and Court of Appeal of Tanzania,

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[795] Access to Information Act, s.19(1) and (2).
[796] *ibid.*, s.19(3).

could be regarded to be a barrier to protection of the right to information which is guaranteed under the CURT. Basically, the High Court of Tanzania is always seized with jurisdiction to hear and determine cases involving human right violations, no matter attempts to limit its powers by the government. Article 30(3) of CURT provides as follows:

> *''Where a person alleges that any provision of this part of this Chapter or any law involving a basic right or duty has been, is being or is likely to be contravened in relation to him in any part of the United Republic, he may, without prejudice to any other action or remedy lawfully available to him in respect of the same matter, institute proceedings for relief in the High Court*." (Emphasis is mine).

Similarly, the attempts by the government to limit the jurisdiction of courts through ouster clauses has for a long time been declared by the High Court of Tanzania and Court of Appeal of Tanzania to be unconstitutional; hence treated as inoperative, null and void. This was held in the case of *Attorney General vs. Lohay Akonaay and Joseph Lohay*[797] where the Court of Appeal affirmed that section 5(1) and (2) of Act No.22 of 1992 containing ouster clause was unconstitutional, as it encroached upon the sphere of Judicature contrary to Article 4 of the CURT, and that it denied an aggrieved party remedy before an impartial tribunal contrary to Article 13(6) (a) of the CURT.

Furthermore, the Court of Appeal of Tanzania in the case of *Attorney-General and two others vs. Aman Walid Kabourou*[798] proceeded to determine an application against decision of the Tanzania Electoral Commission despite a clear stipulation under article 74 (12) of the CURT prohibiting courts to do so. It was held that 'the

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[797] Court of Appeal of Tanzania at Arusha, Civil Appeal No.31 of 1994 (Unreported).
[798] (1996) TLR 156.

High Court of this country has a supervisory jurisdiction to inquire into the legality of anything done or made by a public authority, and this jurisdiction includes the power to inquire into the legality of an official proclamation by the Electoral Commission.

The more or less similar issue had been addressed by the High Court of Tanzania in the case of *Mwanza Restaurant and Catering Association vs. Mwanza Municipal Director,*[799] when construing the provision of s. 15 of the Regulation of Prices Act, 1973 containing finality clause, Mwalusanya, J., (as he then was) observed as follows:

> *"...the ouster clauses are used to cover up or hide the errors or blunders of the ruling class and its statutory bodies. The judiciary has therefore a duty to see to it that the ruled are not oppressed by the ruling class unnecessarily or purely to serve the immediate interests of those who cling to power.* The judiciary has a role to enhance the rights of the people. It is through the courts that people can defend their rights" (Emphasis mine).

The similar reasoning was applied by the court in other cases whereby finality clauses were challenged for denying victims right to challenge administrative decisions, in which case finality clauses were declared to be unconstitutional. In the case of *Tanzania Air Services Ltd vs. Minister for Labour*[800] it was observed that even if appeal was disallowed by a statute a party could still go to the High Court by the way of judicial review. Similarly, in the case of *OTTU (on behalf of P.P Magasha) vs. Attorney-General and another,*[801] the Court declared s.27 (1C) of the Industrial Court of Tanzania Act 1968 as amended by Act No.3 of 1990 which provided that the decision of the Industrial Court was final and conclusive, to be unconstitutional and

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[799] High Court of Tanzania at Mwanza, Misc. Civil Cause No 3 of 1987 (unreported).
[800] (1996) TLR 217.
[801] (1997) TLR 30.

invalid.

Generally, the above judicial interpretations of finality clauses is also shared by distinguished scholars such as Wambali[802] who argues that the High Court will always have inherent jurisdiction to try all cases involving violation of the Bill of Rights in the Constitution regardless of ouster clauses in the legislations. [803] He also argues that ouster clauses tend to affect independency of judiciary through establishment of quasi-judicial administrative tribunal (also known as kangaroo courts) to adjudicate upon sensitive matters in the eyes of the executive.[804] Similarly, Ruhangisa[805] observes that ouster clauses when used in the law would side-step the judiciary by restriction of court's jurisdiction and establishment of extra-judicial tribunals, which may affect the rule of law in a country.[806]

Nevertheless, unlike the previous provision with finality clause, s.19 (4) of the Access to Information Act, 2016 provides that where the information requested is within the authority of an information holder who is under the Minister for Legal Affairs, then the latter will no longer be an appellate body.[807] This means any person aggrieved by the decision of the Minister may apply for review in the High Court of Tanzania. It is therefore important to observe that the High Court of Tanzania will always be seized with powers to hear complaints or disputes from both administrative and judicial

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[802]Wambali, M.K.B., *The Enforcement of Basic Rights and Freedoms and the State of Judicial Activism in Tanzania*, Journal of African Law, Volume 53 No.1 of 2009.

[803]*ibid*., pp.37-40.

[804]Wambali, M.K.B., *Democracy and Human Rights in Tanzania: The Bill of Rights in the Context of Constitutional Developments and History of Institutions of Governance*, PhD Thesis, University of Warwick, 1997, p.42.

[805]Ruhangisa, J.E., *Human Rights in Tanzania: The Role of the Judiciary*, PhD Thesis, School of Oriental and African Studies, School of London, 1998.

[806]Ruhangisa, J.E., *Human Rights in Tanzania: The Role of the Judiciary*, PhD Thesis, School of Oriental and African Studies, School of London, 1998., pp.100-104.

[807] The Access to Information Act, 2016, s.19(4).

bodies, despite a provision ousting its jurisdiction.

Conclusively, the Access to Information Act 2016 is one of important laws for actual realization of the peoples' right to self-determination as enshrined under various international instruments. It establishes a duty on part of government organs to publish certain information, including contracts and their annexes that have been entered by information holder and third parties.[808]This seeks to ensure that people are aware of the laws, policies, agreements and processes governing administration of a particular institution in order to ensure peoples' participation in economic, social and cultural development of the nation. It also defines procedure to challenge government acts which affect citizens' right of access to information, including filing an appropriate administrative and judicial review.

Nevertheless, the Access to Information Act 2006 is likely to affect peoples' right to participate in the natural resource decision making as it vests power to the government entities to deny access to information on quite unreasonable, unclear and unambiguous grounds. Yet, it also gives absolute and final powers to the Minister of Legal Affairs to determine appeals involving refusal to provide access to certain information. This may have an impact to the laws governing review and renegotiation of agreements which imposes duty on the Minister of Legal Affairs to disclose natural resource agreements to the peoples' representatives. Thus, there is little checks and balances on the powers of the Minister of Legal Affairs who is basically a political figure.

[808] The Access to Information Regulations 2017, regulations 4(1)(iii) and 5(2).

Similarly, the Access to Information Act 2016 imposes unreasonable fines and penalties including imprisonment to any person who unlawfully discloses information to the public. These factors may contribute to unreasonable refusal by the government to grant access to certain public documents, leading to minimal participation of non-state actors in the exercise of the right to manage resources and regulate foreign investments. There is need to harmonize provisions of the Access to Information Act 2016 and other legislations in order to provide adequate protection of peoples' right to information, including access to information related to natural resource agreements.

4.2.12 The Arbitration Act[809]

This Act specifically provides for arbitration as one of the Alternative Dispute Resolution mechanism to resolve commercial disputes. Basically, arbitration refers to system of dispute resolution whereby a third neutral and impartial person known as arbitrator is interposed by the parties in order to resolve the dispute by issuing an award. As discussed earlier on, the state and the investors are allowed to constitute the tribunal for settlement of disputes arising from investment agreements or arrangements. This is possible where a mining/petroleum agreement or arrangement entered between the government of Tanzania and investors contain an arbitration clause.

Principally, the arbitration clause is a separate and distinct agreement binding on the parties notwithstanding the validity of the main (substantive) agreement.[810] This

[809] Act No.2 of 2020.
[810] Ibid., Ss.9 and 10.

arbitration agreement must be in writing[811] and should not contravene certain minimum requirements which are considered to be necessary for public interest.[812] As previously stated under s.11(2) of the Permanent Sovereignty Act, 2017, disputes arising from exercise of the right to PSNR may be addressed through both institutional and ad hoc arbitration, provided the seat of arbitration is Tanzania and the law applicable is the law of Tanzania. This is to say, whether arbitration is conducted by the institution such as Tanzania Arbitration Centre (hereinafter referred to as TAC) [813] or by party-constituted ad hoc arbitrators there are certain rules which are binding on the parties and the tribunal.[814]

Some of the binding provisions include : the power of the court to determine applications for stay of proceedings;[815] the power of the TAC to determine applications to remove an arbitrator on reason of impartiality, lack of qualifications, soundness of mind, and failure to conduct proceedings according to law.[816] Other binding provisions concern competence of the tribunal to determine substance and preliminary jurisdictional issues; [817] duties of the arbitral tribunal;[818] duties of the parties;[819]attendance of witnesses;[820] refusal to issue award for non-payment of fees;[821] and power of the court on enforcement of awards.[822]

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[811] S.8 of the Arbitration Act provides that an agreement would be effective if it is in writing or there is an exchange of communication in writing or there is evidence in writing.
[812] *ibid*., s.4(a), (b) and (c).
[813] The Tanzania Arbitration Centre (TAC) is established under s.77 (1) of the Arbitration Act, No.2 of 2020.
[814] Act No.2 of 2020, ss.5(1), (2), (3) and (5).
[815] *ibid*., s.13.
[816] *ibid*., s.26.
[817] *ibid*., ss.32 and 34.
[818] *ibid*., s.35.
[819] *ibid*., s.42.
[820] *ibid*., s.45.
[821] *ibid*., s.58.
[822] *ibid*., ss.68 -74.

By enlarge, the above provisions give both government of Tanzania and investors an equal access to the tribunal including right to challenge an award to the High Court of Tanzania. The party referring the matter to court must give notice to the opposite party of any recourse sought, in which case a right to be heard will be extended to the defendant. Impliedly, the Arbitration Act 2020 guarantees both the state and the investor access to judicial remedies including an opportunity to challenge an award. Basically, the High Court of Tanzania has power to enforce arbitral awards concerning natural resources provided leave is sought and the award is valid and properly procured by a tribunal with competent jurisdiction.

However, all the courts in Tanzania including the High Court of Tanzania have the duty to protect sovereignty over natural resources during enforcement of arbitral awards. It is clearly stated that enforcement of arbitral award may be refused by the court if subject matter of dispute is not capable of settlement by arbitration under laws of Tanzania; or where recognition or enforcement of an award would be contrary to written laws, norms or public policy.[823] This means that, in case the award made by the appropriate tribunals, contravenes the laws of Tanzania including the Permanent Sovereignty Act, then the courts would be obliged to refuse recognition or enforcements of such impugned awards. However, such act may be regarded as denial of right to an effective judicial remedy since grounds for refusal of recognition or enforcement of awards could depend on the evidences submitted by the government.

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[823]Act No.2 of 2020, s.78)2) and (5).

Basically, the Arbitration Act, No.2 of 2020 is relevant when discussing the principle of PSNR in Tanzania. It particularly guarantees access to justice in case of violation of substantive contractual rights in several ways. First, it addresses loopholes of the repealed Arbitration Act[824] by providing procedures for arbitration and confidentiality of proceedings. Secondly, it sets standard rules which are binding on the parties, whether it is domestic or international arbitration, and whether it is determined by institutions or ad hoc tribunal. Thirdly, it vests powers to the parties (government and investors in the extractive industry) to enter into arbitration agreement in writing for resolving investment disputes.

Principally, it guarantees freedom of the parties to constitute the arbitral tribunal in case of ad hoc arbitration whereby each party has a right to select their arbitrators, who then appoint a lead arbitrator. Similarly, parties may still opt for other methods of resolving disputes such as negotiation, international mediation and conciliation as practiced by national and international tribunals. This represents a position shift from the requirements of the Permanent Sovereignty Act 2017 which restrict settlement of disputes concerning resource rights outside Tanzania. Hence, it could be argued that Tanzania partly conforms to principles of international investment law which permits international arbitration.

Fourth, the Arbitration Act 2020 gives each party the opportunity to prove the case before an impartial tribunal by procuring witnesses and professional advisers or experts. The parties and the arbitral tribunal must agree as to procedural and

[824] Cap 15 R.E 2010 (repealed)

evidential matters such as: language to be used; where proceedings should take place; types of documents to be disclosed; whether to apply rules of evidence including admissibility of oral and documentary evidence; issues of submissions, and so forth.[825] Basically, the arbitration proceedings must be conducted in a way that protects confidentiality of information, unless disclosure is necessary for effective determination of the disputes and party's justice.[826] This is likely to promote independence of arbitrators and impartiality of proceedings within prescribed national and international standards.

Fifth, the Arbitration Act clearly defines the roles, duties and powers of both parties to arbitration and the arbitrators /tribunal. The arbitral tribunal is given powers to make different orders that are considered appropriate in a given situation, except matters on security for costs, order for protection of property, and other reliefs which would require express agreement.[827] On the other hand, parties have duty to comply with the tribunal's directions, appear on agreed date and time, and take any necessary steps to obtain a decision of the tribunal. [828]

Therefore, the Arbitration Act 2020 is very fundamental when addressing aspect of investor protection under the principle of PSNR. As earlier stated, Tanzania has the duty to exercise her sovereign rights to natural resources in accordance with limits set under national and international law. One of those limits is to provide provisions that ensure access of all parties to judicial and administrative remedies. Allowing

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[825] Act No. 2 of 2020, s.36.
[826] *Act No.2 of 2020*, ss.36A, 36B and 36C.
[827] *ibid*., ss.40 and 41.
[828] *ibid.*, s.42.

investors to submit their disputes to systems fully constituted by the parties, including international arbitration, promotes parties' confidence in the tribunals and guarantees access to effective judicial remedies.

This means Tanzania and investors can resolve conflicts arising from mining/ petroleum agreements on three main conditions. First, there must be an agreement in writing clearly constituting the arbitral tribunal. Secondly, place of arbitration should be Tanzania and not otherwise. Thirdly, the tribunal must use law of Tanzania as the law governing the dispute. This means that any dispute settlement framework opted by the parties, including international arbitration must consider the requirements prescribed under the Permanent Sovereignty Act 2017, mandatory provisions of the Arbitration Act 2020 and Tanzania Investment Act 2022.

If one reads s.100 of the Arbitration Act 2020 and s.2(1) of the Tanzania Investment Act 2022 it is clear that the intention of the Parliament was to allow the government of Tanzania to use international arbitration mechanisms for settlement of investment disputes in the extractive sector so long as the seat of arbitration is Tanzania. This would ensure that the award issued by the said tribunal is effective, valid and enforceable by the courts of Tanzania. This matter is also addressed in chapter five of this thesis.

4.3 Institutional Framework on Adoption of PSNR and Public Participation in Mainland Tanzania

The laws adopting PSNR in Tanzania establish various institutions that are responsible for management of natural resources. These institutions are owned by

the state and managed by the government. Principally resource management is the function of both the central government and local government. Generally, the central government comprise of the President of the United Republic of Tanzania, government ministries and departments. The President is a trustee of all-natural resources in Tanzania, hence vested with powers to determine how resources should be exploited and managed. Generally, the President performs executive roles as the head of the state, head of government and Commander in Chief of Armed Forces. This means the President is the superintendent public officer over all public servants.

Nevertheless, the President of Tanzania enjoys absolute and overriding powers over policy and legislative matters affecting natural resources. This is because under s.2 (1) of the Presidential Affairs Act, the powers of the President to make proclamations or exercise executive powers are unlimited. This is why the President may absolutely reverse, alter or defer orders made by other administrative authorities. This includes the veto power over legislative enactments. As explained earlier, the President of the United Republic of Tanzania enjoys unlimited discretionary powers which cannot be challenged by any court in Tanzania, except by way of impeachment.

On the other hand, the President has power to constitute cabinet by appointing ministers, deputy ministers, permanent secretaries and Attorney General, which together act as custodian of natural resources. Further, the President has power to appoint directors of public institutions, regional and district commissioners, heads of military forces, Chief Justice and Judges, and other senior government officials. These appointees, with exception of judicial officers, work under the guidance and strict supervision of the President. Principally, Ministers, Deputy Ministers and

Permanent Secretaries may exercise powers vested into the President, except those powers that are absolutely vested into the President by the Constitution of the United Republic of Tanzania and any written law.[829] This signifies that the President in collaboration with the Ministers, Deputy Ministers and Permanent Secretaries prepare and execute policies, plans and laws governing natural resource exploitation.

According to various sectoral laws discussed under chapter four of this thesis, Minister responsible for Natural Resources and Minister for Legal Affairs; Chief Secretary; Permanent Secretaries responsible for Legal Affairs, Investments, Local Government, Labour, and Home Affairs, are directly involved in the review and renegotiation of natural resource agreements or arrangements. Further, the office of the Attorney General represented by the Deputy Attorney General is also involved in the review process. On matters of environmental protection, the Minister responsible for environmental matters is responsible for issuance of permits. Other sectoral Ministers are responsible for issuance and/or revocation of various licenses.

Thus, the central government plays an important role in natural resource management by laying down plans, policies, law reforms, concluding agreements, issuing licenses, monitoring and evaluation, and revenue collection. On the other hand, the local governments at regional, district and village levels are established to ensure citizen participation in the development process. The top local government leaders including regional commissioners, district commissioners, and secretaries are appointed by the

[829] Refer to s.2 (1) of the Presidential Affairs Act, Cap. 9 R.E 2010

President; hence directly accountable to him/her. Specifically, the local governments strive to ensure that peoples' interests are incorporated in the local content and corporate social responsibility plans. Similarly, local government through ward counselors do participate in monitoring development projects such as schools, hospitals and health care centers, and water facilities built as part of corporate social responsibility.

Furthermore, the government set in place various regulators for effective implementation of the natural resource laws. These include: Mining Commission which regulates the mining sector including issuing mining licenses and resolving disputes; PURA which regulates the upstream sector; EWURA which regulates the midstream and downstream petroleum production levels; Local Content Committee which deals with approval of the local content plans. Furthermore, NEMC is responsible for environmental management and while TEITA Committee ensures transparency and accountability of all market players in the extractive sector, including the government, revenue authorities and tax payers (investors).

Each of the above regulators performs their statutory mandates independently. Nevertheless, the functioning of these institutions is either dictated by the respective sectoral Minister and the President of the United Republic of Tanzania, who basically determines their composition. This makes the President to have overall management powers over natural resources in the land over other state organs. The justification for such power relation is that the President as the Head of State holds resources as a trustee on behalf of the people; hence must be vested unrestricted powers over public property. This approach was mostly preferred by the Members of Parliament from the

ruling party during deliberation of ss.4 and 5 of the Permanent Sovereignty Bill (now Act), who argued that the President as the top government official, selected by the people during the general election, must be given powers to decide on all matters affecting the people of Tanzania.[830] This argument which is historically driven has merit given the current state structures under the current provisions of the CURT.

However, there is fear among Tanzanians that the President, if not morally upright, may abuse unfettered discretionary powers vested in him or her. This could be evidenced by deliberations of some MPs during deliberations of ss.4 and 5 of the Permanent Sovereignty Bill (now Act) who *inter alia* argued that it was high time to vest sovereign resource rights to either the National Assembly as peoples' representatives, local government authority or any other people-centred independent body.[831] Accordingly, this would possibly check the exercise of powers of the President, who appears to enjoy immunity from prosecution for any act done while in office. This study squarely agrees with the latter view which appears to be in conformity with the purpose of the law of vesting resource rights to the people of Tanzania and giving opportunity to the national assembly and other non-state actors an opportunity to control powers of government leaders.

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[830] See the contributions made by the then Members of Parliament in the Hansards of 58th Meeting, 3rd July 2017: Prof. Palamagamba Kabudi, A.G., (pp.220-224), Joseph Kakunda (p.265) and then Minister of Local Government and Minister responsible for Public Service and Good Governance (pp.267-268), available at https://www.parliament.go.tz/polis/uploads/documents/1501654825-3%20JULAI%20%202017.pdf, retrieved on 17th March 2022 at 12.30 pm.

[831] See the contributions made by the then Members of Parliament in the Parliamentary Hansards of 58th Meeting, 3rd July 2017 : John Mnyika (pp.177-180), Godless Lema (pp.185-189), Zitto Zuberi Kabwe (pp.207-208, 266), John Heche (p.165), Kasuku Bilago (p.268), Mussa Mbarouk and Upendo Peneza (pp.269-270),and Pauline Gekuli (p.263) available at https://www.parliament.go.tz/polis/uploads/documents/1501654825-3%20JULAI%20%202017.pdf, retrieved on 17th March 2022 at 12.30 pm.

On the other hand, the law recognizes the national assembly as an important body in the management of resources. Despite its express legislative and oversight functions under article 63(3) (a) –(e) of the CURT, the national assembly is given mandate to receive reports of all agreements signed by the government and investors, and issue necessary directives to the government for implementation. However, as discussed earlier the national assembly has discretion to make such resolution; hence it is not bound by any law. Impliedly, it signifies that the powers given to the national assembly to pass resolution advising the government to review or renegotiate agreements may or may not be exercised. This partly explains why renegotiated agreements have not been laid down before the national assembly to date. This kind of lacuna completely defeats the purpose of the law which was to make the government accountable to the people.

However, from the parliamentary proceedings during enactment of the Permanent Sovereignty Act and its sister law, it is very clear that such lacuna was deliberately done. The MPs from the ruling party, including the then A.G, maintained use of the word ‘may’ on the pretext that applying the word ‘shall’ could be interpreted to mean a command on the sovereignty of national assembly to make decision; hence interfering with its discretionary powers.

Further, it was also argued that use of ‘may’ was aiming at ensuring that the national assembly retains its oversight role and does not encroach the executive powers of the government to conclude agreement. Similarly, it was also submitted that imposing an obligation on the national assembly to deliberate on agreements or arrangements and pass resolution thereto could possibly turn agreements into legislative act; hence

unreasonably making the national assembly part of the agreements and hard to change such agreements.[832]

Conversely, this study holds that the national assembly should be obliged to deliberate on the agreements and making recommendations to the government in accordance with its own procedures. It is irrational to impose an obligation on the government to review or renegotiate agreements, lay down the renegotiation report before the Parliament and yet not impose an obligation on the national assembly to deliberate and make meaningful resolutions. Since the purpose of the law was to vest resource rights to the people of Tanzania by giving them an equal chance to participate in the decision-making process through their representatives, then the law ought to have imposed an obligation on the national assembly to approve mining/petroleum agreements or arrangements.

Basically, approving of natural resource agreements by the Parliament is practiced by various resource rich countries such as: Bolivia, Mongolia, Kuwait, Egypt, Ghana, Liberia, Sierra Leone, Guinea, Bahrain, Yemen and Azerbaijan.[833] This has encouraged debate and transparency, increased civil society participation, and provided base for the government to negotiate strongest possible terms.[834] However, looking at the composition of the Tanzania national assembly and the party politics which most of the times dominate discussions in the house, it is prudent to designate

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[832]See the contributions made by the then Members of Parliament in the Parliamentary Hansards of 58th Meeting, 3rd July 2017, available at https://www.parliament.go.tz/polis/uploads/documents/1501654825-3%20JULAI%20%202017. pdf, pp.277-288.

[833] Natural Resource Governance Institute (NRGI), Parliamentary Guide for Approval of Natural Resource Contracts in Tunisia, May, 2016, p.6.

[834] *ibid*., p.7

a more neutral and politically-free organ which would comprise of all key stakeholders, including representatives from the national assembly, Civil Society Organizations, professional bodies, local authorities, mining industry and other independent government officers such as CAG. This could maximize public participation in the decision making, promote transparency, ensure objectivity and quality of discussions and reduce political biasness. This matter is amplified under chapter six of this thesis.

On the other hand, people's representatives at the local government levels constitute another key institution on matters of natural resource management. Although not directly mentioned under the Permanent Sovereignty Act, counselors at the ward and district/urban levels are empowered to make bylaws and plans for smooth exploitation of resources and revenue allocation in their administrative boundaries. For example, they are responsible for approval and implementation of the local content and corporate social responsibility plans at the local government levels. However, they are not entitled to participate during review or renegotiation of natural resource agreements. This was purposely made because natural resource management is the function of the central government under the leadership of the President.

Nonetheless, there is need to engage representatives at the local government levels before the government concludes an agreement with investors. This could be done at the early stage before the team of government negotiators begins actual negotiations with investors. Here, local people or their representatives would be invited in a

meeting to air their concern, priorities or expectations. The team could then take note of the views, document the same and submit them to the respective Minister to be included in the terms of reference. Such practice could ensure that local peoples' interests at a place where actual exploitation is done are taken on board when negotiating and concluding natural resource agreement by the government.

Unfortunately, the idea of involving local government leaders was rejected by the members of the national assembly.[835] Since the intention of the reforms was to engage peoples' representatives in the decision-making process, then it is necessary that the government should consult local government leaders. This will ensure that interests of the local community where actual exploitation of resources is done are taken on board; hence increasing acceptability of the project, averting possible conflicts and reducing extreme poverty of people around the production sites.

Thus, Tanzania has set in place various institutions for effective implementation of the laws adopting the principle of PSNR. There are various government institutions responsible for enforcement of the laws, including the President, ministers, deputy ministers and permanent secretaries of sectorial ministries. Similarly, there are government departments set in place as regulators of market players in the extractive industry. On the other hand, the people-centred institutions such as national assembly, civil society organizations, local government leaders and private sector, are partly involved in the management of resources. There is need to amend various laws in

[835] Refer to the opinion by the representative from the opposition party, John W. Heche (MP) in the Parliamentary Hansards of 58th Meeting, 3rd July 2017, available at https://www.parliament.go.tz/polis/uploads/documents/1501654825-3%20JULAI%20%202017.pdf, p.163.

order to vest powers to the independent people-centred institutions in order to curb possible abuse of powers by the government. This matter is addressed under chapter six of this thesis.

4.4 Conclusion

This chapter has critically addressed various laws which explicitly and impliedly provide for the principle of PSNR in Tanzania. The chapter has considered the fact that both state and non-state actors must be involved in the exercise of PSNR for economic development and welfare of the people. This automatically would require provisions of the law to ensure that both state and non-state actors participate in the decision making, subject to reasonable access to relevant natural resource information and equal access to administrative and judicial remedies.

Therefore, the chapter has explored laws specifically adopting the UNGA Resolutions and other international instruments on the principles of PSNR and Public Participation in Tanzania. Here, the discussion was centred on CURT, the Permanent Sovereignty Act 2017, the Unconscionable Terms Act 2017, the Petroleum Act 2015, the Mining Act 2018 and the regulations made under these three Principal legislations, including the Standing Orders of the Parliament of United Republic of Tanzania, 2016. Furthermore, the chapter evaluated other laws which provide for rights and duties implied under the principle of PSNR in Tanzania. Basically, the discussion was centred on the provisions of Environmental Management Act, Tanzania Extractive Industries (Transparency and Accountability) Act 2015, Access to Information Act 2016, Arbitration Act 2020, the Local Government (Urban Authorities) Act, and the Local Government (District

Authorities) Act, 1982.

It was established that both state and non-state actors participate in the decision-making process, including: review and renegotiation of agreements; preparing local content and CSR plans; and enacting of laws governing extractive industry. Further, these laws provide state and non-state actors with an equal right of access to natural resource information and access to judicial and administrative remedies, which are key state obligations under the principle of PSNR. These legal postulates ensure that resources are utilized for national economic growth and welfare of the people.

However, it has been shown that under the above laws, participation of state organs in the decision making supersedes that of non-state actors due to inadequate provisions which mandates effective public involvement in the decision-making prior conclusion of binding mining/petroleum agreement. Similarly, these laws contain provisions that would adversely affect investors' contractual rights under international investment laws. This includes provisions which: compel the investor to renegotiate fixed term contracts; stipulating the applicable law of the investment agreement to be the law of Tanzania; requiring mandatory settlement of disputes by institutions established in accordance with laws of Tanzania; compulsory disclosure of investment terms to the national assembly; and entrenchment of statutory terms to be implied in natural resource agreements which partly would limit freedom of consent.

Thus, it is evident that the laws seeking to adopt the principle of PSNR in Tanzania are likely to face a number of legal and practical challenges which would need to be

addressed in order to ensure that Tanzania exercises her sovereign rights in a way that safeguards peoples' right to participate in the decision-making process and investor's contractual rights and interests under international investment laws.[836]

[836]These issues are critically addressed in chapter five of this thesis.

CHAPTER FIVE

LEGAL CHALLENGES OF IMPLEMENTATION OF PSNR AND PUBLIC PARTICIPATION IN MAINLAND TANZANIA

5.1 Introduction

PSNR is now part and parcel of the enforceable principle in Tanzania. It is an important tool in management of natural resources in Tanzania, seeking to promote economic development of the nation and welfare of the people. Similarly, public participation is now an important element of natural resource governance in Tanzania. Nevertheless, implementation of the laws governing PSNR and Public Participation may cause significant impacts on the people of Tanzania and foreign investors; hence affecting desired people sustainability and economic growth. This chapter presents legal and practical challenges that may be encountered in the course of implementation of the laws on PSNR and Public Participation. It also gives an overview of how the challenges could be addressed in order to ensure sustainable development of the people in Tanzania.

5.2 Legal Challenges facing Implementation of PSNR

5.2.1 Breach of International Investment Agreement

One of the obvious effects of adoption of the principle of PSNR in Tanzania is breach of fundamental terms of international investment agreements. This arises due to change of the law governing old investment contracts between the government of Tanzania and mining companies. Basically, the old contracts contained stability provisions which restricted the government of Tanzania from changing the law governing substance of the contracts. Similarly, the new legislations affect sanctity

of contract as it declares some terms of contract to be unconscionable before parties have revisited or renegotiated agreements. For example, provisions restricting use of national courts in settlement of disputes would be contrary to the arbitration clauses contained in the bilateral investment agreements which requires state-investor dispute to be addressed by way of international arbitration.

Furthermore, provisions subjecting specific investment agreement to the national laws of the land may partly contravene investment agreements whereby the substantive law governing the contract is international law. Similarly, restriction on free movement of capital and beneficiation of resources may partly affect investment benefits granted to the mining company. Basically, sections 19 and 20 of the Tanzania Investment Act [837] vest power to Tanzania Investment Centre (TIC) to issue a certificate of incentives to the company which invests in projects of strategic importance. Such certificate of incentives is presumed to be valid for a period of five years in which case the investor would be entitled to claim benefits therein, including tax reliefs and other financial arrangements. Tanzania is precluded from amending laws or otherwise modifying certificate of incentive to the detriment of the investor in order to create a predictable investment climate.

Thus, enacting of the laws which change the investment conditions at the detriment of the investor is basically non-acceptable under general principles of contract and international law which is accommodated under the provisions of Permanent Sovereignty Act 2017. Tanzania would be liable for breach of investment

[837] Act No.9 of 2022

agreements, including payment of damages and appropriate compensation for purported expropriation of foreign properties. This matter has been addressed by various international tribunals in several cases involving change of the law by host state. The first case is that of *Texaco Overseas Petroleum and Others vs. the Libyan Arab Republic*[838] whereby Republic of Libya changed the law in order to ensure equitable distribution of resources contrary to the existing concessions. However, one of the provisions of the agreement between Libya and petroleum companies required the host state to observe general principles of international law.

It was held that reference to general principles of law in the international arbitration context was a sufficient criterion for the internationalization of a contract; hence private contracting party was protected against unilateral and abrupt modifications of law in the host state. The Court further held that nationalization of Texaco's properties according to Libyan law was unlawful, and Libya 's defense based on lawful sovereign act was refused by the International Court of Justice (ICJ) on ground that it was bound to observe contractual obligations in good faith in accordance with both national and international laws.

Similarly, in the case of *Libyan American Oil Co. (LIAMCO) vs. Libya*[839] the court observed, *inter alia,* that the right of a State to change the law was held to be sovereign, subject to indemnification for premature termination of concession agreements. Further, nationalization of concession rights, if not discriminatory and not accompanied by a wrongful conduct was not unlawful, but constituted a source

[838] 17 I.L.M 1 (1977)
[839] 17 I.L.M 3 (1978)

of liability to compensate the concessionaire for said premature termination of the concession agreements. Thus, though the concession agreements were to be governed by and interpreted in accordance with the 'common principles of Libyan and international law', it was observed that any part of Libyan law in conflict with the principles of international law was to be excluded.

The above two precedents imply that Tanzania may be sued for breach of investment agreement arising from unilateral change of the law to the detriment of investors. This implies that Tanzania has powers to change the law governing investment agreements, so long as the reforms do not affect the accrued contractual rights and other interests. This obligation is established under article 26 of the Vienna Convention on the Law of Treaties, 1969 (to be referred to as VCLT) which requires states to observe terms and conditions of an agreement in good faith. Furthermore, article 27 of the VCLT provides that state parties must be bound by the letters of the investment agreements no matter how cumbersome it may prove to be. Further it categorically states that use of internal amended law to avoid liability cannot be justified.

Similarly, the sanctity of agreement is guaranteed under article 1.3 of the UNIDROIT Principles of International Commercial Contracts (hereinafter referred to as UNIDROIT Principles) which applies in agreements between states, and agreements between states and investors.[840]Basically, it provides that a contract validly entered into by the parties is binding, and that it can be modified or

[840] These Principles are not binding provisions but they are regarded as *lex mercatoria.*

terminated in accordance with its terms or by agreement. This suggests that states and investors are bound by investment agreements which may be changed subject to renegotiation clause. Thus, states and investors are bound by the terms of agreement and they are obliged to act in good faith and fairly in accordance with international investment laws.[841]

However, there are circumstances whereby Tanzania may not be bound by the provisions of investment agreement including stability clauses which freeze her laws. First, where there is fundamental change of circumstances (*rebus sic stantibus)* of the investment agreements as per article 62 of the VCLT. Tanzania may change law requiring renegotiation of contracts as a result of change of conditions that existed at the time of conclusion of an agreement, which were not foreseeable by the parties. Such conditions must have been regarded by both parties as essential basis of consent and the change should radically affect the nature of obligations under the contract.

Secondly, where there is impossibility of performance of contract due to permanent disappearance or destruction of the object considered essential for performance of agreement, as per article 61 of VCLT. Tanzania must prove that she did not vitiate or otherwise influence the impossibility of performance, and that impossibility should not be of a temporary nature. However, Tanzania must comply with lawful procedures, including giving reasonable notice of at least three months in writing to the other party before suspending the said agreement. These legal requirements are

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[841] Article 1.7 of UNIDROIT Principles of International Commercial Contracts, 2016.

provided for under articles 65 and 67 of VCLT and article 7.1.7 of the UNIDROIT Principles of International Commercial Contracts, 2016.

It could be argued that principle of PSNR in Tanzania should be exercised in accordance with international investment law and existing investment agreements. This approach basically signifies three things. First, it qualifies the assumption that state's sovereignty is 'permanent' and 'unlimited' by imposing a duty on the state to respect investment agreements and international law. Secondly, it regards states and investors as equal parties with equal rights and liabilities. Thirdly, it acknowledges the fact that state's exercise of sovereign powers should consider the best interest of the people when amending or changing laws, so long as the state acts fairly, reasonably and equitably.

This means change of law would be valid so long as it ensures fairness, reasonableness and equity among the parties to investment agreement. This was proclaimed by the International Centre for Settlement of Investment Disputes (ICSID) in the case of *Parkerings-Compagniet vs. Lithuania*[842], where the tribunal observed the following:

> *"…it is each States' undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a stabilization clause or otherwise, there is nothing objectionable about amendment brought to regulatory framework* … As a matter of fact, any businessman or investor knows that laws will evolve over time. *What is prohibited however is for a state to act unfairly, unreasonably, inequitably in the exercise of its legislative power.*" (Emphasis added)

[842]ICSID Case No. ARB/05/8, para 332, Award of 11 September 2007.

On the basis of the above statement, Tanzania needs to observe basic minimum standards in order to lawfully exercise principle of PSNR, including expropriation of foreign property. First, the national law must affect all people without discrimination. This famous principle of non-discrimination is now regarded as a principle of customary international law universally applied in most states.[843] Secondly, the host state must enact such laws with expropriation effect on reasons of public utility and not for private profit. Currently, there are no specific rules of international law or national laws which govern the notion of public purpose; hence the government of Tanzania has the burden of proof. Thirdly, Tanzania must pay appropriate and full compensation to investors for damage arising from change of the law.

Hence, Tanzania is required to exercise the principle of PSNR cautiously in order to protect existing international investment agreements, the breach of which attracts liability under international law. A good example of breach claim from the 2017 reforms in the extractive sector is the case of *Winshear Gold Corporation vs. Tanzania*[844] whereby the claimants alleged that the respondent unlawfully expropriated the property of the company contrary to articles 6, 7 and 10 of the agreement between the Government of Canada and the Government of the United Republic of Tanzania for the Promotion and Reciprocal Protection of Investments. Specifically, the claimants had four retention licenses along the RUPA Gold Field which were valid for 12 years since 2014.

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[843] Francis, N.J.S.J., The Protection of Foreign Property under Customary International Law, Boston College Law Review, Volume 6 Issue 3 of 1965, pp.397-398;
[844] ICSID Case No.ARB/20/25 (hearing of the matter has been completed).

The Claimants alleged that radical change of mining regulatory framework and retroactively abolishing retention license category, by repealing sections 37 and 38 of the Mining Act 2010, and adoption of the Mining (Mineral Rights) Regulations of 2018 [845] without effective consultation or payment of compensation to the claimants was a breach of the respondent's treaty obligations. Specifically, regulation 21 of the Mineral Rights Regulations provides *inter alia* that: 'all retention licenses issued prior these Regulations are hereby cancelled and shall cease to have legal effect; and all rights therein are hereby and without any assurance reverted to the government.'

It was also submitted by the claimants that the enactment of the Unconscionable Terms Act 2017 drastically opened all and existing investment contracts to parliamentary review contrary to article 17 of the Treaty between Canada and Tanzania.[846] It was further submitted that cancellation of licenses and enactment of laws under emergency procedures were not based on rational policy goals. On these facts, the claimants submitted that Tanzania breached the Treaty and must accept its international responsibility notwithstanding their claim to inalienable sovereign power to change the law for management of their resources.

On the other hand, the respondent submitted that the 2017 reforms were done by the government in order to ensure sustainable development of the mining sector, and that it did not aim at expropriating foreign property. It was also submitted that the reforms were necessary administrative and legislative measures permissible within

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[845] GN No.1 of 2018, published on 10th January 2018.
[846] An agreement between the Government of Canada and the Government of the United Republic of Tanzania for the Promotion and Reciprocal Protection of Investments of 2013.

the ambits of the law. Further, it was submitted by the respondent's counsels that the reforms were not discriminatory and did not target foreign property as claimed by respondents. Similarly, it was submitted that the reforms sought to serve the 'public purpose' by preventing abuse by the companies and achieving a win-win situation in all agreements. On top of all that, Tanzania had exercised its sovereignty over natural resources within the acceptable limits set in the Constitution of the United Republic of Tanzania, 1977. Thus, the Permanent Sovereignty Act 2017 and the Unconscionable Terms Act 2017 were lawful because they had been passed according to the Standing Orders of 2015.

Since the ICSID has not issued an award it is not appropriate to make conclusive comments on whether or not Tanzania would be liable for breach of the treaty provisions. However, by looking at the respondent's submissions with regard to appropriate compensation which claimant would be entitled to, it leaves no doubt that the government of Tanzania would be adjudged to have breached terms of the BIT between Tanzania and Canada. Thus, the Winshear Gold Corporation's case is a vivid example of breach of international investment agreements occasioned through enactment of the Permanent Sovereignty Act 2017, the Unconscionable Terms Act 2017 and various regulations made there under.

5.2.2 Challenges on Interpretation of Terms

Basically, interpretation of provisions of the principle of PSNR is contentious in national and international courts due to its historical origins as discussed under chapter two. While national courts would interpret the principle in favour of their nations of which they owe allegiance, international tribunals would construe the

provisions in favour of foreign investors. This might give rise to conflicting interpretations where both fora are used for dispute settlement as one would first exhaust local remedies before referring a dispute to international arbitration. Specifically, courts would be faced with interpretation dilemma on three important aspects.

First, one would need to establish the purpose for amendments of the law which potentially affect investor's contractual rights and vested interests. As explained earlier, the law of Tanzania and international law generally does not prescribe definition of the terms 'public interest' or 'national interest' nor lay down standards or tests to be used to construe these terms. Basically, it is the government of the host state (Tanzania in this case) which would be required to show that the principle of PSNR was used to serve public interest (otherwise referred to as welfare of the people) or national interests. This is technically known as public purpose rule which is one of the contentious principles which courts would find difficult to construe. Schjver[847] shares the same belief as he makes the following remarks:

> *"While many conclude that the demand of a 'public interest' or 'public purpose' should be maintained, there is recognition of the fact that ultimately it is the taking government which determines the public purpose or utility of a particular expropriation, and that in many cases 'it can be taken as impossible that an international court or organization can form a reasonable judgment on the accuracy of a claim by a State that an action served a public purpose."*[848]

Secondly, the courts would need to determine whether or not compensation payable by the state to the investors was adequate, prompt and fair enough to remedy the loss

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[847]Schrijver, N.J., Sovereignty Over Natural Resources: Balancing Rights and Duties, University of Groningen, 1995

[848]*ibid*., p.276.

actually suffered. These standards on determination of appropriate compensation are highly contentious among countries. Basically, capitalistic countries have rigidly required host states to pay 'adequate, prompt and effective compensation' (also known as hull doctrine), while developing states have flexibly applied the concept to suit the prevailing economic conditions.[849] The ideal of compensation in the western countries is that states pay 'adequate, prompt and effective' when such compensation is fair, just and paid within reasonable time.' [850]

A practical example on conflicting approaches on determination of compensation has been revealed in the *Winshear God Corporation vs Tanzania*.[851] While the claimant used the cost approach method which is in accordance with international practice in the mining sector based on the opinion of expert, the respondent used the share transaction method for computation of appropriate compensation. These two methods yield different value estimates of the claimant's property at the valuation date whereby the cost approach method approximated value to a tune of 116 million Canadian Dollars and the respondent's estimates range from 5.7 to 9.5 million Canadian Dollars. This shows a considerable difference between the claimant and respondent on what constitutes fair market value of the property subject to compensation.

Similarly, the tribunal is likely to face a challenge on the standard for determination of compensation. Generally, the hull doctrine has hardly been used by tribunals

[849]Schrijver, N.J., Sovereignty Over Natural Resources: Balancing Rights and Duties, University of Groningen, 1995, p.278.
[850] Amir, Rafat., *Compensation for Expropriated Property in Recent International Law*, Villanova Law Review, Volume 14 Issue No.2 of 1969, p.206.
[851] ICSID Case No. ARB/20/25

since it contains uncertainty and impossible standards, and the economic realities in the developing states make it hard to pay 'full' compensation. The approach taken by tribunals in the *Aminoil Award*[852] and *Ebrahimi vs. Iran*[853] was to require host states to pay 'appropriate' compensation considering specific circumstance of each case. Moreover, the determination of appropriate compensation may differ from one country to another considering socio-economic conditions, the ability of the state to pay, reasonableness and interests of the host country.[854] This means that appropriate compensation depends on the discretion of the court, the applicable law and the circumstance of each case.

The third contentious matter that would face courts is the construction of the term 'unconscionable' for purposes of justifying renegotiation or review of agreements. As stated earlier, Tanzania and its people must exercise sovereign rights over natural resources considering the underlying obligations including duty to protect investors and respect investment agreements in good faith. This is so because the Permanent Sovereignty Act 2017 domesticates UNGA Resolutions which urges state to exercise the principle of PSNR in accordance with national and international laws. Using the literal meaning rule in interpreting the provisions concerning unconscionable terms, it is no doubt that any investment agreement which subjects state's authority to international arbitration or otherwise provides certain forms of capital incentives to investors could be said to be unconscionable terms.

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[852]21 *ILM* (1982), pp. 1031–33, paras. 143–144.
[853]*Ebrahimi*v. *Iran* (1994), Iran-US Claims Tribunal, 12 October 1994, The Hague, paras 88and 95, pp. 38–39 and 44
[854]Schrijver, N.J., Sovereignty Over Natural Resources: Balancing Rights and Duties, University of Groningen, 1995, pp.281-282.

However, if the same provisions are construed purposively in line with the provisions of Tanzania Investment Act 2022, then such unconscionable provisions may be held to be unfair and against the investment agreements concluded between Tanzania and foreigner investors. While the former approach could be preferred by local courts or tribunals on nationalistic reasons the latter approach could be preferred by international courts or tribunals for preserving contractual norms. Thus, legal practitioners and adjudicators are likely to come up with diverse interpretations depending on the whether the law applicable is national law or international law.

A good example is diverging views on the validity of some articles of the Intergovernmental Agreement (IGA) between the United Republic of Tanzania and the Emirate of Dubai Concerning the Economic and Social Partnership for the Development and Improving Performance of Sea and Lake Ports in Tanzania of 2022. Although this agreement does not concern the extractive industry, however it is relevant to this study because it deals with ports which are part of natural resources covered under the Permanent Sovereignty Act 2017. The great debate surrounds on construction of articles 20 and 21 of the IGA. Article 20 provides that dispute arising from IGA will be resolved through international arbitration using the UNCITRAL Arbitration Rules and that the seat and venue of arbitration shall be Johannesburg in South Africa. It also requires that disputes under Project Agreements and HGA will be subject to international arbitration in a neutral venue and seat.

Conversely, article 21 of the IGA stipulates that the governing law of the Agreement shall be English Law while the governing law of each HGA and the relevant project

shall be the laws of Tanzania. The above provisions have been challenged by several scholars on being ultra vires to the provisions of Permanent Sovereignty Act 2017 and hence regarded as unconscionable terms on two grounds. One, the articles appears to contravene the statutory requirement which requires disputes on natural resources to be resolved in Tanzania; hence providing Johannesburg as a place and venue for arbitration is substantially erroneous. Secondly, the choice of the Law of England as the applicable law of the Agreement is significantly contrary to the law which requires law of Tanzania to be the governing law of natural resource related agreements or arrangements. Basically, this approach regards Permanent Sovereignty Act 2017 as a framework law for all-natural resource related agreements, including international investment agreements.

On the other hand, there is another group which supports the government view on the validity of articles 20 and 21 of the IGA. Their arguments are purely based on Tanzania Investment Act 2022 read together with the Arbitration Act 2020. Generally, both laws permit the application of international arbitration and other ADR forms in resolving investment disputes. Section 33 of Tanzania Investment Act 2022 provides that a dispute between the investor and the Tanzania Investment Centre or the government may first be resolved through negotiation mechanism.

Moreover, if no agreement is reached, the parties may refer the dispute to arbitration using the locally available mechanisms, ICSID or Treaty-based mechanisms. The most important requirement is that both parties must have expressly agreed to that effect. Thus, choice of foreign law and foreign forum for settlement of disputes arising from the interpretation and application of IGA between Tanzania and Emirate

of Dubai may be considered to be legal under the investment laws of Tanzania.

The above represent diverging interpretation approaches of the laws whereby the former is based on nationalism approach and the latter is based on liberalism approach. However, the trial court in the case of See the Judgment in the case of *Alphonce Lusako and 3 Others vs. The Attorney General and 3 Other*[855], has clearly set its own ground by ruling that the IGA between Emirates of Dubai and Tanzania is an international agreement which is governed by the provisions of the Vienna Convention on the Law of Treaties 1969. Thus, the court affirmatively agreed with the respondent's submission based on article 27 of the Vienna Convention on the Law of Treaties which restricts use of national laws to defeat state's obligation under international law. Similarly, the trial court was convinced beyond reasonable doubt that there was no any direct violation of the provisions of the Constitution of the United Republic of Tanzania. This is because the IGA was ratified by the Parliament which enjoys absolute representative privileges under articles 21(1) and 63(2) of the Constitution of the United Republic of Tanzania, read together with the Parliament Standing Orders of 2022.

The trial court clearly observed inter alia that 'intergovernmental agreements are entered by the executive branch of the government and that what makes them binding is completion of the ratification process.'[856] Further, the trial court observed tha Emirates of Dubai had capacity to enter into contract with Tanzania because the

[855] Miscellaneous Civil Cause No.5 of 2023, High Court of the United Republic of Tanzania (Mbeya Sub-Registry) (Unreported).
[856] See the Judgment in the case of *Alphonce Lusako and 3 Others vs. The Attorney General and 3 Others*, Miscellaneous Civil Cause No.5 of 2023, at p.51.

subject matter of the agreement concerned with trade and investment which do not touch foreign policy and international relations within the purview of the UAE. Thus, the court disregarded the arguments based on lack of instrument authorizing Dubai to sign an agreement on behalf of the UAE because the petitioners failed to provide evidence to prove or disprove the facts. The burden of proof in this case was vested into the petitioners as established in the case of *Paulina Samson Ndawavya vs. Theresia Thomas Madaha*. [857] Hence, failure to prove lack of authority on part of Emirate of Dubai was construed in favour of the respondents. Thus, the court held that since the parties were competent and with capacity to enter into trade and investment cooperation agreement, the signing of IGA was not shrouded in any irregularity which would render it invalid or illegal.' [858]

Impliedly, the trial court underscored respondent's arguments based on provisions of the Permanent Sovereignty Act 2017 with regard to application of Tanzanian laws and forum for dispute settlement. Similarly, the trial court disregarded possibility of encroaching sovereignty of the state in the sense that the exclusive control and land rights granted to DP World applied only to other investors and not against government of Tanzania. Accordingly, the trial court agreed with the respondent's submissions that sovereignty of Tanzania cannot be limited since it is permanently vested into the people and the state since Independence Day in 1961. The trial court concluded that since the applicable law for HGAs is that of Tanzania, then the

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[857] Court of Appeal of Tanzania, Civil Appeal No.45 of 2017 (Unreported).
[858] See the Judgment in the case of *Alphonce Lusako and 3 Others vs. The Attorney General and 3 Others*, Miscellaneous Civil Cause No.5 of 2023, at p.56.

government will always be seized with enforcement powers. However, the court decision leaves a lot to be desired considering stability provisions entrenched into the IGA.

Generally, the above decision of the trial court raises two critical questions. One, whether or not the Permanent Sovereignty Act 2017 applies to international bilateral agreements? Secondly, whether or not freezing provisions (also known as stability clauses), choice of foreign law and forum are in conformity with the Unconscionable Terms Act 2017? These questions are very crucial for protection of natural resources in Tanzania as envisaged under the 2017 reforms. Ideally, the language used in the Permanent Sovereignty Act 2017 requires all agreements or arrangements concerned with natural resources and wealth to be reviewed by the national assembly, ensure people and state participation and comply with unconscionable term provisions. There is no clear exclusion or exemption of bilateral agreements on matters of natural wealth and resources as prescribed under the Permanent Sovereignty Act 2017. Hence, there is need for the Court of Appeal of Tanzania to provide a harmonized interpretation of the 2017 laws in order to ensure certainty and predictability of laws governing international investment agreements in the natural resource sectors.

5.2.3 Ousting Jurisdiction of International Courts and Exclusion of International Law

As explained earlier, the Permanent Sovereignty Act 2017 clearly requires all disputes arising out of the exercise of sovereign right over natural resources to be determined by local courts or tribunals established under the laws of Tanzania.

Basically, parties have freedom to choose a forum/institution for settlement of disputes, as long it is not a foreign court or tribunal. Similarly, it restricts the application of foreign law; instead disputes must be resolved using the law of Tanzania. This implies that parties' autonomy may only be exercised with regard to composition of the tribunal (either local courts or local tribunals) but not on the choice of the applicable laws (both substantive and procedural laws).

Literally, it means that under no circumstances can international tribunals determine disputes between the United Republic of Tanzania which emerges from implementation of the requirements of the Permanent Sovereignty Act 2017. Thus, international tribunals of which Tanzania is a member such as the International Centre for Settlement of Investment Disputes (ICSID), International Court of Justice (ICJ), African Court on Human and Peoples' Rights, East African Court of Justice, and so forth, do not have jurisdiction to determine investment disputes between the United Republic of Tanzania and investors arising from realization of the principle of PSNR. This clearly limits jurisdiction of international courts on commercial transactions which concern sovereignty of the people of Tanzania

Generally, the above legislative state act carries with it three important effects. First, it purports to exclude application of international law to investment contracts entered by the state when exercising its right to PSNR. This means that all investment agreements or arrangements must be construed according to the local laws. Nevertheless, this attempt may not be successfully implemented since s.4 (3) of the Permanent Sovereignty Act, 2017 incorporates various international instruments, including the UNGA Resolution 1803 (XVI) of 1962 and CERDS of 1974 which

requires host state to respect international laws.

Secondly, it extends state immunity from legal proceedings at international law since it restricts investors to challenge government's acts before international courts or tribunals so long as the subject matter of the agreement is among the natural resources within the scope of the Permanent Sovereignty Act. This means that Tanzania may claim immunity from jurisdiction of ICSID for decisions made under the Permanent Sovereignty Act 2017.Nevertheless, Tanzania is duty bound to show whether decisions so made amount to '*jure imperii'* or '*jure gestionis'* in order to claim immunity. Principally, immunity can be claimed for public acts and not acts of commercial nature. States cannot successfully claim immunity for acts of commercial nature, unless there is evidence to show that the activity in question was done under the sovereign authority.

Shaw[859] avers that in most states including England, South Africa, United States, Nigeria and Australia, national courts were faced with complexities when distinguishing commercial transactions of the state which are purely private and those commercial transactions done under the sovereign authority. This may face either national and international courts or tribunals determining disputes between the United Republic of Tanzania and investors.

Thirdly, exclusion of international tribunals or courts signifies an expression of withdrawal, suspension or termination from the existing bilateral or multilateral agreements which directly provided investors a right of access to international courts

[859]Shaw, M.N., International Law, 6th Edition, Cambridge University Press, pp.718-725.

without necessary exhausting local remedies. Basically, article 62 of the Vienna Convention on the Law of Treaties of 1969 (VLCT) allows states (Tanzania inclusive) to take legislative measures aiming at discharging the international agreement if there is fundamental change of circumstances (also known as doctrine of *rebus sic stantibus*), so long as the circumstances were unforeseeable. Moreover, the government of a particular state must be able to show that the given set of facts resulted in a radical transformation of the state's obligations under the international agreement.

The above was expressed in the *Fisheries Jurisdiction case*[860] where the court observed that before the doctrine of *rebus sic stantibus* is invoked, states must show that such changes 'must have increased the burden of obligations to be executed to the extent of rendering the performance something essentially different from that originally undertaken. The same test was also discussed by the same court in the case of *Gabcikovo-Nagymaros Project case*,[861] in which article 62 of VCLT was regarded as codification of customary international law. Thus, the government of Tanzania may provide evidence showing change of factors that had formed basis of Tanzania's consent to be bound by the agreements on international dispute settlement.

For example, Tanzania may show evidence on inequalities of states; inconsistence in various decisions by the international tribunals; unexpected high costs which impose burden on the economy of the country; and unjust decisions which encroach shared

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[860]ICJ Reports, 1973, pp.3, 20-21; also see 55 ILR, p.183.
[861] ICJ Reports, 1997, pp.7, 38; also see 116 ILR, p.1.

international law values of sovereignty of the States. Nevertheless, the government of Tanzania must also give evidence of the impact of the stated conditions to the performance of state obligations under a given international agreement. Where the above two requirements have been met, then Tanzania would be relieved from performing its obligations, including suing or being sued in the international courts.

However, the state relationship with investors under the agreement is not automatically discharged upon occurrence of the above factors. All state obligations prior termination of the bilateral or multilateral agreements shall remain valid as clearly stated under articles 70 and 72 of VCLT. This means that as long as the New York Convention and ICSID Convention are still binding on Tanzania, then the government is still bound to meet contractual obligations arising from these multilateral agreements. This is proved by the fact that since 2017 to 2021 a number of mining companies have instituted arbitration proceedings against the government of United Republic of Tanzania before the ICSID, notwithstanding express prohibition under the provisions of the Permanent Sovereignty Act 2017.

Examples of complaints which have been filed against the government of the United Republic before ICSID include the following cases. The first case is *Montero Mining and Exploration Limited vs. United Republic of Tanzania*[862] where the subject matter is the breach of mining concession contrary to the Bilateral Investment Treaty (BIT) between Tanzania and Canada of 2013. The second case is *Nachingwea U.K Limited (U.K), Ntaka Nickel Holdings Limited (U.K) and Nachingwea Nickel Limited*

[862] ICSID Case No.ARB/21/6.

(Tanzania) vs. United Republic of Tanzania[863] whereby the subject matter of the dispute is breach of mining concession contrary to BIT United Kingdom of Great Britain &Northern Ireland and Tanzania, 1994.

In the latter case it has been held by the tribunal that the government of Tanzania adversely affected rights of the claimants by repealing the retention license regime without any valid justification and compensation. The tribunal observed that 'the claimants were permanently and substantially deprived of their foreign investments in Tanzania.[864] Further, the tribunal has found out that the government of Tanzania unlawfully expropriated the Claimant's investment in breach of article 5 of the BIT. The tribunal has also found that the date of expropriation was 10th January 2018 when the Mining (Retention Licenses) Regulations were published and licenses revoked. It has also been observed by the tribunal the purpose of amending legislation was to target foreign mining companies and was discriminatory; hence unlawful expropriation. [865]

Similarly, the tribunal observed that since the government failed to provide evidence to justify what is known as 'public interest' and 'policy powers 'doctrines, then it must be liable to provide full reparation for the injury caused by its breach of international obligations at the appropriate standard of the 'fair market value.' Finally, the tribunal held that the government of Tanzania must pay the claimants

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[863] ICSID Case No. ARB/20/38

[864] *Refer to the award in Nachingwea U.K Limited (U.K), Ntaka Nickel Holdings Limited (U.K) and Nachingwea Nickel Limited (Tanzania) vs. United Republic of Tanzania*, pp.52-65 (paragraph 195 -234 of the Award).

[865] Ibid., pp.69 –83 (paragraph 252-294).

prompt, adequate and effective compensation using the cost approach as the appropriate valuation method. Consequently, the tribunal has ordered the government of Tanzania to pay the claimants USD 76, 704,461.76 in damages and additional losses, and compound interest thereto of 2% above the USD Prime rate; USD 254, 420.07 as reimbursement for the claimant's share of the costs of arbitration; USD 3,859, 161 in respect of the claimant's legal costs and expenses.[866]

On the other hand, the Tribunal made necessary decision with regard to whether ICSID has jurisdiction to determine the claim notwithstanding provisions of the Permanent Sovereignty Act 2017. The tribunal agreed that Tanzania has powers to enact laws on settlement of disputes; however, when it comes to international obligations arising from the BIT, the tribunal has jurisdiction to hear and determine claims should it appear that Tanzania breached the BIT. Conclusively, the tribunal affirmatively observed that Tanzania 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty.'[867]

The third case is *Richard N. Westbury, Paul D.Hinks and Symbion Power Tanzania Limited vs. United Republic of Tanzania*[868] whereby subject matter of dispute is breach of electronic power generation project agreement contrary to the BIT United Kingdom of Great Britain &Northern Ireland and Tanzania, 1994. The forth case is the case of *EcoDevelopment in Europe AB and EcoEnergy Africa AB vs. United*

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[866] Refer to the Award in the case of Nachingwea U.K Limited (U.K), Ntaka Nickel Holdings Limited (U.K) and Nachingwea Nickel Limited (Tanzania) vs. United Republic of Tanzania, pp.85-120 (paragraph 299-413).
[867] Ibid., pp.48-50.
[868] ICSID Case No.ARB/19/17

Republic of Tanzania[869] involving breach of agribusiness project agreement contrary to BIT Sweden and Tanzania, 1999.The last case is *Winshear Gold Corp vs. United Republic of Tanzania*[870] involving breach of mining concession contrary to BIT Tanzania and Canada of 2013. All these cases are pending before the ICSID and specific arbitrators have already been appointed.

The above incidences prove that exclusion of international dispute mechanisms in resolving state-investor dispute does not affect existing obligations under various investment agreements. This implies that the adoption of the principle of PSNR in Tanzania does not preclude the state from jurisdiction of international tribunals conferred by specific investment treaties. Notwithstanding the provisions of Permanent Sovereignty Act 2017, the government of Tanzania adopted the Arbitration Act 2020, which among other things allows parties to investment agreements to conclude an arbitration agreement for purposes of dispute resolution. Consequently, Tanzania and mining companies may agree in writing to refer a dispute to international arbitration, in which case they may choose local or international tribunals or constitute their own ad hoc tribunal.

Thus, on the basis of Arbitration Act 2020 it is possible for Tanzania and foreign mining companies to refer a dispute arising from exercise of the sovereign right over natural resources to international arbitration. This is possible where parties to arbitration are incorporated in Tanzania or the central management and control are

[869] ICSID Case No.ARB/17/33
[870] ICSID Case No.ARB/20/25

exercised in Tanzania as per s.3A of the Arbitration Act 2020. Thus, an agreement to refer dispute to arbitration between TPDC (on behalf of the government) and the mining company registered under the provisions of the Companies Act [871] may be held to be valid as long as the seat of arbitration is Tanzania. This could be said to be consistent with provisions of the Permanent Sovereignty Act 2017.

Another scenario is where a government of Tanzania through appropriate state organ or ministry concludes an arbitration agreement with a foreign company expressly referring the dispute arising out of exercise of sovereign right over natural resources to an international tribunal outside the territorial limits of Tanzania. On 5th February 2020, it was reported that the government of Tanzania through a negotiating team chaired by Prof. Palamagamba John Kabudi (the former Minister of Constitutional and Legal Affairs) entered an agreement with Barrick Gold Corporation in which Tanzania agreed to settle disputes between them (both commercial and environmental) through international arbitration using Singapore or UNCITRAL model.[872]

This is what is termed as international arbitration under s.3 of the Arbitration Act 2020 because one of the parties (Barrick Gold Corporation) is a non-national, although the control of a company is exercised mainly in Tanzania through Twiga Minerals Corporation whereby Barrick Gold Corporation owns 84% and the government of Tanzania owns 16% of the total shares. Basically, the above

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[871] Cap 212 R.E 2010.
[872] See the Citizen, 5th February 2020 (accessed vide https://www.thecitizen.co.tz/tanzania/oped/barrick-gold-is-back-in-business-in-tanzania-but-for-how-long--2702810, on 4th May 2021.

arbitration agreement can be said to be lawful under s.4 of the Arbitration Act 2020 read together with s.33 of the Tanzania Investment Act 2022 which provides for freedom of parties on arbitration matters, provided they comply only with safeguards necessary to protect public interests. However, s.2(1) of the Tanzania Investment Act 2022 excludes mining and petroleum agreements from application of the Act. This suggests that disputes in the extractive sector must be arbitrated in Tanzania.

Regardless of contravening the law, an arbitration agreement is generally binding on the parties and must be respected by courts. This legal position was also stated by the Supreme Court of India in the case of *State Trading Corporation of India vs. Jindal Steel and Power Limited and Ors*[873] where it was held that once the parties have agreed to follow a particular mechanism to settle their disputes, it is incorrect for courts to overlook the same. Similarly, the same principle was addressed by the Court of Appeal of Kenya in the case of *Carl Rouning vs. Société Navale Chargeurs Delmas Vieljeux*[874] where it was held that the material choice of forum clause in the bill of lading was willingly accepted by the parties; hence they should be held to their mutual undertaking.

Similarly, the Court of Appeal of Tanzania has reiterated the above principle in the case of *Sunshine Furniture Co.Ltd (appellant) vs.Maersk (China) Shipping Co.Ltd (1st Respondent) and Nyota Tanzania Limited (2nd Respondent).*[875] It was held *inter alia* that the parties to the commercial contract have freedom to decide a dispute

[873]Civil Appeal No 2747 of 2020 (Unreported).
[874] Civil Appeal No.16 of 1982 (Unreported)
[875] Civil Appeal No.98 of 2016 (Unreported).

settlement forum and choice of law; and that such agreement will be binding on the parties. Thus, the Court sustained the High Court's decision of dismissing the case for want of jurisdiction since the bill of lading provided for international dispute framework. The Court stated as follows:

> '*…the clause expresses the parties' choice of the law and forum among the courts which have jurisdiction to entertain any dispute arising from the bill of lading*…Basically therefore, *the parties did not, by agreement, oust jurisdiction of the courts in Tanzania.* They only chose the law and the court at which a dispute arising from their shipment contract shall be determined.' (Emphasis is mine).

Conversely, one could also argue that the above agreement to refer all investment disputes concerning the principle of PSNR to Singapore is unlawful for being inconsistent with the Permanent Sovereignty Act 2017. Nevertheless, this argument may be watered down by the fact that the arbitration agreement is separable and distinct from the substantive agreement; hence it remains valid regardless of being inconsistent with the Permanent Sovereignty Act. This means that there is potential chance for conflicting interpretations and applications of the Permanent Sovereignty Act 2017, the Arbitration Act 2020 and the Tanzania Investment Act 2022 when it comes to matters of international arbitration.

For example, Kennedy[876] appreciates the effect of the Arbitration Act of 2020 in the settlement of investment disputes. He argues that international arbitration can be applied in settlement of investment disputes in the natural resource related agreements provided the seat of arbitration is Tanzania. Kennedy observes that

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[876] Kennedy, G., International Arbitration on Investment Disputes in Natural Wealth and Resources Sector in Tanzania, East Africa Law Review, Volume 47 Issue No.2 of December 2020, pp.33-35.

'under the new law, all disputes involving natural resources can only be arbitrated in Tanzania, as a seat of arbitration, whether under the auspices of the bodies established in Tanzania or otherwise.'[877] Thus, there is a need for harmonization of the above three laws so as to ensure certainty and clarity of the law governing international arbitration on all-natural resource related investment disputes.

5.2.4 Possible Procedural and Substantive Laws Inconsistencies in the Administration of Justice

The implementation of the principle of PSNR in Tanzania may not only cause state-investor disputes, but it may also lead to disputes between investors and members of the local community. It is doubtful if the mechanisms used to resolve state-investor disputes could be used to address the disputes between investors and members of the local community. Chapter four has shown that there are various bodies with mandate to resolve disputes between investors and the people. These involve both administrative and judicial organs such as the Mining Commission, responsible Ministers, Environmental Appeals Tribunal, and other ordinary courts under the Magistrates Courts Act.[878]

Basically, appeals from quasi-judicial bodies such as Ministers, Environmental Appeals Tribunal and Mining Commission are determined by the High Court of Tanzania, save for decision made by the Minister of Legal Affairs concerning access to information in which Minister's decision is regarded as final and conclusive. It

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[877] Kennedy, G., International Arbitration on Investment Disputes in Natural Wealth and Resources Sector in Tanzania, East Africa Law Review, Volume 47 Issue No.2 of December 2020, p.1.
[878] Cap 11 R.E 2010

was established that claims for compensation due to pollution must be filed in the ordinary courts such as Primary Court, District and Resident Magistrate Courts and the High Court depending on pecuniary jurisdiction of each court.

Reading s.11 of the Permanent Sovereignty Act 2017 it would seem that disputes between investors and the people must be determined by framework adopted in an investment agreement so long as it concerns sovereignty of the people and the state to exploit resources. The Act does not clearly accommodate other mechanisms provided in other legislations, and this could pose a challenge on institution of suits. For example, the agreement between Barrick Gold Corporation and the government of Tanzania subjects all disputes (commercial and environmental) to be determined according to Singapore or UNCITRAL.

The question is whether individual citizens in Tanzania could file a suit against an investor for pollution in ordinary courts while the agreement between the company and the state provides for international arbitration? Thus, there is need to define what specific types of disputes should be subject to international arbitration because every dispute concern citizens of Tanzania. While under private law citizens would be able to institute claims on their own, the same is not the case on matters of public law whereby citizens would be represented by the government.

Another challenge could be whether s.11 of the Permanent Sovereignty Act 2017 covers both public and private acts of state organs. Principally, sovereign acts which attract immunity under international law is what is known as jure imperii (public acts) and not acts of commercial nature. This means the provision would be

construed to cover acts or omissions attributed to the state as a representative of the people. Nevertheless, where the government institution acts in a commercial capacity, then s.11 of the Permanent Sovereignty Act 2017 could not be invoked. The former approach implies that systems adopted by the state and investor under s.11 must be used when suing the state in the public international law sense, while the latter approach gives the government and investor an opportunity to seek for private law remedies, including filing suit in the ordinary courts subject to pecuniary jurisdiction limits.

Another issue that may arise concerns the requirements for suing the state. The Permanent Sovereignty Act 2017 does not expressly provide for procedure of suing the state. Principally, suits against the government are instituted against the Attorney General, subject to the requirements under the Government Proceedings Act[879], including a 90 days' notice. Nevertheless, the Permanent Sovereignty Act 2017 does not specifically refer to the Government Proceedings Act or any other procedural law. This means unless a dispute is resolved through international arbitration or other ADR mechanisms, there are no procedural rules specifically meant to cover cases under s.11 of the Permanent Sovereignty Act 2017.

In other words, the Permanent Sovereignty Act 2017 overruled or suspended all other dispute resolution mechanisms that were contained in the old dispute resolution regimes in the extractive industry and did not take any initiative to either make savings of any procedural rules, including Civil Procedure Code and the Arbitration

[879] Cap 5 R.E 2010

Rules of the National Construction Council, 2001. Moreover, the coming into force of the Arbitration Act 2020 and the adoption of the Arbitration Rules of 2021[880] has cured this gap. Furthermore, the Permanent Sovereignty Act 2017 does not in any way amend other laws governing specific resources such as Land Act,[881] Forest Act,[882] Wildlife Conservation Act,[883]and so forth, so as to harmonize them in accordance with principles set in the Permanent Sovereignty Act 2017.This needs to be made clear in the law so as to expressly cover each specific sectoral legislations, and eliminate any possibility of eroding the purpose of the Permanent Sovereignty Act 2017.

Another challenge is the lack of qualified arbitrators competent to resolve natural resource conflicts. Tanzania has a good number of arbitrators in the field of labour relations and construction industry. Unfortunately, the Tanzania Centre for Arbitration has not yet fully commenced its operations; hence the Centre needs to be fully established for better administration of justice in the extractive industries.

5.3 Legal Challenges Facing Implementation of Public Participation in the Decision Making

5.3.1 Discretionary Powers of the State Authorities

The laws governing PSNR and Public Participation in Tanzania still vest discretionary powers to various state authorities to determine how natural resources must be exploited. This is a greatest challenge when it comes to realization of the

[880] GN No.146 of 2021 published on 29th January 2021.
[881] Cap.113 R.E 2010.
[882] Cap 323 R.E 2010
[883] Cap 283 R.E 2010

right of the people to participate in the decision-making process. Among the principles governing natural resource governance include the rule against non-discrimination and non-discretionary. These rules are to a large extent compromised due to enormous powers vested to the President to make decisions for the benefit of the people of Tanzania. As pointed out in Chapter four, the President of the United Republic of Tanzania has been vested with discretionary powers to enter into agreements for the benefit of the people. This almost gives absolute powers to the President to determine the future of the nation including the destiny of international relations.

It should be noted that the provisions of CURT basically vest unlimited powers to the President to constitute all state organs, including Ministers and Deputy Ministers, Permanent Secretaries, Directors of various government departments or agencies, Chief Justice, Judges, Attorney General, Solicitor General and so many other administrative positions responsible with implementation and interpretation of the laws. All the above presidential appointees, with except of Judges, are directly accountable to the President of the United Republic of Tanzania.

Similarly, the President has potential chances to control the legislative arm of the government through the office of the Speaker who also possesses discretionary powers; Prime Minister and other sectoral Ministers and their Deputies who collectively and jointly stand and support the government position in the House. Basically, the main determinant of the government policy is the President of Tanzania. Similarly, it is the same person who may determine matters that need to be

disclosed before the National Assembly either through certificate of urgency or through presidential orders which cannot be challenged in any way. A good example can be seen on how debates concerning the IGA between the Government of Tanzania and the Government of Emirate of Dubai proceeded in the national assembly. It was unlikely that members of the national assembly could make any changes to the IGA between Tanzania and Emirate of Dubai which was laid down for approval, notwithstanding voices from legal experts and political analysts on the legal implication of the agreement to the sovereignty of the people of Tanzania.

The main role of the national assembly in the DP World saga was not to hold the government accountable but to protect government's acts, including legitimizing an agreement with restrictive freezing and stability provisions. Even when some members from the opposition parties raised a concern on existence of unconscionable provisions within the DP World agreement, contrary to Unconscionable Terms Act, yet even the Speaker was not willing to understand. This has exposed the government and its senior officers to ridicule, including being accused of being partisan, selfish, and corrupt. Worse, the approved IGA for protection of DP World has raised many constitutional related conflicts, including allegations for breach of the Constitution of the United Republic of Tanzania.

Generally, it is because of failure by the national assembly and the government to involve key stakeholders in the negotiation or approval of the said agreement that Tanzania has finally entered into the controversial agreement. Consequently, four people have lodged the Constitution Petition before the High Court of Tanzania at

Mbeya[884] challenging validity of provisions of the Contract and the process of ratification of IGA between Tanzania and Emirate of Dubai of October 2022. One of the grounds for challenging the validity of the IGA was inadequate time given to the public to appear before the national assembly for provision of opinion. It was a fact that notice inviting the public to appear in Msekwa Hall, Dodoma for public hearing was issued on 5th June 2023 and the actual date for hearing was on 6th June 2023. This meant that people from different parts of the country had to travel to Dodoma within 24 hours. Similarly, the notice inviting the public to give opinion did not contain the IGA or its summary, and the notice was circulated through social media. Thus, it was submitted by the petitioners that the given 24 hours' notice was unreasonable and denied people of Tanzania a right to participate in government affairs of public concern.

Conversely, it was submitted by the petitioners that time given was reasonable within the prudence of the national assembly, which has inherent powers (wisdom) to determine its affairs, including public hearing. It was submitted that the 72 people who appeared and gave opinion with regard to IGA was reasonable number since not every person would be interested with the subject matter of the IGA. Accordingly, it was submitted that reasonableness of time and number of participants were 'dependent on the circumstances, the subject matter, its urgency and importance

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[884] *Alphonce Lusako and 3 Others vs. The Attorney General and 3 Others*, Miscellaneous Civil Cause No.5 of 2023, High Court of Tanzania at Mbeya (Unreported) . This petition has been filed under article 108(2) of the Constitution of the United Republic of Tanzania, Cap.2 and s.2(3) of the Judicature and Application of Laws Act, Cap.358 R.E 2019.

placed thereon.'[885] The strength of the petitioners' submission was based on the South African Constitutional Court in the cases of *Doctors for Life International vs Speaker of National Assembly & 11 Others*; [886] *Land Access Movement of South Africa & 5 Others vs. Chairperson of the National Council for Province*[887] and *British Railways Board & Another vs. Pickin*.[888]

Generally, all the above court decisions emphasize that reasonableness is an objective standard which is sensitive to the facts and circumstances of a particular case; nature and importance of legislation; time and expenses. Thus, the trial court agreed with the submission of the respondents in that the national assembly is a sovereign body which acts within its procedural rules, the Standing Orders of 2022. Nevertheless, the court made a strong statement with regard to time of the notice as hereunder:

> 'While nobody would tell, with any semblance of mathematical precision, that elongated timeframe for solicitation of views would draw attention of more than the 72 respondents who turned up and; whereas quantity of respondents would not guarantee quality of the views from the public, **there is no denying that this constrained timeframe denied or limited the opportunity for wider participation**……in our view, and not oblivious to the fact that the Standing Orders have not set a time prescription for invitation of public participation, **circumstances of this case and the mighty importance of business set for the day, some more time was needed to ensure that the coveted importance of public participation is upheld and seen to have been conformed to.** This is despite the fact that Parliament would not be bound by such public opinion anyway' (emphasis is mine).

Despite the above statement, the trial court desisted to interfere with independence of the Parliament which has exclusive powers to control over its own affairs and

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[885] See the Judgment in the case of *Alphonce Lusako and 3 Others vs. The Attorney General and 3 Others*, Miscellaneous Civil Cause No.5 of 2023, High Court of Tanzania at Mbeya (Unreported), p.29.
[886] Case No.CCT 12/05 (unreported)
[887] Case No.CCT 40/15 (unreported)
[888] (1974) 1 All ER 608

proceedings as promulgated under article 89 of the Constitution of the United Republic of Tanzania. Generally, the court's decision is based on liberal democracy model of public participation which solely recognizes Members of Parliament as a decision-making organ. Thus, the above trial court statement shows that public participation in Tanzania is not a mandatory requirement, unless the Parliament deems it fit so to do. Further, it shows the relevance of setting up more time for people to give out their views. Finally, it shows that opinion given by the public is not binding to the national assembly. This is a legal gap which needs to be addressed in order to effectively guarantee right to public participation in the decision-making process in Tanzania.

Notwithstanding the trial court's decision to uphold the IGA, it is doubtful if the national assembly can practically challenge agreements dully authorized and/or signed by the President. This is because the President of Tanzania exercises four key roles: s(h)e is the Head of the State, Head of the Government, the Commander in Chief of Armed Forces, and the Chairperson of the Ruling Political Party. This basically makes him or her to be an imperial President. Thus, under the existing state centric approach of resource ownership there is no way President's decision or orders could be faulted since there are no significant systems of checks and balances.

To fortify the above position, s. 4(4) of the Basic Rights and Duties Enforcement Act [889] states that senior government leaders namely: The President, Vice President, Prime Minister, Speaker and Deputy Speaker and the Chief Justice enjoy immunity

[889] Cap 3 R.E 2020 (as amended by the Written Miscellaneous Amendment Act No.3 of 2020).

from prosecution, including human rights violations. This carries potential negative impacts to the realization of peoples' rights to participate in the decision-making process. There is a need to establish legal mechanisms which would require government to engage non-state actors such as members of CSOs, local communities and professional bodies, prior signing of the agreement. This is because the principle of PSNR as adopted in Tanzania vests resource ownership rights to the people of Tanzania. As shown in chapter four, the laws governing PSNR in the extractive industry in Tanzania partly provide for participation of the non-state actors in the decision making.

However, the existing laws as discussed under chapter four do not adequately guarantee the right to participate in the decision making on various factors including: lack of binding legislations providing for public participation rules and procedures and inadequate provisions on access to judicial and administrative remedies, in case of breach of participatory rights. On the other hand, public participation becomes meaningful when people have access to information relating to three aspects: owners of beneficial interests, resource contracts and revenues generated from mining or petroleum projects. As correctly observed by NRGI, when government negotiators know that agreements will be public and subject to legal, public and commercial scrutiny, they have always been careful to come up with good deals.[890] When citizens are fully informed about contracts in the extractive industry they are likely to engage in meaningful and strong debates. As rightly observed by NRGI, stronger

[890] Natural Resource Governance Institute, The 2021 Resource Governance Index, pp.1-3.

public debate is essential for holding governments and companies accountable.[891]

Unfortunately, the existing laws do not fully allow maximum disclosure as pointed under chapter four of this thesis. There is need for the government and companies to disclose contracts because of the global EITI trends which encourages online publication of contracts. The Resource Governance Index of 2021 awarded Tanzania an average score of 58% and 55% in the mining and petroleum sectors respectively. The above average score depends on the availability of disclosure legislations and policies and the extent to which such legislations and policies are implemented. Tanzania's score is low compared to other African resource rich countries such as Guinea (62%), Ghana (78%) and Senegal (82%) because of persistent gaps around contract disclosures and disclosures of environmental mitigation plans.[892] Thus, there is a need for amendment of laws to ensure unfettered contract disclosures.

Apart from the above legal factors, there are other non-legal factors which partly affect effective public participation in Tanzania. These include: political diversities and dominance of the ruling party in various government institutions; unreasonable state control of people's right to freedom of expression and freedom of assembly; inadequate consultation procedures including limited time for consultation, unreasonable notice for meetings and lack of legal status of peoples' opinions adopted during public hearing. Nevertheless, it has been shown in this thesis that sometimes people are unable to participate due to economic activities they are

[891] ibid, p.32.
[892] Natural Resource Governance Institute, The 2021 Resource Governance Index., p.18

engaged in; ignorance of matters under discussion; and technical language used in preparation of matters under discussion. There is need for special law to provide mandatory participation of non-state actors in the natural resource decision making process.

5.3.2 Existence of Multiple Natural Resource Disclosure Systems

As previously shown under chapter three, the government is under obligation to report natural resource agreements to the National Assembly after rigorous scrutiny by various groups of people including the cabinet, permanent secretaries of designated ministries, and stakeholders during public hearing. On the other hand, the government is under duty to disclose natural resource agreements and associated financial reports to TEITA Committee which is composed of both state and non-state actors for accountability purposes. The final report of the TEITA Committee after verification by the Controller and Auditor General (CAG) and the implementation report by the government are still submitted to the National Assembly for deliberation.

Generally, the above two reporting systems involve disclosure of natural resource agreements or arrangements by the government. It should also be noted that such reports contain minimum privileged information about foreign investments which the government is obliged to protect under various bilateral investment agreements. Thus, having two disclosure systems is likely to place the government in a position to violate provisions of the investment agreements; hence susceptible to compensation claims by investors. As discussed before, the government of Tanzania has neither disclosed mining agreements TEITA Committee nor the National

Assembly. This could be related to the need on the part of the government to protect investment agreements in accordance with international law.

Logically, the non-disclosure of natural resource agreements by the government implies a number of things. First, it signifies non-practicability of the provisions of the law necessitating disclosure in Tanzania. The government is not prepared to comply with the requirement of the law; hence making provisions of the law irrelevant. Secondly, it represents abuse of power by the government leaders due to refusal to comply with legal requirements; hence non-adherence to the principles of rule of law. Thirdly, it could also mean that the institutions mandated to compel disclosure of natural resource agreements are ineffective or otherwise lack enforcement mechanisms. Last but not least, it signifies absolute or discretionary powers vested into executive arm of the government with less or fewer systems of checks and balance, including judicial review.

Thus, there is need to amend the existing laws so as to ensure that natural resource agreements are disclosed to the independent people-accountable institution. As observed by NRGI, failure of the government of Tanzania to disclose has partly been caused by existence of overlapping governance structures in the country.[893] This demands for setting an institution with express mandates and setting in place enforcement mechanisms in order to compel administrative authorities to comply with the laws. This could be done by strengthening the capacity of the TEITA Committee by giving it special powers to compel government leaders to disclose

[893] Natural Resource Governance Institute, The 2021 Resource Governance Index, p.18

agreements. This could be guaranteed if the Committee is reconstituted to contain both state and non-state actors with maximum independence and tenure security. If this is done correctly, then there would be no need to lay down agreements to the National Assembly which has proved to be inefficient to hold the government accountable for reasons related to its composition. This matter is further addressed in chapter six of this thesis.

5.3 PSNR and Public Participation in the Near Future in Tanzania

The discussion above has shown a number of challenges that may be encountered in the course of implementation of the laws governing principle of PSNR and Public Participation. As earlier stated, PSNR is a recognized rule of international law which is now binding on all states. Thus, Tanzania is justified to incorporate the principle of PSNR under national laws. Nevertheless, there is a need to implement the principle in a way that does not contravene international investment laws. This would require harmonization of the Permanent Sovereignty Act of 2017, Unconscionable Terms Act of 2017 and the Tanzania Investment Act 2022. Without making such reforms we are likely to witness more debates on inconsistences of international investment agreements related to natural resources exploitation such as minerals, oil and gas, ports, forest and wildlife, and so forth.

Similarly, there is an increasing demand for public participation in the decision-making process, particularly on all matters that surround natural resources in Tanzania. The adoption of the EITI Principles by the government of Tanzania demands effective public consultations before final decisions in form of agreement or arrangement. Further, the government must see to it that private companies which

have invested in the mining and petroleum projects are dully consulted before the change of legal and regulatory frameworks which could affect their property rights. Otherwise, failure to consult them may form the basis for compensation claims before the international tribunals. This has been observed in the Winshear Gold Corporation's case whereby the claimant challenged the 2017 reforms in the extractive sector for lack of meaningful consultations.

It is undisputed fact that the 2017 legislations were passed within 7 days, unlike the Mining Act 1998 and the Mining Act of 2010 which had months of public consultations. Basically, the claimant's counsel challenged the emergency procedures embedded in the Parliamentary Standing Orders of 2020 whereby the President is given power to present certain bills under a certificate of urgency. It was submitted that such emergency procedures contravene the cardinal principle on the due process of law since it led to expropriation of claimant's property rights under the cancelled retention licenses. Thus, it could be argued that public participation is not only a concern for the people of Tanzania but also for foreign investors. It is high time that the government considers public participation has the necessary evil for sustainable development of the people and the state's economy.

To comply with the due process of law in legislative and policy making procedures requires a paradigm shift in terms of how the government and the national assembly engages the general public in decision making. As it stands today, there is increased awareness on citizen's constitutional obligation to protect resources of the United Republic of Tanzania, as per article 27(1) and (2) of the Constitution of the United Republic of Tanzania, 1977. Thus, the government must enact a comprehensive law

which makes it mandatory for any state authority to engage non-state actors before adoption of laws, policies and plans for development purposes. Failure to do that, we should expect increase of petitions in courts challenging governments acts which partly or wholly interfere with sovereignty of the people and the state to explore, manage and regulate exploitation and development of natural resources.

Similarly, investors (local or foreigners) must also be prepared to respect national laws governing requirements for settlement of investment disputes in the extractive sector. They must accept the fact that Tanzania prefers international or domestic arbitration whereby the seat and governing law must be Tanzania. Similarly, investors need to understand that disclosure of contracts to the public is important now than ever in order to secure interests of the people. Just like it is in the developed world, transparency in government affairs is vital for attainment of sustainable developed goals. Tanzania, being a poor country with less capital and low technology, depends on foreign investments for exploitation of resources. However, there is need to engage and negotiate contracts on a win-win situation. Because of economic dynamics, the investors must be prepared to renegotiate terms of agreements so as to ensure benefits of the people. The government needs to take different institutional and legislative reforms in order to balance the interests of both the people of Tanzania and investors as explained under chapter six of this thesis.

5.4 Conclusion

This chapter has critically analyzed legal and practical challenges which are likely to arise during implementation of the laws on PSNR and Public Participation in Mainland Tanzania. These issues range from breaching investment agreements;

ousting jurisdiction of international tribunals contrary to bilateral investment agreements between the state and investors; exclusion of international law remedies contrary to the UNGA Resolution 1806 (XVII) of 1962; and challenge on interpretation of key legal terms. Other issues that may be encountered include: discretionary nature of powers vested on state authorities, and existence of multiple systems for disclosure of natural resource agreements which may lead to liability of the state under international investment laws. The following chapter presents a brief summary of the main research findings, conclusion and recommendations.

CHAPTER SIX

SUMMARY OF FINDINGS, CONLUSION AND RECOMMENDATIONS

6.1 Summary of Findings

This study sought to analyze how the principle of PSNR is reflected in the Tanzania's laws and practice. The central theme of the study was to assess how the principle of PSNR is exercised under domestic law without compromising state obligations relating to investor's protection and public participation. The idea was to ensure that natural resources are properly exploited by the government for the benefit of the current and future generation.

This study preceded on the premise that sustainable development of the people and economic development of the state would be achieved if both state and non-state actors are involved in the decision-making process. This would ensure quality of decisions made, timely assessment of impacts of legislative and administrative measures taken by the government, and averting the danger of investment disputes that cost a lot of state budget which may ultimately lead to a resource curse phenomenon.

To accomplish the above tasks the researcher raised three questions: (1) How does the law in the extractive industry protect the right of the people to participate in the decision-making process in Tanzania? (2) What are the effects of provisions governing PSNR on the validity and enforcement of the existing and new investment agreements under national and international laws? (3) Which measures and mechanisms should be taken in order to safeguard State's right to PSNR and effective public participation in the decision-making process as guaranteed under

different regional and international instruments?

Being the case, three areas of the principle of PSNR and Public Participation were covered, namely: participation in the decision-making fora, access to information and access to justice. These key areas are guaranteed both under international human rights and environmental law frameworks. This study has established that Tanzania's extractive laws partly implement the principle of PSNR and Public Participation through different mechanisms. First, there are different legislations providing for participation of people in different activities, for example: review and renegotiation of mining and petroleum agreements; environmental impact assessment and audit; legislative and policy making processes; preparation of local content plan, corporate social responsibility plan and development plans.

Other areas in which stakeholders are partly involved in the decision-making process includes: involvement in the extractive accountability and transparency processes, and composition of various institutions responsible for issuing licenses. As discussed in chapter four, a number of institutions responsible with natural resource management comprise of representatives from private sector, civil societies and professional bodies. This is a true reflection of deliberative democracy and pluralist democracy models as discussed under chapter two.

Nevertheless, this thesis has shown that participation of people and other stakeholders in the decision-making process is faced with a number of legal challenges. For example, decisions made by people through public hearings or comment procedure are not binding on the decision makers; the Ministers or

administrators are vested with discretionary powers which gives them power to either convene or not convene a public meeting and disregard public opinion Similarly, some agreements or arrangements concluded by the government before entry into force of the review and renegotiation regulations are exempted from disclosure requirement. This possibly affects the ability of the National Assembly and other stakeholders to scrutinize these agreements despite a compulsory disclosure requirement.

Furthermore, participation of people and other non-state actors in the decision making is partly affected by provisions which vests powers to the President to exclude some matters from public scrutiny through certificate of urgency or discussing matters by committees under strict confidence. This affects the possibility of the people to deliberate on some sensitive matters since the office of the Speaker may reject request for public hearing on what they call ‘public interest’ or ‘national security.’ Yet, Parliamentary Standing Orders vest power to the specific Committee to designate or choose stakeholders for purposes of hearing, hence affecting equal participation of people-based organizations in the decision-making process.

Worse still, guidelines and rules adopted by the national assembly in order to ensure participation of non-state actors in the legislative and policy making are not legally binding on the government or parliament; hence not enforceable in any court of law. This means any legislation or policy would be valid even when people and other organizations were not involved in the making since the matter would be regarded by the court as ‘political’ and not ‘legal’ issue. As it stands now, one cannot effectively file a suit in court seeking for a declaration order to nullify a legislation or policy on

the ground of lack of participation of people, unless one shows how their rights have been specifically damaged.

Further, the study has also shown that the government is given absolute powers to determine the nature of information to be disclosed to the national assembly and other people-based institutions for participation purposes. This explains why to date the government has not disclosed any mining and petroleum agreements before the National Assembly or the TEITA Committee as required by law. Although this purports to protect investor's interests under international law, it affects people's sovereignty to effectively discuss and deliberate on natural resource agreements or arrangements.

Apart from participation of people, the law on PSNR in Tanzania appears to be inconsistent with international investment law on protection of investors on various aspects. First, it purports to exclude application of international law despite Tanzania being party to various bilateral and multilateral investment agreements. Secondly, it compels investor to renegotiate fixed term natural resource contracts containing stability clauses without clear renegotiation agreement; hence forcing or otherwise causing undue influence on investors. This could make investors negate their consent in future leading to compensation claims.

Thirdly, the law on PSNR automatically invalidates investment agreements which contain the so called 'unconscionable terms' without necessarily reaching a mutual consensus or agreement. This grossly affects investors consent and may affect validity and enforceability of the purported new terms. Legally, such act amounts to

unilateral change of the terms of investment agreements; hence giving rise to claims for compensation and damages. Fourth, by clearly excluding international bodies in adjudicating disputes concerning PSNR, it is likely to give rise to disputes relating to breach of bilateral agreements on settlement of disputes by international tribunals. Exclusion of international bodies in the national laws is an implied form of withdrawal or suspension of international agreement by Tanzania, although the specific procedure has not been observed.

Fifth, there is possibility for disputes on interpretation of some provisions of the national law, particularly on what constitutes 'unconscionable terms, 'public interest' or 'welfare of the people' and 'adequate compensation.' These terms have not been defined by any national or international law. The government of Tanzania must provide material evidence to support her legislative reforms, short of which Tanzania would be liable for breach of investment agreement and the duty on '*pacta sunt servanda*.' As shown, there are some cases pending before the ICSID filed by foreign mining companies on the basis of breach of mining concessions by the state.

Finally, laws providing for access to information in Tanzania require state organs and mining companies to disclose natural resource agreements, subject to prescribed procedures. This is in order to guarantee constitutional rights to freedom of information and freedom of expression. Basically, every information holder in the public sector has the obligation to disclose information to the applicant within a reasonable period. However, these laws could affect people and investors in various ways. On the part of the people, these laws affect their ability to participate in decision making through partial access to information contained in the natural

resource agreements. This is because the laws permit non-disclosure of exempt information, the list of which is so wide and covers controversial issues such as national security, national defense and intelligence, foreign relations, military operations, commercial secrets and government control of the economy.

Similarly, information may be withheld on 'public interest,' the term not defined under any international laws, national laws or case laws, but dependent on proof by governments of the day. Generally, the discretionary powers of the government and lack of clear definition of the terms 'exempt information' and 'public interest' could possibly affect the right of the people to access information. This is because any information in the MDAs or PSAs may fall within these categories; hence the desired disclosure of natural resource agreements or arrangements may be rendered nugatory.

Worse enough, these laws make it an offence for any person to disclose 'exempt information' or any privileged information, whereby if convicted one would be liable for imprisonment for a term not less than three years and not exceeding 5 years, or any other term specified under the provisions of National Security Act 1970.Basically, criminalization of matters concerning disclosure of information which are civil in nature creates fear on the information holder's life and their families, which obviously makes access to information more difficult and impracticable. As rightly argued by Ndumbaro[894] criminalization of information

[894]Ndumbaro, D., The Cyber Law and Freedom of Expression: The Tanzanian Perspectives, International Journal of Science Arts and Commerce, Volume 1 No.8 of 2016, pp.20-24

related matters and imposition of harsh punishment is a ground for abuse and misuse of power which suffocates freedom of expression. There is a need for amendment of the law in order to align with international standards on protection of access to information and freedom of expression.

On the part of investors, the laws impose the duty on the government to disclose natural resource agreements to the National Assembly, TEITA Committee and non-state actors through public hearing. This creates potential risks on the investors due to possibility for the rise of political agenda that may tarnish the image of the mining companies and disturb investment climate, leading to unanticipated contractual breaches and consequential economic losses including loss of trust and confidence. A good example is disclosure of the DP World Agreement which has given rise to outcries from all parts of the country. Thus, there is a need to set a balance between protection of peoples' right to access natural resource information and the need to protect investor's economic rights.

Finally, the study has shown possible practical challenges that may be encountered in the course of implementing the principle of PSNR in Tanzania. These included: possible inconsistencies in the determination of disputes between investors and the people; possible objections that may be raised on jurisdiction of local courts in determination of disputes between investors and the people, particularly environmental disputes and disputes on compensation for loss of land. There is need for clear stipulation of dispute settlement mechanisms involving investors and the people who may arise in the course of implementation of the principle of PSNR and Public Participation in Tanzania, notwithstanding arbitration agreement between the

state and investors.

6.2 Conclusion

The main purpose of this study was to find out how the principle of PSNR in Tanzania's extractive laws is used to safeguard the local people's right to participate in the decision-making process without affecting investors' rights under international investment law. This role has been fulfilled by analyzing various laws, international conventions, case laws and literature on sovereignty over natural resources and public participation. Further, this thesis has clearly shown that both state and the people have a right to own and manage resources for the sustainable development of the people, including enacting laws and policies, reviewing and renegotiating MDAs and PSAs and setting various institutions for enforcement and monitoring purposes.

Moreover, the government is expected to exercise sovereign rights in good faith, respect accrued or vested rights of investors under the old investment agreements, and involve non-state actors in the decision making. This could ensure that both the state and the people exercise resource rights within standards recognized by national and international laws. Basically, Tanzania has taken a commendable step to internalize the international principle of PSNR in her laws, with a view that natural resources are exploited and used to finance development of the people and the country at large.

The approach taken is to declare all-natural resources to belong to the people of Tanzania (public property) but vested to the President as a trustee for the people of Tanzania. This is a state-people based approach in which the government takes care

of the natural resource exploitation, subject to inclusion of the people and investors in the decision-making process. Nevertheless, these laws domesticating the principle of PSNR and Public Participation vest absolute and discretionary powers to the state authorities, under the supervisory role of the President. This has adverse impacts on sustainable management of resources, because it promotes government control over natural resources on one hand, and disregards right of the people and non-state actors to participate in the decision making, on the other hand.

The above situation is likely to hinder effective implementation of the principle of PSNR due to the fact that people's rights and investors rights are likely to be violated. This could lead to various disputes against the state, in which case Tanzania would be liable to pay damages and compensation to investors. As rightly observed by Kennedy, international arbitration is very expensive and has likelihood of affecting well-being of the people in the host states.[895] This is because it is not the government which would be required to pay for the costs, but the people of Tanzania through direct and indirect taxes. This would lead to poverty, a well-known resource curse in most resource rich countries. Hence, there is needed to take legislative and institutional reforms in order to ensure sustainable management of mining and petroleum industry. The following part provides for measures that could be taken by subjects of the principle of PSNR in order to improve the existing legislations in the extractive sector.

[895] Kennedy, G., International Arbitration on Investment Disputes in Natural Wealth and Resources Sector in Tanzania, East Africa Law Review, Volume 47 Issue No.2 of December 2020, pp.28-29.

6.3 Recommendations

6.3.1 To the Government

The government is responsible for enactment and enforcement of the laws, policies and plans. As a representative of the people, the government should reform the existing laws in order to give more power to the people and public-accountable institutions such as national assembly, CSOs, PBs, leaders at the village and ward levels, and so forth, to participate in the decision-making process. This may be done through amendment of various legislations discussed under chapter 4 or enacting the specific public participation binding Act or Regulation which provide for the three elements of public participation, namely: participation in decision making fora, access to information and access to justice.

The public participation legislation or amendments should require mandatory involvement of different stakeholders in decisions that affect the interests of the people and the nation at large. This means participation of people and other non-state actors should no longer be a discretionary matter, but a legal requirement for validity of any agreement or arrangement in the extractive sector. Similarly, the ways in which people and other stakeholders would be consulted should be defined by the law.

Further, the public participation legislation should clearly provide for the establishment of fund to cover costs of hearing; stipulate issue of reasonable notice, and compulsory public disclosure of vital information which is relevant for a particular purpose. On that regard, the laws governing disclosure of information should be decriminalized in order to allow reasonable disclosure of mining and

petroleum agreements. Similarly, the law should clearly define specific circumstances under which information in the MDAs or PSAs may be withheld. Further, the law should specify one independent organ for disclosure of agreements or arrangements in order to reduce chances for infringement of trade secrets by the government.

This thesis recommends that TEITA Committee should be the only organ to receive and deliberate mining and petroleum agreement reports submitted by the government. However, the existing membership of the Committee would need to be improved for purposes of discussing and approving agreements. The study recommends for reducing members from the government and extractive industries from five (5) to three (3). This is because the two sectors above do not fall within the pressure groups for accountability purposes. Moreover, the number of members representing civil society organizations should be maintained to five (5) as provided by the current law. Nevertheless, in order to make the TEITA Committee to be more independent, it is recommended that we expand participation to other crucial members from Members of Parliament, Tanganyika Law Society, Religious groups and members of the academia.

The study recommends the addition of five (5) members from the following parliamentary committees, namely: The Public Accounts Committee (PAC), Local Government Accounts Committee (LGAC) and Energy and Minerals Committee (EMC). Each of these committees should select one representative to join the TEITA Committee. Another one Member of Parliament should be a representative of people from an area where actual mining or petroleum operations would be taking place.

The role of this member is to represent the local people and ensure that community rights are protected in mining and petroleum agreements or arrangements. Then, one member should be selected to represent official opposition party in the Parliament. This would make the total of members from the national assembly to five (5).

Apart from MPs, the TEITA Committee should also comprise of three (3) legal experts in the fields of international investment law and mining/petroleum law appointed by the President of Tanganyika Law Society (TLS) after consultation with the Members of the Council. The role of the members from legal fraternity is to assess the legal implications of provisions within the agreement and advise the government accordingly. Similarly, the TEITA Committee should also comprise of three (3) representatives from religious groups in Mainland Tanzania and two (2) members of academia from the Higher Learning Institutions with not less than 10 years' experience in the fields of economics, international business and taxation. These two members representing the academia should be nominated from public and private universities in the country. Above all, the committee should also comprise of one member from the Prevention and Combating of Corruption Bureau (PCCB) whose role is to check on potential chances of corruption in the government dealings.

This means the TEITA Committee would comprise of a total number of twenty-five (25) members from the government, extractive companies, national assembly, academia, legal fraternity, CSOs, religious institutions and the independent corruption bureau. Such a multisectoral composition of the Committee is likely to guarantee independence of the TEITA Committee, create strong systems of checks

and balances and promote effective participation of non-state actors in the management of extractive industry.

Hence, there is need for the government to amend section 5 of the Transparency and Accountability Act so as to accommodate the above recommended structure of the TEITA Committee. Further, section 10 of the same Act should be amended to vest powers to the TEITA Committee to review mining and petroleum agreements before they can be signed by the government. This means the government should not be required to submit agreements to the National Assembly except as required by the TEITA Act. This will possibly reduce risks related to political manipulation which is an inherent factor facing extractive projects in the World. This would also reduce cost on the party of government in terms of per diems and other allowances payable to the members of the national assembly. Further, the law should be amended by vesting powers to the Committee to impose sanctions whenever any public official fails to comply with the Committee's resolutions.

The above proposed model can promote transparency and accountability of the government by ensuing disclosure of agreements within limits prescribed by international investment law. This is because the Committee proceedings would not be open to the majority of the politically affiliated members. Further, it would save time and preserve confidentiality of privileged information; hence promote government disclosure. Similarly, there is a high chance for objective and quality discussions which cannot be achieved in ordinary parliamentary proceedings which are usually tainted with statements for political promotion of a particular Member of Parliament.

Furthermore, the law necessitating for disclosure of agreements or arrangements should be amended to require compulsory disclosure of all-natural resource agreements to the TEITA Committee. This should include both new and renegotiated agreements relating to exploitation of all-natural resources within the definition covered under the Permanent Sovereignty Act of 2017.This presupposes amendment of the Transparency and Accountability Act to cover not only extractive industry but other natural resource related sectors such as wildlife, tourist, water and marine sectors. This would ensure that all agreements concerned with natural resources are effectively disclosed to a public-accountable institution.

Similarly, the Transparency and Accountability Act should be amended to give the TEITA Committee more powers to enforce its own decisions or orders concerning with disclosure of agreements and publish contracts. Publication of contracts could be done in two ways, namely: publish full document in the website open and accessible to the public or use machine-readable formats which allow one to only access specific information.[896]

On the other hand, the law governing access to information should allow aggrieved persons to take the matter to the High Court, which is a constitutional organ for dispensation of justice in Tanzania. This means any decision made by the Minister should be appealable to the High Court of Tanzania, just like decisions by the Mining Commission or Environmental Appeals Tribunal. The finality clause under

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[896] Natural Resource Governance Institute; Contract Transparency: Creating Conditions to Improve Contract Quality, NRGI Primer, June 2018, p.7.

s.19 (3) of the Access to Information Act should be repealed. Furthermore, the public participation legislation law should further provide for the *locus standi* to any person (natural or legal) to challenge any legislation which has been passed contrary to the public participation law.

The above legal postulates mean that where there is unjustified denial of access to information and other related participatory rights or where the government disregards substantive part of the public opinion, then one should be able to challenge validity of the law or decision before the High Court of Tanzania. This means one should not be required to show the extent to which his or her rights have personally been violated by the executive or Act of Parliament in order to lodge a complaint in court as per s.4(3) of the Written Laws (Miscellaneous Amendments) Act No.3 of 2020.[897]As correctly argued by Shivji[898] s.4 (3) above violates a constitutional right of every citizen to take a legal action to ensure protection of the constitution and the laws of the land as per article 26(2) of CURT.

There is every reason for the government to respect decisions of the higher courts of the land concerning public interest litigation, which have declared that Personal interest is not an ingredient under article 26(2) of CURT. On the other hand, the Permanent Sovereignty Act 2017 should be amended to be consistent with the Arbitration Act 2020 and the Tanzania Investment Act 2022 which supposedly

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[897] This amendment looks similar to the decision made by the High Court of Tanzania in the case of *Legal and Human Rights Centre and Tanganyika Law Society vs. Hon. Mizengo Pinda and the A.G*, Miscellaneous Civil Cause No.24 of 2013 (Unreported)

[898]Shivji, I.G., Tanzania Abolishes Public Interest Litigation: A Comment on the Amendment of Basic Rights and Duties (Enforcement) Act, (Cap 3 of the Revised Laws of Tanzania); CODESRIA Bulletin Online No.2 of June 2020, pp.1-4; See also *Mtikila vs. Attorney General* (1995) TLR 31.

allows parties to an investment agreement to subject their dispute to international arbitration according to the arbitration agreement. This should be done by amendment of provisions governing unconscionability of agreements under s.6(2) which provide determination of disputes by international bodies as one of unconscionable terms. Since international arbitration is now allowed so long as the place of arbitration is Tanzania and the law applicable is the Arbitration Act of 2020.

Basically, the Arbitration Act 2020 is a replica of the UNCITRAL Model Law on International Commercial Arbitration1 which was adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985 and amended by UNCITRAL on 7 July 2006. The UNCITRAL Model Law on International Commercial Arbitration is one of the results of the harmonization process by the United Nations Commission on International Trade Law which was established by the United Nations General Assembly in 1966. It was prepared with input from lawyers around the world, including third world countries; hence more preferred by developing states. It covers all stages of the arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral award and reflects a worldwide consensus on the principles and important issues of international arbitration practice. Therefore, this thesis recommends that the government of Tanzania should invoke the UNCITRAL Model or international mediation for purposes of settlement of state-investor disputes.

Furthermore, the government should amend other laws governing resources in specific sectors so as to align them with the requirements of the Permanent Sovereignty Act 2017. These include: laws governing substances occurring in nature

such as soil, subsoil, gaseous and water resources' and flora, fauna, genetic resources, aquatic resources, micro-organisms, air space, rivers, lakes and maritime space, including the Tanzania's territorial sea and the continental shelf, living and non-living resources in the Exclusive Economic Zone. This means there should be harmonization of the provisions of the Permanent Sovereignty Act 2017, the Arbitration Act 2020 and the Tanzania Investment Act 2022 in order to clearly restrict dispute concerning natural resources to be adjudicated by any international body outside territorial limits of Tanzania.

On the other hand, the government should amend various laws providing for grounds for non-disclosure of information by specifically defining terms such as national interest, public security and other unclear terms as explained under chapters four and five of this thesis. The last but not least, the government should seek for amicable ways to resolve all suits filed by the investors before the international tribunals. The study recommends for appointment of competent and qualified negotiators to settle the pending disputes out of court. It is highly advised that the government must not in any way enforce agreements without participation of investors. Thus, the government of Tanzania must implement the principle of PSNR in a way that respects rights of investors.

Nevertheless, the government of Tanzania must take steps to negotiate international investment agreements which do not contravene fundamental provisions of the Permanent Sovereignty Act 2017 which was passed to enforce provisions of the Constitution. This would require the government to make consultations with different stakeholders and constitute team of negotiators with required knowledge

and skills in the subject matter of the agreement. This is because once an agreement has been signed by the parties, it becomes binding until otherwise it is renegotiated. Such renegotiation of contracts is a burden to the people of Tanzania as it may lead to compensation claims when investors are not prepared to renegotiate. Government negotiators must take the terms of agreement seriously so as to avoid making unreasonable concessions which would cost the government a lot of money; hence leading to resource curse. It is recommended that the government strengths the contract negotiation departments by equipping with qualified and competent personnel in diverse areas of practice.

6.3.2 To the Members of the Public and Non-State Actors

Different reports and studies have shown that members of the public including local government leaders are ignorant of the laws and policies governing natural resource exploitation, particularly on aspects of corporate social responsibility and local content. Generally, participation of the people in the decision making is vital throughout the life cycle of any extractive project from exploration to project closure.[899] Further, a wide range of stakeholders have a great role to play in analyzing and managing risks and impacts of large-scale mining. However, effective participation of the people depends on how much people are informed.

It is highly recommended that different stakeholders such as CSOs, CBOs, and other professional bodies including Tanganyika Law Society (TLS) have the mandate to

[899] Doyle, C. & Carino, J., *Making Free Prior & Informed Consent a Reality- Indigenous People and the Extractive Sector*, Middlesex University School of Law, May 2013, pp.76-78.

continue educating members of the public in order to strengthen their abilities to demand for government accountability and transparency. The existing institutions responsible for awareness and capacity building need to venture much into extractive laws and policies in order to advocate for change in the legal and institutional framework so as to promote the 'voice of the people' in various aspects of life, particularly in the rural areas where actual mining is conducted.

Furthermore, stakeholders should continue providing technical support to Members of Parliament, local government leaders and members of the local communities in order to increase their understanding on the laws and policies governing exploitation of minerals and petroleum in Tanzania for effective monitoring of mining and petroleum obligations. There is a need to develop a uniform training manual which could ensure that all stakeholders share common knowledge on key aspects of mining and petroleum operations in order to develop joint monitoring mechanisms. As provided under article 27(1) and (2) of CURT, every person (natural or legal) has the duty to protect natural resources of the United Republic of Tanzania and safeguard state property against all forms of waste and squander.

Thus, different stakeholders must pull together their efforts in order to ensure transparency and accountability of the government and extractive companies. This is possible where civil societies develop monitoring tool kit covering five basic areas: operational commitments, fiscal terms, environmental obligations, workers health and safety and social commitments. With shared goals CSOs and other people-centred organizations are able to create pressure on both the government and extractive companies in order to comply with the laws, including a requirement to

disclose natural resource agreements to the TEITA Committee.

6.3.3 To the Extractive Companies

The extractive companies are responsible for actual exploration and exploitation of natural resources. Their principal goal is to exploit resources in order to realize investment costs and make profit. Extractive companies are purely commercial companies, eager to make profits out of the mining operations. Despite their commercial objective, it is recommended that mining companies must ensure that resources benefit the people of Tanzania through self-motivated CSR and local content compliance. Similarly, the extractive companies are urged to conduct their operations fairly according to the laws of Tanzania and the international mining practices which require involvement of the people, particularly indigenous people, in various matters that affect their lives.

Furthermore, the extractive companies should specifically respect human rights, particularly land and environmental rights. Specifically, the mining companies must protect local people's rights to fair compensation due to pollution or loss of farm land due to mining operations. The assessment and payment of compensation must reflect the market value of the given assets, and not to be based on government valuation which has led to gross under compensation to the members of community. This thesis recommends that determination of compensation by the appropriate institutions should be based on understanding between investors and members of the local community, and if no agreement is reached, then appropriate compensation be determined according to the market value of the property.

On the other hand, investors are encouraged to participate in the review and renegotiation of agreements, with a view to improve inconsistencies in the natural resource agreements. This would be consistent with investors' duty to observe the agreements in good faith as prescribed under international investment agreements. Basically, all MDAs and PSAs which restrict or hinder sovereignty of the people and the state to own, explore and manage resources is obviously a breach of duty to bargain in good faith. It is a rule of international contract and investment law that parties to agreements would need to conclude terms which are mutually accepted. This is likely to be preserved when all parties to agreement have freely participated in the review or negotiation of agreements.

6.3.4 To Other Researchers

The topic on the principle of PSNR and Public Participation in Tanzania is still a new area that has a lot of implications to the sustainable development of the people. The concern of this thesis was to see how people of Tanzania and other non-state actors are involved in the decision-making process as part of promotion and protection of people's right to self-determination. However, the thesis did not look at the financial implications of the principle of PSNR and Public Participation. Thus, this thesis encourages other researchers to engage in analysis of the laws of Tanzania in relation to management of revenues generated from the mining and petroleum operations for the benefit of Tanzania and members of the local community.

6.3.5 Recommendation for Further Research

The principle of PSNR and Public Participation constitutes both legal and economic principles for management of natural resources. This study looked at the legal

implications of these two principles in the extractive industry. It has not addressed economic aspects of the principle of PSNR and Public Participation which purely focus on investment and revenue management. Without putting in place fiscal rules and policies, revenues from the extractive sector may not benefit the people. Thus, there is a need for further study in aspects of PSNR and Public Participation in investment and revenue management matters of the extractive industry. This is a gap which requires further research in the near future.

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APPENDICES

Appendix 1: Questionnaire

A. PARTICULARS OF THE RESEARCHER:

Name: Gaspardus Rwebangira

Reg. No: PG201705451

Institution: Open University of Tanzania

Contacts: gaskamuntu@yahoo.com; 0762 428 287

B. PUROSE OF THE RESEARCH

I am a PhD student at Open University of Tanzania undertaking a thesis titled '**The Principle of Permanent Sovereignty over Natural Resources and Public Participation in Tanzania-A Case in the Extractive Industry.**' This study applies people-state centred and people-centred approaches to analyze the gaps in the existing law on PSNR and legal effects arising therefrom. This seeks to ensure maximum participation of both state and non-state actors in the natural resource governance; hence promoting an inclusive and sustainable development of the people and economic development of the nation.

Please, you are highly requested to help me in accomplishing this task by filling in this questionnaire. The responses from you will be kept in confidence and will only be used for academic purposes. Please fill free to contact me via my phone number 0788127100 for any additional information or clarification. I thank you for your time.

C. PARTICULARS OF THE RESPONDENT

Name:……..

Occupation:……

Age:……. (optional)

Gender :…….(optional)

D. INSTRUCTIONS

(i) Fill in the blanks provided

(ii) *Where required to give your personal view, please briefly explain.*

(iii) *Where not understood the question, you are allowed to skip it.*

Part I: General Questions on Principle of PSNR and Public Participation in Tanzania

1. Tanzania adopted the principle of PSNR through the Natural Wealth and Resources (Permanent Sovereignty Act) 2017 and the Natural Wealth and Resources Contracts (Review and Renegotiation of Unconscionable Terms) Act 2017. Do you think the principle of PSNR is a necessary tool of economic development in Tanzania? Briefly explain

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2. the Natural Wealth and Resources (Permanent Sovereignty Act) 2017 and the Natural Wealth and Resources Contracts (Review and Renegotiation of Unconscionable Terms) Act 2017 require natural resource agreements to be reviewed and finally laid down before the National Assembly. Do you think the National Assembly is an appropriate organ for protection of interests of the people of Tanzania? Briefly explain.

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3. What do you consider to be the effects of disclosing the natural resource agreements before the National Assembly on the part of foreign investors?

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4. The Natural Wealth and Resources (Permanent Sovereignty Act) 2017 and the Natural Wealth and Resources Contracts (Review and Renegotiation of Unconscionable Terms) Act 2017 provide the basis for renegotiating or review of agreements to be the unconscionability of the terms in the investment agreements. What is your comment on what is regarded to be unconscionable terms?

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5. The Natural Wealth and Resources (Permanent Sovereignty Act) 2017 and the Natural Wealth and Resources Contracts (Review and Renegotiation of Unconscionable Terms) Act 2017 require all investment disputes arising out of the state exercise of the principle of PSNR to be adjudicated in Tanzania using national laws. What is your opinion on this matter?

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6. The Natural Wealth and Resources (Permanent Sovereignty Act) 2017 and the Natural Wealth and Resources Contracts (Review and Renegotiation of Unconscionable Terms) Act 2017 vests discretionary management powers of natural resources in the hands of the President. What is your comment on this

matter?

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7. What do you consider to be the position of foreigner investor during renegotiation of agreement under the provisions of the Natural Wealth and Resources (Permanent Sovereignty Act) 2017 and the Natural Wealth and Resources Contracts (Review and Renegotiation of Unconscionable Terms) Act 2017?

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8. What do you consider to be the effects of the provisions of the Natural Wealth and Resources (Permanent Sovereignty Act) 2017 and the Natural Wealth and Resources Contracts (Review and Renegotiation of Unconscionable Terms) Act 2017 to the investor?

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Part II: Assessment of Public Participation under the principle of PSNR

9. The Permanent Sovereignty Act 2017 and other laws governing extractive industry in Tanzania provide that resources are owned by people of Tanzania. Explain how people of Tanzania participate in the ownership of natural resources?

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10. The principle of PSNR requires that people including members of the local community and other stakeholders (NGOS, CSOs, CBOs, professional bodies, etc) participate in the decision making. List down laws protecting right to people's participation in the decision making?

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11. Mention ways used by the government entities (both central and local government) to promote people's participation in the decision making, including law making, policy making and planning?

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12. Briefly explain how people and representatives from NGOS, CSOs or professional bodies are selected for purposes of public hearing during policy and law-making processes?

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13. In your own opinion, do you think the government provides adequate time and information to enable effective participation of the people and other stakeholders in the decision-making processes?

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14. Are opinions and views given by the members of public and other stakeholders relevant and binding on the government organs when making decisions? Briefly explain

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15. What are legal remedies (if any) available in case the government does not take public views or otherwise passes and implements decision contrary to people's opinions and views? Briefly explain.

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16. In your own opinion, which groups of people of Tanzania should be involved in the making, review and renegotiation of natural resource agreements for sustainable development of the people? Mention and briefly explain reason of your choice.

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17. Mention legal challenges which affect or hinder public participation in the natural resources' decision-making process in Tanzania.

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18. Briefly explain how the law on PSNR should incorporate participation of the people, CSOs and other professional bodies in the following decision-making processes:

(i) Enacting laws and policies:

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(ii) Conclusion, review and renegotiation of MDAs and PSAs:

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(iii) Preparation of local content plan and corporate social responsibility plan

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(iv) Enforcement of laws, policies, MDAs and PSAs, local content and corporate social responsibility plans

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Part III: Assessment on access to mining and petroleum information

19. The principle of PSNR requires the government to ensure people's access to information relating to mining and petroleum activities so as to participate in the decision making. Mention laws providing for people's access to information in Tanzania.

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20. What measures have been set in place by the government to ensure reasonable disclosure of information relating to mining and petroleum operations to the people and other stakeholders in Tanzania?

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21. The law on PSNR requires natural resource agreements or arrangements to be laid before the National Assembly. What do you think would be the legal implication of such disclosure of agreements *vis-a-vis* company trade secrets as envisaged in most PSAs and MDAs?

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22. What factors hinder implementation of the laws on access to mining and petroleum information, including mining and petroleum sharing agreements? Briefly explain

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23. What should be done in order to ensure citizen access to natural resource information in Tanzania without affecting duty of trade secrecy?

Part IV: Assessment on Access to administrative and judicial remedies

24. The Permanent Sovereignty Act 2017 requires disputes to be determined by domestic judicial bodies established in Tanzania while the Arbitration Act 2020 empowers parties to investment agreement to adopt their own dispute settlement mechanisms including international arbitration. What is your comment?

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25. In your opinion, is compulsory determination of disputes involving PSNR by locally established institutions in conformity with international investment laws and treaties? Briefly explain.

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26. In your own opinion, do you think courts and other judicial bodies in Tanzania are competent and independent enough to resolve international investment disputes? Briefly explain

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27. Assuming that a decision passed by the courts in Tanzania appears to be unfair to either of the parties, is there any chance to challenge the decision before international courts? If yes, explain how.

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28. Do you think courts in Tanzania would be able to grant prompt and reasonable compensation to victims of state sovereign right to PSNR? Briefly explain

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29. Is exclusion of international dispute settlement bodies in conformity with existing PSAs and MDAs? In your answer, briefly state the legal effect of such exclusion.

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30. What should be done in order to enable the local courts and tribunals to effectively and fairly resolve disputes concerning exercise of principle of PSNR without compromising principle of fairness?

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31. Mention legal challenges likely to arise from implementation of the laws governing PSNR in Tanzania, both on foreign investors and the people of Tanzania?

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32. The law governing permanent sovereignty over natural resources seeks to ensure people of Tanzania benefit from natural resources exploitation. Briefly explain how the law should be implemented without affecting legitimate investor's expectations?

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33. Any general comment on how Tanzania could implement the principle of PSNR without affecting investor's contractual rights and interests?

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Thanking you in advance