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**Advancing Transparent Disclosure in Petroleum Governance: A Comparative  
Study of the Transparency Provisions in the Model Petroleum Agreements in  
Kenya and Nigeria**

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120018**

**Submitted in Partial fulfillment of the requirements for the Degree of  
Master of Laws at Strathmore University**



**Strathmore Law School**

**Nairobi, Kenya**

**October, 2022**

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1<sup>st</sup> September 2022

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## Abstract

Natural resources, especially oil and gas, play a pivotal role toward the socio-economic development of a country. However, despite making steps towards maximizing the full socio-economic benefits of oil production activities, several countries are still marred with mismanagement of the revenues that emanate from the oil and gas sector. Scholars have argued that one of the enablers of mismanagement of public resources is the aspect of governmental secrecy and lack of transparent and accessible information on petroleum contracts entered between governments and the oil companies. The deeply entrenched culture of secrecy has thus led to poor resource governance in several African countries, with Nigeria being a prime example. Though Nigeria has been in oil and gas extraction for a longer period of time in comparison to Kenya, it has not however achieved good resource governance due to non-disclosure of the contracts. Concerns are already emerging that Kenya, though still in its infancy extraction stage, is closely following the footsteps of Nigeria in terms of transparent disclosure of fiscal terms, which may ultimately hamper its quest for good resource governance.

This thesis examines gaps in Kenya's petroleum contract which may hinder transparent disclosure of fiscal and other important sustainability information by oil and gas companies. It thus argues that if not comprehensively addressed, lack of transparent disclosure of fiscal terms in Kenya may hamper good resource governance just as it is the case in Nigeria.

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### **List of Abbreviations/Acronyms**

AMV	Africa Mining Vision
BO	Beneficial Ownership
EITI	Energy Industry Transparency Initiative
EPRA	Energy and Petroleum Authority
FPIC	Free, Prior and Informed Consent
ICCPR	International Covenant on Civil and Political Rights
ILEG	Institute for Law and Environment Governance
IOC	International Oil Companies
KCSPOG	Kenya Civil Society Platform Oil and Gas
KRA	Kenya Revenue Authority
NAP IV	National Action Plan IV
NAPIMS	Nigerian Extractives Industry Transparency Initiative
NOC	National Oil Company
NSWG	National Stakeholder Working Group
OGP	Open Government Partnership
PANEL	Participation, Accountability, Non-discrimination and Equality and Empowerment and Legality
PSC	Production Sharing Contract
UNCED	United Nations Conference on Environmental and Development

## **List of Statutes**

### **Constitution**

Constitution of Kenya, 2010.

### **Statutes**

Access to Information Act No. 31 of 2016.

Extractives Industries Transparency Initiative Act, 2007 (Nigeria)

Income Tax Act, Chapter 470 Laws of Kenya

National Petroleum Corporation Act (Chapter 320, 1990) (Nigeria)

Petroleum Industry Act, 2021, (Nigeria)

Petroleum Act No. 2 of 2019

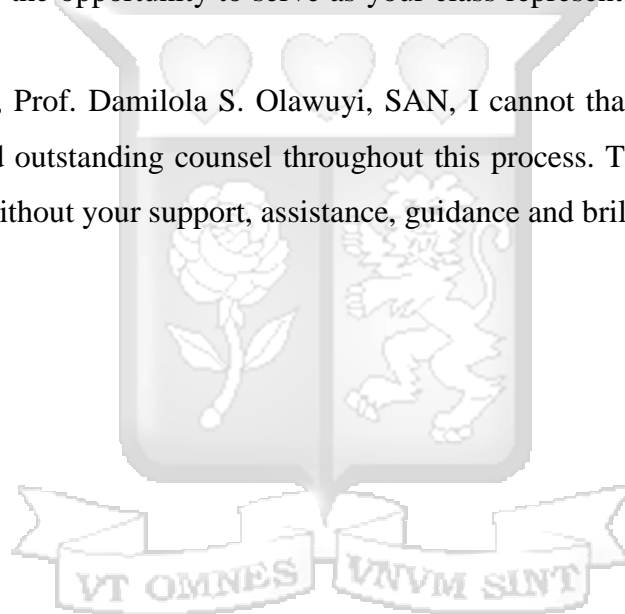


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## Dedication

This work is dedicated to my lovely son, Sean Kingára, who constantly kept me company through the many late nights and always kept me inspired to always keep writing even when I was discouraged.

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## Chapter 1: Introduction

### 1.1 Background

The aim of this research is to examine how transparency provisions in Kenya's petroleum sector can be improved. Drawing lessons from Nigeria, it examines the importance of transparent disclosure of fiscal terms as a prerequisite for good resource governance; the strengths and gaps in Kenya's petroleum contracts with respect to transparent disclosure; and how such gaps can be addressed through innovative legal reforms that strengthen transparency and accountability in Kenya's petroleum sector.

Oil, gas and other natural resources have often been seen as a panacea to most of the economic struggles that countries have experienced.<sup>1</sup> Through natural resources, countries have been able to boost their economies through foreign exchange, development in infrastructure, improved local content among other benefits that often accompany extraction of minerals. In Kenya, the discovery of oil in the Northern part of the country saw a robust hope among citizens that it would help spur economic growth and development in the country. In specific the Northern region where the discovery was made there was hope for advancement in economic growth owing to the fact that the region has not been economically viable due to its adverse climatic condition.

Years later since the discovery of petroleum products in Kenya, there has been negligible number of economic activities stemming from the extraction of oil in the Turkana region.<sup>2</sup> The country has tried to come up with laws to ensure there is effective and efficient resource governance that would in turn spur economic growth.<sup>3</sup> Schoeberlein, in a report published by the Transparency International notes that one of the ways through which countries can ensure there is a corresponding economic growth in oil and mineral rich countries is to adopt good resource governance strategies that

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<sup>1</sup> Kigwiru VK, '*The Challenges Facing the Oil and Gas Sector in Kenya and the Way Forward*' (Social Science Research Network 2020) SSRN Scholarly Paper ID 3534983 <<https://papers.ssrn.com/abstract=3534983>> accessed 25 October 2021.

<sup>2</sup> Kigwiru VK, '*The Challenges Facing the Oil and Gas Sector in Kenya and the Way Forward*' (Social Science Research Network 2020) SSRN Scholarly Paper ID 3534983 <<https://papers.ssrn.com/abstract=3534983>> accessed 25 October 2021.

<sup>3</sup> Agade K, '*Oil and Emerging Conflict Dynamics in the Ateker Cluster: The Case of Turkana, Kenya*' (2017) 21 *Nomadic Peoples* 34.

entrench the concept of transparency and accountability.<sup>4</sup> The report notes that despite most African countries being well endowed with natural resources, most countries haven't had corresponding growth in their economies. In Kenya, a number of studies have documented significant concerns about 'lack of openness, limited information flow, secrecy of mining and oil and gas contracts and unaccountable sector.'<sup>5</sup> Without addressing transparency gaps in the development and implementation of petroleum contracts in Kenya, achieving good governance outcomes in Kenya's oil and gas sector may remain elusive.

The aim of this thesis is therefore to examine how transparency provisions in Kenya's petroleum sector can be improved. After discussing the importance of transparent disclosure of contractual terms and fiscal benefits as a precondition for good resource governance, it examines current gaps in Kenya's petroleum contracts that hinder transparent disclosure. In Kenya, as a way of enhancing good governance in all spheres including good resource governance, Kenya enshrined Article 35 of the Constitution. This provision is meant to ensure access to information by the citizens in order to enhance transparency and accountability. Additionally, Article 10 of the Constitution of Kenya 2010 encapsulated principles of good governance, accountability and transparency. Despite the call in these provisions, Kenya has not espoused some of these good resource governance principles in its model contracts and agreements between Kenya and International Oil Companies.

Kenya's legal regime defines petroleum agreement as "any agreement, license or contract or other agreement between the Government and a contractor to conduct

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<sup>4</sup> Schoeberlein, J. *National strategies for advancing good governance in Africa*. Transparency International., 2020, 24.

<sup>5</sup> The Institute for Law and Environmental Governance, *Transparency and accountability in Kenya's extractives sector: What works, what doesn't?* (March, 2020) [http://ilegkenya.org/wp-content/uploads/2020/07/ILEG\\_POLICY\\_BRIEFS\\_TRANSPARENCY\\_AND\\_ACCOUNTABILITY-IN-THE-EXTRACTIVE-SECTOR-IN-KENYA-WHAT-WORKS-WHAT-DOES-NOT.pdf](http://ilegkenya.org/wp-content/uploads/2020/07/ILEG_POLICY_BRIEFS_TRANSPARENCY_AND_ACCOUNTABILITY-IN-THE-EXTRACTIVE-SECTOR-IN-KENYA-WHAT-WORKS-WHAT-DOES-NOT.pdf); Kigwiru, Vellah Kedogo, *The Challenges Facing the Oil and Gas Sector in Kenya and the Way Forward* (February 9, 2020). Available at SSRN: <https://ssrn.com/abstract=3534983> or <http://dx.doi.org/10.2139/ssrn.3534983>.

upstream petroleum operations in accordance with the provisions of this Act.”<sup>6</sup> The model petroleum agreement that is outlined in the Kenya Petroleum Act 2019 is a Production Sharing Contract (PSC). A PSC is defined as “a petroleum agreement entered between the Government and the contractor, which enables the contractor to explore, develop and produce petroleum within a contract area”<sup>7</sup> A model PSC is found in the Petroleum Act. Despite the attempt to ensure there is a product sharing agreement enshrined in the legal instruments, such contracts and agreements have remained confidential thus hampering good resource governance in the extractive industry.<sup>8</sup>

This study will immensely make reference to the Nigerian model petroleum contracts. The choice of Nigeria is informed by the fact that Nigeria like Kenya is a developing country. Secondly, Nigeria has been in the exploration industry for some time and yet it is faced by lack of transparency and accountability that has led to poor resource governance of resources. Nigeria is a good example of how lack of transparent disclosure of fiscal benefits may result in the resource curse. Despite many years of oil and gas exploration, Nigeria has little to show in terms of economic, social, environmental and human development.<sup>9</sup> Even though Nigeria has a well-endowed petroleum industry in Africa it has, however, certain similarities with the shortcomings of resource governance that espouses lack of transparency and non-disclosure of petroleum contracts and agreements. The resources are vested in the government and the Act of Parliament that governs oil production and exploration activities is the Petroleum Industry Act 2021. The Nigeria National Petroleum Corporation (NNPC) Limited is the nation’s national oil company that has powers to enforce the regulations adopted under the Act and take part in the oil activities from the Nigerian National Petroleum Corporation Act (NNPCA). In Nigeria, the PSC is also the type of contract used in the petroleum industry.<sup>10</sup>

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<sup>6</sup> Section 2, *Petroleum Act* (Act No. 2 of 2019).

<sup>7</sup> Section 2, *Petroleum Act* (Act No. 2 of 2019).

<sup>8</sup> Abosede OB, ‘Oil, environmental conflict and the challenges of sustainable development in the Niger Delta’ (2014) 9 *Journal of Peacebuilding & Development* 77.

<sup>9</sup> Olawuyi D, *Principles of Nigerian Environmental Law* (Afe Babalola University, Ado Ekiti, 2015) 1-25.

<sup>10</sup> -<<https://iclg.com/practice-areas/oil-and-gas-laws-and-regulations/nigeria>> on 28 November 2019.

Petroleum contracts ought to be as transparent as possible in order to ensure that all the processes in the petroleum activities are open and accountable. The accountable management of oil and gas resources will ensure generation of greater revenue share and benefits to the country and to the local communities. However, the Nigerian contractual regime falls short of international best practices on transparent disclosure.<sup>11</sup> The Energy Industry Transparency Initiative (EITI) is a “global standard to promote the open and accountable management of oil, gas and mineral resources” and it is grounded on the foundation that natural resources in countries belong to the citizens.<sup>12</sup>

Transparency in the oil and gas industry consists of:

...opening up government information to the public, to scrutiny by society. Transparency does not imply an act of accountability to a specific person or the simple disclosure, but the democratic practice of revealing governmental information and creating participatory and public processes for engaged democracy.<sup>13</sup>

Even though Kenya is at its infancy when it comes to the oil industry, a number of transparency issues are already emerging. Concerns over governmental secrecy in terms of disclosing information of revenues, results of environmental impact assessment and stakeholder consultation processes have increasingly been raised.<sup>14</sup> For example, the Constitution of Kenya 2010 provides for access to information for every citizen under Article 35 but there are confidentiality clauses in the petroleum contracts which makes it inconsistent to Article 35. There are no mandatory provisions for the transparent disclosure of the contracts and the information therein. Suffice to add that this study appreciates that there are grounds upon which access to information can be restricted under the Constitution and the enabling legislation. However, on a positive note, it is the hypothetical take of this study that there exist no such grounds with regards to the model petroleum contracts.

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<sup>11</sup> D. Olawuyi, *Extractives Industry Law in Africa* (Springer, 2018) 1-25.

<sup>12</sup> Chapter 1, *The EITI Standard*, 15 October 2019, Ed 2, 6.

<sup>13</sup> Andrade M, Hernandez C, Landivar A and Mendez M, *Petroleum contracts: A comparative study of Ecuador and Bolivia: What are the strengths, the weaknesses, the opportunities and the threats*, Trace Briefings, 2010-2011.

<sup>14</sup> Nderi, AW. "*Embracing Transparency and Accountability in Kenya's Extractives Sector*." [PhD dissertation, University of Nairobi, 2019.]

In order to address these problems, it is important to examine how transparency provisions in Kenya's petroleum contracts can be enhanced. Transparency in petroleum contracts is an important feature. Because of the amount of revenue the petroleum industry brings into a country once it is commercially viable, it is important to enhance transparency provisions to ensure that there is no mismanagement in the resources. It is a concept that is advocated for in both the local and international communities. Enhanced transparency can help reduce the corruption in the petroleum sector which in turn alleviates the resource curse. Disclosure should be made when it is due and, in the manner, required. Once transparency is achieved in the manner required, other matters such as 'accountability, credibility and compliance' follow suit. Proper governance will in turn be fostered by all these practices.<sup>15</sup>

PSCs cannot be implemented or negotiated as contracts on their own as they exist within other laws and regulations within the host country. These laws and regulations usually exist in a hierarchical form. In Kenya, the most superior law is the Constitution and therefore all other laws and procedures have to be consistent with the Constitution. As a starting point, Article 35 gives the citizens a right to access to information and this right must be upheld at all times.<sup>16</sup> Even with the existence of the model PSC in the Petroleum Act, petroleum contracts are not available in the public domain and there is also no mention of their summary terms or any other details at all. Two examples of these contracts are:

First there was the Block 10BB signed on 25 October, 2007, between the government of Kenya and the Turkana Drilling Consortium (Kenya) Limited.<sup>17</sup> During the signing of the contract, the company outlined that it was ready to ensure there was disclosure of the contents of the said contract.<sup>18</sup> This was, however, refuted by the government which on its side insisted that there was certain vital information within the contract

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<sup>15</sup> Oyewunmi, OA., and Olusola JO. "Transparency in Nigeria's oil and gas industry: Is policy re-engineering the way out?." *International Journal of Energy Economics and Policy* No. 3 (2016): 630-636.

<sup>16</sup> 'Potential government revenues from Turkana oil', Kenya Civil Society Platform for oil and gas, April 2016, 6 -<[kcspeg.org/wp-content/uploads/2018/08/Revenues-from-Turkana-Oil-April-2016.pdf](http://kcspeg.org/wp-content/uploads/2018/08/Revenues-from-Turkana-Oil-April-2016.pdf)> on 21 July 2021.

<sup>17</sup> Patey LA, Kenya: An African Oil Upstart in Transition, 53, 2014.

<sup>18</sup> Nyabuto WO, Kenya: An African Oil Upstart in Transition, 53, 2014.

that made it impossible to reveal the content of the said contract.<sup>19</sup> Despite the need and cry among the citizens for the contract to be revealed and its content made public, such has never happened and the contents of the contract remains a secret.<sup>20</sup>

The second contract was the Block 13T signed on 17 September, 2008, between the government of Kenya and Platform Resources Inc.<sup>21</sup> Despite the contract being the one that gave the companies a go ahead to conduct exploratory purposes, the contents of the said contract also remained to be undisclosed. The nondisclosure of the said contracts thus has hampered good resource governance on the Kenyan side. This is also true for Nigeria where most of the contracts are not made public especially between the government and the oil companies.<sup>22</sup> This has also been attributed majorly to the poor resource governance in the country.

Africa Oil and Tullow are yet to publicly disclose any of their contracts in Kenya. Africa Oil, a company listed on the Toronto Stock Exchange, a stock market that enshrines ultimate disclosures for the company that are listed in its market. Tullow has also disclosed their contracts in other jurisdictions so Kenya should not be an exception with the same.<sup>23</sup> Aside from the extractives industry, Kenya has generally had a pertinent problem when it comes to contract disclosure. One main example is the Standard Gauge Railway (SGR) contract which has never been disclosed since it was signed. This has resulted in the Civil Society groups Okoa Mombasa and the Institute for Social Accountability (TISA) filing a petition on 21 June, 2021, at the High Court to get orders in order to compel the disclosure of this contract.<sup>24</sup>

This thesis examines how transparency provisions in the Kenya's petroleum sector can be improved. It examines the strengths and gaps in Nigeria's petroleum contracts to see

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<sup>19</sup> Nandako S, Transparency in the management of oil and gas blocks: a review of Kenya legislative framework, 2020.

<sup>20</sup> Nandako S, Transparency in the management of oil and gas blocks: a review of Kenya legislative framework, 2020.

<sup>21</sup> 'Potential government revenues from Turkana oil', Kenya Civil Society Platform for oil and gas, April 2016, 8.

<sup>22</sup> Rotimi O and Aderemi AA, "Revenue generation and transparency in Nigeria oil and gas industry: Position of Nigeria Extractive Industries Transparency Initiative (NEITI). Research Journal of Finance and Accounting, 99-114.

<sup>23</sup> 'Potential government revenues from Turkana oil', Kenya Civil Society Platform for oil and gas, April 2016, 8.

<sup>24</sup> -<pwyp.org/country/Kenya/> on 21 July 2021.

the pitfalls that can be avoided, as well as the positive lessons that can be adopted to strengthen transparency and accountability in Kenya. Comparing the two model petroleum contracts in the two countries will be able to show the areas in which the Kenyan law may need improvement and those areas that also give Kenya a higher bargaining power when it comes to the negotiation of these contracts.

## **1.2 Statement of the Problem**

The problem critically analyzed in this study can be categorized into two main fronts that are interconnected. First, Kenyan legal frameworks on oil and gas espouse aspects such as transparency and the right for citizens to request and access information from the government. These frameworks are intended to ensure there is good governance in all spheres within the country. One of the essentials of good governance is the duty of the government to disclose certain information to the general public. However, the duty to disclose information has not been achieved yet as most of the agreements entered between the governments and the international oil companies are not always made public despite the general outcry from the public. The upshot to this more often is that there may be self-serving interests by the different stakeholders in the oil and gas sector.<sup>25</sup> The first problem thus looks how the lack of transparent disclosure of fiscal terms leads to, and promotes, poor resource governance that may lead to the second problem of corruption and the proverbial *resource curse*.

## **1.3 Statement of Objectives**

The study is premised on the broader objective of examining how the lack of disclosure of the model contracts in the petroleum industry contribute to poor resource governance which is in turn detrimental to the countries. Towards this end, three minor objectives will be pursued. Namely:

- a. To examine the importance of transparent disclosure of fiscal terms as a prerequisite for good resource governance in the petroleum sector, drawing lessons from Nigeria;

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<sup>25</sup> Arnim L, Ukoha U and Mbabazi P (eds), *Oil Wealth and Development in Uganda and Beyond: Prospects, Opportunities, and Challenges* (Leuven University Press 2019)  
<<http://www.jstor.org/stable/10.2307/j.ctvt9k690>> accessed 5 October 2021.

- b. To evaluate the strengths and gaps in Kenya's petroleum contracts with respect to transparent disclosure; and
- c. To examine how transparency gaps in Kenya's petroleum contracts can be addressed through innovative legal reforms that strengthen transparency and accountability in the Kenyan model petroleum contracts.

#### **1.4 Research Questions**

This research aims to answer the following questions:

- a. What frameworks and models of transparency are adopted in Kenya and how do they contribute to poor resource governance?
- b. What are the inadequacies of the Kenyan model petroleum contracts with respect to transparent disclosure?
- c. What best practices can be adopted from the Nigerian model contracts and what recommendations can be adduced to improve the transparency provisions in the Kenyan petroleum contracts?

#### **1.5 Hypothesis**

This study attempts to test two important hypotheses. The first hypothesis tested is to the effect that the legal frameworks and models of transparency adopted towards disclosure of the contracts entered between these countries and international oil companies does not enhance effective and good resource governance. The second hypothesis guiding this study is that failure to effectively address gaps in transparency could over time result into poor resource governance thus giving room for corruption and other adverse effects such as *resource curse*.

#### **1.6 Justification of the Study**

Oil exploration is a high-risk activity which should be carried out under very specific terms, essentially those that are favorable to the host government. For Kenya, the petroleum industry is at the infancy phase and there is no certainty of finding any commercially viable oil, as is the case in any exploration activity. Therefore, the government ought to ensure that they are free from any liability and risk and that even if there is no commercially viable oil found, the geological data obtained should remain beneficial to the government. The best way of ensuring this is to compare the model

petroleum contract in Kenya with a different model petroleum contract that has been used over a period of time, therefore easier to tell trends and to also see what terms are favorable to the host government in all the phases, especially in the exploration phase.

## **1.7 Conceptual Framework**

Contract transparency in petroleum contracts is directly related to the citizens of a country having ownership in the natural resources of their country, which are held in trust by the government. They therefore have a right to be made aware of the agreements pertaining to their natural resources. Any agreements the government makes with IOCs or independent oil companies should therefore be communicated to the citizens of the country as a stakeholder.<sup>26</sup> Transparency ought to connect four main aspects of public accountability in order to be considered effective. Adequate transparency and accountability will ultimately ensure that there is accurate information sharing with the public, accessibility to information as a matter of public interest since the resources ultimately belong to the people, and ultimately that there is adequate public participation of the people. Suffice to add that these are constitutional dictates that are highlighted hereinbelow.

### **1.7.1 Accuracy of Information**

Accuracy of information can be defined as the aspect of the information released to the public not only being correct, but also precise. Accuracy of information relating to the contracts entered between governments and oil companies is important in various ways. Through their accuracy, the general public and other stakeholders can provide checks and balances on not only the use of the revenue generated in the course of the interaction, but also ensuring that the government and the oil companies keep their end of the bargain.

Information accuracy in resource governance also serves to ensure that there is a reduction of any form of mismanagement that may occur. Cases of corruption are greatly reduced when the information released to the general public is accurate. This enables the general public to audit the conduct of the parties and effectively monitor

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<sup>26</sup> Hubert D and Pitman R, '*Past the tipping point? Contract disclosure within the EITI*', National Resource Governance Institute, 2017, 1.

and evaluate the transactions. Through accuracy of data disseminated to the public, the government sets the right steps to ensure that it is open to audit which in turn can be a stepping stone to minimize any form of mismanagement. A disclosure that is not accurate therefore hampers good resource governance as monitoring and evaluation on the efficacy of the upstream and downstream oil activities cannot be conducted. Petroleum contracts are definitely bulky and complex. Their accuracy and levels of being understood will largely depend on the governing authorities' willingness and ability to break down the complex data and accurately deliver it to the general population.

### **1.7.2 Accessibility of the information as a public interest matter**

Oil and gas as a natural resource is often held in trust for the citizens by the government. This argument thus requires the government to undertake actions necessary to ensure that they are used to the benefit of the citizens. One of the ways through which this can be monitored is through ensuring that all actions taken surrounding their extraction and subsequent processing are disclosed to the general public. Due to the nature and the import of petroleum and gas as natural resources being an emotive and an important economic tool, the information relating to them thus operatively make such information a public interest matter.

Accessibility of information on the model petroleum contracts to the public should be prioritized. This should be done as a constitutional decree and requirement. There should be in existence a public portal at which every person so desirous can access the model contracts. In order to ensure effective disclosure, there should be availed versions that are general population reader friendly and the technical contracts that can be accessed and studied by experts from organizations such as civil society organizations that educate the public.

### **1.7.3 Public Participation and Openness**

Public participation and openness are fundamental aspects in the management and governance of natural resources. Through public participation, disclosure can be made to the public and the public in turn can voice some aspects they want covered in the

contracts and agreements between countries and the oil companies.<sup>27</sup> The disclosures through public participation ensures that all the stakeholders involved in the process take part in planning and the management of the natural resources as is required. This improves mineral resource governance as there will be need for public accountability. This greatly reduces the aspects of mismanagement that comes with non-disclosure of vital information relating to natural resources. Public participation is a national principle, value and virtue. This requirement should be adhered to fully to entrench accountability, transparency, inclusion and openness in the management of public resources.

Transparency can therefore be seen as a link to good governance as it provides for accountability and the stakeholders. The accountability allows stakeholders get this information published to them and receive information that is helpful and that informs them of the processes that are ongoing in the exploration of the natural resources that rightfully belong to them. This can also increase their confidence towards the process and in turn, towards the government and ultimately lead to sustainable development. Therefore, it can be said that accountability can only be achieved with transparency and access to the information contained in these petroleum contracts.

### **1.8 Literature Review**

This study acknowledges that there exists literature on how transparent disclosure contributes to good resource governance. The literature in existence can be themed into those that support transparent disclosure as a way of advancing good governance<sup>28</sup> and those that are in support of non-disclosure as a way of ensuring effectiveness of commercial transactions between countries and the oil companies and other mineral resource mining companies.<sup>29</sup> The literature reviewed in this section critically analyses how to advance good governance through the use of transparent disclosures. To this end, journal articles that touch on transparent disclosure to advance good resource governance will be analyzed from among others, the comparative jurisdiction-

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<sup>27</sup> Muigua K, 'Towards Meaningful Public Participation in Natural Resource Management in Kenya' 31.

<sup>28</sup> Asiago BC, Fact or Fiction: Harmonizing and Unifying Legal Principles of Local Content Requirements, *Journal of Energy and Natural Resources Law*, 34, 2016, 337-360.

<sup>29</sup> Batra Mukta, Bafna, Namit, Renewable Energy: The WTO's Position on Local Content Requirements, *Energy Law Journal*, 39, 2018, 401-426.

Nigeria.<sup>30</sup> In analyzing the existing literature, the study will also identify the existing gaps in the literature and how this study will help seal these gaps. Despite the foregoing statement of existence of literature on the topic, this study, however, finds its relevance on the premise that there still exist a dearth of literature in the Kenyan scenario since oil was only discovered less than a decade ago.

Based on the foregoing, this literature review is presented in two main themes. The first theme analyses the importance of disclosure of the oil and gas contracts while the second part analyses how transparent disclosure leads to good resource governance.

### **1.8.1 Transparent Disclosure**

Scholars such as Olawuyi note that transparent disclosure in the extractive and oil and gas industry is an important element not only to citizens, but also the government itself. Olawuyi opines that disclosures serve a greater purpose since countries can not only enhance their profitability in the activities but can also help mitigate or reduce any legal risk that may arise out of the transactions.<sup>31</sup> Transparent disclosure in enhancing the profitability in the oil and gas activities reduces cases of corruption as the public can be able to audit and monitor how the revenues generated are utilized.

Michael also argues that transparent disclosure as a form of public governance strategy encompass public participation.<sup>32</sup> In the oil and gas industry, more often weighty decisions affecting the upstream and downstream operations calls for transparent disclosure. The two authors note that where there is public participation, transparent disclosure can be easily achieved as it shows an institution's commitment to transparency. Transparent disclosure enhances the trust between the public, the government and the oil companies. Through the bridging of the trust between the various stakeholders involved, good governance can be easily achieved.

The Extractives Industries Transparency Initiative (EITI) is the 'global standard' on contract transparency in petroleum contracts and it gives a guideline on how to properly

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<sup>30</sup> Abe, Oyeniya, Local Content Requirements in Nigeria's Extractive Sector and the Implications for Sustainable Development, *Journal of African Law*, 66, 2022, 73-96.

<sup>31</sup> Olawuyi D, '*Legal Strategies and Tools for Mitigating Legal Risks Associated with Oil and Gas Investments in Africa*' (Social Science Research Network 2015) SSRN Scholarly Paper ID 2660541 <<https://papers.ssrn.com/abstract=2660541>> accessed 6 October 2021.

<sup>32</sup> Peace Research Institute Oslo (PRIO), '*Horizontal Inequality, Decentralizing the Distribution of Natural Resources Revenues, and Peace*' <<https://www.prio.org/Publications/Publication/?x=5146>> accessed 10 October 2021.

manage a country's natural resources in order to ensure that the citizens in the country benefit from these resources.<sup>33</sup> EITI implementing countries have normalized such disclosure practices in the recent past and it has since become more popular globally. Such transparency and disclosure show that governments and IOCs see the benefits that emanate from allowing citizens to be part and parcel of the process as this contributes to the citizens handing over the social license to operate and in turn, less disruptions and less resistance is experienced from the citizens and the local communities. Governance practices are also improved as there is less room for corrupt practices from officials as they are held responsible for all their actions and decisions pertaining to these petroleum contracts and the implementation process. Transparent disclosure would therefore simply mean that the citizens would have access to these contracts as a matter of their right to the natural resources being exploited.<sup>34</sup>

The EITI standards provide a guideline as to which contracts ought to be accessible. These standards outline the contracts as:

“...any contract, concession, Production-sharing agreement or other agreement entered into by the government, which provides the terms attached to the exploitation of oil, gas and mineral resources” or “any license, lease, title or permit by which a government confers on a company(ies) or individual(s) right to exploit oil, gas and/or mineral resources.”<sup>35</sup>

These standards base their guiding principles on the foundation that such contracts are public contracts and should therefore be disclosed to the public. Based on this, citizens would also be able to know which contracts are relevant and which ones they should access for information. There ought to be proper civic education which addresses these pertinent issues with regards transparency and disclosure of petroleum contracts. There should be easy access of these contracts and the channels used should also be effective. The EITI guidelines propose that EITI implementing governments should publish “metadata” which allows for such contracts to be published using their subject matter, thus making it easier to access and retrieve contracts in a specific manner.<sup>36</sup>

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<sup>33</sup> -<<https://eiti.org/standard/overview>> on 04 June 2020.

<sup>34</sup> Hubert D and Pitman R, ‘*Past the tipping point? Contract disclosure within the EITI*’, 1.

<sup>35</sup> Section 2.4, *EITI Standards 2019*, <[https://eiti.org/files/documents/eiti\\_standard2019\\_a4\\_en.pdf](https://eiti.org/files/documents/eiti_standard2019_a4_en.pdf)> on 04 June 2020.

<sup>36</sup> Hubert D and Pitman R, ‘*Past the tipping point? Contract disclosure within the EITI*’, 4.

Nigeria signed up to EITI in 2003 and enacted the Nigerian Extractives Industries Transparency Initiative (NEITI) Act in 2007. It finally became EITI compliant in 2011, meaning that they had been found to be conducting their petroleum activities as per the EITI standards and guiding principles on transparency. In 2011, however, Transparency International (TI) released a report confirming that Nigeria was still not EITI compliant as there were major irregularities with the disclosure of petroleum contracts as per the guidelines outlined by EITI.<sup>37</sup>

For such contract transparency and disclosure to be possible, there ought to be policies put in place in order to ensure that the laws on transparency and the practice in real sense, are connected and that any gaps that are apparent in practice are dealt with efficiently and effectively. Citizens should always have an understanding of the current practice for contract disclosure to ensure effective transparency.

Some of the major questions that erupt and have often been outlined in various literature is the question on the information ought to be disclosed.<sup>38</sup> In most commercial contracts, there are certain vital clauses that are considered to be materially private that would hamper the financial position of the company. Additionally, there are such information that are always considered to be important to the government that ought not to be left open to the public. Literature therefore suggests that most of this information that are considered to be important and highly private should thus not be disclosed. To this end, there is also the argument as to what material would be conserved to be very private that ought not to be revealed to the general public.

The second aspect that literature outlines is on the aspect of the timelines that are put in place for disclosure of the information. Most arguments are to the effect that the disclosure should be something which is continuous.<sup>39</sup> More often, in countries where the disclosures are made, these disclosures are made at the time of entering of the

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<sup>37</sup> Bature BG, 'An empirical study of the Nigerian Extractive Industries Transparency Initiative (NEITI)' 2014, 4.

<sup>38</sup> Pereira, Eduardo G, Local Content Policies in the Petroleum Industry: Lessons Learned, Oil and Gas, Natural Resources, and Energy Journal, 4, 2019, 631-674.

<sup>39</sup> Ndulo, Nchimunya D, The African Continental Free Trade Area: Local Content Requirements as a Means to Addressing Africa's Productive Capacity Constraints, Michigan Journal of International Law, 43, 2022, 61-128.

contracts with the multinational oil companies. Even though this is the time through which the disclosures should be made, it is always imperative to note that contracts between countries and the multinational companies are often continuous in nature. This should therefore prompt the government and the oil companies to continue disclosing most of the contracts as well as any changes that might be made or are made in the course of the transactions.

The third ambit of transparent disclosure is the format to be used for the disclosure of the information. Since contracts that relate to the mining of petroleum and gas is an important one in a country, it is always important that countries choose the right format that can be used to reach the maximum number of people. This therefore will encourage most of the people to have a look at the document and subsequently take part in mechanisms that would ensure there is proper resource governance. The format used to disclose therefore is also an important aspect of disclosure as it can either enhance or inhibit disclosure of the information to the public.

In most of the contracts, even though international oil companies are more ready to disclose the contents of the contracts more than the countries, one aspect which is often not addressed is the channels to be used for publishing of the contracts to be disclosed.<sup>40</sup> In cases where the channels for disclosure may not reach a wider variety of people, then the aspect of transparent disclosure may not be easily achieved as most people may not be in a position to use some channel. Scholars thus note that one of the ways through which transparent disclosure can be enhanced is through using a channel that can be easily accessed by the general public. The lingering gap, however, is that the scholars fail to provide substantive ways for the disclosure. This study seeks to provide some critical avenues for this disclosure.

### **1.8.2 Transparent Disclosure and Good Governance**

Transparent disclosure as an important element in the management of oil and gas wealth ensures that there is a proper mechanism through which the said wealth is managed and how a country is able to relate to the oil companies for mutual benefit. Through the citizens having accurate information on the amount that is generated from such

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<sup>40</sup> Hubert D and Pitman R, '*Past the tipping point? Contract disclosure within the EITI*', 5.

activities and how much a country and the companies gain, the citizens can take active part in outlining how the money should be managed. Scholars such as Hubert note that through the active involvement of the citizens in the matters pertaining such transactions, doors are opened to the public to take part in the active management of the resources and their wealth. This helps minimize the cases of corruption which may be there as a result of non-disclosure.

Transparent disclosure greatly affects positively how the decisions are made in the course of upstream and downstream oil operations. In instances where those in charge are left to make decision, their decision will more often be put into public scrutiny.<sup>41</sup> Such decisions always involve aspects of the strategic plans, the environmental impact assessments and the financial decisions. This enables the general public to have a general view of some of the operations that will take place in the course of the extraction. This gives the general public the mandate to put into question some of the aspects that may not augur well with the general population. As a way of enhancing good governance in the course of the activities, those who are tasked with the duty of carrying out the process are more often compelled to take the right steps.

Meyers *et al* note that the petroleum industry is often marred by corruption cases that not only stem from the side of the government, but can also be construed to emanate from the oil companies. They note that as a way of curing this menace in developing countries, there is always a need for enhancing clarity of the objectives that are always set in the contracts<sup>42</sup> Some of these contracts always outline the roles and responsibilities of various stakeholders in the contractual relationship. This is because in the course of mining of oil and gas, different players ought to undertake different roles for its successful completion. In instances where the public are no certain of who is to undertake which role which is often come about due to non-disclosure, the responsible stakeholders are often not put into task to explain why they have not undertaken their responsibilities.<sup>43</sup>

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<sup>41</sup> Finn J, Khelif W and Ingley C, '*Transparency Is (Full) Disclosure in Corporate Governance*' (2020).

<sup>42</sup> . Lahn, G, Valérie M, John M, Keith M, and Paul S. "*Good governance of the national petroleum sector.*" The Chatham House Document, London: Chatham House (2007): 26.

<sup>43</sup> Myers K and Lahn G, '*Good Governance of the National Petroleum Sector*' 29.

Another important aspect of transparency disclosure is that through the disclosure of the oil and petroleum contracts between countries and the oil companies, the Chatham House notes that countries are able to do a comparative analysis. This comparative analysis contributes to good natural resource governance through various ways such as through giving countries an opportunity to do a comparative study through which they can be able to make appropriate decisions.<sup>44</sup> These appropriate decisions allow countries to choose those companies with favorable terms that they in turn can use to enhance good resource governance that is free from corruption. Another argument propounded by the instate is that in case where there are companies with a disreputable operation, countries are able to make independent and informed decisions to enhance their relations with other oil companies.

A Resource Governance Index (RGI) can be used to measure the transparency and accountability in petroleum operations.<sup>45</sup> This index would usually look at four key qualities in governance. These qualities are as discussed.

The first resource governance index measure used is the manner in which reports are done in practice. More often, there are mechanisms that are out in place by the government and the international oil companies. However, most of these reports do not however correspond to the practicability of the said reports. A proper report on the progress of the disclosures as well as the measures put in place to enhance good resource governance ensures that all the contents of the contract and all the outlined roles and responsibilities by the different stakeholders are put into action. The monitoring and evaluation of every aspect of the operations thus becomes easier.

The second aspect presented by most authors is that for there to be proper resource governance, there should always be existing institutional and legal setting upon which the practice of disclosure is handled.<sup>46</sup> In the Kenyan situation, the oil and gas regulations and laws are not well articulated yet. This is premised on the fact that Kenya having started the exploration and mining of oil and gas less than a decade ago, the laws have not been well developed to ensure there is proper disclosure as a way of enhancing

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<sup>44</sup> Marcel V, 'Guidelines for Good Governance in Emerging Oil and Gas Producers 2016' 58.

<sup>45</sup> Index RG, Natural Resource Governance Institute, 2017.

<sup>46</sup> Muller K, Domfeh KA, Institutional Assessment in Natural Resource Governance: A Conceptual Overview. Forest Policy and Economics, 2017, 1-2.

good resource governance. In some instances, there has been a reluctance and lack of political good will to legislate and enact the necessary regulations as required by the Constitution and statutes.

One of the aspects that has often disturbed transparent disclosure of the oil contracts is the need for safety and quality measures that have been put into place for such disclosure. In cases where there are no safety mechanisms and quality checks that ensures that the information given to the general public is of quality and is accurate, the achievement of good governance in the sector is always hard. This is due to the fact that the general public, may not be in apposition to independently and accurately put the various stakeholders to task to ensure that there is good governance.

The environment in which disclosure is being done and what the prevailing conditions are is also an important aspect of disclosure.<sup>47</sup> In cases where there is limited freedom of speech among citizens, even when such disclosures are made, the discourse may not be constructive as the citizens may not be in a position to independently give critique and or comment on the content of the contract freely. This can thus greatly hamper good resource governance as there may be general fear among the citizens that any form of criticism, however constructive may be seen as a dissident thus coming with repercussions. The prevailing disclosure conditions thus play an important role as well in a polity to enhance good governance.

### **1.9 Research Methodology**

This study adopts the doctrinal methodology in undertaking a thorough analysis of the transparency provisions in the model PSCs from Nigeria and Kenya, by looking at the similarities, differences and what can be recommended to the Kenyan model PSC. It relies on primary and secondary including journals, statutes, judicial decisions, international treaties, articles and textbooks. It shall also be a study on the concepts of transparency in petroleum contracts and access to information.

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<sup>47</sup> Chene M, 'Natural resource management and governance; A literature review focusing on extractives industry' CHR Michelsen Institute, Paper Number 8, 2017, <<https://www.u4.no/publications/natural-resource-management-transparency-and-governance.pdf>> on 23 June 2020.

Secondly, the study utilizes a comparative study, drawing lessons from Nigeria on the importance of transparency in petroleum sector governance. The rationale of the comparative study is based on the following reasons. Firstly, both countries are developing African countries and have similar legal cultures and systems. Secondly, given the negative implications of lack of governmental transparency to sustainable development in the Nigerian oil and gas sector, lessons learned from Nigeria can inform thoughts on legal framework for ensuring greater transparency in the distribution and used of oil and gas revenue in Kenya. Thirdly, Kenya is at its infancy when it comes to the oil and gas industry and its policies, laws and structures are just being laid out so therefore, there is room to learn and improve at this stage. Fourthly, to study trends in the transparency implementation in Nigeria to ensure that Kenya includes provisions in their policies and laws that allows for the most favorable outcomes. Finally, to make recommendations on laws and policies that are already in place with regards to transparency provisions and implementation.

### **1.10 Chapter Breakdown**

This thesis is divided into five chapters. The current chapter is the introduction which presents the topic of the study as well as introduce the research question, the hypothesis, the methodology, the theoretical framework and the objectives of the study.

Chapter 2 discusses the guiding principles of international law on transparency. It examines the meaning, nature and scope of transparent disclosure and why it is an essential pillar for sustainable development and good governance in the petroleum sector.

Chapter 3 analyzes transparency gaps in Kenya's petroleum contract. It identifies legal and institutional gaps that must be addressed to infuse greater transparency into the petroleum sector governance in Kenya. The chapter is enriched with a comparative assessment of the transparency gaps in Nigeria.

Chapter 4 discusses the legal and institutional framework required for addressing gaps in Kenya's petroleum contracts. It proposes essential guiding principles of integrating transparency provisions into the petroleum fiscal regime in Kenya.

Chapter 5 is the concluding chapter. It provides a summary of the research, discusses practical challenges that will need to be overcome in mainstreaming and implementing transparency provisions in Kenya. It then provides recommendations on how such practical gaps can be addressed. The chapter also identifies areas for further research.



## Chapter 2: Meaning, Nature and Scope of Transparent Disclosure

### 2.1 Introduction

The aim of this chapter is to examine the meaning, nature and scope of transparency disclosure and why it is important for sustainable development in the petroleum sector. The discussion draws from the guiding principles of international law on transparency disclosure. In most countries, oil, gas and minerals are the property of the nation. The Kenyan Constitution vests ownership of natural resources to the people of Kenya and enjoins the state to utilize the environment and natural resources for the benefit of the people.<sup>48</sup> Article 71 further mandates Parliament to enact legislation providing for classes of transactions subject to ratification when it involves the grant of a right of concession to another person for the exploitation of any natural resources in the country.<sup>49</sup>

There has been judicial declaration that have reinforced this ringfencing of natural resources being used for the public good. For instance, the doctrine of public trust in dealing with natural resources was aptly captured by the Indian Supreme Court in *M.C Mehta v Kamal Nath and Others*<sup>50</sup> in the following terms;

‘The public trust doctrine primarily rests on the principle that certain resources like air, sea, waters and the forests have such great importance to the people as a whole that it would be wholly unjustified to make them subject to private ownership. The said resources being a gift of nature, they should be made freely available to everyone irrespective of the status in life. The doctrine enjoins upon government the duty to protect the resources subject to the trust for the enjoyment of the general public rather than to permit their use for private or commercial purposes.

Transparency disclosures are at the core of public trust and principles on transparency and accountability in the extractives sector. They have gained traction universally through the years to attain the status of principles of international law. By dint of Article

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<sup>48</sup>Article 69(1) (h), *Constitution of Kenya*, 2010.

<sup>49</sup>Article 71(1), *Constitution of Kenya*, 2010.

<sup>50</sup>*M.C Mehta v Kamal Nath and Others*, Writ Petition No. 182 of 1996 Supreme Court of India.

2(5) and (6) of the Constitution, Kenya has ratified some of the international policy instruments and is a party to a number of conventions. The chapter is divided into three parts, part one will explore the meaning, nature and scope of transparent disclosure, part two guiding principles of international law on transparent disclosure and lastly why transparent disclosure is important for sustainable development.

## **2.2 Meaning, Nature and Import of Transparent Disclosures**

The Extractive Industries Transparency Initiative define transparency disclosure as an acceptance to publicly disclose the full text of any license, concession, contract or other agreement governing the exploitation of oil, gas and minerals.<sup>51</sup> Transparency in the petroleum sector is founded on the notion that the public ought to have access to information pertaining the projects being undertaken in their country.

Transparency goes beyond simple disclosures of government information for public scrutiny but the democratic practice of revealing governmental information and creating participatory and public processes for engaged democracy. Consequently, contract transparency should remain a continuous process through the life cycle of the agreement.<sup>52</sup>

Requirement 2.4 of the EITI Standard defines contract to encompass the full text to the agreement entered into by government providing the terms attached to the exploration activities, the full text of any addendum or rider relevant to the transaction and full text of any alteration or amendments to the main agreement or addendum.<sup>53</sup> According to the Centre for Global Development governments should entrench transparency disclosures by design through systems that support proactive publication of contracts as open data and any restrictions for disclosures justified under the law.<sup>54</sup> The Constitution of Kenya recognizes the right to access information and obliges the state to publish and publicize any important information affecting the nation.<sup>55</sup> This right,

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<sup>51</sup><https://eiti.org/standard/overview> Accessed 8<sup>th</sup> October, 2021.

<sup>52</sup>Andrade M, Henandez C, Lavindar A and Mariela M, *'Transparency in Petroleum Contracts A Comparative Study of Ecuador and Bolivia: What are the Strengths, the Weaknesses, the Opportunities and the Threats?'* (2011)

<sup>53</sup>EITI International Secretariat, 'The EITI Standard 2019', (2019) <https://eiti.org/document/eiti-standard-2019#download> Accessed 9<sup>th</sup> October, 2021.

<sup>54</sup>Centre for Global Development, 'The Principles on Commercial Transparency in Public Contracts', (2019).

<sup>55</sup>Article 35(3), *Constitution of Kenya*, 2010.

however, is subject to the limitation of rights article to the extent that the limitation is reasonable and justifiable in an open and democratic society.<sup>56</sup>

Transparent disclosure more often does not necessarily mean that all the material and content of contract should be released to the general public. Rather, transparent disclosure revolves around the release of information that is impactful to the general public and are also vital.<sup>57</sup> Most scholars cited above such as Andrade note that in cases where there is extreme disclosure, it may impede the whole essence of disclosure since the public may be swamped up with more information which in the long run, they may not be in a position to decipher. There is thus the encouragement of disclosure of the impactful information which more often is not disclosed by the government and the oil companies that in turn hampers the commitment to good governance of natural resources.

There are several rationales that have been advanced towards the shift from non-disclosure to disclosure of oil and gas contracts. The main reason why there has been this shift is to enhance proper resource governance.<sup>58</sup> Andrade notes that in countries where there is transparent disclosure of the content of the contracts, there is good resource governance as various entities within the country which can provide checks on the use of natural resources can do so thus reducing cases of corruption or any form of mismanagement that would have otherwise occurred.

More often, the general public as well as the law makers may not be in a position to critically analyze the contents of the contracts. Arguments have been propounded to the effect that disclosure enables the public and the law makers to monitor the performance of the companies.<sup>59</sup> This enhances the cases of accountability required on the companies hence a reduction in mismanagement of the revenues accruing from the resources. Through disclosures, the lawmakers can also be in a position to come up with laws and regulations that can be properly used to ensure that cases of illicit and unjust enrichment

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<sup>56</sup>Article 24(1), *Constitution of Kenya*, 2010.

<sup>57</sup> *Aboody D, 'Recognition versus Disclosure in the Oil and Gas Industry'* (1996) 34 *Journal of Accounting Research* 21.

<sup>58</sup> Hasan QM and Karwan AP, '*Production Sharing Contracts and Rentierism: Reforming Transparency Gaps in Kurdistan's Oil and Gas Contracts*' (2021) 8 *The Extractive Industries and Society* 100899.

<sup>59</sup> '*The Principles on Commercial Transparency in Public Contracts*' 32.

are greatly reduced while also coming with strategies to enhance proper resource governance.

### **2.3 Guiding Principles of International Law on Transparent Disclosures**

Through the course of time several international guiding principles on transparency in petroleum contracts have been developed including the Extractives Industry Transparency Initiative (EITI) Standard, International best practices for contract management, guiding principles for durable extractive contracts, the International Monetary Fund (IMF) guide on resource revenue transparency, the Africa Mining Vision, panel principles among others. This study attempts to analyze some of the key principles that when adopted by Kenya will lead to proper resource governance.

#### **2.3.1 The EITI Standard 2019**

The EITI Standard is the global standard for the good governance of oil, gas and mineral resources.<sup>60</sup> The standard lays out principles as the general aims and commitments by all stakeholders and prescribes requirements that must be adhered to by countries implementing the EITI. The EITI requirements cover social and economic spending, revenue allocation, revenue collection, production and contracts and licenses.<sup>61</sup> The standard supports the prudent use and proper management of natural resource for the benefit of citizens. It promotes the disclosure of revenues and revenue allocation by the government to expand the participatory space for citizens to hold the government accountable and enhance healthy debates on sustainable development.<sup>62</sup> The standard also outlines the need for contract transparency and transparency in the laws governing these operations. Laws must be properly understood by citizens and proper checks and balances established by legislation and implemented by institutions set up for such specific purposes.

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<sup>60</sup>EITI International Secretariat, 'The EITI Standard 2019', (2019) <https://eiti.org/document/eiti-standard-2019#download> Accessed 9<sup>th</sup> October, 2021.

<sup>61</sup><https://eiti.org/standard/overview> Accessed 8<sup>th</sup> October, 2021.

<sup>62</sup>EITI International Secretariat, 'The EITI Standard 2019', (2019) <https://eiti.org/document/eiti-standard-2019#download> Accessed 9<sup>th</sup> October, 2021.

### **2.3.2 The Guiding Principles for durable extractive contracts**

The Organization for Economic Co-operation and Development (OECD) came up with guiding principles for states on how to create durable extractive contracts. The principles include; governments setting out long term plans and visions for sustainable development in the extractive sector, inclusion of all stakeholder's interests in the contracts, consistency of contracts with all the applicable laws both internationally and domestically, fiscal systems to be included and outlined in the contracts must be in line with the host governments general fiscal systems regime, in order to create a fair benefit sharing strategy and inclusion of the risks of the project in the contract.<sup>63</sup>

### **2.3.3 The IMF guide on resource revenue transparency**

This guide was first issued in 2015 and later revised in 2017 to offer best practices on good resource revenue management. The guide outlines four elements of good fiscal transparency to include; clarity of roles and responsibilities for all stakeholders in the sector so that every stakeholder is aware of what they need to do and can therefore be clearly held to account in case of wrong-doing or malpractice. This is especially important with the public officials in their carrying out of their duties.<sup>64</sup>

Secondly, governments are obligated to make information including revenue in the extractive industry public to citizens to bolster capacity for accountability. Thirdly, budgeting process should be open and accountable in order for all resources to be accounted for. With this process being open and accountable, citizens will be able to have a better understanding on how the revenues work and how they are split down the process. It will also be able to manage expectations of the public and ensure they have a better understanding on how revenues are gained and how they are spent and in turn, what benefit will be directly accrued by them.<sup>65</sup> Lastly, an assurance of integrity in revenue management and transparency which is especially important for public officials and the private sector officials in their dealings with petroleum activities. This calls for putting systems of checks and balances such as audit to maintain integrity and public disclosure of any discrepancies to enhance accountability systems.<sup>66</sup>

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<sup>63</sup>OECD Development Centre, 'Guiding Principles for Durable Extractive Contracts', (2019).

<sup>64</sup>International Monetary Fund, 'Guide on Resource Revenue Transparency', (2007)

<sup>65</sup>International Monetary Fund, 'Guide on Resource Revenue Transparency', (2007)

<sup>66</sup>International Monetary Fund, 'Guide on Resource Revenue Transparency', (2007)

### 2.3.4 Publish What You Pay (PWYP)

This initiative is a campaign that was started in 2002 by six London-based NGOs including; Global Witness, Open Society Institute, Catholic Agency for Overseas Development (CAFOD), Oxfam GB, Save the Children UK, and Transparency International UK. The campaign has since grown into a global network with over 800 organizations and it enables citizens to be the main stakeholders in the exploration operations and the step-by-step dealings, in order to benefit from the resource.<sup>67</sup>

In Kenya, the KCSPOG is a civil society group that prides itself as part of the PWYP initiative since 2018. The initiative promotes the publishing of contracts between the host governments and the IOCs and other investors and contractors as a push for open bidding process from the bidding to the awarding, negotiating of the contract and the execution of the contract. In this way, the citizens are able to see the economic benefit that is reaped from the exploration and production activities and the government bodies and its officials can be able to reap the maximum economic benefits from these activities.<sup>68</sup>

The disclosure of revenues in the sector is also encouraged and entrenched in this initiative. It recommends for such disclosure to be done and practiced by both governments and IOCs and contractors, and making disclosure mandatory in the host country. In addition, payment of taxes should also be disclosed as this is a source of revenue that can be used to improve the status of public amenities in the country to improve the quality of lives of the citizens.<sup>69</sup>

A great step by Kenya has been the introduction of the register of Beneficial Owners (BO) in order to keep track of the actual owners of the company who own 10% or more of the company. The PWYP initiative also calls for disclosure through the BO register system. Publishing this information will assist in knowing who to hold accountable for what actions and will increase transparency. In addition, publishing this information will increase public confidence and expectations in the extractives industry. To ensure this is happening, audits are an important feature of transparency and the PWYP

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<sup>67</sup>Bagabo, P., Mugenyi, O., Magara, S., and Twebaze, P., *Contract Transparency in Uganda's Petroleum and Mining Sectors* Kampala: ACODE Policy Research Paper Series, No.94, 2019, 1-33.

<sup>68</sup><https://www.pwyp.org/areas-of-work/contract-transparency/> Accessed 24<sup>th</sup> July, 2021

<sup>69</sup><https://www.pwyp.org/areas-of-work/revenue-transparency/> Accessed 24<sup>th</sup> July, 2021

initiative also recommends and pushes for these to be done periodically in order to check on any discrepancies so as to remedy them.<sup>70</sup>

Public participation is an element that is strongly encouraged by the PWYP initiative. It encourages host governments and other stakeholders to ensure that there is public participation in decision making when it comes to the natural resources of the country. For this to successfully happen, there must be access to meaningful information and the proper dissemination of the same to the citizens and local communities that these activities will affect and impact. Decision-making can only be efficient and meaningful if there is meaningful information disseminated to the public domain. This is because the benefit accrued from the exploration and production of the natural resources are usually for the benefit of all citizens as they are the true owners of the resources, which are held in trust by their governments on their behalf.<sup>71</sup>

### **2.3.5 Africa Mining Vision**

The Africa Mining Vision (AMV) is a “transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio-economic development.”<sup>72</sup> It was formulated by the African Union to respond to issues and problems faced by the mining sector. The Africa Minerals Governance Framework was then developed to implement the AMV vision.<sup>73</sup>

The AMV was formed to “promote equitable, broad-based development through prudent utilization of the continent’s natural wealth.”<sup>74</sup> The main focus of the AMV is to first ensure that there is a tax regime/system in place that is working sufficiently in order to deal with any tax evasion and avoidance by any shareholder in the sector. This would in turn help deal with the rampant issue of corruption and corrupt officials in the sector. It also deals with how to promote and uphold the principle of Free, Prior and Informed Consent (FPIC) for the local communities in the exploration and production

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<sup>70</sup><https://www.pwyp.org/areas-of-work/anticorruption/> Accessed 24 July 2021.

<sup>71</sup><https://www.pwyp.org/areas-of-work/civic-engagement/>> Accessed 24 July 2021.

<sup>72</sup>Africa Mining Vision, February 2009.

<sup>73</sup>Institute for Law and Environmental Governance, ‘*Transparency and Accountability in Kenya’s Extractive Sector: What works, what doesn’t?*’, Policy Brief No. 1 of 2020.

<sup>74</sup>Ushie V, ‘*From Aspiration to Reality- Unpacking the Africa Mining Vision*’ OXFAM International, 2017, 1.

activities which affect their lives directly or indirectly. This is an important pillar in public participation and should be upheld.<sup>75</sup>

The AMV also pushes for sustainable development and there are six main areas in which it focuses on for this to be achieved:

For exploration to be more successful, there needs to be better and improved geological data that is collected for better knowledge and higher chances of successful exploration and production. This in turn increases the rate of revenue. Governments that have better information about their geological data will be able to have a greater bargaining power when it comes to contract negotiation with the IOCs and other contractors. Having a greater bargaining power means that the rate of revenue from the exploration and production activities increases.

The host government is intended to know and formulate both local and international strategies that work for their jurisdiction in order to improve capacity for mineral sector governance. Good illustrations of such improvements include: skill transfer from the IOCs and contractors to the local people in order to ensure that they can eventually take up the exploration and production activities and become self-sufficient, ensuring compliance with legislation by all stakeholders in order to promote transparency and accountability, ensuring that the host government always has higher bargaining power in contract negotiation in order to increase the revenue output for its citizens, ensuring that the natural resources wealth obtained from the extractives industry is well managed with systems put in place for checks and balances for accountability and transparency purposes and it also calls for ensuring that infrastructure constraints are dealt with as this is one of the biggest problems in African countries.<sup>76</sup>

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<sup>75</sup> Ushie V, *'From Aspiration to Reality- Unpacking the Africa Mining Vision'* OXFAM International, 2017, 2-3.

<sup>76</sup> Ushie V, *'From Aspiration to Reality- Unpacking the Africa Mining Vision'* OXFAM International, 2017, 9.

### 2.3.6 Human right principles (The PANEL Principles)

The PANEL principles are international human rights norms, derived from core international human rights instruments, which aim to integrate human rights standards in policies and the practice.<sup>77</sup> PANEL is an abbreviation that stands for: Participation, Accountability, Non-discrimination and Equality, Empowerment and Legality. These principles should be applied to the extractives sector and in the contracting process for transparency.<sup>78</sup>

Under participation, person's whose rights are going to be affected by these activities should be able to participate in the decisions surrounding such activities.<sup>79</sup> Therefore, multi-stakeholder participation is essential in the contracting process of exploration and production of natural resources from contract awarding process, the licenses awarding, the approvals, the decommissioning, any resettlement to be done and so on.

Under accountability, how the rights are being affected should be monitored and made well known and the remedies available should also be made known.<sup>80</sup> The main human right that would be affected here would be loss of land through compulsory acquisition to allow for the exploration and production activities to take place. In order for these rights to be upheld, resettlement and compensation must be properly done and the government and officials in charge must be held accountable.

Under non-discrimination and equality, the vulnerable groups must be fully and adequately represented.<sup>81</sup> Most of the areas in which the natural resources are exploited

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<sup>77</sup>See UN Practitioners' Portal on Human Rights Based Approaches to Programming, 'The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies', available at: <http://hrbaportal.org/the-human-rightsbased-approach-to-development-cooperation-towards-a-common-understanding-amongun-agencies> [HRBA Portal]. See also Scottish Human Rights Commission, 'A Human Rights Based Approach: An Introduction', available at: [www.scottishhumanrights.com/media/1409/shrc\\_hrba\\_lea!et.pdf](http://www.scottishhumanrights.com/media/1409/shrc_hrba_lea!et.pdf) Accessed 18<sup>th</sup> May, 2021.

<sup>78</sup>See UN Practitioners' Portal on Human Rights Based Approaches to Programming, 'The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies', available at: <http://hrbaportal.org/the-human-rightsbased-approach-to-development-cooperation-towards-a-common-understanding-amongun-agencies> [HRBA Portal]. See also Scottish Human Rights Commission, 'A Human Rights Based Approach: An Introduction', available at: [www.scottishhumanrights.com/media/1409/shrc\\_hrba\\_lea!et.pdf](http://www.scottishhumanrights.com/media/1409/shrc_hrba_lea!et.pdf).

<sup>79</sup>HRBA Portal (n. 63); see also Scottish Human Rights Commission (n. 63)..

<sup>80</sup>HRBA Portal (n. 63); see also Scottish Human Rights Commission (n. 63)..

<sup>81</sup>HRBA Portal (n. 63); see also Scottish Human Rights Commission (n. 63)..

are areas from which vulnerable groups come. There must be no discrimination and all groups must be treated equally and must be allowed to participate in these activities at all stages.

Under empowerment, there must be civic education to ensure that all people are aware of their right to information in order to participate in the activities such as policy development and contract negotiation. Access to information should therefore be a process that is as easy and straightforward as possible so as to ensure it is disseminated as swiftly and accurately as possible. There should also be timely reporting of this information, with strict adherence to timelines.

Under legality, any activities that are undertaken in the exploration and production stages should be set out in law, both local and international law, in as much as they apply to the country's legal system.<sup>82</sup> This means that all stakeholders must comply with the law through all the processes they undertake. There should also be access to redress where there has been an illegality caused.

The PANEL principles can also act as a guide to gauging how transparent a country is in their contracting process in the extractives sector, most especially in terms of carrying members of the public along in resource governance in a manner that respects and protects their human rights.<sup>83</sup>

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<sup>82</sup>HRBA Portal (n. 63); see also Scottish Human Rights Commission (n. 63).

<sup>83</sup> Damilola Olawuyi, 'Corporate Accountability for the Natural Environment and Climate Change', in Ilias Bantekas and MA Stein (eds), *Cambridge Companion to Business and Human Rights* (Cambridge University Press 2021).

## 2.4 Codification of the Guiding Principles of International law on Transparency Disclosures

### 2.4.1 The Rio Declaration on Environment and Development 1992

The Rio Declaration was adopted in 1992 after the UNCED was held in Rio De Janeiro, Brazil.<sup>84</sup> Principle 10 of this declaration states that:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial participation and administrative proceedings, including redress and remedy, shall be provided.<sup>85</sup>

There are three fundamental principles that underpin Principle 10 of the Rio Declaration known as “access rights”. These are: “access to information, access to public participation and access to justice.” They are especially important in promoting and ensuring there is sound environmental governance.<sup>86</sup> Public participation in environmental matters helps to ensure that the communities affected are put into consideration when laws, policies and other legislation is being adopted by the host governments. The foundation of the “access rights” is the access to justice pillar which ensures that citizens’ rights are upheld and where it is lacking or infringed on, there is an option available to seek redress for justice to prevail.

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<sup>84</sup>Institute for Law and Environmental Governance, ‘*Transparency and Accountability in Kenya’s Extractive Sector: what works, what doesn’t?*’ Policy Brief No. 1 of 2020.

<sup>85</sup><https://www.unep.org/civil-society-engagement/partnerships/principle-10>. Accessed 19<sup>th</sup> May 2021.

<sup>86</sup>[unep.org/civil-society-engagement/partnerships/principle-10](https://www.unep.org/civil-society-engagement/partnerships/principle-10)>. Accessed 21st July 2021.

## **2.4.2 United Nations Convention Against Corruption**

This convention is the only legally binding universal anti-corruption instrument.<sup>87</sup>

“The purposes of this Convention are: (a) To promote and strengthen measures to prevent and combat corruption more efficiently and effectively; (b) To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery; (c) To promote integrity, accountability and proper management of public affairs and public property.”<sup>88</sup>

This convention is especially important in the extractives industry because corruption is a rampant feature in the industry and it stands out as a unique anti-corruption tool due to the mandatory character of many of its provisions, as well as its far-reaching approach.”<sup>89</sup> This convention covers five main areas that touch on its purpose of combatting corruption and these are: preventive measures in order to prevent the corruption, criminalization of the corruption and law enforcement, international cooperation in the fight against corruption, asset recovery and technical assistance in cases of corruption and information exchange that would assist in the fight and enforcement against corruption.<sup>90</sup> The convention also covers different types of corruption such as bribery, abuse of office and its functions, corruption in the private and public sector, among others. There is also a chapter in the convention that deals with asset recovery and returning any resources gained illegally or through corruption, to their rightful owner, countries inclusive.<sup>91</sup> The adoption, implementation and utilization of this convention will positively impact the oil and gas industry in Kenya.

## **2.4.3 The African Union Convention on Preventing and Combatting Corruption**

“The objectives of this convention are to: 1) promote and strengthen the development in Africa by each state party, of mechanisms required to prevent,

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<sup>87</sup>[unodc.org/unodc/en/treaties/CAC/](https://www.unodc.org/unodc/en/treaties/CAC/)>. Accessed 21st July 2021.

<sup>88</sup>Article 1, ‘United Nations Convention Against Corruption’, 31 October 2003, Council of Europe, European Treaty Series, No. 173.

<sup>89</sup>Institute for Law and Environmental Governance, ‘Transparency and Accountability in Kenya’s Extractive Sector: What works, what doesn’t? Policy Brief No. 1 of 2020

<sup>90</sup>[unodc.org/unodc/en/corruption/uncac.html](https://www.unodc.org/unodc/en/corruption/uncac.html)>. Accessed 21st July 2021.

<sup>91</sup>[unodc.org/unodc/en/corruption/uncac.html](https://www.unodc.org/unodc/en/corruption/uncac.html)>. Accessed 21<sup>st</sup> July 2021.

detect, punish and eradicate corruption and related offences in the public and private sector; 2) promote, facilitate and regulate cooperation among the state parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption and related offences in Africa; 3) coordinate and harmonize the policies and legislation between the state parties for the purposes of prevention, detection, punishment and eradication of corruption on the continent.”<sup>92</sup>

This convention is mandatory in nature with provisions such as Article 7 that outlines the fight against corruption and related offences in the public service. This is an important provision in transparency of the extractives sector and it gives recommendations on how to deal with corrupt officials, a rampant problem faced in the extractives sector, resulting to corruption and mismanagement. It also highlights the importance of the media to have access to information about the sector, thus contributing to the plight of transparent disclosure.<sup>93</sup>

Article 9 mandates state parties to the convention to ensure that there is access to information by the citizens in order to be able to have valuable information that would aid in the fight against corruption in these countries, among other offences.<sup>94</sup> This in essence will involve the citizens as a watchdog over the use and disposition of their natural resources. The citizens will ultimately benefit from the prudent use of the resources and improve their standards of life.

Article 11 deals with corruption in the private sector. Here, the IOCs and private contractors come into play. The Article outlines how legislation and its adoption as well as means to help combat corruption especially by punishing the wrong-doers. These punishments would be mandated by law and laid out in the different legislation in the host country.<sup>95</sup> It also ensures that there is no unfair competition with respect to

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<sup>92</sup>Article 2, ‘The African Union Convention on Preventing and Combatting Corruption’, 01 July 2003.

<sup>93</sup>Institute for Law and Environmental Governance, *Transparency and accountability in Kenya’s extractive sector: what works, what doesn’t?* Policy Brief No. 1 of 2020.

<sup>94</sup>Article 9, ‘The African Union Convention on Preventing and Combatting Corruption’, 01 July 2003.

<sup>95</sup>Article 11, ‘The African Union Convention on Preventing and Combatting Corruption’, 01 July 2003.

tendering procedures. This is especially important in the bidding process and award of contracts and should be as transparent and accountable as possible.

Article 12 deals with civil society and the media.<sup>96</sup> These two groups need to be engaged fully in the fight against corruption and in turn, keep the government accountable at the highest level possible, in their dealings with public affairs. The civil society groups should participate and hold consultations with the government as well as obtain information regarding corruption in as far as they can. The media, similarly and in tandem, ought to have such information made available to them as far as possible in so long as it does not affect any ongoing investigations regarding corrupt dealings and any right to a fair trial. The media performs an important function of information digestion and dispensation in an open and democratic society. The media has a duty to engage experts that disseminate information in a manner that the larger public can be kept in tandem with the markets and prospects of the use of their natural resources.

#### **2.4.4 The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)**

Though Kenya is not a party to the Convention, it remains one of the most elaborate treaties that provide guidance on the importance of, and procedure for enhancing public access to information. Article 1 of this convention states the objective as:

“In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.”

From the above objective, it is clear that this convention empowers people with the rights to access information, participate in decision-making in environmental matters as well as seek justice and redress for any injustices with regards the environment. In essence, this convention seeks to protect both environmental and human rights.<sup>97</sup>

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<sup>96</sup>Article 12, 'The African Union Convention on Preventing and Combatting Corruption', 01 July 2003.

<sup>97</sup>[www.informea.org/en/treaties/aarhus-convention](http://www.informea.org/en/treaties/aarhus-convention)>. Accessed 22<sup>nd</sup> July, 2021.

It also gives rights to the environment to the public and also mandates all stakeholders and the government via the relevant authorities to give the public access to environmental information and in turn, public participation in decision-making on environmental matters. Specifically, the convention focuses on the interaction between the citizens and the public authorities in order to ensure that there is an “open administrative culture” between them.<sup>98</sup> This relationship and co-existence is important because with access to information, the public is able to hold the public bodies and their officials accountable and therefore, there is increased transparency as a result. Sustainable development can also be achieved through the open and transparent relationship.

The importance of this convention is that it mandates the government to ensure that human and environmental rights are upheld and respected. In the Kenyan context, this would ensure that the citizens have a say and participate actively in any decision making that involves the environment, especially if it affects them due to oil and gas activities.

## **2.5 The place of Transparency Disclosures in Sustainable Development**

According to the Brundtland Report, sustainable development is development that meets the needs of the present without compromising the ability for future generations to meet their own needs.<sup>99</sup> It is an important consideration in the oil and gas sector as excavation of petroleum products has cross-cutting effects on various sectors including public finance, health and safety, environment. The role of government as a trustee of natural resources on behalf of the people translates into ensuring that excavation activities meet the sustainable development concerns. Transparent disclosures meet this need in various ways including; acting as a monitoring tool, an accountability mechanism, trust building, a participation avenue and negotiation tool.

Transparency disclosures make it easier to know the responsibilities of each party and provides a monitoring matrix for extractive industry projects in order to establish whether the rules are being followed.<sup>100</sup> Countries that embrace transparent disclosures

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<sup>98</sup>[www.ohchr.org/Documents/Issues/Development/GoodGovernance/Corruption/COMMISSION FOR EUROPE.pdf](http://www.ohchr.org/Documents/Issues/Development/GoodGovernance/Corruption/COMMISSION_FOR_EUROPE.pdf)>. Accessed 22<sup>nd</sup> July, 2021.

<sup>99</sup>United Nations, ‘A Report of the World Commission on Environment and Development: Our Common Future’, (1987).

<sup>100</sup>National Resource Governance Institute, ‘*Contract Transparency: Creating Conditions to Improve Contract Quality*,’ (2018).

have better opportunities to get better deals by entering into negotiations with companies on a more level playing field.<sup>101</sup> Transparency disclosures also present an important avenue to hold public officials and company representatives accountable for the deals they make. When negotiators know that the outcome of their work will be subject to public, commercial and legal scrutiny, there is an incentive to draft more carefully and resist high-level political interferences and excessive industry pressure during negotiations and drafting of contracts.<sup>102</sup>

Awareness of the terms within contracts helps lay the foundations of trust between society, government and companies which is an important component of any democracy.<sup>103</sup> For companies, embracing transparency disclosures buys them a social license to operate from the people making projects more stable while at the same time increasing public trust that the government is working in the interests of citizens and their welfare.

## **2.6 Core elements of Transparency in Petroleum Contracts**

The study avers that the following criteria can be used for assessing transparency in contracts:

The existence of policy, institutional and legal framework in a country is a good place to start at. The laws should be adequate in order to increase transparency at all levels of the contract performance and the host government should ensure that the contract should also be consistent with the applicable laws in the country and they should not change arbitrarily. Laws and regulations should be defined clearly and should not contradict each other. These should also be able to give a higher bargaining power to the host country in the negotiation of the PSCs. All the policies and legislation should be harmonized and there should not be any contradiction between the existing laws, policies and regulations applicable to the sector.

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<sup>101</sup>National Resource Governance Institute, *'Promises are vanity, contracts are reality transparency is sanity'* (2019).

<sup>102</sup>National Resource Governance Institute, *'Contract Transparency: Creating Conditions to Improve Contract Quality,'* (2018).

<sup>103</sup>National Resource Governance Institute, *'Promises are vanity, contracts are reality transparency is sanity'* (2019).

The contract areas ought to be properly known and this information should be available to all stakeholders. All the legitimate interests of all stakeholders ought to be taken into consideration and all minority groups should also be considered. This transparency in the contract should be between all the stakeholders in the process.<sup>104</sup> This will mean that the stakeholders are taken into greater consideration and they are able to own most of the operations that are involved in the course of mining and exploration of oil and gas. Stakeholder involvement thus will enhance governance as through the information they will have, they can give feedback that will enhance good use of the resources that are gained from the oil and gas industry. Uganda has taken a step in ensuring that it involves most of the stakeholders by disseminating all the necessary information to stakeholders. More often, what breeds poor resource governance is the lack of knowledge of the existing oil wells within a country. When the government is silent on the existing oil wells, it becomes hard for the stakeholders involved to take measures that would enhance transparency and accountability. If there are any new locations available for new petroleum operations, these areas should be well identified and published for all stakeholders to have knowledge of their existence. This has in turn encouraged good governance in most oil rich countries as these locations are often published for the public so that they have knowledge of these locations and their expected income generation estimates. This calls for technology transfer contracts that ultimately leave the host country empowered to identify and explore its natural resources.

Another transparency approach that has been taken is with regard to the knowledge of the companies that take part in the bidding process. A transparent disclosure committed to good resource governance would ensure that any bidding processes and the companies that are taking part in these processes ought to be known to all stakeholders. The winning bidder should also be known and the criteria used should be open to all stakeholders.

Revenue transparency is an important feature of contract transparency and should be a feature that is made mandatory by legislation. The PWYP initiative calls for revenue transparency that comes complete with checks and balances such as periodic audits to check on any discrepancies. This transparency should be from both the government and

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<sup>104</sup>OECD Development Centre, Guiding Principles for Durable Extractive Contracts, 2019, 1-15.

the IOCs and other stakeholders. Access to this information should be in the public domain and any citizen should be able to easily access meaningful information. This is also applicable to the taxes as the revenue collected from these taxes can assist with improving the lives of the citizens as well as to develop the country further. It will also assist in curbing tax evasion.<sup>105</sup>

There should be information about reserves, those being currently used in any petroleum operations and any newly discovered reserves. The criteria discourage “stand-alone reporting” by the government and encourages that such reporting should be especially relevant to the citizens keeping in mind that they are the real owners of the resource.

More often, different mining and exploration projects are categorised as different projects. Because each project has a different contract, the criteria encourages that each of these contracts should be disclosed. All levels of the contract process also ought to be disclosed. This will not only encourage competitiveness, but also enhance good resource governance thus reducing cases of corruption and mismanagement of the revenues generated from the different projects.

There should also be disclosure of all the impacts that the project will have including environmental impacts, as well as disclosure of how compliance towards mitigating these impacts is being carried out. An access to justice mechanism and remedies in the case of any breach of rights should be outlined. This is in the case of corruption, any breach of rights outlined in the contract or legislation in the sector. Additionally, there should be a proper system in place to deal with amendments in the law. Investors would usually want such assurances before they invest in a project in the host country. Any material changes in the law should be discussed among the different stakeholders bona fide and agreements reached in a fair and non-discriminatory manner.<sup>106</sup>

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<sup>105</sup> <https://www.pwyp.org/areas-of-work/revenue-transparency/> on 24 July 2021.

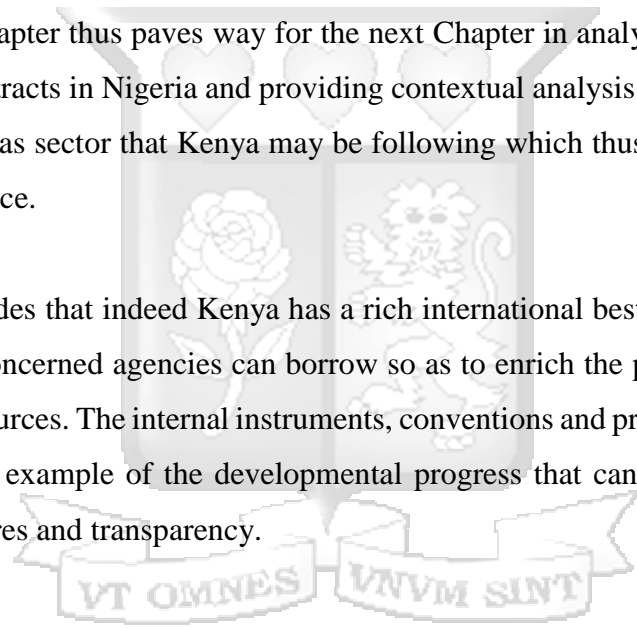
<sup>106</sup> OECD Development Centre, Guiding Principles for Durable Extractive Contracts, 2019, 1-15.

## 2.7 Conclusion

The foregoing Chapter critically analyzed the concept, scope and nature of what transparent disclosure is. It was able to show that one of the steps towards proper resource governance is through ensuring that the key tenets of transparent disclosure are achieved with the aim of ensuring that the oil and gas sector do not lead to a resource curse which most oil rich countries often suffer as a result of corruption and poor resource governance.

In looking at the nature, scope and concept, the chapter also looked at the various international best practices and principles that enhance transparent disclosure within the oil and gas sector. Through and understanding of these concepts of transparent disclosure, the Chapter thus paves way for the next Chapter in analyzing the gaps that are in sharing contracts in Nigeria and providing contextual analysis of the gaps in The Nigerian oil and gas sector that Kenya may be following which thus may lead to poor resource governance.

This study concludes that indeed Kenya has a rich international best practice platform from which the concerned agencies can borrow so as to enrich the proper governance of our natural resources. The internal instruments, conventions and practices from select states serve as an example of the developmental progress that can be achieved with adequate disclosures and transparency.



## **Chapter 3: Transparency Gaps in Kenya’s Model Petroleum Sharing Contract: Lessons from Nigeria**

### **3.1 Introduction**

As discussed in the Chapter Two, transparency is important in the extractives industry because of its different and unique characteristics, in comparison to other industries, that make the industry vulnerable. One characteristic is that the exploration and production usually take place in very remote areas of the host country. An example in Kenya is Turkana. Another characteristic is that the activities are very technical and would require expertise that is specific to these activities. This is the reason that host governments get into contracts with IOCs for the procurement of such activities. It also requires a vast amount of financial support in order to undertake these activities hence IOCs play a crucial role in the activities. The extractive industry is also volatile in terms of pricing of products and cost of production as that is usually defined by the going market rates.<sup>107</sup>

Because of this, the industry requires the management and the activities undertaken thereunder to be as effective as possible so as to accrue benefits that would be beneficial to the citizens and other stakeholders. The best way to do this would be through transparency and accountability in order to promote good governance and reduce instances of corruption and mismanagement of the sector.<sup>108</sup>

Kenya and Nigeria’s PSCs have salient features with respect to transparency. In a PSC, the government will usually assume the least amount of risk in the production of its petroleum activities at all stages. This means that the IOC will assume the most amount of risk and also cover the financial risks. A PSC therefore allows foreign oil companies to take part in local oil exploration activities. There is no one standard for the format of a PSC. Different countries have adopted different versions of their own PSCs depending on their individual needs but there are salient features that are similar in these PSCs.<sup>109</sup> In the early 1900s, Nigeria sought to increase its petroleum activities through the exploration and development of the offshore and inland basin. Consequently, the

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<sup>107</sup> Institute for Law and Environmental Governance, *Transparency and accountability in Kenya’s extractive sector: what works, what doesn’t?*, Policy Brief No. 1 of 2020.

<sup>108</sup> Institute for Law and Environmental Governance, *Transparency and accountability in Kenya’s extractive sector: what works, what doesn’t?*, Policy Brief No. 1 of 2020.

<sup>109</sup> A Mabel, H Celica, L Alejandro, M Mariela, ‘*Transparency in Petroleum Contracts*, 2010-2011.

government decided to adopt the PSC as the appropriate upstream contract, especially because the financial burden would be greatly reduced for the government and assumed by the IOC. The greatest drawback however, is that profitability is highly dependent on the oil price.<sup>110</sup> In Kenya, the Petroleum Act 2019 has a model PSC that can be used to negotiate terms with IOC. It can be adapted as is or can be amended to suit different situations. In the Vision 2030, which is the national development plan, it is clear that oil development is for the benefit of the people and priority is given to the local community. In the Constitution of Kenya, 2010, there are principles that have been laid out with regards natural resources and public affairs.<sup>111</sup>

Effective monitoring of these contracts to ensure transparency is a governance issue that ought to be prioritized by the local governments in order to ensure profitability for the benefit of the local government. In Nigeria, the National Petroleum Investment Management Service (NAPISM) is tasked with the responsibility of managing and monitoring the costs of the petroleum operations.

### **3.2 The Search for Transparency in Nigeria's Petroleum Industry**

The Nigeria Oil and Gas industry is one often marred by non-disclosure. Most of the documents and the activities that happen within the sector are often not disclosed to the general public for scrutiny.<sup>112</sup> Most of the revenues that are often generated annually are not published with the aim of ensuring that there is transparency within the sector that would in turn lead to the most of the watchdog entities to put into place mechanisms for ensuring that there is good resource governance. The non-disclosure thus serves to be a signpost for corruption as most of the citizens may not be aware of some of the revenues generated thus cannot be in a position to put the government into task.<sup>113</sup> This provides a safe space through which poor resource governance can set the pace for the industry.

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<sup>110</sup> A Mabel, H Celica, L Alejandro, M Mariela, 'Transparency in Petroleum Contracts, 2010-2011.

<sup>111</sup> Kenya Vision 2030.

<sup>112</sup> Akinrele AA SAN, 'Transparency in the Nigerian Oil and Gas Industry' (2014) 7 *Journal of World Energy Law and Business* 220.

<sup>113</sup> Akinrele AA SAN, 'Transparency in the Nigerian Oil and Gas Industry' (2014) 7 *Journal of World Energy Law and Business* 220.

One of the ways through Nigeria's transparency approaches have been thwarted is through lack of a clear and dimensional approach to public participation.<sup>114</sup> In the existence of poor public participation approaches adopted by a country, transparency measures are also thwarted as public participation provides a proper antecedent for transparency policies.<sup>115</sup> The Nigerian approach to public participation in matters relating to oil and gas is often minimal which therefore hampers any measures that can always be put in place to enhance transparency in the sector.

Public participation in Nigeria has become an emerging issue in the recent past. There have been various attempts to make the Nigerian government publish petroleum contracts. There have been three instances that stand out in these efforts: 2015 public statement by the Minister of State for Petroleum Resources recommended for contracts to be made open to the public, 2016 U.K Anti-Corruption Summit by President Muhammadu Buhari for the principles of the Open Contracting Data Standard for Public Disclosure of contracts and 2016 "Big Wins" for publishing fiscal rules and contracts.<sup>116</sup> Public participation is an important element of contract transparency and should be encouraged at all stages of the contract implementation.

The Deep Offshore and inland Basin Production Sharing Contract Act<sup>117</sup> has recently been amended to include a new section (section 17) that introduces an 8-year periodic review of contracts as well as penalties for non-compliance of the contract in the new section 18. These two provisions are very important when it comes to transparency as there is a reprimand for any defaulters of such terms.

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<sup>114</sup> Oyewunmi OA and Olujobi OJ, 'Transparency in Nigeria's Oil and Gas Industry: Is Policy Re-Engineering the Way Out?' (2016) 6 International Journal of Energy Economics and Policy 630.

<sup>115</sup> Oyewunmi OA and Olujobi OJ, 'Transparency in Nigeria's Oil and Gas Industry: Is Policy Re-Engineering the Way Out?' (2016) 6 International Journal of Energy Economics and Policy 630.

<sup>116</sup> Pitman R and Chinweze A, *The Case for publishing petroleum contracts in Nigeria*, National Resource Governance Institute, 2018, 1-2.

<sup>117</sup> The Deep and Offshore Inland Basin PSC (Amendment) Act, 2019, (Nigeria).

The Nigerian model PSC has the following transparency provisions also included in its terms:

- a) Clause 3 defines the scope of the contract. It outlines the scope under which the contractor shall operate.
- b) Clause 4 defines the term of the contract and shall outline the number of years the contract shall operate and undertake the exploration activities. The contractor cannot therefore operate for a longer time than defined in the contract.
- c) Clause 5 defines the manner in which relinquishment of the contract area shall take place. The contractor is therefore obligated to follow the guidelines as per this clause.
- d) Clause 6 defines the minimum work programme and expenditure that the contractor is obligated to work under. This increases transparency as it is clear to the stakeholders how the contractor shall work and how much it would cost. It is also easier for planning and for making revenue projections to be able to ascertain the true value of the project to the citizens.
- e) Clause 7 sets up a management committee that provides direction for the contractor to properly work under the work programme provided in the contract.
- f) Clause 10 provides for the valuation of petroleum products. It spells out the procedures to be undertaken while valuing the petroleum products.
- g) Clause 14 provides for books of accounts, audit and overhead costs. It provides that the government shall have a right to audit the book of accounts once noticed has been served upon the contractor who has an obligation to keep proper books of accounts. Operating costs by the contractor are also outlined in this clause.
- h) Clause 17 provides for confidentiality and public announcements of the contracts. This clause provides that there shall only be public announcements furnished as long as the other party is notified. All information regarding the operation must be kept by both parties.
- i) Clause 19 provides for termination of the contract. It outlines the circumstances under which the contract may be terminated by the government against the contractor. It is therefore clearly spelt out for the contractor and other stakeholders to be aware of.
- j) Clause 24 provides for conciliation and arbitration. It states that any dispute that cannot be resolved among the parties should be referred to dispute resolution by an

independent party. This makes the process more transparent and fairer to both parties.

There are, however, governance issues when it comes to the implementation of these clauses. For instance, in Nigeria, National Petroleum Investment Management Service (NAPIMS), a unit of NNPC, is tasked with managing and monitoring costs of petroleum operations. NAPISM has, however, not been successful in the performance of its duties. Alba's Framework<sup>118</sup> sets out best practices for contract transparency. The salient features of this framework include:

- i. The uncertainty of oil revenues needs to be considered as well as the technical operations in the extractives industry. Most of the revenues that are often outlined or disclosed as the amount generated from the industry are always estimates. This brings uncertainty to the extent that ensuring transparency becomes hard as an accurate and independent evaluation on how the said revenue can be properly put to use.
- ii. There is need for local content to be considered in order to ensure that the host countries can support future generations and continuity once the IOCs have stopped operations and left the governments in charge. As it stands, most of the local content requirements have not been properly developed to ensure there is value addition to the citizens and locals. This would enhance the overall value derived by people within the country. The value addition stemming from employment, technological transfer, procurement of locally produced goods among others would ensure sustainability. This is only possible where there are proper mechanisms that enhances transparent disclosure of the activities within the locality of extraction and the country at large.
- iii. There is need to ensure transparency in awarding these contracts in order to avoid corruption. There is always lack of a systematic method through which information is transparently disclosed. This can be seen from the fact that governments rarely disclose to the public the way through which they have awarded the said contracts and the mechanism that will ensure that the best is achieved out of the same. This non-disclosure therefore leads to poor governance as people may not

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<sup>118</sup> Mwabu G, 'Kenya's Oil Governance Regime: Challenges and policies, Oil wealth and development in Uganda and beyond', Leuven University Press, 2020, 356-357.

systematically give independent valuation on how the tenders have been awarded and subsequently the criteria used to ensure that those who have been given the tender have the best repute.

- iv. There is need to ensure that all stakeholders are included and that vulnerable groups in the local communities are also considered and properly represented. Through the representation of various stakeholders, good resource governance in the oil and gas sector will be achieved as there will be mechanisms through which the communities can take part in the course of the exploration and extraction of oil and gas. Since public consultation and participation is an important aspect of good governance, the cases of mismanagement will be greatly reduced in the sector.
- v. Alba suggests that there ought to be a “one-stop clearance shop” in the Ministry that deals with all the matters in the extractive sector in order to ensure ease of compliance by all parties and in a transparent manner. As it stands, most sectors and players are involved in the course of the exploration and extraction of oil and gas. The long chain of the different stakeholders involved thus provides the loopholes through which mismanagement and corruption thus leading to poor resource governance.

Contract transparency is especially for the benefit of the citizens. It would help them understand the type of contract the government has negotiated on their behalf, considering that they are the true owners of the resource, as well as to be able to hold these parties to the contract accountable. Contract transparency also allows for public scrutiny and this helps build confidence among the public as they become part of the process.

Nigeria was the first African country to implement the EITI initiative in 2003 and in 2004, NEITI was established.<sup>119</sup> There was growing need for transparency in Nigeria as the sector was extremely corrupt and the international investors were unwilling to invest in the sector. There were continuous calls for transparency even with civil society groups. The NEITI Act 2007 was enacted to tackle this problem but the actual practice

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<sup>119</sup> Wilson E, Alstine J, ‘Localising transparency’, *International Institute for Environment and Development, Exploring EITI’s contribution to sustainable development*, 2014, 33-  
<<http://www.jstor.com/stable/resrep01393.9>> on 09 March 2021.

was far from where it needed to be in order to tackle these issues. However, it was a start to EITI implementation by Nigeria.<sup>120</sup>

Audits suggested as an EITI step in Nigeria have been inconsistent throughout the years. The audits that have been done however, have showed that there has been corruption, unpaid and underpaid taxes and financial misinformation.<sup>121</sup> To also assist the NEITI implementation, the civil society groups together with oil companies and government representatives set up a committee known as the National Stakeholder Working Group (NSWG) as well to ensure proper implementation. In 2006, NEITI published a report where Nigeria was considered EITI compliant at a high standard, as per the World Bank. The ‘gold standard’ of implementation as set out by the World Bank had the following criteria:

- i. Access to information regarding production of the resources.
- ii. Audits to be undertaken.
- iii. IOCs and NOCs should publish information regarding the oil and gas activities they are undertaking.
- iv. It was made mandatory to ensure that all companies publish this information including payments made.<sup>122</sup>

According to the NEITI Act, there is a mandate for the government to disclose revenues collected and paid while undertaking oil and gas activities.<sup>123</sup> In practice however, this is not the case. NEITI Act has the following main objectives:

- i. For due process a transparency in any payments made in the sector both by IOCs and the governments;
- ii. For accountability in payments from the government to the IOCs;
- iii. To tackle the problem of corruption in all stages of the oil and gas activities by the IOCs and the government.<sup>124</sup>

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<sup>120</sup> Wilson E, Alstine J, ‘*Localising transparency*’, 33.

<sup>121</sup> Wilson E, Alstine J, ‘*Localising transparency*’, 34.

<sup>122</sup> Wilson E, Alstine J, ‘*Localising transparency*’, 33-34.

<sup>123</sup> Article 3e, Extractives Industry Transparency Initiative Act, 2007, (Nigeria).

<sup>124</sup> Idemudia U, ‘*The quest for the effective use of natural resource revenue in Africa: Beyond transparency and the need for compatible cultural democracy in Nigeria*’, Volume 56 (2), *Sources Africa Today*, 2009, 11.

### 3.2.1 Transparency gaps identified in the Nigerian contract and problems caused

In Nigeria, once the NEITI started publishing reports on the follow up process of the EITI implementation in the country, there were gaps that were found in the process. Some of these gaps included: financial discrepancies, tax discrepancies and corruption in the sector. There has been no political will power to enforce the NEITI Act and the EITI standard because of the corruption in the institutions.<sup>125</sup>

As an EITI standard, participation by all the multi-stakeholders in the Nigerian contract is gravely lacking. Public participation is lacking and there is little to no consultation with the citizens in such contracts. Civil society groups representation is also lacking and as such, this shows that the EITI process in Nigeria is not open to public participation and by participation by all the multi-stakeholders.<sup>126</sup>

The Nigerian contract pushes for transparency in as far as the publishing of the contracts and revenues is concerned. A grave gap however is that it does not outline the process in which the contracts are actually awarded. This is an important step in transparency as award and negotiation of contracts ought to be transparent and such information should be published to the public. The problem that this non-disclosure would create is that there would be a feeling of exclusion and mistrust with the other stakeholders where they feel like they have not been adequately included in the process.

Another major gap is that NAPISM has not been successful with the monitoring and evaluation of costs and revenues. This is a very sensitive issue as the revenue is where the stakeholders gain their benefit from. There should be a proper system of checks and balances in order to ensure that all the officials concerned with this stage of the process are held accountable for their actions and decisions as far as they concern the revenue obtained from petroleum operations. Without this, there would most probably be an unfair and inequitable allocation of revenue and misuse of funds. The PWYP principle should be put into serious practice in this instance.

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<sup>125</sup> Wilson E, Alstine J, 'Localising transparency', *International Institute for Environment and Development, Exploring EITI's contribution to sustainable development*, 2014, 34-  
<<http://www.jstor.com/stable/resrep01393.9>> on 09 March 2021.

<sup>126</sup> Wilson E, Alstine J, 'Localising transparency', *International Institute for Environment and Development, Exploring EITI's contribution to sustainable development*, 34.

There is lack of political will to increase transparency in the sector and this continues to be a great problem in Nigeria. There is a grave delay in actual implementation of EITI standards and the legislation put in place in order to increase transparency.<sup>127</sup> There is also lack of good governance as the officials working in the sector have no system of checks and balances that is actually implemented in order to ensure that there is transparency and accountability in their actions. The stakeholder engagement in the sector is lacking and NEITI has since been a process that does not involve all the players in the sector in an effective manner.<sup>128</sup> Most of the scholars have noted that the best approach that can lead to good governance within the sector is through having a good political will that would support most of the strategies geared towards disclosure of information. Through the will, most of the government agencies involved in the course of upstream and downstream production and manufacturing of oil and gas can be compelled to ensure that there is disclosure of information to enhance good resource governance.

Nigeria has been greatly affected by the oil resource curse due to lack of transparency and this has also led to a lot of oil theft which is a great gap in their transparency methods. The Niger Delta is a place that has been gravely affected by this and there is a need to address this issue in the model PSC in order to ensure there is transparency in that manner as well. This should be at all stages: the exploration stages as well as production stages, through to how the petroleum and other products are distributed in an effective manner, for the benefit of the stakeholders.<sup>129</sup>

The implementation of the EITI process in Nigeria, even with the NEITI Act, has been poorly managed. The main issue is the political interference of the process which leads to delays in implementation as well as corruption. Any reporting of information is usually outdated due to the delays in disseminating information to other stakeholders.<sup>130</sup>

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<sup>127</sup> Wilson E, Alstine J, 'Localising transparency', *International Institute for Environment and Development, Exploring EITI's contribution to sustainable development*, 37.

<sup>128</sup> Wilson E, Alstine J, 'Localising transparency', *International Institute for Environment and Development, Exploring EITI's contribution to sustainable development*, 37.

<sup>129</sup> Wilson E, Alstine J, 'Localising transparency', *International Institute for Environment and Development, Exploring EITI's contribution to sustainable development*, 37.

<sup>130</sup> Adeleke F, 'The extractives industries transparency initiative and Africa's mineral governance regime', South African Institute of International Affairs, Occasional paper 266, 2017, 17-18 - <<https://www.jstor.org/stable/resrep28385>> on 10 March 2021.

The next section discusses whether the same challenges in Nigeria are noticeable in Kenya's contracts.

### **3.2.3 Transparency Provisions in the Kenyan Model Petroleum Sharing Contract**

Kenya has been firming up a robust legal framework for regulation of the petroleum sector in the country. Chapter five of the Constitution is wholly dedicated to land and environment and outlines obligations in respect of the environment.<sup>131</sup> In 2019, Parliament enacted the Petroleum Act, 2019 repealing the Petroleum (Exploration and Production) Act, 1984.

The new Act enjoins the Ministry of Petroleum and Mining and the Energy and Petroleum Regulatory Authority to regulate the sector.<sup>132</sup> Section 12 of the Act establishes the National Upstream Petroleum Advisory Committee whose principal role is to advise the Cabinet Secretary on negotiations of Petroleum Agreements with local and international contractors.<sup>133</sup>

The schedule of the Petroleum Act introduces a Model Petroleum Agreement in the form of a production sharing contract and the Cabinet Secretary is granted the power to negotiate, award and execute petroleum agreements on behalf of the government. The model agreement is supplemented by a Participation Agreement as Appendix C to the agreement which outlines the general terms and conditions for government's participation in upstream petroleum operations.<sup>134</sup>

In line with Article 71 of the Constitution, the Petroleum Act provides that agreements must be reviewed and ratified by Parliament. The ratification process is subject to public participation by different stakeholders in the sector with contracts being made public for transparency and accountability.<sup>135</sup> The Act also introduces a revenue sharing framework for natural resources between the national, county and local community.

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<sup>131</sup>Article 69, Constitution of Kenya, 2010.

<sup>132</sup>Part III, Petroleum Institutions, Petroleum Act (Act No. 2 of 2019).

<sup>133</sup>Section 12, Petroleum Act (Act No. 2 of 2019).

<sup>134</sup>Schedule, Petroleum Act (Act No. 2 of 2019).

<sup>135</sup>Allen S and Megan R, '*Production Sharing Contracts and Kenya's Petroleum Act*', (2021).

The county government shall have an equivalent of 20% of the national government's share, 5% to the local community while the national government takes the rest.<sup>136</sup>

The Petroleum Act is supplemented by other laws which play a role in petroleum operations including the Occupational Health and Safety Act 2007, Land Act 2012, Competition Act 2010, the National Construction Authority Act 2011 and the Environmental Management and Coordination Act 1999 (EMCA).<sup>137</sup> The National Energy Policy 2018 is also a notable policy for petroleum extraction in the country. There are also institutions that have been put in place to implement these laws and regulations. These include: The Ministry of Energy and Petroleum, the National Oil Corporation of Kenya (NOCK), the Energy and Petroleum Regulation Authority (EPRA), Kenya Pipeline Company (KPC), the Kenya Revenue Authority (KRA) with an expectation to run their operations in a transparent manner for the benefit of their citizens who are the most important stakeholders in these petroleum operations.

The Kenya model PSC has the following transparency clauses included:

Clause 15 provides for reports and states that “the contractor shall supply to the Cabinet Secretary and Authority daily reports on drilling, completions and production operations, and weekly reports on exploration including seismic and geophysical operations.”<sup>138</sup> This provides transparency in the operations and ensures that the government has information from the contractor step by step. This clause also stipulates timelines under which these reports ought to be submitted. In practice, there is no public publishing of these reports and that makes it difficult to actually confirm that in practice, the daily reporting is being done. There is a grave disconnect between this provision actually providing transparency and the practice on the ground.

Clause 24 provides for record keeping and audits and states that “in accordance with its obligations under the Energy and Petroleum Policy, the Act and regulations the contractor, shall maintain records to facilitate the determination of the local content of

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<sup>136</sup>Section 58, *Petroleum Act* (Act No. 2 of 2019).

<sup>137</sup><https://www.africalegalnetwork.com/kenya/wp-content/uploads/sites/22/2017/05/Conducting-Oil-Gas-Activities-Kenya-1.pdf>> Accessed 23<sup>rd</sup> April 2020.

<sup>138</sup> Clause 15, *Petroleum Act* (No 2 of 2019).

expenditure incurred in respect of upstream petroleum operations.”<sup>139</sup> An additional requirement of supporting documents which undergo an audit is also stipulated in this clause and this ensures that the documentation is valid and authentic. There is no public publishing of these audits and records and therefore, the transparency clause does not provide actual transparency in practice.

Clause 27 provides for the exploration work program and detailed budget. These are submitted to the Cabinet Secretary within a stipulated timeline who shall in turn provide any modifications to the contractor where necessary. Because contracts are not published publicly, there is no way of actually vetting these terms and therefore, there is no real manifestation of transparency. Similarly, there can also be no way of seeking accountability with lack of this information and therefore, even though the contractors do not follow the work program or budget, there is no method of accountability which the public can explore.

Clause 35 provides for the valuation of crude oil. This therefore means that the contractor is not responsible for setting such price and therefore, the government can ensure that the pricing is done in the correct way for the benefit of its citizens. There is no civic education as to how this is done and so therefore, the citizens have no manner in which they can question the process.

Clause 43 provides for books, accounts and audits and provides that “the contractor shall keep books and accounts in accordance with the accounting procedure and shall submit to the Cabinet Secretary and Authority a statement of those accounts, not more than ninety (90) days after the end of each calendar year.”<sup>140</sup> It also mandates the contractor to appoint an independent auditor approved by the government to audit the books of accounts. These are not publicly available and so therefore, there is still lack of transparency in practice.

Clause 53 provides for dispute resolution in amicable settlement, expert determination and arbitration as per the UNCITRAL rules.<sup>141</sup> It also provides for timelines to be

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<sup>139</sup> Clause 24, *Petroleum Act* (Act No. 2 of 2019).

<sup>140</sup> Clause 49, *Petroleum Act* (Act No. 2 of 2019).

<sup>141</sup> Clause 53, *Petroleum Act* (Act No. 2 of 2019).

followed during such dispute resolution. The Arbitrators are also appointed fairly to be able to ensure that the determination is as fair as possible to all parties.

Part I outlines the interpretation of terms and scope of the contract. This ensures that there is a clear determination of the areas the contract covers and thus increases transparency. The parties to the contract must operate within the scope provided in the contract and the interpretation of terms is also well and clearly defined. Lack of public publishing of the contract makes it difficult for the public to ensure that the scope of the contract is being adhered to.

Part II outlines the terms, exploration obligations and termination of the contract. The contractor is made aware of the contract area that is to undergo exploration as well as the start date. It also outlines the terms of the termination of the contract and therefore, these terms must be adhered to and as such, there is an increase of transparency.

Part IV outlines how financial reports to the Cabinet Secretary by the contractor with set timelines that must be followed.

Part VI outlines the work programme, development and production. The contractor can therefore only perform its obligations under the contract as per the terms outlined in the work programme agreed upon.

All these clauses in the Kenyan Model PSC show that transparency is a priority in such contracts and should be an utmost priority to ensure the success of these projects for the benefit of the local community. The practice however shows lack of implementation of these transparency provisions as there is little to no public reporting. There has been some civil groups participation to ensure that these transparency provisions in the model PSC are strictly upheld. One such event was the national conference on Minerals, Oil and Gas - Jukwaa la Madini, Mafuta na Gesi, held in 2019 and hosted by the ILEG.<sup>142</sup>

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<sup>142</sup> Institute for Law and Environmental Governance, *Transparency and accountability in Kenya's extractive sector: what works, what doesn't?*, Policy Brief No. 1 of 2020.

Although there are transparency clauses in the model PSC, the realization of full transparency and disclosure has been a challenge due to a number of reasons. These are:

The legal compliance and enforcement systems in the country are not up to par with the standard required. Even with the laws present, enforcement remains weak and an issue especially due to the rampant problem of corruption in the sector.

There is lack of political will and therefore the senior officials that are supposed to be making the laws and the changes required actually do nothing as it benefits them more when there is less transparency and accountability. Good governance is lacking in the sector.

The citizens do not know how to fully enforce their rights or there is bare ignorance of their rights so therefore access to information and public participation is not implemented as it should be. They also do not demand any accountability from the government and its officials and in that way, the domino effect is that the government and its officials then continue in the practices of corruption and mismanagement. The weak governance systems enable a great playing field to these corrupt individuals who lack integrity and political will.<sup>143</sup>

There are well defined parameters of the terms and the scope of the contract and therefore, all parties are aware of the duties and obligations befit to them. This includes the termination of the contracts as well. Well defined parameters of the terms and the scope of the contract help with promoting transparency as it becomes clear as to which party performs which role and to what extent and therefore in the same way, it helps with keeping officials accountable. It also promotes good governance.

PWYP is a transparency clause that is included in both model PSCs and it should be followed with strict deadlines in order to be aware about how the revenues are split among the different stakeholders. It is also a great way of ensuring transparency and

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<sup>143</sup> Institute for Law and Environmental Governance, *Transparency and accountability in Kenya's extractive sector: what works, what doesn't?*, Policy Brief No. 1 of 2020.

accountability. It is also a practice of good governance to publish revenues that are considered public, such as those within the sector.

OGP should be a practice that is adopted in the model PSC as a transparency clause. Drawing lessons from Nigeria, Kenya should strictly adopt the OGP NAP IV of 2020 to 2022. Citizen participation is an important factor in building and gaining public confidence as well as active participation in the process. Nigeria has failed in adopting the NEITI as well implementing the NEITI Act successfully and they have greatly felt the results on their petroleum sector.

The establishment of the NEITI and the NEITI Act in Nigeria is a positive step to eventually implementing transparency by the EITI standard in the country but its implementation has failed greatly over the years. Drawing lessons from this, Kenya should adopt a similar framework and yoke it together with the current legislation in order to ensure that transparency is a success.

The Nigeria contract has had major issues in delay of relaying information to other stakeholders save for the fact that those provisions are well catered for. In the Kenyan contract, these timelines need to be included and followed strictly.

Lack of political will in Nigeria has been a major factor that affects transparency. Drawing lessons from this, the Kenyan contract should ensure that transparency and accountability clauses in contracts are mandatory in nature and that there are checks and balances to ensure that the same is monitored and well implemented.

Kenya has been a member of the OGP since 2011. The OGP National Action Plan IV (NAP IV) emphasizes on the need for transparency and accountability and ease to access information by citizens, which is a right embedded in Article 35 of the Constitution of Kenya. The NAP IV also has two new commitments it reiterates and these are: access to justice in order to ensure greater access to justice for citizens and

ensuring greater access to information especially by using technology to ensure there is more proactive dissemination of information and effective records keeping.<sup>144</sup>

Commitment 2 of the NAP IV outlines a system of open contracting that Kenya plans to adopt in the public sector, the extractives sector inclusive. This also includes auditing and evaluation of such contracts to ensure better performance of such contracts. These are current ongoing commitments<sup>145</sup>. Commitment 4 of the NAP IV outlines the process of public participation, as enshrined in Article 10 of the Constitution of Kenya 2010, and is intended to be meaningful and inclusive for all groups of people. It also outlines the process of legislative openness linked to good governance. These shall be implemented through “access to information, public accountability, citizen engagement and use of technology.”<sup>146</sup> Commitment 6 details access to information by citizens and makes reference to Article 31 of the Access to Information Act, 2016.

Similarly, the Kenya Civil Society Platform Oil and Gas (KCSPOG) and Publish What You Pay Kenya are civil society groups that are at the head-front of pushing transparency in the petroleum sector in Kenya and they ensure that as far as possible, they educate the citizens on their right to transparency in the sector. They also teach and enlighten the citizens on the need to hold the government accountable for all the decisions they make.<sup>147</sup> Civil society empowerment is an important tool in transparency.

There are two laws in Kenya that enshrine the cost-auditing process in the sector. These are: The Model PSC in the Petroleum Act. These two instruments ensure that there are proper audits of the revenues generated from the upstream and downstream operations

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<sup>144</sup> Open Government Partnership (OGP) National Action Plan IV 2020-2022, 12, - <[https://www.opengovpartnership.org/wp-content/uploads/2021/03/Kenya\\_Action-Plan\\_2020-2022.pdf](https://www.opengovpartnership.org/wp-content/uploads/2021/03/Kenya_Action-Plan_2020-2022.pdf)> on 20 May 2021.

<sup>145</sup> Open Government Partnership (OGP) National Action Plan IV 2020-2022, 12, - <[https://www.opengovpartnership.org/wp-content/uploads/2021/03/Kenya\\_Action-Plan\\_2020-2022.pdf](https://www.opengovpartnership.org/wp-content/uploads/2021/03/Kenya_Action-Plan_2020-2022.pdf)> on 20 May 2021.

<sup>146</sup> Open Government Partnership (OGP) National Action Plan IV 2020-2022, 12, - <[https://www.opengovpartnership.org/wp-content/uploads/2021/03/Kenya\\_Action-Plan\\_2020-2022.pdf](https://www.opengovpartnership.org/wp-content/uploads/2021/03/Kenya_Action-Plan_2020-2022.pdf)> on 20 May 2021.

<sup>147</sup> Mutsotso A, 'Kenya Civil Society Platform Oil and Gas (KSPCOG) & Publish What You Pay (PWYP) Kenya Draft comments on the proposed rule by the Securities Exchange Commission on disclosure of payments by resource extraction issuers', Kenya Civil Society Platform Oil and Gas (KSPCOG) & Publish What You Pay (PWYP) Kenya, 2020, 1.

in the oil and gas sector. This enhances good governance. The Income Tax Act, 1974 in the ninth schedule also outlines some of the methods through which revenue in relation to natural resources can be sustainably be used to enhance good governance.<sup>148</sup> Similarly, there are government agencies that are tasked with the functions of ensuring that these audits are carried out. These are: The Ministry of Petroleum and Mining as per the Model PSC in the Petroleum Act. the Kenya Revenue Authority (KRA) who are mandated to audit and collect petroleum taxes, the Office of the Auditor General who are mandated to audit government bodies on their spending and Energy and Petroleum Authority (EPRA) who are the industry regulator as per the Petroleum Act.<sup>149</sup>

With respect to contract disclosure, Kenya has signed contracts with IOCs for petroleum exploration and production activities but very few of them have been publicly disclosed. In a rather expected manner, the government has been the party to refuse this disclosure of the contracts and that rises a very suspecting eye. In the same way, it has also declined to join the EITI initiative.<sup>150</sup>

### **3.3 Assessing contract transparency of Petroleum Contracts in Kenya**

In Kenya, using the above criteria, there is the existence of legal and institutional frameworks that are in place in order to promote transparency. However, transparency gaps still exist in the law, the public reporting process, gaps in the procurement process etcetera.

Public participation is a very big step towards contract transparency. It allows the citizens to be able to have knowledge of each step of the contracting process and therefore increases civic trust towards the government and their dealings with the IOCs. In Kenya, the public participation in petroleum operations is mostly spearheaded by the civil society institutions because the local communities in which these resources have so far been discovered are arid areas of the country where the people are not educated and therefore, they would not be able to understand the complexities of these contracts. This is compounded by the fact that publishing of the petroleum contracts in Kenya is

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<sup>148</sup> Redhead A, Mule D, Beke A, 'Examining the crude details: Government audits of oil & gas projects costs to maximize revenue collection: Kenyan case study', OXFAM GB, 2018, 5.

<sup>149</sup> Redhead A, Mule D, Beke A, 'Examining the crude details', 2018, 8.

<sup>150</sup> Redhead A, Mule D, Beke A, 'Examining the crude details', 2018, 12.

not a mandatory requirement and there is also no law that ensures citizen monitoring at all levels of the contract process.

Additionally, the practice on the contracting process is not known to the public and civil society groups and so it is therefore very difficult to keep surveillance of the process to ensure that there is accountability by the government to the other stakeholders in whose interest they act for. The secrecy shrouded in the contracting process could partly be blamed on the hesitance and/or lack of political will to enact the enabling legislative framework to enhance accountability and transparency.<sup>151</sup> Because of lack of accountability and a lot of these contracts being kept a secret, it would be very easy for resources not to be fully accounted for and because of this, the local citizens therefore do not benefit to the maximum from the resources held for them in trust.

Reporting of revenues will usually increase contract transparency as well as manage expectations and this is a great step towards building contract transparency. If a government and its officials are dealing in corrupt practices while undertaking petroleum operations, the economic benefits will be compromised. Investors in the same way would also be unwilling to invest in such a country.<sup>152</sup> Disclosure and transparency is a strong pillar in the fight to extinguish corruption. With transparency, even if corruption would not be completely non-existent, there would be a rise in accountability and the citizens would have increased confidence in the government and their dealings in the petroleum transactions as well as the collection and allocation of revenue.<sup>153</sup>

There is lack of this transparency and there is very little reporting about these contracts. This includes the awarding of the contracts to the actual negotiation and implementation. Transparency and accountability go hand in hand with good governance and the information must remain meaningful in a way that can be consumed positively by stakeholders. There has to be civic education in order to ensure a meaningful EITI process.

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<sup>151</sup> Section 121, *Petroleum Act* (Act No. 2 of 2019).

<sup>152</sup> Truelove M.A, 'Oil, diamonds and sunlight: fostering human rights through transparency in revenues from natural resources', *Georgetown Journal of International Law*, 2003, 211.

<sup>153</sup> Truelove M.A, 'Oil, diamonds and sunlight: fostering human rights through transparency in revenues from natural resources', *Georgetown Journal of International Law*, 2003, 212.

The Petroleum Act outlines the manner in which licenses are awarded to any contractor who wishes to undertake any petroleum activities. The Cabinet Secretary of Energy has the power to divide the country into different blocs and if anyone wishes to undertake any petroleum activities in any of these blocs, then they have to have express permission from the Minister. This permission is granted through a license under the PSC. The application process is usually done through an application process where bidding is done or via negotiations with the PSC being used as a guide.<sup>154</sup> The Petroleum Act also outlines the manner in which the petroleum agreements are negotiated, awarded and executed. The contract is usually concluded between the Cabinet Secretary and the contractor and this is usually after bidding is over or after the direct negotiations are concluded.<sup>155</sup> Further the Cabinet Secretary is required to formulate regulations on accountability, transparency and openness of the upstream and downstream petroleum products.<sup>156</sup> However, these subsidiary regulations remain yet to be enacted three years since the enactment of the Act.

Even with these processes being expressly outlined in the Act, there is no mention of public disclosure of these contracts and the bidding process nor the negotiation, award and execution of these contracts. There is a grave disconnect with the law and transparency in the contracting process leading to lack of information in the public domain. This therefore means that there is a grave abuse of the right to information and public participation as is outlined in the FPIC principle. There is also no possible way of the citizens holding any public official accountable to their actions and decisions.

There are inconsistencies with the laws that are currently in place in the sector and the actual practice and implementation. One of these inconsistencies is the fact that the Kenyan PSC overlooks the right to information as enshrined in Article 35 of the Constitution. It does not make it mandatory. Instead, it mentions that there should be reporting by the contractor to the Cabinet Secretary, record keeping and audits and financial reports but does not outline the process or timelines for these processes.

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<sup>154</sup> Section 16, *Petroleum Act* (Act No. 2 of 2019).

<sup>155</sup> Section 18, *Petroleum Act* (Act No. 2 of 2019).

<sup>156</sup> Section 121, *Petroleum Act* (Act No. 2 of 2019).

Similarly, it does not outline any public disclosure, only disclosure to the Cabinet Secretary and this is a grave gap in the law.

The legal compliance and enforcement are extremely disconnected in theory and this causes lack of transparency. Even with existing laws in place and the model PSCs, the fact that the government officials cannot be held accountable would mean that there is lack of compliance and enforcement where they need to be held accountable. This completely defeats the EITI process and its implementation in both countries.

The Kenyan PSC has a couple of transparency gaps. One of the transparency gaps is that there is no mention of public participation and access to information by the public. This is manifested in the lack of contracts disclosure to the public and this has been the case since petroleum exploration and production began in the country. No contract is in the public domain and as such, the citizens lack information and therefore cannot participate in any decision-making processes. There is also no revenue transparency as there is no reporting done to the public domain and therefore there can be no public participation or information to hold public officials and other stakeholders accountable. This is also a problem as public expectation will also not be managed and there will most likely be resistance from the public when it comes to these petroleum exploration and production activities. A good example is the Turkana community and how they have been resistant to these activities due to lack of information.<sup>157</sup>

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<sup>157</sup><https://www.devex.com/news/communities-flag-concerns-over-kenya-oil-project-94672>>. Accessed 31<sup>st</sup> July 2021.

## **Chapter 4: Legal and Institutional Framework for Addressing the Transparency Gaps in the Kenyan Model Petroleum Sharing Contract**

### **4.1 Introduction**

Premised on the analysis and discussion in Chapter Two and Three, this chapter draws illustration from the said chapters and presents certain policy guidelines and institutional changes that can be incorporated to enhance transparency with the aim of enforcing good resource governance. At the core of the chapter are some of the aspects of transparency that can be used to enhance good resource governance. Contract transparency is important in extractive industries in order to ensure that the government and its citizens in turn, benefit from these operations. It also allows for the improvement in competition and allows for all stakeholders to be part of the vetting process, thus ensuring that their interests are taken care of. It also reduces corruption and bribery in the sector. These contracts are essential as they set out terms such as obligations and rights of the parties, as well as any protection that would be afforded to these parties.<sup>158</sup> They therefore need to be as clear and transparent as possible. Contract transparency covers three main areas of the contract process that are extensively analyzed in this study as shown below:

#### **4.1.1 Award of the contract**

The first step towards transparent disclosure is through the award of contracts to multinational oil companies.<sup>159</sup> More often, countries invite different companies to take part in the bidding of the contract and the successful companies are often awarded. However, this may not be true in some cases. For example, in Nigeria, there are certain contracts which were awarded to oil companies while at the same time there weren't proper bidding of the tenders.<sup>160</sup> This hampers the aspect of ensuring that there is transparency from the onset. Through the bidding, transparency is often achieved in the sense that different companies can tender their interest in taking part in the upstream and downstream operations in the oil industry.

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<sup>158</sup> Bagabo, P., Mugenyi, O., Magara, S., and Twebaze, P., 'Contract Transparency in Uganda's Petroleum and Mining Sectors', No.94, 2019, 1-33.

<sup>159</sup> Paul Bagabo et al, 'Contract Transparency in Uganda's Petroleum and Mining Sectors'.

<sup>160</sup> VOS Okeke and ET Aniche, 'A Critique of the Enforcement of Nigeria Extractive Industries Transparency Initiative (Neiti) Act 2007 in Nigerian Oil and Gas Sector' (2013) 14 British Journal of Arts and Social Sciences 98.

Upon successful tendering and bidding, countries such as Nigeria have often been faulted for failing to disclose some of the criteria that is used to award the said contracts. This is important aspect of enhancing transparency since a country often has a duty to give reasons to its citizens on some of the important decisions that it makes.<sup>161</sup> Since contracts between the governments are binding to the citizens and the companies, it is always important to outline some of the aspects that the government put into consideration before awarding tenders to the companies. In Nigeria, just like the Kenyan scenario, the government has not been at the forefront of explaining the mechanisms or the criteria that they used to award different companies' contracts to undertake in the mining and extraction of oil and gas.

Akinrele notes that one of the ways through which transparency is enhanced is through constant disclosure of the content of the contracts as well as the implementation of the same.<sup>162</sup> This means that one way of avoiding poor governance is through constant revealing and keeping open the information in relation to the upstream and downstream operations in the oil industry. This means that the award of contracts and the criteria used in the awarding of the contracts should be taken into consideration by the countries seeking to enhance good governance through transparent disclosure of all the material information relating to the operations in the oil and gas.

#### **4.1.2 Contract Content and Signing**

There are various salient aspects that are often included in the contracts that the public may not often be aware of. One such important aspects is always the mining rights that have been given to the companies. Disclosure of contracts that details the mining rights given to the companies enhances good governance as the citizens can independently give their views on what they think of the said mining rights. Mining rights often outline to what extent these companies are supposed to mine or extract oil and gas.<sup>163</sup> Kenya and Nigeria have often not disclosed the mining rights that are often given to the oil

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<sup>161</sup> MA Ante and AE Ante, 'Towards Information Transparency: Current Posture and Advocacy for Open Data Systems for Efficiency, Equity and Justice—The Nigerian Oil and Gas Experience', *SPE Nigeria Annual International Conference and Exhibition* (OnePetro 2019).

<sup>162</sup> Oyewunmi OA and Olujobi OJ, 'Transparency in Nigeria's Oil and Gas Industry: Is Policy Re-Engineering the Way Out?' (2016) 6 *International Journal of Energy Economics and Policy* 630.

<sup>163</sup> Thomas WW, 'Renegotiating Acquired Rights in the Oil and Gas Industries: Industry and Political Cycles Meet the Rule of Law' (2008) 1 *Journal of World Energy Law & Business* 55.

companies. This greatly hampers good governance as there can never be any proper oversight by the needed companies as there is little or no information through which oversight bodies can make analysis.

In Kenya, while there has not been an intense mining and production of oil and gas, there are however certain revenue benefits that have been realized by the government such as bonuses. There however has not been any form of active disclosure of the benefits and revenues occasioned from these oil companies. This also presents a loophole through which mismanagement of the oil and gas revenue can be achieved. Carole notes that one of the ways through which mismanagement comes about is through lack of revelation of the amounts earned by the country. The authors such as Carole note that more often the governments do not outline the exact revenue generated but often gives estimates which give room for poor resource governance.<sup>164</sup>

Another important aspect of transparent disclosure on the content of the contracts that governments often enter into is the aspect of the amount that the multinational companies should get out of the extraction. Kenya, just like Nigeria has not been able to have enough technological equipment and experts to undertake in the exploration and extraction of oil and gas.<sup>165</sup> Due to the inefficiency coming from lack of these two aspects, most oil companies end up taking a lot of revenue due to the fact that they may have an upper hand and technological requirements. This hampers the negotiating power of most countries. Poor resource governance is thus seen in two ways, first it can be seen in the benefit that the companies derive out of the contracts. Secondly, the oil companies may end up benefitting more from the extraction at the expense of the citizens.<sup>166</sup> This leads to poor resource governance. This always call for the need to have the benefits to be accrued by the companies published.

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<sup>164</sup> Nakhle c, 'Towards Good Governance of the Oil and Gas Sector in the MENA' [2017] United Nations Economic and Social Commission for Western Asia.

<sup>165</sup> Olawuyi DS, 'The Emergence of Right-Based Approaches to Resource Governance in Africa: False Start or New Dawn?' 11.

<sup>166</sup> Nwapi C and Andrews N, 'A New Developmental State in Africa: Evaluating Recent State Interventions Vis-a-Vis Resource Extraction in Kenya, Tanzania, and Rwanda' (2017) 13 McGill Journal of Sustainable Development Law 223.

## 4.2 Contract implementation, monitoring and enforcement

Implementation of the agreements set in a contract is considered as the most important step towards achievement of the contractual plans between countries and companies. One of the ways to enhance good governance is always through ensuring there is transparent disclosure in course of implementation of the agreements in the contract. In cases where the contracts are made public, each stakeholder is always at a pressure from the public to ensure that it meets its part of the bargain<sup>167</sup>. This enhances good resource governance as there will not only be a continuous disclosure, but the various stakeholders involved will have to hold their side of the bargain.

The implementation of the plans put in place more often are not taken into consideration in the transparency and disclosure. However, this is always the most important part as it is through the implementation of the structures put in place that there can be realization of revenue generation. In cases where there is no disclosure, implementation may falter as there may not be proper mechanisms to ensure that the plans put in place are followed to the latter thus leading to good resource governance. In Kenya as well as Nigeria, more often there is no transparent disclosure on the steps that have been put in place. This makes the evaluation of the process a daunting task thus leading to poor resource governance. Through transparent disclosure in the various phases, countries can be in a position to enhance good resource governance as there is proper checks in the operations of the companies towards realization of goals set in the contract.

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<sup>167</sup> A Mabel, H Celica, L Alejandro, M Mariela, 'Transparency in Petroleum Contracts: A comparative study of Ecuador and Bolivia: What are the strengths and weaknesses, the opportunities and threats?' Trace briefings, 2010-2011.

#### 4.2.1 Transparency by publishing contracts

One of the major problems resource rich developing countries suffer from is the “resource curse thesis”. This concept was first discussed in Hossein Mahdavy in 1971. Over the years, it has gained popularity. In his study, Hossein Mahdavy described the “resource curse thesis” to link poor economic growth in resource rich developing countries and how resource wealth is handled.<sup>168</sup>

Nigeria has been one of the countries that has suffered from this unfortunate curse. Even with the country’s rich oil resources, the revenue that comes from this resource is filled with officials who are corrupt and therefore, very little goes back to the citizens. Instead, they remain poor and continue to live in abject poverty. This is part of the reason that there is an amendment in the Deep Offshore and Inland Basins Act, as discussed in the previous chapter, to include further transparency of contracts by ensuring they are published to the public.

Kenya currently has no legal requirement to publish petroleum contracts publicly and this ought to be a legal requirement in order to increase transparency as well as public confidence in the government’s dealing in petroleum operations. Because the natural resources in a country belong to the citizens, they should be made well aware of their dealings and the revenue benefit that will befall them in such operations. This is a grave gap that has been left out in the Kenyan legislation and it ought to be reconsidered. This will also help in the reduction of corrupt dealings among the officials and keep them accountable for their actions and decisions in petroleum operations.

In Kenya, there is no PSC that has been publicly published to date. Keeping in mind that Kenya is still at its infancy with regards petroleum operations, the publishing of petroleum contracts to the public would help avoid the resource curse in the country and as a result, the citizens would benefit greatly from a resource that is in fact their own. Publishing of contracts would also help manage public expectation and it would provide meaningful information about the exploration and production activities. There would also be clarity about the scope and roles of different stakeholders and checks and

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<sup>168</sup> Mahler A, ‘Nigeria: *A prime of the resource curse? Revisiting the oil violence link in the Niger Delta*’, *German Institute for Global and Area Studies (GIGA)*, No 120, 2010, 7. - <<https://www.jstor.org/stable/resrep07605>> on 8 May 2020.

balances would be easier to perform. Corruption would also be controlled as there would be contract transparency and therefore abuse of powers would be unlikely as is the case with unpublished contracts where there is no access to any information regarding the terms of the contract. Access to this information is a constitutional right and as such, it should be made mandatory by law and any breach should also be punishable by law. Access to the contracts should also be made easy and there should be strict adherence to timelines for publishing, which should also be enshrined in the law. Kenya should also adopt the EITI standards to assist with contract transparency. KCSPOG has been in the forefront of promoting the concept of transparency of contracts as well as civic education of the same and this is a great step in ensuring that citizens understand why contract transparency is and why it is important. Civic education is therefore also a great tool and the government should also focus on providing the same to the citizens, who are the true owners of the natural resources.

#### **4.2.2 Transparency and participation by the multi-stakeholders**

Public participation is a factor that also greatly impacts transparency. As discussed in previous chapters, it helps manage public expectation as the public is aware of the step by step contracting process and especially what to expect in terms of revenue. Without civic education on these factors, there would be a lot of resistance from the public to allow the IOCs to undertake these petroleum operations and in return, it would either slow down the operations or bring them to a halt. A great example in Kenya is the resistance that has been observed from the people of Turkana. Special care needs to be taken to be able to involve all different types of groups, especially keeping in mind the vulnerable groups. In addition, there also needs to be more attention paid to how the public participation is done, especially keeping in mind that most of the local communities in which these resources are discovered are mostly uneducated or at least, a higher percentage is uneducated. The information passed down needs to be user friendly. Civil society groups need to be properly represented in the extractives industry. They are an important part of the civil society groups in Kenya have assisted to this respect but there needs to be more done in terms of laws and their implementation with regards public participation. One such civil society group is the Friends of Turkana that has been instrumental in their work.

Public participation is also important when it comes to making decisions concerning the natural resources. Here, the FPIC principle come in handy and citizens are informed on the projects and their consent is obtained before these projects commence. This consent is especially important and it will ensure that the citizens have an understanding of what to expect and how they will be affected, as well as what they will gain. It will also ensure that there are no interruptions during the project from citizens who feel aggrieved due to lack of participation. Therefore, timelines will be adhered to and there will be no delays caused by the citizens. There should be equity participation by all stakeholders.

#### **4.2.3 Transparency in revenues**

Revenue transparency is equally as important and this information needs to be available to the citizens and the Kenyan legislation ought to adopt the PWYP principle to the fullest extent. The government ought to publish clear and concise reports on their revenue collection and how that passes down to the citizens. More specifically, there needs to be clear attention paid to the time it will take for the citizens to be able to benefit from these resources especially because of the lengthy time it takes for petroleum operations to be considered viable. In the same way, there also needs to be a clear understanding by the citizens and all other stakeholders regarding the distribution, to whom it will go to, at what stage and at what point of the petroleum operations. Such information should also be published in a way that is useful to the citizens and other stakeholders.

Good fiscal transparency of resource revenue should also include an open budgeting system which is publicly accessible. This should be set out in law and made mandatory. Similarly, an open tax system should also be set out in the law and made mandatory, showing the taxes paid to the government and also those paid by the government and IOCs as well. Any breach should be punishable by law as well. The core fiscal regimes in the contract should also be publicly disclosed in order for citizens to better understand how the revenues gained are split between the stakeholders and what benefit they ought to expect. This is especially important given that the petroleum contract model used is a production sharing contract.

#### **4.2.4 Transparency in licensing**

Permits are required to begin any petroleum operations by the IOCs. These are usually issued by the government and in Kenya, there are different departments in the Ministry of Energy that issue these permits. In Nigeria, the officials have been heavily involved in corruption and the processes have been flouted through and through. In Kenya, the recommendation for this problem would be to have a “one stop shop” as discussed in previous chapters. This would mean that all permits would be acquired from one government agency and this would assist in reducing the incidences of corruption as there would be less officials dealing with these processes.

Clarity and openness of these licensing procedures are important in transparency. Open tendering in the bidding process is important as it helps with ensuring a non-discriminatory and non-corrupt process. Bidding processes with defined procedures should be used for the licensing awards. Once bidding has been completed, they should be made public. The award process should also be made public in order to ensure that the procedure is as transparent as possible and checks and balances can be used to check on any discrepancies. When it comes to negotiated bids, the process should still be publicly disclosed and any proposals received for such types of bids should be publicly disclosed. Similarly, once negotiations are done, the company that is awarded the license should also be made public. This should be made mandatory by law.

#### **4.2.5 Transparency and accountability**

In the same way, there should also be criteria put in place to ensure that these government agencies are investigated and properly audited including citizen monitoring. This means that the citizens should be included in the contract process from the beginning up to its enforcement. It should not only be left to the government to have this information. This will also boost transparency in the process and therefore increase civic trust in the process.

Borrowing from the unfortunate events in the Niger Delta where the local community was greatly affected by the pollution and other environmental impacts that were as a result of the petroleum operations, there ought to be transparency when it comes to the effects to the environment due to the petroleum operations. Local communities should

participate in all Environmental Impact Assessments (EIAs) and they should be properly compensated for any adverse effects or otherwise that are in relation to the project. This also includes compensation for local communities that end up being displaced and losing their ancestral land. The compensation also ought to be fair and adequate and the local communities should participate in all negotiations regarding the same.

To make the process easier, there should be an assessment criterion that can be used to check on all these elements that make up contract transparency. This criterion should check on each component and award a mark, probably on a scale of 1 to 5, 1 being the lowest and 5 being the highest. This way, it would be easier to check on what needs improvement, and what needs to be kept up.

#### **4.2.6 Transparency and good governance**

Forms of national governance include sectoral governance strategies, and this instance, good governance of the petroleum sector. In the petroleum sector, African countries have sought to include transparency as one of the pillars to promote good governance and to increase the benefits from natural resources for their citizens. The Africa Mining Vision (AMV) 2009 is one such strategy. It calls for more “transparency and equitable exploitation of mineral resources.” Kenya ought to ensure that their legal framework in the petroleum sector is in line with such directives and that they are also EITI compliant. Practice and the legal framework ought to work in tandem and the government needs to ensure that this is the case all through the operations.<sup>169</sup>

National anti-corruption strategies also ought to be out in place in order to curb corrupt practices. The implementation of these strategies must be coordinated in all the different aspects and monitoring and evaluation is important in order to ensure the success of these strategies.<sup>170</sup> The Kenyan law needs to ensure that these anti-corruption strategies are included and that there are sanctions that accompany any flouting of such strategies.

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<sup>169</sup> Schebertain J, *National strategies for advancing good governance in Africa*, Transparency International, 2020, 8.

<sup>170</sup> Schebertain J, *National strategies for advancing good governance in Africa*, Transparency International, 2020, 8.

### **4.3 Legal and Institutional Safeguards**

#### **4.3.1 Institutional Safeguards towards Transparency in Oil and Gas Sector in Kenya**

##### **4.3.2 Petroleum Advisory Committee**

As a way of enhancing transparency to achieve the goal of good governance. The Petroleum Act establishes a committee known as the Petroleum Advisory Committee.<sup>171</sup> The committee is tasked with various functions which include the award of various tenders to successful bidders and companies. The committee is also tasked with revoking the licenses of the awarded companies in cases of violation of the policies and laws. The role of the committee in relation to enhancing transparency can be ascertained from its functions ascribed under section 13 which gives the committee powers to advise the cabinet secretary in charge of oil and gas to revoke some of the licenses already issued. Through this, the committee can be in a position to enhance transparency by advising the government through the ministry in charge of oil and gas on approaches towards enhancing good resource governance.

The committee is also tasked with the duty of developing a criterion for the negotiations around the petroleum agreements.<sup>172</sup> Since these negotiations involve agreements with the contractors and the government, the committee thus can serve an important function of enhancing public participation in the negotiations which is always the first step towards enhancing transparency. As a way of enhancing transparency, the Act establishing the committee should be amended to include the mandate of collecting information in relation to the upstream and downstream operations within the oil and gas industry. Olusula notes that one of the ways through which transparency can be enhanced is through the reengineering of policies to ensure that policies and laws provides a clear guideline through which transparent disclosure can be achieved.<sup>173</sup>

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<sup>171</sup> Section 10, *Petroleum Act* (Act No. 2 of 2019).

<sup>172</sup> Section 13 (c), *Petroleum Act* (Act No. 2 of 2019).

<sup>173</sup> Oyewunmi OA and Olujobi OJ, 'Transparency in Nigeria's Oil and Gas Industry: Is Policy Re-engineering the Way Out?' (2016) 6 *International Journal of Energy Economics and Policy* 630.

### **4.3.3 Energy & Petroleum Regulatory Authority**

The second institution that was established towards enhancing good governance within the petroleum industry is the Energy and Petroleum Regulatory Authority. Established under the Energy Act,<sup>174</sup> the authority can be construed to be a body tasked with the enhancing of transparent disclosure through its mandate of collection of data in the upstream activities in the petroleum industry. One of the functions of the authority is to provide information with regards to upstream operations in the petroleum sector.<sup>175</sup> The body thus is mandated to enhance transparent disclosure in all the upstream operations in the oil and gas industry.

Despite the body having a pool of information with regards to all the upstream and downstream oil operations, the body does not take the step towards transparent disclosure as may be required. Transparent disclosure often requires continuous and consistent disclosure; however, the entity has not been at the forefront of continuously publishing material information with regards to the upstream and downstream activities which can enhance good governance.

### **4.3.4 National Land Commission**

Established under Section 10 of the Land Act, the National Land Commission can also be construed as one of the institutional within the oil and gas sector that by extension can play an important role in transparent disclosure. Since all land where natural resources such as oil and gas are considered public land, the commission is mandated to ensure that there is transparent disclosure of the acquisition of such lands where minerals have been found. This, by extension mandates the commission to involve the public in the process of acquiring the land, the mode of acquisition, the compensation to be awarded and the purpose for which the land will be used. This by extension, makes the commission an important institution towards transparent disclosure in the oil and gas industry in the upstream and downstream oil operations.

The NLC's role towards acquisition of land can thus ensure that there is transparent disclosure in the onset of the operations. This is however far from the truth as during

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<sup>174</sup> Section 9, *Energy Act* (Act No. 1 of 2019).

<sup>175</sup> Section 10 (c), *Energy Act* (Act No. 1 of 2019).

the acquisition of land for the mining in Turkana, most of the process was not clearly outlined neither was the amount which was used in the acquisition of the said land made public.<sup>176</sup> This therefore calls for the need to come up with aspects that would nurse that there is transparency in the course of the acquisition of the land for the purpose of oil and gas operations. Through this, good governance in the oil and gas industry can be attained as there will be a case of proper disclosure through which people can provide checks and balance where there are cases of corruption in the sector.

#### **4.3.5 National Oil Corporation of Kenya**

The National Oil Corporation of Kenya is another important institution that can be used to enhance transparency in the oil and gas sector. The body, deals with all the upstream and downstream oil operations within the country. To this end, the corporation often facilitate and coordinate production sharing contract negotiations as well as undertake all the necessary appraisals of the PSCs. The corporation, through this mandate can be in a position to enhance transparent disclosure through allowing the public check these data and PSCs to enhance proper resource governance. Additionally, the corporation has a pool of data in relation to the operations in the upstream and downstream operations. The entity is thus best placed to enhance transparent disclosure within the industry.

#### **4.3.6 The National Assembly**

The National Assembly also plays a pivotal role towards transparent disclosure in the oil and gas industry. This role is twin in nature in the sense that it grants mining rights to companies as well as coming up with legislative laws and policies to enhance good resource governance. Their oversight authority and mandate in the natural resource management as outlined in the Constitution of Kenya places them at the side of enhancing good resource governance.<sup>177</sup> The national assembly plays a pivotal role in good resource governance through its mandate of granting mining rights to oil companies. Through this role, they are able to ensure that it puts in place or grants a right to a company that will enhance proper resource governance.

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<sup>176</sup> Agade KM, “*Ungoverned Space*” and the Oil Find in Turkana, Kenya’ (2014) 103 *The Round Table* 497.

<sup>177</sup> Article 193, *Constitution of Kenya*, 2010.

The second role played towards good resource governance through transparent disclosure is the primary role of the national assembly. The institution is charged with the duty of enacting laws in all sectors including the oil and gas sector. Through the enactment of laws such as the Petroleum Act, The Energy Act among others, the institution can be in a position to enhance good governance through coming up with laws that ensure there is disclosure of information that are pertinent in the industry and can also enhance good resource governance. The institution, though has taken certain good step towards the right direction through the enactment of laws that encourage access to information thus leading to disclosure, there is still not all disclosure especially in the oil and petroleum sector.<sup>178</sup>



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<sup>178</sup> Access to Information Act, (Act No. 31 of 2016).

## **Chapter 5: Recommendations and Conclusions**

### **5.1 Introduction**

This final chapter provides a summary of the research, discusses practical challenges that will need to be overcome in mainstreaming and implementing transparency provisions in Kenya. It then provides recommendations on how such practical gaps can be addressed. The chapter also identifies areas for further research

Most developing countries are often marred with the challenge of poor resource governance. This challenge often led to the resource curse phenomenon where despite being well endowed with resources, the countries still languish in retarded or poor economic growth. One of the factors that often lead to this is lack of transparent disclosure of the activities within the operation of mining. This research thus sought to pay attention to the concept of transparent disclosure and how it can lead to good resource governance. The research questions, though distinct, were connected in the sense that they sought to look at the gaps that exist in most of the petroleum sharing contracts that hamper good resource governance. The study thus took a comparative study with the aim of drawing illustrations from Nigeria on how lack of proper mechanism in the country has led to poor resource governance while making reference to how the Kenya oil and gas sector has taken an almost similar approach. To this end, the study was able to come up with the findings as here below.

### **5.2 Summary of Research Findings**

The main finding of the study is that there are several gaps that exist in the Nigerian contract sharing agreement that hamper transparent disclosure which in turn affects adversely, good resource governance. Kenya, also having discovered oil less than a decade ago has also adopted some of the aspects of the Nigerian oil and gas sector in relation to sharing contracts. The effects thus can be construed to mean that the challenges of poor resource governance as experienced in Nigeria may also be experienced in Kenya.

The first gap that has hindered transparent disclosure is the non-existence of laws requiring the entities involved in oil and gas to disclose information. In the absence of laws governing transparent disclosure in the industry, the sharing agreements and contracts often remain as hidden thus there cannot be proper scrutiny of the important

aspects of it which affects the public directly. This is true with the Nigerian situation and Kenya as well where despite there being the Access to information Act, transparent disclosure is still a daunting task.

The second challenge that has marred the Nigeria oil and gas industry which in turn has hampered good governance in resource management is the aspect of lack of political goodwill. Since the political class are often tasked with the idea of coming up with laws to enhance good resource governance, the Nigerian political class has not taken any steps towards ensuring that the laws are implemented to enhance transparency. The Kenyan political class, through the national assembly, has also been reluctant in enacting laws that would ensure transparent disclosure. This is despite being mandated by the constitution to take necessary steps towards good resource governance.

In Nigeria, there has been the challenge of implementation challenge. This is one of the gaps that the study established that the lack of proper entries to take steps towards implementation has hampered the need to properly implement laws requiring public disclosure. Due to the reluctance of bodies tasked with the implementation of EITI, the country has faced challenges that are often faced due to poor resource governance. In Kenya though the model production sharing contracts envision transparent disclosure of information relation to the oil and gas extraction and processing, this has however not been fulfilled. It has thus also hampered proper resource governance in the country.

### **5.3 Practical Gaps to Implementation**

A number of practical gaps that may hinder the effective implementation of the transparency framework proposed in this study will have to be carefully addressed. Even though there are various aspects that have affected transparent disclosure thus hindering good resource governance, there are certain practical aspects that have greatly hindered the commitment towards transparency.

#### **5.3.1 Lack of Political Good Will**

The first one is lack of political goodwill. The Constitution of Kenya has placed in the state agencies the responsibility of managing state resources in trust for the people of

Kenya.<sup>179</sup> In order to ensure efficient and equitable utilization of these resources, there is need to break away from a system of governance trapped in political patronage and that has plundered the resources to the benefit of the elite.<sup>180</sup> There is lacking constitutionalism within the governance structures. In order to break free from patronage and eliminate the curse of constitutions without constitutionalism, there will be needed a dramatic shift in policies that have been enacted through a transparent and inclusive system and that bind all state organs. There is need for urgent implementation of the existing policies with regard to natural resources and review of those that continue to promote the plunder of the resources.

### **5.3.2 Lack of Technical Expertise and Capacity**

The second practical hindrance is the aspect of lack of proper capacity and resources within the oil and gas industry. In both the two countries, the expertise in the sector is minimal, this therefore affects greatly the commitment towards transparent disclosure as there is always a need for professionals who will enhance transparent disclosure with the know-how within the sector on how the sector works. The mining sector is technical and requires resources, extensive research and exposure for a country to have sufficient human resource to aid in the extraction of the natural resources.<sup>181</sup>

The other limb of the lack of capacity and illiteracy, is the centrality of the fact that the communities amongst whom the natural are found. Many a times the resources are located in the far-flung areas that barely have good connectivity and high illiteracy levels. These two factors combined make it possible for the communities to spectate as their resources are plundered and shipped away by investors that have both the expertise and the resources.

### **5.3.3 Weak Laws**

It can be said that there exist weak legal systems that have not done so much to ensure that there is strict compliance with the transparency, accountability and efficient use of

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<sup>179</sup> Article 71, Constitution of Kenya, 2010; requires the involvement of Parliament in any agreements that involve Kenya's natural resources.

<sup>180</sup> Transparency and Accountability in Kenya's Extractives Sector: What works, what doesn't? Policy Brief No. 1 of 2020, p. 13.

<sup>181</sup> Kenya Civil Society Platform on Oil and Gas, 'Setting the Agenda for the Development of Kenya's Oil and Gas Resources: the Perspectives of Civil Society (Nairobi, July 2014).

the natural resources. There are serious challenges associated with government bureaucracies such as holding onto the age-old privacy and confidentiality of contracts that shrouds in secrecy and opaqueness. This opaqueness may be a catalyst for the government and the investors to circumvent the laws and regulations within developing jurisdictions.

#### **5.4 Recommendations**

In Kenya and other countries with PSCs as the petroleum contract model, it is extremely important to have transparency especially about how the sharing of revenue is done.<sup>182</sup> Host communities need to be aware of this revenue share in order to manage expectations as well as to have an idea of what benefits they should expect. In order to facilitate the engagement of the host communities, and owing to the high illiteracy levels of the communities in whose locations natural resources are found, there should be mechanisms that can have the contract, even in detailed and digestible summaries, be translated to the indigenous languages.

Civil society engagement is extremely vital especially when it comes to educating the citizens about the sector. They can assist with ensuring civic education to citizens is done and there is better understanding of the sector and its operations. This would help increase transparency and accountability in the sector. When citizens have information about the sector and especially about their rights, they can then enforce them and hold anyone who breaches them accountable. The civil society groups can also act as middle men between the citizens and the government in these operations. The media should also assist with this and the dissemination of information to the public domain in as much as possible. The civil society organization can achieve all the above by ensuring and pushing for the full implementation of the existing laws and policies and the amendments of those that promote opaqueness.

Any information disseminated to the public must be meaningful information that can be easily understood. Giving citizens information that is too technical for them to understand beats the point of transparency as well as allowing the citizens to take part

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<sup>182</sup> Mutsotso A, 'Kenya Civil Society Platform Oil and Gas (KSPCOG) & Publish What You Pay (PWYP) Kenya Draft comments on the proposed rule by the Securities Exchange Commission on disclosure of payments by resource extraction issuers', 3.

in the decision-making process. In the same way, they cannot access any of their rights when there is lack of information about the activities taking place in the sector. It is equally important to ensure that the FPIC principle is adhered to.<sup>183</sup>

Having a system of checks and balances is especially important in order to ensure there is transparency and accountability in the sector. Audits are a good way of ensuring public officials and IOCs remain accountable to their actions. Fiscal audits are especially important because revenues in the extractive sector need to be accounted for as the benefit is supposed to be distributed among the stakeholders and this is where corruption is rampant. Similarly, taxes being paid in and out should also be audited in order to curb tax evasion and avoidance in the sector. There should also be publication of these different revenues and audits to the public domain. Audits should be published by both governments and IOCs and contractors.<sup>184</sup> There should be adopted a model that administers and invests the taxes and revenues for the benefit of the current and future generations in tandem with the Constitution of Kenya.

The publication of the PSCs ought to be made mandatory by law. This is where most of the information stems from and as such, it is important to have these contracts in the public domain so as to enable access to information that is meaningful and in turn, public participation. This can be done through national laws making the publication mandatory and also joining initiatives like EITI.<sup>185</sup> The OGP commitments should also be implemented strictly.

The laws in the host country need to be clear and straight to the point. They should not contradict each other. Similarly, the actual implementation needs to be deeply rooted and strong in practice and these laws should also address any breach and the mechanisms that deal with such breaches. Civil society groups can also assist in holding the governments and IOCs accountable in addition to the laws that are in place. Host

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<sup>183</sup> Wilson E, Schwarte C, Cotula L, Garside B, Siegele L, 'Taking control: how citizens can hold industry to account' *International Institute for Environment and Development*, 2009, 1-4 - <<http://www.jstor.com/stable/resrep01424>> on 10 March 2021.

<sup>184</sup> Readhead A, Mule D, Beke A, OXFAM, 'Examining the crude details', 13.

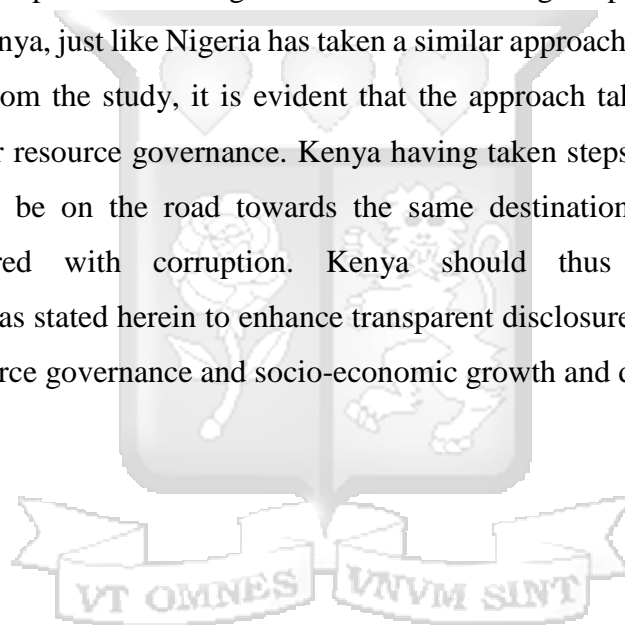
<sup>185</sup> Readhead A, Mule D, Beke A, OXFAM, 'Examining the crude details', 13.

governments therefore need to ensure that their laws protect the citizens and give them a higher bargaining power. They should also be non-discriminatory.<sup>186</sup>

The Cabinet Secretary for the time being in charge of Oil, Gas and Petroleum products in general should provide the regulations contemplated under Section 121 of the Petroleum Act. The regulations will go a long way into enshrining and promoting transparency and disclosure and ultimately good natural resource governance.

## **5.5 Conclusion**

Transparent disclosure plays an important role in the governance of resources. In the absence of transparent disclosure in oil rich counties, the country more often will predispose itself to poor resource governance thus leading to phenomena such as resource curse. Kenya, just like Nigeria has taken a similar approach towards disclosure of information. From the study, it is evident that the approach taken by Nigeria has greatly led to poor resource governance. Kenya having taken steps similar to Nigeria may thus as well be on the road towards the same destination of poor resource governance marred with corruption. Kenya should thus take steps and recommendations as stated herein to enhance transparent disclosure which will in turn lead to good resource governance and socio-economic growth and development.



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<sup>186</sup> Adeleke F, 'The extractives industries transparency initiative and Africa's mineral governance' 13.

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## Appendices

### Appendix A: Ethics Clearance



14<sup>th</sup> March 2022

Ms Mkalama, Lynda  
lynda.mkalama@strathmore.edu

Dear Ms Mkalama,

**RE: A Comparative Study of The Transparency Provisions in The Model Petroleum Agreements in Kenya And Nigeria.**

This is to inform you that SU-IERC has reviewed and **approved** your above **SU masters'** research proposal. Your application reference number is **SU-IERC1153/21**. The approval period is **11<sup>th</sup> March 2022 to 10<sup>th</sup> March 2023**.

This approval is subject to compliance with the following requirements:

- i. Only approved documents including (informed consents, study instruments, MTA) will be used
- ii. All changes including (amendments, deviations, and violations) are submitted for review and approval by SU-IERC.
- iii. Death and life-threatening problems and serious adverse events or unexpected adverse events whether related or unrelated to the study must be reported to SU-IERC within 48 hours of notification
- iv. Any changes, anticipated or otherwise that may increase the risks or affected safety or welfare of study participants and others or affect the integrity of the research must be reported to SU-IERC within 48 hours
- v. Clearance for export of biological specimens must be obtained from relevant institutions.
- vi. Submission of a request for renewal of approval at least 60 days prior to expiry of the approval period. Attach a comprehensive progress report to support the renewal.
- vii. Submission of an executive summary report within 90 days upon completion of the study to SU-IERC.

Prior to commencing your study, you will be expected to obtain a research license from National Commission for Science, Technology, and Innovation (NACOSTI) <https://research-portal.nacosti.go.ke/> and obtain other clearances needed.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Ben Ngoye".

for **Dr Ben Ngoye,**  
**Secretary; SU-IERC**  
**Cc: Prof Fred Were,**  
**Chairperson; SU-IERC**



## Appendix B: Similarity Index Report



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Submitted in Partial fulfillment of the requirements for the Degree of Master of Laws at Strathmore University  
Strathmore Law School  
Strathmore University  
Nairobi, Kenya