

**THE IMPACT OF PROPOSED LEGISLATION ON THE REGULATION OF THE OIL
AND PETROLEUM INDUSTRY IN KENYA**

**A DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE
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THE IMPACT OF PROPOSED LEGISLATION ON THE REGULATION OF THE OIL AND PETROLEUM INDUSTRY IN KENYA

ABSTRACT

STATEMENT OF THE PROBLEM

The oil and petroleum industry in Kenya is one of the most important contributors to strategic economic and industrial development in Kenya. The production, refinement and supply of affordable fuels and oils is thus of paramount importance for the sustenance of meaningful economic development.

The call for controls and/or mechanisms of control to regulate the importation, exportation, transportation, refining, storage and sale of petroleum products has been prompted by the prevailing high prices of such petroleum products and the apparent lack of mechanisms to regulate the nature of this economic resource and prevent the arbitrary manner in which petroleum suppliers set the prices of their products.

As a result of the foregoing, both the Parliamentary Oil Industry Regulatory Board¹ and the Government through the Office of the Attorney-General sought to draft Bills ready to be introduced before Parliament in its current session.²

The Office of The Attorney-General thus published a Bill for Introduction into the National Assembly cited as The Petroleum Bill, 2001³.

The purpose of this Bill is to repeal and replace The Petroleum Act (Chapter 116 of the Laws of Kenya). This is the Act which currently provides for the regulation of the importation, transportation and storage of petroleum. The object of the proposed repeal is to review and refine the existing legal framework in order to better regulate the petroleum sector to take into account the development in the industry following the liberalization of the petroleum sector in 1994.⁴

The Petroleum Bill, 2001 has incorporated proposals from the Petroleum Industry Regulatory Board that were sought to be contained under the Board's Petroleum (Amendment) Bill 2001. This latter Bill will now not be published for presentation before Parliament.

¹ The Oil Industry Regulatory Board sought to present The Petroleum (Amendment) Bill 2001.

² The session of the 8th parliament beginning 20th March 2001.

³ Published in The Kenya Gazette Supplement No. 26(Bills No.9) Of 6th April 2001.

⁴ Contained in the Memorandum Of Objects And Reasons Under The Petroleum Bill, 2001.

This dissertation will thus attempt to analyse the likely effectiveness of the Bill in regulating the petroleum sector in Kenya, and what its effect would be if it were passed into law by The National Assembly. The dissertation will also consider possible additions and alterations to the Bill that would make it even more effective.

STATEMENT OF OBJECTIVES

It is therefore the objective of this dissertation to:

1. Outline the petroleum law as it stands presently under The Petroleum Act Cap 116 and any other regulations currently in place that govern the sector.
2. Analyse the provisions of The Petroleum Bill, 2001.
3. Analyse the problems associated with the regulation of the oil and petroleum sector in Kenya and how effectively the Bill, if enacted into law, would resolve these problems.
4. Compare the efficacies obtained by the legal system of a country that has introduced or embraced legislation to better regulate its petroleum sector to the Kenyan position.
5. Suggest amendments to The Petroleum Bill, 2001 and any other reforms to the sector, which reforms are garnered towards the attainment of better regulation of the oil and petroleum industry in Kenya.

JUSTIFICATION

Oil and petroleum play an important role in the economy of every nation in the world, and will remain one of the world's most indispensable commodities. However, petroleum is a scarce commodity. Some countries are blessed with large quantities of oil and gas resources, while others, a majority, have no oil and gas reserves at all. Kenya is amongst those with no oil and gas available as a natural resource.

After wood, petroleum products are the major source of energy in Kenya. An estimated 4 percent of Kenya's Gross Domestic Product (GDP) is used in the importation of petroleum. Further to this, an estimated 10 percent of the Government's total revenue is gained from taxes on petroleum sales.⁵

⁵ Adopted from The Sunday Nation, February 4, 2001. A commentary on the role the oil and petroleum industry plays in the Kenyan economy, by the U.S Ambassador to Kenya, H.E. Johnnie Carson.

Kenya's reliance on petroleum products is probably not untypical of many developing countries – a cross between needing and using petroleum for growth and development and needing and using taxes on petroleum sales to provide the underpinnings of government budgets and revenues. Kenya's demand for petroleum products is projected to grow between 3 and 5 percent every year for the foreseeable future.

In addition, Kenya is the backbone of the Great lakes region as far as transportation is concerned. Kenya's oil pipeline, as well as its road, rail and port system are absolutely critical to much of the economic well-being of east and central Africa, as they rely upon it for almost all their petroleum and transport needs.

Thus, efficiency is required in the management of this sector, which is of such vital importance to Kenya and the surrounding region. This can only be achieved through the application of better regulatory mechanisms by means of sound legislation. It is for this reason that this dissertation is attempted to analyse the provisions of the proposed Petroleum Bill, 2001, and how effectively it regulates the petroleum sector in Kenya in light of the above circumstances.

HYPOTHESIS

1. There does not exist a proper legal framework in place for the regulation of the oil and petroleum sector in Kenya.
2. That in order to achieve development and growth of the petroleum sector in Kenya, there is required more effective regulation of the sector through new and focused legislation that reflects developments in the market following the liberalisation of the sector in 1994.
3. That what Kenya needs is a free market monitored by a competent regulating body. Such a body would formulate policies, ensure that set standards of petroleum products are maintained, investigate claims of monopolistic and other prohibited business practices, ensure the quality of products produced and sold in Kenya, and if necessary, take action against companies engaged in such practices.

INTRODUCTION

THE IMPACT OF PROPOSED LEGISLATION ON THE REGULATION OF THE OIL AND PETROLEUM INDUSTRY IN KENYA

The Government of Kenya, under its liberalisation policy introduced in the early 1990's, decided to liberalise the oil and petroleum sector in Kenya so as to bring it in line with its economic policies. Thus, with effect from the 27th October 1994, the oil industry in Kenya was liberalised. The effect of this liberalisation on the oil industry was profound, and it contributed to changes not only in the manner of the importation of petroleum, but also to the nature of the regulation of the sector.

Key among these changes introduced by the liberalisation of the sector included the abolition of The National Oil Corporation Of Kenya (NOCK), and the abolition of quotas under which the 8 oil companies that were in operation in Kenya at the time used to import crude oil. It therefore left the field open for anyone willing to venture into the field of importation of petroleum.

However, despite the introduction of these changes following the liberalisation, there has not been a corresponding amendment of the legislation regulating the petroleum industry in Kenya. The Petroleum Act Cap116 of the Laws Of Kenya was enacted in 1948 and has been in operation since its commencement on 31st August 1948. This Act has since only been amended on four occasions, the last amendment being in 1983.⁶

The Petroleum Act Cap.116 is cited as an Act of Parliament to make provision for restricting and regulating the importation, transport and storage of petroleum.

This citation in itself is contradicted by the situation prevailing in the sector currently, following the liberalisation in 1994, where there is no longer any restriction on the importation of petroleum. It thus becomes immediately clear that there is required an overhaul of this existing legislation that will provide for the developments in the sector following the liberalisation in 1994. It was in this spirit that The Petroleum Bill 2001 was published by the Attorney General to cater for the above situation. However, hastily prepared legislation in Kenya has in the recent past been exposed as ineffective and unconstitutional when it is subjected to judicial scrutiny.⁷

The nature of this dissertation therefore will be to analyse the likely effectiveness of The Petroleum Bill in regulating the importation, exportation, transportation, refining, storage and

⁶ There have been four amendments to this Act via L.N. 343/1956, L.N. 173/1960, L.N. 86/1981 and L.N.11/1983.

⁷ The Kenya Anti-Corruption Act and The Kenya Roads Board Act are recent examples of legislation that have been passed by Parliament only to be later struck down by the Judiciary as unconstitutional.

sale of petroleum, and for connected purposes associated with the same. The Bill will also be analysed with regard to any other laws that it might contravene.

The role of organisations in Kenya that are involved in the oil and petroleum industry, such as the Petroleum Institute Of East Africa, and the impact which they could have upon the regulation of the sector will also be analysed.

CHAPTER ONE (1)

THE OIL AND PETROLEUM INDUSTRY IN KENYA TODAY

1.1 THE SOCIAL, POLITICAL AND ECONOMIC EFFECT OF THE OIL AND PETROLEUM INDUSTRY IN KENYA

The importance of oil and petroleum as a natural resource to the economy of any nation can not be underemphasized. However, many countries in the world, including Kenya, do not have this important mineral as a natural resource. But, irrespective of how nature has treated any one country or region of the world, every country that wants to build its economy, improve the welfare of its people and to become a hub of growth relies to some significant degree on oil and petroleum.

Even today, as we look at the emergence of entirely new technologies and industrial applications, the petroleum industry remains a vital part of our future. Petroleum is required to drive our cars, heat our homes, cook our food, obtain energy to power our factories and to produce other electronic power sources. As had already been noted, Kenya's reliance on petroleum products is not untypical of many developing countries. This reliance is a cross between needing and using petroleum for growth and development, and needing and using taxes on petroleum sales to provide the bulk of government budgets and revenues.

After wood, petroleum products are the major source of energy in Kenya. An estimated 4 percent of Kenya's Gross Domestic Product (GDP) is used in the importation of petroleum. Further to this, an estimated 10 percent of the Government's total revenue is gained from taxes on petroleum sales. The Government also collects nearly 50% of the pump price of a litre of petroleum in the form of road maintenance levies.¹

Kenya is the most important country in East and Central Africa as far as petroleum is concerned. Its place as the backbone of the region's transportation network has contributed largely to this. The port of Mombasa situated on the Kenyan coastline is a vital link for the region to the states in the Middle East, which are the major source of crude oil for the region. Millions of litres of petroleum from the Middle East pass through the port of Mombasa destined for both Kenya's domestic market, and for further re-exportation to the other countries in the region. The petroleum is re-exported through Kenya's oil pipeline, as well as its road and rail network. The

¹ Adopted from The Sunday Nation, February 4, 2001. A commentary on the role the oil and petroleum industry plays in the Kenyan economy, by the U.S Ambassador to Kenya, H.E. Johnnie Carson.

effect of this strategic placement of Kenya in the region has contributed to its rapid growth as the commercial hub of the region. This, too, has led to a situation where its infrastructure in the form of roads and railways are over-stretched by the sheer volume of petroleum related traffic, and the attendant environmental degradation. Clearly, the transport industry in Kenya is boosted by this petroleum related traffic and the revenues that arise therefrom, but more growth is required in the network of infrastructure required for the transportation of petroleum to ease congestion and allow prompt and faster arrival of petroleum products in the market.

In the socio-economic sphere, the petroleum industry is one of the single largest employers in Kenya. The petroleum industry currently employs over 2000 individuals in the upper to middle-management level, and a further approximately 10,000 individuals in junior-level jobs and in the informal petroleum sector.² A sector that directly employs so many individuals contributes significantly to the training and education of its workforce, and even more to their economic well being. The effect of an economically stable population is the increase in the purchasing power of the people, which results in higher demand for consumer products for the local market. This, in turn, leads to growth of local manufacturing concerns to meet this increased demand, leading to a diversified economy and fiscal growth of the country.

In the political sphere, Kenya has recently undergone substantial economic reforms which are aimed at stamping out corruption, economic mismanagement and outdated economic policies. In this regard, the government of Kenya, as had been earlier stated, introduced reforms to the petroleum sector in 1994 aimed at liberalising the sector in Kenya. While this liberalisation has contributed to the opening up of the sector to independent players in the market, it has not created corresponding regulations on the sector with regard to the new liberalisation. This has led to intense lobbying for parliamentary intervention to regulate the sector, in particular with regard to public sentiment that suppliers unnecessarily inflate prices of petroleum products. However, the government has stated categorically that a return to price controls is not in line with its economic policies. While pump prices are higher now than they were in the past, this is attributable to various factors: taxes, refining costs, marketing costs, the value of the Kenyan shilling as compared to other world currencies, and most importantly, the price of the oil bought from abroad.

The net effect of the petroleum industry in Kenya is that it impacts heavily upon the life of each and every member of society. This makes it of paramount importance to have the sector run efficiently so as to make this important resource available to all Kenyans.

² Contained in the weekly newsletter of The Petroleum Institute Of East Africa available at <http://www.petroleum.co.ke>

1.2 THE PETROLEUM ACT CAP. 116 OF THE LAWS OF KENYA AND ITS EFFECTIVENESS IN REGULATING THE OIL AND PETROLEUM INDUSTRY IN KENYA

The Petroleum Act is cited as an Act of Parliament to make provision for restricting and regulating the importation, transport and storage of petroleum.

Under Section 2 of the Act, petroleum is defined to include “any inflammable liquid made from petroleum, coal, schist, shale, peat or any other bituminous substance or from any product of petroleum”.

The Act further states that petroleum shall not be imported, unloaded, landed, loaded, transhipped, transported or kept save in accordance with rules made under the Act.

The Act seeks to regulate the petroleum sector in Kenya by giving the Minister (the Act is not specific on which Minister, but currently, the Minister in charge of Energy carries out this duty) authority to make rules regarding petroleum.

The Act at Section 4 gives the Minister power to make rules-

- (a) Defining the kind of petroleum to which the rules shall apply, and dividing petroleum into classes or categories and making different provisions with regard to such classes or categories.
- (b) Restricting and regulating the importation, landing, loading, shipping, transportation and storage of petroleum; and prescribing a system of licensing for the purposes aforesaid, the manner in which application for any such licence shall be made, the authorities which may grant the same, the fees which may be charged therefore and any other matters incidental thereto.
- (c) Providing for notice to be given by the owner or master of any ship entering a port with petroleum, and for ascertaining the quantity and description of any petroleum on board any such ship.
- (d) Determining the places at which, and the conditions on and subject to which, petroleum may be imported, unloaded, landed, stored, loaded or transhipped.
- (e) Providing for the delivery to such officer as may be specified of samples of petroleum landed or intended to be landed and for testing of such samples.
- (f) Providing for the nature and situation of the premises in respect of which licenses to possess petroleum may be granted, the inspection of premises so licensed and the taking of samples and the testing of petroleum found thereon.

- (g) Regulating the description and construction of vehicles to be used in the conveyance of petroleum by road.
- (h) Prohibiting or restricting the carriage of goods and passengers in vehicles carrying petroleum.
- (i) Prescribing the quantity of petroleum which may be conveyed at any one time or in any one vehicle.
- (j) Prescribing the precautions to be observed in the conveyance of petroleum by road, in the manner of packing and the mode of transit and in the loading and unloading of vehicles used for such conveyance.
- (k) Prescribing apparatus for testing petroleum, the tests to be applied and the manner in which tests are to be made.
- (l) Fixing fees for the sampling and testing of petroleum.
- (m) Appointing officers for the testing and examination of petroleum and prescribing their powers and duties.
- (n) Generally for the better carrying out of the purposes of the Act.

The rest of the Act (Sections 5 to 10) deals with the penalties for contravening provisions of the Act and the Rules made thereunder.

The subsidiary legislation made by the Minister under Section 4 are contained under the Act and are referred to as The Petroleum Rules. These Rules are primarily concerned with the importation, classification, transportation and storage of petroleum and the attendant licensing requirements. It can be argued, then, that while the Act is sufficient in terms of making substantive rules regulating the physical handling of petroleum, it has failed to cater for the following-

- The Act has not taken into account new developments arising from the liberalisation of the petroleum sector in 1994 that removed all restrictions upon the importation of petroleum. The Act in its present state still has restrictions on the importation of petroleum.
- The Act does not address itself to environmental issues which arise by the very nature of petroleum itself, and the potential devastating effect on the environment if certain necessary precautions for the safe handling of petroleum are not enforced and regulated effectively.
- The Act has given the Minister excessive and arbitrary power to make rules for the regulation of petroleum in Kenya. Such power, if not exercised conscientiously, could result in abuse of office by the Minister.

- The Act has failed to make provision for an office, for example that of a Commissioner of Petroleum, who is engaged on a full time basis in the running of the petroleum sector in Kenya. Experience has shown that in other sectors, such an office is necessary for the smooth and efficient running of its affairs.
- The Act has failed to take into account the role that can be played by certain other organisations in the petroleum industry that would enable the sector to be run more efficiently.

1.3 THE EFFECT OF THE RESTRICTIVE TRADE PRACTICES, MONOPOLIES AND PRICE CONTROL ACT ON THE OIL AND PETROLEUM INDUSTRY IN KENYA

A restrictive trade practice is defined under Section 4 of the Restrictive Trade Practices, Monopolies and Price Control Act (hereinafter referred to as the RTP Act) as an act performed by one or more persons engaged in production or distribution of goods or services which-

- (a) In respect of other persons offering the skills, motivation and minimum seed capital required in order to compete at fair market prices in any field of production or distribution, reduces or eliminates their opportunities so to participate; or
- (b) In respect of other persons able and willing to pay fair market prices for goods or services, either for production, for resale or final consumption, reduces or eliminates their opportunities to acquire those goods or services.

Prior to the liberalisation of the petroleum sector in 1994, there were only 8 petroleum companies in operation in Kenya. The Government had introduced strict quotas under which these companies were allowed to import crude oil into the country. These companies were as such engaged in oligopolistic trade practices, which fell within the meaning of a restrictive trade practice under Section 4 of the RTP ACT.

However, with the introduction of liberalisation, this was no longer the situation as the market was opened up to accommodate anyone willing to enter into the field of importation and supply of petroleum in Kenya. The effect of this was to bring the entire petroleum sector into conformity with the provisions of the RTP Act.

In addition, under Section 5(b) of the RTP Act, trade practices which are directly and necessarily associated with the licensing of participants in certain trades and professions by agencies of the Government acting in accordance with authority conferred on them by an Act of Parliament are exempted from the provisions of the Act. This implies that the authority given by the Petroleum Act to the Minister to appoint officers who are in charge of licensing of petroleum operators in Kenya cannot be classified under a restrictive trade practice.

With regard to the regulation of prices, the RTP Act at Section 35(1) gives power to the Minister for the time being responsible for finance to fix by order maximum prices for the sale, either wholesale or retail, of any goods. However, whereas this provision exists in the statute, the Government policy is against price regulation, and no maximum prices have been set for petroleum products under this Act.

1.4 GOVERNMENT POLICY RELATING TO TAXATION OF PETROLEUM, IT'S EFFECT ON THE PRICING MECHANISM, AND ITS GENERAL ROLE IN THE SECTOR.

The Government of Kenya relies substantially on revenues generated from taxes on petroleum and petroleum products to meet its recurrent and development expenditure. This reliance of the Government on these taxes has led to a taxation policy that lays particular emphasis upon the generation of maximum revenues from the petroleum sector. In this regard, therefore, the following taxes are levied upon the sector.

1.4.1 TAXES LEVIED UNDER THE INCOME TAX ACT CAP. 470 OF THE LAWS OF KENYA

Income tax on oil companies is set aside from that of other incorporated bodies. The Ninth Schedule of The Income Tax Act, referred to as The Taxation of Petroleum Companies Schedule, deals with tax on petroleum companies.

Under the schedule, a petroleum company is described as a body corporate that carries out, in addition to any other activities, operations under a petroleum agreement entered into under the Petroleum (Exploration and Production) Act.

The effect of this description implies that only petroleum companies that are actively engaged in the exploration or production of petroleum under an agreement with the Government to that effect are liable to be taxed under this schedule.

However, other bodies engaged in the petroleum sector are taxed under Section 34 of The Income Tax Act. Under this section, tax shall be charged at the corporation rate for that year of income.

1.4.2 ROAD MAINTENANCE LEVY FUND

This tax was introduced in 1993 under The Road Maintenance Levy Fund Act No. 9 of 1993. The aim of this tax is to collect funds for the construction, repair and maintenance of public roads in Kenya. It was introduced to replace the Road Toll Tax, which was deemed to be arbitrary in application and difficult to implement.

Under this fund, the Minister of Transport and Communication makes an order from time to time indicating the amount of the levy on petroleum fuel (the levy may be on premium petrol, regular

petrol, diesel, kerosene or liquefied petroleum gas). The current Road Maintenance Levy Fund (Imposition Of Levy) Order, which came into effect on 1st September 2000, imposes the rate at nearly 50 percent of a litre of premium petrol.

1.4.3 THE REFINERY AND THROUGHPUT TAX.

This was a tax levied upon oil companies or anyone importing crude oil into Kenya. Under this tax, anybody importing crude oil into Kenya was required to pay The Kenya Petroleum Refinery Limited (K.P.R.L.) for refining the oil. This tax was introduced in October 1994, following the liberalisation of the petroleum sector. The tax was in the form of a suspended duty imposed at the rate of 50 cents per every litre of crude oil imported into the country.

The Government sought to introduce this tax so as to enable K.P.R.L. collect funds that would enable it not to be dependant upon the former guarantee it had, prior to the liberalisation in 1994, that all crude oil imported into Kenya be refined by the K.P.R.L.

This tax was abolished in 1999, when it was deemed that the K.P.R.L. was no longer financially reliant upon the guarantee.

1.4.4 THE EFFECT OF TAXATION ON THE PRICING MECHANISM OF PETROLEUM

The effect of the high taxes imposed by the government on the oil and petroleum industry in Kenya has led to a situation where by the companies pass on the burden of the tax onto the final consumer. This means that the tax is eventually met by the consumer, thus making petroleum products more expensive in Kenya than in other developing countries. Under Sessional Paper No. 10 of 1965³, the Government of Kenya had signified its intention to keep the rate of tax to the Gross National Product at below 18 percent. However, due to difficulties in its fiscal policies it had to increase this ratio to 25 percent⁴. A substantial part of this increase in the amount of tax can be attributed to increase in taxes on fuels and petroleum products.

Thus, it has been suggested that any future legislation on petroleum must take into account the pricing mechanism of petroleum so as to effectively apportion the tax payable between the consumer and the supplier or distributor, instead of the consumer bearing the whole burden of the taxes. Further to this, the role of the Government in the petroleum sector should be enhanced to aid in better regulation so as to justify the amount of tax it obtains therefrom.

³ Sessional Paper No. 10, titled African Socialism and Its Application To Planning In Kenya.

⁴ Under Sessional Paper No. 1 of 1986.

1.5 CONCLUSION

In this Chapter, the laws that are currently in operation that affect and regulate the petroleum sector in Kenya have been briefly analysed. What becomes immediately clear is that the sector has undergone drastic changes over the years that is not reflected by a corresponding change in the laws that govern it. The Petroleum Act has in particular been overtaken by developments in the market which have rendered it almost obsolete.

The importance of petroleum as a resource for nation building can not be underestimated. From a commercial point of view, regulations must exist to govern the market place. These regulations can only be put into place by laws. The law must therefore be as dynamic as the changes that occur in the market place. Laws must be re-evaluated from time to time to ensure that they do not lag behind the sectors that they are required to regulate.

This Chapter has therefore laid the foundation for an analysis of the changes that can or should be enacted so as to enable the petroleum sector in Kenya to be better regulated so as to ensure efficiency, safety and promotion of the sector.

CHAPTER TWO (2)

THE PROVISIONS OF THE PETROLEUM BILL 2001 AND ITS EFFECTS

2.1 INTRODUCTION

The Petroleum Bill 2001 is cited as a Bill for an Act of Parliament to regulate the importation, exportation, transportation, refining, storage and sale of petroleum and for associated purposes.

Under the **Memorandum of objects and reasons** contained under the Bill, the purpose of this Bill is to repeal and replace the Petroleum Act Chapter 116 of the Laws of Kenya. The primary objective of the proposed repeal is to review and refine the existing legal framework in order to reflect the developments in the market following the liberalisation of the petroleum sector in 1994. Key among the objectives of the Bill are-

- To provide for the licensing and regulation of petroleum business which is defined as the importation, exportation, refining, transportation, storage and sale of petroleum.
- To regulate the construction of pipelines, refineries and bulk liquefied petroleum gas facilities.
- To ensure the maintenance of health and safety standards within the sector.
- To enhance penalties for offences under the proposed Act in order to ensure compliance.

In this chapter, the Petroleum Bill 2001 will be analysed with regard to how effectively it has managed to address the above noted objectives contained under its Memorandum of objects and reasons. Further to this, the impact of the Bill if it were passed into a legislative instrument will be assessed. This assessment will look into both the legal and economic consequences upon the oil and petroleum industry in Kenya and the consumers of petroleum products in Kenya. Of particular concern will be the provisions of the Bill that are likely to conflict with other written laws, and which might come under further judicial scrutiny

However, an analysis of this Bill would not be complete if it were only limited to the express provisions contained under the Bill. In this regard, therefore, the Bill will be further analysed in relation to how effectively it manages the petroleum industry in other fields not expressly contained under the Memorandum of objects and reasons under the Bill.

2.2 THE PETROLEUM BILL 2001

The Petroleum Bill 2001 was published in the Kenya Gazette Supplement No. 26 (Bills No. 9) of 6th April 2001 from page 569 to 607 inclusive.

2.2.1 PRELIMINARY

Part I of the Bill is primarily concerned with definitions of terms used under the Bill. Of particular importance herein are the following terms-

“Petroleum” is defined to include petroleum crude and any liquid or gas made from petroleum crude, coal, schist, shale, peat or any other bituminous substance or from any product of petroleum crude and includes condensate.

“Minister” means the Minister for the time being responsible for matters relating to petroleum.

“Petroleum business” means a concern carrying on the importation, refining, exportation, transportation, storage or sale of petroleum.

“Petroleum dealer” means a person licensed to carry on petroleum business.

The definition of other terms contained under Part 1 of the Bill are precise and carry relevance to the entire reading of the Bill.

2.2.2 THE OFFICE OF COMMISSIONER OF PETROLEUM

Part II of the Bill is headed as the **Appointment, powers and duties of the Commissioner of Petroleum.**

Section 3 of the bill reads, “**There shall be a Commissioner of Petroleum and such other officers as may be necessary for the proper carrying out of the provisions of this Act and the Commissioner so appointed shall, subject to the directions of the Minister, be responsible for the general administration of this Act and the performance of all functions assigned to him thereunder.**”

Under Section 4 of the Bill, the duties of the Commissioner shall include-

- (a) The licensing and regulation of the importation, exportation, refining, transportation, storage and sale of petroleum.
- (b) The inspection and supervision of petroleum dealers.

- (c) Liaising with the Kenya Bureau of Standards on the enforcement and review of petroleum quality standards.
- (d) Liaising with the Ministries responsible for health, safety and the environment in formulating and enforcing the health and safety standards with which a licensee shall be required to comply in the conduct of petroleum business.
- (e) Advising the Minister on the formulation of policy on, and the development of, the petroleum industry.
- (f) Developing and managing a national petroleum conservation programme.
- (g) Liaising with the responsible Ministry in the development and co-ordination of a national oil-spill response plan.
- (h) Mounting public education campaigns on issues relating to petroleum, particularly with regard to environment, health, safety and petroleum conservation.
- (i) Acting as liaison between the oil industry and the various Government bodies and agencies involved in the petroleum sector.
- (j) Making recommendations to the Minister for periodic review of the petroleum laws and regulations after consultations with other stakeholders.
- (k) Performing such other duties as may from time to time be assigned by the Minister.

Under Section 5(1) of the Bill, the Commissioner shall also collect such data and other information as may be necessary to enable him to maintain supervision and surveillance of the affairs of petroleum dealers and for the protection of consumers and, for that purpose, may require petroleum dealers to submit statistical and other returns on a periodic basis in addition to any other returns required by law.

Similarly, under Section 6 of the Bill, the Commissioner may publish, in whole or in part, at such times and in such manner as he thinks fit, any information furnished to him under the Bill.

The Commissioner is empowered under Section 7 to delegate, in writing, any of his powers and duties under the proposed Act to such officer or officers appointed under Section 3 of the Bill as he may determine.

Under Section 3(2), no person shall be qualified for appointment as Commissioner unless such person-

- Holds a degree from a university recognised in Kenya, in engineering, economics, science, law, commerce or energy.
- Has at least 15 years working experience in a relevant field, ten of which must have been spent in the petroleum sub-sector, and

- Is at least thirty-five years of age.

Further, a person shall not qualify for appointment, or if already appointed, shall be disqualified if-

- He, his spouse or his dependent child is or becomes the owner, manager or is otherwise involved in the ownership or management of any concern engaged in petroleum business.
- He is adjudged or enters into a composition or scheme of arrangement with his creditors.
- He has been convicted of an offence and sentenced to a term of imprisonment exceeding six months.

However, notwithstanding the above, no act by the Commissioner done *bona fide* for the purposes of, or in pursuance of the proposed Act, shall be invalidated by reason only of any defect in his appointment.

The purpose of this qualifications requirement for the holder of the office of Commissioner appears to be the need to have a professionally qualified individual who has had relevant experience in the petroleum sub sector to occupy the office. Further to this, the requirements under subsection (3) are a guard against any potential Commissioner, or a sitting Commissioner, exercising partiality in the discharge of his duties due to financial constraints on his part, or due to criminal impropriety. It seeks to have only morally upright individuals as holders of this office.

The effects of the establishment of the office of the Commissioner of Petroleum will be discussed later in this chapter.

2.2.3 THE LICENSING OF PETROLEUM CONCERNS

This is dealt with under Part III of the Bill. Under the provisions of Section 8, no person shall import, export, refine, sell, store or transport petroleum except under and in accordance with the terms of a licence issued under this Part.

The Commissioner of Petroleum shall designate such number of licensing officers as are necessary for the proper administration of the provisions of the proposed Act. Under Section 10(1), any person intending to engage in petroleum business shall, prior to commencing such business, apply for a license in accordance with this Section. The Section goes further to

prescribe the categories of licences required, and how the application for the licences shall be made.⁵

The licensing officer shall consider every application received under this Section, and shall, if satisfied that the applicant meets the prescribed requirements for the grant of a license, within 30 days of the receipt of the application, issue a license to the applicant upon payment of the prescribed fee. A license shall be subject to such conditions as the Commissioner may deem fit.

The Bill contains further information as to renewal, revocation and particulars of licences which relate to regulation via licensing, and penalties for the breach of licensing requirements.

However, the decision of a licensing officer is not final, under Section 19(1), a person aggrieved by the decision of the licensing officer may, within 21 days of being notified of such decision, appeal to the Minister. The Minister shall, by notice in the Kenya Gazette, establish an Appeals Advisory Committee which shall comprise such members as the Minister may specify.⁶ Every appeal received by the Minister shall be referred to the Appeals Advisory Committee which shall consider such appeal and forward it to the Minister together with its recommendation thereon. The decision of the Minister on any licensing appeals shall be final.

As had already been earlier noted, licensing is the primary means by which regulation of the petroleum sector is effected. In this regard, therefore, the Bill appears to be conclusive as to the regulation by licensing as it covers it comprehensively.

2.2.4 CONSTRUCTION OF PIPELINES, REFINERIES AND BULK LIQUEFIED PETROLEUM GAS FACILITIES

This Part of the Bill relates to the regulation of construction of petroleum handling infrastructure in the form of refineries, pipelines, e.t.c. It is similar to licensing as it seeks the authority of the relevant office for permission to construct.

Under Section 20(1), any person intending to construct a pipeline, refinery or bulk liquefied petroleum gas facility shall before commencing such construction, apply in writing to the Minister for authority to do so. An application under subsection (1) shall-

- (a) State the name and address of the owner of the proposed pipeline, refinery or bulk liquefied petroleum gas facility.

⁵ Under Section 10(3), every application for a license shall be made in the prescribed form addressed to the licensing officer and shall identify the proposed place of business and the type of petroleum business activity in respect of which the license is sought.

⁶ There is no requirement for any qualification of the members whom the Minister may appoint to the Committee under the Bill. The Minister is thus granted absolute discretion in this respect.

- (b) Be accompanied by three copies of plans and specifications for the proposed pipeline, refinery or liquefied petroleum gas facility.
- (c) In the case of a pipeline, specify the points between which the proposed pipeline is intended to run and state what is to be transported by the proposed pipeline.
- (d) In the case of a refinery or bulk liquefied petroleum gas facility, specify the location, type and capacity.
- (e) Contain such other details as may be prescribed.

The Minister is required to consider every application received under this Section and shall, if satisfied that the applicant meets the prescribed requirements, by notice in the Kenya Gazette, grant to the applicant authority to construct a pipeline, refinery or bulk liquefied petroleum gas facility. This authority shall be subject to the prescribed conditions.

Having conditions for the granting of authority herein effects regulation of these petroleum facilities. Under Section 23, the Minister shall, before issuing an authority under Section 20, take into account all factors that appear to him to be relevant, including but not limited to the following with respect to the facility-

- The relevant Government policies.
- The financial capability of the applicant, and the methods of financing the proposed pipeline, refinery or bulk liquefied petroleum gas facility.
- Any public interest that in the Minister's opinion, may be affected by the granting or the refusal of the authority being sought.
- Compliance with the Environmental Co-ordination and Management Act No. 8 of 1999, and in particular, the report of the environmental impact assessment study in respect of the project, and with any other relevant laws.

The effect of Section 23 is that the Minister may take into account Government policies, Sessional Papers, the public interest, environmental concerns, land tenure systems, e.t.c before granting such authority. The upshot of this is that the Minister has unfettered discretion to determine what criteria to use to grant or refuse to grant authority.

If after authority is granted to construct a pipeline, refinery or bulk liquefied petroleum gas facility has been granted, the execution of works has not commenced at the expiry of twenty four months from the date on which the authority was granted, or at the expiry of any extended period which the Minister may allow, the authority shall cease to have effect.

An authority may further contain terms and conditions as the Minister may deem appropriate and shall, in particular, make provision for the duration of the authority, the person who is authorised

to execute the works, the area in which the works may be executed and the conditions to be satisfied before any works authorised by the Minister are used.

Subject to this, the Minister may by notice in the Kenya Gazette, revoke or suspend an authority to construct a pipeline facility if any term or condition thereof has not been complied with or has been contravened. The rest of the Part deals with offences relating to construction and operation of pipelines, refineries and bulk liquefied petroleum gas facilities, and penalties arising from the same.

2.2.5 SAFETY AND ENVIRONMENTAL STANDARDS

This is contained under Part V of the Bill. This Part is concerned with the regulation of the quality of petroleum with regard to its safety, and other environmental concerns.

Under Section 26(1) of the Bill, it is stated that every person who engages in petroleum business shall ensure that such petroleum conforms to the relevant Kenya standard declared under the Standards Act, and any other standards which the Minister, in consultation with the National Standards Council, may prescribe in respect of petroleum. As regards adulterated petroleum, the storage, transportation or sale of the same is prohibited under subsection (2)

In addition to the above, there is a requirement for importers of petroleum to maintain such quantities of petroleum at locations as the Minister may, by notice in the Gazette, prescribe. The reason behind this requirement, while not expressly provided for in the Bill, is to enable the sampling of such petroleum products for conformity with the set standards as prescribed under Section 26(1). The Bill also makes provision for petroleum handlers to comply with other written laws relating to the environment, health and safety, notwithstanding the provisions of the Bill itself. The Bill requires that any accident which occurs in relation to petroleum business that causes harm to people or the environment in Kenya, or within the Exclusive Economic Zone, be reported in writing to the Commissioner of Petroleum by the petroleum dealer as soon as possible. The Part further describes the offences related to contravention of the set out provisions and the penalties attached thereto.

Overall, the Bill does not make, nor set out the standards of safety required for the handling of petroleum, nor does it set out benchmarks for what is considered to be adulterated petroleum.⁷ Instead, the Bill passes this duty to the Kenya Bureau of Standards and to the Minister in consultation with the National Standards Council.

⁷ Under Section 2 of the Bill, adulterated petroleum is vaguely described as any mixture of refined petroleum products.

2.2.6 RULES AND POWER TO MAKE RULES

Under Section 4 of the Petroleum Act, the Minister is granted power to make rules regarding petroleum. The rules which he can make under this Section were outlined in Chapter One. The Petroleum Rules made under Section 4 were contained under the Act as subsidiary legislation. The Petroleum Bill departs from this earlier format. Whereas the Minister is granted power to make rules under Section 30(1), these rules are not contained under the Bill as subsidiary legislation.

However, the Petroleum Bill gives the Minister far much wider powers in the making of rules than the Petroleum Act. Under Section 30(1) of the Petroleum Bill, the Minister may make rules-

- (a) Dividing petroleum into classes or categories and making different provisions with regard to such classes or categories.
- (b) Providing for the exemption of Government Ministries and Departments from the requirement of licences.
- (c) Providing for the procedure and the manner of operations of the office of the Commissioner.
- (d) Providing for the importation of petroleum through an open tender system and the manner in which such system shall operate.
- (e) Providing for the maintenance of minimum operational stocks of petroleum.
- (f) Providing for the maintenance of strategic stocks of petroleum.
- (g) Providing for the mode of sale, documentation and display of prices of petroleum in retail dispensing sites and depots.
- (h) Providing for environment, health and safety aspects associated with the handling, storage and use of petroleum.
- (i) Providing for notice to be given by the owner or master of any ship entering a port with petroleum and for ascertaining the quantity and specification of any petroleum on board such ship.
- (j) Determining the places at which, and the conditions subject to which petroleum may be imported, offloaded, landed, stored, loaded or transhipped.
- (k) Providing for the delivery to such officer or officers as may be specified, samples of petroleum landed or intended to be landed for testing.

- (l) Providing for the nature and situation of premises in respect of which licences to possess petroleum may be granted, the inspection of premises so licensed and the taking of samples and testing of petroleum found thereon.
- (m) Governing the design, construction and operation of pipelines, refineries and bulk liquefied petroleum gas facilities and providing for the protection of property, the environment and the safety of the public in relation thereto.
- (n) Governing the design, construction and operation of retail dispensing sites and storage depots and providing for the protection of property and the environment and safety of the public in relation thereto.
- (o) Governing the design and construction of vehicles and vessels to be used in the transportation of petroleum by road, rail, inland or coastal waters.
- (p) Prohibiting or restricting the carriage of goods and passengers in vessels carrying petroleum.
- (q) Prescribing the quantity of petroleum that may be conveyed at anyone time or in any one vehicle.
- (r) Prescribing the precautions to be observed in the transportation of petroleum, in the manner of packing and the mode of transit and in the loading and unloading of vessels used for such transportation.
- (s) In consultation with the Kenya Bureau of Standards, prescribing the appointment of officers for the testing and examination of petroleum and prescribing their powers and duties.
- (t) In consultation with the Kenya Bureau of Standards, prescribing apparatus for testing petroleum, the tests to be applied and the manner in which such tests are to be made.
- (u) Prescribing the marking of fuels and categories of petroleum in respect of which such marking shall be carried out.
- (v) Providing for the supply of petroleum statistics and information.
- (w) Generally for the better carrying out of the provisions of the proposed Act.

These newer and further reaching powers reflect developments which have occurred in the petroleum sector which had not been envisaged at the time the Petroleum Act was enacted. The effects of these will be analysed later in this Chapter. The rest of Part VI deals with offences and penalties relating to the contravention of any rules made under the proposed Act.

2.2.7 THE PETROLEUM TRIBUNAL

Section 41(1) of the Petroleum Bill establishes the Petroleum Tribunal. It states, "there is established a tribunal to be known as the Petroleum Tribunal for the purpose of arbitrating in cases where disputes arise between the parties under this Act. The Tribunal shall consist of a chairman who shall be a person qualified to be appointed a Judge of the High Court Of Kenya, and two other members whom the Minister is satisfied possess expert knowledge of the matters likely to come before the Tribunal, one of whom shall be a person not in the employment of the Government. The Bill further states that the Minister in consultation with the Attorney General shall appoint the chairman and members of the Tribunal.

The schedule to the Petroleum Bill contains provisions relating to the operation of the Petroleum Tribunal. It contains the terms and tenures of the members of the Tribunal. Section 9 of the Schedule states that the Tribunal shall have the powers of the High Court-

- To administer oaths to the parties and witnesses to any proceedings.
- To summon witnesses and to require the production of documents.
- To order the payment of costs.

In addition, the provisions of the law relating to Commissions of Inquiry in Kenya shall apply, with any necessary adaptations or modifications, to the members of, the witnesses before, and the proceedings before the Tribunal with respect to the protection of the members of the Tribunal from suit, the form of summonses to witnesses, the giving or fabricating of false evidence and the appearance of advocates. Under the Schedule, decisions of the Tribunal shall be by a majority of votes of the members, and in the case of equality of votes, the chairman shall have a casting vote. All decisions of the Tribunal shall be signed by all members agreeing thereto. Under Section 11 of the Schedule, the Tribunal shall have power to make rules governing its procedure.

2.2.8 MISCELLANEOUS PROVISIONS

Part VII of the Petroleum Bill relates to other miscellaneous provisions not dealt with under the other Parts of the Bill. Primarily, it provides for the Commissioner of Petroleum to, from time to time if so directed by the Minister, cause an inspection to be made by an inspector authorised by him in writing, of any petroleum dealers and of his books, accounts and records. The Part further describes the powers of the inspectors, the procedures for the inspection, and offences related to the contravention of or a refusal to produce books and accounts for inspection.

Under Section 37(4) of the Bill, the inspector shall submit his report to the Commissioner in which he shall draw attention to any breach or non-observance of the requirements of the proposed Act or any regulations made hereunder, any irregularity in the manner of conduct of the business of the petroleum dealer or any apparent mismanagement or lack of management skills in that dealer, and any other matter revealed or discovered in the course of the inspection, warranting remedial action or further investigation.

Section 42 contains a general penalty for the contravention of the provisions of the proposed Act, while Section 43(1) repeals the Petroleum Act.

2.3 THE EFFECTS OF THE PETROLEUM BILL 2001

A cogent examination of the provisions of the Petroleum Bill 2001 would not be complete without an analysis of the expected effects and reactions that would occur if the Bill were to be passed into law. The effects that would occur would be of two types; the strictly legalistic effect of the provisions on the petroleum sector, and the economic effects that would stem from these provisions.

2.3.1 THE LEGAL IMPLICATIONS OF THE PETROLEUM BILL 2001 IF IT WERE PASSED INTO LAW.

The Petroleum Bill 2001 seeks to introduce two radical concepts which had not previously existed within the petroleum sector in Kenya. These are the establishment of the office of Commissioner of Petroleum, and the establishment of a Petroleum Tribunal.

As had been earlier noted, Section 3(1) of the Petroleum Bill establishes the office of a Commissioner of Petroleum and such other officers as may be necessary for the proper carrying out of the provisions of the proposed Act. The Commissioner so appointed shall, subject to the directions of the Minister, be responsible for the general administration of the proposed Act, and all functions assigned to him thereunder.

The establishment of this new office creates legal implications of two kinds. Firstly, amongst the duties of the Commissioner is included the duty to make recommendations to the Minister for periodic review of petroleum laws and regulations after consultations with other shareholders.⁸ Whereas this duty might not attract much attention because it is only limited to the making of a recommendation, it is nevertheless of great importance. Its effect is that the Bill

⁸ Under Section 4(J) of the Petroleum Bill.

creates a legal framework for it to be constantly re-evaluated and reviewed from time to time so as to keep it in touch with the changes that will inevitably occur in the petroleum sector. A recommendation by the Commissioner of Petroleum to the Minister for the review of particular provisions would go a long way to cure the problem of the Act being rendered ineffective or redundant by the changes that occur in the market, as is the case with the current Petroleum Act Cap 116 of the Laws of Kenya. If this duty of the Commissioner to recommend proposals for the review of petroleum laws and regulations could be linked to an established legislative law review program that would incorporate these proposals for publication before Parliament, then a proper mechanism for the regular review of petroleum laws would be put in place.⁹

Secondly, the Commissioner of Petroleum, as established by the Petroleum Bill 2001, becomes the principle licensing officer (under Section 4(a)) and is also charged with the responsibility of the inspection and supervision of petroleum dealers (Section 4(b)). The legal effect of this is immediately clear. As regards licensing, under Section 8(1), no person shall import, export, refine, sell or transport petroleum except under and in accordance with the terms of a licence issued under the proposed Act. Further, a licence shall be subject to such conditions as the Commissioner may deem fit.

Licensing is the primary means of regulating the petroleum sector in Kenya, and as such, the Commissioner becomes the primary regulating officer. He decides whom to grant licences, and on what conditions such licences shall be granted. The legal effect of this is that he, subject to the provisions of the proposed Act, becomes the regulator of the petroleum sector in Kenya by regulating persons granted licences to operate in the sector. However, persons aggrieved by any decision of the Commissioner as principle licensing officer may appeal to the Minister as laid out under Section 19 of the Petroleum Bill.

As regards the inspection and supervision of petroleum dealers, the commissioner is empowered under Section 5(1) to collect such data and information as may be necessary to enable him to maintain supervision and surveillance of the affairs of the petroleum dealers and for the protection of consumers. For this purpose, he is empowered to require petroleum dealers to submit statistical and other returns on a periodic basis, in addition to any other returns required by law. The legal effect of this is that the petroleum dealers will be required to submit statistical and other returns under the proposed Act to the Commissioner of Petroleum, at periods which he shall specify. These returns may be published, in whole or in part, at such times and in such manner as the Commissioner thinks fit, provide that such information would not be published if it disclosed the financial affairs of any person, unless the consent in writing of that person is

⁹ However, there is no comprehensive legislative law review program in Kenya at the present moment.

given. This in effect means that in addition to the returns submitted to the Income Tax department, to the Registrar of Companies, and other annual returns, petroleum dealers will be required, under the proposed Act, to make returns to the Commissioner of Petroleum. Under Section 5(2), a person who fails to furnish information pursuant to a request by the Commissioner under this Section commits an offence and shall be liable on conviction to a fine of not less than fifty thousand shillings, or to imprisonment for a term exceeding three months, or to both. This is in addition to the powers of the Commissioner to inspect petroleum dealers and their books, accounts, documents, correspondence, statements or returns under Sections 37 to 40 of the Petroleum Bill.

Section 41(1) of the Petroleum Bill establishes a Petroleum Tribunal for the purpose of arbitrating in cases where disputes arise between the parties under the proposed Act. The operational characteristics of the Petroleum Tribunal under Section 41 of the Petroleum Bill and the Schedule to the Petroleum Bill have already been discussed earlier in this chapter. However, the legal effects of this Petroleum Tribunal need to be addressed.

Under Section 9 of the Schedule to the Petroleum Bill, the Tribunal shall have the power of the High Court to administer oaths to parties and witnesses to proceedings, to summon witnesses and order production of documents, and to order the payment of costs. In addition, the law relating to Commissions of Inquiry under the Commissions of Inquiry Act shall apply with any necessary modifications or adaptations. Further, under Section 11 of the Schedule, the Tribunal shall have power to regulate its own procedure.

The first legal question that arises is who is empowered to institute proceedings of the Petroleum Tribunal? The Petroleum Bill does not state this, nor does it state how proceedings shall be carried out, nor what kinds of disputes arising between parties under the proposed Act can be referred to the Tribunal. In this respect, therefore, it can only be assumed that the intention of the Bill is for the Tribunal to make its own rules governing its procedure and in relation to which cases it shall arbitrate over under the power granted to it by Section 11 of the Schedule to the Petroleum Bill.

The second legal issue that arises in relation to the Petroleum Tribunal is related to its scope of operation. Under the Bill, the role to be played by the Petroleum Tribunal appears to be very limited. In relation to licensing, under Section 19(1) of the Bill, any person aggrieved by any decision of the licensing officer may, within 21 days of being notified of such decision, appeal to the Minister. The minister shall refer every appeal received by him to the Appeals Advisory Committee which shall consider such appeal and forward it to the Minister together with its

recommendations thereto. The decision of the Minister on any appeal shall be final. This means that the Petroleum Tribunal is automatically excluded from any disputes related to licensing.

Similarly, in relation to the authority required by any person intending to construct a pipeline, refinery or bulk liquefied petroleum gas facility, there is no provision for any appeal from the decision of the Minister.¹⁰ This also disqualifies any involvement of the Petroleum Tribunal, as no legal basis for appeal exists.

2.3.2 THE ECONOMIC EFFECTS OF THE PETROLEUM BILL 2001

The introduction of the Petroleum Bill has created the foundation for a stable base for the regulation of the petroleum sector in Kenya. Indeed, if the provisions of the Bill are enacted into law, then the current regulatory problems afflicting the sector would be alleviated to a great extent. It is almost practically impossible to attempt to evaluate all the economic effects that would arise from the enactment of the Petroleum Bill, and therefore, only a few important effects will be outlined herein.

Firstly, under Section 5(1) of the Bill, the Commissioner is empowered to collect data and information as may be necessary to enable him maintain supervision and surveillance of the affairs of the petroleum dealers, and may, for that purpose require petroleum dealers to submit statistical and other returns on a periodic basis. In addition, the Commissioner may publish, in whole or in part, at such times, and in such manner as he thinks fit, any information furnished to him under this Section, provided that the information so furnished shall not disclose the financial affairs of any person, unless the consent in writing of that person is given.

What this Section does is to empower the Commissioner to publish data received from petroleum dealers. This statistical data is of great economic value. It would enable economic analysts to predict trends in the market structure, it would enable development planners to be able to better allocate resources to where they are required in the petroleum sector, and it would further enable government to plan its tax structure in relation to the petroleum sector more efficiently.

Another advantageous economic effect is the introduction of regulations on the standards of the quality of petroleum (under Section 26 of the Bill). The effect of this is that the petroleum in the Kenyan market shall be of a consistently better quality, leading to greater efficiency of the industrial sector in Kenya, as compared to the present situation where inferior quality of petroleum, especially diesel oil and kerosene, has led to higher operating costs of industries in Kenya due to inefficiency of power machinery that run on sub-standard fuels.

¹⁰ Under Part IV of the Petroleum Bill.

Another economic effect would arise from the introduction of the office of the Commissioner of Petroleum. Under Section 3(2) of the proposed Act, the Commissioner must be a holder of a degree as specified therein, and must have also had at least ten years working experience in the petroleum sector. The importance of this office arises in that the Commissioner usurps part of the role played by the Minister in regulating the petroleum sector in Kenya. He is the chief regulating officer who has a hands-on role in the sector, unlike the Minister who holds political office. The role of a Commissioner who is so experienced and has moral integrity will instil confidence in investors in the petroleum sector, in addition to the immediate advantage of better and more relevant policy formulation in the petroleum sector.

All the above will contribute to economic development of the petroleum sector.

2.4 CONCLUSION

In this chapter, an analysis of the Petroleum Bill 2001 and its effects has been attempted. The Bill is an important tool in the attempt to realise the efficient and proper regulation of the petroleum sector in Kenya. The Bill is comprehensive in covering its objectives as had been defined in its Memorandum of Objects and Reasons, and would require only certain minor amendments. In conclusion, the Petroleum Bill 2001, if enacted into law, would be a suitable and effective replacement for the current Petroleum Act Chapter 116 of the Laws of Kenya.

CHAPTER THREE (3)

A COMPARATIVE ANALYSIS

3.1 INTRODUCTION

The Kenyan situation as regards the regulation of the petroleum sector is not untypical of the situation in many other developing countries in Africa. However, in the recent past, certain other countries have enacted petroleum legislation aimed at streamlining the operations of their oil and petroleum industry. Some of those countries which have been successful in implementing revolutionary petroleum legislation to curb irregularities in their local petroleum sectors would serve as a good example for Kenya to follow.

In particular, the Republic of South Africa is a recent example of a country that has adapted legislation to amend its petroleum laws. This legislation, and other oil and petroleum regulatory bodies in the petroleum sector of the Republic of South Africa will be looked into in this chapter. This shall then be compared to the Kenyan situation. In this chapter, too, will be an outline of the role of the Organization of Petroleum Exporting Countries (OPEC) in regulating the oil and petroleum sector in the international market. International conventions that also seek to regulate the international petroleum sector will also be analysed.

3.2 COMPARISON BETWEEN THE KENYAN AND SOUTH AFRICAN SITUATION

The South African Petroleum Products Act is the legislative instrument that governs the oil and petroleum sector in the Republic of South Africa. This Act has been in existence for over forty years. During this period, the South African petroleum sector underwent substantial changes to its structure and form. The regulatory framework which governs the South African oil industry has to be assessed in terms of its development within the historical context of the apartheid era, and the transition to democratic rule.

In the apartheid past, the regulator framework governing the industry possessed both a political and economic logic. During this time, the oil companies had to adjust to and conform to numerous policies within an apartheid regulatory framework. The regulatory framework was predominantly geared towards self-sufficiency and survival of the privilege of the white population of South Africa irrespective of the ultimate cost to the overall economy. The policies during the apartheid era were-

- Self-sufficiency of the South African market upon strategic stockpiles of crude oil that it maintained. (This was due to trade restrictions imposed upon South Africa by the international community due to its segregation policies).
- Self-protection of the white portion of the South African population by restricting or limiting the sale and supply of the scarce petroleum resource only to themselves.
- The apartheid government relied upon secrecy regulations enshrined in its laws to prevent questions related to taxes on petroleum products and other policy considerations.

The creation of the new democratic South Africa (from September of 1993) has ensured the scrapping of regulatory measures which were politically motivated. The transition equally ushered in a policy process for the restructuring of the petroleum industry in anticipation of the eventual transformation of the oil industry that it may serve the needs and economic priorities of the new South Africa within a competitive global environment. It was therefore in this regard that new legislation was sought to produce a viable alternative of the regulatory framework to suit its new priority based on reconstruction and development, and attracting new investment. Since this period, amendments have been presented and incorporated into the Petroleum Products Act, but however, no comprehensive overhaul or review of the petroleum laws has been carried out. Consequently, due to pressure from players in the South African market, a Petroleum Bill was presented before the South African Parliament in October of the year 2000. This Bill is yet to be debated before the parliament.

The South African Petroleum Bill is cited as a Bill for an Act of Parliament to promote the orderly development and regulation of the oil and petroleum industry, to establish a National Petroleum Regulator as the custodian and enforcer of the national regulatory framework, and to provide for matters connected therewith.¹¹ The objects of the Bill are stated to be-

- To promote the efficient, effective, sustainable and orderly development and distribution of petroleum products, storage and distribution facilities, and the provision of efficient, effective and sustainable petroleum transmission, storage, distribution and trading services.
- Facilitate investment in the petroleum industry.
- Ensure the safe, efficient, economic and environmentally responsible transportation of petroleum and petroleum gas.

¹¹ Contained under the South African Petroleum Bill, Short Title, and Chapter one.

- Encourage companies in the petroleum industry that are owned or controlled by historically disadvantaged South Africans by means of incentives so as to enable them to become competitive.
- Ensure that petroleum provision, storage, distribution and trading services are provided on an equitable basis and that the interests and needs of all parties concerned are taken into consideration.
- Promote the development of competitive markets for oil and petroleum products.
- Facilitate petroleum trade between the Republic of South Africa and other countries, and
- Provide access to petroleum and petroleum gas in an affordable and safe manner.

Chapter One of the South African Petroleum Bill is concerned with definitions of terms contained under the Bill, and its objects as enumerated above.

Chapter Two establishes the Office of a National Petroleum Regulator. Section 3 of the Bill states, "The National Petroleum Regulator is established as a juristic person". This establishes the National Petroleum Regulator as a legal person with all the attendant powers and privileges. This office is similar to that of the Commissioner as contemplated by the Kenyan Petroleum Bill 2001. Under the South African Bill, the Petroleum Regulator must in accordance with the proposed Act-

- (a) Issue licenses for
 - (i) Construction of petroleum transportation, storage and distribution facilities.
 - (ii) Operation of petroleum transportation, storage and distribution facilities.
- (b) Undertake investigations and inquiries into the activities of licencees.
- (c) Consult with government departments, the South Africa Petroleum Industry Association (SAPIA) and other bodies and institutions regarding any matter contained in this Act.
- (d) Consult with government departments, the South Africa Petroleum Industry Association and other petroleum regulatory bodies to promote and facilitate the construction, development and functioning of petroleum storage, transportation and sale.
- (e) Expropriate land or any right in, over or in respect of such land as is necessary for the performance of a licencee's functions.
- (f) Promote competition in the petroleum industry.
- (g) Regulate tariffs on petroleum and petroleum products in accordance with terms of the provisions of the proposed Act in the prescribed manner.
- (h) Perform any activity incidental to the performance of his functions under the proposed Act, and

- (i) Exercise any power or perform any duty conferred or imposed on him under the proposed Act.

Chapter Three of the South African Bill relates to licensing of petroleum concerns. The Bill states that no person may, without a licence issued by the Petroleum Regulator, construct petroleum refining, storage or distribution facilities, operate petroleum refining, storage or distribution facilities, or trade in petroleum. It further sets out rules for application for licences, conditions for the grant of licences (imposed by gas regulator within a guided framework), terms of the licence, etcetera.

Chapter Four of the Bill deals with general provisions relating to inspection, investigation and general supervision of the members of the petroleum industry. These powers are vested in the National Petroleum Regulator. In addition, it contains provisions in relation to expropriation of land and other transitional provisions.

The South African Petroleum Bill is similar in many aspects to the Kenyan Bill. In particular, provisions relating to the offices of the Commissioner of Petroleum and the National Petroleum Regulator. In both instances, the holder of the office is the chief regulatory officer of the petroleum sector, and he/she has a hands-on role in the running of the petroleum industry in a professional capacity. The main difference that arises between the two Bills is that the Kenyan Bill makes provision for the Minister in charge of petroleum to have a supervisory role over the Commissioner of Petroleum and the industry generally. Whereas in the Republic of South Africa, the Petroleum Regulator is solely in charge of the regulation of the sector, in Kenya, the Commissioner acts subject to the instruction of the Minister.¹² This in some instances can lead to duplication of roles which can cause inefficiency and unnecessary expense.

However, in the Republic of South Africa, regulation of the petroleum sector extends beyond governmental control. The South African Petroleum Industry Association (SAPIA) was founded in 1994 to usher South Africa's petroleum industry into a new era. The petroleum industry, in forming the Association, was aware of the need to make South Africa a competitive nation, and of the role that the availability and cost of fuel would play in achieving this target.¹³

The Association comprised of six founder members, BP Southern Africa Ltd, Caltex Oil (SA) Ltd, Engen Petroleum Ltd, Shell South Africa Ltd, Total South Africa Ltd, Zenex Oil Ltd, and was joined by Sasol Oil Company in 2000. SAPIA exists to foster among its members the desire to be a world-class industry and to encourage co-operation on matters of common concern, but without inhibiting competition. Among SAPIA's goals are the following-

¹² Under Section 4 of the Petroleum Bill.

¹³ The Role Of SAPIA in the South African market, published and available at www.mbendi.co.za/sapia.

- To ensure good governance and the highest standards of conduct of members of the petroleum industry.
- To promote consultation among members on issues of concern to the industry.
- To create a forum for consultation between the industry, government and other organizations on issues of public interest, particularly matters concerning the industry's effects on, and responsibility to, society and the natural environment.
- To seek consensus between the industry, labour, government and other interests on how the industry should be re-shaped to best serve the new South Africa.
- To inform and educate the public on the petroleum industry and improve understanding of issues which affect all South Africans.
- To publicise the industry's contribution to national welfare and promote its image.
- To represent the South African petroleum industry at international level.

SAPIA has consistently advocated for minimum governmental intervention in the petroleum industry. It believes that regulation over the commercial functioning of the industry is not necessary to ensure a stable supply of petroleum products at internationally competitive prices to the economy and to consumers.¹⁴ The government of South Africa has recognized this and included SAPIA as a regulatory body in the South African Petroleum Bill as had been earlier outlined.¹⁵

However, minimum governmental intervention does not mean complete *laissez-faire* in the petroleum industry. Regulations concerning safety and environmental issues will need to be maintained and enforced. Similarly, anti-competitive behaviour and monopolistic practices should also be strictly policed.¹⁶

SAPIA also plays a role in policy formulation by participating in a National Advisory Forum. Among its policy suggestions for the petroleum industry are-

- The state should no longer be involved in commercial operations in the petroleum industry.
- Refiners should remain in control of their own crude acquisition.
- Industry participants should be free to import and export petroleum products without controls.
- The general competition law, franchising law and labour laws prevailing in the economy will apply to the liquid fuels industry.

¹⁴ An address by SAPIA Director Mike Rademeyer to the Portfolio Committee on Minerals and Energy.

¹⁵ Under Chapter 2 of the South African Petroleum Bill.

¹⁶ Supra, Note 14.

- Sound health, safety, environmental protection and energy efficiency standards will apply and be enforced by the state.
- A stable and competitive petroleum industry.

In Kenya, the Petroleum Bill does not make provision for the regulation of the petroleum sector by any private sector body. However, it cannot be expected that the Commissioner of Petroleum and the other officers appointed under him, or the Minister in charge of petroleum can effectively be able to advance regulation of the industry or apply formulation of policies in the sector single-handed. It is immediately clear that the petroleum sector in Kenya has to come together to also participate in the regulation of the sector. This can be attributed to a number of reasons-

- Government does not have sufficient resources to maintain a comprehensive monitoring and regulatory mechanism over the sector. Thus, a self-monitory mechanism ought to be imposed.
- Issues of policy formulation should be carried out on an interpartite basis, with all concerned persons included or represented.

Additionally, as the industry developed, it became necessary that a structure for initiating change, promoting petroleum interests and serving as a forum for co-operation within the industry itself, with Government and the public, be put into place.

The Petroleum Institute of East Africa (PIEA) was launched on the 8th July 2000 in response to a recognized need in the industry, following the liberalization of the petroleum sector in 1994, that the oil companies in Kenya lacked an organized body which could liaise with the government over industry policy issues or jointly articulate the industry's concerns.

The PIEA describes itself as a centre in East Africa for the advancement and dissemination of technical, economical and professional knowledge relating to the international oil and gas industry, and acts as a forum for all with interest in the petroleum industry for the advancement and safety of the industry. The membership of the PIEA is of a voluntary nature and comprises of all the major petroleum companies in Kenya and several of the small independent oil suppliers.

The PIEA provides a range of services to the petroleum industry such as organizing of technical meetings, conferences, workshops and making available technical and non-technical educational material that is of relevance to the sector.

The Institute has, at its basis of incorporation, the following fundamental principles-

- To provide a forum for interaction for all interested in the oil and petroleum industry.

- To promote the mutual improvement of its members and assist members acquire professional knowledge, values and understanding of the petroleum industry.
- To provide an industry focus that is independent of Government and other commercial interests.
- To foster foreign and domestic trade for petroleum in East Africa.
- To lobby for the enactment of comprehensive guidelines necessary for the advancement and safety of the petroleum industry.
- To afford a means of co-operation with Government on all issues of public concern.

The role that the PIEA plays in the regulation of the petroleum sector in Kenya can be likened to that of SAPIA. However, the South African body has been incorporated under the proposed South African Petroleum Bill, which if enacted, would give the body statutory mandate to participate in policy formulation and regulation. In Kenya, the Petroleum Bill does not make provision for the PIEA or any such local body to participate in the policy formulation or regulation of the local petroleum industry.

In conclusion, it can be surmised that the South African position is almost similar to the Kenyan position in terms of regulation of the petroleum sector. The only major difference being that in South Africa, there is a greater emphasis on the government playing a secondary role in the regulation of the sector.

3.3 THE ROLE PLAYED BY THE OPEC AND INTERNATIONAL CONVENTIONS IN THE REGULATION OF THE INTERNATIONAL PETROLEUM SECTOR

3.3.1 THE ORGANIZATION OF PETROLEUM EXPORTING COUNTRIES

The Organization of Petroleum Exporting Countries (OPEC) was founded in Baghdad, Iraq, in September of 1960. At the time of its formation, the original members of OPEC were Iran, Iraq, Kuwait, Saudi Arabia and Venezuela. Between 1960 and 1975, the organization expanded to include Qatar (1961), Indonesia (1962), Libya (1962), The United Arab Emirates (1967), Algeria (1969) and Nigeria (1971). Ecuador and Gabon also became members but subsequently withdrew. The aim of the organization is to co-ordinate and unify its members petroleum policies with regard to crude oil production quotas. It is estimated that the current eleven OPEC members

account for roughly 40% of the world's oil production, and hold about 77% of the world's oil reserves.¹⁷

The main role that OPEC plays on the international oil and petroleum sector is with regard to the prices of crude oil. By limiting the production of crude oil through a quota system, OPEC controls the prices at which crude oil is made available to the world market. At its quarterly meetings, the 10 OPEC countries national oil ministers decide issues and make announcements that influence world oil markets and prices.

OPEC countries tend to produce at levels above its production quotas set by the meetings of the national oil ministers, except when the quotas set are near total production capacities. Due to the OPEC countries policy considerations, most of the crude produced is withheld as strategic stocks of petroleum in the producing countries, and only a limited amount is made available on the world market, leading to increasing cost of crude oil due to excessive demand. Thus, importers or refiners of crude oil have to buy crude at a higher price, and the transferred effect of this high price of crude is eventually passed to the consumer of the petroleum product.

However, non OPEC countries that produce oil have consistently worked to supply crude at lower prices. In Kenya, in particular, the recent decision by the Ministry of Energy to allow local companies to import zero-rated crude oil from Sudan under the Common Market For Eastern and Southern Africa (COMESA) trading bloc agreement at a lower cost of crude oil than that set by the OPEC countries will inevitably lead to cheaper prices of petroleum products to the consumer of petroleum products.¹⁸

3.3.2 INTERNATIONAL CONVENTIONS GOVERNING THE OIL AND PETROLEUM SECTOR

There are two basic international conventions that govern the oil and petroleum sector. These are the **International Convention On Civil Liability For Oil Pollution Damage** and the **International Convention On Oil Pollution Preparedness, Response and Cooperation**.

These conventions are primarily aimed at curbing the harmful effects of oil pollution.

The International Convention On Civil Liability For Oil Pollution Damage was drawn up in Brussels in November of 1969. In its preamble, the convention reads that the state parties to the

¹⁷ A report of the Energy Information Administration, Short-term Energy Outlook – International Petroleum Supply and Demand with OPEC, available at www.energyforum.gov.sa.

¹⁸ Extracted from the Daily Nation of Wednesday, July 11, 2001.

convention, conscious of the dangers of pollution posed by the worldwide maritime carriage of oil in bulk, and convinced of the need to ensure that adequate compensation is available to persons who suffer damage caused by pollution resulting from the escape or discharge of oil from ships, desiring to adopt uniform international rules and procedures for determining questions of liability and providing adequate compensation in such cases, drew up the convention. This convention exists, therefore, for the purpose of apportioning civil liability to persons guilty of the pollution of the seas by discharge or escape of oil and by means of the penalty imposed, to compensate the victims of the oil spill.

The International Convention On Oil Pollution Preparedness, Response and Cooperation is more recent than the International Convention On Civil Liability For Oil Pollution Damage, having come into effect on the 30th of November 1990. Under the convention, the parties to it-

- Conscious of the need to preserve the human environment in general and the marine environment in particular.
- Recognizing the serious threat posed to the marine environment by oil pollution incidents involving ships, offshore units, sea ports and oil handling facilities.
- Mindful of the importance of precautionary measures and prevention in avoiding oil pollution in the first instance, and the need for strict application of existing international instruments dealing with maritime safety and marine pollution prevention.
- Mindful also that in the event of an oil pollution incident, prompt and effective action is essential in order to minimize the damage which may result from such an incident.
- Emphasizing the importance of effective preparation for combating oil pollution incidents and the important role which the oil and shipping industries have in this regard.
- Recognizing further the importance of mutual assistance and international cooperation relating to matters including the exchange of information respecting the capabilities of states to respond to oil pollution incidents of significance which may affect the marine environment or the coastline and related interests of states, and research and development respecting means of combating oil pollution in the marine environment.
- Taking account of the “polluter pays” principle as a general principal of international environmental law.
- Taking account also of the importance of international instruments on liability and compensation for oil pollution damage, including the 1969 International Convention On Civil Liability For Oil Pollution Damage, and the 1971 International Convention On the Establishment of an International Fund for Compensation for Oil Pollution Damage

(FUND), and taking account of the importance of bilateral and multilateral agreements and arrangements including regional conventions and agreements.

- Bearing in mind also the relevant provisions of the United Nations Convention on the Law of the Sea¹⁹, being aware of the need to promote international cooperation and to enhance existing national, regional and global capabilities concerning oil pollution preparedness and response, and taking into account the special needs of the developing countries and small island states, considered that these objectives may best be achieved by the development of an International Convention on Oil Pollution Preparedness, Response and Cooperation.

The Government of Kenya has recognized the dangers posed to the marine resources by ships carrying oil, and has ratified both of the above mentioned conventions, in addition to the Merchant Shipping (International Safety Management (ISM) Code) Regulations covering other marine safety aspects, and is in the process of enacting them into law.²⁰

3.4 CONCLUSION

The international conventions governing the oil and petroleum industry are all related to the field of environmental protection and pollution prevention. There does not exist any other comprehensive international mechanism to regulate other fields of the industry in relation to pricing, co-ordination of oil supply, marketing, disposal of oil surplus and related wastes. The majority of these are, however, covered under regional, bilateral and multilateral agreements and arrangements. These agreements or treaties are not always beneficial to the overall international well-being of the industry, as has been evidenced by the operation of one of these bodies formed under a multilateral treaty, the OPEC.

The South African situation is largely similar to the Kenyan position, particularly with regard to governmental intervention in the oil and petroleum sector. The fundamental difference arises in the role played by the private sector in South Africa, which has, in its proposed statute, allowed private organizations in the sector to participate actively in the regulation of the sector by engaging in policy formulation and implementation to a certain extent.

The aim of this chapter has been to compare the Kenyan situation to that of another jurisdiction with the aim of realizing the best possible regulations that should be incorporated into the

¹⁹ Part XII of The United Nations Convention on the Law of the Sea.

²⁰ Under the draft regulations contained in the Merchant Shipping Act on Oil Spill Liability and Compensation.

Kenyan legislation. International conventions relating to the oil sector were also examined with a view to determining whether Kenya's legislation complied with its international obligations.

CHAPTER FOUR (4)

RECOMMENDATION AND CONCLUSION

4.1 INTRODUCTION

The effectiveness of the Petroleum Bill in the efficient regulation of the importation, exportation, transportation, refining, storage and sale of petroleum and other connected purposes is of fundamental importance to this treatise.

In the preceding three chapters, the situation prior to the introduction of the Petroleum Bill 2001, and as it remains now was examined. Then, the provisions of the Petroleum Bill and its impact were assessed. Finally, a comparison was made between the Kenyan and the South African position as regards the regulation of the oil and petroleum sector, and also in relation to conformity with Kenya's international treaty obligations. From the foregoing, conclusions should be drawn as to what further recommendations may be proposed to the Petroleum Bill. These recommendations are examined in this chapter.

4.2 RECOMMENDATIONS

The most important of the changes that should be made and incorporated into the Petroleum Bill is with regard to the duplication of duties and roles under the Bill. The Minister in charge of petroleum and the Commissioner of Petroleum have been granted largely the same duties which overlap and are similar in content and mandate.²¹ It is submitted that the Commissioner of Petroleum should be granted all the executive duties under the Bill, and that the Minister be empowered only to approve the policy that has been formulated, and not be engaged in their formulation. This is due to the fact that the Minister is a political officer, and might lack the qualifications that are necessarily present in the Commissioner of Petroleum²², and the expertise required in the petroleum sector.

Similarly, the Petroleum Tribunal established under Section 40 of the Petroleum Bill for the purpose of arbitrating in cases where disputes arise between the parties under the proposed Act. This Petroleum Tribunal's mandate is not defined, and is further particularly limited by certain sections of the Bill²³ which prevent the Petroleum Tribunal from having jurisdiction over

²¹ The duties under Section 4 of the Petroleum Bill.

²² Under Section 3(2) and (3) of the Petroleum Bill.

²³ Section 19 and Part IV of the Petroleum Bill.

licensing appeals and appeals on the granting of authority to construct pipelines, refineries, and bulk liquefied petroleum gas facilities. It is recommended that the Petroleum Tribunal's jurisdiction not only be specifically defined under the Bill, but that it should also be extended to cover the aforementioned licensing appeals. In addition, procedural issues in relation to the institution of proceedings before the Tribunal need to be addressed in the Bill.

The second recommendation to the Petroleum Bill is with regard to the role played by non-governmental organisations in the regulation of the petroleum sector. It is recommended that Kenyan bodies in the petroleum sector, such as the Petroleum Institute of East Africa (PIEA), be incorporated under the Bill in the formulation of policies for the regulation of the sector, to also be further incorporated under the Bill to mount public education campaigns on issues relating to petroleum, particularly with regard to environment, health, safety, and petroleum conservation. The reason for this is that the industry cannot forever be reliant upon governmental regulation, particularly in the face of the economic reality and hardships which have impacted negatively upon the government's budget. Coupled to this is the fact that such bodies in the sector might have better and more focused policy suggestions than can be expected of the Commissioner of Petroleum. The industry, to succeed in this new economic environment, will have to be more self-regulating than it is at the present moment. However, this self-regulation should be limited only to policy formulation and implementation, and not to other safety critical areas such as environmental concerns, safety concerns, e.t.c. where governmental supervision is necessary.

It is also proposed that a **National Advisory Forum** be established under the Bill. This forum should consist of representatives from the established petroleum companies in Kenya, the Parliamentary Oil Industry Regulatory Board, the Petroleum Institute of East Africa (PIEA) and the Commissioner of Petroleum. The role of this National Advisory Forum would be to formulate policy to regulate the industry, in place of the Rules under the Bill which are formulated by the Minister.²⁴

The National Advisory Forum shall be empowered under the proposed Bill to formulate policies that would ensure the following-

1. That there is free and fair competition in the market generally following the liberalisation of the sector. This should further be coupled to freedom of entry into the market for new entrants, provided they fulfil the licensing requirements.
2. That there should be a nationwide availability of petroleum and its by-products at internationally competitive prices so as to boost economic growth of the country.

²⁴ Under Section 30(1) of the Petroleum Bill.

3. That petroleum fuels are used in an energy efficient manner and in an environmentally sustainable fashion.
4. That the State would no longer be involved in the actual day to day running of the commercial operations of the petroleum industry. The Forum would ensure this by providing an alternative body for policy formulation and developmental planning for the industry.
5. That refiners of petroleum products in Kenya would remain in charge of their own crude oil acquisition without any quotas or limitations set by Government. In order that refiners may economically optimise their operations, it is important that they retain control over the selection of their crude stocks and all aspects of procurement thereof.
6. That market forces of supply and demand will be allowed to set prices of petroleum products. This would mean that profit margins would no longer be regulated by the State.
7. That the general competition law, franchising law and labour law that is prevailing in the country will apply to the petroleum industry in Kenya.
8. That sound health, safety and environmental protection standards will apply to the petroleum sector in Kenya.
9. That there should be unrestricted supply and distribution of petroleum products in the Kenyan market. Companies should be free, as at present, to enter as they see fit into commercial supply arrangements, product exchange agreements and joint shipping, docking and distribution operations. These types of operations are the accepted international norms of the oil industry and are considered to be in the interests of efficiency.
10. That taxes and levies on the petroleum sector be optimised so as to provide a balance between the national finance policy and the national energy policy. The rationale behind such a policy consideration stems from the fact that government relies heavily on taxes from the petroleum sector to meet its budgetary obligations. However, for the petroleum industry to operate efficiently, profitably and at consumer-friendly prices, then it is imperative that these taxes be at manageable levels so as not to overburden the petroleum companies.
11. That there is industrial growth in the petroleum sector, both in the infrastructure necessary for refining, transporting, and retailing petroleum products, and in the technology for producing better and more advanced petroleum products (such as synthetic fuels and oils).

4.3 CONCLUSION

The oil and petroleum industry in Kenya is in a period of its existence where it has become of vital importance to the economy of the country. The country relies on the industry to provide energy that is critical for economic development. Petroleum is the lifeblood that courses through the veins of the country's economy.

It is important, therefore, that this important natural resource be supplied to all Kenyans in sufficient quantity and quality, and at prices that are affordable. The purpose of this dissertation has been to examine the oil and petroleum industry in Kenya, the laws that govern this industry, the proposed laws with regard to the industry, and suggestions that can be made to better govern and regulate the industry.

In conclusion, at this point in time when Kenya's petroleum sector is in transition, the law must likewise be capable of changing with the reality of the situation in the petroleum sector.