

UNIVERSITY OF NAIROBI

SCHOOL OF LAW

**EMBRACING TRANSPARENCY AND ACCOUNTABILITY IN KENYA'S
EXTRACTIVES SECTOR**

BY

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DEDICATION

This thesis is dedicated to my father, Richard Nderi for his unwavering support, guidance and encouragement. To my mother whose support has brought me this far. I also dedicate this to my siblings for whose hard work and determination inspired me. A special dedication to my husband Gitonga, my children Kendi, Kimathi and Nderi for their encouragement, support and patience though out my studies.

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Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014]

Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others [2017]

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

LIST OF ABBREVIATIONS

AFRICOG.....Africa Centre for Open Governance

CSR.....	Community Social Responsibility
DFID.....	Department for International Development
EIA.....	Environmental Impact Assessment.
EITI.....	Extractives Industries Transparency Initiative
EI.....	Extractive Industries
GDP.....	Gross Domestic Product
GHEITI.....	Ghana Extractive Industries Transparency Initiative
ICES.....	Information Centre for the Extractive Sector
IHRB.....	Institute for Human Rights and Business
KNCHR.....	Kenya National Human Rights Commission
MT.....	Million Tons
NRC.....	Natural Resource Charter
PSC.....	Product Sharing Contract
SID.....	Society for International Development
WB.....	World Bank

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CHAPTER ONE INTRODUCTION TO THE STUDY

1.1. Abstract

Good governance of the extractive industry (EI)¹ is critical in global governance of the natural resources.² The Extractive Industry has been defined as the process where the earth's raw materials are removed, processed and distributed for use by consumers. The earth's materials could include oil, gas, hydrocarbons, and precious metals and the process of removing the earth's minerals include extraction, mining, drilling, dredging and quarrying. Kenya has recently discovered vast mineral resources such as oil, gas, coal, titanium. These resources could spur Kenya's social economic development if well managed. Lessons of potential growth from EI include countries such as Ghana³ and Norway⁴ that are well endowed in natural resources have demonstrated that a transparent and accountable EI sector has potential to contribute towards sustainable development in addition to reducing poverty risks related to conflict and corruption.⁵ However, in countries such as Congo, Sierra Leone and Nigeria that are characterized by poor governance systems, the EI has been more of a curse than a blessing as it has resulted into unending conflict⁶ and slow economic growth.⁷

¹ Extractive industry is the activities where raw materials from the earth such as soil, minerals, oil, gas, aggregates are extracted and processed for use by consumers.

² Stephen D, *Natural Resource Governance: New Frontiers in Transparency and Accountability* (Transparency and Accountability Initiative: London, 2010) at 6.

³ Heller P, *Considerations for Indonesia's New Government: Transparency and Accountability in the Oil and Mining Industries, Briefing Paper* (Natural Resource Governance Institute: Gadjah Mada, 2014) at 1.

⁴ Ibid at 1.

⁵ Ibid.

⁶ Hofmann B, *Transparency and Accountability in Africa's Extractive Industries: The Role of the Legislature* (National Democratic Institute for International Affairs: Washington, 2007) at 36.

⁷ Sachs J D, *Natural Resource Abundance and Economic Growth* (Harvard University: Cambridge, 1997) at 1

The 20th century has witnessed phenomenal growth in Kenya's mining industry due to discovery of various mineral deposits of oil in Turkana, coal in Kitui and titanium in Kwale.⁸ Relatedly, to accompany management of these natural resources, principles of good governance, environmental conservation and sustainable use of natural resources are well articulated in Kenya's Constitution. Article 10 of Kenya's Constitution focuses on good governance while Article 69(1) requires sustainable natural resource utilization that respects principles of natural resources conservation. The constitution also enshrines the citizen's right to information, under Article 35 of the Bill of Rights values and principles of public service, entrenched by Article 232(1) (e) (f) among others. Parliament is mandated to create legislation to implement provisions on sustainable extraction in the Extractive Industry (EI).⁹ The courts have advanced principles and values of good governance through various court decisions discussed by this research. In *Peter Makau Musyoka and others v. the Ministry of Energy and Petroleum, the Ministry of Mining, Fenix Co. Ltd and others*,¹⁰ it was demonstrated that the absence of openness in most of the exploration contracts signed was against the constitution of Kenya. For example, the relation between the stakeholders and local community was neither transparent nor grounded in law as it often failed to protect the environment.

⁸ Mutua E, Report on the Policy, Legal and Regulatory Framework in the Extractive Industry of Kenya Consideration of the Interests of Local Communities, Women, Youth and the Vulnerable, and the Environmental Sustainability of the Industry: A Comparative study of Turkana, Kitui and Kwale Counties of Kenya, April 2014.

⁹ Article 72, Constitution of Kenya, 2010.

¹⁰ High court of Kenya at Machakos Constitutional Petition No. 305 of 2012: Members of Mui community (Kitui county) alleged lack of transparency in concessioning, agreement signing, lack of community and public participation and violation of right to clean environment.

1.2. Background

Globally, Africa has some of the largest mineral resources producing 65% of diamond output worth £8.4 billion per annum,¹¹ 25% of all the oil used in the USA and £13.2 worth of oil used in the China respectively.¹² Moreover, Africa gets revenue from its EI that could help in alleviating poverty, spur socio- economic development and improve livelihoods of its people. However, this has not happened and as a consequence many African countries still rank very low in international human development index.¹³

Kenya has been spared this malady because it has not yet joined the major mineral resource producers. This is changing rapidly with the discovery of mineral deposits such as soda ash, limestone, and fluorspar, salt, copper, gold and nickel were discovered.¹⁴ Titanium, niobium and rare earths has been discovered in Kale County, coal in Kitui County in Mui basin estimated at 400 million tones (MT) and oil, and Turkana.¹⁵ Natural gas reserves have been discovered in the coast region. In Taita, minerals including calcium deposits of gemstones have been discovered.¹⁶ Oil and titanium revenues are forecast to significantly improve Kenya's annual collected revenues from the EI. Revenues from the latter weighing 25,000 MT was exported in February 2014, estimated to be worth \$3.78 million.¹⁷ Therefore EI is an emerging sector with huge potential of expanding Kenya's revenue streams and the transformation of its social, economic growth and development. The expected growth is anchored on a number of pillars. First, Kenya's vision 2030

¹¹ Hofmann *supra* note 5 at 15.

¹² Ibid

¹³ Institute of Economic Affairs, *A Primer to the Emerging Extractive sector in Kenya: resource bliss, Dilemma or Curse* (IEA: Nairobi, 2014) at 12.

¹⁴ IEA *supra* note 20 at 9

¹⁵ Ibid.

¹⁶ Ibid

¹⁷ Ibid.

launched in 2008¹⁸, an ambitious economic blueprint that envisages enhancement of living standards in the country by 2030. Income from the EI would form an important aspect of the economic pillar as it would finance the achievement of the vision.¹⁹ Secondly, government estimates indicates an improvement in Kenya's national income to 1% being EI contribution. 2% of Kenya's export earnings come from EI, however with an expected growth of 10% of GDP,²⁰ it has the potential of transforming the country's economic status.

Tullow Oil Company discovered oil in Kenya in 2012,²¹ thereby raising expectations for rapid transformation of the economy.²² In 2013, a Canada-based Company known as Africa Oil, discovered more oil in Turkana County,²³ with estimated reserves in excess of 750 billion barrels of oil with the potential of yielding over a billion barrels.²⁴ Mass extraction of oil is set to commence and contribute to revenues generated from oil.²⁵ The new oil discovery gives Kenya an opportunity to accelerate economic growth and reduce poverty.²⁶ EI is therefore set to become a major driver of Kenya's economy in the near future.²⁷

1.3 Statement of the problem:

¹⁸ Government of Kenya. Vision 2030 Development Strategy for Northern Kenya and other Arid Lands, (GoK: Nairobi, 2011).

¹⁹ Ibid.

²⁰ Information Centre for the Extractive Sector (ICES), East Africa Resource Centre, African Development Bank.

²¹ Africa Centre for Open Governance, 'Mixed Blessing? Promoting Good Governance in Kenya's Extractives Industries,' available at <<http://www.africog.org>> accessed on 22 August 2018 (*hereinafter* AFRICOG).

²² Ibid

²³ Ibid.

²⁴ Odhiambo A, 'Tullow to resume exploration, ups Turkana reserves' *Business Daily* (Nairobi, 9 May 2016).

²⁵ Ibid.

²⁶ Ibid.

²⁷ IEA *supra* note 20 at 12.

The growth of the EI in Kenya has not been accompanied with a robust framework that would ensure good governance of these resources for the benefit of all stakeholders. The constitution lays an elaborate framework for transparency and accountability at all levels of governance including the EI. Implementation of the constitutional framework is critical through legislation and practice. Kenya has begun developing laws and policies aligned to the principles of transparency and accountability. However, these laws and policies are either fraught with gaps and inadequacies that limit full realization of a transparent and accountable EI sector. Secondly, the laws are either in draft form or their implementation pending, thus cannot regulate EI. For instance, Kenya has adopted the Access to Information Act 2016, the Petroleum Act 2019 and the Energy Act 2019. The laws despite being progressive in improving the EI sector do not have accompanying regulations to ensure they are fully implemented. The Sovereign Wealth Fund Bill that would ensure equity in management of EI is in draft form and yet to be deliberated by Parliament. Additionally, although progress has been made in the creation of required laws, claw back provisions on transparency gains leave little room for communities to manage the growing EI sector. The Access to information framework limits realization of the right to information to citizen while the Petroleum Act criminalizes certain disclosure of information Act unless with consent from the person from whom the information was obtained. Another challenge facing EI in Kenya is that the sector is highly technical and requires informed participation of communities and stakeholders. A lot of stakeholders lack necessary awareness to fully participate and contribute to decision making and policy processes on the EI sector. The information asymmetry between the government, private companies and community's means there is minimal participation of stakeholders in governance of the EI sector due to limited awareness and knowledge of the EI sector. . Furthermore, Kenya has for many years operated under a culture of secrecy with laws

such as the Official Secrets Act, the Penal Code and the Criminal procedure Act that criminalize disclosure of information. The country requires a holistic shift in policy and legal processes as well as embracing a culture of openness and accountability introduced by the constitution. The research will review the legal framework, emerging jurisprudence and comparative lessons for Kenya in embracing comprehensive good governance frameworks for the EI sector.

Objectives of the Study

1. To analyze governance problems facing the EI sector
2. To establish the sufficiency of Kenya's legislative, policy and institutional framework in the governance of the EI.
3. To compare and borrow lessons to enhance good governance of Kenya's EI.

Research Questions

1. What are the governance challenges facing the EI in Kenya?
2. To what extent is Kenya's legal, policy and institutional regime adequate in the governance of the EI?
3. What lessons could be adopted to enhance good governance of Kenya's EI?

1.4 Hypothesis

Kenya does not get full value from its EI arising from its weak legal, policy and institutional mechanism that has failed to institute principles of good governance in its EI.

Justification of the Study

The paradox of abundant mineral resources is that instead of contributing to sustainable development it has a close linkage to poor governance practices such as, corruption, impunity poor living standards, weak democratic institutions that lead to conflicts and massive environmental degradation..²⁸To the extent that mineral wealth became a curse for most mineral rich countries. If this trend is not arrested, Kenya risks facing the similar challenges that have visited other African states in EI. Transparency and accountability are key elements that ought to be integrated in governance of a country's EI sector in order to reduce risks associated with poor governance.

The Government of Kenya prioritized EI after the discovery oil of commercial value in Turkana in 2012.²⁹ With this discoveries, a number of expectations are on the cards on the part of the government, county governments, investors and the community. For the government it is to bring in as much needed foreign exchange as possible by increasing its earnings, lower the public debt, develop infrastructure among other development projects. Multinational Companies expect growth of profit and income and communities look at the eradication of poverty and creation of employment opportunities.³⁰ While County Governments expect a share of revenue generated. To achieve this, transparency and accountability are critical principles that must be mainstreamed throughout the EI value chain. This will reduce risks of corruption, secrecy around licensing and agreements between government and investors. This study seeks to analyze Kenya's legal

²⁸Society for International Development, *The Extractive Resource Industry in Tanzania Status and Challenges of the Mining Sector* (SID: 2009).

²⁹ Adam Smith International, 'Recommendations for the Development of Kenya's Extractive Industries, 'Final Report (2013).

³⁰ Ibid.

framework and international norms and standards while providing practical lessons for good governance of Kenya's EI sector.

1.6 Theoretical Framework

This study will rely on two theories; public choice theory which links economics to political science in the belief that parties make decisions based on their own selfish interests; government officials further their own self-interests as opposed to public interests³¹ Those people involved in the EI tend to pursue their own private interests at the expense of the public and pursuing the public interest to the extent that it is aligned to their own selfish interests³². As interest or utility maximizers, individuals, politicians or bureaucrats will take decisions to ensure their private interests are satisfied.³³

According to the interest group theory, interest groups are keen to pursue their selfish interests by pursuing regulatory decisions that favor them. Usually they organize themselves in small groups around an issue and with the collective ownership of the interests, they overcome collective action challenges. As a consequence their interest easily carries the day as they trade in the resources they acquire.³⁴ These resources are in the form of finances and votes³⁵, in exchange for a favorable regulatory environment and favorable policies on the part of the political class.³⁶ Clearly, the EI can easily be turned into a tool for sustainable development if all stakeholders pursue public rather than self-interest. The public choice theory provides an explanation as to how persons in political leadership have managed to control and use public resources with impunity. In turn, these

³¹ Stigler G J, "The Theory of Economic Regulation" (1971) 2 *Bell Journal of Economics* 3

³² Tullock G, *Government Failure: A Primer in Public Choice* (Institute of Economic Affairs: London, 2000) at 10

³³ Ayine D M, "Democratic Deliberation of Trade Legislation in Ghana: Institutions, Interests and Accountability" (SJD Thesis, Stanford University, 2006).

³⁴ Stigler *supra* note 40 at 3

³⁵ Croley S, "Public Interested Regulation" (2000) *Florida State University Law Review* 7

³⁶ *Ibid.*

resources are used to protect their private over public interests. These has been facilitated by the information gaps, little or minimum public participation, hence state officials make decisions that operate in their favor.³⁷ The gist of the interest group theory is that failure in the governance of the EI can be attributed to many factors like the self-seeking behavior of politicians, corruption and rent-seeking.³⁸ This is not surprising considering the large amount of revenues contributed by the EI, it is prone to attract rent-seeking activities, interest group capture and corruption unless the legal regime guarantees the deliberate transparent and accountable management of such revenues.³⁹

1.7 Literature Review

This study will analyze scholarly publications, published journals and articles touching on transparency and accountability and community participation in the EI. In the process, it would identify the gaps in the law and how the current study would address them. However, whereas a lot of literature on the subject exists in America and Europe, there is a dearth of information in Africa and East African region at large.

1.7.1 Participation and Effects of the Extractives Sector on Local Communities

Africa has experienced conflict anytime investors and the local communities in the EI have come in contact. This is caused by failure to comply with human right standards by investors, governments; the absence of benefit sharing, dispossession of community land and environmental degradation. Others challenges include: violation of land rights, lack of or poor land compensation,

³⁷ Stigler supra note 40 at 3

³⁸ Killick A, A Reaction Too Far: Economic Theory and the Role of the State in Developing Countries (Overseas Institute: London, 1989) at 12.

³⁹ibid

lack of policy on local content, poor revenue sharing mechanisms, insecurity and a general absence of opaque operations.⁴⁰

According to Migai, Odari and Njonjo⁴¹ there is a need for clear laws, policies and institutional frameworks to govern the extractives sector and ensure expectations of stakeholders are met. The article notes that the existing and proposed legal framework fails to factor community interests such as impacts on social, cultural life, health, safety and environmental concerns. With such gaps in the legal framework, the authors are apprehensive that the interests of communities will not be guaranteed. They propose a raft of recommendations mainly the enactment of a legal framework to regulate: information disclosure as a necessary step in ensuring good governance in EI.

Andrews⁴² has noted that community social responsibility (CSR) has helped in addressing poor governance of the EI in Ghana. According to the Andrews, EI has often failed to benefit local communities mainly due to the absence of factors such as good infrastructure, and good governance approaches in the management of the EI. The paper views CSR as a model of harnessing a bottom up approach to development which would involve local community participation. This would include the establishment of projects that respond to local needs, adopting self-reflection methods and responding to emerging needs and changes in priorities. Similarly, the state needs to facilitate the development of a legal-regime that adopts CSR as a grass roots oriented process. Communities in Ghana lament over poor services and very little participation in the management of revenue generated from oil finds. Additionally, expectations

⁴⁰ Norwegian Church Aid, *Local Communities in Kenya's Extractives Sector: From Paternalism and Partnership* (Norwegian Church Aid: Nairobi, 2015).

⁴¹ Migai, Odari and Njonjo *supra* note 21.

⁴² Andrews N, 'Community Expectations from Ghana's New Oil Find: Conceptualizing Corporate Social Responsibility as a Grassroots-Oriented Process', (2013) 60 *Africa Today* 55.

for employment and other socioeconomic benefits of oil drilling have not been met, due to failure to prioritize community needs. The author emphasizes the need for a bottom up approach in CSR initiatives. The paper fails to interrogate best practice measures that can be adopted to promote a bottom up approach to governance. This study will analyze models of community participation from jurisdictions and make suitable recommendations.

In the report, “*Development of Kenya’s Extractive Industries*, Smith⁴³ opines that without effective intervention, the possibilities of tensions increasing in Kenya are high arising from growth in the EI. The report points out some challenges facing the EI as: poor governance that is characterized by corruption, dispossession of land, lack of trust among communities and poor government coordination both at county and national levels. It highlights the role the county governments in regulating extractives activities stressing that parliament and the government have a huge responsibility in ensuring benefits from EI accrue to the local community.

This study will use this report to argue for early engagement with the sector in its infancy and support the installation of strong legal, policy and institutional frameworks. Albeit to a mechanism, of fairness and responsiveness in utilization of revenues from EI while mitigating negative environmental impact and disruption of lives and rights of host communities.

The Institute for Economic Affairs (IEA)⁴⁴ in its report has urged the government to ensure local communities are consulted in project design and execution. Transparency in implementing projects incentivizes communities to protect the environment. Investors meet their end of the bargain by fully funding the projects in line with earlier commitments in a transparent process.

⁴³Ibid

⁴⁴AFRICOG *supra* note 30 at p.13

The study will build on IEA's recommendation in buttressing the relevance of access to information and participation by host communities on activities of EI as a critical consideration. This is against the background that the main focus of the EI activities are concentrated in marginalized areas of the country. For that matter, stakeholders need to be sensitive to the negative consequences not only to the environment but the effects of their activities on the social welfare of the local community.

1.7.2 Good Governance in the EI

The Africa Centre for Open Governance (AFRICOG), ⁴⁵considers the adoption of good governance as the way to go for Kenya's EI. The report, isolates disclosure of information on contracts, revenues and noncompliance with existing laws and regulations and oversight mechanisms as being key challenges of EI in Kenya.

Some of the best practices encapsulated in the EITI, revolve around information disclosure in tendering process, award of contracts, revenue collection.⁴⁶ It views EITI as a non-binding model for governance of EI at a global levels. States that subscribe to EITI are required to implement the standards together with companies and CSO. EITI standards require companies to make full disclosure of tax information, licensing procedures award and content of contracts.

Principles enumerated by EITI standard, ⁴⁷are meant to ensure good governance in the extractive industry by all stakeholders particularly: the governments and investors. The standards include prudence in the use of mineral wealth, states sovereign duty to EI wealth is to ensure it is

⁴⁵ Ibid at 13.

⁴⁶ Ibid.

⁴⁷ EITI International Secretariat, 'The EITI Standards,' available <<http://www.eiti.org>> accessed on 22 July 2015.

used for the benefit of a country's citizens.⁴⁸ Disclosure of information on revenues facilitates public participation in addition to informing options for development in a sustainable manner. Investors and states need to promote transparency in the EI governance through the enhancement of prudent public financial management. State commitment to the highest standards of accountability in disclosure of payments and revenues involving all extractive industry companies operating in the country would go a long way in addressing the governance gap.⁴⁹ The study will draw inspiration and information from this publication to argue for disclosure of information on EI as a necessary condition for holding leaders accountable and informing the public on facts regarding the utilization of natural resources.

According to the KNCHR,⁵⁰ challenges in the EI are not limited to land rights, community engagement, security, employment and labor or environmental degradation. The report explores the challenging relationship between private companies and communities which arise due to failure by the companies to involve local communities in the exploration process, information asymmetry with the communities, assessments and in opportunities for job creation. This has often created mistrust, fostered corruption, and created suspicion between companies, communities and the government. The report makes recommendations to better engage the communities, open sharing of information on activities including CSR to the media, civil society and host communities. Building on this research, this study has cast the net wide to jurisdictions that have been involved in natural resources governance for longer such as Nigeria, Norway and Botswana

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ The Kenya National Human Rights Commission *"The state of Human Rights in the Kenyan Extractive sector. 2016*

and in the process draw a comparative analysis for lessons Kenya can learn in the promotion of sustainable development in the EI.

The Institute for Human Rights and Business (IHRB), ⁵¹has introduced human rights due diligence into EI in Kenya. This has been done through the adoption of and application of the UN Principles guiding Business and Human Rights. This study builds on these findings and analyzes international policy and regulatory regime relevant to the EI from global initiatives.

1.8 Limitations

The concept of good governance⁵² includes among other things elements of participatory governance, accountability, transparency, equity, rule of law, sustainable development. This study limits its focus on only two good governance principles mainly transparency, disclosure of information and accountability on the part of the government as key elements in the governance of the EI.

1.9 Research Methodology

This is qualitative research that draws on comparative lessons from jurisdictions that have documented best practices in EI avoiding the resource curse associated with discovery of natural resources. Data collection on desktop analysis of primary and secondary data. Review of primary data involved analyzing data in the Constitution, Acts of Parliament and international legal

⁵¹The Institute for Human Rights and Business, *Promoting Human Rights Due Diligence in Kenya's Oil and Gas Exploration Phase: The Role of Juniors and Majors*, the *Nairobi Process: A Pact for Responsible Business*, a http://www.ihrb.org/about/programmes/navailable_at_airobi-process.html. accessed on 5 August 2017. (hereinafter IHRB)

⁵²Ibid.

instruments (international treaties, conventions and declarations, regional charters, global initiatives such as EITI standards). Review of secondary data used textbooks, journal articles, conference papers, reports. Data analysis involved the use of desk top analysis of primary and secondary data.

1.10 Chapter Breakdown

Chapter One: Introduction to the Study.

The chapter provides the background, statement, questions, the objectives, hypothesis, justification, the conceptual and theoretical framework, limitations, significance, the literature review, research methods.

Chapter Two: Overview of International Norms in Good Governance in the Extractive Industry

The chapter focuses on governance norms of EI at the international on transparency. An assessment of global governance initiatives and their role in enhancing transparency and participation to improve governance of the extractives sector are examined.

Chapter Three: Response to Governance Challenges of the Extractive Industry in Kenya.

Chapter 3 is on Kenya's legislative, policy and institutional response to the governance challenges affecting the EI sector outlined in chapter two above. In particular, it reviews existing and draft

legislation that seek to an open. EI sector. Gaps in Kenya's legal, policy and institutional framework would also be identified.

Chapter Four: Comparative study: Lessons from Ghana and Norway This chapter examines how other jurisdictions particularly Ghana and Norway have leveraged on existing international governance initiatives to incorporate good governance in EI in their domestic legislative framework

Chapter Five: Conclusion and Recommendations

The chapter draws conclusions and makes recommendations for legal and institutional reforms as well as adoption of measures to promote transparent and sustainable governance of the sector.

CHAPTER TWO

OVERVIEW OF INTERNATIONAL NORMS IN GOOD GOVERNANCE IN THE EXTRACTIVE INDUSTRY.

2. Introduction

The 21st century has witnessed the development of international initiatives to oversee good governance in the management of EI.⁵³ This is in an effort by development partners and the CSOs to particularly address issues related to the ‘resource curse’.⁵⁴ The paradox affecting resource rich countries is that whereas their economies are expected to out-perform non-resource rich countries, they instead grow minimally with declining per capita incomes than the latter.⁵⁵ This phenomenon elicited an economic, social and legal political explanation. In economic terms it caused the ‘Dutch Disease’⁵⁶ characterized by sharp increases in corruption, rapid appreciation of local currencies. The effect is to make the non-resource sector less competitive and undermines the domestic economy by exerting unnecessary inflationary pressure on fragile economies of developing countries.⁵⁷ Socially, both the resource curse and Dutch disease led to declining social standards, rise in crime levels, poverty which often led to conflict.⁵⁸ The third impact is a political and legal one of effects of corruption on the institutions of resource rich economies. The latter leads to an

⁵³ Acosta, A, *The Impact and Effectiveness of Accountability and Transparency Initiatives: The Governance of Natural Resources* (Institute of Development Studies: University of Sussex,) at 3

⁵⁴Ibid.

⁵⁵ Sachs and Warner *supra* note 6

⁵⁶ Ibid

⁵⁷Ibid.

⁵⁸ Acosta *supra* note 64 at 3

environment within which political incentives are created for discretionary and often opaque management of EI that would facilitate corruption.⁵⁹

This chapter examines various norms at the international level that have been established to address issues associated with poor governance in EI. It explores the challenges that motivated the global community into the creation of standards that would address poor governance in EI. Attention is paid to poor state accountability in EI, opaque contracts, poor allocation and use of revenues from EI⁶⁰ The contribution of international initiatives in good governance would be discussed with respect to the establishment of standards agreeable to the host nations and multinational corporations, provision of policy platforms to encourage multiple stakeholder engagement, the creation of international networks like -CSO activists and partnerships committed to good governance in EI.⁶¹

2.1. Evolution of Natural Resources Governance (NRG) Initiatives

This section will address the historical evolution of good governance norms in EI. Mainly because EI in Africa has often had a controversial relationship with development. Since the 1950s when African countries began attaining independence from colonial masters, EI was viewed as an opportunity to boost economic growth similar to what had happened in the USA, Australia and Norway in previous years.⁶² It was thought that natural resources would lead to economic growth⁶³, others argued that EI would become a “precondition for the take-off” of a country

⁵⁹ Mehlum, H, R, 'Institutions and the Resource Curse', (2006) 116 *The Economic Journal* 1-20.

⁶⁰Ibid at 300

⁶¹Ibid at 312

⁶² Anayati A, *The 'Resource Curse' and the Extractive Industries Transparency Initiative (EITI)* (Unpublished MA Thesis, King's College London, 2012) at 2

⁶³Ibid

developing.⁶⁴ Little was realized that they were comparing developed countries with good governance frameworks in EI that had preceded extractions, with jurisdictions in the developing world that were new to massive mineral revenue inflows with non-existent governance structures. Optimism was culpable with the belief that the discovery of EI would counterbalance the increase in imports as the most recurrent characteristic of economies that were industrializing.⁶⁵ In a nutshell, EI would be a blessing that would lead to sustainable development. This scenario changed in the 1980s after the collapse of communism.⁶⁶

2.2. The Quest for Good Governance in EI

The quest for achieving a unified international framework on good governance out of the numerous approaches was a daunting one. This was against the background that sovereign states remain the custodians of governance initiatives.⁶⁷ The assumption made was that all states had the capacity to enforce principles of good governance yet some are still fragile without operational institutions as they have been weakened by persistent conflicts. It is also important to mention that in the mix were non-state actors, multinational companies, international bodies that often created competing norms, behaviors and guidelines that would regulate governance of EI.⁶⁸

The challenge for good governance was two -fold: the interaction locally, nationally, regionally and internationally that was characterized by non-aligned objectives. Secondly, the multi-layered

⁶⁴ Rostow, W.W, *The Stages of Economic Growth: A Non-Communist Manifesto* (Cambridge University Press: Cambridge, 1960) at.31

⁶⁵Anayati *supra* note 73.at 2

⁶⁶ Ibid.

⁶⁷ Lehmann *supra* note 78 at 3

⁶⁸ Speed, A, *The Global Resource Nexus: The Struggles for Land, Energy, Food, Water, and Minerals* (Transatlantic Academy: Washington, D.C, 2012).

decision making process with the potential to influence neighbor states.⁶⁹This was illustrated in the DRC where the UN issued numerous sanctions targeting states that facilitated illegal export of mineral resources. This was meant to prevent gold mining being used as a resource to fuel armed conflict in the region.⁷⁰ The UN has further supported and financed state initiatives such as security and elections to improve democratic governance.⁷¹

2.3. Principles of International Norms in EI

International norms in EI governance are based on a number of guidelines or principles of good governance namely: open duties and responsibilities, transparent budgeting, disclosure information and integrity in operations. The most prominent and commonly used norms are EITI based on 12 principles that emphasize strong commitment to public interest, ethical standards, observing rule of law and also integrity.⁷²Stakeholder consultation and outcomes that address social economic and environmental questions.⁷³

So long as EI is transparently and accountably managed, the basis of its wealth belongs to all citizens and not a few individuals. According to EITI principles transparency can be achieved so long as government information on revenues resonates with EI information along the value chain. These principles and guidelines have been adopted by many countries and incorporated in legal,

⁶⁹ Lehmann *supra* note 78 at 3

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Chartered Institute of Public Finance and Accountancy, *Good Governance in the Public Sector: Consultation Draft for an International Framework* (CIPFA: London, 2013) at 11

⁷³ Ibid.

policy and institutional framework.⁷⁴ As an illustration, Norway, Ghana and Nigeria have codified EITI's governance structure into their national governance structures.⁷⁵

States which join EITI framework have to meet certain minimum requirements. And even after the requirements have been met, a candidate would undergo a validation process, to test its accountability credentials, only then would it qualify and be declared as EITI compliant.⁷⁶ The validation process is done after every three years, countries that fail to keep up with the validation process are disciplined by being suspended or even delisted.⁷⁷ Some of the requirements for states joining EITI framework include: effective oversight, publication of EITI Reports, government disclosure revenues, and impact of EITI implementation.⁷⁸

2.4. Norms of International Transparency Initiatives in EI

This section addresses norms in transparency initiatives established at the international level. These initiatives have been extolled as mechanisms for the promotion of economic growth, social and sustainable development and good governance. They are designed to ensure that governments, citizens reap the benefits of EI.⁷⁹ Governments get a fair share of company's income⁸⁰ as well as increase accountability, improve the economy, poverty reduction, reduce economic crimes and enhance accountability from government⁸¹ since the norms are voluntary, they provide opportunities for change of behavior without enforcement mechanisms.

⁷⁴ Extractive Industries Transparency Initiative, *The EITI Standard* (EITI International Secretariat: Oslo, 2013a).

⁷⁵ Lehmann *supra* note 78.at 7.

⁷⁶ Ibid.

⁷⁷ Ibid at 7

⁷⁸ Hilson, G, 'Good Governance and the Extractive Industries in Sub-Saharan Africa', (2008) 30 (1) *Mineral Processing and Extractive Metallurgy Review: An International Journal* 81

⁷⁹ Ibid

⁸⁰ Ibid

⁸¹ Aaronson, S.A, Oil and the public interest, 2008, available at <http://www.voxeu.org/article/can-transparency-extractive-industries-break-resource-curse>, accessed on 6 July 2018.

The norms espouse openness with clear rules of disclosing information, plans, processes and actions.⁸² Accountability and transparency therefore are inter-related thus need to be adopted throughout the EI value chain.⁸³ These principles have been integrated in global and regional initiatives that advocate for good governance and transparency in EI such as EITI, Publish What You Pay (PWYP), Revenue Governance Index (RGI), and Open Government Partnership. The IMF agrees with the principles and opines that poor governance leads to the resource curse.⁸⁴

The focus is on the evaluation of norms encapsulated in EITI for the simple reason that EITI brings together various stakeholders, states, companies and NGOs whose main concern is governance of EI.⁸⁵ The EITI is not just a voluntary initiative; it has certain compulsory elements as well that states are required to conform to in addition to its moderate to narrow mandate. Singly, the EITI does not have answers to all the governance questions but it provides a foundation up on which more concrete governance platforms can be built in the EI sector. It demonstrates an all -round and comprehensive inter-linkages that can form ground work for an international treaty.⁸⁶

2.4.1. Transparency in Disclosure of Production Requirements

Governance challenges in the EI include: poor information disclosure, tax evasion/underpayment and poor revenue forecasting. Information on the amount and value worth of resources is important in determining revenue governments receive. The absence of accurate data on volumes of production can lead to underpayment.⁸⁷ Information with respect to production is important for it

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Transparency International. 'The 2013 Corruption Perceptions Index.' Transparency International. 9 June 2014.

⁸⁵ Lehmann *supra* note 78.at 4

⁸⁶ Ibid.

⁸⁷ Ibid.

reveals total production volumes for covered fiscal year,⁸⁸ value of production by commodity, state/region, contribution to economy of EI in key producing regions for covered year, estimated proven reserves, disaggregation by company, project and major commodity sub-type, total figures for reporting year and prior year, stage of production of commodities in each state, source for volume data and methodology for valuation and whether there are challenges with measuring production and reconciliation.

To avoid this eventuality, disclosure of information as to total production⁸⁹ and exports⁹⁰ are required. For purposes of fulfilling mandatory EITI production standards, it is required that a multi-stakeholder group should review lessons from EITI implementation.⁹¹ This should include EITI clear information of production data, exploration activities,⁹² production volumes and values⁹³ and export volumes and values.⁹⁴

2.4.2. Promoting Transparency in Revenue Collection

The governance of revenue collection in EI faces a number of challenges as well namely:⁹⁵ misappropriation of revenues at the national or sub-national level, patronage, and misallocation of revenues. At the macro level, challenges include: lack of fiscal discipline which results into expenditure volatility and poor investment decisions. At the micro level, the challenges include weak public financial management, poor investment and public wastage.⁹⁶ EITI seeks to address

⁸⁸ Section 3.5(a) & §3.4(e), EITI 2013.

⁸⁹ Section 3.5(a), EITI 2013

⁹⁰ Section 3.5(b), EITI 2013

⁹¹ Resource Watch Institute, *Extractive Industries Transparency Initiative: Using the EITI Standard for Reform* (RWI: London, 2013) at 9.

⁹² Section, 3.3, EITI, 2013.

⁹³ Section, 3.5(a) and 3.4(e), EITI, 2013.

⁹⁴ Section, 3.5(b), EITI, 2013.

⁹⁵ RWI *supra* note 102 at 9

⁹⁶ *Ibid*

these challenges by encouraging disclosure of information of resource revenues both from the investors to the host nations. The underlying assumption is that increased access to information generates accountability and improves the conditions for further reforms that help to promote good governance.⁹⁷ Fiscal transparency increases the cost of rent-seeking behavior by requiring more elaborate schemes to divert revenues, or by raising the possibility of internal and external pressure.⁹⁸

Disclosure of information is critical in EI for it facilitates in the development of good governance. The key components of disclosure process include: ⁹⁹multi-stakeholder dialogue which creates a neutral space for building trust and facilitating discussion on various governance issues. Second, is objective setting or work plan which links EITI to broader national policy priorities. Thirdly, disclosure of relevant information helps to reconcile terms of reference and EITI report. Fourth, the analysis of information by CSO and the media which enables informed public understanding and policy debates. Fifth, linkages need to be made to policymaking and institution building especially in Parliament, Ministry and various regions to increase accountability and development.¹⁰⁰

Disclosure of information is critical to the implementation of an EITI framework. An effective and efficient governance system should capture information relating to revenue collection, production data, the allocation of rights and beneficial interests. In the context of revenue collection, the following is key: legal framework and fiscal regime,¹⁰¹ economic contribution,¹⁰² taxes and

⁹⁷ Ibid at 4.

⁹⁸ Ibid.

⁹⁹ RWI *supra* note 102 at 4

¹⁰⁰ Ibid.

¹⁰¹ Section, 3.2, EITI, 2013.

¹⁰² Section, 3.4(a)-(c), EITI, 2013.

primary revenues,¹⁰³ in-kind revenues,¹⁰⁴ infrastructure/barter provisions¹⁰⁵ and transportation revenues.¹⁰⁶

EITI has established standards of disclosure that foster fair revenue management; Section 3.7(a) of EITI requires disclosure of all revenues (in cash or in kind) that have gone to the national government. Disclosure of information should attach to all other revenue including sovereign wealth fund funds for development, for state companies, local governments as well as extra budgetary entities.¹⁰⁷

Distribution requirements should include a description of distribution format, indicating the records in budget or an explanation of budget allocations, with links to financial reports and description of revenues earmarked for regions or programs.¹⁰⁸

2.4.3. Observation of the Rule of Law

This is the hall mark of civilized and democratic societies. It requires that the law is applied and enforced fairly at all times to everybody in an impartial manner. Similarly, the judiciary needs to be insulated from unfair interference, should be independent and have autonomy to enable it discharge its functions without fear or favor. This would also facilitate the growth of societies where people feel safe that their rights are protected while offering redress to those whose rights have been violated. Adherence to the rule of law therefore becomes the only effective means of ensuring that breaches of law and regulatory provisions are dealt with promptly.¹⁰⁹

¹⁰³ Section, 4.2(a), EITI, 2013.

¹⁰⁴ Section, 4.1(c), EITI, 2013.

¹⁰⁵ Section, 4.1(d), EITI, 2013.

¹⁰⁶ Section, 4.1(f), EITI, 2013.

¹⁰⁷ Ibid. Section 3.7(a)

¹⁰⁸ Section 3.7(a), 3.8, EITI

¹⁰⁹ CIPFA *supra* note 83 at 15

Observing rule of law needs officials in public sector demonstrate commitment and compliance with all relevant laws especially those addressing EI.¹¹⁰ At the international level, efforts should be made to use existing powers for the benefit of local communities among other stakeholders. In essence the rule of law provides a mechanism through which the public sector entities and individuals can be held to account through compliance with existing law especially on issues of national expenditures.¹¹¹

Policy decisions regarding the allocation of rights in EI is key in laying the foundation for good governance in EI sector especially revenue management.¹¹² Governance challenges affecting allocation of rights comprise bribery in awarding contracts and licenses.¹¹³ Others are pursuit of personal economic and social benefits that arise from poor negotiation skills and poor oversight in award of contract rights.¹¹⁴ According to RWI recommendations, laws in EI should succinctly describe key features of the contract system, explain if core fiscal terms in legislation are negotiated in contracts, indicate which authorities collect major payments and the division of roles and describe the method of sub-national transfers.¹¹⁵

Allocation of rights to the stakeholders is critical as a clear sign of certainty in the entitlement of each stakeholder. For that to happen disclosure of information with respect to the following would be required, licenses,¹¹⁶ license award/transfer process and any deviations,¹¹⁷ beneficial owners¹¹⁸

¹¹⁰ Ibid

¹¹¹ Ibid.

¹¹² RWI

¹¹³ Ibid

¹¹⁴ Ibid.

¹¹⁵ Ibid

¹¹⁶ Section, 3.9, EITI, 2013.

¹¹⁷ Section, 3.10, EITI, 2013.

¹¹⁸ Section, 3.11, EITI, 2013.

and contract or license disclosure.¹¹⁹ License allocation¹²⁰ as a governance tool enables a clear description of the award or transfer process as the case may be, it provides a list of all the applicants and the bid criteria, technical and financial criteria, non-trivial deviations, recipient information, efficiency and effectiveness.¹²¹ With regard to beneficial interest to the community and revenue management, EITI requires information with respect to direct payments/receipts¹²² mandated sub-national transfers,¹²³ employment¹²⁴ and mandated social payments.¹²⁵ Beneficial ownership¹²⁶ relies on a proper management of EI resources. To that extent the following information would be required, revenues recorded & not recorded in national budget¹²⁷ earmarked revenues and budget/audit processes.¹²⁸ The essence of obtaining information about beneficial ownership is to ascertain the legal ownership, and the existence or non-existence of politically connected persons. In case it is government, information about beneficial ownership would reveal the identity of state owned enterprises (SOEs) and their subsidiaries, list of bodies that bid the identity and level of ownership and the existence or lack of it of a public register.¹²⁹

The main goal of EITI is public understading of revenues and expenditure. which help public debate and inform choice of appropriate and realistic options for sustainable development.”¹³⁰ Information in EI can drive change in various ways through the creation of neutral spaces for building trust and facilitating discussion by multi-stakeholder dialogue (MSG). The information

¹¹⁹ Section, 3.12, EITI, 2013.

¹²⁰ Section 3.10(a)-(c), EITI, 2013

¹²¹ RWI *supra* note 102 at 6

¹²² Section, 4.2(d), EITI, 2013

¹²³ Section, 4.2(e), EITI, 2013

¹²⁴ Section, 3.4(d), EITI, 2013

¹²⁵ Section, 4.1(e), EITI, 2013

¹²⁶ Section 3.11(a-b) and Sec 3.6(c), EITI, 2013.

¹²⁷ Section, 3.7, EITI, 2013

¹²⁸ Section, 3.8, EITI, 2013

¹²⁹ RWI *supra* note 102 at 6

¹³⁰ Principle 4, EITI

established links EITI to broader national policy priorities by setting objectives and work plans. Information is also useful in evaluating pressing questions and concerns through disclosure of relevant information by enabling an informed public understanding and policy debates. More importantly, it facilitates the analysis of information CSOs and the Media which increases accountability and development links to policy making and institution building Parliament and Ministries.¹³¹

Implementation of EITI would impact EI in various ways: it would increase dialogue between stakeholders, increase or improve public access to information on government revenues, improve trust between stakeholders, strengthen governance and management of EI, strengthened accountability of the government improved investment climate.¹³² An evaluation of EITI reports shows that they have made a great impact in public understanding of the EI sector. However, the reports do not cover other important issues as they are not analyzed. CSOs have in addition been observed not to understand how to use the data as it is not in a form that is easily to accessible.¹³³

2.4.4. Openness, Benefit Sharing and Comprehensive Stakeholder Engagement

International frameworks have introduced norms that are designed to infuse openness, benefit sharing and elements of comprehensive stakeholder engagement as attributes of accountability. Governance challenges associated with social impact of EI include: economic inequality (distributional), community discontent with companies (unmet expectations), and the use of funds to buy off local actors and lack of coordination with local development plans.¹³⁴ Disclosure of

¹³¹ RWI *supra* note 102 at 6.

¹³² RWI Survey of PWYP Coalitions, 2011.

¹³³ RWI

¹³⁴ *Ibid.*

information with respect to social impact should be in two key areas namely: the level of extractive industries contribution to employment,¹³⁵ and the companies social expenditure, who is receiving it and to reconcile the two.¹³⁶

The EI contribution to employment is required to show levels of employment for national and foreigners including those on indirect employment. The template for employment and procurement should be sufficiently open as an element of accountability. It should be clear how much companies have spent on the community. Benefit sharing needs to be promoted by local content policies that should facilitate community suppliers and chain development.¹³⁷

Local communities have borne the brunt of the negative effects of the EI but have been unable to get their rightful benefit interest from mineral extraction due to lack of adequate community participation and inability of the local community to organize community engagement,¹³⁸ absence of a legal framework, minimum information in the expected proceeds that would inform decision making. Though local communities may also have unrealistic expectations, that breed conflicts between institutions or responsible agencies in the country, the need for benefit sharing cannot be understated.

The EITI has put in place an elaborate framework designed to ensure the local communities are entitled to share in the benefit of the EI. Section 4(2) (d) of EITI requires companies to show direct revenue payments or receipts, while Section 4(2) (e) requires companies to disclose payments to mandated sub-national transfers in delivering companies' Social expenditure. Further disclosures are required in reporting on material mandated and required either by law or contract payments.

¹³⁵ Section 3.4(d)

¹³⁶Section 4.1(e)

¹³⁷ RWI *supra* note 102 at 4

¹³⁸*Ibid.*

The specific details should include: name and function of non-government beneficiaries as an aspect of transparency and accountability. If the payments are not monetary, the nature and value of in kind payments would be required. All discretionary social payments are required to be reported by the companies.¹³⁹

2.4.5. Social Participation and Governance

EITI recommends engagement of stakeholders including CSOs in implementation of public regulations and policies. This presents great potential for enhancement of successful governance reform to address governance challenges articulated above.¹⁴⁰ CSO are further democracy,¹⁴¹ For that matter, a viable, strong and informed CSO is important and be a partner in the process of developing good governance standards in EI.¹⁴²

Therefore, supporting the development of an informed and strong CSO, and promotion of opportunities for it to participate in governance mechanisms has become an essential part of promoting favorable conditions for successful governance reforms in EI. The idea is to improve the quality of governance by allowing citizens to directly engage with leaders from an informed perspective thus increasing the chances of effective positive change.¹⁴³ Direct social participation would also serve to empower citizen groups in the promotion of accountability.¹⁴⁴

One of the main features of EITI is the requirement that members of CSO are given opportunities to participate directly in monitoring and validation of revenue flows from corporations to

¹³⁹ Section, 4.1(e), EITI

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² McGee & Gaventa *supra* note 108.at 7,

¹⁴³ Ibid

¹⁴⁴ Ibid.

governments. This creates a feedback mechanism between the state and citizens that would help defeat corruption.¹⁴⁵ In essence, EITI gives a voice and improves participation of stakeholders previously left out of EI. Ideally this participation that should be officially sanctioned by the state enables civil society organizations attain a measure of political status that allows them to dialogue with governments from a stronger political platform. In a way, this alters the power relationship and dynamics of domestic political processes.¹⁴⁶ CSO can potentially use the leverage and knowledge acquired to exert more effective political pressure in other areas of governance.

2.5. National Obligations

Member countries of EITI have certain obligation under the EITI framework: first, follow EITI work plan objectives to reflect national priorities.¹⁴⁷ Secondly, an annual MSG review of EITI impacts on natural resource governance.¹⁴⁸ EITI implementing countries require transition arrangements to implement the new EITI standard such as their work plans that are updated with necessary actions and annual activity reports that document progress in all key sectors.¹⁴⁹

EITI member's countries are required to maintain a register with information on all licenses pertaining to: license ownership, the coordinators of the license area, the dates of application and award and duration of the license.¹⁵⁰ For production license, the commodity being produced, for a license held by a consortium, the information would be the level of ownership of each partner and

¹⁴⁵ Aaronson S A, "Limited Partnership: Business, Government, Civil Society, and the Public in the Extractive Industries Transparency Initiative (EITI)", (2011) 31 *Public Administration and Development* 50

¹⁴⁶ Ibid.

¹⁴⁷ Section, 1.4(a), EITI, 2013

¹⁴⁸ Section, 7.2, EITI, 2013

¹⁴⁹ RWI *supra* note 102 at 6

¹⁵⁰ Ibid

the operator.¹⁵¹Information should generally be displayed for other related licenses like the beneficial ownership of each license holding company, contract associated with the license, production levels and any other payments made pursuant to the contracts. .¹⁵²

Disclosure of contract/license requirements¹⁵³ is necessary to ensure government policy on contract/license for exploration and exploitation is accessible. Similarly, legal provisions, actual disclosure practices and planned reforms, overview publicly available contracts/licenses and reference, public disclosure of all exploration & exploitation contracts and licenses. In addition, active contracts & new contracts, public education & dialogue strategies and online, free of charge and anonymous to search.¹⁵⁴

2.6. Achievements of International Governance Norms in EI

EITI is the most elaborate norm creating framework for the governance of EI consisting of complex governance structures. It is a multi-layered system that requires international, regional, national and local reporting standards on EI revenues.¹⁵⁵ Implementation of EITI has contributed to a number of benefits such as increased dialogue and trust between stakeholders, improved public access to information on government revenues, strengthened governance and management of EI, strengthened accountability of the government on EI, prevention and resolution of conflicts based on issues of EI.¹⁵⁶By 2014, an estimated 48 countries had implemented EITI, 31 were compliant

¹⁵¹ Ibid.

¹⁵² Ibid

¹⁵³Ibid Section 3.12

¹⁵⁴ RWI *supra* note 102 at 6

¹⁵⁵ Lehman *supra* note 78 at 8.

¹⁵⁶Ibid.

while 17 were candidate countries.¹⁵⁷ Out of the 207 years covered by EITI reports, disclosure of revenues to governments has grown to a value of €1.3 trillion.¹⁵⁸

EITI has also created a framework of transparency in EI with other critical global actors like the WB, IMF, OECD and other MNC such as BP, De beers and Vale.¹⁵⁹ The quick adoption of EITI framework is partly attributed to its limited scope and participatory approach thus making it easier for countries to adopt.¹⁶⁰ The initiative has encouraged dialogue and participation especially in conflict prone states like Liberia which brought on board hitherto sworn enemies to a common understanding. The approach allowed hostile parties to reduce tension that facilitated fruitful engagement.¹⁶¹

In Congo, EITI initiative has broadened civil society organization's participation in remote regions that gave the government the confidence to disclose hitherto opaque contracts with China.¹⁶² The success of EITI is further demonstrated in other jurisdictions that have reported financial reporting gains. For example, Nigeria EITI has identified missing payments of €10 billion from the Nigeria National Petroleum Corporations (NNPC).¹⁶³ Out of this €2 billion could be recovered for the Nigerian Federal Government.¹⁶⁴ The outcome of this finding was the revision of the 2012 Executive Draft of the Petroleum Industry Bill, as existing gaps would be insufficient in restructuring the NNPC.¹⁶⁵ Good governance has generally improved in the countries that have

¹⁵⁷ Ibid

¹⁵⁸ Extractive Industries Transparency Initiative, *EITI Fact Sheet* (EITI International Secretariat: Oslo, 2014).

¹⁵⁹ Ibid.

¹⁶⁰ Extractive Industries Transparency Initiative, *Impact of EITI in Africa: Stories from the Ground* (EITI International Secretariat: Oslo, 2010) at 2

¹⁶¹ Ibid

¹⁶² Ibid at 15

¹⁶³ Ibid at 7

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

embraced a transparent management of EI. One of its greatest achievement is that EITI has generated public space for discussion and that has increased levels of trust between stakeholders, especially between government and society. It has additionally promoted social inclusion and greater community engagement.¹⁶⁶

2.6.1. Development of Monitoring Mechanism

Out of the challenges and initiatives, a monitoring mechanism has evolved spearheaded by the OECD, EU and the USA whose sole purpose is to prevent EI in the DRC and other countries being used to finance conflict.¹⁶⁷ These mechanisms have target the demand side or consumers of mineral resources from DRC. For instance legislation has been developed in the OECD and EU countries to guide mineral exports from the DRC.¹⁶⁸ Due to lobbying from International NGOs, the US introduced Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act¹⁶⁹ That has made it mandatory for publicly listed companies to report the usage of natural resources from DRC.¹⁷⁰ Companies are required to report the minerals as ‘conflict free’.¹⁷¹ However, the unintended consequence has been that companies have simply switched to other sources without similar stringent regulations thus achieving a similar result of ‘Congo free’.¹⁷²

¹⁶⁶Ibid at 17

¹⁶⁷ Lehmann *supra* note 78 at 4

¹⁶⁸ Ibid.

¹⁶⁹the Dodd-Frank Wall Street Reform and Consumer Protection Act

¹⁷⁰ Lehmann *supra* note 78 at 4

¹⁷¹ Ibid

¹⁷² Ibid.

2.6.2. Use of EITI Framework to Reform Policy

EITI is a useful tool for reform of policy in EITI member countries. The Revenue Watch Institute Guide to the EITI Institute has established guidelines that would generate relevant information to further improve EI governance.¹⁷³ These guidelines are based on two EITI requirements namely processes and policies. Processes would include multi-sectoral group (MSG) governance and participation of the CSOs. Policies requires information that encapsulates allocation of rights, disclosure of production data, disclosure of revenue collection (RC) and their social impact (SI)¹⁷⁴

2.7. Shortcomings of International Governance Initiatives in EI

Critics of EITI have argued that although EITI has scored tremendous milestones in transparency, its narrow focus has failed to transform economies of resource rich developing countries, reduce poverty or even raise living standards.¹⁷⁵ Its greatest challenge has been the inability to craft a theory capable of transforming societies rich in natural resources but poor on governance.¹⁷⁶ The tension between transparency and societal transformation is palpable in the EI framework. Expectations on transparency are over rated, because EITI can only do so much due to its limited scope. CSOs that are relied up on have limitations in terms of capacity to interpret information on financial flows from EI.¹⁷⁷ It is even doubtful if CSOs were given the required expertise, they would be able to effect societal transformation since some of them work in hostile environments arising from political, economic, legal and social sensibilities.¹⁷⁸ In Kenya for example, efforts to

¹⁷³ RWI *supra* note 102.

¹⁷⁴ Ibid

¹⁷⁵ *supra* note 171 at 4

¹⁷⁶ Ibid at 3.

¹⁷⁷ Ospanova, S I A, *EITI and Sustainable Development: Lessons and New Challenges for the Caspian Region* (International Institute for Environment and Development: London, 2013) at 40.

¹⁷⁸ Ibid.

reform operations of CSOs have been hampered by the reluctance by the government to operationalize the Public Benefits Act, 2013.

EITI has a voluntary as well as a compulsory component. It is voluntary because states have the option to either join or not, those who join go through a compulsory validation process where states are required to meet certain transparency and accountability checklist before being certified as compliant.¹⁷⁹ This has helped safeguard the integrity of EITI process by holding all member states to a similar global standard. However, this has not held true for companies, whose membership remains voluntary.¹⁸⁰ It creates a number of shortcomings, investors and companies merely have to give information on revenues whether or not it is the actual value of the resource.¹⁸¹ This is made worse by a complex set of tax related mechanism used by MNC to under value intra company trade through a process of transfer pricing.¹⁸² So far EITI has failed to address negative effects of transfer pricing and tax evasion. Achieving transparency by EITI would require transparent reporting of profits in all countries and not just resource rich states as is currently the case.¹⁸³

The biggest challenge for EITI is its voluntary nature, whose effectiveness depends on the ability of all players accepting it. For example, the existence of competition from other companies would severely undercut its standards and it would consequently fail.¹⁸⁴ Transparency of revenue collection is a first step towards good governance. Transparency goes beyond disclosure of information and openness, it is also about developing the right competencies that is linked to

¹⁷⁹ Ibid

¹⁸⁰ Lehmann *supra* note 78 at 7

¹⁸¹ Visser, K, *Lessons of Transparency from EITI. Occasional Paper 12: Focus on the Global South* (EITI: Bangkok, 2012) at 18

¹⁸² Ibid

¹⁸³ Ibid.

¹⁸⁴ Ibid at 15.

capacity building.¹⁸⁵ EITI could introduce mechanisms to deal with violations of human rights, improvement of skills On EITI reporting for better compliance.¹⁸⁶ Despite demands for CSO's inclusion being unmet, concerns still remain around EITI's independence and effectiveness due to its heavy involvement with CSO.¹⁸⁷

In the meantime, companies that have adopted EITI half-heartedly support transparent reporting. For example in the USA, the Dodd-Frank Wall Street Reform and Consumer Protection Act under its section 1504 requires disclosure to the Securities Exchange Commission (SEC) of all amounts above \$100,000 from EI by type, project and government.¹⁸⁸ The implementation of Act was however challenged by the American Petroleum Institute (API) on behalf of several oil companies namely: BP, Chevron, Exxon, Shell and Statoil (all listed as supporters of EITI).¹⁸⁹ The Federal Court agreed with the position of the API, holding that the SEC had over stepped its mandate. Henceforth, the implementation of Section 1504 was put on hold.¹⁹⁰ Thus the inherent contradiction between voluntary commitments and transparency in EI has helped to undermine global adoption of transparency initiatives. It would be incumbent up on EITI to establish mechanisms that would reprimand/sanction stakeholders that are double faced. Such mechanisms are currently non-existent.¹⁹¹

The most serious shortcoming of EITI is its limited scope. In line with its principal, its purpose of “prudent use of natural resource wealth,” if not well managed, “can create negative economic and

¹⁸⁵ Ibid.

¹⁸⁶ Ibid at 17

¹⁸⁷ Ospanova *supra* note 188 at 11

¹⁸⁸ Ibid

¹⁸⁹ Ibid

¹⁹⁰ Ernst & Young, *Disclosing Government Payments: Implications for the Oil and Gas Industry* (Ernst & Young Oil & Gas Center: Houston, 2013) at 1

¹⁹¹ Ibid at 10

social impacts”¹⁹². The gap in this framework is that it does not mention environmental degradation caused by EI or even the option of not extracting. This is important because whether or not EI is being done transparently, peoples’ livelihoods would be negatively impacted.¹⁹³

2.9. Conclusion

The negative effect of the ‘resource curse’ has had the positive effect of growth in transparency frameworks around the world under the umbrella of EITI. However, the norms created under this framework are mainly voluntary and without an enforcement mechanism, its effect is limited. The only compulsory component binds member states of EITI. Despite these setbacks, EITI has created a framework of globally related and like-minded transparency institutions such as the IMF, WB and OECD committed to the establishment of transparency and accountability networks. Though EITI has limited scope, it has facilitated dialogue in countries under conflict by reducing tension between adversaries to conflicts to a common understanding. The efforts of EITI have however been undermined by the existence of both voluntary and compulsory frameworks. As a result, EITI is only binding to few member countries, but all companies are voluntary members while being important stakeholders. This is a gap through which a truly international transparent framework in EI would be difficult to achieve. The next chapter examines governance challenges in Kenya’s EI and how they have been addressed.

¹⁹² EITI Standard *supra* note 85 at 9.

¹⁹³ *Ibid* at 10

CHAPTER THREE.

LEGAL POLICY AND REGULATORY REGIME ON TRANSPARENCY AND ACCOUNTABILITY OF THE EXTRACTIVE INDUSTRY SECTOR IN KENYA.

3 Introduction

This chapter discusses Kenya's extractives sector landscape and analyses how the legislative framework has addressed the governance challenges attendant to the sector. Kenya has largely relied on agriculture and tourism as its main sources of revenue. Focus has now increased to the contributing to about 1% of Kenya's gross domestic product (GDP). This has created higher expectations of contribution of over 5% of the country's GDP.¹⁹⁴ These expectations have cascaded to other stakeholders such as local communities, government and investor companies to benefit

¹⁹⁴ Odari, Migai and Njonjo *supra* note 21.

from the sector. As such success of the EI in Kenya would depend on how the country governans the EI and increase revenues for the benefit of all stakeholders.

3.1 Kenya's Extractive Sector

Kenya's geological landscape is categorized into five major areas; The Nyanzian Shield (Nyanzian and kavirondian System) found in western region of the country. The latter (Kavirondian system) is composed of mud and sandy stones while the former is composed of basalts and stones of iron, and presence of base, metals including silver, copper and gold.¹⁹⁵

The Proterozoic/ Mozambique belt occurs in the east and west of the Rift Valley. Major minerals found here are marble, corundum, kaolin fluorspar, graphite, wollastonite, kyanite, , magnesite, as well as a variety of gemstones¹⁹⁶ Palaeozoic and Mesozoic cluster is found within the coastal belt and also the northern parts of Kenya. Mineral deposits present sand stones, clays, limestone, gypsum, manganese and hydrocarbons. According to the Ministry of Mining, there is occurrence of mineral sands and titanium. ¹⁹⁷In the central parts of Kenya, carbon dioxide, soda ash clays, diatomite, rubies and gypsum have been found. The Tertiary and Quaternary Sediments found host a variety of Mining in Kenya that is carried out by international mining companies and small scale mining operations by local communities. Mining companies have invested in Kenya and operate around mining areas. For example, the Tata Chemicals companies operates around Lake Magadi, the Kenya Fluorspar Company in Rift-Valley, Africa Diatomite Industries Limited (ADIL) operating in rift region of Kenya. ¹⁹⁸Over 70percent of mining in Kenya is licensed, small scale

¹⁹⁵Ibid

¹⁹⁶NCA *supra* note 51

¹⁹⁷Ministry of Mining *supra* note 206

¹⁹⁸ NCA *supra* note 27

mining that takes place consists of small-scale mining (ASM) and artisanal workers that mainly operate in areas with gemstones.¹⁹⁹ Kenya has also made discoveries of oil and gas oil in Turkana County.

3.2 Governance of EI in Kenya

The Constitution of Kenya 2010 lays the foundation for good governance in Kenya and establishes the principles and values of good governance. Article 10 of the constitution lays down these values to include public participation, accountability, transparency, sustainable development among others. The principles and values guide all state and public officers when interpreting and applies the constitution and public policies²⁰⁰

These principles have been reflected in critical areas of public service including principles of public finance management, principles of land and environment management, principles of Kenya's electoral system and public service.²⁰¹ The principles of transparency and accountability have been advanced in Kenya's legislative framework and through the judicial system and emerging jurisprudence from the Kenyan legal system and pronounced as critical elements for realization of all human rights such as the rights and good governance. . In the matter of the *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others*²⁰² The Electoral Commission (IEBC), an independent Commission mandated to manage and conduct elections in issued a tender for materials to be used in the elections to Al Ghurair Printing & Publishing LLC. The Respondents who included the main opposition party,

¹⁹⁹Ministry of Mining *supra* note 206

²⁰⁰ National principles and values of public service

²⁰¹ Values and Principles of governance under the Constitution of Kenya 2010

²⁰² Kenya Law Reports, Civil Appeal 224 of 2017

National Super Alliance Kenya (NASA) challenged the award of the tender on allegations that it did not comply with values of governance. The Petitioner argued that the principles under article 10 are non-justiciable and ought to be realized progressively. The court held that Article 10 (2) of the Constitution is a critical cornerstone of our democracy. The principles under Article 10 are justiciable and enforceable immediately and important in public service.

Similarly in the matter of the *Communication Commission of Kenya -v- Royal Media Services & 5 Others*²⁰³ Article 10 has Constitutional obligations to be followed by all Public Officials and State Officers. In *Peter Makau Musyoka and Award of Mining Concessionary Rights to the Mui Coal Basin Deposits*²⁰⁴ a petition was filed by members of the Mui Coal Basin Land Community. They argued that the process of awarding a license to explore, exploit and blocks of coal in Mui basin to Fenxi Company was in contravention of Article 10 and Article 35 of the Constitution because the same was done in secrecy and without participation of the public. In addition, the petitioners argued that the process of exploration of coal was likely to cause degradation of the environment and contravene the right to a clean and healthy environment. The Court in making a decision agreed that principles are key constitutional values and elements of our new democracy. The court further observed that the constitution *'treats secrecy on matters of public interest as anathema to our democracy.'* There are challenges associated with EI²⁰⁵ top among them being, accountability on EI, from decision makers. Secondly transparency and accountability has not been assured throughout the EI value chain. When the EI resources are discovered, the government needs to reduce uncertainty through a transparent contracting and licensing system that allocates

²⁰³ Kenya Law Reports, Petition No.14 of 2014; [2014]

²⁰⁴ Kenya Law Reports Petition Nos 305 of 2012; [2015]

²⁰⁵ RWI *supra* note 102 at 8

rights efficiently.²⁰⁶ Thirdly is the challenge associated with benefits to all stakeholders in EI. Nationally owned resource companies need to embrace accountability with clear mandates, operational efficiency while the state ought to ensure benefits to local communities, environmental, socio-economic costs of resource projects should be accounted for. The fourth and critical challenge is the poor management of revenue resources. Kenya needs to prudently invest EI resources for optimum and equitable results to benefit current and future generations. In addition, domestic expenditure of revenues should be regulated to cover for revenue volatility that is cyclic.

Other challenges are with respect to exclusion of marginalized groups especially those faced by women and children engaged in mining activities, who often work in hazardous conditions. The majority of women and children participate in small-scale mining (ASM) which is often labor intensive with minimal financial compensation. Women in the sector suffer from gender related inequality with regard to inability to own and control resources, capacity gaps that limit their participation in decision making and limited technical knowledge on the complex EI sector.²⁰⁷

Children on the other hand are subjected to child labor which is a violation of labor laws.

Participation of communities in mining activities is often limited as the mining sector is largely controlled by foreign firms. The limited participation of communities living in natural resource rich is due to lack of expertise, inadequate financial and technical expertise required in the mining sector. Additionally, there is limited building of local content leading to low skills transfer.

²⁰⁶ Ibid.

²⁰⁷Ministry of Mining *supra* note 206 at 7.

Kenya's legal framework on EI has been weak and institutions facing interference from political interests. Another compounding challenge has been limited technical skills, lack of comprehensive tax policies to cover the sector leading to slow growth.²⁰⁸

3.3 Legislative and Policy Response to the Governance Challenges in EI

Strategies to address the governance challenges articulated above. The response has encapsulated constitutional, legislative, policy and judicial measures and reforms.

3.3.1 Constitutional Foundation of Governance of Extractive Industry

The Kenyan Constitution is supreme in governing natural resources exploitation. It has various articles, which touch on the regulation of the extractive sector. Article 10 outlines guiding principles in implementation of the law and which guide public officials in exercise of their public functions. The adoption of these values in the legal framework is critical in setting the framework for management of different sections of the governance framework which includes natural resources.

The constitution enshrines the right to access information held by government. Article 35 protects the right to public information ²⁰⁹ and it requires the state to disclose all relevant information affecting the nation and information held by private bodies in certain instances. The right to information is important in the governance of a country's national resources by ensuring that citizen have information and effectively participate in governance from an informed perspective

²⁰⁸Ibid

²⁰⁹ Article 35(1) of the Constitution of Kenya 2010

and have access to information on government actions within the context of EI. The inclusion of private companies within the framework of Access to Information is an important step towards protecting rights and obligations of private investors in the EI value chain.²¹⁰ Article 42 provides for healthy environment.²¹¹ Dealing with challenges associated with environmental degradation associated with effects of extraction. The constitution sets principles of natural resources use and management including equity, efficiency, and sustainability²¹²

Article 69(1) gives the state responsibility to ensure natural resources are utilized in a manner that benefits all both at national and county levels.²¹³ Article 61(1) of Kenya's Constitution provides for collective ownership of land as a nation, communities or individuals. Public land according to Article 62(1) (f) includes land containing minerals. The public therefore has an interest and a right to participate in all transactions affecting public land.

The Constitution introduced a two level government, with devolution under Article 174. The current structure allows for a participatory approach to governance with objectives to ensure people's participation in governance of resources, sharing of resources in an equitable and sustainable manner²¹⁴. If properly implemented, devolution provides a starting point for public participation in governance of local resources and sharing of revenues generated from EI.

While the Constitution through Article 35 introduces a shift in governance by allowing the public to access information held by the government and by select public bodies, the constitutional provision introduces a limitation on who can access the right to information held by the courts as

²¹⁰ Ibid Article 35 (1).

²¹¹ Ibid Article 42

²¹² Ibid Article 60

²¹³ Ibid Article 69

²¹⁴ Ibid Article 174.

citizens only. Jurisprudence emerging from the courts has recognized the importance of this right but has been consistent with the limitation introduced by the constitution protecting the right of citizen. In the matter of *Nairobi Law Monthly Company Limited V Kenya Electricity Generating Company & 2 Others* where the Petitioner being the Nairobi Law monthly a limited liability company requested for information from Respondent being the Kenya Electricity Generating Company. The information sought was with regard to contracts awarded to companies by the Respondent. The petitioner argued that information ought to be provided in line with Article 35 of the Constitution of Kenya. The Judge recognized the right to information as a fundamental right necessary for the enjoyment of all other rights. In that regard the right is recognized in Kenya and international instruments like Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). However, the Judge in her judgement observed that the petitioner was a company and not a natural citizen and therefore was not entitled to the right to information as per Kenyan law . The Constitution provision limits the enjoyment of the right to information which should be enjoyed by all persons as has been the case with jurisdictions that recognize the right to information as a human right. To advance the right to information, Kenya should adopt a framework that allows protection of the right to information for all persons.

3.4 Legislative Response to Governance Challenges in of the EI

Kenya has made a number of legislative interventions that seek to improve the extractive sector. Laws are: Access to Information Act 2016, Public Finance Management Act, Petroleum Act 2019, The Environmental Management and Coordination Act, Land Management Laws, Mining Act, 2016. We highlight provisions of transparency contained in Kenya's legal framework on EI.

3.4.1 Access to Information Act, 2016.

The law passed in 2016 provides legislative framework for implementation of constitutional rights and principles, including the bill of rights ²¹⁵ on disclosure. The Act obligates the government to proactively disclose information affecting citizens, private companies on the other hand have an obligation to disclose information that may be of interest to the public.²¹⁶Enactment of an access to information Act by Kenya demonstrates commitment to proactive disclosure and a transparent government system including disclosure of public revenue. The Act facilitates principles of proactive disclosure, simplified access to information procedures within a stipulated period of time and guides private bodies on their roles to the public on being accountable. The access to information Act recognizes that certain information may be withheld for certain reasons such as protection of personal privacy, national security, and information interferes with due process of law, affect commercial interests including intellectual property²¹⁷these are cited as limitations to access to information. The law is an elaborate and significant development in promoting transparency and accountability, Kenya needs to prioritize development and adoption of regulations that will implement the Act fully.

3.4.2 The Mining Act, 2016

The principle of transparency and accountability is reflected in the Mining Act 2016. The Act is in line with values under Articles 60, 62, 68, 69, 71.²¹⁸In addition the centrality of these values was captured by the Court of Appeal decision in the case of *Cortex Mining Kenya Limited v*

²¹⁵Ibid Article 35.

²¹⁶Ibid Article 35 (1) .

²¹⁷Section 5 of the Access to Information work 2016.

²¹⁸ Various Articles of the Constitution governing the management and use of land in Kenya.

Cabinet Secretary Ministry of Mining & 9 others where the applicant, Cortec Mining Limited moved to court to challenge revocation of a mining license issued to it by the Government of Kenya. The respondents who included the Cabinet Secretary in charge of mining, the Attorney General, National Environment Management Authority argued that the license was issued irregularly and failed to comply with elements of public participation, environmental conservation as they had not undertaken an Environmental Impact Assessment, nor received clearance from institutions mandated to conserve the environment and cultural heritage such as the National Environment Authority (NEMA), Kenya Forest Service, National Museum among others. In addition, the granting of the license failed to comply with principles of Article 10 including participation of the community as argued by Kwale County. The court observed that National values and principles of governance under Article 10 ought to be observed by every person including state officers are enjoined to uphold the Constitution and to defend it. The principles ought to have been applied in granting the mining license. The Act introduces a transparent and participatory legal regime in line with the supreme law of Kenya In advancing transparency and accountability, the Act under section 119 obligates that information relating to mining be open; this include information relating to revenues paid to the government, mineral agreements entered into are made public information, licenses issued and their status will also remain open to the public²¹⁹. The minister is required to develop separate regulations that will ensure a more accountable and transparent mechanisms for reporting and publishing information and reports on the mining sector.

²¹⁹ Section 119 of the Mining Act 2016.

In addition, the Act establishes the office of the leadership which includes a Director in charge of mines who is to operate in an open manner.²²⁰The Act contemplates an open and transparent system that promotes public oversight. Section 20 of the Act contemplates cooperation between various players; government, non-state actors who could be private sector, media and civil society to operationalize the Act by facilitating public participation²²¹ and the development of policies that ensure consultation almost stakeholders in mining operations make deliberate attempts to entrench principles of governance in the mining sector.

Section 29 of the Mining Act mandates the Cabinet Secretary to ensure that a data base of information is open to the public .. Section 119 provides for disclosure of information on agreements and mining contracts. The Cabinet Secretary has an obligation to ensure access to information and provide for an accountable and transparent publication of mineral related activities.²²²

Engagement of the community is factored in by the Act through transparent mechanisms when awarding mineral licenses. The Cabinet Secretary is required to send a notice to a land owner, community and the county government when receiving a mineral right application, and publish the same in the Kenya gazette and national newspaper allowing people to object to the grant of the license. This is a critical move in ensuring community participation and information in the dealings with land in the context of the extractives sector.

To promote local content development, value addition and community development, the Mining Act provides for community training by mineral rights holders, research and participation

²²⁰Ibid. Section 20(I)

²²¹Ibid. Section 20 (2)

²²²Ibid Section 119

of communities in the extraction process. This would ensure that benefits of mining are felt by all stakeholders as a critical component of good governance. Community participation is required in the process of resettlement arising from mining operations.²²³ Sharing of mining revenues is considered with a capping of 10% of the royalties paid by mineral right holders distributed to communities where the mineral operations occur. The mining Act heralds a good foundation to improve governance of the mining sector. Through elaborate provisions that mirror international standards and initiatives, the Act provides a good basis to improve transparency and accountability once implemented. Through a legal notice number 84 ²²⁴ the ministry of mining has developed regulations that would aid implementation of the mining Act 2016 thus allowing for public engagement and information on mining and exploration in Kenya.

3.4.3 Land Management Laws

The legal framework on land management is contained under Chapter 5 of the Constitution. The legislative framework includes; the National Land Commission Act, 2012, the Land Registration Act, No. 300 of 2012, and the Land Act, No 6 of 2012. These laws provide for the good management and use of land in Kenya considering resources are in marginalized areas where land is owned communally. Of interest to the extractives sector, the Constitution of provides all land belongs Kenyans collectively.²²⁵ Land must be utilized within principles of equity, efficiency and in a sustainable manner through the application of principles of “transparent and cost effective

²²³Ibid. Section 153

²²⁴ Kenya Gazette Supplement No.78, Legal notice No.84 of the Mining Act(No, 12 of2016)The Mining (State Participation) Regulations, 2017

²²⁵ Article 61, the Constitution of Kenya 2010

administration of land, participation, accountability and democratic decision making within communities, the public and government.”²²⁶The Constitution also provides land classification as public, community or private land. All natural resources are in public land where the management is with the national government for the people of Kenya, and administered by NLC. The minerals shall be administered on their behalf by the National Land Commission. From these provisions, it is clear that the Constitution envisages that land and all mineral resources found on land belong to the people of Kenya. The principles of good governance adopted in the land administration process ensure that natural resources benefit all stakeholders in the EI value chain.

The Land Act 2012 creates an obligation on the NLC administer public land transparently and in an accountable manner. This includes public engagement where a thirty days’ notice should be given to the public and interested parties on allocation of public land. In this regard, the commission is required to publish or send a notice of action, to the public and interested parties, at least thirty days before allocation of any land under the Land Act. In addition, the principle of intra-generational equity is considered in the use of land by requiring the Commission to ensure sustainable management of land for future generations.²²⁷ The Commission is required to undertake an inventory of all natural resources and make rules and regulations for the sustainable conservation of natural resources and sharing of benefits

3.4.4 The Environmental Management and Coordination Act

The Act lays out the framework for the management and conservation of the environment. The Act establishes a framework for the management of the environment and reiterates constitutional

²²⁶Ibid. Article 60

²²⁷ Section 4 of the National Land Act

principles and the right to a clean and healthy environment including obligations to promote development and sustainable use of natural resources²²⁸. The right to information is recognized as a facilitative right for the enjoyment of other rights, In this regard, the Act introduces section 3A with strong provisions for provision of information held by the National Environment Management Authority²²⁹ The Act establishes the environmental action plan committee that among other functions analyze Kenya's natural resources and monitor the pattern of their distribution in Kenya.²³⁰ The law recognizes a clean and healthy environment as a human right and requires that environmental impact assessments (EIA) are undertaken with a report submitted to the National Environmental Management Authority²³¹ for review and approval. The EI sector is factored by the Act as one of the activities that require an EIA done. These activities include open cast mining, extraction of metals and coal as well as exploration and production of petroleum in any form.²³² The Act contemplates public participation and transparency by requiring that upon receipt of an EIA report, and its publication widely inviting public comments and views.²³³ The principles contained in the Act have been upheld by courts in various decisions. In the matter of *Save Lamu & 5 others v (NEMA) & another [2019]*²³⁴. A contract was awarded to the first respondent for the power generation in Lamu. This involved setting up a power plant along Kwasasi in Lamu county. The first petitioner alongside others acting on their behalf and that of members of the community challenged the process of carrying out an Environmental Impact Assessment and issuance of the Environment impact Assessment Licence to the project by the

²²⁸ The Environment Management and Coordination Act, general principles, Section 2A

²²⁹ Ibid, section 3A

²³⁰ Section 38, the Environmental Management and Coordination Act 1999 No. 8 of 1999 (hereinafter EMCA)

²³¹ EMCA.

²³² Ibid. Schedule

²³³ ibid

²³⁴ Tribunal Appeal Net 196 of 2016

first respondent, the National Environment Management Authority. The challenge was on various grounds among them that the process lacked sufficient public participation and was a threat to the right to a clean and healthy environment. The court held that insufficient scoping process that lacked proper public participation and was a *threat* to the right to a clean and healthy environment. The court in its holding observed that principles of the constitution must be observed and that public participation by individuals and members of the community is critical in the system of environmental impact assessment. Similarly, access to information is important to ensure meaningful participation of communities and citizens in making decisions and contributing to debate and policy processes.

The principles of public participation and access to information in environmental governance and the process of EIAs is therefore drawn from the constitution of Kenya and international principles applicable to Kenya by virtue of Article 2(5) and 2(6) of the constitution of Kenya including the Rio declaration²³⁵

3.4.5 The Petroleum Act 2019

The Petroleum Act 2019 provides a framework for governing petroleum operations including exploitation, contracting production of petroleum.

The Act introduces an elaborate framework for transparency, accountability and public participation. Through the Petroleum Act 2019, various functions such as the Cabinet Secretary, Parliament Contractors are mandated to maintain transparent an open policies on Petroleum, open strategic plans, open contract negotiation processes²³⁶, and disclosure of the volume of petroleum

²³⁵ The Rio Declaration on Environment and Development. Principle 10, 1992

²³⁶Section 9 of the Petroleum Act 2019

produced by contractors. The Act provides for the development of an annual petroleum policy which must be circulated widely and the status of its implementation published widely to members of the public.²³⁷

With regard to Petroleum agreements, the law stipulates open processes including negotiation of contracts, award and execution of an agreement; by requiring that petroleum agreements are entered in a transparent, competitive and cost effective manner. In addition, the Act mandates the Cabinet Secretary to publish names and details of the Contractor awarded the contract; on the other hand, the Contractor awarded is required to maintain accurate books of accounts, records provide information ,integrate public participation on execution of his contract and petroleum operations.²³⁸

With regard to Parliament the Act requires reports to be submitted to Parliament annually and for Parliament to ratify field operations and issuance of licenses arising from petroleum exploration. In ratifying field operations, Parliament is required to integrate public participation.

The Petroleum Act establishes the Petroleum Authority whose mandate is to grant licences and at the same time can, suspend or revoke it. The Contractor is required to make reports to the authority including on the volume, quality and quantity of petroleum received. The Act penalizes disclosure of false information and imposes a fine for such wrong doing. In addition, the Act establishes a Petroleum fund that seeks to benefit future generations. The fund is to be managed within principles and provisions of the Public Finance Management Act 2012. While the Petroleum Act envisages a transparent and accountable framework for petroleum operations, the Act limits disclosure of information by requiring that information shall not be disclosed to the public without

²³⁷ Ibid Section 5

²³⁸ Ibid Section 19.

consent from the person from whom it was obtained. This claws back rights guaranteed under the Constitution of Kenya, the freedom of information Act and progressive provisions on transparency contained under the Petroleum Act. The provisions limiting access to information would need to be implemented with caution so as not to deny the public their right to information.

The Petroleum Act is progressive and provides an opportunity for Kenya to govern petroleum operations in a manner that provides accountability to all stakeholders and benefit of communities, providing that Agreements are entered in a transparent to give effect to 'relevant articles of the Constitution in the governance of the petroleum sector. According to the law, operations in petroleum exploration and development are done in a transparent and participatory approach. The Act obligates the Cabinet Secretary responsible for petroleum to publish the national policy on upstream petroleum operations, and strategic plans. By requiring the publication of these plans, public oversight and scrutiny is implied in the petroleum exploration and development process. The Bill proposes a framework for stakeholder engagement through participation in the process of entering into agreements and negotiating contracts in a fair, transparent, cost effective and competitive manner.

The law further makes proposals for community benefit sharing and local content development by requiring all contractors to prioritize goods manufactured in Kenya, employment of qualified and skilled Kenyans, technology transfer, research and development, financial services industrial training and attachments for members of the community. In addition, the Regulatory Authority is mandated to promote local content development and a monitoring unit. A training fund would be established and managed by the Cabinet Secretary containing monies raised by contractors as their contribution to training.

3.4.6 Public Finance Management Act

Article 201 of the Constitution anchors the framework for Kenya's public finance management and principles. These principles include being open equitable, accountable and participatory in management of public finances and clear financial reporting.²³⁹ These principles are contained in the Public Finance Management Act and should be adopted in the management of revenue collected from all sectors which would include the extractives sector. These revenues are collated by the national government and are considered as public funds. As such the revenues must be utilized in a transparent, equitable and open manner.

3.5 Other Proposed Laws

Other legislative frameworks have been proposed that seek to address remaining governance challenges that relate to revenue sharing, benefit sharing, levels of local content and community participation in the EI

3.5.1 Kenya Sovereign Wealth Fund Bill 2019

The draft Sovereign Wealth Bill Sovereign Wealth Fund, seeks to provide efficient institutional framework for the management of minerals and petroleum revenues in Kenya. The Bill establishes a public fund known as the Kenya Sovereign Wealth Fund. The draft Bill provides guiding principles for Public Officials administering the proposed law to operate within the principles of governance set out under the constitution. These principles include transparency and accountability as set out under various sections of the constitution. If enacted into law, the Bill

²³⁹ Article 201, the Constitution of Kenya, 2010.

lays a foundation for management and investing of revenue generated from the extractives sector with benefits of future generations of citizens of Kenya. The proposed law provides for principles of good governance to provide efficient structures for the management of minerals and petroleum revenues in Kenya.

3.6 Kenya's Policy Framework in the Extractive Sector

Other than constitutional and legislative interventions in the governance of EI, Kenya has also passed certain policy framework that seek to address governance challenges in WI. These include: vision 2030 and National Energy and Petroleum Policy.

3.6.1 Vision 2030

Vision 2030 represents Kenya's development blueprint envisages to transform Kenya's economy and improve the quality of life for Kenyans by the year 2030.²⁴⁰ Following the discovery of commercial deposits of oil and gas resources, export earnings are set to increase GDP growth, bolster economic growth as the seventh pillar of vision 2030.²⁴¹ The plan identifies challenges to the sector such as financial capacity, need for capital for exploration, limited technical capacity and manpower in the extractives sector.²⁴² The main policy on the extractives sector is carried in Kenya's vision 2030 plan medium term plan.²⁴³ The plan recognizes the capacity of strong policy, legal and institutional reforms in the improvement of governance in the sector. This justifies the

²⁴⁰ Government of Kenya, *Kenya Vision 2030: A Competitive and Prosperous Kenya* (Government Printer: Nairobi 2007).

²⁴¹ Ibid.

²⁴² Ibid

²⁴³ Ibid.

high expectations in the levels of transparency, accountability and public consultation in the governance of the EI.

3.6.2. The National Energy and Petroleum Policy

The aim of the policy is promote a sustainable supply of energy.²⁴⁴ Through the policy, the government of Kenya is keen on establishing regulatory frameworks for petroleum operations with a view of promoting development, attract investors and enhance capacity in the country.²⁴⁵ Through the policy, the government recognizes the need for transparency and accountability as the starting point of good governance in the sector. The state has made commitments in the promotion of awareness, consultation with public in protection of the environment.²⁴⁶ The policy proposes an improvement of the legal frameworks aligned with Article 35 on Access to Information to ensure greater transparency.

3.7. Institutional Framework in EI

The Petroleum Act establishes the Petroleum Advisory Committee is in charge for the award and revocation of petroleum exploration licenses under the Petroleum Act 2019. The Committee referred to as the Committee in charge of Upstream Petroleum Advisory comprises of members including the Attorney General, the Permanent Secretary Ministry of petroleum, the Treasury among other representatives, Kenya Revenue Authority²⁴⁷. The Committee is critical in

²⁴⁴IEA *supra* note 20 at 5.

²⁴⁵ Ibid,

²⁴⁶Ibid

²⁴⁷Section 10 of the Petroleum Act 2019

management of petroleum operations because they provide advisory services to the Cabinet Secretary on Petroleum operations which includes licenses and agreements.

The energy Act 2019²⁴⁸ establishes the Authority which is a body corporate with functions including collecting and maintaining energy data and compliance with the law; the constitution provides for transparency and accountability.²⁴⁹ Parliament as an institution is critical in carrying out its mandate on representation of the people. With regard to governance of extractives, Parliament ratifies rights and concessions granted for natural resources exploitation including oil and gas as well as oversight functions. In carrying out its functions, Parliament is required to undertake public participation and ensure that the public is aware of decisions that are taken on their behalf. The relevant commission in charge of allocation of revenue makes recommendations on the basis for the equitable sharing of revenue raised by the national government, a role which affects allocation of revenues from the extractives sector.

The National Land Commission is a constitutional body charged with the responsibility of managing public land.²⁵⁰ Within the principles laid out Secondly, the role of the Commission is extended upon the discovery of minerals as the land becomes public land. NLC is required to establish a transparent, open, fair and participatory process through which acquisition of public land and compensation of land would be effected. This is in addition to making rules that ensure fair compensation of owners whose land has been acquired compulsorily²⁵¹ and where the project fails to take off, the land may revert back to the original owners or their successors.

²⁴⁸The Energy Act 2019.

²⁴⁹ Ibid Section 11

²⁵⁰ Article 67, Constitution of Kenya, 2010

²⁵¹ Section 110, the Land Act, 2012

The National Assembly²⁵² is a critical institution with oversight mandate in the natural resources management. Some of its duties is to ratify grant of rights as well as concessions granted to all entities including the national government. The Senate House is tasked with serving the oversight and legislative interests of devolved governments as regards the management of natural resources. Similarly, the central role played by County governments under Article 176 of the Constitution cannot be underestimated.²⁵³ They are closer to the people in areas where activities of the extractive sector take place. County governments also benefit from revenues allocated to them by the national government. County Assemblies²⁵⁴ discharge oversight and legislative functions that ensure equitable and sustainable governance of the extractives sector.

NOCK is a state corporation whose mandate, is to coordinate and facilitate production sharing contracts (PSC) negotiations, and carry out financial appraisals of PSCs to ensure accurate information is maintained. NOCK has a data center for storage of seismic data, well logs and reports as well as gravity data which have been obtained in Kenya through petroleum exploration companies.²⁵⁵

3.8 Judicial Decisions on Governance in EI

Some conflicts relating to governance in the extractive sector have ended up in court. The clear message sent by the courts is that transparency and accountability is prerequisite to good

²⁵² Article 93, the Constitution of Kenya 2010

²⁵³ Ibid Article 176.

²⁵⁴ Ibid. Article 177.

²⁵⁵ Mkutu K, *Conflict, Security and the Extractive Industries in Turkana, Kenya Emerging Issues 2012-2015* (USIU-Africa: Nairobi, 2016)

governance in the extractive sector. In this section two cases are discussed to illustrate the essence of good governance in the extractive sector.

3.8.1. *Friends of Lake Turkana Trust v Attorney General & 2 others*²⁵⁶

The issue in this petition was about disclosure of environmental information.²⁵⁷The government of Kenya entered into an agreement with Ethiopia for the supply of electricity.. This construction would cause environmental concerns and have an adverse impact on Lake Turkana and the communities living around it. The petitioner argued that the government had failed to adhere to provisions of the access to information act by failing to proactively disclose information on agreements between the parties .²⁵⁸The court held there was failure o disclose important information relating to environment conservation in line with the Constitution. The petition was allowed and the government compelled the petitioners to comply with full disclosure.²⁵⁹

3.8.3. *Peter Makau Musyoka and others Vs the Ministry of Energy and Petroleum, the Ministry of Mining, Fenix Co. Ltd and others*²⁶⁰

Members of the Mui coal basin land community alleged that the ministry of energy started coal exploration in the Mui Basin to establish the existence of commercially viable coal deposits in the region. The Ministry of mining invited expressions of interest (EOI) from firms for concession of

²⁵⁶ Environment and Land Court at Nairobi suit No. 825 of 2012

²⁵⁷ Ongaro B and Watare A, *The Relevance of Access to Information and its Role in Ensuring Good Governance: Drilling Past the Resource Curse* (Strathmore University: Nairobi,) at 130

²⁵⁸*Ibid*

²⁵⁹ ICJ Kenya, Access to information law in Kenya: rationale, policy framework and roadmap, 2016.

²⁶⁰High court of Kenya at Machakos Constitutional Petition No. 305 of 2012

Mui coal blocks. When awarding contracts, the Ministry of energy formally awarded the contract to Fenxi Ministry Industry Co. Ltd and later the government entered into a benefit sharing agreement with Fenxi Ltd. Petitioners in this case alleged that when awarding contracts, the Ministry did not adhere to principles of Article 10 of the Constitution on Transparency, public participation of the people, the petitioners also alleged that Article 35 of the constitution was contravened as well as Article 42 and Article 70 on the right to a clean and healthy environment. In contravention of Article 35 on Access to Information, the process pertaining to the concession, the benefit sharing agreement (BSA) and the process of negotiating it were done in secrecy in violation of Article 35(1) and Article 10 of the constitution. The petitioners had wanted to be furnished with a copy of the BSA which the government initially declined. However, in the course of litigation, the Attorney General (AG) supplied copies of the BSA.²⁶¹

The court held that public participation is pre requisite to environmental governance. Observing that public participation in environmental matters must include access to and dissemination of relevant information. In addition, the judges ordered the AG and Fenxi ltd to commence engagement with the local community and provide reasonable opportunity for public participation in the EIA, resettlement programs and in benefit sharing programs.

Based on jurisprudence emerging from courts, the right to information and disclosure requirements are recognized as critical principles of democracy. As was decided in the case filed by friends of Lake Turkana the court recognized that access to information on human rights affecting citizen is critical. In this case, the court ordered the government to disclose information to the petitioner. Similarly, in the *Musyoka* case, the court recognized important closely linked principles which

²⁶¹ Ongaro and Watare *supra* note 252 at 140.

include public participation, access to information and accountability. Based on the jurisprudence, the courts continue to promote enforcement of principles of transparency enshrined in the legislative framework.

3.9. Conclusion

Kenya has made progress to enhance governance of its extractives sector. However, the policy, legal and institutional frameworks requires full implementation to maintain a transparent and accountable framework. Kenya has made a significant step in enactment of critical laws with elaborate disclosure provisions. These include the mining Act, the Petroleum Act, the Energy Act and the Access to information Act. Implementation of most of these laws remain a challenge in the absence of implementation guidelines. The Access to information Act for instance requires development of regulations towards its implementation. On the Mining Act, the Ministry developed some regulations which were gazetted but retains a host of regulations that require implementation. The Petroleum Act have regulations that require finalisation and passage by Parliament.

In addition, the legal framework exposes weaknesses with regard to the protection of community rights and participation in management and sharing of revenues generated from natural resources such as petroleum. The revenue sharing formula does not adequately compensate communities and in addition does not provide a framework for enhancing capacity of the communities to promote informed debate in governance of EI. As such, Kenya's policy, legal and institutional framework must adopt efforts to benefit communities through their involvement and training on their rights and role in the extractives sector. Various pieces of legislation such as the Sovereign Wealth Fund Bill are still in draft and these could be prioritized to provide a framework for community benefits. These laws and policies must be prioritized to cure existing gaps in Kenya's legal framework.

CHAPTER FOUR

STUDY LESSONS FROM GHANA AND NORWAY

4.1. Introduction

The discovery of mineral resources in many developing countries has been associated with a ‘resource curse’ or a phenomenon where the discovery becomes a source of social, economic and political conflict. In Kenya this has been demonstrated through non-disclosure of EI agreements, corruption and sometimes conflict. This chapter makes an assessment of how other jurisdictions have been able to deal with the resource curse and the lessons Kenya can learn in instituting transparency and accountability mechanisms. Ghana and Norway have been chosen for various reasons. Ghana in particular is an African country at almost the same level of development with Kenya. On top of that, through various legislative, policy and institutional measures, it has been able to avoid conflicts that have been the norm in resource rich African countries such as Nigeria, DRC and Sierra Leone. Norway on its part is renowned for establishing standards in EI that have been adopted internationally for the governance of EI and has utilized revenues generated from EI to spur social economic development.

The disclosure of revenues generated from oil and gas is a public good that helps in the fight against corruption and promoting accountability for the benefit of the public. As discussed in chapter one, most countries endowed with these resources are faced with conflict, poverty and low economic development.²⁶² In addition, these countries face challenges related to violent conflicts, environmental degradation, gender and other inequalities, displaced communities and factors that

²⁶²AFRICOG *supra* note 30 at 10

undermine democratic governance²⁶³ and other challenges associated with the resource curse. Most of these countries are yet to benefit from revenues accrued from their EI sector. In contrast, there are examples of countries such as Norway, Botswana, Australia and Chile²⁶⁴ that have drawn economic and social benefits from their EI sectors. For instance, when oil was discovered in Norway, it was not a rich country by OECD standards. After the discovery and over the past three decades, Norway's GDP per capita has increased from 90% of the OECD average, to 150 per cent (OECD, as a result, Norway has begun providing support to developing countries with high resource dependence through programs such as the "Oil for Development" Programme. Similarly, Chile has benefitted from its copper wealth, and diversified its economy to develop innovative industries.²⁶⁵ Chile has managed to diversify its economy and develop innovative industries. However, the focus of this chapter is on Ghana and Norway.

4.2. Governance of EI in Ghana

Ghana is one of the Sub-Saharan countries that is endowed with vast natural resources. Oil was discovered in the country's Jubilee fields in March 2009.²⁶⁶ In July 2010 the Owo-1 drilling confirmed huge amounts of oil reserves. A maximum depth of 4,000 meters has been drilled.²⁶⁷ As such, Ghana is endowed with oil resources and is ranked the second largest producer of gold after South Africa.²⁶⁸ Despite being well endowed with vast resources of minerals, Ghana has not fully exploited in full the mineral resource revenue that would enable it to spur sustainable

²⁶³Ibid.

²⁶⁴Ibid.

²⁶⁶ Manteaw, S., *Ghana's big test: Oil's challenge to democratic development* (CSIS: Washington, DC, 2009) at 7.

²⁶⁷Ibid

²⁶⁸ Ibid.

economic growth and reduce extreme poverty among its citizenry. The country has however recognized transparency and accountability as key principles that must be factored in the framework of its EI sector. As such, Ghana has undertaken legislative reforms and signed on to global initiatives such as the EITI in 2003, PWYP, and Open Government Partnership (OGP) among others. These initiatives have helped it avoid the resource curse experienced in other countries. Additionally based on the approaches taken, Ghana will provide lessons for developing countries such as Kenya in the EI sector.

4.2.1. Ghana's EITI Framework

Ghana has integrated principles of EITI in the governance of the EI. The Ghana Extractive Industries Transparency Initiative (GHEITI) was established to improve transparency and accountability and to coordinate the EI that was perceived as being secretive, corrupt and a major cause for environmental degradation.²⁶⁹ Ghana produced its first report that qualified it to be a candidate in 2007 and thereafter became EITI compliant in 2010.²⁷⁰ GHEITI brings together stakeholders in the extractives sector including investors, government, civil society organizations, and EI companies.²⁷¹ In addition by 2016, Ghana had successfully integrated transparency and accountability and received a 2016 EITI Chair's Award, for taking the recommendations from its EITI reports and turning them into reforms.²⁷² Among the reforms initiated through GHEITI was the enactment of Ghana's Petroleum Revenue Management Act 2011.²⁷³ The Act provides a

²⁶⁹Ibid.

²⁷⁰Ibid.

²⁷¹ Ongaro and Watare *supra* note 252 at 120.

²⁷² McGee & Gaventa *supra* note 108.at28.

²⁷³Ibid

transparent framework in management of Ghana's petroleum revenues.²⁷⁴ In addition the Act establishes the Petroleum Holding Fund as a designated public fund held by the Bank of Ghana to receive and disburse petroleum revenue due to the Republic. The funds is to be administered with the highest internationally accepted standards of transparency and good governance.²⁷⁵ To ensure meaningful participation of civil society in extractives, GHEITI empowered civil society organizations with knowledge and expertise in EI thus creating a robust advocacy process.²⁷⁶ The major accomplishments of the GHEITI are discussed below.

4.2.2. Ghana Publish what you Pay initiative

PWYP has been implemented in Ghana through a coalition of civil society organizations.²⁷⁷ The coalition has participated in the Extractive Industries Transparency Initiative's (EITI) National Multi-Stakeholder Group and has worked on increasing opportunities for civil society in the country to participate in the oil, gas and mining sector. The coalition has also worked on petroleum revenue tracking and expenditure. Among the successes of PWP is to encourage companies to publish what they pay and for governments to publish what they earn, and to encourage public disclosure of EI contracts and transparency of licensing procedures.²⁷⁸

²⁷⁴ Africa Centre for Energy Policy, Centre for Public Interest Law and Friends of the Nation, 'Review of the Petroleum Revenue Management Act, 2011 (Act 815),' available at <http://www.acepghana.com/wp-content/uploads/2013/12/ATT00051.pdf> accessed on May 2019.

²⁷⁵ Section 2, Petroleum Revenue Act 2010, of Ghana.

²⁷⁶ *Ibid.*

²⁷⁷ McGee & Gaventa *supra* note 108.at 7.

²⁷⁸ Ongaro and Watare *supra* note 252 at 120.

4.3. Ghana's Commitments to Anti-corruption

The 2016 Anti-Corruption Summit held in the United Kingdom (UK) where Ghana endorsed the Summit goals aimed at combating corruption.²⁷⁹ The government committed itself to “work towards making government public procurement ‘open by default’ starting with an open contracting data standards for high value contracts and in the oil, gas and mining sector.”²⁸⁰ These commitments if implemented promise to enhance governance of Ghana's Extractive Industry which will provide lessons for countries such as Kenya.

4.3.1. Open Government Partnerships Commitments

Ghana is a member of the OGP platform and has developed its 2015-2017 second country action plan.²⁸¹ As part of its priorities, Ghana has committed to implement activities aimed at strengthening transparency and accountability in the management of the country's oil and gas revenues through the following regime.

4.3.2. Transparency in Ghana's policy and Legislative Frameworks

Ghana adopted the Petroleum Revenue Management Act. This law draws lessons from other successful oil producing companies to steer the country's governance of the oil sector, but also to avoid challenges that have faced other oil producing countries like Nigeria, Angola, and Equatorial Guinea among others.²⁸² This has led to progress in the governance of revenues in Ghana's oil in

²⁷⁹ Aryee, B. ‘Ghana's mining sector: Its contribution to the national economy’, (2001) 27(2) *Resources Policy* 61-75.

²⁸⁰ Ibid.

²⁸¹ Ibid.

²⁸² Corrigan, C. C. ‘Breaking the resource curse: Transparency in the natural resource sector and the extractive industries transparency initiative’, (2014) 40 *Resources Policy* 17-30.

the most transparent, accountable and sustainable manner.²⁸³ The Act lays out key structures that guide spending oil revenues in a transparent and accountable manner. For instance, the Act raises the bar in governance of the EI in Ghana by requiring transparent and accountable management of petroleum resources²⁸⁴ in the tendering process.²⁸⁵

The Petroleum Revenue Management Act provides for three years for classification of information after which it would be made available to the public.²⁸⁶ The Minister in charge of economic planning and finance affairs is required to undertake the publication of revenues of receipts in two national newspapers.

4.3.3. Public Participation

There have been processes adopted to foster local compliance with EITI standards. These include forums that disseminate information to the public on one hand and also interactions with parliament.²⁸⁷ The forums provide a platform for engagement of the leaders with the public. The summary of discussions in these meetings are clear ways of implementation of GHEITI within the public domain. Other than holding forums to disseminate EITI reports, partnerships with media are explored as an avenue to disseminate information to the public.²⁸⁸

Ghana's experience shows Kenya's opportunities to promote transparency and participatory approach to governance of the EI through policy and legislative provisions that provide for transparency and accountability. Kenya has on its part made commitments to join global initiatives

²⁸³ Ibid

²⁸⁴ Section 4 of the PRM Act of Ghana

²⁸⁵ Ibid

²⁸⁶ Ibid Section 49(6)

²⁸⁷ EITI International Secretariat, *Extractive Industries Transparency Initiatives: Source Book* (EITI: Oslo, 2005) at 4

²⁸⁸ Ibid.

such as the EITI, PWP that advocate for transparency in EI. The initiatives would be a step forward in placing Kenya in a progressive platform that fosters good governance in EI. The participation of the media and civil society in governance provides lessons for Kenya in ensuring inclusion of all stakeholders in governance of EI.

4.4. Lessons from Norway

Oil was first discovered in Norway in 1959 with exploration beginning in 1962.²⁸⁹The Norwegian government awarded exploration to private investors by granting them tax breaks and 10 per cent royalties.²⁹⁰ Norway has been listed as the 14th most important oil and gas producer after Venezuela and with 39% of its exports coming from oil and gas.²⁹¹It has come out as a good model in the promotion of transparency and accountability and good governance. This model is based on clear legal and institutional frameworks that have seen Norway maximize returns and revenue generated from its natural resources.

First, Norway has removed management of oil from the political system and established a public company called Statoil to inform government policies and commercial interests on behalf of the government. Oil exploration contracts have been competitively awarded to Statoil as well as to other companies. This is important as such competition helps with skills transfer, boosts technical and organizational capacity in commercial knowledge.

Secondly, the government of Norway deposits 100% of Norway's oil and gas revenues into a Sovereign Wealth Fund.²⁹² The government withdraws 4% of Norway's oil and gas revenues for

²⁸⁹ Ibid

²⁹⁰ Ibid.

²⁹¹ Ibid

²⁹² Ibid

public services²⁹³ Norway's sovereign fund established under the government Pension Fund Act was created in 1990 as the petroleum fund of Norway with the main aim being to save for the country's future expenditure and supporting the country's oil revenues. As such the government spends 4 % of the fund on free education, free universal healthcare, free education and pension for its citizens. A high degree of transparency is adopted in management of the fund with information disseminated through digital platforms and meetings on the management of the fund.²⁹⁴

Norway has signed on to the EITI and has in place organizational structures for reporting and reconciliation of revenue in line with EITI guidelines making it one of the top performers in transparency of revenues generated from oil.²⁹⁵

Companies are granted licenses as a group called the licensee group maintained by the Ministry of Petroleum and Energy. The group of companies selected operate in a model where they share ideas and experiences as well as costs and revenues that come with the production license. This models licensing brings expertise which boosts production. It acts as a control system in the production licenses and reduce corruption due to monitoring from other licensees.

4.4.1. Establishment of a Sovereign Wealth Fund (SWF)

The government of Norway deposits 100% of Norway's oil and gas revenues deposited in a SWF.²⁹⁶ The government withdraws 4% of Norway's oil and gas revenues for public services²⁹⁷ Norway's SWF was created in 1990 under the government Pension Fund Act²⁹⁸ as the petroleum

²⁹³ Ibid at 100

²⁹⁴ Ibid

²⁹⁵ Ploeg R V, *Challenges and Opportunities for Resource Rich Economies* (Centre for Economic Policy Research: Oslo, 2006).

²⁹⁶ Ibid

²⁹⁷ Ibid

²⁹⁸ Ibid

fund of Norway with the aim of saving for the country's future expenditure and supporting the country's oil revenues. As such the government spends 4 % of the fund on free education, free universal healthcare, free education and pension for its citizens. A high degree of transparency is adopted in the management of the fund with information disseminated through digital platforms and meetings on the management of the fund.²⁹⁹

Norway has signed on to the EITI and has in place organizational structures for reporting and reconciliation of revenue in line with EITI guidelines making it one of the top performers in transparency of revenues generated from oil.³⁰⁰ This has been reflected in the award of licenses to oil companies. Companies are granted licenses as a group called the licensee group that is maintained by the Ministry of Petroleum and Energy. The group of companies selected share ideas and experiences as well as costs and revenues that come with the production license.³⁰¹ The benefit of this model is that different licensees bring expertise which boosts production while acting as a control system in the production licenses. This minimizes corruption due to strict monitoring from other licensees.³⁰²

The major objective of EITI is standardization of criteria for publishing cash flows between companies in the EI and the government. In Norway it is passed through a separate regulation for the reporting and reconciliation of cash flows from the petroleum industry. The regulation came into effect as of July 1st, 2009, and instructs licensees on the Norwegian Continental Shelf to report all payments made to the State.³⁰³

²⁹⁹ Ibid

³⁰⁰ Ibid

³⁰¹ Ibid

³⁰² McPherson, C, "National Oil Companies: Evolution, Issues, Outlook," in Davis, Ossowski, and Fedelino, *Fiscal Policy Formulation*, 2003.

³⁰³ Ibid.

4.4.2. Legislative Intervention

Norway has established robust set of laws that regulate the oil and gas sector that promote transparency. The Petroleum Act (Act No. 72 of 29 November 1996 relating to petroleum activities) provides the general legal basis for the licensing system that governs Norwegian petroleum activities. The Act provides the procedure before a production license is awarded for exploration or production. Licensing contracts are not disclosed publicly but the standard license agreements are published and can be found on the government's webpages. The country has a Petroleum Register which is a register comprising all production licenses and licenses to install and operate facilities for transportation and utilization of petroleum.³⁰⁴

The Limited Liability Company Act provides a procedure for the establishment of a private limited liability company. The board of directors needs to ensure the creation of a register of shareholders for the company. Similarly, for public limited liability company, the board of directors shall ensure the creation of a register of shareholders for the company in a securities registry. The registers of shareholders for private and public companies are public and are accessible to anyone.³⁰⁵

The Petroleum Taxation Act (Act No. 35 of 13 June 1975) provides for the taxation of petroleum. The taxation of oil and gas activities in Norway is levied on each company based on the company's total operating income from the oil and gas activities less the total expenses. As a result, payments of tax are not split according to payments related to oil production and payments related to gas

³⁰⁴ Ibid

³⁰⁵ Ibid

production. In addition to the petroleum taxes, the companies pay area fees and environmental fees: CO₂-fee and NO_x-fee.³⁰⁶

The Norwegian Government and the petroleum sector are seeking to make information about the tax revenues received from companies operating on the Norwegian continental shelf more accessible. The member companies of the Norwegian Oil Industry Association (OLF) share the aim of increasing transparency in the EI. On behalf of OLF member companies, an overview of all Norway's tax revenues from petroleum companies operating on the Norwegian continental shelf are published.³⁰⁷

Norway provides critical lessons for Kenya in governance of the EI sector. For instance, the constitution supports the use of natural resources in a sustainable manner. Secondly, principles of intergenerational equity bind Kenya in the management of natural resources. Lessons from Norway for Kenya include the adoption of a sovereign wealth fund that supplements sources of funding for government expenditure. Kenya could begin with the passage of the sovereign wealth fund Bill that is still in draft and borrow key lessons from Norway on administration of the fund. Secondly, similar to Norway, Kenya could sign on to global standards such as EITI that foster transparency in EI.

4.5. Conclusion

In conclusion it is possible for the extractive industry to lead to sustainable development and improve standards of living. These two examples show that it is possible to achieve transparency and accountability in the EI so long as the correct legislative, policy and institutional framework

³⁰⁶ OECD, *The OECD Guidelines for Multinational Enterprises* (OECD: Paris, 2000).

³⁰⁷ Ibid.

is put in place. That is not all these frameworks have to be enforced so as to unleash sustainable and equitable human development. It is also evident that Africa has a lot to account for from its past mistakes of having plenty of natural resource wealth but the population languishing in abject poverty. Through learning from previous mistakes and capitalizing on success stories from other countries, the emerging natural resource rich countries such as Kenya stand a better chance of avoiding potential adverse consequences of natural resource abundance. Countries such as South Africa, Malaysia, Australia, Canada and Norway demonstrate convincingly that with good institutions and accountability framework, harnessing of extractive industries can be a blessing rather than a curse. And represent countries that have avoided the resource

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1. Conclusion

This study analyzed the concept of good governance in EI and identifies key principles of good governance such as public participation, human rights, ethics, integrity, transparency and accountability. The Constitution of Kenya 2010 lists principles of good governance and national values which include human dignity, equity, integrity, transparency, democracy, participation of the people among others.³⁰⁸ The thesis discusses transparency and accountability as key elements that should be mainstreamed throughout the EI value chain. The definitions of being accountable and transparent point to the ability of citizens to hold their leaders to account for decisions they make on behalf of the citizen. As such, transparency and accountability become principles that need to be implemented throughout the EI value chain and which have been embraced by most natural resources rich countries. In addition, global initiatives and standards such as the EITI and Publish What You Pay have been discussed as measures Kenya can adopt to enhance an open EI sector. This concluding chapter therefore summarizes the findings under this research focusing on transparency and accountability in EI and offers modest proposals to enhance what can be adopted to enhance good governance in Kenya's EI sector.

³⁰⁸ Article 10, the constitution of Kenya 2010.

The research finds that Kenya has great potential for development through its vast natural wealth. ³⁰⁹The country has also recently discovered a range of extractive resources, including niobium and rare earths, mineral sand deposits, coal, as well as oil and gas deposits³¹⁰. News of the natural resources discovery was received with excitement and expectations of sudden transformation of the lives of stakeholders including communities living in fragile conditions³¹¹, the government has expectations to increase revenue earnings, multinational companies expect to increase profits through exploration contracts while communities expect the revenue collected to translate to social, economic transformation. All these resources have the potential to benefit all these stakeholders if good governance is adopted.

While the above natural resources discovery and ongoing exploration herald glad tidings for Kenya, it has in equal measure raised apprehension among experts in EI that challenges already experienced within the EI sector may be exacerbated. There are lessons for Kenya not to suffer negative effects where natural resource wealth does not lead to development outcomes. Thus, Kenya must adopt good governance to its nascent EI sector if stakeholders are to experience benefits from natural resources.

The study viewed the concept of governance as an essential ingredient of sustainable development in the context of EI. Various definitions discussed such as the WB definition, the UNDP definition, the ADB, the International Development Association all build a consensus around governance as an essential ingredient for sustainable development and must be applied throughout the EI value chain. Key elements of governance such as transparency and

³⁰⁹ AFRICOG *supra* note 30.

³¹⁰ IEA *supra* note 20

³¹¹ *Ibid*

accountability foster good governance in EI. As such, countries such as Ghana that have discovered natural resources have made efforts to mainstream these principles in their legal frameworks governing EI and adopt global initiatives to promote transparency as mechanisms to promote accountability and avoid the resource curse.

Secondly, the study analyzed existing and draft policy and legal frameworks governing Kenya's EI against these key principles of transparency and accountability. Comparisons have been drawn from countries such as Equatorial Guinea, Nigeria where, despite being endowed with rich natural resources, there has been little benefit drawn from the resources due to the failure to integrate transparency and accountability within EI. This is unlike countries like Ghana, Botswana, Nigeria and Norway that have drawn benefits from their natural resource wealth through integration of transparency and accountability. For instance, with the discovery of oil in the Niger Delta and over half a century producing oil, much of the revenue collected from Nigeria's oil has not been felt by majority of the country's citizen as large amounts of revenue have disappeared with lack of transparency. Similarly, with the discovery of oil in Equatorial Guinea, the country has become the third largest crude oil producer with production being over seventeen barrels per day. However, according to the UNDP human development index, the growth of the economy failed to not improve much the living standards the country's people nor improved the country's GDP. Experiences in these countries and others indicate that without proper management, the EI sector can lead to adverse effects such as conflict, weak institutions, marginalization of groups such as women and youth, corruption and degradation of the environment.

The trend of low levels of development in resource rich countries associated with governance have led to consensus to embrace accountable governance as a policy response. As such, investors and governments in resource rich countries have adopted approaches to embrace

these standards. Chapter three of the paper finds that while Kenya has made significant steps in developing its policy and legal framework governing the EI sector with enactment of various laws and development of draft laws, the existing legal framework is fraught with gaps. Besides various laws are still in draft form and yet to be adopted. In addition, existing laws though a step in the right direction in establishing a legal framework in EI governance fall short of taking into account the interests of local communities either through local content laws or benefit sharing mechanisms. Even with constitutional provisions outlining transparency and accountability as key principles of governance, the laws contain inconsistencies that do not guarantee principles of transparency and accountability in EI. The courts have made significant progress to underscore the importance of constitutional values of transparency, accountability and linkages to environmental protection in EI. Various decisions from the courts point to the need to observe the rule of law in processes such as EI.

5.2. Recommendations

The thesis observes that Kenya has opportunities to improve its EI sector through various initiatives and makes the following recommendations.

- Adoption of global standards on transparency and accountability. Global initiatives such as the EITI, PWYP, have been adopted and implemented in countries such as Ghana discussed here with high levels of improvement in EI governance registered. Similarly Kenya could sign up to the EITI framework and adopt the standards, that will support Kenya to align with global standards in good governance and draw lessons from her African neighbors to avoid challenges such as the resource curse experienced in resource rich countries.

- Kenya's legal and policy framework requires to be aligned in a unified manner that fosters equity in revenue collection, reporting and benefit sharing. Various pieces of legislation provide for different standards and approaches to EI governance. For instance, the Mining Act 2016, implies that the State department responsible for collecting fees, charges and royalties payable is the Ministry of Mining while the Natural Resources (Benefit Sharing) Bill, 2019, provides that the Kenya Revenue Authority shall collect royalties under the Bill.³¹²

Similar inconsistencies are noted with the sharing of revenues with provisions under the Mining Act 2016 giving the National Government a seventy percent of the royalties while the County Government and the community affected by the mining operations shall receive twenty percent and ten percent respectively. According to the Petroleum Act, the County government is entitled to a share of 20%. Of the National Government's share and a 5% share from the National Government's share to host communities. Another inconsistency noted in the Natural Resources (Benefit Sharing) Bill, 2019 with introduction of a fund that gets a share of 20% with the remainder shared between the national and County Government at 60% for national government and 40 % for county government respectively.³¹³

- The research recommends that Kenya fully implements laws governing the EI sector. This includes development of regulations to the Petroleum Act 2019, finalize regulations to the Mining Act 2016 and regulations to the Access to information Act 2016. Implementation of these laws will strengthen the legal and governance framework on EI.

³¹² Njonjo K S, *Case studies of revenue-sharing models: What Kenya can learn from other countries drilling past the resource curse.* (Strathmore University, Nairobi.) at 77.

³¹³ Ibid

- Capacity Building and Local Content Development of communities. To ensure that the benefits of EI are fully realized, Kenya ought to adopt strategies to build capacity of civil society, the public and local communities as is the case in Ghana. As noted in this thesis, natural resources are discovered and exploited in areas that are marginalized. As such there is often information asymmetry between communities on the one hand, investment firms and governments. Citizen awareness and information is therefore necessary to ensure their participation.

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