

Beating the Resource Curse: Transparency in Kenya's Upstream Oil and Gas Sector

by

Sally Lesley Brunton

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Supervisor: Professor Ian Taylor

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Declaration

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Abstract

In 2012 Tullow Oil plc discovered commercial quantities of crude oil onshore Kenya. Additional commercial discoveries have subsequently been made and estimates suggest that Kenya's oil reserves are substantial. Steps towards the development and production of these reserves are progressing and Kenya is thus preparing to become another of sub-Saharan Africa's oil-exporting states. Nevertheless, experience has shown that the majority of these resource-rich states have succumbed to symptoms of the 'resource curse': economic and human development and growth has been hindered rather than helped and many of these states find themselves struggling to escape from the clutches of rent-seeking, bribery and corruption.

In an attempt to determine how best Kenya might avoid the negative impacts of the curse this study examines various strands of resource curse theory. It focuses on theories that suggest the promotion of good governance through the implementation of effective transparency and accountability measures can help a state to beat the curse. Following a discussion about Kenya's political culture and an overview of the structure of its oil and gas sector, this study applies these theories to the case of Kenya in order to ascertain how transparent its oil and gas sector is currently, what it stands to gain from further transparency and accountability, and what barriers might stand in the way.

This study concludes that whilst the Kenyan government and international oil companies operating in Kenya offer rhetorical support for the promotion of effective transparency and accountability, this rhetoric is not matched in practice. Kenya's oil and gas sector is characterised by opacity and its reform is currently in limbo. The primary reason for this appears to be a lack of government will to implement change: Kenya's political culture is inherently secretive and this in turn lends itself to the continued prevalence of bribery, corruption and ethnically-motivated patronage. International oil companies, civil society and the international community each have a role to play in promoting transparency initiatives and face certain challenges of their own, however without government support there is little hope that such initiatives will progress from rhetoric to reality. This study ultimately shows that unless and until Kenya's oil and gas sector embraces transparency, its positive impact on the state's development is likely to be thwarted.

Opsomming

Tullow Oil het in 2012 kommersieel benutbare ruoliebronne in Kenia ontdek. Verdere ontginbare bronne is sedertdien gevind en volgens beramings bevat Kenia omvatreke oliereserwes. Die ontwikkeling en benutting van hierdie bronne kom tans op dreef, en Kenia gaan binnekort nog een van die olieproduserende state suid van die Sahara wees. Ervaring toon egter dat die meerderheid van hierdie natuurlike-hulpbronryke lande aan ‘n ‘hulpbronnvloek’ ly: die ekonomiese groei en maatskaplike ontwikkeling word in werklikheid belemmer in plaas van aangemoedig, en menigte state sukkel om uit die kloue van wanbestuur, korrupsie, en omkoping te ontsnap.

Hierdie studie gebruik verskeie aspekte van hulpbronnvloekteorie om te probeer bepaal hoe Kenia die negatiewe aspekte van sy oliefondse moontlik kan vryspring. Daar word op teorieë gefokus wat aandui dat die bevordering van goeie regeringbestuur, deur die aanwending van deursigtige administrasie en verantwoordbaarheid, ‘n land kan help om die hulpbronnvloek te bestry. Nadat Kenia se politiese kultuur bespreek en ‘n oorsig van sy olie- en gassektore gegee is, word hierdie teorieë op die Kenia toegepas om te bepaal hoe deursigtig sy olie- en gassektore tans is, die baat wat hy by verbeterde deursigtigheid en verantwoordbaarheid kan vind, en die struikelblokke wat dit moontlik kan verhoed.

Daar word tot die gevolgtrekking gekom dat alhoewel die Keniaanse regering en internasionale oliemaatskappye skynbaar deursigtigheid en verantwoordbaarheid wil bevorder, hierdie lippediens nie met die werklikheid strook nie. Kenia se olie- en gassektore word gekenmerk deur ondeursigtigheid en die hervormingspogings sloer. Die hoofrede hiervoor blyk ‘n gebrek aan wil te wees vanaf regeringskant om verandering aan te bring: Kenia se politieke kultuur is in wese geheimhoudend en bied ‘n ryke teelaarde vir voortdurende omkoperie, korrupsie, en etniese begunstiging. Internasionale oliemaatskappye, die burgerlike samelewing en die internasionale gemeenskap kan elkeen ‘n bydra lewer om deursigtighedsinisiatiewe te bevorder, en word elkeen deur sy eie uitdagings in die gesig gestaar, maar sonder ondersteuning vanaf die regering is die kans klein dat sulke insiatiewe ooit sal slaag. Hierdie studie dui uiteindelik daarop dat die positiewe impak van Kenia se gas- en olie-industrie op die land se ontwikkeling belemmer sal word, tensy die sektore werklik deursigtigheid omarm.

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List of Acronyms and Abbreviations

Africa Oil	Africa Oil Corporation, including all of its subsidiaries and related entities
bopd	Barrels of oil per day
BP	British Petroleum plc, including all of its subsidiaries and related entities
DfID	The United Kingdom's Department for International Development
Dodd-Frank Act	Dodd-Frank Wall Street Reform and Consumer Protection Act 2010
EITI	Extractive Industries Transparency Initiative
EOPS	Early Oil Pilot Scheme
ERC	Energy Regulatory Commission
EU	European Union
FDP	Field development plan
FEED	Front End Engineering Design
GDP	Gross domestic product
IFC	International Finance Corporation
IOC	International oil company
KCSPOG	The Kenya Civil Society Platform on Oil and Gas
KES	Kenyan shilling
KRA	Kenya Revenue Authority
Maersk Oil	Maersk Oil & Gas A/S
MMBO	Million barrels of oil
MoEP	Ministry of Energy and Petroleum
NAFFAC	National Fossil Fuels Advisory Committee
NEMA	National Environment Management Authority
NGO	Non-governmental organisation
NOC	National oil company
NOCK	National Oil Corporation of Kenya
NRC	Natural Resource Charter
NRGI	Natural Resource Governance Initiative
NUPAC	National Upstream Petroleum Advisory Committee
Petroleum Policy	2015 Draft National Energy Petroleum Policy
PSC	Production sharing contract

PwC	PricewaterhouseCoopers
PWYP	Publish What You Pay
SEC	United States Securities and Exchange Commission
Tullow	Tullow Oil plc, including all of its subsidiaries and related entities
UNDP	United Nations Development Programme
UPRA	Upstream Petroleum Regulatory Authority
Upstream Bill	Petroleum (Exploration, Development and Production) Bill 2015
US\$	United States dollar
World Bank	The World Bank Group

Chapter 1

INTRODUCTION

1.1 Background and Rationale

Despite the emergence of alternative sources of energy and the recent global slump in oil prices, demand for fossil fuels continues to rise. One direct result of this demand is that private companies are constantly on the lookout for new frontiers. East Africa is one such frontier with substantial reserves of gas declared in the Rovuma Basin offshore Mozambique and both onshore and offshore Tanzania. It is estimated that South Sudan has the third largest reserves of oil in sub-Saharan Africa (Francis, 2016) and in Uganda there have been major discoveries with resources estimated to be in the region of 1.7 billion barrels of oil (Tullow, 2017c). It thus came as no great surprise when Tullow Oil plc (Tullow) announced in March 2012 that it had discovered a major oil play in the Turkana County region of north-west Kenya. Further significant discoveries have been made in Kenya since 2012 and initial estimates suggest that there are over 750 million barrels of oil (MMBO) recoverable within the South Lokichar Basin alone with the overall upside potential targeting one billion barrels (Tullow, 2017c). Although plans for the small-scale exportation of crude from Kenya by truck (Otuki, 2017) have been halted amidst the uncertainty caused by the delayed enactment of new petroleum legislation and the debacle of the current elections, there is still significant exploration and development activity in Kenya's oil sector by international oil companies (IOCs). Such activity reflects an optimism that Kenya could soon join its neighbours in the possession of a burgeoning upstream sector¹.

One inevitable result of a state's discovery of commercial volumes of natural resources² is an application by observers of 'resource curse' rhetoric. Will the state in question succumb to the curse, or will it follow the example of states such as Norway and Botswana and successfully avoid the notoriously damaging effects that large natural resource finds are supposed to promise? What steps should the state take if it wishes to avoid the curse and

¹ All references to the upstream or oil sector throughout this study are intended to capture natural gas as well as oil.

² For the purposes of this study, 'natural resources' are defined as non-renewable natural resources such as oil, gas and minerals.

promote positive economic growth and development? Should the resource in fact be left undeveloped?

Literature examining resource curse theories is vast and well established. For example, there are writers who focus on whether there is really a curse and there are those who study what its causes are. Increasingly, others are examining what might be done to best avoid falling into the curse's trap. Whilst the literature falling into the latter grouping is impossible to neatly categorise, one common theme is the recognition that there is no 'one size fits all' framework; it is generally acknowledged that each state begins from a unique starting point and is consequently affected by different factors. Varying population sizes and composition, geographical endowments, levels of economic and institutional development, political environments and histories are just some examples of the factors which will prevent any one state from developing a blueprint for avoiding the curse that can then be applied to any other state. Nevertheless, there is a growing belief that good governance within a state's natural resources sector is a fundamental element for any successful avoidance of the curse. Al Faruque's recent conclusion that "the prevailing poverty and underdevelopment in many mineral resource-rich developing countries and economies in transition are largely attributed to the mismanagement and corruption of revenues derived from the extraction of such resources and their diversion by the ruling elite for their own benefit at the expense of the vast majority of people (2015:66-67)" is typical of this growing belief and promotion of good governance is regarded as an antidote to such harmful mismanagement and corruption. Transparency is oft-cited as a key element in the promotion of good governance because it "not only removes the cover for possible corruption, but enables good decisions, allows rapid intervention to correct problems in the system, and builds trust (Lahn, Marcel, Mitchell, Myers & Stevens, 2007b:14)."

A focus on improving transparency in the natural resources sector began to take hold and garner global interest following the World Bank Group's (World Bank) financing of the Chad-Cameroon pipeline in the late 1990s and early 2000s when the World Bank's documents were made public but the upstream documents remained confidential (Rosenblum & Maples, 2009:17). Hicks (2015:2, 12) argues that Chad was used as something of a laboratory for testing theories of successful resource extraction and that the promotion of transparency and good governance were at the heart of this after it emerged the World Bank's involvement had been ineffective at preventing Chad from using its oil revenues to buy

weapons instead of funding development projects. According to Rosenblum and Maples (2009:18) the focus on transparency garnered in Chad resulted in calls for the BTC (Baku-Tbilisi-Ceyhan) pipeline documents to be made public and subsequently “contract transparency became an urgent issue.” Global initiatives such as Publish What You Pay (PWYP) and the Extractive Industries Transparency Initiative (EITI) emerged and further demanded revenue transparency, but transparency has since been developed to incorporate much more than just the disclosure of contracts and revenue streams. There is a recognition that the net of transparency should be cast wider to incorporate all elements of the life-cycle of a natural resource project, a recognition reflected in the fact that the EITI Standard no longer just cites revenue transparency as an objective but also that of contracts and licences, production data and social and economic contributions (EITI, 2016).

The relevance of studies focused on the meaning of transparency, how best it be achieved and what impact it might have upon governance within the natural resources sector cannot be understated. Given the continued global demand for oil it is unlikely that arguments to leave the oil in the ground will be heeded by governments, like the Kenyan government, who find themselves in possession of what could be an incredibly value resource with the potential to transform the state’s development path. As Hicks (2015:10) has argued, the question therefore becomes how best to manage the resources and it is crucial that we understand what role increased transparency might play in such management.

Kenya presents an opportunity to study the relevance of transparency within a fledgling oil sector, one which still has the potential to both be shaped and to dramatically alter its state’s development path. Kenya is ranked 146th out of 188th states in the United Nations Development Programme’s (UNDP) most recent Human Development Index with a score of 0.555 (UNDP, 2016:24). Poverty levels are dire: the World Bank (2016:vi) estimates that around 40 per cent. of the population live below the national poverty line and it is notable that the oil discoveries to date have been made in Turkana County where development has historically lagged behind other counties and where 94 per cent. of the population are believed to live below the poverty line (World Bank, 2016:97). Turkana is also home to the Kakuma refugee camp which had a population of 183,542 registered refugees and asylum seekers as at 31 August 2017 (UNHCR, 2017). That there is hope the oil sector can help boost and support economic growth and development within Turkana and nationwide is therefore understandable, particularly as both the Kenyan government and Tullow have stated

(if not yet demonstrated) a willingness to embrace transparency. Kenya's governance levels are also commendable: in the 2016 Ibrahim Index of African Governance it was ranked 12th in Africa and 3rd (out of 13) in East Africa (Mo Ibrahim Foundation, 2016b:4-5). It therefore appears to be a state where transparency has a chance of being successfully implemented and effectively utilised.

Nonetheless, there are significant challenges to overcome. Like so many other states in Africa, Kenya's political culture is one characterised by bribery, corruption and patronage with ethnic tensions simmering throughout the state. Ethnic violence reached boiling point in the aftermath of the 2007 general election when over 1,100 people were killed and over 600,000 were forced to flee their homes (Smith, 2013) and there remains an underlying fear that, although the 2013 general elections were relatively peaceful, tensions may once again induce further violence during the re-run of 2017 general election which is due to be held on 26 October 2017³. Furthermore, Turkana County has previously experienced violent conflict over resources such as water and arable land (World Bank, 2016:98). Coupled with the ongoing process of devolution initiated by Kenya's adoption of a new constitution in 2010, the risk of disagreement and thus disparate policy between various interest groups is high.

Upon Tullow's discovery of oil in Turkana in 2012 cartoonist Gado produced the drawing depicted in Figure 1.1 below. His suggestion that the threat of the resource curse looms over Turkana and its inevitability is undeniably pessimistic, yet it is a pessimism which is rooted in precedent. No oil-rich state in Africa has thus far avoided the curse's symptoms and Kenya's starting point appears rife with challenges. The need for a greater understanding of how transparency and good governance might mitigate the onset of the resource curse is made ever more urgent.

³ This study was submitted for examination on 3 October 2017 and thus prior to the re-run of the general election. Its scope therefore does not cover any developments in Kenya following this submission date.

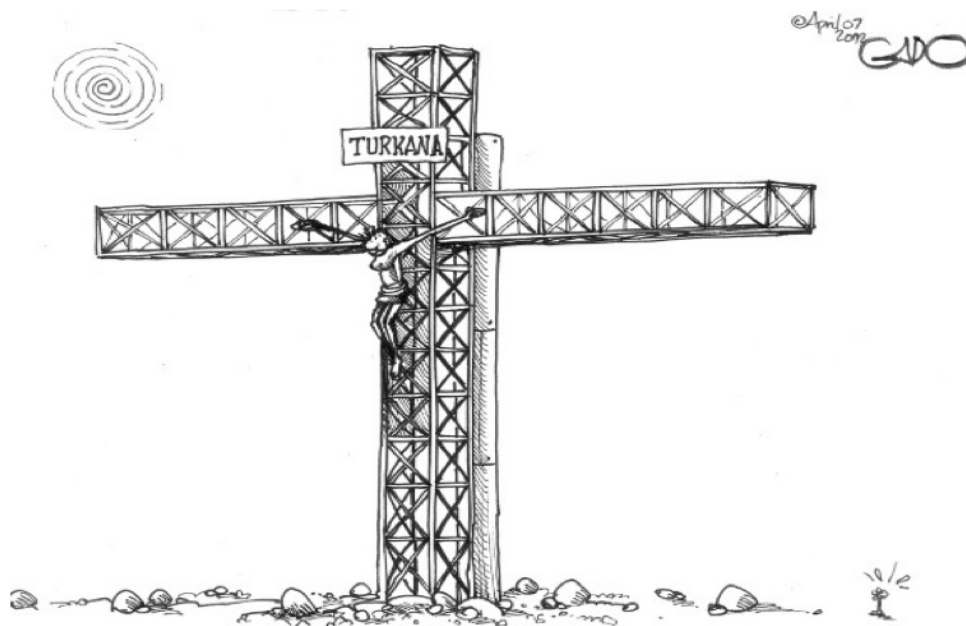


Figure 1.1: Turkana (Source: Mwampembwa, 2012).

1.2 Research Problem and Focus of the Study

The very fact that the number of states commonly cited as having avoided the resource curse (such as Norway, Botswana, Chile and Canada) is dwarfed by the number of those that have succumbed to its symptoms is significant: it proves that there is a pressing need to continue to expand on the resource curse theory in order to determine how a state with natural resource wealth might avoid the onset of the curse. This need is relevant for states that are already extracting and exporting their natural resources, however it is arguably even more relevant for those still in the early stages of such exploitation whose policies and development paths are less embedded and perhaps more inclined to positive change.

Many commentators on the resource curse acknowledge the importance that good governance has for a state that wishes to promote successful development of its natural resources and to encourage sustained economic growth in place of stagnation. The broad aim of this study is to ascertain what role increased transparency can have in promoting such good governance and consequently avoiding the resource curse. Understanding this issue is crucial: if it can be shown that there is an important role for transparency to play in avoiding the curse, this will allow civil society, the governments of resource-rich states and the private companies operating within these states to justify a push for increased transparency and will provide

them with the impetus to necessitate the required changes in applicable legal and regulatory frameworks. Whilst so many of the factors attributed to causing the curse are outwith a government's control—such as the type of resource found and the timing of the discovery, ethnic or religious divisions or the state's history—good governance is largely within a government's control. Furthermore, this will encourage the international community to increase the pressure initiated in the form of initiatives such as PWYP, the EITI, Transparency International and the Open Contracting Partnership for all resource-rich states to pursue transparency by making a state's non-adherence to such schemes a repellent to foreign investment. Importantly, if more states are in a position whereby there is a greater likelihood of them avoiding the resource curse then this will undeniably aid the social and economic development of millions of people across the globe.

Thus, this research will be of benefit to the Kenyan government as well as other parastatal bodies and policy-makers involved in the oil sector. It will be of relevance to the private companies operating within the sector, from the companies who own the licenses to their business partners, contractors, advisers and shareholders. It will greatly benefit civil society and the communities directly affected by onshore oil developments, but also the Kenyan population as a whole. However, this research will have a larger role to play in the ongoing academic and political debate over whether transparency can really be achieved in the oil sector and, if it can, what effect this can have on achieving better governance and avoiding the resource curse. This study therefore aims to contribute to an increased understanding of transparency within the oil sector. As one of many states recently finding itself to be rich in natural resources, the Kenyan example will further provide a useful test case on which other states can turn their scrutiny.

1.3 Research Questions and Objectives

The primary objective of this research is to investigate what the impact of increased transparency in the Kenyan oil sector might be and whether such transparency can help Kenya avoid symptoms of the resource curse. Accordingly, the study seeks to answer the following main research question:

To what extent might increased transparency in Kenya's oil sector help it to avoid the resource curse by promoting good governance?

Another objective is to examine what form transparency in Kenya's oil sector should take and how it is to be achieved. Inextricably linked to this objective is the need to obtain an understanding of the political culture in Kenya as this will help to determine roles that each of the Kenyan government, civil society, private actors and the international community play in promoting or prohibiting increased transparency and to appreciate how they might be affected by increased transparency. Therefore, in order to support and complement the main research question the following sub-questions have been developed:

- (i) *What is meant by increased transparency and how might it be achieved in Kenya's oil sector?*
- (ii) *How transparent is Kenya's oil sector at present?*
- (iii) *What are the main barriers Kenya faces to achieving increased transparency in its oil sector?*
- (iv) *Why is increased transparency important to Kenya's oil sector and what effects might it have?*

1.4 Theoretical Framework

1.4.1 The Economic 'Resource Curse'

Auty (1993) coined the term 'resource curse' to capture the idea that a state endowed with natural resources often paradoxically suffers from lower economic growth than those states with no, or limited, natural resources. Essentially, it is said to occur when natural resources (the focus traditionally being on non-renewable resources such as oil, gas and minerals) are newly discovered or if there is a boom, for example if there is a drastic improvement in terms of trade for the resource in question. There will be an influx of revenue entering the state and a surge in government income with a corresponding increase in government spending. The question is whether this increased spending capacity is sustainable due to its reliance on a steady flow of foreign exchange and revenues, such revenues being entirely dependent on a sector where price volatility is high. The 'trap' element is that domestic costs sit on an upward curve as governments tend to get tied into costly mega-projects and social spending projects to quell the public's demands to 'share the resource wealth'. If proven to be unsustainable, economic growth will slow, as will social and political development and stability. In sum, the state may be worse off than if it had no resources at all.

An important element to this is the ‘Dutch disease’. This term was used in 1977 by The Economist to explain why the Netherlands’ manufacturing sector was stunted following a huge gas discovery in the 1950s. It has since been broadened to refer generally to describe the impact a prosperous resource sector can have on non-resource sectors. To understand the ‘disease’ it is helpful to think of a resource state’s economy as divided into three commodity sectors: (i) the tradable natural resources sector (that is, the natural resources themselves and associated industries); (ii) the tradable non-resource manufacturing sector (such as manufactured goods); and (iii) the non-tradable sector (such as public services) (Sachs & Warner, 1995:6). The theory is two-fold: firstly, an influx of foreign currency related to the resource sector can lead to currency appreciation which makes the tradable non-resource products less price competitive on the export market; and secondly, as the supply of tradable natural resources increases, so too does the demand for non-tradable goods and services and this results in a movement of capital and labour away from the tradable non-resource manufacturing sector. Manufacturing tends to suffer and experiences stunted growth.

The resource curse theory therefore suggests that whilst resource booms normally have a positive short term impact on an economy, in the long term the impact will, conditionally, be detrimental (Collier & Goderis, 2012:1242). This is why the resource curse is often referred to as the ‘paradox of plenty’: one would logically expect a state with high resource reserves to be able to turn these resources into a means to achieve economic, resource-based development. There is a failure to effectively diversify the economy away from reliance on resources, thus thwarting economic growth and, in turn, social development (Gelb, 1988). In reality, a state often becomes dependent on its resource sector and allocates inadequate capital and labour to other sectors. There is consequent underinvestment in certain sectors and overinvestment in others, causing a failure to diversify the economy and stimulate economic and social development. In essence there is a lack of forward and backward linkages between the resource sector and the rest of the economy and long term growth will stagnate (Renner, 2002:16).

Exactly how the curse will manifest itself varies in substance and in degree from state to state. Nonetheless, the effects can be categorised as either economic or socio-political. Economic symptoms include slow economic growth, volatile government revenue (Van der Ploeg, 2011), Dutch disease (Corden & Neary, 1982; Sarraf & Jiwanji, 2001; Auty, 2001), unsustainable government spending and levels of foreign debt (Stevens, Lahn & Kooroshy,

2015) and lack of diversification. Socio-political symptoms include weakened democracy and institutions (Stevens *et al.*, 2015), rent-seeking and corruption (Sarraf & Jiwanji, 2001), lack of development (Stevens *et al.*, 2015), poverty and social inequality (Sarraf & Jiwanji, 2001), as well as a susceptibility to conflict (Collier & Hoeffler, 2004).

Whilst Auty (1993) was the first to refer to these effects as the ‘resource curse’, this was not a new theory in 1993. A wealth of debate about the effects of exporting resources on a state’s capacity to grow and develop began to emerge in the 1970s and the bulk of literature written until the early 2000s was characterised by negativity (see Cordon & Neary, 1982; Auty, 1993; Sachs & Warner, 1995; Auty, 2001; Van der Ploeg, 2011). However, the tide has been turning and the literature has expanded to question whether there is such a thing as the resource curse and, if so, then what causes it, what its effects are and how to mitigate or avoid it. The prevailing view in recent literature is thus more optimistic (see Maloney, 2002; Kaznacheev, 2013; Stevens *et al.*, 2015) and has increasingly focused on the political, rather than economic, aspects of the curse.

1.4.2 The Roles of Transparency and Good Governance

A dominant element of the politically-focused resource curse literature is an analysis of the role played by corruption, including bribery and rent-seeking: corruption in resource-rich states is often recognised as central to any explanation of why the resource curse takes hold and prevents positive socio-economic development (Kolstad & Wiig, 2009:521). Much of the more optimistic resource curse literature consequently focuses on how the promotion of transparency can help to lower corruption and the mismanagement of revenues, thereby establishing a vital element of good governance. Diamond-rich Botswana is justifiably often held up as an example of how transparency and good governance can help a state overcome the curse (see for example Iimi, 2006; Meijia & Castel, 2012), with many believing this success can be emulated. George Soros, founder of the PWYP campaign, suggests that “the resource curse is a major scourge, but it can be cured. It has now been recognised that transparency and accountability are the remedies (Soros, quoted in Humphreys, Sachs & Stiglitz, 2007a:xiv).” The logic is that transparency provides information, builds trust and permits accountability: “the belief is that transparency is the essential first step in a multidimensional strategy to counteract the resource curse. In effect, it is the first manifestation of what could become a fiscal social contract for the entire energy sector (Karl,

2007:274).” This idea that transparency has a role to play in avoiding the resource curse is not new and is undoubtedly prevalent, and it is gaining traction in Kenya. For example, the Kenya Civil Society Platform on Oil and Gas (KCSPOG) argues that “transparency shines light on secrecy and unearths the cost of opaque deals to the state, communities and citizens (2014:30).” However, Kolstad and Wiig’s (2009:529) assertion eight years ago that “at the present time...the evidence base unfortunately does not match the popularity of the transparency concept [and]...more research is needed to inform policies in this area” still stands.

One aspect of this is that there is a need to broaden our understanding of exactly how transparency can be implemented and what barriers might be encountered. Existing theories that suggest revenue and contract transparency be increased must be examined alongside those calling for transparency in all areas of the natural resource sector. Amongst others, these include transparency of relations between governments and oil companies; contract negotiations and bidding processes; important project documents and sub-contracts; policies related to the sector (in particular those planning for the tradable non-resource and non-tradable sectors); fiscal management; and community relations (Humphreys *et al.*, 2007b:328-330). We also need to understand how compliance with transparency initiatives can be ensured, how restrictive confidentiality provisions in private contracts can be avoided and how “information overload” is to be prevented (Humphreys *et al.*, 2007b:332-333). Furthermore, there is a need to appreciate exactly how the information made available through transparency initiatives is to be utilised. Shaxson (2007:218) has suggested that achieving transparency in itself might not be sufficient:

...transparency campaigns rest on the idea that if African citizens know more about where their money is going, they can then ‘call their rulers to account.’...However, with a few exceptions, the record here is patchy, as African civil societies are often so weak and fragmented that in many cases it is hard to stir up outrage, except from local groups that are funded by western NGOs that want to drum up interest in the issue.

This raises the question of whether transparency initiatives can realistically be expected to be effective and we therefore need a greater appreciation of what the combined impact of successful increases in transparency across the oil sector might be. As the Natural Resource Governance Institute’s (NRGI) Benchmarking Framework states:

...transparency means making relevant and timely information easily available to all actors so that they can observe and analyse decisions made and actions performed by authorities and corporate actors. In addition to deterring bad behaviour, transparency

also helps lay foundations of trust between citizens, the private sector and the government (NRGI, 2016:27).

Theory thus predicts that transparency will permit accountability if there is a concurrent ability to interpret, understand and utilise the disclosed information: “transparency allows information to be generated, which can then be communicated, used and deployed to place pressure on public and private power-holders or retrospectively hold them to account (Desai & Jarvis, 2012:110).” Whether this ability is attainable is something that can only be understood by applying the theory to a real-life case study.

These theories of transparency will be expanded and explained in Chapter 2 below before being applied throughout the remainder of this study to the case of Kenya in order to determine what form transparency should take, how it should be implemented and if it has the potential to stop, or at least limit, the encroachment of the resource curse in the Kenyan oil sector. In essence, this study will seek to test whether the dominant definitions of transparency can work effectively in the Kenyan context. Such application to a state in the process of establishing its oil sector will not only provide insight into the possibilities open to Kenya itself through embracing transparency, but it will contribute to the wider theoretical approach to the resource curse.

1.5 Research Design and Research Methodology

To apply the theory that greater and effective transparency can lead to good governance within the oil sector generally would be incredibly problematic and indeed near impossible given the number of states that have proven oil and gas reserves. It is thus prudent to apply this theory to a particular case study in order that a large amount of detailed information can be collected and analysed. Whilst this will not permit generalisations about the theory to be applied to other states, a more focused study will allow a deeper analysis of the role transparency has to play in promoting a successful development of a particular state’s oil sector. This case study can subsequently be used to develop theories and hypotheses which can in turn be used as a base on which further research can be conducted across different states.

This study therefore uses a qualitative research method and it is based on a single case study, namely the oil sector in Kenya. The majority of information used has been collected from secondary sources including academic texts; journal articles; government reports and policies; publications from think tanks, multilateral organisations and civil society organisations; newspaper articles; and legislative and regulatory texts. This secondary information is supported by information acquired from interviews with individuals representing civil society bodies and private sector organisations who operate in (or have knowledge of) the Kenyan oil sector. These methods have permitted the researcher to obtain first-hand information for analysis alongside the secondary information. This triangulation allows for crosschecking of findings using a variety of methods and consequently improves the accuracy of results of the study.

Regarding the interviews, interviewees were specifically selected by the researcher according to their knowledge and experience of the topic being researched as well as their availability and willingness to participate in the study. The interviews were conducted by e-mail and telephone in an informal setting to encourage the interviewee to be open and responsive. They were semi-structured whereby the researcher prepared a number of questions about the relevant topic but also encouraged the interviewee to expand on a question as he or she saw fit; this not only allowed the researcher to obtain answers to the specific questions she sought but also to gain an insight into other areas which the interviewee considered to be relevant and which the researcher may not have been aware of. By conducting interviews in place of alternative methods of information collection such as questionnaire distribution or focus groups the researcher was able to hold a focused and detailed conversation with the respondent and was able to direct the conversation as required, including in instances where the respondent might have veered onto less relevant topics. The researcher was also in a position to ask follow-up questions or for clarifications once the interview had concluded, actions which are often not possible if using questionnaires or focus groups.

The specific case of Kenya was chosen for a number of reasons which prove its suitability as a case study for examining the role of transparency in the oil sector. Firstly, the oil sector in Kenya is still extremely young and underdeveloped. Significant reserves were found only five years ago and large-scale export is unlikely to occur in the foreseeable future whilst discussions are ongoing about the construction of an export pipeline and the draft Petroleum (Exploration, Development and Production) Bill, 2015 (Upstream Bill) remains in limbo.

That the industry is so youthful permits an optimism that it can still be shaped and influenced by policies that promote transparency and good governance, thus increasing the importance of studies such as this which seek to understand why transparency is necessary and how it might work in the Kenyan context. Secondly, both the Kenyan government and Tullow have publicly stated their support for increased transparency. This willingness to embrace transparency from the key public and private sector players involved in Kenya's oil sector suggests that the necessary policies are likely to be embraced if existing research and analysis can clearly demonstrate the benefits such policies can bring. A third and related reason is that Kenya forms part of the East African region where upstream activity is extensive and that Kenya is pushing for rapid development of its oil reserves: "If Uganda has gained a reputation for moving cautiously as it prepares for the impact of oil on the economy, its neighbour Kenya seems to be trying to achieve the opposite (Hicks, 2015:175)." If Kenya can build on its apparent willingness to embrace transparency whilst at the same time pushing for the swift progression of its oil industry at a pace faster than its neighbours', it can use its regional influence to lead by example and promote an agenda of transparency and good governance across the East African oil sector.

1.6 Limitations and Ethical Considerations

Given Kenya's political culture and the lack of transparency which exists within the oil industry at present, it is recognised that there are limitations on the availability of data and sources for analysis. An example is that production sharing contracts (PSCs) signed by the Kenyan government and private oil companies have not been made available by the government; those which are available are few in number (only seven are freely available as at October 2017) and have been published to comply with foreign stock exchange disclosure requirements. Official details about which companies hold exploration block licenses are also scarce and out of date: the most recent petroleum exploration block map provided by the National Oil Corporation of Kenya (NOCK) on its website is dated 2015 (NOCK, 2017b). Furthermore, initial requests for meetings with government ministers and representatives to discuss transparency efforts received a negative response. Whilst Chapters 3 and 4 of the study address these issues by discussing the nature of Kenya's political culture and the operation of the oil sector, their effect is ultimately to limit the availability of research material.

The study therefore relies largely on publicly-available secondary sources but is bolstered by a number of key informant interviews conducted with private sector and civil society representatives. Whilst it would have been advantageous to also hold interviews with government ministers and to conduct focus groups with members of the Turkana communities where much of Tullow's activities are undertaken, the political climate, budget and time constraints of this study did not permit such research to be undertaken. As a result, neither the first-hand perspectives of the government nor community members will be presented as part of the research and the perspectives given are limited to those of the private sector and civil society representatives. It is further acknowledged the interviewees were not chosen at random and were instead selected by the researcher following consideration of their availability and knowledge of the research topic.

As the research for this study incorporates interviews with individuals, Stellenbosch University's 'Policy for Responsible Research Conduct at Stellenbosch University' (2016) was adhered to. Each interviewee was: (i) made aware of the purpose of the research and the study; (ii) informed of how their responses and the research results will be disseminated; (iii) asked to sign a written consent form; (iv) informed of their right to refuse to answer any questions or to suspend or conclude the interview at any point; and (v) not monetarily remunerated for their participation. Detailed written records of each interview were taken and kept by the researcher, and all records (including each interviewee's personal and confidential information, where relevant) are secured appropriately. All necessary steps were taken by the researcher to ensure that the interviewees' rights to confidentiality and privacy were respected. Finally, all information provided by interviewees and used in this study has been fully referenced and attributed to the relevant participant.

1.7 Outline of the Study

The study is structured under the following chapter headings:

Chapter 1: *Introduction.*

Chapter 2: *Avoiding the 'Resource Curse': The Importance of Transparency.* This chapter reviews resource curse literature that concentrates on the importance of good governance in a resource-rich state's attempt to avoid the curse. It

focuses on theories which suggest that increased transparency has the potential to promote good governance through its interplay with accountability, specifically in the upstream oil sector. This chapter provides definitions of good governance and of transparency which are then used throughout the study.

Chapter 3: *Kenya's Political Culture.* The purpose of this chapter is to study the political culture in Kenya. It focuses on the continued prevalence of corruption, bribery, patronage and ethnic division in the political system and contextualises these within the current devolutionary changes being implemented following the adoption of Kenya's new constitution in 2010. This analysis is necessary in order to understand the obstacles which stand in the way of promoting increased transparency within Kenya's oil sector.

Chapter 4: *The Kenyan Oil Sector.* Chapter 4 provides information on the history and current status of the oil sector in Kenya and details the domestic and international legislation, rules and regulations which apply to it. The chapter also introduces the government, the private sector, civil society and the international community as the four key interest groups who have the potential to shape, affect and be affected by transparency within the Kenyan oil sector.

Chapter 5: *Implementing Effective Transparency in Kenya.* This chapter analyses the role transparency might play in promoting good governance and accountability by applying the theory and definitions ascertained in Chapter 2 to the case study of Kenya whilst accounting for the contextual factors identified in Chapters 3 and 4. It thus considers how far Kenya has progressed in achieving transparency to date and what current and future barriers it faces.

Chapter 6: *Conclusion.*

Chapter 2

AVOIDING THE ‘RESOURCE CURSE’: THE IMPORTANCE OF TRANSPARENCY

The ‘resource curse’ is a well-established and well-studied concept. Literature on the subject is vast and a detailed examination of such literature is beyond the scope of this thesis. Instead focus will be placed on one aspect of the curse, that is how it might be affected by the promotion of good governance through greater transparency and accountability.

Most commentators agree that there are two elements to the curse: economic and political (Karl, 1997; Ross, 2001; Sarraf & Jiwanji, 2001; McPherson & MacSearraigh, 2007; Torvik, 2009). Economic explanations for its existence tend to concentrate on limited diversification, Dutch disease and revenue volatility (Busse & Gröning, 2013:1; Li, 2013:572), whilst proffered solutions include adopting suitable macroeconomic policies, establishing natural resource funds, pursuing economic diversification, direct distribution of wealth to the population and transparency and accountability of revenue streams (Weinthal & Luong, 2006:35). As detailed in Chapter 1.4 above, initial academic coverage of the curse was centred on economics, however in the 1990s the tide began to turn and note was taken of how political explanations and solutions might be of equal, if not greater, importance.

In her study of Venezuela, Karl (1997:5) claimed that although economic explanations for the curse—such as Dutch disease—were powerful, they ultimately “fail to capture the underlying political and institutional processes that set off economic laws and market forces in the first place that subsequently form strong barriers to necessary readjustments.” Numerous scholars then began to examine political explanations, but it was the work of Robinson, Torvik and Verdier (2006) which marked a true change in focus. Some of Robinson’s prior work had examined the role institutions and good governance played in Botswana’s success (Acemoglu, Johnson & Robinson, 2001b), but the motivation to focus on political aspects of the curse in the 2006 study was based on the recognition that much of the existing literature had been economics-focused, save for studies on the impact of rent-seeking (Robinson *et al.*, 2006:448). They concluded that political incentives are central to an understanding of whether natural resources are a curse (Robinson *et al.*, 2006:447, 451) and at the heart of this are political institutions “which promote the accountability of politicians, and generally develop state institutions away from patrimonial practices towards the use of rational and

meritocratic criteria in allocating public sector resources (Robinson *et al.*, 2006:450).” For some, there is therefore justification for a shift in focus from Dutch disease-focused explanations and a belief that the curse might be less of an economic problem than a political one (Collier, 2006:1484; Ölcer, 2009:31).

This shift in academic focus coincided with the emergence of a new global norm pushing for better governance in the extractive industries: “from the mid-1990s onward, all of a sudden the perverse outcomes of oil extraction in developing countries came into the policymaker’s and the broader public’s spotlight” and this caused a “rhetorical rise of the good governance agenda (Benner & Soares de Oliveira 2010:289, 294).” Actions of corporates abroad started to garner attention, not least in Angola. With its publication of the ‘A Crude Awakening’ report, Global Witness revealed that Angolan oil revenues had been used to sustain the state’s civil conflict (Gillies, 2010:109) and there was further evidence that conflict diamonds were used for similar purposes (Van Alstine, Manyindo, Smith, Dixon & Amaniga Ruhanga, 2014:49). Global Witness also showed that in Angola US\$4.2 billion of oil revenues were unaccounted for by the Angolan government between 1997 and 2001 (Ghazvinian, 2007:135). Furthermore, activists were seemingly at increased risk globally, with the execution of Nigerian activist Ken Saro-Wiwa in 1995 causing global outrage and a resultant intensification of the focus on the global oil sector (Benner & Soares de Oliveira, 2010:292).

For Gillies (2010:103), the subsequent emergence of transparency as an international norm in the oil sector was therefore rooted in reputational risk: risk to western governments, to oil companies and to international institutions. She argues that promotion of transparency became desirable behaviour from 1999 onwards and that it represented “a surprising development in a sector previously characterised by carefully guarded opacity (Gillies, 2010:103).” As a sector traditionally dominated by secrecy, it was a “seemingly inhospitable environment” for transparency to emerge (Gillies, 2010:104), a fact Rosenblum & Maples (2009:7) agree with. Haufler (2010:59) goes further than Gillies and suggests that as well as being an element in the global fight against corruption, extractive sector transparency as a norm was aided by businesses trying to act responsibly in volatile or conflict-affected areas following many brutal and prolonged conflicts in the Balkans and parts of Africa.

Regardless of its origins and catalysts, this chapter will examine the theory behind the promotion of transparency as a norm in the extractive sectors. Chapter 2.1 firstly explores in

more detail the political aspects of the resource curse before Chapter 2.2 looks at the theories which suggest good governance and transparency are key to avoiding it. Chapter 2.3 in turn sets out some of the tangible methods for implementing transparency in the oil sector. Importantly, Chapter 2.4 then explores the widely-held belief that transparency is likely to have little impact without effective accountability. Finally, Chapter 2.5 reviews the barriers that might prevent transparency being promoted from theory into practice.

2.1 The Political Side of the Resource Curse

Two elements of political resource curse theory garner the most attention, namely corruption (including patronage) and rent-seeking. For Bhattacharyya and Hodler (2009:608), economic performance in a resource-rich state can be negatively affected by either, or both, of these elements. Whilst they are similar, these elements are distinct and are best treated separately (Kolstad & Søreide, 2009:214). Corruption in particular is perceived as common in sub-Saharan Africa and “the oil resource curse in Africa has thus become the fashionable poster child for Africa’s woes (Clarke, 2008:528).” The effect of corruption, patronage and rent-seeking on a resource-rich state’s development trajectory has thus understandably received significant attention since the late 1990s.

2.1.1 Corruption and Patronage

Many scholars have studied the supposed linkage between natural resource rents and corruption (Leite & Weidmann, 1999; Palley, 2003; Herringshaw, 2004; Hodler, 2006; Weinthal & Luong, 2006; McPherson & MacSearraigh, 2007; Petermann, Guzmán, & Tilton, 2007; Kolstad & Wiig, 2009; Bhattacharyya & Hodler, 2009; Arezki & Brückner, 2011; Frankel, 2012; Busse & Gröning, 2013). Corruption can be defined simply as “the abuse of public office for private gain (Kolstad & Wiig, 2009:522)” or more widely as “the use of entrusted power for private gain at the expense of the public interest (Aaronson, 2011:50).” An intangible concept, Busse and Gröning (2013:6) suggest that it “assesses the level of corruption within a political system and includes financial corruption (e.g., demands for special payments and bribes in connection with import and export licences, exchange controls, or tax assessments), excessive patronage, nepotism, or secret party funding.” It can therefore take many forms, including nepotism; patronage; job reservations; exchange controls; secret party funding; bribes; police protection; loans; tax assessments; and others

(Bhattacharyya & Hodler, 2009:612). However, within the oil sector corruption has been categorised into four forms: (i) policy corruption, including sector policies, laws and taxes such as price controls, special accounting procedures and tax breaks; (ii) administrative corruption, for example abuse of office; (iii) commercial corruption, including kickbacks, tender-rigging and cost inflation; and (iv) grand corruption, namely theft of money and diversion of funds (McPherson & MacSearraigh, 2007:198-199).

With regard to patronage, it is a specific form of corruption. For the purposes of this study patronage is defined as “the use of public resources to secure political power (Kolstad & Søreide, 2009:216)” and can be captured by each of the four aforementioned categories of oil sector corruption. It is generally accepted that ‘big men’ play a key role in the oil sector, and particularly in Africa (McPherson & MacSearraigh, 2007:201), and their role in promoting and sustaining patronage and corruption in the sector is significant. Collier (2007:44-45) has convincingly argued that patronage politics develops with resource abundance: “in the context of ethnic loyalties and the absence of press freedom, patronage politics is more cost-effective than the provision of public services as a strategy for winning elections.” In an earlier work he argues that this is because

in a well-functioning democracy, parties compete to spend public revenues effectively on public goods, balancing the benefits against the costs of taxation. However, an alternative way of gaining votes is to bribe opinion leaders through private patronage. Where voters have strong ethnic loyalties and limited objective information, as is common in Africa, patronage politics is likely to be cost effective (Collier, 2006:1484).

Whilst Corrigan (2014:17) is one of few who believe corruption has no real impact on a resource-rich state’s growth and development, the impact of the different forms of corruption is widely regarded as negative. Easterly, who argued that the impact of corruption generally on growth had been ignored for too long (2001:252), concluded that “corruption not only has a direct effect on growth; it also has an indirect effect because it makes other policies that affect growth worse (Easterly, 2001:246).” Numerous scholars subsequently applied this theory to resource-rich states and reached similar conclusions. For example, Kolstad and Wiig (2009:521) argued that corruption is key when explaining why resource-rich states have poor socio-economic development. Auty (2009:43) suggests patronage erodes institutions and Aaronson (2011:51) believes it has a direct impact on corporate profits, business risk levels, investment and access to public services, governance and democracy, corporate social responsibility and attraction of inward investment and support.

Regarding the oil sector specifically, scholars have consistently shown a link between resource rents and corruption. Sala-i-Martin and Subramanian (2003) found that corruption, rather than Dutch disease, caused poor economic performance in Nigeria. Damania and Bulte (2003:24) built on the earlier work of Leite and Weidmann (1999) and found that the greater the level of natural resources in a state, the higher its levels of corruption. Petermann *et al.* (2007:99) looked empirically at differences between fuel and non-fuel exports and their impacts on corruption and, whilst their study is limited in that it only covers the period from 1998-2002 and that it accepts the causal links are complex, they concluded that fuel exports have an unambiguous and persistent impact on corruption: as dependency on these exports increases, so too does corruption. Bhattacharyya and Hodler's (2009:608-609) extensive study was conducted in reaction to the small amount of existing literature on rents and corruption and analysed panel data for 124 states between 1980 and 2004—a welcomingly broader period than Petermann *et al.*'s study. They concluded that there is a link between resource rents and increased corruption, one which is dependent on the quality of democratic institutions in the relevant state. With similar motivation, Arezki and Brückner (2011:955, 961-962) examined 30 oil-exporting states between 1992 and 2005 to show that oil rents significantly increase corruption. More recently, Busse and Gröning (2013:15) concluded that natural resources increase the opportunities available for corruption, particularly in developing states and specifically in Africa. Interestingly, studies by both Vicente (2010:37) and Frynas, Wood and Hinks (2017:236) suggest that even the expectation of a resource boom can lead to increased levels of corruption, with the former's analysis of how expected booms in both Sao Tome e Principe and Cape Verde resulting in a recommendation that there is a need to monitor the political arena after a resource discovery to ensure national laws are put in place and internal and international supervision exists in order to prevent misappropriation of natural resource revenues by politicians.

This is not to say that corruption is solely a problem for resource-rich or oil states, however they are particularly susceptible. “The oil sector is prone to mismanagement and abuse because of the magnitude of the revenues at stake, its enclave-sector nature with few people involved, and the complexity of fiscal arrangements (Cossé, 2006:10).” Ferguson (2005:378) agrees, arguing that traditionally the oil sector is like an enclave where IOCs operate separately to the rest of society: they are often incorporated offshore, they use private security and infrastructure and they send their funds offshore. Darby (2009:24) and Healy, Kuppuswamy and Serafeim (2011:6) both point to the fact that the scale of the sector and its

revenues leans towards domination by monopolies and oligopolies, particularly foreign companies, and McPherson and MacSearraigh (2007:196-197) agree, arguing that this means there is a concentration of revenue flows which permits limited accountability. Cossé (2006:10), McPherson and MacSearraigh (2007:196-197) and Healy *et al.* (2011:6) all concur that the sector's complexity—both technically and structurally—opens the door for corrupt activity, the latter highlighting in particular the complexity of the legal, fiscal and commercial agreements (Healy *et al.*, 2011:6). The assumption is that this complexity allows less opportunity for accountability in the sector as few are in a position to decipher its workings. An additional factor that is said to pave the way for corruption is the involvement of the government, such involvement justified because of the strategic significance of the sector to the state (McPherson & MacSearraigh, 2007:196-197; Healy *et al.*, 2011:6). Government's dominance and oversight over the sector naturally increases opportunity for corruption and patronage and again a lack of oversight where transparency is low. Finally, McPherson and MacSearraigh (2007:196-197) suggest that the structure of the oil sector is such that there are a large number of transactions throughout the value chain, therefore granting many opportunities to corrupt in small fractions which further makes detection difficult. The overarching point is that there is seemingly little opportunity for transparency and accountability and much opportunity for corruption in the oil sector.

2.1.2 Rent-seeking and the Rentier Effect

Because of the exceptionally high potential rents they can generate, combined with the finite life of the resources, extractive industries have turned many resource-abundant countries into honey-pots, raided by all actors, domestic and foreign, regardless of the long-term consequences of this collective rent-seeking. Citizens in resource-rich countries have in general lacked information about the true value of the resources, the revenues generated by them and the spending of the receipts, since the extractive sector has, by tradition, closed its doors to public scrutiny. This opacity in the industry has also resulted in a lack of technical knowledge that limits the ability of outsiders to engage on complex issues (Ölcer, 2009:8).

Like patronage, rent-seeking is a form of corruption and there is thus overlapping literature (Bhattacharyya & Hodler, 2009:609), with much of the literature on corruption discussed above also applicable to rent-seeking. For example, Leite and Weidmann (1999) were amongst the first to highlight the fact that resources increase opportunities for rent-seeking and are a therefore factor in corruption levels in that state, and a number of scholars similarly concluded that resource booms are very likely to lead to rent-seeking (Lane & Tornell, 1996;

Tornell & Lane, 1999; Baland & Francois, 2000:527-529). That said, there is a distinct body of literature that discusses rentier state theory (Mahdavy, 1970; Anderson, 1987; Beblawi & Luciani, 1987; Ross, 2001; Jensen & Wantchekon, 2004; Moore, 2004; Weinthal & Luong, 2006) and which therefore requires separate consideration.

‘Rentier states’ can be defined as states “that receive on a regular basis substantial amounts of external rent. External rents are in turn defined as rentals paid by foreign individuals, concerns or governments to individuals, concerns or governments of a given country (Mahdavy, 1970:428).” Mahdavy’s (1970:428) definition of a rentier state gave the term its currently understood meaning—he was the first to explore the concept—but this was refined by Beblawi who added that the rents are paid to the government and only a few actors are involved in generating the rents (Ross, 2001:329). Mahdavy’s ground-breaking study focused largely on Iran (1970), with Beblawi & Luciani (1987) expanding this focus to the Middle East and Arab states more generally. However, it was not until Yates (1996) and Ross (2001) that the rentier state concept was expanded beyond the Middle East and seen as a more globally-applicable problem. Yates (1996) focused on Gabon between 1975 and 1985 but also examined Nigeria, Angola, Congo and Cameroon and set out with the intention of telling the story of rentier states in Africa as a whole. Ross (2001) meanwhile took this even further and analysed data from 113 states between 1971 and 1997.

The concept is that “states based on external sources of income are substantially different from states based on domestic taxation (Beblawi & Luciani, 1987:10).” As defined, this clearly captures many oil-exporting states where oil revenues flow into the state from foreign entities. As discussed with corruption more generally in Chapter 2.1.1, the oil sector appears to be at particular risk of rent-seeking due to the ‘point-source’ nature of the resource (Sala-i-Martin & Subramanian, 2003; Kolstad & Søreide, 2009:215; Arezki & van der Ploeg, 2011:519; Williams, 2011:499; Frankel, 2012:10). Point-source resources are those from a narrow economic or geographic base, like minerals and fuels (Isham, Pritchett, Woolcock and Busby, 20015:141), thus capturing oil and gas. In their study of Nigeria, Sala-i-Martin and Subramanian (2003:13) found that such point-source resources create easily appropriable and high rents and therefore have a more robust and systematic effect on growth by way of their negative effect on institutional quality. Specifically, Moore (2004:305) argues that this is because the physical concentration of the resource naturally leads to the resource being

concentrated in the hands of few and they have the potential to create huge surplus rents ripe for rent-seeking.

Rent-cycling theory suggests that low rents incentivise efficiency and growth as the government must tax to gain revenues, so rent is channelled through markets as opposed to patronage networks (Auty, 2009:34). Therefore, where rents are high the opposite occurs and instead rentier states are created and they “live largely off unearned income: the state is resourced with little organisational or political effort on the part of the state apparatus, and especially little such effort in relation to their domestic populations (Moore, 2004:304).” Essentially, oil revenues can result in the state’s financial autonomy so domestic taxpayers have less importance to the government and, in turn, the state no longer needs to be accountable to its population as it is not dependent on them for taxation revenues. As Mahdavy (1970:432) found with Iran, oil revenues permit the government to have large public expenditure with little need for taxation, balance of payments problems or inflation. For Collier (2006:1484), the checks and balances required to prevent rent-seeking and patronage are the very restraints eroded when the need to tax is lowered due to rents. McGuirk’s (2013:309) recent empirical study further showed that as resource rents increase the taxation burden in a state decreases, his explanation being that it is done “as a means of rendering them [the populace] more acquiescent to the current regime’s policies.” The result is government spending of oil wealth and therefore “getting access to the oil rents becomes cardinal. This cultivates a culture of dependence and a rentier mentality in the elite (Yates, 2009:7).”

It is argued that this ‘rentier effect’ has numerous consequences. For Ross (2001:330), these consequences are either economic or political. The former involves less economic growth, whereas the latter involve less democracy. Torvik (2002:469) suggests that rentier state theory can be used as an alternative explanation for economic effects of the curse in place of Dutch disease, arguing that “more natural resources are likely to stimulate rent-seeking that results in fewer manufacturing firms and lower average productivity, rather than harming the productivity in traded sector agriculture as an application of standard Dutch disease theories would suggest, or increasing productivity in domestic manufacturing.” Furthermore, as well as the basic economic problems caused by a direct diversion of resources through rent-seeking and the rentier effect, Frynas *et al.* (2017:236) believe that

given their dependence on extractive revenues, governments in resource-rich countries have greater incentives to focus their efforts on political competition to capture resource rents and on patronage to pay off political supporters to stay in power, rather than on encouraging the creation of wealth by improving the quality of societal institutions.

Regarding political consequences, Moore (2004:306-307) has discussed seven ‘political pathologies’ which are generated from a state reliance on oil revenues in place of taxation: (i) government autonomy from citizens; (ii) increased external, foreign intervention that further exacerbates government autonomy; (iii) coupism and countercoupism; (iv) reduced incentives for civic politics; (v) a vulnerability to subversion; (vi) non-transparency in public expenditure; and (vii) ineffective public bureaucracy. Busse and Gröning (2013:2) reveal the political impact by dividing the rentier effect into three further categories. Firstly, the ‘taxation effect’ discussed above where the need to tax is reduced; this can consequently hinder representative political systems and can cause lower demands from the population for government accountability and institutional improvement. Secondly the ‘spending effect’, where easily obtained revenues are spent, for example, on patronage (which similarly tends to decrease pressure for democratisation). Thirdly, the ‘group formation’ effect, which sees suppression of special interest or social groups by the government who use revenues to curb the activity of these groups, such groups often being key in pushing for the promotion of political rights. For Acemoglu, Robinson and Verdier (2004:162-163), rent-seeking and the rentier effect can also help sustain kleptocrats when rents are used to bribe groups and this sees the state “controlled and run for the benefit of an individual, or a small group, who use their power to transfer a large fraction of society’s resources to themselves.” In sum, there are many negative political consequences for rentier states where rent-seeking is permitted to flourish.

2.1.3 A Threat to Democracy?

The political effects of the curse are not simply restricted to corruption and rent-seeking. For example, the analysis above lends itself to the theory that resource rents threaten democracy. Specifically, there is an argument that taxation is required to permit democracy through accountability (Frankel, 2012:9-10) and that resource rents prevent this from occurring due to the rentier effect. Auty (2006:20) concludes that low-rent states have a better chance of democratisation and economic growth and this conclusion clearly draws on the rentier state theory discussed above (Ahmadov, 2013). As with rentier state theories, the initial focus for

scholars suggesting resources can negatively impact democratic levels focused on the Middle East, but again Ross (2001:356) expanded the analysis and found there was a broader link between resource abundance and a lack of democracy, particularly in poorer states. Jensen and Wantchekon (2004:816) empirically analysed resource-rich states in Africa between 1970 and 1995 and found a distinct correlation between high resource abundance and poor democratic levels. Isham *et al.* (2005:146-149) then built on Ross and found that in addition to the lack of accountability caused by low taxation levels, governments were able to use rents to mollify revenues and to repress dissent, and Ahmadov (2013:1260) found the same in a more recent study of oil-rich states in sub-Saharan Africa.

Indeed, there are those who argue that autocracies tend to perform better than democracies in resource-rich states (Collier, 2006; Collier, 2007; Collier & Hoeffler, 2009; Wright, Frantz & Geddes, 2013). Referring to his 2005 work with Hoeffler, Collier (2006:1484) suggests that “resource rents subvert and indeed reverse the normally beneficial economic effects of democracy. In the absence of resource rents democracies grow more rapidly than autocracies, but with large resource rents autocracies outperform democracies.” Later he argued this is caused by a malfunction of democracy, largely because “oil and other surpluses from natural resources are particularly unsuited to the pressures generated by electoral competition (Collier, 2007:43).” His belief is that autocracies outperform democracies in terms of economic growth when around eight per cent. of the national income is derived from natural resources (Collier, 2006: 1484). The general consensus in the literature is that oil wealth ultimately deters the forces of democratisation and increases the chances of autocratic regime survival (Wright *et al.*, 2013:288), but it is worth noting that there are some who believe instead that it permits spending on measures (including on the military) which suppress challenges from other autocrats (Isham *et al.*, 2005:146-149; Wright *et al.*, 2013:289). Further, there are others who believe that there is little evidence to prove that natural resource wealth has an impact on democratic levels (Karl, 1997; Dunning, 2008; Corrigan, 2014:17) and Dunning (2008:278) points to resource-rich states such as Botswana, Bolivia, Chile, Australia, Norway, the United Kingdom and Ecuador which are largely considered to be full democracies despite their significant resource wealth.

2.1.4 Conflict

Another important political consequence of resource abundance is susceptibility to conflict. In their study of 30 states Arezki and Brückner (2011:961) found no link between resource wealth and conflict, and Clarke (2007:68) similarly argues that there is “no simple causal nexus [which] ties oil to wars and hence inevitable conflict: many dimensions have marked most struggles even within petroliferous states.” For Clarke (2007:187) oil is susceptible to terrorism and hostile state action due to its long-life cycle, its slow pace of development and the fact hard assets tend to be sitting targets, but he believes there is no causal link to civil conflict. Nonetheless, many have argued otherwise (Collier & Hoeffler, 1998; Hodler, 2006; Bjorvatn & Naghavi, 2011; Frynas *et al.*, 2017). Collier and Hoeffler (1998:568-569) concluded that initially resource-rich states are more likely to experience civil conflict than states with no natural resources, however the chances of conflict decrease as resource wealth increases as this corresponds with increased state power and government financial capability which in turn permits spending on military defence (1998:271). Bjorvatn and Naghavi (2011:741) later reached the same conclusion. Interestingly, Hodler (2006) found that ethnically fractionalised, resource-rich societies have a greater risk of conflict, whilst Collier and Hoeffler (1998:571-572) found the opposite. Instead, the latter found that societies with two key power groups have a 50 per cent. higher risk of conflict than homogenous or highly fractionalised societies (Collier & Hoeffler, 1998:571-572).

2.1.5 Summary

What is clear from the analysis above is that the resource curse has political as well as economic dimensions. The general view is that the resources—in particular the revenues they generate—are used ineffectively and there is wastage. The bulk of the literature demonstrates that resource-rich states tend to see higher levels of corruption and rent-seeking which in turn hampers economic growth, democratisation and human development. For states rich in oil this can be a significant problem and civil conflict might arise:

over time, reliance on energy to fuel growth can in fact undermine growth and effective governance. Without productive investment in the economy as a whole, government officials both depend upon and favour oil for growth. Entrenched policymakers may funnel petrodollars to their allies and families to stay in power. Corruption can become endemic. Eventually, many such countries are at increased risk for conflict and even state failure (Aaronson, 2008).

Chapter 2.2 will examine the theory that effective governance and transparency can help curb the onset of such problems.

2.2 Good Governance and Transparency

“In most countries, the profits from oil exports are more likely to contribute to clientelism, corruption, human rights abuses, and conflict than to benefit the broad majority of citizens. This is the direct result of bad resource governance (Benner & Soares de Oliveira, 2010:309).” Many commentators believe that political causes and consequences of the resource curse are due to bad governance, holding the view that better governance, institutions and policies would help overcome or lessen the impact of the curse by curbing corruption and rent-seeking (Damania & Bulte, 2003; Mehlum, Moene & Torvik, 2006; Collier & Goderis, 2012; Kolstad & Søreide, 2009:217; Stevens *et al.*, 2015:2-3; Frynas *et al.*, 2017:259). The global good governance initiatives that emerged in the late 1990s and early 2000s gained a foothold at a time when the academic resource curse literature more generally was expanding, with the curse termed as ‘bad resource governance’ (Van Alstine *et al.*, 2014:49). In his widely read and well commended book ‘The Bottom Billion’, economist Paul Collier included bad governance as one of his four ‘traps’ alongside that of natural resources, arguing that although avoiding economic problems are important in escaping such traps, governance of natural resources is key (Collier, 2007:42). In essence, a standpoint emerged where the curse was no longer seen as inevitable and that good management could help overcome it (Herringshaw, 2004:175). Botswana’s apparent avoidance of the curse was seen as good evidence of such, with numerous commentators pointing to its effective governance and strong institutions (Sarraf & Jiwanji, 2001:1, 17; Iimi, 2006).

2.2.1 The Concept of Governance

“An oft-repeated mantra is that good governance is vital in avoiding the resource curse. But ‘governance’ is a difficult concept to pin down (Shepherd, 2013:vi).” In the late 1990s when governance became the focus of international attention, Kaufmann, Kraay and Zoido-Lobaton (1999) introduced six new aggregate measures using over 300 indicators for the World Bank to enable it to produce its Worldwide Governance Indicators index. The six indicators were regulatory burden; rule of law; graft; government effectiveness; political instability and violence; and voice and accountability. They broadly defined governance

as the traditions and institutions by which authority in a country is exercised. This includes (1) the process by which governments are selected, monitored and replaced, (2) the capacity of the government to effectively formulate and implement sound policies, and (3) the respect of citizens and the state for the institutions that govern economic and social interactions among them (Kaufmann *et al.*, 1999:1).

By 2009 the six indicators remained largely the same, but ‘regulatory burden’ had become ‘regulatory quality’; ‘political instability and violence’ became ‘political stability and absence of violence/terrorism’; and ‘graft’ had changed to ‘control of corruption’ (Kaufmann, Kraay & Mastruzzi, 2009). However, the definition of governance from 1999 (as cited above) remains the same in the most recent Worldwide Governance Indicators (2017) publications, publications which are still produced by Kaufmann and Kraay. In her work on Botswana, Iimi (2006:10) used these World Bank indicators as the basis for her analysis, concluding that the most important for resource-rich developing states promoting good governance are voice and accountability and government effectiveness, complemented by market-friendly and anti-corruption policies.

However, what good governance means in reality is also important. For McPherson and MacSearraigh (2007:194) it “has several dimensions, including clear and stable laws; the rule of law; high levels of capacity in government; fiscal, monetary, and budgetary discipline; and open dialogue between government and society. The absence of corruption, however, is one of good governance’s cornerstones.” Lahn, Marcel, Mitchell, Myers and Stevens (2007a:8) agree that it has numerous dimensions, the five key elements being “clarity of goals, roles and responsibility; sustainable development for future generations; enablement to carry out the role assigned; accountability of decision-making and performance and transparency; and accuracy of information.” Regarding petroleum sector governance in particular, Lahn *et al.* (2007b:2) highlight the importance of organisation, processes, policies, objectives and regulation:

petroleum sector governance refers to the system for making and implementing decisions concerning the exploitation of a nation’s oil and gas resources. It includes the structural and hierarchical organisation of the sector, its decision-making and communication processes, the policies and objectives governing its activities and the regulation of those activities.

In sum, Van Alstine *et al.* (2014:49) clarify governance’s meaning for the natural resources sector “as the hard and soft rules which shape and constrain the way hydrocarbons contribute to sustainable development and poverty alleviation within host countries (Van Alstine *et al.*,

2014:49).” In practice, the quality of such governance can be addressed through numerous means including incentive structures, regulatory and legal frameworks, institutional and political (including policy) frameworks and capacity, as well as through transparency and accountability (Desai & Jarvis, 2012:108).

2.2.2 The Impact of Good Governance

The primary justification for advocating good governance is that it can change institutions. Institutionalist thinking thus underpins the ‘good governance’ agenda within the international development sphere (Hickey & Izama, 2017:163-164) and, as noted above, Botswana is commonly cited as a working, successful example (Acemoglu, Johnson & Robinson, 2001a; Acemoglu *et al.*, 2001b; Iimi, 2006:9; Meijia & Castel, 2012). In his study of the impact of institutions on economic growth, North (1990) found that they are relevant for economic performance and explain variations between different states, for some benefit growth and some cause stagnation. Easterly (2001:250-252) agrees, arguing that strong institutions can prevent corruption and create incentives for better government: they provide checks and balances as opposed to pay-off opportunities. More recently, Andreula, Chong and Guillén (2009:13) conducted a survey of 82 states to analyse the levels of fiscal transparency and found that the higher the level of institutional quality or governance, the higher the levels of fiscal transparency. Regarding the impact of good governance on the effects of the resource curse specifically, although Ahmadov (2013:1260) has questioned whether improved governance and institutions can help economic effects, he does believe they can help curb the political effects. Mehlum *et al.* (2006:1) studied panel data for 42 states where more than 10 per cent. of gross domestic product (GDP) was made up from resource export revenue, concluding that the quality of institutions is key when explaining difference in success for resource-rich states, depending on whether they are “grabber friendly” or “producer friendly.” Lane and Tornell (1996) and Tornell and Lane (1999) both find that rent-seeking and resource-grabbing happens when there are dysfunctional institutions, with Mehlum *et al.* (2006:3) citing Venezuela, Nigeria and Mexico as examples. It is worth noting that Mehlum *et al.*’s (2006) findings stand in contrast to those of Sachs and Warner (1995) who found that resources do not deteriorate institutions and that Dutch disease is a more applicable explanation for the curse. However, Mehlum *et al.* (2006:3,12) argue that this analysis has no relevance for explaining *how* institutions can affect growth in a resource-rich state.

2.2.3 Governance in the Oil Sector

“Producing oil seems to be a bit like cocaine: if you are already healthy it might invigorate you, but if you are weak or sick, as many African countries are, it can do you serious harm (Shaxson, 2007:5).” As touched on above, there is a belief that natural resources can foster corruption and rent-seeking in states that have poor democratic institutions (Bhattacharyya & Hodler, 2009:619). Further, whilst strong institutions are considered by some as necessary to ensure checks and balances on a state’s oil sector are in place, there is also a warning that resource rents tend to erode these very institutions (Collier, 2007:46; Collier & Hoeffler, 2009:305; Sala-i-Martin & Subramanian, 2003:6). As with solutions proposed to economic aspects of the curse, such as the creation of stabilisation and savings funds or the encouragement of diversification, solutions to poor governance and weak institutions are focused on policy improvements (Alba, 2009:24). Islam (2003:36) is one of many who suggests that governments must share information to benefit from better policy-making, which in turn will lead to better governance and economic growth. Transparency and scrutiny are thus forwarded as positive steps to improving governance.

Scrutiny of government is a public good, the supply of which is commonly provoked by the tax burden. The lack of scrutiny in countries with large resource rents makes it easier for public revenues to be diverted into patronage: not only are public revenues larger, but they are also less well defended. Hence, on this thesis, resource rents subvert democracy by making patronage politics financially feasible. In such environments, trust must be placed not in the good faith of political parties, but in the efficacy of appropriate checks and balances that enforce accountability of politicians to citizens (Collier, 2006:1484).

Corrigan (2014:19) latterly agreed with Collier, arguing that scrutiny is of paramount importance in resource-rich states where levels of scrutiny, transparency and therefore accountability tend to be lower because there is no (or limited) citizens’ tax burden.

In sum, the current consensus is that it is not oil itself which is the issue but that it is a case of bad governance which can be fixed. Shaxson (2007:7) famously called oil “the corrupting, poisonous substance” and wrote that “ExxonMobil likes to say that there is no resource curse, just a governance curse. This is like saying of a heroin addict with criminal tendencies that there is no drug problem, just a criminal problem (2007:235).” For Shaxson (2007:235), it is oil that is the problem, not corruption or bad behaviour. Ghazvinian (2007) is of a similar opinion and Watts (2004:199) had earlier concluded the same during his study of Nigeria where he argued that although petro-states are hugely varied, one thing they have in common

is that oil is central to how communities are made and broken. Nevertheless, the analysis above has shown that there are convincing arguments to suggest instead that “the ‘resource curse’ phenomenon should be attributed more to the corruption and mismanagement of resource revenues than to the resources themselves (Al Faruque, 2015:68),” particularly in Africa. Clarke (2007; 2008) believes bad governance is to blame, attacking Shaxson and Ghazvinian for blaming oil (2008:532-536) and instead stating that “most often African countries are found to be cursed by their politicians (2008:531).” Heilbrunn (2014:34) has an even more optimistic view, believing that “African petrostates are better off with oil than they would have been had oil companies never discovered the oil and gas.” Domestic policy and the response to an influx of resource rents are considered key and the focus on promoting transparency is borne from this belief.

2.2.4 Calls for Transparency

A desire to improve governance in resource-rich states led to a focus on promoting transparency (Islam, 2003). Transparency was—and often still is—seen as the “Swiss Army knife of policy tools (Haufler, 2010:56)” and therefore “emerged as the most broadly recommended policy response to the poor governance records in resource-rich states and their damaging developmental effects (Gillies & Heuty, 2011:26).” Many global initiatives were created on the basis that “sunlight is the best disinfectant (David-Barrett & Okamura, 2013:3),” with the primary target of these initiatives being corruption and rent-seeking: Yates (2012:223) sees corruption as “a plant that grows best in darkness, and tends to wither when exposed to the light.” As Ölcer (2009:17) argues, transparency within the oil sector is deemed necessary if there is to be any informed debate or scrutiny.

As a concept, transparency can be defined as “the public disclosure of information in accessible formats (Gillies & Heuty, 2011:28).” How this manifests specifically in the oil sector will be discussed in Chapter 2.3 below, but it is important to note that whilst initial focus was placed on transparency of government revenues and payments to the government from the private sector, this has subsequently expanded to incorporate the entire value chain. Many scholars now accept that whilst transparency of government revenues is important, corruption is often worse in government expenditure than it is in revenues (Shaxson, 2007:218) and there thus needs to be a clear and transparent expenditure process (Gary & Karl, 2003:78; Kolstad & Søreide, 2009:217; Kolstad & Wiig, 2009:521; Gillies, 2010;

Shepherd, 2013). For Shepherd (2013:vii-viii), “the biggest threat that oil poses to this harmony [between government and society] would come from allowing rumour and speculation to dominate, notably over how revenues are allocated. It is for this reason that transparency is vital.” However, it is not just monetary flows that are considered important. Healy *et al.* (2011:13) divide the information that should be made transparent into two categories: payment and performance. Whilst the former captures revenues, profits, profit taxes and royalties, the latter also captures information such as production volumes and reserves. Gillies (2010:105-106) agrees, arguing that oil sector transparency as a norm should mean that the public “enjoy greater access to information about the revenue flows and operations of the petroleum industry” and she suggests this includes revenue flows (that is payments by oil companies to governments, including in-kind gifts, as well as flows of revenue between government agencies), revenue management (including investment strategies and funds), revenue expenditure and also information on industry operations.

2.2.5 The Intended Impact of Transparency

As mentioned, many believe that transparency can help lower corruption and rent-seeking and therefore can improve governance in resource-rich states. It is widely accepted that payment and information disclosure can help citizens hold their governments accountable, thus reducing corruption and rent-seeking, improving management of the sector, reducing conflict and promoting sustainable development (Haufler, 2010:53). Somewhat dauntingly, the supposed impacts of transparency are vast. In 2010 the Institute of Development Studies undertook a literature review to determine what scholars believed transparency could achieve. The findings were summarised as follows by Gillies and Heuty (2011:28):

improved public services, re-direction of resources to poor neighbourhoods, creation of new civic associations, reducing clientelism, enhanced democratic representation, less leakage in public expenditure, public participation, trust, improved decision making, better public understanding of decision making, fulfilment of socioeconomic rights, like access to water, less corruption, improved public financial management, improved business environment, empower the public, empower reformers, empower local voices, better budget utilisation and better delivery of services, increased state or institutional responsiveness, new democratic spaces for citizen engagement.

Nevertheless, the impacts that receive most academic attention can be grouped into the following: reduced corruption (including rent-seeking), greater trust between government and society and improved economic growth.

Regarding corruption and rent-seeking, Kolstad and Wiig (2009:522) argue that transparency has a direct impact on the detection of corruption and therefore the probability that those involved will be caught. If an oil company's cost structure is transparent then there is a lower chance of officials being able to distort figures (Kolstad & Wiig, 2009:522). Rent-seeking should thus decrease as the government would no longer hold all of the information, particularly as "secrecy is an important way in which government officials attempt to influence public opinion or create rents for themselves (Kolstad & Wiig, 2009:523-524)." Corrigan (2014:19) agrees and argues transparency should make it harder for the government to divert its resource revenues to channels of patronage, rent-seeking or other forms of corruption.

As well as removing the cover for corruption, Lahn *et al.* (2007a:14) and Marcel (2016:26-28) believe that transparency correspondingly builds trust. Eigen, the founder of TI and then chairman of the EITI, said in a speech to oil industry members in Houston that a key aim of the EITI is to increase trust (2006:38), and Al Faruque (2015:68-70) takes this further by suggesting that such trust between communities, governments and oil companies is necessary in order to add stability and reduce the likelihood of conflict which can correspondingly be increased by secrecy. Another helpful way of looking at how transparency can help reduce corrupt activity is to do as Kolstad and Wiig (2009:522) did and determine what a *lack* of transparency can do. For them, various bureaucratic assumptions exist which show that a lack of transparency has the following impacts: (i) "makes corruption less risky and more attractive"; (ii) "makes it harder to use incentives to make public officials act cleanly"; (iii) "makes it hard to select the most honest and efficient people for public sector positions or as contract partners"; (iv) "informational advantages give access to rents, making reform difficult"; (v) "makes co-operation more difficult to sustain, and opportunistic rent-seeking more likely"; and (vi) "may undermine social norms and reduce trust."

Linked to a reduction in corrupt activity garnered by greater transparency is the impact a more open sector would have on promoting economic growth. By encouraging more effective policymaking and a sensible distribution of revenues, in his study Cossé (2006:10) found evidence that transparency aids economic growth. Gary and Karl (2003:78), Corrigan (2014:19) and Al Faruque (2015:68) agree, with the latter citing better management of revenues as crucial to ensuring the entire population benefits. Al Faruque (2015:68-70) further argues that transparency helps encourage a stable business and investment climate,

something that Eigen (2006) also believes. For Eigen (2006:338-339), transparency should increase investment as direct foreign investment is harmed by perceptions of corruption and transparency reduces this risk. He further suggests that corporates operating in transparent climates will gain better reputations, thus attracting better employees and investors than corporates considered as opaque (Eigen, 2006:339).

Proponents of transparency argue that it makes markets work more efficiently; enhances trust and co-operation; strengthens institutions; reduces corruption and mismanagement; enables people to hold others accountable for their actions; and increases the legitimacy of decisions and institutions (Haufler, 2010:55).

In sum, the concept of increased transparency is rooted in an assumption that more information is better than less. Information disconnects or asymmetries are a problem and transparency helps to level the playing field. Gillies and Heuty (2011:31) argue that “information asymmetries facilitate rent-seeking behaviour and permit those in charge to utilise the country’s resource wealth to advance their personal and political aims.” If transparency can help to remove these information enclaves and in turn lead to policy improvements, there should be less wastage of resource wealth. “Decisions made in a vacuum fail to benefit from multiple views and available expertise, and they are subject to little scrutiny (Gillies & Heuty, 2011:31).” Williams (2009:124) agrees with Gillies and Heuty, arguing that information “can help to reduce the problems associated with informational asymmetries between parties, a fact that has been well-known in the theoretical economic literature for many years.” Figure 2.1, produced by Gillies and Heuty, helpfully shows in diagrammatical format these impacts on the political economy of a resource-rich state, including how they help obtain good governance. The ‘Level I’ effects are the direct effects and have an impact on the incentives of individuals to act ‘well’, whereas the ‘Level II’ effects are indirect and are dependent on the costs of corruption outweighing the potential gains if the incentives created by Level I are to be successful.

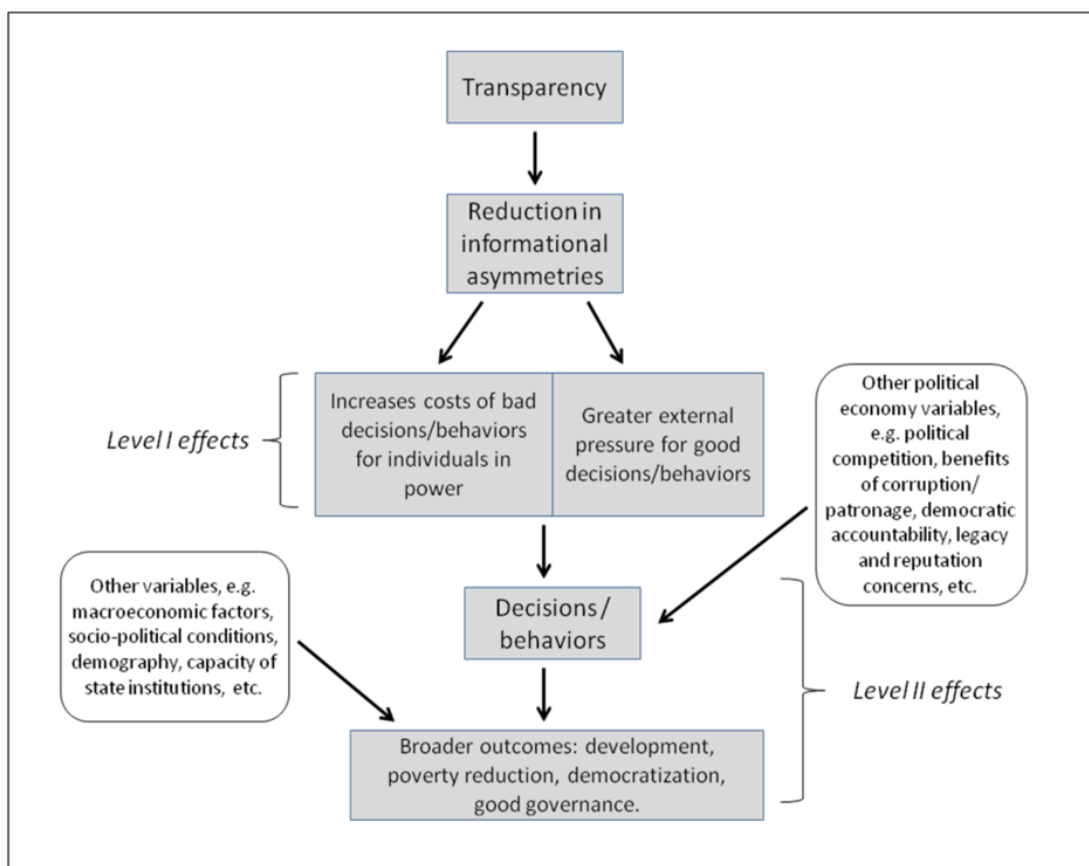


Figure 2.1: The Impact of Transparency on the Political Economy of Decision Making in Resource-rich States (Gillies & Heuty, 2011:32).

2.2.6 Inherent Difficulties in Measuring Effectiveness

Whilst the literature is on the whole agreed that there is a link between oil rents, corruption and rent-seeking, it is important to note that there is also acknowledgement that it is inherently difficult to test causality and also to test the effectiveness of transparency initiatives (Kolstad & Wiig, 2009:521; Mejia Acosta, 2010:7-9; Arezki & Brückner, 2011:961; Gillies & Heuty, 2011:26-30). That is not to say scholars and commentators have not tried and the wealth of studies on the impact and effectiveness of the EITI is testament to this (see for example Aaronson, 2008; 2011; Darby, 2009; Hilson & Maconachie, 2009; Ölcer, 2009; Shaxson, 2009; Keblusek, 2010; Scanteam, 2011; David-Barrett & Okamura, 2013; Corrigan, 2014; Sovacool & Andrews, 2015; Rustad, Le Billon & Lujala, 2017). However, there are some inherent methodological issues: “one methodological problem in evaluating the governance impact of resource extraction is the hidden nature of corrupt dealings that may be an integral

part of transactions with government but may not be known or prosecuted (Frynas *et al.*, 2017:250-251).” Further, Clarke (2007; 2008) is wary of corruption statistics in general as they tend to be subjective and based on individual perceptions of corrupt practices without being empirically tested (2008:526). Gillies and Heuty (2011:26-30) highlight the confusion between effectiveness and impact, and they believe sampling issues are common. For them it is impossible to directly compare states and to account for time inconsistencies—for example between implementation and effect—and attribution, where transparency initiatives are likely to be happening at the same time as other reforms making it hard to tell which reform is having an effect. Mejia Acosta (2010:7-9) agrees, noting the difficulty in measuring effectiveness both qualitatively and quantitatively when key hurdles relate to attribution—that is identifying the relevant factors for change, and timing—that is measuring the lapse of time between implementation of initiatives and change.

2.3 The Reality of Transparency in the Oil Sector

Although there is an increasing body of literature discussing the merits of transparency, there is still a limited analysis of exactly what form this transparency should take in the oil sector. Indeed, a large part of the existing analysis is produced by civil society organisations and by the international transparency and governance initiatives themselves (for example, Lahn *et al.*, 2007a; Lahn *et al.*, 2007b; Alba, 2009; NRGI, 2014; EITI, 2016; NRGI, 2016). Nevertheless, the analysis to date is relatively consistent on how transparency should be applied to the sector. As discussed in Chapter 2.2.4 above, there has been a notable shift of focus from simply promoting revenue transparency to capturing the entire value chain. This is reflected by the broadened scope of the EITI Standard in recent years which now captures transparency of contracts and licences, production, revenue collection and revenue allocation as well as social and economic contribution (EITI, 2016). The consensus is thus that the entire value chain of an oil project should be more transparent. Van Alstine *et al.* (2014:50) cite the World Bank’s value chain for extractive sector transparency as a good starting point for, although limited in some respects, it covers more than just revenue and similarly to the new EITI Standard includes: “(i) award of contracts and licenses; (ii) regulation and monitoring of operations; (iii) collection of taxes and royalties; (iv) revenue management and allocation; and (v) implementation of sustainable development policies and projects.”

In their report for Chatham House, Lahn *et al.* (2007a:56) produced a series of benchmarks that should be applied in order to promote transparency and good governance in the petroleum sector generally. These include ensuring that “a simple, comprehensive guide to the petroleum sector governance structure is available publicly” and that “the government and other shareholders receive timely and accurate financial and operational information from operators (Lahn *et al.*, 2007a:56).” Where information about the sector is not publicly-available, Lahn *et al.* (2007a:56) suggest that “the rationale for that confidentiality is explained and justified,” and they also suggest that the criteria for awarding licences and material government procurement contracts (including by the NOC) are published and explained. Although the scope of this current study does not permit a detailed discussion of the academic debates surrounding the practical implementation of transparency throughout the oil sector’s value chain, the following sections will provide an overview of the commentary on the key areas of the sector where it is argued transparency might most usefully be implemented.

2.3.1 Award of Contracts and Licences

This is one area of the value chain that attracts regular demands for greater transparency (see Collier, 2007:140; Lahn *et al.*, 2007a; Alba, 2009:3; Ölcer, 2009:20; Caspary, 2012:174). It is important because it comes as one of the first steps in the chain and, as Ölcer (2009:20) states, is a step often associated with corruption. The argument is that by making the licensing and bidding process for oil exploration and production rights more transparent, public trust is increased and so is competition between the bidders, thus attracting higher quality and better qualified IOCs (Lahn *et al.*, 2007a:57). Alba (2009:6) agrees, suggesting that transparent and competitive bidding procedures will help promote competition which in turn is of benefit to the host state. Caspary (2012:174) argues that there should therefore be “transparent, competitive, and nondiscretionary procedures for the award of exploration, development, and production rights” and that these procedures be “embedded in a clear legal, regulatory, and contractual framework, which is upheld by a set of institutions with clearly defined responsibilities,” something Alba (2009:23) is in agreement with. Whilst Lahn *et al.* (2007a:57) do not go as far as to suggest the bidding rounds necessarily be open, they do believe that “whichever system a country chooses, the selection criteria (e.g. the investment commitment, operations record, transfer of technology, best practices, standards of business conduct, etc.) and reasons for the choice of winning company should be explained publicly.”

2.3.2 Corporate Ownership

Linked to encouraging a transparent licensing and contract award process is transparency of ownership. Section 2.5 of the EITI Standard (EITI, 2016) currently recommends that governments keep a public record of who the ultimate or beneficial owners of an upstream licence are, yet this is not mandatory. It is also something that the NRGI's Natural Resource Charter (NRC) (2014:10) recommends be put in place. In his study of petroleum ownership rights in Kenya, Hubert (2016) cited concern that a lack of transparency in ownership does little to curb IOCs from using complicated structures for tax avoidance. With oil revenues taking numerous forms—from corporate taxes and royalties to direct profits—any leakage of these revenues from the host state is likely to have a significant impact on the overall revenues governments receive. Hubert (2016:4) believes that the problem of companies operating in host states through subsidiaries registered in a tax haven “is particularly acute in the extractive sector, where large multinational companies establish complex corporate structures in order to minimise tax payments and maximize profits.” Thus, a transparent system whereby ownership of petroleum rights is publicly-available could help the public understand exactly who holds those rights.

2.3.3 Revenues, Payments, Taxation and Expenditure

As mentioned in Chapter 2.2.4, the initial focus of transparency initiatives was on flows of money between IOCs and governments. This includes all bonuses (including signature and production bonuses), royalties and taxes, all of which should be traceable and transparent and, ideally, made to the central bank (Alba, 2009:3,12; NRGI, 2014:10). Al Faruque (2015:51) places high importance on transparency of taxes and royalties because he argues that any windfall revenues (for example, when oil prices increase) are particularly vulnerable if the institutional quality is not sufficient to ensure they are allocated correctly. However, there is an increasing demand for transparency of revenue allocation and management by governments (Collier, 2007:141; Alba, 2009:14; Caspary, 2012:175). Alba (2009:24) argues that allocation of revenues to sub-national bodies must be transparent and Caspary (2012:175) suggests that opacity in expenditure of resource revenues could mean that they “easily end up funding corrupt practices, promoting social and economic inequalities, and generating intrastate or even interstate conflicts.” Whether this also demands the creation and monitoring of stabilisation or national savings funds, what is clear is that revenue

management and allocation should follow clear and transparent policies. Ultimately for Collier (2007:141) this is critical: “whereas transparency in public spending is always desirable, in the resource-rich countries it is vital.”

2.3.4 Contracts

The NRC (2014:10) and Section 2.4 of the EITI Standard (EITI, 2016) call for contracts and other documentation relevant to upstream projects to be publicly-available. In particular, focus tends to be on the key upstream project documents which might include licences or PSCs, joint operating agreements, shareholders’ agreements and service contracts. Eigen (2006:342) and Rosenblum and Maples (2009:15-17) believe that citizens have the right to see what is in the contracts that govern the extraction and sale of the resources they own, with the latter saying it is undemocratic to keep these contracts private. However, calls for contract transparency go further. For example, Rosenblum and Maples (2009:11-12; 46), who conducted an extensive study on the viability of confidentiality claims, argue that it puts governments in a better position for negotiating terms of future deals if they have the same access to information that the IOCs do. This is important in light of the fact that many governments of emerging oil states have far less experience in negotiating and concluding upstream deals than the IOCs they are negotiating with, so transparency of upstream contracts—even if those from other states—would help to reduce the information asymmetry between parties. Further, Rosenblum and Maples (2009:11-12) believe that transparency of contracts would aid the stability and durability of contracts, thus preventing uncertainty for IOCs, investors and shareholders that the terms might be renegotiated: essentially, trust increases and there is less suspicion between the parties. In sum,

those who considered contract transparency of vital importance for ensuring that contracts maximise the public interest thought so because such contracts—when combined with prevailing laws and regulations—would clearly set out the beneficiaries of such investments, the fiscal terms (which may be either contract-specific or governed by legislation), the geographical extent of the investment and compensation measures for those affected by the development. Pushing for across-the-board contract transparency would, it is hoped, lead to greater harmonisation of contract terms both within countries as well as internationally (Darby, 2010:25).

Typical arguments against disclosure of project documents tend to focus on the fact that there is a risk of disclosure of sensitive commercial information which will in turn induce a ‘race to the bottom’ where IOCs will try to compete in an unsavoury manner to get the best concessions (Rosenblum & Maples, 2009:17; Sovacool & Andrews, 2015:184-186). As

Gillies (2010:107) states, this sees the IOCs “set about wooing producer governments...[and] companies soften their governance, environmental and other standards so as to sharpen their competitive edge (2010:107).” Furthermore, many IOCs and governments will point to the fact that they are prevented from disclosing documents because the documents contain restrictive confidentiality provisions. However, as Rosenblum and Maples (2009:23, 33) argue, the need to keep confidential or commercially sensitive information hidden from public scrutiny has to be pitted against the public interest and these arguments are in themselves circular: it is these parties who negotiate the contracts and who could therefore choose to exclude restrictive confidentiality provisions, or at the very least waive them with consent. Darby (2009:22) also notes that such waivers to confidentiality provisions are common in the sector. In addition, commercially sensitive information is in itself hard to define and can be broad, but more importantly it is often the case that it is not even included in primary contracts: in their study of 150 oil and mining contracts between governments and companies, Rosenblum and Maples (2009:23, 33-35) found that these contracts rarely held information on shareholders, revenue and cash flow, merger and acquisition activity, employee data or reserve details, all of which might objectively be considered sensitive. Darby (2009:23) further points out that proprietary information is likely to either be geological data or that relating to costs of extraction and profitability, none of which will be held in primary contracts.

Ultimately, the critical question is “what is the difference between the information that governments and companies want to keep confidential versus the information that needs to be confidential (Rosenblum & Maples, 2009:7)?” Legal justification for secrecy disregards government obligations and society’s democratic right to information (Rosenblum & Maples, 2009:12). Moreover, Darby (2009:24) argues that many documents are already available and Rosenblum & Maples (2009:13) make the valid point that it is standard industry practice to share contracts and agreements:

within the industry, confidential contracts are bought and sold, analysed, and even ranked. Some contracts, or essential details of their terms, are disclosed to investors pursuant to securities regulations. Others are shared among colleagues on electronic mailing lists. For larger projects, competitors are often co-parties to the contract, giving them *de facto* access.”

Rosenblum and Maples (2009:14) concluded their study thus: “though unquestioned for decades, contract secrecy provides no discernible benefits for any of the parties involved. The

arguments for contract transparency are substantial, and the counterarguments look weak under scrutiny.”

2.3.5 Operational Information

Although the focus of transparency initiatives tends to be on the areas of the upstream value chain discussed above, there is an increasing recognition that more transparency relating to operations is required (Alba, 2009:3). For example, the NRCG's NRC advises that national oil company (NOC) details and operations should be publicly-available (NRCG, 2014:10) and their actions should be monitored and regulated. Further, the NRC suggests that data and reports on all licence activity should be publicly-available, including geological surveys, reserve estimates and any social, economic or environmental impact assessments (NRCG, 2014:10). Nonetheless, as suggested in Chapter 2.3.4 this leads to questions of commercially sensitive information disclosure and there is acknowledgment that there can be legitimate demands by IOCs for certain information to be kept confidential, such demands often capturing operational information (Kolstad & Wiig, 2009:525). This conclusion is supported by the findings of Healy *et al.* (2011:2-4) who studied the supposed costs to companies of revealing proprietary information and determined that expropriation risk is increased when operational data is released by oil companies. There is therefore ongoing debate over the value of releasing operational data.

2.4 **Accountability**

Advocates of transparency argue that it will help to increase accountability and therefore reduce incentives to bribery, rent-seeking and other corrupt behaviour. There is broad consensus that incentives are key (Auty, 2009:43; Kolstad & Søreide, 2009:224; Gillies & Heuty, 2011; Caspary, 2012:179; Busse & Gröning, 2013:16; Corrigan, 2014:19-20) and that incentives to good behaviour must outweigh the benefits of bad behaviour. At the heart of this is ensuring accountability (Caspary, 2012:179).

2.4.1 Transparency Needs Accountability

Whilst transparency is important, it is only the first step towards achieving accountability (Stevens *et al.*, 2015:21-22) and alone is considered insufficient to promote good governance

(Gary & Karl, 2003:6; Kolstad & Søreide, 2009:224; Ölcer, 2009:22; Li, 2013:57; Shepherd, 2013:23-24; Stevens *et al.*, 2015:21-22). As Shepherd (2013:23-24) argues, access to information or even public consultation is not the same as transparency: “simple access to information is not enough to drive meaningful popular engagement.” Accountability is required to incentivise good behaviour, particularly in resource-rich states. Kolstad and Søreide (2009:224) have clearly summarised why:

For access to information to have an impact on the conduct of government officials, the officials must face some sort of sanction where misconduct is detected. In many resource-rich developing countries, opposition parties or other groups or institutions that would be able to punish a government for corruption, are missing or weak, or have been co-opted by the government (cf. the rentier state argument). In other words, accountability is the important issue, and transparency is only one aspect of this.

Accountability therefore acts as an incentive. Rosenblum and Maples (2009:11) argue that this is particularly important where natural resources are concerned as governments are not corporates and government accountability over non-renewable resources is crucial for the governments “have duties, obligations and interests that go beyond pure profit maximisation. As such, the same secrecy afforded to contracting parties in commercial law is out of place in such contracts [with governments].” For Newell and Wheeler (2006:13) accountability is both an outcome and an ongoing process of engagement between citizens and governments. Indeed, Desai and Jarvis (2012:102) believe accountability receives less attention than it deserves when resource industry governance is discussed, arguing the need for “accountability for the key decisions made in the development of non-renewable resources from the award of licences through to how revenues are distributed, spent and resulting investment is managed and monitored.”

Numerous studies have used the EITI as an example to show that transparency must go hand-in-hand with accountability. Like Shepherd (2013), Ölcer (2009:22) makes clear the need to distinguish clearly between transparency and accountability, with the latter involving “the provision of information regarding actions or decisions, their justification, and recourse to punishment in the case of misconduct.” For him, the EITI is lacking in the first aspect and third aspect, so “risks being an instrument of toothless transparency without full accountability (2009:22).” Hilson and Maconachie’s (2009:52) conclusion backs this up as they found that transparency could be useful but only with effective institutional change in the host state and that alone transparency cannot tackle corruption. The Scanteam (2011:3)

survey later demonstrated similar results, finding that in the states they studied transparency had often improved but that there was little evidence to show that governance or accountability had done simultaneously, and Caspary (2012:179) reached a similar conclusion. David-Barrett and Okamura (2013:22) believe that “it is only when there is an absence of accountability that public officials exercise their power for private ends unchecked by scrutiny, complaint, or the threat of punishment,” and that whilst EITI membership might help reduce corruption by granting transparency, accountability is key. Finally, although Aaronson (2008) reviewed the effectiveness of EITI membership (and thus transparency) after four years of implementation and found many states had shown better governance levels, including voice and accountability, Sovacool and Andrew’s (2015:184) more recent study of Liberia and Azerbaijan showed that their governance indicator results instead plummeted. Aaronson (2008) herself admitted that the period covered by her study (four years) is too short for a full impact analysis to be conducted, however it is clear from both her study and that of others that there must be accountability for transparency to be effective.

2.4.2 Effective Accountability

The equitable participation of citizens or groups using transparent information is required to hold private and public-decision makers to account and to increase accountability (Desai & Jarvis, 2012:109). Accountability should therefore either come from the grassroots level, that is bottom-up, demand-side accountability, or from the supply-side where policy-makers and those responsible for ensuring accountability promote it (Desai & Jarvis, 2012:109). However, transparency and accountability cannot stand alone in a society and consequently, as Al Faruque (2015:71) suggests, “governance structure, institutional setting and political culture largely determine the bedrock of accountability of a government's expenditures and public actions in a country.” Thus, the accountability mechanisms must be effective.

As Darby (2010:9) suggests, “simply making information available is not sufficient to achieve transparency. Large amounts of raw information in the public domain may breed opacity rather than transparency.” Information released through transparent initiatives must be timely, accurate, relevant and accessible in order that citizen participation, a key element of transparency and accountability, is permitted (Darby, 2010:9). Citizens must be empowered in order to participate (Scanteam, 2011:3) and this is often challenging in

resource-rich states where the poor and marginalised do not consider themselves citizens (Desai & Jarvis, 2012:112). Gillies and Heuty (2011:37) agree, believing that any transparency and accountability initiatives must be rooted in broader reforms which empower citizens. But as Shaxson (2007:218) noted, “African civil societies are often so weak and fragmented that in many cases it is hard to stir up outrage, except from local groups that are funded by western NGOs that want to drum up interest in the issue.”

Further, the information released through transparency initiatives must be decipherable by civil society and citizens in order to permit accountability (Darby, 2010; Haufler, 2010). As noted above, the oil sector is considered to be notoriously complex, so interpretation of released information must be supported: “much government information is complex, but that is not a sufficient reason to keep it from the public (Rosenblum & Maples, 2009:41).” Gillies and Heuty (2011:36) argue that effective dissemination of information is required, and Herringshaw (2004:177) points to the fact that information must be provided in an accessible format to ensure governments can be held accountable. In their study of Uganda, Van Alstine *et al.* (2014:55-57) found that weak local government capacity caused by increased decentralisation was also a barrier to growth. After studying the impact of the EITI in Nigeria, Keblusek (2010:14) concluded that it is not safe to assume civil society has the required capability to evaluate information and Benner and Soares de Oliveira (2010:30) found little evidence to show the EITI has had any impact on citizen empowerment in Nigeria. Aaronson’s (2011:53) study of the EITI resulted in her reaching a similar conclusion, namely that the EITI is constrained by many factors including a lack of government willingness to engage with civil society, the latter’s ability to dissect the information and finally the public’s ability to interpret it. She suggests that the public’s interpretation is regularly thwarted by illiteracy, lack of education, cultural and political factors, lack of interest and livelihood demands (2011:53). For Gary and Karl (2003:58-59) the concern is civil society capacity as they believe understanding is key to staying abreast of change and to adjusting to such changes in the sector, otherwise there will be no meaningful interaction with the government and IOCs.

Kolstad and Wiig (2009:524) believe education can help with civil society and public interpretation, and Collier (2007:141) forwards the idea of using a “broker” who acts as an accountant but not a police officer with regard to sector revenues and payments, therefore “converting a confusing morass of information into knowledge that citizens could use.”

Nonetheless, achieving accountability in oil-rich states with oppressive regimes is likely to be challenging (Hilson & Maconachie, 2009:57). Keblusek (2010:15) therefore argues that there is a need for citizens to feel comfortable to organise, comment on and challenge public policy. Furthermore, Ölcer (2009:26-27) finds that “this includes [needing] an environment in which civil society is very strong, knowledgeable and independent...and where there exists no conflict of interest between the government and extractive industries on the one hand, and citizens on the other” yet that “these characteristics are far from being the reality in most resource-rich countries.”

Although difficult, what is clear is that society cannot rely solely on external actors to push for transparency and accountability as there is a definite need for civil society and the public to have certain rights and capabilities: (i) institutional freedom (including free speech, a free press and freedom of assembly); (ii) the means to hold the government accountable; and (iii) a mutual interest in transparency, accountability and the eradication of corruption (Weinthal & Luong, 2006:41).

2.5 Barriers to Success

As discussed in Chapter 2.4.2 above, achieving effective accountability by ensuring that the information released through transparency is accurate, reliable, timely and can subsequently be meaningfully interpreted by a capable civil society and the public is a key step towards success. Similarly, ensuring that civil society and the public have the freedom to hold governments and IOCs to account is also a challenge. There are, however, further barriers that stand in the way of effective transparency and accountability initiatives.

2.5.1 Will and Co-operation

In her study of the EITI, Aaronson (2011:50) found that often the partners in the initiative (that is governments, civil society and business) did not share the same vision, and indeed there was a limited partnership as some implementing governments had not fully embraced civil society involvement and were restricting information access. This problem is likely to be encountered with all transparency initiatives, for it is necessary to have the co-operation of all partners. Clarke (2007:271) believes motivations for joining initiatives are schizophrenic and that there should be a clear political will, as is agreed by Stevens *et al.* (2015:19). Hilson

and Maconachie (2009:68) found that the World Bank's experience in Chad and elsewhere has shown that host regimes must be committed to transparency, yet Haufler (2010:58) notes that often host governments are reluctant to do so when there is a chance that the wealth of elites can be reduced and patronage networks hampered. IOCs must also embrace change, but this can be difficult. Whilst some oil companies act out of self-interest and may promote transparency, it can at times simply be "to protect their positions with regulators, stock exchanges and the equity markets (Clarke, 2007:272)." Concern that disclosure might affect their competitive advantage or incur the wrath of host governments prevents transparency by IOCs (Haufler, 2010:58), as infamously happened to British Petroleum plc (BP) in Angola in 2001 after the company disclosed details of its signature bonus for a new concession without consent and resulted in the government writing an open letter to BP threatening its expulsion (Ghazvinian, 2007:140-141; Gillies & Heuty, 2011:37; Stevens *et al.*, 2015:22). Furthermore, "disclosure is not a policy that corporations necessarily welcome. Any single company has a disincentive to adopt information disclosure on its own, since it may undercut its competitive position and reduce its ability to obtain contracts with secretive governments (Haufler, 2010:58)." In sum, there must be a concentrated and combined effort by all parties.

This leads to a related barrier, which is that some key players in the industry might be less affected by or concerned about promoting 'good governance'. Whilst some states choose to implement initiatives like the EITI "because they seek to improve their reputation with the international community (David-Barrett & Okamura, 2013:6)," others are seemingly not so concerned with their reputation. Chinese, Russian and Indian companies—key players in the global oil market—are a case in point: "despite soliloquies from its advocates, the norm of oil sector transparency has held little sway over 'non-Western' actors in [the] oil sector such as Chinese and Russian national oil companies (Gillies, 2010:122)." Benner and Soares de Oliveira (2010:295) concur, suggesting that Chinese and Indian understanding of energy is firmly "realpolitik" and has little regard for the reformist agenda. Gillies (2010:123) goes on to argue that reputational concern is crucial for whether companies view it as necessary to embrace transparency, suggesting that smaller companies and non-Western companies have less chance of doing so than bigger, public-facing companies. She cites Talisman's continuation of activity in the former Sudan years after most other companies left as an example, explaining it was due to the fact Talisman had little consumer interaction as it did not sell products directly to consumers (Gillies, 2010:123). Haufler (2010:69) agrees that smaller firms face less pressure to embrace transparency and includes NOCs in this analysis,

with MacSearraigh (2007:200) suggesting that smaller companies are often more corrupt than larger ones. Healy *et al.* (2011:5) interestingly argue the opposite, believing bigger companies tend to reveal less information, and there is a related argument that companies are not in fact put off investing in states which are known to be opaque or corrupt (Hilson & Maconachie, 2009:57). Continued investment by IOCs in states like Chad, Nigeria, Iraq and South Africa stand to bolster this point.

There is also a debate over whether the burden of disclosure should be placed on IOCs or on governments (Gillies, 2010:118). Darby (2009:118) believes that most companies are neutral on the point so the focus of activity should be placed on governments, and Gary and Karl (2003:2) agree. However, it is no secret that many oil executives prefer the EITI model to the PWYP model as the former puts the impetus with the government rather than the company, unlike the latter (Ghazvinian, 2007:139-140). Furthermore, Gary and Karl (2003:2-3,78) argue that there are key roles for international finance institutions and export credit agencies which should promote transparency and accountability by using their leverage in a timely and logical fashion, for example by export credit agencies only financing private sector organisations or offering loans, risk insurance or guarantees to companies who are transparent. Palley (2003) emphasises the role of the International Monetary Fund and the World Bank, similarly suggesting that they should only provide country assistance or financing to recipients who promote transparency. That said, most scholars and commentators agree that the important thing is for all parties to be involved and that pressure must come from each one of them (Collier, 2007:143-144; Ölcer, 2009:22).

2.5.2 Voluntary Nature of Initiatives

Transparency can be required by law, for example by government legislation (either in the host state or in the home states of IOCs), by stock exchange and regulatory rules or contractually, however existing global initiatives such as PWYP, Transparency International and the EITI are voluntary. Many see this as a problem (Gary & Karl, 2003:53; Herringshaw, 2004:176; Hilson & Maconachie, 2009:91-92; Kolstad & Søreide; 2009:224; Kolstad & Wiig, 2009:528; Ölcer, 2009:21-22; Benner & Soares de Oliveira, 2010:312; Aaronson, 2011:57; Gillies & Heuty, 2011:38-39; Al Faruque, 2015:73). Aaronson (2011:57) argues that the voluntary nature of initiatives means IOCs and governments can ignore or selectively implement them and Al Faruque (2015:73) believes that success therefore necessitates an

existing level of integrity and transparency. With a voluntary initiative it is hard to encourage accountability, particularly as some governments might not wish to go further than encouraging transparency by pairing it with the necessary accountability (Hilson & Maconachie, 2009:91-92). There are calls for these initiatives to be mandatory (Gary & Karl, 2003:53; Herringshaw, 2004:176; Benner & Soares de Oliveira, 2010:312; Gillies & Heuty, 2011:38-39), with Herringshaw (2004:176) and Gary and Karl (2003:53) arguing that this would even the playing field for companies rather than punishing those who show leadership on transparency and it would prevent the worst behaving companies from being able to undercut the best behaved. The lack of sanctions available to punish those who do not comply with requirements also attracts criticism, with Benner and Soares de Oliveira (2010:302-303) for this reason calling the EITI toothless and Hilson and Maconachie (2009:57) going further: “overall, it appears that the EITI, which is a voluntary pact that imposes no penalties on regimes that violate its principles, is far from being a recipe capable of offsetting the resource curse in sub-Saharan Africa.”

2.5.3 The Form of Information Disclosure

A further area of debate surrounds what form information should be provided in to comply with the EITI: either aggregated (no company breakdowns) or disaggregated (company-by-company). Darby (2009) discusses this in detail and is of the belief that disaggregated information is required (2009:3). He believes that this allows for a distinction between ‘good and bad’ IOCs, that suspicion for IOCs not complying increases when they use aggregated reporting on the assumption that they have something to hide and that disaggregation is essential where states employ revenue-sharing formulae for redistribution of industry revenues to regional or other sub-national bodies, as in Peru (Darby, 2009:31-32). He further notes that most of the information is already available in a disaggregated format and that it allows the dissemination of accurate information which, in turn, pre-empts calls for resource nationalism as companies can defend themselves against unfounded accusations.

In countries where no information is published on the fiscal contribution of companies to government, and where little or no public goods and services are provided, the public will often assume that a government’s failure to provide public goods and services is not because the money has been wasted (as is often the case), but rather because the company is not paying enough (Darby, 2009:31-32).

As part of his research Darby interviewed many involved in the oil sector and he provides a summary of many of the common arguments against disaggregation, despite the fact he then

systematically discredits them. Arguments against disaggregation include: (i) company payments are the wrong focus as government revenues are key, so there is no need for disaggregation; (ii) disaggregated information does not provide the information required for accountability; (iii) individual company payments will not necessarily help identify corruption; (iv) there is a political risk for the IOCs if the public is ignorant, with a chance that the IOC will attract unwarranted criticism and be subject to demands for nationalisation or renegotiation of terms; (v) there is a commercial risk to the IOCs if their investors are ignorant; (vi) competitive risk exists where less scrupulous IOCs undercut the compliant IOC; and (vii) it could breach confidentiality restrictions and cause commercial disadvantage (Darby, 2009:16-29). However, as Darby (2009:24) notes, ultimately all IOCs operating in a state will be equally vulnerable if they all have to disclose the same form of information. The assertion is therefore that uniformity of disclosed information is key.

2.6 Chapter Summary

To date, and despite significant support for transparency initiatives, “the picture is sobering: the good governance and transparency agenda has not affected the core rules of the game of global energy governance. Instead the agenda has remained only a niche concern, mostly at a superficial rhetorical level (Benner & Soares de Oliveira, 2010:310).” Benner and Soares de Oliveira (2010:311) see little evidence that good governance is affecting global markets:

The shady world of international oil trading remains immune to reputational concerns. Likewise, private rating agencies do not factor transparency and good governance records into their rating decisions. Western secrecy laws continue to shield oil and gas profiteers. Confidentiality clauses in investment contracts perpetuate obfuscation and corruption. What is more, consumers at the pump do not have any ability or inclination to base their decisions on which gas to buy based on the development stance of the oil company.

Clarke (2007:273) agrees, noting the continued existence of “backroom deals, illicit payments, the search for insider edge in contracts and the like. The link from corporate oil to the realm of Caesar is an umbilical cord that is unlikely ever to be entirely broken.” 10 years later and the situation remains relatively unchanged.

However, context is key and the way a state seeks to manage its resource sector needs to be tailored depending on circumstance; there is no one-size-fits-all solution (Lahn *et al.*, 2007a, 2007b; Scanteam, 2011:3; Frankel, 2012:20; Stevens *et al.*, 2015:16). Best practice industry

standards are not always suitable for emerging producers who often face development challenges and have weak institutional capacity and limited experience and knowledge, so heeding national context is key (Yates, 2012; Marcel, 2016:6). “Context matters. The paradox of plenty that we find in Africa seems to be contextually ground in African realities (Yates, 2012:2).” There is therefore hope for Kenya, a state on the brink of petroleum production, but it is crucial that the right policies are put in place as soon as possible. This is particularly important given the findings of Frynas *et al.* (2017:237) who looked at the cases of Madagascar and Sao Tome e Principe and found that the effects of the resource curse can show before genuine resource windfalls occur as anticipation is enough to trigger a change. Further, Kenya seems to be at significant risk of the curse:

There is little experience, expertise, knowledge, dialogue and public information on the extractive sector in Kenya. This comes against a background of high poverty incidence, where 48 per cent. of citizens live below the poverty line. Poverty is more severe in some of the regions where oil, gas and minerals have been discovered. In areas like Turkana, conflict incidences are high and women and children are often the main casualties (Oiro Omolo & Mwabu, 2014:3).

As a result of its infancy there is very little literature on Kenya’s oil sector, and indeed this is a gap that this study seeks to fill. The theories discussed in this chapter can therefore be applied to the case of Kenya in order to speculate as to how transparency might be able to positively impact Kenya’s strategy for avoiding negative effects of oil wealth. However, given the importance of understanding context, before turning to an analysis of how transparency and accountability might be implemented in and affect Kenya, Kenya’s political culture and the current status of its oil sector will be examined.

Chapter 3

KENYA'S POLITICAL CULTURE

'Political culture' is a concept introduced by Sidney and Verba in the 1960s and it has since received much academic attention and revision. However, for the purposes of this research it can be defined simply as "the set of attitudes, beliefs and sentiments that give order and meaning to a political process and which provide the underlying assumptions and rules that govern behaviour in the political system (International Encyclopaedia of the Social Sciences, 2008)." This chapter will focus on how certain attitudes, beliefs and sentiments manifest themselves in and have an impact on Kenya's political system and it will therefore examine the quality of Kenya's democracy and the existence of political violence, ethnic division, patronage systems, bribery and corruption in the state.

3.1 Background

To fully understand the political culture in Kenya it would be necessary to examine Kenyan history from the pre-colonial period until the present day. Neither the scope nor the focus of this research permits such a detailed examination, but it is fundamental that the nature of today's political culture is recognised. As Chapter 4 will demonstrate, various actors play a formal role in Kenya's oil sector. However, the informal influences exerted upon these formal actors, such as systems of patronage, bribery, corruption and ethnic divisions, are strong and are embedded in Kenyan society. This chapter will therefore provide an overview of the political culture in Kenya to demonstrate the potential impact that such informal influences might have upon transparency in the oil sector.

Barkan (2013) describes three eras in Kenya's political history: the period up until independence in 1963, including the late-colonial period and the transition to independence; the post-independence period from 1963 until 1990; and the period from 1990 onwards when Kenya became—at least in name—a democratic, multi-party state. Throughout these periods Kenya has stood apart from many of its African counterparts in that it has suffered no military dictatorships, no civil war nor any periods of failed socialism; however, "it is, and always has been, a deeply divided society and polity (Lonsdale, 2014:88)." Classified as a lower-middle income state by the World Bank (2017a:6), it has a population of 46,050,302 and a gross national income per capita of only US\$1,340. Far from reaching its potential to

develop a strong economy and promote sustainable human development since independence, instead it is generally accepted that Kenya suffers from and is stunted by inherent problems of land distribution, inequality, corruption, poverty, insecurity and employment (wa Gĩthĩnji & Holmquist, 2008:356). It is also home to one of the world's largest populations of refugees and currently faces a significant security threat from the al-Qaeda linked terrorist group al-Shabaab: following Kenya's Operation Linda Nchi in October 2011 when it invaded Somalia, various terrorist attacks have targeted Kenyan citizens (including the attacks on Nairobi's Westgate Mall and Garissa University College) and there has been a surge in related political discontent (Anderson & McKnight, 2015:1-4). In sum, Kenya may have avoided a number of the pitfalls experienced by its neighbours, however its path has been far from steady.

3.2 A Functioning Democracy?

After decades of one-party rule in Kenya under Jomo Kenyatta (president from 1963 to 1978) and Daniel arap Moi (president from 1978 to 2002), in 1992 Kenya held its first multi-party elections. This was a development described by Haugerud (1995:55) as a "political explosion." However, it would take another decade for opposition parties to create a unified coalition capable of defeating Moi (Bratton & Gyimah-Boadi, 2015:9), with Mwai Kibaki subsequently becoming president and remaining so until 2013 when current president and son of Jomo Kenyatta, Uhuru Kenyatta, was elected as Kibaki's successor. As well as the emergence of multi-party politics in the 1990s, the 2002 elections were a further landmark in Kenya's struggle toward democracy as Kibaki's platform heralded expectations of real and improved democracy where the handover of political power was smooth and where corruption and bribery would have no place (Nasong'o & Murunga, 2007:9). Indeed, Kenya does exhibit many typically democratic characteristics: it holds regular elections, its citizens participate in the political process, there is an active opposition, there have been handovers of power between governments and there have been coalition governments. Many also herald the adoption of the new constitution in 2010 as a positive step, particularly regarding its commitment to devolution:

A more decentralised government makes eminent sense, given Kenya's diversity and experience with political use of central power. Decentralisation has been increasingly seen and adopted worldwide as a guarantee against discretionary use of power by central elites as well as a way to enhance the efficiency of social service provision, by allowing for a closer match between public policies and the desires and needs of local constituencies (World Bank, 2012:1).

Kenya's commitment to devolution is considered relatively unique, not simply because it is enshrined in the constitution (as opposed to being required by more easily revocable legislation), but because of its scope (D'arcy & Cornell, 2016:255). The elections in 2013 saw 47 new county governors elected and the establishment of county assemblies which have some legislative power, with county governments given responsibility for certain key service delivery such as healthcare. Further, fiscal resources of not less than 15 per cent. of national revenues have been allocated to the county governments.

However, although Kenya might outwardly appear democratic, numerous factors suggest otherwise and reveal that its democracy is unproven. Regarding devolution, there is concern that it "could potentially undermine national unity by encouraging fragmentation of the state along partisan lines or by 'decentralising corruption', leaving citizens worse off if local elites are able to capture resources (World Bank, 2012:1)." The International Crisis Group (2013:14) has warned that this decentralisation could balkanise counties and create "ethnic fiefdoms" which will perpetuate current inequalities. Instead of reducing patronage and rent-seeking, D'Arcy and Cornell (2016:246) argue that these practices are continuing under decentralisation but simply on a more localised scale due to popular expectations that suggest it is 'everyone's turn to eat'. For them, "decentralisation has not changed the way in which politics is practised in Kenya, but rather the levels on which it operates, bringing it closer to ordinary people (D'Arcy & Cornell, 2016:273)." Whilst others accept that devolution has generated a system with more robust checks and balances, there is a belief that the cost of this is a potential exacerbation of corruption and ethnic tensions locally (Cheeseman, Lynch & Willis, 2016:2). For Long, Kanyinga, Ferree and Gibson (2013:141) there is ultimately a risk that the new governorships are simply "another political arena ripe for violent contestation."

On top of the risks that devolution poses to Kenya's democracy, the effectiveness of Kenya's democracy can be called into question. There were clear irregularities in the 2013 elections (Long *et al.*, 2013:140) and the Supreme Court was required to validate the result when Raila Odinga challenged Kenyatta's victory after the latter's Jubilee coalition received 50.07 per cent. of the vote (International Crisis Group, 2013:1). It is also hard to ignore the fact that Kenyatta is the first president to be elected whilst facing trial under the International Criminal Court at The Hague and only the second elected president to do so after Omar al-Bashir (International Crisis Group, 2013:9); hardly esteemed company. There have been numerous confirmed reports of procedural faults during the 2013 elections, such as the widespread

failure of the new biometric registration system, the breakdown in the results transmission and tallying mechanism and the unnecessary delay in publishing results (Cheeseman, Lynch & Willis, 2014:3). As Long *et al.* (2013:152) ask, “how can an electoral process be considered free and fair if more than three-quarters of citizens believe that their electoral officials had problems counting and reporting the contest’s results, and nearly a third think that these problems led to the wrong outcome?”

The outcome of Kenya’s most recent election does little to suggest things are improving⁴. Fears of voter intimidation, electoral misconduct and violence in the run-up to the election seemed justified when in the primaries 62 people were charged with electoral offences including incitement to violence and bribing of voters (Kenya Election: 62 Charged for Electoral Offences, 2017). Chris Msando, a key and senior election official who was head of information technology at the primary body responsible for overseeing the polls (the Independent Electoral and Boundaries Commission) and who was heavily involved in developing Kenya’s new electronic voter registration and ballot systems, was found brutally murdered in the outskirts of Nairobi just days before the polls (Burke, 2017). Voters subsequently went to the polls on 8 August 2017 to choose their new president—Kenyatta and Odinga were once again the two key candidates—as well as members of parliament and county governments. The incumbent Kenyatta was declared winner of the presidential race with approximately 54 per cent. of the vote compared with Odinga’s 44 per cent., but within 10 days and echoing the post-election period in 2013, Odinga sought to challenge these results in court amidst claims that Kenyatta’s victory came amidst huge voting irregularities and fraud (Kenya Election: Raila Odinga to Challenge Result in Court, 2017). In what has been termed an “historic ruling and a first in Africa (de Freytas-Tamura, 2017),” Kenya’s Supreme Court subsequently took the bold and unprecedented decision to nullify the result of the presidential election and ordered a re-run. Addressing the courtroom, Justice Maraga stated that the six-judge panel had found that the electoral commission had “committed irregularities and illegalities in the transmission of results” and raised concerns about other, unspecified issues (de Freytas-Tamura, 2017). Whilst many rightly hail the actions of the Supreme Court as a victory for the rule of law and thus democracy in Kenya, the fact remains that these irregularities could occur in the first place and, importantly, the election was

⁴ As noted in Chapter 1, this research was submitted before the date of the election re-run on 26 October 2017. Its scope therefore does not capture any developments subsequent to the date of submission.

widely and quickly praised as legitimate by the international observers whose specific role is to expose any such irregularities. As Epstein (2017) notes, it is shocking that in the immediate aftermath of the election

observer teams from the African Union, the European Union, and the highly respected US-based Carter Centre, led by former Secretary of State John Kerry, commended the electoral process and said they'd seen no evidence of significant fraud. Congratulations poured in from around the world and Donald Trump praised the elections as fair and transparent.

Furthermore, the response to the annulment has been lacklustre: Kenyatta has threatened to “fix” the Supreme Court and called its judges “crooks” on a live TV broadcast (Kenya Election: Kenyatta Vows to ‘Fix’ Court as Win Quashed, 2017), and Odinga’s opposition boycotted the opening of the new parliament on 12 September 2017 (Kenyan Opposition MPs Boycott Uhuru Kenyatta’s Speech, 2017). In light of such developments, it is clear that Kenya has a way to go before its electoral process might be classified free and fair.

3.3 Political Violence

It is, however, electoral violence which provides the strongest evidence that effective democracy has not yet been attained in Kenya. Political and electoral violence has existed for decades in Kenya and Mueller (2008:192-194) has highlighted the role played by “privatised violence” under president Uhuru Kenyatta and then under president Moi. She argues that this saw the advent of gangs like the Mingiki and the Baghdad Boys across the state, all of whom operated outwith state control and therefore began to delegitimise this state control. Coupled with a “phenomenon of deliberately weak autonomous institutions outside the presidency (Mueller, 2008:194),” this privatised violence and lack of legitimate government force were contributing factors to the excessive and costly violence experienced in the aftermath of the 2007 elections.

Widely viewed as fraudulent (Harbeson, 2012:17; Long *et al.*, 2013:141), the 2007 elections saw Odinga securing a majority in the National Assembly but Kibaki being declared president. The violence that then erupted—lasting until the effective interception of the Kofi Annan-led mediation party and appointment of Odinga as prime minister under the National Accord and Reconciliation Act—cost the lives of about 1,500 people and the displacement of nearly 600,000. This fighting “was the worst since independence and shattered Kenya’s reputation as one of Africa’s most stable new democracies (Bratton & Gyimah-Boadi,

2015:9).” It had clear ethnic undertones and was focused largely in the Rift Valley region where a vast tract of land had been allocated to Kikuyu settlement under the Million Acre Settlement Scheme in the 1960s and which the Masai generally considered to be theirs (Harbeson, 2012:26). With Kalenjin and Luo initially the main perpetrators, Kikuyu victims quickly regrouped and retaliated with dire and prolonged consequences (Bratton & Gyimah-Boadi, 2015:9). Although it resulted in fewer deaths than electoral violence in the early 1990s (Cheeseman *et al.*, 2014:5), this violence garnered worldwide attention. One reason for such attention was because although some of the violence appeared to be spontaneous, “a significant proportion was allegedly planned, organised, and financed by political leaders (Bratton & Gyimah-Boadi, 2015:9).” Branch and Cheeseman (2009:19) astutely argue that “the extent to which the violence was planned, and how much of it occurred under the direction of political leaders, will never be known. Nonetheless, the speed and coordinated nature of the early attacks strongly suggests that it was not spontaneous.” Indeed, the roles allegedly played by Ruto (the current deputy president) in inciting violence against Kikuyu in the Rift Valley and then by Kenyatta against Luo and Kalenjin in Nakuru and Naivasha are why they were indicted by the International Criminal Court (Cheeseman *et al.*, 2014:7).

It is not accurate to attribute this violence solely to ethnic divisions (Branch & Cheeseman, 2010:2). Deep social divisions also exist in Kenya and put pressure on the state’s fragile and young democratic institutions to perform, which they failed to do (wa Gĩthĩnji & Holmquist, 2008:345). Nevertheless, whilst the 2013 elections were relatively peaceful, many believe that the conflict drivers from the 2007 elections such as high unemployment, land grievances, impunity, corruption, failed resettlement of internally-displaced persons, ethnic tensions, weak institutions and socio-economic inequality still abound and are yet to be adequately addressed (International Crisis Group, 2013:15). This is the reason for warnings that violence could well return during the saga of this year’s elections: in 2013 peace was desired at all costs, but Cheeseman *et al.* (2014:16) have warned that such a desire may not hold strong in 2017 as the conflict drivers continue to exist.

3.4 Patronage in an Ethnically Divided State

Although it is too simplistic to reduce electoral violence in Kenya to tribal warfare, it is fair to say that “ethnic identities become salient because they have come to embody other societal divisions, such as regional inequalities, control over land, and access to political opportunities

(Branch & Cheeseman, 2009:3).” Kenya has over 40 ethnic groups with no one group forming a majority, leaving it with somewhat of a “salient ethnic cleavage (Hassan, 2017:383-386).” Whilst Barkan (2013) believes colonialism left a legacy of inequality of regions, classes and land, Lonsdale (2014) takes this further and suggests that these divisions are largely ethnic. For him, although pre-colonial Kenya had ethnic groups in the place of political tribes, colonialism brought with it hierarchies of race, ethnicity and power and ethnic tribes were then politicised after independence by Kenyatta through land distribution (Lonsdale, 2014:90, 93, 100). Inequality in Kenya today thus has a clear ethnic and a regional dimension, particularly when it comes to ownership of land (wa Gĩthĩnji & Holmquist, 2008:346). This inequality is rooted in pre- and post-independence land resettlements, and indeed land rights and disputes are embedded in Kenya’s history. By way of example, as an East African Protectorate Kikuyu and Masaai lands were regularly passed to the state and this was a factor in the Mau Mau Rebellion when up to 20 per cent. of Kenya’s land mass, including its best agricultural land, was given to white settlers (Klopp, 2000:15-16).

Klopp (2000:15-16) concludes that land has been a key element of Kenya’s patronage system since independence and led to the “land-grabbing mania” of the 1990s, as well as undoubtedly being a factor in the 2007 electoral violence. Patronage in Kenya is largely structured along ethnic lines (D’Arcy & Cornell, 2016:256) and this seeps into the political parties: for Elischer (2010:219) and Mueller (2011:2014), political parties have central, ethnically-based structures. “Kenyan political parties are barely distinguishable in terms of ideology, programs, platforms, or organisation. Many are no more than changing sets of ethnic coalitions (Mueller, 2011:104).” Mueller believes that ethnicity is the key determining factor in the distribution of Kenya’s national resources:

Politics [in Kenya] is viewed primarily as a winner-takes-all zero-sum ethnic game. The national economic cake is the prize. Various ethnic groups argue that it is their turn to eat. The means to this end is controlling the state and having a fellow co-ethnic become president (Mueller, 2011:105).

This view is shared by Cheeseman *et al.* (2016:29) who suggest that this pattern of patronage exists in the local political arena as well the national. For them, there is fierce local competition amongst “local notables” for the resources that government positions can offer: “salaries, allowances, bursary funds, control over licences and property, the issuing of contracts, and the hiring of staff, all come with elected office, and county governments have become a field for vigorous contests over these benefits (Cheeseman *et al.*, 2016:29).” Thus,

although ethnic divisions were not the *sole* cause of past violence, it is important to recognise that ethnicity and ethnically-motivated patronage certainly form an extremely prominent part of Kenya's political culture.

3.5 The Prevalence of Bribery and Corruption

Ethnically-motivated patronage is clearly a key element of Kenya's political culture, one which is overshadowed perhaps only by the prevalence of bribery and corruption. According to Burbidge (2015:3), corruption "is bleeding away the people of Kenya, day in, day out...Kenyan society suffers from pervasive corruption, dominating the provision of public services, the formation of contracts and, of course, political life." Burbidge draws on Groenedijk to define political corruption as "the misuse of public authority for private gain" and he argues that citizen acceptance of widespread corruption is hugely problematic in Kenya for it means that citizens are somewhat complicit, gradually becoming unable to distinguish between what is and is not corrupt (2015:4-5). For him two big political scandals of recent years, namely the Goldenberg and Anglo-Leasing scandals, turned the tide away from the aforementioned hope for a crackdown on corruption promised under Kibaki (Burbidge, 2015:13). Wrong's (2010) widely-published book detailing the experience of John Githongo—Kenya's appointed anti-corruption czar—in his discovery and exposure of the Anglo-Leasing fraud in the 2000s reignited the belief that corruption is firmly embedded in Kenya at the highest levels. Once discovering the fraud, Githongo's complaints fell on deaf ears, including with the World Bank and the United Kingdom's Department for International Development (DfID). Similarly, the Goldenberg scandal of the early 1990s had seen government bonus and export credit schemes abused by the Goldenberg company which claimed to export gold and diamonds (Kenya has no significant reserves of either resource). Billions of shillings were transferred from the central bank between 1990 and 1993 and the involvement of government and opposition members, including Odinga, was proven. However, those involved were never punished and instead flaunted their wealth (Branch, 2012:219-222). Both scandals served to reinforce the idea in Kenya that corruption, even on the largest scale, is likely to go unpunished and be swept under the carpet.

It is not just in the infamous scandals where bribery and corruption can be found; there are countless stories of public officials abusing their power and position. For example, the Energy and Petroleum Cabinet Secretary Davis Chirchir was suspended in 2015 after he was

allegedly involved in corruption, as were three other Cabinet Secretaries: Kazungu Kambi (Labour), Felix Koskei (Agriculture, Livestock and Fisheries) and Michael Kamau (Transport) (Nalubega, 2015). Having survived three impeachment attempts at the National Assembly, the Devolution Cabinet Secretary Anne Waiguru resigned due to poor health in 2015 but was widely linked to the loss of Sh791 million by the National Youth Service (Alushula, 2015). Latterly, numerous officials from the Ministry of Health have been accused of theft of more than five times the amount Waiguru is accused of pocketing and distributing (Revealed: Taxpayers Lose Sh5bn in NYS-style Afya House Theft, 2016), and deputy president Ruto has a seemingly unshakeable association with bribery, fraud and corruption (ODM Says DP Ruto is a CORRUPTION ADDICT Whose Other Name is 'Bill SCANDAL Man', 2015).

Furthermore, bribery and corruption are not just prevalent at government level. Instead, “paying bribes to the police and bureaucrats remains routine for ordinary Kenyans, as do other economic crimes (Hope Sr., 2017:62-63).” Neither is it new, particularly with regard to land. According to Harbeson (2012:25) land tenure corruption is “like a virulent cancer [which] suffused the Kenyan body politic” and in 2002 the Ndungu Commission found “conservatively” that between the Moi and (Uhuru) Kenyatta administrations about 200,000 illegal land titles were issued, 98 per cent. of which were issued during 1986 and 2002. For Hope Sr. (2017:62) “corruption represents a governance ill...It persists in Kenya primarily because there are people in power who benefit from it and the existing governance institutions lack both the will and capacity to stop them from doing so.” In his earlier work Hope Sr. blames the grasp of Kenyan corruption on deliberately undermined or weakened institutions which in turn are unable to uphold the rule of law, coupled with a lack of public accountability, the centralisation and personal nature of presidential power and the acceptance of corruption as a necessary aspect of ensuring personal survival and economic gain (2014:494-495). It would therefore not be a stretch to conclude that many view corruption as endemic at all levels in Kenya (Wrong, 2010; Hope Sr., 2014; Hope Sr., 2017).

This is not to say that the problem of corruption is ignored. President Kenyatta recently made a public speech where he derided the courts for their failure to do enough, citing the fact that between 2009 and 2016 only 198 corruption cases were resolved when there are more than 600 cases still pending (Judiciary, Independent Departments on the Spot Over War on Corruption, 2016). Yet Kenya consistently scores poorly on global governance and

corruption indicators. In the latest Ibrahim Index of African Governance (Mo Ibrahim Foundation, 2016a) which uses 90 indicators of good governance across 14 sub-categories and four categories, Kenya has improved its general ranking over the last 10 years and is now ranked 12th out of 54 African states. However, its worst scores come from the ‘Safety and Rule of Law’ category which includes analysis of ‘Rule of Law’, ‘Accountability’, ‘Personal Safety’ and ‘National Security’ sub-categories and where Kenya is ranked 25th out of the 54 African states. In particular, the four indicators in which it has recorded worsening scores over the last 10 years relate to ‘Accountability’: ‘Access to Information’, ‘Accountability of Public Officials’, ‘Corruption Investigation’ and ‘Corruption and Bureaucracy’. This decline in anti-corruption success is supported by Figure 3.1 below which shows Kenya’s percentile ranking on the World Bank’s Worldwide Governance Indicators, where 0 is low and 100 is high. The percentile rank shows how many other states rate lower than Kenya, with the bars showing the estimated rank and the black lines showing the likely range. It can be seen that although ‘Government Effectiveness’ and ‘Rule of Law’ scores have improved, the ‘Control of Corruption’ and ‘Voice and Accountability’ scores are extremely poor and are in fact worsening.

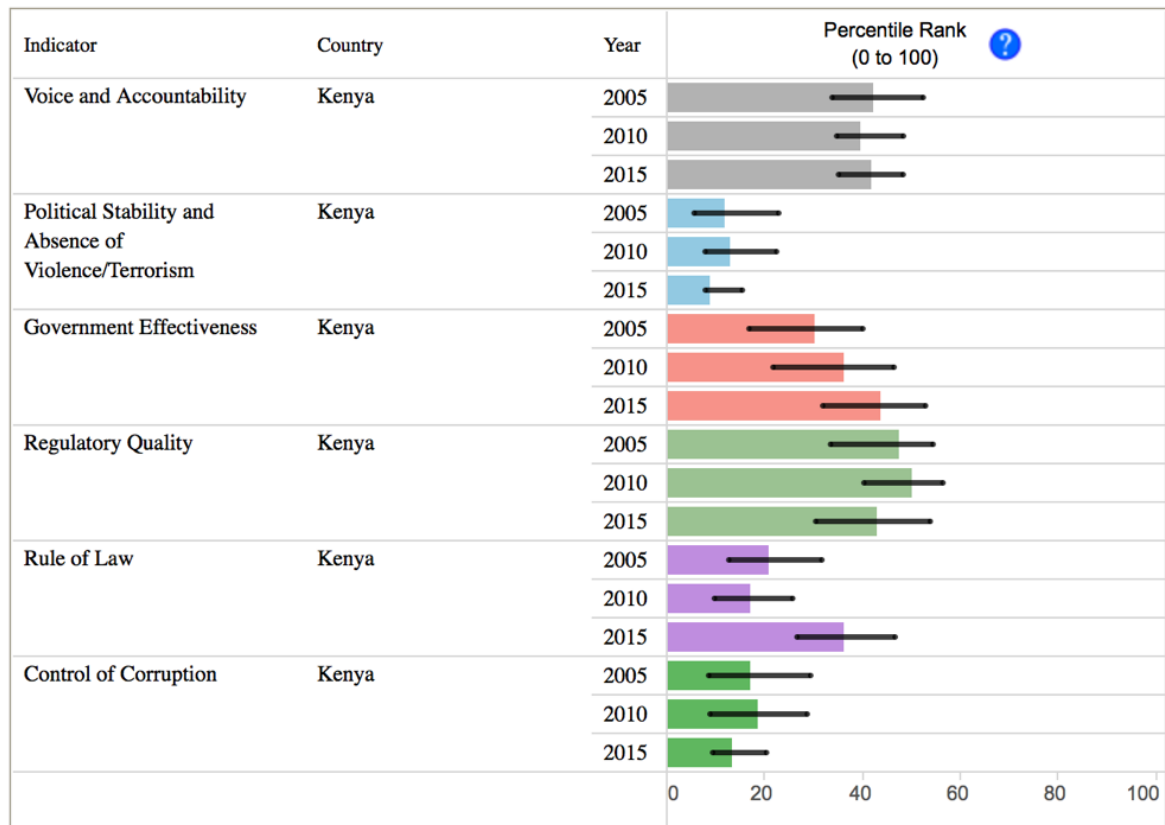


Figure 3.1: Kenya's Ranking on The World Bank's Worldwide Governance Indicators 2005 to 2015 (Source: World Bank, 2017c).

Transparency International's Corruption Perceptions Index shows a similar pattern: improvement on the whole, but only by a small margin. This lack of significant change is clearly shown by Figure 3.2 below which has been compiled using Kenya's scores from 2006 until 2016. The index goes from 0 (highly corrupt) to 100 (very clean), with Kenya scoring around 21 or 22, peaking at 27 in 2012 and 2013 and then dropping again to its current level of 26⁵. For perspective, Denmark and New Zealand were the highest scorers in 2016 with a score of 90.

⁵ Note that prior to 2011 the index used a decimal point system from 0 to 10 instead of 0 to 100. A score of 2.2 in 2009 would equate to a score of 22 from 2011 onwards. The figures for the pre-2011 period have thus been converted to the current format for the purposes of Figure 3.2.

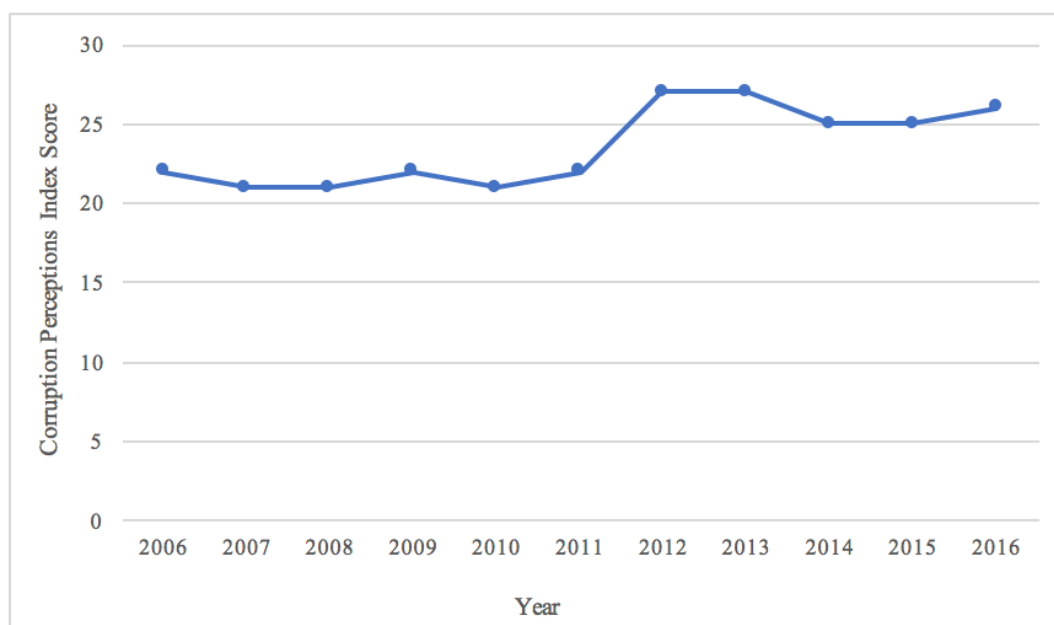


Figure 3.2: Kenya's Score on Transparency International's Corruption Perceptions Index 2006 to 2016 (Source: Author's own, compiled using data from Transparency International, 2017).

Table 3.1 further shows the progression of Kenya's global ranking on the index and again indicates that it has made little notable improvement since 2006.

Year	Ranking (/ number states surveyed)	Score
2016	145/176	2.6
2015	139/168	2.5
2014	145/175	2.5
2013	136/177	2.7
2012	139/176	2.7
2011	154/183	2.2
2010	154/178	2.1
2009	146/180	2.2
2008	147/180	2.1
2007	150/180	2.1
2006	142/163	2.2

Table 3.1: Kenya's Ranking and Score on Transparency International's Corruption Perceptions Index 2006 – 2016 (Source: Author's own, compiled using data from Transparency International, 2017).

Corruption is undoubtedly a concern for Kenya: for its government, its citizens and those doing business there. It is acknowledged that high levels of corruption can have a stranglehold on prospects of growth and profitability of private firms in Kenya, not least in their ability to penetrate export markets (Kimuyu, 2007:215). Kenya's position on the World Bank's ease of doing business survey (2017a:6-7) has risen from 113th out of 190 states in 2016 to 92nd in 2017, ranking it behind Mauritius (49th), Rwanda (56th) and Botswana (71st) but ahead of states such as Namibia (108th) and Tanzania (132nd). Nonetheless, corruption, bribery and fraud is endemic and scandals appear daily in the state's newspapers. Combined with the tradition of ethnically-based patronage systems, electoral violence and discrepancies that call into question the extent of democratic governance and the failure of its institutions to effectively promote and sustain democratic processes and the rule of law, Kenya's political culture is one which is far from stable:

On balance, it is a history characterised not only the absence of democracy, but also by the weakness and decay of the state itself and its descent into what in important respects has been a kind of Hobbesian jungle, despite Kenya's superficial appearance as one of sub-Saharan Africa's more stable and secure post-independence states (Harbeson, 2012:18).

But what does this mean for transparency in Kenya's burgeoning oil sector? This will be explored further in Chapter 5, but it is important that formal actors in the sector are aware that the political culture will seep into all oil activities. Not only are the government and its representatives key players in the sector (including with regard to drafting and enforcing relevant legislation, the award of exploration and development licenses and other contracts and the control of revenue streams), but all activities in the sector are conducted with the overarching consent of the Kenyan government. It is therefore crucial to understand how informal influences such as those outlined above affect operations in the sector, and specifically how they might act as barriers to achieving greater transparency. There is an inextricable link between the oil sector and political culture, and ultimately there is a risk that oil becomes a resource subject to the influences of patronage, division, conflict and corruption.

3.6 Chapter Summary

This chapter has demonstrated that modern Kenyan politics is characterised by certain features. Its democracy exists but comes under threat from various angles, not least through electoral violence, irregularities and the near-constant accusations of fraudulent political

activity. Long-standing ethnic divisions in Kenya surface in political forms and, despite recent improvements, it appears that bribery, corruption and patronage are mainstay features of the Kenyan political climate. Alongside the formalised arms of political life it is clear that many, more informal influences are at play: one can justifiably argue that at least a form of neopatrimonialism exists in Kenya.

Neopatrimonialism is a concept used to help understand much of African politics. Médard defined patrimonialism as “an ideal subtype of traditional domination corresponding to a lack of differentiation between what is private and what is public” and neopatrimonialism as “a mixed type combining in various degrees differentiation and lack of differentiation of the public and private domains (Médard, quoted in Yates, 1996:10).” Bratton and Van de Walle (1994:459) stated that “neopatrimonial practice can be found in all polities” but argued that “it is the *core* feature of politics in Africa” and, further, that “the interaction between the ‘big man’ and his extended retinue *defines* African politics, from the highest reaches of the presidential palace to the humblest village assembly.” Both Médard and Yates (1996:5) agree, finding that neopatrimonialist realities are prevalent in Africa and with Médard concluding that “public authority has been made an object of appropriation by the formal officeholders, functionaries, politicians and military personnel who based their strategies of individual ascendancy or family ascendancy on a private usage of the republic (Médard, quoted in Yates, 1996:5).” In essence, informal structures exist alongside the formal, rational-legal state bureaucracy and also affect a state’s governance. As can be seen from the analysis above and particularly with regard to ethnic divisions, bribery, patronage and corruption, Kenya has not avoided the clutches of neopatrimonialism and it is embedded in Kenya’s political culture.

How such a political culture might impact any attempt to implement effective transparency in Kenya’s oil sector and whether it poses an insurmountable barrier will be examined in Chapter 5, but it is first necessary to understand and contextualise the sector itself. The following chapter will thus provide a history and overview of Kenya’s oil sector before identifying the key, formal actors who have such an influence over it.

Chapter 4

THE KENYAN OIL SECTOR

Before turning to looking at the history and status of Kenya's oil sector and identifying the key players and structures within it, it is important to note the significant difference between the formalised aspects of the sector and those that have an impact and influence but which are more informal. In respect of the latter aspects, as suggested in Chapter 3 and as will be explored in Chapter 5, the reality in Kenya is that neopatrimonialism exists and the result is that numerous informal structures, processes and actors have an important role to play in informing outcomes in the oil sector. In essence, there is a substantial disconnect between the formal nature of the sector and the way it operates in reality. This chapter will examine the formal aspects of the sector, namely those formalised structures, processes and actors which shape it and which derive from the rational-bureaucratic state and its institutions.

4.1 History and Overview

Kenya has four basins in which oil and gas exploration takes place: the Anza, Mander, Tertiary Rift and Lamu Basins (NOCK, 2017b). Latest information from the NOCK suggests that these basins have been divided into 46 exploration blocks, as is shown by Figure 4.1 below. However, this information is unhelpfully outdated. Not only was the number of blocks increased by 17 to 63 in mid-2016 (Kamau, 2016), but the available information on which entities holds rights to each block dates from December 2014 and is therefore inaccurate as a number of blocks have since been relinquished or have changed ownership. Indeed, on the NOCK's website the latest map is from 2015 and the version below has been taken from a secondary source. The inference is that there is a lack of transparency at the most basic level in Kenya's oil sector.

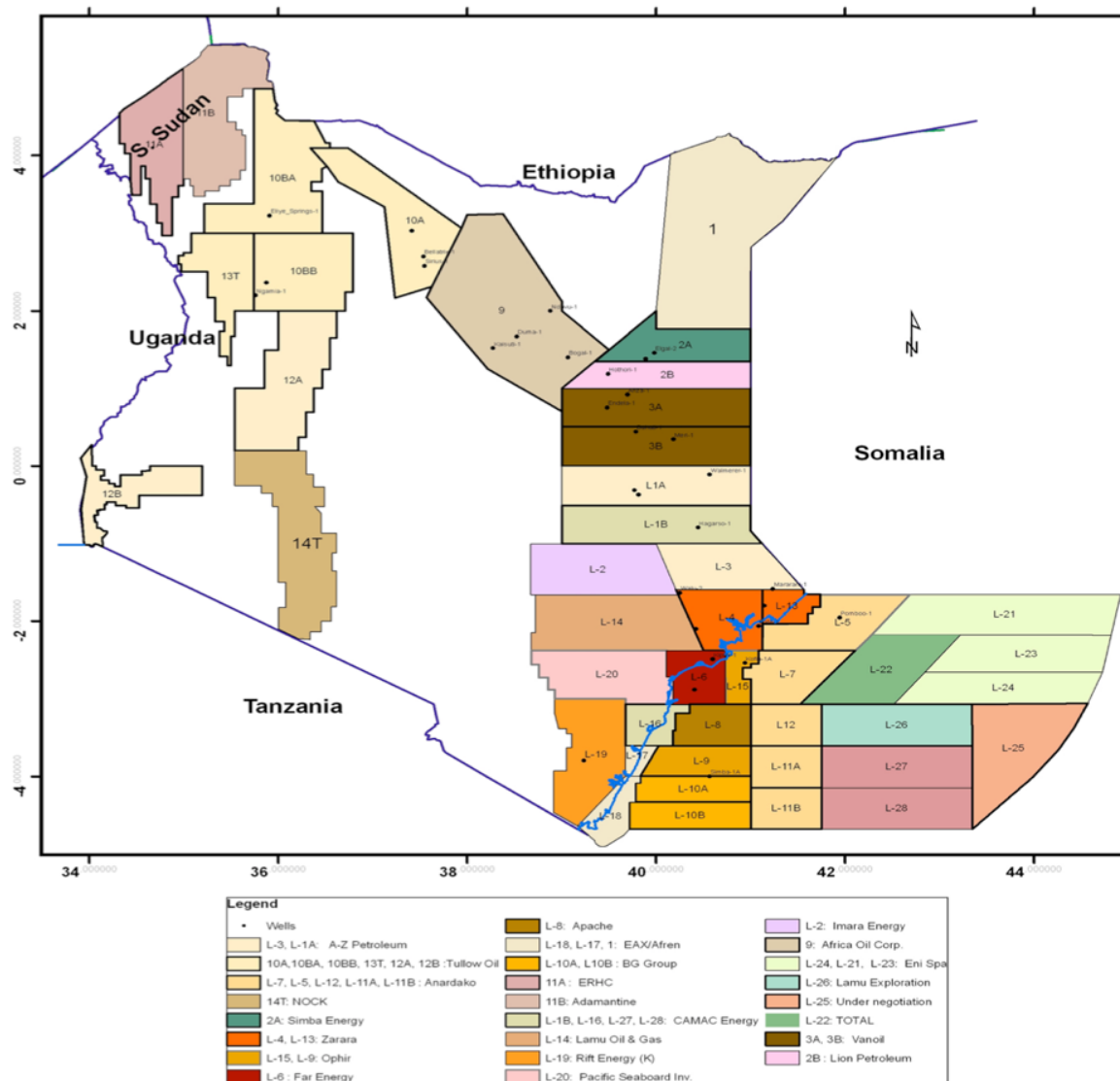


Figure 4.1: Kenyan Exploration Blocks (Source: The NOCK, from Hubert, 2016).

What makes this lack of transparency most surprising is that upstream activity in Kenya is not new. In a study for the Oxford Institute for Energy Studies, Patey (2014:8) describes three separate waves of exploration activity in Kenya. The initial wave from the 1950s to 1950s saw a total of 15 exploration wells being drilled (Patey, 2014:8). The first well was drilled in 1960 and Kenya attracted interest from oil giants like BP and Shell who were involved in exploration in the Lamu Basin from 1954 and drilled 10 wells (NOCK, 2017a). According to the NOCK (2017a), numerous gravity, geology, aeromagnetic and seismic surveys were also conducted in the Mendera Basin, but there was no drilling activity. In the 1970s gas and oil shows were then found in the Cretaceous rocks in the Lamu Basin which encouraged further

drilling by multinational oil companies including Chevron and Esso, however there were no commercial finds.

Patey (2014:8) describes the second wave of exploration activity as taking place after the introduction of the first petroleum legislation. The Petroleum (Exploration and Production) Act was first enacted in 1984 and then revised in 1986 where changes included the transition from royalty-based contracts to PSCs. Further exploration blocks were created and another 15 wells were drilled before the turn of the century (Patey, 2014:8). Total and Amoco drilled 10 wells between them in the Anza and Mendera Basins between 1985 and 1990, but all proved dry (NOCK, 2017a). Nonetheless, exploration activity continued with the government itself commissioning further studies, including the Lamu Basin study in 1991, to increase the amount of data available. Again, although there were no commercial finds during this period there were indications that significant oil plays were present. For example, in Block 10BB in Turkana county the Loperot-1 well discovered oil but political tensions prevented the operator, Shell, from gaining an extension on its exploration period and the well was left undeveloped (Patey, 2014:8).

It was not until the third and current wave from 2000 onwards that activity significantly increased. 30 wells had been drilled in the 50 years between 1950 and 2000, but in the shorter period between 2000 and 2012 33 wells were drilled (Patey, 2014:8). Numerous basin studies were conducted, including the NOCK's Tertiary Rift Basin study in 2000-2001 and Woodside's acquisition of 7884km of 2D seismic offshore Lamu in 2003 (NOCK, 2017a), which helped to retain international interest in Kenya's blocks. However, a key turning point was when significant discoveries of oil and gas were made onshore Uganda and offshore Tanzania and Mozambique (KCSPOG, 2014:8). Drilling activity across East Africa surged and in March 2012 Tullow, with its joint venture partner Africa Oil Corporation (Africa Oil), found oil accumulations with its Ngamia-1 exploration well in Block 10BB in the South Lokichar Basin which forms part of the Tertiary Rift Basin (Tullow, 2017c). Tullow followed this up with further success in the South Lokichar Basin, as is shown in Table 4.1 and Figure 4.2 below.

Exploration Well	Block	Date of Discovery
Ngamia-1	10BB	March 2012
Twiga South-1	13T	October 2012
Etuko-1	10BB	July 2013
Ekales-1	13T	September 2013
Agete-1	13T	November 2013
Amosing-1	10BB	January 2014
Ewoi-1	10BB	January 2014
Etom-1	13T	August 2014
Erurt-1	13T	January 2017

Table 4.1: Tullow's Kenyan Oil Discoveries (Source: Author's own, compiled using data from Tullow, 2017c).

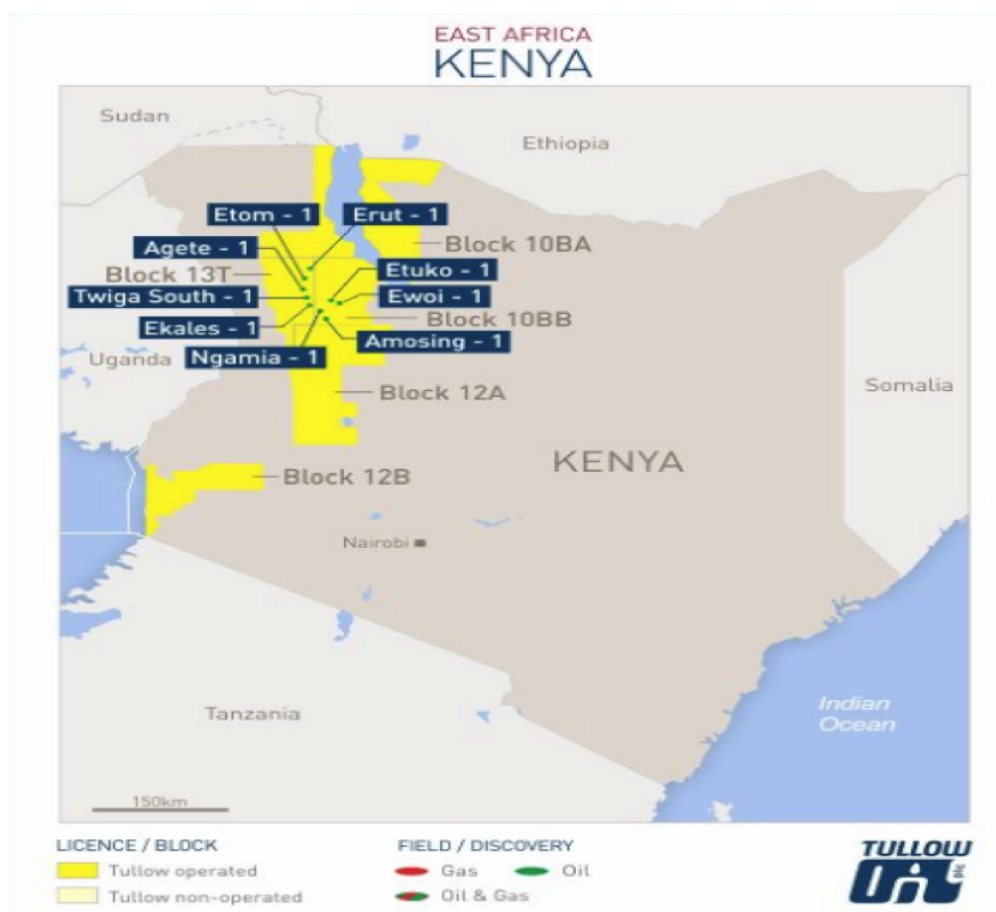


Figure 4.2: Map of Tullow's Kenyan Oil Discoveries (Source: Tullow, 2017c).

The result of Tullow's success has been a significant increase in drilling activity, with KPMG (2016:5) estimating that over 40 wells were drilled between 2012 and 2016 "...owing to the favourable price per barrel but also due to renewed enthusiasm over the prospectiveness of the [East African] region." This trend can be seen in Figure 4.3 below where drilling activity in Kenya (shown in yellow) was minimal between 2000 and 2012 with only two wells drilled, yet there was a noticeable jump from 2012 onwards following Tullow's discovery in Block 10BB.

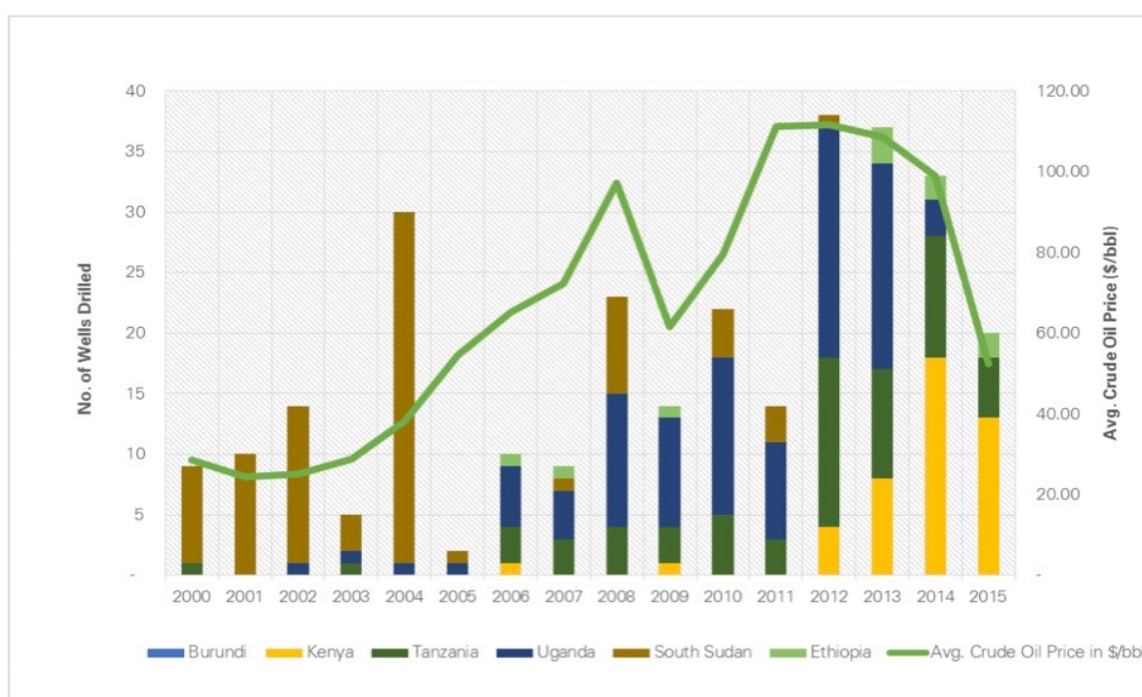


Figure 4.3: Number of Wells Drilled per Year in East Africa (2000-2015) (Source: BP Statistical Review 2015, Wood Mackenzie in KPMG, 2016:6).

Exploration activity is still continuing in Kenya. For example, following the success of the Erut-1 well which proved that the oil limits of the South Lokichar Basin extend to its northern point (see Figure 4.2 above for the Erut-1 well location), Tullow and its partners have drilled the Amosing-6 and Ngamia-10 wells in 2017 and plan to drill a further three wells in the current exploration and appraisal period of Block 10BB (Tullow, 2017a). Focus is also being placed on further appraisal and development of existing discoveries. With estimated recoverable resources of 750 MMBO and an overall upside potential targeting 1 billion barrels (Tullow, 2017c), development of existing discoveries is underway. A field development plan for Tullow's South Lokichar Basin discoveries was submitted to Kenyan

authorities in December 2015 and the partners are targeting developmental approval from the government and a Final Investment Decision in 2017 (Africa Oil, 2016).

Midstream activity is also progressing to capitalise on the recent discoveries. Initial plans envisaged a pipeline originating in Uganda then crossing into Kenya or Tanzania before reaching a port, allowing export of oil by sea from Uganda and from Kenya through connection points. However, in April 2016 Uganda opted for the southern route which will see its pipeline routed from Hoima in western Uganda into northern Tanzania and to the port at Tanga (Senelwa, 2016). Kenya has thus announced that its own US\$2.1 billion pipeline will run from the South Lokichar Basin area in Turkana to Lamu port in the east (Senelwa, 2016) and it will be approximately 865km long (Ndege, 2017). The proposed pipeline route is shown in Figure 4.4 below.

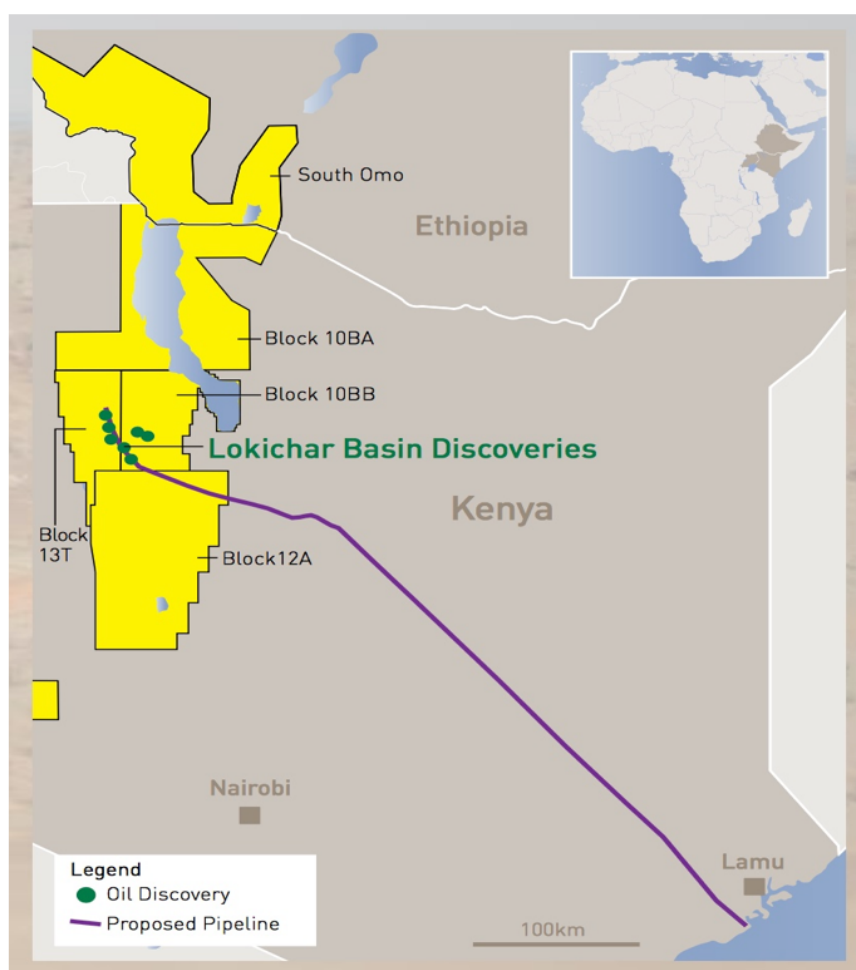


Figure 4.4: Proposed Route for the Kenyan Export Pipeline (Source: Tullow, 2017d:11).

According to the official request for consultants to apply for the pipeline's front end engineering design (FEED), the discovered crude is considered 'sweet'—that is, it is low in sulphur—and relatively waxy, meaning that the pipeline will need to be heated (The Government of the Republic of Kenya, 2016). Tullow (2017c) declared that its upstream FEED for the project has already begun and that the Joint Development Agreement, concluded in October 2016, is due to be executed. Large scale production and transportation of crude (estimated at up to 100,000 barrels of oil per day (bopd)) is thus expected to begin once the pipeline has been constructed, with optimistic indications suggesting this could be as early as 2020 (Otuki, 2017).

Kenya's desire to see oil exports begin as soon as possible saw President Kenyatta (2016) announce that small-scale exports of oil from Turkana would begin in June 2017: "We have started and we are not moving back. We want to be at the top of the pile. So, we have set a path and Kenya is going to be a major oil producer and exporter." On 14 March 2017 Tullow signed a production agreement with the government providing for the transportation of crude by truck from Turkana to Mombasa port for export (Otuki, 2017). Termed the Early Oil Pilot Scheme (EOPS), Tullow states that "the EOPS will use existing upstream wells and oil storage tanks to initially produce approximately 2,000 bopd gross in mid-2017. This early pilot scheme will provide important information to assist in full field development planning (Tullow, 2017c)." Initial delays awarding EOPS upstream contracts did not stop progress, with Tullow first intending to evacuate its stored crude—produced during extended well testing from 2015—before moving to well production in the latter stages of 2017 (Tullow, 2017a). Kenyatta's attempts to accelerate the timeline for crude exports appeared to be gaining ground, for in May 2017 it was announced that China and India would be the first buyers of Kenya's exported oil (Ndege, 2017). However, on 29 June 2017 and one day before the government's deadline of 30 June 2017 for the EOPS to begin, Charles Keter, the Cabinet Secretary for Energy, announced that the EOPS plans were to be suspended (Githae, 2017). Official explanations for the suspension blamed the delay in adoption of the new Upstream Bill (Githae, 2017), yet media reports also suggest that tensions on the ground in Turkana had prevented Tullow from accessing its sites and that bandit attacks on the company responsible for constructing the necessary Kitale-Turkana road saw a suspension of activity (Achuka, 2017; Githae, 2017). Whatever the reason, Kenya's Ministry of Energy and Petroleum (MoEP) (2017b) is correct to assert that "it is clear that the National Government and

Turkana County Government have more to discuss before the first oil can be transported to Mombasa.” For the time being, progress with regard to exports is thus in limbo.

4.2 The Key Players

A huge range of formal actors are involved in Kenya’s oil sector, from IOCs and their employees, shareholders, advisors and consultants, to government representatives and agencies and to members of the local communities where oil exploration and development takes place. Nonetheless, for the purposes of this study it is necessary to limit and define this almost exhaustive list in order to analyse who plays an important role in shaping transparency in the sector and who is most likely affected by its existence. Accordingly, the following groups have been identified:

- (i) the government of Kenya, including its representatives and associated agencies, institutions and other bodies;
- (ii) IOCs, as well as their associated entities and representatives;
- (iii) civil society in Kenya, incorporating local communities within oil-rich regions as well as the entire Kenyan population. This group also includes civil society organisations, the media and non-governmental organisations (NGOs) within Kenya; and
- (iv) the international community, including NGOs and other global initiatives.

These first three groups comprise what are commonly referred to as the three “sectors” of society: respectively, the government sector, the business sector and the civil society sector (United Nations, 2017). The addition of the international community is necessary for this study due to the prominence that international organisations and movements have within the global natural resources sector, and thus in that of each resource-rich state, particularly with regard to promoting transparency and good governance. Taking each of these four groups in turn, this Chapter 4.2 will briefly summarise the roles that they play in Kenya’s upstream sector.

4.2.1 The Kenyan Government

Numerous government entities have a role to play in the sector and the landscape is set to change if the 2015 Draft National Energy Petroleum Policy (Petroleum Policy) is

implemented in full. The following paragraphs therefore describe the status quo and the proposed changes, with Figure 4.5 showing key existing institutions (in orange boxes) and those which are to be established (in blue boxes).

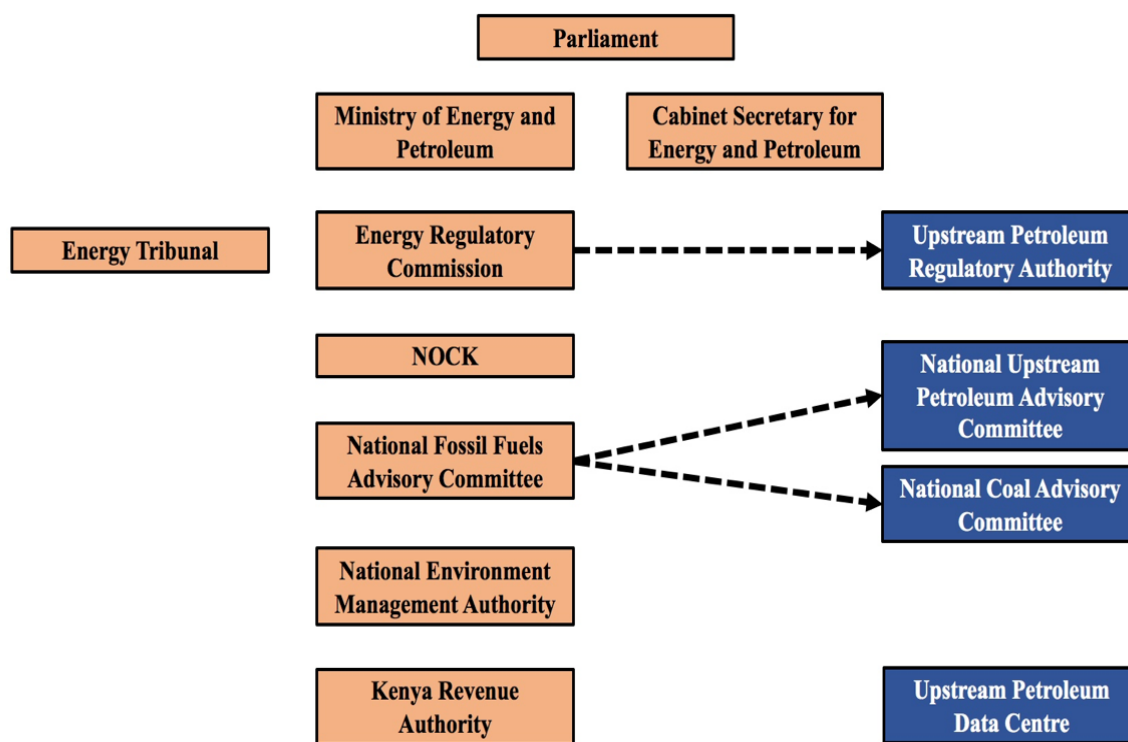


Figure 4.5: Key Government Institutions in the Kenyan Oil Sector (Source: Author's own).

4.2.1.1 *Ministry of Energy and Petroleum and the Cabinet Secretary for Energy and Petroleum*

Kenya's MoEP "is responsible for formulation and articulation of energy and petroleum policies...Its tasks include national energy and petroleum planning, training of manpower and mobilisation of financial resources (Republic of Kenya, 2015a:21)." The Cabinet Secretary⁶ for Energy and Petroleum is the head of the MoEP and has wide-ranging powers granted to him under the Petroleum (Exploration and Production) Act 1986 (Republic of Kenya, 1986). For example, under Section 5(1) of this Act (Republic of Kenya, 1986) he "...may, on behalf of the government, negotiate, enter into and sign petroleum agreements with a contractor"

⁶ Previously the person holding this position was known as the 'Minister', however following the adoption of Kenya's new constitution in 2010 all government Ministers are now referred to as 'Cabinet Secretaries'.

and, in accordance with Section 5(2), he “...may grant non-exclusive exploration permits, in respect of areas specified therein, under which a person may enter upon an area and prospect and carry out geological and geophysical surveys.” He thus has the power to negotiate and grant petroleum agreements as well as directing policy and overseeing regulation of the sector.

4.2.1.2 *Energy Regulatory Commission and the Energy Tribunal*

The Energy Regulatory Commission (ERC) is currently responsible for regulating Kenya’s energy sector. It is supported by the operations of the Energy Tribunal which is described by the government in its Petroleum Policy as a “quasi-judicial body” whose role is “to primarily hear appeals against the decisions of ERC. It also has jurisdiction to hear and determine all matters referred to it relating to the energy sector (Republic of Kenya, 2015a:21).” However, it can be argued that the ERC’s powers are limited and its independence questionable given that its regulatory function overlaps with that of the Cabinet Secretary for Energy and Petroleum (KCSPOG, 2014:19). Whilst not yet enacted, the Upstream Bill proposes that a separate authority be created for regulating the upstream petroleum sector, namely the Upstream Petroleum Regulatory Authority (UPRA) (Republic of Kenya, 2015b: Section 15). It will be a body corporate and an independent entity with a monitoring function. According to the Petroleum Policy (Republic of Kenya, 2015a:21), the ERC will retain “responsibility for economic and technical regulation of electric power, renewable energy, and downstream petroleum sub-sectors. Its functions [will] also include tariff setting, review, licensing, enforcement, dispute settlement and approval of power purchase and network service contracts.” Meanwhile, Section 16 of the Upstream Bill requires the new UPRA to

- (a) regulate upstream petroleum operations in Kenya; (b) provide such information and statistics to the Cabinet Secretary as may be required from time to time; (c) collect, maintain and manage upstream petroleum data; (d) conduct due diligence and investigate the affairs of any person prior to granting non-exclusive exploration permit; (e) perform any other function that is incidental or consequential to its functions under this Act or any other written law (Republic of Kenya, 2015b).

4.2.1.3 *The National Fossil Fuels Advisory Committee*

The National Fossil Fuels Advisory Committee (NAFFAC) is the licensing body of the government and its role is to assist the Cabinet Secretary for Energy and Petroleum,

particularly during negotiations. Its members include the Attorney General, the Commissioner of Petroleum, the Principal Secretary of the National Treasury, the MoEP's Chief Geologist, the Commissioner of the Kenya Revenue Authority (KRA) and the Director General of the National Environment Management Authority (NEMA) (KCSPOG, 2014:19). However, the Petroleum Policy proposes replacing NAFFAC with two separate committees: the National Upstream Petroleum Advisory Committee (NUPAC) which will be responsible for petroleum exploration and development, and the National Coal Advisory Committee (Republic of Kenya, 2015a:12).

4.2.1.4 *The NOCK*

The NOCK is one of the key players in Kenya's oil sector. It is officially described in the Petroleum Policy as "a wholly owned state corporation mandated to stabilise the petroleum supply market by participating in all aspects of the petroleum industry namely upstream, mid-stream and downstream activities (Republic of Kenya, 2015a:23)." According to the KCSPOG (2014:18) it previously "performed both regulatory and commercial roles but in recent times, it does not exercise any regulatory powers. Its principal role is now that of a mainstream oil company taking part in oil and gas exploration." Nevertheless, although it does participate directly in upstream activities (see Chapter 4.2.2 below), its role expands further and in reality it advises the Cabinet Secretary for Energy and Petroleum, granting the NOCK policy influence (KCSPOG, 2014:18). According to the international law firm Freshfields Bruckhaus Deringer (2013:2), the NOCK effectively "acts as an instrument of government policy in matters related to oil and gas and gives advice to Kenyan energy policymakers...It also acts as the agent of the government in relation to the compilation of national energy data, running petroleum laboratories and the development of alternative fuels (2013:2)." That said, the Petroleum Policy seeks to restructure the NOCK in order that the midstream and downstream business is separated from the upstream (Republic of Kenya, 2015a:29).

4.2.1.5 *Other Actors*

Other significant government actors include parliament whose role is to oversee the executive and, according to Kenya's new constitution, to ratify all petroleum agreements (KCSPOG, 2014:19). Although the expertise and capacity of parliament to consider technical upstream

matters is debatable, it certainly can have a major impact on the sector. The current delay of the Upstream Bill is a case in point. The KRA will also have an increasingly important role to play once petroleum production revenues commence as it is responsible for managing and collecting taxes, and NEMA is responsible for the enforcement of environmental laws and regulations. Finally, there is likely to be a prominent place for the proposed Upstream Petroleum Data Centre which, according to the Petroleum Policy (Republic of Kenya, 2015a:29), will be responsible “for the safe, secure custody and management of upstream petroleum data.”

4.2.2 IOCs

As noted in Chapter 4.1, there is little up to date or accurate publicly-available information detailing which IOCs hold upstream licenses in Kenya. Table 4.2 below was taken from the draft Petroleum Policy (Republic of Kenya, 2015a:26) and shows that in January 2015 there were 22 IOCs holding licences in Kenya. However, not only is this information over two years old, but it does not provide details of the IOCs who are non-operators on the blocks. By way of example, under Blocks 10BB and 13T it lists simply ‘Tullow Oil’: Tullow does operate these blocks, but it is in a joint venture partnership with Africa Oil and Maersk Oil & Gas A/S (Maersk Oil). Indeed, if relying solely on the government-provided information in Table 4.2 one would not be aware that Maersk Oil even has any interest in Kenya. Furthermore, this information does not account for the 17 new blocks created mid-2016, nor does it give any indication as to the full chain of block ownership. For example, BG Group is said to hold two blocks but it was subject to a takeover by Shell, meaning that Shell is now the ultimate owner of Blocks L-10A and L-10B (Connors & Kent, 2016). BlockL-09 is said to be held by ‘Ophir/Dominion’, but it would be more accurate to say that Dominion is the actual operator and that Dominion is a subsidiary of Ophir Energy plc, again due to a takeover (Ophir Energy plc, 2017). ‘Zarara’ is the operator of Blocks L-4 and L-13, however this does not indicate that Midway Resources International in fact owns Zarara (Midway Resources International, 2017). Even when it suggests ‘Tullow Oil’ holds the block this information is inaccurate for it is a subsidiary of Tullow which holds the asset. Ultimately, this information is of limited use as it is both out of date and lacking in requisite detail, particularly regarding which corporate entity specifically holds the assets and who the beneficial owner of such entity is.

No.	Exploration Company	Block(s)	No. of Blocks
1	Tullow Oil	10A, 10BB, 10BA, 13T, 12A and 12B	6
2	Anadarko	L-5, L-7, L-12, L-11A, L-11B	5
3	BG Group	L-10A, L-10B	2
4	Ophir/Dominion	L-9	1
5	Vanoil Resources	3A, 3B	2
6	Africa Oil	9	1
7	Zarara	L-4, L-13	2
8	FAR/Flow Energy	L-6	1
9	Lion Petroleum	2B	1
10	NOCK	14T	1
11	Simba	2A	1
12	Afren	L-17/ L-18, 1	3
13	A-Z Petroleum	L-1A & L-3	2
14	CAMAC Energy	L-1B, L-16, L-27, L-28	4
15	Rift Energy	L-19	1
16	Imara Energy Corp.	L-2	1
17	CEPSA	11A	1
18	Milio International	L-20	1
19	Adamantine Energy Ltd	11B	1
20	Lamu Oil Exploration	L-14	1
21	Total Exploration & Production Kenya B.V.	L-22	1
22	Eni Spa	L-21, L-23, L-24	3

Table 4.2: Licensed Petroleum Exploration Companies in Kenya as at January 2015 (Source: Author's own, compiled using data from Republic of Kenya Draft National Energy and Petroleum Policy 2015).

In his study on beneficial ownership and the use of tax havens by entities operating in the Kenyan oil sector, Hubert (2016:15) undertook “an exhaustive review of public domain information including corporate filings to all relevant stock exchanges as well as company annual reports and press releases” to accurately ascertain which entities are directly involved in the sector. Table 4.3 below details his findings as at January 2016 and shows each of Kenya's onshore and offshore blocks as well as the IOCs that hold working interests in such

blocks, their percentage holding and which entity is the operator. However, there have been inevitable changes since then. These include (but are not limited to) the following⁷:

- (i) Blocks 01, L-17 and L-18 are subject to a sale from Afren (the parent company of East Africa Exploration (Kenya) Ltd.) to Octant Energy Corp. (Koigi, 2017; Ngugi, 2017);
- (ii) Marathon Kenya Limited BV sold its interest in Block 9 to Delonex Energy Ltd. (Delonex Energy Ltd., 2017);
- (iii) Africa Oil purchased Centric Energy Kenya Ltd.'s 25 per cent. working interest in Block 10BA (Maersk Oil, 2017);
- (iv) Delonex Energy Ltd. now holds a 40 per cent. working interest in Block 12A (Delonex Energy Ltd., 2017) and neither Africa Oil nor Marathon Kenya Limited BV hold a stake in it any longer (Tullow, 2017b);
- (v) Block 12B is now held solely by Tullow (Tullow, 2017b);
- (vi) Block 14T is held by the NOCK (see Table 4.2 above);
- (vii) working interests in Blocks L-04 and L-13 are now held 75 per cent. by Zarara Oil & Gas Limited, 15 per cent. by Sohi Gas Dodori Ltd. and 10 per cent. by the NOCK (Midway Resources International, 2017);
- (viii) Total S.A.'s website makes no mention of holding any interest in Blocks L-05 or L-07 (Total S.A., 2016) and neither does Anadarko Petroleum Corporation (Anadarko Petroleum Corporation, 2017), suggesting these blocks might have been relinquished;
- (ix) there is uncertainty as to whether Eni Kenya BV actually holds any interest in offshore Blocks L-11A, L-11B and L-12. There have been changes in ownership since January 2016—Anadarko Petroleum Corporation claims ownership of a 45 per cent. —not a 50 per cent. —working interest in the blocks, as is suggested by Table 4.3 (Anadarko Petroleum Corporation, 2017). Furthermore, there is no mention on Eni S.p.A.'s website of its ownership of these blocks and Cove Energy plc (the parent entity of Cove Energy Kenya Limited) was subject to a takeover in 2012 by the Thai entity PTT Exploration and Production Public Company Ltd. (Bream, 2012);
- (x) Total E&P Kenya BV holds a 70 per cent. working interest in Block L-22, not a 100 per cent. interest as shown in Table 4.3 (Total S.A., 2016); and

⁷ This information has been compiled by the author from publicly-available sources and is, to the best of her knowledge, correct as at the date of submission of this study.

- (xi) in August 2017 it was announced that Total S.A. had agreed to acquire a 100 per cent. equity interest in Maersk Oil meaning Total S.A. will, through its subsidiaries, take ownership of Maersk Oil's interests in Blocks 10BA, 10BB and 13T (Total S.A., 2017).

Block	Operator	Holding (%)	Joint Venture Partners	Holding (%)
01	East Africa Exploration (Kenya) Ltd.	80	Lion Petroleum Corp.	20
02A	Simba Africa Rift Energy Limited	40	Essel Group M.E.	60
02B	Lion Petroleum Corp.	100	-	-
03A	Avana Petroleum Kenya Ltd.	100	-	-
03B	Avana Petroleum Kenya Ltd.	100	-	-
09	Africa Oil Turkana Ltd.	50	Marathon Kenya Limited BV	50
10A	<i>Unallocated</i>	-	-	-
10BA	Tullow Kenya BV	50	Centric Energy (Kenya) Ltd.	25
			Maersk Oil Exploration International K1 Limited	25
10BB	Tullow Kenya BV	50	Africa Oil Turkana Ltd.	25
			Maersk Oil Exploration International K2 Limited	25
11A	CEPSA Kenya Ltd.	60.5	ERHC Energy Kenya Limited	38.5
11B	Adamtine Energy (Kenya) Limited	50	Bowleven (Kenya) Limited	50
12A	Tullow Kenya BV	40	Africa Oil Kenya BV	20
			Delonex Energy Ltd.	25
			Marathon Kenya Limited BV	15
12B	Tullow Kenya BV	50	Swala Energy Kenya Limited BV	50
13T	Tullow Kenya BV	50	Africa Oil Kenya BV	25
			Maersk Oil Exploration International K3 Limited	25
L-01A	A-Z Petroleum Kenya Limited	100	-	-
L-01B	CAMAC Energy Kenya Limited	100	-	-
L-02	Imara Energy Corp.	100	-	-
L-03	A-Z Petroleum Kenya Limited	100	-	-
L-04	Zarara Oil & Gas Ltd.	82.5	Sohi Gas Lamu Ltd.	16.5
L-05	Anadarko Kenya Company	50	Total E&P Kenya BV	40
			Cove Energy Kenya Limited	10

L-06 (onshore)	Milio Exploration & Production (Kenya) Ltd.	69.6	Far Limited	30.4
L-06 (offshore)	Flow Energy Limited	100	-	-
L-07	Anadarko Kenya Company	50	Total E&P Kenya BV	40
			Cove Energy Kenya Limited	10
L-08	<i>Unallocated</i>	-	-	-
L-09	Dominion Petroleum Kenya Limited	100	-	-
L-10A	BG Kenya Limited	100	-	-
L-10B	BG Kenya Limited	100	-	-
L-11A	Anadarko Kenya Company	50	Total E&P Kenya BV	30
			Cove Energy Kenya Limited	10
			Eni Kenya BV	10
L-11B	Anadarko Kenya Company	50	Total E&P Kenya BV	30
			Cove Energy Kenya Limited	10
			Eni Kenya BV	10
L-12	Anadarko Kenya Company	50	Total E&P Kenya BV	30
			Cove Energy Kenya Limited	10
			Eni Kenya BV	10
L-13	Zarara Oil & Gas Ltd.	83.5	Sohi Gas Dodori Ltd.	16.5
L-14	Lamu Oil & Gas Limited	100	-	-
L-15	<i>Unallocated</i>	-	-	-
L-16	CAMAC Energy Kenya Limited	100	-	-
L-17	East Africa Exploration (Kenya) Ltd.	100	-	-
L-18	East Africa Exploration (Kenya) Ltd.	100	-	-
L-19	Rift Energy Corp.	100	-	-
L-20	Milio Exploration & Production (Kenya) Ltd.	91.8	Pacific Seaboard Investment Ltd.	8.2
L-21	Eni Kenya BV	100	-	-
L-22	Total E&P Kenya BV	100	-	-
L-23	Eni Kenya BV	100	-	-
L-24	Eni Kenya BV	100	-	-
L-25	<i>Unallocated</i>	-	-	-
L-26	<i>Unallocated</i>	-	-	-
L-27	CAMAC Energy Kenya Limited	100	-	-
L-28	CAMAC Energy Kenya Limited	100	-	-

Table 4.3: Ownership of Kenyan Petroleum Rights as at January 2016 (Source: Author's own, compiled using data from Hubert, 2016:15-16).

Whilst it is often possible to work out the ultimate beneficial owner—that is, the holding or parent company of the entity which holds the direct interest in the block—from the name of the company in Table 4.3, this is not possible in all cases. It is therefore worth noting the following:

- (i) Lamu Oil & Gas Limited, owner of Block L-14, is a joint venture between Edgo Energy and QFB (Edgo Energy, 2017);
- (ii) Molori Energy Inc. (previously known as Taipan Resources Inc.) is the parent company of Lion Petroleum Corp. which holds interests in Blocks 01 and 02B (Dumaresq, 2017);
- (iii) Erin Energy Corporation is the parent company of CAMAC Energy Kenya Ltd., owner of Blocks L-01B, L-16, L-27 and L-28 (Erin Energy Corporation, 2012);
- (iv) Blocks 03A and 03B are held by Avana Petroleum Kenya Ltd. but its parent company is actually Vanoil Energy Ltd. (Vanoil Energy Ltd., 2014); and
- (v) CH-SwissOil Holdings International Ltd. is the ultimate parent company of Sohi Gas Dodori Ltd..

In sum, many IOCs currently operate in Kenya. However, the corporate ownership chain of these entities is far from transparent and nor is it information which is made readily available to the public. In addition to this there is no accessible source from which members of the public can access up-to-date information telling them which entities own upstream interests; there is simply no official record and such information must be deduced from other publicly-available sources. It is nonetheless worth noting that whilst many IOCS are active in Kenya, only three of these entities are close to development. Tullow, Africa Oil and Maersk Oil⁸ are in the development and production phase and this is taking place in Blocks 10BB and 13T. As operator and owner of interests in a further three blocks (Block 10BA with Africa Oil and Maersk Oil, Block 12A with Delonex Energy Ltd., and Block 12B on its own) Tullow is widely and justifiably considered to be *the* key IOC operating in Kenya at present (Tullow, 2017b).

Finally, it is important to mention the Petroleum Institute of East Africa as an important actor in the Kenyan oil sector. It is an organisation offering voluntary membership to, amongst

⁸ However, as noted above Maersk Oil is subject to a takeover by Total S.A..

others, IOCs involved in the oil sector in Kenya. It seeks to act as a bridge between its members and the government and is recognised by the government as playing “a key role in capacity building and awareness creation in the petroleum sub-sector (Republic of Kenya, 2015a:23).

4.2.3 Civil Society and the Public

Civil society in Kenya refers to individual Kenyan citizens, as well as organisations, groups and bodies that represent the interests of such citizens but which are separate from government or business entities. Furthermore, when referring to civil society this study not only refers to those community members in the Turkana region where oil exploration is currently concentrated, but it is also referring to the entire population of Kenya. Whilst it is impossible to detail all relevant civil society players active in Kenya’s oil sector, the following will highlight some of the most important. It can be argued that what unites these different and diverse players is that they face common challenges. According to the KCSPG (2014:iii), these challenges are threefold: “firstly, building its capacity in the new sector, secondly, participating in the ongoing development and reform of policy and legislation in the sector, and thirdly, ensuring that communities...have access to information about the sector.”

Perhaps the most prominent civil society player in Kenya is the KCSPG itself. The KCSPG acts on behalf of civil society organisations and leaders and thus sits as somewhat of a central figure in the sector. Oxfam Kenya (2016) also works extensively “...with partners to ensure sustainable, inclusive development aligned with the priorities and expectations of local communities” and states it “is working closely with the communities and the county government to ensure the community is engaged in the oil exploration and are aware of their rights and responsibilities.” Another important civil society organisation is the Extractives Baraza. A largely online platform supported by the British government’s Kenya Extractives Programme, it claims to be “an advocacy-neutral online platform that promotes knowledge, transparency and evidence-based stakeholder dialogue on the extractives sector in Kenya” and it aims “to enhance citizen participation and engagement in the governance of Kenya’s extractives sector (Extractives Baraza, 2017).”

Other examples comprise smaller organisations, such as the Turkana Development Organisations Forum which is “a non-political, non-partisan and non-profit making membership organisation. It...is dedicated to improving enjoyment of human rights and root[s] for democratic governance among the people of Turkana County (Turkana Development Organisations Forum, 2017).” The Kenya Oil and Gas Working Group is another group whose ‘tagline’ is “Building Communities and Promoting Accountability” and which “provides a platform for constructive stakeholder engagement and community engagement, and knowledge management contributing to good governance and sustainable development in the oil and gas sector (Kenya Oil and Gas Working Group, 2017).” The localised Turkana Empowerment Advocacy Group has a presence on Facebook and posts items and views it claims are representative of some members of the Turkana community, whilst the Kenyan Barrel blog is a regularly updated site containing oil industry news and information aimed to “create knowledge and awareness amongst the greater public (Kenyan Barrel, 2017).” Oil News Kenya also offers oil sector news for the East African region in a particularly accessible format, either through its websites or through Twitter (Oil News Kenya, 2017; Twitter, 2017). Importantly, it is clear that civil society representation in Kenya is diverse and takes many forms.

4.2.4 The International Community

Non-Kenyan actors—particularly international institutes and organisations—play an important role in Kenya’s oil sector. With specific regard to transparency, these actors include the EITI, PWYP, the NRCI (including its NRC and Benchmarking Framework), Transparency International and the Open Government Partnership. However it is worth noting that it is not just organisations which have an impact on Kenya’s oil industry. Foreign regulatory frameworks and legislation are equally important in that they often capture (and therefore govern) the activities of IOCs operating in Kenya. For example, stock exchange rules may require listed entities (and their related entities) to disclose certain information about their operations which will subsequently become publicly-available. The same applies to domestic legislation which governs the activities of IOCs. An IOC incorporated in France but operating in Kenya will be required to comply with French and European Union (EU) legislation and regulations. Thus, if such legislation or regulations require disclosure of certain information by the IOC, that information will be made public even if the same disclosure requirement is not imposed on the IOC by Kenyan regulations or legislation.

Examples of how such requirements have influenced the Kenyan oil sector to date will be discussed in Chapter 4.4 below.

4.3 The Domestic Legal and Regulatory Framework

The legislation and regulations governing all activities in Kenya's oil sector is vast. Table 4.4 below therefore sets out the legislation, regulations and government policies most relevant to upstream operations.

No.	Legislation, Regulation or Policy
1	The Constitution of Kenya 2010
2	The Energy Act No. 12 of 2006
3	The Petroleum (Exploration and Production) Act 1986, Chapter 308
4	The Petroleum (Exploration and Production) Regulations
5	The Petroleum Development Fund Act 1991, Chapter 426C
6	The Income Tax (Amendment) Act, particularly Schedule 9
7	The Commission of Revenue Allocation Act 2012
8	The Environment and Land Court Act No. 19 of 2011
9	The Environmental Management and Co-ordination Act 1999
10	The Land Act 2012
11	The Anti-Corruption and Economic Crimes Act No. 3 of 2003
12	The Ethics and Anti-Corruption Commission Act No. 22 of 2011
13	The Model PSC

Table 4.4: Key Oil and Gas Legislation, Regulations and Policies in Kenya (Source: Author's own).

In addition, new legislation has been proposed in the form of the Upstream Bill and the Energy Bill 2015. Once enacted the former will govern upstream activities whereas the latter will govern, amongst other energy matters, midstream and downstream petroleum activities. The government's Vision 2030 (along with the associated Medium Term Plans) and its draft Petroleum Policy are also highly relevant as they place a focus on the oil sector which did not exist prior to Tullow's discovery in Turkana in 2012.

A desire to promote greater transparency and accountability is indicated by the numerous references to these concepts in some of the legislation and government policies listed above. The constitution (Republic of Kenya, 2010) makes numerous references to it: Article 10 places “good governance, integrity, transparency and accountability” as national values and principles of governance, Article 35 states that all citizens have the right to access information held by the state or information required for the exercise or protection of their rights and fundamental freedoms, and Article 71 requires that transactions involving the grant of rights or concessions for the exploitation of natural resources must be ratified by parliament. The model PSC upon which all PSCs signed by IOCs in Kenya are to be based also deals with transparency. Clause 49 (ERC, 2015) contains industry-standard confidentiality provisions but also specifically caters for disclosure of the PSC and related information in certain circumstances, such as when required by law, in order to comply with Article 71 of the constitution “or in accordance with internationally accepted standards and norms concerning transparency in the extractive industries.” Whilst IOCs are permitted to negotiate this clause and it therefore may take a different form in the signed PSCs, what seems to be apparent is that government is intending to pave the way for greater transparency.

The proposed Upstream Bill (Republic of Kenya, 2015b) reflects the constitutional provisions in Clause 121 where the Cabinet Secretary for Energy and Petroleum is to:

develop a framework for reporting, transparency and accountability in the upstream petroleum sector, which includes the publication of all petroleum agreements, records, annual accounts and reports of revenues (fees, taxes, royalties and other charges), as well as, any other relevant data and information that support payments made by the contractor and payments received by the Government, County Governments, and local communities.

Such reporting is to be disaggregated into different agreements and on a project basis, so the intention is that information will be easily interpreted. Furthermore, the Upstream Bill (Republic of Kenya, 2015b) requires the new UPRA (see Chapter 4.2.1.2 above) to act in an open and transparent manner (Clause 44.1(b)), and Clause 44.2(d) requires it to “advocate and ensure transparency in the interaction of the upstream petroleum sector” and itself.

The draft Petroleum Policy (Republic of Kenya, 2015a:29) further envisages the government ensuring “transparency and accountability in petroleum upstream operations taking into account best industry practices” and states that “efforts shall be made to align them with [the]

existing legal framework.” This is cited as a short-term strategy to be achieved prior to 2019. The Petroleum Policy also highlights the specific need for greater revenue transparency: “The government shall put in place transparent mechanism[s] for the allocation of energy and petroleum revenues raised by the national and the county governments for the benefits of people of Kenya (Republic of Kenya, 2015a:119).”

Kenya Vision 2030 is Kenya’s long-term development plan and it also focuses on increasing political accountability, suggesting transparency is necessary to achieve this: “An accountable system is one that is open and transparent and one that permits free flow of information. It should be a system in which the leaders are accountable to citizens (Republic of Kenya, 2007:22).” Kenya’s current Medium Term Plan covers the period 2013-2017 and mentions improving transparency across its strategy for the political, economic and social pillars of the plan. Specifically regarding development of oil, it states that:

the government will develop the policy, legal, and institutional framework for the exploitation and management of Kenya’s natural resources...for the maximum economic benefit of the country and local communities, done in a transparent and accountable manner (Republic of Kenya, 2013:xii).

It also focuses on revenue transparency, declaring that the government will ensure that “legislation for transparency and fair sharing [of] the revenue generated is enacted, and safeguards erected...to avoid risks usually associated with huge inflows of resource-based external earnings (Republic of Kenya, 2013:xii).” However, perhaps most notable is the plan’s direct commitment to joining the EITI (Republic of Kenya, 2013:70).

Nonetheless, the Upstream Bill has not yet been enacted nor the Petroleum Policy adopted. In September 2016 President Kenyatta failed to grant his assent to the Upstream Bill and set out his misgivings in a memorandum to the National Assembly. According to media reports he “said the revenue due to the local communities should be reduced from the 10 per cent. of what the national government gets as set by parliament, to five per cent. (Senelwa, 2017).” This in turn caused local leaders in Turkana County—including governor Josephat Nanok—to start “agitating for increased allocation of the proceeds to the host community and the county government (Senelwa, 2017).” It thus remains to be seen what form the final bill will take.

4.4 The International Framework

There are no compulsory international laws or regulations governing Kenya's oil sector as a whole. Instead, compliance with international organisations' policies and rules are voluntary. Three of the most important of such regimes are the EITI, PWYP and the NGRI.

The EITI is an international, multi-stakeholder group consisting of government, industry and civil society which encourages key information about governance in the extractive industries to be reported annually and provides recommendations for improving such governance whilst simultaneously disseminating reported information to the public (EITI, 2016:5). It is organised around the 12 EITI Principles (set out in Figure 4.6 below) that were first agreed in 2003 at the London Lancaster House Conference and which lay out the EITI's general aims and commitments (EITI, 2016:9). These Principles are complemented by the EITI Requirements which must be adhered to by all states implementing the EITI and by the process of 'Validation' which allows stakeholders to determine if implementation standards are sufficient when measured against the EITI Standard (EITI, 2016:9). The EITI Standard, currently in its fifth edition, is the framework document which sets out these elements. Ultimately the EITI promotes transparency by requiring disclosure of contracts and licences, production data, revenue collection and revenue allocation information, beneficial ownership details as well as social and economic contributions.

- 1** We share a belief that the prudent use of natural resource wealth should be an important engine for sustainable economic growth that contributes to sustainable development and poverty reduction, but if not managed properly, can create negative economic and social impacts.
- 2** We affirm that management of natural resource wealth for the benefit of a country's citizens is in the domain of sovereign governments to be exercised in the interests of their national development.
- 3** We recognise that the benefits of resource extraction occur as revenue streams over many years and can be highly price dependent.
- 4** We recognise that a public understanding of government revenues and expenditure over time could help public debate and inform choice of appropriate and realistic options for sustainable development.
- 5** We underline the importance of transparency by governments and companies in the extractive industries and the need to enhance public financial management and accountability.
- 6** We recognise that achievement of greater transparency must be set in the context of respect for contracts and laws.
- 7** We recognise the enhanced environment for domestic and foreign direct investment that financial transparency may bring.
- 8** We believe in the principle and practice of accountability by government to all citizens for the stewardship of revenue streams and public expenditure.
- 9** We are committed to encouraging high standards of transparency and accountability in public life, government operations and in business.
- 10** We believe that a broadly consistent and workable approach to the disclosure of payments and revenues is required, which is simple to undertake and to use.
- 11** We believe that payments' disclosure in a given country should involve all extractive industry companies operating in that country.
- 12** In seeking solutions, we believe that all stakeholders have important and relevant contributions to make – including governments and their agencies, extractive industry companies, service companies, multilateral organisations, financial organisations, investors and non-governmental organisations.

Figure 4.6: The EITI Principles (Source: EITI, 2016:10).

Membership of the EITI is not automatic and requires a strict compliance with the EITI process. States must apply to become an EITI candidate, following which they are considered an 'EITI candidate' until they become 'EITI compliant' by adhering to the EITI Requirements and EITI Standard; compliance is regularly checked through the 'Validation' process (2016:11-12). Whilst Kenya is not currently an EITI implementing state (of which there are currently 52), it has made public commitments to become one. For example, as noted in Chapter 4.3 above, Kenya's current Medium Term Plan states an intention to join the

EITI. More notable was the commitment made following President Obama's visit to Kenya in 2015 when the two governments issued a 'Joint Commitment Between the Governments of the Republic of Kenya and the United States of America to Promote Good Governance and Anti-Corruption Efforts in Kenya'. This document (2015:Section II, para 14) specifically declares that "the Government of Kenya commits to implementing the [EITI] domestically and to identifying and enabling an EITI implementation focal point within the government within six months." Nonetheless, Kenya remains neither a compliant state nor even a candidate, so it remains to be seen whether such statement will hold true.

PWYP is a global coalition of civil society organisations which, like the EITI, promotes transparency and accountability in the extractive sector. Initially focused on payment transparency, it has expanded this focus to capture contract disclosure and transparent licensing procedures and it seeks to achieve greater EITI compliance and wider EITI reporting across the world. "PWYP has had members in Kenya since 2012, their primary focus has been calling for Kenya to join the [EITI] and advocating on the country's mining bill (PWYP, 2017)." PWYP thus engages with civil society in Kenya to encourage EITI compliance and provides civil society organisations with an important support framework and guidance as to how best achieve their goals.

The NRC is an international institute which has produced the NRC to provide practical advice and policy options for governments, the international community and society in order to manage natural resource wealth (2014:4). The NRC is structured around 12 precepts, the second of which is that "resource governance requires decision makers to be accountable to an informed public" and which can be aided by providing "transparency of information along the entire chain of decisions (2014:10)." As well as promoting the avoidance of confidentiality clauses in contracts, the NRC (2014:10) requires various levels of information to be disclosed, including:

- (i) "names of companies and beneficial owners, whether invested or bidding;
- (ii) NOC [national oil company] operations and details;
- (iii) data and reports for licence activity including geological surveys, reserve estimates, impact assessments (social, economic and environmental);
- (iv) contracts;
- (v) fiscal details as well as savings funds; and

(vi) all revenues.”

The NRC Benchmarking Framework (2016:3) “draws on the policy options and practical advice of the NRC, and consists of a series of questions that government officials, concerned citizens or actors in the international community can use to structure research, discussions and strategic planning.” In respect of precept 2 of the NRC regarding transparency and accountability specifically, the questions it asks are as set out in Figure 4.7 below. Again, whilst application is voluntary, the NRC and the Benchmarking Framework are nevertheless tools which can be and are applied to the Kenyan oil sector. By utilising the questions in Figure 4.7, interested parties have a framework around which they can measure how transparent and accountable the Kenyan government is and thereafter take appropriate steps to address any issues.

Transparency and accountability (precept 2)	2.1 Transparency. Does the government ensure that resource management is sufficiently transparent for all actors to effectively understand and scrutinize decision making and its implications?	2.1.1 Access to the legal framework. Does the government ensure that the full legal framework governing resource management is available to the public?
		2.1.2 Disclosure rules. Has the government established rules that enable access to information on resource management?
		2.1.3 Information management. Do government agencies have effective information management systems that support access to information?
		2.1.4 Open data. Does the government publish data according to open data standards?
		2.1.5 Comprehensive disclosure. Does the government ensure that data is released on a comprehensive set of resource governance and management issues?
	2.2 Official oversight. Do government oversight bodies hold officials to account?	2.2.1 Legislature. Does the legislature hold public officials to account on issues relating to resource governance?
		2.2.2 Supreme audit institution. Does a supreme audit institution oversee the government’s management of financial flows relating to the extractive sector, and does the government respond to its findings?
		2.2.3 Corruption control. Does the government take effective measures to deter, detect and prosecute corruption?
	2.3 Communications and public oversight. Is there a critical mass of informed citizens that holds the government to account?	2.3.1 Government communication and the management of expectations. Does the government implement a communications strategy to ensure that the public has realistic expectations of the future benefits and costs of extraction?
		2.3.2 Civic and political freedoms. Does the government ensure that civic and political freedoms are consistently upheld?
		2.3.3 Media and civil society. Do the media and civil society groups effectively improve public accountability in natural resource management?
		2.3.4 Independent research. Do research institutions carry out independent and high-quality research on resource governance?
		2.3.5 Professional associations. Do professional associations and unions actively promote and enforce professional standards of conduct and engagement among their members who are engaged in extractive industries?

Figure 4.7: NRC Benchmarking Framework, Precept 2 Summary (Source: NRGI, 2016:8).

In addition to these voluntary initiatives, there are compulsory legal provisions in non-Kenyan legislation which have an impact on Kenya's oil sector. Examples are laws and regulations which affect an IOC operating in Kenya, applicable either because of the IOC's state of incorporation or which stock exchange it is listed. For example, Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act 2010 (Dodd-Frank Act) in the United States requires extractive "companies registered with the US Securities and Exchange Commission (SEC) [to] produce annual reports detailing payments made to foreign governments (national and sub-national), agencies and state-owned enterprises (KCSPOG, 2014:36)." These provisions capture foreign-incorporated companies and subsidiaries of the SEC registered company and they require project-level reporting of any payment—either single or part of a related series—which exceeds US\$100,000 (SEC, 2016). Payments include royalties, taxes, licence and acreage fees, bonuses and production entitlements (KCSPOG, 2014:36). The impact of these provisions is, however, in doubt under the new Trump administration in the United States after Congress and the Senate voted to repeal the SEC transparency requirements and the legislation was signed by President Trump in February 2017. "The SEC is still obligated under the Dodd-Frank law to write some form of a transparency rule for extractive industries," but "the agency can never publish any rule that is 'substantially the same' as the one that has now been overturned (Cama, 2017)." Currently the SEC rules govern the disclosure of many IOCs operating around the world, including in Kenya, so any removal or weakening of the present requirements will have a significant effect on the global oil sector.

The EU has implemented similar requirements to Section 1504 of the Dodd-Frank Act by means of Chapter 10 of the EU Accounting Directive (2013/34/EU) and the EU Transparency Directive (2013/50/EU), plus the associated regulations. These Directives require EU member states to implement similar legislation domestically and their scope is therefore vast. The Directives require compliance from companies which are engaged in extractive industries and either (a) publicly listed in the European Economic Area; or (b) private companies defined as sufficiently large⁹. There are no exemptions and it is irrelevant if the company is registered in the Europe. Payments must be disclosed on a per government and per project basis, and the scope covers all payments of €100,000 or more for single or related

⁹ Companies considered as sufficiently large are those that meet at least two out of the three following criteria: (i) turnover of at least €40 million; (ii) total assets of at least €20 million; and (iii) at least 250 employees (European Commission, 2013).

transactions (European Commission, 2013). Furthermore, payments in kind or other payments such as production entitlements, taxes, royalties, dividends and bonuses must be disclosed (European Commission, 2013). The effect of this legislation, as well as similar legislation from jurisdictions across the world, is that many IOCs must now comply with increased disclosure rules.

Other compulsory disclosure requirements emanating from stock exchange rules also affect IOC transparency. Examples can be found demonstrating how this has directly impacted IOCs operating in Kenya: the only Kenyan PSCs publicly-available are those which listed IOCs have been forced to disclose due to stock exchange requirements. Five of the seven Kenyan PSCs in the public domain relate to CAMAC Energy Kenya Limited's Blocks L-1B, L-16, L-27 and L-28 and ERHC Energy Kenya Limited's Block 11A, both companies having to disclose the PSCs due to their parent companies' SEC filing requirements. The other two publicly-available PSCs are those for Lion Petroleum Corp.'s Blocks 1 and 2B, the disclosure of which was required due to Lion Petroleum Corp.'s listing on the Toronto Stock Exchange. Other stock exchanges are following suit, an important example being the Hong Kong Stock Exchange where new extractive company applicants must provide country-by-country reporting on tax, royalty and other government payments (Global Witness, 2013:10). What is clear is that foreign rules and legislation are tools that can be used to promote transparency globally: if a company listed on the Toronto Stock Exchange is legally required to disclose its PSC, there is little the Kenyan government can do to prevent it. The effectiveness of such tools and of the voluntary initiatives described above in achieving greater transparency and promoting good governance in Kenya's oil sector will be discussed in Chapter 5.

4.5 Chapter Summary

This chapter has provided an overview of the history of Kenya's oil sector and has summarised its current status. It has shown that, despite the relatively long history of oil exploration in Kenya, the sector remains relatively undeveloped and this is most apparent in its lack of exports and the delays hindering adoption of the new Upstream Bill. Current plans for developing the sector following Tullow's discovery of commercial quantities of oil in 2012 are on hold and it remains to be seen how quickly and efficiently these plans will be given effect, particularly given that the uncertainty garnered by the status of legislative limbo is hardly conducive to prompt development of the sector. Furthermore, this chapter has

highlighted the fact that there is no accurate, publicly-available source of information which provides an interested party with clear and concise details about which IOCs operate in the state. Specifically, Chapter 4.2.2 demonstrates that it is nearly impossible to conclude which IOCs hold upstream interests in Kenya without extensive research. That said, the proposed legislation and various government policies do suggest a rhetoric supportive of improving and implementing transparency in the sector.

This chapter also identified four key actors that play a role in shaping and influencing the sector: the government (and its related bodies and entities), IOCs and their affiliates, civil society organisations and the international community. It has shown that each such actor has a direct impact on the operations of the sector. For example, the government is directly involved through its allocation of licenses and interests to IOCs and by virtue of the activities of the NOCK, but it is also responsible for adopting, implementing and enforcing the legislation and regulations that govern the sector (and which have been summarised in Chapter 4.3). IOCs are fundamental to the sector for, without them, no activity would take place; they thus hold significant sway over how activities progress and in what manner. Civil society organisations like the KCSPOG are perhaps the strongest link between the citizens of Kenya and the oil sector and they are thus crucial to ensuring that public opinion is heard and that rights are protected. Finally, the role of the international community cannot be ignored: not only do influential organisations such as the EITI and PWYP hold sway in the Kenyan oil sector, but as Chapter 4.4 has demonstrated, rules, regulations and laws derived from foreign jurisdictions can have a huge impact on how the sector develops.

Given their dominant and significant roles, it is thus necessary to determine how each of these actors might help to promote or hinder the implementation of effective transparency in the Kenyan oil sector. Chapter 5 will therefore firstly examine how transparent the sector is at present before analysing the potential impact of each of the government, IOCs, civil society and the international community on the push for increased transparency in Kenya.

Chapter 5

IMPLEMENTING EFFECTIVE TRANSPARENCY IN KENYA

Chapters 3 and 4 have explored the contextual factors relevant to gaining an understanding of how transparency might effectively be implemented in the Kenyan oil sector. It is thus necessary to develop the analysis further by applying the theories discussed in Chapter 2 to Kenya whilst accounting for this context. It is important to note that there is undoubtedly a difference between introducing transparency and it subsequently being effective in helping to avoid negative political effects of the resource curse: not only is it crucial that the correct information is released in a timely manner by all relevant parties, but it must be information which can be disseminated efficiently and interpreted easily. Only then is there hope for the information to be used to promote accountability and deter poor behaviour such as corruption, patronage and rent-seeking. The process is therefore threefold: firstly, transparency and dissemination of the correct information must be achieved; secondly, meaningful interpretation must be possible and permitted; and thirdly, effective accountability must exist. This chapter will examine each of these elements and will in particular focus on the barriers to achieving them. It will begin by using the theories identified in Chapter 2.3 and building on the discussion in Chapter 4 in order to assess existing levels of transparency in Kenya's oil sector before looking briefly at what future transparency initiatives might be implemented. The remainder of the chapter will focus on how transparency and accountability is might be thwarted by the four key players in the sector identified in Chapter 3: government, civil society, IOCs and the international community.

5.1 The Current Position

5.1.1 Block Allocation, Ownership and Documentation

As discussed in Chapter 4, there is very little accurate information available about the allocation of upstream blocks and licences in Kenya. Whilst the NOCK website contains a map showing the location of the blocks and an image detailing the structural framework of the basins (NOCK, 2017b), the map is dated from 2015 and it is also hard to decipher who

the IOCs owning the blocks are. Moreover, it does not show working interests in each block and instead only notes the operator's company name (at times this is also inaccurate). There is a clear lack of transparency and there are no official publicly-available sources revealing information on beneficial ownership of the interests. Indeed, the most comprehensive information is available from the 2016 study of Hubert (2016) who meticulously scoured public sources and news channels to determine his (now also outdated) understanding of which IOCs own and operate each of Kenya's upstream blocks. As Hubert (2016:5,19) notes, the difficulty in accessing accurate ownership is problematic, particularly as he found that only five companies operating in Kenya at the time of his research do not use tax havens as part of their corporate structure. These five companies are Adamantine Energy LLC, Far Limited, First Oil Plc, Qatar First Bank LLC and Simba Energy Inc.. He concludes that there is a widespread use of low tax jurisdictions or tax havens by IOCs operating in Kenya and that the structures are complex: "in total, thirty-five separate companies hold a percentage stake in at least one of the 41 active petroleum license[s] in Kenya. These subsidiaries are ultimately owned by twenty-seven separate parent companies" and "seventeen of these parent companies own petroleum rights in Kenya directly through a subsidiary registered in a tax haven (Hubert, 2016:5)." In sum, Hubert (2016:22) argues that

uncovering these corporate structures is much more difficult than should be the case. Best practice in extractive sector good governance calls for the government to publish details of all companies holding oil, gas and mineral rights. Kenya already provides some of this information through the online mining cadastre portal. Comprehensive information on petroleum rights should also be published including the legal names of operators and their joint venture partners as well as their respective percentage stakes and the dates on which the relevant transaction were concluded. Furthermore, as Kenya has made a public commitment to joining the EITI, companies should be required to disclose full details of their corporate structures and their beneficial owners.

As this author found in her research, the only practical means available to a member of the public wishing to determine ownership details is to painstakingly search online and to fit the pieces of the jigsaw together oneself. The discussion in Chapter 4.2.2 above is further testament to how difficult the lack of transparency in ownership makes it for anyone wanting to establish who owns Kenyan petroleum rights. This difficulty is compounded by the fact that many of the IOCs involved in Kenya are subsidiaries and often neither they, nor their parent companies, have websites which provide information on their assets or operations. Furthermore, given that most upstream transactions tend to be covered by industry-specific media outlets as opposed to the mainstream outlets, any interested member of the public will

struggle to accurately decipher which IOCs currently own which blocks in Kenya following inevitable acquisitions and disposals of interests. The situation in Kenya is thus far from that advocated by those who believe corporate ownership should be fully transparent, as discussed in Chapter 2.3.2 above.

One particular area of concern regarding block ownership is the lack of clear information available on government interests in the blocks. The model PSC (ERC, 2015) and existing PSCs (see Table 5.1 below) provide for the government to either have an existing stake in the blocks or to elect to participate in the blocks at a future date. Table 5.1 shows what such options consist of for the seven PSCs that are publicly-available in Kenya and, whilst the government may not have elected to take any interests, there is no officially-provided information available to suggest this is the case. Of specific interest is what participation rights the government has in Blocks 10BB and 13T (either directly, through the NOCK or through another actor) where Tullow has discovered commercial quantities of oil. On the basis of the model PSC and the provisions of the available PSCs listed in Table 5.1, it can be assumed that the government will have been granted similar participation rights to Blocks 10BB and 13T. If truly transparent then the public would have access to this information in order to determine what expenditure the government is committed to on these blocks—it is unlikely to have a carried interest for the development and production phases—and what costs it has incurred to date.

Block	PSC Clause Reference	Government Participation Option
1	28	Up to 18% carried interest during the exploration phase, then it can elect to convert this interest to a full participation interest
2B	28	Up to 18% carried interest during the exploration phase, then it can elect to convert this interest to a full participation interest
11A	28	A 10% carried interest up to the point commerciality is declared, following which it can elect to obtain another 10% interest (taking its total interest to up to 20%). Following a declaration of commerciality the government's interest will be a full participation interest
L-1B	28	Up to 20% participation interest in a development area
L-16	28	Up to 20% participation interest in a development area
L-27	28	Up to 20% participation interest in a development area
L-28	28	Up to 20% participation interest in a development area

Table 5.1: Known Government Interests in Upstream Blocks (Sources: Author's own, with information from Block 1 PSC, 2007; Block 2B PSC, 2008; Block 11A PSC, 2012; Block L-1B PSC, 2012; Block L-16 PSC, 2012; Block L-27 PSC, 2012; Block L-28 PSC, 2012).

As noted in Chapter 2.3.1, the process by which blocks are awarded to IOCs is an area of the sector which receives significant attention from proponents of transparency. Unfortunately, the process is far from transparent in Kenya. Past awards were granted by means of bilateral negotiations and there was no public bidding round. Although there has been recent acknowledgement that the 17 newly created blocks would be subject to a bidding round (Odhiambo, 2015) and similar calls have been made in the past (Obulutsa, 2012), this has not yet materialised. Possibly delayed due to the stalled Upstream Bill, the NOCK's website suggests that for the time being awards will continue to be made bilaterally: interested parties are invited to submit an application to 'the Minister of Energy' (NOCK, 2017c). Indeed, this appears to be out of date for, as noted in Chapter 4.2.1.1, the Minister of Energy position has been superseded by that of the Cabinet Secretary for Energy and Petroleum. Thus, the bidding procedure for Kenya's oil interests remains opaque.

In Chapter 2.3.4 it was mentioned that numerous scholars and international transparency initiatives also propose transparency of upstream contracts. However, Kenya has not yet

embraced such a proposition. Only seven Kenyan PSCs are available and these have only entered the public domain through foreign stock exchange and legal requirements, not from domestic initiatives (see Chapter 4.4). The NOCK makes the model PSC available and gives a brief summary of its terms (NOCK, 2017c), but this is a far cry from releasing the full, tailored documents which are normally heavily negotiated between the government and the IOC. As will be discussed below, neither of the two key IOCs operating in Kenya (Tullow and Africa Oil) have released their PSCs despite suggesting they would like to. The Kenyan situation is therefore far from transparent with regard to the release of upstream documents.

5.1.2 Operational Information

If the lack of transparency regarding block allocation and ownership is stark, the opacity of operational information is even more so. Given Kenya's oil sector is relatively youthful and is embraced by a strong optimism, it might be expected that more operational information would be made publicly-available by the government. However, this is not the case and all that is available is information released by certain IOCs. The MoEP website does provide some very basic information, including a basinal map and a map of wells drilled as well as a graph depicting the years such wells were drilled (MoEP, 2017a). The NOCK also provides a summary of wells drilled, including the relevant year and a brief indication of what was encountered (such as "oil discovery" or "net oil play / gas") (NOCK, 2017d). Additionally, it has a promising webpage entitled 'Geophysical Data'; however, the promise is hindered when all that the page delivers is a simple one-page Excel sheet (NOCK, 2017e). To access data one must instead pay the NOCK: for example, it costs US\$5,000 for the latest (2006) data on the Mandera Basin's potential or US\$500 for any well geological report, geochemical reports, well velocity analyses, post-well reviews and proposal reviews dated after 2002, or it will cost US\$1,000 for a well completion report post-2002 (NOCK, 2017f). Suffice to say that it is unlikely most members of the Kenyan public or civil society organisations would be willing to pay such sums for this information.

Therefore, whilst the NOCK (2017a) boasts that through its National Data Centre project it holds "an inventory of all petroleum exploration data i.e. seismic data, well logs, well reports, other oil exploration related reports, aeromagnetic and gravity data, obtained in the country by different operators in both digital and analogue formats" and has "set up cores and drill-cuttings storage facility which holds samples retrieved during drilling from 1960 to date,"

most of this information remains outwith the realistic reach of all who are not directly involved in the oil sector. In sum, the government makes very little operational information available to the public and instead the best information is obtained from IOC press releases and websites, yet such information is entirely dependent on the will and practice of each individual IOC. Available information on the operations of the NOCK is similarly sparse, with its website proudly detailing the airborne geophysical survey it conducted over its own block, Block 14T (NOCK, 2017g), but little else. Indeed, one would struggle to find information on the NOCK's own website about which interests it owns or what options it has for future participation. Again, the lack of transparency is undeniable.

5.1.3 Revenue Flows and Expenditure

In Chapter 2.3.3 the theories about transparency of revenue flows between IOCs and government (including all revenues, taxes, payments and bonuses) as well as government expenditure and allocation of revenues were discussed and it was noted that such theories formed the basis of early calls for transparency in the oil sector. Whilst Kenya has not yet reached production—when substantial revenues and payments are likely to be made from IOCs and received by the government—that is not to say that significant and material payments are not already being made and received.

An example can be taken of Tullow's activities which are particularly notable given it is close to moving from development to full production. According to latest information published on its website, Tullow (2017d) claims to have spent KES6.1 billion in 2013 which includes “total payments to all Kenyan stakeholder groups, including taxes to the national Government, expenditure with local suppliers and discretionary investment in community projects.” Using an historic exchange rate from mid-2013 this equates to approximately US\$70 million which is a huge amount of money, and Tullow (2017d) states that KES1.9 billion of this (just under US\$24 million) comprised of taxes: VAT, withholding tax on imported services and PAYE to its employees. What is most concerning is that Tullow's activities and financial reports are to date unaudited: no audit of Tullow's statements and operations has been conducted since it began operating in Kenya. This is worrying, particularly as the situation seems unlikely to change in the near future: in 2016 it was reported that Tullow claims to have US\$1.5 billion of recoverable costs yet no qualified auditor had been found to conduct the audit, and that four shortlisted firms were rejected due

to excessive professional fees (Herbling, 2016). Indeed, until the new UPRA is established (see Chapter 4.2.1.2) it seems unlikely that there will be any progress in appointing a suitable auditor and that opacity will remain.

Furthermore, the lack of publicly-available PSCs (see Chapter 5.1.1) means there is significant opacity with regard to the other financial commitments IOCs have in Kenya. For example, the model PSC (ERC, 2015) and each of the publicly-available PSCs make provision for the IOCs to pay signature bonuses to the government, to pay annual surface fees, to contribute annually to training funds and, in some cases, to local community development projects. Tables 5.2, 5.3 and 5.4 respectively set out these signature bonus, surface fee and training fund commitments under the PSCs we have access to.

Block	PSC Clause Reference	Amount of Signature Bonus (US\$)
1	5(1)	250,000
2B	5(1)	65,000
11A	5(1)	310,000
L-1B	5(1)	310,000
L-16	5(1)	310,000
L-27	5(1)	310,000
L-28	5(1)	310,000

Table 5.2: Known Signature Bonus Payments (Sources: Author's own, with information from Block 1 PSC, 2007; Block 2B PSC, 2008; Block 11A PSC, 2012; Block L-1B PSC, 2012; Block L-16 PSC, 2012; Block L-27 PSC, 2012; Block L-28 PSC, 2012).

Block	PSC Clause Reference(s)	Amount of Annual Surface Fee (US\$) / km ²	Initial Size of Contract Area (km ²)
1	5(2), Appendix A	From 2.5 to 30	31,780.68
2B	5(2), Appendix A	From 3 to 100	7,806.53
11A	5(2)	From 5 to 100	Not known
L-1B	5(2), Appendix A	From 5 to 100	12,128.75
L-16	5(2), Appendix A	From 5 to 100	3,613.34
L-27	5(2), Appendix A	From 5 to 100	10,585.62
L-28	5(2), Appendix A	From 5 to 100	10,585.62

Table 5.3: Known Annual Surface Fees (Sources: Author's own, with information from Block 1 PSC, 2007; Block 2B PSC, 2008; Block 11A PSC, 2012; Block L-1B PSC, 2012; Block L-16 PSC, 2012; Block L-27 PSC, 2012; Block L-28 PSC, 2012).

Block	PSC Clause Reference(s)	Annual Training Fund Commitment (US\$)	Annual Local Community Development Project Commitment (US\$)
1	Clause 13(2)	Between 60,000 and 200,000	n/a
2B	Clause 13(2)	Between 60,000 and 200,000	n/a
11A	Clause 13(2) Clause 13(3)	Between 175,000 and 200,000	At least 50,000
L-1B	Clause 13(2) Clause 13(3)	Between 175,000 and 200,000	At least 50,000
L-16	Clause 13(2) Clause 13(3)	Between 175,000 and 200,000	At least 50,000
L-27	Clause 13(2) Clause 13(3)	Between 175,000 and 200,000	At least 50,000
L-28	Clause 13(2) Clause 13(3)	Between 175,000 and 200,000	At least 50,000

Table 5.4: Known Training Fund and Local Community Development Project Commitments (Sources: Author's own, with information from Block 1 PSC, 2007; Block 2B PSC, 2008; Block 11A PSC, 2012; Block L-1B PSC, 2012; Block L-16 PSC, 2012; Block L-27 PSC, 2012; Block L-28 PSC, 2012).

Regarding the annual training fund commitments and the annual surface fees, these range in value depending on what phase of the PSC the contractors are in—either exploration, development or production. To demonstrate how significant these payments can be it is worth looking at Block L-1B as an example. This PSC was signed on 10 May 2012 by the Kenyan government and CAMAC Energy Kenya Limited (the ‘Contractor’) and a signature bonus of US\$310,000 was payable on or before the date of execution to the MoEP (Block L-1B PSC, 2012). For the initial exploration period of two years, surface fees of US\$5 per km² were payable which, on a contract area of 12,128.75km², would have totalled US\$60,643.75 per year and US\$121,287.50 for the initial period. If this period was extended (as is likely to have been the case), then for the next two years the fees rose to US\$10 per km² and then again to US\$15 per km² if extended for a second time. Thus, during the first six years of the PSC’s term—taking us to 2018—and assuming none of the contract area was surrendered and that the exploration period was extended, the total surface fees payable would be US\$727,725. During this period US\$1,050,000 would have been spent on the training fund and at least US\$300,000 on local community development projects. Thus, for the initial six years of exploration the contractor would have paid a sum equating to approximately US\$2,077,725, and this excludes all forms of taxes and other payments. Given that there are over 40 such PSCs in Kenya at present and that some of these have moved into the development periods, the amount of revenue being received by the government from signature bonuses, surface fees, training fund and development project commitments is substantial. Yet again, however, there is a real lack of transparency over these commitments.

Table 5.5 demonstrates a further area of IOC expenditure of which the public has little knowledge, again save for that information revealed in the publicly-available PSCs or from IOC disclosures to shareholders or regulators: exploration period work commitments. These commitments relate to what expenditure the government requires the IOCs to make during the exploration period and they depend on what stage of exploration the PSC is in and whether the exploration phase is extended. Normally capturing amounts spent acquiring 2D or 3D seismic or drilling exploratory wells, the expenditure will not be received by the government directly but will instead be incurred by the IOC. This also explains why the sums are so high: acquiring seismic and drilling wells is hugely expensive. And although the payments are not being made to government (though some indirect revenues may be made through taxation), it is still helpful for the public to be aware of how much money the IOCs are investing in operations in Kenya. Even the most basic analysis of the available figures

shown in Table 5.5 reveals how significant these flows of money are to the Kenyan economy: for the seven PSCs included in Table 5.5 the average minimum commitment for the exploration period is US\$63.64 million. Given that there are currently 41 allocated blocks (see Table 4.3 above), a rough estimate of minimum commitments using this average figure of US\$63.64 million per block would result in a total commitment of just over US\$2.6 billion before development and production even begin. Once again, however, the lack of available information in a readily accessible format points to further opacity in Kenya's oil sector.

Block	PSC Clause Reference	Exploration Period Minimum Work Commitment (US\$)
1	Clause 4(1)	<ul style="list-style-type: none"> - 9.55 million during first three years - 6 million during first two year extension - 6 million during second two year extension <p style="text-align: right;">Total: 21.55 million</p>
2B	Clause 4(1)	<ul style="list-style-type: none"> - 11.75 to 14.75 million during first three years - 13 million during first two year extension - 19 million during second two year extension <p style="text-align: right;">Total: 43.75 to 46.75 million</p>
11A	Clause 4(1)	<ul style="list-style-type: none"> - 10.25 million during first two years - 30 million during first two year extension - 30 million during second two year extension <p style="text-align: right;">Total: 70.25 million</p>
L-1B	Clause 4(1)	<ul style="list-style-type: none"> - 5.25 million during first two years - 32 million during first two year extension - 26 million during second two year extension <p style="text-align: right;">Total: 63.25 million</p>
L-16	Clause 4(1)	<ul style="list-style-type: none"> - 5.25 million during first two years - 32 million during first two year extension - 26 million during second two year extension <p style="text-align: right;">Total: 63.25 million</p>
L-27	Clause 4(1)	<ul style="list-style-type: none"> - 11.7 million during first three years - 40 million during first two year extension - 40 million during second two year extension <p style="text-align: right;">Total: 91.7 million</p>
L-28	Clause 4(1)	<ul style="list-style-type: none"> - 11.7 million during first three years - 40 million during first two year extension - 40 million during second two year extension <p style="text-align: right;">Total: 91.7 million</p>

Table 5.5: Known PSC Exploration Period Minimum Work Commitments (Sources: Author's own, with information from Block 1 PSC, 2007; Block 2B PSC, 2008; Block 11A PSC, 2012; Block L-1B PSC, 2012; Block L-16 PSC, 2012; Block L-27 PSC, 2012; Block L-28 PSC, 2012).

What is clear from the figures shown in Tables 5.2 to 5.5 is that the commitments are not negligible, yet the public has no clear summary of how much these payments are for each of the blocks (particularly as since signature some of the PSCs will have moved from exploration to development phases, and some periods may well have been extended). The only means of determining the *approximate* amounts is to study the PSCs themselves, something that requires an understanding of how PSCs are structured and what each payment is. Furthermore, there is no information at all for the blocks where PSCs are not available—the majority of Kenyan blocks. In sum, Kenya’s oil sector is more opaque than it is transparent and the significance of this will only increase as blocks begin to move from exploration into development and production.

5.1.4 Legislative and Contractual Provisions

Chapter 4.4 set out the existing and proposed legislation and regulations governing upstream activity in Kenya and it also highlighted the relevant provisions which promote transparency and accountability in the sector. For example, Articles 10 and 71 of the constitution (Republic of Kenya, 2010) are conducive to implementing further transparency measures, as are Clauses 44 and 121 of the proposed Upstream Bill (Republic of Kenya, 2015b) and the draft Petroleum Policy (Republic of Kenya, 2015a). Government policy documents including Vision 2030 and its current Medium Term Plan do similarly (Republic of Kenya, 2007; 2013) and it is thus clear that there is at least a rhetoric of promoting greater transparency in the sector.

However, the reality does not currently match this rhetoric. Firstly, it is relatively difficult to determine what legislation is applicable to the sector. The NOCK website has a section called ‘Overview of Legal Framework’ (NOCK, 2017h), but this gives little information about existing provisions and instead includes links to the new, draft documentation such as the draft Petroleum Policy, the Energy Bill 2015, the Upstream Bill and the new draft model PSC, none of which have yet been formally adopted. Even once relevant legislation or provisions have been identified, interpretation of these is difficult for anyone without legal or oil sector experience. For example, the new draft model PSC is 125 pages long (ERC, 2017). But more importantly there are calls for legislative provisions—and specifically the draft Upstream Bill—to go further in their promotion of transparency. Of the Upstream Bill, civil society organisation the KCSPOG (2014:15) believes it “does not contain a comprehensive

transparency regime” and that “the types of disclosure that would enhance the bill [include] reporting on winning bids after a public tender, disclosure of beneficial ownership information, and disclosure about expenditure from oil revenues.” Further, the KCSPOG (2014:15-16) argues that the absence of a clear mechanism for financing the NOCK by means of government revenues from the sector is a glaring omission from current legislation and that

in spite of the high risks of corruption in the oil and gas industry, the bill does not incorporate anti-corruption clauses consistent with major international benchmarks such as the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; the United States of America Foreign Corrupt Practices Act 1977; and the United Kingdom Bribery Act 2010.

Kenyan legislation in its current and proposed form therefore appears to lack the teeth necessary to enable the promotion of effective transparency and accountability.

Further barriers to transparency currently lie in the form of PSC confidentiality provisions. As discussed in Chapter 2.3.4, opponents to increased transparency and IOCs often cite restrictive confidentiality provisions as justification for why they do not release information and the provisions in the existing model PSC, the new draft model PSC and the seven publicly-available PSCs in Kenya are indeed restrictive. Although both the model PSC (ERC, 2015) and the draft model PSC (ERC, 2017) permit disclosure of the PSC and related information in certain circumstances such as when required by law, in order to comply with Article 71 of the constitution “or in accordance with internationally accepted standards and norms concerning transparency in the extractive industries,” such provisions do not appear to exist in the publicly-available PSCs. Instead, Clause 37 of five of these PSCs prevents disclosure of the PSCs (and their content) by any party to that PSC without the prior written consent of the other parties, save for the usual caveat where disclosure to affiliates, bona fide third party purchasers, independent contractors and consultants or as required by law is permitted (Block 11A PSC, 2012; Block L-1B PSC, 2012; Block L-16 PSC, 2012; Block L-27 PSC, 2012; Block L-28 PSC, 2012). The other two PSCs do not expressly permit such disclosure (Block 1 PSC, 2007; Block 2B PSC, 2008). It is interesting that all five of the more ‘lenient’ PSCs were signed in 2012 following adoption of the new constitution which promotes increased transparency, whereas the other two PSCs (Block 1 PSC, 2007; Block 2B PSC, 2008) which do not contain similarly lenient provisions were signed in 2007 and 2008; this perhaps explains why the earlier PSCs permit less transparency. Nonetheless, the earlier PSCs (Block 1 PSC, 2007; Block 2B PSC, 2008) are wider in scope than the later PSCs

(Block 11A PSC, 2012; Block L-1B PSC, 2012; Block L-16 PSC, 2012; Block L-27 PSC, 2012; Block L-28 PSC, 2012) with regard to what the government may do with information it receives from the IOCs: whilst Clause 37(2) of the earlier two PSCs permits the government to “use any information supplied, for the purpose of preparing and publishing reports and returns required by law, and for the purpose of preparing and publishing reports and surveys of a general nature,” the latter PSCs restrict this usage to “internal use.” Positively, Clause 49(3) of the new draft model PSC (ERC, 2017) does once again remove this reference to ‘internal use’.

In general it is important to acknowledge that these existing confidentiality provisions are not as restrictive as others commonly found in PSCs. In particular they generally allow disclosure of the contract or of information provided pursuant to it if the prior written consent of the other party is obtained and such consent cannot be unreasonably withheld. The new draft of the model PSC (ERC, 2017) contains similar provisions in Clause 49(2). This therefore opens the door for IOCs (or the government) if they wish to release information; it would be hard for the other party to hide behind their PSC confidentiality clause. Furthermore, the new draft model PSC (ERC, 2017) expressly notes that the PSC is a public document at Clause 49(5):

This contract is a public document and the Government shall have the right to publish and keep it publicly available. The Government may publish such information concerning this contract as may be required by the laws of Kenya, including for purposes of obtaining ratification of the contract by Parliament in accordance with Article 71 of the constitution, or in accordance with internationally accepted standards and norms concerning transparency in the extractive industries.

Although this clause gives only the government the express right to publish the document, it is likely that during negotiations the IOCs will argue for this to be reciprocal and, regardless, there would be a convincing argument that the reference to the PSC being publicly-available would grant this right to the IOCs anyway. Yet this clause is not wide enough to capture the public release of information provided by one party to the other pursuant to the contract, such as operational information, and such information would therefore require the prior written consent of the other party for disclosure.

That said, if new PSCs signed by the government and IOCs include the provisions of the new draft model PSC it is certainly a step in the right direction for transparency. Although existing PSC provisions (which are likely to be relatively restrictive given the analysis of those seven publicly-available PSCs and the existing model PSC) will remain unchanged, it

would be hard and unlikely for the government to justify releasing only the new PSCs if demanded by civil society organisations or the IOCs themselves. Nevertheless, there is no certainty as to when the new PSCs will be signed nor what their provisions will be and there is no guarantee that the new model PSC will be adopted as currently drafted. The conclusion is thus that the current Kenyan legislative, regulatory and contractual provisions do little to promote effective transparency in the sector but that there are indications this could change in the future.

5.1.5 Next Steps

Given the analysis above it is clear that there is minimal transparency in Kenya's oil sector at present and further steps need to be taken. What transparency does exist, such as the release of PSCs or of operational information, tends not to come from the government but instead from either foreign requirements—whether that be stock exchange rules, regulatory rules or simply reports to shareholders and investors—or from the IOCs themselves. Barriers to effective transparency are thus already in place simply from the structure of Kenya's upstream sector and there is seemingly not an established, conducive framework in place to permit transparency initiatives to take hold. Chapter 5.2 will examine in detail what further barriers might stand in the way, however before turning to this it is necessary to briefly summarise what form some of these initiatives might take.

Ultimately, transparency could be improved in each of the areas discussed in Chapters 5.1.1 to 5.1.4 and this could be achieved through compliance with international initiatives such as PWYP and the EITI, or domestically through legislation, contractual provisions or simply good practice. Kenya has already expressed its desire to join the EITI and did so on a very public stage by expressing a joint commitment with the United States when Barack Obama visited Kenya as president of the United States in 2015:

The two Governments share a commitment to transparency in decision-making and financial flows related to the extractive industries, and intend to work collaboratively with all stakeholders to make this information publicly accessible and usable. The Government of Kenya commits to implementing the [EITI] domestically and to identifying and enabling an EITI implementation focal point within the government within six months. The Government of Kenya also commits to adopt and implement a progressive and transparent policy and legislative framework for upstream, mid-stream, and downstream extractive activities, including transparency in licensing procedures, publication of contracts, and environmental and conservation and labour requirements in line with international standards.” (Joint Commitment Between the Government of the Republic of Kenya and the United States of America to Promote

Good Governance and Anti-Corruption Efforts in Kenya, 2015:Section II, paragraph 14).

This public commitment arguably establishes a way-in for the international community and grants it a place to press for further transparency, but perhaps more important are the roles IOCs, civil society organisations in Kenya and the government can play. Whilst waiting for the Upstream Bill and associated policies to be adopted the government could take the initiative by publishing a regularly updated database of ownership (direct and beneficial) of the upstream blocks and it could also release further PSCs to the public, ideally all existing PSCs. Ownership details could include the NOCK's interests as well as a summary of what rights the government has to participate in PSCs. The government could also release details of all signature bonuses it has received to date, as well as what contributions have been made to training funds and local development projects by IOCs and how such contributions have been spent. Finding a suitable auditor for Tullow's operations would be a significant step and this might in turn lead to audits of other IOCs operating in Kenya.

Furthermore, given that production is scheduled to begin in the not-too-distant future, the government should focus on its revenue allocation policies. As the KCSPOG (2014:24) argued back in 2014, "Kenya should enact standalone legislation on petroleum revenue management with clear transfer and withdrawal rules as well as investment and savings rules." This is particularly important because although the government has in the past proposed establishing a sovereign wealth fund which will receive all of central government's share of petroleum revenues and will thereafter be used for budget stabilisation and support as well as future generational equity, "it is not clear yet what fiscal rule the government will adopt to determine the size of annual spending from the fund (KCSPOG, 2014:24)." As Charles Wanguhu of the KCSPOG has suggested, transparency on how the government plans to utilise its petroleum revenues is fundamental and such revenues should ideally be divided into a budget fund, a stabilisation fund and a sovereign wealth fund with clear rules for transfers and withdrawals (Chatham House, 2014a; Chatham House, 2014b). Whatever it decides, the government must make its policies transparent and communicate these to the public. Communication is key and, as the PricewaterhouseCoopers (PwC) consortium (2015:291) noted in a 2015 report on Kenya's oil sector, it is crucial that IOCs and the government "develop and implement a communication strategy on the process and timelines

associated with exploration and development of the petroleum sector to manage expectations of local communities/leaders and Kenyan people in general.”

As mentioned in Chapter 2.5.1, it is unlikely that IOCs will take the first step to improving transparency without obtaining the consent of the government to do so. Further, international initiatives will have little impact if the government does not express a will to co-operate. As such, the government appears to be in the prime position for advancing transparency in the sector. However, as will be demonstrated below, numerous barriers stand in the way.

5.2 Further Barriers to Effectiveness

Chapter 5.1 has shown that there is currently limited transparency in Kenya’s oil sector, indicating that significant barriers to further transparency exist. It is necessary to identify these barriers, bearing in mind the theoretical view discussed in Chapter 2 that incentives are key to promoting and sustaining effective transparency and accountability. This Chapter 5.2 will therefore examine the roles of the four key actors identified in Chapter 4: the government, civil society and the public, IOCs and the international community.

5.2.1 The Kenyan Government

In Chapter 3 it was demonstrated that Kenya’s politics—and by extension its government—is characterised by commonplace bribery, corruption, patronage and ethnic division. The current electoral debacle is a case in point. Given Chapter 2’s conclusion that political effects of the resource curse can include each of these characteristics, it is justifiable to assert that these pre-existing characteristics are likely to be strengthened now that significant oil reserves have been found and are in the process of being developed. In turn, this casts doubt on how effective transparency is to be implemented when many of the powerful actors in Kenya, particularly in government, would see their positions weakened by increased transparency and accountability. To put it another way, the government—including its members, related entities and parastatals—is unlikely to be incentivised to damage a political culture it is already so reliant upon by shining a light on it. So, whilst Omolo and Mwabu (2014:178) are correct to assert that the “inclusion of the extractive sector as the seventh industry in the economic pillar of Kenya’s second Medium Term Plan...of Vision 2030 shows the importance attached to this emerging industry by the government,” it is likely that

the sector is also seen as important to the government as a further opportunity for bribery, corruption and patronage. Despite the official supportive rhetoric, this would suggest that there may be a lack of will on the part of the government to implement transparency measures.

5.2.1.1 *A Lack of Will*

This lack of will can be demonstrated by practical examples, all of which have stunted progress of transparency initiatives to date and can thus help explain why the sector remains so opaque. The best illustration is the delayed Upstream Bill. The enactment of this bill promises much for transparency, as discussed in Chapter 4.3, however, it remains in limbo and is unlikely to be progressed until after the re-run of the elections and thus later this year at the earliest. One of the key contentious issues raised by the bill (and by Kenyatta in his refusal to provide presidential assent to it in 2016—see Chapter 4.3) is that of revenue allocation between central and county governments. Indeed, this issue became a key part of Odinga's election campaign and he pushed for fair revenue sharing: at a campaign rally in Turkana County on 27 July 2017 he declared he would give Turkana residents a 20 per cent. share of oil revenues (Lutta, 2017), something Kenyatta seems opposed to. Agreement on revenue allocation is crucial, but delaying the Upstream Bill garners further uncertainty and does little to progress the push for transparency. Only once it is in place will the government's true dedication to transparency be put to the test.

Another example of confusing government reluctance is shown by its lack of co-operation with the PwC consortium charged with compiling a report for the World Bank with the objective of this report being provided to the government to aid its production of a 'Petroleum Sector Master Plan for Kenya' (PwC Consortium, 2015:17). The consortium was made up of PwC, Channoil Consulting Limited and QED Gas Consulting and its report noted that "the development of an effective Oil and Gas Master Plan is hampered by the absence of reliable data as to the likely extent and recoverability of hydrocarbons in Kenya (PwC Consortium, 2015:24)." The consortium called on the government to force IOCs to provide more reliable information on their seismic activities and drilling plans so that pipeline development and further inward investment could progress, but they specifically highlighted the fact that very little information was provided to the consortium by the MoEP or by the NOCK (PwC Consortium, 2015:33).

In an interview for this research the KCSPOG's Charles Wanguhu (2017) gave yet another example of the government lacking the will to promote transparency when noting that although there has been some reform and steps towards reducing opacity, there has been government pushback. He discussed the proposed requirement in the Upstream Bill for parliament to ratify PSCs—rather than just the Cabinet Secretary, as is currently the case—and argued that such a requirement would ensure that the Cabinet Secretary knows that others will review the PSCs and therefore the results of his or her negotiations. Wanguhu (2017) suggested this requirement would reduce potential avenues for corruption as it would be harder to corrupt parliament than just one person. Yet he also said that some had proposed a watered-down provision whereby parliament had the right to approve field development plans (FDPs), but not PSCs. The issue with this, Wanguhu (2017) argued convincingly, is that it will provide far less oversight than if parliament had to approve PSCs: whilst Chapter 4 revealed that the government has signed over 40 PSCs, very few of these will reach the stage where a FDP is required—perhaps only four or five. Moreover, as demonstrated by Chapter 5.1 above, significant expenditure is incurred under each PSC document. Therefore granting parliament scrutiny over all PSCs is a far greater step towards transparency and accountability than only granting it scrutiny over the few FDPs Kenya is likely to see, even if expenditure under the latter is likely to overshadow that under the PSCs. The point is that parliamentary scrutiny is a tool which can help reveal and act as a disincentive to corrupt activity, but the Kenyan government's seeming reluctance to commit to it indicates there are still serious barriers in the way of transparency.

In his interview Wanguhu (2017) suggested that there are two primary obstacles to implementing transparency in Kenya: (i) the government's default to secrecy; and (ii) political issues of bribery, corruption and, ultimately, patronage. Regarding the former, there has been a slight shift since the adoption of Kenya's new constitution and reform *is* happening, however the mentality of government secrecy is hard to change. Wanguhu (2017) cited the rebuffals he and the KCSPOG receive when approaching IOCs to release their PSCs and the standard justification that they will not do so without government permission. The government's fall-back on secrecy is traditional and embedded, and according to Wanguhu (2017) it is a bipartisan approach. It is therefore unlikely to change even if the re-run of the election sees Odinga appointed as president. Nevertheless, it is something that could be overcome with great leadership and Wanguhu (2017) believes bribery, corruption and patronage are the bigger issue. He argues that the oil sector is viewed by many in government

as a “cash cow” providing many opportunities for pilfering and that this mind-set is very difficult to challenge. The promotion of effective transparency would raise accountability and would therefore see such opportunities hindered, so the will to embrace such promotion is understandably lacking.

5.2.1.2 *Capacity Constraints*

Nevertheless, government will is not the only barrier in the way of transparency. Kenya’s oil sector is still very young and undeveloped. The proposed reforms and changes discussed in Chapters 4.2 and 4.3 are a step in the right direction, but it is the case that capacity concerns are an issue. It remains to be seen how transparency initiatives, which require a significant amount of manpower and time, can be implemented. For example, maintaining publicly-available records of PSCs, corporate ownership structures and block operational activities as well as revenue streams is incredibly onerous, not to mention complicated. It requires well-trained and experienced staff members, all of whom communicate clearly and effectively with one another. Such structures are yet to be truly tested in Kenya and the pressures on these structures will be even greater in light of decentralisation. Not only could decentralisation magnify regional disparities and ethnic divisions, as well as decentralising corruption (see Chapter 3.2), but there are serious questions over whether local, county governments will have the capacity to handle the demands of a burgeoning oil sector. Moreover, progress to date (most notably in respect of revenue allocation) has suggested that further disparity between central and localised government in terms of practical responsibilities and policy is likely. Even if the will for further transparency and accountability is present, there are therefore numerous capacity issues which will need to be addressed before effectiveness is achieved.

5.2.1.3 *Summary*

In sum, there are two key barriers from the Kenyan government’s perspective to implementing transparency and to it being effective: sufficient will and sufficient capacity. The youthfulness of Kenya’s oil sector is somewhat of a double-edged sword with regard to the latter. Although currently underdeveloped and untested, government capacity can be shaped and improved and Kenya has the advantage of being able to observe how other states, including its neighbour Uganda, have expanded their capacity and to learn lessons from this.

There is also scope for pressure to be exerted by civil society, IOCs and the international community in order to push for a greater capacity that will allow transparency initiatives to take hold. In essence, capacity can be built and it is the lack of political will to embrace transparency that poses a more considerable test to Kenya's adoption of effective transparency and, in turn, accountability. As shown by IOC reluctance to release PSCs without government consent, the government is *the* crucial player in any push for transparency. It has to lead the way and create an environment which is receptive to such a push and which enables effectiveness through appropriate accountability mechanisms. As Hicks (2015:2017) concluded following her study of the oil sectors in Ghana, Chad, Niger, Tanzania, Mozambique, Uganda and Kenya, the government's stance is critical:

what has been abundantly clear...is that it is ultimately governments that decide how far it is in their interests to implement the many transparency measures profiled in this book. Civil society—campaign groups, journalists, ordinary people and opposition voices—has an important role to play, but if leaders decide against a step on whatever grounds, protest is often powerless.

5.2.2 Civil Society and the Public

As discussed in Chapter 4.2.3, numerous civil society organisations are active in the Kenyan oil sector and many of these are involved in the push for greater transparency: these include Transparency International, Oxfam and the KCSPOG. Primarily acting in the interests of the Kenyan population, it is important to understand how these organisations interact with and best represent such public interest. Whether civil society organisations are thwarted by capacity constraints—that is by their ability and the ability of the public to effectively analyse and interpret the information released through transparency measures—is a relevant question, as is that which asks whether they and the public have the political and social freedoms to act, exert pressure and hold the government and IOCs accountable. Without such freedoms and the requisite capacity there is little chance that transparency initiatives will prove effective, for as concluded in Chapter 2.4, to be successful transparency requires effective accountability.

5.2.2.1 *Freedom of Expression*

In Kenya freedom of expression is protected by Article 33 of the constitution (Republic of Kenya, 2010). However, there are countless incidences which suggest that this freedom is not

always upheld. Perhaps the most well-known is the experience of John Githongo discussed in Chapter 3.5 and exposed to the world in Wrong's (2010) 'It's Our Turn to Eat'. More recently, a number of Kenyan NGOs including the Kenya Human Rights Commission were deregistered, allegedly due to their intention to challenge Kenyatta's election victory in August (Cerono & Mwere, 2017). Whilst this suggests that civil society organisations and their representatives may not feel that they have full freedom to operate, the reality is not as clear-cut. In his interview for this research Wanguhu (2017) said that he currently feels comfortable and free to conduct activities for the KCSPOG—whether with government representatives or the media—but that the Kenyan government's action against these NGOs is a warning to other organisations working in the sector: "In effect it is a threat that if we can close them we can close you. While we may feel free to conduct activities now the freedom is not unlimited or indefinite. The basic premise is that we fall foul of the powers that be then we are also a target." It therefore appears that most civil society organisations operate on a day-to-day basis with relative freedom in Kenya, but that there is an underlying threat that this may not always be the case.

It is also difficult to ascertain whether the necessary freedoms are afforded to individuals who are not high-profile, who are not attached to registered civil society organisations or international NGOs or who are members of the press. Freedom House (2017) declares Kenya as only 'partly free' and concludes that the press is not fully-free, with scores for political and civil liberties also poor. In line with the discussion in Chapter 3, it concludes that Kenya's "political rights and civil liberties are seriously undermined by pervasive corruption and cronyism, police brutality, and ethnic rivalries that are exploited by political leaders (Freedom House, 2017)." In a pre-election study earlier this year, Human Rights Watch (2017) also recorded many threats to free expression and it surmised that these had increased since Kenyatta came to power in 2013. Its findings suggest that the media is particularly at risk from censorship: "The government has attempted to obstruct critical journalists with legal, administrative, and informal measures, including threats, intimidation, harassment, online and phone surveillance, and in some cases, physical assaults (Human Rights Watch, 2017)." Whether these restrictions are applicable to expressions relating specifically to Kenya's oil sector is hard to determine given the very nature of the censorship, however any push for transparency in a state which suffers such censorship is likely to be stunted.

In his interview Wanguhu (2017) also explained that the KCSPOG's activities are often restricted in their scope simply by the lack of information that is available to it (Wanguhu, 2017). He gave the example of having to use the PSC from Block 10BA in a recent analysis of projected revenues from Kenyan blocks rather than the PSC for Tullow's Block 10BB as the latter PSC is not publicly available. Given that Block 10BB is where commercial production is due to start, access to the specific information for this block is critical for any projected revenue analysis; Block 10BB is simply an adjacent block and in Wanguhu's (2017) opinion it is difficult to overstate the importance of having access to all PSCs in order to permit civil society organisations to conduct an accurate and meaningful analysis. Indeed, the reality of the oil sector is that PSCs are heavily negotiated, commercial documents and access to a model PSC or one for another block is far from comparable with having access to the final, signed PSCs under analysis. It further ties in with the theory discussed in Chapter 2.5.3 whereby the form of information disclosed should be uniform. In this instance, all IOCs should ideally be required to release the same information in the form of their PSCs. This lack of contract transparency has pushed the KCSPOG to running its new 'Hidden Contracts' campaign (KCSPOG, 2017) to increase pressure on the government and IOCs to release the PSCs. However, Wanguhu (2017) also mentioned that the KCSPOG is considering tackling the issue through legal means to try and force the release of contracts. It thus seems that although civil society organisations do not suffer from a lack of freedom to express views, they are ironically being hampered in their pursuit of further transparency by the current opacity of the sector.

5.2.2.2 Capacity for Analysis and Interpretation

Civil society organisations can be granted all the required freedoms to disseminate information and exert pressure for accountability, but effective transparency requires a civil society—and public—that can correctly and meaningfully interpret and analyse the information it receives. As noted in Chapter 2.1.1, the complexity of the oil sector lends itself to creating an environment where bribery and corruption can thrive. Breaking down the barriers caused by this complexity can thus help to achieve accountability: the greater the capacity for understanding and analysis, the less likely it is that corrupt acts can be hidden behind the veil of complexity.

Kenya's active civil society organisations are well-organised, well-established and extremely capable at producing and disseminating clear and meaningful briefs on aspects of the oil sector. This is demonstrated by the number of excellent, detailed and accessible publications they produce, most noteworthy of which are those produced by the KCSPOG and its partners. For more day-to-day information, Oil News Kenya has a regularly-updated website and Twitter feed which permit easy and simple public access to sector developments (Oil News Kenya, 2017; Twitter, 2017). However, the ability of the public to access, interpret and understand the information produced is another matter. Kenya's adult literacy rate for the years 2008-2012 was 72.2 per cent. (UNICEF, 2017), which is relatively high compared to the rate in many of its neighbouring states. Nevertheless, understanding the complexities of the oil sector is likely to be a significant challenge for most of the population. To the untrained or inexperienced eye, the meanings of terms such as 'cost recovery', 'recoverable reserves', 'participation interests' and 'relinquishment' that litter oil contracts are almost indecipherable and this heightens the pressure on civil society organisations to present and distribute released information in an accessible and understandable format. The KCSPOG for one is aware of such responsibility, and in his interview Wanguhu (2017) cited the example of explaining the complexities of cost recovery to the public: whilst a release of PSCs or IOC expenditure and payment details might suggest that an IOC is spending a certain amount of money in Kenya, Wanguhu noted the importance of explaining to the public that this amount is significantly reduced by the operation of cost recovery mechanisms. Once again this demonstrates the need to ensure that the public has access to information, but also that the information must be accurate. Civil society organisations thus play a fundamental role in interpreting, analysing and disseminating information and, as Wanguhu (2017) notes, it is these actions that 'start the conversations' which in turn can help push for accountability.

Communication with local communities, particularly where upstream activity is conducted, is also crucial. Preventing a disconnect between the provision of information and its use is necessary to ensure public expectations are managed accurately and that they are realistic. For example, in their recent study Johannes, Zulu and Kalipeni (2014:161) examined the potential impact of the discovery of oil in Turkana and warned that their interviews with local residents

revealed a predominant local fear that the oil discovery would worsen their social and economic marginalisation. Emerging evidence, including exclusion of local communities in oil-related decision-making, land grabbing by outsiders at the expense of locals, corruption, and incipient interethnic conflicts over discovered oil-

field territories in Turkana County indicates increased vulnerabilities, risks, and perverse opportunities which suggest a high likelihood that oil will exacerbate interethnic conflicts in an already volatile region and even result in full-blown violent conflicts between the already marginalised Turkana and the government, national, and foreign investors such as Tullow Oil, unless effective preventive and corrective actions are taken early.

Transparency can undoubtedly help to ease such a disconnect, provided the correct information is provided to locals in a form they can understand and query. A prime example is the expectation of Tullow providing locals in Turkana with jobs. As Johannes *et al.* (2014:153) note, this expectation is justifiable but “overpromising and under-delivering is a major risk that could lead to more disaffection with the oil industry among the Turkana.” Their interviews “revealed that several Turkana residents had already been promised high level positions in local Tullow Oil operations, only to be offered menial jobs, including as road marshals—positions which paid less than 500 Kenyan shillings (US\$6) per day (Johannes *et al.*, 2014:153).” Local frustrations have emerged, with local media reporting in June that various Tullow assets, including wells, were seized or blocked by activists (Lewis, 2017). In another specific study on the impact of oil discoveries in Turkana, Agade (2014:504) concludes that expectations must be realistically managed and that efforts to date by various actors, including civil society, have helped to improve basic understanding. Both Agade (2014:511) and Johannes *et al.* (2014:161) ultimately warn that the need for effective communication and transparency is exacerbated by the heightened risk of conflict in the county. In order to minimise this risk it is thus critical that locals have the capacity to both access and understand information provided to them, yet in a region where poverty dominates and educational opportunities are limited, this is a significant challenge.

5.2.2.3 *Summary*

There is an important recognition in Kenya that the population must be able to understand the oil sector in order to engage in the conversation about its future, something that is fundamental if improved transparency is to have a positive effect on the sector and help to avoid—or lessen—the impact of the resource curse. Similar to Collier’s advocacy of having an impartial ‘broker’ in charge of natural resource revenues (see Chapter 2.4.2), an active and capable civil society is necessary to act as the ‘middle man’. This will help to ensure that the correct information is being released and that it is being analysed, used and distributed effectively in order to prevent negative effects arising from disinformation, including in

particular the management of local community expectation in terms of jobs, revenues and opportunities. In sum, Kenyan civil society organisations have a critical role to play in both the push for further transparency in the oil sector and for ensuring its effectiveness through accountability. Whilst these organisations are active and, seemingly, are at present relatively unhindered in their activities concerning the oil sector, they are nonetheless indirectly hindered by the current lack of transparency and are therefore unable to be as effective as they wish in pushing for accountability. Somewhat of a ‘chicken and egg’ situation, this would suggest that pressure also needs to be exerted from other areas and that civil society must act in concert with the government, the international community and IOCs.

5.2.3 IOCs

IOCs operating in Kenya undoubtedly play a key role in the push for greater transparency. Not only do they produce or have access to the bulk of the information that proponents of transparency wish to see made public (including PSCs, payments to government, expenditure details, reserve details and operational information), they have a unique position in that they can exert significant pressure on the government. Without the IOCs, the industry would grind to a halt: their expertise and financial reserves are critical for the operation of the sector. This is particularly the case for the major IOCs operating in Kenya who are household names and some of the largest, most powerful companies in the world. Nonetheless, promising rhetoric which hints at a desire to increase transparency has thus far seen little gain in reality and IOCs are consistently hiding behind their concerns for commercial confidentiality and fears of government reproach.

5.2.3.1 *Promising Rhetoric, Contradictory Actions*

As operator of the first block in Kenya to have discovered commercial quantities of crude, Tullow has a relatively unique position in the Kenyan oil sector and is therefore in a position of influence. It also has a reputation as being a company at the forefront of pushes for further transparency: for example, it was the first oil company to disclose its payments to governments across the world with project-by-project detail (albeit largely in aggregated country-by-country format) (Burgis, 2014). It bolsters this reputation with its own statements: “At Tullow, we are committed to being transparent about our payments to government as we believe this enables communities, citizens and governments to have a constructive debate on

the sustainable management of oil revenues (Tullow, 2017d).” It is true that Tullow has released a significant amount of information about its payments to the Kenyan government, as discussed in Chapter 5.1.3. However, it remains the case that Tullow has failed to make its Kenyan PSCs publicly-available, something it has done for many of its PSCs from other jurisdictions (including in Uganda).

Canadian-registered Africa Oil is a joint venture partner of Tullow’s in Blocks 10BB and 13T where commercial discoveries have been made in Kenya. Like Tullow, it has also identified itself as an advocate of transparency and has expressed a desire to release its PSCs. However, despite its listing on the Toronto Stock Exchange and the precedent set by other Canadian companies, it has failed to do so. Research by the KCSPOG (2016:6) highlighted this disjuncture:

disclosure obligations there [in Canada] require companies to provide to their investors all contracts “so significant that the reporting issuer’s business depends on the continuance of the contract,” though crucially there are some exemptions. Canadian oil companies routinely disclose production sharing contracts as a result of this provision, but Africa Oil has not.

Furthermore, the KCSPOG suggest that Africa Oil is failing to adhere to International Finance Corporation (IFC) requirements. According to the KCSPOG (2016:6), in 2015 Africa Oil received US\$50 million from the IFC “specifically to support the further investment in Blocks 10BB and 13T in Kenya. As a matter of policy, the IFC calls on their clients to disclose ‘the terms and conditions agreed with host governments under which a resource is being developed’.” Yet these PSCs remain hidden from public view. Interestingly, in his interview Wanguhu (2017) mentioned a surprising ‘error’ on the IFC’s website: its ‘contract disclosure’ page states that “IFC Extractive Industry clients commit to being transparent about the terms and conditions agreed with host governments under which a resource is being developed” and goes on to provide a list detailing its clients and containing hyper-links to the relevant ‘terms and conditions’ (IFC, 2017). However, whilst some of the other hyper-links lead to investment agreements or operational details about the respective client’s assets, the Africa Oil link leads simply to the draft Upstream Bill (IFC, 2017). This permits two, alternative assumptions: firstly, Africa Oil itself does not want to release the PSCs. This would seem plausible for, if it really wanted to release the PSC, Africa Oil could justifiably use the reasoning that the IFC requires—and its stock exchange rules recommend—PSC release when asking the government for consent to disclose the document. The second,

alternative assumption is that the government is reluctant to consent to the release of the PSC and is refusing to be influenced by IFC or foreign pressure. Either way, what is clear is that PSC release in Kenya is still a contentious issue that needs to be resolved to allow transparency initiatives to progress.

5.2.3.2 *Consent and Commercial Confidentiality*

Practically, it is very difficult to definitively ascertain why IOCs like Africa Oil and Tullow have not released their PSCs in Kenya, nor why ownership, operational and revenue transparency is still hindered. As discussed in Chapter 5.2.1, it could be because the government is simply opposed to such steps towards greater transparency. IOCs are unlikely to act if their actions are likely to incur the wrath of the government—the case of BP in Angola, as detailed in Chapter 2.5.1, is a reminder that the government is ultimately in control of the IOCs' operations and could, if it so wished, significantly hamper or restrict them. This desire to avoid going against the government's wishes does appear to be relevant to Kenya as Wanguhu (2017) noted that the common response he receives from IOCs when asking them to release information or PSCs is that the government needs to and has not given its consent. Ultimately, most IOCs will be acutely aware that it is not worth 'rocking the boat' and risking their operations unless they have a lot to lose (or gain) from doing so. Perhaps the reality is that pushing for greater transparency is not a risk they are willing to take.

This is not to say that all IOCs are happy for information regarding their operations or assets to be made publicly-available. As the theory explored in Chapter 2.3 suggests, many opponents of transparency initiatives cite confidentiality of commercially sensitive information as a justifiable explanation for why certain information must remain undisclosed. In an interview for this research, a London-based partner at an international law firm who has over 15 years' experience advising clients on oil and gas matters noted the importance of confidentiality to many IOCs:

Activities and, in particular, the content of contracts that corporate entities have with counterparties and governments, include commercially sensitive material. This includes the nature of operations that companies agree to carry out, the nature of production and other bonuses that they agree to pay, and profit splits. Transparency over these items could have a negative impact on a company's ability to be competitive. It could also have a negative impact for the state as it will be under

pressure from international investors to always offer the best terms that have been disclosed (Interviewee (anonymous), 2017).

He surmised that whilst transparency will undoubtedly help to decrease the incidence of bribery and corruption, “this needs to be balanced against the need for companies to be able to attract investment and to maintain a competitive advantage (Interviewee (anonymous), 2017).”

In addition, he suggested that there is a substantial internal administrative burden involved in ensuring compliance with transparency measures and that this results in additional costs and therefore lower profits for IOCs (Interviewee (anonymous), 2017). Indeed, he argued that this has a great impact on smaller companies as it can reduce their ability to attract much-needed investment (Interviewee (anonymous), 2017). There is a commonly-held industry view that confidentiality clauses in contracts are therefore legally critical to protect commercial information and thus to protect the IOCs, particularly those operating in frontier jurisdictions—like Kenya—or those who are taking significant commercial risks:

Companies (and states) are unlikely to be prepared for their commercial information to be disclosed to competitors. Absence of that confidentiality may impact investment decisions. This is particularly the case in less developed jurisdictions where a sector, such as oil and gas, is in its infancy—early-movers are likely to seek greater concessions from the state [and these concessions] should be rightfully resisted by the state for investors that move once the industry is flourishing (Interviewee (anonymous), 2017).

This supports the theory raised in Chapter 2.3.4 that IOCs are particularly concerned with triggering a ‘race to the bottom’ by releasing confidential information. Given that Kenya is considered a frontier and relatively high-risk jurisdiction due to its limited number of commercial discoveries and lack of production, it is likely that many of the IOCs operating there are of the view that their commercial terms should be left as a matter for bilateral negotiation between themselves and the government.

Further, the majority of the IOCs operating in Kenya are unlikely to be considered ‘household names’ in many other states across the world; most of them are smaller, independent IOCs (see Table 4.3 for a summary of the IOCs currently operating in Kenya). For example, the most well-recognised names would likely be Total S.A. and BG Group, as well as perhaps Eni S.p.A., Anadarko Petroleum Corporation and Tullow. The point is that there is a theory (see Chapter 2.5.1) to suggest smaller, less well-known IOCs are more prone

to opacity than those which have a greater reputational risk due to their household branding: there is less pressure for them to push for transparency as there is less of a commercial need to do so. Additionally, in his interview the legal partner cast doubt on the validity of the theories discussed in Chapter 2.5.1 which maintain that a lack of transparency in a jurisdiction hampers inwards investment: “Investors seek certainty. Good governance, democratic rule and accountability are all matters that investors consider, but if a jurisdiction can provide a stable investment environment and access to hydrocarbons, then most will invest, even in the absence of those things (Interviewee (anonymous), 2017).”

Nevertheless, these barriers can be overcome. There are benefits to IOCs who operate in a transparent manner and in a transparent jurisdiction. Not only does it provide comfort to investors in relation to their own compliance obligations, but it “may serve to simplify dealings with ministries and other state entities in some jurisdictions if there is a developed ‘template’ and precedent bank,” particularly as “many projects in developing nations are slowed due to the inexperience of the government employees involved (Interviewee (anonymous), 2017).” If a majority of the IOCs operating in Kenya were to reach a consensus and push for greater transparency, the rest would be made to follow. This is not beyond the realms of possibility: Tullow is a major proponent of increasing transparency and is the key IOC in Kenya, thus putting it in a natural leadership position. Given that the vast majority of the IOCs in Kenya are registered (or have parent companies registered) in western jurisdictions as opposed to the more secrecy-prone jurisdictions of China, India and Russia, there is the potential for a concerted effort to be made from the IOC perspective to pressure the government into converting its rhetorical support for transparency into practical support.

5.2.3.3 *Summary*

Chapter 5.1 revealed that the Kenyan oil sector is relatively opaque, with IOCs largely responsible for what information has, to date, been made publicly-available. Although these IOCs have less of a role to play in ensuring transparency could lead to effective accountability, they do have a key role to play in the initial implementation of transparency initiatives and norms in the sector. However, their ability to push for further transparency is currently constrained by the will of the Kenyan government. Whilst fears over competition and a lack of pressure exerted by reputational concerns might cause some IOCs to be disinclined to release commercial information, government requirements and precedent could

force this to happen. With support from key players like Tullow and Africa Oil, IOCs supporting increased transparency do have the potential to push the government into action. A change in incentives is required. The recent takeover of Maersk Oil's Kenyan assets by Total S.A. will cement the latter as a major player in the Kenyan oil sector and therefore offers promise that it could help pressure the government to push for transparency, however this is simply speculation. Ultimately, it remains the case that IOCs will 'pick their battles' with the government and whether transparency becomes the focus of one of these battles remains to be seen.

5.2.4 The International Community

A final set of barriers stand in the way of the implementation of effective transparency and accountability measures in Kenya: the inherent weakness of current international initiatives such as the EITI, PWYP and the NRGI. The weaknesses of these initiatives, including their voluntary nature and the lack of sanctions available for non-compliance, were discussed in Chapter 2.5. These are, however, shortcomings in the initiatives more generally and they are not specific to the case of Kenya. Indeed, the most relevant point is that Kenya appears to be paying them little heed and their impact on the Kenyan oil sector is, consequently, limited. Wanguhu (2017) confirmed this in his interview and stated that there is little support in government for the EITI, despite Kenyatta's public statements to the contrary and the contents of the current Medium Term Plan. Unless and until the nature of international initiatives changes such that it puts significant pressure on and incentivises all states to comply, there is little chance that they will greatly impact on Kenya's oil sector.

That said, where the international community can have a great impact is in the form of foreign laws and regulations which capture the activities of IOCs with assets in Kenya. For example, in Chapter 4.2.4 and Chapter 4.4 it was explained that foreign stock exchange and regulatory rules can require that listed entities and their subsidiaries comply with certain disclosure requirements, and it is requirements such as these that are responsible for the public availability of the seven Kenyan PSCs analysed in Chapter 5.1. Foreign legislation undoubtedly also has an impact, with the legal partner stating the following in his interview:

The promulgation of the [United Kingdom's] Bribery Act [2010], and the increasing preparedness of the DOJ [United States Department of Justice] to prosecute or investigate companies with even a limited nexus to the United States under the FCPA [Foreign Corrupt Practices Act of 1977], based on activities undertaken by companies

internationally has certainly had an impact over the past 5-10 years. My experience is that most oil and gas companies now take this form of compliance incredibly seriously and have put in place training and procedures to minimise bribery and corruption risks. Many now engage one or more compliance lawyers/officers to manage this part of the company's business (Interviewee (anonymous), 2017).

In essence, these foreign requirements and international initiatives can, cumulatively, help to pressure the Kenyan government and IOCs to embrace greater transparency. As Wanguhu (2017) succinctly notes, they are additional tools that can assist in the push for transparency. But not only can these tools help to see greater transparency measures put in place, they can also help to make non-compliance taboo and they can help ensure transparency is effective by promoting accountability.

5.3 Chapter Summary

This chapter has shown that Kenya's oil sector is still characterised by opacity despite progress in the form of the new constitution, the proposed Upstream Bill, the Petroleum Policy and positive rhetoric from key players including Tullow, Africa Oil and Kenyatta himself. Amongst other issues, access to PSCs is limited to those released due to foreign requirements, operational information is limited to that released by the IOCs, payments to the government are largely hidden and it is almost impossible to accurately determine the identity of block owners. The first step in achieving effective transparency in the Kenyan oil sector is therefore to see an increase in transparency itself, and to do this the government, civil society and IOCs must work together whilst adhering to pressures from the international community.

The irony is that each of the actors who could help implement transparency measures in Kenya can also be responsible for the failure of such measures, either through a lack of will or through a lack of influence. It is fundamental that all of the actors work together with the same aim, but the key issue is the will and the capacity of the government. Even if IOCs succumb to pressure from civil society and the international community and thus wish to improve their transparency and that of the sector as a whole, it is highly unlikely they will take the practical steps required without the consent of the government. In this regard, perhaps the biggest barrier facing transparency is therefore that Kenya's political culture traditionally lends itself to secrecy. With the prevalence of corruption, bribery and patronage in the political system it will be incredibly difficult for advocates of transparency to

incentivise those involved in that system to squander what is undoubtedly a new opportunity to profit.

What is more, even if opacity is reduced and transparency measures are implemented, there is no guarantee that this transparency will be effective in reducing the effects of the resource curse. To be effective there must be accountability, and the same barriers standing in the way of implementing transparency can also severely inhibit its effectiveness through blocking accountability. Again, this is most notable in the form of government will. Nevertheless, it remains the case that Kenya is at a critical juncture. As Wanguhu (2017) concluded his interview he made an important point: Kenya must get things right now as it is not Nigeria or Angola—it does not have the scale of reserves that these states have and it is therefore restricted in its opportunity by the relatively short time frame it has to develop the reserves it does have. Kenyans must be given the opportunity to access relevant information, to analyse it and to synthesise it in order that the dialogue can begin amongst the population as to how best Kenya might develop its limited resources in a proper and cost-effective way.

Chapter 6

CONCLUSION

6.1 Summary of Findings

With the aim of determining how best Kenya, a state with newly-discovered commercial quantities of oil, might best utilise its natural resources for sustained economic and human development, this study has examined a number of strands of resource curse theory. It has in particular focused on political aspects of the curse, including the prevalence of bribery, corruption and patronage in resource-rich states. It has further considered the theories which suggest that good governance—specifically increased transparency and accountability—can help a state to reduce the impact of these political effects of the curse by changing incentives and removing opportunity for corrupt actions. Following an exploration of Kenyan political culture and a summary of the formal structure of its oil sector, these theories were then applied to the case of Kenya. A number of significant findings were made.

Firstly, this study has demonstrated that transparency in Kenya's oil sector is currently very limited and that the reality does not match the rhetoric. Despite the government and certain IOCs outwardly proclaiming support for breaking down the opacity of the sector's operations, much of the sector is still shrouded in secrecy. Furthermore, what transparency there is has largely resulted from external, and not Kenyan, requirements. A second key finding is that there is therefore scope for further transparency initiatives to take hold. In addition to the rhetoric, numerous reforms have been put in place and there are well-developed plans in the form of the Upstream Bill and Petroleum Policy to restructure the sector for the better. Nevertheless, the third key finding suggests that there are substantial challenges to be overcome before the sector is likely to benefit from greater transparency.

This third—and perhaps most important—finding is that for transparency to be effective it needs to be implemented correctly and supported by accountability, and that ultimately success is dependent on the will and incentives of the actors involved. This study identified four key actors as having the greatest formal influence and control over the implementation and effectiveness of transparency and accountability measures in Kenya's oil sector: the government, civil society (including the Kenyan people), IOCs and the international community. Whilst it is true that each of these actors brings something unique to the table

and simultaneously has to work in concert with the others, it was found that the government is the party with the greatest influence. Its support and formal promotion of transparency initiatives paves the way for effective accountability. Civil society and international pressures certainly have an impact and are largely responsible for initiating and maintaining the conversation, yet without the government's approval there is likely to be little traction. IOCs do have access to much of the information these initiatives seek to release, but they are unlikely to act in defiance of the government even if they do wish to release information. Indeed, if the government legislates and sets a precedent for further transparency, even the most reluctant IOC will be forced to comply as domestic, Kenyan requirements will be binding on all IOCs operating in the state. However, on the part of the Kenyan government there seems to be a serious lack of will to push for further transparency and this is largely due to the embedded political culture of secrecy, bribery, corruption and patronage. These informal influences work alongside the formal framework of the oil sector and are a key barrier to the implementation of effective transparency in Kenya.

The rather pessimistic conclusion that can be drawn from these three key findings is that although theoretically it appears transparency might help Kenya to avoid some of the effects of the resource curse, there are too many who stand to lose from its promotion. There is a clear lack of political support and therefore will to embrace transparency initiatives, let alone to permit their effectiveness through accountability. The way transparency can foreseeably help Kenya beat the curse is if it is implemented through formal measures quickly and comprehensively by the government with the support of civil society and IOCs. Only then is there realistic hope that it can increase accountability and discourage bribery, corruption and patronage.

6.2 Contribution of the Research

Although this research has used Kenya as a case study it contributes more generally to wider resource curse literature through its analysis and application of theories relating to good governance, transparency and accountability. But by using the Kenyan case study it adds to a currently sparse body of academic research on Kenya's oil sector and in particular it provides an in-depth look at Kenya's support (or lack of support) for promoting further transparency. In this regard it hopefully stands to complement the work done to date by the KCSPOG and its partners. It has further shown what Kenya stands to achieve if it embraces transparency

and it has also drawn attention to what barriers need to be broken down. Finally, it has revealed that although international pressures are important for creating norms, domestic pressures and constraints are perhaps more important. This would suggest that future research should therefore concentrate on the effectiveness of national transparency initiatives rather than the current academic focus on transnational initiatives such as the EITI and PWYP.

6.3 Limitations of the Research

The scope of this research has been limited by a number of contextual and practical factors. Regarding the former, it is limited in that much of the current legislation of Kenya's oil sector is going through a process of reform. Most notable is the proposed Upstream Bill which remains under consultation and has not yet been enacted. This context has therefore required the analysis herein to be based on existing legislation that is likely to be repealed in the near future, and draft legislation which may yet be tweaked; there is no guarantee as to what shape the legislation—a key element governing transparency requirements—will take. Related to this is the current political context. As noted above, politics and government feature heavily as an influence on transparency initiatives in Kenya, however whilst the tense and uncertain process of re-running the presidential election is ongoing it is particularly difficult to analyse the impact this is having on the oil sector. A further contextual limitation is simply the fact that Kenya has not yet reached commercial oil production: whilst the resource curse's effects can show even before discoveries have been made, the most significant consequences are likely to emerge only once production is underway and more substantial revenues are flowing into Kenya's economy. This study is by its very nature speculative in that it seeks to theorise *how* transparency *might* impact Kenya, however the true effectiveness of any transparency initiatives will only be realised when its oil sector is at a later stage of development.

With regard to practical limiting factors, this study would have benefited from a number of in-country interviews with members of the public (particularly in Turkana County) as they would provide an interesting and valuable perspective on how transparent the sector currently is and how effective further transparency measures might be. Nevertheless, the costs and logistics involved in organising and conducting such interviews were restrictive. These restrictions also prevented interviews with government officials or representatives that would add another important perspective about transparency, particularly given the prominence ascribed to the Kenyan government in this study. That said, perhaps the largest practical

limitation to this study is linked to the sensitivity of its subject matter. Whilst costs and logistics were restrictive, more significant were the difficulties encountered when contacting and receiving feedback from government officials and IOC representatives about participating in the study. Again, further interviews would have broadened the depth of evidentiary analysis in this study.

6.4 Recommendations for Future Study

This research has sought to analyse how transparency initiatives might hinder the effects of the resource curse, and in particular its negative political effects. The scope for further study of such a subject is vast given how many states across the world have significant reserves of natural resources and how varied their levels of adherence to transparency in their natural resource sectors are. However, Kenya was chosen as a case study in part due to the youthfulness of its oil sector: as noted in Chapter 1, this gives the study certain value as Kenya is still shaping its sector and thus has the capacity to be influenced. There is therefore just cause for future research to make Kenya its focus.

A useful analysis would be one that digs deeper into the motivations of IOCs operating in Kenya. More specifically, to gain an insight into whether the current opacity of Kenya's oil sector is caused more by a reluctance on the part of the government or of IOCs, such research could record the commercial views of each of the IOCs in Kenya (obtained by interviews with company insiders) and could use a quantitative analysis to examine how transparent these IOCs are in other jurisdictions. On a related note, it would be informative to conduct research on levels of environmental and local content transparency in Kenya (something that Wanguhu (2017) considers crucial). Although less relevant to studies concentrating on the resource curse, these are vital aspects in the push for greater transparency in the natural resource sector more generally and are often over-looked. A study focusing on how transparent IOCs are with regard to their environmental and local content obligations—and on what these obligations are under Kenyan law—would have great relevance for Kenya.

Of further benefit would be a comparative study examining how Kenya's transparency obligations and progress compares to other jurisdictions. A comparison with Uganda would be especially useful given the fact they are geographical neighbours, they share similar histories, their oil industries are at a similar stage and are relatively undeveloped, and because

a number of the key IOCs involved in these industries (including Tullow) are the same. That said, other states could be equally informative as comparative studies if chosen depending on their stage of production, level of reserves when compared to GDP, political cultures and perceived avoidance of the resource curse.

Nevertheless, there is also scope for somewhat of a ‘sequel’ to this study. Conducting a similar analysis as presented above would be particularly informative upon conclusion of the latest presidential elections and enactment of the new legislation governing upstream activities in Kenya. As noted in Chapter 6.3, this present study has been restricted by its timing as the near-term future of the sector is in relative limbo; things are likely to change over the coming months and years. Revisiting and updating the analysis once current uncertainties have been removed would add an invaluable further perspective on whether Kenya is effectively tackling the threat of the resource curse through the tool of transparency.

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