

**ACCESS TO INFORMATION AND RIGHTS OF THIRD PARTIES TO  
CONTRACTS IN THE KENYAN EXTRACTIVES-MINING  
INDUSTRY**

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## **DECLARATION**

I, **LUCIA TATENDA WANGUI**, 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: .....

Date: .....

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

Signed: .....

**JONAH MNGOLA**

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## **DEDICATION**

To God for His grace. To my Mum who is my greatest mentor and role model. To my Grandparents and family for their love, support, sacrifices and prayers which have aided me every step of this journey. To all young mining lawyers keen on protecting our Continents resources from misuse and nurturing our environment for sustainable development.

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## **ABSTRACT**

The resource curse paradox is quite queer indeed however it can be explained simply. On one hand, there needs to be significant foreign investment and technology to exploit natural resources. On the other, state revenues from the sale of these resources on international markets are substantively less as compared to revenues from other productive activities. Both these circumstances, combined with little public monitoring, mean that multinational corporations, producing country governments, and specific interest groups use these contracts for their sole benefit to the detriment of the majority.

To counter that, transparency initiatives in the extractive industry have become a norm rather than the exception to the norm. Various processes have been established internationally to monitor the disclosure of these contracts. These establishments have also been used to identify how the revenue from the extractive industry is being utilised. This study sought to investigate methods which can be used in the endeavour for more disclosure on contracts.

It sought to determine who the beneficiaries of such projects are and what contractual measures can be taken to identify and protect these third-party beneficiaries. It seeks to find out the safeguards to the environment and human health thus showing the necessity for companies to disclose their environmental costs and plans. To ensure accountability, this paper proposes certain checks and balances that should be implemented by governments throughout different stages in the mining projects thus maximising on the potential revenues from the project.

**LIST OF CASES:**

*Peter Makau Musyoka & 19 others (Suing on their own behalf and on behalf of the Mui Coal Basin Local Community) v Permanent Secretary Ministry of Energy & 14 others [2014] eKLR.*

*Nairobi Law Monthly Ltd vs. Kenya Electricity Generating Co. Ltd & Another*

## **LIST OF ABBREVIATIONS:**

<b>AMV</b>	Africa Mining Vision
<b>APA</b>	Advanced Pricing Agreement
<b>CDAs</b>	Community Development Agreements
<b>ECA</b>	Export Credit Agencies
<b>EITI</b>	Extractive Industry Transparency Initiative
<b>FDI</b>	Foreign Direct Investment
<b>GDP</b>	Gross Domestic Product
<b>IASB</b>	International Accounting Standards Board
<b>IFRS</b>	The International Financial Reporting Standards
<b>IMC</b>	International Mining Company.
<b>IMF</b>	International Monetary Fund
<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>TFFI</b>	Task Force on Financial Integrity
<b>UNCTAD</b>	United Nations Conference on Trade and Development
<b>WB</b>	World Bank
<b>WHO</b>	World Health Organisation
<b>ZRA</b>	Zambia Revenue Authority

## **CHAPTER 1: INTRODUCTION:**

### **1.1 BACKGROUND OF THE PROBLEM**

In a democracy, government exists to serve the people. The Kenyan Constitution captures this through article 1 on sovereignty of the people. Consequently, decisions and actions that government take are because of sovereign power granted to them by the people through the Constitution. In the process of governing, governments collect and stores information. Such information is a public good and should be available to the public.<sup>1</sup> Dr. Odote aptly puts it, *“In democracies, the government exists only to represent and act on behalf of the people. The information it gathers is done for the public benefit, with public funds, for public purposes. The collection, use, storage and retrieval of information are all carried out for the sake of the wider public good. People have a right to have access to that information; to seek it and to receive it.”*<sup>2</sup> This therefore means that in Kenya, the people of Kenya, are the owners of all sovereign power<sup>3</sup> and are the third-party beneficiaries to the contracts that exist in the extractive sector. Being beneficiaries of the contracts they have a right to access the information in the contracts.<sup>4</sup> Yet how can people who are not party to the contract stake a claim on it? Gathii introduces the Third-Party Beneficiary principle by stating that, *‘Under the Third-Party Beneficiary Principle, a contract between A and B for C’s benefit gives C standing to sue on such a contract. A third-party beneficiary contract arises when a promisor agrees with a promisee that a third party will receive the performance of the contract. Depending on the jurisdiction, the third-party beneficiary principle either eliminates the need for privity or asserts that privity exists, by the party’s status as a third-party beneficiary.’*<sup>5</sup> This is establishing that for there to stand presence of a claim where the two parties agreeing to the contract acknowledge that a third party is bound to be the beneficiary of the contract.

There is no shortage of data that’s likely to be generated in a modern mining operation and some may be justifiably proprietary or commercially sensitive. The real issue despite disclosure advancing into norm status is the asymmetric access to contract data as opposed

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<sup>1</sup> Odote C, ‘Access to Information Law in Kenya: Rationale and Policy Framework’, *The Kenyan Section of the International Commission of Jurists (ICJ Kenya)*, 2015.

<sup>2</sup> Commonwealth Human Rights Initiative, ‘Our Rights, Our Information; Empowering people to demand rights through knowledge’, *Commonwealth Human Rights Initiative*, 2007.

<sup>3</sup> Article 1, *Constitution of Kenya*, (2010).

<sup>4</sup> Article 35, *Constitution of Kenya*, (2010).

<sup>5</sup> Gathii J, *Incorporating the Third-Party Beneficiary Principle in Natural Resource Contracts*, Published LLM Thesis, Loyola University Chicago School of Law, August 15, 2014.

to the unavailability of such data. The Constitution of Kenya in Article 62(2) vests the ownership of public land to the County government which holds in trust and administers this land. However, it vests all minerals and mineral oils are held by the National government and is administered by the National Land Commission.<sup>6</sup> The Mining Act outlines in this regard, *‘Subject to Article 35 of the Kenyan Constitution and any other written law, all mineral agreements entered into in accordance with the Kenya Mining Act shall be public and be made accessible to the public. The Cabinet Secretary should ensure access to information including ensuring that mineral agreements and the status thereof are available in the official website of the Ministry. Further, the Cabinet Secretary should provide for accountable and transparent mechanisms of reporting mining and mineral related activities, including; revenues paid to the government by mineral right holders and production volumes under each licence or permit. These shall be published on the ministry website, annually with records, reports, mineral agreements and any other relevant information.’*<sup>7</sup> Thus the Third-Party Beneficiary principle can be applied in Mining extraction contracts.

The practical realisation of human rights requires effective policies, laws and practical mechanisms that ensure access to information. Only access to timely and accurate information can empower the citizens of a country with the knowledge they need to scrutinise the policies that affect their human rights and the leverage to challenge the status quo.<sup>8</sup> Officials negotiating on behalf of their governments may be even more careful to ensure they protect the public interest when they know the resulting deal will be made public. Publication can help build trust between contracting parties and society. It can avoid misperceptions around the contents of the agreements. This is important for government, but also for the mining company, which may become a local presence for decades. Publication enables broader analysis of the deal. Above all, it can facilitate more effective monitoring of contract implementation both by government and by third parties.<sup>9</sup>

## **1.2 STATEMENT OF PROBLEM:**

When the public learns of big mineral discoveries, or hears that a major IMC has come to their country to negotiate a mining contract, public expectations can shoot through the roof.

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<sup>6</sup> Article 62(3), *Constitution of Kenya* (2010).

<sup>7</sup> Section 119, *Mining Act Kenya* (2016).

<sup>8</sup> Odote C, ‘Access to Information Law in Kenya: Rationale and Policy Framework’, *The Kenyan Section of the International Commission of Jurists (ICJ Kenya)*, 2015.

<sup>9</sup> The International Senior Lawyers Project (ISLP), Open Oil, Revenue Watch Institute-Natural Resource Charter (RWI-NRC), and the Vale Columbia Centre on Sustainable International Investment (VCC): ‘Mining Contracts; How to Read and Understand them’ 2014, <https://eiti.org/sites/default/files/documents/mining-contracts-how-to-read-and-understand-them.pdf> on 25 June 2016.

There are many reasons for this, but political reasons dominate. Contracts between resource companies and governments are the fundamental documents that set out the key terms of agreement in many oil, gas, and mining investments. Among other things, contracts may include information on a project's fiscal terms, local content, environmental impact, infrastructure, and production timing—information that is crucial for citizens to understand, monitor, and hold their governments and the investors accountable for their obligations. Moreover, disclosure helps ensure participatory approaches to benefit sharing.<sup>10</sup>

The study aims to show a commercial perspective, both government and investors benefit from disclosure, as it promotes balanced deals. This can lead to increased investment stability, improved revenue collection and forecasting, decreased risk of renegotiation, and minimized risk of conflict and loss of social licenses to operate. It is key for the study to establish how to monitor arm's length transactions.

Finally regarding the identification of third parties, the Liberia - Putu (2010) Agreement, states regarding third party beneficiaries, '*Apart from the government, the Company and the shareholder... no Person shall have any rights under this Agreement*'.<sup>11</sup> The provision stated above is significant in that it cuts off one potential avenue that individuals or communities may have otherwise could use to enforce contractual commitments made for their benefit or protection by governments and/or companies. This project thus seeks to show that a way of protecting inter-generational equity for third parties is by expressly stating it in the contract.

### **1.3 RESEARCH OBJECTIVES**

- i. To determine that disclosure of information requires adept information on compensation.
- ii. To determine that disclosure of information requires transparency.
- iii. To determine that proper checks and balances will ensure that a government is accountable to its citizens who indeed at the third-party beneficiaries to these contracts.

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<sup>10</sup> OGP Openness in Natural Resources Working Group : 'Disclosing contracts in the Natural Resource sector' (2016)

[http://www.opengovpartnership.org/sites/default/files/FIN%20OGP%20Issue%20Brief%20K%20Disc\\_0.pdf](http://www.opengovpartnership.org/sites/default/files/FIN%20OGP%20Issue%20Brief%20K%20Disc_0.pdf) on 4 May 2016.

<sup>11</sup>The International Senior Lawyers Project (ISLP), Open Oil, Revenue Watch Institute-Natural Resource Charter (RWI-NRC), and the Vale Columbia Centre on Sustainable International Investment (VCC): 'Mining Contracts; How to Read and Understand them' 2014, <https://eiti.org/sites/default/files/documents/mining-contracts-how-to-read-and-understand-them.pdf> on 25 June 2016.

## 1.4 RESEARCH QUESTIONS

- i. What is the significance of access to information in the mining sector?
- ii. Are there any mining specific contracts that would be reasonable disclosed?
- iii. How can the rights of third parties be expressly protected in contracts?
- iv. What checks and balances can a government establish?
- v. What is the effect of mining activities environmental degradation activities on the livelihoods of third parties?

## 1.5 JUSTIFICATION AND SCOPE OF THE STUDY:

Transparency is the public disclosure of information about how mineral resources in a country are managed. Information that is disclosed in a manner that is timely and accurate manner is effective disclosure. This matter is a cross cutting one which can extend through different contexts; local content, revenues, mining operation, services to name a few.<sup>12</sup> Full contract transparency will require a government to make all its contracts both past and present in all its extractive industries easily accessible to the public<sup>13</sup> The Constitution of Kenya in Article 71<sup>14</sup> has provided a check on the executive power by giving Parliament a vote on contracts dealing particularly with natural resources. While a country may have such a law in its books, it might not always be followed consistently. Governments are increasingly making contracts available but it can be said to be merely *ad hoc*.<sup>15</sup>

International Financial Institutions (IFI) have also given advice relating to the need for contract disclosure. The IMF's Guide to Resource Revenue Transparency has reiterated the need for the disclosure of contracts.<sup>16</sup> It provided that the best practices in this respect are: (i) standard agreements and terms for exploration, development, and production, with minimum discretion for officials, though these terms may vary over time; (ii) clear and open licensing procedures; (iii) disputes open to (international) arbitration; and (iv)

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<sup>12</sup> Alexander Manea, 'Transparency and Accountability Africa Mining Legislation Atlas, World Bank Workshop, Accra, 16 December 2016 Available on PowerPoint.

<sup>13</sup> International Policy and Practice on Contract Transparency, < [http://www.resourcegovernance.org/sites/default/files/RWI\\_Contracts\\_Confidential\\_Chapter\\_5.pdf](http://www.resourcegovernance.org/sites/default/files/RWI_Contracts_Confidential_Chapter_5.pdf)> on 22 November 2016.

<sup>14</sup> *Constitution of Kenya* (2010).

<sup>15</sup> International Policy and Practice on Contract Transparency, < [http://www.resourcegovernance.org/sites/default/files/RWI\\_Contracts\\_Confidential\\_Chapter\\_5.pdf](http://www.resourcegovernance.org/sites/default/files/RWI_Contracts_Confidential_Chapter_5.pdf)> on 24 November 2016.

<sup>16</sup> IMF, 'Guide on Resource Revenue Transparency', 2005. < <https://www.imf.org/external/pubs/ft/grt/eng/060705.pdf>> on 11 December 2016.

disclosure of individual agreements and contracts regarding production from a license or contract area.

According to an Amnesty International Report<sup>17</sup>, *"Pollution and environmental damage caused by the oil industry have resulted in violations of the rights to health and a healthy environment, the right to an adequate standard of living (including the right to food and water) and the right to gain a living through work for hundreds of thousands of people"*.

This research focuses on the methods in which this principle of maximum disclosure can be expounded on given the transparency mechanisms as brought out in the Mining Act of Kenya. The Mining Act of Kenya deals with aspect of disclosure and in different stages of the mining process. The Mining Act further goes ahead to provide that the Minister should reveal mining revenues which undoubtedly would deal with any likely tax evasion tactics. The research aims to show that the rights of third parties are violated in cases of environmental pollution, loss of taxable income and in times when community negotiations are not done adequately.

#### **1.6 HYPOTHESIS:**

- i. When contract disclosure follows the appropriate channels, rights of third parties are respected and protected.
- ii. If contracts are indeed broken down to their individual phases it is easier for the government and third parties alike to determine what sort of revenue it shall receive from the project. The taxable revenue can be used to improve the lives of the citizens.
- iii. Disclosure of Environmental management plans and costs are useful in establishing if a multinational is key on the socio-economic and environmental impacts of the project.

#### **1.7 LIMITATIONS:**

Time constraints, this project is submitted in partial fulfilment for the award of the Degree of Bachelor of Laws. The study therefore had to be limited within a few contract constraints. The nature of contract law is that is vast, the nature of contracts within the extractives sector is one which requires enough data on the subject matter. This implies that the study was limited due to an excess of ways that can be deciphered in our local laws which can protect third party beneficiary rights and therefore could not be fully expounded on.

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<sup>17</sup> Amnesty International: 'Nigeria: Petroleum, Pollution and Poverty in the Niger Delta', (*Amnesty International*), <[https://www.amnesty.de/files/Amnesty\\_Bericht\\_Niger\\_Delta\\_09.pdf](https://www.amnesty.de/files/Amnesty_Bericht_Niger_Delta_09.pdf)> on 4 January 2017.

## **1.72 PARAMETRES OF STUDY**

Mining Contracts in the past have been shrouded in secrecy. However today disclosure is no longer just an exception but a norm. The Oil and Gas industry is a good example of contract disclosure being the norm. However, although this paper will look mainly into the Mining Industry it can draw good examples from the Oil and Gas Industry. It will also limit itself to some case studies from the African Continent.

## **1.8 DEFINITION OF TERMS**

- i. Third Party Beneficiary: A third party who acquire contractual rights either if the contract expressly says so or where the contract purports to confer a benefit on him<sup>18</sup>
- ii. Transfer Pricing: Setting the price for goods and services sold between related legal entities within an organisation<sup>19</sup>

## **1.9 SUMMARY OF CHAPTER:**

The consequence of exploitation contracts agreed upon between producing states and multinational corporations can be harmful to the common good. Little public monitoring coupled with low state revenues from the sale of these resources lead to a situation where specific interest groups pursue their own interest to the detriment of the majority. To combat this phenomenon the discussion on disclosure is one that is not new but needs to be considered in African states especially. This in turn will lead the way to protection of the people's rights. Alternatively, the introduction of a third-party beneficiary principle into the extractive context matrix will ultimately lead to preservation and promulgation of these rights for third parties.

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<sup>18</sup> Sec 1&2, *Contracts Rights of Third Parties Act 1999* UK.

<sup>19</sup> PWC, 'International Transfer Pricing 2013-2014', <https://www.pwc.com/gx/en/international-transfer-pricing/assets/itp-2013-final.pdf> on 4 December 2016.

## **CHAPTER 2: THEORETICAL FRAMEWORK:**

Before the 1980's the standard way of thinking concerning the relationship between having an abundance in natural resources and advancement was the previous was beneficial to the latter mentioned. Views for the fact that natural resource would empower creating nations to make the move from a work in progress to industrial take-off were advanced by Water Rostow.<sup>20</sup> A few financial experts tested these perspectives before the late 1980's, contending that the structure of the worldwide economy and the way of the universal product markets puts developing nations that were dependent on natural resources sends out at a genuine hindrance. Writings post this period have proposed something else.

The likelihood that the natural abundance of resources will experience harsh negative externalities has been suggested and cannot be denied. The character of this externalities is such that it causes countries to experience negative economic, political and social outcomes.<sup>21</sup> This literature has been extremely influential: the idea that natural resources are bad for development is now widely accepted by researchers and officials at the major international financial institutions, the World Bank and the International Monetary Fund.<sup>22</sup>

My theoretical framework of the resource curse which ultimately shows the relevance of access to information and relevant transparency and accountability mechanisms in the extractives industry will be seen in several perspectives. How can the blessing of an endowment of natural resource turn into a curse? How does the resource curse affect transparency and accountability mechanisms vis a vis disclosure of contractual information? What duty do multinational and governmental organisations owe the public in terms of access to information in combatting the resource curse? The explanations that have been advanced thus far, are from both the political and economic dimension. Generally, one can distinguish three subthemes in the literature debating both the root cause and the solution to

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<sup>20</sup> Mcneish J: 'Rethinking Resource Conflict' (*Documents.worldbank.org*, 2010) <http://documents.worldbank.org/curated/en/577611468163483076/text/620520WP0Rethi0BOX0361475B00PUBLIC0.txt> on 20 November 2016.

<sup>21</sup> Bimal Chandra R, Satyaki S and Nikhil Ranjan M, 'Natural Resource Abundance and Economic Performance—A Literature Review' Published Article, Current Urban Studies, Department of Architecture, Birla Institute of Technology, Mesra, Ranchi, India (2013) 01.

<sup>22</sup> Rosser A, 'The Political Economy of the Resource Curse': A Literature Survey IDS Working Paper, 2006, 268.

the problem; detrimental economic effects, the link between natural resources and violent conflict as well as the impact on governance and political institutions.<sup>23</sup>

## **2.1 ECONOMIC LITERATURE:**

*Revenue volatility* comes through variations in production rates, fluctuation and increase of values in international markets.<sup>24</sup> The result of this as identified by economic literature is that there is a possibility of devastating shocks of a macroeconomic nature if a state is dependent on a single natural resource. Thus, the failure to resolve macroeconomic policies has had the effect of hampering the planning and creation of prudent fiscal and tax policies which has indeed led to a rise in debt accumulation and corruption.<sup>25</sup>

The most perceptible commitments start from Collier and Hoeffel, who moved the fixation from grievances and socio-political figures as essential driver for wars towards the thought of greed an instructive component. This argument presented highlights especially money related rousing strengths for conflicts given by the misuse of crude materials. They show that quantifiably, common riches are a strong and basic determinant of war onset. The organization of natural resources is undeniably essential in choosing the likelihood of conflict as well.<sup>26</sup> Franke and Partners directed an observational examination on the resource conflict dynamic showing that it is very controlled by the nature of its administration. They found a noteworthy negative connection between good administration and the outbreak of contention. Sound monetary strategies and in addition socio-political game plans are key to lessen the impeding components mentioned previously.<sup>27</sup>

## **2.2 GOOD GOVERNANCE**

Good governance is considered key to actively counter the resource curse. Transparency initiatives through contractual disclosure and Anti-corruption measures have been commonly suggested to address the aspect of the resource. However, in the literature so far there have been few contributions providing evidence of the theoretical and practical

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<sup>23</sup> Mroß K, 'Fighting the Curse by Lifting the Curtain; How Effective is Transparency as an Instrument to Escape the Resource Trap', Schriftenreihe des Instituts für Politikwissenschaft der Universität Duisburg-Essen, 2012.

<sup>24</sup> Rosser A, 'The Political Economy of the Resource Curse': A Literature Survey IDS Working Paper, 2006, 268.

<sup>25</sup> Coutinho L: 'The Resource Curse and Fiscal Policy'

[https://ucy.ac.cy/erc/documents/The\\_Resource\\_Curse\\_and\\_Fiscal\\_Policy.pdf](https://ucy.ac.cy/erc/documents/The_Resource_Curse_and_Fiscal_Policy.pdf) on 22 November 2016.

<sup>26</sup> Manobo Mushed S., Zulfan Tadjoeeddin Mohammad, 'Reappraising the Greed and Grievance Explanations for Violent Internal Conflict' SSRN Electronic Journal, (2007).

<sup>27</sup> Rosser A, 'The Political Economy of the Resource Curse': A Literature Survey IDS Working Paper, 2006, 268.

significance of transparency. One of few papers explicitly addressing this relationship is by Kolstad and Wiig in 2009 who investigated the relevance of transparency to counter corruption in resource-rich states. They observed that “*despite the popularity of the transparency concept, its role in reducing corruption and its importance in averting the resource curse are poorly understood*”. Their empirical analysis on the matter it could be deduced that in a way of conclusion transparency can indeed reduce corruption.<sup>28</sup>

The strength of government institutions before nations strike it rich is a key factor in differentiating between nations that are flourishing or that are cursed. In developing countries, which often pan out to be the most resource abundant, little is known by the public about how much money and at what point in time the nation receives from its oil and gas or mining operations. Even less is known regarding the matter on how much tax is paid by multinationals. The impact of this is that government officials can easily manipulate the figures and ultimately steal more from the citizens with far less accountability.<sup>29</sup>

A recent study showed that 80 percent of the average earnings in developing countries come from extractable commodities.<sup>30</sup> The importance of a trade balance needs to be stressed. This is because numerous resource rich nations import more than they export. This absence of monetary and economic diversification in a nations portfolio is presented negatively in a State’s financial development. The *Dutch Disease* is a follow up to this failure because it is found that such countries fail to promote a more competitive manufacturing sector.<sup>31</sup> The Dutch Disease phenomenon occurs when a country is overly dependent on its revenues from natural resources leading to an inflow of wealth from the sale of these resources. This has the effect of appreciating a country’s currency meaning that it becomes more difficult for the country’s other exports to be sold due to their pricey value. These problems results in long-term effects on growth by reducing the country’s economic diversity and increasing its dependence on nature resource exports<sup>32</sup>

Special tax breaks given to mining companies in secret taxes or in mining tax laws has plagued African countries. Of note, Malawi, South Africa, DRC, Tanzania, Ghana and Zambia. In Ghana, South Africa, and Tanzania, a report estimated that lower royalty rates

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<sup>28</sup> Rosser A, ‘The Political Economy of the Resource Curse.

<sup>29</sup> Mingcong L, ‘Corruption, Transparency and the Resource Curse’, 3 *International Journal of Social Science and Humanity*, November 2013.

<sup>30</sup> <[http://unctad.org/en/PublicationsLibrary/diaepcb2012d2\\_en.pdf](http://unctad.org/en/PublicationsLibrary/diaepcb2012d2_en.pdf)> on 17 November 2016.

<sup>31</sup> Mingcong L, ‘Corruption, Transparency and the Resource Curse’, 3 *International Journal of Social Science and Humanity*, (2013).

<sup>32</sup> Frankel J, ‘The Natural Resource Curse: A Survey’ SSRN Electronic Journal.

have cost or will cost treasuries up to US\$68m, US\$359m, and US\$30m a year respectively. In Malawi and Sierra Leone, tax breaks granted in mining contracts have cost or will cost treasuries up to US\$16.8m and US\$8m a year respectively. In the DRC, the tax exemptions in a single mining contract have cost the treasury US\$360,000 a year.<sup>33</sup>

What has been the experience in the past is there was a nonexistence of authorities with the mandate to effectively enforce democratically and transparently promulgated rules which govern the operation and taxation of extractive activities. The quality of governance, legislative and policy processes determines if the people of a State that is endowed with natural resources will benefit from properly funded national development. This would require some changes from African states in terms of outlawing the use of confidential contracts which provide for special tax breaks which enable the companies to minimise the tax owed to the state and ultimately trickles down to a reduction of the revenue needed for development.

Stiglitz's central point in his book on making globalization work, is that the resource curse is not inevitable. He suggests that for instance, 'the IMF could shift from the usual developmental targets using GDP in making loan decisions which can be applied in the mining sector to Green Net National Product values'. Why? "First, GDP is a measure of aggregate economic production. GDP can go up even if most of the wealth leaves the country, leaving GNP - gross national product - the amount of money that stays within the nation - unimproved. Second, since GDP measures only aggregate economic output it fails to capture the fact that over the long-term projects that initially enhance GDP leave behind environmental degradation especially from extractive industries and are economically unsustainable as well".<sup>34</sup>

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<sup>33</sup> Tax Justice Africa: 'Breaking the Curse; How Transparent Taxation and Fair Taxes Can Turn Africa's Mineral Wealth into Development', Open Institute of South Africa Johannesburg & Tax Justice Africa Nairobi, March 2009 < <http://www.christianaid.org.uk/Images/breaking-the-curse.pdf> > on 9 January 2017.

<sup>34</sup> Stiglitz JE, 'Making Globalization Work', London Penguin Books ,2006.

## **CHAPTER 3: CASE STUDY**

### **3.1 CONTRACT DISCLOSURE DURING COMMUNITY NEGOTIATION**

Third party beneficiary rights can be classified within the right to a clean and healthy environment, protection of the right to private property, economic and social rights and access to justice.<sup>35</sup> Relying on Articles 3, 33(1) and 42 of the Kenyan Constitution, the counsel representing the *amicus curiae* on the issue on environmental degradation showed that any matter that would be impacting the environment would need to be continuously resolved. He also called to attention the Benefit Sharing Agreement in which issues which the community had wanted to be addressed but had been left out. *Petition 34 of 2013*<sup>36</sup> sought declarations with certain Constitutional implications including; A declaration that the County of Government of Kitui must be involved in the negotiations of the terms and conditions of the Coal Mining Agreement and, in particular, that the County Government must be involved in determining the appropriate levels of sharing of the benefits/profits of the Coal Mining Project; A declaration that the law requires that the Coal Mining Agreement must be approved by Parliament before its execution and a declaration that the Petitioners and the community ought to be involved in the negotiations for the Coal Mining Agreement as part of their right to participation.<sup>37</sup> The arguments brought out in this case show the necessity of clear provisions guiding the rights of third parties. Additionally, this case demonstrates the need of disclosure of the rights and implications of all the parties involved which is both the government and the multinational corporation vis a vis the community interests.

### **3.2 MULTINATIONAL TRANSPARENCY IN TAXATION**

Winnie Byanyima, Oxfam International's Executive Director said: "*Africa is haemorrhaging billions of dollars because multinational companies are cheating African governments out of vital revenues by not paying their fair share in taxes. If this tax revenue were invested in education and healthcare, societies and economies would further flourish across the continent.*"<sup>38</sup> According to UNCTAD, trade mispricing is just one of the ways

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<sup>35</sup> *Constitution of Kenya*, 2010.

<sup>36</sup> *Peter Makau Musyoka & 19 others (Suing on their own behalf and on behalf of the Mui Coal Basin Local Community) v Permanent Secretary Ministry of Energy & 14 others* [2014] eKLR.

<sup>37</sup> *Peter Makau Musyoka & 19 others (Suing on their own behalf and on behalf of the Mui Coal Basin Local Community) v Permanent Secretary Ministry of Energy & 14 others* [2014] eKLR.

<sup>38</sup> Oxfam International, 'Multinational Companies cheat Africa out of Billions of Dollars' *Oxfam International*, June 2015 <<https://www.oxfam.org/en/pressroom/pressreleases/2015-06-02/multinational-companies-cheat-africa-out-billions-dollars>> on 6 January 2016.

multinational companies avoid paying their fair share of taxes., developing countries lose an estimated US\$100billion a year through another set of tax avoidance schemes involving tax havens.

The Payments to Governments report 2015, released by Glencore on June 2015 show it paid \$5-billion to governments, of which \$2 .86-billion was paid in taxes and royalties in relation to its extractive operations.<sup>39</sup> The largest sum, \$867-million, was paid to the Australian government. The South African government was eighth in line and receiving \$83.5-million. The commodities giant is based in the low-tax jurisdiction of Switzerland. Earlier in 2016 Anglo American reported that in 2015 it had paid slightly more than \$4-billion to governments, of which \$862-million was paid to South Africa. Rio Tinto reported a total \$4.5-billion paid to governments in 2015, \$93-million of which was paid to South Africa, where its subsidiary, Richard’s Bay Minerals, operates. BHP Billiton paid \$7.3-billion to governments last year. These disclosures were made in terms of a European Union transparency directive, which requires all large EU-listed companies to disclose certain payments to governments, country by country and project by project.<sup>40</sup>

The Zambian Revenue Authority in 2011 prepared an audit of Mopani Copper Mines. In its findings, the report noted significantly that the operations conducted by Mopani Copper Mines had strategies which could be regarded as moving taxable revenue out of the country. This was coming from inconsistency in production volumes and costs that had been declared. The audit alleged that the transfer pricing activities in relation to sale of copper was not in accordance to the initial agreement as it was not an arm’s length transaction. It suggested that Mopani sold the copper at lower prices to its parent in Switzerland to take advantage of the ultra-low tax regime.<sup>41</sup>

What do these two contrasting results suggest about this issue on disclosure? It shows the role of two entities in this haemorrhage of funds; the government and the multinational corporation. Fiscal tools can be used by governments to improve the share of benefits accruing to the state trickling down to social spending, to diversify production, create jobs

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Glencore ‘Glencore Payments to Governments’  
,< [http://www.glencore.com/assets/sustainability/doc/sd\\_reports/GLEN-Payments-to-Government-2015.pdf](http://www.glencore.com/assets/sustainability/doc/sd_reports/GLEN-Payments-to-Government-2015.pdf)>  
on 6 January 2017.

<sup>40</sup> Steyn L, ‘How much do governments rake in? Mining giants come clean on taxes’  
<http://mg.co.za/article/2016-07-06-00-mining-giants-come-clean-on-taxes> ‘Mail and Guardian’ on 2 January 2017.

<sup>41</sup> Hillary J: ‘Extracting Minerals Extracting Wealth’,  
[http://www.waronwant.org/sites/default/files/WarOnWant\\_ZambiaTaxReport\\_web.pdf](http://www.waronwant.org/sites/default/files/WarOnWant_ZambiaTaxReport_web.pdf) ‘War on Want’ on 7 January 2017.

and to mitigate other impacts. Tax makes rulers accountable to citizen taxpayers who also happen to be the third-party beneficiaries to this projects. Oxfam in its research has come up with a minimum guarantee that provides for a regional and or international tax floor that ultimately guarantees the minimum income to national governments as opposed to having to compete to a ‘race to the bottom on matters such as royalties and various safeguards.’<sup>42</sup>

### **3.3 POLLUTION AND HEALTH CARE CONCERNS THAT SHOULD NECESSITATE CONTRACT TRANSPARENCY AND DISCLOSURE**

In Kenya, research gave details of environmental influences of artisanal gold mining in the Migori Gold Belt in Kenya. It attempted to quantify the various additives to the environment and their health effects. ‘A conclusion was reached that the concentration of heavy metals, Pb (lead), As (arsenic) and Hg (mercury) at mine sites, stream sediments and water far exceeded the recommended values of the World Health Organisation (WHO). The concentrations of Pb and As in the Macalder stream were 13.75mg L-1 and 8.04mg L-1 respectively against the WHO recommendation of 0.05mg L-1 for both metals. Poisoning from lead was particularly emphasised pointing out that it does not breakdown naturally but it impairs the nervous system, it affects foetus development, and it affects the IQ of infants and children’.<sup>43</sup>

Water pollution in Tarkwa Ghana is showing that a lot of the water sources are indeed polluted due to mining operations. Major pollutants included increased sediments, mineral reagents and spent chemicals. Cyanide spillages, Mercury leakages can be a burden to the residents because the ground water, farming land and resources in the water bodies are used a source of livelihood and a means of survival.<sup>44</sup>

In Tanzania, a paper from the Journal of Cleaner production explained that environmental pollution is a major problem in the mining areas of Geita District. The welfare of groups of women and children was being severely impacted due to air and water contamination. The health and safety of mine workers and mining communities was identified to be in danger due to inhalation of mercury, water contamination and poor safety measures. In addition to that the pits that were left uncovered post the project were the breeding ground for agents

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<sup>42</sup> Lifting the Resource Curse; ‘How poor people can and should benefit from the revenues of extractive industries’, *Oxfam International*, December 2009.

<sup>43</sup> Ogola J, Mitullah W, Omulo M, ‘Impact of Gold mining on the Environment and Human Health: A Case Study in the Migori Gold Belt, Kenya’, University of Nairobi, Environmental Geochemistry and Health 2002.

<sup>44</sup> Mwakwambirwa J, ‘Influence of Mining related factors on the livelihoods of resettled communities in Kenya: The Case of Titanium mining in Mswambweni division, Kwale County, Kenya’, University of Nairobi, 2015.

that spread water borne and air borne diseases. Buildings close to the mining pits have been damaged and have large crevasses on the wall due to constant vibration.<sup>45</sup>

In Zambia, toxic fumes were the cause of the death of a politician which sparked the interest on the contractual matter. Locals in addition had long complained of health problems after inhaling sulphur dioxide released by a Glencore subsidiary at the Mopani Copper Mines. The defence contested the claim citing that there had been an environmental indemnity agreement signed with the Zambian government in 2000. The duty of care by the mining company had been breached because sulphur dioxide emissions exceeded the legal limits.<sup>46</sup>

In Kitui County in Kenya, water related impacts of fossil fuel extraction and refining in some areas leave the community with three basic choices; find an alternative source of water, treat the water before drinking it or drink contaminated water and risk adverse health outcomes. The water bodies of the Mui basin area are the greatest victims of coal exploration and studies on the impact of coal exploration on water bodies shallow well and borehole water quality assessment is usually neglected because of a general belief that it is pure through natural purification processes.

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<sup>45</sup> Kitula A: The Environmental and Socio-economic Impacts of Mining on Local Livelihoods in Tanzania: A case study of Geita District, 14 *Journal of Cleaner Production* (2006), 405-414  
< <https://pdfs.semanticscholar.org/aefc/e89999bd25e752f47bac9116fb260de2568a.pdf>> on 4 January 2017.

<sup>46</sup><https://www.theguardian.com/business/2016/sep/18/glencore-court-ruling-in-zambia-may-trigger-new-pollution-claims> on 3 January 2017.

## **CHAPTER 4: DISCUSSION**

To understand the key issues at play, I shall analyse why access to information is key in the extractives sector and further explain how this provision can be implemented further. The analysis applied in the discussion also suggests ways in which Kenya can regulate this institution.

### **4.1 WHY IS IT IMPORTANT TO HAVE OF ACCESS TO INFORMATION IN THE MINING SECTOR.**

To answer the why, the *Declaration of Principles on Freedom of Expression in Africa* was adopted in 2002 by the African Commission on Human and People's Rights in 2002 which underscored that "*public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information.*"<sup>47</sup> An essential part of democratic governance in Kenya is ensuring that access to information is achieved.<sup>48</sup> The importance of access to information is also evident from the directions given to courts by Article 20(4) of the Constitution to ensure that in interpreting the Constitution they ensure that they do so in a manner that is consistent with an open and democratic society. An open society is one where access to information and transparency are basic and guiding hallmarks. The Constitution signals Kenya's commitment to access to information. This is further buttressed by Article 10 on national values and principles of governance that commits all to the rule of law, democracy, participation, good governance transparency and accountability. Article 24 pinpoints that some rights and freedoms are indeed subject to limitation. It provides that the right of access to information, like all the rights in the Bill of Rights, can be limited by law, only to the extent that that limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, considering all relevant factors.

The ideals of democracy and human rights are very closely intertwined; both emanate from the fundamental belief in the equality of all human beings who therefore have the right to make an equal contribution to their own governance and be equally protected under the law. The Commonwealth Harare Declaration of 1991 recognised this when Commonwealth

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<sup>47</sup> *Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa*, 32nd Ordinary Session of the African Commission on Human and Peoples' Rights, 17-23 October 2002, Banjul, the Gambia. Available at <<http://www.achpr.org/sessions/32nd/resolutions/62/>>

<sup>48</sup> Article 35 of the Constitution of Kenya 2010, stipulates that:  
"*Every citizen has the right of access to information held by the state; and information held by another person and required for the exercise or protection of any right or fundamental freedom. Every Person has the right to the correction or deletion of untrue or misleading information that affects the person. The state shall publish and publicize any important information that affects the person.*"

leaders stated their belief in: “*the liberty of the individual under the law, in equal rights for all citizens regardless of gender, race, colour, creed or political belief, and in the individual’s inalienable right to participate by means of free and democratic political processes in framing the society in which he or she lives*”.

In 2004, a *Joint Declaration on International Mechanisms for Promoting Freedom of Expression* was released by the United Nation’s Special Rapporteur on Freedom of Speech and Expression, the Organization of American States and the Organisation for Security and Cooperation in Europe. This Declaration affirmed that “access to information is a “fundamental human right” for all citizens and stated that governments should respect this right by enacting laws that allow people to access as much information<sup>49</sup> from them as possible which is the principle of maximum disclosure.”<sup>50</sup> The Declaration also recognised how important access to information is for supporting people’s participation in government, promoting government accountability and preventing corruption. In October 2003, the UN General Assembly adopted the United Nations Convention Against Corruption (UNCAC), a comprehensive treaty which details various measures that state parties to the Convention should take to combat corrupt practices. The Convention explicitly recognises the central role that transparency and the right to information can take in ensuring government accountability by enabling the public to participate in the exposure of corruption. Article 13 requires states to ensure that: “the public has effective access to information” and to undertake: “public information activities that contribute to non-tolerance of corruption, as well as public education programmes”. When individuals can demand access to official accounts and financial documents it becomes possible for them to identify the discrepancies between what a government has claimed to have spent on public works and projects and what it has spent.<sup>51</sup>

In Kenya part of the realisation of proper access to information can be seen through legislation such as *The Public Finance and Management Act*. The Public Finance and Management Act incorporates access to information in public financial matters. The

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<sup>49</sup> The Public’s Right to Know, Principles on Freedom of Information Legislation’, *Article 19* <<https://www.article19.org/data/files/pdfs/standards/righttoknow.pdf>> on 10 January 2017.

<sup>50</sup> ‘Public bodies should, as a minimum, be under an obligation to publish operational information about how the public body functions, including costs, objectives, audited accounts, standards, achievements and so on, particularly where the body provides direct services to the public. Private bodies themselves should also be included if they hold information whose disclosure is likely to diminish the risk of harm to key public interests, such as the environment and health’.

<sup>51</sup> Commonwealth Human Rights Initiative, ‘Our Rights, Our Information; Empowering people to demand rights through knowledge’, *Commonwealth Human Rights Initiative*, 2007.

Parliamentary Budget Office has as amongst its duties the responsibilities to comply with Article 35 of the Constitution by ensuring that documents, reports and other documents it produces are published and publicized within fourteen days of publication. The National Treasury, the Intergovernmental Budget and Economic Policy Committee, the county treasury, the county executive committee member for finance, and that for planning are all required to publicize information, all aspects of proactive disclosure of information. Section 198 makes it an offence to conceal financial information, which may also be read to mean duty to provide accurate financial information.<sup>52</sup> In the case of *Nairobi Law Monthly Ltd vs. Kenya Electricity Generating Co. Ltd & Another*<sup>53</sup> the court stated that: -

*‘The right to information is critical to and closely interlinked with the freedom of expression and of the media, and indeed with the enjoyment of all the other rights guaranteed under the Constitution.’... ‘State organs or public entities ... have a constitutional obligation to provide information to citizens as of right under the provisions of Article 35(1)(a). .... They have a duty under the relevant legislation about the information and reports that they should provide. However, they cannot escape the constitutional requirement that they provide access to such information they hold to citizens’.*

The UN Economic Commission for Africa (UNECA) has been spearheading the development of a Mining Vision for Africa and is leading the development of best practice guidelines for African governments to ensure that their mining laws protect the environment and communities while maximising the remittances from mining companies to government budgets in a transparent and accountable way.<sup>54</sup> As discussed above access to information is a recognised human right. Through it members of the public will be able to note discrepancies in actions in which the government is either failing or lacking to perform its fiduciary duty to the people. In Kenya, minerals are defined as public land. This public land is held in trust for the people of Kenya by the County Government and administered by the National Land Commission.<sup>55</sup> Given Kenya’s exponentially growing extractive industry many contracts will be gotten into for the exploration of certain minerals. It is thus with

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<sup>52</sup> Dr Odote C, ‘Access to Information Law in Kenya: Rationale and Policy Framework’, *The Kenyan Section of the International Commission of Jurists (ICJ Kenya)*, 2015.

<sup>53</sup> Nairobi Law Monthly Company v Kenya Electricity Generation Company & 2 Others [2013] Eklr.

<sup>54</sup> Tax Justice Africa: ‘Breaking the Curse; How Transparent Taxation and Fair Taxes Can Turn Africa’s Mineral Wealth into Development’, Open Institute of South Africa Johannesburg & Tax Justice Africa Nairobi, March 2009 < <http://www.christianaid.org.uk/Images/breaking-the-curse.pdf> > on 9 January 2017.

<sup>55</sup> Article 62, *Constitution of Kenya*, (2010).

upmost importance that the legislation and implementation surrounding access to information of the activities being carried out is readily availed.

To better understand resource management and to bring additional stability contract disclosure is vital. In the long term, it will assist governments renegotiate better deals because the information asymmetry with the companies has been set. In shorter terms. Governments will easily enforce the contracts. The fact that the contracts are now available to the public gives government officials a set incentive to negotiate better deals due to incompetence or and corruption. The complexities of extractive agreements will be simplified for the general public. Transparency of contracts goes ahead in ensuring stable and durable contracts which is a necessary element in promoting sustainable use, management and development of resources.<sup>56</sup>

Kenya's drafting of confidentiality clauses may limit access to information but should learn from international best practice examples. Take for instance the *Denmark's Model License of 2005 for Exploration & Production of Hydrocarbons* which recognizes that the public interest in information should outweigh the company's interest in confidentiality states:

*“[Information can be disclosed if] no legitimate interest of the licensee requires the information to be kept confidential; essential public interests outweigh licensee's interest in maintaining confidentiality; information of a general nature is furnished in connection with issuance of public statements”*

Access to information is important in understanding the connection between the interrelated points in resource development.<sup>57</sup> Each point beginning from the need to exploit resources, to exploration, revenue collection and ultimately state expenditure on revenues presents key pick up points where the 'value chain' can be utilised better for the public. This picture painted in which there is transparency in the entire value chain and involves meaningful citizen participation will ensure equitable and sustainable use of the funds and the resources.<sup>58</sup>

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<sup>56</sup>Rosenblum P & Maples S, 'Contracts Confidential: Ending Secret Deals in the Extractives Industries', *Revenue Watch Institute*,2009.

<sup>57</sup>Rosenblum P & Maples S, 'Contracts Confidential: Ending Secret Deals in the Extractives Industries', *Revenue Watch Institute*,2009; Contracts typically contain information about fiscal terms and the allocation of risk that are essential to understanding the benefits and risks, the real value, of the deal. Beyond the fiscal aspects that are necessarily involved, contracts may also contain provisions covering many other areas that directly affect citizens, including (but not limited to) environmental mitigation and protection measures, sections on land use and rights, and provisions dealing with the displacement of local communities and their rights.

<sup>58</sup>Rosenblum P & Maples S, 'Contracts Confidential: Ending Secret Deals in the Extractives Industries', *Revenue Watch Institute*,2009.

The resource curse is where natural resource exporting countries tend to underperform economically, have non-democratic governments as well as poor governance, are plagued with corruption and have a higher propensity of involvement, in some cases, in conflict<sup>59</sup>. It's been classified into two categories; the "Dutch Disease" and the "Nigerian Disease".<sup>60</sup> The former is where there is reallocation of resources towards the primary product at the expense of the manufacturing sector, here the government has a rent seeking behaviour instead of ploughing back proceeds to develop other non-resource sectors like agriculture, resulting in slow economic growth and an increase in unemployment since the resource sector typically employs few people<sup>61</sup>. The latter on the other hand is characterized by resource revenues being wasted by governments who lack the institutional capacity to use these windfall gains efficiently; therefore, what features prominently here is corruption and rent seeking behaviours.

One of the shortcomings to transparency is where disclosure of information to the general populace of a country does not in itself imply the possession of the ability to process the disseminated information. All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information. Generally, bodies should designate an individual who is responsible for processing such requests and for ensuring compliance with the law. Further, the possession of information is of no use if agents are unable to punish abuses of that office,<sup>62</sup> thus the need to support and strengthen the concept of accountability through civil society. Transparency should address upstream activities such as procurement. Transparency in contractual arrangements is an important step towards revenue transparency, as confidentiality harbours secrecy and corruption,<sup>63</sup> Governments contract on behalf of its citizens, thus the need to disclose the contents of such contracts to its citizens who conferred upon it such powers and ensure adequate checks and balances are in place.<sup>64</sup>

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<sup>60</sup> Shaffer B and Ziyadov T, 'Beyond the Resource Curse', University of Pennsylvania Press 2012 2.

<sup>61</sup> Williams A, 'Shining a Light on the Resource Curse: An Empirical Analysis between the Natural Resources', *World Development*, 2011, 490; Stiglitz, 'Making Globalization Work', 134.

<sup>62</sup> Kolstad I and Wigg A, 'Is transparency the Key to Reducing Corruption in Resource-Rich Countries?', *World Development*, 2009, 524.

<sup>63</sup> Abdullah Al Faruque: 'Transparency in Extractive Revenues in Developing Countries and Economies in Transition: a review of emerging best practices', Vol.24 No.1, *Journal of Energy and Natural Resources Law*, (2006), 70.

<sup>64</sup> Barnett H, 'Constitutional and Administrative Law' 4th edn, *Cavendish* (2002) 134-135; Arzequi R, Gylfason T and Sy A, 'Beyond the Curse: Policies to Harness the Power of Natural Resources', *International Monetary Fund* (2011) 66.

## **4.2 HOW DO YOU ENSURE ACCESS TO INFORMATION?**

### **4.2.1 IDENTIFICATION OF THIRD PARTY BENEFICIARY RIGHTS**

The first step is actually ensuring those who require this information can expressly identify their protection. One of the protections that can be accorded to third parties who are either influenced by poor tax policies or environmental degradation post extraction is through the express intention that can be claimed in a contract. In the discussion, earlier in the paper, the first reasoning for a third-party beneficiary claim to a contract would be in relation to a contract whose performance is for the benefit of the third party. To further protect these rights a contract can specify the third party who is to benefit from the contract expressly. Disclosing contracts is one of the most emphasised point on countries that are part of the EITI.<sup>65</sup> Members of a class or answering to a particular description could create very wide categories of third parties in construction. This would include the rights protected under Article 70 of the Constitution of Kenya 2010. Article 70 provides that a third party who alleges that their right to a clean and healthy environment has been violated can seek redress and additionally does not have to demonstrate any suffered injury. The nature of extractives transactions is also applicable under third party rights as further outlined under Article 71 of which transactions are to be ratified by Parliament if it involves a grant of a right or concession on behalf of the people of Kenya for the exploitation of natural resources. The Contracts(Rights of Third Parties Act) 1999 provides that, *'once a third party has a right to enforce a term, to prevent the contracting parties agreeing to rescind or vary the contract in such a way to extinguish or alter the rights of third parties unless the third party has consented in certain circumstances which are; where the third party has communicated his assent to the term to the promisor, the promisor is aware that the third party has relied on the term, the promisor can reasonably be expected to have foreseen that the third party would rely on the term and the third party had actually relied on it'*.<sup>66</sup> This means that for the express term to prevail, before the third party's rights are "crystallised", either the third party should be aware of the express term; or one or more parties to the contract should take reasonable steps to make the third party aware of the term.<sup>67</sup> To give practical examples of the rights of third party rights developments in other industries, the construction industry is

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<sup>65</sup> Countries sign up the EITI standard to ensure full disclosure and to better manage natural resource revenues. The revenues are disclosed in an annual EITI report, which allows citizens to see for themselves how much their government receives from their country's natural resources.

<sup>66</sup> <[https://www.designingbuildings.co.uk/wiki/Rights\\_of\\_third\\_parties](https://www.designingbuildings.co.uk/wiki/Rights_of_third_parties) > on 23 September 2016.

<sup>67</sup> Charlton's Law, 'The Contracts (Rights of Third Parties) Ordinance - the Impact on Hong Kong Contracts' *Charlton Hong Kong Newsletter*, <http://www.charltonslaw.com/the-contracts-rights-of-third-parties-ordinance-the-impact-on-hong-kong-contracts/> on 21 September 2016.

of note. The principle provides certain rights to the owners to directly enforce subcontracts without the need for collateral warranties. In the employment industry, rights to third parties ensures that dependants of employees can enforce terms under an employment contract which confers a benefit for example medical insurance or repatriation benefits to the dependant. It also enables employees seeking to enforce terms of a secondment agreement between an employer and a related company within a group, or the employer and a third party (client or industry/ governmental body).<sup>68</sup>

The Third-Party Beneficiary Principle should be one of the background rules against which contracts for negotiation of extractive resources should be conducted. Thus, even if beneficiary communities are unable to pursue remedies in court the recognition of the Third-Party Beneficiary Principle would likely influence the negotiation of contracts by requiring parties to consider the rights and interests of the community. It is my opinion that the Third-Party Principle is key in the transparency and accountability front given that contracts lay down the foundation upon which natural resource extraction occurs an issue that requires attention is the private international law remedies that can be attained.

The EITI standard holds that countries are encouraged to publicly disclose any contracts or licenses that provide terms attached to the exploitation of oil, gas and minerals.<sup>69</sup> We've also determined that access to information and contract disclosure is need a prerequisite for third parties for them to be able to access justice. How then can the disclosure of contracts happen given that many multinational corporations will claim confidentiality issues?

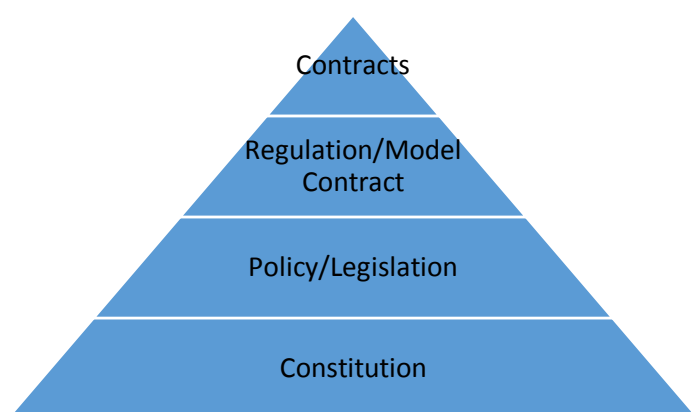


Figure 1 Transparency Pyramid- Legal Framework.

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<sup>72</sup>Baker & McKenzie, 'Contracts (Rights of Third Parties) Ordinance', *Client Alert* [http://www.bakermckenzie.com/-/media/files/insight/publications/2015/06/contracts-rights-of-third-parties-ordinance/al\\_china\\_contractsordinance\\_jun15.pdf?la=en](http://www.bakermckenzie.com/-/media/files/insight/publications/2015/06/contracts-rights-of-third-parties-ordinance/al_china_contractsordinance_jun15.pdf?la=en) on 25 September 2016.

<sup>69</sup> Requirement 2.4, *EITI Standard 2016*, February 2016.

To illustrate that contracts do not exist in a vacuum consider the overarching legal framework in a pyramid perspective. This hierarchical framework has its base founded in the Constitution. The Constitution should provide information that protects the fundamental values and rights of every citizen and may include the answer on who owns the natural resource. The next layer constitutes of the laws and policies that govern the industry; in the case of Kenya this is the Mining Act 2016 and the Petroleum Bill. The next layer provides a more specific front by setting for regulations that are more like specific requirements in the application of the law. The final layer of the pyramid is the contractual layer. This layer serves as a ceiling which all the layers of the pyramid are reflected. The strength of a contract is thus envisioned in the constitution then rooted in the law and subsequently supported by the regulations.<sup>70</sup>

Section 119 of the Mining Act<sup>71</sup>, is subject to Article 35 of the Constitution<sup>72</sup> and any other written law, provides that all mineral agreements entered into in accordance with this Act are to be public and be made accessible to the public. “The Cabinet Secretary is to ensure access to information under, including ensuring that mineral agreements and the status thereof is available in the official website of the Ministry for the time being responsible for mining. The Cabinet Secretary is meant also make Regulations to provide for accountable and transparent mechanisms of reporting mining and mineral related activities, including-revenues paid to the government by mineral right holders and production volumes under each licence or permit. The Cabinet Secretary publishes on the ministry website, annually, records, reports, mineral agreements and any other relevant information”. The hierarchy of information by virtue of these mechanisms provided can be followed.

Countries considering publishing contracts should ideally look to publish these documents in their “full text” form, as is encouraged by the EITI Standard. The reason for this is that publishing the full text, including the relevant signatures, represents the strongest path for countries to realizing the benefits of disclosure: increased trust among citizens, companies and government; ability to monitor compliance and enforcement; ability to maximize usefulness of revenue data; and enhanced incentives to sign contracts in the long-term public interest.

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<sup>70</sup> Natural Resource Governance Institute, ‘Contract Transparency Creating Conditions to Improve Contract Quality’ *Natural Resource Governance Institute*  
[http://www.resourcegovernance.org/sites/default/files/nrgi\\_Contract-Transparency.pdf](http://www.resourcegovernance.org/sites/default/files/nrgi_Contract-Transparency.pdf) on December 5 2016.

<sup>71</sup> *Mining Act of Kenya* 2016 (No. 12 of 2016).

<sup>72</sup> *Constitution of Kenya*, 2010.

#### 4.2.2 CONTRACT TRANSPARENCY REGARDING FINANCIAL AND TECHNICAL RESOURCES

Technical resources underpinning a mineral resource announcement should be disclosed at the time that the estimate is announced, which is when investors would be expected to be making investment decisions. On 5 October 2011, the ASX Group (ASX) commenced a comprehensive consultation process with the release of, *ASX Listing Rules Review Issues Paper: Reserves and Resources Disclosure Rules for Mining and Oil & Gas Companies*” (*ASX Issues Paper*). The report showed that a clear majority of the commenters supported annual disclosure and reporting requirements on resources, reserves and aggregate holdings. The report further provided that companies would need to identify material changes that resulted from their actions on the projects and an aggregation of costs showing the differences between estimations of projections past.<sup>73</sup> This would come in handy in transparency and accountability in exploration licenses and renewal licences.

In the Peter Mui case, the Petitioner asked for relief for the Petitioners and the Community based on an alleged contravention of Article 10 of the Constitution in the award of the tender to explore, exploit, or develop the Mui Coal Basin Blocks C and D and specifically that the award was done in secrecy, without due diligence to confirm the awardee’s technical capabilities and in a manner devoid of public participation as envisaged in the Constitution.<sup>74</sup>

Contracts represent the agreement between the government and the extraction company about how, when and at what cost the extraction occurs. They represent the “deal” the government gets in exchange for mineral rights. When contracts remain secret, citizens and oversight actors cannot properly monitor the implementation of the deal, and the country is at high risk of corruption and leakage.<sup>75</sup> The fact that so many contracts remain secret reinforces a culture of impunity in which public officials are not held accountable for questionable deals they make. Contract transparency is crucial in ensuring that laws are followed, country benefits are maximized, and communities are reassured that the government is acting in the public interest.

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<sup>73</sup> Australian Securities Exchange: ‘ASX Listing Rules Review Issues Paper: Reserves and Resources Disclosure Rules for Mining and Oil & Gas Companies’ (ASX Issues Paper) [http://www.asx.com.au/documents/rules/reserves\\_resources\\_disclosure\\_rules\\_report\\_consultation\\_feedback.pdf](http://www.asx.com.au/documents/rules/reserves_resources_disclosure_rules_report_consultation_feedback.pdf) on 8 January 2017

<sup>74</sup> *Peter Makau Musyoka & 19 others (Suing on their own behalf and on behalf of the Mui Coal Basin Local Community) v Permanent Secretary Ministry of Energy & 14 others [2014] Eklr.*

<sup>75</sup> Natural Resource Governance Institute, ‘Contract Transparency Creating Conditions to Improve Contract Quality’ *Natural Resource Governance Institute* [http://www.resourcegovernance.org/sites/default/files/nrgi\\_Contract-Transparency.pdf](http://www.resourcegovernance.org/sites/default/files/nrgi_Contract-Transparency.pdf) on December 5 2016

The Mining Act of Kenya provides that the Cabinet Secretary in consultation with the National Treasury may enter a mineral agreement with the holder of a mining licence where the proposed investment exceeds USD 500 million.<sup>76</sup> It is a requirement protects third party beneficiaries by ensuring that the investors and companies in charge of extractions have the technological and financial capacity to undertake the contract *bona fide*. Governments and companies can always agree to publish contracts and they can agree to modify the confidentiality clauses to allow for contract transparency. Even when the parties do not agree to make any information public, confidentiality clauses in extractive industries contracts almost always include an exception for disclosures that are required by law. This is the other way governments can require contract transparency by law.<sup>77</sup> Any information that is highly sensitive can always be redacted prior to disclosure<sup>78</sup>.

#### **4.2.3 CONTRACT TRANSPARENCY THROUGH IDENTIFYING FINANCIAL RESOURCES APPLICABLE IN EACH MINING PHASE WITHIN DISCLOSURE RULES.**

The Cabinet Secretary should indeed make Regulations to provide for accountable and transparent mechanisms of reporting mining and mineral related activities, including-revenues paid to the government by mineral right holders and production volumes under each licence or permit.<sup>79</sup> To promote transparency and accountability, the Cabinet Secretary should prescribe rules after completion of each mining stage. There the discussion that will follow will identify what happens at each phase. Evaluation, means that post exploration which happens in phase one it is determined whether a mineral resource has technical feasibility and commercial viability. It determines the volume and the grade of the deposits, surveys transportation and infrastructure requirements while conducting the necessary market and finance studies. In stage four which is production, the mineral reserve is extracted and processed for sale on a commercial scale. By the fifth phase which is closure and rehabilitation, the operations have entirely ceased and the site is being restored and rehabilitated. It is important to have an overview of why this phases are important because the phases often overlap and sometimes even simultaneously. This means that the accounting

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<sup>76</sup> Section 117, *Mining Act of Kenya* (2016).

<sup>77</sup> Natural Resource Governance Institute, 'Contract Transparency' *Natural Resource Governance Institute* < <http://www.resourcegovernance.org/analysis-tools/publications/contract-transparency>> on December 5 2016.

<sup>78</sup> Natural Resource Governance Institute, 'Contract Transparency' *Natural Resource Governance Institute* <<http://www.resourcegovernance.org/analysis-tools/publications/contract-transparency>> on December 5 2016.

<sup>79</sup> Section 119(3), *Mining Act Kenya* (2016).

costs for the project will overlap as well. This shows that it is not always easy to determine at what point to cut-off costs between the various phases.<sup>80</sup>

Now that it has been established that the identification of points to cut off costs may be difficult, I shall go through what costs run through these phases that can indeed be monitored. The first two phases which are exploration and evaluation determine that the costs of exploration are for discovering mineral resources while the costs of evaluation are for proving the technical feasibility and commercial viability of any resources found. The nature of the resource through the calculation of its estimate reserve value is such that it should benefit the society. The importance of disclosure of such documents is that a proper review can be done to the commerciality of the resources found.<sup>81</sup>

Phases two and three interloop occasionally, the cut-off between evaluation and development is therefore often a critical accounting issue. The cut-off point is once the technical feasibility and commercial viability of extracting the mineral resource has been determined. A Bankable Feasibility study is undertaken and then a decision on whether there is indeed commercial viability to be able to develop is made by the directors. The Bankable Feasibility study will go ahead to establish an availability for financing and will identify the existence of markets which will be vital for the long-term contracts that shall be signed.

Phases three and four deal with development and production. Research has shown that to determine the cut-off point between the two is rarely simple. However, it is important to recognise that the change from development to production means that costs can no longer be capitalised as recoverable and should be treated as operating expenses and will no longer be capitalised upon by the mining company. Thus, more taxable revenue that can be submitted to the governments.

The accounting treatment of exploration and evaluation expenditure can have a fundamental impact on the financial statements of a mining entity, particularly for junior mining companies with no producing assets<sup>82</sup>. The IASB Framework for the Presentation of

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<sup>80</sup> PWC, 'Financial Reporting in the Mining Industry, *International Financial Reporting Standards*, 6 edition, <http://docplayer.net/2136634-Financial-reporting-in-the-mining-industry-international-financial-reporting-standards.html> on 7 December 2016.

<sup>81</sup> Energy, Utilities & Mining, Financial reporting in the Mining Industry, *International Financial Reporting Standards*, 2007' <<https://www.pwc.com/gx/en/energy-utilities-mining/pdf/ifrs-mining.pdf>> on 26 December 2016.

<sup>82</sup> 'Energy, Utilities & Mining, Financial reporting in the Mining Industry, *International Financial Reporting Standards*, 2007' <<https://www.pwc.com/gx/en/energy-utilities-mining/pdf/ifrs-mining.pdf>> on 26 December 2016.

Financial Statements (‘the IASB Framework’) defines an asset as “a *resource controlled by the entity because of past events and from which future economic benefits are expected to flow to the entity*’. It states that an asset should be recognised when: *it is probable that future economic benefits will flow to the entity (which can be through commercial exploitation of a mineral deposit, or sale of exploration/mining rights); and the asset has a cost or value that can be measured reliably.*”<sup>83</sup>

In determining the treatment of exploration and evaluation expenditure under the IASB Framework, an entity must determine the ‘unit’ to which costs should be allocated. Within the mining industry, the most common approach is to allocate costs between areas of interest. The International Financial Reporting Standards (IFRS Standards), in IFRS 6<sup>84</sup> the definition of exploration and evaluation expenditure only begins to apply to expenditure incurred after the entity has obtained the legal rights to explore in an area. Assets that are in respect to exploration activities can be recognised as assets in the instance that an entity has substantial knowledge of the mineral deposit in question and has gone ahead to construct infrastructure and the facilities which would be needed to exploit those resources he expects to find if there has been a proven history of returns to the amounts that are spent and are going to be spent.

#### **4.2.4 CONTRACT TRANSPARENCY THROUGH PROPER CHECKS AND BALANCES BY THE GOVERNMENT.**

Under section 101 of the Mining Act, a statement of the financial and technical resources available to the applicant to carry out the proposed mining operations and to comply with the conditions of the licence should be provided to the relevant authorities.<sup>85</sup> The IFRS 6 has previously determined that a mining company should be able to identify a policy which would specify its expenses on exploration and evaluation and apply that system consistently.

<sup>86</sup>The International Accounting Standard 18 recognises revenue once all the significant risks

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<sup>83</sup>International Accounting Standards Board, ‘Information for Observers World Standard Setters Meeting’, London Agenda 1A, September 2006  
<<http://www.ifrs.org/Current-Projects/IASB-Projects/Conceptual-Framework/Other-Public-Meetings-Observer-Notes/Documents/WSSAGENDAPAPER1A.pdf>> on 27 December 2016.

<sup>84</sup> “International Financial Reporting Standards (IFRS Standards) is a single set of accounting standards, developed and maintained by the International Accounting Standards Board (the Board) with the intention of those standards being capable of being applied on a globally consistent basis—by developed, emerging and developing economies—thus providing investors and other users of financial statements with the ability to compare the financial performance of publicly listed companies on a like-for-like basis with their international peers”.

<sup>85</sup> *Mining Act of Kenya* 2016 (No 12 of 2016).

<sup>86</sup> ‘Technical Summary, IAS18 Revenue’, 2012 < <http://www.ifrs.org/Documents/IAS18.pdf>> on 7 January 2017.

and rewards have been transferred to the purchaser and once that is done the Government can realise if a policy is consistently being used for the people of Kenya as they can identify the costs and the probability of further economic benefits.

The type of contracts that are common in the mining industry are such that producers and buyers will enter long-term sales contracts. These contracts will secure supply and reasonable pricing arrangements and thus are important to a mining entity in determining whether to move to the production stage.<sup>87</sup> Stabilization clauses within such contracts protect the producer and/or the seller from significant changes to the underlying assumptions they had agreed upon at the time of signing the contract. Additionally, the clauses relating to price adjustment may vary based on world market prices, cost escalation of another form of price index indicator. If a long-term contract results in continuing losses because pricing and other contract terms cannot be changed, associated capitalised mine expenditure may not be recoverable.<sup>88</sup>

An entity only recognises a provision for a loss in relation to an individual contract if the unavoidable costs of meeting the obligations under the contract exceed the economic benefits expected to be received under it. Many mining contracts will permit periodic adjustments if circumstances change, particularly as long-term relationships between producers and buyers are becoming more important as global demand for minerals increases. If an onerous contract exists whereby product is supplied to a third party on terms that cannot yield a profit, associated assets such as the underlying mine is written down prior to recognising any provision for loss.<sup>89</sup> Due to there being no future economic benefit for its value, a mine is written-off. After such depreciation of value, the remaining loss is the lower of the cost between fulfilment and penalties payable to exit the contract. The gains or loss arising from derecognising an asset are included in profit or loss when it is derecognised. Any gains are thus classified as income. Therefore, the terms of the contract need to be reconsidered before the provision for onerous contract is recognised to consider terms that

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<sup>87</sup> 'Energy, Utilities & Mining, Financial reporting in the Mining Industry, *International Financial Reporting Standards*, 2007' <<https://www.pwc.com/gx/en/energy-utilities-mining/pdf/ifrs-mining.pdf>> on 26 December 2016.

<sup>88</sup> PWC, 'Revenue from Contracts with Customers; The standard is final – A comprehensive look at the new revenue model', 2015 < <https://www.pwc.com/us/en/cfo/direct/assets/pdf/in-depth/2014-01-revenue-from-contracts-with-customers.pdf>> on 5 January 2017.

<sup>89</sup>International Accounting Standard 37 Provisions, Contingent Liabilities and Contingent Assets < [http://ec.europa.eu/internal\\_market/accounting/docs/consolidated/ias37\\_en.pdf](http://ec.europa.eu/internal_market/accounting/docs/consolidated/ias37_en.pdf)> on 4 January 2016.

will result in recognition of ways which the third parties benefit from the gains of such a contract.

The government must ensure that the management of a mining entity must make the following disclosures: the accounting policy adopted for the recognition of revenue including all aspects – for example, shipment terms and provisional pricing; the amount of each significant category of revenue recognised during the period including revenue arising from the sale of goods, the rendering of services, interest, royalties and dividends and the amount of revenue arising from exchanges of goods or services included in each significant category of revenue.<sup>90</sup>

Many mining companies report on environmental issues affecting their operations as part of their operating and financial review in the annual report and/or in separate sustainability or corporate responsibility reports. Transparent reporting mechanisms for this are necessary because due to the nature of the work mining involves, damage to the environment can be damaged for a long-term basis and thus adequate compensation measures must be identified at the beginning of the contract term including provisions on the use of water.

Petition 305 of 2012<sup>91</sup> asked for prayers for an alleged breach of or the likely violation or infringement of the right to a clean and healthy environment contrary to Articles 42 or 70 of the Constitution based on the apprehension that the methods to be deployed in the coal mining would lead to environmental degradation and the threat to health contrary to Article 43 of the Constitution from the effects of coal mining.

#### **4.2.5 CONTRACT TRANSPARENCY IN REPORTING FINANCIAL DATA BY MULTINATIONAL CORPORATIONS**

The nature of the natural resource extractive industry is such that the natural resource which is extracted is not under the ownership of the extracting company but to the country which they were extracted from. The submission given by the Publish What You Pay to the International Accounting Standards Board alluded to the fact that this given as a justifiable reason by governments to levy higher forms of contributions from companies in the

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<sup>90</sup> 'Energy, Utilities & Mining, Financial reporting in the Mining Industry, *International Financial Reporting Standards*, 2007' <<https://www.pwc.com/gx/en/energy-utilities-mining/pdf/ifrs-mining.pdf>> on 26 December 2016.

<sup>91</sup> *Peter Makau Musyoka & 19 others (Suing on their own behalf and on behalf of the Mui Coal Basin Local Community) v Permanent Secretary Ministry of Energy & 14 others* [2014] Eklr.

extractives. This would indicate why governments would not like to disclose details on a tax concession it has with a multinational company.

The reason behind this could be to erase the general ideology that the way tax law is administered in the country is not just and equitable. Additionally, it may be used to conceal the fact that some multinational companies negotiate lower tax liabilities for secret gain by some government officials. Some may argue that governments do not wish to weaken their bargaining power in future negotiations who would be seeking similar treatment if the information is disclosed. This situation identifies above can be solved through valuation of the profits that are accrued by the mining entity.<sup>92</sup> The problem that arises is that it is difficult to value the transfer pricing at which some transactions happen. Valuing the pricing of more sophisticated assets that may be trading between associated mining entities may not be simple if they are unique and therefore there is no similar information in the market, this in turn will mean that it would be hard for the government to identify the arm's length price for such transactions. To value the amount of profit arising from such a country ends up being difficult if such transfer pricing means are underway.

If there is a perception that payments made by multinational corporations may be misused, or not properly accounted for by governments, the central case for greater transparency concerns the value of those payments. The payment portfolio to governments is diverse and includes but is not limited to corporate income tax payments, royalties, the charge given for the right to exploit those natural resources. The goal should be therefore to identify how to make public all those payments.<sup>93</sup> A good example on transparency initiatives came through the amendment to the Dodd-Frank Act, which made it mandatory for companies in the extractive sector listed in the United States to publish all their payments to governments country by country, was legislated in the United States.

To hold governments to account, it is argued that there should be disclosure of total payments made to each government. But to hold companies to account, it would in principle be necessary to identify whether the amount of tax due has in fact been paid.<sup>94</sup> In the first place,

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<sup>92</sup> Centre for Tax Policy and Administration, 'Review of Comparability and of Profit Methods; Revision of Chapters I-III of the Transfer Pricing Guidelines', July 2010, *Organisation for Economic Cooperation and Development*, < <https://www.oecd.org/ctp/transfer-pricing/45763692.pdf>> on 2 January 2017.

<sup>93</sup> OECD Observer

<[http://oecdobserver.org/news/archivestory.php/aid/3132/Corporate\\_responsibility\\_and\\_paying\\_tax.html](http://oecdobserver.org/news/archivestory.php/aid/3132/Corporate_responsibility_and_paying_tax.html)> on 3 January 2017.

<sup>94</sup> Devereux M, 'Transparency in reporting Financial Data by Multinational National Corporations, *Oxford University Centre for Business Taxation* (July 2011),

even if commercial profits were known, the complexity of tax law properly applied, the allowances and reliefs available and timing issues make it very difficult to know the amount of tax due, and for a variety of reasons the tax paid in a year may not bear a strong relationship to the tax due with respect to the commercial profits earned that year.

It is important to note that developing countries face an asymmetry in information. The taxpayer in their jurisdiction will be typically a subsidiary of the multinational group, so when audited and required to provide information to the tax authority it may be able to respond only for itself, for it often has no legal ability to compel the production of information in the possession of affiliates in other territories which are third persons.<sup>95</sup> One quite extensive example of the public disclosure that might be required from a multinational company to satisfy the accountability objective has been put forward by the Task Force on Financial Integrity( TFFI).

TFFI proposed the following as disclosure requirements for each multinational company: “The name of each country in which it operates, the names of all its companies trading in each country in which it operates, what its financial performance is in every country in which it operates, without exception, including: its sales, both third party and with other group companies, purchases, split between third parties and intra-group transactions, labour costs and employee numbers, details of the cost and net book value of its physical fixed assets located in each country, details of its gross and net assets in total for each country in which operates.”<sup>96</sup>

The fiscal and public agencies governing the extractive sector in many African countries are weak and porous. In many cases, companies enjoy excessive tax incentives, which is exacerbated by extensive unethical tax avoidance, transfer mispricing and anonymous company ownership schemes. To address this weakness, and after decades of responding to

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<[http://www.sbs.ox.ac.uk/sites/default/files/Business\\_Taxation/Docs/Publications/Reports/transparency-in-reporting-financial-data-by-multinational-corporations-july-2011.pdf](http://www.sbs.ox.ac.uk/sites/default/files/Business_Taxation/Docs/Publications/Reports/transparency-in-reporting-financial-data-by-multinational-corporations-july-2011.pdf)> on 29 December 2016.

<sup>95</sup> Devereux M, ‘Transparency in reporting Financial Data by Multinational National Corporations, *Oxford University Centre for Business Taxation* (2011),

<[http://www.sbs.ox.ac.uk/sites/default/files/Business\\_Taxation/Docs/Publications/Reports/transparency-in-reporting-financial-data-by-multinational-corporations-july-2011.pdf](http://www.sbs.ox.ac.uk/sites/default/files/Business_Taxation/Docs/Publications/Reports/transparency-in-reporting-financial-data-by-multinational-corporations-july-2011.pdf)> on 29 December 2016.

<sup>96</sup> Murphy R, ‘Country by Country Reporting Holding Multinational Corporations to account wherever they are, Task Force; Financial Integrity & Economic Development’, (2009),

<[http://www.financialtransparency.org/wp-content/uploads/2015/04/Final\\_CbyC\\_Report\\_Published.pdf](http://www.financialtransparency.org/wp-content/uploads/2015/04/Final_CbyC_Report_Published.pdf)> on 29 December 2016.

externally driven transparency agendas, African governments embraced the Africa Mining Vision (AMV) in 2009 as one of its pillars is fiscal regime and revenue management.<sup>97</sup>

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<sup>97</sup> Steyn L, 'How much do governments rake in? Mining giants come clean on taxes' <http://mg.co.za/article/2016-07-06-00-mining-giants-come-clean-on-taxes> 'Mail and Guardian' on 2 January 2017.

## **CHAPTER 5: EFFORTS BY KENYA IN ENCOURAGING ACCESS TO INFORMATION TO THIRD PARTIES**

The Kenya Ministry of Mining launched their official Cadaster Portal (or register) to enable government to regulate and obtain value from mining operations. Some of the things the newly launched cadaster will help the government in doing include: formally recording all applications for various types of licences and issues titles for these licenses, registering all changes to the title, checking against overlapping with existing claims or other impediments and advising the Ministry whether the application is technically sound and if the license payments have been done. The portal also initiates the procedures for modifying or cancelling a license if needed, maintaining a register and a map of the licenses as a technical reference in case of dispute and it will also facilitate submission of statutory fees for licenses. The Online Transactional Mining Cadaster Portal (OTMCP) is a web-based e-Government system through which participants in the Kenyan mining industry will be able to interact with the Ministry to: view licenses or permit details and application status in real time, submit and manage electronically the application for granting renewals and other business processes, submit digital documents to meet reporting requirements and also to submit fee payments via credit card or mobile money.

In addition, the International Monetary Fund (IMF) team is pushing the Kenya government to make public details of a number of deals it has signed with oil exploration and mining firms. Keeping in mind that Kenya has so far only committed to implementing the EITI but is not a candidate country nor is it compliant. But officials on the IMF team disclosed that the government has denied them access to the documents, a fact that can only leave Kenyans guessing how the country is faring in regard to the exploration and exploitation of minerals. It found that the Ministry of Environment and Mineral Resources “treats these agreements as confidential and did not release them to the mission.”<sup>98</sup>

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<sup>98</sup> <http://www.freedominfo.org/2013/08/kenya-debating-transparency-of-natural-resource-contracts/> on 5 January 2017.

## **CHAPTER 6: RECOMMENDATIONS AND CONCLUSION**

### **6.1 TO THE GOVERNMENTS:**

1. To break the resource curse and turn mineral wealth into revenue for development, the laws, the policies and the institutions that govern financial payments made by mining corporations to national governments need to be reformed.
2. Most tax codes or mining agreements require prices in such transactions to be at the same price as a company would obtain in an "arm's-length" transaction. But determining the arm's-length price and monitoring such transactions can be challenging. To assist governments in this respect, some mining agreements contain provisions requiring reporting of such transactions, documentation of the basis of the arm's-length prices used and, in some cases, a certification from a company officer about such prices.<sup>99</sup>
3. The practice of granting tax exemptions to mining companies in mining contracts should cease. Whichever mining tax rates and terms used should be legislated in the substantive laws and not only in the development agreements.
4. Country legislation should push for a new international accounting standard that would force companies to report on their profits, expenditures, and taxes, fees and community grants paid in each financial year on a country-by country basis.
5. Sometimes an estimate of the minerals' value in the mining jurisdiction may be agreed ahead of time by the government and the company in what is called an "Advanced Pricing Agreement" (APA).<sup>100</sup> Rather than the government checking costs shipment by shipment, both sides agree on a method of doing the valuation to save themselves the trouble of arguing over it later. APAs are generally not included in the mining contract itself, although the contract could require the company and government to make one before production starts.
6. They must demand that such companies comply with the highest international standards in the social, humanitarian, and environmental spheres.

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<sup>99</sup> The International Senior Lawyers Project (ISLP), Open Oil, Revenue Watch Institute-Natural Resource Charter (RWI-NRC), and the Vale Columbia Centre on Sustainable International Investment (VCC): 'Mining Contracts; How to Read and Understand them' 2014, <https://eiti.org/sites/default/files/documents/mining-contracts-how-to-read-and-understand-them.pdf> on 25 December 2016.

<sup>100</sup> PWC: 'Transfer pricing at your fingertips' <<https://www.pwc.com/gx/en/international-transfer-pricing/assets/itp-2013-final.pdf>> on 5 January 2017.

## 6.12 TO THE ACCOUNTING BOARD

1. To the International Accounting Standards Board Adopt a new international accounting standard for extractive industries, which require them to report on their profits, expenditures, and taxes, fees and community grants paid in each financial year on a country-by-country basis.

## 6.13 TO BILATERAL AND MULTILATERAL DONORS

1. Scale up their financial assistance to African governments to improve their capacity to monitor and audit the accounts of mining companies, and to review their mining tax regimes. African governments should be free to use this finance to purchase legal and other technical assistance from any service provider of their choice.
2. Detail the use of fiscal incomes from extractive industries within national and local budgets and development plans, in both the short and medium terms (i.e. for mitigating health and education or environmental impacts in exploited areas) and the long term (i.e. for productive diversification and to reconstruct sources of livelihood in exploited areas).<sup>101</sup>
3. OECD countries and international donors should establish and apply transparency and corporate responsibility criteria for the companies they support through their Export Credit Agencies (ECAs). They should respect and adhere to OECD guidelines and UN standards for multinational companies, as well as the OECD Anti-Bribery Convention and the UN Convention against Corruption; and consider the possible proposal of an OECD convention on transparency and reporting for multinational companies. ECAs should have in place policies requiring disclosure of payments and contracts, independent monitoring of projects, and assurance of minimum governance conditions before financing projects.<sup>102</sup>

## 6.14 TO THE THIRD-PARTY BENEFICIARIES

1. When one of these non-parties is harmed because of mining operations, and sues the government and/or company for relief, the contract should often specify who will wind up ultimately paying for any compensation. These are called "indemnification

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<sup>101</sup>Oxfam Briefing Paper, 'Lifting the Resource Curse; How Poor People can and should benefit from the revenues of extractive industries' [https://www.oxfam.org/sites/www.oxfam.org/files/file\\_attachments/bp134-lifting-the-resource-curse-summary\\_7.pdf](https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bp134-lifting-the-resource-curse-summary_7.pdf) on 8 January 2017.

<sup>102</sup> Oxfam Briefing Paper, 'Lifting the Resource Curse; How Poor People can and should benefit from the revenues of extractive industries' [https://www.oxfam.org/sites/www.oxfam.org/files/file\\_attachments/bp134-lifting-the-resource-curse-summary\\_7.pdf](https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bp134-lifting-the-resource-curse-summary_7.pdf) on 8 January 2017.

“clauses, and are used by contracting parties to decide how to allocate liability between themselves and should be included in these contracts.

2. Legislation should contain a provision in its mining law requiring the mining license or contract holders to negotiate and enter Community Development Agreements (CDAs) to facilitate the transfer of social and economic benefits to local communities. CDAs can help define the relationship between mining companies and impacted communities, including the roles of local and national governments and nongovernmental organizations.<sup>103</sup> A careful CDA will probably specify the timing of contributions, the use to which each contribution is to be put (or the process for allocating funds to specific uses) and a vehicle for the management of the contributed funds. They also provide a framework for community interactions with the mining company (and potentially local government entities) across the whole range of matters that may concern the local community.

## **6.2 CONCLUSION:**

My hypothesis that when contract disclosure follows the appropriate channels, rights of third parties are respected and protected has been proved. Kenya needs to ensure that its legislative framework on the extractive industry provides access to information on contracts that affect the lives of its beneficiaries and does indeed facilitate access to justice as envisioned by Constitution. The contracts governing the relationships in the extractives sector is one that has implications to the growth of a country's revenue, its environmental and economic costs should be regulated through a consistent policy. Governments play a supervisory role in ensuring that the rights of third parties who are to benefit from these contracts are protected. Establishing a method in which contracts can be supervised after every stage of an extractive operation will serve as the best checks and balances system to ensure that multinational organisations and governments alike are perpetually under scrutiny thus facilitating access to the benefits of these resources. A further study into disclosure raises the issue if, and to which extent, disclosure should be voluntary, and if voluntary how could it be made more effective.

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<sup>103</sup> Clement Fofunde, 'Negotiation of Community Development Agreements', Africa Mining Legislation Atlas, World Bank Workshop, Accra 2016 Presentation Available.

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