TRANSPARENCY AND ACCOUNTABILITY IN THE LEGAL FRAMEWORK GOVERNING THE UPSTREAM HYDROCARBON INDUSTRY IN TANZANIA MAINLAND

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(BLDSHI002)

A thesis submitted in the Department of Public Law University of Cape Town in fulfilment of the requirements for the degree of Doctor of Philosophy

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February 2019

University of Cape Town

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DECLARATION

I, Shirley Baldwin Mushi, hereby declare that the work on which this thesis is based is my original work and that it has not been previously submitted in whole, or in part, for the award of any degree or qualification at any university. All the sources used, referred to or quoted have been duly acknowledged.

Signed by candidate

Signed.....Date.....17th August 2020

ABSTRACT

It is widely believed that the slow socio-economic development of resource rich countries may be curbed by the promotion of transparency and accountability in resource governance. There is a universal consensus among politicians, multilateral institutions, corporations, and civil societies that the 'paradox of plenty' and its associated social ills of corruption, poverty and conflict are mainly due to the lack of transparent and accountable resource governance. Nations have thus adopted policies and legal frameworks on resource governance that seek to codify and implement the principles of transparency and accountability. Even so, transparency and accountability are still far from being in most developing nations. This thesis argues that transparency and accountability may only be realized in practice if their key aspects are duly incorporated in the law.

Using the conceptual foundations on the governance principles of transparency and accountability, the thesis identifies four components that a legal framework ought to incorporate to foster transparency and accountability in practice. First, there has to be clear provisions establishing accountability relationships in the legal framework. Questions on who the actors are, who is to be called to account, who is entitled to hold another to account, and for what could one be held accountable have to be made very clear in the law. Even within the framework of multiple accountability mechanisms clarity of the circumstance the various mechanisms function is key. Equally, transparency relationships have to be clear on the kind and nature of the information to be disclosed, to whom it may be disclosed, at what time and in which manner such information may be disclosed.

Second, the legal framework must provide for suitable accountability implementation mechanisms that give the accountor the required independence and mandate to inquire, render judgement and have the capacity to put its decisions to effect. Third, the legal framework ought to be able to create a well-coordinated web of accountability structures to provide for checks and balances. The legal framework should be able to ensure that actors given authority to fulfil their obligations are able to answer and face vigorous scrutiny and verification processes by independent actors. Lastly, the legal framework has to facilitate access to clear, reliable and complete information by interested parties and the public to promote transparency.

The thesis uses these components to conduct an appraisal of the legal and institutional framework governing hydrocarbons in Tanzania. It establishes whether the governance aspects of transparency and accountability are duly incorporated in the legal framework to ensure their implementation in practice. It concludes that Tanzania's legal framework on hydrocarbons recognizes on paper the value of transparency and accountability, but it largely fails to incorporate them sufficiently in a way that ensures they are fully implemented.

DEDICATION

To My Beloved Parents
Nancy and Baldwin Fanuel Mushi

When the world shut its doors on me, you both opened your arms for me. When I felt defeated, you opened your hearts for me. Thank you for always being there for me.

Thank you for who I become today.

This humble effort is a sign of my gratitude and love for you.

ACKNOWLEDGEMENTS

The completion of this thesis would not be possible without the active and passive support of those surrounding me throughout my journey. I am grateful for the humbling blessing in the opportunity to reflect and express gratitude for their support.

First, at this moment of completion I thank the almighty God for seeing me through My PHD journey. Indeed the will of God will never take you where his grace will not protect you.

I am deeply indebted to my supervisor Prof. Danwood Chirwa at this instance of accomplishment. He has been more than just a supervisor. He has not only patiently guided me throughout my thesis but also went out of his way to make sure I had all the support he could possibly offer for me to complete my thesis. I will forever be greatly indebted. It is my humble prayer that one day I will get the opportunity to show such kindness to others. More importantly, I am a better researcher because of his personal zeal for perfection and persistent conviction. I sincerely thank him for who I am today and will continue learning from him.

I express my sincere thanks to members of the PHD hour group from the Mineral Law Department. As fellow travelers in the PHD Journey, we supported and encouraged each other. It was indeed a blessing to have a team of brilliant minds read and comment on your work. I am grateful for their valuable assistance and time. I also thank Dr. Ngaya Munuo, and Dr. Justice Mavedzenge for their support, encouragement and valuable time. Their input in my work is highly valued and much appreciated.

I extend special thanks to a dear friend Godknows Mudimu. He is undeniably a friend indeed. No words can express my gratitude to him. I also thank the PHD commons friends whom made research quite pleasant. Special thanks goes to Shamilla, Chipo, Simon, Gati, Anne and Wami.

I would also like to extend special thanks to Ms Doris Mwambala and Ms Rene Francke. They were an aunty and a big sister I never had. They always knew the right words of encouragement to comfort me at the darkest of times. I am grateful for their love and time.

Most Importantly, I am highly indebted to my loving family. The completion of this thesis was made possible by their sacrifices and their sheer tenacity in guaranteeing that I stay focused in pursuit of my mission. To my sons Alman, Avi, and Alvan, I thank you for putting up with my absence and I apologies for all the missed birthdays and sports days. To my dearest beloved Alnoor, despite the tough journey we have had you have been and always will be my special gift from God. I am lucky and glad to have shared your world. No amount of words can express my gratitude. I only wish you abundant blessings and may God's grace always be with you. To my parents, I thank you for everything and most importantly, I thank my sweet mother for her endless prayers. Finally, I thank my siblings Vanessa, Yvonne and Fanuel for their love and support. I love you all dearly and I am deeply indebted.

LIST OF ABBREVIATIONS AND ACRONYMS

AU	African Union
ASP	Afro Shiraz Party
AG	Attorney General
AGIP	Azienda Generale Italiana Petroli
BITs	Bilateral Investment Treaties
BP	British Petroleum
CCM	Chama cha Mapinduzi
CSOS	Civil Society Organisations
CHRAGG	Commission for Human rights and Good Governance
CAG	Controller and Auditor General
CSR	Corporate Social Responsibility
EU	European Union
EITI	Extractive Industry Transparency Initiative
GHEITI	Ghana Extractive Industries Transparency Initiative
IPTL	Independent Power Tanzania Limited
ICSID	International Centre for Settlement of Investment Disputes
IMF	International Monetary Fund
MP	Member of Parliament
MIGA	Multilateral Investment Guarantee Agency
MOC	Multinational Oil Companies
NEMC	National Environment Management Council
NOC	National Oil Company
NEITI	Nigeria Extractive Industries Transparency Initiative
OECD	Organisation for Economic Development and Cooperation
OPEC	Organization of the Petroleum Exporting Countries
PURA	Petroleum Upstream Regulatory Authority
The Bureau	Prevention and Combating of Corruption Bureau
PSA	Production Sharing Agreement
PAC	Public Accounts Committee
PIC	Public Investments Committee
PWYP	Publish What You Pay

SES	Sector Environment Section
STAMICO	State Mining Cooperation
SDG	Sustainable Development Goals
TANU	Tanganyika African National Union
TANESCO	Tanzania Electric Supply Company Limited
TAITA	Tanzania Extractive Industries (Transparency and Accountability) Act
TPDC	Tanzania Petroleum Development Corporation
Transparency Committee	Tanzania Extractive Industry Transparency Committee
UNBP-Judiciary	UN Basic Principles on the Independence of the Judiciary
UNGPS	UN Guiding Principles on Business and Human Rights
UN	United Nations
URT	United Republic of Tanzania
USA	United States of America
WTO	World Trade Organization

CHAPTER 1
INTRODUCTION AND BACKGROUND

1.1 THE HYDROCARBON INDUSTRY PROMISE IN TANZANIA

Tanzania has gained a place on the world's hydrocarbons map with the discovery of large quantities of commercially viable gas reserves, estimated to be in the region of 55.08 trillion cubic feet (tcf) of recoverable natural gas.[1] This discovery has raised expectations among all Tanzanians.[2] For the elite and common citizen, rich or poor, Tanzania's oil and gas resource is regarded as the 'ace'. These expectations have also left the nation in anxiety.[3] While some see the industry as promising an end to 'perennial poverty' and aid dependency, others see it as providing an opportunity to 'get rich quickly'. For the local Tanzanian, the predominant wish is to have a share in the benefits ripped from their land.

Much of the debate on the newly discovered hydrocarbons has centred on how to steer the new sector towards realizing the nation's dream of becoming the next big oil and gas producer.[4] To that end, Tanzania has put in place a new legal framework to regulate the industry. These laws were passed in a rush under a 'certificate of urgency'.[5] This accelerated process inured those

[1] Budgetary speech of the Ministry of Energy and Minerals by former minister George Simbachawene in parliament. Parliamentary 20th session /22nd sitting of 6 June 2015 (parliamentary Hansard), available at http://parliament.go.tz/polis/uploads/documents/1446554222-6%20JUNI%202015.pdf, accessed in September 2018 at 20.

[2] A. Ambroz & E. Mushi, 'Great Expectations: Citizens' Views about the Gas Sector', (Sep 2015) (25) *Sauti za Wananchi* 1 at 6.

[3] It is worth noting that the enthusiasm in receiving the gas discovery in Tanzania is a matter of the country's last regime (2005-2015). Currently the hydrocarbon industry is almost history and has been totally ignored by the regime. Focus is now on electricity for industrialization from Stigler's Gorge Dam being built on the Rufiji river.

[4] Speech by his Excellency Jakaya Mrisho Kikwete, former President of the United Republic of Tanzania during launching of the fourth Tanzania deep offshore and north Lake Tanganyika licensing round 25 October 2013, Dar es Salaam, available at http://www.ikulu.go.tz/index.php/media/speech/135, accessed in September 2018.

[5] According to the parliamentary rules and regulations *(Kanuni za Bunge za Kudumu* 2016), a certificate of urgency is a document obtain by government (minister or attorney general) when in need of urgent passing of a bill by bypassing all necessary procedures. The certificate is issued by a permanent committee responsible for addressing issues covered by the tabled bill. K.80 (5) and (6) of *Kanuni za Bunge za Kudumu* 2016.

laws from public scrutiny.[6] It led political opposition leaders – indeed the entire nation –to ask: 'why the rush?' and 'is the legislation appropriate for the industry?' These are the questions that the public is also asking our leaders and legislators.[7] Everyone is asking whether Tanzania's hydrocarbon sector will ultimately be the game changer or become the country's curse.

Tanzania has a history of mining gold, diamond, and tanzanite. The history of poor governance of mining these minerals remains in the minds of Tanzanians.[8] For long, they have witnessed a poorly managed extractive industry that has failed to improve their welfare.[9] The prospect of history repeating itself is a genuine concern, and it is thus understandable that there is heightened public interest in the new discoveries of hydrocarbons. On 23 May 2013, the Mtwara community vehemently opposed the construction of a 532 km natural gas pipeline from Mtwara to Dar es *Salaam*.[10] This was a reminder that Tanzania is also prone to resource-based conflicts if adequate conflict prevention and resolution measures are not in place.

The new legal framework is the subject of investigation in this study. The central concern lies in the governance aspects of the new legal framework, especially the elements of accountability and transparency. The governance questions relating to transparency and accountability are not peculiar to Tanzania. Indeed, they are crucial to any state exploiting natural resources. How Tanzania's hydrocarbon resources are governed will determine whether the country derives

[6] Press statement of 9 July 2015 by the Tanzania Coalition of Civil Societies contesting the move, available at http://business-humanrights.org/en/tanzania-civil-society-groups-decry-lack-of-consultation-in-enacting-key-oil-gas-revenue-management-laws, accessed in September 2018.

[7] B. Lugongo, 'Civil Society Organizations' Fault Rushing of Key Legislation without Adequate Consultation', *The Citizen*, Monday, 6 July 2015 at 2.

[8] F. Lugoe, 'Governance in Mining Areas in Tanzania With Special Reference to Land Issues', (2012) (41) *ESFR* 1 at 8-9; S. P. Sanga, 'The Role of Poor Governance in the Tanzanite-Al Qaeda Link Controversy, and Policy Options for Tanzania Enabling it to Escape from 'Curses' in the Mining Industry', (2006-2007) *Centre For Policy Studies Central European University International Policy Fellowship* 5-6.

[9] Sanga, ibid.

[10] A. Ihucha, 'Mtwara Protests Expose Gaps in Oil, Gas, Mineral Laws Management', *The East African*,2 February 2013, available at http://www.theeastafrican.co.ke/news/Mtwara-protests-expose-gaps-in-oil-gas-mineral-laws-management/-/2558/1682724/-/ws8pasz/-/index.html, accessed in September 2018. See also, BBC News 'Tanzania Mtwara Gas Riots', *BBC News*, 24 May 2013, available at http://www.bbc.com/news/world-africa-22652809, accessed in September 2018.

maximum benefits from these resources and uses them for their intended public good such poverty alleviation, or throw the country into the abyss of the well-known resource curse.

1.2 THE PARADOX OF PLENTY

Possession of natural wealth is no guarantee of development. It is therefore not surprising that poverty, inequality, and deprivation are also found in countries with the greatest natural resource endowments.[11] In some countries, rich deposits of non-renewable natural resources such as hydrocarbons and minerals have often helped to nurture and sustain autocracy, despair and insecurity.[12] This mystery is what scholars have dubbed the 'resource curse' paradox.[13]

[11] B. C. Roy *et al*, 'Natural Resource Abundance and Economic Performance—A Literature Review', (2013)1(4) *Current Urban Studies* 148 at 148-149; R. Auty, *Resource Abundance and Economic Development* (New York: Oxford University Press, 2001) 3; M. L. Ross, 'The Political Economy of the Resource Curse', (1999) 51(2) *World Politics* 297; M. Badia-Miró *et al*, *Natural Resources and Economic Growth: Learning from History* (London: Routledge, 2015) 2-3.

[12] P. Collier, *The Bottom Billion: Why the Poorest Countries are Failing and What Can be done about It* (New York: Oxford University Press, 2007) 38-50; Badia-Miró *et al*, supra note 10; I. Gary & T. L. Karl *Bottom of the Barrel: Africa's Oil Boom and the Poor* (Maryland: Catholic Relief Services, 2003).

[13] The resource curse, also known as the paradox of plenty, describes the negative development outcomes associated with non-renewable extractive resources. It raises the following paradox: How are countries with an abundance of non-renewable natural resources, like minerals and fuels, tend to have less economic growth and worse development outcomes than countries with fewer natural resources? See African Development Bank and the African Union, *Oil and Gas in Africa* (New York: Oxford University Press 2009) at 79; J. Sachs *et al*, *Escaping the Resource Curse* (New York: Columbia University Press, 2007) 1-4; R. M. Auty, *Sustaining Development in Mineral Economies: The Resource Curse Thesis* (London: Routledge, 2003)1-6.

Scholars have attributed the resource curse to a wide range of causes: the Dutch disease,[14] price volatility,[15] armed conflict,[16] authoritarian rule,[17] among others, but contemporary studies have dismissed these explanations.[18] Critics have drawn attention to the methodology used to establish the conventional curse theories as well as the period of study chosen.[19] Ross, for example, seems to believe that most of the conventional explanations were made at the time when 'the oil producing states were indeed economically troubled'.[20] In his work, Ross shows that the GDP of hydrocarbon economies grew around 40% faster than those of other economies during a boom in the price of hydrocarbons.[21] Luciani, on the other hand, while appreciating the arguments on price volatility, remarks that in recent years 'relevant actors are capable of riding through the waves unscathed'.[22] This is because countries are said to have adopted

[14]The term was coined in 1977 by *The Economist* to describe the decline of the manufacturing sector in the Netherlands after the discovery of the large Groningen natural gas field in 1959 see; E. Christine, 'Back to Basics – Dutch Disease: Too Much Wealth Managed Unwisely', (2003) 40(1) *IMF Finance and Development* 2. In the 1950s and 1960s, the strand of argument for the resource curse was mainly the concern of lack of diversification or the impact of foreign currency appreciation on the non-hydrocarbon trade sector of the economy. See P. Stevens, 'The Resource Curse Revisited (Appendix: A Literature Review)', (2015) *Energy, Environment and Resources* 1 at 4.

[15] Studies argue that high price periods would trigger a borrowing boom creating debt problems which would in the long run impact on national budgets and expenditure as well as hinder the adaptation of long term fiscal policie. See M. Basedau & A. Mehle, *Resource Politics in Sub-Saharan Africa* (Humberg: GIGA, 2005) 328-331; Stevens, supra note 13; G. Luciani, 'Price and Revenue Volatility: What Policy Options and role for the State?', (2011) 17(2) *Global Governance* 213-228.

[16]I. Bannon & P .Collier, 'Natural Resources and Conflict: What We Can Do', in I. Bannon & P. Collier (eds), *Natural Resources and Violent Conflict Options and Actions* (Washington: World Bank, 2003)1-17 at 4.

[17] Studies noted that hydrocarbon abundance appeared to change government behaviour resulting to limited prospects of development. The resources were then the cause or accelerator of conflict, poverty, and inequality and in turn hindered any prospects of economic progress. See R. Auty & A. Gelb, 'The Political Economy of Resource Abundant States', in R. Auty (ed), *Resource Abundance and Economic Development* (New York: Oxford University Press, 2001) 126-44.

[18] C. N. Brunnschweiler & E. H. Bulte, 'The Resource Curse Revisited and Revised: A Tale of Paradoxes and Red Herrings', (May 2008) 55 (3) *Journal of Environmental Economics and Management* 248-264.

[19] Stevens, supra note 13, at 6-7.

[20] M. Ross, *The Oil Curse: How Petroleum Wealth Shapes the Development of Nations* (Oxford: Prinston University Press, 2012) 3.

[21] Ibid.

[22] Ibid.

policies that render the volatility argument void.[23] Similarly, the armed conflicts explanation of the curse has been criticized on the ground that it accounts for 'a limited number of catastrophes' and says 'very little about the economic performance of oil rich states'.[24]

Sub-Saharan Africa has been a central subject of analysis by scholars in the context of the resource curse phenomenon.[25] Despite its abundant natural resource wealth, sub-Saharan Africa remains impoverished, with high levels of illiteracy as well as low life expectancy due to civil conflicts, preventable waterborne diseases, malaria, HIV, and malnutrition, just to mention a few problems.[26] Tanzania is no exception to this predicament, as its mining industry has proven.[27] The discovery of commercially viable hydrocarbon carbon resources in Tanzania raises the question whether Tanzania can enjoy its blessings of oil and gas and avoid the resource curse.

[23] G. Luciani, 'Price and Revenue Volatility: What Policy Options and Role for the State?', (2011) 17(2): *Global Governance*, 213–28 at 214.

[24] Supra note 53, at 202.

[25] Generally see; M. Basedau & A. Mehler, *Resource Politics in Sub-Saharan Africa* (Hamberg: Institute of African Affairs, 2005), N. Shaxson, 'New Approaches to Volatility: Dealing With the 'Resource Curse', in Sub-Saharan Africa', (2005) 18 (2) *International Affairs* 311–324; M. Basedau, 'Context Matters - Rethinking the Resource Curse in Sub-Saharan Africa', 1 May 2005, *GIGA* Working Paper No 1; S. B. Blomberga *et al*, 'New Wine in Old Wineskins? Growth, Terrorism and the Resource Curse in Sub-Saharan Africa', (2011) 27(1) *European Journal of Political Economy,* 50–63; O. Jan-Peter, 'Old Curses, New Approaches? Fiscal Benchmarks for Oil-Producing Countries in Sub-Saharan Africa', (May 2007) 1 IMF Working Papers, 1-42.

[26] M. L. Ross, 'The Political Economy of the Resource Curse', (1999) 51(2) *World Politics,* 297-322; Basedau, supra note 24 at 3; G. Strange, 'Political Economy: Failed' States and Failed Regionalism?', (2011) Working Paper No. 6, School of Social Science, University of Lincoln. Available at https://ulincoln.academia.edu/GerryStrange, accessed in September 2018; M. Brückner & A. Ciccone, 'International Commodity Prices, Growth and the Outbreak of Civil War in Sub-Saharan Africa', (2010) 120 (544) *the Economic Journal*, 519–534; G. Handley *et al*, 'Poverty and Poverty Reduction in Sub-Saharan Africa: An Overview of Key Issues', (2009) Working Paper 299, *Overseas Development Institute* 1.

[27] P. Butler, 'Tanzania: Liberalisation of Investment and the Mining Sector Analysis of the Content and Certain Implications of the Tanzanian 1998 Mining Act', in B. Campbell (ed) *Regulating Mining in Africa: For whose Benefits*? (Uppsala: Nordic Africa Institute 2004) 67-80.

As noted above, recent studies have tended to dismiss the resource curse phenomenon.[28] As Stevens has argued, there is a *prima facie* case for dropping the 'automatic use of the term resource "curse" in favour of the term resource "impact" and then consider whether the outcome is a curse or a blessing'.[29] This raises the question: what then is the difference between the 'blessed' and the 'cursed' hydrocarbon producing nations? How do the likes of Norway escape the curse and likes of Nigeria do not?

1.3 THE TRANSPARENCY AND ACCOUNTABILITY APPROACH TO THE PARADOX OF PLENTY

Whether one believes in the existence of the resource curse or not, a truth one may not escape is that the difference between the 'cursed' and the 'blessed' nations lies in the administration and regulatory framework of their hydrocarbon resources. Studies indicate that by successfully improving the quality of administrative and regulatory institutions, enforcing the rule of law and ensuring transparency and accountability, a nation can escape from the resource curse.[30] On this account, the manner in which regulatory structures interact with each other and with all the stakeholders and the public and the existence of appropriate processes, policies and laws concerning the distribution of power and responsibilities in the hydrocarbon industry are of critical importance. How decisions are taken and how citizens or other stakeholders are involved in the making of those decisions play an important part in maximizing the social-economic benefits from the hydrocarbon resources. Overlaying all these questions are the fundamental principles of transparency and accountability.

[28] C. N. Brunnschweiler & E. H. Bulte, 'The Resource Curse Revisited and Revised: A Tale of Paradoxes and Red Herrings', (2008) 55(3) *Journal of Environmental Economics and Management* 248–264 at 261; K.W. Ramsay 'Revisiting the Resource Curse: Natural Disasters, the Price of Oil, and Democracy', (2011) 65 *International Organization* 507-529 at 526; D. Lederman & W. F. Maloney; *Natural Resources, Neither Curse Nor Destiny* (Washington DC: Stanford University Press, 2007); P. J. Luong & E. Weintha, *Oil is not a Curse: Ownership Structure and Institutions in Soviet Successor States* (Cambridge: Cambridge University Press 2010).

[29] Stevens, supra note 13, at 11.

[30] T. L. Karl, 'Ensuring Fairness: The Case for a Transparent Fiscal Social Contract' in Sachs *et al*, supra note 12, at 257-8.

The global trend for the hydrocarbon industry has been to champion transparency and accountability in the upstream hydrocarbon actives.[31] Given the increase of both the demand for oil and gas, and new discoveries of hydrocarbon resources in developing countries, the secrecy of the hydrocarbon industry and boundaries between hydrocarbon industry sectors are said to have faded dramatically.[32] This change has also been noted across the extractive industry, due in part to the international initiative for transparency and accountability undertaken by key actors within the extractive industry.[33] Foreign investors, who are the major actors for resource exploitation, are also drawn to reliable and better-regulated state resources as they are seen to be more predictable and hence provide assurance for their massive capital investments.[34] The level and manner in which hydrocarbon regulatory organs of a state are held answerable for their decisions and operations is crucial in ensuring effective management of the resources for development.[35]

As noted earlier, Tanzania's extractive industry has a history of poor regulation. Against this backdrop, a new set of laws on oil and gas was adopted in a hurry and without public participation. This by itself has raised significant public concern. The nature of these legal reforms, the regulatory mechanisms they have introduced and the extent to which they foster transparency and accountability in the regulation of Tanzania's hydrocarbon resources are thus explored in this study.

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[31] World Bank, 'Towards Transparency in Oil, Gas, and Mining', available at http://www.worldbank.org/en/news/feature/2013/05/23/towards-transparency-in-oil-gas-and-mining, accessed in September 2018; I. Gary, 'Global Progress Continues on Oil, Mining Transparency Laws'. Available at http://thehill.com/blogs/congress-blog/energy-environment/222385-global-progress-continues-on-oil-mining-transparency, accessed on September 2018.

[32] Speech of Abdalla S. El-Badri OPEC Secretary General, at the Executive Plenary Session of the Kuwait Oil and Gas Conference, Kuwait, 7 October 2013(The Power of Collaboration, People and Technology in the Oil and Gas Industry), available at http://www.opec.org/opec_web/en/2624.htm, accessed in September 2018.

[33] The Extractive Industries Transparency Initiative (EITI) is a global Standard to promote open and accountable management of natural resources. It seeks to strengthen government and company systems, inform public debate, and enhance trust. In each implementing country, it is supported by a coalition of governments, companies, and civil society working together. See more on https://eiti.org/eiti.

[34] PWC, Report on Africa's Oil and Gas Industry; 'From Fragile to Agile' (2015), available at https://www.pwc.co.za/en/assets/pdf/oil-and-gas-review-2015.pdf, accessed in September 2018 at 10-11.

[35] F. Hameed, 'Fiscal Transparency and Economic Outcomes', (2005) *IMF Working Paper 37, 05/225* at 30.

1.4 RESEARCH QUESTION AND THE PURPOSE AND SIGNIFICANCE OF STUDY

The purpose of this study is to conduct an appraisal of the legal and institutional framework governing the upstream hydrocarbon industry in Tanzania. The appraisal aims at establishing the extent to which and how well the governance aspects of transparency and accountability are incorporated in the legal framework to ensure their effective implementation in practice.
In investigating whether the new legal framework sufficiently incorporates transparency and accountability in the governance of Tanzania's hydrocarbons, the study addresses the following questions that are more specific:

i. What is the role of transparency and accountability in the regulation of the hydrocarbon sector?
ii. What are the philosophical or conceptual foundations for transparency and accountability and indices for measuring these concepts?
iii. What transparency and accountability-related challenges exist in the regulatory framework of the hydrocarbon sector?
iv. How does the Tanzanian regulatory framework fare with regard to established and emerging transparency and accountability requirements for the sector?
v. How could Tanzania's hydrocarbon regulatory framework be improved in order to enhance transparency and accountability in the sector?

Enhanced transparency and accountability in the governance of the hydrocarbon resources is likely to increase management efficiency, reduce opportunities for self-dealing and diversion of revenues for personal gain, raise the level of public trust, and reduce the risk of social conflict.[36] On that premise, the thesis seeks to contribute to efforts made in improving the regulation of the hydrocarbon industry in Tanzania so that the country can avoid the resource curse. By undertaking an extensive study on transparency and accountability in the governance of Tanzania's hydrocarbons, the thesis addresses key legal and policy challenges to the effective regulation of the industry. There is an ongoing debate on the laws governing the

[36] EITI, 'Extractive Industries: A Guide to Best Practice in Transparency, Accountability, and Civic Engagement across the Public Sector', available at http://transparencyinitiative.theideabureau.netdna-cdn.com/wp-content/uploads/2011/09/8-Extractive-industries1.pdf, accessed in September 2018.

extractive industry including hydrocarbons in Tanzania. Much as this debate is occurring in the public and among policy makers, there is a dearth of research-based interventions in the debate, especially at the policy level. In this respect, the thesis contributes something more concrete to the debate that could inform further policy and legal reforms.

Additionally, Uganda and Kenya have also announced similar hydrocarbon discoveries.[37] As in Tanzania, there is also a raging debate in these countries about the accountability and transparency problems arising from their respective regulatory framework.[38] This study is therefore significant beyond Tanzania. The whole of East Africa is grappling with these issues.

Tanzania's Constitution expressly requires that there should be transparency and accountability in the management of non-renewable natural resources.[39] In accordance with the Constitution and land laws,[40] all land and natural resources are vested in the President as the trustee of the people of Tanzania. While citizens are guaranteed the right to occupy land, the right of occupancy excludes the use or exploitation of minerals or petroleum forming part of or below the surface of the respective land.[41] Minerals and hydrocarbons are governed by the state on behalf of the people of Tanzania.[42] Thus, the nature of resource ownership itself dictates a need for transparency and accountability in the regulation of resources. These laws give the citizens the right to question and vet the regulation of their natural resources. With this very clear stipulation of the law, the interrogation of transparency and accountability of the hydrocarbon regulatory framework in Tanzania, done by this study, is consistent with what Constitution mandates.

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[37] National Oil Cooperation of Kenya, 'Oil and Gas Exploration History in Kenya', available at http://nationaloil.co.ke/site/3.php?id=1, accessed in May 2016; Uganda Oil and Gas Info Ltd, 'History And Development', available at http://www.ugandaoilandgas.com/ugandaoilandgas_003.htm,accessed in September 2018.

[38] East African Legislative Assembly Committee on Agriculture, Tourism and Natural Resources, 'Report on Governance of Natural Resources in the EAC Region December 2012', available at http://www.eala.org/uploads/FINAL%20REPORT%202013_JAN_08%20RECOMMENDATIONS%20AND%20RESOLUTONS%20OF%20THE%20WORKSHOP%20ON%20GOVERNANCE%20OF%20NATURAL%20RESOURCES%20_FIN_%20.pdf, accessed in September 2018.

[39] Article 24 of the Tanzania Constitution 1977.

[40] Section 2 the Land Act Cap113 of 1999 and Article 24 of the Tanzania Constitution 1977.

[41] Ibid.

[42] Ibid and S. 4 of the Petroleum Act No. 21 of 2015.

Besides, Tanzania is a signatory to the Extractive Industries Transparency Initiative (EITI)[43] . Though the status of the country's participation in the EITI is commendable,[44] the country was suspended in September 2015 due to its failure to publish its reports punctually and for not meeting the EITI standards.[45] This only further stresses the importance of the study in identifying and addressing key transparency and accountability challenges and gaps in the hydrocarbon regulatory framework in Tanzania.

1.5 RESEARCH METHODOLOGY

The thesis uses the resource-curse theory to contextualize the governance challenge of natural resources.[46] It also makes use of the governance tools of transparency and accountability in evaluating the governance of the hydrocarbon industry in general and specifically in the legal framework governing hydrocarbons in Tanzania.[47]

The study first identifies the structure of the hydrocarbon industry that includes ownership and access rights of the resources and the regulatory structures and involved stakeholders including oil companies and regulatory authorities.[48] It maps out the various transparency and accountability relationships forged by the industry structure. The study then uses the identified industry structure and the transparency and accountability relationships in evaluating the legal framework put in place for their governance.

[43] It also obtained a complaint status in December 2012. A country is designated as Compliant when the EITI Board considers that it has met all of the EITI Requirements. 'Compliant countries must undergo Validation every three years or upon the request from the EITI Board'. Compliance with the EITI Requirements does not necessarily mean that a country's extractive sector is fully transparent, but that there are 'satisfactory levels of disclosure and openness in the management of the natural resources, as well as a functioning process to oversee and improve disclosure'. See https://eiti.org/glossary#EITI_compliant, accessed in September 2018.

[44] EITI, 'Implementation Status', available at https://eiti.org/countries, accessed in September 2018.

[45] TEITI 'Sixth Report of the Tanzania Extractive Industries Transparency Initiative for the Year Ended 30 June 2014', available at http://www.teiti.or.tz/wp-content/uploads/2015/11/TEITI-6th_2014_Report-TEITI-12-Final.pdf, accessed in September 2018 at 130.

[46] See subsection 2 above.

[47] Chapter 3.

[48] Chapter 2.

In addressing the question of transparency and accountability in Tanzania's hydrocarbon legal framework, the study conceptualizes the governance aspects of transparency and accountability and identifies the elements needed for effective regulation of this industry.[49]

The first is that there has to be provisions clearly establishing accountability relationships and their implementation mechanisms. Questions on who are the actors, who is to be called to account, by whom and for what, have to be stated very clearly in the law. Even within the framework of multiple accountability mechanisms, clarity about the circumstances the various mechanisms function is key. In the same vein, there has to be clarity on information disclosed, by whom, at what time and in which manner. This clarity of the law is helpful in creating a roadmap to effective accountability and transparency practices.

The second element is that the legal framework must provide for accountability implementation mechanisms that are sufficiently independent, have adequate mandate to inquire and render judgement, and have the capacity enforce their decisions. These bodies must be able to affect change on the behavior of the accountee.

The third element is that the legal framework should be able to create a well-coordinated web of accountability structures that provides for a check and balance system. The legal framework should be able to ensure that actors given authority to fulfil their obligations are able to answer and face vigorous scrutiny and verification processes by independent actors. Here the legal framework ought to employ vertical and horizontal accountability mechanisms.
The last element is that the legal frame must facilitate access to clear, reliable and complete information by interested stakeholders and the public. In terms of form and substance, the information given must be capable of being comprehended by its users.

1.6 SCOPE AND LIMITATIONS OF THE STUDY

As is well known, Tanzania is a union of Tanganyika and Zanzibar. Accordingly, Tanzania has union and non-union matters that are administered by separate government administrations either concurrently or exclusively. While management of hydrocarbons forms part of union matters, each party to the union also regulates it separately. This study is limited to Tanzania

[49] Chapter 3.

Mainland (formerly Tanganyika). Any subsequent reference to Tanzania in this study therefore refers, unless otherwise stated, to Mainland Tanzania.

By the same token, while the hydrocarbon industry has three segments - upstream, midstream and downstream, this study focuses on the upstream segment. As explained further in chapter 2, for hydrocarbon resource owners, it is the governance of the upstream activities that determines whether the hydrocarbon resources will enhance social economic development or not. Another reason for focusing on the upstream sector has to do with feasibility of the study and the fact that the law in Tanzania provides for separate regulatory and institutional frameworks for upstream operations from midstream and downstream operations as is further elaborated in chapter 5 of this thesis.

In limiting its enquiry to the legal framework governing upstream operations, the study has excluded the interrogation of laws pertaining to tax collection and distribution. While it would be worthwhile to review the tax regime in terms of accountability and transparency, it would have unduly expanded the scope of the thesis to include that theme. An interrogation of the tax regime and fiscal accountability requires a different set of analytical tools warranting an entire thesis of its own. Fortunately, another candidate has already completed a doctoral thesis interrogating tax leakages in the upstream hydrocarbon industry in Tanzania.[50]

1.7 COURSE OF INQUIRY

As is clear by now, the overall aim of this thesis is to address transparency and accountability gaps in the legal framework of Tanzania's hydrocarbon sector. In so doing, this introductory chapter has contextualised the problem and identified areas of interrogation. The remainder of the thesis is divided into seven chapters.

Chapter 2 provides an overview of the hydrocarbon industry. It looks at how the industry is structured, and identifies the key industry players. Looking at recent history and development of the hydrocarbon industry, the chapter identifies driving forces behind the industry and its structure while tracing their implications for transparency and accountability. The chapter also

[50] B. Luhende, 'Towards a Legal Framework for Preventing Tax Revenue Leakage in the Upstream Oil and Gas Industry in Tanzania: An Analysis of the Concepts, Methods and Options available in a Public Trusteeship Model of Natural Resource Holding', PHD Thesis University of Cape Town, 2017.

discusses hydrocarbons as the major source of energy and the impact of such importance in its governance and regulation.

Chapter 3 identifies and analyses the conceptual foundations of transparency and accountability as they relate to governance in general and the governance of natural resources in particular, focusing in particular on the elements of effective transparency and accountability systems and mechanisms. This discussion sets the foundation for reviewing the legal framework governing hydrocarbons in Tanzania.

Chapter 4 focuses on transparency and accountability trends and challenges presented by the hydrocarbon industry. It concentrates on general transparency and accountability practices of the key industrial players, identifying 'common practices', regional and international policies and initiatives that have been adopted by the hydrocarbon industry. In identify key industrial trends on transparency and accountability, the chapter looks at how the various industrial players interact and highlight the challenges involved in ensuring the use of transparency and accountability in the hydrocarbon industry. It uses the adopted industry structure in chapter two and looks at how the various key players advance transparency and accountability in the industry. The chapter also looks at other factors and policies that influence transparency and accountability practices in the hydrocarbon industry such as environmental policies, intellectual property rights and human rights policies.

Chapter 5 gives an account of the development of the legal framework governing hydrocarbons in Tanzania and describes the current legal and institutional framework. The chapter traces the development of the extractive industry and the discovery of the hydrocarbon resources from the pre-colonial era, the colonial era, and independence era. The chapter then looks at the post-independence era discussing the era of economic liberalisation and foreign investment policies. Throughout the discussion, the chapter analyses various legal and constitutional developments that have a bearing on the regulation of the hydrocarbon industry particularly on aspects of transparency and accountability. Finally, the chapter describes the current legal framework and identifies the corresponding institutional framework for the governance of Tanzania's hydrocarbon industry, laying the foundation for the analysis in later chapters.

Chapters 6 and 7 answer the question whether the legal framework governing the hydrocarbon industry in Tanzania fully recognises the principles of accountability and transparency and

establishes sufficient mechanisms to ensure that those principles are respected in practice. The answer to this question are obtained by using the four analytical tools identified in Chapter three for determining whether a legal framework establishes adequate accountability and transparency frameworks. Chapter 6 focuses on the analytical tools on transparency. It interrogates whether the Tanzanian legal framework makes adequate provision for access to clear, reliable and complete information by industry players, interested stakeholders and the public. Furthermore, it assesses the measures taken, if any, to facilitate access to comprehensible and user-friendly information held by the state and other players. The various transparency relationships in the governance of upstream hydrocarbon industry provided for under the law are analyzed and outlined, bearing in mind the question whether the law makes sufficient provision for transparency in these relationships as far as the upstream hydrocarbon activities are concerned.

Chapter 7, on the other hand, deals with accountability. It asks whether the law provides clarity in every established accountability relationship. It considers at how the law addresses the fundamental questions of who is to be called to account, by whom, how, where and for what. The chapter also addresses the question whether the legal framework provides for accountability implementation mechanisms that give the accountor the required independence and mandate to inquire, render judgement, and have the capacity to put its decisions to effect. The chapter also looks at whether the legal framework creates a well-coordinated web of accountability structures to provide for sufficient and efficient checks and balances in the governance of Tanzania's hydrocarbons.

Chapter 8 sums up the central issues raised and addressed in the course of study and provide conclusions thereon. More specifically, it offers the findings of the study on the main question whether Tanzania's hydrocarbons legal framework adequately incorporates key aspects of transparency and accountability.

CHAPTER 2
THE HYDROCARBON INDUSTRY: EVOLUTION AND INDUSTRY ACTORS

2.1 INTRODUCTION

This chapter seeks to provide an insight on the hydrocarbon industry, its structure, complexities and identifying the key industry players. Understanding the hydrocarbon industry and its related complexities and structure provides a foundation for the analysis of transparency and accountability as tools of resource governance in the industry. The main aim of this chapter is to identify the main industry players and their role in the industry. The thesis uses the adopted upstream hydrocarbon industry structure in this chapter in the assessment of transparency and accountability in the industry.

The chapter starts by defining the hydrocarbon industry and what the industry involves. It then makes a brief discussion on modern history and development of the hydrocarbon industry as it relates to transparency and accountability. The chapter also discusses the prominence of hydrocarbons as the major source of energy and the impact of such importance in its governance and regulation. It identifies key industrial players and their role in the structure and operation of the industry. This over view of the hydrocarbon industry provides a foundation for analysis of transparency and accountability in Tanzania's hydrocarbon regulation.

2.2 DEFINITION OF THE HYDROCARBON INDUSTRY

Hydrocarbons are organic compounds comprising of carbon and hydrogen. The majority of hydrocarbons are found buried underneath the sedimentary rock of the earth where decomposed organic matter undergoes heating and compression over a long period.[1] Hydrocarbons can combine in numerous ways to form various compounds.[2] The different

[1] U. R. Chaudhuri, *Fundamentals of Petroleum and Petrochemical Engineering* (Florida: CRC Press, 2016) 7-8; J. Hilyard, *The Oil & Gas Industry: A Nontechnical Guide* (Oklahoma: PennWell Books, 2012) 3-6.

[2] R. C. Selley & S. A. Sonnenberg, *Elements of Petroleum Geology* (ed3) (London: Academic Press, 2014) 13; A. Fagan, *An Introduction to the Petroleum Industry* (Brampton: Government of Newfoundland and Labrador,

properties of hydrocarbon compounds are determined by variances in the number and arrangement of hydrogen and carbon atoms they contain.[3] They can form liquids such as petroleum, gases such as *natural gas* and solids, such as the asphalt that is used to pave roads among others.[4]

The hydrocarbon industry comprises the global processes of exploration, extraction, transporting, refining and marketing of the various hydrocarbon products.[5] Currently, petroleum and natural gas are the major hydrocarbon products of the industry.[6] The industry is habitually separated into three major components: upstream, midstream and downstream. The upstream segment of the industry involves the finding of the hydrocarbon sites and bringing the respective hydrocarbon products from the ground.[7] Upstream activities consist of exploratory work involving the hunt for underground (or underwater) hydrocarbon reservoirs, the initial drilling, followed by the production phase, which is the actual extraction of hydrocarbons from the ground.[8] The midstream and downstream segments involve the purification of the hydrocarbons and refining them into different products.[9] They also involve the gathering, transportation and marketing of hydrocarbons and its products.[10] The focus of

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Dept. of Mines and Energy, 1991) 1-3; D. Havard, *Oil and Gas Production Handbook: An Introduction to Oil and Gas Production* (North Carolina: Lulu Publishing, 2013) 17-19.

[3]Havard, ibid; J.G. Speight, *Handbook of Offshore Oil and Gas Operations* (Oxford: Elsevier, 2015) 14-16; C. Termeer, *Fundamentals of Investing in Oil and Gas* (Florida: Chris-Termeer Publishing, 2013) 51-56; P.A. Clennel, *Introduction to Petroleum Exploration and Engineering* (London: World Scientific, 2016) 15 -17.

[4] Ibid.

[5] A. C. Inkpen & M. H. Moffett, *The Global Oil & Gas Industry: Management, Strategy & Finance* (Oklahoma: Penn Well Books, 2011) 20; F. Jahn *et al*, *Hydrocarbon Exploration and Production* (ed 2) (Amsterdam: Elsevier 2008) at 1.

[6] M. S. Vassiliou, *The A to Z of the Petroleum Industry* (Maryland: Scarecrow Press, 2009) 1; J.G. Speight, *Handbook of Industrial Hydrocarbon Processes* (Oxford: Gulf Professional Publishing, 2011) 46.

[7] Inkpen & Moffett, supra note 5 at 21; M. A. Al-Sahlawi, 'Structure of the Oil and Gas Industry', in H. K. Abdel-Aal, & M. A. Al-sahlawi, *Petroleum Economics and Engineering* (London: CRC Press 2014) 21; R. Clews, *Project Finance for the International Petroleum Industry* (London: Academic Press, 2016)Vii.

[8] Jahn *et al*, supra note 5 at 1-6; S. Werner *et al*, *Managing Human Resources in the Oil & Gas Industry* (Oklahoma: PennWell Books, 2016) 58-59; B. Beyazay, *The Nature of the Firm in the Oil Industry: International Oil Companies in Global Business* (Vol. 62) (New York: Routledge, 2016) 13- 14.

[9] Inkpen & Moffett, supra note 5 at 26-31; J. R. Fanchi, & R. L. Christiansen, *Introduction to Petroleum Engineering* (New Jersey: John Wiley & Sons, 2016) 291-294.

[10] Ibid.

this study is on upstream activities of the hydrocarbon industry. The governance of the upstream activities determines whether the hydrocarbon resources will provide social economic development for its owners or not.

2.3 TRANSPARENCY IN THE DEVEOPMENT HISTORY OF THE HYDROCARBON INDUSTRY

In the early years of the hydrocarbon industry, there was little attention from state regulation of its exploration.[11] In the 1850s in America where the modern hydrocarbon industry was born, hydrocarbons were just another commodity in the trade market.[12] Hydrocarbons were regulated by nothing more than the laws of trade and agreements on land leases and other forms of business contracts.[13] The early years of the industry were characterized by the dominance of monopolistic private enterprises, which developed and controlled the infrastructure and technology of the industry.[14] Operations of the industry were characterized by secrecy and business tricks given the fierce competition of private enterprises.[15] Setting off on this footing, there was little to be told of transparency and accountability on the exploration of hydrocarbons beyond the boardrooms of private companies.

In the early 1990s, with the discovery of the internal combustion engine powered by petroleum, hydrocarbons ceased being just another commodity in the market and quickly became the engine of global politics and economics. Oil powered the submarine, the airplane, the tank, and

[11] D. Yergin, *The Prize: The Epic Quest for Oil, Money & Power* (New York: Simon & Schuster, 2012) 32-34; N. Malavis, *Bless the Pure and Humble: Texas Lawyers and Oil Regulation, 1919-1936*(Texas: Texas A&M University Press, 1996) IV and Chapter One; J.A. Pratt, 'The Petroleum Industry in Transition: Antitrust and the Decline of Monopoly Control in Oil', (1980) 40(4) *The Journal of Economic History* 815–837; G. D. Nash, *United States Oil Policy, 1890-1964: Business and Government in Twentieth Century America* (Pennsylvania: University of Pittsburgh Press, 1968) 11.

[12] Yergin, supra note 11 at 33, T. Daintith, *Finders Keepers?: How the Law of Capture Shaped the World Oil Industry* (London: Earth scan, 2010)3; Malavis, supra note 11.

[13] Ibid.

[14] N. Antill & R. Arnott, *Valuing Oil and Gas Companies: A Guide to the Assessment and Evaluation of Assets, Performance and Prospects* (Cambridge: Woodhead Publishing, 2000) 8-11; T. C. Winegard, *The First World Oil War* (Toronto: University of Toronto Press, 2016) at 52.

[15]I. M. Tarbell, *The History of the Standard Oil Company: Briefer version* (New York: Courier Corporation, 2012) 14; Yergin, supra note 11 at 42-7.

motorized transport, which was the key military innovations of World War I.[16] Nations, saw hydrocarbons as primary in asserting and maintaining their political and economic dominance and control.[17] These developments marked the beginning of the quest for possession, control, and regulation of hydrocarbons by states.[18]

By this time, the private industry had well established dominance in the exploration of hydrocarbons and was inevitably used by states to advance national hydrocarbon interests.[19] As a result, states had limited direct control in the management and affairs of the oil companies.[20] The reliance on the oil companies as vehicles of national interest in hydrocarbons enhanced and facilitated control of the world hydrocarbon economy by the most powerful private interests.[21] The major oil companies controlled 85 percent of the world's oil reserves and were popularly labeled the 'seven sisters' cartel consisting of Anglo-Persian Oil Company (Now BP); Standard Oil of California (now Chevron); Texaco (which later merged with Chevron); Royal Dutch Shell; Standard Oil of New Jersey (ESSO/Exxon); and Standard Oil Company of New York (SOCONY) (now Mobil and part of ExxonMobil).[22] The use of competitive private companies coupled with the significance of hydrocarbons in politics and economics made it difficult for the industry to function in a transparent manner.

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[16] Yergin, supra note 11 chapter 9; W. G. Jensen, 'The Importance of Energy in the First and Second World Wars,' (1968) 11 *Historical Journal* 538-45, as cited in D. S. Painter, 'International Oil and National Security', (fall, 1991) 120(4) *Searching for Security in a Global Economy* 183-206 at 184.

[17] B. C. Black, *Crude Reality: Petroleum in World History* (Maryland: Rowman & Littlefield, 2014) 11.

[18] Yergin, supra note 11 chapter 10; L. Fischer, *Oil imperialism: The International Struggle for Petroleum* (London & New York: Routledge, 2016) 19-20.

[19] Yergin, supra note 11 chapter 28; K. Crane *et al*, *Imported Oil National Security and U.S* (California: Rand Corporation, 2009) 25.

[20] Yergin, supra note 11 chapter 28; S. J. Randall, *United States Foreign Oil Policy since World War I: For Profits and Security* (Montreal: McGill-Queen's Press-MQUP, 2005)15-42; M. Kent, *Moguls and Mandarins: Oil, Imperialism and the Middle East in British Foreign Policy 1900-1940* (London & New York: Routledge, 2013) 34-68.

[21] A. Mahdi, *Energy and US foreign policy: The quest for resource security after the Cold War* (New York: IB Tauris, 2012) 8-9; Encyclopedia of the New American Nation 'Oil - The Origins of U.S. Foreign Oil Policy' available at http://www.americanforeignrelations.com/O-W/Oil-The-origins-of-u-s-foreign-oil-policy.html#ixzz4YUA17IZU accessed in September 2018.

[22] A. Sampson, *The Seven Sisters: The Great Oil Companies and the World They Shaped* (New York: Viking Press, 1975) chapter 9 available at https://journeytoforever.org/biofuel_library/sevensisters/7sisters9.html accessed in September 2018.

In the first half of the 19th century, oil concessions were obtained by way of imperialism and skullduggery of corrupt leaders and intermediaries in the various countries.[23] Hydrocarbon concessions were mostly a deal between the ruling government of the respective producing nations and the oil companies advancing national interests of their home countries.[24] The scramble by imperialist states for oil resources across the globe led to high secrecy in negotiations, terms, and awarding of hydrocarbon concessions.[25] There were no specific laws or rules governing the negotiations or awarding of hydrocarbon concessions and every concession was likely to be different from the other dependent on the lobbyists (oil fixers)[26] and the needs of the ruler of the producing country.[27] Such environment facilitated very little accountability and transparency in the oil concessions.

The years following the 1960s shaped the modern development of the hydrocarbon industry through the nationalization of hydrocarbon resources by countries in possession of the resource.[28] Through nationalization, the hydrocarbon industry was integrated into national economies and thus required strategic control by the producing countries over pricing, the rate of production and other regulation aspects.[29] This meant the creation of competent legal and

[23] Yergin, supra note 11 at 281-98 & 410-21; C. More, *Black Gold: Britain and Oil in the Twentieth Century* (London: Bloomsbury Publishing, 2009) 1-10; L. Fischer, *Oil imperialism: The International Struggle for Petroleum* (London & New York: Routledge, 2016) at 13-15.

[24] Yergin, supra note 11 at 289-98; M. Kent, *Oil and Empire* (Berlin: Springer, 2016) 9, 15-16.

[25] Yergin, supra note 11at 263.

[26] The oil fixers and lobbyists are individuals who facilitate the conclusion of hydrocarbon deals. They do not have any tangible monetary input but usually have excellent networks of political contacts. They use their contacts as leverage for legal protection. Fixers have been central to the effective conclusion of hydrocarbon deals ever since the beginning of the industry to date. See. K. Silverstein, *The Secret World of Oil* (New York: Verso Books, 2014) for a detailed discussion on the Oil fixers and their role and position in the industry.

[27] Silverstein, ibid at 7-9; F. Parra, *Oil politics: A modern history of petroleum* (New York: IB Tauris, 2004) 7-14.

[28] The first front in this epic contest was opened in Venezuela. Nationalization of the oil industry in numerous countries, including Libya, Kuwait, Mexico, Nigeria, Saudi Arabia, and Venezuela. See T. Falola &A. Genova, *The Politics of the Global Oil Industry: An Introduction* (Connecticut: Greenwood Publishing Group, 2005) 49-64; D. Babusiaux, *Oil and Gas Exploration and Production: Reserves, Costs, Contracts* (Paris: Editions Technip, 2007) at 28-9.

[29] V. Marcel *et al*, *Oil Titans: National Oil Companies in the Middle East* (Washington, D.C: Brookings Institution press, 2006)28-9 &34-36.

regulatory frameworks for the governance of hydrocarbons by the respective countries.[30] Accordingly, this implied the increased requirement of accountability and transparency in regulation of hydrocarbons at the national level. Notwithstanding increased involvement of states in the regulation of hydrocarbons, given the role of the industry in geopolitics as well as corrupt and rent seeking behaviour in most hydrocarbon producing countries, there remained very little to show for in as far as transparency was concerned. For many years, the lack of transparency was considered one of the traits of the hydrocarbon industry. [31]

In the modern day hydrocarbon industry, states remain in control of the industry with ownership of over 90% of the world's hydrocarbon reserves.[32] National oil companies (particularly in developed countries) have also grown to be competitors of the major international oil companies with both the technology and the financial capacity to invest and develop oil reserves outside their borders.[33] While the hydrocarbon industry is well advanced technologically, environmental[34] and energy security concerns remain a burning problem. Increased poverty, conflict, corruption among other social challenges have also become a norm in developing hydrocarbon resource countries.[35] These and other challenges in the industry have created a web of multiple stakeholders at different levels who demand for more transparency and accountability in the governance of hydrocarbons. These stakeholders make

[30] Ibid, L. Atsegbua, 'Principle of Permanent Sovereignty over Natural Resources and Its Contribution to Modern Petroleum Development Agreements', (January –June 1993) 35(1/2) *Journal of the Indian Law Institute*, pp. 115-126.

[31] M. Andrade *et al*, 'Transparency in Petroleum Contracts: A Comparative Study of Ecuador and Bolivia: What are the Strengths, the Weaknesses, the Opportunities, and the Threats?', (2010) 11 *TRACE Briefings* 1-19 at

[32] S. Werner *et al*, *Managing Human Resources in the Oil & Gas Industry* (Oklahoma: PennWell Books, 2016) 319.

[33] C. Nakhle, 'Petroleum Fiscal regimes Evolution and Challenges', in P. Daniel *et al*, *The Taxation of Petroleum and Minerals: Principles, Problems and Practice* (London: Routledge, 2010) 91; J. R. Heilbrunn, *Oil, Democracy, And Development in Africa* (Cambridge: Cambridge University Press, 2014)92.

[34]The Hydrocarbon industry's carbon emissions are said to be the major cause of 'havoc in the planet's climate, bringing closer the specter of rising sea levels, shifting vegetation zones, and more frequent storms, floods, and droughts'. M. Renner, 'The New Geopolitics of Oil', (2006) 49(3) *Development,* 56-63 at 61-62; D. Yergin, *The Quest: Energy, Security, And the Remaking of the Modern World* (London: Penguin, 2011) 997. Generally see chapter 25 and 6 on the global agenda on environmental challenges.

[35] N. Shaxson, 'Oil Corruption and the Resource Curse', (2007) 83(6) *International Affairs (Royal Institute of International Affairs 1944)* 1123-1140; M. L. Ross, 'Blood Barrels-Why Oil Wealth Fuels Conflict', (2008)87 *Foreign Affairs* 2-8; M. Renner, 'The New Geopolitics of Oil', (2006) 49(3) *Development*, 56-63 at 57-58.

up the key players in the industry and influence policies and regulation of the industry. How these players are held accountable and the manner in which the legal framework for the industry's regulation facilities such accountability and transparency is of particular interest to this study. The section below identifies the main industry players and outlines the hydrocarbon industry structure that will help to highlight the focal points for transparency and accountability.

2.4 INDUSTRY PLAYERS AND STRUCTURE OF THE HYDROCARBON INDUSTRY

Academic literature seems to define better the structure of the hydrocarbon industry when referring to particular jurisdictions.[36] In the global context, the literature is not clear on exactly what the structure of the hydrocarbon industry is. Some scholars adopt a value chain model to represent the structure of the industry,[37] while others concentrate on the industry's players.[38] Most of the literature in the industry discusses various aspects of the industry without referring

[36] See for example: S. Martin, 'Petroleum', in J. W. Brock, *The Structure of American Industry: Thirteenth Edition* (Illinois: Waveland Press, 2015) 34, U. Ibp Usa, *Russia Oil and Gas Exploration Laws and Regulation Handbook* (Washington DC: International Business Publications 2010) 66-96; M. Olorunfemi *et al, Nigerian Oil and Gas: A Mixed Blessing?* (Lagos: Kachifo Limited 2014) Chapter one among other Jurisdiction specific literature.

[37] F. Hoshdar & S. F. Fassihi, 'Technology Development in Iranian Petroleum Industry: Approaches, Achievements, and Challenges', in A. S. Soofi & M. Goodarzi, (eds) *The Development of Science and Technology in Iran* (New York: Palgrave Macmillan 2017) 91; B. Beyazay, *The Nature of the Firm in the Oil Industry: International Oil Companies in Global Business* (Vol. 62) (New York: Routledge, 2016) 13; S. Tordo, *National Oil Companies and Value Creation* (Washington D.C: World Bank Publications, 2011) Chapter 2.

[38] N. Selley *et al*, *The New Economy of Oil: Impacts on Business, Geopolitics and Society* (London: Routledge 2013)86; S. Van Vactor, *Introduction to the Global Oil & Gas Business* (Oklahoma: PennWell Books 2010)6; J. Hilyard, *The Oil & Gas Industry: A Nontechnical Guide* (Oklahoma: PennWell Books, 2012) 255; E. Penrose, 'The Structure of the International Oil Industry: Multinationals, Governments and OPEC', in J. Rees & P. R. O'Dell, *The International Oil Industry* (London: Palgrave Macmillan UK, 1987) 9.

to the industry's structure.[39] Other scholars refer to pricing and market structures[40] while others identify the industries structure based on resource ownership and control.[41]

This thesis adopts the use of industrial players to define the industries structure, as they are the focus of study. This approach is best suited to form a foundation for evaluating the industry's governance with particular interest in the use of transparency and accountability as governance tools. Here, we divide the players into four groups according to ownership and regulation, exploration and production of the resources, hydrocarbon trade and market and third party actors or stakeholders.

2.4.1 Ownership and Access Regulators of Hydrocarbons

Like many nonrenewable valuable natural resources, the ownership regime of the hydrocarbon resource in most countries is centred on the notion of state sovereignty.[42] The concept of sovereignty seeks to respect the principle of permanent control of peoples and nations over

[39]See for example; Inkpen & Moffett, supra note 5; C. Stabell, 'Competitive Strategy and Industry Structure: A Value Configuration Interpretation', in J. D. Davis, *The Changing World of Oil: An Analysis of Corporate Change and Adaptation* (Hampshire: Ashgate Publishing 2006) 89; D. G. Victor Hults *et al*, Oil *and Governance: State-Owned Enterprises and the World Energy Supply* (London: Cambridge University Press, 2011) among others.

[40] M. A. Al-Sahlawi, 'Structure of the Oil and Gas Industry', in H. K. Abdel-Aal, & M. A. Al-sahlawi, *Petroleum Economics and Engineering* (London: CRC Press 2014) 21; R. Clews, *Project Finance for the International Petroleum Industry* (London: Academic Press, 2016) 93-99.

[41] P. J. Luong & E. Weinthal, *Oil Is Not a Curse: Ownership Structure and Institutions in Soviet Successor States* (Cambridge: University Press 2010) chapter 3 and 6. They identify structures with state ownership with control, State ownership without control, private domestic ownership and private foreign ownership. Also see; B. Sarbu, *Ownership and Control of Oil: Explaining Policy Choices across Producing Countries* (London: Routledge, 2014).

[42]The USA is one exception were they also have private ownership of hydrocarbon resources. Private Ownership is the dominate regime of hydrocarbon industry with the federal government owning only about 25% of domestic resources and the majority of which are offshore. See: J. Lowe, *Oil and Gas Law in a Nutshell*, 6th. (Minnesota: West Academic ,2014)12; also see H. L. Lax, *Political Risk in the International Oil and Gas Industry* (Berlin: Springer Science & Business Media, 1983) 32-33; B. Taverne, *Petroleum, Industry And Governments: A Study of the Involvement of Industry and Governments in Exploring for and Producing Petroleum* (ed 3) (The Hague: Kluwer Law International, 2013)126-127.

their natural resources.[43] Constitutions across the world tend to recognize the idea that the people own natural resources.[44] Ownership by the sovereign state thus refers to resource interests that are entrusted in the state on behalf of its people.[45] States in possession of hydrocarbon resources have the obligation of putting governance and regulatory frameworks to ensure that the resources are exploited to meet the social-economic development interests of their people.[46] In that context, the state is bound to act in conformity with the principles of equality and public trust,[47] which in essence demand for transparency and accountability. The extent to which states uphold these principles in practice varies widely.[48]

States in possession of hydrocarbon resources are the first key players of the industry. They set the scene for the rest of the industry's players and structure.[49] Through regulatory and governance frameworks, host governments determine the nature of hydrocarbon exploration

[43] UN General Assembly Resolution 1803 (XVII) on the "Permanent Sovereignty over Natural Resources" of 1962 at 1; H, Steinberger, 'Sovereignty', in R. Bernhardt, (Ed.) *Encyclopedia of Public International Law Vol. IV* (Amsterdam: Elsevier, 2000) 501; Sarbu, supra note 41 at 1.

[44]S. Tordo, *Fiscal Systems for Hydrocarbons: Design Issues* (Washington DC: World Bank Publications, 2007)7; W. Hickey, *Energy and Human Resource Development in Developing Countries: Towards Effective Localization* (New York: Springer, 2016) 151.

[45] Hickey, Ibid.

[46] Sarbu, supra note 41 at 23.

[47] K. H. Gupta, *Sustainable Development Law: The Law for the Future* (Gurugram: Partridge Publishing, 2016) 32. See more in chapter 3 of thesis on governance. Also see, A. B. Klass, 'Modern Public Trust Principles: Recognizing Rights and Integrating Standards', (2006-2007) 82 *Notre Dame Law Review* 699 -754 at 701&754; P. D. Smith & M. H. McDonough, 'Beyond Public Participation: Fairness in Natural Resource Decision Making', (2001) 14(3) *Society & Natural Resources* 239-249 at 40-41; S. V. Ciriacy-Wantrup & R. C. Bishop, 'Common property as a concept in natural resources policy', (1975) 15 *Natural Resources Journal* 713-728 at 714-15 & 725-27.

[48] The question of governance and management of resources is quite controversial. Different jurisdictions have different modes of government and national values which determine the nature of policies and principles they adopt. Authoritarian regimes would be different from democratic regimes. Even in democratic regimes a number of factors determine how governments operate. See. P. Hirst, 'Democracy and Governance. Debating Governance', in J. Pierre, *Debating Governance: Authority, Steering, and Democracy* (Oxford: Oxford University Press, 2000)13-35; B. G. Peters, 'Governance and Comparative Politics', in J. Pierre, *Debating Governance: Authority, Steering, and Democracy* (Oxford: Oxford University Press, 2000)36-53.

[49] A. Clo, *Oil Economics and Policy* (New York: Springer Science & Business Media 2013) 46-47.

and the role and responsibilities for actors involved.[50] These frameworks vary from one state to another.[51] However, they all function as interaction drivers of the industry players.[52]

In setting up governance systems, governments enact legislation and formulate policies to ensure that access of the hydrocarbon resource is controlled in an orderly and acceptable manner in the broader context of public interest.[53] This involves the question of security and safety, environmental protection, revenue systems among other benefit sharing mechanisms.[54] In the majority of countries in possession of hydrocarbons, governance structure is regulated by statute.[55] The respective legislation generally establishes the specific authorities and governance institutions of the industry ranging from ministries, licensing agencies, and environmental assessors to revenue collectors and arbitration bodies.[56] The thesis focuses on these legislation and the established institutions when analyzing transparency and accountability in the Tanzanian legal framework. It accesses how such legislation provides for transparency and accountability of the established governance institutions and the industry players in general.

2.4.2 Resource Explorers and Developers

The producers and explorers of the hydrocarbon resource are oil companies. A state explores and produces its hydrocarbons by its self through its oil company or by entering into various types of agreements with commercial hydrocarbon producing enterprises.[57] Given the

[50] H. Le Leuch, 'Recent Trends in Upstream Petroleum Agreements: Policy, Contractual, Fiscal, and Legal Issues', in A. Goldthau, *The Handbook of Global Energy Policy* (West Sussex, John Wiley & Sons, 2013)127; Clo, ibid.

[51] N. Bret-Rouzaut & J. Favennec, *Oil and Gas Exploration and Production: Reserves, Costs, Contracts*, (Paris: Editions TECHNIP, 2011) 175-176.

[52] A. Goldthau, 'Challenges in Global Oil Governance', in R. E. Looney, *Handbook of Oil Politics* (London: Routledge, 2012)350-51.

[53] J. Easo, 'Licences, Concessions, Production Sharing Agreements and Service Contracts', in G. Picton-Turbervill, *Oil and Gas: A Practical Handbook* (London: Globe Business Publishing, 2009)27-8.

[54] Inkpen & Moffett, Supra note 5 at 51; F. Al-Kasim et al, 'Grand Corruption in the Regulation of Oil', (2008) 2008(2) U4 *Anticorruption Resource Centre* 1 at 15.

[55] B. Taverne, *Petroleum, Industry and Governments: A Study of the Involvement of Industry and Governments in Exploring for and Producing Petroleum* (ed 3) (The Hague: Kluwer Law International, 2013) 123.

[56] Taverne, supra note 55 at 125.

[57] Babusiaux, supra note 28 at 182.

sophistication and the need of intensive capital and technology required for the exploration and production of hydrocarbon resources, states usually engage private or other national companies in the development of the resources.[58] The oil companies may be divided into two groups: national oil companies and multinational or international oil companies. The literature on the industry refers to a range of terms used to define various types of oil companies based on their maturity, fiscal capacity and profile, area of specialization, ownership and so on.[59] These terms include integrated oil companies, international oil companies, independents, oil majors and super majors.[60] For purposes of this study, all foreign companies operating in a state will be defined as a multinational company. The choice of this definition is made within the context of a developing country's structure in mind where most of the hydrocarbon companies operating in those countries are usually multinational companies.

2.4.2.1 National Oil Companies

Customarily, national oil companies enter hydrocarbon-producing agreements on behalf of their governments.[61] They act as the link between the government and the multinational companies.[62] The majority of countries with hydrocarbons have established national oil companies to represent their economic interests.[63] While a few national oil companies have met such expectations over the years, the majority of national oil companies are yet to live up to their economic potential.[64] National oil companies are habitually limited from strictly functioning as business entities especially in developing countries.[65] They are operated as an extended arm of government addressing social, political, economic and even regulatory

[58] P. Park, *International Law for Energy and the Environment* (New York: CRC Press, 2013) 75.

[59] Inkpen & Moffett, supra note 5 at 11-13 ; T. Falola & A. Genova, *The Politics of the Global Oil Industry: An Introduction* (Connecticut: Greenwood Publishing Group, 2005) 24-25; T. R. Twyman, 'US Petroleum Supply Changing: Roles of the Majors and Non-Major Producers', in V. C. Mtsiva, *Oil and Natural Gas: Issues and Policies* (New York: Nova Science Publishers 2003)1-2.

[60] See Inkpen for an exhaustive list of the terminologies used and the various classifications: Inkpen & Moffett, supra note 5 at 11-13.

[61] N. Ghorban, 'National Oil Companies with Reference to the Middle East 1900-73', in R. W. Ferrier & A. Fursenko, *Oil in the World Economy* (London: Routledge, 2016)20.

[62] Inkpen & Moffett, supra note 5 at 55.

[63] S. Tordo, *National Oil Companies and Value Creation* (Washington D.C: World Bank Publications, 2011) 23.

[64] R. L. Nersesian, *Energy Economics: Markets, History and Policy* (London: Routledge, 2016)220.

[65] Nersesian. ibid; Tordo, supra note 63 at 26-7.

obligations.[66] Their objectives go beyond revenue generation to include job creation, wealth re-distribution and are in many cases operated as the *de facto* treasury for the country.[67] Such operation of national oil companies is likely to impair transparent and accountable governance of the oil companies.

Being the link between the oil execrators and the owners situates national oil companies at the focal point of the hydrocarbon industry. They are the traders of the world's hydrocarbons on behalf of their states.[68] Roughly, two-thirds of global hydrocarbon sales happen through contracts with national oil companies.[69] Notwithstanding their importance in the industry, national oil companies vary tremendously, and how each operates and behaves depends on the economic, political, social and policy climate of its state.[70] The thesis therefore will particularly focus on how the legal framework provides for transparency and accountability of Tanzania's National Oil Company. It will also seek to see whether Tanzania's company falls in the trap of being an extended arm of government or it is indeed and economic entity capable of realizing the nation's hydrocarbons economic potential.

2.4.2.2 Multinational Oil Companies

In the context of developing countries, multinational companies are indispensable to their hydrocarbon industry at least for the time being.[71] Developing countries' oil companies lack the required monetary capital, technology and or managerial skills needed to develop profitable hydrocarbon projects.[72] As a result, they rely on multinational companies with financial

[66] Inkpen & Moffett, supra note 5 at 17.

[67] Inkpen & Moffett, supra note 5 at 15; R L. Nersesian, Energy *Economics: Markets, History and Policy* (London: Routledge, 2016) 221; C. Nakhle, 'Petroleum fiscal regimes Evolution and challenges', in P. Daniel *et al*, *The Taxation of Petroleum and Minerals: Principles, Problems and Practice* (London: Routledge, 2010) 91.

[68] A. Gillies, 'Selling the Citizens' Oil: The Case for Transparency in National Oil Company Crude Sales', (2012) available at http://www.resourcegovernance.org/sites/default/files/OilSales-Transparency.pdf accessed in October 2016 at 2.

[69] Ibid.

[70] A. M Jaffe & R. Soligo, 'State-Backed Financing in Oil and Gas Projects', in A.Goldthau & J. M. Witte, *Global Energy Governance: The New Rules of the Game* (Washington D.C: Brookings Institution Press, 2010) 110.

[71] R. F. Mikesell, *Petroleum Company Operations and Agreements in the Developing Countries* (London: Routledge, 2016)25-6.

[72] S. Tordo, *Petroleum Exploration and Production Rights: Allocation Strategies and Design Issues* (Washington Dc: World Bank Publications, 2010)2-3.

muscle, experience and a technological advantage in the exploration and extraction of hydrocarbons.[73] Multinational oil companies are profit-oriented organizations. State owned multinational oil companies also have political and security agendas in their foreign hydrocarbon investments.[74] All multinational oil companies are respondent to the demands and expectations of their private shareholders or their government interests.[75] They have minimal public policy goals towards the host governments and their operations and decisions are based on profit maximization or their political agendas (for the case of state owned companies) if any.[76] These interests of multinational companies do have a baring of transparency and accountability in hydrocarbon governance in host governments. The thesis explores how Tanzania's legal framework balances such interests in providing for transparency and accountability of multinational companies in its hydrocarbon sector.

2.4.3 Trade and Market Influencers

Once oil companies have produced hydrocarbon resources the question of trade comes up, which brings to mind other players who are fundamental to the hydrocarbon industry, such as the Organization of the Petroleum Exporting Countries (OPEC) and the Organization for Economic Development and Cooperation (OECD). OPEC and OECD harbour major hydrocarbon producers, the major consumers, and own the major multinational oil companies. OECD in particular is at a pivotal position to influence trade, policies, governance, and regulation of the hydrocarbon industry. This is mainly because OECD countries are not only major industry players but also development partners in a majority of developing hydrocarbon-producing countries including Tanzania.

How these market influencers affect global transparency and accountability trends is explored further in Chapter 4. Such policy influence is also highlighted in the context of the involvement of multinational companies. OECD countries have adopted transparency policies and legislation that govern their multinational companies some of which operate in Africa exploiting hydrocarbons.

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[73] Ibid.

[74] O. Noreng, *Crude Power: Politics and the Oil Market* (Vol. 21) (London: IB Tauris, 2006) 54-55.

[75] Inkpen & Moffett, supra note 5 at 17.

[76] Ibid.

2.4.4 Third Party Actors

Though the trade of and regulation of the hydrocarbon industry involves decisions of great importance to government revenues and company profits, there are a number of players with an interest in influencing such decisions. Decisions on hydrocarbons do not only affect the deciding parties but the entire global economy.[77] Resolutions on hydrocarbons go beyond the shaping of the energy demand and supply curve, which is in itself crucial to global development.[78] Extraction of hydrocarbons affect broad concerns on the disruption of the climate system and environmental degradation, critical poverty eradication issues, among other global agendas.[79] Moreover, hydrocarbons are finite in nature, they are found in and produced by a few countries yet their consumption is global and at an ever increasing demand.[80] Accordingly, these aspects bring about the recognition of third party industrial actors. These include multinational organizations such as the World Bank and IMF, global CSOs among other plays who in one way or another have influenced certain traits of policy development in the hydrocarbon industry.

2.4.4.1 World Bank and IMF

The World Bank and the IMF are key players of the hydrocarbon industry. It is estimated that the World Bank Group provides an annual average of over $US1 billion to extractive industries.[81] This has consequentially made these monetary institutions influential in the governance and regulation of resources they fund.[82] It is approximated that over a hundred countries have reformed their hydrocarbon and/or mining sectors over the past two decades

[77] T. Van de Graaf, *The Politics and Institutions of Global Energy Governance* (London: Palgrave Macmillan, 2013) 35-38.

[78] Ibid.

[79] Ibid at 37.

[80] T. Shelley, *Oil: Politics, Poverty and the Planet* (London: Zed Books, 2005)1-2.

[81] World Bank , 'The World Bank Group in Extractive Industries 2010 ANNUAL REVIEW' (2010) available at http://www.ifc.org/wps/wcm/connect/e3d34f8044d640c589f38dc66d9c728b/WBG_Extractive_Industries_Annual_Review_2010.pdf?MOD=AJPERES accessed in September 2018 at 13-15; Global witness, 'IMF and World Bank Need to Bolster :Transparency Measures in the Extractive Industries' (2008) available athttps://www.globalwitness.org/media_library_detail.php/676/en/assessment_of_international_monetary accessed in September 2018.

[82] Inkpen & Moffett, supra note 5 at 290; R. J. Heffron, *Energy Law: An Introduction* (New York: Springer 2015) 15-16.

following the directives of the World Bank and/or IMF programs.[83] One example of industry specific policies is the local content policy guidelines for the hydrocarbon industry by the World Bank.[84] The IMF has also conducted surveys and made recommendation on the formulation and implementation of fiscal policy in oil-producing countries.[85] Both the World Bank and IMF have influenced good governance policies,[86] they have made commitments in fighting corruption[87] and have influenced corporate standards that affect the major players of the hydrocarbon industry.[88] How these actors affect transparency trends in the industry is explored in Chapter 4 while their influential policies such as anti-corruption policies are also discussed in analyzing Tanzania's hydrocarbon industry.

2.4.4.2 Civil Society Organisations

The continued skullduggery associated with the hydrocarbon industry ever since its establishment has necessitated the intervention of civil societies.[89] This intervention has made them a key player in influencing governance polices and regulation of the industry.[90] CSOs

[83]Global witness, 'IMF and World Bank Need to Bolster: Transparency Measures in the Extractive Industries' (2008) available at https://www.globalwitness.org/media_library_detail.php/676/en/assessment_of_international_monetary accessed in September 2018.

[84]S. Tordo *et al*, *Local Content Policies in the Oil and Gas Sector* (Washington DC: World Bank Publications, 2013).

[85] M. J. M Davis *et al*, *Fiscal Policy Formulation and Implementation in Oil-Producing Countries* (Washington DC: International Monetary Fund, 2003).

[86]V. P. Nanda, 'The "Good Governance" Concept Revisited', (2006) 603(1) *The ANNALS of the American academy of political and social science* 269-283 at 272-279.

[87] N. Kofele-Kale, *The International Law of Responsibility for Economic Crimes: Holding State Officials Individually Liable for Acts of Fraudulent Enrichment* (London: Routledge, 2016) 396-397; D. Schmidt-Pfister & H. Moroff, *Fighting Corruption in Eastern Europe: A Multilevel Perspective* (New York: Routledge, 2013) 75-76.

[88]G. H. Uriz, 'The Application of the World Bank Standards to the Oil Industry: Can the World Bank Group Promote Corporate Responsibility', (2002)28 *Brook Journal of International Law* 77- 122 at 199.

[89]C. A. Williams, 'Civil Society Initiatives and Soft Law in the Oil and Gas Industry', (2003-2004) 36 *N.Y.U. Journal of International Law and Politics* 457- 502 at 461; P. Eigen, 'Fighting Corruption in A Global Economy: Transparency Initiatives in the Oil and Gas Industry', (2006) 29 *Houston Journal of International Law*, 327-354 at 332.

[90] P. R. Heller, 'Civil Society and the Evolution of Accountability in the Petroleum Sector', in K. Appiah-Adu, *Governance of the Petroleum Sector in an Emerging Developing Economy* (London: Routledge, 2016)89.

intervention is under the premise that, poor governance and political decisions in the regulation of hydrocarbons (and other natural resources) is the main cause of the resource curse.[91] CSOs have built transnational networks advocating for solutions for the escalating political instability, corruption, authoritarianism, civil war, indebtedness and poverty in resource rich countries.[92] The past two decades have seen these networks successfully institutionalize transparency and good governance agendas in the global extractive industries.[93] The CSOs' advocacy initiatives have gained unprecedented support from western governments, international financial institutions and multinational companies at least in theory.[94] The CSOs initiatives have come to mark current resource governance trends in the extractive industry in general.[95]

These initiatives, which have evolved, to being multi-stakeholder initiatives in the extractive industry include the Extractive Industry Transparency Initiative (EITI) and Publish What You Pay (PWYP) campaign.[96] These initiatives seek to institutionalize transparency in governance

[91] M. J. Calder, *Administering Fiscal Regimes for Extractive Industries* (Washington DC: International Monetary Fund 2015) 51; A. Bauer & J. C. Quiroz, 'Resource Governance', in A Goldthau, *The Handbook of Global Energy Policy* (West Sussex: John Wiley & Sons, 2013) 245.

[92] R. Price, 'Transnational Civil Society and Advocacy in World Politics', (2003) 55(4) *World Politics*, 579-606; A. Rosser, 'The Political Economy of the Resource Curse: A Literature Survey', (2006) *IDS Working Paper 268; Institute of Development Studies* at 7-8; J. D. Clark, 'Introduction: Civil Society and Transnational Action', in J. D. Clark, *Globalizing Civic Engagement: Civil Society and Transnational Action* (London: Earth Scan, 2012) chapter one.

[93] C. Cater, 'The Recourse Curse and Transparency', in B. Currie-Alder *et al*, (eds) *International Development: Ideas, Experience, and Prospects* (Oxford: Oxford University Press, 2014) 402; R. J. Heffron, *Energy Law: An Introduction* (New York: Springer 2015) 15-16.

[94] The majority of OCED countries are not compliant to the EITI initiatives yet many have incorporated transparency into the extractive industry regulation. Deutsche EITI, *Implementation of the EITI in G7, EU and OECD countries: Facts & Figures* (Bonne: Deutsche Gesellschaft für, 2016) 2 & 29-30; A. Ravat, & S. P. Kannan, *Implementing EITI for Impact: A Handbook for Policy Makers and Stakeholders* (Washington DC: World Bank Publications, 2012)2-3.

[95] T. Benner *et al*, 'The Good/Bad Nexus in Global Energy Governance', in A.Goldthau & J. M. Witte, *Global Energy Governance: The New Rules of the Game* (Washington D.C: Brookings Institution Press, 2010) 297.

[96] C. McPherson, 'National Oil Companies: Ensuring Benefits and Avoiding Systemic Risks', in A.Goldthau, *The Handbook of Global Energy Policy*, supra note 92 at 152.

and regulation of natural resource.[97] PWYP is a coalition of more than 800 organizations that campaigns for transparency and accountability all along the value chain of extractive industries with the aim of achieving resource-led development.[98] The PWYP campaigns helped to establish the EITI.[99] The EITI has evolved to being a voluntary global standard to promote transparent administration of extractive resources by governments and companies through the disclosure of government revenues and company payments,[100] the premise being that 'increasing transparency in the extractive sector will enable citizens to hold governments and companies to account for the ways in which natural resources are managed'.[101] The EITI Standards obligates the disclosure of information throughout the activities of the extractive industry value chain.[102] It requires disclosure on licences and contracts allocation and registration, field operations and company transactions, information on production, revenue and company payments as well as revenue allocation and distribution.[103] In the implementation of the EITI, compliant countries have their own state secretariat and multi-stakeholder supervision group, comprising of government actors, extractive companies and civil society.[104] At the global arena, the EITI is developed and overseen by a Multi-stakeholder Board, comprising of state representatives, civil society organizations, extractives companies, financial institutions, and international organizations.[105]

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[97] C. Cater, 'The Recourse Curse and Transparency', in B. Currie-Alder *et al*, (eds) *International Development: Ideas, Experience, and Prospects* (Oxford: Oxford University Press, 2014) 402.

[98] Publish What You Pay, Proud past, bright future: PWYP activities report 2012-2015 available at http://www.publishwhatyoupay.org/wp-content/uploads/2016/02/pwyp_ar2016.pdf accessed in September 2018 at 2.

[99] V. Haufler, 'Mncs and the International Community: Conflict, Conflict Prevention and the Privatization of Diplomacy', in V. Rittberger *et al*, *Authority in the Global Political Economy* (London: Palgrave Macmillan, 2008)228.

[100] A. Bauer & J.C. Quiroz, 'Resource Governance', in Goldthau, supra note 92 at 255.

[101] Publish What You Pay, 'Objectives' available at http://www.publishwhatyoupay.org/about/objectives/ accessed in September 2018.

[102] EITI, THE EITI STANDARD 2016 available at https://eiti.org/sites/default/files/documents/english-eiti-standard_0.pdf accessed in September 2018 at 9.

[103] Ibid.

[104] T. P. Gormley, 'Transparency and International', in Energy in K. Talus, *Research Handbook on International Energy Law* (Cheltenham: Edward Elgar Publishing. Talus, 2014) 524-525.

[105] A. Ravat, & S. P. Kannan, *Implementing EITI for Impact: A Handbook for Policy Makers and Stakeholders* (Washington DC: World Bank Publications, 2012) 290.

Tanzania has ratified and domesticated the EITI guidelines. The thesis explores how Tanzania's EITI legislation provides for transparency and accountability and whether it could be improved by borrowing from other EITI participating countries or the EITI guidelines. The thesis also studies the role of CSOs as stakeholders in as far as transparency and accountability is concerned in the legal framework.

2.5 THE QUESTION OF THE APPLICABLE LAW

While hydrocarbons are predominantly regulated by respective producing countries, their transnational nature necessitates an application of a broader regulatory regime.[106] This broader regulatory regime is entangled through a complex web of international and regional treaties, industry specific standards, and other applicable standards.[107] This regime involves an interaction among various fields such as environmental concerns, political concerns of energy security and economic power, finance and investment, health and human rights among others.[108] Though the existence of '*lex petrolea'* or the international petroleum law is contested, at least a body of various international laws affecting the industry is not disputed.[109] This includes various environmental treaties, investment promotion and protection treaties, international treaties and conventions on intellectual property, treaties on taxation just to mention few.[110] The thesis analyse how these treaties and conventions provide for transparency and accountability and are compatible with national legislation to the extent in which they form part of Tanzania's hydrocarbon legal framework.

The involvement of MOCs and the interaction among states naturally necessitates the use of neutral dispute resolution bodies.[111] Given the investments involved in the industry, the International Centre for Settlement of Investment Disputes (ICSID) among other international

[106] A. Wawryk, 'Petroleum Regulation in an International Context: The Universality of Petroleum Regulation and the Concept of Lex Petrolea', in T. Hunter, (ed) *Regulation of the Upstream Petroleum Sector: A Comparative Study of Licensing and Concession Systems* (Cheltenham: Edward Elgar Publishing, 2015) 35.

[107] Heffron, supra note 94 at 15-18.

[108] Heffron, supra note 94 at 3-4.

[109] Wawryk, supra note 107 at 8.

[110] See Zedalis on environmental treaties; R. Zedalis, *International Energy Law: Rules Governing Future Exploration, Exploitation, and Use of Renewable Resources* (New York: Routledge, 2016) chapters 6 &7.

[111] C. O. García-Castrillón, 'Reflections on the Law Applicable to International Oil Contracts', (2013) 6(3) *Journal of World Energy Law and Business*, 1-34 at at 5.

arbitration bodies are central to the hydrocarbon industry.[112] They are responsible for the formulation of the contested '*lex petrolea'*.[113] The hydrocarbon industry has been considered the major source of international case law.[114] The ICSID alone had energy disputes making up 37% of the claims before it.[115] Tanzania has entered bilateral trade agreements with various countries that demand the use of international dispute resolution bodies. In accessing accountability, the thesis also evaluates how such bodies are provided for in the legal framework especially in as far as multinational companies' accountability is concerned.

2.6 CONCLUSION

As the major source of energy, the hydrocarbon industry is unique and complex. While it is the cornerstone of our global development, it is also a major catalyst of global distraction. As humans enjoy the benefits of mobility and other technological advancements, they are also rightly concerned about our climate, war and other social ills attributed to the hydrocarbon industry. Its resources are located and produced by a few countries yet consumed by the global community. Their extraction requires heavy investment, technical knowledge, and technology that a majority of its producers do not possess, individually. All these characteristics underline the complex nature of the hydrocarbon industry that involves several private, national, and international players, not to mention the various fields involved ranging from engineering, economics, and politics among others. When looked at through the lenses of regulation and governance, this complexity explains the reluctance of adopting an explicit international legal and regulatory framework of the industry. Regulation of hydrocarbons therefore depends on effective domestic regulation that is in many cases faced with broader transnational challenges.

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[112] A. Sabatar & M. Stadnyk, 'International Arbitration and Energy: How Energy Dispute Shape International Investment Dispute Resolution', in K. Talus, *Research Handbook on International Energy Law* (Cheltenham: Edward Elgar Publishing. Talus, 2014) 200.

[113] T. C. Childs, 'Update on Lex Petrolea: The Continuing Development of Customary Law Relating to International Oil and Gas Exploration and Production', (2011) 4(3) *The Journal of World Energy Law & Business* 214-259 at 214.

[114] Sabatar & Stadnyk, supra note 112 at 199; K.Talus *et al*, 'Lex Petrolea and the Internationalization of Petroleum Agreements: Focus on Host Government Contracts', (2012) 5(3) *Journal of World Energy, Law & Business* 181-193 at 182 .

[115] K.Talus, 'Oil and Gas: International Petroleum Regulation', in E. Morgera & K. Kulovesi, (eds) *Research Handbook on International Law and Natural Resources* (Cheltenham: Edward Elgar Publishing, 2016) 248.

CHAPTER 3

Understanding the hydrocarbon industry and its related complexities provides a clear foundation for the analysis of transparency and accountability as tools of resource governance in Tanzania's hydrocarbons industry. The identification of the industry's structure, the players involved, and the applicable laws is essential to the analysis of how the various laws and industrial players interact in the governance of the industry particularly in the aspects of transparency and accountability.

Having provided the overview of the hydrocarbon industry, Chapter 3 investigates the concepts of transparency and accountability as they relate to resource governance.

CHAPTER 3
THE CONCEPTS OF TRANSPARENCY AND ACCOUNTABILITY

3.1 INTRODUCTION

Chapter one and two showed that there is a growing demand for accountability and transparency in the governance of the extractive industry. This is because transparency and accountability are indispensable to the good governance of natural resources as long as ownership of natural resource is based on the doctrine of public trust and the principle of state sovereignty. For a nation to control its resources in a manner that ensures development and wellbeing of its people, the people are obliged to demand good governance of their resources by holding those they trusted with the obligation of governance to account.

In a majority of today's democracies, people's control over their resources is exercised through national policies and legislation. In different spheres of governance, policies and laws create the foundation of transparency and accountability relations and their implementation mechanisms. These policies and laws do not guarantee implementation. However, they create a road map for effective transparency and accountability relationships and implementation in governance. The question however remains what constitutes adequate legislation for the promotion of effective accountability and transparency practices. Answering this question is critical to determining, in chapters six and seven, whether the concepts of transparency and accountability are sufficiently incorporated in Tanzania's hydrocarbon industry legal framework.

The aim of this chapter therefore is to identify and analyse the concepts of transparency and accountability as they relate to governance. The argument it seeks to advance is that for there to be effective transparency and accountability, legislation must make provision for certain core elements of transparency and accountability systems and mechanisms of ensuring their implementation. The chapter starts by defining the concepts of transparency and accountability and drawing the respective concept elements. Then it looks at the various classifications or forms of transparency and accountability as well as their implementation mechanisms. The chapter ends with an evaluation of the relationship between transparency and accountability and the limitations involved.

3.2 ACCOUNTABILITY

As a concept, accountability is ambiguous.[1] It means different things to different people.[2] Academic literature on accountability is also conceptually disintegrated, incoherent, and nebulous.[3] This is partly because many scholars approach and define accountability from different contexts producing their own specific definition of accountability. Is accountability, answerability,[4] responsibility,[5] democracy,[6] punishment,[7] controllability,[8] or responsiveness?[9] Is accountability a mechanism of evaluation or analysis?[10] Are there different, forms, modes,

[1] A. Sinclair, 'The Chameleon of Accountability: Forms and Discourses consider this comma, consistency,' (1995) 20(2-3) *Accounting, Organizations and Society* 219-237 at 224; R. D. Behn, *Rethinking Democratic Accountability* (Washington DC: Brookings Institution Press, 2001) 3. Olsen discusses the ambiguity of Accountability beyond the definition of the term but also its practical operation. J. P. Olsen, 'Accountability and Ambiguity,' in M. Bovens *et al*, *The Oxford Handbook Public Accountability* (Oxford: Oxford University Press, 2014) Chapter 7.

[2] M. Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework', (2007)13(4) *European law journal* 447-468 at 448-9; M. Bovens *et al*, 'Public Accountability' in M. Bovens *et al*, *The Oxford Handbook Public Accountability* (Oxford: Oxford University Press, 2014) 2.

[3] P. Newell, 'Taking Accountability into Account: The Debate so Far', in P. Newell & J. Wheeler, *Rights, Resources and the Politics of Accountability* (London: Zed Books, 2006)39; H. Bergsteiner, *Accountability Theory Meets Accountability Practice* (West Yorkshire: Emerald Group Publishing, 2012) 4.

[4] C. D. Kenny, 'Horizontal Accountability, Conflicts and Concepts', in S. Mainwaring & C. Welna, (eds) *Democratic Accountability in Latin America* (Oxford: Oxford University Press, 2003)63; K. Auel, 'Democratic Accountability and National Parliaments: Redefining the Impact of Parliamentary Scrutiny in EU Affairs', (2007) 13(4) *European Law Journal* 13.487-504 at 495.

[5] M. Bemelmans-Videc, 'Accountability, A Classic Concept in Modern Contexts: Implications for Evaluation and Auditing Roles', in B. Perrin *et al*, (eds) *Making Accountability Work: Dilemmas for Evaluation and for Audit* (New Jersey: Transaction Publishers, 2011) 21.

[6] M. E. Warren, 'Accountability and Democracy', in Bovens *et al*, supra note 2 at 39.

[7] Behn, supra note 1 at 3.

[8] A. Lupia, 'Delegation and its Perils', in K. Strom *et al*, (eds*) Delegation and Accountability in Parliamentary Democracies* (Oxford: Oxford University Press 2003) 34-5; J. Koppell, 'Pathologies of Accountability: ICANN and the Challenge of "Multiple Accountabilities Disorder', (2005) 65 (1) *Public Administration Review* 94-108 at 97.

[9] D. Bright, 'Responsible Work Executive Excellence: The Magazine of Leadership Development, Managerial Effectiveness, and Organizational Productivity', (2001) cited in H. Bergsteiner, *Accountability Theory Meets Accountability Practice* (West Yorkshire: Emerald Group Publishing, 2012) 26.

[10] M. Bovens, 'Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism', (2010) 33(5) *West European Politics* 946-967.

and types, of accountability? Would the term 'accountability' change meaning in an authoritarian government as opposed to a democratic government? Would it be different in profession as opposed to political context? The list of potential questions one would ask oneself upon reading the literature on accountability is endless. Varied definitions, classifications, and interpretations from all fields of study give overlapping and multidimensional answers to such questions. Bearing in mind that the study involves public governance of a multi-stakeholder industry involving a range of players and actors, this chapter seeks to come up with a general definition of accountability by narrowing down what the literature considers the core attributes of the concept particularly as relates to public governance.

3.2.1 Defining Accountability

Accountability involves relationships between parties.[11] The term 'relationship' refers to a connection formed between parties based on collective interactions and mutual goals, interests or feelings.[12] It involves expectations that require the fulfilment of rights, duties, and responsibilities.[13] How the relationship unfolds and the rights, duties, and responsibilities are executed towards achieving mutual goals, interests and feelings is where we find accountability coming up.

[11] Some scholar's dispute that identifying accountability to involve relations is wrong as it neglects what they call individual, personal, or self-accountability that does not involve any interaction with another party. See, B. R Schlenker & M. F. Weigold, 'Self-Identification and Accountability', in R. A. Giacalone & P. Rosenfeld, (eds) *Impression Management in the Organization* (New Jersey: Lawrence Erlbaum Associates, 1989) 21-43; Bergsteiner supra note 3 at 25. For a detailed analysis on self-accountability see: V. Argyou, 'Self-Accountability, Ethics and the Problem of Meaning', in M. Strathern, (ed) *Audit Cultures: Anthropological Studies in Accountability, Ethics, and the Academy* (London and New York: Routledge 2000) 196-211; H. Willmott, 'Thinking Accountability: Accounting for the Disciplined Production of Self', in R. Munro & J. Mouritsen, (ed) *Power, Ethics & The Technologies of Managing* (London: International Thompson Business Press, 1996)23-39.

[12] Oxford English Dictionary Online, available at https://en.oxforddictionaries.com/definition/relationship, accessed in January 2017. These relations could be legal, ethical, corporate, national, personal, educational, or whatever possible relations possible for human organization and association.

[13] D. D. Frink & R. J. Klimoski, 'Advancing Accountability Theory and Practice: Introduction to the Human Resource Management Review Special Edition', (2004) 14(1) *Human resource management review* 1-17 at 2.

For some accountability refers to the keeping of record and account of how an actor in a relationship plays his/her role in achieving the expected relationship goals or interest.[14] The mere keeping of record and account however fails to cater for the roles of both parties in a relationship. The record keeper ought to be able to give an account and justification of the manner in which he or she exercised and fulfilled relevant rights, duties, and responsibilities. The duty to give justification is what others have referred to as answerability.[15] However, answerability has not only been associated with the giving of an account or justification, but also with liability for the consequences of failure to provide a justification.[16]

Advocates of answerability as 'a component of accountability' argue that the person who demands an explanation must be in a position to exact punish on the person who fails to provide the explanation.[17] They call this the enforcement dimension of accountability.[18] This element

[14] This group of scholars is considered to relate accountability to its original sense of bookkeeping. See M. Dubnick, 'Accountability and the Promise of Performance: In Search of the Mechanisms', (2005) 28(3) *Public Performance & Management Review* 376-417 at 379; R. Mulgan, 'Accountability: An Ever-Expanding Concept?', (2000) 78(3) *Public administration* 555-573 at 556. Dubnick traces the history of accountability from 1085 England under the reign of King William who ordered the compilation of a survey of the landholdings. Requiring Landholders to 'render a count of what they possessed. M. Dubnick, Seeking Salvation for Accountability, paper presented at the Annual Meeting of the American Political Science Association (2002), p 7–9 available at http://mjdubnick.dubnick.net/papersrw/2002/salv2002.pdf accessed in November 2016.

[15] A. Schedler *et al*, *The Self-Restraining State: Power and Accountability in New Democracies* (London: Lynne Rienner Publishers, 1999) 14-15; Behn supra note 3 at 3.

[16]Schedler *et al* ibid; K. Auel, 'Democratic Accountability and National Parliaments: Redefining the Impact of Parliamentary Scrutiny in EU Affairs', (2007) 13(4) *European Law Journal* 13.487-504 at 495; B. Romzek & M. Dubnick, 'Accountability', in J. M. Shafritz, (ed) *International Encyclopedia of Public Policy and Administration Volume 1* (Boulder: Westview Press, 1998)6-7.

[17] R. Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (Hamphshire, PalgraveMacmillan 2003) 18-19; P. Burnell, 'The Relationship of Accountable Governance and Constitutional Implementation, With Reference to Africa', (2008)1 (3) *Journal of Politics and Law* 10-24 at 11-12; J. S. Lerner & P. E. Tetlock, 'Accountability and Social Cognition', (1994)1 *Encyclopedia of Human Behavior* 1-10 at 2; Koppell supra note 8 at 97; I. Thynne & J. Goldring, *Accountability and Control: Government Officials and the Exercise of Power* (Sydney: Law Book Company, 1987) 8 quoted in A Sinclair, supra note 1 at 221; B. Romzek & M. Dubnick, supra note 16 at 6.

[18] Schedler *et al*, supra note 15 at 15-16; A. M. Goetz & R. Jenkins 'Accountability', in A. Kuper, (ed) *The Social Science Encyclopedia* (London &New York: Routledge 2004) 1; N. Garvey & P. Newell, 'Corporate Accountability to the Poor? Assessing the Effectiveness of Community-Based Strategies', (2005) 15(3-4) *Development in Practice*, 389-404 at 391.

of accountability has, however, raised the question whether accountability enforcement is only triggered when a party fails to fulfil an expected relationship obligation and whether the consequence that follow have to be negative in nature. These concerns have led other scholars to argue that accountability should take place regardless of the failure or success in fulfilling relationship obligations.[19] Accountability consequences do not have to be negative: they could also involve rewarding of actors who have fulfilled their obligations.[20]

Other scholars define accountability as the giving of an account and justification by a subordinate.[21] Such a definition implies that accountability exists in only those relationships that involve authority and hierarchy and hence make it possible for the 'enforcement dimension' of accountability to occur.[22] Such a definition is misleading especially in the context of public administration where accountability relationships may involve parties with equal constitutional powers such as the executive and the legislative branches of government. Additionally, accountability relationships often involve mutual rights, duties and responsibility such that even those in authority can be called to account for their actions.[23]

In view of these accounts of accountability, accountability is the act of giving account (informing, explaining and justifying) by one, or group of, actor(s) to another or other actors for the manner in which he/she has exercised his/her rights, duties and responsibilities in order to achieve specific expectations.

3.2.2 Elements of Accountability

In accordance with the above definition, accountability entails several elements. The first is the existence of the actor giving the account (accountee) and the actor to whom the account is

[19] Bergsteiner, supra note 3 at 161; J. S. Lerner & P. E. Tetlock 'Accounting for the Effects of Accountability', (1999) 125(2) *Psychological Bulletin* 255-275 at 255.

[20] Ibid.

[21] Romzek & Dubnick, supra note 16 at 6; K. Strøm, 'Delegation and Accountability in Parliamentary Democracies', (2000) 37(3) *European Journal of Political Research* 261-290; A. Lupia & M.D. McCubbins, 'Representation or Abdication? How Citizens Use Institutions to Help Delegation Succeed', (2000) 37 *European Journal of Political Research* 291–307.

[22] M. Samuel & B. Novak, *The Accountability Revolution: Achieve Breakthrough Results in Half the Time* (Tempe, Facts on Demand Press. 2001) cited in Bergsteiner, supra note 3 at 27.

[23] Bergsteiner, supra note 3 at 27.

given (the accountor).[24] In the governance of hydrocarbons, the accountee could be a licensing authority, relevant ministry, or a public or private corporation. The accountor could be a senior civil servant, an auditing, monitoring and evaluation agent, parliament or civil society organisations or the public.

The second element is the existence of guiding principles (formal or informal)[25] to govern the process of accountability. These guidelines could be derived from prescribed laws or adopted norms, customs and even societal moral standards guiding the respective accountability relationship. The guiding principles in a relationship obligates the actor to acknowledge ownership of his actions or inactions and the acceptance of being put to task for such action or inaction.[26]

The third element of accountability relates to the access to information by the accountor.[27] This is the process of account giving itself. The accountee is expected to provide the accountor with information about the manner in which he/she has conducted himself/herself. Such information might include facts, records, statistics, communications, and reports.[28] This element involves the transparency dimension of accountability.[29]

[24] Various terms have been used to refer to the actor giving account and the actors demanding account. Bovens for example refers to the actor demanding account as the 'accountability forum' and the accounting party as 'actor', others use terms depicting their understanding and definition of accountability for instance principle and agent, role sender and responder, among others. Others have also used the term accountor and accountee as preferred in this study. See, Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework.', supra note 28 at 452. Bergsteiner analyses the different terms as used by various scholars. Bergsteiner, supra note 3 at 27.

[25] Where prescribed by law or codes of conduct or practice they are referred to as formal and informal where it is part of custom, generally accepted moral values and norms.

[26] Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework', supra note 2 at 451.

[27] G. C. Avery & H. Bergsteiner, 'Responsibility and Accountability: Towards an Integrative Process Model', (2011) 2 (2) *International Business & Economics Research Journal* 31-40 at 32-34.

[28] Schedler et al, supra note 15 at 14-15.

[29] Koppell, supra note 8 at 96.

The fourth element relates to the legitimacy of the accountor's interrogative capacity to seek explanations and justifications on the information provided by the accountee.[30] This is what is called the answerability dimension of accountability as has been noted earlier. Answerability entails the 'argumentative dimension of accountability'.[31] In other words, the interrogation of "why" the accountee acted in the particular manner.

The fifth element of accountability is about evaluation and rendering judgement based on the guiding principles of the respective relationship.[32] This is what is called the controllability dimension of accountability.[33] For instance, where a minister submits a report on the hydrocarbon sector to parliament, the latter may approve the report or censure the ministry for poor performance or underperformance. While accountability machineries do provide control over actions of the other actor, other control measures may occur *ex ante* or *ex post* that do not amount to accountability.[34] These measures include preemptive endeavours of directing conduct such as through straight orders or laws and regulations.[35]

The sixth element relates to the adequacy of the mandate and the independence of the accountability agency. This goes hand in hand with the fifth element discussed above. The accountor ought to be free from any influence from the accountee and must have sufficient mandate to enforce accountability and influence the accountee's behavior.

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[30] H. Slim, 'By What Authority? The Legitimacy and Accountability of Non-Governmental Organisations', (2002) 10 (1) *The Journal of Humanitarian Assistance* 1-12 at 5-8; T. Risse, 'Transnational Governance and Legitimacy', in A. Benz and Y. Papadopoulos, *Governance and Democracy: Com-paring National, European and International Experiences* (London, Routledge 2006)187-9.

[31] Schedler *et al*, supra note 15 at 15,

[32] Bergsteiner, supra note 2 at 193 and 115; B. R Schlenker *et al*, 'The Triangle Model of Responsibility', (1994) 101(4) *Psychological review*, 632-652 at 641; Mulgan, supra note 17 at 555-6

[33] Koppell, supra note 8 at 97-8.

[34] M. Busuioc, 'Accountability, Control and Independence: The Case of European Agencies', (2009) 15(5) *European Law Journal* 599-615 at 606; C. Scott, 'Accountability in the Regulatory State', (2000) 27 (1) *Journal of Law and Society* 38-60 at 39; Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework,'supra note 28 at 453-454.

[35]Mulgan, supra note 17 at 19; Busuioc, supra note 36 at 605; Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework,' supra note 2 at 453-454

Lastly, the seventh element of accountability relates to the consequences the accountee might face upon the accountor rendering judgement. The consequences may be either positive or negative, depending on the nature of the judgement and the type of relationship and its guiding principles.[36] This element is sometimes described as the liability dimension of accountability,[37] to underline the fact that actors can be held liable for their actions or inactions, penalized for their 'malfeasance', and rewarded for their achievements.[38] However, the consequences of an unsatisfactory account need not only entail rewards or sanctions. For instance, instead of asking for the Minister's resignation, parliament may increase monitoring or consider reducing a Minister's authority over the budget.

For there to be accountability, the above elements must be incorporated in the guiding principles that establish the respective accountability relationship. As highlighted in the introduction above, legislation has an important role to play in defining accountability relationships, the substantive principles of accountability, and in establishing the mechanism by which accountability is implemented in practice. This study uses the above accountability elements as a yardstick in determining whether the hydrocarbon's legal framework in Tanzania facilitates accountable governance in the industry.

3.3 TYPES AND SYSTEMS OF ACCOUNTABILITY

The different types and systems of accountability discussed in accountability consider five fundamental questions: Which actor should give account? To whom should the accountee be accountable? For what must the account be given? By what standards must the account be given? Finally, by which means should the accountee be held accountable? Answers to these questions differ depending on the type of the accountability relationship and the applicable context. Each question is capable of providing a peculiar form of accountability even where

[36] K. Siegel-Jacobs & J. Yates, 'Effects of Procedural and Outcome Accountability on Judgment Quality', (1996) 65(1) *Organizational Behavior and Human Decision Processes* 1-17 at 1-4; Bergsteiner, supra note 3 at 154-55.

[37] Koppell, supra note 8 at 96-7; E. L. Normanton, 'Public Accountability and Audit: A Reconnaissance', in B. L. R. Smith and D. Hague, *The Dilemma of Accountability in Modern Government: Independence Versus Control* (1971) 311 cited in C. Scott, 'Accountability in the Regulatory State', (2000) 27 (1) *Journal of Law and Society* 38-60 at 40.

[38] Koppell, supra note 8 at 96-7; J. Fearon 'Electoral Accountability and the Control of Politicians', in A. Przeworski *et al*,(eds) *Democracy, Accountability and Representation*, Vol. 2 (Cambrigge:Cambridge University Press, 1999) 55; M. Philp, 'Delimiting Democratic Accountability', (2009) 57(1) *Political Studies* 28-53 at 30.

they are applied in the same context. This explains why there are various aspects of accountability. The study will only limit itself to the types and systems of accountability pertaining to public administration and governance.

3.3.1 Horizontal and Vertical Accountability

There are two major types of public accountability: vertical and horizontal accountability.[39] Horizontal and vertical accountability are categorized based on why and to whom the accountee should give account. The nature of the relationship between an accountor and accountee determines whether what is applied is horizontal or vertical accountability.

3.3.1.1 Vertical Accountability

Vertical accountability applies where there are formal obligations on the accountee to give account to the accountor.[40] This may be due to a hierarchical relationship or by compulsion emanating from the laws.[41] For instance, most government relationships and all relationships that involve delegation of powers or a chain of command are considered to fall under the vertical form of accountability.[42] Vertical accountability may also apply in other legal or

[39] A third type of accountability, called diagonal accountability, is sometimes also mentioned. Diagonal accountability refers to direct public engagement with vertical or horizontal accountability institutions when inciting enhanced oversight of state conduct. See:T. Schillemans, 'Accountability in the Shadow of Hierarchy: The Horizontal Accountability of Agencies', (2008) 8(2) *Public Organization Review* 175-194 at 178; P. Magnette *et al* 'Conclusion: Diffuse Democracy in the European Union: The Pathologies of Delegation', (2003)10(5) *Journal of European Public Policy*, 834-840 at 836; M. Bovens, 'The Concept Of Public Accountability', in E. Ferlie *et al*, *The Oxford handbook of public management* (Oxford, Oxford University Press, 2005) 196; J.A. Fox, 'Social Accountability: What Does The Evidence Really Say?', (2015) 72 *World Development* 346-361 at 347; J. Ackerman, 'Co-Governance for Accountability: Beyond "Exit" and "Voice"', (2004)32(3) *World Development* 447-463 at 450-51. This study does not consider this type of accountability to be different from vertical accountability because civil society organizations represent the public interest and thus their demand for accountability falls within that of the citizens in vertical accountability.

[40] Schedler *et al*, supra note 15 at 23; Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework,' supra note 2 at 460; L. J. Diamond & L. Morlino, 'The Quality of Democracy; An Overview', (2004)15 (4) *Journal of Democracy* 20-31 at 25.

[41] Bovens ibid.

[42]Lupia, supra note 8 at 35; Schillemans supra note 43 at 178; Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework,' supra note 2 at 460; A. Michels & A. Meijer, 'Safeguarding Public Accountability in Horizontal Government', 10(2) *Public Management Review* 165-173 at 168.

administrative relationships where the accountor has the authority and the accountee is compelled to submit to the accountor and render an account by legislative or regulatory orders.[43] In the same hierarchy model, vertical accountability applies to the means through which citizens seek to enforce performance standards and demand accountability from those in public office.[44]

For purposes of this study, vertical accountability takes two forms: internal and external vertical. External vertical accountability refers to the process by which the state and other agencies are held to account by non-state actors through the relationship between citizens and their political representatives. [45] Internal vertical accountability refers to hierarchal accountability mechanisms within the specific government departments, institutions and agencies.

3.3.1.2 Horizontal Accountability

Horizontal accountability exists where you have actors of parallel authority demanding accountability from the other.[46] Within the context of public administration and governance, horizontal accountability refers to a network of state actors that are authorized and willing to hold other state actors accountable for their actions or omissions.[47] The accountor in this case ought to have autonomy and legal authority from the other.[48] It has been suggested that horizontal accountability also refers to voluntary accountability, which requires no formal form of compulsion on the accountee whether by way of a hierarchical relationship or legislative or

[43] Michels & Meijer, ibid at 168.

[44] Schedler *et al*, supra note 15 at 3.

[45] A.C. L Davies, *Accountability: A Public Law Analysis of Government by Contract* (New York: Oxford University Press, 2001)77-78.

[46] C. D. Kenney, 'Horizontal Accountability, Conflicts and Concepts', in S. Mainwaring & C. Welna, *Democratic Accountability in Latin America* (Oxford, Oxford University Press, 2003) 59; C. Sampford *et al* , 'From Greek Temple to Bird's Nest: Towards a Theory of Coherence and Mutual Accountability for National Integrity Systems', (2005) 64 (2) *Australian Journal of Public Administration* 96-108 96-7; G. O'Donnell, 'Horizontal Accountability in New Democracies', in Schedler *et al*, supra note 15 at 29-51, P.C. Schmitter, 'The Limits of Horizontal Accountability' in Schedler *et al*, supra note 15 at 61-2.

[47] Donnell ibid at 38.

[48] See the sixth element of accountability above.

regulatory orders.[49] A common example used is the giving of account to various stakeholders in society where the accountee voluntarily feels morally obliged to give account.[50] This classification begs the question to whether 'moral compulsion' is the governing principles of the particular relationships between the accountors demanding accountability and the accountee feeling morally obliged to give account. As discussed earlier, accountability relationships are governed by not only formal rules or legislation but also customs and morals depending on the respective accountability relationship.

For purposes of this study, horizontal accountability refers to the intra-governmental accountability mechanisms between the executive and its administrative authorities and the other organs of state including other autonomous oversight institutions such as the auditor general, anti-corruption commissions, and human rights commissions.

As shown in chapter two, the governance of hydrocarbons involves the cooperation of private actors, the government, multinational organisations and institutions, and even interactions with other sovereign powers.[51] Accountability in the governance of such multiple actors calls for the application of both vertical and horizontal types of accountability. This is not peculiar to the hydrocarbon industry but modern governance generally. In public administration, traditional vertical forms of accountability in a hierarchical manner work alongside horizontal forms of accountability such as ombudsmen, various types of oversight bodies and boards of commissioners, professional evaluation bodies among others.[52] In analysing Tanzania's legal framework in chapter six and seven, the thesis looks at how these types of accountability are provided for and the manner in which they work alongside each other.

3.3.2 Systems of Accountability

[49] Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework,' supra note 2 at 460; Michels & Meijer, supra note 46 at 169.

[50]Bovens Ibid; J. Koppenjan & E. H. Klijn, *Managing Uncertainty in Networks* (London: Routledge 2004) 195.

[51] Chapter 2 subsection 4 of this thesis.

[52] T. Schillemans, 'Redundant Accountability: The Joint Impact of Horizontal and Vertical Accountability on Autonomous Agencies', 2010 34(3) *Public Administration Quarterly* 300–337 at 301; T. Schillemans & M Bovens, 'The Challenge of Multiple Accountability,' in M J Dubnick & H. G, Frederickson *Accountable governance: Problems and promises* (London, M.E. Sharpe 2015)at 3-4; Michels & Meijer, supra note 46 at 168.

Vertical and horizontal accountability are enforced through various systems of accountability depending on the context of the accountability relationship at hand. Systems of accountability are the various methods and procedures by which the respective type of accountability is enforced. These could be political, legal, administrative, professional, or social.

1) Political accountability

Government actors owe the political accountability to the public.[53] In a majority of democratic political systems, enforcement is made though representative institutions such as parliament or congress.[54] These representative institutions are charged with the power to oversee the manner in which public interests are protected by the executive or governing body.[55] Thus, the executive and other political organs of government are accountable to parliament or congress, which is in turn accountable to the citizenry via elections.[56] The executive can give its account directly to the representative institution such as parliament or congress or through oversight agencies that report to parliament such as anti-corruption agencies or auditing agencies.[57]

2) Legal accountability

[53] R. Bellamy & A. Palumbo, 'Introduction', in R Bellamy & A. Palumbo, *Political Accountability* (London: Routledge, 2017) at 1-12; A. Schedler, 'Conceptualizing Accountability', in Schedler *et al*, supra note 15 at 14.

[54] K. Strøm, 'Delegation and Accountability in Parliamentary Democracies', (2000) 37(3) *European Journal of Political Research* 261-290 at 261; Mulgan, supra note 17 at 36.

[55] W. C Muller *et al*, 'Parliamentary Democracy Promises and Problems', in K. Strøm *et al*, (eds) *Delegation and Accountability in Parliamentary Democracies* (Oxford, Oxford University Press 2003) 19; T. Persson *et al*, 'Separation of Powers and Political Accountability', (1997)122(4) *The Quarterly Journal of Economics* 1163-1202 at 1164.

[56] D. Woodhouse & K. Alderman, 'Ministers and Parliament: Accountability in Theory and Practice', (1994) 72(4) *Public Administration-London* 611-619; F. Gains & G. Stoker, 'Delivering 'Public Value': Implications for Accountability and Legitimacy', (2009) 62(3) *Parliamentary Affairs* 438-455 at 445-7; Sinclair supra note 1 at 222.

[57] M. Bovens, 'The concept of public accountability', in E. Ferlie *et al*, *The Oxford handbook of public management* (Oxford, Oxford University Press, 2005) 187.

Legal accountability is enforced via the courts in accordance with prescribed legal standards, administrative, civil, or criminal.[58] Although it is usually enforced by ordinary courts, a specialized tribunal or other body with appropriate legal authority can sometimes enforce it.[59]

3) Administrative or bureaucratic accountability

Government bodies and their employees enforce administrative or bureaucratic accountability.[60] The nature of enforcement procedures in this respect is dependent on the respective organization or institute. Employees of the respective institutes or organizations are subject to a number of operation codes, legislation, and regulations according to which their superiors or overseeing administrative bodies hold them accountable.[61]

4) Professional accountability systems

Human resource departments of organisations and other services delivery offices implement professional accountability.[62] Professional accountability is based on the norms, codes, and regulations on ethics and practice of the particular profession.[63] Enforcement could be by the relevant professional associations or monitoring bodies [64] or internal administrative accountability mechanisms.[65]

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[58] ibid at 188.

[59] R. W. Grant & R. O. Keohane, 'Accountability and Abuses of Power in World Politics', (2005) 99(1) *American Political Science Review* 29-43 at 36; B.S. Romzek & M. J. Dubnick, 'Accountability in the Public Sector: Lessons from the Challenger Tragedy', (1987) *Public Administration Review* 227-238 at 228-9; Scott, supra note 36 at 42.

[60] B. G. Peters, 'Accountability in Public Administration', in Bovens *et al*, supra note 2 at 211-2; Bovens, 'Analysing and Assessing Accountability…' supra note 2 at 456; R. Gregory, 'Accountability in Modern Government', in B.G. Peters *et al*, (eds) *Handbook of Public Administration* (London: SAGE, 2003)557-8.

[61] N. McGarvey, 'Accountability in Public Administration: A Multi-Perspective Framework of Analysis', (2001)16 (2) *Public Policy and Administration* 17-29 at 18; Peters, ibid at 218-223.

[62] Romzek & Dubnick, supra note 72 at 229; K. Kraus & C. Lindholm, 'Accounting in Inter-Organisational Relationships within the Public Sector', in H. Håkansson et *al*, *Accounting in Networks* (London: Routledge, 2010) 124.

[63] Bovens, 'The Concept of Public Accountability', supra note 2 at 188; S. Banks, 'Negotiating Personal Engagement and Professional Accountability: Professional Wisdom and Ethics Work', (2013)16(5) *European Journal of Social Work* 587-604 at 593.

[64] M. Canning & B. O'Dwyer, 'Professional Accounting Bodies' Disciplinary Procedures: Accountable, Transparent and in the Public Interest?', (2001) 10(4) *European Accounting Review* 725-749 at 726-7.

[65] Mulgan, supra note 17 at 559; L. Deleon, 'Accountability in a 'Reinvented' Government', (1998) 76 (3) *Public Administration* 539-558 at 548-541.

The above systems of accountability address the fundamental element of enforcement. They address the forum and manner in which the accountee may be held accountable as well as the powers of the accountor to enforce accountability. They reflect the fifth, sixth and seventh elements of accountability discussed in section 2.2 above relating to implementation mechanisms that are sufficiently independent, have adequate mandate to inquire and render judgement, and have the capacity to enforce their verdicts. A sufficient legislation must not only establish accountability relationships but also sufficiently provide for the adequate forum and required autonomous mandate to ensure accountability implementation. In analysing the legal framework governing hydrocarbons in Tanzania, Chapter 7 analyzes how the above accountability implementation systems are provided for and questions whether they are sufficiently independent with adequate mandate to inquire and render judgement, as well as enforce their decisions.

Alongside accountability is the concept of transparency, which in most cases is treated synonymously with accountability in governance policies, laws, and debates. The next section of this chapter analyses the concept of transparency. Thereafter, the chapter discusses the relationship between the two concepts and how they apply in governance.

3.4 TRANSPARENCY

The element of accountability that involves access to information is centred on the concept of transparency. This makes the analysis of the concept of transparency inevitable in this thesis. The concept of transparency is not only essential for accountability but also it is in itself an important aspect of good governance. Transparency in governance functions as a means to and ends where it plays a role as a key element in accountability, the rule of law, responsiveness among other aspects of good governance. In as far as, accountability is concerned; there are times where information disclosure in accountability may not necessarily amount to transparency as shall be elaborated further below in section 6. For these reasons, the thesis analyses transparency on its own merits in chapter six and as an element of accountability in chapter seven.

Unlike accountability, transparency as a concept is under-conceptualized and theorized.[66] In academic debates, the term transparency is used synonymously with terms such as honesty, accountability, democracy, publicity, frankness among others.[67] As with accountability, transparency poses a noteworthy difference on how it is interpreted and implemented within various fields, countries, institutions, economic or political dimensions.[68] Even so, a number of scholars have tried to locate transparency within the framework of other concepts such as accountability, democracy, and openness or analyze it on its own[69]. In attempting to get a clear understanding of transparency as a concept, the discussion will draw on the various elements discussed earlier and later discuss its various types or classifications.

3.4.1 Defining Transparency

[66]M. Z. Hillebrandt, Living Transparency: The Development of Access to Documents in the Council of the EU and Its Democratic Implications (2017) PHD Thesis, Faculty of law, Amsterdam Center for European Law and Governance at 19; A. Bellver & D. Kaufmann, 'Trans parenting Transparency: Initial Empirics and Policy Applications', (2005) World Bank Policy Research Working Paper No. 8188 at 342-3.

[67] S. J. Ward, 'The Magical Concept of Transparency', in L. Zion & D. Craig, *Ethics for Digital Journalists: Emerging Best Practices* (New York and London: Routledge, 2014) 47. For instance, Stasavage uses the term transparency as being synonymous to publicity, D. Stasavage, 'Polarization and Publicity: Rethinking The Benefits of Deliberative Democracy', (2007) 69 (1) *The Journal of Politics* 59-72 at 61; WHO considers transparency as Honesty and openness, see; WHO, *Regional Office for the Eastern Medi, Measuring Transparency to Improve Good Governance in the Public Pharmaceutical Sector: Jordan* (Geneva: World Health Organization, 2009) 12.

[68] S. Wehmeier & O. Raaz, 'Transparency Matters: The Concept of Organizational Transparency in the Academic Discourse', (2012) 1 (3) *Public Relations Inquiry* 337-366 at 338; J. Fox, 'The Uncertain Relationship between Transparency and Accountability', (2007) 17 (4-5) *Development in Practice* 663-671 at 664, C. Ball, 'What is Transparency?', (2009) 11 (4) *Public Integrity* 293-308 at 297-302.

[69]C. Hood & D. Heald, *Transparency, the Key to Better Governance?* (Oxford: Oxford University Press, 2006) Vol. 135; G. Michener & K. Bersch, 'Identifying Transparency,' (2013) 18 (3) *Information Polity* 233-242; J. Forssbaeck & L. Oxelheim, 'The Multifaceted Concept of Transparency', in J. Forssbaeck & L. Oxelheim, *The Oxford Handbook of Economic and Institutional Transparency* (Oxford: Oxford University Press, 2014) chapter 1; S. J. Piotrowski, *Transparency And Secrecy: A Reader Linking Literature and Contemporary Debate* (New York: Lexington Books, 2010) chapter one; Wehmeier & Raaz ibid ; F. Bannister & R. Connolly, 'The Trouble with Transparency: A Critical Review of Openness in E-Government', (2011)3 (1) *Policy and Internet* 1–30; A. Meijer, 'Understanding Modern Transparency', (2009)75(2) *International Review of Administrative* 255-269 among others.

Like accountability, transparency has no universally established definition. Adherents of transparency such as the EITI, World Bank, IMF, UN, and OECD adopt similar definitions of the term with some variations. The EITI defines transparency as the 'openness and public disclosure of activities'.[70] The World Bank and UN define it as the 'availability of reliable, relevant and timely information',[71] while the IMF seems to combine all the latter definitions. IMF defines transparency as 'the clarity, reliability, frequency, timeliness, and relevance of public fiscal reporting and the openness to the public of the government's fiscal policy-making processes.[72] According to the WTO, transparency refers to 'easy access and notification of information' of trade policies and regulations by member states.[73]

Vishwanath and Kaufmann describe transparency as 'the increased flow of timely and reliable economic, social, and political information'.[74] They add that information should be of 'good quality and reliable, timely, complete, fair, consistent and represented in clear and simple terms'.[75] Holzner and Holzner define transparency as 'the value of openness in the flow of information'.[76] Naurin clarifies that the concept of transparency captures not only the question of 'accessibility of information' but also the ability of those seeking the information 'to form opinions about actions and processes' addressed by the respective information.[77] Tracy, in the field of qualitative research, defines transparency as honesty in the research process.[78] In the

[70] The EITI Glossary available at https://eiti.org/glossary accessed in September 2018.

[71] United Nations (E/C.16/2006/4), 'Definition of basic concepts and terminologies in governance and public administration', (2006) available at http://unpan1.un.org/intradoc/groups/public/documents/un/unpan022332.pdf accessed in September 2018 at 10; World Bank, 'Transparency in Public Finance' available at http://www.worldbank.org/en/topic/governance/brief/transparency-in-public-finance accessed on September 2018.

[72] IMF, 'Fiscal Transparency, Accountability, and Risk' (2012) available at http://www.imf.org/external/np/pp/eng/2012/080712.pdf accessed in September 2018 at 5.

[73] Article X of the General Agreement on Tariffs and Trade 1986.

[74] T. Vishwanath & D. Kaufmann, 'Toward Transparency: New Approaches and their Application to Financial Markets', (2001) 16 *The World Bank Research Observer* 41–57 at 41.

[75] Ibid.

[76] B. Holzner & L. Holzner, *Transparency in Global Change: The Vanguard of the Open Society* (Pennsylvania: University of Pittsburgh Press, 2006) at 1.

[77] D. Naurin, 'Transparency, Publicity, Accountability-The Missing Links', (2006) 12 (3) *Swiss Political Science Review* 90-98 at 90.

[78] S. J. Tracy, 'Qualitative Quality: Eight "Big-Tent" Criteria for Excellent Qualitative Research', (2010) 16 (10) *Qualitative inquiry* 837-851 at 842.

field of security markets, Bessembinder and Maxwell define transparency as 'the amount and timeliness of the information'.[79]

The common elements mentioned by the above definitions of transparency are accessibility of information, the wholeness and reliability of information and the ability of the informed to use the respective information. For the purpose of this study, transparency refers to the accessibility[80] of clear, timely, reliable, and complete information by stakeholders or the public who are willing and able to access and use such information.

3.4.2 Elements of Transparency

In accordance with the above definition, transparency entails several elements. The first element is the accessibility of information. By accessibility is meant the ease by which information seekers can locate or find information readily available. This includes the liberty of individuals to secure access to information via open knowledge resources such as the internet and databases held by government and other institutions.

The second element relates to clarity of the information. Clarity of information involves the ease by which information is understood by its recipient, including the language in which information is and how simple the presentation is.

The third element relates to the wholeness or completeness of information. For there to be transparency, information made available has to be whole and complete. Provision of partial information creates opacity and can be misleading.

The fourth element of transparency relates to timing. Information must be accessed and disclosed in a timely manner. This is particularly necessary to allow for timely responses and interventions by relevant stakeholders. Information is of no use if access to it is given after material events have already passed.

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[79] H. Bessembinder & W. Maxwell, 'Markets Transparency and the Corporate Bond Market', (2008) 22 (2) *The Journal of Economic Perspectives* 217-234.at 218.

[80] By accessibility, we refer to the easy in which information seekers can locate or find information readily available.

For the purpose of this study, the analysis of transparency and its elements as defined above is based on it being a policy mechanism rather than a virtue.[81] Transparency as a virtue particularly in governance is used mainly as a substantive norm.[82] Transparency as a policy mechanism involves the establishment of an appropriate regulatory framework for ensuring transparency through legislation.[83] The manner in which transparency as a policy mechanism is implemented differs from one jurisdiction to another and from one sector to another.[84] However, these frameworks usually provide for information disclosure, the modes of such disclosure, the scope of disclosure and measures for non-compliance, among other things. Accordingly, it is these aspects of the hydrocarbon industry legal framework that the thesis interrogates. Chapter 6 interrogates how the hydrocarbon legal framework in Tanzania provides for information disclosure in the industry. It also addresses whether the legal framework makes adequate provision for access to clear, reliable, complete, and timely information by interested stakeholders and the public to promote transparency in practice.

Transparency as defined above establishes a relationship between at least two actors: those who supply information and those who seek information. In the context of public governance, a transparency relationship exists between the government and citizens, public service providers and the public, organisations/ institutions and their stakeholders, government and development partners and so on. The demand for information is a two-way exchange.[85] For instance, government can demand information from organization or development partners the same way the latter can demand such information from government. Others have regarded the exchange of information or the demand for transparency to involve a principal agent relationship where the principal seeks information from the agent.[86]

[81] The study acknowledges the importance of transparency and accountability as values of governance and inference to transparency and accountability virtuous nature may be made in the course of study.

[82] T. Schillemans & M. Bovens, 'The Challenge of Multiple Accountability', in M. J. Dubnick & H. G. Frederickson, (eds) *Accountable Governance: Problems and Promises* (London: M.E. Sharpe 2015) 4.

[83] Hillebrandt, supra note 79 at 26-30.

[84] Ibid at 29

[85] Fox supra note 79 at 665; A. Fung *et al*, *Full Disclosure: The Perils and Promise of Transparency* (Cambridge: Cambridge University Press, 2007)151-69.

[86] A. Prat, 'The Wrong Kind of Transparency', (2005) 95(3) *American Economic Review* 862 – 77; G. J. Miller, 'The Political Evolution of Principal-Agent Models', (2005) 8 *Annual Review of Political Science* 203–225.

3.5 CLASSIFICATIONS OF TRANSPARENCY

The right to demand information is widely regarded as a major component of governance.[87] Within the context of public governance, this right to information is now recognised by custom and legislation.[88] Considering transparency as a fundamental tool in governance, in the relevant parties to transparency relations have presumed a right to know and demand information even where there are no formal provisions to that effect.[89]Good governance and democracy scholars have referred to access to information and transparency as a 'human right'.[90] They hold that there is a basic right to be informed and know what the government is doing and why.[91] Apart from custom, different jurisdictions have adopted various information disclosure regulations. These regulations vary from country to country as well as the context in which they are applied. Based on the right to demand information, one can draw one category of transparency that is passive transparency as discussed in section 5.1 below. In governance, the right to demand information by citizens comes alone with the duty of government as trustee to inform citizens. This obligation to inform by government gives rise to proactive transparency as explained in section 5.2 below.

3.5.1 Passive or Reactive Transparency

[87] See subsection 4.1 above.

[88] C. Hood, 'Transparency in Historical Perspective', in C. Hood & D. Heald, supra note 82 at 15; B. I. Finel & K. M. Lord, 'The Surprising Logic of Transparency', (1999) 43(2) *International Studies Quarterly* 315-339 at 315.

[89] J. J Choi & S. Heibatollah, 'Corporate Transparency from the Global Perspective: A Conceptual Overview', in J. J Choi *et al,* (eds) *Transparency and Governance in a Global World* (Wales: Emerald Group Publishing Limited, 2012)4.

[90] P. Birkinshaw, 'Transparency as a Human Right', in C. Hood & D. Heald, supra note 82 at 47–58; J. Klaaren, 'The Human Right to Information as a Vehicle for Transparency', in A. Bianchi &A. Peters, *Transparency in International Law* (Cambridge: Cambridge University Press, 2013) 223; J. E. Stiglitz, 'On Liberty, the Right to know and the Public Discourse: The Role of Transparency in Public Life', in M. J. Gibney, *Globalizing Rights: The Oxford Amnesty Lectures 1999* (Oxford: Oxford University Press, 2003) 119-21; T. C. Hennings, 'Constitutional Law: The People's Right to Know', (1959) 45 (7) *American Bar Association Journal* 667–770.

[91] J. E. Stiglitz, 'Participation and Development: Perspectives from the Comprehensive Development Paradigm', (2002)6 (2) *Review of Development Economics* 163-182 at 166; W. Parks, 'Open Government Principle: Applying the right to know under the Constitution', (1957) 26 *The George Washington Law Review*: 1-22 at 7.

Passive or reactive transparency refers to when the information seeker in a transparency relationship lodges a request for information from the information supplier.[92] Such information is not supplied voluntarily. This happens where information is not readily available to the seeker but he/she has the right to demand for such information from the information holder.

The problem with reactive transparency is that it does not guarantee whether the information holder will respond timeously to the information request with clear and complete information.[93] This problem highlights the fact that mere promulgation of the right to access to information laws does not make a government or institution accountable. For passive transparency to work the right to demand information must be clearly protected by law as must the procedures to be followed in accessing such information be clearly laid down.

3.5.2 Proactive or Voluntary Transparency

Proactive transparency refers to a process whereby the information holder or supplier voluntarily or by law makes information available to the public.[94] This type of transparency is viewed as the future of the right to information and an integral part of governance by transparency.[95] The majority of governments disclose information while in compliance with legislation other than being voluntary.[96]

[92]V. Mabillard & M. Pasquier, 'Transparency and Trust in Government (2007–2014): A Comparative Study', (2016) 9 (2) *NISPAcee Journal of Public Administration and Policy* 69-92 at 72-3; A.J Meijer *et al*, 'Open Government: Connecting Vision and Voice', (2012) 78(1) *International Review of Administrative Sciences* 10-29 at 15; H. Darbishire, *Proactive Transparency: The Future of the Right to Information* (Washington DC: World Bank, 2010) 3.

[93] Michener & Bersch, supra note 82 at 238.

[94] V. Mabillard & M. Pasquier, 'Transparency and Trust in Government (2007–2014): A Comparative Study', (2016) 9 (2) *NISPAcee Journal of Public Administration and Policy* 69-92 at 72-3 ; A. J Meijer *et al*, 'Open Government: Connecting Vision and Voice', supra note 103 at 15.

[95] Darbishire, supra note 103 at 3.

[96] Mabillard & Pasquier, supra note 105 at 72-3. Scholars have also identified a third category of transparency as that which involves information obtained from whistleblowing activities or the leaking of information. This has been referred to as forced transparency. Whereas as this type of transparency is acknowledged it is not within the scope of analysis the concept of transparency within the legal framework. Also see; Meijer et al, 'Open Government: Connecting Vision and Voice', supra note 103 at 15.

This type of transparency has the danger of being inadequate. It has been observed that 'governments and politicians can manipulate the presentation and revelation of information to achieve the same basic goals as a policy of secrecy and obfuscation'.[97] It may also encourage information suppliers to conceal damaging information. This is particularly true in corrupt and autocratic governments where information may be disclosed only nominally. In such regimes, information on decision-making processes or outcomes of their actions are usually concealed on the ground of ambiguous national security claims. [98]

In analyzing transparency in Tanzania's hydrocarbon industry, Chapter 6 critics how the legal framework provides for both passive and proactive transparency. It also analyses the nature of information disclosed under passive transparency as compared to proactive transparency and the manner in which such information is published.

In governance literature and in practice, the concepts of transparency and accountability are habitually used together as twin principles. They are broadly accepted as a part of solutions to governance problems and considered by many to be inseparable in that course. The following section investigates the link between the two concepts and their function in governance.

3.6 THE RELATIONSHIP BETWEEN TRANSPARENCY AND ACCOUNTABILITY

The focus of accountability is bringing actors to account for their actions or inactions and imposing sanctions for failure to fulfil the expected relationship goals or provide reward for the fulfillment of those goals.[99] The focus of transparency, by contrast, is disclosure and openness in the manner in which actors conduct their affairs.[100] The question remains: at what point do the two concepts meet or overlap?

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[97] J. M. Balkin, 'How Mass Media Stimulate Political Transparency', (1999) 3 *Cultural Values* 393-431 cited in, H. J. M. Ruijer, 'Proactive transparency in the United States and the Netherlands: The Role of Government Communication Officials', (2017) 47(3) *The American Review of Public Administration*, 354-375 at 356.

[98] See Lindlet and Naurin on information disclosure and Corruption. C. Lindstedt & D. Naurin, 'Transparency and corruption: The conditional significance of a free press', (2005) QOG *Working Paper Series*, 5.

[99] See section on the definition of accountability above.

[100] See section on the definition of transparency above.

In the process of giving an account, the accountee is required to inform the accountor and, where necessary, to explain the manner in which he/she conducted himself to achieve the particular relationship expectations. It is at this point that transparency is often treated as a precondition for accountability. However, while this may seem to be the juncture at which transparency and accountability intersects, this is not always the case. There are scenarios where the two concepts apply without intersecting. It is necessary to analyze such scenarios particularly because in the hydrocarbon industry, which is the subject of this study, consists of multiple players including private enterprises who may not always be obliged to account to the public even where they disclose certain information that may be of public relevance. For instance, hydrocarbon companies may be required to disclose their annual financial reports to the public. While this information could be easily and readily accessible to the public, hydrocarbon companies are not obliged to account to the public of any decisions that they make. However, hydrocarbon governance institutions where the public is a principal and government institutions agents, hydrocarbon companies become indirectly accountable to the public. The public can respond to information disclosed by applying pressure on the state institutions mandated to hold the government and other industry players accountable on behalf of the people.[101]

There are also cases where accountability can take place without access to information. Common examples include where ministers are held accountable by parliament without full disclosure of information.[102] For instance, where parliament wants to establish what kind of information the hydrocarbon Minister had while making decisions, a parliament committee may scrutinize security and intelligence services without public disclosure of their activities and who produced what information at what time to the Minister. In such a scenario, the non-disclosure of the individuals who guided the Minster does not hinder the Minister's accountability process. Such scenarios usually speak to the non-disclosure or confidentiality provisions in the legal frameworks. In analyzing Tanzania's hydrocarbon industry the thesis also looks at non-disclosure provisions and the extent to which they impede transparency and accountability. Other examples include scenarios where actors such as doctors or advocates

[101] J. Shkabatur, 'Transparency With (out) Accountability: Open Government in the United States', (2015) 31 (1)4 *Yale Law & Policy Review* 79-140 at 82-83.

[102] C. Hood, 'Accountability and Transparency: Siamese Twins, Matching Parts, Awkward Couple?', (2010)33 (5) *West European Politics* 989-1009 at 992.

who in the discharge of their duties may be sanctioned upon being called to account for public disclosure of their dealings with patients or clients. Thus while the concepts of transparency and accountability are always paired together in the majority of good governance policies, literature , statutes and treaties, they do not always harmoniously work together or positively influence each other. It is therefore necessary to analyze both concepts on their merits and the manner in which they relate to each other as provided for in the legal framework. This is done in chapters six and seven.

3.7 CONCLUSION

Transparency and accountability are central pillars of good governance. For there to be effective governance, the law must sufficiently incorporate the key elements of these concepts, define the accountability and transparency relationships and establish appropriate mechanisms of implementing these concepts. In particular, such relationships must address the questions on who are the actors, who is to be called to account, by whom and for what in as far as accountability is concerned. In the case of transparency, the relationships must address the questions of information disclosure, by whom, at what time and in which manner. It is also critical that accountability implementation mechanisms are sufficiently independent, have adequate mandate to inquire and render judgement, and have the capacity enforce their decisions. Usually, Accountability and transparency mechanisms operate in a pluralistic governance context. This calls for coordination and cooperation as well as checks and balances to ensure that accountability actors are themselves accountable.

Lastly, the chapter has addressed transparency and showed that access to clear, reliable and complete information by interested stakeholders and the public is critical to ensuring good governance. In terms of form and substance, the information given must be capable of being comprehended by its users. These features represent the key elements of transparency and accountability that will be used to assess the Tanzanian hydrocarbon legal framework.

CHAPTER 4
TRANSPARENCY AND ACCOUNTABILITY TRENDS IN THE HYDROCARBON INDUSTRY

4.1 INTRODUCTION

As established in Chapter 2, the history of the hydrocarbon industry accounts that transparency and accountability did not matter much as the industry emerged and evolved. Driven by private pioneer oil companies, the industry was in its early stages of development characterised by secrecy and muddy business tricks. As imperialist nations and companies tried to out-compete others to secure oil reserves across the globe, they used all kinds of measures including skirting accountability and transparency. Nonetheless, transparency and accountability have become 'buzz words' in modern day discussions on the governance of hydrocarbon and the extractive industry in general. The industry now faces different and broader universal challenges including climate change, energy security, as well as critical concerns of the resource curse and its associated misfortunes. These concerns have brought about discussions of transparency and accountability in the hydrocarbon industry.

This chapter identifies and discusses the key industrial trends on transparency and accountability. The focus is on general transparency and accountability practices of the key industrial players and, more specifically, on common practices, regional, transnational or international policy recommendations, and initiatives that have been adopted by the hydrocarbon industry.[1] While the chapter does not engage in a detailed analysis of national regulatory regimes, it draws on various national regulations relating to the implementation of transnational policies in order to substantiate general and specific trends in the industry. In identify key industrial trends on transparency and accountability, the chapter considers the question of how the various industrial players interact and highlights the common challenges to ensuring the use of transparency and accountability in the hydrocarbon industry. Understanding these trends and challenges is essential to the analysis and critique of the manner

[1] Transparency and accountability are governance questions that affect all spheres of human association. Given their central role in governance, these principles have been provided for in a multitude of regional and international conventions and policy guidelines in all fields. In establishing the industry's transparency and accountability trends, the thesis considers policy recommendations that are most relevant to the hydrocarbon industry and those that directly deal with concepts of transparency and accountability.

and extent to which Tanzania's legal framework on hydrocarbons incorporates the governance tools of transparency and accountability.

4.2 HYDROCARBON INDUSTRY TRANSPARENCY AND ACCOUNTABILITY TRENDS IN HOST GOVERNMENTS

Transparency and accountability are governance questions that are affected by a nation's customs, political orientation, and socioeconomic factors.[2] A discussion on accountability of natural resources addresses the broader question of government and its accountability systems. Democratic hydrocarbon producing countries follow a constitutional form of government, which falls in either a presidential or a parliamentary structure of governance.[3] These forms of government have in place an accountability system providing the needed checks and balance in the various arms of government.[4]

This is in line with the UN Charter,[5] and principles of international law that recognise the importance of sovereign rights in exploiting resources pursuant to a country's development policies.[6] International law places the responsibility to ensure adequate governance of natural resources on states.[7] International instruments such as environmental and human rights instruments require states to ensure the enactment of legislation that would set standards and

[2] See subsection 2 of Chapter 3 of this thesis.

[3] A. Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (New Haven: Yale University Press, 2012) Chapter 1 &2. Also see: B. Obi Nwabueze, *Constitutional Democracy in Africa: Forms of government, (Vol 4)* (New Delhi: Spectrum Books, 2003) 31 and P. M. Shane, 'Analyzing Constitutions', in R. A. W. Rhodes, *et al* (eds) *The Oxford Handbook Of Political Institutions* (Oxford: Oxford University Press 2008) 191.

[4] C. Harlow, 'Accountability and Constitutional Law' in M. Bovens *et al* (eds) *The Oxford Handbook Public Accountability* (Oxford: Oxford University Press, 2014)195. See R. Bellamy, (ed) *The Rule of Law and the Separation of Powers* (New York: Routledge, 2017) on a detailed discussion of the two doctrines.

[5] See Article 2 of the Charter observing Sovereign equality, territorial integrity, and political independence of a state. United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

[6] See Principle 2 of the Rio Declaration, which provides that states under international law 'have the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies'. Report of the United Nations Conference on Environment and Development U.N. Doc. A/CONF.151/6/Rev.1 (1992).

[7] See Article 7 of the UN General Assembly, Charter of Economic Rights and Duties of States: resolution / adopted by the General Assembly, 17 December 1984, A/RES/39/163.

provide for implementation and accountability mechanisms.[8] Sustainable Development Goal [9] (SDG) 16 as international soft law also calls on states to 'Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels'.

The extent to which these governance structures incorporate transparency and effective accountability depends on the respective national orientation and context. This section reviews common practice and best policy recommendations to states on transparency and accountability in the industry. It also considers how states use vertical and horizontal forms of accountability and the use of passive and proactive transparency in the governance of hydrocarbons.

4.2.1 Vertical Accountability and Transparency

In a majority of constitutional systems of governance, the management and regulation of natural resources is entrusted to the government on behalf of the people.[10] This creates a vertical form of accountability where the people as owners of the natural resources bear a constitutional right to demand accountability for the governance of their natural resources from government. Such accountability is usually enforced through political or judicial systems of accountability. The common practice of democratic nations is that citizens enforce their role as accountors directly through democratic elections or indirectly through the legislature. The indirect enforcement of political accountability stems from the principle that the legislature has a legitimate right to serve as a check on the actions of government since the legislature represents the will of the people.

[8] See for instance: Article 2 of the UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, UN, Treaty Series, vol. 999, p. 171; Article 5 of the UN General Assembly, United Nations Convention against Corruption, 31 October 2003, A/58/422; Article 4 of the UN General Assembly, United Nations Framework Convention on Climate Change : resolution / adopted by the General Assembly, 20 January 1994, A/RES/48/189 among others.

[9] UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1.

[10] Subsection 4.1 of Chapter 2 of this thesis.

4.2.1.1 Parliamentary Oversight

Indirect political accountability is by common practice well provided for in constitutions and legislation,[11] which establish accountability relationships identifying government (usually represented by the ministers) as the accountee and parliament as a representative branch as the accountor. Many constitutions oblige the government to be answerable to parliament for their actions or inactions.[12] Parliament as the accountor has the authority to demand access to information from government and the government is obliged to provide such information. By common practice, governments usually table annual or quarterly reports before parliament. [13] As the accountor, parliament seeks an explanation and justification based on the information provided by the accountee. Upon a careful evaluation of the government's account, parliament may approve or censure the government for its actions or inaction. To ensure effective accountability, constitution normally provide for parliamentary independence by guaranteeing the principle of separation of powers.[14]

The above account of indirect political accountability ideally incorporates all elements of accountability and should be able to enhance accountability if put to practice. The constitutional provisions on political accountability usually fail in weak or poorly governed democracies due to the lack of implementation of two essential elements of accountability. One relates to information disclosure or transparency and the other to the lack of parliamentary independence.

[11] Subsection 3.2 of Chapters 3 of this thesis on political accountability.

[12] K. Strøm, 'Delegation and Accountability in Parliamentary Democracies', in A. Palumbo & R. Bellamay, (eds) *Political Accountability* (New York: Routledge, 2017)113; M. Elliott & D. Feldman, (eds) *The Cambridge Companion to Public Law* (Cambridge: Cambridge University Press, 2015) 96.

[13] R.Pelizzo & R. Stapenhurst, 'Tools for Legislative Oversight: An Empirical Investigation', (2004) World Bank Policy Research Working Paper 3388, available at http://siteresources.worldbank.org/PSGLP/Resources/ToolsforLegislativeOversight.pdf accessed in September 2004.

[14] A. Kavanagh, 'The Constitutional Separation of Powers', in D.Dyzenhaus & M. Thorburn (eds) *Philosophical Foundations of Constitutional Law* (New York: Oxford University Press, 2016) 221; R. Bellamy, 'The Political Form of the Constitution: The Separation of Powers, Rights and Representative Democracy', (1996) 44(3) *Political Studies* 436–456.

As regards accountor independence, a major challenge is usually the inability of parliament to exercise its accountability function due to lack of independence from the executive. Parliamentary systems tend to have close links between the government and parliament, [15] especially in dominant party-based systems where both members of parliament and government leaders are elected from the same party.[16] The latter is usually coupled with other factors like corruption by political leaders and other self-serving interests especially in developing countries.[17] As noted in Chapter 3, the independence of the accountor is an essential element in ensuring accountability.[18] The principle of separation of powers expressed in most constitutions has to be natured by the provisions establishing the oversight organs and its functions to guarantee independence.

As far as transparency is concerned, a major challenge is usually the lack of political will in corrupt and weak governments to report their activities adequately. [19] Lack of adequate information hinders the National Assembly's ability to hold government to account effectively.[20] Good governance practices require comprehensive and full disclosure in a timely manner as shall be discussed further below on various information disclosure standards and recommendations.

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[15] W. Hout, 'Parliaments, Politics, and Governance: African Democracies in Comparative Perspective', in M. A. Salih, *African Parliaments: Between Governance and Government* (New York: Palgrave Macmillan, 2005) 25; W.C. Müller, 'Political Parties in Parliamentary Democracies: Making Delegation and Accountability Work', (2000) 37 *European Journal of Political Research* 309-333 at 310-11.

[16] Mülle, ibid. Also see, H. Kitschelt, 'Citizens, Politicians, and Party Cartelization: Political Representation and State Failure in Post-Industrial Democracies', (2000) 37(2) *European journal of political research* 149-179.

[17] J. Davies, 'Parliamentarians and Corruption in Africa: The Challenge of Leadership and The Practice of Politics', (2009) A Report on Behalf of The African Parliamentarians Network Against Corruption (Apnac) and The Parliamentary Centre Of Canada available at https://www.parlcent.org/en/wp-content/uploads/2011/04/research_and_reports/Challenge_of_Leadership.pdf accessed in September 2018 at 22-32.

[18] Subsection 2.2 of Chapter 3 of this thesis.

[19] R. Jenkins, 'The Role of Political Institutions in Promoting Accountability', in A. Shah, (Ed.) *Performance Accountability and Combating Corruption* (Washington DC: The World Bank 2007)170; J.Heilbrunn, 'Corruption, democracy, and reform in Benin', A. Schedler *et al*, (eds) *The Self-Restraining State: Power and Accountability in New Democracies* (London: Lynne Rienner Publishers,1999) 227.

[20] Inter-Parliamentary Union, *Constitutional and Parliamentary Information* (Geneva: Inter-Parliamentary Union, 2009) 74.

4.2.1.2 Elections

In modern democracies, free and fair elections are guaranteed as a constitutional right and operate as a major mechanism for political accountability.[21] Citizens assess and render judgement on national policies and their implementation by government through their votes. To fulfil their electoral role, citizen ought to be well informed of the respective government policies and their implementation. Accordingly, the right of citizen to seek information and be informed of all matters of public interest is recognized by most constitutions.[22] The question of how such rights are enforced is usually left to legislation, which is expected to ensure that the public has timeous access, correct and complete information. Recognizing the significance of legislation in this regard, regional international organizations have adopted model laws on access to information such as the Model Law for Access to Information for Africa and the Model Inter-American Law on Access to Public Information.[23] These are discussed below.

4.2.1.2.1 Access to Information Policy Recommendations

4.2.1.2.1.1 Regional Model Laws

The Inter-America and the African regional model laws set out standards that countries should adopt in ensuring access to information. They make provision for both passive and proactive information disclosure. The proactive information disclosure they recommend relates to the

[21] M.N. Franklin *et al* 'Elections and Accountability', in M. Bovens *et al* (eds) *The Oxford Handbook Public Accountability* (Oxford: Oxford University Press, 2014)389.

[22]These rights are incorporated in the Bill of Rights of most constitutions. They are in line with International human rights treaties. They include; The International Covenant on Civil and Political Rights of 1966, The African Charter on Human and Peoples' Rights, 1981; The American Convention on Human Rights, 1969, and its Protocols of 1988 and 1990 and the European Convention on Human Rights, 1950, and its Protocols Nos. 1, 4, 6 and 7.

[23]African Commission on Human and Peoples' Rights Model Law on Access to Information for Africa (2013) and Model Inter-American Law on Access to Public Information (2010) AG/RES. 2607 (XL-O/10). While there is an extensive list of similar recommendations, the study discusses the model laws as they represent what is considered an ideal legislation on access to information and incorporates the recommendations covered in different international guidelines. Other international guidelines with similar recommendations include : The Council of Europe Recommendation REC 2002(2) on access to official documents(2002) ; African Commission on Human and Peoples' Rights: Declaration of Principles on Freedom of Expression in Africa(2002) ACHPR/Res.62(XXXII)02; the UNESCO's Maputo Declaration on Fostering Freedom of Expression of Access to Information and Empowerment of People (2009) ; the UNESCO's Brisbane Declaration on Freedom of Information 2010; and the Dakar Declaration on Media and Good Governance (2005).

management of public resources such as information on public contracts, public expenditure, reporting, and monitoring mechanisms relevant to the public authority.[24] Such information must be published by an adopted publication scheme, which ensures wide circulation of information.[25] The Model Laws make detailed recommendations on access to information request procedures on passive information disclosure, which ensure timely response, and easy access of information by all.[26] The recommended procedures include mode of request application, recommendations on assistance the duty to assist information applicants, and manner of response by the information holder.[27]

To ensure impartiality in handing access to information, both the Inter-America and the African Model Law recommend the establishment of an information committee or body responsible for monitoring the implementation of the legislation,[28] setting publication schemes for proactively disclosed information, and addressing complaints on access to information procedures, among other responsibilities.[29] They also recommend that such a committee should be free from executive interference and report to the legislature that in turn should be responsible for appointing the committee and approving its budget.[30] Such provisions would ensure that access to information procedures are fair, independent and adequately resourced.

As regards whose information can be accessed, both the Inter-America and the African Model Law provides that requests for access to information should extend to information held by public

[24] Section 12 (1) of the Model Inter-American Law on Access to Public Information and Section 7(1) and (2) of the Model Law on Access to Information for Africa.

[25] Section 9(1) of the Model Inter-American Law on Access to Public Information and section and section 66 of the Model Law on Access to Information for Africa.

[26] Sections 12-19 on access to information procedures in the Model Law on Access to Information for Africa and Part 111 on accessing information held by public authorities of the Model Inter-American Law on Access to Public Information.

[27] Ibid.

[28] Section 45 of the Model Law on Access to Information for Africa and Section 55 of the Model Inter-American Law on Access to Public Information.

[29] Section 58-60 of the Model Law on Access to Information for Africa, and 62 and 63 of the Model Inter-American Law on Access to Public Information.

[30] See section 53-57 on independence, structure and operations of the oversight mechanism of the Model Law on Access to Information for Africa and 55(1)(3) of the Model Inter-American Law on Access to Public Information.

bodies and private institutions such as companies as long as it is of public interest.[31] In general, both model laws are quite comprehensive and largely incorporate the required transparency elements such as accessibility of information, clarity of information, wholeness, and completeness of information, as well as timeliness of information accessibility.[32] They also recommend giving primacy to the provisions of access to information legislation in cases of a conflict between them and the provisions of any other laws. [33]

The main weakness of the Inter-American Model Law is the failure to address adequately the question of exemptions from disclosure.[34] The Inter-America Model Law provides that access to information may be denied where 'allowing access would create a clear, probable and specific risk of substantial harm' to public interests such as 'national security', 'international or intergovernmental relations', 'ability of the State to manage the economy', 'legitimate financial interest of a public authority, tests and audits, and testing and auditing procedures'.[35] The Model Law fails to provide a guide as to what amounts to 'substantial harm' and what is meant by terms such as 'national security' and 'legitimate financial interest of the public authority'. These terms have been used in a number of countries to deny access to information on hydrocarbon agreements especially where diplomatic corruption was involved.[36] It has also been common for hydrocarbons contracts to be treated as being confidential and therefore not open to public scrutiny even in states, which have adopted information disclosure policies.[37]

[31] Section 3 of the Model Inter-American Law on Access to Public Information. Section (1) of the Model Law on Access to Information for Africa defines information holder as 'a public body, relevant private body and/or private body.

[32] See section: 7, 12, 13, 15, 16, 21, 22, 46, 53, & 58 of the Model Law on Access to Information for Africa and sections 5, 9, 11, 20-26, 35, 55, & 64 of the Model Inter-American Law on Access to Public Information.

[33] Section 4 of the Model Law on Access to Information for Africa.

[34] This is a universal shortfall in most of the recommendations citied under footnote 12 above.

[35] Section 41 (b) of the Model Inter-American Law on Access to Public Information.

[36] F. Al-Kasim *et al*, 'Grand Corruption in the Regulation of Oil', (2008) U4 (2) *Anticorruption Resource Centre* 1-40 at 11.

[37] R. Weijermars, 'Natural Resource Wealth Optimization: A Review of Fiscal Regimes and Equitable Agreements For Petroleum and Mineral Extraction Projects', (2015)24(4) *Natural Resources Research*, 385-441 at 433; S. A. Mucci, *Political and Investment Risk in the International Oil and Gas Industry* (London: Lexington Books 2017) 91 ; T. L. Karl, 'Ensuring Fairness: The Case for Transparent Fiscal Social Contract', in M. Humphreys *et al*, (eds.) *Escaping the Resource Curse* (New York: Columbia University Press, 2007) 266; P. Le Billon, *Fueling War: Natural Resources and Armed Conflicts* (London: Routledge, 2013) 64-65.

Clear provisions defining the grounds upon which exemption from information disclosure can be made could remedy these challenges.

Unlike the Inter-American Model Law, the African Model Law provides guidance on national security and defence. It provides that information that may not be accessible on natural security grounds including information on military tactics, strategies or military exercises; on operations undertaken in preparation for hostilities or in connection with the detection, prevention, suppression or curtailment of subversive or hostile activities; on intelligence relating to the defence of the state; on methods of, and scientific or technical equipment for, collecting, assessing or handling information on state defence; and on the identity of a confidential source.[38] This definition is rare in comparative international and regional legal practice on transparency.

4.2.1.2.1.2 The Extractive Industries Transparency Initiative (EITI) Standards

For countries with extractive industries such as hydrocarbons, the EITI provide an elaborate set of information disclosure standards that countries may adopt.[39] The EITI standards encourage countries to disclose publicly in full any contracts and licences that provide the terms of oil, gas, and minerals exploitation.[40] The EITI Standards recommend countries to maintain 'a publicly available register or cadaster system(s) with timely and comprehensive information' regarding the companies and licence holders engaging in the exploitation of extractive resources.[41] Such information may include licence holder(s), coordinates of the licence area or the size and location of the licence area, date of application, date of award and duration of the licence, where there is production the nature of product produced.[42] With regard to extractive resources location data, the standards recommend that the government should provide such data without unreasonable 'fees and restrictions'.[43] They encourage states to make a register of the 'beneficial owners of the corporate entities that bid for, operate or invest in extractive assets, including the identity of their beneficial owners, the level of ownership and details about how

[38] Section 30(2) of the Model Law on Access to Information for Africa.

[39] See subsection 4.4.2 of Chapter 2 for background details on the EITI.

[40] EITI Requirement 2.1 and 2.4 of the EITI Standards 2016.

[41] EITI Requirement 2.3 of the EITI Standards 2016.

[42] Ibid.

[43] Ibid. at 2.3(b) 2.

ownership or control is exerted',[44] and to make such register freely and electronically available.[45]

The EITI Standards also recommend states to disclose comprehensive information on government taxes and revenues from extractives,[46] including on the sale of the state's share of production or other revenues collected in kind, infrastructure and barter arrangements, transportation revenues, state-owned enterprises transactions and sub-national payments.[47] All such information is supposed to be accurate and reliable and made publicly available in a timely manner.[48]

4.2.1.2.1.3 International Monetary Fund (IMF) Guidelines

Another set of guidelines on transparency and accountability in the hydrocarbon industry is the IMF Guide on Resource Revenue Transparency.[49] While these guidelines provide for comprehensive fiscal transparency of natural resource revenues, some of its principles are applicable to general resource governance. For instance, the IMF Guide recommends that there should be clarity of roles and responsibilities in resource revenue and that all grants of rights to exploit resources should be 'well established in laws, regulations, and procedures that cover all stages of resource development'.[50] This recommendation addresses the accountability elements relating to the question of establishing who is responsible for what and who is accountable to whom. The recommendation that government's policy and legal frameworks, their implementation and participation in resource exploitation be disclosed and explained to 'the public clearly and comprehensively' sufficiently cover elements of transparency.[51] The requirements for assurance of integrity described in the IMF guide relating to resource-related transactions also address the element of accountability enforcement mechanisms. The guide provides that 'there should be adequate oversight mechanisms in place'.[52]

[44] EITI Requirement 2.5 (c) of the EITI Standards 2016.

[45] Ibid.

[46] EITI Requirement 4 of the EITI Standards 2016

[47] See EITI Requirement 4.1 to 4.6 of the EITI Standards 2016.

[48] EITI Requirement 4.8 of the EITI Standards 2016.

[49] International Monetary Fund: Guide on Resource Revenue Transparency (2007)

[50] Ibid, Guideline I.2.2.

[51] Ibid. Guideline II.

[52] Ibid Guideline IV.

While the IMF Guide has comprehensive provisions on fiscal transparency and accountability, it does not define what constitutes 'adequate or effective oversight mechanisms'.[53] This oversight is significant because it pertains to the independence of the accountor and the accountors' ability to enforce decisions, which are important elements of accountability.

The above recommendations by the model laws, the EITI standards and the IMF guidelines, if well adopted, could ensure that national legal frameworks incorporate transparency-facilitating stakeholders to hold government to account over the management of extractives. Read together the recommendations provide for accessibility, clarity of the information, wholeness or completeness of information and timeliness of information disclosure which are the key elements to transparency.

4.2.1.3 Judicial Accountability

Pursuant to international and national human rights law, citizens are entitled to have access to judicial remedies for human rights violations.[54] Citizens may therefore hold government accountable through judicial mechanisms in connection with human rights violations resulting from the process of hydrocarbon exploitation. In accordance with international human rights and humanitarian law as well as the UN Basic Principles on the Independence of the Judiciary (UNBP-Judiciary),[55] states are obliged to ensure access to a competent, autonomous and impartial judiciary.[56] The UNBP-Judiciary principles call on states to guarantee independence of the judiciary by enshrining it in the Constitution or legislation.[57] Accordingly, constitutions

[53] Ibid.

[54] See Article 2(3) (a) of the Covenant on Civil and Political Rights 1966 (1976), Article 8 of the Universal Declaration of Human Rights (1948). Also see Human Rights Committee, *Anthony Fernando v. SriLanka*, UN Doc CCPR/C/83/D/1189/2003 (2005), para 9.2 and *Dissanayake v. SriLanka*, UN Doc CCPR/C/93/D/1373/2005 (2008), para.8.2.

[55] Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1985) and endorsed by General Assembly resolutions 40/32 and 40/146 (1985), Articles 1-8.

[56] Supra note 55; Article 26 of the African Charter on Human and Peoples' Rights (1986); Article 8 of the American Convention on Human Rights (1969); Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; and Articles 12 & 13 of the Arab Charter on Human Rights (2004).

[57] Article 1 of the UNBP-Judiciary principles.

of democratic nations provide for an independent judiciary responsible for providing checks on laws of the legislature and acts of the executive according to the rule of law.[58]

In accordance to principles on independence of the judiciary and constitutional practice, the judiciary is an impartial accountor and enforces accountability on 'the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences.' [59] The Judiciary therefore provides a sufficient accountability enforcement mechanism for citizens. Judicial accountability however remains an unfavourable mechanism in holding government to account in developing countries.[60] This is mainly due to the lack of government's failure to respect and observe judicial decisions on human rights violations conducted in the course of policy implementation.[61]

From the above account on vertical accountability and transparency, it is ascertained that, international law and policies provide states with sufficient recommendations on transparency and accountability in their legal framework. The recommendations recognize the accountor role of citizens and clearly define the manner in which citizens may hold government as accountee accountable. Recommendations provided for under the above discussed political and judicial accountability mechanisms comprehensively incorporate the elements of transparency and accountability as established in Chapter 3.

4.2.2 Policy Recommendations on Internal Vertical Accountability

A number of international and regional standards for the conduct of the public administration have emerged. These standards largely address the theme of hierarchical accountability. They include the International Code of Conduct for Public Officials,[62] the Council of Europe Model

[58] E. Barendt, 'Separation of Powers and Constitutional Government', in R. Bellamy, *The Rule of Law and the Separation of Powers* (London: Routledge, 2017) 275.

[59] Article 2 of the UNBP-Judiciary principles.

[60] J. Fox, 'Social Accountability: What Does the Evidence Really Say?', (2014) Working Paper No. 1 *Global Partnership for Social Accountability (GPSA)* at 9.

[61] J. Court *et al*, 'The Judiciary and Governance in 16 Developing Countries', (2003) Discussion Paper 9 United Nations University World Governance Survey available at https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4108.pdf accessed in September 2018.

[62] Annex to the UN Doc A/RES/51/59 Action against corruption (1996).

Code of Conduct for Public Officials,[63] the Ibero-American Charter for the Public Service[64] and the Charter for the Public Service in Africa.[65] Among other things, these policy standards expect public officials to be 'accountable to [their] immediate hierarchical superior unless otherwise prescribed by law'.[66] They also recommend that sanctions must be imposed for misconduct by public officials such as for being involved in a conflict of interest or failing to comply with their responsibility to provide access to official information.[67]

These standards complement the anti-corruption conventions, which set standards for public conduct and criminalize corrupt practices, embezzlement of public resources and misuse of public office.[68] However, they do not provide details about enforcement. Even those that provide for the establishment of monitoring bodies for the implementation of public accountability[69] do not require them to be independent.[70] This gap is however filled by the anti-corruption conventions discussed below.

4.2.3 Horizontal Accountability Policy Recommendations

It is common for states to adopt horizontal accountability mechanisms particularly as it relates to governance of national resources. Oversight institutions such as the anti-corruption bodies, national audit organs, good governance agencies, environmental authorities, and more recently transparency and accountability boards or committees are prime examples. International and regional organizations have adopted treaties that set standards by which horizontal

[63] Rec (2000)10, adopted by the Committee of Ministers of the Council of Europe Recommendation on 11 May 2000.

[64] Doc. A/58/193 adopted by the fifth Ibero-American Conference of Ministers for Public Administration and State Reform (2003).

[65] Charter for the Public Service in Africa adopted by the Third Biennial Pan-African Conference of Ministers of Civil Service Windhoek, Namibia 5 February 2001.

[66] Article 10 of the Council of Europe Model Code of Conduct for Public Officials. Also, see Article 51(d) of the Ibero-American Charter for the Public Service.

[67] Article 24 of the Council of Europe Model Code of Conduct for Public Officials; Code II on Conflict of interest and Disqualification of the International Code; Part II on rules of conduct of public employees of the Charter for the Public Service in Africa; Chapter 5 of the Ibero-American Charter for the Public Service.

[68] See note 71 below.

[69] See the Ibero-American Charter for the Public Service and the Council of Europe Model Code of Conduct for Public Officials.

[70] Article 28 the Charter for the Public Service in Africa.

accountability mechanisms are expected to operate including the United Nations Convention against Corruption,[71] AU Convention on Preventing and Combating Corruption,[72] and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[73] There are also environmental conventions including those that are industry specific such as the International Convention on Oil Pollution Preparedness, Response and Co-Operation of 1990 (OPRC), The International Convention on Civil Liability for Oil Pollution Damage (CLC) 1969 and the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001. [74]

All these conventions make provisions for the establishment of oversight institutions that are responsible for enforcing accountability.[75] They recommend that such institutions should 'be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State to enable them to carry out their functions effectively and without any undue influence'.[76] The EITI standards discussed earlier further recommend the formation of an independent multi-stakeholder oversight body that is comprised of government representatives, private enterprises and the civil society. [77] A similar recommendation is made by the transparency or access to information model laws as earlier. [78]All these provision address the necessary accountability element pertaining to the independence and adequate mandate of the accountor in carrying out their functions.

[71] 31 October 2003, UN DOC. A/58/422 entered into force in 14 December 2005.

[72] AU, African Union Convention on Preventing and Combating Corruption (2003).

[73] OCED, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: adopted by the Negotiating Conference on 21 November 1997.

[74] These International instruments make provision for matters that are cross cutting and affect the hydrocarbon industry. They provide for the criminalization of corrupt practices by public officials and private enterprises; they set environmental standards, accounting standards among many other. This chapter does not analyse such standards but looks at the provisions with regard to the implementation of accountability for the breach of such standards by bodies put in place to ensure accountability. How these standards impact accountability will however be looked at when addressing the cases study in Tanzania.

[75] See for example Article 6 of the UN Convection against Corruption and Article 5 of the AU Convention on Preventing and Combating Corruption.

[76] Article 6 of the UN Convection against Corruption. Also, see Article 20(4) of the African Union Convention on Preventing and Combating Corruption.

[77] Requirement 1 of the EITI Standards 2016.

[78] See note 28 above.

International policy recommendations clearly establish the accountability relationship between government and the people in resource governance. There is clear recognition of citizens as accountors and government as accountee. As ascertained above, national constitutions and international recommendations define adequate transparency and accountability structure providing for how citizens should hold government accountable and for what. The above account demonstrates that international recommendations incorporate the elements of accountability and transparency as established in chapter 3. It is also apparent that ideal practice requires the existence of redundant transparency applying both vertical and horizontal forms of accountability as discussed in chapter 3.

4.3 TRANSPARENCY AND ACCOUNTABILITY TRENDS AMONG OIL COMPANIES

This section discusses the transparency and accountability trends among oil companies focusing particularly on international and regional trends. As discussed in chapter two, there are two distinct groups of oil companies: national oil companies and multinational oil companies.[79] In many respects, these companies play quite different roles in the industry's structure especially in developing nations. It is for this reason that this dissection is structured around these distinct groups companies.

4.3.1 National Oil Companies

National Oil Companies vary tremendously depending on the economic, political, social and policy climate of its respective state.[80] In most developing hydrocarbon producing countries, national oil companies are state owned either entirely or with the state being the majority shareholder. As state enterprises, national oil companies are usually held accountable through governance structures regulating state corporations. Their transparency and accountability practices mirror general transparency and accountability attitudes of the state.[81] The vertical

[79] Subsection 5.2 of Chapter 2 of this thesis.

[80] V. Marcel, *Oil Titans: National Oil Companies in the Middle East* (Washington DC, Brookings Institution Press, 2007) 30-33; S. Tordo, *National Oil Companies and Value Creation* (Washington DC, World Bank Publications, 2011) xii; C. McPherson, 'National Oil Companies: Evolution, Issues, Outlook', in M. J. M. Davis *et al*, (eds) *Fiscal Policy Formulation and Implementation in Oil-Producing Countries* (Washington DC: International Monetary Fund, 2003) at 185-186.

[81] S. Tordo, supra note 80 at 24-25; C. McPherson, supra note 80 at 190; B. Sarbu, *Ownership and Control of Oil: Explaining Policy Choices across Producing Countries* (New York: Routledge, 2014) 35.

and horizontal systems of accountability discussed earlier therefore apply to national oil companies. These companies are normally obliged to disclose information on company financial transactions including procurement and expenditure, agreements, strategic plans and annual performance reports.

A major challenge with enforcing transparency and accountability in national oil companies in developing countries arises where the state is the sole owner or controlling stakeholder. Studies show that management structures of solely state-owned oil companies lack transparency and accountability.[82] Being sole owners, states with weak governance and democracy face little or no pressure to be transparent about the governance of their national oil companies, which are often operated as an extension of government.[83] Such national oil companies run the danger of having a highly politicized and corrupt management, under pressure to do more than generate revenue for the government.[84] In states where government controls national oil company decisions,[85] national oil company reports form part of ministerial reports and fail to provide sufficient information on the company's operations, hindering full accountability.[86]

[82] I. Gary& T. L. Karl, *Bottom of the Barrel: Africa's Oil Boom and the Poor* (Maryland, Catholic Relief Services, 2003) 24-25; J. F. Seznec, 'Politics of Oil Supply: National Oil Companies vs. International Oil Companies' in R. E. Looney,(ed) *Handbook of Oil Politics* (London: Routledge, 2012) 47; S. Tordo, *National Oil Companies and Value Creation* (Washington DC: World Bank Publications, 2011)24-25; A. Cheon *et al*, 'Instruments of Political Control: National Oil Companies, Oil Prices, and Petroleum Subsidies', (2015) 48(3) *Comparative Political Studies*, 370-402 at 378.

[83] K. A. Auzer, *Institutional Design and Capacity to Enhance Effective Governance of Oil and Gas Wealth: The Case of Kurdistan Region* (Singapore: Springer, 2017)22; Seznec, supra note 82 at 48; Tordo, supra note 80 at 24-25; D. L. Losman, 'The Rentier State and National Oil Companies: An Economic and Political Perspective', (2010) 64(3) *The Middle East Journal*, 427-445 at 436; Cheon *et al*, supra note 82 at 377.

[84] McPherson, supra note 80 at 189; Marcel, supra note 80 at 3; Losman, supra note 83 at 433.

[85] P. J. Luong, & E. Weinthal, *Oil is Not a Curse: Ownership Structure and Institutions in Soviet Successor States* (Cambridge, Cambridge University Press, 2010) 46; Tordo, supra note 80 at 27-28; A. C. Inkpen & M. H. Moffett, *The Global Oil & Gas Industry: Management, Strategy & Finance* (Oklahoma: PennWell Books, 2011) 55-58.

[86] R. E. Gyampo, 'Transparency and Accountability in the Management of Oil Revenues in Ghana', (2016)51(2) *Africa Spectrum* 79–91; V. M., Glada Lahn *et al*, 'Good Governance of the National Petroleum Sector' (2007) available at https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Energy,%20Environment%20and%20Development/ggdoc0407.pdf accessed in July 2017; I. Gary& T. L. Karl, supra note 13 at 25; A. Gillies, supra note 18 at 106-107.

The OECD Guidelines on Corporate Governance of State-Owned Enterprises address the above transparency and accountability challenges of national oil companies.[87] They recommend that states should 'allow [their enterprises] full operational autonomy to achieve their defined objectives and refrain from intervening in management'.[88] They also recommend government as a shareholder to avoid setting enterprise objectives in a non-transparent manner.[89] They recommend that 'ownership rights should be clearly identified within the state administration'[90] and that the exercise of ownership rights should be 'centralized in a single ownership entity or carried out by a coordinating body' with the capacity and competencies to effectively carry out its duties.[91] According to the Guidelines, state-owned entreprises should be 'held accountable to the relevant representative bodies and have clearly defined relationships with relevant public bodies, including the state supreme audit institutions.[92] The guidelines also recommend that state-owned enterprises should observe transparency and be subject to the same accounting, disclosure, compliance, and auditing standards as non-state companies.[93]

These Guidelines recognize the significance of both vertical and horizontal accountability institutions for state-owned companies. By ensuring state owned companies independent from government control, the Guidelines subject state companies to sufficient scrutiny by government authorities providing for horizontal accountability. At the same time, state owned companies remain subject to accountability before the people as the owner through political accountability mechanisms.

4.3.2 Multinational Oil Companies

When operating in host states, multinational companies are governed by the host government's legislation. As common practice, multinational companies disclose information and comply

[87] OECD Guidelines on Corporate Governance of State-Owned Enterprises, 2015 Edition.

[88] Ibid, Guideline II (B).

[89] Ibid.

[90] Ibid, Guideline II (D).

[91] Ibid.

[92] Ibid, Guideline II (E).

[93] Ibid, Guideline VI.

with transparency and accountability requirements provided for by national laws of the host.[94] Even where a multinational cooperation is willing to disclose their payments and contracts, they may not do so without the consent of their host countries or against the law.[95]

It has been observed that host governments, which lack the financial, technological, and human resources to run profitable hydrocarbon projects tend to have weak provisions on transparency requirements for multinational companies.[96] This is not helped by the social, economic, and political pressure to attract foreign investment or 'resource-for-infrastructure' deals.[97]

However, a number of global initiatives have promoted transparency and accountability among multinational companies. They include the EITI's Company Expectations,[98] the UN Global Compact,[99] regional anti-corruption policies and laws, the OECD Guidelines for Multinational Enterprises[100] and the G20/OECD Principles of Corporate Governance.[101] Increasingly, in varying degrees multination companies including a number of hydrocarbon companies have adopted these standards.

4.3.2.1 The EITI's Company Expectations

The EITI expects companies to disclose publicly taxes and payments made to the host government and if they do not, to state why.[102] For EITI implementing countries, companies

[94] Analysis drawn from information on supporting companies in the EITI website at https://eiti.org/supporters/companies, accessed in September 2018.

[95] Ibid.

[96] N.J. Ayuk & J.G. Marques, *Big Barrels: African Oil and Gas and the Quest for Prosperity* (London: Clink Street Publishing, 2017) Introduction; see Chapter 2 subsection 5.2.2 of this thesis.

[97] A. C. Alves, 'China's 'Win-Win' Cooperation: Unpacking the Impact of Infrastructure-For-Resources Deals in Africa', (2013) 20 (2) *South African Journal of International Affairs* 207-226 at 212; I. Taylor, 'Unpacking China's Resource Diplomacy in Africa', in M.C Lee *et al*, *China in Africa* (Stockholm: Nordiska Afrikainstitutet, 2007) 14 ; Generally see N.J. Ayuk & J.G. Marques, ibid.

[98] Outline of Expectations for supporting companies of 2018 available at https://eiti.org/sites/default/files/documents/company_expectations.pdf accessed in September 2018.

[99] The Ten Principles of the United Nations Global Compact (2004) available at https://www.unglobalcompact.org/what-is-gc/mission/principles accessed in September 2018.

[100] OECD: Guidelines for Multinational Enterprises (2008).

[101] Endorsed by the G20 Leaders' Summit in Antalya on 16 November 2015.

[102] EITI: Expectations for EITI Supporting Companies (2018) 1.

are expected to 'ensure comprehensive disclosure of taxes and payments made',[103] to support the implementation of decisions to disclose licences and contracts regarding hydrocarbon exploration and exploitation in accordance with the EITI Standards discussed earlier.[104] Companies are also encouraged to 'take steps to identify the beneficial owners of direct business partners, including joint ventures and contractors' and to disclose them.[105] Furthermore, companies are encouraged to ensure that their processes are 'appropriate to deliver the data required for high standards of accountability'.[106]

The EITI Company Expectations are listed in eight bullet points with no detailed commentary on how and what companies should do to ensure appropriate delivery of their information or a guideline on the circumstances under which it is justified to withhold information. The EITI Company Expectations ought to be elaborate and detailed as the EITI Standards applicable to states. They at the very least ought to provide companies with a guide on information disclosure to the public and company transparency and accountability policies in general. The lack of adequate guidelines for disclosure or exceptions for non-disclosure allows companies room to favour the long preferred opacity in hydrocarbon exploitation. This is substantiated by information on company support of the EITI. Of the 36 companies declaring support of the EITI initiative as indicated in the EITI website, only Total and Eni have practised proactive disclosure of payments even without the compulsion of the law.[107] The majority of the companies only implement the EITI in their operations in countries, which are party to the initiative and only upon request.[108] Some are considered in support of the Transparency and accountability initiative by merely, participating in EITI meetings or by engaging with CSOs or government on outreach programmes on transparency and accountability.[109] They however do not have any reports showing compliance of EITI information disclosure.

[103] Ibid.

[104] Ibid.

[105] Ibid.

[106] Ibid.

[107] Analysis drawn from supporting companies in the EITI website at https://eiti.org/supporters/companies accessed in 2017.

[108] Ibid.

[109] Ibid.

Companies can easily circumvent or comply with the requirement to ensure 'appropriate' disclosure processes without giving effect to sufficient transparency. For instance, some companies are considered in support of transparency and accountability initiative by merely, participating in EITI meetings or by engaging with CSOs or government on outreach programmes on transparency and accountability.[110] They however do not have any reports showing compliance with information disclosure expectations.

4.3.2.2 The UN Global Compact

Of all principles of the UN Global Compact, Principle number 10 is directly relevant to transparency and accountability. It provides that: 'Businesses should work against corruption in all its forms, including extortion and bribery'.[111] According to the commentary on this principle, companies should 'introduce anti-corruption policies and programmes within their organizations and their business operations',[112] 'report on the work against corruption in the annual communication on progress', and 'share experiences and best practices through the submission of examples and case stories'.[113] The commentary also suggests that companies should 'join forces with industry peers and with other stakeholders to scale up anti-corruption efforts, level the playing field and create fair competition for all'.[114] As the UN Compact merely enunciates principles, it does not recommend any specific measures companies may take to combat corruption.

[110] Observation drawn from supporting companies in the EITI website at https://eiti.org/supporters/companies accessed in 2018.

[111] Principle 10 of the Ten Principles of the United Nations Global Compact available at https://www.unglobalcompact.org/system/attachments/29351/.../COP%20English.pdf accessed in September 2018.

[112] Ibid.

[113] Ibid.

[114] Ibid.

4.3.2.3 The OCED and G20/OCED Recommendations

The OECD Guidelines for Multinational Enterprises[115] and the G20/OECD Principles of Corporate Governance[116] provide elaborate guidelines on company information disclosure. They both recommend that companies should ensure that 'timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company'.[117] Material information is defined in the principles and guidelines as 'information whose omission or misstatement could influence the economic decisions taken by users of information' or 'that a reasonable investor would consider important in making an investment or voting decision'.[118] Such information should be made public at least annually. Likewise, the G20/OCECD Principles call for 'timely disclosure of all material developments that arise between regular reports'[119] and 'simultaneous reporting of material or required information to all shareholders'.[120] Both the Principles and the Guidelines provide a comprehensive list of kind of information to be disclosed.

Despite their comprehensiveness, the OECD Guidelines state that enterprises 'should tailor' their disclosure policies to the nature, size and location of the enterprise with due regard taken of costs, business confidentiality and other competitive concerns'.[121] This gives discretion multinational enterprises to decide on the extent to which they adhere to the principles set out in the Guidelines.

[115] Organisation for Economic Cooperation and Development (OECD), OECD Guidelines for Multinational Enterprises, adopted at the OECD's annual Council meeting at ministerial level in Paris on 27 June 2000.

[116] G20/OECD Principles of Corporate Governance, adopted at the G20 Finance Ministers and Central Bank Governors Meeting 4-5 September 2015, Ankara.

[117] Principle V. of the G20/OECD Principles of Corporate Governance. Also, see Chapter III guideline (1) of the OECD Guidelines for Multinational Enterprises.

[118] Principle V. of the G20/OECD Principles of Corporate Governance and Chapter III: Commentary on disclosure paragraph (13) of the OECD Guidelines for Multinational Enterprises.

[119] Principle V. of the G20/OECD Principles of Corporate Governance.

[120] Ibid.

[121] Chapter III guideline (1) of the OECD Guidelines for Multinational Enterprises.

4.3.2.4 The United Nations Guiding Principles on Business and Human Rights of 2011

The UN Guiding Principles on Business and Human Rights not only call upon states to ensure that multinational corporations and other business enterprises respect human rights, they also impose a direct duty on the corporations and enterprises to respect human rights.[122] The UNGPS requires businesses to communicate with persons and communities affected by their operations.[123] Such communication should include human rights impact assessments, mitigation policies, and redress and other remedial procedures.[124] Additionally, businesses are called upon to disclose information on the internal instruments of accountability for human rights violation including external verification procedures.[125]

The UNGPS address a big gap in upstream natural resource exploration where companies as major investors are rarely held accountable directly by the communities impacted by their operations. Direct accountability of companies to the affected communities has largely depended on a state's diligent legislative measures. These Guidelines impose an obligation on host states to provide individuals with access to effective domestic judicial mechanisms to address business-related human rights abuses.[126]

4.3.2.5 National Anti-Corruption Laws with a Global Reach

Western countries, particularly the United States of America (USA), EU, and OECD members, have increasingly adopted anti-corruption legislation with a global reach. This legislation has had the effect of extending the application of transparency and accountability to multinational oil companies operating beyond the territorial jurisdiction of their home countries. For instance, the USA now requires companies registered with the United States' Securities and Exchange Commission to disclose in their annual reports payments made to any non-USA government

[122] Principle 11 of the Guiding Principles on Business and Human Rights: implementing the United Nations 'Protect, Respect and Remedy' Framework, UN DOC: A/HRC/17/31.

[123] Ibid, principle 16.

[124] Ibid.

[125] Ibid, principle 21.

[126] Ibid, principle 25.

for purposes of the commercial development of oil, gas, and minerals.[127] The EU has adopted similar directives that have already been incorporated into national legislation by some member countries.[128] OECD member countries are required by the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions[129] to criminalize the bribery of foreign public officials by companies based in their territories.[130] The Convention, accompanied by related guidelines and policy recommendations, provides a comprehensive structure for eradicating foreign bribery by companies based in OECD countries.[131] Thus, even where host counties lack sufficient transparency and accountability systems, Western multinational corporations may still be held accountable by their countries of origin.

OECD countries represent about 90 per cent of the world's total foreign direct investment outflows and harbour the largest investors of the hydrocarbon industry.[132] By adhering to and

[127] Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, H.R. 4173 (July 2010) (the "Dodd-Frank Act").

[128] In June and October of 2013, the European Union (EU) Parliament and Council adopted two directives—the EU Accounting Directive and the EU Transparency Directive, respectively (the "EU Directives"). These EU Directives require oil, gas, mining, and logging companies to disclose payments they make to governments on per government and per project basis. Although it has since exited the EU, in 2014, the United Kingdom became the first of the EU member states to implement the EU Accounting Directive, which has since been implemented by 11 other EU member states. See Proposing Release at I.C. (Introduction and Background/Developments Subsequent to the 2013 Court Decision). See Letter from United States Department of the Interior (November. 6, 2015), available at http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-96.pdf (describing the United Kingdom's Reports on Payments to Government Regulations 2014 (December 1, 2014). The other EU member states to implement the EU Accounting Directive include Austria, Croatia, the Czech Republic, Denmark, Germany, Hungary, Italy, Lithuania, Portugal, Slovakia, and Spain. See Proposing Release at I.C. (Introduction and Background/Developments Subsequent to the 2013 Court Decision). Further, the EU Accounting Directives require large public companies incorporated in the EU to report their resource extraction payments. The EU Transparency Directives require companies listed on EU-regulated stock exchanges to report their resource extraction payments.

[129] 37 ILM 1, entered into force February 15, 1999.

[130] Article 1 of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions Adopted by the Negotiating Conference on 21 November 1997.

[131] OCED, 'Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents' available at https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf accessed in 2017.

[132] OCED, 'Foreign Direct Investment (FDI) Data' available at https://data.oecd.org/fdi/fdi-flows.htm accessed in 2017.

enforcing OECD policy guidelines, OECD countries can greatly improve the use of transparency and accountability in the hydrocarbon industry. According to the 2015 report of Transparency International, only the UK, the USA, Germany, and Switzerland effectively enforce the Convention.[133] Austria, Australia, Canada, Finland, Italy, and Norway moderately enforce it while the rest do little to or do not enforce it at all.[134]

While anti-corruption laws with global reach are encouraging transparency among multinational corporations, in some host states this is undercut by legislation, which protects the confidentiality of concession and other agreements.[135] National legislation in developing counties such as Tanzania should take advantage of the shift in the West, which has presented an opportunity of enhancing transparency and the accountability of multinational corporations operating the hydrocarbon sector in their jurisdictions.

4.4 CONCLUSION

International and regional organizations (state and non-state) have increasingly set guidelines for national legislation on transparency and accountability in resource governance. These guidelines recommend the kinds of accountability structures that may ensure that the exploitation of hydrocarbons takes place in a manner that benefits all stakeholders especially citizens. At the very least, they call for states to ensure that there are sufficient legal and regulatory frameworks that define clear transparency and accountability relationships and their applicable implementation mechanisms. Increasingly, national constitutions have, at least at the formal level, identified citizens as the accountor and government as the accountee and defined what the government should be held accountable for and by what means should citizens hold it to account. However, this broad commitment to accountability requires legislation that defines the specific principles, mechanisms and procedures for implementing the various

[133] H. Fritz *et al*, 'Exporting Corruption Progress Report 2015: Assessing Enforcement of the OECD Convention on Combatting Foreign Bribery' (2015) *Transparency International* at 7.

[134] Ibid.

[135] J. Topal & P. Toledano, ' Why the Extractive Industry Should Support Mandatory Transparency: A Shared Value Approach', (2013) 118(3) *Business and Society Review* 271-298 at 280; P. Eigen, 'Fighting Corruption in a Global Economy: Transparency Initiatives in the Oil and Gas Industry', (2007) 29 *Houston Journal of International Law* 327–354 at 343; Also see: EITI, EITI rules (2011) Including the Validation Guide (Oslo, Norway: EITI Secretariat, 2011) for further examples.

elements of accountability and transparency in specific sectors, as the guidelines and policies discussed in this chapter highly recommend.

Such legislation, it has been shown, should establish accountability implementation mechanisms that are sufficiently independent and have adequate mandate to carry out their accountability function. It must also facilitate easy and timely access to clear, reliable and complete information by interested stakeholders and the public. The information given must be capable of being comprehended by its users in terms of both form and substance.

One of the enduring challenges to transparency and accountability remains the fragmentation of domestic legislation governing hydrocarbon resources. A majority of states with hydrocarbon resources, particularly in developing countries, have weak democracies, face challenges in enforcing the rule of law, and have corrupt leadership. These problems make it difficult for such nations to codify in a comprehensive manner all elements of transparency and accountability in their legal frameworks. At the end of the day, the ability of a state to ensure that there is accountability and transparency in the hydrocarbon industry depends on its overall commitment to the rule of law, constitutionalism and human rights.

The thesis will now shift to a discussion of how well the elements of transparency and accountability identified in Chapter 3 and elaborated upon in this chapter are incorporated into Tanzania's legal framework governing the hydrocarbon industry. In particular, the next chapter introduces Tanzania's legal framework of the hydrocarbon industry while Chapters 6 and 7 provide a detailed analysis of Tanzania's legal framework.

CHAPTER 5
THE LEGAL FRAMEWORK GOVERNING THE HYDROCARBON INDUSTRY IN TANZANIA

5.1 INTRODUCTION

Having identified the core elements of transparency and accountability that should underpin a satisfactory legal framework for the hydrocarbon industry, the study will in the next two chapters address the central question of the extent to which the legal framework governing Tanzania's hydrocarbon industry incorporates these core aspects of transparency and accountability. Before proceeding with such an analysis, it is important to study the development of the legal framework governing hydrocarbons in Tanzania.

Thus, this chapter traces the development of the extractive industry and later the discovery of the hydrocarbon resources from the pre-colonial era, the colonial era, and the independence era. The chapter also discusses the post-independence era, especially the impact of economic liberalization and foreign investment policies. Throughout the discussion, emphasis is laid on the legal and constitutional developments that have had implications for the regulation of the hydrocarbon industry particularly in general and transparency and accountability in the industry particularly. Finally, the chapter introduces the current legal framework and the corresponding institutional framework for the governance of Tanzania's hydrocarbon industry.

5.2 PRE-COLONIAL ERA

Tanzania's extractive industry dates back to the pre-colonial era, that is, the period before the 1880s.[1] There are tales of Arab and local traders who mined and sold extractive resources such as gold, copper, iron, and salt before colonialism.[2] There was also inter-community batter trade

[1] A. Elbra, *Governing African Gold Mining: Private Governance and the Resource Curse*. (London: Springer, 2016) 88; C. S. L. Chachage, 'New Forms of Accumulation in Tanzania: The Case of Gold Mining', (1993) 9(2) *Minerals and Energy* 2-13 at 3.

[2] C. S. L. Chachage, 'The Meek Shall Inherit the Earth but not the Mining Rights', in P. Gibbon, (ed) *Liberalised Development in Tanzania: Studies on Accumulation Processes and Local Institutions* (Uppsala: Nordic Africa Institute, 1995) 48.

involving resources like iron ore, salt, honey and bark cloth.[3] Although it is known that extractive industry existed in pre-colonial Tanzania, its activities remain poorly documented. However, before Tanganyika was colonized natural resources were governed by the customary laws of the respective tribes across the country.[4] Under the various customs, land ownership was predominantly communal, allocated to a tribe, clan, or family.[5] The chiefs or headsmen had the power to administer the land on behalf of the community.[6]

Apart from land, tribal communities engaged in trade involving various extractive resources such as gold, copper, iron, and salt.[7] Community members shared the benefits from such trade.[8] However, due to lack of information on how these communities lived, it is not possible to ascertain the extent to which transparency and accountability were entrenched in their practices on exploitation and use of natural resources.

5.3 COLONIAL ERA

The colonial era planted the seed for the modern legal and regulatory policies of Tanzania's extractive industry. During the German rule in the 1880s, unoccupied land and its natural resources were owned and controlled by the German colonial state under the Imperial Land Ordinance of 1895.[9] It was at this point that state ownership of land and mineral resources started. The German colonial government exercised full ownership of natural resources. They

[3] T. Håkansson, 'Rulers and Rainmakers in Precolonial South Pare, Tanzania: Exchange and Ritual Experts in Political Centralization', (1998) 37(3) *Ethnology* 263-283 at 269-272.

[4] A. Rwegasira, *Land as a Human Right: A History of Land Law and Practice in Tanzania* (Dar es salaam: Mkuki na Nyota Publishers, 2012) 50; E. J. Luoga *et al*, 'Land Cover and use Changes in Relation to the Institutional Framework and Tenure of Land and Resources in Eastern Tanzania Miombo Woodlands', (2005) 7(1) *Environment, Development and sustainability* 71-93 at 76.

[5] Rwegasira, ibid, at 50.

[6] Ibid.

[7] C. S. L. Chachage, 'The Meek Shall Inherit the Earth but not the Mining Rights', in P. Gibbon, (Ed) *Liberalised Development in Tanzania: Studies on Accumulation Processes and Local Institutions* (Uppsala: Nordic Africa Institute, 1995) 48.

[8] Ibid, 180.

[9] M. Prevezer, *Varieties of Capitalism in History, Transition and Emergence: New Perspectives on Institutional Development* (London: Routledge, 2017) 201; J. Emel *et al*, 'Extracting Sovereignty: Capital, Territory, and Gold Mining in Tanzania' (2011) 30(2) *Political Geography* 70-79 at 74.

granted mining concessions over huge pieces of land to interested private parties.[10] By 1910, the Germans had about 76 prospecting fields of gold.[11] The colonial government was accountable to its government in Germany and not to the people of Tanganyika. All mineral resources benefitted the colonial government and not the colonial territory.

When the British took over Tanganyika in 1919 in accordance with the Versailles Peace Treaty, they maintained the same colonial control of resources.[12] The 1920 Tanganyika Order in Council annexed Tanganyika to the centralized governance of his majesty the king. State secretaries of the territory and the respective governors all reported to the British Crown.[13] The Mining Ordinance was passed in 1920, which declared all land with mineral resources property of the British Crown.[14] The Governor controlled the land on behalf of the Crown; the main interest was in encouraging big capital investments in the extractive industry through concessions.[15] In 1922, the Crown passed another piece of legislation, the Mineral Oil Mining Ordinance,[16] which empowered the Governor to grant a lease to exploit oil to any person over any area over any period of time and under any conditions determined by the Governor.[17] Absent in the Ordinance were provisions on revenue collection and their distribution and use.[18] Given it was the Governor who had the power to negotiate and approve leases for oil mining and reported to the British Crown in London,[19] it is not surprising that the first concessions

[10] Elbra, supra note 1, at 88.

[11] Emel *et al*, supra note 9, at 74.

[12] In 1919, the Treaty of Peace between the Allied and Associated Powers and Germany was signed at Versailles. In accordance with the treaty German renounced in all her rights over German East Africa to the British colony. Treaty of Peace with Germany (Treaty of Versailles) 1919 available at https://www.loc.gov/law/help/us-treaties/bevans/m-ust000002-0043.pdf accessed in September 2018.

[13] See Article 4-12 of the Tanganyika Order in Council 1920.

[14] Tanganyika Territory (1920) Mining Ordinance, in Imperial Institute, (Ed) *The Mining Laws of the British Empire and of Foreign Countries.* (Vol. VIII, East Africa. Part 1 - Tanganyika, Kenya, Nyasaland and Zanzibar) (London: His Majesty Stationary Office, 1927) 3-4.

[15] Emel *et al*, supra note 9 at 74-75

[16] Tanganyika Territory (1922) Mineral Oil Mining Ordinance supra note 14.

[17] S. 3 of the Mineral Oil Mining Ordinance 1922; supra note 14 at 32.

[18] Ibid at 32.

[19] Ibid at 58.

were awarded to British Petroleum (BP) and Shell along the coast of the territory, although no commercially viable hydrocarbon reserves were discovered.[20]

With the increased activity of BP and Shell in the coast, a new 1958 Mining (Mineral Oil) Ordinance was passed.[21] The new Ordinance, though more detailed than its predecessor, still maintained the vast powers of the Governor. For purposes of accountability, the British Crown established the British Overseas Audit Services based in London.[22] The Audit Service had audit departments in overseas territories to audit, monitor, and report all of its colonies' activities.[23]

Natural resources during the colonial era were explored and extracted for the benefit of the colonial governments. The people of Tanganyika were deprived of their resources and lost any rights to demand accountability from their colonial masters.

5.4 INDEPENDENCE AND NYERERE'S AFRICAN SOCIALISM

5.4.1 Transparency and Accountability in Government

Tanganyika gained independence from Britain in 1961.[24] Consequently, Tanganyika's natural resources were now in the hands of the people of Tanganyika to be governed and exploited for their benefit. In 1962, the then ruling Tanganyika National African Union (TANU) pushed for the adaptation of the first republican Constitution.[25] Nominees of TANU formed the National Assembly that converted itself into a constituent assembly that adopted the 1962 Republican Constitution.[26] The 1962 Constitution provided limited provisions on executive oversight and

[20] Tanzania Petroleum Development Corporation (TPDC) 'Exploration History' available at http://www.tpdc-tz.com/upstream.php accessed in September 2017.

[21] Cap. 399 of the laws of Tanganyika.

[22] C. Jeffries, *The Colonial Empire and its Civil Service* (Cambridge: Cambridge University Press, 1938) 175; J. Ridley, *Cutting Edge Internal Auditing* (West Sussex: John Wiley & Sons, 2008) 66.

[23] Jeffries, ibid at 176-177; G. Van Deleur Fiddes, *The Dominions and Colonial Offices* (London: Putnam's, 1926) cited in A. Bertram, *The Colonial Service* (New York: Cambridge University Press, 2011) 45.

[24] See the Tanganyika (Constitution) Order in Council, 1961 and the Tanganyika Independence Act, 1961.

[25] J. P. W. B, McAuslan, 'The Republican Constitution of Tanganyika', (1964) 13(2) *International & Comparative Law Quarterly*, 502-573 at 504.

[26] IG Shivji et al, *Constitutional and Legal Systems of Tanzania: A Civics Source Book* (Dar es Salaam: Mkuki na Nyota Publishers, 2004) 47; L Ndumbaro, 'The State of Constitutionalism in Tanzania', in B. Tusasirwe, (Ed)

transparency. It adopted a presidential system with the President as the head of state, the head of government and commander in chief of the armed forces.[27] The President had vast powers including appointing all members of the executive branch of government including its departments and no law could pass without his assent.[28] Executive functions where carried out by the Vice President and Ministers who reported to and received directives from the President. [29] The President exercised oversight over the collective and individual responsibilities of Ministers.

National Assembly had no power to check sufficiently powers of the President or Ministers. While the National Assembly had the ability to inquire into executive activities including decision of the President, it could not enforce its decisions.[30] Under the 1962 Constitution, National Assembly had no authority to pass a vote of no confidence in the President but the President had the power to dissolve the National Assembly on any ground and at any time as he thought fit.[31] As explained in Chapters 3 and 4, an accountor has not only to have the mandate to hold the accountee accountable but also the independence and capability to enforce its decisions.

The 1962 Constitution had no bill of rights, let alone the right of access to information. It therefore fell short of recognizing the elements of transparency and eventual accountability discussed in Chapter 3.

Constitutionalism in East Africa: Progress, Challenges and Prospects in 2003 (Vol. 5) (Kampala: Fountain Publishers, 2005)13.

[27] Article 3 of the Tanganyika Republic Constitution 1962.

[28] Article 4 of the Tanganyika Republic Constitution 1962.

[29] Article 11 (3) and 15 (2) of the Tanganyika Republic Constitution 1962.

[30] B.M. Nchalla, 'Tanzania's Experience with Constitutionalism, Constitution-Making and Constitutional Reforms', in M. K. Mbondenyi & T. Ojienda (Eds), *Constitutionalism and Democratic Governance in Africa* (Pretoria: Pretoria University Law Press, 2013) 28.

[31] Article 64 (2) of the republican constitution 1962; see J. S. R. Cole & W. N. Denison, 'Tanganyika: The Development of its Laws and Constitution', in G. W. Keeton, *The British Commonwealth* (Vol. 12) (London: Steven & Sons, 1964)51.

The 1965 Constitution replaced the 1962 Constitution after the union between Tanganyika and Zanzibar was formed, creating what is now known as Tanzania.[32] The Union Government of Tanzania was responsible for 11 union matters, while the Revolutionary Government of Zanzibar had exclusive jurisdiction over all other matters regarding the island.[33] The 1965 Constitution introduced the monopoly of one political party as it abolished all political parties and declared TANU for Tanzania Mainland and Afro Shiraz Party (ASP) for Tanzania Zanzibar as the only political parties respectively.[34] All members of parliament and government leaders were thus members of the respective political parties.[35] Consequently, all parliament and government activities were to be run under the supervision of the respective parties.[36]

The 1965 Constitution did little to entrench accountable governance particularly in as far as the elements of the independence of the accountors and the separation of powers was concerned. The lack of checks and balances was worsened by the 1975 amendment to the Constitution,[37] which rendered government organs subordinate to the political party that run all government affairs.[38]

In 1977, the Constitution of the United Republic of Tanzania (URT) came into force. The 1977 Constitution continued with the concept of party supremacy by declaring Chama cha Mapinduzi the only political party and all government affairs were run according to directives of the party.[39] Article 63(4) of the 1977 Constitution cemented the lack of political

[32] The Union of Tanganyika and Zanzibar Title Act, No. 22 of 1964 and the Union of Zanzibar and Tanganyika Law, 1964. These are collectively referred to as Acts of Union.

[33] Section 5 & 6 of the Union of Tanganyika and Zanzibar Title Act See also article 6 (1), 12, and 13 of the Interim Constitution of Tanzania, 1965.

[34] Article 3 (1) of the Interim Constitution of Tanzania, 1965.

[35] Article 3 (3). See also P. J. Kabudi 'The Doctrine of Separation of Powers and its Application in Tanzania: Success, Challenges and Prospects', available at http://www.utumishi.go.tz/utuweek/SOP.pdf accessed in September 2018 at 14-15.

[36] The Constitution of TANU was even made the first schedule of the state Constitution making it by law a part of the republic's Constitution. See also I. G Shivji *et al*, *Constitutional and Legal System of Tanzania* (Dar es Salaam: Mkuki na Nyota Publishers, 2004) 52-53.

[37] The Act No. 8 of 1975 to amend the Interim Constitution of Tanzania 1965.

[38] Section 3 of the Act to amend the Interim Constitution of Tanzania 1965.

[39] Article 3 (1) & (2). Shivji observes that interpreting the respective provision of the article as establishing party supremacy is erroneous. He argues that 'the provision does not say anything of the sort. It declares the party to be

accountability through parliament by declaring Tanzanian Parliament a special committee of the national party congress.

Governance of resources under the then President Julius Nyerere was therefore unchecked. Nyerere had the liberty to run the country as he thought fit with no need to render an account over his actions.[40] There was no transparency and all information to the public was controlled. Most government information was classified and the National Security Act[41] prohibited disclosure of information by government officials.[42] Disseminated information was geared towards advancing government interests.[43]

5.4.2 The Hydrocarbon Industry

TANU under the leadership of Nyerere adopted a conservation approach and advocated for zero exploration and extraction of Tanzania's extractive resources until Tanzania had both the geological and engineering capacity to explore its extractive resources.[44] Nonetheless, for the

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the final authority subject to provisions of its own as well as the constitution of the united republic. The CCM constitution pertains to private rights of its membership while the state's constitution pertains to public rights and prevails in all cases. Thus the Constitution is supreme.' Whereas the supremacy of the constitution as the mother law of the land is undisputed, given the extensive mandate given to the president who is the party chairman and the role of the party national congress in legislative affairs, it subsequent to refer to the provision as "technically" establishing party supremacy. See. I. G. Shivji, *Tanzania: The Legal Foundations of the Union* (Dar es Salaam: Dar es Salaam University Press, 2009) 71 footnote 140 in page 118.

[40] Further, see Shivji's discussion on manipulating law in a democratic environment in the period of 1964-1967. I. G Shivji, *Where is Uhuru? Reflections on the Struggle for Democracy in Africa* (Nairobi: Fahamu/Pambazuka, 2009) 80.

[41] Act No. 3 of 1970.

[42] Section 5 (1) of the National Security Act 1970.

[43] P. Grosswiler, 'Changing Perceptions of Press Freedom in Tanzania', in F. Eribo & W. Jong-Ebot, *Press Freedom and Communication in Africa* (Asmara: Africa World Press, 1997)104-105.

[44] C. Chachage, 'Mwalimu in Our Popular Imagination: The Relevance of Nyerere Today', in A. Cassam, & C. Chachage, *Africa's Liberation: The Legacy of Nyerere* (Oxford: Pambazuka Press, 2010) 4; D. F. Bryceson & J. B. Jønsson, 'Mineralising Africa and Artisanal Mining Democratising Influence', in D. F. Bryceson *et al*, (*Eds*) *Mining and Social Transformation in Africa: Mineralizing and Democratizing Trends in Artisanal Production* (Oxford: Routledge, 2014) 13. Also see Pratt, Cranford, *The Critical Phase in Tanzania 1945-1968: Nyerere and the emergence of a socialist strategy* (Nairobi: Oxford University Press, 1978) p.227.

existing concessions, Nyerere adopted a policy of total state control and nationalization.[45] Subsequently, in 1969, the Tanzania Petroleum Development Corporation (TPDC) was established by a presidential decree published in the Gazette as per the Public Corporations Act No 17 of 1969.[46] TPDC was established to ensure direct state ownership of shares and operations in the hydrocarbon industry. At this time, Tanzania had entered an exploration agreement with Azienda Generale Italiana Petroli (AGIP), an Italian company that explored and made gas discoveries in Songo in 1973.[47] Upon the discovery, the Italian company relinquished its rights declaring the discovery not to be commercially viable.[48] During this time, there was no change in the laws governing hydrocarbons from those adopted in the colonial era. TPDC, like all other public corporations, operated under strong directives from the President who was given extensive powers under the Public Corporations Act.[49]

5.5 THE BEGINNING OF ECONOMIC LIBERALIZATION AND REVIEW OF UJAMAA POLICIES: 1970s TO EARLY 1980s

[45] Elbra, supra note 1 at 91; S. Nghambi 'The Process of Obtaining Mineral Rights in Tanzania' in N. Leader-Williams *et al*, *Mining in Protected Areas in Tanzania* (International Institute for Environment: wildlife series) (London: International Institute for Environment & Development 1996) 11.

[46] Government Notice No. 140 of 30th May 1969.

[47] P. Bofin & R H. Pedersen, 'Tanzania's Oil and Gas Contract Regime, Investments and Markets', (2017) No 1 DIIS Working Paper at 9; Economic and Social Research Foundation (ESRF), The Petroleum Exploration Study: A Baseline Survey Report (2009) available at http://www.policyforum-tz.org/files/ESRFNPAPetroleumSectorBaselineReport.pdf accessed in August 2018 at 15.

[48] Ibid.

[49] See Section 6 of the Public Corporations Act No. 17 of 1969.

Nyerere's *ujamaa* (socialism),[50] nationalization and state control over economic resources failed and Tanzania was thus forced to reconsider its policies.[51] Nyerere started reconsidering his policies on the extractive industry in the late 1970s by, among other things, increasing private sector participation in the exploration of the extractive industry.[52] These moments saw a change in the extractive industry legislation allowing licensing of extractive resource activities though still maintaining state ownership and control.[53] In 1980, the Petroleum (Exploration and Production) Act[54] was passed, laying the foundation for a detailed legal framework governing the hydrocarbon industry in Tanzania. The 1980 Petroleum Act was adopted following the discovery of commercially viable gas reserves in Songo between 1974 and 1979 by joint operations between TPDC and AGIP under a 50-50 share agreement.[55] The Act reproduced the Constitution's provisions that vested the ownership and control over any petroleum under the lands forming part of the Tanzanian Republic to the people.[56] All hydrocarbon activities could thus only be conducted in accordance with the licence conferred in terms of the Act.[57]

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[50] Ujamaa was a form of social and economic policy developed by Nyerere. The principles of the Ujamaa policies were self-reliance, total participation of all in developing the nation, communal labour in the rural sector and communal ownership of land, and nationalisations in the private sector and of public services. These Ujamaa principles where implemented by Nyerere from 1960s to 1985. See : G. Hydén, *Beyond Ujamaa in Tanzania: Underdevelopment and an Uncaptured Peasantry* (California: Univ of California Press, 1980); J K Nyerere, *Ujamaa: The Basis of African Socialism* (Newark: Jihad Productions, 1970) ; M. Jennings, 'Ujamaa' in Oxford Research Encyclopedia of African History available at http://oxfordre.com/africanhistory/view/10.1093/acrefore/9780190277734.001.0001/acrefore-9780190277734-e-172?print=pdf (accessed in September 2018).

[51] J. Ndembwike, *Life in Tanzania Today and Since the Sixties* (Dar, es Salaam: Continental Press, 2010) 151; K. J. Havnevik, *Tanzania: The Limits to Development from Above* (Dar es Salaam: Mkuki Na Nyota Publishers 1993) 56-62; K. E. Svendsen, 'The Creation of Macro-Economics Imbalance and a Structural Crisis', in J. Boesen *et al*, *Tanzania: Crisis and Struggle for Survival* (Uppsala: Nordic Africa Institute, 1986)71-78.

[52] Chachage, supra note 2 at 54-55.

[53] P. Butler, 'Tanzania: Liberalisation of Investment and the Mining Sector Analysis of the Content and Certain Implications of the Tanzania 1998 Mining Act', in B. K. Campbell, (*Ed*) *Regulating Mining in Africa: For Whose Benefit?* (Vol. 26) (Uppsala: Nordic Africa Institute, 2004) 67.

[54] Act No. 27 of 1980.

[55] D. M. Anderson & A J. Browne, 'The politics of oil in eastern Africa', (2011) 5 (2) *Journal of Eastern African Studies* 369-410 at 379.

[56] Section 4 (1).

[57] Section 4 (2).

5.5.1 The Petroleum (Exploration and Production) Act 1980

The 1980 Act set out the basic structure for management and control of petroleum including administration matters in relation to exploration, extraction, licensing; regulatory powers of the Minister; duties and powers of the office of the Petroleum Commissioner, dispute resolution, and the rights of persons affected or disturbed by exploration or development processes. The Act also formally introduced the use of product sharing agreements as the mode of contractual agreements in the hydrocarbon industry.[58] The Act gave the Minister extensive discretion.[59] All industry decisions were to be taken solely by the Minister who was the regulating authority of the industry.[60] With the lack of transparency and insufficient checks on the executive, the Minister's vast powers were only subject to internal vertical accountability by the President.[61] The Commissioner for Petroleum Affairs in the Minister's office who was appointed by the President assisted the Minister in executing his duties.[62] The Commissioner was responsible for ensuring implementation of the Act.[63]

The Act did not give much detail on the process by which exploitation rights were to be granted, conditions for exploitation or detailed fiscal provisions. The latter were subject to negotiation under the PSA agreements. The Act did not contain the terms transparency, accountable or accountability. There were no provisions demanding the Minister nor the Commissioner to ensure transparency or accountability under the Act. Any information regarding operations was deemed confidential and disclosure of such information was considered an offence.[64] Disclosure could only be made for, or in connection with, the administration of the Act or to an authorised agency of the Republic or in accordance with section 10 of the Act.[65] The only

[58] Section 14.

[59] See Part III of the Act.

[60] Ibid.

[61] See subsection 3.2 of Chapter 3 on internal vertical accountability.

[62] Section 8.

[63] Section 9.

[64] Section 10 (1).

[65] Section 10 provides that: 'No person shall disclose any information obtained by him in, or in connection with, the administration of the Act, unless the disclosure is made for or in connection with the administration of the Act; In formation may be disclosed for or in connection with the preparation of official statistics; information may be

persons authorized to demand or receive information from licence holders were the Minister, Commissioner or other authorized government authority.[66] There were no procedures for making any information public or for the public to access or obtain information.

5.5.2 Other Constitutional Developments

Tanzania adopted a series of constitutional amendments towards the late 1970s and the early 1980s that contributed to significant changes in the countries accountability structures. Some of these changes make up the current constitutional provisions and are discussed further in Chapters 6 and 7 as they relate to transparency and accountability. The most significant amendment was the introduction of bill of rights in 1984.[67] Among other rights, the amendment eshrined the 'right to seek, receive and, or disseminate information regardless of national boundaries' and 'the right and the freedom to participate fully in the process leading to the decision on matters affecting [citizens], [their] well-being or the nation'.[68] The 1984 amendment also empowered the High Court to declare any Act of Parliament or part of it unconstitutional if in contradiction with the Constitution.[69] Article 27 (2) of the Constitution also imposed a duty on 'all persons to safeguard the property of the state authority and all property collectively owned by the people'. These amendments introduced some important aspects of transparency and accountability that are discussed further in Chapters 6 and 7.

disclosed with the consent of the person from whom the information was obtained and it may also be disclosed for the purpose of any legal proceedings. See section 10(1) a-g.

[66] Section 16, 55, 68, and 86.

[67] Constitutional Amendment Act No. 15 of 1984. C. K. Mtaki & M. Okema, ibid at 167; C.M. Peter, *Human Rights in Africa: A Comparative Study of the African Charter on Human and Peoples' Rights and the New Tanzanian Bill of Rights* (London: Greenwood, 1990) 5-7. The Bill of Rights was introduced but it was suspended for a period of three years allegedly in order to give the government time to put its house in order. It therefore became operational in 1988. It is in that year that the first human rights case was filled in the High Court of Tanzania at Mwanza- *Chumchua s/o Marwa v. Officer i/c of Musoma Prison and Another*, High Court of Tanzania at Mwanza, Miscellaneous Criminal Cause No.2 of 1988(Unreported). See D.Z. Lubuva, 'Reflactions on Tanzania Bill of Rights' (1988)14(2) *Commonwealth Law Bulletin*, 853.

[68] Article 18 (1), Article 21 (1) & (2).

[69] Part VI of the constitution establishing the Constitutional Court.

The 1984 constitutional debates also led to demands of more autonomy to Zanzibar.[70] These demands marked the beginning of the current controversy over control of hydrocarbon resources between Zanzibar and Main Land Tanzania.[71] In 2009 Zanzibar's House of Representatives declared the Island's natural resources (hydrocarbons included) not a union matter.[72] The 2010 amendment of the Zanzibar Constitution incorporated a declaration to this effect without following the due process provision of the 1977 Constitution.[73] As this study only focusses on the legal and institutional framework-governing hydrocarbon resources in Tanzania Mainland, it does not address this controversy.

5.6 THE ERA OF ECONOMIC LIBERALISATION AND FOREIGN INVESTMENT POLICIES

In 1986, under the presidency of Ali Hassan Mwinyi, Tanzania opened up to the World Bank's structural adjustment programme.[74] The program advanced economic liberalization,

[70] P. J. Kabudi, *Human Rights Jurisprudence in East Africa: A Comparative Study of Fundamental Rights and Freedoms of the Individual in Tanzania, Kenya and Uganda* (Baden-Baden: Nomos Verlagsgesellschaft, 1995) 63M. Suksi, *Sub-State Governance through Territorial Autonomy: A Comparative Study in Constitutional Law of Powers, Procedures and Institutions* (London: Springer, 2011) 195-197.

[71] See a discussion on the parliamentary debates on Zanzibar's sovereignty in D. Lawrence, Tanzania: the Land, its People and Contemporary Life (Dar es Salaam: New Africa Press, 2009) 131-146; M. A. Bakari, *The Democratisation Process in Zanzibar: A Retarded Transition* (Volume 11 of Hamburg African studies) (Hamburg: GIGA-Hamburg, 2001) 125-126.

[72] Budget Speech of Zanzibar's Minister for Natural Resources, Works, Energy and Lands, Mr Mansour Yussuf Himid in 2008 at the House of Representatives. Salma Said and Orton Kiishweko, 'Tanzania: Zanzibar Says No Oil Sharing' Thursday 17 July 2008 the Citizen available at http://allafrica.com/stories/200807180026.html (accessed in September 2018). See H I.Majamba, 'Tanzania's Oil and Gas Industry: Legal Regime, Management, and Access Rights', (2016) 19(1) *RiA Recht in Afrika| Law in Africa| Droit en Afrique* 3-23 at 7.

[73] The tenth constitutional Amendment of the Zanzibar Constitution 1984 Act No. 9 of 2010.The Oil and Gas Upstream Act No. 6 of 2016 (Zanzibar) clearly vests all hydrocarbon resources under the Zanzibar government on behalf of its people under section 4. Such amendments of the law are contrary to the united republic constitution. The united republic constitution sets out procedures for amending the constitution in Art.98 (1) b. This includes the list of union matters as provided for in the second schedule of the constitution that may be amended or deleted as stated in item 7. See H.I. Majamba ibid at 6-7; for a discussion on the access to oil and gas in the context of the union.

[74] B. J. Ndulu and F. M. Mwega, 'Economic Adjustment Policies', in J. D. Barkan, *Beyond Capitalism Vs. Socialism in Kenya and Tanzania* (London: Lynne Rienner Publishers, 1994) 119; A. Bigsten & A. Danielson, *Tanzania: Is The Ugly Duckling Finally Growing Up?*(Uppsala: Nordic Africa Institute, 2001) 19.

encouraging foreign investment and involvement of private actor's in economic development projects.[75] This period marked the end of total state control in the extractive industry.

As far as hydrocarbons were concerned, between 1980 and 1991, Tanzania experienced the most activity and most of the hydrocarbon drilling in Tanzania is reported to have occurred during this period.[76] Seismic data was mostly collected in the Rift Rukwa Basin and Mafia Deep Offshore Basin with discoveries being made in Songo and Mnazi Bay.[77]

During this period, the 1980 Petroleum Act was the law in operation. However, a number of significant constitutional amendments took place that brought further fundamental changes to the government accountability structure. In 1992, the one-party system ended and a multiparty system was adopted.[78] Members of Parliament (MPs) and presidential candidates could now come from any registered political party. This promised an improvement in the accountability function of parliament through the introduction of MPs from the opposition parties. Another amendment in the same year strengthened the powers of the National Assembly. It provided for the removal of the President by way of impeachment, introduced the post of a Prime Minister as head of government, and gave the National Assembly powers to take a vote of no confidence against the President or Prime Minister?.[79] These changes brought about bolster the separation of powers in Tanzania. The extent to which these changes affect transparency and accountability of hydrocarbon resources is further discussed in Chapters 6 and 7.

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[75] P. Bulter, supra note 54 at 67.

[76] Tanzania Petroleum Development Corporation (TPDC), 'Exploration History' available at http://tpdc.co.tz/upstream.php accessed in September 2016.

[77] Ibid.

[78] The Eighth Constitutional Amendment Act No. 4 of 1992. These Constitutional amendments were based on the report of the Nyalali Commission. The Nyalali Commission of February 1991 was a Presidential Commission set up under the leadership of then-Chief Justice Francis Nyalali. The Commission collected views of citizens and made appropriate recommendations on whether the country should adopt a multiparty or single party system. It sat during the term of President Ali Hasan Mwinyi. The Constitutional amendments included the change of Article 3 (On One party); deleting Article 10 (party supremacy); deleting Article 63(4) the position of the National Assembly as a Committee of the Party's National Conference. These Changes came under the enactment of the Declaration of multiparty state Act No.4 of 1992. For further details, see Msekwa, Pius, *The transition to multiparty democracy* (Dar es Salaam Tema Publishers Co., 1995).

[79] The Ninth Constitutional Amendment Act No. 20 of 1992.

The new political system led to the mushrooming of media houses with various newspapers, radio and TV stations, and a greater public demand for access to information.[80] Although no specific legislation was adopted to facilitate access to information, a new information and broadcasting policy was adopted in 1993. Unfortunately, the policy did not advance access to information. On the contrary, it protected information held by government from public view and sought to control the media houses.

5.7 TOWARDS THE CURRENT LEGAL FRAMEWORK

As Tanzania embraced economic liberalisation and marketed itself as an investor friendly country, the hydrocarbon industry experienced increased activities through foreign investment especially from 2000. The extraction of natural gas in Songo and Mnazi Bay took off with the implementation of the Gas to Electricity project.[81] Seismic data was acquired in a number of phases between 2000-2012 that led to exploration drilling of wells by British Gas BG (Blks - 1,2,3), Statoil (Blk - 2) and Petrobras (Blk - 5), making significant gas discoveries in blocks 1, 2, 3 and 4.[82] Exxon Mobil and Statoil also made major reserve discovery offshore named the Zafarani field off the coast of the Indian Ocean.[83] Together these discoveries make Tanzania one of Africa's major gas reserve owners.

The major discoveries referred to above necessitate a reconsideration of the adequacy of the existing legislation to govern the industry. As noted earlier, the 1980 Act was inadequate and superseded by later events. The extensive ministerial powers, the lack of an appropriate institutional framework and the provisions on revenue in the 1980 Act were incompatible with the nation's policies that had been adopted since the Act was enacted. Tanzania had evolved politically as well. Various policies and laws governing land, environment, investment, good governance among other cross cutting sectors have also been enacted. Internationally, policies

[80] M. Sturmer, *The Media History of Tanzania* (Ndanda: Ndanda Mission Press, 1998.) 172-175; Tanganyika Law Society (TLS), *Legislative Hindrances to Transparency and Open Governance in Tanzania: A Study on Access and Right to Information in Mainland Tanzania* (Dar es Salaam: Tanganyika Law Society 2014) 6.

[81] A. Eberhard *et al*, *Independent Power Projects in Sub-Saharan Africa: Lessons from Five Key Countries* (Washington: World Bank Publications, 2016) 206; Tanzania Petroleum Development Corporation (TPDC) 'Exploration History' available at http://www.tpdc-tz.com/upstream.php accessed in September 2017.

[82] TPDC, ibid.

[83] Ibid.

on the extractive industries have also demanded more transparency and accountability and increased local participation in the governance of extractive resources.[84]

Accordingly, in 2015 a new legal framework to govern the hydrocarbon industry was promulgated. The legal framework followed a series of reviewed and new policies to regulate and govern hydrocarbons. They include National Energy Policy of 2015, the National Petroleum Policy of 2015, the National Natural Gas Policy of 2013 and the Natural Gas Utilisation Master Plan 2016 – 2045 Strategy. Although these policies inform the current legal framework, they will not be discussed in this chapter and reference to them may only be made in the course of analysis where relevant.

The following section discusses the current legal and institutional frameworks governing the hydrocarbon industry. In outlining the legal framework, the section also covers laws in cross cutting sectors relevant to the hydrocarbon industry. It is also note worth that in Tanzania; hydrocarbons have always been handled by individual laws and not the general investment promotion and protection codes. They were therefore not anticipated in the Foreign Investments (Protection) Act, 1963 (Cap 533); National Investment (Promotion and Protection) Act, 1990 (Act No. 10 of 1990); and the current Tanzania Investment Act, 1997 (Act No. 26 of 1997).

5.8 CURRENT HYDROCARBON INDUSTRY LEGAL AND REGULATORY FRAMEWORK IN TANZANIA

5.8.1 The Constitution

Legal provisions on the regulation of hydrocarbons in Tanzania may be traced from its Constitution. Article 27 read together with Article 4 of the 2015 Petroleum Act vests all hydrocarbon resources in the republic to be managed by the government as trustee. These provisions establish the accountability relationship between government and the people. This relationship is discussed further in Chapter 7.

Following the Constitution is the principal legislation of the hydrocarbon industry, starting with the Petroleum Act 2015, which has to be read together with the Oil and Gas Revenues Management Act,[85] and the Tanzania Extractive Industries (Transparency and Accountability)

[84] See chapters 2 and 4 of the thesis.

[85] Act No. 22 of 2015

Act all of 2015.[86] More recently in July 2017, the Natural Wealth and Resources (Permanent Sovereignty) Act[87] and the Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act were passed.[88]

5.8.2 Principle Legislation

5.8.2.1 The 2015 Petroleum Act

The 1915 Petroleum Act is the main legislation governing the hydrocarbons industry in Tanzania. It provides for the regulation of the activities of the entire value chain of the industry starting with the upstream to mid and downstream activities. The major aim of the Act is to 'secure the accountability of petroleum entities and to provide for other related matters'.[89] The preamble shows the countries commitment to accountability in the sector unlike the 1980 Act, which did not contain the term accountability, or transparency. The Act is applicable in the entire Republic of Tanzania including Zanzibar.[90]

The Act designates Cabinet as the superintendent of the hydrocarbon industry.[91] Cabinet is responsible for approving all strategic sector decisions. The Minister responsible for hydrocarbons is the custodian of the industry. He or she is however obliged to consult and seek directives from Cabinet before making any major strategic decisions.[92] The Minister is also obligated to consult with other sectoral ministers before making decisions that could affect other sectors.[93] As the custodian of the industry, the Minister is charged with the duty, among other things, to develop and implement policies and plans; the administration of all industry licenses; entering into petroleum agreements on behalf of the government; promoting local

[86] Act No. 16 of 2015.

[87] Act No. 5 of 2017.

[88] Act No. 6 of 2017.

[89] Preamble of the Act.

[90] Section 2. Where hydrocarbon activities are undertaken in Tanzania Zanzibar, they are governed and administered by the institutions in accordance with the laws of Zanzibar (Section 2(2) b of Petroleum Act). As noted earlier, the applicability of the law in Zanzibar remains out of the scope of this thesis and shall not be discussed further. It is however important to note that there are debates going on as to whether or not oil and gas should be removed from the list of union matters in the constitution.

[91] Section 4 (3).

[92] Section 5 (3) (a).

[93] Section 5 (3) (b).

participation; attracting foreign investment; and ensuring transparency.[94] The Minister may, in writing, give the regulatory body directives with respect to policy issues to be observed and implemented.[95] He may also give policy directions to the National Oil Company in respect of performance of its functions.[96] In discharging his functions, the Minister is assisted by the Commissioner for Petroleum Affairs.[97] Chapter 6 and 7 analyse these provision against the backdrop of the core requirements of transparency and accountability discussed in Chapters 3 and 4.

5.8.3.1.1 Administrative Provisions and Institutional Framework

The Petroleum Act establishes various institutions for the governance and regulation of the industry's activities. These include the Oil and Gas Bureau within the Office of the President. The Bureau's role is to advise Cabinet on strategic matters relating to the oil and gas economy.[98] The Act also establishes two regulatory authorities: the Petroleum Upstream Regulatory Authority (PURA) as the regulator of upstream activities and the Energy and Water Utilities Regulatory Authority (EWURA) as the regulator of midstream and downstream activities.[99] As the scope of the study is limited to upstream activities, the analysis on transparency and accountability in Chapter 6 and 7 will only examine PURA, the regulator of upstream activities.

Apart from the regulatory Authorities, the Petroleum Act re-establishes Tanzania Petroleum Development Corporation (TPDC) to be the National Oil Company.[100] The Act relinquished TPDC's initial regulatory obligations under the 1980 Act. The Government of Tanzania is supposed to maintain a 51% share of the Oil Company at all times.[101] The National Oil Company's main role is to carry out the nation's commercial aspects in the entire value chain of the hydrocarbon industry.[102] In carrying out this role, TPDC is mandated to form subsidiary

[94] Section 5.

[95] Section 14.

[96] Section 10.

[97] Section 6.

[98] Section 7.

[99] Section 11 and 29 respectively.

[100] Section 8.

[101] Section 8 (2).

[102] Section 8

companies to implement its function effectively.[103] TPDC has exclusive rights over the exploration, production, and development of the country's hydrocarbons. All industry activities are accredited to TPDC who enters agreements with interested investors on behalf of the government.[104] TPDC also has an advisory role; it advises the government on matters relating to the hydrocarbon industry.[105]

As observed in Chapter 2 and 4, the major challenge with developing nations lies in ensuring that national oil companies have the autonomy to perform their commercial functions and are held accountable. They are usually operated as an extended arm of government making hence not sufficiently held accountable by government oversight bodies. Chapter 7 analyses how Tanzania's legal framework tackles this common problem.

5.8.3.1.2 Regulation of Upstream Activities

Having laid down the administrative provisions and established the various institutions, the Act provides for the governance of the hydrocarbon activities. It sets out the manner in which hydrocarbon operations are to be conducted and the mandate, duties, roles and functions of the various institutions and industry players. Part III of the Act, which governs upstream activities, provides for the management of petroleum areas and reconnaissance permits and the administration of upstream hydrocarbon rights, licences, and agreements.[106] The provisions on cessation of upstream hydrocarbon operations are provided for under part V of the Act. The administration of these provisions rests with the Minister subject to advice from PURA.[107] Cabinet approves all agreements that the Minister upon advice from PURA enters with TPDC and its partners on behalf of government.[108] Chapter 7 explores the implications of these provisions for both internal vertical and horizontal accountability.[109]

The Petroleum Act also defines the obligations of licence holders and contractors. Among other things, it obliges the licence holders to undertake corporate social responsibility programs to

[103] Section 8 (3).

[104] Section 8 (1) and section 9 (2).

[105] Section 9 (1) (a).

[106] Sections 32- 127.

[107] Section 43 (2), 47 (1), 48 (3), 50 (5), 52 (1) among other such provisions under the Petroleum Act.

[108] Section 47 (2).

[109] Sub section 3 of Chapter 3 of this thesis.

be agreed upon by respective local authorities and communities.[110] The Act also obligates the licence holders to use of goods manufactured or available locally and of services rendered by Tanzanian companies.[111] Licensees are also required to submit to the regulator a training and recruitment plan of Tanzanian citizens.[112] Other obligations relate to work practices for licence holders, maintenance of property and survey of wells.[113] Chapter 7 analyses how the licence holders and the contractors are held accountable over the fulfilment of these obligations.

The Petroleum Act addresses the issues of surface rights and land users. It provides for compensation to surface right holders where such rights are disturbed by hydrocarbon activities;[114] and for the protection against interference of other surface activities in sea during hydrocarbon operation such as fishing, navigation and other lawfully authorized activities.[115] Other provisions address grazing rights, cultivation rights and land development in hydrocarbon operation sites.[116] These rights form the basis of the vertical relationship between the state and citizens and, to some extent, the horizontal relationship between citizens and private upstream actors. Chapter 7 analyses at how citizens can use these rights and other rights to hold the government and upstream actors accountable.

Furthermore, the Petroleum Act provides for the management of hydrocarbon information and documentation. All data and information developed from hydrocarbon activities is owned by the government and placed under the custody of the upstream regulatory authority.[117] The provisions on information touch on the availability of information to the public, the confidentiality of data, failure to provide information required information, among other things.[118] These provisions are consistent with the EITI Standard recommendations and several

[110]Section 222.

[111] Section 219.

[112] Section 220 (4).

[113] Part III sub-part V.

[114] Section 111.

[115] Section 110 (4).

[116] Section 110.

[117] Section 42.

[118] Part III sub-part IV.

international policy recommendations on access to information discussed in Chapter 4.[119] These provisions are discussed further in Chapter 6.

The Petroleum Act also addresses health, safety, and environmental issues.[120] Upstream health and safety matters are further addressed by the Occupational Health and Safety Act[121] and other relevant related laws[122] while environmental matters are addressed by the Environmental Management Act.[123] The National Environment Management Council is in charge of all relevant environmental clearance and permits.[124] Chapters 7 and 6 analyses how these provisions and the regulatory authorities facilitate greater accountability within the upstream sector.[125]

The Petroleum Act is the first comprehensive piece of legislation governing the hydrocarbon sector in Tanzania. If implemented properly, it has potential to improve accountability in the hydrocarbon sector in Tanzania. However, its effective implementation is dependent in part on a number of other laws including those discussed below.

5.8.2.2 The Oil and Gas Revenues Management Act, 2015

The Oil and Gas Revenues Management Act (*hereinafter* the Hydrocarbons Revenue Act) mainly provides for fiscal rules and management of hydrocarbon revenues. In archiving this objective, the Act establishes the Oil and Gas Fund that consists of a Revenue Holding Account and a Revenue Saving Account held at the Bank of Tanzania.[126] The Holding Account acts as a current account where revenue collection and distribution is done.[127] The Savings Account

[119] Subsection 2.1.21 of Chapter 4 of this thesis.

[120] The act in Part VI provides for safety standards, safety precautions and emergency preparedness. It also provides for in Part VII for environmental provisions relating to compliance with environmental principles, pollution damage, liability of licence holder for pollution damage, liability for pollution damage caused without a licence, claiming of damages among other things.

[121] Act No. 5 of 2003.

[122] Section 199 (1).

[123] Section 208 (1).

[124] Section 17 (1) &18 of the Environmental Management Act.

[125] Subsection 3.1.2 of Chapter 3 of this thesis.

[126] Section 8 (1) & (2).

[127] Section 10 (3).

receives savings from the Holding Account.[128] The Finance Minister is the administrator of the fund. [129]

The Hydrocarbons Revenue Act requires all collection, deposit, and disbursement of hydrocarbon revenues to be done in a transparent and accountable manner.[130] The records of hydrocarbon revenues and expenditure in whatever form are to be simultaneously published by the Minister in the Gazette.[131] The Act also requires all information required to be made public to be published online on the Government and Ministry of Finance website. [132] The Hydrocarbons Revenue Act subjects all records on hydrocarbon revenues and expenditure to National Assembly oversight.[133]

These legislation provisions on revenue disclosure are quite commendable are consistent with the IMF guidelines on Resource Revenue Transparency as discussed in Chapter 4.[134] Improper management of revenues from non-renewable resources particularly in developing countries is usually the source of under development and associated social ills. As discussed in Chapter 2 and 4 transparency in hydrocarbon revenue is one way to mitigate the resource curse effects of corruption and related misfortunes. Chapter 6 analyses these provisions on hydrocarbon revenue disclosure taking into account the claw-back clauses in the Act and other contradictory legislation in the legal framework. The Chapter established the extent to which these provision guarantee transparency in hydrocarbon revenue information. Complementing the Petroleum Act and the Oil and Gas Revenues Management Act is the Tanzania Extractive Industries (Transparency and Accountability) Act as described below.

[128] Section 10 (4).

[129] Section 4.

[130] Section 18 (1) & (2).

[131] Section 18 (4).

[132] Section 18 (5).

[133] Section 18 (6).

[134] Subsection 2.2.1.3 of Chapter 4 of this thesis.

5.8.2.3 The Tanzania Extractive Industries (Transparency and Accountability) Act 2015(TEITA Act)

The TEITA Act domesticates the global Extractive Industries Transparency and Accountability Initiative.[135] This underscores Tanzania's formal commitment to promoting transparent and accountable exploitation of non-renewable resources. The TEITA Act provides for the 'establishment of the Extractive Industries (Transparency and Accountability) Committee (hereinafter the Transparency Committee) for purposes of ensuring transparency and accountability in extractive industries and to provide for other related matters'.[136]

The Transparency Committee is an independent government entity with oversight mandate over the extractive industry.[137] It is composed of a chairperson and 15 multiple stakeholders; five from government, five from the extractive industry companies and five from civil society organizations.[138] The main responsibility of the Transparency Committee is to ensure that 'benefits of the extractive industry are verified, duly accounted for, and prudently utilized' for the benefit of Tanzanians.[139] The provisions of the TEITA and the powers of the Transparency Committee are analyzed further and critiqued in Chapters 6 and 7.

While the Petroleum Act, the Hydrocarbons Revenue Act, and the TEITA Act collectively constitute the main legal and institutional framework of the hydrocarbon industry, several other laws complement this legal framework.

[135] Refer to Sub section 5.4.2 of chapter 2 of this thesis on the Extractive industry transparency and accountability initiative.

[136] Preamble of the TEITA Act No. 16 of 2015.

[137] Section 4 (2).

[138] Section 5.

[139] Section 10 (1).

5.8.3 Ancillary Legislation[140]

5.8.3.1 The Natural Wealth and Resources (Permanent Sovereignty) Act, 2017

The Natural Wealth and Resources (Permanent Sovereignty) Act is a short piece of legislation with 13 sections that seeks to ensure the protection of the national interest in the exploration of natural resources. The Act was passed by National Assembly in July 2017. It is applicable only in Tanzania Main land. The Act is implemented and overseen by the Minister responsible for constitutional affairs.

The Act reiterates the constitutional provision on national sovereignty over natural resources.[141] Unlike the Petroleum Act where natural resources are vested in the republic to be managed by the government as trustee, the Sovereignty Act vests all natural wealth and resources in the President on behalf of the people.[142] However, it prohibits the exploitation of natural resources except for the benefit of the people of Tanzania.[143] Section 7 of the Act specifically requires that all exploitation of natural resources should 'guarantee returns' towards the development of the national economy.

Particularly notable in the Sovereignty Act are provisions promoting the participation of the people and the government in the exploitation of natural resources,[144] requiring the government to hold an equitable stake in all natural resource ventures and providing for the opportunity for

[140] Other laws that have a bearing on the hydrocarbon upstream operations are not discussed in this chapter but may be discussed in the analysis as would be necessary. Such legislation include: the Occupational Health and Safety Act 2003 which provides the promotion, co-ordination, administration and enforcement of occupational safety and health standards; Laws pertaining to anti-corruption including the Prevention and Combating of Corruption Act 2007; Laws relating to access to land and compensation including The Land Acquisition Act 1967 and the Local Government(District Authorities) Act 1982; Bank of Tanzania Act 2006; Foreign Exchange Control Act; Insurance Act 2009; Companies Act (Cap 212 2002); Fair Competition Act 2003; Tanzania Investment Act (Cap 38 [R: E] 2002); Standards Act 2009; Merchant Shipping Act 2003; Income Tax Act 2004 as amended; The Value Added Tax Act 2014; The Stamp Duty Act 1975 and the East African Community Customs Management Act 2004.

[141] Section 4 & 5 (1).

[142] Section 5 (2).

[143] Section 6.

[144] Section 6.

any person to acquire stakes in natural resources ventures.[145] The participation of citizens requires access to information and transparency in hydrocarbon operation. Section 11 of the Sovereignty Act prohibits the institution of proceedings concerning the exploitation of natural resources in Tanzania in a foreign court or tribunal. All proceedings related to natural resources are instead expected to be determined by Tanzanian courts and in accordance with national laws. The Sovereignty Act also provides for National Assembly review of all exploitation arrangements under section 12 of the Act. These provisions are discussed further in Chapters 6 and 7.

5.8.3.2 The Natural Wealth and Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Act, 2017 ("Unconscionable Terms Act")

The Unconscionable Terms Act, applicable only in Tanzania Mainland, regulates to contracts on natural resource concluded before the Act was enacted. It therefore has retrospective effect. Its aim is to identifying natural resource agreements with 'unconscionable terms' so that they can be re-negotiated in order to remove such terms or terminate such agreements.[146] The Act defines 'unconscionable terms' as including terms that restrict the right of the state to 'exercise full permanent sovereignty over the country's natural resources', and terms that restrict government's control over foreign investors that are 'inequitable and onerous'. The Act also prohibits agreements that permit the use of foreign courts and tribunals as a means of settling disputes.[147] It also provides for the National Assembly review of all agreements on natural resources to identify the ones that are unconscionable or have unconscionable terms so that the government can renegotiate them.[148]

Chapter 7 of the thesis considers the implications of these provisions for National Assembly oversight and dispute resolution involving multinational corporations and international law.

[145] Section 8.

[146] Preamble of the Act No. 6 of 2017.

[147] Section 6.

[148] Section 5 (3).

5.8.3.3 Environmental Management Act, 2004

The Environmental Management Act is the principal legislation governing environmental affairs of the country.[149] The Act vests the management of all environmental affairs in the Minister responsible for the environment.[150] The Minister is assisted by the National Environmental Advisory Committee established under the Act.[151] The Environmental Act also establishes the National Environment Management Council (NEMC), which exercises general supervision and coordination over all matters relating to the environment.[152]

The Environmental Management Act enshrines key environmental principles such as the polluter pays principle, the precautionary principle and the principle of sustainable development.[153] The Act makes it mandatory for all extractive operations including hydrocarbon projects to undertake an environmental impact assessment before they can be implemented.[154] Additionally, specific Environmental Impact Assessment Regulations address hydrocarbon exploration and extraction.[155] National Environment Management Council (NEMC) oversees all environmental impact assessment and other environmental clearance assessments.[156] The power to issue any environmental clearance and licence for hydrocarbon projects is vested in the Minister.[157] The Act also requires the Minister responsible for hydrocarbons to conduct a strategic environmental assessment upon the discovery of such resources.[158]

5.7.4.4 The Access to Information Act 2016

The Access to Information Act provides for access to information by the public and for the transparency and accountability of information holders.[159] It applies to all public authorities

[149] Act No. 20 of 2004.

[150] Section 13.

[151] Section 11.

[152] Section 17 (1)

[153] See Part II of the Act.

[154] Section 81.

[155] Environmental Impact Assessment and Audit Regulations of 2005.

[156] Section 17 (1) &18.

[157] Section 13.

[158] Section 105.

[159] Preamble of Act No. 6 of 2016.

and to private bodies that use public funds or are in possession of information of significant public interest.[160] This Act is discussed further in Chapter 6.

5.8.4 International Law

Ratification of International treaties and conventions by Tanzania makes the ratified legal instruments part of the country's law upon domestication. According to Article 63(3) e of the Constitution, the National Assembly is required to deliberate and ratify any international instrument that Tanzania is party to.[161] Upon ratification, if the legal instrument is domesticated by parliament legislation, it will then form part of the law. However, Tanzanian courts use international treaties and customary international law in interpreting domestic legislation. For instance, in *Director of Public Prosecution v. Daudi Pete*,[162] the Court of Appeal interpreted the bill of rights by taking into account provisions of the African Charter on Human and Peoples' Rights.

The applicability in Tanzania of international legal instruments relating to the governance of the extractive industry including human rights treaties, anti-corruption treaties and treaties on environmental and maritime matters will be discussed in chapter 6 and 7. The Chapters will also explore how Tanzania could learn from international standards and best practice.

5.9 CONCLUSION

This chapter has shown that Tanzania's hydrocarbon industry is noticeably young. This does not mean that other natural resources have not been exploited for a long time. For example, before Tanzania was colonized, the customary laws of the respective tribes governed natural resources across the country. Under the communal system that prevailed then, the various tribes and communities generally used natural resources such as land and water for the common good. However, during the colonial era, natural resources were explored and extracted for the benefit of the colonial governments, which did not consider themselves accountable to the colonized.

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[160] Section 2 (2).

[161] Article 63 (3) (e) of the Tanzania Constitution 1977.

[162] *DPP v. Daudi Pete* [1993] TLR 22(CA) 34. On the use of international law in the interpretation of domestic legislation, see e.g. *Republic v. Mbushuu Alias Dominic Mnyaroje and Kalai Sangula* [1994] TLR 146(HC) 156; *Attorney General V. Rev Christopher Mtikila* [1995] TLR 31 (HC).

Upon gaining independence in 1961, the law was changed to provide that all natural resource wealth now vested in the people of Tanganyika to be governed and exploited for their benefit. The early independence constitutional framework did not, however, clearly recognize accountable governance. Under President Nyerere, the government operated without checks. Parliament under the 1962 Constitution had no power or political will to censure the executive. The Constitution did not have a bill of rights; neither did it recognize the right of access to information. Most government information was classified, and the National Security Act prohibited disclosure of information by government officials. Due to President Nyerere's policy of zero exploration, no exploitation of hydrocarbons took place during this period.

In the late 1970s, Tanzania reconsidered its policy of zero exploitation of resources. This move led to the enactment, in 1980, of the first Petroleum Act, which gave the responsible minister extensive discretion in making all industry decision. In a context of lack of transparency and insufficient checks on the executive, the Minister's vast powers were only subject to oversight by the President. In 1977, multiple constitutional amendments were made which introduced elements of accountability, such as the separation of power and the bill of rights. The new Constitution afforded citizens opportunities of holding the government accountable.

Until recently, Tanzania did not have a comprehensive legal framework governing the hydrocarbon industry. It is also clear that the 2015 legal framework on hydrocarbons has made efforts not only to provide for sufficient regulation of the industry but also to support the transparency and accountability initiatives in the industry by ensuring the integration of the same in its policies and laws. The current legal framework, unlike the 1980 Act, extensively provides for the regulation of industry activities and for transparency and accountability. Notable in this framework is the specific provision for a special oversight transparency and accountability committee. The question remains to what extent the current law incorporates the aspects of transparency and accountability to be able to facilitate transparent and accountable practice in the governance of hydrocarbon resources. The next two chapters address this question.

CHAPTER 6
TRANSPARENCY IN THE LEGAL FRAMEWORK GOVERNING HYDROCARBON RESOURCES IN TANZANIA

6.1 INTRODUCTION

As established in Chapter 3, public administration and governance function best in a context where transparency and accountability principles are fully recognized and respected. Hence, the pursuit of greater efficiency in the extractive industry informs the move in recent years by the global extractive industry towards promoting accountability and transparency. As shown in Chapter 3, transparency in resource governance facilitates accountability and promotes good governance and sound decision making. The governance of hydrocarbon resources in developing countries such as Tanzania involves complex relationships including multinational players. To ensure that all such players are held fully accountable, it is necessary that there be full transparency in the industry.

This and the subsequent chapters aim at answering the question whether the legal framework governing the hydrocarbon industry in Tanzania fully recognizes the principles of accountability and transparency and establishes sufficient mechanisms to ensure that those principles are respected in practice. Chapter 3 identified the analytical tools for determining whether a legal framework establishes adequate accountability and transparency frameworks. This chapter focuses on transparency. As has been shown in Chapters 3 and 4, a legal framework that fully embraces transparency must clearly protect the right of access to information, establish what type of information can be publicly disclosed or accessed, who is bound to provide access to information, who can seek access or is entitled to the information, lay down the procedures by which the right of access to information can be realized in practice. The legal framework must facilitate access to clear, reliable, timeous, and complete information by industry players, interested stakeholders and the public. Furthermore, it must provide for the duty of the state to enable the public to understand and make use of the information held by the state and other players. This chapter seeks to establish the extent to which these aspects are incorporated in Tanzania's upstream hydrocarbon legal framework.

In addressing the above, this chapter identifies and critically discusses the various transparency relationships in the governance of upstream hydrocarbon industry provided for under the law. As will become clear in the chapter, Tanzanian law establishes three main transparency relations: the relationship between the hydrocarbon resource owners and the trustee charged with the task of managing the resource; the resource managers and the resource development players; the resource owners and the resource development players. The chapter investigates whether the law makes sufficient provision for transparency in these relationships in upstream hydrocarbon activities.

6.2 OVERVIEW OF PRINCIPAL LAWS ADDRESSING TRANSPARENCY IN THE HYDROCARBON INDUSTRY

The main laws addressing the question of transparency in the hydrocarbon industry in Tanzania are the Constitution, the Petroleum Act, the Tanzanian Extractive Industry Transparency and Accountability (TEITA) Act, the Oil and Gas Revenue Management Act (Hydrocarbons Revenue Act) and the Access to Information Act.[1] The Tanzanian Constitution recognizes the right of the people to seek information and to be informed at all times on matters that are of importance to them.[2] Broadly construed, such matters of importance would include information on activities pertaining to the governance of natural resources.

These Acts have taken commendable steps towards championing transparency in the industry. The Petroleum Act makes it mandatory for the regulatory authorities, the National Oil Company and the Minister to conduct all industry activities in a transparent manner.[3] In doing this, the Petroleum Act codifies the international policy recommendations made by the Extractive Industry Transparency Initiative (EITI) and the International Monetary Fund (IMF)

[1] The Petroleum Act No.21 of 2015; the Tanzania Extractive Industries (Transparency and Accountability) Act No. 16 of 2015; Oil and Gas Revenue Management Act No. 22 of 2015 and the Access to Information Act No. 6 of 2016.

[2] Article 18 of the Constitution of Tanzania 1977.

[3] Section 13(1) (d), 31(1), 9(2) (f), 5(1) (f) also see Section 18(1) of the Oil and Gas Revenue Management Act No. 22 2015.

Guidelines discussed in Chapter 4.[4] The Minister responsible for hydrocarbons is charged with the duty to ensure and sustain transparency in the industry.[5] The National Oil Company (NOC) and the Petroleum Upstream Regulatory Authority (PURA) are the main organs responsible for acquiring, analyzing, and disseminating information on issues relating to the hydrocarbon industry.[6] The TEITA Act establishes a Transparency and Accountability Committee responsible for overseeing and ensuring transparency as discussed in Chapter 5.[7]

Essentially, these laws provide for both passive and limited proactive transparency in the various transparency relationships they establish.[8] The sections below provide a detailed analysis of how transparency is enshrined and regulated in these relationships.

6.3 VERTICAL TRANSPARENCY BETWEEN OWNER AND TRUSTEE OF TANZANIA'S HYDROCARBON RESOURCES

As discussed in Chapter 3, vertical accountability applies where there are formal obligations on the accountee to give account to the accountor.[9] Transparency being an element of accountability, the term 'vertical transparency' is used in analyzing the transparency aspects in vertical accountability relationships, in this case, the relationship between the hydrocarbon resource owners and the government.

As outlined in Chapter 5, in accordance with the Constitution, the Petroleum Act and the Natural Resources Act, hydrocarbon resources, like all other non-renewable extractive resources, belong to the people of Tanzania.[10] The people have a constitutional right to monitor and protect their national resources for the benefit of the nation as a whole.[11] These resources

[4] Subsection 2.1.2.1.2 and 2.1.2.1.3 of Chapter 4 of this thesis.

[5] Section 5(1) (f) of the Petroleum Act No. 21 of 2015.

[6] Section 12(2) (c), 9(2) (f), Section 88(1) and (5), 84(1) of the Petroleum Act.

[7] See subsection 7.3.3 Chapter 5 of this thesis.

[8] See subsection 2.1.2.1 of Chapter 4 of this thesis.

[9] Sub section 3.1.1 Chapter 3 of this thesis.

[10] Subsection 7.2 of Chapter 5 of this thesis.

[11] Article 27 of the Tanzanian Constitution 1977.

are vested in the state as the trustee of the people. Thus, the control of the nation's natural resources is done through the medium of a trust in a democratically elected government.[12] This is the first transparency and accountability relationship that the law establishes. This relationship involves the people as the owners of the resources and those entrusted with the public power and responsibility to protect and manage those resources. As owners of the resources, the people are the accountors and information seekers while the government, as the manager of the resources on people's behalf is the accountee and information holder. This section analyzes how the law defines this vertical transparency relationship and the mechanisms of enforcing such transparency.

6.3.1 Proactive Transparency

Proactive transparency, as noted in Chapter 3, refers to when the information holder or supplier makes the initiative of making information public voluntarily or pursuant to legislation.[13] As regards the relationship between the public and the government, Tanzanian law provides for proactive transparency under the Petroleum Act, the Hydrocarbons Revenue Act, and the TEITA Act.

6.3.1.1 Proactive Transparency under the Petroleum Act

Proactive transparency as provided for under the Petroleum Act relates to information on graticulation of the earth's surface and the constitution of blocks, on the assessment made to open an area for hydrocarbon activities and on the tendering processes of hydrocarbon agreements.[14] Reference maps prepared for hydrocarbon sites are required to be deposited and made available to the public at the offices of PURA and on its website.[15] Similarly, assessment reports on areas to be open for hydrocarbon activities are expected to be published by the Minister in the Gazette and on the website of the Ministry and PURA.[16]

[12] See subsection 2.1 of Chapter 4 of this thesis.

[13] Subsection 5.2 of Chapter 3 of this thesis.

[14] See Section 32(7), 33(9) and 48 (1) & (2).

[15] Section 32(7) of the Petroleum Act.

[16] Section 33(4) of the Petroleum Act.

However, section 33(9) of the Act reads; 'The Minister shall publish the decision in the Gazette, website of the Ministry and PURA or in any other manner as the Minister may determine'. This provision suggests that the Minister has discretion to choose the mode of publication. To ensure transparency, it is important that, at the very least, the law require the publication to be in one of the formal means by which the government publishes its policies and laws, and the publication has wide circulation to the public. International policy recommendations call for states to have publication schemes for proactively disclosed information.[17] To ensure transparency and avoid misuse of power, publication schemes are required to be known to the public and be approved by a body responsible for monitoring information disclosure and access to information.[18]

The Act also makes provision for proactive transparency in relation to tendering processes. It provides that hydrocarbon agreements 'shall [only] be entered into after a transparent and competitive public tendering process' has been completed.[19] The Minister is obliged to publish an invitation to tender or intention to initiate direct negotiation with a particular stakeholder in a newspaper with wide circulation.[20] While this is a noteworthy development consistent with best practice,[21] the Petroleum Act does not regulate the tendering process, leaving the issue to be addressed via regulations promulgated by the responsible Minister.[22] At the time of writing, regulations addressing hydrocarbon-tendering processes were yet to be promulgated. The only regulations promulgated under the Petroleum Act are those on local content.[23] In addition, no new licences have been issued in Tanzania Mainland since the 2015 Petroleum Act came into force.

[17] Section 65(1) (b) and 65(4) and (5) of the Model Law on Access to Information for Africa and Section 9 and 10 of the Model Inter-American Law on Access to Public Information. See Subsection 2.1.2.1 of Chapter 4 of this thesis.

[18] Ibid.

[19] Section 48(1) of the Petroleum Act.

[20] Section 48(2) of the Petroleum Act.

[21] See Subsection 2.1.2.1.2 and 2.1.2.1.3 of Chapter 4 of this thesis.

[22] See section 48(4) of the Petroleum Act.

[23] The draft Petroleum (Local Content) Regulations 2017.

Provisions requiring the disclosure of information on the declaration of hydrocarbon discovery and the revocation of the discovered blocks are another form of proactive transparency under the Act. The Minister is required to publish in the Gazette all declared 'location' blocks upon a discovery or the revocation of the discovered and declared blocks as stipulated under section 64 and 77 of the Petroleum Act. The rest of the information on the hydrocarbon industry as provided for under the Petroleum Act falls under passive transparency as discussed below.

6.3.1.2 Proactive Transparency under the Oil and Gas Revenue Management Act

The provisions of the Oil and Gas Revenues Management Act (hereinafter the Hydrocarbons Revenue Act) requiring information on hydrocarbon revenue management to be published constitute an instance of proactive transparency. Section 18(4) of the Hydrocarbons Revenue Act states that 'oil and gas revenues and expenditure in whatever form, shall simultaneously be published by the Minister in the Gazette'. Subsection (5) adds that 'information required to be made public shall also be published online on the website of the Government and Ministry of Finance'. These provisions are the most commendable provisions providing effectively for transparency consistent with EITI Standards and IMF Guidelines on Natural Resource Revenue Transparency.[24] The requirement to publish revenue records assures the public of timeous and reliable information. Furthermore, the additional requirement to publish the information online enables easier access by the public and interested stakeholders than publishing in the Gazette.[25]

What is missing from the Act is an explicit indication of the regularity by which information on the revenues and expenditure of hydrocarbon revenues is required to be so published. It is unclear whether the information on revenue and expenditure that needs to be published refers to the quarterly reports on the performance of the Oil and Gas Fund from the Board and Governor of the Bank submitted to the responsible Minister, or the records on oil and gas

[24] Subsection 2.1.2.1.2 and 2.1.2.1.3 of Chapter 4 of this thesis

[25] See discussion further below Subsection 3.3 on public documents and the government gazette.

revenue and expenditure compiled by the collecting authorities in accordance with section 18(3) of the Revenue Act or both.[26]

This problem is compounded by the fact that while section 15 of the Revenue Act requires the Auditor General to audit the quarterly reports, it does not say whether such audited quarterly reports ought to be submitted to the Minister or published in anyway. Similarly, section 20 of the Hydrocarbons Revenue Act that deals with the accounting and auditing of the Fund does not make any provisions with regard to the publication of revenue and expenditure reports.

One may consider section 18(4) to refer to the requirement of publication of information on hydrocarbon revenue records as compiled by the collecting authorities. Even so, the published tax annual reports are aggregated reports, which do not give any insight on the industry's revenue performance.[27] Additionally, the audited reports are published annually and are only considered public documents after they have been tabled before the National Assembly.[28] Revenue collection information, it must be underlined, is not public information.[29] Section 12 of the Tax Administration Act provides that information and documents on taxpayers and any other information obtained during the fulfilment of tax laws 'must be treated with secrecy and not published or disclosed to unauthorized person'.[30]

While section 22 of the Hydrocarbon Revenue Act provides that the Hydrocarbon Revenue Act is to prevail in case of inconsistency with other laws, the application of section 22 under section 18(4) of the Hydrocarbon Revenue Act as it relates with other laws on disclosure of revenues

[26] Section 18(3) refers to the respective laws pertaining to tax collection, audit, and disbursement of government funds.

[27] See, Tanzania Revenue Annual Report 2014 – 2015 available at http://www.tra.go.tz/images/uploads/AnnualReport2014-2015.pdf (accessed in September 2018); Tax Statistics Report 2015/16(Tanzania Main Land) - Tanzania National Bureau of Statistics available at https://nbs.go.tz/nbs/takwimu/Tax/Tax_Statistics_Report%20_2015_16_Tanzania_Mainland.pdf accessed in September 2018.

[28] Section 39 of the Public Audit Act No. 11 2008.

[29] Section 12 of the Tax Administration Act No. 10 of 2015.

[30] Section 12 of the Tax Administration Act.

is complex. This complexity is raised by section 18(3), which clearly notes that the respective laws pertaining 'to tax collection, audit, and disbursement of government funds shall apply in the collection, audit, and disbarment of government funds'. This may be considered as inconsistency within the Hydrocarbon Revenue Act itself where publication is interpreted in the context of revenue reports as reported and published under the tax laws. In order for section 18(4) to be effective, the section ought to be explicit as what it means by 'simultaneous publication of hydrocarbon revenue and expenditure'.

6.3.1.3 Proactive Transparency under the TEITA Act

The TEITA Act provides for proactive transparency by the Minister and hydrocarbon companies. As outlined in Chapter 5, the Petroleum Act is to be read together with the TEITA Act whose main purpose is the establishment of the Extractive Industries (Transparency and Accountability) Committee (hereinafter the Transparency Committee). The purpose of the Transparency Committee is to ensure transparency and accountability in the extractive industry. Accordingly, through the Transparency Committee, the Act provides for proactive transparency by the Minister and hydrocarbon companies on three major information categories. The first is on information pertaining to contracts, licences and other resource access information; the second is about information on stock and revenue; and the third is information from the reconciliation reports of the Transparency Committee as discussed below.

On information concerning the access of resources, section 16(1) of the TEITA Act obliges the government, through the Transparency Committee, to publish extractive resource information. It provides : 'the Committee shall cause the Minister to publish in the website or through a media which is widely accessible all concessions, contracts, licenses' relating to extractive industry companies and 'names of shareholders owing interest in the companies'. The Committee is also required to 'cause the Minister' to publish environmental management plans of extractive industry companies.[31] While section 16(1) codifies proactive information disclosure, it is unclear what 'to cause the Minister to publish' means and how the Committee

[31] Section 16(1) of the Tanzania Extractive Industries (Transparency and Accountability) Act No. 16 of 2015 (TEITA ACT).

could fulfil this obligation. One may question whether the duty to publish lies with the Minister or the Committee. This provision is inconsistent with Requirement 2 of the EITI Standard 2016 under which the TEITA Act is modelled after. Under the Requirement 2.1, the obligation to disclose information is mandatory and lies solely with the state.

Since its establishment in 2015,[32] the Transparency Committee has not succeeded to 'cause the Minister' to publish hydrocarbon information as required under section16 (1). According to the 2016 reconciliation report published in March 2018 commissioned by the Transparency Committee, the Ministry of Energy 'does not maintain an up-to-date contacts database of the extractive companies in Tanzania'.[33] The report also indicates that 'the Petroleum Upstream Regulatory Authority(PURA) does not have a proper petroleum register, which contains the licence information set out in Requirement 2.3 of the EITI such as name of licence holders, coordinates, and date of application'.[34] At the time of writing, PURA did not have a functioning website and the Transparency Committee did not report on the measures it had taken to cause the Minister to comply with the TEITA Act.

According to the 2017 Transparency Committee report, the Minister communicated his intention to publish the required information on the Ministry's website to the hydrocarbon companies.[35] British Gas and Statoil, replied, observing the 'need to protect proprietary information' before the disclosures of the agreements are made.[36] The Minister is yet to publish any PSA agreements or information required under section 16(1) on its website.

[32] Before the enactment of the TEITA Act, the Transparency Committee was in operation as an entity implementing the global EITI. (See chapter 2) The TEITI was founded in 2009 honouring the government's commitment in implementing the global EITI initiative by disclosing company payments and government receipts of taxes and revenues from the extractive sector.

[33] Tanzania Extractive Industries Transparency Initiative Final Report for the Period 1July 2015 to 30June, 2016, 58-59, available at http://www.teiti.or.tz/wp-content/uploads/2018/04/TANZANIA-EITI-2015-2016-FINAL-REPORT.pdf (accessed in September 2018).

[34] Ibid.

[35] TEITI, Annual Progress Report January- December 2017 at 6, available at http://www.teiti.or.tz/wp-content/uploads/2018/06/TEITI-Annual-Progress-Report-2017.pdf (accessed in September 2018).

[36] Ibid.

There are however three hydrocarbon companies in support of the EITI initiative that have published their agreements in the online extractive resource contracts website.[37]

With regard to stock information, section 16(2) requires extractive companies to 'report or submit all information' relating to extractive activities that they would 'report or submit to their local or foreign stock exchange' to the Transparency Committee. The Committee is also equipped with powers to obtain any information regarding all extractive industry activities from all industry players.[38]

While these provisions provide for proactive transparency, the Transparency Committee is not compelled to publish all reports or information it may receive. This is so because the Transparency Committee is mandated to disseminate information, as 'it may consider necessary'.[39] There is thus no guarantee that all information reported by the companies to the Committee would be published. Apart from the TEITI annual reports, the Transparency Committee has not published any hydrocarbon company reports or information to date. The Committee recently uploaded a list of active hydrocarbon licences that indicates the name of company, the type of licence, date awarded duration and operating area.[40] The TEITA Act could borrow a leaf from Ghana's EITI provisions. Ghana better provides for the publication of company information and any other information obtained by the GEITI Committee by making it mandatory for the GEITI Committee to publish such information.[41] Both in Ghana and Nigeria, EITI committees have websites on which such information is published. These

[37] See PSA agreements with Pan African Energy, ExxonMobil, and Statoil, available at http://resourcecontracts.org/countries/tz (accessed on 20 January 2019).

[38] Section10 (2) (b), (c), (e) of the TEITA Act No. 16 of 2015.

[39] Section10 (2) (h) of the TEITA Act.

[40] TEITI, Active PSAs/Licenses (Exploration & Development), available at http://www.teiti.or.tz/wp-content/uploads/2018/01/Active-PSAs-Licenses-Exploration-Development.pdf (accessed in June 2018).

[41] Rule 3(h) of the Rules of Procedure for the Ghana Extractive Industries Transparency Initiative (Gheiti) Multi-Stakeholder Group (Msg) of 2010. It reads: 'Publish the reports of all audits, investigations and/or reconciliations conducted pursuant to this Act and to disseminate such reports through widely accessible media, including but not limited to, the national newspapers and the electronic media'.

websites are up-to-date and contain hydrocarbon and mining agreements. The Ghanaian one also includes a section on company reports.[42]

Regarding revenue reconciliation reports, section 17(5) of the TEITA requires 'reconciliation reports on government revenues to be submitted to the Transparency Committee by the independent administrator for consideration and publication'. Although the requirement for publication provides for proactive transparency, the provision does not set out the time limit for the consideration period nor the manner in which the reports ought to be published. Similar provisions are also made under section 18 (1) requiring the Committee to 'submit the reports to the Minister for consideration and publication'. The Transparency Committee has so far published only one reconciliation report on its website. The reconciliation report published covers the period of July 2015- June 2016 and was posted in March 2018. The consideration period before publication by the Transparency Committee appears to have been more than a year and does not fit the transparency definition of timely publication.[43] A review of publications made by the Transparency Committee in their website suggests a pattern of undue delay in publication. For example, the Transparency Committee published 2011-2014 reports only in January 2017 and those of 2015-2016 in March 2018.[44]

6.3.1.3.1 Transparency and the Mandate of the Oversight Transparency Committee

Notwithstanding the above short falls, the TEITA Act still has the potential of enhancing transparency if the Transparency Committee implemented the existing provisions of the Act. One of the functions of the Committee is to develop a framework for transparency and accountability in the reporting and disclosure by companies of the revenue they pay to the government.[45] This mandate gives the Committee an opportunity to improve the state of transparency in the extractive industry. The Committee could develop a framework that

[42] See http://www.gheiti.gov.gh/site/index.php?option=com_phocadownload&view=sections&Itemid=54 (accessed in June 2018).

[43] See Section 4.2 of Chapter 3 and Section 2 of Chapter 4 of this thesis.

[44] See http://www.teiti.or.tz/?cat=6&paged=1 (accessed in September 2018).

[45] Section 10(2) (a) of the TEITA Act No. 16 of 2015.

compels companies to publish the revenue they have paid the government and other relevant financial information in a clear and easily understood language, on a widely circulated media and on their webpages. At the time of writing, the Transparency Committee had not yet promulgated any reporting guidelines or format.

Apart from creating guidelines, the Transparency Committee also has the power to ensure compliance of the TEITA Act by extractive industry stakeholders. Section 23 of the TEITA Act makes it an offence to withhold information from the Committee or fail to adhere to publication requirements as stipulated under the Act. The Transparency Committee can therefore compel stakeholders to adhere to transparency provisions. However, it appears as if the Transparency Committee does not to make use of this policing authority. According to the reconciliation report, it was observed that reporting stakeholders 'were not readily willing to provide the data required for the production of the EITI Report'.[46] Yet the Committee does not seem to have taken any measures to ensure such co-operation by stakeholders. Unsurprisingly, the report also observed that a majority of industry stakeholders were not aware of the Transparency Committee and its functions.[47] This observation seems to be consistent with those of many global initiatives.[48] After over eight years of EITI implementation, one would expect the Transparency Committee to be well known by both the industry stakeholders and the citizens. The Transparency Committee is obliged under section 10(d) and (i) to promote extractive industry awareness and transparency among stakeholders and citizens.

It can be concluded that the mandate given to the Transparency Committee and the provisions in the TEITA Act on proactive transparency give hope of improved transparency in the sector. However, the TEITA Act codifies proactive transparency only in relation to revenue disclosure

[46] Tanzania Extractive Industries Transparency Initiative Final Report for the Period July 1 2015 to June 30, 2016, at 59, available at http://www.teiti.or.tz/wp-content/uploads/2018/04/TANZANIA-EITI-2015-2016-FINAL-REPORT.pdf (accessed in September 2018).

[47] Ibid, at 57.

[48] L David-Barrett and K. Okamura, 'The Transparency Paradox: Why do Corrupt Countries Join EITI', (2013) Working Paper No. 38, *European Research Centre for Anti-Corruption and State-Building* at 6; A. Gillies, 'Reputational Concerns and the Emergence of Oil Sector Transparency as an International Norm', (2010) 54(1) *International Studies Quarterly* 103-126.

of payment made to government. It does not cover transparency in other industry processes such as the granting of licences. The mandate afforded to the Transparency Committee is also limited to extractive companies and not the government. Although there is already a revenue reporting system, the framework developed by the Transparency Committee could be more specific to ensure timeous publication of revenue reports to the public. In this aspect, Tanzania could borrow from similar disclosure requirements in other jurisdictions such as Canada, the EU and even the USA[49] where companies registered in their jurisdictions are required to disclose annually to the public specific payments made to all governments. Such payments include bonuses, dividends, government fees, infrastructure improvement, production entitlements, royalties, and taxes.[50]

6.3.2 Passive Transparency under the Legal Framework

Passive transparency relates to information that may be accessed by an information seeker from the information holder upon request.[51] In this case, the public from the government may request information on hydrocarbon activities. The legal framework makes provision for passive transparency under the Constitution, the Petroleum Act, and the Access to Information Act. This subsection evaluates the nature of the information catered for by passive transparency under the law and critiques the way the law provides for access to such information. It raises the question whether the law as is currently conceived makes adequate provision for easy and timeous access to reliable information.

6.3.2.1 Right to Hydrocarbon Industry Information

The Petroleum Act gives the public the right of access to information pertaining to the industry held by the regulatory authority.[52] Section 84(6) of the Petroleum Act reads: 'any person may request access to information in the Petroleum Registry, and the information registered shall be

[49] See subsection 3.2.5, Chapter 4 of this thesis.

[50] Extractive Sector Transparency Measures Act 2015 of Canada, The EU Accounting Directives; Article 41(4) the Directive 2013/34/EU and Section 1504 on Disclosure of payments by resource extraction issuers of the Dodd-Frank Wall Street Reform and Consumer Protection Act 2010.

[51] Subsection 5.1 of Chapter 3 of this thesis.

[52] Section 84(6) of the Petroleum Act.

public except as otherwise provided by law'. At the same time, the Access to Information Act confers the same right to any Tanzanian national with respect to access information held by any public authority or private body.[53] These provisions give effect to the Constitution, which recognises the right to receive and access information by citizens.[54] As outlined in chapter 5, the Regulatory Authority is the holder of the hydrocarbon industry information and has the responsibility of disseminating such information to the public.[55]

The right of access to hydrocarbon information is however subject to approval and fees as provided for under the Petroleum Act and complemented by the Access to Information Act.[56] Section 91(1) of the Petroleum Act reads: 'PURA may, with a written approval of the Minister, make available to the public' hydrocarbon industry information.' Information referred to in section 91(1) (a)-(d) includes details of all agreements, licences, permits and any amendments to the licences, permits or agreements whether valid or terminated; details of exemptions, variations or suspensions of conditions of licence and permit; approved development plans; and all assignments and other approved arrangements in respect of a licence or permit. Section 91(2) states that access to information is provided upon payment of prescribed fees.

At the time of writing, no regulations had been promulgated concerning access to hydrocarbon industry information or prescribing the applicable fees.[57] Both the Access to Information Act and the Petroleum Act are silent on the regulation of fees and do not give any directives. Section 21 of the Access to Information Act states that 'the information holder … may charge fees for recovering actual costs of production of the requested information.' Charging fees for access to information is a normal practice in most countries.[58] However, it has been argued that such fees 'should not be such as to constitute an unreasonable impediment to access to

[53] Section 5(1) of the Access to Information Act No.6 of 2016 passed in September 2016.

[54] Article 18(d) of the Tanzania Constitution 1977.

[55] Section 12(2) (C) of the Petroleum Act.

[56] Section 91(1) and (2) of the Petroleum Act and section 21 of the Access to Information Act No.

[57] The Access to information Act requires the information holder in this case the Minister and PURA to determine the fees for access to information.

[58] M. Daruwala, Open Sesame: Looking for the Right to Information in the Commonwealth: CHRI's 2003 report; Commonwealth Human Rights Initiative at 42.

information'.[59] Experiences from other countries show that the amount of fees affects the level of access to information by the people.[60] In many law income countries, the applicable fees are set without regard to the financial capacity of the majority of the population.[61] Access to information law in countries like South Africa have addressed this problem by giving the Minister the mandate to exempt certain groups of people or certain information categories from the prescribed fees.[62] No such arrangement has been made in Tanzania.

Another impediment to accessing information related to the hydrocarbon industry is the requirement in section 91(1) that access to information must be given upon 'the written approval of the Minister'. According to section 84(6) of the Petroleum Act information received under section 91(1) of the same Act is 'public except as otherwise provided by law'. It is therefore questionable why access to such information should be provided only when the Minister approves in writing. Apart from the bureaucratic hurdles that arise from vesting such a power in a senior government position like that of a Minster, the law does not provide guidelines on the manner in which ministerial approval is to be acquired.

As observed in Chapter 4, the trend in the hydrocarbon industry worldwide is to proactively make information including that on contracts and licences public. Over 72 countries implementing the EITI, including new gas producing countries like Mozambique, publish contract and licence details.[63] Such information provides the citizens the much-needed tools of assessing government's commitment to accountable governance as far as its hydrocarbon revenue and environmental commitments, among other things, are concerned.

[59] Human Rights Committee, General Comment No. 34 Freedom of Opinion and Expression CCPR/C/GC/34/CRP.4 at 7.2010.

[60] Daruwala, supra note 48 at 42.

[61] Ibid.

[62] Sections 22 (8) and 92 of the Promotion of Access to Information Act No. 2 of 2000.

[63] EITI, 'Progress Report 2017: Ending Company Anonymity – The Key to Fighting Corruption', available at https://eiti.org/progress-report-2017/contract-transparency (accessed in September 2018).

Section 91(1) is also inconsistent with the provisions of the TEITA Act as regards proactive transparency. The provisions on proactive transparency require the Minister to publish hydrocarbon industry information including agreements and other hydrocarbon company information. Since the TEITA Act requires such information to be published by the Minister, there is thus no need for ministerial consent. The inconsistency in the legislation may explain the lack of compliance and poor adherence to the provisions of the TEITA Act by the government institutions highlighted above.

6.3.2.2 Accessing Hydrocarbon Industry Information

Passive transparency is triggered by the request of information by the information seeker. For there to be passive transparency, there has to be clear provisions on the procedures taken in accessing the information. Part III (b) of the Access to Information Act of 2016 lays down the procedure for accessing information. These procedures are largely consistent with international best practices.[64] Section 10 of the Access to Information Act permits the use of hard or electronic correspondence in making information requests. It also requires the 'information holders' to offer appropriate assistance to illiterate or disabled requestors.[65] There is no application fees charged for information requests. Section 21 provides for fees for the 'actual costs' of information production. The response time for furnishing information is a maximum of 30 days.[66]

Upon a request, the 'information holder' notifies the seeker 'whether the information exists, and if it does, whether access to the information or a part thereof shall be given'.[67] Where access is granted, the information holder must 'promptly' give the applicant the required information.[68] Where access to information is denied, the information holder is required to give reasons for the refusal including 'the specific provisions of the Act' relied upon and the 'factors

[64] See Subsection 2.1.2.1 of Chapter 4 of this thesis.

[65] Section 10(4) of the Access to Information Act No. 6 of 2016.

[66] Section 11(1) of the Access to Information Act No. 6 of 2016.

[67] Section 11(1) (a) of the Access to Information Act No. 6 of 2016.

[68] Section 11(1) (b) of the Access to Information Act.

taken in consideration in relation to public interest'.[69] Where the information requested is held by 'another holder', the holder should 'transfer the request to such other holder' within 7 days and notify the seeker of such transfer.[70] The access to Information Act also gives a number of reasonable grounds on which access to information may not be granted. These include reasons related to the protection of national interests or security, legally privileged information, and personal privacy.[71]

Although the Act appears to be well developed, several factors undermine access to information and significantly impede transparency. These factors may be divided into major and minor concerns. The major concerns relate to the primacy of the Access to Information Act, the lack of an independent commission to determine access to information matters, the lack of redress for information applicants, severe penalties for wrongful disclosure, no penalties for denial of access to information, and broad exemptions to disclosure of information. The minor concerns relate to the limitation of information seeks to Tanzanian citizens and natural persons, the possible abuse of the transfer of request procedure, and lack of guidelines regulating cost of production fees as highlighted earlier.

6.3.2.2.1 Major Concerns Limiting Access to Information

Firstly, contrary to best practice, the Access to Information Act does not supersede other pieces of legislation in the event of a conflict relating to information disclosure. Section 5(2) of the Access to Information Act reads: 'The information holder shall, subject to the provisions of section 6 and any other written laws, make available to the public or, on request, to any person, information which is under his control'. Section 6 lists the conditions under which information may not be disclosed. Section 5(2) therefore clearly pre-empts primacy of the Information Act. Other laws that may expressly deny access to information override access to information provided for under the Access to Information Act. Such law would include confidentiality provisions provided for under the Petroleum Act as shall be discussed further below. According to international best practice and the Model Law on Access to Information for Africa, access

[69] Section 14 (a) and (b) of the Access to Information.

[70] Section 13 (1) of the Access to Information Act.

[71] Section 6 of the Access to Information Act.

to information laws are always to prevail in the event of legislative conflict.[72] Tanzania could learn from such best practice, which includes examples from Latin America, America and other African countries such as Nigeria and Malawi.[73]

Secondly, where access for information is denied or the prescribed fees are too high, the procedures for appeal present no viable remedy to the information applicant. Contrary to best practice, Tanzania's Access to Information Act does not provide for an independent body to adjudicate access to information disputes and does not permit applicants to seek judicial remedies. According to section 19(1), an aggrieved information seeker 'may appeal to the head of the [respective] institution' of which the request was lodged.[74] The head of the institution reviews the appeal in consideration of 'its own laid down procedures … within 30 days' from the day of appeal.[75] Where a party is aggrieved by the decision, he/she 'may within 30 days upon receiving such a decision appeal to the Minister [of Justice and Constitutional Affairs] whose decision shall be final'.[76] The provisions do not permit any aggrieved party to seek judicial redress in court except where the 'requested information is within the authority of an information holder who is under the Minister [of Justice]'.[77] In such an event, 'the Minister shall cease to be an appellate body and any aggrieved person may apply to the high court for review.'[78]

[72] Article 4 of the Model Law on Access to Information for Africa of 2012, prepared by the African Commission on Human and Peoples' Right.

[73] See; H. J., Blanke & R. Perlingeiro, (Eds.) *The Right of Access to Public Information: An International Comparative Legal Survey* (Berlin: Springer 2018). The Latin Americans also have the Inter-American model law which is similar to the African model law and provides for primacy of the Access to Information Act under it article 4. See Model Inter-American Law on Access to Public Information (AG/RES. 2607 (XL-O/10) of 2010. See also section 6(1) of Malawi's Access to Information Act and section 3 of Nigeria's Freedom of Information Act of 2011.

[74] Section 19(1) of the Access to Information Act.

[75] Section 19(2) of the Access to Information Act.

[76] Section 19(3) of the Access to Information Act.

[77] Section 19(4) of the Access to Information Act.

[78] Ibid.

By denying access to ordinary courts via judicial review, the Act falls short of fully guaranteeing access to information. These provisions have not yet been challenged in the courts of law on the basis that they violate the right of access to courts or a remedy.[79] It therefore remains to be seen whether they will stand judicial scrutiny. Tanzania could learn from its East African neighbour Kenya that has established an impartial Commission on Administrative Justice to review decisions on access to information.[80] Decisions of the Administrative Commission are subject to appeal to the High Court.[81] A similar practice obtains in Malawi, Uganda, Nigeria, and South Africa, where judicial redress is possible with respect to access to information decisions.[82]

Thirdly, granting access to information may be deterred by severe penalties imposed on public officials upon disclosure of confidential or exempted information. This is due to the consequences of improper disclosure. Section 6(6) of the Access to information Act reads:

> Any person who-
>
> (a) disclose exempt information, other than information relating to national security, commits an offence and shall, on conviction be liable to imprisonment for a term not less than three years but not exceeding five years.
>
> (b) discloses exempt information relating to national security, commits offence and the provisions of the National Security Act shall apply.

Section 93(4) of the Petroleum Act also criminalizes disclosure of confidential hydrocarbon information. It provides that 'any person who contravenes the nondisclosure provisions under section 93 (1) and (3) commits an offence and shall be liable to a fine of not less than million shillings'.

[79] The denial of judicial redress is arguably unconstitutional as it is contrary to Article 13(6) (a) providing for access to justice and Article 30(3, 4) giving the High Court 'original jurisdiction to hear and determine any matter brought before it' on infringement of rights.

[80] Section 14 of the Access to Information Act No. 31 of 2016, Kenya.

[81] Section 23(3).

[82] Section 49 of the Access to Information Act No. 13 of the Malawi laws 2017, Section 37 and 38 of the Access to Information Act No. ; Section 21 of the Freedom of Information Act 2011 of the Nigerian laws.

These provisions inhibit access to information that is key for transparency. Public actors may be forced to interpret narrowly the provisions of the Act to favour non-disclosure. It is best practice and consistent with international policy recommendations for countries to criminalize the denial of requested information.[83] Under the Tanzanian laws, offences only lean towards wrongful disclosure providing an incentive for non-disclosure by the information holder.
Collectively, the factors discussed above inhibit access to information. Access to information is an essential pillar in attaining transparency as discussed in Chapter 3. The law fails to guarantee the right to access information by provisions that favour government decisions on nondisclosure.

6.3.2.2.2 Minor Concerns Limiting Access to Information

The Access to Information Act limits access to information to only Tanzanian citizens and natural persons, which is contrary to international best practices. Section 5(4) of the Access to information Act reads: 'For purposes of this section, "person" means a citizen of the United Republic'. This limitation considerably affects transparency. As discussed in Chapter 2 and 4, CSOs and research institutions play a significant role in enforcing transparency. CSOs are better equipped with the capacity to analyze and interpret information for use by other stakeholders particularly citizens. They play an important oversight role in monitoring natural resources that the public might not efficiently do. Equally, foreign stakeholders play an important role in applying global political pressure where needed to combat corruption or enforce international standards. By excluding such key stakeholders from the right of access to information, the Act falls short in guaranteeing transparency. This limitation may however be easily addressed by a broad interpretation of the term 'citizen' to include legal persons, but this would still leave out interaction organizations.

[83] See provisions of various country laws on the following surveys. D. Banisar, 'The Freedominfo. Org Global Survey: Freedom of Information and Access to Government Record Laws around the World' available at http://www.freedominfo.org/documents/global_survey2004.pdf (accessed in September 2018). Also, see F.Diallo and C. Richard, (Eds.) *Access to Information in Africa: Law, Culture, and Practice* (Boston, Brill, 2013) Part III of the book looking at African countries case studies. Specifically see page 270.

The procedures governing access to information permit the transfer of a request made by one information holder to another. Section 13 (1) of the Access to information Act provides that '[w]here the information holder to which a request for information is made considers that another information holder is the appropriate holder of the information requested, [he or she may] transfer the request to such other information holder and give a written notice of the transfer to the person who made the request.' The response period 'shall' apply to the new 'information holder with effect from the date on which the request is transferred'.[84] This provision could create an unreasonably lengthy period in accessing information. Institutions may potentially avoid information disclosure by passing on requests among themselves. Best practice is that in the event of such a transfer, the response period is calculated from the day in which the information request was originally received.[85] As discussed in Chapter 3, transparency not only entails access to information but timely access to information. Such provisions could impede transparency by delaying access to information. In addition, Tanzania's 30 days period of granting access to information is already longer than the recommended and widely adopted 21 or 14 days periods in the Modal Access to Information laws.

6.3.2.3 Confidentiality Provisions

The nature of information subject to passive transparency under the law is not clearly defined. As noted earlier, section 91 of the Petroleum Act directs the regulatory authority to make public all information pertaining to industry activities and players upon the approval of the Minister and payment of the prescribed fees. However, the same information is considered confidential in other provisions of the Act. According to section 92 (1) (a) and (b) of the Petroleum Act, all data submitted by licence and permit holders to the regulatory authority is confidential and 'shall not be reproduced or disclosed to a third party'.[86] As an exception, such information may be disclosed where the disclosure is sanctioned by the licence or permit holder after a 'written consent of the Minister' or sanctioned by the regulator with 'prior written consent of the license

[84] Section 13(2) of the Access to Information Act No. 6 of 2016.

[85] Section 17(4) (b) of the Model Law on Access to Information for Africa.

[86] Section 92(1) of the Petroleum Act.

holder'.[87] Section 92(3) of the Petroleum Act protects the confidentiality of data by allowing disclosure of hydrocarbon industry information only for government purposes, arbitration, or statistical records.

Furthermore, section 93(1) of the Petroleum Act provides that 'Information furnished or report submitted under this Act by a licence holder and permit holder shall not be disclosed to any person who is not PURA or an officer in the public service except with the consent of the licence holder or permit holder.' However, according to section 93(2) (i), information may be disclosed 'to ensure transparency and accountability under the relevant law'.

Given these confidentiality provisions and those that criminalize information disclosure discussed earlier, it is unclear whether hydrocarbon industry information in Tanzania is public information or not. Although the Act makes an exception that information may be disclosed for purposes of transparency, the confidentiality provisions impose serious restrictions on the scope of the right of access to information. They leave state authorities with a wide scope of interpretative discretion that could be used to frustrate efforts to enforce and uphold transparency.

As noted above and in Chapter 4, the trend in the extractive industry is to eliminate confidentiality in the governance of the resources. In Tanzania, the contradiction in the law encourages non-disclosure of information. Moreover, the Act leaves the question of access to hydrocarbon information to the discretion of the Minister. As pointed out earlier, where the Minister denies access to information, his or her decision is final, which means that it may not be challenged before an impartial body or court of law. In view of all these factors, it is fair to argue that the Petroleum Act does not make hydrocarbon industry information easily accessible. It therefore hence fails one of the key tests for transparency.

6.3.3 Accessibility of Public Information

[87] Section 92(1) (a) and (b) of the Petroleum Act.

CHAPTER 6

Tanzanian law makes the publication of information in the government Gazette and the declaring of documents 'public documents' as the main channels of information disclosure and publication. This raises the question whether public documents and the government Gazette are easily accessible.

The government Gazette is available at the government bookshop and on the government website.[88] However, the Gazette is mainly known by lawyers and a few other professionals. The Gazette is not a widely circulated source of information in Tanzania. Although it is published on the government's website, few Tanzanians have access to computers and the internet. Fewer Tanzanians have access to the government bookshop and can afford to pay a fee of one thousand Tanzanian shillings (Tshs.1000). Access to the government bookshop is limited because there is only one government bookshop in the whole of the Tanzania coastal zone, one in the Northern Zone and one in the Lake Zone. Most of the time the government bookshops are not sufficiently stocked.[89]

The publications of the government gazette are equally not available timely. For instance, in the case of the government gazette as available on the government website, there is a delay of 6 to 7 months or even more. Example after the publication of 29 January 2016, the next publication was posted on the website on 16 September 2016. At the time of writing this particular section in December 2017, the last post on the website of the gazette was on 4 August 2017.

As for reports tabled before the National Assembly, they are regarded as public documents and subject to requests for access to information. The Clerk of the National Assembly is the custodian of all public documents and is responsible for facilitating access to it by members of parliament and the public.[90] However, the National Assembly (Administration) Act does not compel the Clerk to publish these public documents. While some of the reports tabled before the National Assembly are posted on the website of the National Assembly, this is not done

[88] See http://www.tanzania.go.tz/home/pages/12.

[89] Based on visits by the researcher to these bookshops.

[90] Section 8(2) (d) of the National Assembly (Administration) Act No. 14 of 2008.

consistently. As a result, many reports and public documents remain unpublished. For instance, at the time of writing, only eight National Assembly reports released between 2008 to 2015 had been published.[91]

6.4 TRANSPARENCY BETWEEN GOVERNMENT AND HYDROCARBON COMPANIES AND OTHER INDUSTRY DEVELOPERS

The transparency relationship between the government and hydrocarbon companies can take both vertical and horizontal forms. Where a contractual relationship is entered into between the companies and the state, such a relationship is private in nature and gives rise to horizontal accountability with either party having a contractual right to demand accountability from the other. On the other hand, the state has the public duty to manage and regulate hydrocarbon activities. In its capacity as the manager of hydrocarbon resources, its relationship with the hydrocarbon companies is vertical in nature. Tanzanian law provides for both vertical and horizontal transparency to regulate the relationship between the government and hydrocarbon companies. The nature of transparency recognized is both proactive and passive.

6.4.1 Proactive and Passive Transparency in the Horizontal Transparency Relationship

The Petroleum Act compels hydrocarbon companies to disclose information proactively to the regulatory authorities and Minister throughout the various stages of the upstream industry.[92] Companies disclose information pertaining to their general operations and financial status, ability to undertake and develop hydrocarbon projects, their company policies, for example, to the government.[93] Similarly, government plans, policies, and strategies on the industry are available to the hydrocarbon companies seeking to invest in the country. Companies and the government have a contractual obligation under the product sharing agreements or other agreements to disclose information to each other in fulfilment of their contractual duties.

[91] See http://www.parliament.go.tz/publication/reports (accessed 20 January 2019).

[92] Section 51(2), 46, 62, 57 of the Petroleum Act.

[93] Section 51(2), 46, 62, 57 of the Petroleum Act; Section 14 &15 of the TEITA Act No. 16 of 2015 among other provisions requiring the hydrocarbon companies or other stakeholders to disclose information.

6.4.2 Passive Transparency in the Vertical Transparency Relationship

The Petroleum Act mandates the Minister, the regulatory authority, the tax collector and the Transparency Committee to seek information from hydrocarbon companies including information pertaining to different stages of hydrocarbon activities from application of permits/licences,[94] tax collection,[95] oversight,[96] and other administrative matters.[97] The Petroleum Act and the TEITA Act state that any person who fails to comply with a request for the disclosure of such information commits an offence and is liable to a fine or imprisonment.[98] According to the Petroleum Act, a government authority may give a written notice to an identified holder of information to provide the information specified under the notice.[99] Hydrocarbon companies are required to comply with the notice: if they do not, they would be committing an offence.[100]

The Petroleum Act does not only require hydrocarbon companies to provide information: the Act also expects any person believed to be capable of giving information or producing documents relating to exploration or development operations to provide the relevant information upon written request by relevant authorities.[101] Where a person or authority refuses or fails to comply with a requirement to disclose information demanded by the government or 'knowingly or recklessly furnishes false information or misleading in a material particular commits an offence',[102] he or she is liable on conviction to a fine or imprisonment.[103]

[94] Section 49(1), of the Petroleum Act.

[95] Section 122 of the Petroleum Act.

[96] Section 10(1) (b), (c), (e) of the TEITA Act.

[97] Section 94 of the Petroleum Act No.21 of 2015 and other related laws such as the companies Act and Investment Act.

[98] Sections 95 and 123 of the Petroleum Act; section 24 of the TEITA Act.

[99] Sections 49(1), 65(3) and 94(1) of the Petroleum Act.

[100] Sections 49(1), 65(3) and 94(1) of the Petroleum Act.

[101] Sections 94(1) and 122(1) of the Petroleum Act.

[102] Section 15(3) of the TEITA Act ; section 95 and 123 of the Petroleum Act.

[103] Section 15(3) of the TEITA Act; section 95 and 123 of the Petroleum Act.

The Petroleum Act also mandates government to conduct investigations, negotiations, or consultations with the various industry players to ensure the smooth administration of upstream activities.[104]

In short, these provisions have potential to ensure that the government holds hydrocarbon companies accountable. With these provisions, the government has the legal authority to demand access to reliable and clear information relating to the upstream hydrocarbon activities. By imposing sanctions for failure to comply with requests for information or for furnishing false or misleading information, the law seeks to guarantee that information holders provide reliable information.

6.5 TRANSPARENCY BETWEEN THE HYDROCARBON INDUSTRY COMPANIES AND THE PEOPLE

Transparency between hydrocarbon companies and the people may be considered horizontal in nature as the people and companies are both private. A direct transparency relationship between hydrocarbon companies and the people is established within the context of corporate social responsibility (CSR) and in environmental legislation. In these two contexts, the law makes room for limited forms of proactive and passive transparency.

Tanzania could have capitalized on guidelines on information disclosure for companies and compelled companies to disclosure information directly to the public. For instance, the OECD Guidelines for Multinational Enterprises and the G20/OECD Principles of Corporate Governance, discussed in chapter 4, call for companies to ensure 'timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company'.[105] Domestic laws in the United States of America and some EU countries also compel companies to publish financial information.[106]

[104] Sections 49(2) (3) and 107 of the Petroleum Act.

[105] Principle V. of the G20/OECD Principles of Corporate Governance. Also, see Chapter III guideline (1) of the OECD Guidelines for Multinational Enterprises.

[106] See Subsection 3.2.5 of Chapter 4 of this thesis.

Section 222 (4) (a) of the Petroleum Act merely mandates local authorities to create by-laws that could compel companies to publish information on the implementation of agreed projects on CSR. It also requires licensed companies to prepare annual corporate social responsibility plans upon consultation and agreement with local authorities.[107] The plans must take into consideration environmental, social, economic and cultural activities based on local government priorities of the host community.[108] The local authorities are tasked with endorsing and overseeing the implementation of the respective plans.[109] They are also supposed to prepare guidelines for corporate social responsibility within their localities and raise public awareness on hydrocarbon projects in their areas.[110] The by-laws promulgated by the local authorities could promote proactive transparency by compelling companies to publish information on the implementation of the CSR plans.

Apart from the Petroleum Act, local government legislation is also very clear on local participation and access to information in development projects.[111] For instance, the Local Government (District Authorities) Act provides that where a scheme for development has been approved, the ward development committee has the obligation to disseminate information to all persons in the ward of the details of the scheme and of the date, time and place upon which and when people can participate in it.[112] Communities can gain access to information pertaining to the various CSR projects conducted by companies in their communities by this one commendable mechanism.

With regard to the environment, the process of conducting environmental impact assessments (EIAs) for hydrocarbon projects requires companies to consult with the host local

[107] Section 222.

[108] Section 222(2), of the Petroleum Act.

[109] Section 222(4), of the Petroleum Act.

[110] Section 222(4), of the Petroleum Act.

[111] Section 33(1) & (2) of the Local Government (District Authorities) Act No.7 of 1982.

[112] Section 33(1) of the Local Government (District Authorities) Act No. 7 of 1982.

communities.[113] The Environmental Act and the Environmental Impact Assessment and Auditing Regulations[114] give local communities hosting hydrocarbon projects access to information.[115] All information pertaining to EIAs including project brief, terms of reference, reports of persons presiding at public hearings, decisions and any other information submitted to the Environmental Management Council is public information.[116] The regulations clearly state that any person shall be given access to such information unless the information is exempted from public disclosure.[117] Proprietary information[118] or information considered detrimental to national security may also be exempted from public records as stipulated under regulation 39(2) and 40. Though the provisions do not define what constitutes national security, the language of the Environmental Act as well as the regulations is clear enough to prevent abuse, and hence to promote participation of the communities in decisions relating to the environment.

Despite these notable provisions, hydrocarbon companies and other industry players are not required by law to disclose any information on their actives directly to the public. As noted earlier, hydrocarbon companies are only compelled to disclose certain information to the government or to the relevant state authorities, which may or may not relay the information to the public. As observed in Chapter 4,[119] where hydrocarbon companies are compelled by their countries of origin to disclose information, good practice suggests that such information should be accessible directly from company websites. Such direct access is essential for purposes of holding both the government and companies accountable. Information from companies helps citizens to check and verify the information provided by the government.

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[113] Regulation 17 of the Environmental Impact Assessment and Auditing Regulations (GN No.349 of 2005).

[114] Ibid.

[115] Regulation 17 of the Environmental Impact Assessment and Auditing Regulations; sections 26, 27, 28 (3) and 29 of the Environmental Management Act No.

[116] Regulation 39 of the Environmental Impact Assessment and Auditing Regulations.

[117] Regulation 40 .

[118] Regulation 3. 'Proprietary information' means information relating to any manufacturing process, trade secret, trademark, copyright, patent, or formula protected by law in Mainland Tanzania or by any international treaty to which the United Republic is party.

[119] See Section 3.2 of Chapter 4.

6.6 THE STATE'S DUTY TO PROMOTE ACCESS TO HYDROCARBON INFORMATION

For there to be transparency, information need not only be accessible: those who seek such information should be able to understand and make use of it.[120] In Tanzania, the Petroleum Act and the TEITA Act require the public to be educated and encouraged to participate in the hydrocarbon industry. The Transparency Committee is charged with the responsibility of promoting awareness about, and public participation in, the governance of extractive industries.[121] The regulatory authority PURA is also responsible of promoting local content[122] and ensuring citizen participation in the upstream industry activities.[123] In practical terms, this obligation entails conducting public awareness campaigns, holding stakeholders seminars to publishing simplified information on the industry and access to information procedures.

In this regard, the Ministry has an Energy and Minerals News Bulletin where the public is informed about energy and mineral industry activities of the ministry. The Transparency Committee also conducts awareness raising workshops on disclosure of revenue receipts and CSR contribution at district level.[124] The News Bulletin published by the Ministry is only available online and therefore accessible to those who have access to the Internet. So far, the Transparency committee has conducted a number of awareness rising workshops. [125] By contrast, PURA is yet to do the same.

6.7 CONCLUSION

[120] See Section 7.1 of Chapter 3.

[121] Section 10(2) (i) of the TEITA Act.

[122] Local content refers to the building of local skills, and use of local labour and local manufacturing in extractive or other industries. For detailed information on local content see, S. Tordo *et al*., *Local Content Policies in the Oil and Gas Sector* (Washington: The World Bank, 2013).

[123] Section 12(2) (e) of the Petroleum Act.

[124] See TEITI, Operational TEITI Work Plan 2017-2018 available at http://www.teiti.or.tz/wp-content/uploads/2017/03/Operational_TEITI_Workplan_-2017-and-2018.pdf accessed in September 2018 at 5.

[125] Ibid.

CHAPTER 6

Tanzania's hydrocarbon legal framework recognizes the value of transparency in the governance of the industry. This is traced from the recognition of the constitutional right of the people to seek information and be informed, to the principle industry legislation. As discussed above, the Petroleum Act makes it mandatory for the regulatory authorities, the national oil company, and the Minister to conduct all industry activities in a transparent manner. The Hydrocarbons Revenue Act, TEITA Act, and the Natural Resources Act provide similar provisions.

The legal framework also sets out commendable provisions promoting transparency between the government and hydrocarbon companies. Hydrocarbon companies are compelled to disclose proactively all information pertaining to their upstream activities and similarly government plans, policies and strategies on the industry are available to the hydrocarbon companies. As elaborated in section 4 above, the law safeguards the government's right to demand and easily access reliable, clear, and timely information from any person or body for the governance of the upstream activities.

Section 3 of the Chapter ascertained that the law makes commendable efforts towards achieving transparency between the government and the public. The law makes an explicit requirement of hydrocarbon agreements to be entered into after a transparent and competitive public tendering process has been completed. The law requires hydrocarbon revenues and expenditure in whatever form, to be simultaneously published by the Minister in the Gazette, website of the Government and that of the Ministry of Finance.

Equally, section 5 above establishes that creditable steps are taken under the law to enforce transparency between the public and the hydrocarbon companies in as far as environmental issues, and corporate social responsibility projects are concerned. The local government authorities Acts are very clear of local participation and access to information on respective development projects. All information with regard to Environmental Impact Assessment is public information. However, these commendable steps taken to provide for transparency under the legal framework on hydrocarbons fall short of the required elements to facilitate transparency in the industry.

CHAPTER 6

Contrary to best practice, the Tanzanian Access to Information Act, which provides for access to information procedures, is not prevalent in the event of conflicting legislation on information disclosure. Confidentiality provisions provided for under the Petroleum Act or any other law prevail over the Access to Information Act. Furthermore, where access to information is denied or where fees are charged too high, the procedures for appeal present no viable remedy to the information applicant. Contrary to best practice, Tanzania's Access to Information Act does not provide for an independent body to entertain access to information matters and does not permit applicants to seek judicial remedies. By denying access to ordinary courts via judicial review, the Act falls short of fully guaranteeing access to information. The denial of judicial redress is also unconstitutional as it is contrary to Article 13(6) (a) providing for access to justice.

The Legal frame work also makes a firm prohibition against disclosure of information furnished or reported under the laws to any person who is not the regulator or an officer in public service except with the consent of the licence or permit holder. Granting access to information may be deterred by severe penalties imposed on public officials upon disclosure of confidential or exempted information. This is due to the consequences faced upon improper disclosure as compared to no consequences faced in the event of nondisclosure.

The access to information procedures permit a transfer of request by one information holder to another which maybe prone to abuse as explained above. Such provision could create an unreasonably lengthy period in accessing information. Institutions may potentially avoid information disclosure by passing on requests among themselves. This is mainly because time of the response period of the application is calculated from the date of transfer. Best practice is that in the event of such a transfer, the response period is calculated from the day in which the information request was originally received. Transparency not only entails access to information but timely access to information. Such provisions impede transparency by delaying access to information.

The Petroleum Act and the Access to Information Act leave the question of access to hydrocarbon information within the discretion of the Minister. As discussed above, in the event that the Minister denies access to information, his decision may not be appealed before an impartial body or court of law. Consequently, the Petroleum Act does not make hydrocarbon industry information easily available hence fails to provide sufficiently for Transparency.

Apart from the access to information procedures, the nature of information subject to passive transparency under the Petroleum Act is not clearly defined. Section 91 of the Petroleum Act directs the regulatory authority to make public all information pertaining to industry activities and players upon approval of the Minister and payment of prescribed fees. The same information is considered confidential in subsequent provisions of the Act. Section 93(2) (I) make an exception that information may be disclosed as 'the requirement to ensure transparency and accountability under the relevant law'. However, given the confidentiality provisions and the criminalization of information disclosure, it is unclear whether hydrocarbon industry information is public information or not. The Act does not shed light on the criteria to be used in the application of the exemption. It is unclear at what point the information shall be confidential and at what point it is disclosed for 'the requirement to ensure transparency and accountability'. The contradiction in the law encourages non-disclosure other than disclose of information.

From the above discussion, it is apparent that there is an implementation gap in publishing public information. The Main media of publishing government information is through the government gazette and the government websites. The gazette is not a widely circulated source of information and it is not available in a timely manner. Equally, government websites are usually not up to date and do not timely release required information. Public documents tabled before the National Assembly are also not easily accessible as they are subject to the access to information procedures as discussed above.

The Petroleum Act and the TEITA Act do not compel the hydrocarbon companies to publish directly information to the public. Even where the companies are required to furnish information to the Transparency Committee, the committee is not by law compelled to publish

such information except where it deems fit. The committee is equally not compelled to publish its reports as explained above.

Collectively, the above shortfalls fail to ensure fully the incorporation of accessibility of clear, reliable, and complete information by industry players, interested stakeholders, and the public in the legal framework.

CHAPTER 7
ACCOUNTABILITY IN THE LEGAL FRAMEWORK GOVERNING HYDROCARBON RESOURCES IN TANZANIA

7.1 INTRODUCTION

As argued in Chapter 3, for accountability and transparency to be institutionalized within the hydrocarbon industry, their principles must at the very least be incorporated in the legal and regulatory framework governing the industry. The aim of this chapter is to analyse how key aspects of accountability discussed in Chapter 3 are incorporated in the upstream hydrocarbons legal framework in Tanzania. These aspects of accountability in question include the establishment of accountability relations and their guiding principles, access to information, the accountor's capacity to seek an explanation and justification, the accountor's capacity to render judgement, consequences of the accountor's judgement, and the adequacy of the mandate and independence of the accountor.

The aspects of access to information and relevant guiding principles have already been explored in previous chapters. Specifically, Chapter 6 discussed the extent to which Tanzania's legal framework embodies key aspects of transparency. It was shown that while Tanzania has made some notable efforts to codify the principle of transparency, not all aspects of transparency have been so recognised and legislated. Consequently, Tanzania's hydrocarbons legal framework falls short on this important aspect of accountability. Chapter 5 discussed Tanzania's upstream hydrocarbon legal framework which forms the guiding principles governing accountability in the industry.

This chapter examines the extent to which Tanzanian law regulates various accountability relationships arising from the hydrocarbon industry and the adequacy of the mechanisms established to ensure that the accountees are held fully accountable by the accountors. Firstly, the chapter investigates how the law defines the various actors in these accountability relationships, that is, who are liable to an account, and by whom. Secondly, the chapter asks, what accountability implementation mechanisms are there? Do they seek to ensure that the

accountees are accountable to the accountors? Thirdly, the chapter considers the question whether the law gives the accountor the required independence and mandate to inquire and render judgement, and whether these mechanisms have the capacity to enforce their decisions. As the thesis is concerned with the industry as a whole, the chapter also addresses the question of the overall coherence and compatibility of the various accountability structures.

The focus of the chapter is on accountability as it applies to the regulation of upstream activities of Tanzania's hydrocarbons. For reasons related to feasibility, the chapter is not concerned with accountability for the management of revenues. The chapter first explores the accountability relationship between the hydrocarbon resource owners (the people) and the trustee (government). It then moves on to examine accountability in the governance and regulation of upstream hydrocarbon activities. In this regard, the chapter analyses the various institutions responsible for regulating upstream activities and the way they may be held accountable. Also discussed is how hydrocarbon companies are held accountable.

7.2 VERTICAL ACCOUNTABILITY IN TANZANIA'S UPSTREAM HYDROCARBON INDUSTRY

This section analyses vertical accountability relationships that obtain where there are formal obligations on the accountee to give an account to the accountor[1] such obligations may arise from a hierarchical relationship or the law.[2] First, to be discussed is hierarchical accountability between citizens and the government, and within the government. For purposes of this study, as explained in Chapter 3, the term 'external vertical accountability' refers to the means by which citizens demand accountability from the government, [3] while 'internal vertical accountability' refers to hierarchical accountability mechanisms within a regulatory institution.[4]

[1] See Section 3.1.1 of Chapter 3 of this thesis.

[2] Ibid.

[3] Ibid.

[4] Ibid.

7.2.1 External Vertical Accountability: Citizens and the Government

As pointed out in Chapter 6, the first important accountability relationship that the law establishes in the hydrocarbon industry is that of the resource owners (the people) and the government.[5] The state as a democratically elected trustee of the people is accountable to the people for the manner in which it manages the resources.[6] Citizens as the accountors have a constitutional right to demand an account from their government for the management and regulation of the hydrocarbon resources. This external vertical accountability relationship is clearly established in the legal framework that also provides for political and legal implementation mechanisms. This section investigates whether these accountability mechanisms have been given sufficient independence and mandate to hold the government accountable and the extent to which they have succeeded in doing so.

7.2.1.1 Political Accountability Mechanisms

Usually, citizens hold governments to account directly or indirectly through their elected representatives in the National Assembly.[7] This traditional political accountability mechanism is used to hold the government vertically accountable to its people.[8] In Tanzania, both direct and indirect political accountability are derived from the Constitution.[9]

7.2.1.1.1 Elections

Direct political accountability is primarily achieved through elections where citizens are expected to evaluate and render judgement on policies and their implementation by government through their votes.[10] In the hydrocarbon industry, citizens may hold the government accountable through elections only where issues of poor management of the resources are raised in an election season. In Tanzania, the issue of corruption in the management of energy,

[5] Sections 3 of Chapter 6 of this thesis.

[6] Article 8 of the Constitution of Tanzania 1977.

[7] Section 2.1 of Chapter 4 of this thesis.

[8] Ibid.

[9] Preamble of the Constitution of Tanzania 1977.

[10] Article 21 of the Constitution of Tanzania 1977.

minerals and other natural resources usually features as a prominent campaign talking point.[11] However, the effectiveness of elections as an accountability mechanism in Tanzania's hydrocarbon industry faces two major challenges. The first has to do with the predominance of the one-party system and the second with access to information.

For a long time, Tanzania has remained a one-party state although the country has a multi-party political system.[12] The ruling Chama Cha Mapinduzi (CCM) has historically dominated national politics and the opposition has been weak.[13] Only in 2015 did the country experience competitive elections.[14] Even then, the strength of the opposition parties was restricted to urban areas, not in rural Tanzania.[15] Notwithstanding the improved performance of the opposition in 2015, CCM continues to dominate national politics with over 72 percent of the total seats in parliament.[16] The numbers have continued to change over the last two years with opposition members of parliament defecting to CCM.[17] The predominance of CCM undermines the effectiveness of elections as an accountability mechanism.

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[11] A. Anyimadu, 'Politics and Development in Tanzania: Shifting the Status Quo', (2016) available at https://www.chathamhouse.org/sites/default/files/publications/2016-03-politics-development-tanzania-anyimadu.pdf (accessed in September 2018).

[12] M. Nyirabu, 'The Multiparty Reform Process In Tanzania: The Dominance Of The Ruling Party', (2002) 7(2) *African Journal of Political Science* 99-112 at 108; B. Mohamed & R. Whitehead, 'Nurturing Legacies of the Past', in R. Doorenspleet & L. Nijzink, (eds) *One-Party Dominance in African Democracies* (Colorado: Lynne Rienner Publishers, 2013) at 93.

[13] Ibid.

[14] Commonwealth, 'Report of the Commonwealth Observer Group Tanzania General Elections 25 October 2015', at iv, available at http://thecommonwealth.org/sites/default/files/inline/2015%20Tanzania%20COG%20FINAL%20REPORT_PRINT.PDF (accessed in September 2018).

[15] F. Kimboy, '2015 Elections have Redrawn Political Map', *The Citizen* (November 11, 2015) available at http://www.thecitizen.co.tz/magazine/politicalreforms/2015-elections-have-redrawn-political-map/1843776-2951940-dorvd8/index.html (accessed in September 2018).

[16] Parliament, 'Members of Parliament Composition' available at http://www.parliament.go.tz/pages/compositon (accessed in September 2018).

[17]I.Yamola & J.Lyimo, 'Wabunge Tisa wa Ukawa Watajwa Kuhamia CCM', *Mwananchi* (December 6, 2017), available at http://www.mwananchi.co.tz/habari/Wabunge-tisa-wa-Ukawa-watajwa-kuhamia-CCM/1597578-4216628-efm46o/index.html (accessed in September 2018); The Guardian, 'CCM Picks Ex-Opposition MPs Candidates for Parliamentary By-Elections' (7 January 2018), available at

Compounding the problem of one-party dominance is the lack of access to information.[18] As shown in Chapter 6, Tanzanian law does not make adequate provision for transparency in government decision making, which in turn serves as an impediment for citizens to hold government accountable fully and effectively.

7.2.1.1.2 The National Assembly

Tanzanians indirectly hold the government accountable through their political representatives in the National Assembly. The National Assembly's mandate is generally derived from the Constitution.[19] For the case of non-renewable natural resources such as hydrocarbons, the mandate is also provided for in the natural resources legislation.[20] Article 63(2) - (3) of the Constitution gives the National Assembly oversight mandate on all affairs of government. The National Assembly 'may' interrogate and demand reports or seek an explanation and justification in respect of all government activities.[21] Article 53(2) of the Constitution provides for collective responsibility of government before the National Assembly. It provides that: 'All Ministers under the leadership of the Prime Minister are collectively responsible to the National Assembly for the execution of the affairs of the government'.[22]

The Sovereignty Act and the Unconscionable Terms Act complement the general oversight mandate of the National Assembly. Both these Acts give oversight mandate to the National Assembly over agreements and arrangements relating to natural wealth including hydrocarbons. The two have a common provision, which reads: 'All arrangements or agreements entailing extraction, exploitation or acquisition and use of natural wealth and resources may be reviewed by the National Assembly'.[23] This provision means that the

https://www.ippmedia.com/en/news/ccm-picks-ex-opposition-mps-candidates-parliamentary-elections (accessed in September 2018).

[18] See Chapter 6 of this thesis.

[19] Article 63(2) of the Constitution of Tanzania 1977.

[20] The Natural Wealth and Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Act No. 6 of 2017 (Unconscionable Terms Act) & the Natural Wealth and Resources (Permanent Sovereignty) Act No.5 of 2017 (Permanent Sovereignty Act)

[21] Article 63(3) of the Constitution of Tanzania 1977.

[22] Article 53(2) of the Constitution of Tanzania 1977.

[23] Section 12 of the Permanent Sovereignty Act; section 4(1) of the Unconscionable Terms Act.

National Assembly can review hydrocarbon agreements whenever it deems fit. However, no procedures to govern such review have been promulgated. Not surprisingly, the National Assembly has not yet made any reviews of agreements relating to hydrocarbons.

The National Assembly implements its oversight functions through its standing and ad hoc committees established by its Standing Orders.[24] National Assembly standing committees comprise sector committees including one on the energy and minerals sector and watchdog committees responsible for monitoring public accounts and investments.[25] The committees have mandate to question and investigate all public institutions.[26] The sector Committee on Energy and Minerals is responsible for reviewing all reports submitted to the National Assembly by the Minister responsible for hydrocarbons.[27] The reviewed reports include those on budgets, performance reports, and proposed bills.[28] The Public Accounts Committee (PAC) and the Public Investments Committee (PIC) are responsible for monitoring all government accounts and investments respectively.[29] The two watchdog committees have a crosscutting mandate that extends to government accounts and investments in the hydrocarbon industry.[30] They review financial and investment reports tabled before the National Assembly.

Upon completing their reviews, the committees table their reports before the National Assembly for deliberation and resolution. The reports of the committees are reviewed alongside the original reports tabled before the Assembly by the respective ministers.[31] The implementation of the National Assembly oversight mandate is dependent on its ability to withhold support for government policies and decisions or to censure the government.

During presidency of Jakaya Kiwete (2008–2015), the National Assembly played a remarkably effective role in holding the executive accountable. National Assembly committees tackled

[24] Article 96 of the Constitution of Tanzania 1977.

[25] *Kanuni ya 116 & 118. Kanuni Za Kudumu Za Bunge Toleo La Januari, 2016. (Parliament Regulations 2016).*

[26] *118. Kanuni Za Kudumu Za Bunge Toleo La Januari, 2016. (Parliament Regulations 2016).*

[27] Niongeza ya kanuni shemu ya pili no. (7)(1), Kanuni Za Kudumu Za Bunge Toleo La Januari, 2016.

[28] Ibid.

[29] Niongeza ya kanuni shemu ya nne no.(13, Kanuni Za Kudumu Za Bunge Toleo La Januari, 2016

[30] Ibidi.

[31] Kanuni ya 37, Kanuni Za Kudumu Za Bunge Toleo La Januari, 2016. (Parliament Regulations 2016)

notorious scandals including some in the then Ministry of Energy and Minerals.[32] For instance, in March 2014, PAC launched an investigation into suspicious withdrawals from an 'escrow' account co-owned by Tanzania Electric Supply Company (TANESCO), the national electricity supplier, and Independent Power Tanzania Limited (IPTL), a company contracted to provide emergency electricity during power shortages.[33] PAC's inquiry led to the resignation of the Energy Minister and the Attorney-General.[34] The same inquiry resulted in the dismissal of the Minister for Land and a number of senior state officials.[35] In 2008, the then Prime Minister was forced to resign due to allegations of irregular awarding of a contract to a USA-based energy company Richmond Development in 2006.[36] With the exception of these and a few other notable examples, the National Assembly has generally failed to exercise its oversight functions over the executive and the government.

Several factors prevent the National Assembly in Tanzania from fulfilling its role in practice.[37] The first has to do with the composition of the National Assembly; the second, with the manner in which members of Parliament are elected; the third, with the history of party supremacy;[38] and the fourth, with constitutional limitations. The Constitution expressly requires that all Member of Parliament (MP) belong to a political party.[39] The nomination of all MPs for

[32] The Ministry in currently divided into two: The Ministry of Energy and the Ministry of Minerals.

[33] Athuman Mtulya, 'Tegeta Escrow Will Go down in History as a Major Scandal', *The Citizen* (January 1, 2015) available at http://www.thecitizen.co.tz/News/national/-Tegeta-escrow-will-go-down-in-history-as-a-major-scandal-/1840392-2575094-oumj96z/index.html accessed in September 2018. Also see J.E. Nyang'ro, *ESCROW: Politics and Energy in Tanzania* (Nigeria, African World Press 2016).

[34] Ibid.

[35] Ibid.

[36] The BBC, 'Tanzania's Prime Minister Edward Lowassa has tendered His Resignation after being implicated in an Energy Deal Corruption Scandal', Thursday 7 February 2008 available at http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/africa/7232141.stm accessed in August 2018.

[37] See generallyNyirabu, supra note 13 at 107-09; A. Lawson and L. Rakner, 'Understanding Patterns Of Accountability in Tanzania', Final Synthesis Report commissioned by the Governance Working Group of the Development Partners to Tanzania, Chr. Michelsen Institute (2005) at 34; G. Hyden, 'Political Accountability in Africa: Is the Glass Half-full or Half-empty?', Working Paper Series (6), Africa Power and Politics Programme (2010) at 10.

[38] See subsections 4 and 5 of Chapter 5 of this thesis.

[39] Article 67(1) b of the Constitution of Tanzania 1977.

election is done through the respective political party structures.[40] In the National Assembly, the political parties tend to put party interests before the peoples' interests. This is particularly so with the ruling party in Tanzania that exercises considerable influence on the conduct of its MPs.[41]

By practice, the ruling CCM, which has ruled the country since independence, designates the President of the country as the chairperson of the party. The President as chairperson of the party exerts great control and influence on party decisions, making it difficult for MPs to go against party decisions in the National Assembly. The extent to which the National Assembly fulfils its oversight function is thus dependent on the influence the party leader wields on his or her party. For example, under the presidency and party leadership of Jakaya Kikwete, who was considered liberal, the National Assembly was praised for its enthusiastic oversight function as evident above.[42] On the contrary, the leadership of President Benjamin Mkapa saw weaker National Assembly oversight.[43] Arguably, the current government of President John Magufuli has been subjected to the weakest National Assembly oversight. President Magufuli's influence and control over the National Assembly has been a matter of public concern.[44] MPs of his own political party have publicly complained of being threatened and coerced by intelligence officers for taking a different stance from that of the party.[45]

[40] Article 77 of the Constitution of Tanzania 1977.

[41] A. Lawson & L. Rakner, supra note 42 at 29.

[42]S. Mwombela, 'Tanzanian Citizens Assess the Performance of Parliament and Consider Its Responsibility for Legislation and Oversight', Afro barometer Briefing Paper No. 133 (2014) at 6-8

[43] V. Wang, 'The Accountability Function of Parliament In New Democracies: Tanzanian Perspectives', Chr. Michelsen Institute (CMI) Working Papers (2005) at 13; K. Hirschler & R Hofrueier, 'Tanzania', in A. Mehler *et al*, (ed) *Africa Yearbook Volume 10: Politics, Economy and Society South of the Sahara In 2013* (BRILL: Boston, 2014) 400-401.

[44] P. Nyanje, 'Tanzania: Is Magufuli Plotting to Have Absolute Control?' *The Citizen*, 17 February 2016; D. Page, 'Tanzania's Anti-Corruption Crusader Cracks Down on Opponents', *CNN News*, November 7 2017, available at https://edition.cnn.com/2017/11/07/africa/magufuli-crackdown/index.html (accessed in September 2018); E. Kabendera, 'Magufuli Dares CCM MPs to Impeach PM', *The East African*, 20 March 2017, available at http://www.theeastafrican.co.ke/news/ea/Magufuli-riot-act-mps-impeach-prime-minister-Kassim-Majaliwa/4552908-3857020-gskdprz/index.html (accessed in September 2018).

[45] See video clips of CCM MP Mohamad Bashe and Nape Nauye, available at https://www.youtube.com/watch?v=3-RVKDwNMQc (accessed in September 2018).

Executive dominance of the National Assembly is partly attributable to the Constitution. The National Assembly is composed of the elected constituent members; female members nominated by the political parties represented in the National Assembly based on proportional representation;[46] five members elected by the Zanzibar House of Representatives from among its members; the Attorney-General; and not more than ten members appointed by the President.[47] Consequently, apart from the party members, the President has control over the appointment of ten MPs.

Article 46 A of the Constitution permits the National Assembly to impeach the President if of the position that he has 'committed acts which generally violate the Constitution'. Such impeachable acts could include failure by the President to ensure that 'the national wealth and heritage are harnessed, preserved and applied for the common good'.[48] However, the President has the power under Article 90(2) (a) of the Constitution to dissolve the National Assembly. Additionally, the President may also dissolve the National Assembly if it refuses to 'approve' government's budget or declines to pass a motion that is of 'fundamental importance to government policies'.[49] These provisions mean that impeachment of the President in Tanzania may not happen in practice.

The upshot of this discussion is that while the law establishes an accountability relationship between the people and their government and puts in place political accountability mechanisms such as elections and the National Assembly, these mechanisms are limited by the one-party dominant political system, weak National Assembly oversight over the executive, the absence of strong opposition political parties, and lack access to information by citizens.

7.2.1.2 Accountability through Legal Proceedings

Accountability for the governance of hydrocarbon resources can be enforced via legal proceedings especially if constitutional and other legal rights have been violated or threatened. The Constitution guarantees citizens as beneficiaries of natural resources the right be informed

[46] Pursuant to Article 78 of the Constitution of Tanzania 1977.

[47] Article 62(2) and 66 of the Constitution of Tanzania 1977.

[48] Article 9(c) of the Constitution of Tanzania 1977.

[49] Article 90(2) (b) & (d) of the Constitution of Tanzania 1977.

of the manner in which natural resources are managed.[50] It also enshrines the 'right and freedom to participate fully in the process leading to the decision on matters affecting their well-being or the nation.[51] Other relevant constitutional and legal rights recognized in Tanzania include the right to work,[52] the right to property,[53] and the right to a clean environment.[54] Article 30 (3) of the Constitution provides for enforceability of rights: it states that any person whose right is being violated to 'institute proceedings for redress in the High Court'.

The High Court has held that an action under Article 30(3) lies where a person's right 'has been, is being, or is likely to be contravened.'[55] A petition under Article 30(3) need not show that one's right has already been infringed. Citizens could therefore hold government accountable for hydrocarbon industry policy or laws that are likely to infringe their personal rights and those of the society collectively.

While the courts in Tanzania have opened the possibility for public interest litigation, no such litigation has taken place in relation to legal issues arising from the hydrocarbon industry. Neither has there been public interest litigation to challenge the confidentiality of the agreements on the exploration of hydrocarbons. One possible explanation lies in the limitation that the Constitution places on the adjudication of disputes relating to the management and administration of natural resources. Article 9(1) (c) enjoins the Government to ensure that 'national wealth and heritage are harnessed, preserved, and applied for the common good'. However, this article falls under a part of the Constitution that is not justiciable. Article 7(2) of the Constitution reads: 'The provisions of this Part of this chapter are not enforceable by any court. No court shall be competent to determine the question whether or not any action or omission by any person or any court, or any law or judgement complies with the provisions of this Part of this chapter.' It would appear therefore that Article 7 excludes the possibility of using public interest litigation to ensure that the government is held legally accountable for poor management of natural resources.

[50] Article 18(d) the Constitution of Tanzania 1977.

[51] Article 21(2) of the Constitution.

[52] Article 22 of the Constitution of Tanzania 1977.

[53] Article 24 of the Constitution of Tanzania 1977.

[54] Section 4 of the Environmental Management Act, Act No. 20 of 2004.

[55] Ibid.

This does not mean that there are no other legal means of holding the government and government officials accountable through the courts and other mechanisms. As noted earlier, where a decision of the government adversely affects the rights of an individual or group of them, recourse under the bill of rights is open in the courts. This possibility also exists via the Commission for Human Rights and Good Governance as will be shown below. Individual government officials may also be held accountable for mismanagement of hydrocarbons through the criminal law including through prosecutions conducted by the Anti-Corruption Bureau.[56]

7.2.1.2.1 Accountability through procedures of the Commission for Human Rights and Good Governance

Citizens may also seek redress in court through CHRAGG[57] in holding government and other stakeholders undertaking hydrocarbon activities accountable. CHRAGG has the mandate to receive allegations and complaints in the violation of human rights and to investigate matters involving the violation of principles of good governance.[58] This mandate of CHRAGG is far-reaching and commendably covers governance principles of transparency, participation, responsiveness among others. An aggrieved person or persons acting on their own behalf or on behalf of collective interests of a group or class of persons may lodge allegations or complaints before CHRAGG.[59] CHRAGG has no mandate to pass any binding decision upon conducting its inquiry. It may, however, report the complaint and its findings to 'the appropriate authority having control over' the investigated matter.[60] CHRAGG may also make recommendations to such authority of measures to be taken that would provide an effective settlement, remedy, or

[57] CHRAGG has had no commissioners since 2017 when the last Commissioners under Chairperson Bahame Tom Nyanduga completed its term. There is only a head-less Secretariat because the last Secretary to The Commission (Ms. Mary Massay) has also retired.

[58] This mandate of CHRAGG is stipulated under Article 130(1) b, c and f of the Constitution of Tanzania 1977 &. section 6(1) of the Commission for Human Rights and Good Governance Act No. 7 of 2001.

[59] Section 15(1) (a) – (b) of the Commission for Human Rights and Good Governance Act.

[60] Section 15(2) (b) of the Commission for Human Rights and Good Governance Act.

redress.[61] It may also institute proceedings before the High Court and seek any remedy available in court.[62]

Powers of CHRAGG are however not without limitations. Firstly, CHRAGG may not conduct any investigations or inquiry on the President.[63] Secondly, pursuant to Article 130(3) of the Constitution, the President may give directive or orders to CHRAGG. CHRAGG is compelled to comply with presidential directives if 'the President is satisfied that in respect of any matter or any state of affair, public interest and national security so requires'.[64] The latter provision may easily lead to abuse and prejudice on the powers of CHRAGG. Being the custodian of Tanzania's hydrocarbons the President's directives may affect the impartiality and independence of CHRAGG as an accountor, particularly once complaints are against his government on matters he may wish to conceal from the public. Furthermore, the fact that the President appoints the commissioners of CHRAGG, CHRAGG's independence required to conduct enquiries and hold government accountable may be impaired.[65]

Although there is no reported presidential interference with the powers of CHRAGG, CHRAGG has failed to ensure that it receives corporation and compliance from government authorities.[66] CHRAGG has also remained silent and looked on while the Executive has violated fundamental human rights. The Government of President Magufuli has been accused of conducting unprecedented human rights violation, disregard of the rule of law and the Constitution.[67] CHRAGG has made no inquiry or conducted an investigation or make

[61] Section 15(2) (c) of the Commission for Human Rights and Good Governance Act.

[62] Section 15(3) of the Commission for Human Rights and Good Governance Act.

[63] Article 130(6) of the Constitution of Tanzania 1977 CHRAGG may only exercise its powers on the President in accordance with the provisions of article 46 of the Constitution on impeachment.

[64] Article 130(3) of the Constitution of Tanzania 1977and section 16 (4) of the Commission for Human Rights and Good Governance Act.

[65] See Article 129 of the Constitution of Tanzania 1977.

[66] E. T. Mallya, 'Promoting the Effectiveness of Democracy Protection Institutions in Southern Africa: Tanzania's Commission for Human Rights and Good Governance', EISA research Report No 40 (2009) at 18.

[67] A. France-Presse, 'Tanzania Civil Society Decries "Unprecedented" Violations' *The East African*, 22 February 2018); H. Onyango, 'Tanzania: Bishops Warn President Magufuli against Human Rights Violations', 13 February 2018, available at http://cisanewsafrica.com/tanzania-bishops-warn-President-magufuli-violation-human-rights/ (accessed in March 2018). K. Lutatinisibwa, 'JPM Violated Katiba in Nominations' the *Citizen*, 20 January, 2017.

declarations on the ongoing violations by the government. Furthermore, CHRAGG's decisions on human rights violations and findings of their inquiries are not binding. They are mere recommendations to the responsible authorities unless taken to court.[68]

While CHRAGG is a possible accountability implementation forum for citizens, its effectiveness has been called into question. CHRAGG may have the required mandate to inquire and render judgement but its decisions are dependent on other enforcement bodies who do not enforce CHRAAG's recommendations. Its independence is impaired by the control the President exercises over it via presidential directivities and appointment of members of CHRAGG.

7.2.2 Internal Vertical Accountability within Government Institutions in the Upstream Hydrocarbon Management

This section evaluates hierarchal accountability mechanisms within the hydrocarbon regulatory institutions. It maps out the institutions responsible for governing upstream hydrocarbon activities and the manner in which they hold each other accountable. It is noteworthy that the line between internal vertical accountability and horizontal accountability as shall be discussed below in subsection 3 is quite thin. There are times where in holding each other accountable, government institutions play both vertical and horizontal accountability roles.[69] To avoid repetition, the discussion on internal vertical accountability will be brief. The focus here will

[68]Article 130(1) (e) of the Constitution of Tanzania 1977 and Section 15(3) of the Commission for Human Rights and Good Governance Act, Act No. 7 of 2001. The Nyamuma case fortifies this position. In 2001, Nyamuma residents were evicted from their homes by the government following the government's intention to extend a game reserve into the area the Nyamuma Village occupied. The Government did not compensate the villagers for their expropriated land. Consequently, 135 of the evicted villagers took their case to CHRAGG. In 2004, CHRGG recommended that the government compensate and resettle the villagers. The government rejected CHRGG's recommendations.

In 2006 a local NGO Legal and Human Rights Center (LHRC) filed a petition against the government in the High Court (Land Division) in an effort to have the court enforce CHRAGG's recommendations. The High Court (Land Division) found that it did not have the authority to enforce the CHRAGG's recommendations. This finding was appealed by the LHRC to the Court of Appeal of Tanzania. On 11 October 2008, The Court of Appeal of Tanzania held that the CHRAGG could enforce its recommendations by bringing an action before a court of competent jurisdiction. See the case of LHRC v Thomas Ole Sabaya and 4 Others, Civil Appeal No. 88 of 2006 (Court of Appeal at Dar es Salaam) 11 October 2008 (unreported).

[69] Chapter 3 subsection 4.1.

be only on hierarchical accountability of the principal industry regulatory institutions. A broader discussion on the accountability of upstream regulatory institutions will take place in the context of horizontal accountability.

7.2.2.1 Hydrocarbon Upstream Governance Institutions

There are four institutions and one advisory body responsible for governing Tanzania's upstream hydrocarbon activities. Two of these are supervisory while the other two are responsible for the day-to-day governance and regulation of upstream industry activities. The supervisory institutions are the Office of the President and Cabinet while the governance and regulatory institutions are the Minister responsible for hydrocarbons and the Petroleum Upstream Regulatory Authority (PURA). The advisory body is the Oil and Gas Advisory Bureau instituted in the Office of the President. The regulatory authorities do not work in isolation: other crosscutting sector regulatory authorities support them.[70]

7.2.2.1.1 Supervisory and Advisory Institutions

i) The President

At the top of Tanzania's hydrocarbon, governance pyramid is the President. Section 5 of the Natural Resources Sovereignty Act declares that the President holds all natural resources as a trustee for people.[71] The Act amends Section 4 of the Petroleum Act, which vested hydrocarbon resources in the United Republic. This amendment places an onerous responsibility on the President to oversee the governance and management of natural resources including hydrocarbons. The Act does not provide guidance on how the President should exercise his or her oversight functions. This is likely going to present significant accountability challenges in practice as explained further below.[72]

ii) The Cabinet

The second institution is the Cabinet of the United Republic. The Petroleum Act states that Cabinet has the responsibility for ensuring 'strategic oversight and directions over the hydrocarbon economy'.[73] The Petroleum Act gives Cabinet both policy and administrative

[70] See section 8 of Chapter Five and sections 3 below.

[71] The Permanent Sovereignty Act, No.5 of 2017

[72] Subsection 2.2.2 of this Chapter.

[73] Section 4(3) of the Petroleum Act.

functions. The Cabinet is responsible for approving all major sector decisions including the opening up of areas for hydrocarbon activities and for approving all sector agreements and licenses as presented by the Minister.[74] Section 47(2) of the Petroleum Act provides that 'the Minister on behalf of the Government shall not enter into an agreement without prior approval of the Cabinet'. The Cabinet is composed of the President, the Vice President, the President of Zanzibar and all Ministers plus the Attorney General who has no voting rights.[75]

iii) OIL and Gas Advisory Bureau

The OIL and Gas Advisory Bureau is the main advisory body of the sector.[76] The Bureau is supposed to advise the Cabinet on matters pertaining to the sector, particularly on 'strategic matters relating to the economy'. [77] The Bureau is expected to be constituted within the office of the President.[78] At the time of writing, the Advisory Bureau had not been formed. Although the Bureau's role is advisory and plays no accountability function, it is necessary to discuss how it might influence decision-making and therefore its potential impact on accountability.

7.2.2.1.2 Governance and Regulatory Institutions

i) Ministry responsible for Hydrocarbons

As noted above, two institutions are responsible for the day-to-day management of the upstream hydrocarbon sector: namely, the Minister and PURA. The Minster is the custodian of the hydrocarbon sector. [79] As custodian the Minister is responsible for developing and implementing sector policies, plans, and strategic decisions including the issuing of licenses and entering agreements upon the advice of PURA and subject to the approval of Cabinet.[80] The Minister carries out the daily supervisory activities of the industry and reports to the Cabinet.

However, there is some uncertainty regarding the Minister's responsibility to seek guidance and directives of the Cabinet. Section 5(3) (a) of the Petroleum Act provides that 'the Minister

[74] Section 5(3), 47(2) - (3), 48(3), 68(3) and 75(1) of the Petroleum Act.

[75] Article 54 of the Constitution of Tanzania 1977.

[76] Section 7 of the Petroleum Act.

[77] Ibid.

[78] Ibid.

[79] Section 5 of the Petroleum Act.

[80] Section 5(1), 5(3), 47(1) & (2) of the Petroleum Act.

shall, in respect of any strategic decisions on strategic petroleum investments, seek guidance and directives of the Cabinet'. Furthermore, the Act explicitly requires the Minister to seek the approval of Cabinet on matters pertaining to agreements, licences and opening up areas for hydrocarbon activities.[81] However, with respect to other matters such as the reservation of blocks, the award of blocks to the National Company (TPDC) and the amendment of the second schedule on royalty, the Minister is empowered to make decisions on his own initiative or upon advice from PURA.[82] A decision on reservation of blocks or the direct award of contracts to TPDC may be considered strategic yet no explicit requirement is made as compared to the other provisions on licensing.

ii) The Petroleum Upstream Regulatory Authority (PURA)

As already noted in Chapter 5, PURA is responsible for regulating and monitoring the upstream activities of the hydrocarbon sector.[83] PURA is the main advisory body to the Minister on all upstream hydrocarbon activities[84] including on all technical issues of the upstream industry.[85] PURA is a body corporate that has a Board that supervises its functions.[86] The daily operations of PURA are done under the supervision of the Director General who is the secretary of the Board, who reports to, and receives directions from the Board.[87] The Board is responsible for providing guidance to the Director General and all employees of PURA.[88] Polices and decisions of PURA are thus made by the Board of PURA.

7.2.2.2 Assessment of Internal Vertical Accountability

For internal vertical accountability to be effective, the superior institution in the governance hierarchy must have clearly defined mandate and be able to enforce its decisions.[89] The hierarchy of institutions discussed above is multifaceted. It provides for both horizontal and

[81] See sections 33(1) & (10), 47(1) & (2), 48(3), 68(3) and 75(1) of the Petroleum Act.

[82] See sections 50(1), 50(4), 113(4) of the Petroleum Act.

[83] Section 11(1) of the Petroleum Act.

[84] Section 12(1) (a) of the Petroleum Act.

[85] Section 12(1) (b) of the Petroleum Act.

[86] Section 17(1) of the Petroleum Act.

[87] Section 23(1), 24(1) and (2) of the Petroleum Act.

[88] Section 18(2) of the Petroleum Act.

[89] Subsection 2.2 and 3.1.2 of Chapter 3 of this thesis.

vertical accountability within internal vertical accountability at the top structure of hydrocarbon governance.

The Petroleum Act vests the control of the hydrocarbon sector under the command and leadership of Cabinet.[90] Cabinet is given both policy and administrative functions. This gives Cabinet the mandate to hold the Minister as the supervisory regulator accountable. To the extent that the Minister must seek guidance and approval from Cabinet, the Minister is accountable to Cabinet. However, the Cabinet has no mandate to take any corrective action against the Minister. This mandate rests with the President. The Minister is in that sense horizontally accountable to Cabinet and vertically accountable to the President who is the appointing authority. In the implementation of his/her functions, the Minister is accountable to the President as the supervisory body of the sector and head of executive authority. The Cabinet is in turn accountable to the President as the supervisory body of the sector. PURA as the industry regulator is accountable to the Minister as the supervisory regulator of the daily operations of the industry. The effectiveness of this structure depends on the extent to which the various roles of the actors are able to distinguish between their policy-making functions from policy implementation functions.

To the extent that the President and Cabinet are primarily responsible for policymaking, the constitutional principle of collectively accountability to parliament[91] applies. As argued earlier, the effectiveness of the National Assembly as an accountability institution has varied from time to time, but overall, National Assembly oversight over the executive has been weak.

The major weakness in the Tanzanian legal framework lies in the fact that the implementation functions of the hydrocarbon legislation and policy. Unlike in Ghana, for example, where they have placed the President as the supervisory organ of the sector responsible for approving sector decisions such as granting of licences subject to Parliament's approval,[92] under Tanzania's Petroleum Act, Cabinet is responsible for approving key industry decisions at the same time the President who is also the Chair of Cabinet is given the overall supervisory power of the

[90] Section 4 of the Petroleum Act.

[91] Article 52 (3), Article 53(1) - (2) the Constitution of Tanzania 1977.

[92] Article 268 of the Constitution of the Republic of Ghana 1992 read together with The Petroleum (Exploration and Production) Act 2016 Act No.919 of Ghana.

sector. Naturally, the President's overbearing mandate in the Tanzanian constitutional and political context undermines the role of Cabinet envisioned by the law as an implementation body.

In Tanzania, the Minister responsible for hydrocarbons exercises oversight over PURA.[93] As a law implementation body, PURA is established as an independent authority under the Petroleum Act. This independence is undermined by the power given to the Minister to supervise the petroleum industry and to develop and implement sector policies.[94] In exercising this mandate, the Minister may seek justification from PURA for the manner in which it fulfils its legal obligations. The Minister may also institute inquiries into PURA and take necessary action such as removing the board members of PURA from office.[95]

7.3 HORIZONTAL ACCOUNTABILITY

This section discusses the oversight institutions that may enforce horizontal accountability in the hydrocarbon industry. Of particular interest is whether these institutions have the required independence and mandate to hold governance institutions and actors of the sector to account.

7.3.1 Tanzania Extractive Industries (Transparency and Accountability) Committee

The Tanzania Extractive Industries (Transparency and Accountability) Committee (the Transparency Committee) was established to promote and enhance transparency and accountability in the extractive industry.[96] It was established as an independent government entity with the responsibility of ensuring that benefits of the extractive industry are 'verified, duly accounted for, and prudently utilised for the benefit of the citizens of Tanzania'.[97] The Transparency Committee is composed of five government officials and ten representatives

[93] Section 14 of the Petroleum Act.

[95] See section 5(1) (m) of the Petroleum Act which mandates the minister to take any other functions related to petroleum production activities infilling functions assigned to him by the Act. .

[96] Section 4 of Tanzania Extractive Industries (Transparency and Accountability) Act No.23 of 2015.(*hereinafter* TEITA ACT)

[97] Section 10(1) of the TEITA Act No.23 of 2015.

from companies and civil society organizations (CSOs) with equal representation.[98] The mandate of the Committee is limited to revenue disclosure by hydrocarbon companies and does not cover other key upstream regulation including licensing.[99] The oversight role of this Committee has already been discussed in Chapter 6.[100] The focus here is on whether the Committee has sufficient mandate and independence to hold extractive industry regulators to account. The provisions of the Act suggest so.[101] The noted provisions provide for horizontal accountability and have the potential of providing the much-needed check and balance in the governance of the extractive industry. Reports from the Transparency Committee as highlighted in Chapter 6[102] could trigger political and judicial accountability enforcement measures. Political accountability would be through the National Assembly once its reports are tabled. Subsequent judicial accountability would take place where there is a possibility of criminal allegation. These would trigger an investigation from the Prevention and Combating of Corruption Bureau (the Bureau) or the Public Prosecutor. Since the institutionalization in 2015 of the Transparency Committee, it has not tabled any reports before the National Assembly. The first chairperson of the Transparency Committee was appointed as recent as June 20, 2018.[103] How well the Committee will function as an accountability body remains a question of future assessment. Nonetheless, institutionalised Extractive Industry Initiatives in countries like Nigeria, Mongolia, Liberia, and Kazakhstan have proven to be efficient accountability forums and have triggered substantive change in the management of their nation's extractive resource governance.[104]

7.3.2 The National Audit Office

The National Audit Office of Tanzania headed by the Controller and Auditor General (CAG) is another significant oversight institution in the governance of hydrocarbons in Tanzania.

[98] Section 5 of the TEITA Act No.23 of 2015.

[99] Section 10(1) and (2) of the TEITA Act No.23 of 2015.

[100] Chapter subsection3.1.3.

[101] S.4 (2), 5, 6 & 7 of the TEITA Act No.23 of 2015.

[102] Section 3 of Chapter 6 of this thesis.

[103] Ikulu, Taarifa Kwa Vyombo Vya Habari ya Juni 20 2018.

[104] See, Jonathan Ernst, 'Extractive Industries Transparency Initiative: Results Profile', (2013) World Bank available at http://www.worldbank.org/en/results/2013/04/15/extractive-industries-transparency-initiative-results-profile accessed in September 2018.

Section 28 of the Public Audit Act[105] authorises the CAG to carry out performance audits for purposes of establishing the efficiency of any expenditure or use of resources in ministries, public authorities and other bodies owned by government. This is in addition to the financial audit mandate that the CAG has as stipulated under Article 143 of the Constitution. The CAG may investigate any public institution, interrogate its officers and review documents or take any measures necessary for conducting its functions.[106] The CAG therefore has the capacity to hold all public institutions responsible for the governance and regulation of hydrocarbons to account.

Upon conducting an audit, the CAG is supposed to submit its report to the National Assembly through the President. Pursuant to article 143(4) of the Constitution, the CAG submits the audit report to the President who shall table the same within seven days of the first sitting from the date of which he received the report to the National Assembly. Where the President does not table the report before the National Assembly, the CAG is required to submit the report to the Speaker of the National Assembly.[107] In the exercise of his duty, the CAG is enjoined not to receive directions from any public office including the President.[108] The CAG must conduct his/her affairs in accordance with the Constitution. The High Court is the only authority capable of giving directives to the CAG where it establishes that the CAG has not complied with the provisions of the Constitution.[109]

Unlike other oversight bodies, the CAG is an independent body with its mandate duly protected by the Constitution. Although the President appoints the CAG,[110] the President may not give any directives to the CAG or dismiss the CAG on his own accord. The CAG may vacate office upon attaining the retirement age.[111] He may only be removed from office for inability to perform the functions of his office, misbehavior or for violating the ethics of the Public Leaders' Code.[112] Where the CAG is discharged from office for any of the latter reasons, the

[105] No. 11 of 2008.

[106] Article 143(3) of the Constitution of Tanzania 1977; Section 11(1) of the Public Audit Act.

[107] Article 143(4) of the Constitution of Tanzania 1977.

[108] Article 143(6) of the Constitution of Tanzania 1977.

[109] Article 143(6) of the Constitution of Tanzania 1977.

[110] Section 4 of the Public Audit Act No.11 of 2008.

[111] Article 144(1) of the Constitution of Tanzania 1977.

[112] Article 144(2) of the Constitution of Tanzania 1977.

President appoints a special tribunal to investigate the CAG and make a decision on whether or not he is to be discharged.[113] The Chairman and half of the Tribunal members 'must be persons who are or have been Judges of the High Court or Court of Appeal in Tanzania or any Commonwealth Country'.[114]

Therefore, consistent with the required elements of accountability, the CAG has both the mandate and the needed independence to check all government actors. The CAG provides horizontal accountability in the governance system that is important for the much-needed checks and balances in public governance. The oversight function of the CAG is however a means to an end and has been referred to in Chapter 3 as redundant accountability. CAG reports subject the actors to political systems of accountability through the National Assembly or where offences have been committed; it acts as a trigger mechanism for other oversight institutions such as the anti-corruption bureau or the office of the prosecutor. The reports may also trigger internal vertical accountability within government institutions. Accordingly, the CAG is only effective when the enforcement organs duly carry out their functions.

7.3.3 The Prevention and Combating of Corruption Bureau

The Prevention and Combating of Corruption Bureau (Bureau) is established by the Prevention and Combating of Corruption Act as the main anti-corruption body.[115] The Bureau is composed of a Director General and a Deputy Director General, who are both presidential appointees,[116] and employees.[117] The Bureau reports directly to the President and submits annual reports.[118] The National Assembly is responsible for appropriating the funds to the Bureau for its functions.[119] The President has the power to appoint and fire the Directors of the Bureau as he thinks fit. The Act is silent about the tenure as well as dismissal of the Directors. The Bureau is a needed and important institution in ensuring accountability by checking corrupt practice and rent seeking behaviour in governance of hydrocarbon resources.

[113] Article 144(3) (b) of the Constitution of Tanzania 1977.

[114] Article 144(3) (a) of the Constitution of Tanzania 1977.

[115] Chapter 329 of the Laws of Tanzania (Revised Edition 2002).

[116] Section 6(2) of the Prevention and Combating of Corruption Act (Revised Edition 2002).

[117] Section 6(2) of the Prevention and Combating of Corruption Act.

[118] Section 14 of the Prevention and Combating of Corruption Act.

[119] Section 48(4) of the Prevention and Combating of Corruption Act.

The Bureau plays an important oversight role over public institutions including ministries and public corporations such as PURA and TPDC.[120] The Bureau has the power to investigate and subject to the directions of public prosecution, prosecute offences involving corruption under the Corruption Act and any other written law.[121] The Bureau may also investigate the conduct of any public official connected to corrupt allegations.[122] The Corruption Act criminalizes a number of corrupt practices including the giving and receiving brides as provided for under section 15(1) (a) and (b). Officers of PURA, TPDC, and the Ministry including the Minister could thus be investigated and prosecuted over corrupt practices in the hydrocarbon sector.

The Petroleum Act also combats corrupt practices by criminalizing the participating of public servant's in hydrocarbon activities. It is an offence for officers involved in hydrocarbon governance 'to acquire any form of interest or in any way participate in economic activities' associated with the hydrocarbon industry.[123] Similar provisions are provided for under the Public Leadership Code of Ethics Act[124], which makes it a crime for public actors to 'use public office for personal gains' as well as misappropriating public funds.[125] Public servants in the hydrocarbon sector including the Minister can thus be investigated and held accountable for various corrupt practices in the governance of hydrocarbons. Additionally, the newly introduced Corruption and Economic Crimes Division of the High Court is responsible for disposing of grand corruption cases.[126] The division covers a number of offences including hydrocarbon sector offences as provided for in the First Schedule to the Economic and Organised Crime Control Act.[127]

[120] Section 7 of the Prevention and Combating of Corruption Act.

[121] Section 7(e) of the Prevention and Combating of Corruption Act.

[122] Section 7(f) (iii) of the Prevention and Combating of Corruption Act .

[123] Section 249 of the Petroleum Act.

[124] Chapter 398 of the Laws of Tanzania (Revised Edition 2002).

[125] Section 6(f)-(j) of the Public Leadership Code of Ethics Act (Cap 398).

[126] Section 3 of the Economic and Organised Crime Control Act, (Cap. 200) as amended by s 6 of the Written Laws (Miscellaneous Amendment) Act, No.6 of 2016.

[127] The First Schedule to the Economic and Organised Crime Control Act, as read together with Sections 239 and 240 of the Petroleum Act and section 23 & 24 of the TEITA Act.

The Bureau thus provides for horizontal accountability in the governance of hydrocarbons and has sufficient powers to hold the Minister and other Pubic officers in the sector to account through legal accountability systems. However, contrary to best practice, the Bureau is not an independent body as its mandate could be interfered by an authoritarian and corrupt President with full control over the bureau as noted above and is the chief decision maker of the hydrocarbon industry.[128] The law should provide for an independent anticorruption bureau that does not report to the executive to guarantee actual accountability. Tanzania could learn from comparative practice such as that of Kenya. Particularly on the manner in which Kenya's Ethics and Anti-Corruption Commission is constituted. According to the Kenyan Constitution and the Ethics and Anti-Corruption Commission Act, the President selects a Selection Panel from a list of multi -stakeholder categories stipulated in the Act that includes religious leaders.[129] The Selection Panel then conducts interviews of competent applicants and nominates qualifying applicants for appointment by the President subject to parliamentary approval.[130] Such a process guarantees the required independence to hold the executive members including the President accountable.

7.3.4 Public Leaders' Ethics Secretariat

The Public Leaders' Ethics Secretariat is another oversight body capable of checking the abuse of power in the governance of hydrocarbon resources. The Secretariat is instituted within the office of the President as an independent department pursuant to Article 132 of the Constitution. The role of the Ethics Secretariat is to inquire into the behaviour and conduct of any public leader for ensuring that the provisions of the law concerning the ethics of public leaders are complied with.[131] The President appoints the Secretariat staff and the Ethics Commissioner who is equally a presidential appointee heads it.[132] The President may remove the

[128] See Subsection 2.3 of Chapter 4 of this thesis.

[129] Article 253 of the Kenyan Constitution and Section 6 of the Ethics and Anti-Corruption Commission Act No. 22 of 2011 of the Kenyan Laws.

[130] Ibid.

[131] Article 132(1) of the Constitution of Tanzania 1977.

[132] Section 18 of the Public Leadership Code of Ethics Act No.5 of 2001.

Commissioner from office 'for good cause'.[133] The Commissioner to the President who tables the same before the National Assembly submits reports of the Secretariat's affairs.[134]

The Secretariat has the duty to receive and inquire into allegations and notifications of breach of the Ethics Code from members of the public.[135] Members of the public may make written allegations to the Ethics Secretariat.[136] The Secretariat has the power to entertain such allegations in respect of any public leader.[137] It has the power to initiate and to conduct any investigation in respect of breach of ethics prescribed under the Public Leadership Code of Ethics Act.[138] The Act requires Public Leaders to fulfil their official duties and responsibilities by making decisions in accordance with law and in the public interest.[139] They are to adhere to the code of ethics as stipulated under section 5-7 of the Act. Inquiries of the Ethics secretariat are addressed by the Ethics tribunal, which is established under section 7 of the Public Leadership Code of ethics Act as amended by section 26 of 2015 Act.[140]

While thus far, there no matters reported to the tribunal directly relating to the hydrocarbons industry, the tribunal has entertained various matters relating to public corruption and miss use of office by senior government officials.[141] This includes cases on the famous Tegeta Escrow saga cited above.[142] The Secretariat has the ability of holding hydrocarbon sector regulators accountable over decisions that contravene the provisions of the Petroleum Act or any other written law regulating hydrocarbons. Unfortunately, the Secretariat's mandate is likely to be effectively exercised over lower ranking officials other than the main decision makers in the Industry. The President appoints members of both the secretariat and tribunal and has the power to dismiss them as he thinks fit. Such powers leave the tribunal and the secretariat vulnerable

[133] Section 19 (2) (c) of the Public Leadership Code of Ethics Act No.5 of 2001.

[134] Section 22(8) of the Public Leadership Code of Ethics Act No.5 of 2001.

[135] Section 22(1) of the Public Leadership Code of Ethics Act No.5 of 2001.

[136] Section 22(1) of the Public Leadership Code of Ethics Act No.5 of 2001.

[137] Section 22(1) of the Public Leadership Code of Ethics Act No.5 of 2001.

[138] Section 22(2) of the Public Leadership Code of Ethics Act No.5 of 2001.

[139] Section 6(a) of the Public Leadership Code of Ethics Act No.5 of 2001.

[140] Section 26 of the Public Leadership Code of Ethics Act Cap 398 of 2015.

[141] The United Republic of Tanzania, President's Office, Ethics Secretariat Strategic Plan 2013/14 to 2017/18 at 6.

[142] Subsection 2 of this Chapter.

to presidential control. The Secretariat hence provides horizontal accountability in the governance of hydrocarbon resources but lacks required element of independence to provide sufficient accountability.

The provisions of the law should provide for an Ethics Secretariat whose mandate would be independent from any influence of the executive members. Tanzania could learn from South Africa in the regard where its Public Service Commission is an independent body and 'no person or organ of state may interfere with [its] functions'.[143] The Commission is also accountable to the National Assembly.[144]Its members are appointed by the President but approved by the National Assembly and from persons nominated by the Premier of the Provinces.[145]

7.3.5 The Commission of Human Rights and Good Governance (CHRAGG)

CHRAGG is another institution that may enforce horizontal accountability in the hydrocarbons sector. The mandate and oversight functions of CHRAGG have been extensively discussed above. As with most of the oversight bodies discussed above, CHRAGG has the mandate to enforce horizontal accountability, but may lack required independence to enforce accountability sufficiently as discussed in subsection 2.1.2.1 above.

From the above discussion on the various oversight institutions, it is apparent that most of the institutions do have the mandate to hold hydrocarbon industry regulatory actors to account but lack the sufficient independence to enforce their mandate impartially. This is contrary to international and regional policy recommendation as discussed in subsection 2.3 of Chapter 4. States are called upon to ensure that oversight organs are at liberty to carry out their functions effectively and without any undue influence.[146] Horizontal accountability as discussed above triggers other accountability enforcement systems and depends on them to hold the governance authorities accountable. Such systems are through indirect political accountability by the

[143] Section 196(3) of the Constitution of the Republic of South Africa No.108 of 1996.

[144] Section 196 (5) of the Constitution of the Republic of South Africa No.108 of 1996.

[145]Section 196 (7) & (8) of the Constitution of the Republic of South Africa No.108 of 1996.

[146] Subsection 2.3 of Chapter 4 of this thesis.

National Assembly, judicial accountability through laws enforcement actors and internal vertical accountability through administrative action with the government authorities.

7.3.6 Horizontal Accountability by Line Ministers and Related Regulatory Authorities

Besides oversight institutions, line ministries such as the Ministry of Environment, Health, Natural Resources and Tourism and the Finance and Planning, play a horizontal accountability role in the governance of hydrocarbons. In regulating hydrocarbon activities, the Minister responsible for hydrocarbon affairs is required to 'consult other relevant sectoral Ministries if a duty to be discharged is related to or potentially affect the functions of such other ministries'.[147] Such consultation provides room for horizontal accountability where other sectoral Ministers may ask the Minister for hydrocarbons to account for actions that he ought to have duly consulted them. This provides a check and balance system among the different sectoral ministries.

Similarly, other regulatory authorities do play the same horizontal accountability role over crosscutting matters such as environmental matters, health, land compensation, and revenue collection. The Petroleum Act gives PURA the duty of 'coordinating and cooperating with other government institutions, including other regulatory authorities responsible for monitoring, evaluation, and review of petroleum operations'. [148] This duty on PURA provides for horizontal accountability by other regulatory authorities who may question PURA's actions in the event of lack of cooperation or due consultation.

Despite giving PURA the duty to coordinate and cooperate with other regulatory authorities, there are some provisions of the Petroleum Act that give PURA extensive mandate on matters that fall within the responsibility of other authorities. For instance, the Petroleum Act gives PURA the responsibility to ensure that upstream hydrocarbon actors comply with environmental principles enshrined in the Environmental Act and any other written law.[149] Some provisions in the Act give PURA the power to approve requirements on the conservation

[147] Section 5(3) (b) of the Petroleum Act.

[148] Section 12(2) (g) of the Petroleum Act.

[149] Sections 65, 67,190, referring to PURA. Part VII (a) covers Compliance of Environmental Principles in Upstream Petroleum operations: the Petroleum Act.

and protection of the environment. For example, section 191 (c) reads; '…make provision, to the satisfaction of PURA, for the conservation and protection of the environment and natural resources in that area'. Although PURA is tasked with the duty to ensure coordination with other sectors, such mandate on environmental aspects creates duplicity in enforcing environmental accountability in the sector.

The Minister responsible for environment is the main authority for environmental aspects.[150] The Environmental Management Act calls for the establishment of a Sector Environment Section (SES) in each sectoral Ministry.[151] A designated sector environment coordinator heads the SES.[152] The Coordinator must be a person who possesses adequate knowledge in environmental management.[153] The SES is responsible for ensuring the implementation of environmental principles and laws as per the Environmental Act and any other written laws.[154] It is the 'coordination unit' between the respective sector and the Ministry of Environment and all authorities responsible for environmental regulation.[155] The SES office is responsible for submitting sectoral environmental reports to the Minister of Environment.[156] By vesting any environmental enforcement or oversight obligation on PURA, the Act creates overlapping mandate between the SES office in the Ministry of Energy and PURA. For purposes of effective accountability, the Petroleum Act ought to have left the supervision of environmental aspects to the SES within the Ministry responsible for hydrocarbon Affairs. This would ensure coordination in environmental accountability of the hydrocarbon actors.

Other provisions giving PURA extensive mandate include section 203, which provides for the requirement of safety zones in every hydrocarbon facility. This section gives PURA the mandate to make exceptions for the requirement of safety zones in hydrocarbon facilities. PURA also enjoys broad powers over land compensation matters.[157] Furthermore, section 80(1) (c) of the petroleum Act, gives PURA the power to give consent for carrying out of

[150] Section 13 of the Environmental Management Act No. 20 2004.

[151] Section 30 of the Environmental Management Act.

[152] Section 33 of the Environmental Management Act.

[153] Section33 (3) of the Environmental Management Act.

[154] Section31 of the Environmental Management Act.

[155] Section30(c) of the Environmental Management Act.

[156] Section 32 of the Environmental Management Act.

[157] Section 111, 242(1) (c) of the Petroleum Act.

hydrocarbon activities in National Parks, forests, and game reserves. The regulations have to provide guidelines on when and how PURA is to coordinate with other regulatory authorities, on which matters it should make consultation, and when it is to consider advice. Such a provision in the regulations will avoid the problem of having overlapping or poorly coordinated mandates form multiple institutions. This would thus enhance accountability by clearly stipulating who is to be held accountable and for what.

As discussed in Chapter 3, multiple accountability networks by various state actors are a necessity in our pluralistic governance systems.[158] However, to check problems associated with multiple accountability including enabling the accountee room to manoeuvre and hence avoid being effectively put to account, there has to be sufficient coordination among governance authorities.[159] As discussed above, the Petroleum Act recognizes the importance of such coordination and provides for it. Promulgated regulations could further provide for a more detailed manner of coordination and cooperation to avoid challenges caused by multiple accountability.[160]

7.4 ACCOUNTABILITY AND HYDROCARBON COMPANIES

This section focuses on the accountability relationship between government and hydrocarbon companies. The accountability relationship between oil companies and the government in most cases may be categorized as contractual. Government and companies may both hold each other accountable within the confines of contractual agreements such as the Product Sharing Agreements (PSA) used in Tanzania.[161] However, as it pertains to sector regulations, the regulatory authorities may also hold hydrocarbon companies accountable for noncompliance as provided for under the law. In that regard, this section interrogates how companies are to be held accountable and by who as per the regulatory compliance provisions of the law and the PSA. As discuss in Chapter 5, Tanzania's hydrocarbons are explored by the National Oil Company TPDC and private or multinational hydrocarbon companies. The analysis first considers the regulatory bodies responsible for holding companies accountable, and then

[158] Subsection 3.1.2 of Chapter 3 of this thesis.

[159] Ibid.

[160] Ibid.

[161] See Chapter 2 subsection 5.1 on government and contractual agreements with hydrocarbon companies.

focuses on accountability in relation to the National Oil Company separately and later it critiques how other hydrocarbon companies are held accountable.

7.4.1 Hydrocarbon Companies Accountors

Two organs are mainly responsible for holding hydrocarbon companies accountable for upstream activities on behalf of government and the people. These are the regulatory institutions, which are the Minister and the regulatory authority PURA. As explained above, the Minister is given the mandate to implement sector policies, plans, and make strategic decisions including the issuing of licences and entering agreements upon the advice of PURA and subject to the approval of Cabinet.[162] Alongside such mandate is the responsibility to ensure that industry actors act according to the law, industry policies and in accordance with their contractual agreements. Therefore, the Minister may hold hydrocarbon companies accountable through government orders as would be prescribed by the law or through the judicial system of accountability enforcement or through arbitration as may be agreed upon under the PSA agreement. Further discussion on the Minister's accountor mandate over the companies is carried out in the companies' analysis below. Apart from having the mandate to hold hydrocarbon companies accountable, the Minister equally has sufficient independence required to implement such mandate as provided for under section 5(1) (m) and (2) of the Petroleum Act.[163]

PURA as the upstream regulatory authority equally has sufficient powers to hold hydrocarbon companies to account for compliance with the industry regulations, standards, laws and international best practice.[164] Section 16 of the Petroleum Act gives PURA the mandate to make compliance orders for implementing the provisions of 'the Act or any other law' regulating hydrocarbons. Any person against whom a compliance order is made 'shall comply with the order'.[165] A compliance order by PURA is made in writing specifying the grounds of its making and is enforceable as an injunction of the High Court.[166] Hence, PURA has the mandate and is

[162] Section 5(1), 5(3), 47(1) & (2) of the Petroleum Act.

[163] 'In the discharge of functions under subsection (1), the Minister shall have powers to intervene and take immediate or prompt reparation actions in any regulated activity or petroleum operations…' Section 5(2) of the Petroleum Act.

[164] Section 12(2) (k) of the Petroleum Act.

[165] Section 16(2) of the Petroleum Act.

[166] Section 16(4) of the Petroleum Act.

able to ensure enforcement when holding oil companies to account. The question remains whether PURA has sufficient independence to carry out its accountor function objectively.

As discussed in chapter 3, independence of the accountor is important in the implementation of accountability.[167] For PURA to be an independent body capable of holding industry actors to account and regulate industry activities by the law, its supervisory body from the onset has to be autonomous. The Petroleum Act guards PURA's independence by requiring the board of PURA, which is the supervisory body to be selected from members nominated by the Nomination Committee.[168] However, the composition of the Nomination Committee seems to defeat the intended objective of achieving independence of the board and checking appointment powers of the Minister and the President. Section 27 of the Petroleum Act provides for the composition of the Nomination Committee as follows:

> …the Minister shall establish a Nomination Committee composed of -
> (a) the Permanent Secretary of the Ministry responsible for petroleum affairs, who shall be a Chairman;
> (b) one representative from the Ministry responsible for public service;
> (c) one representative from the Ministry responsible for environment;
> (d) one representative from the Ministry responsible for occupational, safety.
> (2) The representatives from institutions referred to under subsection (1) (a) to (d) shall be of the rank of assistant director or above.

The Nomination Committee comprises of members who are subordinate to and report to members of the Cabinet responsible for making the hydrocarbon sector decisions. The Permanent Secretary as chair is a presidential appointee. The Civil Service Committee whose appointment is equally done by the President appoints the other members who are Directors of the respective ministries.[169] The proposed PURA Nomination Committee is thus susceptible to influence by the Minister, the Cabinet, and the President. Bearing in mind the control of the President as discussed above, it is possible for an authoritarian President to bulldoze over the decisions of the committee and even the appointing mandate of the Minister.

From the practice, so far it is difficult to tell whether the Nomination Committee has been independent or not. The Nomination Committee advertised for candidates to apply for the

[167] Chapter 3 subsection 3 of the thesis.

[168] Section 27 of the Petroleum Act.

[169] Section 9 of the Public Service Act, Act No. 8 of 2002.

nomination to the board on April 6 2016.[170] The information on consideration of applications and nominations is not public record. On April 19 2017, the President selected the Chairman of the Board of PURA who was initially the head of St. Augustine University Tanzania (SAUT) Arusha campus.[171] Give the renowned trend of the President selecting academicians to governmental posts it is difficult to tell whether the selected Chairman was nominated by the Committee or by the President on his own accord.[172] On February 1, 2018, the President selected the Chairman of the Board of PURA to be the Attorney-General of the republic. So far, the Attorney-General is still the Chairman of the Board and it has not been revealed as whether he will be replaced. If the Attorney-General remains the chairperson of the board, as it has been a common practice for government officials to be board members of government entities, it might rise accountability challenges. The Attorney-General is a member of Cabinet meant to supervise the hydrocarbon industry; he also is the legal representative of government and its agencies including PURA. The Attorney-General being chair of PURA's supervisory body is therefore conflicting.

PURA has the mandate to hold industry actors to account and sufficiently enforce its decisions but may not be entirely free from possible external influence from the top. Such external influence on regulatory authorities are what hinder true accountability and foster corrupt or rent seeking habits which are the main causes of poor natural resource governance as discussed in Chapter 1, 2 and 4. How PURA carries out its mandate and level of its independence in carrying out such mandate is subject to practical experience in time. So far, PURA is still in formulation

[170] Ministry of Energy and Minerals, 'Appointment to Board of Directors of the Petroleum Upstream Regulatory Authority (Pura)' (April 6th 2016) available at http://www.tanzaniatoday.co.tz/news/appointment-to-board-of-directors-of-the-petroleum-upstream-regulatory-authority-pura accessed in 2017.

[171] L. A. Lugalila, 'Rais Magufuli Ateua Kamishna WA Madini Na Bosi WA PURA' available at https://hotnewsintz.blogspot.com/2017/04/rais-magufuli-ateua-kamishna-wa-madini.html?view=classic accessed in September 2018.

[172] The President has appointed a substantial number of academicians to political and governmental pots that has caused alarm and concern of who will remain to impart knowledge in the academic institutions. See, Jukwaa la Elimu (Education Forum), 'Wahadhiri Kuteuliwa, Vyuoni Atabaki Nani' available at https://www.jamiiforums.com/threads/wahadhiri-kuteuliwa-vyuoni-atabaki-nani.1450827/ accessed in September 2018. Owden Kyambile, 'Serekali Ipongezwe Kuwathamini Wasomi', *Nipashe Jumapili* (24 July 2016) available at https://www.ippmedia.com/sw/safu/serikali-ipongezwe-kuwathamini-wasomi accessed in September 2018.

and yet to be fully operational and any such analysis is mere speculation.[173] Subsequent subsections explore the provisions of the law in relation to hydrocarbon companies' accountability obligations. Analysis is first made in relation to accountability of the National Oil Company and later other hydrocarbon companies.

7.4.2 The National Oil Company TPDC (TPDC)

The Tanzania Petroleum Development Corporation ("TPDC") is the National Oil Company.[174] TPDC is charged with the responsibility of undertaking commercial aspects of Tanzania's hydrocarbons including participating interests of the Government in all hydrocarbon agreements.[175] TPDC is a state owned entity and the government is to ensure ownership of 'not less than 51% of the shares'.[176] Pursuant to the Public Corporations Act, a board of directors whose members are appointed by the Minister governs TPDC and the President upon advice by the Minister appoints the Chairperson.[177] The Board of Directors of TPDC is responsible for the management and overall supervision of TPDC.[178] However, in accordance with section 6 of the Public Corporations Act, where the state is the sole owner of a corporation, the 'Minister may in writing give the Board of Directors directions of a general or specific character as to the performance of its functions'. Section 10 of the Petroleum Act makes the same provision omitting the requirement of directives being written.[179] It, however, refers to policy directives as compared to Section 6 of the Public Corporations Act that refers to general directives. Under the Petroleum Act, the directions are given regardless of TPDC being solely owned by the state or not.

[173] The ministry of energy just advertised for various posts of PURA including that of the First director of PURA whose closing application date was May 18, 2018. See Vacancy adverts on the Ministry of energy at https://www.nishati.go.tz/wp-content/uploads/2018/05/DG-ADVERT-_PURA-17_05_2018.pdf accessed in September 2018.

[174] Section 8(1) of the Petroleum Act.

[175] Section 9 of the Petroleum Act.

[176] Section 8(2) of the Petroleum Act.

[177] Section 9(1) and (2) of the Public Corporations Act, No.2 1992

[178] Section 8 of the Public Corporations Act, No.2 1992.

[179] Section .10: 'The Minister may issue policy directions to the National Oil Company in respect of performance of its functions under this Act.' of the Petroleum Act.

In light of the above, TPDC as a government entity is accountable to the people, and may be held accountable by all government oversight institutions as discussed above in subsection 2 and 3. As an oil company, the Minister and PURA also hold TPDC accountable as main regulatory authorities for compliance with the industry laws and standards. To be able to be held accountable in such capacity, TPDC has to be an independent institution capable of making decisions and being held accountable for them.

In consideration of the above provisions, TPDC is not an entirely independent corporation capable of making uninfluenced decisions. The provisions of section 10 of the Petroleum Act as discussed above make TPDC prone to being treated as an extended department of the Ministry. Ministerial directivities to TPDC may interfere with its ability to be held accountable for the functions it is responsible for under the law. The Minister will thus be excising internal vertical accountability over TPDC as a subordinate institution for failure to implement ministerial directivities. As discussed in Chapter 4, the latter is not peculiar to Tanzania; it is a common accountability challenge in most developing countries oil companies operated as an extension of government.[180]

At the time of writing, TPDC is still at a transitional stage where it has not taken up its new functions fully as purely the NOC. TPDC was previously both the NOC and the regulatory authority and was operated as an extended arm of government.[181] Since PURA is still in the formation process, it is too early to tell how well the two organs will carry out their mandate and whether TPDC will be independent from ministerial intervention.

How well TPDC may be held to account will depend on how well it will be independent and detached from government influence, principally by the Minister. This would be particularly true in the case where TPDC solely undertakes hydrocarbon activities. So far, TPDC as the

[180] Subsection 3.1 of Chapter 4 of this thesis.

[181] Whereas the regulatory functions where to be done by the Commissioner for Petroleum affairs (Part II 1980 Act), in practice, TPDC operated as the regulatory authority and Oil Company with exclusive rights. Contrary to the provisions of the 1980 Act. Section 13 of the 1980 Act granted licenses to any individual, company or body corporate provided the individual is a Tanzanian citizen and the company or body corporate are registered or incorporated under laws in force in Tanzania. See M. S. Maajar and T.Maro, 'Tanzania' in B. Palmer & C. McKenna, (eds)*Oil-Regulation in 33 Jurisdictions Worldwide* (London; Law Business Research Ltd, 2014) 221.

national company has not taken up any hydrocarbon exploration or production activities on its own. Any analysis on accountability in that regard would be mere speculation. However, experience from the State Mining Cooperation (STAMICO), which was also re-established in 2015, and the mining laws amended in 2017 show that the corporation was always treated as part of government and thus mainly became internally vertically accountable to the responsible Minister and horizontally accountable to oversight bodies.[182] Therefore, there is need for national commercial entities to be given the required independence as recommended by international policy to allow them to conduct their functions so that they may be accountable in that regard and not as executive governance bodies.[183]

7.4.3 Other Hydrocarbon Companies Operating in Tanzania

As noted above, hydrocarbon companies are held accountable by the regulatory institutions for compliance of the industry's law and regulation and for breach of contractual obligations as entered into under the PSA. Concerning compliance, the law makes comprehensive company obligations and accountability provisions as explained below.

7.4.3.1 Regulatory compliance

Hydrocarbon companies may operate in Tanzania in partnership with TPDC if they are 'registered under the Companies Act or any other written law'.[184] Foreign companies operating in Tanzania are registered in Tanzania in accordance with section 435 of the Companies Act.[185] Accordingly, the companies are bound by Tanzanian laws in the conduct of their operations. Sub-part V of the Petroleum Act sets out the obligations of hydrocarbon companies in conduct of operations. Other obligations are provided for under section 222 on corporate social

[182] P.Mihyo, *Non-Market Controls and the Accountability of Public Enterprises in Tanzania* (Hampshire: the McMillan Press LTD, 1994) 79. Generally see P.Mihiyo on lack of sufficient accountability by public enterprises that are always treated as the extended arm of government. See Z. Kabwe, 'Public Enterprises in Tanzania: Challenges and Prospects', paper presented at CEOs Roundtable Dinner, 11 th October 2011 available at http://www.ceo-roundtable.co.tz/docs/Public_Finance_Management_Talk-Zitto%20Kabwe(1).pdf accessed in September 2018 on presidential appointees and interference of government in Public agenesis and enterprises pg. 7-9.

[183] Subsection 3.1 of Chapter 4 of this thesis.

[184] Section 45(a) of the Petroleum Act; sections 433 to 437 of the Companies Act No.12 of 2002 provides for the registration of foreign companies operating in Tanzania.

[185] Act No.12 of 2002.

responsibility and sections 219,220 and 221 on local content. Section 100 stipulates work practices for licence holders while section 102 makes a breach of the stipulated work practice under section 100 an offence. The Act gives PURA the obligation of guaranteeing compliance of the laws and work practice principles by licence holders.[186] PURA is given the right to inspect hydrocarbon operations plus access to all companies' facilities and documents subject to the provisions of the law.[187] As noted above, the law gives PURA sufficient mandate in holding licence holders accountable for the manner in which they conduct hydrocarbon operations. In as far as, hydrocarbon operations are concerned, the law clearly stipulates how and to whom the licence holders are accountable to.

The Petroleum Act requires hydrocarbon companies to make an integrity pledge pursuant to section 223. Accordingly, companies pledge to conduct their activities with integrity and desist from engagements that undermine or prejudice the country's finances and revenue systems. They pledge to ensure that their activities are consistent with the country's economic objectives, policies, and strategies as well as safeguard Tanzania's national security among other requirements under section 223(2). Non-compliance of the integrity pledge amounts to a breach of the conditions of a licence.[188] Consequently, the licence is deemed withdrawn or cancelled and the government exercises the right to take over under the Act.[189] Section 223 enables PURA to hold companies accountable and equally provides for the consequences to be faced upon non-compliance and manner of implementation.[190] Upon implementation of the Act, hydrocarbon companies may therefore sufficiently be held accountable.

7.4.3.2 Accountability on Breach of PSA

With regard to contractual obligations, both the hydrocarbon company and the government may hold each other accountable as equal parties to a contract. This may be done through arbitration as provided for under the Model PSA. The Model PSA under Article 28(c) requires any dispute that may not be amicably resolved by the parties to be settled by arbitration in accordance with

[186] Section 12(2) of the Petroleum Act.

[187] Section 109 of the Petroleum Act.

[188] Section 223(4) of the Petroleum Act.

[189] Section 223(4) of the Petroleum Act, section 195 of the Act provides for expropriation in the hydrocarbon Sector.

[190] See chapter three subsection 3.2 on elements regarding the discussion on consequences.

the provisions of Article 28(d). Article 28 (d) states that; 'disputes shall be resolved in accordance with the International Chamber of Commerce Rules of Conciliation and Arbitration', subject to the specific provisions under the respective Article. The Article names Dar es Salaam as the place of arbitration and the applicable law as the law of the United Republic of Tanzania. This 2013 Model PSA is however reviewed in light of recent developments in the law.

The recent changes brought about by the Natural Wealth and Resources (Permanent Sovereignty) Act [191] require all disputes arising from the exploitation of natural resources to be adjudicated by judicial bodies or other organs established in the United Republic and in accordance with laws of the Republic.[192] Furthermore, all natural resource agreements must acknowledge and incorporate judicial bodies or other bodies established in Tanzania as organs responsible for dispute settlement.[193] The aim of this provision is to avoid having disputes over the countries resources settled by a foreign court.

While these changes seek to guarantee accountability by hydrocarbon companies, Bilateral Investment Treaties (BITs) entered by Tanzania with a number of countries raise concern on effective implementation of the Acts.[194] The treaties guarantee investors in Tanzania various rights, including expropriation only upon satisfactory and acceptable compensation[195] and access to international dispute resolution mechanisms.[196] Tanzania is bond by the bilateral treaties, which are enforced through international tribunals.[197] Tanzania is a member of various international investment tribunals and it has signed and rectified its instruments. Theses

[191] Act No.5 of 2017.

[192] Section 11 of the Natural Wealth and Resources (Permanent Sovereignty) Act.

[193] Section 11(3) of the Natural Wealth and Resources (Permanent Sovereignty) Act.

[194] Tanzania has bilateral investment treaties with the UK, Germany, Sweden, Finland, Italy, the Netherlands, Denmark, Switzerland, Mauritius, Canada, China, Korea, and Zimbabwe among others. See. The treaties may be accessed at the UNCTAD Investment Policy Hub at http://investmentpolicyhub.unctad.org/IIA/CountryBits/222.

[195] See Article 10 of the BIT with Canada, Article 6(d) of the BIT with China, Article 5 of the BIT with the United Kingdom. Similar provisions exist in all other BIT Agreements.

[196] See Articles on Settlement of Disputes between an Investor and the host government in all BIT entered by Tanzania.

[197] See Articles on Settlement of Disputes between an Investor and the host government in all BIT entered by Tanzania providing for various international tribunals including ICSID.

tribunals include the International Centre for Settlement of Investment Disputes (ICSID) and the Multilateral Investment Guarantee Agency (MIGA). Implementation of the above provisions could thus render Tanzania susceptible to a breach of international law and consequently to both political and legally binding consequences. Tanzania should hence ensure that the implementation of the Petroleum Act and the Natural Resources Act are in line with the provisions of the international agreements by ensuring fair and equitable treatment of hydrocarbon companies in the domestic dispute settlement tribunals and courts.

7.4.4 Accountability between the people and hydrocarbon Companies

The people in most cases would hold hydrocarbon companies accountable through the government they put in place for the governance of their resources. However, as discussed under the subsection on accountability through legal proceeding by the people, the people may hold companies directly accountable where their fundamental rights have been breached during the course of hydrocarbon exploitation. Such rights include land rights breached without fair compensation, the right to a clean environment as provided for under the environmental laws[198], right to personal security and freedom. One may also hold a hydrocarbon company accountable for any damages caused on property such as crops, trees, buildings, stock, or works where the company will be liable to pay fair and reasonable compensation.[199]

7.5 CONCLUSION

The Tanzanian legal framework makes it clear that the people have the right to hold the government accountable for the management of natural resources including hydrocarbons. It also clearly establishes various government institutions for purposes of ensuring that there is both hierarchical and horizontal accountability for the governance of the hydrocarbon sector. There are also clear provisions on the accountability of hydrocarbon companies to the state and the people for upstream hydrocarbon activities. The main challenge in the legal framework lies in ensuring that this legal framework is workable and implemented in practice.

This chapter has shown that although the law establishes various accountability mechanisms, in most cases this is done without providing these mechanisms with sufficient independence and mandate. For instance, while the legal framework gives the National Assembly the mandate

[198] Section 4 of the Environmental Management Act.

[199] Section 111 of the Petroleum Act.

to interrogate and call government to account, it also limits the exercise of such mandate by giving the President the power to appoint some of the MPs and the power to dissolve the National Assembly.

One of the familiar challenges to ensuring that there is accountability within the hydrocarbon sector lies in the state of the rule of law, democracy, and constitutionalism in a country. In Tanzania, the challenges to democracy, the rule of law and constitutionalism are inseparable from the challenges to accountability in the hydrocarbon sector. As this chapter has shown, political accountability mechanisms can play a vital role in ensuring that government institutions and authorities are held accountable for the management of hydrocarbon resources. However, these political accountability mechanisms do not function optimally due largely to the one-party dominance system and a skewed political system with a strong executive and week legislature.

Accountability via the courts is possible in Tanzania especially when individual rights have been violated. However, public interest litigation in the area of hydrocarbon resources has not been used despite the fact that such litigation is allowed by the courts. One of the possible explanations is the constitutional provision, which renders matters relating to the governance and management of natural resources non-justiciable.

An important means of ensuring the accountability of individual governmental officials for the management and governance of hydrocarbon resources is anti-corruption law. However, the degree to which the Anti-Corruption Bureau can successfully prosecute corruption-related offences depends on how independent it is and the absence of political interference. Independence is a challenge not only for the Anti-Corruption Bureau but also for many other institutions as has been shown in this chapter. Officials appointed by the President Head most of the horizontal accountability institutions and, in some cases; these officials report to or receive directives from the President or the responsible Minister.

Other horizontal accountability institutions, such as the CAG, TEITA and CHRAGG, lack their own enforcement mechanisms. These institutions merely produce reports whose implementation depends on the National Assembly or the judiciary.

The legal framework sufficiently provides for the accountability of hydrocarbon companies and other stakeholders for upstream activities. The responsible Minister and PURA are empowered to hold companies accountable for compliance with the industry regulations, standards, laws, and international best practice. Companies and the government also hold each other accountable through the medium of the law of contract. Initially, such accountability was enforced by arbitration as provided for in article 28(c) of the Model PSA of 2013. However, recent changes brought about by the Permanent Sovereignty Act require all disputes arising from the exploitation of natural resources to be adjudicated by judicial bodies or other organs established by law. While such provisions are commendable, the bilateral investment treaties (BITs) concluded by Tanzania with several countries could adversely affect the implementation of this new Act.

Given the multiplicity of the accountability mechanisms, it should be expected that there would be instances of duplication and overlapping mandate. It is therefore not surprising that the Tanzanian legal framework recognises the importance of coordination among the various accountability mechanisms by requiring the Minister and PURA to ensure that coordination among cross cutting ministries and regulatory authorities. However, there remain instances where the Petroleum Act gives PURA extensive mandate on matters that lie within the domain of other authorities.

In view of the foregoing, it can be concluded that while Tanzania's hydrocarbon legal framework recognizes the significance of accountability and makes an effort to establish various mechanisms for the hydrocarbon sector, challenges remain. Noteworthy among these are the lack of independence and sufficient mandate of the various mechanisms, and the broader problems of democratization and constitutionalism in the country.

CHAPTER 8
CONCLUSION AND RECOMMENDATIONS

8.1 OVERVIEW

This thesis set out to conduct an appraisal of the legal and institutional framework governing the upstream hydrocarbon industry in Tanzania. The primary objective was to establish the extent to which the governance aspects of transparency and accountability are incorporated in the legal framework to ensure their effective implementation in practice.

As shown in Chapters 2 and 4, recent years have seen the emergence of a global consensus in championing increased transparency and accountability in the management of natural resources.[1] In particular, there has been heightened global demand for transparency and accountability in the extractive industry. Notwithstanding the recognition of fundamental governance principles of transparency and accountability in resource governance, achieving transparency and accountability remains a real challenge for many nations especially developing countries like Tanzania.[2] It is the premise of this thesis that sufficient implementation of these governance principles is only possible if at the very least key aspects of these principles are incorporated into the legal framework. By investigating whether and how these aspects are incorporated in a legal framework, the thesis sought to identify the accountability and transparency challenges arising from the regulatory framework and find solutions to those challenges.

More specifically, for there to be effective governance, the law must sufficiently incorporate the key elements of these concepts, define the accountability and transparency relationships, and establish appropriate mechanisms of implementing these concepts. In particular, the thesis has established that such relationships must address the questions on who are the actors involved in the accountability relationships, who is to be called to account, who is entitled to hold other actors accountable and for what is accountability owed. In the case of transparency, the relationships must address the questions of information disclosure, who is obligated to disclose information, who can have access to such information, and how can such access be

[1] Subsection 4.4.2 of Chapter 2 of this thesis and Subsection 4 of Chapter 4 of this thesis.

[2] Ibid.

facilitated. It is also critical that accountability mechanisms are sufficiently independent, have adequate mandate to inquire and render judgement, and have the capacity to enforce their decisions. Usually, accountability and transparency mechanisms operate in a pluralistic governance context. The thesis argues that this calls for coordination and cooperation as well as checks and balances to ensure that accountability actors are themselves accountable.

International and regional policies and practices corroborate the importance of incorporating these elements of transparency and accountability into legal frameworks. Specific accountability structures are needed to ensure that actors given authority to govern and exploit hydrocarbons are able to answer and face vigorous scrutiny and verification processes by accountors. Indeed, the various policy recommendations discussed in Chapter 4 call for states to ensure that there are sufficient legal and regulatory frameworks that establish clear transparency and accountability relationships and their implementation mechanisms.[3]

What is apparent in the study is that, although international and regional recommendations set a trend of ideal transparency and accountability aspects to be incorporated in national laws, the fragmentation of the regulations that govern the hydrocarbon resource remains a major challenge. Notwithstanding the transnational nature of hydrocarbon resources, their governance, and regulation is dependent on national regulatory frameworks of respective oil producing countries.[4] Additionally, transparency and accountability are governance questions that are affected by a nation's customs, political orientation and socioeconomic factors.[5] Therefore, the extent to which states uphold transparency and accountability principles in legislation and practice is informed by a respective national governance culture.

8.2 TRANSPARENCY AND ACCOUNTABILITY IN TANZANIA'S HYDROCARBON INDUSTRY

The thesis has established that Tanzania's hydrocarbon industry is still at its early stages of development. For that reason, the laws governing the industry are also very new, some having been enacted in the last three years.[6] Nonetheless, Tanzania has discovered its commercially

[3] Subsection 2 of Chapter 4 of this thesis.

[4] Subsection 4.1 of Chapter 2 of thesis

[5] Subsection 2 of Chapter 3 of this thesis.

[6] Subsection 7 of Chapter 5 of this thesis.

viable hydrocarbons and made its laws at a time when the hydrocarbon industry worldwide is seeking to institutionalize the principles of transparency and accountability in the industry. As a new comer to the industry, Tanzania has made notable efforts to codify these principles in its legal framework. However, Chapters 6 and 7 of the thesis proved that not all aspects of transparency and accountability have been so recognized and legislated.

8.2.1 Findings on Transparency in Tanzania's Hydrocarbon Legal Framework

Chapter 6 established that Tanzania's hydrocarbon legal framework recognizes the value of transparency in the governance of the industry. This is traced from the recognition of the constitutional right of the people to seek information and be informed. The Petroleum Act makes it mandatory for the regulatory authorities, the NOC, and the Minister to conduct all industry activities in a transparent manner. The Hydrocarbons Revenue Act, TEITA Act, and the Natural Resources Act have similar provisions.

The study found that Tanzania's hydrocarbon legal framework sets out commendable provisions promoting transparency between the government and hydrocarbon companies. Hydrocarbon companies are compelled to disclose proactively all information pertaining to their upstream activities: conversely, the government is obliged to make government plans, policies and strategies on the industry available to the hydrocarbon companies.[7] The law safeguards the government's right to demand access to reliable and clear information from any person or body in a timely manner for the governance of the upstream activities.[8]

The thesis observed that the law also makes commendable efforts towards achieving transparency between the government and the public. It explicitly requires hydrocarbon agreements to be entered into after a transparent and competitive public tendering process has been completed.[9] The law also requires hydrocarbon revenues and expenditure to be published simultaneously by the Minister in the Gazette and on the websites of the government and of the Ministry of Finance.[10]

[7] Section 4 of Chapter 6 of this thesis.

[8] Ibid.

[9] Section 3 of Chapter 6 of thesis.

[10] Ibid.

Creditable steps have been taken under the law to enforce transparency between the public and the hydrocarbon companies in as far as environmental issues and corporate social responsibility are concerned. Legislation on local government authorities encourages local participation in and access to information concerning development projects. All information regarding environmental impact assessment is considered public information.

Most notable perhaps is the establishment of a specific oversight committee for purposes of safeguarding transparency and accountability in extractive industries. This is a step to the right direction and signifies Tanzania's commitment towards enabling and implementing transparent and accountable governance of its natural resources.

Despite these commendable steps, the Tanzanian legal framework falls short of the required elements to facilitate transparency in the industry. Firstly, Tanzania's legislative provisions on access to information fail to fully guarantee the right of access to information. Contrary to best practice, the Tanzanian Access to Information Act does not supersede over legislation on information disclosure in the event of a conflict. This means that the confidentiality provisions of the Petroleum Act prevail over the provisions of the Access to Information Act. Furthermore, where access to information is denied or the fees charged are too high, the procedures for appeal present no viable remedy to the information applicant. Contrary to best practice, Tanzania's Access to Information Act does not provide for an independent body to entertain access to information matters and does not permit applicants to seek judicial remedies. By denying access to ordinary courts via judicial review, the law falls short of fully guaranteeing access to information. It remains to be seen whether the courts will declare that such denial of judicial redress is unconstitutional.

Secondly, instead of empowering public officials to disclose public information, the information Act and the Petroleum prescribe severe penalties on public officials for disclosure of confidential or exempted information. Best practice dictates that Tanzania should rather criminalize the denial of requested information.

Thirdly, the Petroleum Act and the Access to Information Act leave the question of access to hydrocarbon information within the discretion of the Minister. As discussed in Chapter 6, in

the event that the Minister denies access to information, his or her decision may not be challenged in court of law. Consequently, the Petroleum Act does not make hydrocarbon industry information easily accessible, thereby failing to fulfil an important requirement for transparency.

Fourthly, transparency not only entails access to information but also timeous access to information. Tanzania's provisions on the transfer of request by one information holder to another impede transparency by delaying access to information. The transfer provisions under the Information Act create an unreasonably long period for accessing information. Institutions may avoid information disclosure by passing on requests among themselves. This is mainly because time of the response period of the application is calculated from the date of transfer. Best practice is that in the event of such a transfer, the response period is calculated from the day in which the information request was originally received.[11]

Fifthly, while section 91 of the Petroleum Act directs the regulatory authority to make public all information pertaining to industry activities and players upon approval of the Minister and payment of prescribed fees, the same information is considered confidential in subsequent provisions of the Act. While section 93(2) (I) make an exception that such information may be disclosed as 'the requirement to ensure transparency and accountability under the relevant law', it is unclear whether hydrocarbon industry information is public information.

Lastly, both the Petroleum Act and the TEITA Act do not compel the hydrocarbon companies to publish relevant information to the public. Even where the companies are required to furnish information to the Transparency Committee, the latter is not by law compelled to publish such information except where it deems fit. The Committee is also not compelled to publish its reports.

In these respects, the Tanzanian legislative framework does not fully guarantee transparency in the hydrocarbon sector.

[11] See Section 3 of Chapter 6 of this thesis.

8.2.2 Findings on Accountability in Tanzania's Hydrocarbon Legal Framework

The legal framework in Tanzanian guarantees the right of the people to hold the government accountable for the management of the natural resources including hydrocarbons. Various government institutions have been established for this purpose. On close study, however, the law fails to guarantee sufficient mandate and independence to accountability mechanisms. First, political accountability mechanisms do not function ideally owing to challenges relating to the rule of law, democratization and constitutionalism. For example, Weakness in the National Assembly as an accountor is mostly because it is dominated by one party and controlled by the President.

Second, accountability institutions are influenced by either the president or the Minister; hence lack the independence in implementing their functions. For instance, some accountability institutions such as the Anti-Corruption Bureau need to be guaranteed independent for them to operate freely and optimally. With the exception of the CAG, most accountability institutions lack independence. The officials leading the institutions are presidential appointees and in some cases are obliged by law to implement directives from the President or the responsible Minister.

Third, accountability institutions such as the CAG, TEITA and CHRAGG lack their own enforcement mechanisms. The later institutions merely produce reports whose implementation depends on the National Assembly or the judiciary. How well actors are held accountable therefore depends on the strength of political, judicial, and administrative systems of accountability.

Judicial accountability is possible within the legal framework in as far as individual rights are concerned. However, constitutional provisions declaring such issues non-justiciable undercut the scope of public interest litigation in respect of issues arising from the management of natural resources.

In as far as, hydrocarbon companies are concerned, the legal framework sufficiently provides for accountability .Government through the Minister and PURA are authorized to ensure companies are accountable for compliance with the industry regulations, standards, laws, and

international best practice. The Minister has sufficient mandate and required independence and implementation mechanisms to carry out his accountor functions. PURA is also equipped with sufficient mandate and implementation mechanisms.

As parties to a contract, government and hydrocarbon companies hold each other accountable within the confines of contractual agreements. Previously, such accountability was enforced by way of arbitration as provided for in Article 28(c) of the Model PSA of 2013. Recent changes brought about by the 2017 Permanent Sovereignty Act requires all disputes arising from the exploitation of natural resources to be adjudicated by judicial bodies or other organs established in the United Republic and in accordance with laws of the Republic. All natural resource agreements must acknowledge and incorporate judicial bodies or other bodies established in Tanzania as organs responsible for dispute settlement.

While these changes seek to guarantee accountability by hydrocarbon companies, bilateral investment treaties (BITs) entered by Tanzania with a number of countries raise concern on effective implementation of the law. The treaties guarantee investors in Tanzania various rights, including expropriation only upon satisfactory and acceptable compensation and access to international dispute resolution mechanisms. The BITs could thus adversely affect the implementation of the Sovereignty Act.

Given the multiplicity of the accountability mechanisms, instances of duplicity and overlapping mandates are to be expected. The Tanzanian legal framework recognizes the importance of coordination among the various accountability mechanisms by requiring the Minister and PURA to ensure that there is coordination among cross cutting ministries and regulatory authorities. However, there remain instances where the Petroleum Act gives PURA extensive mandate on matters that lie within the domain of other authorities. Such provisions create duplicity of mandates and problems associated with multiple accountability including enabling the accountee room to manoeuvre and hence avoid being effectively put to account.

From the above-mentioned, it is the conclusion of this thesis that, while Tanzania's hydrocarbon legal framework recognizes the significance of accountability and makes an effort to establish various mechanisms for the hydrocarbon sector, challenges remain. Notable among

the challenges are the lack of independence and sufficient mandate of the various mechanisms, and the broader problems of democratization and constitutionalism in the country.

8.4 GENERAL RECOMMENDATIONS

To address the shortcoming related to transparency, Tanzanian needs to consider amending the Access to Information Act to establish the supremacy of this Act over other Acts. Secondly, Tanzania should address the absence of an independent commission to adjudicate disputes arising from requests and decisions on access to information. Thirdly, the law should allow for access to judicial redress for information applicants. Fourthly, the law should promote access to information by criminalizing the failure to disclose public information rather than criminalizing disclose of such information. In addition, the grounds upon which information should be treated confidential need to be limited.

Tanzania should also adopt international policy recommendations on proactively disclosed information. As elaborated in Chapter 4 and 6, the recommendations call for states to publish information proactively. Not only should such information be published, the government should promote access to such information to all. Consistent with best practice, Tanzania could start by establishing an independent body responsible for enforcing the Access to Information Act.

As regards accountability, much turns on giving the various accountability institutions sufficient mandate and independence, and limiting political influence on accountability institutions. An effective approach would be to first check the problem of presidential influence. Tanzania should consider reducing the powers of the President and strengthening the National Assembly. This recommendation is in line with the views presented by the Constitution Review Commission (CRC) during the 2014 constitutional review processes.[12] For a long time Tanzanians have raised the excessive powers of the President in the current Constitution as one

[12] J. Jesse, 'Report on the Constitutional Making Process in Tanzania' (2013) available at http://katiba.humanrights.or.tz/assets/documents/katiba/tanzania/process/doc/REPORT%20ON%20THE%20CONSTITUTIONAL%20MAKING%20PROCESS%20IN%20TANZANIA%20BY%20LHRC/REPORT%20ON%20THE%20CONSTITUTIONAL%20MAKING%20PROCESS%20IN%20TANZANIA%20BY%20LHRC_13_sw.pdf accessed in September 2018 at 53-54.

of the burning issues in need of reform.[13] Moving forward, Tanzania should implement the constitutional reforms recommended by the CRC on presidential powers. Additionally, the law should safeguard members of parliament from adverse party control. This could be done by ensuring that the president of the country is prohibited from being the chairperson of his/her political party. This would check and balance executive decisions as has been vivid in countries with such practice such as South Africa, where the ruling party successfully recalled its president.

Second, in line with best practice,[14] accountability institutions should report to and be constituted by the legislature other than the executive as highlighted in Chapter 7. This will guarantee effective implementation by an independent accountor from its accountee the executive. Additionally, accountability institutions such as the TEITA and CHRAG should be given powers to implement its decisions other than merely producing reports. Such powers could involve charging accountees fines or revoking certain privileges or permits. Such powers would be in line with international recommendations, which require states to establish accountability implementation mechanisms that are sufficiently independent and have adequate mandate to carry out their accountability function as shown in Chapter 4.

Third, to avoid redundancy and its associated problems, the Petroleum Act ought to be amended so as to ensure that PURA's extensive mandate dose not adversely affect matters that lie within the domain of other authorities. PURA's Extensive mandate as discussed in Chapter 7 creates duplicity of mandates and problems associated with multiple accountability including enabling the accountee room to manoeuvre and hence avoid being effectively put to account.

Lastly, Tanzania should ensure implementation of the commendable provisions of the Permanent Sovereignty Act that require all disputes arising from the exploitation of natural resources to be adjudicated by judicial bodies or other organs established by law in Tanzania. To do so, Tanzania needs to promulgate regulations that are in line with the provisions of the bilateral investment treaties (BITs) concluded by Tanzania with several countries that could adversely affect the implementation of sovereignty Act. The Regulations ought to ensure that

[13] Ibid.

[14] See section 3 of Chapter 7 of this thesis.

fair and equitable treatment is afforded to hydrocarbon companies in the domestic dispute settlement tribunals and courts.

8.5 QUESTIONS FOR FURTHER RESEARCH

The research was conducted at a time when the hydrocarbon legal framework in Tanzania was being promulgated. Regulations for implementation of the legal framework either are in the process of being promulgated or are yet to undergo such a process. Institutions created by the legal framework are still being established and some are yet to start functioning. While this study considered the question, whether the law incorporates the aspects of transparency, and accountability, further research is needed to gather empirical evidence on how these institutions work in practice.

CHAPTER 8

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