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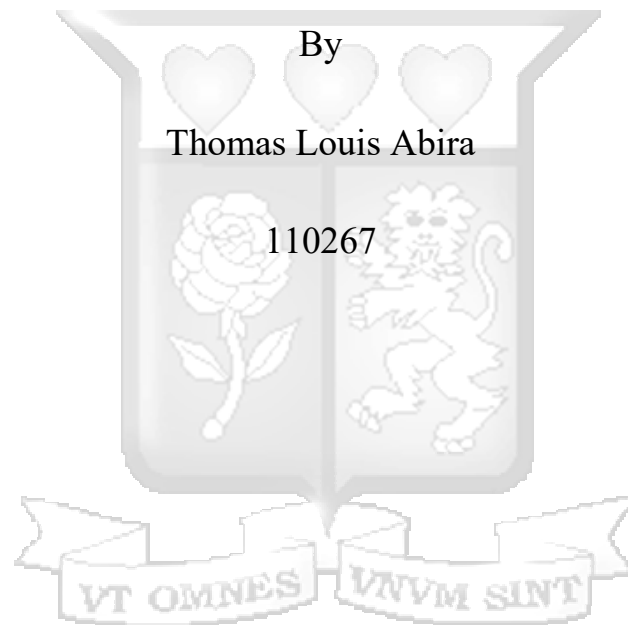
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The Impact of Contract Disclosure Regulations on the Competitiveness of The Kenyan Upstream Petroleum Industry



Master of Laws

2022

The Impact of Contract Disclosure Regulations on the Competitiveness of The Kenyan Upstream Petroleum Industry

By

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Student ID No. 110267

**Submitted in Partial Fulfilment of the Requirements for the Degree of Master of
Laws at Strathmore University**



**Strathmore Law School
Strathmore University**

Nairobi, Kenya

October, 2022

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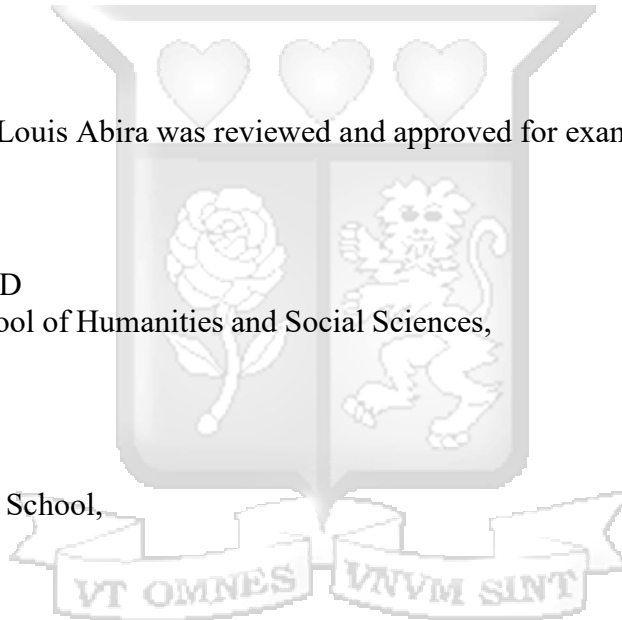
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Abstract

In this study, the researcher examines the relationship between contract disclosure laws in the recently published Kenyan Petroleum Act, 2019 and the competitiveness of Kenya's upstream petroleum industry. The researcher delves into literature around contract disclosure examining arguments for and against the rule against the backdrop of the mandatory constitutional provisions on the values and principles of national governance. This study examines the Kenyan Cabinet Secretary's discretion to publish petroleum contracts and its impact on transparency hence the competitiveness of petroleum corporations as well as the Kenyan petroleum industry in Kenya. The researcher, through this lessons learnt study draws examples from two African countries being, Nigeria and Ghana in a bid to explain the lessons learnt on the impact of contract disclosure laws to the competitiveness of other petroleum corporations and fellow African petroleum industries.

Through the infamous lenses of Michael Porter's (Harvard) five forces of Competitiveness, the researcher measures the competitiveness of the Kenyan upstream petroleum industry drawing a relationship between contract disclosure, transparency and the competitive strength of the Kenyan upstream petroleum industry. The research provides examples of corporations whose competitiveness has been measured against Porter's model and the role of government policy in impacting the competitiveness of such corporations.

Aided by the stakeholder and shareholder theories, this study supports the hypothesis that contract disclosure laws have an impact of the competitiveness of corporations in the upstream petroleum industry and in turn petroleum industries.

The study recommends legislation on petroleum contract disclosure in order to breathe life into the constitutional principles of transparency in governance of natural resources and to enhance the competitiveness of the Kenyan upstream petroleum industry.



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Definitions of key terms

“**Development**” means the planning, placement, construction and installation of facilities needed for production of petroleum;

“**EITI**” means the Extractive Industries Transparency Initiative,

“**Natural resources**” means the physical non-human factors and components, whether renewable or non-renewable, including—

- (a) sunlight;
- (b) surface and groundwater;
- (c) forests, biodiversity and genetic resources; and
- (d) rocks, minerals, fossil fuels and other sources of energy;

“**OPEC**” means the Organization of the Petroleum Exporting Countries founded on 14 September 1960 in Baghdad.

“**Person**” includes a company, association or other body of persons whether incorporated or unincorporated;

“**Petroleum agreement**” means the agreement, contract, or other arrangement between the Government and a contractor to conduct operations in accordance with the provisions of the Petroleum Act;

“**Petroleum operations**” means all or any of the operations related to the exploration for, development, extraction, production, separation and treatment, storage, transportation and sale or disposal of, petroleum up to the point of export, or agreed delivery point in Kenya or the point of entry into a refinery and includes natural gas processing operations but does not include petroleum refining operations;

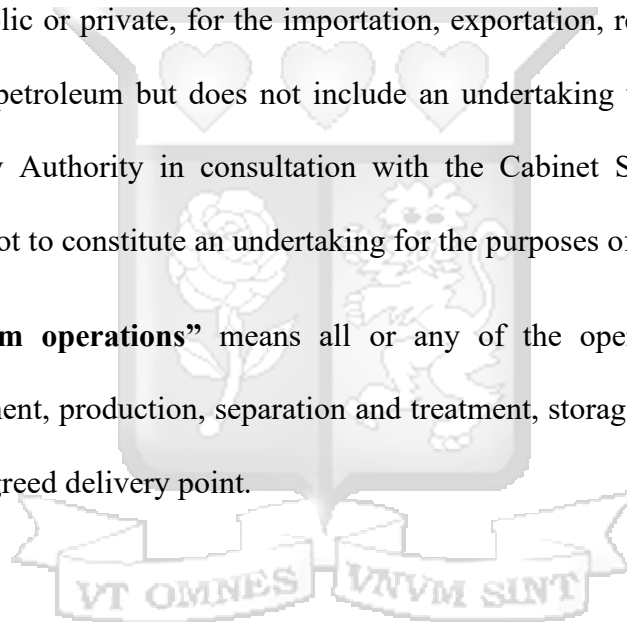
“State Officer” means a person holding a State office;

“State Organ” means a commission, office, agency or other body established under this Constitution;

“Switching Costs” mean one-time costs of switching brands or switching from one supplier's product to another's. These may include such things as employee retraining costs, the cost of new ancillary equipment, the cost and time needed to test or qualify a new source or to redesign a product or even the psychic costs of severing a relationship;

“Undertaking” means any business undertaken pursuant to a licence or a permit and includes all the assets and liabilities from time to time constituting or belonging or appertaining to such business, whether public or private, for the importation, exportation, refining, transportation, storage or supply of petroleum but does not include an undertaking which the Energy and Petroleum Regulatory Authority in consultation with the Cabinet Secretary, by statutory instrument, declares not to constitute an undertaking for the purposes of the Petroleum Act;

“Upstream petroleum operations” means all or any of the operations related to the exploration, development, production, separation and treatment, storage and transportation of petroleum up to the agreed delivery point.



List of Abbreviations

BV	“Besloten Vennootschap” (dutch); a private company with limited liability.
CSEA	Centre for the Study of the Economies of Africa.
CUP	Cambridge University Press.
EIA	Environmental Impact Assessment.
EITI	Extractive Industry Transparency Initiative.
eKLR	Electronic Kenyan Law Reports.
EPRA	Energy and Petroleum Regulatory Authority.
GB	Great Britain.
GHEITI	Ghana Extractive Industries Transparency Initiative.
GNPC	Ghana National Petroleum Corporation.
HBSP	Harvard Business School Press.
HCCC	High Court Civil Case.
KCSPOG	Kenya Civil Society Platform on Oil and Gas.
NNPC	Nigerian National Petroleum Corporation.
NRGI	Natural Resource Governance Institute.
PS	Permanent Secretary.
UK	United Kingdom.

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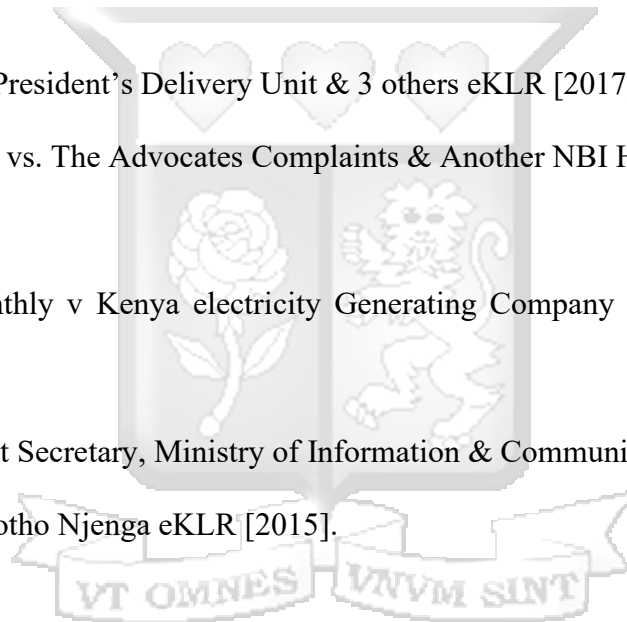
HCIG-Energy Investment Co. Ltd and Liketh Investment Kenya Limited (HCIG Consortium) v Ministry of Energy & Petroleum Contracting Authority & 5 others eKLR [2014].

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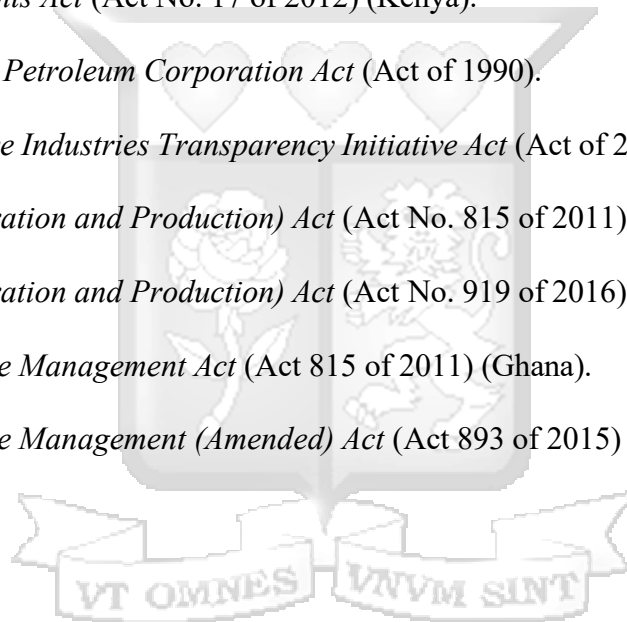
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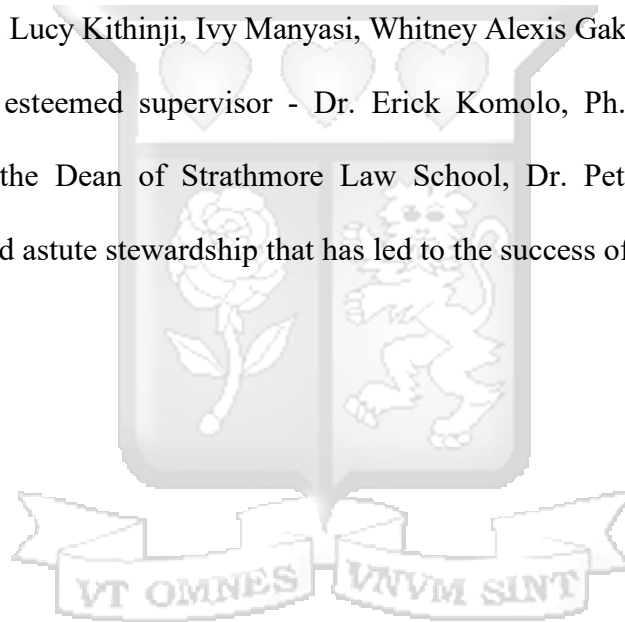
1. Dodd- Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203-July 21, 2010 (United States of America).
2. *Petroleum Act* (Act No. 2 of 2019) (Kenya).
3. *Access to Information Act* (Act No. 31 of 2016) (Kenya).
4. *Constitution of Nigeria* (1999).
5. *Petroleum Act* (Act of 1969) (Nigeria).
6. *County Governments Act* (Act No. 17 of 2012) (Kenya).
7. *Nigerian National Petroleum Corporation Act* (Act of 1990).
8. *Nigerian Extractive Industries Transparency Initiative Act* (Act of 2007).
9. *Petroleum (Exploration and Production) Act* (Act No. 815 of 2011) (Ghana).
10. *Petroleum (Exploration and Production) Act* (Act No. 919 of 2016) (Ghana).
11. *Petroleum Revenue Management Act* (Act 815 of 2011) (Ghana).
12. *Petroleum Revenue Management (Amended) Act* (Act 893 of 2015) (Ghana).



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Chapter 1: Introduction

1.1. Background to the problem

After over 50 years of oil exploration in Kenya, the first commercially viable oil deposits were discovered in South Lokichar in Turkana County in March of 2012.¹ This milestone was achieved through the efforts of Tullow Oil, an Anglo-Irish company that set up operations in Kenya in 2010.² About 7 years later on 26th August, 2019, President Kenyatta flagged off the ship transporting the first 200,000 barrels of Kenyan produced oil to be exported and marked the occasion as a milestone for Kenya as it became the first nation in East Africa to export oil.³ Currently, Kenya has four [4] petroleum exploration basins; Lamu Basin, Anza Basin, Mandera Basin and the Tertiary Rift Basin.⁴

For the purpose of petroleum exploration and production, the government of Kenya must enter into petroleum agreements⁵ with corporations that have the financial muscle, the requisite professional capacity and experience and the technical resources to do the job. As at November 2018, Oxfam reported that Kenya had entered at least 44 petroleum agreements. Of these, only about 10 had been made public.⁶ Kenya had at the date of this study refused to join the Extractive Industry Transparency Initiative (EITI), a voluntary organization of states and oil

¹nationaloil.co.ke/upstream/#:~:text=Petroleum%20Exploration%20in%20Kenya%20began,majority%20within%20the%20Tertiary%20Rift

² <https://www.tulloil.com/our-operations/africa/kenya/> on 4 January 2020.

³ Kenya is now an oil Exporting country, <https://www.president.go.ke/2019/08/26/kenya-is-now-an-oil-exporting-country/> on 27 March 2021

⁴ Kenya Pipeline Company at [https://www.kpc.co.ke/petroleumsector/#:~:text=The%20Upstream%20section%20involves%20the,crude%20oil%20and%20natural%20gas.&text=Kenya%20has%20four%20\(4\)%20petroleum,Basin%20and%20Tertiary%20Rift%20Basin](https://www.kpc.co.ke/petroleumsector/#:~:text=The%20Upstream%20section%20involves%20the,crude%20oil%20and%20natural%20gas.&text=Kenya%20has%20four%20(4)%20petroleum,Basin%20and%20Tertiary%20Rift%20Basin) on 29 March 2021

⁵ Section 2 of The Petroleum Act defines a Petroleum Agreement as any agreement, license, contract or other arrangement between the Government and a contractor to conduct upstream petroleum operations in accordance with the provisions of the Act.

⁶ Oxfam, *Examining the Crude Details: Government Audits of Oil & Gas Project Costs to Maximize Revenue Collection: Kenya Case Study*, (2018) 11.

corporations in favour of transparency in the extractive industry.⁷ The key principles of EITI are analysed in Chapter two of this study. These principles encourage contract disclosure by member states in the interest of good governance and sustainability of their respective petroleum industries. The proponents in favour of EITI principles argue that contract disclosure has a positive impact on the sustainability of a petroleum producing country.⁸ Kenya has not, to this day, joined the EITI initiative. In 2014, the Kenya Civil Society Platform on Oil and Gas (KCPSOG) speculated that Kenya's tendency towards non-disclosure of petroleum contracts was attributable to the confidentiality clause contained in the Model Production Sharing Contract annexed to the Petroleum (Exploration and Production) Act of 1986⁹ which has been carried over to the Petroleum Act of 2019. KCPSOG however noted that this non-disclosure was inimical to the provisions of Article 35 of the Constitution of Kenya which guarantees a citizen's right of access to information held by the state.¹⁰

Confidentiality in the petroleum industry and the larger extractive industry is nothing new nor does it happen in Kenya alone. It is in fact accepted that traditionally, agreements between oil corporations and governments were kept secret. Kenya, being one of the newest entrants into the oil producing club has taken the traditional view of matters. This confidentiality has always been justified by the need for corporations to keep commercially sensitive information secret.¹¹

It is only in recent years that the concept of transparency in its full tenor, not just in terms of contract disclosure, has started creeping into the extractive industry. Arguably, the movement towards openness was spurred by a Global Witness Report in 1999 on the role that the oil and

⁷ Oxfam, *Examining the Crude Details* (2018) 11.

⁸ Oxfam, *Examining the Crude Details* (2018) 11.

⁹ Kenya Civil Society Platform on Oil and Gas (KCPSOG), *Setting the Agenda for the Development of Kenya's Oil and Gas Resources: The Perspectives of Civil Society* (2014) 37.

¹⁰ Kenya Civil Society Platform on Oil and Gas (KCPSOG), *Setting the Agenda for the Development of Kenya's Oil and Gas Resources: The Perspectives of Civil Society* (2014) 37.

¹¹ Natural Resource Governance Institute, 'Contract Transparency: Creating Conditions to Improve Contract Quality' (June, 2018) 3.

banking industry had played in funding the bloody civil war especially in its later years.¹² The Report noted that government transparency, and therefore, government accountability was virtually inexistent in Angola. This had allowed corruption to thrive and oil revenues were hijacked to purchase weapons and to enrich individual politicians. The government of Angola was also accustomed to taking high interest loans from financial institutions on the security of its future oil revenues, thereby mortgaging the future of its population. Most of these financial institutions had an eye on reaping high profits from those oil resources. The writers urged for participants in the oil industry to embrace transparency in the following terms:

Global Witness is advocating an urgent rethink on the issue of corporate accountability in countries that are either emerging from, or are in conflict, and where structures of government accountability and transparency are, at best, fragile and at worst, non-existent. Such accountability requires an extra level of transparency over and beyond that which companies are normally required to demonstrate in their home countries of operation. Global Witness is calling on the international community to ensure that business, especially the oil sector and other extractive industries, radically changes the way it conducts its affairs, so that companies might finally behave like responsible global citizens.¹³

Following this, in 2002, civil organizations including Global Witness, Save the Children UK, Transparency International UK and Oxfam GB developed the ‘Publish What you Pay’ movement, which required oil corporations to publish sums paid to governments for exploration licences and so on.¹⁴ The movement, though well intentioned, ran into trouble because host nations turned hostile towards companies that ‘published what they paid’. For

¹² Global Witness, ‘A Crude Awakening: The Role of the Banking and Oil Industries in Angola’s Civil War and Plunder of State Assets’ 5.

¹³ Global Witness, *A Crude Awakening*, 5

¹⁴ <https://www.pwyp.org/about/> on 30 March 2021

instance, after BP Shell published details of payments it had made to the Angolan Government, the then head of the Angolan National Oil company expressed his anger in a letter to BP's chief executive by writing "it was with great surprise, and some disbelief, that we found out through the press that your company has been disclosing information about oil-related activities in Angola..."¹⁵ Oil corporations, though not entirely unwilling to publish, were apprehensive that such unpleasantness would threaten their business operations. They therefore called for an approach where the governments would be the ones to make disclosures. Through lobbying by movements such as Publish What you Earn, culminated the development of the EITI Principles in the Lancaster House Conference of June 2003.¹⁶

Besides EITI, other initiatives that have taken up the call for transparency and the establishment of corporate governance initiatives in the extractive industry include the Natural Resource Governance Institute (NRGI), the World Resources Initiative and the Open Government Partnership.

Even with the foregoing efforts, transparency, especially in the form of contract disclosure, is not yet fully engendered in the extractive industry. Countries such as Kenya still opt not to disclose petroleum agreements. The reasons advanced for this is that contracts contain commercially sensitive information, that the parties are bound by confidentiality clauses and that the contracts are too complicated for the public to understand.¹⁷ Those in favour of disclosure have argued that citizens have a right to know the terms of the contracts as they are part owners of the resources that are subject of the contract, disclosure allows monitoring and accountability and combats corruption.¹⁸

¹⁵ <https://eiti.org/h>

¹⁶ <https://eiti.org/h> accessed 20 January 2020

¹⁷ Natural Resource Governance Institute, 'Contract Transparency: Creating Conditions to Improve Contract Quality' (June 2018) 3.

¹⁸ Natural Governance Resource Institute: Contract Transparency, 3.

In Kenya, the government has decided to maintain a policy of non-disclosure, or very little disclosure. This is despite the Constitution of Kenya granting Kenyans the right of access to information. In addition, the Petroleum Act requires the Cabinet Secretary to develop a framework for transparency, to include one for contract disclosure. No such framework had been established as of the date of conclusion of this thesis.

The Researcher proposes that contract disclosure is beneficial for all parties, citizens, governments, investors, industry groups and corporations. Further, the researcher proposes that contract disclosure would open Kenya's upstream petroleum market by allowing petroleum corporations the world over to assess the position and conditions of the Kenyan upstream sector by perusing agreements that the government has concluded with other corporations. This is a tool that, if employed wisely, the Kenyan Government can use to attract more investors in its upstream petroleum sector, therefore having a wider array of contractors to choose from. This will put a wider scope of experiences and resources at the country's disposal. The government might therefore be able to enter more competitive contracts at friendlier prices. This research argues that besides this, contract disclosure will improve the relationship between petroleum corporations and the communities in which they operate, thus granting them a wide social licence to operate in the country and thus rendering the companies themselves more competitive in the industry. This study proposes that contract disclosure regulations would indeed have a positive impact on the competitiveness of Kenyan upstream petroleum industry.

1.2. Statement of the Problem

Petroleum contract disclosure is a critical facet of transparency and accountability that is required to enhance and achieve competitiveness in any petroleum industry. The constitution of Kenya envisions values of transparency and accountability in national governance including management of natural resources. The Petroleum Act does not achieve the constitutional standard of transparency and accountability as it contains a general requirement for the Minister

to create a framework on disclosure of contractual information between the state and oil corporations. The Petroleum Act fails to adhere to the constitutional principles of good governance by ensuring that a wide range of taxation and fiscal provisions in Kenya's Model Production Sharing Contract are strictly confidential. In Kenya, petroleum contract disclosure is not mandatory, thus there is a risk of diminished competitiveness of the petroleum industry.

The Cabinet Secretary for Energy and Petroleum's discretion not to disclose petroleum agreements entered between the government and a corporation flies in the face of Article 35 of the constitution of Kenya that grants every citizen of Kenya the right to information. The Petroleum Act provides no criteria for determining when an agreement should be disclosed and when it should not. A general reading of the Act however reveals that parliament's intention was that petroleum agreements should only be disclosed in the interest of transparency and accountability. The Petroleum Act has little regard to Article 10 (1) of the constitution which binds all state organs, state officers, public officers and all persons to the national values and principles of governance. The Cabinet Secretary for Energy and Petroleum is a state officer by definition and is thus bound by Article 10 (2) (c) which requires that all state officers exercise "good governance, integrity, transparency and accountability."

The problem that this study seeks to investigate is whether the disclosure of petroleum agreements has an impact on the competitiveness of national upstream petroleum industries and as such, whether it should be considered in deciding what position Kenya should take on contract disclosure. The Kenyan upstream petroleum industry risks undermining its competitiveness to the economic detriment of Kenyans and petroleum investors without adequate regulations on contract disclosure. The researcher seeks to recommend interventions into policy including the Petroleum Act and Regulations in order to address the threat to the competitiveness of Kenya's upstream petroleum industry.

1.3. Research aim

The Kenyan Petroleum Act restricts contract disclosure, undermining the constitutional values of transparency and accountability in national governance hence undermining competitiveness of Kenya's upstream petroleum industry. The aim of this study is to understand the impact of contract disclosure regulations on the competitiveness of Kenya's petroleum industry.

1.4. Research objectives

1. To analyse the relationship between regulations on disclosure of petroleum agreements and the competitiveness of the Kenyan upstream petroleum industry.
2. To evaluate the impact of disclosure of petroleum agreements to the competitiveness of an individual upstream oil corporations.
3. To compare Kenya with other African jurisdictions exploring whether contract disclosure regulations impact competitiveness in the respective upstream petroleum industries.
4. To explore the interventions needed to enable publication of petroleum contracts and enhancement of Kenya's upstream petroleum industry.

1.5. Purpose of the Study

The purpose of this study is to examine the impact of disclosing petroleum agreements on the competitiveness of individual petroleum companies and the competitiveness of the upstream petroleum industry in Kenya.

1.6. Literature Review

The Natural Resource Governance Institute (NRGI) holds that petroleum contracts will ordinarily contain provisions on the financial terms upon which the parties have agreed. Such provisions include matters to do with royalties, taxes and production shares, a detailed

description of the geographical area in which the corporation is to operate, the operational and production commitments of the corporation and the converse obligations of the host government, health, safety and environmental commitments, social obligations such as local content, infrastructural commitments and stabilization provisions, which can insulate projects from certain legal changes.¹⁹ The effect of contract disclosure, for the purposes of this research, is to make this information available to the citizens of the contracting nation, to oil corporations operating in and outside the contracting nation and to other governments.

While the disclosure of all the above information is significant, Gillies (2010) observes that in the upstream petroleum industry, there are four main contractual provisions whose disclosure is key to the advancement of transparency. These are, namely, revenue flows, revenue management strategies, revenue expenditure and industry operations.²⁰ Global Witness reports that disclosure of the first three, generally referred to as revenue transparency provisions, depends upon three principles, namely, “publish what you pay” - an obligation on companies to publish what they pay host governments, “publish what you earn”- an obligation on host states to disclose what they earn from the production and sale of petroleum and “publish what you spend” - an obligation upon governments to reveal what the revenues from petroleum go into.²¹ Global Witness (2007) argues that these three principles together enable citizens to hold their governments to account for the use of oil revenues, thereby increasing a government’s legitimacy and credibility.²²

Transparency as a principle of good governance is now an established norm, often regarded as an ingredient of democratic governance. It is not as developed in private dealings as private

¹⁹ Natural Resource Governance Institute, ‘Contract Transparency: Creating Conditions to Improve Contract Quality’ (June 2018) 1.

²⁰ Gilles A, ‘Reputational Concerns and the Emergence of Oil Sector Transparency as an International Norm’, *International Studies Quarterly*, 54(2010) 103 -126, 106

²¹ Global Witness, ‘Oil Revenue Transparency: A Strategic Component of US Energy Security and Anticorruption Policy’ (2007) 1.

²² Global Witness, ‘Oil Revenue Transparency’ 1.

persons are expected to be able to conduct their business independently so long as they do nothing illegal or commit acts that go against public policy. NRGi has stated that the nature and form of petroleum agreements between host governments and international oil corporations devolved from the form of purely commercial contracts between private corporations of which no disclosure was required. NRGi proposes that it is owing to such origins that petroleum agreements are still viewed as private documents even when one of the parties is a government.²³ On the other hand, the entry of representative governments into such contracts necessarily raises the question of openness, because such a government does not own the resources, the subject of the contract. It is only a custodian. It should thus not come as a surprise that demands for disclosure, though belated, finally came to the petroleum sector.

Gillies attributes the development of transparency as a norm in the petroleum industry to three main causes.²⁴ The first is as a pedigree of the universal move towards better governance, one of whose elements is transparency that manifests in mandatory or voluntary requirements for disclosure. The petroleum industry does not exist in a vacuum. The proliferation of transparency and other norms of good governance in society must have had some impact on it. Second, she credits the efforts of civil society in calling for transparency in the petroleum industry. Third, and her central thesis, is that the development of transparency as a norm in the petroleum industry benefitted from oil corporations' reputational concerns. She argues that beginning with the late 90s, negative publicity and increasing scrutiny into the activities of oil corporations presented significant concerns over the public image of these companies. Keen to maintain a good image abroad and at home, and so as not to jeopardize future business opportunities, the corporations acceded to the sustained demands for contract disclosure and general transparency.²⁵

²³ Natural Resource Governance Institute, 'Contract Disclosure' 3.

²⁴ Gillies A 'Reputational Concerns and the Emergence of Oil Sector Transparency as an International Norm' 2.

²⁵ Gillies A 'Reputational Concerns and the Emergence of Oil Sector Transparency as an International Norm' 3.

A lot of the literature on contract disclosure of petroleum has its main focus on the practice leading to public good, promoting accountability and reducing corruption. It is said to be a right of the citizens to know what the government does with their resources so that they, in turn, can have the tools to make their government accountable.²⁶ This argument is based on the observation that in all, 26 of the world's 36 oil-rich countries rank among the bottom half of the world's most corrupt countries.²⁷ There is apparently a disconnect between the utilization by government of public resources and the welfare of the public. This has prompted some observers to ask questions around why the petroleum industry is so prone to corruption and abuse. It comes as no surprise to many that petroleum contract disclosure and transparency policies leave a lot of room for improvement in oil producing countries where corruption is most prevalent.

Healy P, Kuppuswamy V & Serafeim G²⁸ suggest four reasons why petroleum industries are so susceptible to corruption. First, they explain that the financial, technical and operational systems of the petroleum industry tend to be very complex. Governments, let alone the general public, are often out of their depth when faced with these complexities. This makes it possible for the select few well versed with the industry to take advantage of the larger world's ignorance and get away with it. Second, they argue that revenue flows from the oil industry are financially concentrated but with very few players. This fosters an environment of a deep-seated and well-heeled kind of secrecy. In host governments with weak governance systems, this kind of environment is fertile ground for corruption.²⁹ Third, they submit that the sheer infrastructural support necessary for the proper functioning of oil corporations means only extremely large and wealthy corporations can hope to make it in the industry. As such, only

²⁶ Rosenblum P & Maples S, *Contracts Confidential: Ending Secret Contracts in the Extractive Industries*, Revenue Watch Institute (2009) 15.

²⁷ Global Witness, 'Oil Revenue Transparency' 1.

²⁸ Healy P, 'Kuppuswamy V & Serafeim G, What Impedes Oil and Gas Companies' Transparency?' Working Paper 12-038, Harvard Business School, 6.

²⁹ Healy P, Kuppuswamy V & Serafeim G, 'What Impedes Oil and Gas Companies' Transparency?' 7.

monopolies and oligopolies that have far reaching influence and extremely deep pockets can manage it. Fourth, where oil is found, it is considered a critical resource and this justifies wide-ranging government involvement. It is conceivable that concerns over the security of supply of the resource might persuade a host government to enter contracts that secure supply, even if this means shutting an eye to corruption, which it often does.³⁰

Kolstad I and Arne W argue that there is evidence to illustrate that countries with abundance of natural resources are more susceptible to be marred with due to the windfalls associated with the monetization of such resources. They argue that the handsome revenues generated from the trade of natural resources encourage host governments to be in involved in rent-seeking. They note however that the propensity to be corrupt can easily be cured and checked by having in place democratic institutions that keep host governments accountable to the people. Kolstad I and Arne W cite Australia and Norway as key examples where competitiveness and good governance has been achieved through transparency and democracy of natural resource governance.³¹

Relative to what has been written about the corruption-thwarting and accountability-promoting potential of contract disclosure, much less has been said about the impact of contract disclosure on the players in and on the operation of the petroleum industry. From available literature, it appears that both host governments and corporations have been reluctant to adopt the practice of contract disclosure. The practice of contract disclosure is far from fully developed and initiatives like EITI have not been adopted by many oil producing states and corporations as members.

In 2015, Adam wrote at length about the licensing, contracting and compliance regime in Ghana's oil and gas sector. He argued that untoward practices such as corruption in the

³⁰ Healy P, Kuppaswamy V & Serafeim G, 'What Impedes Oil and Gas Companies' Transparency?' 8.

³¹ Kolstad I and Arne W, 'Transparency in Oil Rich Economies', *U4 Anti-Corruption Resource Centre*, 2 (2007) 13.

upstream petroleum industry tend to arise from the nature of framework conditions entrenched by national policy makers relating to the governance and petroleum resources.³² Adam argues that both government and corporations have a role to play in enabling weak frameworks and weakening the supervisory role of state institutions. He argues that as a result, the industry becomes conducive for rogue actors to pursue private interests at tax payers' cost. At the time, Ghana's oil and gas industry was fairly new. Adam made these views at a time when Ghana was yet to pass The Petroleum (Exploration and Production) Bill 2014. He criticized the then existing Petroleum laws of Ghana noting that they posed substantial risks for corruption thus placing Ghana at risk of facing the famously touted 'oil curse'. Adam feared that Ghana was at risk of putting private interests above national interests as in the case in most oil producing countries.

Adam observed that there existed several laws that made the Ghanaian petroleum industry susceptible to corruption key among them being the Petroleum (Exploration and Production) Law³³ which allowed the awarding of petroleum agreements through an administrative process as opposed to an open and competitive process. He firstly observed that, at the time there was no genuine intention to pass regulations as per Section 32(m) of the Petroleum (Exploration and Production) Law thus leaving room for corruption. He argues that due to zero political goodwill, Ghana had, between 1984 and 2015, failed to pass a key regulation that would seek to curb impropriety and corruption in the governance of petroleum, particularly the award of petroleum contracts.³⁴

Second to the lack of conducive regulation, Adam observed, that for over 30 years, Ghana no mandatory disclosure requirement for petroleum contracts. Just as in the Kenyan constitution, Adam noted the inherent vesting of natural resources in the people of Ghana which natural

³² Adam M A, 'Ghana's Petroleum Licensing and International Best Practices', *Africa Centre for Energy Policy* (2015) 10.

³³ *Petroleum (Exploration and Production) Law 1984 (PNDC Law 84)*.

³⁴ Adam M A, 'Ghana's Petroleum Licensing and International Best Practices', (2015) 10.

resources were merely entrusted to the state to hold in trust for Ghanaians. He argued that the trustee relationship between the state and its people dictates that all citizens be provided with information on a regular basis regarding the affairs surrounding their natural resources.³⁵ Upon examination of these sentiments by Adam, it is the researcher's reasoned position that the same mandatory right to information ought to be accorded to the citizens of Kenya as the rightful owners of all natural resources held in trust by the Government of Kenya under the Constitution of Kenya, 2010.

Adam observed that the lack of mandatory contract-publication requirements in Ghana gave rise to a conducive avenue for the government to conceal poorly negotiated agreements away from the curious eyes of citizens.³⁶ Adam faulted the Ghanaian government noting that it erred in allowing itself the discretion to publish some contracts and conceal others giving a bad account of a comprehensive disclosure regime.³⁷ He notes that the government did so when it failed to pass a framework for mandatory disclosure of all contracts.

Thirdly, Adam noted that there was a further gap in Ghanaian disclosure frameworks, which was the lack of beneficial ownership and beneficial directorship information relating to companies that had entered into petroleum agreements with the government.³⁸ The lack of beneficial ownership disclosure requirements for a contracted oil company, Adam argued, sometimes leads to the creeping in of vested interests arising from people with political networks. He observed that the beneficial owners or affiliates of certain oil companies sometimes hide behind companies incorporated in certain jurisdictions such as Gibraltar or British Virgin Islands with little risk of being discovered.³⁹ Adam argues that the lack of beneficial ownership disclosure requirements, closely related to contract disclosure

³⁵ Adam M A, 'Ghana's Petroleum Licensing and International Best Practices', (2015) 11.

³⁶ Adam M A, 'Ghana's Petroleum Licensing and International Best Practices', (2015) 11.

³⁷ Adam M A, 'Ghana's Petroleum Licensing and International Best Practices', (2015) 11.

³⁸ Adam M A, 'Ghana's Petroleum Licensing and International Best Practices', (2015) 11.

³⁹ Adam M A, 'Ghana's Petroleum Licensing and International Best Practices', (2015) 11.

requirements, would potentially lead to monopolization of the petroleum industry by certain classes of unknown individuals.⁴⁰

Adam in addition criticized Ghana's Petroleum (Exploration and Production) Bill (2014), which would later be passed in 2016,⁴¹ for its omission to provide mandatory requirements for disclosure of beneficial ownership information.⁴² Adam wrote that the absence of such mandatory requirement gave rise to grave governance exposures which would only lead to proliferation of corruption. This, he argues, was further exacerbated by the fact that majority of the oil companies contracted by the state in Ghana were not publicly quoted companies therefore falling outside of the supervisory ambit of institutions and most importantly, the citizens in whose trust petroleum is held by the state.⁴³

Adam went at great pains to punch holes on the Ghanaian Petroleum (Exploration and Production) Bill 2014, at a time when it was pending before parliament, noting that it allowed a lot of secrecy in the petroleum contract negotiation process. The researcher of this thesis finds Adam's analysis of the contract award process under the 2014 Bill particularly useful and relevant for that matter, as it expands the scope of contract disclosure to include the intricacies of petroleum contract negotiation.⁴⁴ Adam did observe in his analysis that clause 10(4) of the Bill allowed the Minister to disregard the result of a valid open and competitive tender process only to engage in direct negotiations with an oil company. Adam expresses, with surprise, that the Minister had, in the 2014 Bill, no obligation to disclose to Ghanaian citizens any reasons for discontinuing an open and competitively negotiated contract process. He further argues that the discretion given to the Minister may be potentially misused for purposes of exposing the contractual terms contained in an open and competitively awarded contract only to later select

⁴⁰ Adam M A, 'Ghana's Petroleum Licensing and International Best Practices', (2015) 11.

⁴¹ *Petroleum (Exploration and Production) Act* (Act No. 919 of 2016).

⁴² Adam M A, 'Ghana's Petroleum Licensing and International Best Practices', (2015) 11.

⁴³ Adam M A, 'Ghana's Petroleum Licensing and International Best Practices', (2015) 11 &12.

⁴⁴ Adam M A, 'Ghana's Petroleum Licensing and International Best Practices', (2015) 14.

another petroleum company directly and probably in private. Such an eventuality, Adan argues may inevitably place a successful petroleum company at a point of competitive disadvantage over the one that is subsequently engaged directly by the Minister.⁴⁵

Adam notes that the need to find a company that can conduct petroleum exploration and production activities “efficiently” as provided by clause 10(6) of the 2014 Bill ought not to have come in the way of a competitive process because the very rationale for transparency and disclosure would be defeated. Parliament provided no further inspiration according to Adan when clause 20 of the Bill gave the Minister the mandate to change the terms of a petroleum agreement without providing a criterion to guide the exercise of such mandate. Under the Bill, such alterations to the terms of a petroleum contract required no parliamentary approval.

On the whole, Adan argued that the 2014 Bill would encourage rent-seeking if passed in its then form as in the cases of Venezuela, Nigeria, Angola and Equatorial Guinea and took the view that the proposed law fell short of international best practices.⁴⁶

This thesis explores at Chapter 3, the fate of contract disclosure requirements under the Ghanaian upstream petroleum laws when parliament eventually enacted the Petroleum (Exploration and Production) Act in the year 2016.⁴⁷

The International Monetary Fund (IMF), a proponent of contract disclosure, states that an often-expressed concern by corporations and governments with regard to open tendering is that disclosing the details of the winning contract weakens their bargaining position for future negotiations and therefore erodes their competitive advantage.⁴⁸ The IMF however counters this by arguing that in practice, the terms of a contract once concluded become a matter of public knowledge within the industry and that as such, little in the way of competitive

⁴⁵ Adam M A, ‘Ghana’s Petroleum Licensing and International Best Practices’, (2015) 14.

⁴⁶ Adam M A, ‘Ghana’s Petroleum Licensing and International Best Practices’, (2015) 15.

⁴⁷ (Act No. 919 of 2016).

⁴⁸ International Monetary Fund, Guide on Resource Revenue Transparency (2007)17.

advantage can be lost through publication of such a contract. Moreover, it adds, such disclosure should have some advantage for the government because when faced with the possibility of disclosure, a government intent on self - preservation, as all governments are, will be motivated to negotiate well balanced agreements.⁴⁹

Healy P, Kupuswamy V & Serafeim G⁵⁰ write that there are three main reasons why corporations might oppose contract disclosure. The first of these is the risk of expropriation of company assets by the host government. A corrupt state which naturally has no interest in disclosure might choose to nationalize an oil corporation's assets when contract details are disclosed or even when it faces the threat of exposure. When governments do this, they justify it with saying that the corporation did not compensate it well enough.

The second is the legal and business costs associated with corruption. Contract disclosure always involves disclosure of payments. This makes corruption detectible and legal action against the corporation and the government very likely. In order to protect their corruption, governments are likely to maintain relationships with corporations that will not disclose anything. The effect of this is that companies which favour contract disclosure will lose out on business with corrupt governments.⁵¹

The third and last one is the competition risk that accompanies disclosure. The writers explain that for oil corporations, the details on costs of exploration and extraction in a country and the profitability of a venture is considered proprietary information. A corporation's competitive advantage is derived from its ability to incur as little as possible in extraction and production costs. It follows that corporations would be uncomfortable with disclosing details of the profitability or otherwise of their projects, payments for extraction rights and operational costs. Besides, they argue, geological data, such as the size of the reserves, is regarded as confidential

⁴⁹ International Monetary Fund, Guide on Resource Revenue Transparency (2007) 17.

⁵⁰ Healy P, Kuppuswamy V & Serafeim G, 'What Impedes Oil and Gas Companies' Transparency?' 9.

⁵¹ Healy P, Kuppuswamy V & Serafeim G, 'What Impedes Oil and Gas Companies' Transparency?' 11.

information. In a country about whose size and structure of oil reserves is unavailable, a company that has taken steps to discover such information would like to hold on to that for as long as possible and will have a competitive advantage over other companies seeking to do business in the same or neighbouring areas.⁵²

On the latter point, Badia M, Duro M, Jorgensen B & another⁵³ have agreed that disclosure of information that points to an increase in resource reserves in a certain area comes at a cost to the disclosing company. This is because other companies operating in the area double their efforts to try and catch up with the disclosing company or at any rate, to make a discovery of their own. Disclosure focuses the efforts of competitors by providing some sort of certainty that there is something to be found. Healy, Kupuswamy and Serafeim argue that the competitive cost of disclosure is particularly high in countries in which few oil corporations operate because there are ordinarily large information gaps between them about profitability, costs of production and the costs of exploration. To ensure that a corporation that has invested in obtaining relevant information derives as much benefit from its investment as possible, corporations will disclose very little.⁵⁴

Elsewhere, Healy P & Serafeim G argue that while disclosure in the petroleum industry has recognized public benefits, it might come at some cost for the disclosing companies. To elaborate the impact of mandatory disclosure rules, they rely on the fact that the enactment of Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act⁵⁵ had a negative impact on the stock prices of various oil corporations, with those with large operations in host countries that do not support disclosure hardest hit. Overall, they say, the impact was

⁵² Healy P, Kuppuswamy V & Serafeim G, 'What Impedes Oil and Gas Companies' Transparency?' 12.

⁵³ Badia M, Duro M, Jorgensen B & Another, 'Disclosure Regulation and Competitive Interactions: Evidence from the Oil and Gas Industry,' *The Accounting Review* (2020) 4.

⁵⁴ Healy P, Kuppuswamy V & Serafeim G, 'What Impedes Oil and Gas Companies' Transparency?' 13.

⁵⁵ Section 1504 of the Dodd- Frank Wall Street Reform and Consumer Protection Act, enacted in 2010, requires the American Securities and Exchange Commission to enact rules instructing listed resource extraction companies to include in their annual report information relating to any payment made by the issuer, or by a subsidiary or another entity to the American government or a foreign government.

quite significant because it resulted in about \$1 Billion decline in average market capitalization.⁵⁶

Corporate opposition to the introduction of Section 1504 filtered down to three main arguments. First, the corporations argued that it would raise proprietary costs because governments of the host nations would be more informed. They would be more aggressive in their negotiations as they would be in a stronger bargaining position. Second, American companies argued that they would be placed at a competitive disadvantage when compared to companies that were not subject to disclosure requirements. This was especially the case where the host government was anti-disclosure. This would not only put their future operations in those countries at a precarious position, it would render their operations entirely illegal in countries where disclosure was prohibited by law, such as China, Angola and Qatar.⁵⁷

Healy and Serafeim add that contract disclosure can be politically sensitive because it gives ammunition to the media, advocacy groups and civil society organizations to attack a corporation's track record.⁵⁸ This gives rise to claims for improved investment into the local community and invites unwelcome scrutiny into the corporation's profits and the like. Such action on the part of advocacy groups might find political backing at some point, which might lead to a need for renegotiation of the contract and in worst case scenarios, the expropriation of the assets of corporations seen to have benefitted too much. For example, Statoil faced backlash in Tanzania after an addendum to a contract on its offshore project there was leaked in 2014.⁵⁹ Besides this, they add that disclosure of information in one agreement has the

⁵⁶ Healy P & Serafeim G, 'Voluntary, Self-Regulatory and Mandatory Disclosure of Oil and Gas Company Payments to Foreign Governments' *Accounting Horizons* 34(2020) 4.

⁵⁷ Healy P & Serafeim G, 'Voluntary, Self-Regulatory and Mandatory Disclosure of Oil and Gas Company Payments to Foreign Governments' 8.

⁵⁸ Healy P & Serafeim G, 'Voluntary, Self-Regulatory and Mandatory Disclosure of Oil and Gas Company Payments to Foreign Governments' 9.

⁵⁹ David Manley and Thomas Lassourd, 'Tanzania and Statoil: What Does the Leaked Agreement Mean for Citizens?' (2014) Natural Resource Governance Institute, 1.

capacity to influence the corporation's bargaining power in future agreements with the same host state and even with a different one.

Gillies argues that even though the norm has developed substantially, the petroleum industry still is one of those where sustaining contract disclosure as a norm is going to be difficult. She argues that the high demand for oil and the large profit margins are always conducive to corruption that can then only be covered up with opacity. With rising demand, companies might be tempted to resort to what she refers to as a 'race to the bottom' where they compromise on values to improve their competitiveness and secure contracts. Moreover, she argues, the high revenues earned from petroleum by host states renders other forms of reform inducing mechanisms such as aid conditionality ineffective because the host states have a financial edge.⁶⁰

While corporations view the increased bargaining power of a host government as a disadvantage because it is likely to lower their profit margin, transparency initiatives such as NRGI, the Open Government Partnership and the World Resources Institute view such an increase as being commercially advantageous for both corporation and host government. They argue that it leads to increased investment stability and reduces the risk of conflict by addressing the mistrust that pervades the natural resource sector, especially between governments and the governed and in which corporations are often entangled. Disclosure also manages the expectations of the public on the revenue expected from sale of oil, thereby reducing the possibility of conflict. They add that a balanced negotiating table reduces the risk of future renegotiation of the contract and loss of social licences to operate, both of which factors are to the benefit of the corporation.⁶¹

⁶⁰ Gillies A 'Reputational Concerns and the Emergence of Oil Sector Transparency as an International Norm' 6.

⁶⁰ Global Witness, 'Oil Revenue Transparency' 6.

⁶¹ Natural Resource Governance Institute, Open Government Partnership & World Resources Institute, Disclosing contracts in the natural resource sector (2016);3.

Oxfam has elaborated on the risk of renegotiation by explaining that secretly concluded contracts often come with an expiry date. While a corporation may make a windfall through one imbalanced undisclosed contract, this may ultimately prove more expensive when a succeeding government comes in intent on righting the wrongs of the past.⁶² Oxfam gives the example of a contract that was renegotiated in Liberia in 2006. The contract had been entered into by the Mittal Steel AG and the National Transitional Government of Liberia. Due to its perceived imbalance, the Government of Liberia had to renegotiate the contract. This took over a year and cost both the country and the corporation a lot in legal fees and delayed production.⁶³ In another instance, the Government of Uganda and Tullow Oil spent millions in legal fees disputing a discretionary tax holiday that had been offered to Tullow Oil by a former energy minister. The tax authorities in Uganda later claimed that the minister had had no authority to grant that type of tax holiday. The dispute dragged on and delayed the development by Tullow of the oil fields.⁶⁴ Had the contract and the negotiations been publicized and the tax authorities been involved, such a dispute might have been avoided.

Oxfam has also argued that contract disclosure has the potential to attract high-quality investment. It proposes that a transparent government demonstrates stability, confidence, non-discrimination and ethical awareness. Upstanding corporations will want to enter contracts with such a government while corrupt corporations will be discouraged. Oxfam cites the example of Peru's state oil company Peru Petro which reported an improvement in its petroleum sector due to investor confidence after it adopted open contracting.⁶⁵ Similarly, Mexico decided to publish contracts so as to demonstrate that they treated all companies equally without discrimination. Sometime later, Pablo Anzorena, an official in the country's hydrocarbons

⁶² Oxfam, *Contract Disclosure Survey 2018: A review of the contract disclosure policies of 40 Oil, Gas and Mining Companies*, (2018) 7.

⁶³ Oxfam, 'Contract Disclosure Survey 2018,' 14.

⁶⁴ Oxfam 'Contract Disclosure Survey 2018,' 15.

⁶⁵ Oxfam 'Contract Disclosure Survey 2018,' 11.

sector was heard to say that “publishing contracts and financial models has given investors confidence and engaged overseas investors in the Mexican petroleum sector. Following these reforms, we have awarded more than 100 contracts to overseas investors.”⁶⁶

Lastly, Oxfam also argues that Contract transparency can lead to more sophisticated policy development. It argues that the exposure of contract provisions to a wide and varied audience does not only serve to inform, it also serves to invite a large pool of expertise that can be tapped into when creating laws and policies for the petroleum industry in a country. In this way, contract negotiation and policy formulation will not be the preserve of government officials who might have been appointed for their political prowess and nothing more.⁶⁷ In addition, contracts disclosed by one country can inform or guide another country on the pitfalls to avoid and the advantages it can tap into, thus improving contract quality.

This improvement in quality of policy does not happen only on the side of government. As Healy and Serafeim argue, contract disclosure points to a company’s willingness to fight corruption and to support good governance practices in the host state. Besides attracting public loyalty, the company itself also attracts employee talent looking out for responsible companies. Additionally, disclosure is useful to investors as they make investment decisions. It also gives a corporation the parameters within which to evaluate the performance of its managerial team.⁶⁸

Wyld D C and Robert M⁶⁹ set out to explore the relationship between transparency and corporate as well as industry competitiveness. Wyld D C and Robert M found that there was a real relationship between corporate transparency and competitiveness of that corporation.⁷⁰ They posed the following question: “...does the transparency of an entire country's markets and its

⁶⁶ Fredrick Reinfeldt, ‘Governments Need to Publish Oil and Gas Contracts’ *Financial Times*, 19 July 2018.

⁶⁷ Oxfam ‘Contract Disclosure Survey 2018’ 11.

⁶⁸ Healy P, Kuppuswamy V & Serafeim G, ‘What Impedes Oil and Gas Companies’ Transparency?’ 9.

⁶⁹ Rober M was a Professor of Management from South Eastern Louisiana University when he co-wrote the cited journal at the Academy of Management Perspectives.

⁷⁰ Wyld D C & Robert M, ‘Is Transparency Critical for Firm and National Competitiveness?’ *Academy of Management Perspectives*, (23) (2009) 95.

companies influence its competitiveness and the ability of its investors and companies to take advantage of market opportunities?" In answering this question, Wyld D C and Robert M examined a paper written by Jere R F, Inder K K, and Raynolde P from the University of Missouri at Columbia. The professors defined corporate transparency as "the availability of firm-specific information to those outside publicly traded firms."

Wyld D C and Robert M observed that corporations which are more transparent tend to grow at a much better rate, recording better 'investment efficiency as well as lower costs of capital.'⁷¹

They further observed that firms with higher corporate transparency levels tend to have stock prices that are more informative.⁷²

They further observed the industries that are more transparent tend to have more accurate market metrics and gauges to measure corporate performance in a given market. Wyld D C and Robert M argued that corporate transparency provides investors with options. They found that corporate transparency also tends to prevent senior leadership of corporations from conducting the corporation's affairs in a manner that contradicts the wishes of shareholders. This, they conclude, creates the assumption that increased corporate transparency raises the competitiveness of corporations.⁷³

To test this principle, Wyld D C and Robert M decided to measure it on an industry-wide and national level. They decided to examine whether a market's degree of corporate transparency and availability of information was connected to the degree of industry growth. Their research was thus centred on whether a country's disclosure of corporate information means a better investment, economic and financial environment.

Wyld D C and Robert M noted that Francis and his counterparts utilised data collected from 1980 and 1990 from the United Nations Industrial Development Organization in order to

⁷¹ Wyld D C & Robert M, 'Is Transparency Critical for Firm and National Competitiveness?' 95.

⁷² Wyld D C & Robert M, 'Is Transparency Critical for Firm and National Competitiveness?' 95.

⁷³ Wyld D C & Robert M, 'Is Transparency Critical for Firm and National Competitiveness?' 95.

answer this question. Part of the data collected related to 37 manufacturing industries in 37 different jurisdictions from around the world including European and African nations.⁷⁴

Francis and his counterparts ultimately looked at a minimum of 666 member countries of the United Nations. They examined similarities in patterns relating to industry financial performance rates between the member states vis a vis corporate transparency.

The member countries were measured around several indicators including strictness of corporate financial disclosure requirements and level of enforcement of any such existing regulations and requirements.

In addition to the above indicators, Francis and his counterparts examined the degree of opacity of corporate earnings in a given, market. Each of the countries was measured against their respective financial performance as a factor of their respective gross domestic product (GDP).

Wyld D C and Robert M observe that Francis and his counterparts arrived at positive results illustrating that a high degree of financial development was definitely not indicative of the levels of corporate transparency in a jurisdiction. Citing Spain and Japan as instances of markets with higher degrees financial development but very little corporate transparency, Fred and his counterparts established, from their examination, that transparency raises financial competitiveness of a given market but the opposite argument cannot be made unequivocally.

Fred and his counterparts famously argued that ‘opacity and the lack of corporate disclosure creates information friction’. This, Fred argued has the tendency to diminish the faster strategic movement of capital thus lowering the respective markets’ growth rates.

Similar to the above finding, Fred and his counterparts were able to convincingly establish that markets which exercised a higher degree of corporate transparency realised simultaneous levels of industry growth across common industries.

⁷⁴ Wyld D C & Robert M, ‘Is Transparency Critical for Firm and National Competitiveness?’ 95.

Fred and his counterparts also noted that there was a link between a market's degree of corporate transparency and the subsequent growth of its financial performance. Wyld D C and Robert M conclude in their writings that 'the quality and trustworthiness' of a nation's information availability heavily determines the prospects of its ultimate growth.

Wyld D C and Robert M conclude that transparency provides investors and stakeholders with actionable financial data which is useful for purposes of making decisions on how best to allocate capital into a given market. Wyld D C and Robert M also note, in conclusion, that investor confidence is bolstered by high levels of corporate information in an industry. They conclude that Fred's test can be comfortably used to measure the competitive variance across different countries.⁷⁵ The above arguments by Fred, his counterparts and Wyld D C and Robert M do significantly reinforce the thesis of this study, that petroleum contract disclosure requirements have an impact on the competitiveness of petroleum corporation as well as the Kenyan upstream petroleum industry.

1.6.1. Conclusion

The available literature as analysed in this Chapter is illustrative that contract disclosure has advantages for host governments and oil corporations alike. Nonetheless, it presents certain difficulties to the competitiveness of corporations that already have signed agreements with the host governments and appears to favour new entrants into the market. The contract disclosure rule also makes it difficult for governments intent on misappropriating revenue generated from natural petroleum resources in favour of individual interests.

The researcher wishes to contribute to the available literature by looking into the competitive advantages that a nascent petroleum industry such as Kenya might derive from adopting a policy of contract disclosure from the outset. This goal is to be achieved by looking at how

⁷⁵ Wyld D C & Robert M, 'Is Transparency Critical for Firm and National Competitiveness?' 95.

contract disclosure has affected other petroleum industries in Africa, specifically Nigeria and Ghana.

1.7. Hypothesis

This study will proceed with the following hypotheses:

H1. Disclosure of petroleum agreements has a bearing on the competitiveness of the upstream petroleum industry in a nation.

H2. Disclosure of petroleum agreements has a bearing on the competitiveness of an upstream oil company.

1.8. Research Questions

The hypotheses of this research will be proved by answering the following questions

1. Is there a relationship between disclosure of petroleum agreements and the competitiveness of the national upstream petroleum industry?
2. Is there a relationship between disclosure of petroleum agreements and the competitiveness of an individual upstream oil corporation?
3. Is there evidence from other jurisdictions that contract disclosure impacts competitiveness in the upstream petroleum industry?

1.9. Significance and Justification of the Study

The significance of this study is to examine the importance of contract disclosure regulations in relation to a petroleum industry's competitiveness. While much has been written about disclosure, transparency and accountability in the petroleum industry there is little literature on the impact of contract disclosure regulations on the competitiveness of a national petroleum industry. In most African petroleum producing countries, there is a poor understanding of the impact of the lack of contractual transparency and accountability in the petroleum industry.

This study seeks to contribute to the knowledge and policy gap through an evaluation of the competitive impact of contract disclosure regulations. This study is potentially important to oil and gas scholars, state organs, policy makers, ordinary citizens and petroleum investors in the upstream petroleum industry in seeking to understand the factors that need to be considered in formulating a contract disclosure framework.

The literature and comparisons to other jurisdictions made under this study seek to potentially guide Kenyans on the risks, opportunities and competitive advantages of enforcing their rights to information, contractual transparency and accountability in governance of natural resources as enshrined in the constitution. This study also serves the potential to trigger global discourse on the impact of enforcement of transparency and accountability in the upstream petroleum industry through contract disclosure.

The implications of this study will most likely be an increased appreciation by society, for the impact transparency and accountability initiatives in the upstream petroleum industry. This study will likely improve the robustness of existing regulations on contract disclosure in Kenya. The study will likely bring into focus, the implications of mandatory regulations in enhancing competitiveness in the upstream petroleum industry through attraction of direct investment into Kenya among other benefits.

This study is likely to benefit citizens and investors in the petroleum industry in Kenya through a better understanding of the practical advantages of contract disclosure. In seeking to establish that disclosure of contracts in the petroleum industry benefits both citizens and private petroleum investors, the entire Kenyan upstream petroleum industry is the ultimate potential beneficiary of this study.

1.10. Research Methodology

The study is based on a lessons learnt methodology to foster a understanding of the conceptual, theoretical and legal principles underpinning contract disclosure and competitiveness of the upstream petroleum industry in comparison with two key African jurisdictions. These are, Ghana and Nigeria. The researcher chose a lessons-learnt methodology because of the similarities and differences in legislation within the two countries under study and the wealth of plausible lessons available. The researcher chose Ghana as a jurisdiction because of the positive impact of the successful implementation of contract disclosure regulations on competitiveness while Nigeria was selected in order to analyse and understand the consequences of a lack of contract disclosure regulations to Nigeria's upstream petroleum industry.

This study is thus limited to available literature, analysis, theories, opinions and studies found in books, journals, scholarly articles, legislation, libraries, judicial decisions, international development agencies, official government websites and government policy documentation.

1.11. Research Methods

Primary and Secondary data collection methods

The study will rely on the review of written books, case law, journals, institutional reports, text and material in the area of contract disclosure and competitiveness in order to gather an in-depth understanding of the topic of study.

1.12. Chapter breakdown

This research will be divided into 5 chapters, namely, **Chapter 1** which is the introduction to the entire study. This chapter shall include the Background to the Problem, Statement of the Problem, Research aim, Research objectives, Purpose of the Study, Significance of the study

Literature Review, Hypotheses, Research questions, Conceptual framework and Methodology and Methods sections.

Chapter 2 will focus on establishing the conceptual and theoretical basis for contract disclosure and its impact on competitiveness in Kenya. The Chapter will rely on the Social Contract and Stakeholder theories to explain the significance of petroleum disclosure regulations and in whose interest contract disclosure ought to be enforced. This Chapter also analyses the parameters for competitiveness as enunciated by Harvard's Michael Porter and the benefits accruing to an industry in which petroleum contract disclosure is mandated by law. Chapter 2 also links the social contract theories and stakeholder theories to Kenyan laws on contract disclosure, weighing the Kenyan industry against the yardstick of Porter's five forces of competitiveness.

Chapters 3 on the other hand will explore by way of lessons-learned methodology, Kenya's position on disclosure of petroleum contracts as well as the attaching status of competitiveness of the oil market in African countries, namely Ghana and Nigeria. This chapter will compare the two fellow oil producing African countries with a view to drawing best practices and identifying learnings from areas of weakness in each country's petroleum legal frameworks. This Chapter will also analyse Ghana and Nigeria against Porter's five forces of competitiveness in order to establish the answer to research question 3 on whether there is evidence from other jurisdictions that contract disclosure regulations have an impact on a national petroleum industry.

Chapter 4 will be the Conclusion and Recommendations section whose purpose will be to highlight the answers to the three research questions to this study. This chapter of the study will identify the gaps in the literature analysed throughout the study and the researcher's contribution to the study. This Chapter will also identify the utility of the study topic to the

Kenyan petroleum industry and to Kenyans in particular. It will also identify the areas that require research following the conclusion of this study and what needs to be done about the problem identified in the study.



Chapter 2: Conceptual Framework and Theoretical Framework

2.1. Introduction

Having analysed the background, problem, significance, objective, justification to the study and available literature that either supports or disagrees with the thesis of the study in Chapter 1, this Chapter now seeks to explore the gap identified in the last Chapter. The researcher in this Chapter seeks to answer research questions 1 and 2 identified in Chapter 1 in examining whether there is a relationship between disclosure of petroleum agreements and the competitiveness of petroleum corporations and the national upstream petroleum industry. This Chapter thus breaks down the concept of competitiveness and investigates the competitiveness of the Kenyan upstream petroleum industry by applying the model of competitiveness proposed by Michael Porter in 1979. It delves into the justifications for why oil corporations should favour contract disclosure by relying on the Social Contract Theory and the Stakeholder Theory.

This Chapter also weighs the concept of disclosure against the national values of integrity and transparency, the fundamental right to information and mandatory governance standards set out in the Constitution of Kenya. Lastly, the Chapter evaluates the link between the Social Contract and Stakeholder Theories, linking and analysing them against the legal position on contract disclosure in Kenya as espoused in the Constitution of Kenya, the Access to Information Act and the Petroleum Act.

2.2. Conceptual Framework: Defining Competitiveness

Most researchers argue that there is no single accepted definition of competitiveness. That is because, competitiveness of one nation may be based upon different parameters than another.

The term competitiveness seems to mean different things to different researchers.⁷⁶ Some researchers see it as a country's technological leadership, whereas other countries view competitiveness as a country's export shares, productivity or its growth rate. Nguyen H P argues that instead of outrightly attempting to define competitiveness, various factors that influence competitiveness are explored and he agrees with Michael Porter's analysis of competitiveness.⁷⁷

In 1979⁷⁸, Michael E Porter published his revolutionary paper titled 'The Five Competitive Forces that Shape Strategy.' In it, he developed a model for determining the competitiveness at a both a firm and industry level. He developed this model from an analysis of five forces that are manifest in every industry and aid in decision making as to whether to enter a certain industry; whether to increase capital allocation in a specified industry; or whether to develop certain competitive strategies. Porter hypothesized that the more intense the forces were in an industry, the more competitive that industry could be said to be. This concept is significant towards examining the criteria to be applied in analysing the competitiveness of Kenya's upstream industry. Porter's Five Forces are analysed below:

2.2.1. Threat of New Entrants

Porter argues that new entrants to an industry come in with the objective of obtaining a share of the market. A threat of new entrants puts pressure on existing companies in a given market requiring increased costs of investment and production.⁷⁹ Such threat of new entrants thus limits profitability of an industry because the more profitable a market appears to be, the more new players will want to join. Existing companies must therefore maintain a cap on profitability

⁷⁶ Nguyen H P, 'Theoretical Frameworks of National Competitiveness.' In Peter Lang AG *National Competitiveness of Vietnam: Determinants, Emerging Key Issues and Recommendations*, (N-ED) (2009) 25 to 44.

⁷⁷ Nguyen H P, 'Theoretical Frameworks of National Competitiveness.' In Peter Lang AG *National Competitiveness of Vietnam: Determinants, Emerging Key Issues and Recommendations*, (N-ED) (2009) 25 to 44.

⁷⁸ Porter M E, 'The Five Competitive Forces that Shape Strategy' *Harvard Business Review* (1979) 5.

⁷⁹ Porter M E, 'The Five Competitive Forces that Shape Strategy' *Harvard Business Review* (1979) 5.

to deter competitors from entering the market.⁸⁰ He further argues that the higher barriers to entry in a market are, the lower the threat of new entrants.

According to Porter, the key barriers to entry are: capital requirements, supply side benefits of scale, demand side benefits of scale, customer switching costs, incumbency advantages independent of size, unequal access to distribution channels and restrictive government policy.⁸¹

Peteraf M A analysed Yao's contribution to Porter's set of barriers to entry which simplified the factors that are considered to be barriers to entry into a new market.

In Yao's view, a less competitive market is attributable to "production economies and sunk costs, transaction costs, and imperfect information".⁸² Peteraf M A further analyses Ghemawat's firm-specific factors which contrasts from a market-specific categorization. Ghemawat's argument is that threat to a firm's competitiveness arise from "size advantages, preferred access to resources or customers or restrictions on competitors' options."⁸³

Porter specifically examined six types of barriers to entry into a market which are: Cost advantages of incumbents; Product differentiation of incumbents; Capital requirements; Customer switching costs; Access to distribution channels; and Government policy.⁸⁴

It is the thesis of this study that the existing lack of mandatory petroleum contract disclosure laws in Kenya is a deficient government policy that gives rise to insufficiency of information to would-be investors thus constituting a barrier to entry into the Kenyan market.

⁸⁰ Porter M E, 'The Five Competitive Forces that Shape Strategy' 5.

⁸¹ Porter M E, 'The Five Competitive Forces that Shape Strategy' 7.

⁸² Peteraf M A, 'The Cornerstones of Competitive Advantage: A Resource-Based View.' 14 *Strategic Management Journal*, 3 (1993) 183.

⁸³ Peteraf M A, 'The Cornerstones of Competitive Advantage: A Resource-Based View.' 183.

⁸⁴ Karakaya F & Michael J S 'Barriers to Entry and Market Entry Decisions in Consumer and Industrial Goods Markets.' 53 *Journal of Marketing*, 2 (1989) 83.

Peteraf M A stated in his piece that it is fairly in any industry's best interests to attract new entrants because they are likely to introduce into the market, fresh capital, resources, capabilities and a desire to scale in terms of market share. He stated that new entrants to an industry potentially bring down bid prices and tend to inflate costs thus leading to a reduction of profits.⁸⁵

Most companies that enter a market through an acquisition tend to cause a shake-up in the industry. It is argued that an investor's decision to enter a new market or industry is often guided by the cost of the barriers to entry or in other words, the entry deterring price.⁸⁶ This, according to Porter is considered to be the 'cost for product and service quality that balances the rewards of entry into that market against the projected costs.'⁸⁷

Porter argues that the cost of entering a new market is often dependant on the likely reaction of existing market players.⁸⁸ He further argues that the cost of entry into a new industry or market depends on the barriers to entry into that market. It is the thesis of this study that lack of information on the contractual dynamics of existing players in the petroleum industry is a barrier to entry. Such barrier to entry may, according to Porters' argument, potentially drive up cost of entry into the Kenyan petroleum market by new entrants thus diminishing the competitiveness of the Kenyan upstream petroleum industry. This is so because barriers to entry tend to favour incumbent players over new entrants.⁸⁹ A new entrant into the Kenyan market would for instance need to expend high sums of financial investment in research and development in order to realize the rewards of entry into the Kenyan petroleum market.

⁸⁵ Peteraf M A, 'The Cornerstones of Competitive Advantage: A Resource-Based View.' 183.

⁸⁶ Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 36 *Financial Analysts Journal*, 4 (1980) 32.

⁸⁷ Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 32.

⁸⁸ Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 32.

⁸⁹ Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 32.

The financial resources required to enter the upstream petroleum industry are inherently high thus diminishing the likelihood of a large group of entrants.⁹⁰

Most potential entrants will usually face barriers to entry if the market is characterized by economies of scale. Economies that are scaled tend to compel new entrants to set up in a new market at a large scale. Similarly, the likelihood of a substantial reaction from an existing player may potentially be high in an economy where existing players enjoy economies of scale.⁹¹

The types business functions that may possess scale economies include production, marketing, research and development, network, sales or distribution.⁹² In many petroleum contracts, these elements may feature particularly in the technical schedules. It is the researcher's position that lack of such information on incumbent players is a likely barrier to entry as new investors would not be certain as to how to position themselves in order to competitively enter into the market. A bad market entry decision could easily lead to a cost disadvantage on a new entrant. It is thus of high importance to have a mandatory disclosure framework in place to enable new entrants mitigate barriers to entry into the Kenyan market.

Porter argues that in certain markets, incumbent players tend to have strong and long-standing existing distribution channels locally which would potentially place a new entrant at a point of disadvantage. In some petroleum markets, existing players enter into exclusive contracts which only favour a certain petroleum corporation.⁹³ Based on Porter's arguments, it would be difficult for a new entrant into the upstream petroleum market in Kenya to compete with or displace existing players without an intense level of marketing, networking, advertising and business development in order to penetrate the distribution channels that existing petroleum players enjoy. In cases where the barrier to entry is too high to scale for a new entrant into an

⁹⁰ Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 32.

⁹¹ Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 33.

⁹² Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 33.

⁹³ Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 36.

industry, Porter reckons that a new entrant may likely be forced to create an entirely new distribution channel in order to successfully penetrate an industry.

Porter continues to state in his analysis that government policy constitutes a significant entry barrier in some industries.⁹⁴ Some host governments directly or indirectly create barriers to entry into certain industries. Such barriers, Porter argues, may be created through various means such as licensing requirements, or limitations to accessibility of certain materials.⁹⁵ Porter gives examples as to how government policies can lead to significant barriers to entry of a firm into a new market. He gives the examples of government subsidies, technological requirements, emission and pollution standards or even delays in approval of entry into a market raising cost of entry.⁹⁶

Porter argues that government policy often carries with it consequences that impact new entrants in a more adverse manner than they do established players. The researcher takes the position that the lack of a mandatory disclosure regime and the discretion given to the Minister in Kenya to determine whether to publish petroleum contracts is a policy that Government policy that unfairly disadvantages new entrants seeking to enter into the Kenyan upstream petroleum industry.

Porters' argument is that in instances such as these where government policy may require a new entrant to expend additional capital, they tend to be at a permanent competitive disadvantage in contrast with existing players and this disadvantage is largely driven by driven by cost.⁹⁷

⁹⁴ Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 34.

⁹⁵ Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 34.

⁹⁶ Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 34.

⁹⁷ Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 34.

2.2.2. Bargaining power of Suppliers

Powerful suppliers that have some clout can choose to derive more value for themselves at the expense of industry players by charging exorbitant prices for their goods or services, shifting their costs to industry players or by holding onto their services.⁹⁸ Sometimes suppliers apply a competitive force in a given market by reducing the quality of the goods or services they sell. Exorbitant prices can sometimes cause a reduction of profitability from a given market particularly when that market fails to recover those exorbitant prices from their own sales.⁹⁹ The competitive forces influencing supplier power are the opposite of those that influence buyer power.

In most cases of dominance of a market by a few corporations, those corporations tend to have the capacity to exert more control over prices, quality and terms of service.¹⁰⁰

Nevertheless, dominant, powerful suppliers can be contained through the introduction of new entrants of substitutes. Suppliers also tend to exert their competitive force when they are supplying goods or services that do not constitute a significant fraction of their overall sales. Such suppliers or corporations are more likely to charge exorbitant prices. Porter notes that suppliers will only offer reasonable pricing and value-added goods and services to those customers that they consider important.¹⁰¹

Some suppliers apply switching costs to their products or services in order to retain power over their buyers.¹⁰² In the context of this thesis, the researcher argues that petroleum contracts which contain onerous exit clauses aid petroleum companies to exercise their competitive dominance over the government, thus making it difficult for the government to walk away from signed petroleum agreements.

⁹⁸ Porter M E, 'The Five Competitive Forces that Shape Strategy' 10.

⁹⁹ Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 39.

¹⁰⁰ Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 40.

¹⁰¹ Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 40.

¹⁰² Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 40.

Another type of supplier that is worthy of mention is labour force. Labour possesses high competitive power and is sometimes used to bargain a substantial portion of profits from an industry. A corporation's workforce may sometimes erode its profitability if it has a significant standard of organization and has in its membership, the kinds of personnel whose skills are scarce. It is in this way that labour can be a factor of competitiveness in a corporation or in a national industry.¹⁰³

Another powerful category of suppliers that does not only apply in the context of the upstream petroleum industry is the government. Governments set policy and are thus able to influence the competitiveness of an industry using policy.¹⁰⁴ Contractually, governments can also be factors of competitiveness based on their buyer power as they purchase large amounts of goods or services for national use. Most corporations are not able to control supplier power. Corporations that strategically determine the underlying causes of adverse competitive forces can leverage on their market strengths to correct these forces. According to Porter, the best way for a corporation to strategically navigate through competitive supplier or buyer power forces in a given industry is to pose the following questions: How does the corporation competitively posture itself against these supplier and buyer forces?; Where does the corporation stand against substitutes?; Where does it stand against the sources of entry barriers?; and Where chance does the corporation stand in coping with rivalry from established competitors?¹⁰⁵

2.2.3. Bargaining power of buyers

Like powerful suppliers, powerful purchasers have the capacity to derive more value from an industry by forcing prices downwards, demanding better quality in goods and services or by pitting industry players off against one another.¹⁰⁶

¹⁰³ Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 40.

¹⁰⁴ Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 40.

¹⁰⁵ Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 40.

¹⁰⁶ Porter M E, 'The Five Competitive Forces that Shape Strategy' 11.

It is well settled that buyers have the ability to influence prices, require better quality goods or services and also pit competitors against each.¹⁰⁷ Buyer power is an important facet of competitiveness. The power of each important buyer group depends on a number of characteristics of its market situation and on the relative importance of its purchases from the industry compared with the industry's overall business.

An important buyer group is considered to be powerful if it procures large volumes of goods or services relative to a seller's total sales. Buyer power is likely higher if a supplier values the prospect of retaining that buyer group's business.¹⁰⁸

The higher the fraction of total product purchases in an industry a buyer makes, the higher their power relative to that industry.¹⁰⁹ Powerful buyers tend to expend the resources needed to receive favourable quality and prices. Buyers experiencing profitability challenges tend to be more price sensitive and are more likely to bid suppliers downwards or play them against each other.

It is also apparent that buyers are more powerful in instances where they have a lot of information about the industry generally. Buyers who are more integrated to an industry are in a better position to drive downwards prices and have more bargaining power.¹¹⁰

Buyer power can be checked in certain cases when suppliers threaten a forward integration into the buyer's industry. Buyer power can also be neutralized in significant part if the supplier's products have a high impact on the buyer's business. Buyers tend to be less price sensitive when the quality of their products is highly dependent on the quality of the supplier's products. In the upstream petroleum industry, the quality of the infrastructure and equipment needs to be substantially high as the risk posed to the petroleum resource is high in the event of a failure of the equipment. A key illustrator of this fact is the environmental disaster that occurred on

¹⁰⁷ Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 38.

¹⁰⁸ Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 39.

¹⁰⁹ Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 39.

¹¹⁰ Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 39.

the Gulf of Mexico when a massive oil spill was caused by the negligence of the oil corporation. Sellers also check buyers by entrenching switching costs into their supply contracts making it expensive to leave one supplier for another. Enhancing the quality of a supplier's products also mitigates against the risk of a buyer substituting the supplier's goods or services with those of another supplier.¹¹¹ The rules of buyer power apply across consumers, enterprises, wholesalers and retailers.

A company can strategically alter or diminish buyer power by entrenching product differentiation strategies or more strategically, responding to buyer pressure by choosing its buyer groups. A corporation's buyers rarely have the exact same bargaining power.¹¹² Being able to engage in buyer selection enables a supplier to segment their industry and sell their products at different price points to different buyer groups. When buyer groups are strategically segmented in a single industry, it is easier to differentiate price-sensitive customers from those that are not price sensitive thus reducing buyers' ability to posture adversely against suppliers.¹¹³

2.2.4. Rivalry of existing competitors

Rivalry among competitors can manifest in the form of aggressive advertising, discounting of products or the introduction of new products. The greater the rivalry, the less the profitability. Porter argues that rivalry among competitors tends to be at its most intense when competitors are numerous or are roughly equal in size and power, industry growth is slow. Slow growth precipitates fights for market share. Exit barriers are high, rivals are highly committed to the business and aspire for leadership, especially if they have goals that go beyond economic performance in the particular industry. Firms cannot read each other's signals well because of lack of familiarity with one another, diverse approaches to competing, or differing goals.¹¹⁴

¹¹¹ Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 39.

¹¹² Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 39.

¹¹³ Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 39.

¹¹⁴ Porter M E, 'The Five Competitive Forces that Shape Strategy' 16.

Rivalry between competitors in an industry can take the form of price wars, marketing contests, new product propositions, increased customer offers or enhanced customer service. Rivalry can occur when a competitor feels threatened or desires to improve their market positioning.¹¹⁵ When a market player makes a competitive move, other firms in the same industry tend to notice and this may elicit a response. Corporations are as a result of such continuous competitive behaviour, mutually dependent on each other for continuous improvement.¹¹⁶ Strong competitive forces thus leave the competing corporations and the industry better off than industries with less competitiveness. An escalated or excessive set of moves and countermoves in the industry can however leave the industry worse off as all firms then suffer undue adversity under such conditions.¹¹⁷

It is the researcher's position that for a corporation or industry to be competitive, there should thus be a balanced and measured sense of competitiveness for a corporation or an industry's ultimate success. Key examples of unsustainable forms of competitions are price wars as they tend to impact profitability of the industry. Price wars in an industry run the risk of eroding profitability unless that industry enjoys good price elasticity of demand.¹¹⁸

In addition, marketing contests potentially increase demand and consequent product differentiation which benefits all industry players. To measure the intensity of rivalry in a given industry, a number of structural factors ought to be considered:

An industry with numerous competitors will likely have a lot more rivalry as firms will always want to strategically make moves. In certain industries, there may be fewer players with the available resources to mount strong responses to competition and this too intensifies competitiveness in that industry.¹¹⁹ In industries where there is one or a few dominant players

¹¹⁵ Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 35.

¹¹⁶ Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 35.

¹¹⁷ Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 35.

¹¹⁸ Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 35.

¹¹⁹ Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 35.

however, there will usually be clear evidence of market power making it possible for firms to enjoy price leadership and possible profitability.¹²⁰

Rivalry can be countered by ‘slow industry growth’ as it can lead to industry players constantly competing for market share.¹²¹ In industries experiencing rapid growth, there may be less rivalry intensity as firms will simply increase their performance by growing with the industry. In industries where there are ‘high fixed costs’ there is a lot of pressure for all players to fill capacity which can result in reduced pricing. It is key to have fixed costs relative to the cost of adding value. Players who spend more resources on outside inputs with little value add may find it difficult to fill capacity.¹²² Firms with perishable goods also tend to experience pressure to shed prices in order to make sales. Thus, industries that manufacture sensitive or hazardous products find it difficult to sustain profitability due to the pressure. Products that are perceived as commodities will usually be affected by buyer choice and will thus experience pressure for price cuts and service competition.¹²³ It therefore becomes important for firms to promote product differentiation as a shield to competitive rivalry in order to develop buyer loyalty from buyer preference.

Drawing similarities from other forces of competitiveness as laid down by Porter, firms or industries where there is intensified rivalry can neutralize such rivalry by leveraging on switching costs to deter buyers from playing competitors against each other. Intense rivalry sometimes runs the risk of chronic over capacity leading to a distortion of an industry’s supply-demand balance.¹²⁴ An oversupply of products in an industry potentially erodes profitability. In market where *competitors are diverse in strategies from their parent companies*, the result is that volatile rivalry is created as they are often continually exploring new and innovative

¹²⁰ Porter M E, ‘Industry Structure and Competitive Strategy: Keys to Profitability.’ 35.

¹²¹ Porter M E, ‘Industry Structure and Competitive Strategy: Keys to Profitability.’ 35.

¹²² Porter M E, ‘Industry Structure and Competitive Strategy: Keys to Profitability.’ 35.

¹²³ Porter M E, ‘Industry Structure and Competitive Strategy: Keys to Profitability.’ 35.

¹²⁴ Porter M E, ‘Industry Structure and Competitive Strategy: Keys to Profitability.’ 35.

ways of responding to competition. Diversity of competitor strategy makes it difficult for opponents to predict their competitors' next moves.¹²⁵

It is believed by Porter that foreign competitors are more likely to introduce strategic diversity into industries as they operate in different environments abroad. A key example he cites is the acceptance of low rates of return by local shareholder-operators of small manufacturing firms in exchange of autonomy as a reward. A large publicly listed investor entering into a new market may find it unreasonable to accept such low returns. This demonstrates that the manner in which small firms posture themselves in an industry may undercut the profitability of larger firms. Diversity of strategy may also arise in instances where there are firms that perceive the industry as a place where they come to dump excess supplies as they will usually posture themselves differently from firms that consider that industry to be their main source of business. A lot of companies also tailor their strategies to resemble those of their parent companies.¹²⁶ A firm belonging to a larger multinational group will likely adopt very different strategies from one that is an independently standing competitor in the same industry. Sometimes a firm that is deemed as a "rain maker" for its parent company will adopt different policies from a firm that is being postured for the long term.¹²⁷

Market rivalry can be intensified in instances where firms in the industry have high targets to achieve in a given market. Where stakes are heightened, it is more likely that there will be more competitive activity in the market as one player responds to another. Sometimes a firm with a global presence may consider achieving its targets in a certain market to be of great strategic importance. Some firms like Bose, JBL or Beats by Dre¹²⁸ would usually use one market such as the United States or England to build global prestige or create technological credibility. It is

¹²⁵ Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 36.

¹²⁶ Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 36.

¹²⁷ Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 36.

¹²⁸ Chris Kocek, 'Beats \$3.2B Sale Proves It's Great, But Not Necessarily at Headphones' <https://www.entrepreneur.com/article/235525>, accessed 30 June 2020.

firms seeking to achieve this type of strategic market entrance that tend to sacrifice profitability for market share.¹²⁹ This in turns enhances rivalry within a given industry.

Lastly, high barriers to exit may create industrial rivalry such as in the upstream petroleum sector where oil corporations for instance require high capital investment to decommission oil production plants or in instances where they have signed long term contracts with punitive exit clauses. In such cases many players would still mount competitive rivalry despite poor performance or profitability.¹³⁰ The opportunity cost of a given market may be high thus making it more prudent to stay and ‘fight’.

Firms with excess capacity do not tend to exit the market easily and may be prompted to resort to unorthodox tactics which can sometimes put at risk the performance of the entire industry.¹³¹

Porter observes that exit barriers can be high:

“...when the nature of the competitor uses a specialized class of assets which may be difficult to liquidate; when labour agreements, resettlement costs or spare parts maintenance create fixed costs of exit; when inter relationships between one company and others in a multi-business firm in terms of image, marketing ability, access to financial markets, shared facilities and so on lend the business broader strategic importance; when government denies or discourages exit because of job loss and regional economic effects [...]; or when managements are unwilling to make economically justified exit decisions because of loyalty to employees, fear of the consequences for their own careers, pride or other emotional reasons...”¹³²

It is sometimes prudent to analyse the forces of competitiveness together their distinction notwithstanding, for instance, entry and exit barriers or buyer power and supplier power.¹³³

¹²⁹ Porter M E, ‘Industry Structure and Competitive Strategy: Keys to Profitability.’ 36.

¹³⁰ Porter M E, ‘Industry Structure and Competitive Strategy: Keys to Profitability.’ 37.

¹³¹ Porter M E, ‘Industry Structure and Competitive Strategy: Keys to Profitability.’ 37.

¹³² Porter M E, ‘Industry Structure and Competitive Strategy: Keys to Profitability.’ 37.

¹³³ Porter M E, ‘Industry Structure and Competitive Strategy: Keys to Profitability.’ 37.

The most ideal competitive position to be in is an industry where entry barriers are high but exit barriers are low.¹³⁴ In such instances, it is difficult for competitors to enter the market but easy for unsuccessful competitors to exit the market. In market conditions where there are both high entry and exit barriers, the prospect of profit is high while the attendant risk is also substantially high. In such conditions, unsuccessful firms who manage to enter the market tend to remain within the market in order to battle it out with other competitors.¹³⁵

Lastly, it is a most unfavourable scenario for an industry to have low entry barriers and high exit barriers as this is bad for profitability.¹³⁶ Many such industries will attract players who are interested in short term profitability. Such a market structure would lead to an oversupply of capacity in instances where the players are not successful leading increased buyer power and diminished profitability for the industry as a result.¹³⁷

2.2.5. Threat of Substitute Products

When the threat of substitutes is high, industry profitability suffers. Substitute products or services limit an industry's profit potential by placing a ceiling on prices. If an industry does not distance itself from substitutes through product performance, marketing, or other means, it will suffer in terms of profitability—and often growth potential.¹³⁸

The intention of Porter's forces is to define the structure of an industry and therefore formulate strategy based on that structure rather than on fleeting factors like industry growth and technology and innovation. He argues that an understanding of structure gives one an understanding of an industry's profit potential in the long-run because it is structure that determines how the economic value created by the industry is apportioned; how much is

¹³⁴ Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 37.

¹³⁵ Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 37.

¹³⁶ Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 37.

¹³⁷ Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 37.

¹³⁸ Porter M E, 'The Five Competitive Forces that Shape Strategy' 14.

retained industry players, bargained away by customers and suppliers, limited by substitutes, or constrained by potential new entrants.¹³⁹

Corporations that operate in the same industry tend to produce products that compete with each other thus, to an extent offering substitute products. Substitute products have an impact on profitability of an industry as there is always a certain limit within which corporations can price their products.¹⁴⁰ The rule of thumb is that the more rigid the pricing limits arise from the existence of substitute products the lower the profitability of an industry. Porter offers the example of the fibre glass industry in 1978 which at a time when the market's need for insulation material experienced a lot of buyer demand due to the high cost of energy and the prevailing cold weather. What hindered profitability of the industry was the existence of multiple substitutes such as cellulose, rock wool and Styrofoam.

Determining the existence of substitute products in a given industry entails finding products that can serve the same function as that particular product. Based on Porter's reasoning, for instance, renting a home is in certain instances a good substitute for purchasing a home if cost of credit or upfront capital investment is a factor for a buyer. In the downstream petroleum industry for instance, petroleum or diesel consuming vehicles are substitutable for electric or hybrid vehicles.

In some instances, government policies, directives, regulations, subsidies or tax regimes can be considered in the search for substitutes.¹⁴¹ This means, for instance, that a market player can identify befitting alternative business models that potentially save them costs by reviewing applicable policies and choosing a favourable one that enables the firm to do the same business.¹⁴²

¹³⁹ Porter M E, 'The Five Competitive Forces that Shape Strategy' 19.

¹⁴⁰ Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 38.

¹⁴¹ Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 38.

¹⁴² Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 38.

In summary, Porter notes that the best way to identify substitute products is to select those that: enjoy steady improvement on the question of price relative to performance with the industry's product; have the least possible switching costs for prospective buyers; or are produced by industries experiencing high profitability.¹⁴³

Substitute products that are produced by industries experiencing high profitability in instances where a force increases competitiveness thus causing a reduction in price or improvement in performance.¹⁴⁴

In order to counter the competitive force of substitute products, the industry at large ought to act collaboratively.¹⁴⁵ Marketing, price adjustments and other similar competitive strategies may not do much to improve the competitiveness of an industry if only a few players take such steps. The most impactful way to counter substitution against a given industry is through a sustained industry-wide approach towards responding to the substitute.¹⁴⁶ While advertising by one firm in an industry does little to bolster the industry's position against a substitute, heavy and sustained advertising by all industry participants may well improve the industry's collective position against the substitute. This is evidenced by numerous measures taken by select industry groups towards improvement of quality, marketing and distribution of products under threat of substitution. It is important to analyse trends in order to decide whether it is strategically more prudent to counter a substitute or accept that substitute as a key competitive force.¹⁴⁷

Based on the above key concepts as propounded by Porter, it is plausible to argue, for instance, that the upstream petroleum sector is under threat of substitution by other industries in the field of renewable energy such as the solar, wind and hydro power industries.

¹⁴³ Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 38.

¹⁴⁴ Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 38.

¹⁴⁵ Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 38.

¹⁴⁶ Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 38.

¹⁴⁷ Porter M E, 'Industry Structure and Competitive Strategy: Keys to Profitability.' 38.

It is beyond question that emerging forms of renewable energy are now substantially performing the same function as fossil petroleum while offering key additional benefits to the buyer market such as reduction of carbon emissions and environmental sustainability. It is the researcher's position that the petroleum industry need not counter the threat of the substitute that is renewable energy in order to remain competitive. Instead, the upstream petroleum industry could strategically accept the threat as a welcome market force that could introduce into the industry, new opportunities such as sustainable energy solutions powering the exploration and production machinery associated with upstream petroleum exploration and production. A possible cost reduction may be strategically realised thus enabling the substitute to drive the industry's profitability. The inevitable result would be that the upstream petroleum industry would grow in tandem with the growth of the substitute (renewable energy), thus leveraging on the quality and performance of the substitute products as opposed to fighting them.

Conclusion:

If Porter's forces were to be applied to Kenya's young upstream oil and gas industry, the Researcher proposes that the threat of new entrants into the industry is low, as the barriers to entry into the Kenyan market are high. There is little detailed publicly available information on the extent of Kenya's oil reserves. Similarly, the quality of petroleum-based mineral discoveries requires appraisal which calls for highly specialized knowledge and skill on the part of an entrant oil corporation. Besides, the upfront and long-term capital requirements for petroleum exploration, appraisal and production are high presenting a further barrier to entry. It is also plausible to argue that the high capital requirements are a competitive force that is postured against an oil company that is not well funded. A new entrant into the market may thus face stiff competitive disadvantage from existing oil companies, that for instance, have well-resourced parent companies and diverse operations and investments across the globe. As

far as barriers to entry go, it appears that the highest barrier to entry into the Kenyan upstream industry would be incumbency advantages associated with informational capital, supplier power, economies of scale and possible government incentives. Corporations that have been in the country longer probably have more competitive advantages in terms of knowledge of the country's geographical demographics and the available reserves. As far as the threat of new entrants in the Kenyan upstream market go, the Researcher is of the view that the threat is low thus making the industry attractive to that extent.

On the power of suppliers, petroleum is a natural resource and the research argues that the government wields the power, because it is legally vested with title to the resource on behalf of Kenyans. Suppliers of labour might also count but their position does not give them much hold over international the investor oil company. Due to the technical complexity of oil exploration and production, it is very likely that the labour Kenyan communities would be providing would be casual and not highly skilled. Besides, the government has a part to play in the provision of labour because it is through government laws that requirements for local content are imposed. A government that has high bargaining power can raise the cost of granting permits and licences to the point of making the industry less profitable. It can impose local content requirements that make a corporation's operations painful. The truth is however that in petroleum agreements with developing host nations, corporations often have the upper hand over governments. This keeps the corporations' profits sky high.

Buyers of petroleum products are large midstream and downstream companies. These in fact hold great sway and influence over the prices of oil products. The application of this consideration to the upstream oil industry is however not the most appropriate in determining the competitiveness of a national oil industry because raw petroleum is a largely homogenous product. The actions of the multinational purchasers of petroleum are so far reaching they affect global oil prices.

On rivalry of existing competitors, the Kenyan upstream market has relatively few players. Of the oil wells that were drilled in the country between 2012 and 2017, 43 out of 51 wells were drilled by Tullow Kenya.¹⁴⁸ The other companies operating in Kenya include Africa Oil, Anadarko Kenya Company, Lion Petroleum Corporation, Apache, Petroleum Company of Spain (CEPSA) and ERHC Energy.¹⁴⁹ With Tullow Oil monopolizing the industry and the rest of the companies having very marginal shares in the industry, it appears unlikely that there would be much rivalry.

On the existence of substitutes to petroleum, substitutes such as nuclear energy, gas and electricity do exist. The usage of these substitutes is however not near as ubiquitous as the usage of petroleum. In the Kenyan market especially, the use of petroleum in sectors such as transport is virtually a monopoly. The threat to petroleum may be growing, starting with the industrialized nations but the researcher opines that it will be a long time indeed before they gain enough ground to shake the competitive position that petroleum occupies in the market. The researcher concludes that going by the above analysis, Kenya's upstream oil industry is far from competitive. Were Kenyan oil reserves to prove to be very rich, nothing would stand between the few corporations already in that sector and a windfall.

It was established in the literature Review in Chapter One that contract disclosure would involve making details of revenue flows, geographical areas of exploration and reserves found public. The researcher argues that making this information public would weaken the strength of the incumbent, that is the disclosing company, by revealing to potential entrants where oil reserves had been found and what the fiscal terms of its agreement with the government were. This would increase the threat of new entrants, thus making the industry more competitive. Similarly, disclosure would increase the rivalry between existing companies by pointing them

¹⁴⁸ <https://nationaloil.co.ke/wells-drilled/> on 2nd April 2021.

¹⁴⁹ <https://nationaloil.co.ke/wells-drilled/> on 2nd April 2021.

towards where large reserves could be found. Companies would be motivated to increase investments in particular basins or in particular activities modelled on what the disclosing company had done.

2.3. Theoretical Framework

The theoretical framework chosen by the researcher is based on two important theories, being the Social Contract theory and the Stakeholder Theory. These theories are both relevant to the thesis of this study as they aid in understanding why the law is made and for whom the law is made. The examination of these theories is important in analyzing the research question of the impact of contract disclosure regulations in the petroleum industry.

2.3.1. Social Contract Theory of Business Corporations

Thomas Hobbes is credited with having developed the Social Contract Theory to explain the nature of law and political society. Hobbes theorizes that in the state of nature, all men are by nature self-centered and relatively evenly matched in terms of power and ability so that it is impossible for one to conquer and therefore lead or dominate the other by use of sheer force.¹⁵⁰ They exist in a world of finite resources and they have different notions of what constitutes nature, so that they tend to be mysterious to one another.¹⁵¹ Based on these factors, Hobbes concludes that existence in such a world would be unbearably brutal and every man's life would be lived perpetually under threat from the other men. Hobbes believed that if anything could bring men together and instill some order into the chaotic diversity, it would have to be in obedience to some being to whom they had ceded the authority to speak and act for them.¹⁵² Hobbes submitted that men, being reasonable creatures, would seek ways to escape their brutal existence by creating a civil society. He theorized that they would do so by deciding to voluntarily submit to some sort of sovereign to whom every man would be subject. They would

¹⁵⁰ Letwin S R, *On the History of the Idea of Law*, Cambridge University Press, 2005, 93.

¹⁵¹ Letwin, *On the History of the Idea of Law*, 93.

¹⁵² Letwin, *On the History of the Idea of Law*, 94.

cede some of the rights they had against one another in the state of nature to the sovereign in exchange for the sovereign protecting and ensuring a peaceful existence. The obedience of men to the sovereign is not only a voluntary task, but also a last resort because there would be nowhere else to take their disputes. To fail to obey would be self—contradictory because the sovereign is self-imposed.¹⁵³

The foregoing paragraphs present a sketch of the basic outlines of the social contract theory in its most commonly understood sense, as a theory of political and civil society. It has been observed by several scholars that the notion of a social contract is in itself not tied in application to any particular field.¹⁵⁴ They have argued that as such, the theory can be expanded and adapted to explain an infinite number of social, economic and political phenomena.

In the words of Scheppele and Waldron,¹⁵⁵ “there is not just one contractarian method. There are many, and a consideration of contractarianism as a general theoretical approach involves a consideration of the differences among these various methods and the choices that must be made in their design.” Expounding on this position, Donaldson and Dunfee explain that the French Huguenots used the social contract in the pursuit of religious liberty.¹⁵⁶ Donaldson made a spirited attempt to explain moral complexity associated with actions of corporations in the context of business ethics. His theory will shortly be analysed in further detail in this study. Locke used the social contract theory when defending property rights from the king; and Rawls used it to define the principles of distributive justice.¹⁵⁷ Wherever the social contract theory is applied, there seems, however, to be a consensus on the notion that the normative legitimacy of any social contract derives from the belief that humans, acting rationally, agree to, or would

¹⁵³ Letwin, *On the History of the Idea of Law*, 94.

¹⁵⁴ Thomas Donaldson & Thomas W. Dunfee, *Ties that Bind: A Social Contract Approach to Business Ethics*, Harvard Business School Press (1999).

¹⁵⁵ Scheppele K L & Waldron J, ‘Contractarian Methods in Political and Legal Evaluation’ *Yale Journal of Law and The Humanities* 3(1991) 195 – 226.

¹⁵⁶ Donaldson T, *Integrative Social Contracts Theory: Thomas Donaldson & Thomas W. Dunfee. Economics and Philosophy*, 11(1995) 85-112.

¹⁵⁷ Donaldson & Dunfee, *Ties that Bind*, 17.

agree to the terms of whatever agreement it is that affects them either individually, as part of group or society.¹⁵⁸

Against this background, scholars in the field of business ethics have, in an attempt to explain the changing obligations of corporations, developed a theory of social contract for organizations. The framework of a social contract theory for business organizations were laid down by Thomas Donaldson in 1982. When introducing the idea, he relies upon a quote in a speech made by Henry Ford II in 1969 that “the terms of the contract between industry and society are changing -now we are being asked to serve a wider range of human values and to accept an obligation to members of the public with whom we have no commercial transactions.”¹⁵⁹

Thomas Donaldson draws upon the Hobbesian explanation of what justifies the existence of states. He adopts this to the operations of a modern corporation and theorizes that a social contract theory of business would be aimed at answering three questions, why should corporations exist at all? What is the fundamental justification for the existence? And how can their performance be measured to determine whether they have achieved their fundamental purpose? He refutes the idea that the existence of corporations can be justified merely by the ability to create goods and services because while corporations can be judged in so narrow a way, the existence of human beings is a multi - faceted one and the usefulness of corporations to human beings cannot therefore be defined so narrowly. One must therefore go further and ask, besides exploring for and maybe producing petroleum, what else do petroleum contractors owe to Kenyans and to the communities they operate in? The relationship between the Hobbesian and Donaldson’s explanations are that they both deem the general society as an

¹⁵⁸ Donaldson & Dunfee, *Ties that Bind*,17.

¹⁵⁹ Donaldson T, *Corporations and Morality*, Prentice Hall, 1982,36.

important consideration necessary for corporations to factor whenever they undertake their business activities.

Donaldson clarifies that a social contract for business, and in any other context in fact, is a hypothetical construct. In the context of business, it would serve the purpose of defining a corporation's indirect obligations, besides productivity.¹⁶⁰ He suggested that the parties to such a contract would be the consumers, defined broadly as persons that had an economical interest in the corporations' operations, and employees on the one hand and the corporation on the other.¹⁶¹ In the case of upstream petroleum companies, all Kenyans are consumers. The Corporation's obligations to these parties are based on the fact that it exists and thrives through the cooperation and support of society. It owes its status to these people and society at large, it draws its labour force from society and sells its goods and services to the society.¹⁶²

Upstream petroleum companies as a matter of necessity operate within communities and interact, and sometimes interfere with the life of these communities. Their operations are supported to a significant extent by the goodwill of that community and the people of Kenya. They may draw the right to operate in a particular place from a petroleum agreement, but it is doubtful that the agreement would come to their aid if the community turned hostile. As such, going by the social contract theory proposed by Donaldson, the Corporations owe Kenyan citizens a duty not only to do the job they contracted to do in the best way possible, but also to carry out their operations in an ethically sound, environmentally conscious and in as sustainable a manner as possible.

In this age of corporate ethics, best practices and good governance, the Researcher proposes that Corporations such as those the subject of the work, which enter contracts with governments must appreciate that the contracts they enter have profound ramifications for a whole nation,

¹⁶⁰ Donaldson, *Corporations and Morality*, 39.

¹⁶¹ Donaldson, *Corporations and Morality*, 46.

¹⁶² Donaldson, *Corporations and Morality*, 42.

not just shareholders of another corporation, as the case would be if the contract were entered between corporations on both sides. They should be aware that their actions have the ability to foster or thwart good governance, promote or defeat corruption and alleviate or aggravate the poverty levels of a country's citizens. The researcher argues that this corporations should be ready to take every action to improve the position of the country, and contract disclosure would go along way in promoting transparency and accountability.

As in ordinary contracts, it stands to reason that a corporation that upholds its end of the social contract is likely to have more staying power, by virtue of having earned the trust of the society.

2.3.2. Stakeholder Theory

The structure of the corporation that operates in a free market was conceived to allow maximization of profits while minimizing risk for the proprietors. Hence the law on limited liability. In the 1970's the Late Milton Friedman developed the shareholder theory, which may be described as an embodiment of the traditional idea of the corporation. He postulated that a company's sole responsibility was to its shareholders and its social responsibility to increase its profits.¹⁶³ Of a business' social responsibility, he remarked that "when I hear businessmen speak eloquently about the 'social responsibilities of business in a free- enterprise system,' I am reminded of the wonderful line about the Frenchman who discovered at, the age of 70 that he had been speaking prose all his life."¹⁶⁴ Prof. Milton's theory was and still is a substantial one, and it is as a contrast to it that the stakeholder theory may be best understood, even though its originator, Edward Freeman, specifically said that he did not develop it in opposition to Friedman's theory.

¹⁶³ Milton Friedman, 'A Friedman Doctrine – The Social Responsibility of Business is to Increase its Profits' *New York Times*, 13 September 1970.

¹⁶⁴ Friedman, 'A Friedman Doctrine -The Social Responsibility of Business is to Increase its Profits' 1

As early as the 1930's, informed by the devastation occasioned by the financial crash of 1929, a number of major companies, including General Electric, recognized that there were other persons besides shareholders whose actions affected the corporation and whose lives were in turn, affected by the corporation.¹⁶⁵ In particular, customers, employees and the wider community were recognized as actors whose interaction with the corporation is felt.¹⁶⁶ It was not until 1963, however, that the term stakeholder, used to collectively to refer to these actors was used in that sense. The first known official use of the term stakeholder was at a conference organized at the Stanford Research Institute in 1963.¹⁶⁷ The term was used to refer to “all groups on which an organization is dependent for its survival.”¹⁶⁸ About two decades later, Edward Freeman popularized the term when he developed what is today known as the stakeholder theory with the publication of his book, *Strategic Management: A stakeholder Approach* in 1984. In Freeman's words, “stakeholders were individuals who stood in a certain relationship via membership in some group, or via some role-related activity; to the corporation.”¹⁶⁹ He based his theory on the proposition that “once they (stakeholders) are seen as moral beings, without moral immunity, initially on the same rather level playing field. The question becomes, what principles should govern their interaction?”¹⁷⁰

In a defence of Stakeholder Theory, Thomas Donaldson and Lee Preston¹⁷¹ described the theory as a multi-faceted one and which can therefore serve different functions. First, they describe the theory as being instrumental, in that it provides a basis by which the corporation's interactions with its stakeholders relates to the achievement of that corporation's objectives of

¹⁶⁵ Boucher MB & Rendtorff JD, *Stakeholder Theory: A Model for Strategic Management*, Springer Ethics Briefs, 2006, 5.

¹⁶⁶ Boucher & Rendtorff, *Stakeholder Theory: A Model for Strategic Management*, 5.

¹⁶⁷ Boucher & Rendtorff, *Stakeholder Theory: A Model for Strategic Management*, 1.

¹⁶⁸ Boucher & Rendtorff, *Stakeholder Theory: A Model for Strategic Management*, 1.

¹⁶⁹ Freeman E, 'The Politics of Stakeholder Theory: Some Future Directions' *Business Ethics Quarterly* 4(1994),3 Cambridge University Press.

¹⁷⁰ Freeman E 'The Politics of Stakeholder Theory: Some Future Directions' 5.

¹⁷¹ Donaldson T & Preston L E, 'The Stakeholder Theory of the Corporation: Concepts, Evidence & Implications' *The Academy of Management Review*,20 (1995) 65-91.

development and survival.¹⁷² They also refer to it as a descriptive theory, owing to the fact that it proposes a model that explains the nature of the corporation by defining the constitutive pokes on the wheel.¹⁷³ In doing so, it presents the corporation as a function of different cooperative and competing interests, all of which have intrinsic value independent of one another.¹⁷⁴ Lastly, they suggest that the theory is a managerial one, because in addition to describing the corporation and providing a means by which to assess the effect of its stakeholder management approach, it also recommends ways in which such stakeholder management can be structured, altered or improved.¹⁷⁵

The crux of the theory is that a company is not exclusively interested on the needs of its shareholders, which almost always are to do with making of profit, but also on the needs of other persons who affect the corporation's survival. To an extent, the stakeholder theory views an exclusive focus on shareholder interest as a short - term strategy.¹⁷⁶ The theory proposes a long - term strategy, where a company creates value not just for shareholders but also for the community in which it operates.¹⁷⁷ In this way, a company in a sense "invests" in that community, thereby ensuring its long - term survival by earning the support and loyalty of stakeholders. The corporation's focus is not just its place in the market but also in the society. The stakeholder theory thus supports the principle that corporations ought to be concerned about the rights of the people within the eco-system they operate. For purposes of this study, the stakeholder theory thus supports the proposition that corporations ought to support the rights of Kenyans' access to information under Article 35. Under the stakeholder theory, corporations must ensure that the mandatory provisions of Article 10 (1) and Article 10 (2) of the Constitution are implemented by impressing upon the Government of Kenya to govern

¹⁷² Donladson T & Preston E, 'The Stakeholder Theory of the Corporation: Concepts, Evidence & Implications.'

¹⁷³ Donladson T & Preston E, 'The Stakeholder Theory of the Corporation: Concepts, Evidence & Implications.'

¹⁷⁴ Donladson T & Preston E, 'The Stakeholder Theory of the Corporation: Concepts, Evidence & Implications.'

¹⁷⁵ Donladson T & Preston E, 'The Stakeholder Theory of the Corporation: Concepts, Evidence & Implications.'

¹⁷⁶ Boucher & Rendtorff, *Stakeholder Theory: A Model for Strategic Management*, 1.

¹⁷⁷ Boucher & Rendtorff, *Stakeholder Theory: A Model for Strategic Management*, 1.

petroleum industry in a transparent and accountable manner in strict adherence of the principles of national governance. The researcher argues that through the stakeholder theory, investors in the petroleum industry can require the Kenyan government to implement Article 69 the Constitution and petroleum laws in best interest of the stakeholders for whom those provisions were intended to benefit. Article 69 of the Constitution requires the state to-

“(a) Ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and to ensure the equitable sharing of accruing benefits; [...]

(h) utilise the environment and natural resources for the benefit of the people of Kenya.”

It is through observance of the stakeholder theory that corporations would benefit from the success of its stakeholders in turn improving the transparency and competitiveness of the Kenyan upstream petroleum industry.

Boucher & Rendtorff have suggested that Freeman’s stakeholder theory developed as a narrative to understand and remedy three challenges businesses encountered in a dynamic world; the challenge of comprehending value creation and trading; the challenge of incorporating ethics into capitalism and the challenge of engaging management personnel and employing management systems that understand the need for meeting the first two challenges.¹⁷⁸

Upstream petroleum companies are corporations properly so called; with a primary obligation to its shareholders and obligations to its stakeholders. When in the country, the writer proposes that its stakeholders include the community in which it is in direct contact and the people of Kenya, seeing as they enter agreements with the government. In fact, it is arguable that the

¹⁷⁸ Parmar B, Freeman E, Harrison JS & 2 Others, ‘Stakeholder Theory: The State of the Art’ *The Academy of Management Annals*, (2010) 5.

Petroleum Act embraces the stakeholder theory when it provides for Local Content and Training requirements. The Act, at Section 50, provides that a local content plan should address: employment and training; research and development; technology transfer; industrial attachment and apprenticeship; legal services; financial services; insurance services; succession plans for positions not held by Kenyans; consultancy services; construction services; hospitality services; transport services; security services; clearing and forwarding services; inspection services; and other goods, works and services as may be prescribed in the regulations.

The Researcher proposes that in addition to the above specific requirements, another way in which upstream petroleum companies can serve the community and Kenyan citizens at large is to maintain a policy of transparency, which includes contract disclosure. It is only when armed with contract details that the public can put the government to account on its operations in the sector. This would, unlike the activities listed in the act, serve to improve the quality of governance, cut down corruption and improve government accountability. On the other hand, the corporation would benefit from gaining the public's trust, loyalty and in future, might be preferred for future activities.

The Writer appreciates that when contracting with a government, a corporation's choice of contract disclosure might be prevented by that government based on its policies or lack thereof. In the context of petroleum companies however, it has always been the case that when negotiating with lower income countries such as Kenya, they have the upper hand because of their financial muscle and technical resources which low - income countries often lack. As such, it is a plausible proposal that should a company be in favour of contract disclosure, not only is it possible to find a way to do so, it is also likely that such a corporation would have a positive influence on a government's own transparency.

2.4. Practical link between conceptual and theoretical frameworks to Kenyan law

There is written provision within the laws of Kenya that expressly requires the state or upstream petroleum companies to disclose or publish the terms of a production sharing agreement concluded between them. The Researcher will show, through an exhaustive analysis of the Constitution and the Petroleum Act that between the constitutional and statutory provisions requiring the state to act in a transparent manner upholding good governance and the constitutional guarantee of every citizen's right to information held by the state, the state ought to utilize natural resources for the benefit of all Kenyans to whom it owes a duty in line with Thomas Hobbes' stakeholder theory.

This part of the study also shows that Kenya does have a robust framework upon which contract disclosure can be based and even demanded, al be it to a limited degree relative to non-citizens.

2.4.1. Constitutional Framework

The Constitution of Kenya, being the fountain from which the legitimacy of all other laws flow sets down the basis of a statutory framework for contract disclosure in addition to having provisions which might be interpreted as providing for contract disclosure themselves. The Researcher submits that the following Articles are relevant to contract disclosure.

2.4.1.1. Inclusion of Transparency among Kenya's National Values

Article 10 (2) (c) of the Constitution includes, among the national values that are to guide every state actor in the interpretation and implementation of the constitution and public policy decisions, the values of good governance, transparency, integrity and accountability.

Contract disclosure is an element of transparency that would arm Kenyan Citizens with the tools to test the government's accountability. This kind of interaction between the government and its people would surely, if slowly, advance the principle of good governance and foster an environment in which integrity can flourish.

2.4.1.2. Definition of Minerals and Mineral Oils as Public Land

Flowing from the learnings of the Social Contract theory, evidence of constitutional provisions made for the benefit of the people is in the constitutional provisions relating to land which require that the land upon which oil is found automatically becomes public land, by virtue of Article 62 (1) (f) of the Constitution. Under the constitution, all minerals and mineral oils are defined as part of public land. Article 62 (3) elaborates the previous provision further by providing that Public land classified under clause (1) (f) vests and is held by the national government in trust for the people of Kenya. This provision also requires that public and be administered on their behalf by the National Land Commission.

Having already established that the Constitution puts land upon which petroleum is found in the hands of the National government, to hold in trust, or in other words, on behalf of the Kenyan people, it would follow that, even without Article 35 which guarantees Kenyan citizens a right of access to information (discussed below), Kenyans would still have grounds upon which to ask the representative government they have put in power to account for how it has decided to utilize, and the terms upon which it has decided to utilize, the land that it holds in trust for them. This lends credence to the Stakeholder Theory discussed above, where Hobbes recognised that power is exercised on behalf of the people. In an ideal setting, the fact of transparency being a national value should give impetus to the government to disclose the contracts even without being prompted to by its citizens.

2.4.1.3. Right of Access to Information

Further evidence of the practical link to the Stakeholder Theory in Kenyan law is found at Article 35 of the Constitution which bestows upon Kenyan citizens the right of access to information. This article gives every citizen the right of access to (a) information held by the State; and (b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

The exercise of power for the benefit of the people under the Social Contract and Stakeholder theories can best be seen in Article 35 (3) which is instructive towards the thesis of this study. It lays a basis for the publication of petroleum contracts as it requires the state to publish and publicise any important information affecting the nation. Natural resources are an important part of Kenya's national wealth and are held by the state in the interest of the people. This means that Kenyans have the right to information held by the state including petroleum agreements entered by the state on behalf of Kenyans.

To actualize these constitutional provisions, Parliament enacted the Access to Information Act in 2016.¹⁷⁹ The Act elaborates upon and provides a framework upon which Kenyan citizens might take advantage of the rights embodied in Article 35. Most usefully, it also provides instances in which the rights contained therein might be limited. A plain reading of Article 35 of the of Kenya also reveals that the right to information cannot be enjoyed by non-citizens. This in effect excludes a crucial set of stakeholders in the upstream oil and gas industry, that is, international oil companies and foreign investors in oil exploration and production.

In the case of *Republic v Cabinet Secretary, Ministry of Information & Communication & 10 others Ex Parte Adrian Kamotho Njenga*.¹⁸⁰ Odunga J analyzed the rationale for right to access information as enshrined in the constitution of Kenya. In doing so, he relied on the words of Majanja, J in *Nelson O Kadison vs. The Advocates Complaints & Another NBI HC Petition No. 549 of 2013* where he stated as follows:

“The right of access to information is one of the rights that underpin the values of good governance, integrity, transparency and accountability and the other values set out in Article 10 of the Constitution. It is based on the understanding that without

¹⁷⁹ Act No. 31 of 2016.

¹⁸⁰ [2015] eKLR

access to information the achievement of the higher values of democracy, rule of law, social justice set out in the preamble to the Constitution and Article 10 cannot be achieved unless the citizen has access to information.”

Majanja J’s holding above, which is supported by another judge of the High Court of Kenya, Odunga J, demonstrates the importance of the right to information as enshrined in the constitution and the bearing it has on the principles of transparency, integrity and good governance by state officers and state organs.

Section 4(2) of the Access to Information Act renders the rights protected by Article 35 inviolable by providing that every citizen's right to access information is not affected by any reason the person gives for seeking access or the public entity's belief as to what are the person's reasons for seeking. It is thus arguable that the right of every citizen to access petroleum agreements is supported by the Social Contract theory and the Stakeholder theory as these laws have been repeatedly identified as being in existence for the benefit of the people.

In giving effect to the above provisions, the High Court in *Katiba Institute v President’s Delivery Unit & 3 others*,¹⁸¹ observed that “on the above basis, the right to access to information is inviolable because it is neither granted nor grantable by the state. This is a right granted by the Constitution and is protected by the same Constitution.”

The court went on to quote the case of *Nairobi Law Monthly v Kenya electricity Generating Company & 2 Others*¹⁸² where it was stated that:

“34. The...consideration to bear in mind is that the right to information implies the entitlement by the citizen to information, but it also imposes a duty on the State with regard to provision of information. Thus, the State has a duty not only to proactively publish information in the public interest-this, I

¹⁸¹ [2017] eKLR.

¹⁸² [2013] eKLR.

believe, is the import of Article 35(3) of the Constitution of Kenya which imposes an obligation on the State to ‘publish and publicize any important information affecting the nation’, but also to provide open access to such specific information as people may require from the State...

36. The recognized international standards or principles on freedom of information, ... include maximum disclosure: that full disclosure of information should be the norm; and restrictions and exceptions to access to information should only apply in very limited circumstances; that anyone, not just citizens, should be able to request and obtain information; that a requester should not have to show any particular interest or reason for their request; that ‘Information’ should include all information held by a public body, and it should be the obligation of the public body to prove that it is legitimate to deny access to information.

The researcher recognizes that the right to information is a constitutional right accorded to citizens of Kenya only and this excludes international investors, and prospective or existing international oil exploration and production companies who do not qualify as citizens of Kenya. The upshot of the citizen criteria is inevitably to lock out non-citizens from reliance on Article 35 for purposes of enforcing the right to access to petroleum agreements.

The limited application of the right to access to information to citizens was the subject of a court decision in *HCIG-Energy Investment Co. Ltd and Liketh Investment Kenya Limited (HCIG Consortium) v Ministry of Energy & Petroleum Contracting Authority & 5 others*¹⁸³ where M Ngugi J relied on the High Court decision of Majanja J in the case of *Famy Care*

¹⁸³ [2014] eKLR.

*Limited –vs- Public Procurement Administrative Review Board & Another High Court
Petition No. 43 of 2012.* Majanja J held as follows:

“[27] Mr. Mugambi argues that as a citizen, he is entitled to information under Article 35(1). As a citizen, Mr. Mugambi is no doubt entitled to exercise and enforce his constitutionally guaranteed rights. However, in this matter, Mr. Mugambi is not the petitioner but the advocate for the petitioner [...] Mr. Mugambi is not the petitioner and there is nothing in the pleadings that entitles him to act as such. He cannot circumvent the provisions of Article 35(1) by constituting himself as a petitioner and citizen to benefit the petitioner who is not a citizen.”

The Kenyan courts have by virtue of the above decisions breathed clarity into the mandatory exclusion of non-citizens from the right of access to information. The Constitution of Kenya may or may not have unintentionally barred international oil companies and non-Kenyan individual from the right to access of production sharing agreements. It is thus plausible to argue that the Cabinet Secretary may, in deciding whether to allow publication of contracts, interpret the law in a manner that is unfavourable to non-citizens and would be petroleum investors thus undermining competitiveness of the Kenyan upstream petroleum industry.

Section 6 of the Act provides instances in which the right of access to information might be limited. Of the listed instances, the Researcher opines that the one that has a bearing on this work is when such disclosure would substantially prejudice the commercial interests, including intellectual property rights, of that (public) entity or third party from whom information was obtained.¹⁸⁴

It is a notorious fact that the most-cited reason for a failure to disclose contracts in the petroleum, and the extractives industry at large, is the protection of commercial interests. Often,

¹⁸⁴ Section 6(e) *Access to Information Act*.

non-disclosure is usually covered by a confidentiality clause in the contract. It is very likely that the government would rely on this provision to justify a refusal to disclose a petroleum contract. This long-standing argument has however been rebutted by the collective movement towards disclosure in the oil and gas industry which argues that Petroleum contracts are very unlikely to contain commercially sensitive information because these kinds of contract are ordinarily multi-party contracts. In nearly all cases, a government does not enter a contract with one company, it enters a contract with a consortium of companies, each with a role to play. All those parties, and quite possibly their respective allies and subsidiaries are familiar with the terms of that contract. It would be foolhardy for any petroleum company to go into a contract expecting full confidentiality and it is therefore disingenuous, both for the company and the government, to use that confidentiality argument to justify non – disclosure.¹⁸⁵

Moreover, the provisions of Section 6(4) of the Act imply that the exceptions provided by the Act will be applied with some reluctance. The Section provides that despite the designation of some circumstance as an exception, a public entity or private body might nevertheless be required to disclose information where the public interest in disclosure outweighs the harm to protected interests as shall be determined by a Court. Section 6 (6) further elaborates by adding that in considering the public interest referred in subsection (4), particular regard shall be had to the constitutional principles on the need to promote accountability of public entities to the public; ensure that the expenditure of public funds is subject to effective oversight and ensure that any statutory authority with regulatory responsibilities is adequately discharging its functions.

Section 8 of the Act allows members of the Public to request for information from public entities by submitting a written application for the same.¹⁸⁶ The Chief Executive Officer of the

¹⁸⁵ Natural Resource Governance Institute; ‘Contract Transparency: Creating Conditions to Improve Contract Quality’ (June,2018).

¹⁸⁶ Section 8, *The Access to Information Act*.

Public Entity is designated by the Act as an information access officer and is therefore responsible for the processing of requests for information.¹⁸⁷ He may, however, delegate that duty.¹⁸⁸ An application for information is to be processed within 21 days.¹⁸⁹ The Information Officer may decline to disclose the information but must give reasons why and inform the applicant that he or she can appeal such refusal to the Commission on Administrative Justice.

2.5. Conclusion

From the foregoing analysis of the conceptual and theoretical frameworks that support the thesis of this study, it may be concluded that it is in the interest of Kenyans and corporations in the petroleum business to support contract disclosure. It is also beyond discourse that the people of Kenya intended that the Constitution binds all state officers and state organs to exercise state power in a transparent, inclusive accountable and non-exclusive manner for the benefit of the Kenyan people. Every citizen has the right to information and the law affecting the people ought to be interpreted in a manner that benefits the people as envisioned by the Social Contract and Stakeholder theories. The thesis of this study argues that right to transparency, accountability and information ought to be considered when making the decision on whether on whether to publish petroleum contracts. The Stakeholder Theory supports the argument that state power is not exercised in a vacuum and the exercise of power by government ought to have the people in contemplation. The state has a Social Contract with the people for whom it governs petroleum resources. Closely related to the state's social contract with its people is the notion that petroleum corporations owe a larger duty of care to the Kenyan society beyond shareholders at whose behest they invest and do business. This Chapter concludes that petroleum corporations succeed when society succeeds in view of the theories explored. The application of good governance and national values to the management

¹⁸⁷ Section 7(1) *The Access to Information Act*.

¹⁸⁸ Section 7(2) *The Access to Information Act*.

¹⁸⁹ Section 9 *The Access to Information Act*.

of petroleum resources thus benefits the petroleum industry made up of the state, petroleum corporations, and most importantly the society.

This Chapter has also observed that the thesis of the study is potentially undermined by the fact that non-citizens are eligible to rely on the mandatory right to information under the Kenyan constitution. This limitation to the right to information undermines the ability of investors and international upstream oil companies to access crucial information contained in existing petroleum contracts thus diminishing competitiveness.



Chapter 3: Lessons Learnt – Kenya, Ghana & Nigeria

3.1. Introduction

The previous Chapter set out the theoretical and conceptual framework of this study. Chapter 2 delved into the Social Contract Theory and the Stakeholder Theory that underpin the importance of enactment and enforcement of the law for the benefit of the people as propounded by Thomas Hobbes. It examined the link between these two theories as well as evidence of their practical application to the Kenyan situation. In this chapter, a lessons learnt study of the Kenyan petroleum laws against the Ghanaian and Nigerian Petroleum laws is undertaken exploring the gaps that undermine the theories discussed in Chapter 2, specifically the question of petroleum contract disclosure regulations and why it is in each country's interest to publish their petroleum contracts.

This Chapter explores Research Question 3 of this study in order to understand whether there is evidence from other jurisdictions that contract disclosure impacts competitiveness in the national upstream petroleum industry. This Chapter begins by analysing the Kenyan Petroleum Act and the limited discretion it gives the Cabinet Secretary to publish petroleum agreements. The Kenyan legal framework is analysed against the conceptual framework set out in Chapter 2 in order to determine the impact of Kenya's petroleum laws to competitiveness of the national petroleum industry.

The researcher has undertaken a study of the Kenyan petroleum laws against two jurisdictions in this chapter, exploring the lessons learnt in industry competitive forces relative to Ghana and Nigeria respectively, being fellow oil producing countries in Africa. The researcher also chose Ghana as a target to demonstrate evidence of high competitiveness and growth of the Ghanaian petroleum industry attributable to its contract disclosure regime. On the other hand, the

researcher chose Nigeria as a second jurisdiction Kenya can learn from due to the similarity in petroleum laws that restrict or discourage the publication of petroleum agreements. This chapter explores lessons on decreased competitiveness in Nigeria that is likely attributable to the absence of robust contract disclosure regulations, an important question to this study.

3.2. Kenya

In Chapter 2 of this study, the researcher examined the constitutional basis for contract disclosure being the right to access to information under Article 35 and the principles of transparency and accountability in national governance under Article 10 (2). This part of the study examines the basis as well as the gaps in Kenyan national legislation relating to contract disclosure relative to Ghana and Nigeria. This part also analyses the reasons why Kenyans are entitled to publication of petroleum agreements and the limitations to those rights as further observed by the courts of law.

3.2.1. The Petroleum Act, No. 2 of 2019

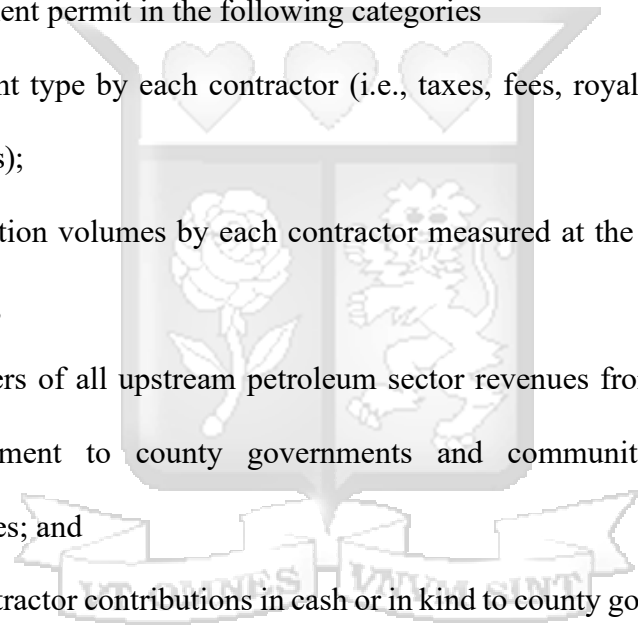
The Petroleum Act is the substantive law that governs the petroleum industry in Kenya. From the outset, it should be noted that the Act is still relatively new, having come into effect on 28th March 2019. Its novelty has lasted much longer than most statutes with minimal implementation in relation to the upstream petroleum industry, possibly owing to the general lull in global activity in 2020 due to the Covid 19 pandemic. As such, the tensile strength of its provisions is yet to be tested by practical application or litigation.

The Act provides for disclosure and general transparency both in express terms and by implication. Section 119 of the Act is the clearest provision on contract disclosure that Kenya has. It reads as follows:

119. (1) In accordance with this Act, the Cabinet Secretary shall develop a framework for reporting, transparency and accountability in the upstream

petroleum sector, which includes the publication of all petroleum agreements, records, annual accounts and reports of revenues, fees, taxes, royalties and other charges, as well as, any other relevant data and information that support payments made by the contractor and payments received by the national government, county governments and local communities.

(2) For reporting purposes, the transparency and accountability framework for the upstream petroleum sector shall be disaggregated into each petroleum agreement, nonexclusive permit, drilling permit, production permit, and plug and abandonment permit in the following categories

- 
- i) payment type by each contractor (i.e., taxes, fees, royalties, and other charges);
 - ii) production volumes by each contractor measured at the delivery point of sale;
 - iii) transfers of all upstream petroleum sector revenues from the national government to county governments and communities, including royalties; and
 - iv) all contractor contributions in cash or in kind to county governments and local communities.

While the Cabinet Secretary is yet to develop the framework referred to in the Act, there is no question that Kenya's petroleum industry, nascent as it is, is going to be one where disclosure is the norm. Section 119 leaves no room for obfuscation and it can only be hoped that when the Cabinet Secretary develops the necessary framework, it will be in furtherance not in curtailment of the provisions of Section 119.

Another relatively express provision is Section 17(1) which provides that where the national government enters into a petroleum agreement under the Act, it shall do so fairly, equitably, transparently, competitively and cost effectively.

In addition to the above sections which might be said to relate directly to contract disclosure, it is worth mentioning that the Act also mandates disclosure in the issuance of non-exclusive exploration permits and also further ensures public awareness of the contracting process by requiring that the petroleum contracts be ratified by Parliament.

3.2.2. Issuance of Non-Exclusive Exploration Permits

According to Section 23 (1) of the Act, the Authority may issue an applicant with a non - exclusive exploration permit and the Energy and Petroleum Regulatory Authority may impose such conditions as it may deem fit on the permit. Subsection 2 requires the Authority to give access to information relating to non-exclusive exploration permits that have been issued under the Act to an applicant for such information. The Authority shall also inform each County Government affected by the non-exclusive exploration activities of the nature and status of such non-exclusive exploration activities.¹⁹⁰

On the issuance of permits, the Act goes beyond securing a citizen's right to information and provides for the right of that citizen to participate in the process leading up to the issuance of such permit. Section 23(8) provides that the Authority, in collaboration with the contractor and any other relevant stakeholder, shall give the local community in a place where upstream petroleum operations are to be permitted adequate opportunity to participate in the process of reviewing and awarding permits under the Act. The Authority is required to carry out public participation through such means as may be necessary to ensure that the citizens within the respective county and the relevant stakeholders:

¹⁹⁰ Section 23(3).

- i) are informed of any decision to be undertaken under this Act which affects them;
- ii) have sufficient notice of at least twenty-one working days of any decisions to be made or permits to be issued which may affect them; and
- iii) have an opportunity to obtain information with respect to any permit issued or decision made under sub-paragraph (i) or to submit their concerns or any information that they may have with respect to the issue under consideration;

The Authority shall also publish any notices required for the purpose of informing the public through such forums including at least one newspaper of local circulation within the local community which is to be affected by the issue under consideration.

Contract disclosure by the state can serve some useful practical purposes such as preventing allegations of collusion or opaqueness in contractual engagements between the state and petroleum corporations. This risk can be best understood from the Court of Appeal Case of *Africa Oil Turkana Limited (previously known as Turkana Drilling Consortium Ltd) & 3 others v Permanent Secretary, Ministry of Energy & 17 others*.¹⁹¹ This case arose from a dispute between the Interstate Petroleum Company Limited formerly Interstate Mining Company (Interstate) and the Permanent Secretary (PS) Ministry of Energy whereby Interstate sought the court's intervention to compel the PS to make full disclosure regarding information given to it by Interstate relating to samples of "a substance suspected to be crude oil" that Interstate claimed to have obtained in the course of its drilling programmes in Turkana and West Pokot areas of the Rift Valley. It was Interstate's case that it submitted the samples of that substance to the PS in December 2005 requesting the Ministry to carry out chemical analysis. Interstate also claimed to have applied for a non exclusive exploration permit in order

¹⁹¹ [2016] eKLR

to conduct further chemical analysis and to undertake crude reserve quantification feasibility report “as a foundation for a production sharing contract with the Ministry of Energy and its overseas strategic investors.”

Interstate accused the Ministry of Energy of “deceitfully and fraudulently” expropriating and misappropriating its secrets and “clandestinely” issuing exploration permits to other petroleum exploration companies. Interstate also alleged that the PS “fraudulently sold out the secrets and transferred the benefits” accruing to Interstate to third party petroleum investors. In response, the PS and third-party investors who were jointly sued in the matter argued that the PS could not be compelled to exercise its statutory discretion.

It was PS’ case that knowledge regarding possible existence of crude oil deposits in the area predated the alleged “discovery” of crude oil by Interstate which was in itself “publicly available” information. The PS argued that third parties “had entered into production sharing contracts with the Minister which had nothing to do with the samples submitted for analysis by Interstate.”

The court dismissed Interstate’s application on the grounds that it had not followed the procedures laid down in the Petroleum Act in seeking an exploration permit and a petroleum production sharing agreement. The court did not enter into the questions surrounding the substance of the agreements entered by the state.

From the above case, it is arguable that if the law provided a mandatory requirement for disclosure of petroleum contracts, the applicant in the above case need not have gone to court and raised a dispute over the alleged secrecy of the agreements entered between the state and the third-party petroleum companies.

The researcher makes no inference or opinion as to whether Interstate’s or the PS’ and other partys’ allegations in the above case had any basis in fact or in law. Besides, the matter was always a judicial review case that by its very nature, tests administrative procedure as opposed

to merit.¹⁹² That notwithstanding, it is arguable that the direction of the Minister to refuse to disclose petroleum contracts can potentially be a deterrent to interested petroleum investors who may entertain suspicion of collusion, conspiracy and secrecy in the contents of a given production sharing agreement. This in effect breeds an unfavourable business environment where lack of transparency and accountability becomes a barrier to entry into the Kenyan upstream petroleum industry.

The study argues that the significance for contract disclosure regulations is high in determining the question of Kenya's competitiveness in relation to the forces enunciated by Michael Porter in Chapter 2 including government policy and regulation. The Petroleum Act can be argued to be a barrier to entry that undermines Kenya's competitiveness in the upstream petroleum industry.

3.2.3. The Model Production Sharing Contract

As an annexure to its provisions, the Petroleum Act provides a template for a production sharing contract that may be used as a guide by persons drafting such a contract. The Model contract is particularly instructive on the nature of provisions that might be found between the government and petroleum corporations. This model contract is important to this study as it contains key provisions in particular under Clause 49 on confidentiality that relate to the issue of contract disclosure, a relevant matter in this study.

Clause 49 is reproduced below for a clear understanding of its implications to this study:

49. Confidentiality

1. All information (including the data, samples and reports referred to in clauses 14 and 15) which the contractor may supply to the Government under this contract shall be supplied at the expense of the contractor.

¹⁹² [2016] eKLR

2. The parties shall keep the information that the other party may supply under this contract confidential and shall not disclose it to any other person other than to a person employed by or on behalf of the party except where such information is required to be published in accordance with the provisions of the Constitution or by a lawful order issued by a court of competent jurisdiction to disclose, except with the consent of the other party which consent shall not unreasonably be withheld.
3. Notwithstanding sub-clause 49(2), the Cabinet Secretary may use any information supplied, for the purpose of preparing and publishing reports and returns required by law, and for the purpose of preparing and publishing reports and surveys of a general nature.
4. The Cabinet Secretary may publish any information which relates to a surrendered area at any time after the surrender, and in any other case, three (3) years after the information was received unless the Cabinet Secretary determines, after presentation by the contractor, that a longer period shall apply.
5. This contract is a public document, and the Government shall have the right to publish and keep it publicly available. The Government may publish such information concerning this contract as may be required by the laws of Kenya, including for purposes of obtaining ratification of the contract by Parliament in accordance with Article 71 of the Constitution, or in accordance with internationally accepted standards and norms concerning transparency in the extractive industries.

The Researcher submits that Clause 49 particularly the confidentiality clauses leave room for discretionary disclosure of petroleum contracts by the Government of Kenya. The sole fact that

the model contract is a public document makes a case for disclosure or publication but subject to the wishes of the state. The state has a “right” to disclose the contract under Clause 49 (5) but not a “duty” contrary to Article 35 of the constitution on the right to information of every citizen and Article 10 on mandatory principles of national governance that include transparency.

It is arguable that the purpose of the above Clause is to allow corporations to protect trade secrets and intellectual property details on one hand, in the limited cases where such protection might be needed while on the other hand allowing the Government to discharge its duty to ensure transparency by publication of the model contract. This argument notwithstanding does not take away from the risk that the Clause may potentially be interpreted in favour of the selfish interests of non-transparent officers in government or private interests of dishonest third parties who may or may not be party to a petroleum agreement.

The limitations of Clause 49 are clear in terms of the wording of the model contract particularly Clause 49 (2) which requires parties to a production sharing contract to keep the contents of the contract confidential as against third parties. Other petroleum investors and ordinary Kenyans are in effect locked out by this clause. This study submits that Clause 49 of the model contract is a restrictive clause that poses a risk of abuse and concealment of material contracts potentially hindering entry into the market by other industry players thus undermining competitiveness within the meaning of Porter’s definition of competitiveness.¹⁹³

3.2.4. The EITI Principles vis a vis Kenya’s legal position on contract disclosure

EITI is a voluntary initiative started by oil producing states in the interest of transparency in the oil and gas sector. These principles are twelve in number, four of which relate to transparency. The first of the four principles relevant to this study is Principle No. 5¹⁹⁴ which

¹⁹³ Porter M E, ‘The Five Competitive Forces that Shape Strategy’ *Harvard Business Review* (1979) 5

¹⁹⁴ <https://eiti.org/h> accessed 20 January 2020

underlines the importance of transparency by governments and companies in the extractive industries and the need to enhance it in public financial management. The Kenyan Petroleum Act does not specifically underscore the importance of transparency in public financial management. This is however a constitutional national value of governance recognized under Article 10 (2).

Principle No.6 recognises that achievement of greater transparency must be set in the context of respect for contracts and laws and accountability. This principle is instructive in this study as it underpins the standards required of member states in relation to contract disclosure regulations. Kenya does not have mandatory contract disclosure requirements as compared to Ghana as further analysed in Chapter 3 of this study.

Principle No.9¹⁹⁵ of EITI reaffirms the commitment of member states to encourage high standards of transparency and accountability in public life, government operations and in business. This principle resonates most deeply with Article 10 (2) of Kenya's constitution that prescribes transparency and accountability as principles of national governance.

Principle No.10¹⁹⁶ is more specific on the extent of transparency expected in relation to fiscal matters. This principle affirms the belief of member states in a broadly consistent and workable approach to the disclosure of payments and revenues required, which is simple to undertake and to use. Disclosure of payments and revenues is a mandatory requirement in Ghana but not a requirement in Nigeria. In Kenya, the constitution

¹⁹⁵ <https://eiti.org/h> accessed 20 January 2020

¹⁹⁶ <https://eiti.org/h> accessed 20 January 2020

entitles citizens to information under Article 35 whereas the state has the prerogative to deny Kenyans such information under the Petroleum Act.

The EITI initiative recommends that transparency and accountability be entrenched in the petroleum laws of oil producing countries in order to secure the economic interests in the natural resources held in trust for their citizenry.¹⁹⁷

It also abundantly clear that Kenya requires contract disclosure regulations that are more robust and mandatory in nature to ensure that where government is reluctant to publish petroleum agreements, Kenyan citizens are empowered to demand such disclosure.

3.3. Ghana

Unlike Kenya which only started its oil exploration programmes about 50 years ago,¹⁹⁸ Oil and gas exploration in Ghana can be traced back to the late 1800s, with the pioneer of hydrocarbon exploration being the West Africa Oil and Fuel Company.¹⁹⁹ It was however only in 2007 that Ghana discovered oil in commercially viable quantities.²⁰⁰ Just five years before oil was first discovered in Lokichar, Turkana, Kenya. Key industry actors in the Ghanaian oil market include the Ghana National Petroleum Corporation (GNPC), Tullow Oil Plc and Kosmos

¹⁹⁷ Kenya Civil Society Platform on Oil and Gas (KCSPOG), *Setting the Agenda for the Development of Kenya's Oil and Gas Resources: The Perspectives of Civil Society* (2014) 37.

¹⁹⁸ nationaloil.co.ke/upstream/#:~:text=Petroleum%20Exploration%20in%20Kenya%20began,majority%20withi n%20the%20Tertiary%20Rift.

¹⁹⁹ 'Ferdinand Adadzi and Nana Serwah Godson-Amamoo: The Oil and Gas Law Review: Ghana' *AB & David Law Affiliates*, 17 November 2020 <https://thelawreviews.co.uk/title/the-oil-and-gas-law-review/ghana> 24 March 2021.

²⁰⁰ 'Ghana's Oil Boom: A Readiness Report Card' *Civil Society Platform on Oil and Gas – Ghana*, 11 April 2011 <https://s3.amazonaws.com/oxfam-us/www/static/oa3/files/ghana-oil-readiness-report-card.pdf> on 23 March 2021, iv.

Energy.²⁰¹ This is similar to Kenya where the key players include Tullow Oil Kenya (BV) Limited but the state operates through the Kenya Ministry of Energy and Petroleum.²⁰²

The comparison between Kenya and Ghana is relevant to this study as it aids in identifying gaps that the Kenyan Petroleum Act has around the area of petroleum contract disclosure and how another African country has filled such gaps for the benefit of its industry.

3.3.1. Legislative framework

The Ghanaian legal framework governing the oil and gas sector has undergone changes since 2007. Commercial oil production in Ghana preceded legislation with the market operating for several years with neither an enabling legislation nor an independent industry regulator.²⁰³ This situation is very similar to Kenya's experience where the state entered petroleum agreements under a vintage petroleum law until the year 2019 when the Kenyan Petroleum Act was passed by parliament. The difference however is that various attempts at developing legislation around contract disclosure were made but not finalised by Ghanaian government during the period between discovery of oil and production.²⁰⁴

Some of the bills previously proposed before parliament but not passed include the Petroleum Revenue Management Bill in 2010 and the Petroleum Exploration and Production Bill which followed.²⁰⁵ The former bill was enacted in 2011 and came with several provisions on accountability for petroleum revenues. In 2015, the Petroleum Revenue Management (Amendment) Act was enacted to deal with deficiencies that existed in the previous Act.

²⁰¹ 'Simplified Guide to the Petroleum Revenue Management Law in Ghana' *Public Interest & Accountability Committee*, June 2017
https://www.piacghana.org/portal/files/downloads/simplified_guide_to_ghana%27s_petroleum.pdf 26 March 2021, 8.

²⁰² nationaloil.co.ke/upstream/#:~:text=Petroleum%20Exploration%20in%20Kenya%20began,majority%20withi n%20the%20Tertiary%20Rift.

²⁰³ 'Ghana's Oil Boom: A Readiness Report Card'.

²⁰⁴ 'Ghana's Oil Boom: A Readiness Report Card', vi.

²⁰⁵ 'Ghana's Oil Boom: A Readiness Report Card' vi.

Unlike in the Kenyan situation, it is clear to the researcher that from Ghana's efforts to pass legislation on transparency in the upstream petroleum industry that Ghana's parliament intended for very minimal discretion on the part of the state to restrict publication of petroleum contracts including those that were entered by the state before publication of a new petroleum regime.

The Ghanaian petroleum legislation has been lauded for being one of the most progressive ones in Africa.²⁰⁶ Even the unamended 2011 Act introduced useful provisions in a bid to promote transparency of the petroleum sector, despite its deficiencies. For example, the Act required the publication of petroleum receipts in the newspapers and mandated the Minister for Finance to provide quarterly reports to Parliament, records of which were required to be made public.²⁰⁷ In contrast, the repealed Kenyan Petroleum (Exploration and Production) Act²⁰⁸ that was in force at the time of discovery of oil in the year 2012 made no provision for publication of contractual or other technical information to the public in relation to production sharing agreements in Kenya. Ghana has thus always been a step ahead of Kenya on the issue of publication of information to the public regarding petroleum undertakings.

3.3.1.1. Petroleum (Exploration and Production) Act

In 2016, Ghana made significant progress towards improving transparency and disclosure in its petroleum sector by enacting into law the Petroleum (Exploration and Production) Act.²⁰⁹ The Act would mark a huge milestone in Ghana's upstream oil and gas legislative framework, bringing forth some laudable provisions that may have contributed to the country's success in the oil and gas market in Africa and globally. This section provides an overview of the key provisions of the Ghanaian Petroleum (Exploration and Production) Act and their import.

²⁰⁶ Ghana's Oil Boom: A Readiness Report Card' vi.

²⁰⁷ *Petroleum (Exploration and Production) Act* (Act No. 815 of 2011).

²⁰⁸ *Kenya Petroleum (Exploration and Production) Act*, Cap 308 (1986).

²⁰⁹ *Petroleum (Exploration and Production) Act* (Act No. 919 of 2016).

a. The petroleum agreement

The Ghanaian Petroleum (Exploration and Production) Act is similar to the Kenyan Petroleum Act in terms of providing guidance by way of a model petroleum agreement that ought to be used by the state and contracting petroleum corporations.²¹⁰ It is an express requirement of the Ghanaian Act that a petroleum agreement must be entered into only after an open and transparent process involving an open competitive tender has been effected.²¹¹ This is similar to the Kenyan Petroleum Act which makes a similar mandatory requirement for transparency and openness in the award of Petroleum Agreements.²¹² The difference however is that in Ghana, the Minister may decide to enter into an agreement with any other petroleum company other than the one competitively selected.²¹³ To further bolster the transparency measures, there is a requirement that all invitations to tender be made public, including publishing it in the National gazette and other media communication outlets.²¹⁴

Both Kenya and Ghana have a mandatory requirement providing that contracts in respect of natural resources must be ratified by parliament. This is in itself a useful provision that makes a good case for publication of petroleum contracts. This is because in both states, the proceedings of parliament are publicly available.

It is thus arguable that best practice based on the remarkable similarity from both Kenya and Ghana requires that the public participates in the entry into petroleum agreements through elected representatives. This is inference important to this study as it supports the notion that the Kenyan cabinet secretary ought not to have discretion to restrict the publication of any petroleum agreement.

²¹⁰ Sections 10-20, *Petroleum (Exploration and Production) Act* (Act No. 919 of 2016).

²¹¹ Section 10, *Petroleum (Exploration and Production) Act*.

²¹² Section 17 (1) *Kenya Petroleum Act (No. 2 of 2019)*.

²¹³ Section 10, *Petroleum (Exploration and Production) Act*.

²¹⁴ Section 10(6), *Petroleum (Exploration and Production) Act*.

b. Petroleum exploration

In Ghana, petroleum agreements include exploration agreements which are subject to publication by the state.²¹⁵ Such agreements may be entered for a period of seven years subject to extension at the discretion of the state.

c. Production activities

The law relating to contract disclosure in Ghana is quite robust in contrast to Kenya and there is evidence of a clear intention by parliament to entrench mandatory contract disclosure provisions into the law. Ghana's approach is a departure to the Kenyan approach which leaves discretion to the minister to create a framework for transparency in the petroleum industry. The Ghana Petroleum (Exploration and Production) Act's key provisions on contract disclosure in the upstream petroleum industry are governed by sections 26 to 37 of the Act and complemented by the provisions of the Model Petroleum Agreement. The Ghanaian Act requires all petroleum exploitation to follow the principle of sustainability, as per section 26. Further evidence of the strictness of the Ghanaian framework is found at section 27 which mandates contractors to submit their proposed development programme to the Minister before commencing any production. This plan is required to be accompanied by an environmental report that contains information including the commerciality of reserves and completion plans.²¹⁶

d. Data, records and public registers of petroleum activities

Unlike Kenya, the Republic of Ghana owns all the data and information obtained by licensees, contractors or GNPC in respect of petroleum activities. The main contrast between the treatment of data by Ghana and Kenya is that in Kenya, EPRA has the authority to request any

²¹⁵ Sections 21-25, *Petroleum (Exploration and Production) Act*.

²¹⁶ Section 27 (4) – (14), *Petroleum (Exploration and Production) Act*.

person for any data relating to petroleum exploration activities but does not have intellectual property in such data.

The most instructive provisions relating to the publication of data on upstream petroleum activities in Ghana are probably the ones that require petroleum investors to keep records and registers relating to petroleum activities. The Ghanaian Act requires petroleum investors to submit such information to the Commission or Minister upon request as per sections 53 and 54. In addition, the Commission is required to establish and maintain a register of petroleum agreements, licences, permits and authorisations as prescribed by the law.²¹⁷ This forms the basis of the main contrast between Kenya and Ghana in terms of the applicable framework on contract disclosure. In Kenya, there is no such framework in place whereas in Ghana, the register prescribed by law is required to be opened to the public.²¹⁸

In February 2018, the Ghana Petroleum Register was published by the government, and it provided comprehensive documents in respect of 17 “contract areas.” This was a major step in implementing the contractual disclosure requirements under the Act. This study seeks to analyse the impact of Ghana’s bold step towards petroleum contract disclosure to the competitiveness of its national upstream petroleum industry.

3.3.1.2. The Ghanaian Petroleum Revenue Management Act of 2011 (amended in 2015)

Ghana has gone a step ahead of Kenya to ensure that petroleum revenue as a natural resource managed by the state on behalf of the people is utilised for the benefit of its people. The Ghanaian Petroleum Revenue Management Act complements the Ghanaian Petroleum (Exploration and Production) Act,²¹⁹ The Act provides for independent oversight over the

²¹⁷Section 56, *Petroleum (Exploration and Production) Act*.

²¹⁸Section 56, *Petroleum (Exploration and Production) Act*.

²¹⁹*Petroleum Revenue Management Act* (Act 815 of 2011).

collection, allocation and utilisation of Ghana's petroleum revenue.²²⁰ The Act was initially enacted to set up a framework for the regulation of upstream petroleum activities, specifically on the collection, distribution and the management of revenue derived from the sale or other commercial activities of oil and gas resources in Ghana for the sole benefit of Ghanaian citizens.²²¹

This study argues that Kenya can draw important lessons from this Ghana's key Petroleum Revenue Management legislation that complements the Social Contract and Stakeholder theories explored in Chapter 2 of this study in which Thomas Hobbes held that government exercises power for the benefit of its people.

While Ghana's Petroleum Revenue Management Act does not make provisions on contract disclosure, it contains useful provisions requiring transparency in the manner in which oil and gas revenue is used for national development. The Act also contains provisions on coordination among government bodies to ensure dissemination of information relating to petroleum receipts and making this available to the public for their knowledge and consumption.²²²

The Ghana Petroleum Revenue Management legislation is beneficial to Ghana in that it enhances transparency in management of proceeds of petroleum agreements completing the value chain of accountability that is a necessary ingredient for boosting competitiveness as proposed by this study.

This study submits that Kenya ought to enact a substantive law on the collection, distribution and the management of revenue derived from petroleum resources in order to enhance its competitiveness through attraction of new entrants into the industry as envisioned by Porter in Chapter 2 of this study.

²²⁰ *Petroleum Revenue Management (Amended) Act* (Act 893 of 2015).

²²¹ Preamble, *Petroleum Revenue Management Act* (Act 815 of 2011).

²²² Section 8, *Petroleum Revenue Management Act* (Act 815 of 2011).

3.3.1.3. EITI membership

Ghana has been a member of EITI since the year 2007.²²³ Ghana has since formed the Ghana Extractive Industries Transparency Initiative. This has led to Ghana's gradual implementation of the principles set out 3.2.4 in this Chapter above. In 2019, the board of EITI after a validation exercise found that Ghana's implementation of EITI standards had contributed to far reaching reforms within the Ghana upstream petroleum industry. The Board of EITI found that the reforms made by Ghana including petroleum contract disclosure and implementation of a mandatory petroleum register that is accessible online increased the government's revenues from the upstream petroleum sector. The board of EITI commended Ghana for publishing all its oil and gas contracts and making these accessible through online portals. This was recognized as a key step in a government that wants to decrease its reliance on foreign aid.²²⁴

According to GHEITI, in 2018, the extractive sector including oil, gas and mining contributed 13.6% of the Ghana's GDP.²²⁵ Kenya on the other hand is yet to publish any information on commercial success of its sales so far though it started marketing its reserves in 2019, about 7 years after Ghana.

Ghana was found to have made meaningful progress in implementing the recommendations of EITI and such implementation was found to be "well aligned with its national priorities geared towards contributing to the achievement of its Government Economic Transformation Agenda and 'Building a Ghana beyond Aid' using our natural resource wealth as a vehicle."²²⁶

Evidence from GHEITI's reports further indicate that Oil and Gas contributed 3.8% of the national GDP in 2019 (up from 2.1% in 2016). Ghana's oil and gas exports now make up 30%

²²³ <https://eiti.org/ghana> on 28 September 2021.

²²⁴ Extractive Industries Transparency Initiative, 'Board decision on the second Validation of Ghana' Decision reference: 2019-16/BM-42, EITI Secretariat, (2019).

²²⁵ <https://eiti.org/ghana> on 28 September 2021.

²²⁶ <https://eiti.org/ghana> on 28 September 2021.

of total exports from Ghana, an increase from 12.1% in 2016.²²⁷ This news certainly paints a picture of economic success that is consistent with competitiveness. This study submits that the rapid progress observed in increasing the wealth and attractiveness of Ghana's petroleum sector is thus likely to attract new entrants into the industry, a key force of competitiveness according to Michael Porter.

Conclusion:

The foregoing part of this chapter has provided an overview of the Ghanaian legislative framework regulating the petroleum sector in comparison to Kenya. There is evidence from the above analysis that the transparency initiatives in place including implementation of contract disclosure regulations have led to an enhanced level of competitiveness of the Ghanaian upstream petroleum industry. This part has identified some key gaps in Kenya's petroleum legislation by comparing the gains made by the Ghana petroleum industry from legislative initiatives introduced by Ghana. The following part of this chapter will look at an overview of the situation in Nigeria in comparison to Kenya and with a view to exploring the extent to which lack of contract disclosure regulations lead to enhanced competitiveness of national upstream petroleum industries in answer to research question 3 of this study.

3.4. Nigeria

Nigeria is ranked the 13th largest producer of oil in the world and the largest oil producer in the African continent.²²⁸ While this is not a factor that merits comparison with Kenya due to Kenya's relatively new entry into the global oil market, the concept of contract disclosure in Nigeria in comparison to Kenya and Ghana is important towards understanding research question 3 of this study.

²²⁷ <https://eiti.org/ghana> on 28 September 2021.

²²⁸ https://eiti.org/es/implementing_country/32 on 24 March 2021.

Key players in the sector include the state-owned NNPC and its subsidiaries. Playing a significant role in the country's economy, the oil and gas sector in Nigeria makes up for 65% of its overall government revenue while there is no publicly available data of the revenue generated by Kenya's oil and gas sector.²²⁹ Emphasis has been made by the researcher of Kenya's relatively recent discovery of oil.

This study observes that despite Nigeria's large oil production volumes, the country is far from reaching its potential in terms of profit, thanks to several challenges. Corruption has been cited as one of the main challenges facing the petroleum sector in Nigeria.²³⁰ The Nigerian petroleum sector has suffered lack of accountability in use of revenues collected from the sector and challenges around management of the sector itself.²³¹ A look at the legislative framework governing the Nigerian petroleum sector reveals some key gaps and opportunities in comparison to the Kenyan and Ghanaian upstream petroleum laws. There is need for consideration to be given on the value of contract disclosure regulations in the Nigerian upstream petroleum industry.

3.4.1. Legislative framework

The first key contrast between the Kenyan upstream petroleum law and the Nigerian petroleum law is that in Nigeria, the Federal Government is vested with the ownership and control of petroleum as a natural resource.²³² The implications of this observation is that it is arguable that the Nigerian situation contradicts the theoretical framework of this study as enunciated in Chapter 2. This study is supported by the Social Contract and Stakeholder theories that state that the government exercises power for the benefit of the people and not for its own benefit.

²²⁹ https://citi.org/es/implementing_country/32 on 24 March 2021.

²³⁰ Gillies A, 'Reforming corruption out of Nigerian oil? Part one: Mapping corruption risks in oil sector governance', *Bergen: U4 Anti-Corruption Resource Centre*, (2009) *Chr. Michelsen Institute* (U4 Brief).

²³¹ Gillies A, 'Reforming corruption out of Nigerian oil? Part one: Mapping corruption risks in oil sector governance', *Bergen: U4 Anti-Corruption Resource Centre*, (2009)

²³² Section 44(3), *Constitution of Nigeria of 1999* and Section 1, *Petroleum Act* (Act of 1969).

It is thus a fundamental departure from the thesis of the study for the Nigerian government to have full proprietary ownership over natural resources. This would suggest that Nigerians do not have an inherent right to access petroleum contract information as it does not legally vest in them.

The Constitution of Nigeria empowers parliament to enact legislation governing natural resources similar to the situation in Kenya.²³³ This study analyses the law that governs the petroleum sector in Nigeria below.

3.4.1.1. The Petroleum Act of 1969

The 1969 Petroleum Act of Nigeria not only sets out provisions in respect of production and exploration of petroleum in Nigeria, but also contains provisions which are observed by the researcher to vest more powers in the Minister as the main regulator of the industry in contrast to Kenya and Ghana which are partly regulated by powerful National oil companies.²³⁴ The powerful functions and powers of the Minister of petroleum in Ghana may however soon be significantly reduced by the proposed Petroleum Industry Governance Bill which is pending enactment as of the date of this study. The Nigerian petroleum industry is also governed by a National Petroleum Corporation as analysed in the next part below.

This study observes that the current legislative framework in Nigeria is weaker than both the Ghanaian and the Kenyan frameworks as there is neither provision for transparency or disclosure of information in the interest of citizens nor is there access to information on petroleum contracts available different stakeholders and key players in the petroleum sector.²³⁵

The Nigerian situation arguably lays the ground for abuse and economic impropriety in the

²³³ Section 44(3), *Constitution of Nigeria of 1999*.

²³⁴ Transparency Deficits in the Disclosure of Oil Sector Information in Nigeria, 2.

²³⁵ 'Transparency Deficits in the Disclosure of Oil Sector Information in Nigeria' *CSEA*, November 2011 <https://media.africaportal.org/documents/Transparency-Deficits-in-the-Disclosure-of-Oil-Sector-.pdf> 25 March 2021.

Nigerian petroleum industry. Weighed against Porter's five forces of competitiveness, the absence of crucial contractual information prevents new entrants from getting into the Nigerian market. The lack of a robust government policy ensuring a level playing field among petroleum companies is also a threat to the competitiveness of the Nigeria upstream petroleum sector.

3.4.1.2. The Nigerian National Petroleum Corporation Act of 1990

While the Nigerian Petroleum Act provides a framework for the regulation of the petroleum sector, there is inadequate provision on contract disclosure as compared to Ghana and in part, Kenya. The Nigerian National Petroleum Corporation Act of 1990 attempted to make some provisions around accountability. The Act establishes the National Petroleum Corporation (NNPC) and prescribes its functions.²³⁶ Section 7 of the Act requires the Corporation to keep proper accounts and proper records in relation to its work, in a form which conforms with the best commercial standards.²³⁷ It is not very clear which commercial standards are applicable and due to the ambiguity of Section 7, there is no mandatory basis in the Nigerian law to ascertain whether the nature of record keeping required by the law includes records of petroleum agreements let alone the question of whether they should be made public as in the case of Ghana.

3.4.1.3. EITI Membership

Nigeria, like Ghana, is an implementing member of the Extractive Industries Transparency Initiative. It has, unlike Ghana entrenched the standards of EITI into an Act of parliament – the Nigerian Extractive Industries Transparency Initiative Act of 2007. The Act not only establishes the Nigeria Extractive Industries Transparency Initiative (NEITI) but lays a basis for the tasks of the Initiative which are modelled around the EITI initiative just like Ghana. The main function of NEITI is to develop a framework for transparency and accountability in

²³⁶ Section 1, *Nigerian National Petroleum Corporation Act (Act of 1990)*.

²³⁷ Section 7(1), *Nigerian National Petroleum Corporation Act (Act of 1990)*.

the reporting and disclosure by all companies in the extractive industry of revenue paid to or due to the Federal Government.²³⁸

While Nigeria's participation in EITI is laudable, Nigeria is yet to fully implement contract disclosure mechanisms in relation to government-related transactions in the petroleum sector, despite promising, severally, to put the framework in place.²³⁹ Unlike Ghana, Nigeria has no public register, for example, making it difficult for the public, including competing oil investor companies in the petroleum sector to find relevant information.

3.5. Disclosure versus Competitiveness vis a vis the Kenyan, Ghanaian and Nigerian

Situations:

The preceding part has provided an analysis of the legislative framework on petroleum contract disclosure in Kenya, Ghana and Nigeria. This part seeks to further examine research questions 2 and 3, that is, does a contract disclosure framework directly affect a country's competitiveness or that of its industry? Is there evidence of from other jurisdictions, namely Ghana and Nigeria in this regard?

To answer these questions, a look at some oil-related figures of both Ghana and Nigeria is imperative. It is estimated that Nigeria has approximately 40 billion barrels of proven petroleum reserves, producing about 2.5 million barrels in a day.²⁴⁰ The oil and gas sector, in general, accounts for about 65% of the country's total revenue.²⁴¹ While Nigeria has over 50 years of oil exploration under its belt, Ghana only has about 10 years.²⁴² Ghana is a smaller oil producer compared to Nigeria and has a lower production capacity but has experienced an increase in oil and gas export revenues from 12.1% in 2016 to 30% in 2019 relative to the total

²³⁸ Explanatory pre-amble, *Nigerian Extractive Industries Transparency Initiative Act* (Act of 2007).

²³⁹ A 2015 statement by Minister of State for Petroleum Resources is an example.

²⁴⁰ <https://eiti.org/nigeria#overview> on 24 March 2021.

²⁴¹ <https://eiti.org/nigeria#overview> on 24 March 2021.

²⁴² <https://www.nesfircroft.com/blog/2019/02/inside-africas-oil-and-gas-industry-in-2019> on 24 March 2021.

exports revenue from Ghana.²⁴³ Of the three countries under study in this Chapter, Kenya has the least production capacity, at approximately 84 barrels per day.²⁴⁴ This is relative to the available oil reserves as per the information made available by the state and does not necessarily reflect a less competitive industry by that fact alone.

Based on the publicly available statistics on the performance of all the three countries under study and bearing in mind the thesis of this study, it is not possible to draw a direct inference to determine whether the existence or lack of contract disclosure frameworks alone makes one country more competitive than others. There are many factors that would negate the thesis of this study if the competitiveness of the three countries under study were to be compared against each other. For instance, Nigeria is a larger producer of oil thanks to the magnitude of its oil reserves, which Kenya and Ghana cannot compete with. Ghana, on the other hand, has less reserves and lower production capacity but has a framework in place which supports transparency. It can however be argued that Nigeria, a country with a weaker legislative framework on disclosure compared to Ghana, has higher barriers to market entry (insufficient enabling government policy) than Ghana thus negatively affecting its competitiveness. While Ghana's oil production capacity is lower, the country faces less corruption cases in the petroleum sector as opposed to its counterparts' lower barriers to entry and increased threats of new entrants. These factors alone can be argued to enhance the competitiveness of Ghana's petroleum market. Kenya and Nigeria are ranked higher on the corruption index, and one of the main challenges cited as facing the Nigerian oil and gas sector is corruption.²⁴⁵ Following the thesis of this study, it would be correct to infer that Nigeria's petroleum market competitiveness would be improved if a contract disclosure framework were put in place.

²⁴³ <https://eiti.org/ghana> on 28 September 2021.

²⁴⁴ <https://www.worldometers.info/oil/kenya-oil/> on 24 March 2021.

²⁴⁵ <https://eiti.org/nigeria#overview> on 24 March 2021.

Nigeria has achieved progress with its Extractive Industries Transparency Initiative Act in respect of revenues paid or due to the government, more could be done if contract disclosure were to be implemented. This is not to say that Ghana's petroleum industry does not suffer from corruption-related issues. Kenya can learn lessons from the robust framework adopted by Ghana and strengthen its own framework by borrowing what has worked in other markets. It is better to have a contract disclosure framework in place than to have none because laws provide a basis increased transparency hence increased competitiveness.

3.6. Findings of study in this Chapter:

3.6.1. The Impact of contract disclosure regulations

The main finding accruing from the lessons learnt study in this chapter is that based on the Porter's Five Model, contract disclosure has a positive effect on a country's competitiveness as an oil producing country.

This Chapter has examined research question 3 relating to evidence that Ghana has implemented a mechanism for registration of all agreements and access of those agreements by the public which has led to improvement of its competitive forces. This study shows that the institutional transparency mechanisms in the Ghanaian petroleum industry have contributed to a vibrant entry by investors and petroleum exploration companies into Ghana's petroleum market as compared to Kenya which has at some point suffered exit of substantial petroleum companies²⁴⁶ (a force of competitiveness). The researcher found the example of Ghana's competitive upstream petroleum industry useful in supporting the hypothesis that there is a correlation between contract disclosure regulations and competitiveness of a petroleum industry.

²⁴⁶ Dalsan Radio (Mogadishu), Kenya: Oil and Gas Companies Exit Casting Doubt on Commercial Viability, <https://allafrica.com/stories/201904070002.html> on 21 June 2020

3.6.2. The utility of a petroleum agreement register.

Closely tied to the preceding finding, is the deduction, from a lessons learnt perspective, that a petroleum register should be one of the key tenets of contract disclosure. The main advantage of publishing petroleum activities and making these documents open to the public is that it provides anyone interested in accessing the data important contextual information. Publication enhances the industry's understanding of petroleum activities undertaken by the government and oil companies and also provides important information which prospective oil investment companies can rely on in assessing market viability, financial modelling and conducting of informed risk reviews thus enhancing accessibility thus competitiveness of that market. The Ghanaian progressive petroleum register has not only changed the disclosure environment in the country but has also been a great resource for other oil producing countries wishing to publish their own petroleum contracts.²⁴⁷

3.6.3. Benefits of joining industry transparency initiatives

Another finding of this lessons learnt study is that oil-producing countries can benefit from membership to and implementation of industry initiative and standards, respectively. The main industry leader in this respect and which the study focused on is the Extractive Industries Transparency Initiative, which both Ghana and Nigeria are part of. The Initiative strives to tackle the problem of secrecy of dealings in the extractives sector, working with member states to improve governance in their extractive sectors. The two countries under the present study have incorporated some of the EITI standards nationally and are regularly monitored to ensure full compliance. A good example of a positive outcome of this membership is the Ghanaian

²⁴⁷ 'Improving Contract Transparency in Ghana's Petroleum Sector' *Natural Resource Governance Institute*, November 2018 <https://resourcegovernance.org/sites/default/files/documents/nrgi-impact-improving-contract-transparency-in-ghana-petroleum-.pdf> 25 March 2021.

petroleum register as well as Nigeria's pending Petroleum Industry Governance Bill, progress which could be attributed to both countries' EITI membership.

3.6.4. Who does contract disclosure benefit or target?

One of the main findings of this Chapter is that the formulation of disclosure in the laws of the three countries under study, namely Kenya Ghana and Nigeria is intended for their citizens or the general public. Disclosure of information finds its basis in the constitution, captured as a duty owed by the state to its citizenry. The Stakeholder and Social Contract theories enunciated in Chapter 2 lend credence to the notion that laws around transparency, accountability and good governance in the upstream petroleum industry exist for the benefit the people whose interests lay with that industry. This study finds that additional legislation complements the constitutional provisions examined in Chapters 2 and 3 that are designed for the benefit of the people, for example, in Kenya, there is enacted the County Governments Act which requires that the public be involved in decision-making and public authorities to furnish them relevant information to facilitate such participation.²⁴⁸ For some reason in Kenya, it appears that such rights to information are undermined in petroleum legislation and this study finds that confidentiality clauses introduced in the Petroleum Act serve to restrict contract disclosure to the detriment of the people. The Minister is, under the law, given discretion to determine the kind of disclosure that is necessary.

This study finds that, in petroleum legislation, the intended audience should also include companies in the petroleum sector, not just locally, but also foreign companies looking to invest in upstream operations in an oil-producing country. The disclosure should not simply be a duty owed to the citizenry of a country. If this larger audience is kept in mind, disclosure would contain more relevant information, for example, full contracts and complementary

²⁴⁸ *County Governments Act* (Act No. 17 of 2012).

documentation that would avail information to competing companies, in turn making the petroleum sector more competitive.

3.6.5. Transparency deficits in petroleum legislation

Based on the analysis in this Chapter, it is easily deductible that there are transparency deficits in the legislative framework governing the oil and gas sector in Kenya. The relatively new Petroleum Act makes all information related to upstream petroleum operations confidential, except when disclosed to, among others an affiliate, prospective purchasers and some government and public authorities.²⁴⁹ This in essence, makes disclosure an exception rather than the general rule.

Ghana's legislative frameworks on the other hand provide more concrete contract disclosure provisions than the Nigerian and Kenyan frameworks, yet Ghana still experiences challenges in terms of implementation. Despite implementation challenges, having some contract disclosure framework in place is better than having none and the enhanced competitiveness of the industry outweighs any perceived risks that are mitigated against through confidentiality.

Another finding of this study is that transparency in the Kenyan petroleum sector lacks a specific form. It could mean having provisions in place obliging the government to publish in the national gazette audit reports of revenues collected from petroleum operations as in the case of Ghana,²⁵⁰ or it could be a provision under the law requiring all petroleum contracts entered by the government to be made public. The nature of disclosure varies. For contract disclosure as a form of transparency in petroleum operations, legislation must be clear as to what kind of disclosure is needed. It is easier to implement such clear provisions as opposed to blanket disclosure requirements that do not set out the parameters of contract disclosure. For example, clear obligations such as in the Ghanaian Petroleum (Exploration and Production) Act are

²⁴⁹ Section 12, *Petroleum Act* (Act No. 2 of 2019).

²⁵⁰ Petroleum Revenue Management Act (Act No. 815).

helpful. Section 56 of the Act expressly places an obligation on the Commission to establish and maintain a register of petroleum agreements, licences, permits and authorisations, and mandates that such register shall be open to the public. The Kenyan Act, on the other hand, only establishes a register for permits and licenses, and provides no guidance in terms of registration of petroleum agreements.²⁵¹ The Nigerian Act does not make such provision either. The case is the same for its Extractive industries Transparency Initiative (NEITI) Act of 2007. The latter only deals with reporting and disclosure in relation to revenue paid or due to the Federal Government without making any provision for contract publication.

3.7. Conclusion

This chapter has attempted an overview of legal frameworks of three countries which play an important role in the petroleum sector in Africa. While Ghana has a strong legislative framework supporting contract disclosure, Nigeria lags in this respect. Nigeria, a country that has faced challenges of corruption, political instability and poor governance, remains the largest oil producing country in Africa, despite its lack of a robust contract disclosure framework like Ghana. But a conclusion can be drawn to the effect that contract disclosure creates an environment that supports accountability and subsequently, competitiveness of the oil sector.

An argument could be made that the Nigerian petroleum market could be even more profitable and competitive with a framework like Ghana's in place. This argument could be supported by the fact that following its implementation of EITI standards, Nigeria has managed to recover 2.4 billion US dollars owed to the Federal Government.²⁵² The clear evidence of enhanced forces of competitiveness are also observed in Ghana's dramatic rise in oil and gas revenues (from 12.1% in 2016 to 30% of all Ghanaian export revenues) since its implementation of EITI.

²⁵¹ Section 84, *Petroleum Act* (Act No. 2 of 2019).

²⁵² <https://eiti.org/nigeria> on 15 March 2021.

What would these figures look like if more transparency measures were to be adopted and enforced, not just in terms of revenue but in terms of consequential benefits to the people who form part of the ecosystem of the national upstream petroleum industries?

In the next chapter, this study draws conclusions based on the analysis of the problem, research questions and literature analysed in Chapter 1, conceptual and theoretical frameworks examined in Chapter 2 and the lessons learnt study undertaken in this Chapter.



Chapter 4: Conclusion and Recommendations

4.1 Conclusion

Throughout its substance, this study has been guided by the following research questions:

1. Is there a relationship between disclosure of petroleum agreements and the competitiveness of the national upstream petroleum industry?
2. Is there a relationship between disclosure of petroleum agreements and the competitiveness of an individual oil corporation?
3. Is there evidence from other jurisdictions that contract disclosure impacts competitiveness in the upstream petroleum industry?

In respect of the first two questions, this study has established that there is indeed a correlation between the disclosure of petroleum agreements and the competitiveness of the upstream petroleum industry as well as individual oil corporations. This conclusion was reached at Chapter 2 based on an analysis of the forces of competitiveness that are impacted by contract disclosure.

In answering the above research questions, the study relied on two hypotheses, one, that disclosure of petroleum agreements has a bearing on the competitiveness of the upstream petroleum industry in a nation, and secondly, that this disclosure has a bearing on the competitiveness of an oil company. Both hypotheses were proven by the findings of this study, bearing in mind that competitiveness is to be measured against the Porter's Five Competitive Forces that Shape Strategy as enunciated in Chapter 2 under the conceptual framework.

This study found that contract disclosure has significant benefits to the national upstream petroleum industry, including fostering transparency and accountability of the sector thus increasing chances of new entrants and investors into the industry. An analysis of the concept

of competitiveness, complemented by the Social Contract and Stakeholder Theories brought this out.

Regarding the third research question, this study has analysed the lessons learnt from two African oil producing countries – Ghana and Nigeria – weighed against Kenya. The third research question established that contract disclosure may or may not have direct impact on competitiveness in the upstream petroleum industry. Nigeria remains Africa's largest petroleum-producing country and is ranked 13th in the world. Ghana's production does not come close but Ghana has experienced a dramatic growth in oil and gas exports, revenues and entrants into the industry constitute evidence of competitive forces that were attributable to the implementation of a robust contract disclosure framework. A direct inference that there is evidence from other jurisdictions that contract disclosure enhances competitiveness is thus made in Chapter 3 of this study.

The peculiar element of this study is that there are several factors that contribute to the competitiveness of an oil and gas industry. There is no single definition of competitiveness and this adds complexity to the thesis of this study. Nevertheless, it cannot be underestimated the role that contract transparency plays as a force of competitiveness of a national petroleum industry.

4.1.1 Utility of the study

Contribution to existing body of knowledge:

This study contributes to the existing body of knowledge on contract disclosure and competitiveness of the national petroleum industry as it brings an angle that demands disclosure of petroleum agreements in order to foster competitiveness in Kenya's petroleum industry. This study also borrows best practices from Ghana in demonstrating how petroleum contract

disclosure can be implemented for the ultimate benefit of the Kenyan petroleum industry including the citizens of Kenya.

4.1.2 Implementation

Finally, this study finds that even when contract disclosure is a legal requirement expressly set out under the law, it takes political goodwill to ensure that implementation is realised. The existence of legal frameworks does not necessarily translate to implementation. It takes more than having a law in place to ensure contract disclosure is made a reality and effective implementation, monitoring and enforcement is key.

4.2 Recommendations

Based on the conclusion drawn in this study, this part recommends the next steps that Kenya ought to take in respect of petroleum contract disclosure in order to enhance the competitiveness of its petroleum market and petroleum companies.

4.2.1 Strengthening the framework of contract disclosure

The Kenyan upstream petroleum sector should emulate Ghana which offers a good, albeit not full-proof, example of how contract disclosure ought to be implemented in Kenya. Kenya may thus amend the Petroleum Act to include express provisions on contract disclosure in respect to the petroleum sector the same way Ghana has done it.

4.2.2 Fostering compliance

Having laws in place that promote contract disclosure is a great step forward but much more has to be done to ensure compliance. The Kenyan government should lead by example, by complying with the constitutional provisions on transparency, including contracts in the petroleum sector. Secondly, the Kenyan government needs to put more measures in place to facilitate compliance. This could be as simple as introducing a requirement that the Cabinet

Secretary maintains and publishes a petroleum register as in the Ghanaian example. It could also take the form of sanctions for failure to comply with contract disclosure rules.

4.2.3 Data dissemination

Data dissemination in the petroleum sector is important for promoting transparency and ensuring contract disclosure. Not only should data dissemination be improved between stakeholders in the petroleum sector but also to the public.

4.2.4 Improvement of technical capacity and disclosure infrastructure

Petroleum regulators and relevant stakeholders should invest in information technology (IT) structures, particularly efficient databases, that not only act as repositories for petroleum contracts but also track activities and developments in the petroleum sector. Development of such IT infrastructure may require inter-agency cooperation in ensuring that data is shared in a proper and timely manner.

4.2.5 Membership in EITI

Kenya should work towards adopting and implementing the standards set by EITI. Kenya could also tap into other EITI member countries for benchmarking purposes to improve its own contract disclosure rules.

4.2.6 Areas of further research

The Kenyan government should tap into the knowledge pool comprising the civil society organisations, academic and research centres in order to collect and analyse data needed to analyse competitiveness in the Kenyan upstream petroleum industry.

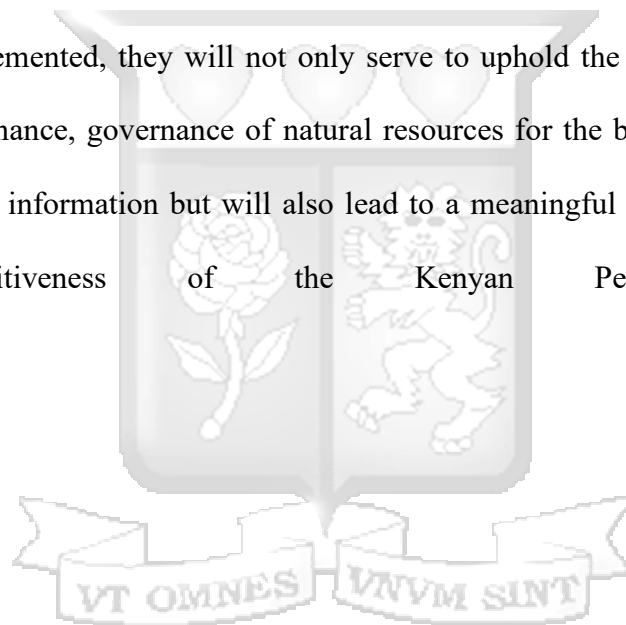
Conclusion:

This study has established that there is a relationship between contract disclosure regulations and the competitiveness of the upstream petroleum industry as well as individual oil corporations in Kenya. The thesis of this study has been supported by literature, a conceptual

and theoretical framework, decided case law and examples drawn from Ghana and Nigeria, fellow African oil-producing countries that have gone through the petroleum policy journey that Kenya is only just beginning.

The researcher concludes that there is a gap in the Kenyan Petroleum Act that needs to be remedied through the recommendations made in this study starting with legislative review and subsequent enforcement through the executive. This study concludes that such steps are necessary to enhance a competitive transparent upstream petroleum industry.

This study also concludes that, if contract disclosure regulations as per its recommendations are enacted and implemented, they will not only serve to uphold the constitutional national values of good governance, governance of natural resources for the benefit of Kenyans and constitutional right to information but will also lead to a meaningful positive impact on the ultimate competitiveness of the Kenyan Petroleum industry.



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Appendices

Appendix A: Similarity Report



Document Information

Analyzed document	Thomas Louis [Final Thesis].docx (D108291159)
Submitted	2021-06-08 18:05:00
Submitted by	
Submitter email	thomas.abira@strathmore.edu
Similarity	9%
Analysis address	library.strath@analysis.orkund.com

Sources included in the report

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W	URL: https://core.ac.uk/download/pdf/188223561.pdf Fetched: 2021-01-11 17:00:17		18

Appendix B: Ethics Clearance Exemption Letter



29th September 2022

Thomas Louis Abira

Student Number: 110267

thomas.abira@strathmore.edu, thlouis@visa.com, tommilouis@gmail.com

Dear Thomas,

RE: The Impact of Contract Disclosure Regulations on the Competitiveness of The Kenyan Upstream Petroleum Industry

This is to inform you that the Office of Graduate Studies has today received your request on email for exemption from Ethical Clearance for the above Thesis. However, it is noted that the Research Services Office and The Strathmore University Institutional Ethics Review Committee (SU-IERC) cannot review your study since you have already collected data and written the Thesis. The ethics approval process is ONLY done before any collection of primary or secondary data.

The office notes that: On the grounds of not having submitted your research proposal, with reason of ethical approval not being compulsory at the time of your research study in the University. This is a letter for you to proceed with the next steps of your academic requirements.

Please be advised, that in future, all research proposals should be submitted to the SU-IERC through the RHinnO Ethics platform: <https://strathmoreuniversity.rhinno.net/login>

Disclaimer: 1) This is not in any way an ethical approval letter. 2) Should there be any legal implications/actions emanating from the research in terms of any ethical violations, you will be personally liable.

Yours sincerely, *

A handwritten signature in blue ink, appearing to read "Bernard Shibwabo".

Dr. Bernard Shibwabo

Director of Graduate Studies