



Transparency and Accountability in Kenya's Extractives Sector: State of Play

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STATE OF PLAY ON TRANSPARENCY AND ACCOUNTABILITY IN KENYA

Our last chapter introduced our readers to the laws in Kenya that govern transparency and accountability. It is however important to note that these laws, albeit vast and largely good, are of no use without proper channels of enforcement, implementation and participation. This chapter provides an overview of Kenya's standing with Transparency and Accountability within the extractives sector. It looks at the challenges that the country faces towards achieving transparency and accountability and provides recommendations for better openness and accountability within the extractives sector.

Introduction

According to Article 62 (3) of the Constitution, all mineral resources constitute public land and are held by the state in trust for the people of Kenya. The state is therefore under obligation to utilize these resources for the benefit of Kenyans. In order for the state to fulfill its obligations, there is need to ensure that people have access to information concerning extractives including pricings, sales, negotiations, contracts and parties involved in the extraction and sale of natural resources.

Because natural resources are non-renewable, their exploitation and use should be sustainable for the social and economic needs of the state (Republic of Uganda, 2008). If such use is not maintained, a country with potential to benefit from its mineral resources runs the risk of suffering the dreaded "[Resource Curse](#)" and "[Dutch disease](#)". This is mostly prevalent in many African resource rich states that are plagued by corruption.

Unfortunately, Kenya has not been spared and is marred by corruption and mismanagement of public resources. This is especially true in as far as transparency is concerned. Kenya ranked 137th out of 180 states in the Transparency International Corruption Perceptions Index (CPI, 2019). It is however important to note that Kenya improved its ranking on the CPI up from 2018 where it took the 144th position and the stakeholders should be encouraged to keep going for a better ranking in the CPI 2020.

Due to the nature of ownership of natural resources in Kenya, that they are held in trust for the people of Kenya by the government, the people of Kenya, who are essentially owners and beneficiaries of the resource have a right to know the bidding process, licensing and exploration, companies involved, value of sales and revenues (UN Gen. Ass. Resolution, 1803). Where there is corruption and no transparency, foreign corporations see these as political risks as transactional costs are increased thereby deterring investment (Af Faruque, 2006).

Many times, lack of transparency in resource rich countries has also inevitably led to conflict in those areas. Conflict is evident in Kenya's resource rich areas like Turkana where oil deposits were discovered. Turkana is believed to have the highest level of poverty in Kenya (UNDP, 2018) and the lack of trust among local communities in the region, livestock rustling, illiteracy and harsh climate have resulted in cross border conflict and people from other communities have had to be employed in oil extraction works like drilling (Cordaid, 2015).

Positive Outlook

Kenya under its Vision 2030 recognizes that in an open democratic society, the people, civil society, parliament and a vigilant press are the ultimate defense against abuse of office. This is the right step in the right direction by the government towards promoting transparency and accountability. Through

encouraging public access to information and data, and by giving people and the press power to have a say concerning abuse of office, the advantages of modern technology and social media reporting come into play and many would be corrupt officials can be brought to book with legitimate evidence.

In addition, the Ministry of Mining made a move to co-operate with the [Regional Centre for Mapping of Resources for Development \(RCMRD\)](#) on mapping of resources towards ensuring that benefits from natural resources are not subject to social exclusion or conflict (Gap Analysis, 2016).

The Natural Resources (Classes of Transactions Subject to Ratification) Act, 2016 was meant to give effect to Article 71 of the Constitution of Kenya, 2010 and for connected purposes. In deciding whether to ratify an agreement or not, the applicable government policy, recommendations of the relevant regulatory agency and comments received from the county government within whose area of jurisdiction the natural resource that is the subject of the transaction is located, adequacy of stakeholder consultation, the extent to which the agreement struck a fair balance between the interests of the beneficiary and the benefits to the country arising from the agreement, benefits which the local community is likely to enjoy from the transaction and whether, in granting the concession or right, the applicable law has been complied with, must all be considered (Muigua, 2019).

The country also has in place the Kenya Sovereign Wealth Fund Bill, 2019 (“SWFB 2019”), which seeks to establish a National Sovereign Wealth Fund to undertake diversified portfolio of medium and long term local and foreign investment to build a savings base for purposes of national development. The Fund is meant to insulate expenditure under the budget estimates of the national government from fluctuations in resource revenues; provide finance for infrastructure development priorities to foster strong and inclusive growth and development; and build a savings base for future generations when minerals and petroleum resources are exhausted (Clause 5, SWFB 2019). The Fund will go a long way in ensuring natural resource benefits sharing as long as all benefits accrued are published and saved in the fund to maximize sharing.

The country generally has in place robust laws and regulations that promote access to information and transparency within the extractives industry.

Areas for improvement

Having clearly set out laws and policies is the start of ensuring and promoting transparency and accountability. We have already noted in the first chapter of this series that Kenya has a well laid out set of laws and policies towards promoting transparency and accountability in the extractives sector. However, these laws and policies need to be revamped to clearly lay out the extent of transparency and accountability required as well as repercussions for non-compliance.

Under the Petroleum Act 2019 for example, the contracts, permits, concessions and licenses issued thereunder must be made public and a provision within the Act to that effect must be included, and any perpetrator brought to book for failure to comply.

The Ministry has formulated, pursuant to section 119 of the Petroleum Act, a framework for reporting, transparency and accountability in the upstream petroleum sector, but a similar framework does not exist for the mining sector. The fact that this framework is not binding, necessitates the enactment of a statute that deals with transparency and accountability in extractives. Kenya could take a cue from Tanzania which has in place the Tanzania Extractive Industries (Transparency and Accountability) Act, 2015. The Act was enacted to ensure transparency and accountability within the country’s extractives sector. There is need for

the Kenyan government to create a statute that strictly deals with transparency and in line with the provisions of Article 35 of the Constitution. This statute should cover beneficial ownership disclosure, transparency in contracting, bidding, licensing, permits and revenue to the effect that citizens are able to establish revenue prices because there is a standard marker for prices of extractives and or already published contracts containing what was bargained. Once these contracts are published, civil society and the public privy to such information then have a duty to monitor the contents of the contracts against actions of parties and demand performance where needed.

Contract secrecy is one of the major causes of abuse of office as public officials are not held to account for the secret deals made that affect the general growth of the country. Unfortunately, failed economies are usually a result of bad governance and mismanagement of natural resources (Wiebelt, 2011). Where transparency and accountability truly exist, there should be proper audits by the government of all companies intending to invest in the extractives sector of the country as well as self-audits by the government. Audits ensure that the country gets fair share of benefits from the resources. It has been reported that Tullow Oil Kenya has so far incurred Kshs. 204 billion in exploration costs, an amount the company wishes to recover as production starts (Okoth, 2020). It is thus prudent that government ensures that such monies declared by companies are a true reflection of what the company has spent. This can be through publishing cost breakdowns of the companies, contracts between governments and the companies, payments made, royalties, fees and other taxes.

There have been civil society organizations pushing for accountability including revenue watch and Publish What You Pay. The International Monetary Fund (IMF) and the World Bank have also been leading proponents for contract transparency (IMF, 2007). Contract transparency requires that governments publish all contracts made with oil companies spelling out all terms and conditions agreed upon, extraction rates and revenues. This is a great move, however, majority of contracts within Kenya hold confidentiality clauses that are against releasing sensitive data to third parties which creates a major road block against transparency and accountability.

The Natural Resources (Classes of Transactions Subject to Ratification) Act, 2016 provides commendable provisions towards promoting public participation and benefit sharing in natural resources exploitation arrangements, but the law is quiet on the thresholds necessary for such approval and this opens unpleasant doors of political manipulation by powerful groups where exploitation is approved by a few for their own selfish interests. The Act can only be fully put to use if the government institutions responsible for ensuring compliance are fully active (Muigua, 2019).

In as far as EITI is concerned, Nigeria is one of the countries that have subscribed to the initiative and has gone as far as enacting the Nigeria Extractives Industries Transparency Initiative (NEITI) which is governed by the NEITI Act 2007. The Initiative is responsible for enacting legislation that promotes transparency and accountability in declaring revenues and contracts awarded. Ghana has a similar initiative known as the Ghana Extractive Industries Transparency Initiative (GHEITI) through which the country has undertaken tremendous legal and policy reforms to enhance transparency and accountability within the extractives sector at the national and sub-national levels (GHEITI, 2019). By contrast, Norway has managed to promote transparency and accountability by simply following the EITI standard (Norwegian Petroleum, 2019). Norway has achieved this through its strong institutions. This goes to suggest that it is not enough that a resource rich country has extensive legislation for transparency and accountability. Robust systems to monitor and promote compliance must be in place and be active.

The quality of a country's institutions largely determines its resource outcomes. Where institutions are weak, powerful and politically exposed persons tend to manipulate and undermine the institutions to the detriment of the rest of the country (Stevens & Dietsche, 2008). Norway was for example able to avert the resource curse due to its mature political environment. The country has great public institutions with minimal incidences of corruption which aided the growth of the oil industry (Halvor & Others, 2011).

In an effort to implement principles of transparency and accountability, the government has consulted other stakeholders in the development of Kenya's Transparency and Accountability Framework and Action Plan for its petroleum sector.

For a country to harness its extractives resources for uniform development there is need for reformed legal and fiscal frameworks, public financial management systems, revenue allocation, mitigation of negative social and environmental impacts and job security (UNDP, 2012). It is noted that where government structures and institutions governing extraction, processing and management of mineral resource revenues are weak, a country is bound to experience the resource curse (Odote, 2014). Strong institutions promote public sector accountability which mitigates the effects of the resource curse. This could also be through instituting an independent body to enforce transparency and accountability from both the state and extractive companies.

It is also important for the government to ensure that natural resources laws involve different government agencies including taxing authorities and the legislature as these come to deal with the extractives along the value chain (NRGI, 2018). Where there has not been any involvement and or communication concerning transparency, these agencies may negate all progress as officers will still be involved in corruption.

Contract transparency is also important because the documents contain information that can be of great benefit to citizens including producing regions; taxes, royalties and production share, operational and production commitments, health and safety, environmental needs of the country as well as stabilization clauses that can be useful in case of political turmoil (NRGI, 2018). This provides an incentive for government officials and company representatives to operate within the confines of the contract as any discrepancy will be publicly disclosed and there will be no monkey business in the negotiation of the contract by parties (NRGI, 2018).

CONCLUSION

The Extractives Industry is an easy target for corruption and the need for transparency to avert this cannot be stressed enough. Secret contracts cannot be scrutinized and agreements cannot be enforced by those who are not aware of contents. Given that the activities of extractive companies affect the livelihood of those living around the project area and country at large, the issue of transparency and accountability should be given high priority.

Transparency and Accountability also plays a central role in minimizing conflict in resource rich areas as well as managing expectations as people are more aware of what was negotiated, what revenues are expected and what revenues are actually received. Transparency therefore enables governments to get better deals for their resources and provides an incentive for governments and companies to make more durable deals.

As Jonas Moberg (Head of EITI International Secretariat) put it, *“The EITI is not just about transparency. The EITI is also about using the data and the EITI forums to identify reforms, improve the management of assets and otherwise improve governance, and become better at holding governments to account.”* To this end, we do hope that the promise to fight corruption under the Vision 2030 and the Open Government Partnership’s push for Transparency and Accountability will come to fruition for the sake of Kenya’s Extractive Sector.

Look out for our next topic on Extractives and the Environment.

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