***On the Interplay between Stabilization Clauses and Sustainable Development: The Case of Tullow Oil plc in Turkana***

**Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree,**

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# Declaration

I, Stacey Adongo, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: ..............................S.A.A.........................................

Date: .................................22/01/2020.........................................

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: .....................................................

Ms. Kate Mavuti

# Abstract

*Prior to exploration activities by Tullow Oil plc in Kenya, several Production Sharing Contracts (PSC’s) were signed between the Government of Kenya and the multinational corporation over exploration activities in Turkana County. These PSC’s and terms within them were however not disclosed to the public. One such term is the stabilization clause(s) within these agreements which in essence gives the company assurances that the laws applicable to the contracts are not subject to change at the government’s whim. Stabilization clauses are closely linked to a country’s attainment of sustainable development given the social and environmental laws that are applicable to the contract. Given that these contracts were negotiated in secret, it is impossible to ascertain the parameters of these stabilization clauses regarding the social and environmental laws that should be given due regard. Non-compliance would result in negative outcomes such as environmental degradation and social ills to the inhabitants of Turkana County. All of these factors eventually affecting the attainment of sustainable development in Turkana County in the future. This paper looks into the relationship between the transparency of stabilization clause negotiation and sustainable development in Kenya’s context and particularly, the Production sharing contracts signed with Tullow Oil plc. It engages in a comparative analysis of Liberia and Tanzania where similar occurrences of lack of transparency in stabilization clause negotiation were witnessed. Finally, it concludes with relevant recommendations for Kenya encouraging the need to employ transparency mechanisms in the negotiation of stabilization clauses.*

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# List of legal instruments

Access to information Act, Kenya (2016)

Constitution of Kenya (2010)

Oil and Gas Revenues Management Act, Tanzania (2015)

Petroleum Act, Kenya (2019)

PSC contracted between the Government of the Republic of Uganda and Tullow Uganda Limited In respect of the Kanywataba Prospect Area in February 2012.

*Rio Declaration on Environment and Development*, (1992)

*Report of the World Commission on Environment and Development: Our Common Future*, 20 March, 1987

Tanzanian Extractives Industries (Transparency and Accountability*)* Act of 2015

*The Energy Charter Treaty*

UNGA, *Permanent sovereignty of natural resources,* 14 December 1962

# List of Cases

*Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others*

*Friends of Lake Turkana Trust v Attorney General & 2 others*

*Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 others*

*Peter Makau Musyoka and others vs the Ministry of Energy and Petroleum, the Ministry of Mining, Fenix Co. Ltd and others*

# Abbreviations

Extractives Industry Transparency Initiative – EITI

Government of Kenya – GoK

International Oil Company – IOC

Liberia Extractives Industry Transparency Initiative – LEITI

Mining Development Agreement - MDA

Production Sharing Contract – PSC

# Chapter one: Introduction

## Background to the problem

In 2012, the Anglo-irish oil and gas exploration company, Tullow Oil plc (Tullow Oil), announced the first discovery of crude oil within Turkana county in Kenya.[[1]](#footnote-1) The company had previously begun its operations in Turkana in 2010 following the signing of a farm out agreement with Africa Oil Corporation, a Canadian-based oil and gas company and Centric Energy-USA.[[2]](#footnote-2) Since 2012, Tullow has drilled more than 21 wells in Lokichar basin, located in Turkana county, that hold an estimated amount of 600 million barrels of recoverable crude oil.[[3]](#footnote-3)

Following the agreements concluded between the Government of Kenya (GoK) through the then Minister of Energy and Petroleum, designated with mandate to sign petroleum agreements on behalf of Kenya,[[4]](#footnote-4) several Production Sharing Contracts (PSC’s)[[5]](#footnote-5) were signed with Tullow Oil.[[6]](#footnote-6) However, these agreements have been concealed from the public and no information pertaining to the stabilization clauses within them and how they were negotiated was disclosed to the public view.[[7]](#footnote-7)

The government’s justification for refusing to make the contents of these PSC’s public, as stated by the Principal Secretary in charge of the Ministry of Energy and Petroleum, Andrew Kamau, is that the Government of Kenya did not possess one uniform agreement for the various exploration companies that it signed exploration agreements with.[[8]](#footnote-8) The Principal Secretary also stated that making these PSC’s contracted with Tullow Oil public would only lead to other International Oil Companies (IOC’s) wanting to be granted the same agreement that was offered to Tullow Oil.[[9]](#footnote-9) This casts doubts upon the contents of these contracts.

 Keeping these contracts secret contradicts President Uhuru Kenyatta’s statement given in 2014 showing his support for the need for transparency in Kenya’s oil industry where he stated: ‘*We have all seen the problems that are in many parts of the African continent as a result of that lack of transparency and we want to ensure that we get it right from square one*.’[[10]](#footnote-10) On the other end, Tullow oil stating it had no reservations with the disclosure of these contracts expressed that it ‘*supports disclosure of Production Sharing Agreements but will only publish these with the express support and agreement of its Government partners*.’[[11]](#footnote-11) This lack of disclosure of the PSC’s is a violation of constitutional provisions and other relevant legislative measures that support transparency. These include: the right to access information that is held by the State[[12]](#footnote-12) and the requirement for parliamentary ratification of any transaction involving the exploitation of Kenya’s natural resources.[[13]](#footnote-13)

Resulting from this lack of transparency with regard to how these contracts have been negotiated, there is no information pertaining to the manner through which certain clauses within these contracts were negotiated. One of these clauses is the stabilization clause(s) found within these PSC’s. Stabilization clauses are clauses offered within private contracts between investors and host states to preclude the changes in the laws that these contracts are subject to for the lifetime of the project.[[14]](#footnote-14)

Without sufficient knowledge on how these clauses were negotiated, there is no information pertaining to their parameters. In other words, there is no information covering the extent of these clauses with regard to the social (labour, health and safety) and environmental laws that these clauses are precluded from interfering with. Information surrounding the scope of these stabilization clauses is pertinent given that the have a close relationship with the relevant social and environmental laws in a particular state.

 In this case, the blatant non-disclosure of the stabilization clauses within the petroleum contracts between Kenya and Tullow oil plc. Is a harmful act to both parties and other parties’ involved although not directly such as the residents of Turkana County and the workers at the oil fields.

Stabilization clauses are well-known for their relationship with relevant social and environmental laws in that, the way in which they are framed, has a direct impact upon present and evolving social and environmental laws and standards. This means that these laws and standards are closely linked to a nation’s attainment or maintenance of sustainable development. Sustainable development in this research refers to the integration of economic development, social development and environmental protection in decision making processes concerning this development in order to improve the quality of life of the present generation without impeding that of future generations.[[15]](#footnote-15)This research paper focuses on the social and environmental dimensions of sustainability.

## Statement of the problem

Part of promoting sustainable development in Kenya is the need to guarantee transparency in the negotiation of Production Sharing Contracts (PSC’s). The PSC’s that Kenya has entered into with British Exploration Company, Tullow Oil extracting oil in Turkana are concealed. This is contrary to Section 119 of the Petroleum Act which mandates the Cabinet Secretary to publish all petroleum agreements in a bid to ensure transparency and accountability through these publications.[[16]](#footnote-16) As a result, there is no knowledge pertaining to how the stabilization clauses within these contracts were negotiated, which would then reveal information on their scope and how flexible they are. There is no guarantee that the laws and regulations that provide for sustainable development are given due consideration. Essentially, the problem entails the lack of balancing the law as stipulated under Section 119 of the Petroleum Act against GoK’s actions given that these actions are in violation of the Act.

## Justification/ Significance of the Dissertation

The Turkana region in Kenya has become a potent region for oil exploration. This study will therefore encourage transparency in stabilization clause negotiation of any future PSC’s to be contracted between Kenya and other IOC’s in this particular region and in other regions in Kenya. This study may also prove to be beneficial to other resource rich developing countries and the IOC’s they contract with currently and in the future for the exploration of petroleum.

This research is also significant as there is not much literature s in existence covering the need for transparency in negotiating stabilization clauses. It may therefore prove to be beneficial in filling this gap in the existing literature on stabilization clauses.

## Hypotheses

The dissertation shall test the following hypotheses:

*Main hypothesis*: The non-disclosure of the Stabilization Clauses by the Government of the Kenya in the petroleum contracts contracted with Tullow Oil Plc. Violate the Petroleum Act.

1. The relationship between petroleum as a natural resource, state sovereignty and the nature of stabilization clauses has an impact on sustainable development.
2. Lack of transparency in the negotiation of stabilization clauses has negative implications upon Turkana’s attainment of social and environmental development.
3. Applying transparency mechanisms in stabilization clause negotiation as done in Tanzania and Liberia can lead Kenya to enhanced transparency in stabilization clause negotiation in Kenya.

## Research questions

*Main research question*: Does he non-disclosure of the Stabilization Clauses by the Government of the Kenya in the petroleum contracts contracted with Tullow Oil Plc. Violate the Petroleum Act?

1. How does the relationship between petroleum as a natural resource, state sovereignty and the nature of stabilization clauses have an impact on sustainable development?
2. What are the potential implications of this lack of transparency on Kenya’s attainment of social and environmental development?
3. How can Kenya emulate the transparency mechanisms in stabilization clause negotiation implemented by Tanzania and Liberia to enhance transparency in the negotiation of stabilization clauses?

## Literature review

## An Etiological Discussion Regarding Stabilisation Clauses

### Origin and rationale

According to Ruggie, stabilization clauses are clauses offered within private contracts between investors and host states to preclude the changes in the laws that these contracts are subject to for the lifetime of the project.[[17]](#footnote-17) These clauses are dominant within long term investments in the extractives industry[[18]](#footnote-18) and more specifically for the purposes of this research, in petroleum sharing contracts (PSC’s) between investors and where the host state is a developing country such as Kenya.

The origin of these clauses, according to Waelde, is traced back to the era between the First and the Second World War.[[19]](#footnote-19) American companies would include these clauses within concessionary contracts, where the title to the oil and gas was granted to the IOC’s for durations spanning from forty to sixty years and the host country would retain a royalty interest.[[20]](#footnote-20) In the American context,this would be as a result of nationalizations occurring in Latin America and the clauses were granted to preserve these concessions for the lifetime of the contract.[[21]](#footnote-21) These clauses are now included in PSC’s, where the national oil company of a state or any other designated entity granted the mandate to act on behalf of the state, has the mandate to engage with the IOC through the contract to explore and produce oil and gas on its behalf.[[22]](#footnote-22)

 The rationale for these clauses, according to Bernadini, is to ‘restrict the legislative or administrative powers of a State as sovereign in its country and legislator in its own legal system, to amend the contractual regulation or even to annul the agreement.’[[23]](#footnote-23) In addition to this, Gjuzi posits that the rationale of stabilization clauses is twofold, that is that firstly, they are used as a risk mitigation tool[[24]](#footnote-24) and that secondly, they are used as a tool to encourage foreign investment.[[25]](#footnote-25)

As a risk mitigation tool, stabilization clauses seek to alleviate the geological and economic risks (comprising of political and regulatory risks) that may arise for the period during which the project is in force.[[26]](#footnote-26) Other aspects of the project that Gjuzi terms as the main factors that are prone to enhance the presence of risks include: the high costs that sunk at the onset of these projects that cannot be recovered, the long-term duration of these projects, and the late return of the investment.[[27]](#footnote-27) These, as Gjuzi notes are combined with the role of the national law of the host state,[[28]](#footnote-28) as such investment contracts are subject to this national law.

As a result of the risks, (mostly political risks) that are seen to be mostly inherent to developing countries, less developed countries and economies in transition, the governments of these states provide stabilization clauses within their petroleum sharing contracts in a bid to attract foreign investment. As pointed out by one scholar on the same,

‘[b]ecause many developing countries continue to seek foreign investment for the purpose of

economic development, it is important that they be able to provide legal security for

investors. Parties seek to provide such security by including certain provisions in the

economic development agreements [referring among others to a stabilization clause].’[[29]](#footnote-29)

In some developing countries[[30]](#footnote-30) these clauses are included in their domestic legislation as a greater incentive to encourage foreign investment. In the Kenyan context, the stabilization clause is found within the MPSC which is annexed to the Petroleum Act.[[31]](#footnote-31)

The section below looks at the particular need for these clauses from the perspective of the company as well as that of resource rich countries.

### b) Types of stabilization clauses

Early stabilization clauses committed the host state not to nationalise, and required the consent of both contracting parties for contract modifications.[[32]](#footnote-32) These were termed as intangibility clauses. More recent stabilization clauses have evolved into diverse and sophisticated tools to manage non-commercial risk associated with the investment project.[[33]](#footnote-33)

This modern alternative known as equilibrium clauses often include negotiation provisions, sometimes vested with recourse to include a third party (arbitration) to determine adaptation where negotiations fail.[[34]](#footnote-34) Stabilisation clauses have transformed over time and to date there are four types used in international investment contracts. These include: freezing, prohibition on unilateral change, balancing and allocation of burden clauses.[[35]](#footnote-35)

Within Kenyan Petroleum Sharing Contracts, an economic equilibrium clause is present. This form is extracted from the Model Production Sharing Agreement (MPSA) present in Kenya’s Petroleum Act. An excerpt of the clause is provided below:

‘(3) If after the effective date of this contract the economic benefits of a party are substantially affected by the promulgation of new laws and regulations, or of any amendments to the applicable laws and regulations of Kenya, the parties shall agree to make the necessary adjustments to the relevant provisions of this contract, observing the principle of the mutual economic benefits of the parties.’[[36]](#footnote-36)

## Sustainable Development, Investment contracts and Stabilization clauses

Sustainable development has been defined differently by different authors since developing one unified definition has proven to be a great challenge. For the purposes of this research, sustainable development is defined as the integration of economic development, social development and environmental protection in decision making processes concerning this development in order to improve the quality of life of the present generation without impeding that of future generations.[[37]](#footnote-37) This definition is drawn from the Brundtland report’s formulation of sustainable development which is defined as ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs.’[[38]](#footnote-38) Within this formulation of sustainable development, all the 3 dimensions: the social aspect, the environmental aspect and the economic aspect have been outlined. This chapter will however, only lay emphasis on the first two facets: social development and environmental development.

This section of the chapter looks at the relationship between investment contracts and the attainment of sustainable development. Investment contracts structured to attain sustainable development outcomes recognize that, from the perspective of the host state, attracting foreign investment is not the end goal to be achieved but, a means to attaining this goal.[[39]](#footnote-39) The ultimate aim happens to be two dimensional. Firstly, to allow people to have better control of their lives by improving their living conditions and secondly, to respect the environment.[[40]](#footnote-40) As such, there should be safeguards in existence that ensure that investments contribute to the achievement of their ultimate aim.[[41]](#footnote-41) This should occur, while at the same time, ensuring that the social and environmental considerations are given due regard where the former is concerned with minimizing the negative impacts on people’s lives while the latter is more concerned with minimizing environmental damage from these investment projects.[[42]](#footnote-42)

In support of a framework governing the need for development that is sustainable, the Rio Declaration under principle 10 states that ’environmental issues are best handled with participation of all concerned citizens, at the relevant level.’[[43]](#footnote-43) This encompasses both the input of the person (social dimension) and the need for environmental protection (environmental dimension). From principle 10, it is evident that sustainable development also requires inclusivity in the accountability and public scrutiny process that is involved in contract negotiation and management.[[44]](#footnote-44) Accountability has been defined through a three dimensional approach to include transparency, answerability and liability.[[45]](#footnote-45) On the other hand, public scrutiny involves supervision from the parliament and civil society to monitor negotiations between the government and investors.[[46]](#footnote-46) Where no mechanisms to allow for such ‘surveillance’ are present, there is no guarantee that agreements, such as PSC’s, between the IOC’s and the host country adhere to these principles. In the Kenyan context, the lack of adherence to the stipulated legislation requiring transparency of petroleum agreements begs to question whether this ambit of accountability is in existence in the PSC’s between the government and Tullow oil plc.

An assumption that may be made is that the stabilization clause that is present in the Kenya’s Model Production Sharing Agreement is that which is similarly found within the PSC’s between Tullow Oil and Kenya and therefore, there would be no need for the government to release these contracts. However, this is easily disproved as noted by Cotula, as model production sharing contracts cannot apply to all instances where there exists a transaction between an IOC and the same country given the existence variations of the contents of the arrangement.[[47]](#footnote-47) Such variations may include; provisions on local content and investor’s commitment to social investment programmes.[[48]](#footnote-48)

Developing countries such as Kenya, highly value these investment projects for the assets that these transnational corporations (TNC’s) advance through these investments.[[49]](#footnote-49) These investments have been witnessed to be highly prevalent particularly in the oil and gas sector in Kenya such as the Tullow oil plc – Kenya endeavour that is the subject of this paper

1. **Contract Transparency in public- private partnerships**

Contract transparency requires that the contracts signed between extractive companies and governments should be kept open and competitive, that contract disclosure is mandatory and that information pertaining to certain provisions within the contract are not kept confidential. When extractive contracts are kept secret, the people involved can be robbed off of the opportunities present for natural resources to propagate a country’s development. Such was witnessed between 2010 and 2012 when the government of the Democratic republic of Congo engaged in secret mining concessions depriving the citizens of 1.36 billion USD which would have been used to fund social services such as healthcare or education.[[50]](#footnote-50) As a result, resource rich countries should be at the forefront of ensuring the transparency in their contracts and particularly touching on all provisions within the contract that might have a possible impact on the countries attainment of development that is sustainable.

Ruggie posits that existing data suggests that stabilization clauses have an impact on the ability of states to apply new environmental and social legislation to investment projects.[[51]](#footnote-51) He notes that it is therefore important that the terms within these agreements are revealed to the public in order to ensure that the citizenry is aware of any actions of the state that may adversely affect them either directly or indirectly.[[52]](#footnote-52)

## Research methodology

The research methodology used in this study is desktop review. The primary sources of information will therefore be an amalgamation of relevant information sourced from books, scholarly articles, journal articles, reports, research papers, theses and relevant documents. This approach will also involve the analysis of relevant primary sources of law; statute, case law and international instruments. The research methodology also involves a comparative analysis as provided for in Chapter 4 of this dissertation.

## Limitations of dissertation

The primary limitation to this study was the lack of material to support this study as there is not in existence many forms of literature that discuss the need for transparency in the negotiation of stabilization clauses within PSC’s.

## Research design

i. **Chapter II** of this dissertation is the conceptual framework. This chapter will emulate the relationship between the permanent sovereignty over natural resources and, the implications of petroleum as a resource on sustainable development. It will also give an outline of the etiological structure of stabilization clauses in keeping with the understanding of how these formulations affect sustainable development. .

ii. **Chapter III** begins with a discussion on sustainable development as a principle. It relates this to the discussion on sustainable development and stabilization clauses. The Chapter also outlines the effects of Tullow Oil’s exploration activities on the social and environmental welfare of the Turkana people. It makes the argument that these activities directly affect Turkana, and, in the long run, Kenya’s attainment of Sustainable Development.

iii. **Chapter IV** of this dissertation serves as the comparative analysis of this study. It examines the negative impact that stabilization clauses negotiated in secret in Tanzania and Liberia had on these countries. The chapter looks at the era prior to which transparency mechanisms were introduced against the era after which transparency mechanisms were introduced in these two countries showing that, the latter exhibited exceedingly positive impacts on the countries’ sustainable development objectives.

The argument presented in this chapter is that, without transparency in stabilization clause negotiations, Kenya might find itself in similar circumstances as Liberia and Tanzania prior to the introduction of transparency mechanisms. This Chapter also provides the recommendations to the problem posed by the study

iv**. Chapter V** this dissertation will serve as the conclusion to the study. The initial problem statement and the findings of the study will be outlined in this chapter

# Chapter TwoChapter two: Conceptual Framework

## Introduction

This Chapter provides a conceptual framework of the dissertation. It provides a lens demonstrating the interplay between the lack of transparency in the negotiation of stabilisation clauses in production sharing contracts, and sustainable development. To achieve this, the Chapter first situates the nature of ‘petroleum’ within natural resources. Then, it goes on to show how the nature of petroleum as a natural resource calls for a lot of prudence and caution in the negotiation of production sharing contracts, specifically when it comes to stabilisation clauses.

After this, an etiological discussion regarding stabilisation clauses is carried out. However, the Chapter goes on to demonstrate, a lot of prudence and caution may be disregarded in the negotiation of stabilisation clauses because of the concept of permanent sovereignty over natural resources that states do enjoy. Given this, the Chapter concludes, there is a strong need for the negotiation of stabilisation clauses to be transparent if sustainable development is to be promoted. The hypothesis that is tested within this chapter is: *The relationship between petroleum as a natural resource, state sovereignty and the nature of stabilization clauses has an impact on sustainable development.*

## Petroleum as a Natural Resource

Natural resources are ‘stocks of materials that exist in the natural environment that are both scarce and economically useful in production or consumption, either in their natural state or after processing.’[[53]](#footnote-53) Additionally, these resources are subject to quantitative depletion through human use[[54]](#footnote-54) meaning, that these resources are bound to be exhausted after a particular period of time elapses while they are subsequently being exploited.

These resources are categorized into four distinct groups: mineral and energy resources, soil resources, water resources and biological resources.[[55]](#footnote-55) Petroleum falls within the first category as a mineral and energy resource. As a natural resource in Kenya, petroleum is construed within both the Constitution and the Petroleum Act. In the Constitution, the definition of natural resources is extended to fossil fuels[[56]](#footnote-56) (that which petroleum is classified as) while in the Petroleum Act, this natural resource is defined as

‘..all hydrocarbons and includes crude oil and natural gas, whether capable of being produced from conventional and unconventional reservoirs, including shale oil, oil shale, shale gas, coal bed methane gas, tar sands, and other sources of hydrocarbon reserves;’[[57]](#footnote-57)

As a natural resource, petroleum has been proven over time to be an extremely essential asset to resource rich countries. The exploration and exploitation of this resource has a significant effect on societies and the environment alike. To examine the extent of the effects of these activities, the next section covers the impact of the nature of petroleum on Sustainable development.

1. **Impact of Petroleum Exploration on Social and Environmental Development**

Oil and gas exploration activities are associated with many environmental and socio-economic impacts.[[58]](#footnote-58) Although the existence of positive e prospects of oil exploration activities serve as beneficial for a country’s economy, there exists a substantial share of negative effects.[[59]](#footnote-59) Some of the positive impacts include: increased rates of employment opportunities, increased volumes of trade and rapid economic growth.[[60]](#footnote-60)

However, negative effects also occur due to the exploration and exploitation of oil. Oil exploration and the subsequent exploitation have caused negative effects on the environment while leading to the destabilization of economies where the cultural and social concerns of communities are not adequately addressed.[[61]](#footnote-61) Despite this, many resource rich nations endowed with oil in the world with oil have or still engage in oil extraction. This is due to the fact that the availability of petroleum is seen as a point of economic transformation and in fact can eventually shape the development fortunes of such nations.[[62]](#footnote-62)

**a) The impacts of oil exploration on the social development of citizens**

One aspect of the social development affected by oil exploration activities regards the health of the inhabitants of the oil exploration area. Existing literature indicates the deteriorating health status of the people constituting the local community near oil reserves.[[63]](#footnote-63) A 2009 report by the United Nations Environmental Programme indicated that exploration of natural resources had the tendency to create health risks to local communities and these risks were more prone to exist in developing countries.[[64]](#footnote-64)

These health risks have also resulted from explosions from pipelines which have resulted in severe injuries and in certain cases, the death of the inhabitants of these local communities.[[65]](#footnote-65) This emerges from the use of highly flammable and explosive materials during the exploration phase of oil extraction.[[66]](#footnote-66) In addition to oil explosions, another high risk factor to the health of the people in the local community is the influx of foreigners to the local population through the introduction of diseases that did not exist prior to their entry into the community.[[67]](#footnote-67) On example of the introduction of new diseases by settlers is cited in a 2009 report by the United Nations Conference on Trade and Development. Here, the report highlighted the case of migrant workers of the ChevronTexaco Company who introduced various diseases to the local population of the Ecuadorian Amazon region where the oil exploration activities were ongoing.[[68]](#footnote-68) The health and general well-being of local inhabitants is crucial for their social development. Where their health is being severely jeopardized, this severely impedes their social development.

**b) The impacts of oil exploration activities on the environment**

The oil exploration process involves several processes that lead to environmental pollution.[[69]](#footnote-69) Oil and gas exploration impacts the environment negatively by exposing it to oil spills, oil leakages, gas flaring and deforestation.[[70]](#footnote-70) The environmental pollution resulting from oil exploration poses serious implications for the survival of species in communities near oil reserves.[[71]](#footnote-71) Oil spillage and leakage massively pollutes water bodies which threatens fisheries, reduces tourism, harms bird life and severely affects the ecological ocean life.[[72]](#footnote-72)

In addition to this, environmental pollution that is caused by oil extraction results in the destruction of the livelihoods of the persons constituting the local communities.[[73]](#footnote-73) This thereby makes it difficult for the present and future generations that may need to make a living off of their tracts of land.[[74]](#footnote-74)

The environmental pollution caused by oil drilling also results in a destruction of livelihoods in local communities making it difficult for the present and future generations to make a living off of their land. Farming and fishing activities, the mainstay of these economies, literally grind to a halt with the exploration of oil. Where these local communities depend on farming and fishing activities as a source of livelihood, their sources of livelihood are greatly affected at the onset of oil exploration activities.[[75]](#footnote-75) Environmental degradation as a result of oil exploration ventures is evidently a source of regression towards environmental development given that present and future generations greatly suffer from these activities.

The scope and breadth of stabilization clauses within production sharing agreements is a strong determinant of whether these agreements preclude or encourage sustainable development in the form of social and environmental development. This arises from the fact that stabilization clauses may discourage the host state government from introducing laws and regulations that protect human rights and such like laws catering for environmental conservation.[[76]](#footnote-76)

## Sovereignty of Natural Resources

### a) Permanent Sovereignty over Natural Resources

The United Nations General Assembly (UNGA) Resolution 1803 on the permanent sovereignty of natural resources recognizes the inalienable right that all states possess to freely dispose of their natural resources in accordance with their national interests that further reinforce their economic independence.[[77]](#footnote-77) This principle has been described as a fundamental right of states, as well as of that of peoples.[[78]](#footnote-78) Tyagi commenting on this principle states

 ‘the principle of permanent sovereignty and the right represent the resolve of developing countries to attain economic independence and to assert the authority of domestic law.’[[79]](#footnote-79)

According to the extractives hub, this principle has led to the creation of National Oil Companies and it has been mentioned that it will sustain their existence into the future.[[80]](#footnote-80)

Noteworthy is that certain features that are particular to petroleum contracts are found in this resolution.[[81]](#footnote-81) These include Articles 1, 6 and 8 which show an inclination towards particular attributes of these petroleum agreements. Article 1 of the Resolution reiterates the above provision within the preamble on the need for permanent sovereignty as a right of peoples and nations over their natural wealth and resources.[[82]](#footnote-82) Consequently, Article 2 lays emphasis on the need for exploration, development and disposition of these resources in accordance with the rules and laws that the peoples and nations observe.[[83]](#footnote-83) This exploitation of resources can be performed by foreign companies on behalf of the state such as the exploration undertaken by international oil companies in developing countries.

In relation to investment agreements between sovereign states, article 8 of the resolution stipulates that such agreements need to not only be observed in good faith but also need to respect the principle of sovereignty.[[84]](#footnote-84) Where these investment agreements are between host states and transnational corporations, Miranda has posited that transnational corporations in developing states aim to obtain maximum guarantees for the security of their investment such as promise of non-expropriation and legislative stability.[[85]](#footnote-85) More specific to the petroleum sector, is the concept of sovereignty of energy resources as discussed below.

### b) Sovereignty over Energy Resources

The concept of sovereignty over energy resources is recognized under Article 18[[86]](#footnote-86) of the Energy Charter Treaty (ECT). Kenya is a party to this treaty. Article 18 (1) of the Charter recognizes two fundamental principles enshrined in international law: state sovereignty and sovereign rights over energy resources which derive from the above discussed principle on permanent sovereignty over natural resources.[[87]](#footnote-87)

Energy sovereignty is the right that communities have to control, regulate and manage their own energy.[[88]](#footnote-88) This right extends to individuals, peoples and communities.[[89]](#footnote-89) In Kenya, this right is envisaged in the Constitution of Kenya, 2010 which recognizes that all minerals and mineral oils belong to the people of Kenya and shall be managed by the state for the benefit of the people.[[90]](#footnote-90)

With regard to the property rights over energy resources, article 18(2) of the charter reaffirms the sovereign rights that the contracting parties to energy agreements have over energy resources that are located in their territories.[[91]](#footnote-91) Within the Kenyan context, property rights over minerals and mineral oils, once more anchored on the Constitution of Kenya, are bestowed upon the state for the benefit of all the citizenry.[[92]](#footnote-92) It is on this premise that the state thereafter enters into contracts and issues out licenses for the exploitation of all minerals and mineral oils within its territory.

Article 18(4) of the charter provides for the requirement that contracting parties must allocate their energy resources in a non-discriminatory manner through published media such as contracts to encourage prospecting and exploration of energy resources.[[93]](#footnote-93) One such agreement that will be the centre of this study is the Petroleum Sharing Contract which falls within the category of contracts advanced for the exploration of energy resources.

To narrow down the discussion into the primary subject of this study, this study shall focus on stabilization clauses found within these production sharing contracts and which, as will be discussed below, are negotiated with the aim to provide balance and security to both contracting parties while affording the principle of sovereignty of natural resources.

### Conclusion

The argument that this chapter has advanced is that certain considerations need to be factored in when stabilization clauses are negotiated. Drawing from the discussions above a lot of prudence needs to be taken into consideration when stabilization clauses are negotiated given there is a strong correlation between these clauses and other relevant concepts as discussed such as sovereignty over natural resources. The next chapter delves deeper into the concept of sustainable development and correlates this concept to the Kenyan formulation relating to Tullow Oil’s activities exploring oil in Turkana County.

# Sustainable Development, Kenyan legislative provisions and Turkana County

**Introduction**

1. **Historical Framework**

Turkana is one of the 47 counties of the Republic of Kenya. Most of its land is communally held by community members, the Turkana people. Most of the Turkana people are still connected with indissoluble ties to their culture, just as they have done for centuries. There was no much interference with the culture of the Turkana people because both the colonial administration and the government of Kenya have historically disregarded this region of the country since it was regarded as economically poor land. It was not until the year 2012 that Turkana became worthy of government’s attention when it was discovered that it is home to significant deposits of oil.

1. **Relevant legislative provisions on transparency in Kenya**

The lack of transparency in the negotiation of the PSC’s between Tullow Oil and Kenya contravenes the following relevant legislative provisions.

1. **Section 119 of the Petroleum Act**

The Petroleum Act under Section 119 provides for a framework for reporting, transparency and accountability. The provision stipulates that there needs to be developed, by the Cabinet Secretary, a framework for reporting, transparency and transparency and accountability in the upstream petroleum accountability. sector, which includes the publication, of all petroleum agreements.[[94]](#footnote-94) To ensure full transparency within Kenya’s petroleum sector, these agreements need to be placed in a common database for access by any person that would want to skim through them. The law clearly provides for transparency and accountability through this provision.

1. **Article 10(2) of the Constitution**

This Article focuses on the need for good governance in Kenya. More specifically, sub-article (2) emphasizes for the need for transparency to actualize good governance.[[95]](#footnote-95) This is grouped together with the principles of integrity and accountability that work hand in hand to ensure that these national values and principles of good governance are respected by state organs, state officers and public officers.

1. **Article 35 of the Constitution**

Article 35 of the Constitution provides that every Kenyan citizen has the right to access information that is held by the State.[[96]](#footnote-96) Access to information is a fundamental right in a society that is governed by the rule of law and consequently to reinforce this constitutional provision, the Access to information Act provides for the right of citizens to access information that is held by a public entity or a private body[[97]](#footnote-97) where the Act defines a public body to include any private entity or non-state actor granted exclusive contracts (such as PSC’s) to exploit natural resources.[[98]](#footnote-98)

1. **Article 71 of the Constitution**

The Constitution also underpins transparency through Article 71 which is more particularly tailored to natural resources. Within this provision, there is a requirement for parliamentary ratification of any transaction involving the exploitation of Kenya’s natural resources.[[99]](#footnote-99) Without the government’s disclosure of specific details within these contracts and the how they were negotiated, it is impossible for parliament to exercise their mandate in examining these transactions.

1. **Freedom of information Act**

The freedom of information Act was crafted pursuant to Article 32 of the Constitution. Under Section 4 of the Act, every citizen has the right of access to information held by the State and such information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.[[100]](#footnote-100) This provision furthers the requirement for the state, any public entity or a private alike to provide information that it holds to its citizenry on demand. This furthers the requirement or transparency and accountability within the law.

1. **What do we mean by transparency in the Law?**
2. **Case Law**

Kenyan courts have had their fair share of cases tackling the issue of transparency and accountability. Most of these cases have surrounded corruption scandals by public officials working for the State. In the following cases, the courts have interrogated the concept of transparency from a judicial point of view.

In *Peter Makau Musyoka and others vs the Ministry of Energy and Petroleum, the Ministry of Mining, Fenix Co. Ltd and others[[101]](#footnote-101),* it was demonstrated the lack of transparency in most of the exploration contracts that had been signed was against the provisions within the Constitution of Kenya. Similarly, in *Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 others[[102]](#footnote-102)*, the judge recognized that the right to information is a fundamental right necessary for the enjoyment of all other rights.

Whereas in *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others[[103]](#footnote-103)*, the court found that the National values and principles of governance under Article 10 must be observed by state officers to uphold and defend the Constitution. Here, the applicant wanted the mining licence issued to it revoked given that the respondents including the Cabinet Secretary in charge of mining, the National Environmental Management Authority and the Attorney General failed to undertake an Environmental Impact Assessment nor did they issue clearance from institutions mandated to preserve the environment and cultural heritage of Kenya.

In the case of *Friends of Lake Turkana Trust v Attorney General & 2 others*[[104]](#footnote-104), GoK had entered into an agreement for the supply of electricity with Ethiopia. These activities would lead to adverse impacts on Lake Turkana and surrounding communities living around it. The applicant in this case argued that GoK had failed to comply with the provisions in the law on access to information by failing to disclose the agreements entered into between the parties. The court held that there was failure of disclosure of information that is pertinent to environment conservation in line with the Constitution.

1. **Accountability**

Accountability may be defined as ‘the obligation to explain and justify conduct.[[105]](#footnote-105)’ This implies a relationship in which some parties have the right to hold other parties ‘to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met.[[106]](#footnote-106)’In a democratic context, accountability institutions are to serve four main functions. First, they are to make it possible for the public to hold those that sit in public offices accountable.[[107]](#footnote-107) Secondly, they are to enable the people to prevent the abuse of power and resulting corruption.[[108]](#footnote-108) Third, accountability mechanisms keep the agents of the people on their toes, helping the people to prevent abuse of power and corruption given that the agents are constantly aware of the fact that they will be called upon to account for the way they exercise the power that is delegated to them.[[109]](#footnote-109) Lastly, accountability mechanisms serve the function of legitimating government in the perception of the citizenry,[[110]](#footnote-110)

## Social and environmental Impact of Tullow oil’s presence in Kenya

Evidence from a report has shown environmental malpractice by Tullow oil plc in its engagement within Turkana. According to Benson Nakuwa, a local activist in Turkana county, the company took advantage of the local citizens’ lack of awareness to their rights and left areas without tree covering after contractors that they hired left bare patches of land where they had been contracted to repair dry well pads.[[111]](#footnote-111)

The same report shows a violation of health and safety laws where the hospital built by the company lacks basic resources and several water projects that were initiated by the company collapsed leaving the people and livestock without both the promised healthcare facility and, without such basic resources as mentioned and, water.[[112]](#footnote-112) It is evident that Tullow oil has not taken into consideration the resultant effects of its activities onto the social and environmental welfare of the citizens of Turkana in proximity to their activities.

Much can be said in relation to these negative effects however, there is a dire need for the PSC’s between the company and Kenya to be duly disclosed for knowledge of the stabilization clauses within them to be made known to the public.

The Turkana people have little to no knowledge and information on environmental pollution but ever since the inception of Tullow Oil in Turkana, there has been heightened sensitization on environmental hazards associated with Oil drilling.[[113]](#footnote-113) They believe that the fumes from Oil firms going to the atmosphere are dangerous to them and their animals, the cutting down of trees by the Oil firms as they create space for construction of camps has left the already dilapidated environment in a pathetic and deplorable state.[[114]](#footnote-114)

 The local community no longer enjoys a lot of rain like before and is alleging that the rain seasons are no longer predictable because of the effects of Oil mining in the area.[[115]](#footnote-115) (FOLT, 2016). The increased traffic due to Oil mining by Tullow Oil has brought about a lot of dust which has led to increased respiratory diseases both to the humans and livestock.[[116]](#footnote-116) The action of the oil company to dump potentially harmful silicate in Twiga well in Lokichar Basin was received with mixed reactions from the community. The liquid waste was smelly and it was dumped in a manner that it would have been swept by the surface runoff in case of a heavy downpour.[[117]](#footnote-117) This has created tensions and raised the awareness of the community on the glaring environmental concerns as a result of Oil mining in Lokichar Basin.[[118]](#footnote-118) (FOLT, 2016).

**Conclusion**

Both social and environmental concerns are evidently present in these reports and given the it is possible that further violations of the social and environmental laws are currently occurring in the present moment. It is therefore important that the government looks into these violations in line with the lack of transparency in the involved PSC’s.

# Chapter Four: Comparative Analysis and Recommendations

The objectives of this chapter are three-fold; first, to emulate through a comparative analysis of Liberia and Tanzania, how the lack of transparency in the extractives sector and consequently, the lack of transparency in the stabilization clauses in agreements between IOC’s and these countries negatively affected their social and environmental development. Tanzania and Liberia have been used in this comparative study in relation to Kenya because they are all developing states in Africa, they are all resource rich developing states and, they all have a history of s corrupt regime holding power.

The second of objective of this chapter is to show that reforms within these countries’ transparency mechanisms with regard to the aforementioned agreements led to improved social and environmental development. Third, to give recommendations that Kenya should follow drawn from both Tanzania and Liberia and to give further recommendations that are deemed to be relevant. The hypothesis that is tested within this chapter is: Applying transparency mechanisms in stabilization clause negotiation as done in Tanzania and Liberia can lead Kenya to enhanced transparency in stabilization clause negotiation in Kenya.

### Pre-transparency Mechanisms

## i. Liberia

Following the end of the civil war in Liberia that occurred between 1999 and 2003, the National Transitional Government of Liberia (NTGL) was formed. The NTGL’s tenure was however characterized by reports of large scale corruption with this regime notorious for its lack of transparency and accountability with massive reports of corruption in the public sector.[[119]](#footnote-119) A few months prior to the end of NTGL’s tenure, it signed a controversial Mineral Development Agreement (MDA) with Mittal Steel company.[[120]](#footnote-120) Mittal steel company was one of the world’s largest producers of steel and is now part of ArcelorMittal after a merger with the company Arcelor in 2006.[[121]](#footnote-121)

The negotiations between NTGL and Mittal Steel that led up to the signing of the MDA were performed in secret despite demands by human rights groups to stop the deal on the grounds that public scrutiny was heavily lacking.[[122]](#footnote-122) The terms within the MDA were made confidential up until they were leaked by local citizens and upon examination of these terms, it was revealed that the MDA contained broad stabilization clauses and, other provisions that heavily favoured Mittal Steel.[[123]](#footnote-123)

The stabilization clauses within this agreement were condemned by human rights groups as they argued against their broad scope which allowed Mittal Steel to be exempted from new social and environmental standards to be introduced subsequent to the conclusion of the agreement.[[124]](#footnote-124) Had the agreement not been disclosed to the public, the stabilization clauses within it would have made it almost impossible for Liberia to meet its human rights obligations and improve any social and environmental laws which had degenerated as a due to the civil war.[[125]](#footnote-125)

## ii. Tanzania

Tanzania enacted its Mining Act 1998 containing little to no provisions of transparency following pressure from the World Bank for the privatization of her mines.[[126]](#footnote-126) As a result, negotiations that led to the signing of Mining development Agreements (MDA’s) with mining companies were conducted and kept secret for almost an entire decade.[[127]](#footnote-127) Consequently, this fuelled perceptions that certain terms placed (the stabilization clauses and the tax incentives) within these agreements were unnecessary.[[128]](#footnote-128)

These perceptions were confirmed when several copies of the MDA’s that were leaked were seen to contain a combination of full freezing clauses and economic equilibrium clauses.[[129]](#footnote-129)

These stabilization clauses did not make a distinction between fiscal and non-fiscal laws and they formed a basis upon which certain companies could avoid compliance with new social and environmental laws or seek compensation from the government for the cost of compliance with these laws.[[130]](#footnote-130) Demands for transparency and accountability within the mining sector developed from the sentiment against these stabilization clauses as framed within these contracts and in addition to this, the stark inability of a majority of Tanzanians that could not benefit from the mining sector.[[131]](#footnote-131)

### Post - transparency mechanisms

## i. Liberia

Liberia achieved EITI compliant status in 2009 and in the same year, it enacted the Liberia EITI Act as a way to enhance transparency.[[132]](#footnote-132) The Act established the LEITI website where contracts, agreements and concessions in the extractive industry are publicly available on the website in full disclosure of the terms within them.[[133]](#footnote-133) Advancing the accountability mechanisms in Liberia’s extractive industry has had a positive impact on the stabilization clauses within the contracts.[[134]](#footnote-134) Such improvements are like the renegotiation of the Mittal Steel MDA which led to a renegotiation of a narrower stabilization clause.[[135]](#footnote-135) Consequently, the company was no longer exempted from complying with any new laws enacted that would affect the contract.[[136]](#footnote-136) Furthermore, as noted by Sotonye, a review of stabilization clauses in more recent extractive contracts in Liberia discloses a limited scope to these clauses and contentedly, the scope of these clauses is limited where social, environmental and health and safety laws are excluded from its application.[[137]](#footnote-137)

A similar occurrence has been witnessed in a 2013 PSC that stipulates that the company shall not be compensated ‘in respect of changes in Law which pertain to health, safety, security, labor and environment, and that are consistent with international standards and best practices and that are applied on a non-discriminatory basis.’[[138]](#footnote-138) This happens to be great progress compared to past practices in Liberia which goes on to emulate the need for outright transparency in negotiation of stabilization clauses in agreements within the extractives sector.

## ii. Tanzania

 It was against this background that President Jakaya Kikwete was elected in the year 2005, his campaign largely relying on the promise to improve transparency in the extractive industry as well as to review all the MDAs concluded under uncertain conditions.[[139]](#footnote-139) In fulfilling this promise, Tanzania joined the EITI in 2009 and was afforded compliant status in the year 2012.[[140]](#footnote-140)

One of the initiatives that was taken in order to implement the EITI was the enactment of Tanzania’s 2010 Mining Act. As a result of the introduction of transparency mechanisms within this Act, the stabilization clauses to be granted in Tanzania’s mining sector were greatly affected as the The 2010 Act limited the scope of stabilization clauses that could be included in MDAs to “applicable rates of royalties, taxes, duties and levies.”[[141]](#footnote-141) This means that mining companies, involved in mineral extraction in Tanzania, can no longer be exempted from changes to social and environmental laws.[[142]](#footnote-142) In addition to this, the terms granted within these MDAs, including stabilization clauses, are now made subject to a periodic review every 5 years after they are granted.[[143]](#footnote-143)

Tanzania’s implementation of the EITI also spearheaded the enactment of several laws to effectively regulate the country’s petroleum sector. These laws include the Oil and Gas Revenues Management Act 2015.[[144]](#footnote-144) This Act established an Oil and Gas Fund which to be used to maintain fiscal and macroeconomic stability, enhance social and economic development, and safeguard resources for future generations (intergenerational equity as an element of sustainable development.)[[145]](#footnote-145) Consequently, the Tanzanian Extractives Industries (Transparency and Accountability*)* Act of 2015 provides for the mandatory requirement that all contracts, contracts and concessions within the Tanzanian extractive industry need to be published online or alternatively through media that is deemed as widely accessible.[[146]](#footnote-146)

## Discussion

The evidence from the above comparative analysis shows that, as initiatives increase transparency are introduced; the use of broad stabilization clauses within extractive industry contracts greatly decreases.[[147]](#footnote-147) It is clear that where governments are willing to negotiate stabilization clauses in secret, they fail to justify such inclusion up until the public decides to hold them accountable. This was witnessed above when the MDA between Mittal steel and Liberia was leaked to the public and similarly, when the MDA’’ signed in Tanzania were leaked.

It can be pre-empted that had there been no disclosure of this agreement, the stabilization clauses granted would have been retained and there would be further degradation of the social and environmental welfare in Liberia and Tanzania. This is justifiable given that broad stabilization clauses which more often that not, exempt investors from all laws, including human rights laws (Labour laws, health and safety laws) and laws to protect the environment are negotiated in secret within the applicable contracts.[[148]](#footnote-148)

Drawing reference to the disclosed PSC’s between Tullow Oil plc and Kenya, this can be said to be the plausible outcome given there is no knowledge as to how the stabilization clause within these contracts was negotiated. There is no knowledge pertaining to their scope, limits or the breadth of these clauses which begs to question whether they were negotiated with the citizens in mind with due regard to social and environmental laws that have a direct link to well-being of the people of Turkana. Furthermore, given the reports presented in chapter three of this research on the existing violations to the environment and to potentially to the health of the people of Turkana, it is safe to say that these PSC’s should be disclosed in order to determine the extent of the stabilization clauses within them.

The involvement of the EITI in Liberia and Tanzania does not go unnoticed. As exemplified in the case study, after joining the EITI, they were both able to achieve maximum levels of transparency through the publication of these agreements. Consequently, through this publication, there is a reduction in the scope of these clauses which takes into consideration the need for countries rich in petroleum to implement the EITI as well.

Kenya should therefore strive to join and become EITI compliant. Such an incentive would be great in allowing for the country to disclose not only the PSC’s contracted with Tullow oil but also, all other PSC’s that have been negotiated before and consequently, any other PSC’s to be negotiated in the future. Such disclosure would allow the public to be aware of the stabilization clauses as negotiated in these agreements: of their scope and limitation and furthermore, to be aware of how they relate to the applicable social and environmental laws.

1. **Recommendations**

The recommendations given in conclusion of this chapter are categorized into two distinct classes. That is, first, those relating to the transparency of the system (that which determines how relevant policies are developed, This ambit is concerned with the need for both the legislative and regulatory processes being clear).[[149]](#footnote-149)

Second, those relating to the transparency of the participants (the host state and the IOC as the company granted extraction rights).[[150]](#footnote-150) Third, those relating to the transparency of the outcome of the system (among which relates to social and environmental performance, which derive from the exploration activities of the IOC).[[151]](#footnote-151)

### Transparency of the system

1. Adherence to legislative provisions that require that contract transparency should be upheld. In particular, access to information, parliamentary requirements to ratify natural resource contracts and the provision within the Petroleum Act requiring that petroleum agreements are disclosed to the public.
2. Kenya should apply to join the EITI. Joining the EITI will require contract transparency to be upheld and therefore, this will enhance the need to ensure there is transparency surrounding how the stabilization clauses within the production sharing contracts are negotiated, making sure that certain limits are taken into consideration. If and when Kenya joins, the EITI and becomes EITI compliant, it can also establish an EITI Act as Liberia did, to serve the purpose of maximizing transparency in the extractives sector as a whole.
3. Development of a transparency and accountability policy for contracts in Kenya’s oil and gas sector. This policy should have a section primarily focusing on stabilization clauses and the need for their negotiations to be transparent and open to public scrutiny.
4. Periodic review of stabilization clauses granted in PSC’s. This can be performed every 5 years as was the case in Tanzania. Alternatively, each contract can be independently scrutinized and a specific timeline for a periodic review is granted on a case to case basis. This practice would however need te fortified within relevant legislation and the contract to guarantee credibility of the practice.

### Transparency of the participants

#### The government of Kenya

1. The Government should disclose the production sharing agreements between itself and Tullow oil Plc. From such disclosure, the stabilization clauses within these contracts will be in public view and as a result, the public, civil society and other beneficiaries will have requisite knowledge on the scope of stabilization clauses within these contracts. As such, this disclosure will provide help preserve the social and environmental dimensions of sustainable development where the applicable laws that are stabilized are known to the public.
2. Kenya must demand that international oil companies comply with the highest international standards in the social and environmental sector when granted stabilization clauses within their PSC’s.

#### Tullow oil plc:

1. From the initial stages of where the agreement is to be concluded, the IOC should insist on full disclosure of the agreement. This will provide an incentive to the government to disclose the terms of these contracts and as a result, the stabilization clauses within these contracts will be duly disclosed. Given Tullow Oil has disclosed its PSC’s with Uganda,[[152]](#footnote-152) the company should similarly push for the disclosure of the PSC’s concluded with Kenya.

### Transparency of the outcome of the system

This section comprises of transparency mechanisms touching on the outcome of the system in relation both social and environmental sectors. These mechanisms are to ensure that there is compliance with social and environmental laws and regulations. These include:

1. The provision of links to real-time environmental monitoring or recent monitoring results that cover the areas where oil exploration activities are taking place.[[153]](#footnote-153) This information should be present in a user-friendly manner and should not include legal or any other form of jargon.
2. The publication of the social and environmental management plans for all the projects. These are tools used to ensure that undue or reasonably avoidable adverse impacts of the construction, operation and decommissioning of a particular project are prevented; and that the positive benefits of the projects are enhanced to the degree that is expected.[[154]](#footnote-154)
3. Reports by all relevant government agencies that have the mandate of monitoring any aspect of environmental and social performance in relation to a particular project.[[155]](#footnote-155) This way, the relevant government agency will have the mandate to report on whether the IOC is complying with relevant social and environmental laws as per parameters set out by the stabilization clause within its PSC.

# Chapter Five: Conclusion

## Introduction

This Chapter serves as the conclusion of the whole dissertation. It has four objectives. Firstly, it begins by restating the initial problem that this dissertation intended to solve. Secondly, it provides the three hypotheses invoked in the study that were advanced with the aim of solving the problem outlined in the study. Thirdly, the chapter provides the finding’s that this dissertation has found from these three hypotheses. The chapter then concludes with recommendations directing future research.

## Initial problem

This study began by demonstrating that there is a need to ensure transparency in stabilization clause negotiation. This emanated directly from the lack of disclosure of the PSC’s contracted between Tullow oil and Kenya over exploration of oil in Turkana County. Such concealment of these contracts violates relevant constitutional and legislative provisions providing for the need for transparency in Kenya’s oil and gas sector.

## Hypotheses

Below are the three hypotheses used to address the above problem. First, that the relationship between petroleum as a natural resource, state sovereignty and the nature of stabilization clauses has an impact on sustainable development. Second, that the lack of transparency in the negotiation of stabilization clauses has negative implications upon Turkana’s attainment of social and environmental development. Third, that applying transparency mechanism in stabilization clause negotiation as done in Tanzania and Liberia can lead Kenya to enhanced transparency in stabilization clause negotiation in Kenya.

## Findings

1. **That the relationship between petroleum as a natural resource, state sovereignty and the nature of stabilization clauses has an impact on sustainable development.**

Regarding the first hypothesis, that the relationship between petroleum as a natural resource, state sovereignty and the nature of stabilization clauses has an impact on sustainable development, this dissertation relied on the concepts as stated to exhibit their interrelationship. This chapter finds that there is a strong need for the negotiation of stabilisation clauses to be transparent if sustainable development is to be promoted.

1. **That the lack of transparency in the negotiation of stabilization clauses has negative implications upon Turkana’s attainment of social and environmental development.**

Regarding the second hypothesis, that the lack of transparency in the negotiation of stabilization clauses has negative implications upon Turkana’s attainment of social and environmental development, this chapter focused the discussion onto Turkana County. It interrogated certain aspects of the exploration activities of Tullow Oil in Turkana. Drawing from these aspects, this Chapter also discussed notable effects of Tullow Oil’s exploration activities in Turkana onto the environment and onto the social welfare of the people of Turkana.

1. **That applying transparency mechanism in stabilization clause negotiation as done in Tanzania and Liberia can lead Kenya to enhanced transparency in stabilization clause negotiation in Kenya.**

Regarding the third hypothesis, that applying transparency mechanism in stabilization clause negotiation as done in Tanzania and Liberia can lead Kenya to enhanced transparency in stabilization clause negotiation in Kenya, this chapter argues for the need for Kenya to mirror the transparency mechanisms used in Liberia and Tanzania. The chapter finds that were these transparency mechanisms are invoked, the resultant effect on the social and environmental development of the country proves to be positive.

## Directing future research

This dissertation has focused solely on the lack of transparency in stabilization clause negotiation in PSC’s contracted with Tullow oil over oil exploration activities in Turkana County. Turkana County is not the only area where oil exploration activities occur in Kenya. This dissertation may therefore be helpful in directing future research towards the transparency in stabilization clause negotiation between other IOC’s exploring for oil in other areas in Kenya. Kenya being a developing state, this dissertation may be applicable to other developing countries that lack transparency in the negotiation of the stabilization clauses within their PSC’s.

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148. Frank S, ‘Stabilization Clauses and Human Rights: The Role of Transparency Initiatives’ 126. [↑](#footnote-ref-148)
149. This model is derived from the Natural Resource Governance Institute report on *International Best Practices for Transparency in Contract Management: Recommendations for the National Hydrocarbons Commission of the Government of the United Mexican States*, 2016, 13. [↑](#footnote-ref-149)
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152. From a sample of a PSC contracted between the Government of the republic of Uganda and Tullow Uganda Limited In respect of the Kanywataba Prospect Area in February 2012, < <http://africaoilgasreport.com/wp-content/uploads/2015/07/UGANDA-KANYWATABA-PSC-FOR-TULLOW.pdf> > accessed on 18th January 2020. [↑](#footnote-ref-152)
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