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Gastech Conference 5th-7th September 2012,
Dar-es-Salaam

Driving Confidence in Contracts Between
Governments and Foreign Investors

By Dr.Ali Abdullahi, CEO

PRESIDENT-ELECT BARACK OBAMA'S TAX PLAN



LOOK, HE'S GIVING US ALL MONEY,
JUST LIKE HE PROMISED!

HE HAS
YOUR WALLET.

ROGER
MAYNARD

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- FDI is usually exposed to greater and different types of risk compared to those encountered in an investor's domestic market. Additionally, it may be harder to manage these risks when operating in a different legal System. Some of the most common risks associated with FDI include:
- **FDI discrimination:** FDI may be discriminated against by the government of a host State attempting to protect its domestic industry. Such action may hinder, restrict or damage new and existing FDI
- **Political risks:** This includes arbitrary government action, such as a lack of due process in the local courts, misleading government conduct and poor government administration.
- **Global economic risks:** This includes exchange rate fluctuations, volatility of petroleum and raw material prices and the deterioration of the global economy.
- **Civil unrest:** Assets may be damaged, destroyed or lose significant value in times of war, armed conflict, revolution, civil riot or state of emergency.
- **Government instability:** The investment environment may become unfavourable or uncertain because of government instability.

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▣ Key Questions For Investors

- Maximising Confidence in Contracts between Governments and Foreign Investors requires that both parties must understand their obligations. The following might guide the investor:
 - Does the country in which the investment is made have an investment treaty with your country? If not, can you structure your investment through a third country to obtain investment treaty protection?
 - Does your investment fall within the scope of the investment treaty? Are you an 'investor' and is your commercial activity an 'investment' as defined by the treaty?

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- What are the standards of protection afforded by the investment treaty?
- - national treatment(national treatment protection requires the host State to treat investors no less favourably than it treats its domestic investors);
- - most favoured nation treatment;
- - fair and equitable treatment;
- - compensation in the event of expropriation or nationalisation;
- - full protection and security;
- - compensation in the event of war or riot;
- - non-impairment by arbitrary and unreasonable measures;
- - the right to repatriate investments; and
- - the umbrella clause.(Umbrella clauses appear in many investment treaties and are designed to create a reciprocal obligation between States to observe any other obligations including contractual obligations, and obligations that exist as a matter of that State's domestic law which they have entered into with the investors from the other State. If, for example, the State breaches its contract with the investor, then through the operation of the umbrella clause this breach may be elevated to the status of a breach of an investment treaty obligation, and entitle the investor to take direct action against the State under the dispute resolution procedure provided by the treaty)

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- ▣ Has the country of investment entered into any other investment treaties? If so, you may be able to take advantage of more favourable provisions contained in other investment treaties if your investment attracts 'most favoured nation' treatment.
- ▣ Ensure compliance with local laws. This includes registration and incorporation requirements, competition laws, etc.
- ▣ Consider including an arbitration clause in all of your contracts

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- ▣ Consider obtaining political risk and other insurance(PRI)
- ▣ If contracting with a State or State owned enterprise, consider the inclusion of the following provisions in your contract:
 - ▣ - State waiver of sovereign immunity;
 - ▣ - a declaration of State ownership of the enterprise; and
 - ▣ - a 'change in law' or stabilisation clause (Kuwait Vs Aminoil).
- ▣ Finally obtain specialist legal advice prior to making the investment to ensure optimal structures for protection are put in place.

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- ▣ Maximising Confidence in Contracts between Governments and Foreign Investors requires careful consideration of many complex legal issues and strategic positioning at the very outset of your venture
- ▣ Multinational corporations active in the global Oil and Gas sector face a number of challenges when looking to expand their operations into new territories. Four key questions come to mind:
 - How have political risks for global natural resources companies changed over the last couple of years?

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- How have recent changes in the global economy affected the political risks we face?
- How has Foreign Investors appetite for political risk insurance (PRI) evolved?
- Apart from PRI, what tools are available to today's investor to build more confidence in contracts and manage political risk?
- Some of the other tools available in building confidence in contracts are:
 - First and foremost, it is essential to assess the nature of the risk comprehensively before making an investment. A company must do its homework on the country, the region, and prospective partners well before it becomes contractually committed

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- ▣ Once the initial evaluation is complete, those risks, because they are not static, must be actively monitored, and mitigation strategies must be adjusted without hesitation.
- ▣ A key mitigation strategy for those investing for the long term in the natural resources industry is for companies to seize the moment and make fair deals, structured to keep the interests of the foreign investor generally aligned with those of all of the key stakeholders – including local and regional interests – over the life of an investment.

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- While it has been considered by many to be beneficial to include local strategic partners or investors that are thought to bring something to the table, it is equally important to ensure that they profit only if the investment prospers.
- Investments should be structured to take advantage of investment treaties and access to international arbitration(ICSID,ICC,UNCITRAL etc). If fiscal or tax stabilization arrangements are envisioned under local law, the time must be taken to complete such agreements before fully committing to a project
- Finally, irrespective of predominant local business practices, companies must be totally and uncompromisingly transparent

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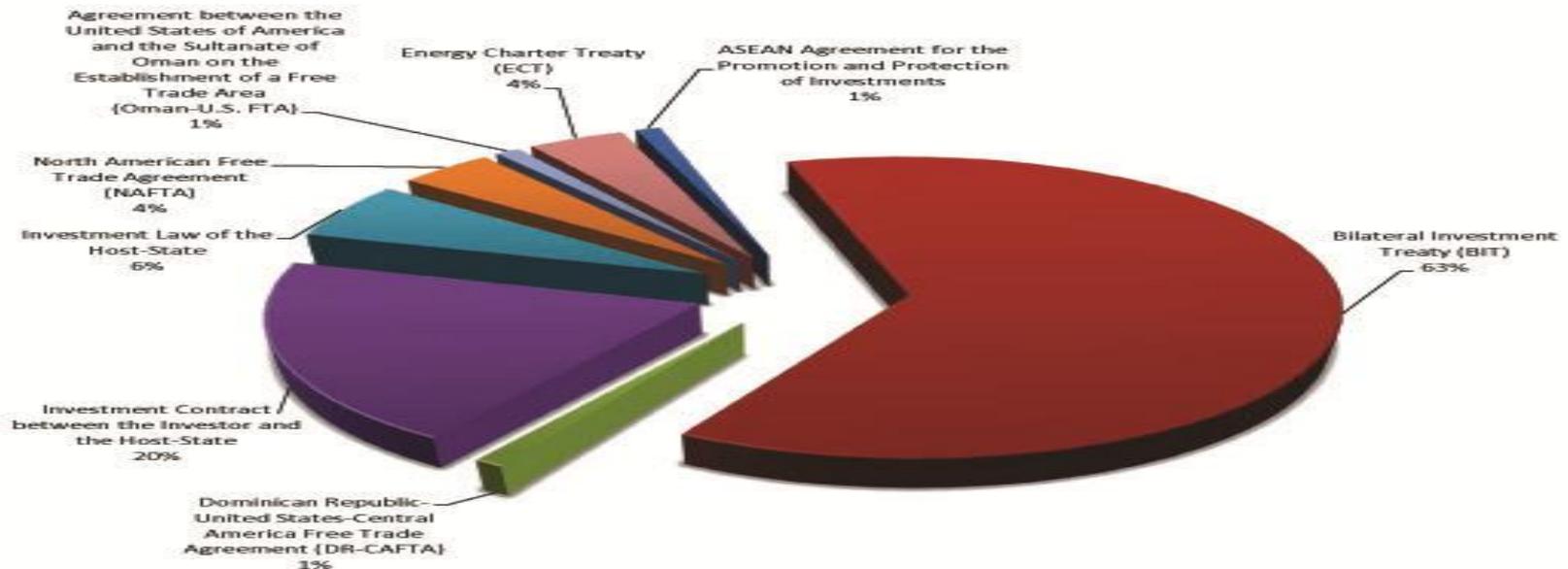
- ▣ Key Questions for Governments
- ▣ Governments in developed, developing and third world countries need to ensure that at building confidence in contractual agreements they must adhere to the following tenements:
 - Honoring and respecting BIT and MIT treaties
 - Clarity of Resource and Investment Laws (the case of Australia and Venezuela)
 - Stability of Local laws
 - Transparency in governance and administration
 - Independence of local courts from political interference and corruption free legal system

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Basis of Consent Invoked to Establish ICSID Jurisdiction in Registered ICSID Cases

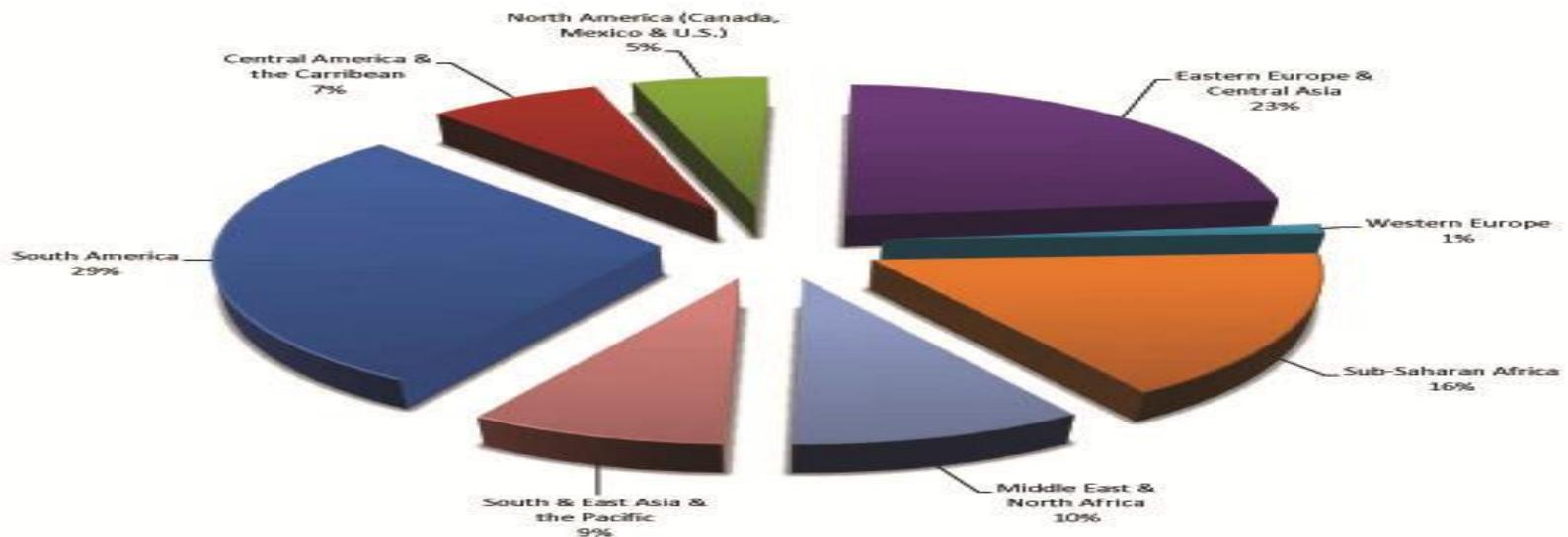
Chart 5: Basis of Consent Invoked to Establish ICSID Jurisdiction in Cases Registered under the ICSID Convention and Additional Facility Rules:



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Geographic Distribution of All ICSID Cases by State Party Involved

Chart 6: Geographic Distribution of All Cases Registered under the ICSID Convention and Additional Facility Rules by State Party Involved*:



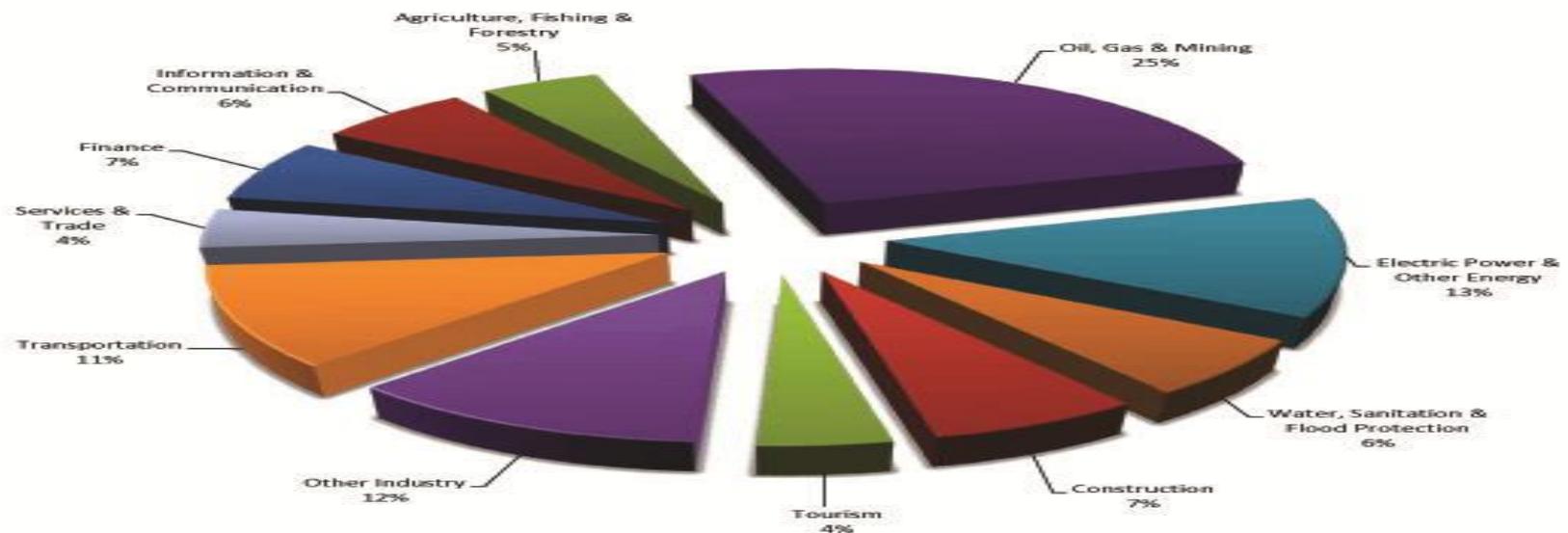
* The classification of the geographic regions above is based on the World Bank's regional system, available at <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/0,,pagePK-180619~theSitePK-136917,00.html>, and also includes World Bank donor countries.

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Distribution of All ICSID Cases by Economic Sector

Chart 7: Distribution of All Cases Registered under the ICSID Convention and Additional Facility Rules by Economic Sector*:

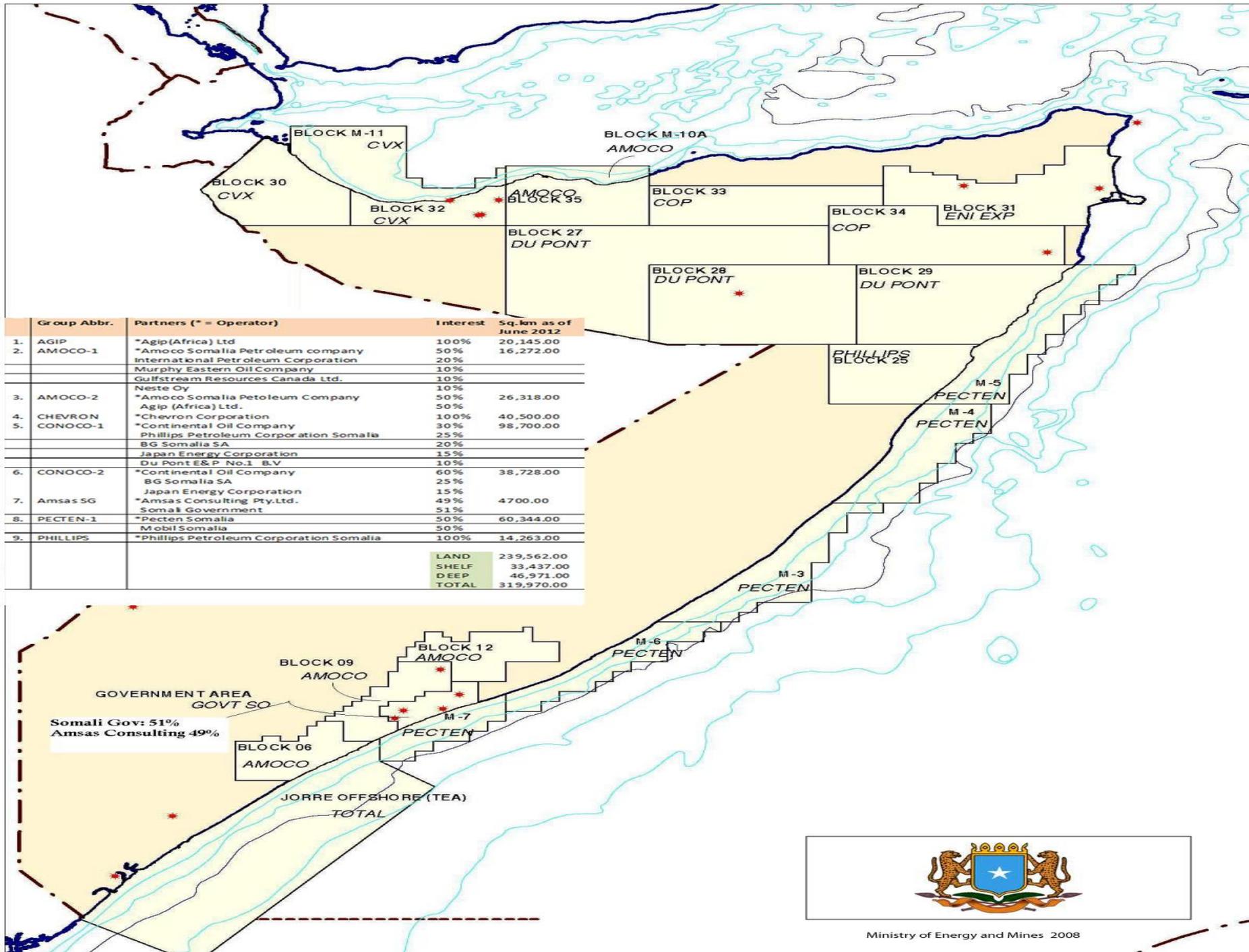


* This sector classification is based on the World Bank's sector codes, available at <http://siteresources.worldbank.org/PROJECTS/Resources/SectorCodesLists.pdf>.

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- Finally driving confidence in contracts requires good communication of both investors and governments, ironing out areas of differences, and respect for international and local laws.
- The availability of dispute resolutions forums ICSID, ICC, UNCITRAL and other bodies in combination with other PRI ameliorating mechanism available to investors such as MIGA, Islamic cooperation for the insurance of investments & export Credit (ICIEC) will and can also enhance further confidence in contracts between governments and investors.
- Defense: The availability of 'Force majeure' clause can be used by both parties though it is used most often by companies to cover themselves in case of inevitable disaster. An example is the Tsunami that hit Asia recently (In the case of Somalia 1989 most oil and gas Companies 15 in number declared Force Majeure and most want to come back after August 2012 elections which will bring in a new government) – but for how long?



| Group Abbr. | Partners (* = Operator) | Interest | Sq. km as of June 2012 |
|-------------|---|----------|------------------------|
| 1. AGIP | *Agip(Africa) Ltd | 100% | 20,145.00 |
| 2. AMOCO-1 | *Amoco Somalia Petroleum company | 50% | 16,272.00 |
| | International Petroleum Corporation | 20% | |
| | Murphy Eastern Oil Company | 10% | |
| | Gulfstream Resources Canada Ltd. | 10% | |
| 3. AMOCO-2 | *Amoco Somalia Petroleum Company | 50% | 26,318.00 |
| | Agip (Africa) Ltd. | 50% | |
| 4. CHEVRON | *Chevron Corporation | 100% | 40,500.00 |
| 5. CONOCO-1 | *Continental Oil Company | 30% | 98,700.00 |
| | Phillips Petroleum Corporation Somalia | 25% | |
| | BG Somalia SA | 20% | |
| | Japan Energy Corporation | 15% | |
| | Du Pont E&P No.1 B.V | 10% | |
| 6. CONOCO-2 | *Continental Oil Company | 60% | 38,728.00 |
| | BG Somalia SA | 25% | |
| | Japan Energy Corporation | 15% | |
| 7. Amsas SG | *Amsas Consulting Pty.Ltd. | 49% | 4700.00 |
| | Somali Government | 51% | |
| 8. PECTEN-1 | *Pecten Somalia | 50% | 60,344.00 |
| | Mobil Somalia | 50% | |
| 9. PHILLIPS | *Phillips Petroleum Corporation Somalia | 100% | 14,263.00 |
| | LAND | | 239,562.00 |
| | SHELF | | 33,437.00 |
| | DEEP | | 46,971.00 |
| | TOTAL | | 319,970.00 |



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- ▣ Thank You

- ▣ Any Further Questions Please email us at
 - ▣ ceo@amsasconsulting.com
 - ▣ Or
 - ▣ info@amsasconsulting.com