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Resource Contracts Secrecy vis-à-vis the People's Permanent Sovereignty over Natural Resources: A Legal Analysis of Tanzania's Extractive Industry

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Abstract

This paper examines the implications of resource contract secrecy on the people's right to permanent sovereignty over natural resources (PSNR). It is estimated that governments around the world undertake public contracts worth US$9.5 trillion annually. Extractive contracts particularly affect the lives of about 3.5 billion people globally. Nevertheless, public contracts remain top government secrets in most countries, including Tanzania. While the government of Tanzania has taken a progressive approach to protect its natural resources interests through several PSNR instruments, it has simultaneously limited the exercise of that right by the people by denying them access to extractive resource contracts. Considering the country's high levels of corruption, this paper concludes that contract secrecy is a corruption hideout which may compound the mismanagement of extractive resources. Thus, proactive disclosure of resource contracts and the re-enactment of powers of Parliament to review and endorse extractive contracts before their signing are proposed.

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1. INTRODUCTION

The extractive industry is a high value sector which can promote national development if properly managed. In Tanzania, the extractive sector contributed 7.2% of the national GDP in the financial year 2020/21 and was projected to account for 10% of the GDP by the year 2024/25.[1] According to the Organisation for Economic Cooperation and Development (OECD) Foreign Bribery Report for 2014, the extractive sector has the highest corruption levels than other economic sectors.[2] Factors which account for this peril include deficiencies in national anti-corruption legal and judicial systems, politicised decision-making processes in the extractive value chain, inefficient corporate anti-corruption compliance and due diligence procedures and, ineffective transparency and accountability mechanisms.[3] Thus, one of the measures recommended globally to enhance governance in the extractive industry is contracts disclosure.[4]

It is estimated that governments around the world undertake public contracts worth US$9.5 trillion annually.[5] These contracts impact on the daily lives and economic well-being of the entire world population. Extractive contracts particularly affected the well-being of about 3.5 billion people in 63 countries.[6] Despite their significant impact on the people's well-being, for many years, public contracts have been treated as top government secrets in most countries, including Tanzania.[7] Such secrecy denies the public an opportunity to assess the terms of those contracts and determine the extent of their benefits to the people. Similarly, contract secrecy undermines the people's right to permanent sovereignty of their natural resources which is a fundamental element of the right to self-determination as enshrined in several international legal instruments.[8]

Applying an analytical legal lens to the extractive industry, this paper examines the Tanzanian resource contract regime and its implications on the people's right to permanent sovereignty over natural resources. It argues that although Tanzania has adopted several legal initiatives towards promoting resource contracts transparency, it lacks the political will to implement those initiatives. Consequently, the people who are beneficiaries of the resources cannot assess the contracts to determine the propriety of their terms and hold the government accountable. This paper argues further that, considering the high levels of corruption in Tanzania, maintaining contract secrecy is a corruption hideout which may perpetuate mismanagement of natural resources. It therefore recommends for the government to honour its international obligations to disclose extractive contracts and for the re-enactment of the power of Parliament to review and endorse extractive contracts before their signing.

This article is divided into six main parts. After this introduction, the next part delves into the doctrine of permanent sovereignty over natural resources, discussing its evolution and core tenets, how it is incorporated in Tanzanian law, and its place in

[1] TEITI, *Tanzania Extractive Industries Transparency Initiative 13th Report for the Period of 1 July 2020 to 30 June 2021* (TEITI 2023) 32.
[2] OECD, *OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials* (OECD Publishing 2014) 21.
[3] OECD, *Corruption in the Extractive Value Chain: Typology of Risks, Mitigation Measures and Incentives* (OECD Publishing 2016) 15–17.
[4] EITI, *Contract Transparency in Oil, Gas and Mining: Opportunities for EITI Countries* (EITI International Secretariat 2018) 10.
[5] Marchessault L, *Open Contracting: A New Frontier for Transparency and Accountability* (World Bank Institute & Open Contracting 2013) 1.
[6] Open Contracting, 'Delving into the World of Oil, Mining and Gas Contracts with Open Contracting' https://www.open-contracting.org/what-is-open-contracting/extractives/ accessed 22 January 2024 and World Bank, 'Extractive Industries' https://www.worldbank.org/en/topic/extractiveindustries/overview accessed 22 January 2024.
[7] Open Contracting (n 6).
[8] UNGA *Resolution 1803 (XVII) Permanent Sovereignty over Natural Resources* 1194th Plenary Meeting 14 December 1962.

promoting resource contracts transparency. Part three presents the global extractive industry transparency standards whereas part four examines their implementation in Tanzania. Part Five examines the implications of contract secrecy on the people's PSNR rights, while Part Six presents the conclusion and reform suggestions based on the findings of this paper.

2. PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES

States have the right to freely exploit and dispose of natural resources found within their boundaries.[9] This principle is established in international law as the right to permanent sovereignty over natural resources (PSNR).[10] PSNR entitles states with the exclusive autonomy over the use and control of their natural wealth. However, in the exercise of this right, states have an obligation to protect and promote the interests of their people.[11] This implies that states are trustees of natural resources while the ownership is vested in the people.

The exercise of PSNR is rooted in the concept of sovereignty. The academic discourse on the definition of sovereignty is broad.[12] However, it basically refers to the recognition of the power of people or institutions to govern themselves at all levels.[13] At the international platform, it denotes the external recognition of political bodies exercising effective control over a population within a defined territory.[14] These attributes are *sine qua non* to conferring international personality on a state.[15] At the domestic level, sovereignty refers to the power of the government within its territory and the ability to exercise control over its people. Under the social contract theory, this power in fact comes from the people who voluntarily cede it to the government in the hope that the government will protect their rights. Therefore, the doctrine of PSNR does not concern states alone but also the people of those states.

2.1. Evolution of PSNR as an international law principle

PSNR as an international law principle emerged in the 1950s to 1960s during the formative years of decolonisation. As formerly colonised states obtained their independence, they simultaneously gained the right of membership to the United Nations, eventually becoming the majority in the United Nations General Assembly (UNGA).[16] Counting on their number in the UNGA, the new states pursued for changes to the traditional rules of international law that undermined their political and economic sovereignty.[17] They sought to introduce new principles which would replace the old ones that were detrimental to their economic interests.[18] PSNR was one of the new principles promulgated by these states.

Early indications of introducing PSNR in international law were observed in 1952 when UNGA adopted a Resolution on Integrated Economic Development and Commercial Agreements (Integrated Economic Resolution). Notably, it recognised for the first time in international law history the right of underdeveloped countries to determine freely the use of their natural resources to further their economic development plans in

[9] UNGA (n 8) para 4.
[10] UNGA (n 8). Also, Charter of the United Nations (1945), art 2(1) and the Rio Declaration on Environment and Development (1992), principle 2.
[11] African Charter on Human and Peoples Rights (1981), art 21(1).
[12] See A Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004) 100–107 for a detailed analysis.
[13] WP Nagan and C Hammer, 'The Changing Character of Sovereignty in International Law and International Relations' (2004) 43(141) *Columbia Journal of Transnational Law* 153.
[14] Ibid 153.
[15] Montevideo Convention on the Rights and Duties of States (1933), art 1.
[16] M Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier Publishers 1979) 140.
[17] A Anghie (n 12) 202.
[18] Ibid 198.

accordance with their domestic priorities.[19] It appears that this right had existed hitherto in relation to developed nations only. The Resolution served to extend its application exclusively to underdeveloped nations.

The Integrated Economic Resolution assigned underdeveloped nations not only the right to freely use their natural resources but also the obligation to use those resources to further their economic development and the growth of the global economy.[20] A dual role was created in this regard: furthering domestic economic interests and contributing to the expansion of the world economy. It appears that this provision was a compromise on the competing demands between third world countries and developed nations. On the one hand, independent developing nations intended to liberate themselves from the economic domination of Western powers. So, the furthering of domestic economic interest was their main agenda. On the other hand, developed nations wanted to install systems that would maintain their interests in developing nations.[21] Thus, the obligation to promote the growth of the world economy intended to satisfy them.

Subsequent discussion in UNGA led to the adoption of a Resolution on Permanent Sovereignty Over Natural Resources.[22] This Resolution was the first concrete international recognition of PSNR. In Paragraph 1, it declares that the exercise of the right to PSNR must be for national development and for the welfare of the people of the state concerned. Thus, the exploration and exploitation of natural resources must conform to domestic rules of the host state and to international law.[23] Following the adoption of this Resolution, PSNR has attained the status of customary international law and has been incorporated in international law instruments,[24] regional instruments[25] as well as being applied by international judicial organs and arbitration tribunals.[26]

2.2. Canons of PSNR

Permanent sovereignty over natural resources is a principle of international law which grants upon resource-rich nations the power to control their natural resources.[27] The exercise of PSNR entails five canons: (1) the right of states to freely dispose of natural resources; (2) the right to freely explore and exploit natural resources; (3) the right to regulate the exploration, development and disposition of natural resources; (4) the right to use natural resources for national development and the well-being of their people; and (5) the right to resolve disputes through national law. The exercise of these rights must be undertaken in accordance with international law.[28] The management of resource contracts is an essential component of the powers of states to regulate the exploration, development and disposition of natural resource and the promotion of national development and people's welfare. Therefore, this paper examines how the Tanzanian resource governance framework embraces this PSNR tenet.

2.3. PSNR in Tanzania

In Tanzania, the doctrine of PSNR has both constitutional and statutory foundations. Article 8(1)(a) of the Constitution of the United Republic of Tanzania of 1977 states that 'sovereignty resides in the people and it is from the people that the Government […]

[19] UNGA *Resolution 523 (VI) Integrated Economic Development and Commercial Agreements* (1952), preamble para 1.
[20] Ibid.
[21] M Bedjaoui (n 16) 78.
[22] UNGA (n 8).
[23] Ibid, para 2 & 3.
[24] See common article 1 to the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966.
[25] See for instance Article 21 of the African Charter on Human and People's Rights.
[26] See for example, Texaco Overseas Petroleum Company v The Government of the Libyan Arab Republic, 17 *International Legal Materials* (1978) 3-37.
[27] SP Ng'ambi, 'Permanent Sovereignty Over Natural Resources and the Sanctity of Contracts, From the Angle of Lucrum Cessans' (2015) 12(2) *Loyola University Chicago International Law Review* 154.
[28] Ibid.

shall derive all its power and authority'. Further, article 8(1)(c) of the Constitution expressly provides that the government shall be accountable to the people. Thus, in line with these constitutional provisions, the government is required to operate in a way which ensures that national wealth and resources are protected and used for the development of the people of Tanzania.[29] In that regard, a duty is placed on all persons to protect natural resources in the country. Specifically, article 27(2) of the Constitution provides that:

> All persons shall be required by law to safeguard the property of the state authority and all property collectively owned by the people, to combat all forms of waste and squander, and to manage the national economy assiduously with the attitude of people who are masters of the destiny of their nation.

In line with the spirit of strengthening domestic control over natural resources and ensuring that such resources benefit the people of Tanzania, in 2017, the government enacted two specific laws on PSNR. These are the Natural Wealth and Resources (Permanent Sovereignty) Act No 5 of 2017 and the Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act No 6 of 2017. The two statutes assert the permanent sovereignty of the people of Tanzania over natural wealth and resources located in its territory.[30] They further domesticated the UNGA Resolution 1803 (XVII) on PSNR, thereby making the Resolution enforceable in domestic courts of law.

Regarding ownership, section 5(1) and (2) of the Natural Wealth and Resources (Permanent Sovereignty) Act (the Permanent Sovereignty Act) provides that natural wealth and resources shall remain the property of the people, held in trust by the President on their behalf. The Act requires the government to exercise control over those resources on behalf of the people and ensure that every agreement or arrangement over natural resources secures fully the interests of the people and the country.[31] The context under which such interests are secured in resource contracts is the major subject of this article.

2.4. Relationship between PSNR and resource contract transparency

The right to PSNR emerged originally as an aspect of the right to self-determination during the decolonisation process. As colonised territories fought for their political freedom, they also claimed their right to full control over the resources located in them.[32] Since the traditional public international law regulated affairs between states, this right was vested primarily in the state.[33] States acquired the right to PSNR which entitles them to the enjoyment of natural resources within their boundaries. However, during decolonisation, peoples and the state referred to the same thing.[34] It is in that sense that Paragraph 1 of the PSNR Resolution recognises it as a right of peoples and nations.[35] As such, the people have the inherent entitlement to enjoy and utilise natural wealth and resources that are in the control of their state.[36] This right also

[29] Constitution of the United Republic of Tanzania 1977, art 9(i).
[30] Natural Wealth and Resources (Permanent Sovereignty) Act 2017 (No 5 of 2017), s 4(1).
[31] Ibid, s 6(1).
[32] E Enyew, 'Application of the Right to Permanent Sovereignty over Natural Resources for Indigenous Peoples: Assessment of Current Legal Developments' (2017) 8 *Arctic Review on Law and Politics* 225.
[33] D Cambou D and S Smis, 'Permanent Sovereignty Over Natural Resources from a Human Rights Perspective: Natural Resources Exploitation and Indigenous Peoples' Rights in the Arctic' (2013) 22(1) *Michigan State International Law Review* 354.
[34] LA Miranda, 'The Role of International Law in Resource Allocation: Sovereignty, Human Peoples-Based Development' (2012) 45(3) *Vanderbilt Journal of Transnational Law* 798.
[35] UNGDA (n 8).
[36] See International Covenant on Civil and Political Rights (1966), art 47 and International Covenant on Economic, Social and Cultural Rights (1966), art 25.

bestows upon them the right to participate in the management of those resources.

Disclosure of resource contracts is a mechanism which allows the people to participate in the regulation of natural resources by enabling them to assess the terms of the exploitation and hold entrusted officials accountable where appropriate. To promote this type of accountability in resource governance, several initiatives have been taken globally. The next part discusses these global initiatives with the view to informing the analysis of the Tanzanian resource contracts transparency regime.

3. GLOBAL EXTRACTIVE INDUSTRY TRANSPARENCY STANDARDS

Transparency standards targeting the extractive industry have proliferated since the early 2000s. Currently, there are three major forums advocating for transparency in this sector. These are the Kimberley Process, Publish What You Pay, and the Extractive Industries Transparency Initiative. The following sub-parts discuss the standards and norms established under these initiatives, and their implications on extractive sector governance in developing countries, particularly Tanzania.

3.1. The Kimberly Process

The Kimberley Process is the first multilateral forum dedicated to preventing the flow of so-called 'blood diamonds'.[37] It sets transparency and oversight standards in the trade of diamonds to ensure that rough diamonds sold by rebel groups and their allies do not flow into the global market.[38] Its main regulatory instrument is the Kimberly Process Certification Scheme. The Scheme was launched in 2002 in Interlaken, Switzerland[39] and was named after the city where the initial negotiations took place, Kimberley in South Africa. The Scheme entered into force in 2003 when participating states started to implement its rules.[40] Currently, the Kimberley Process has 56 participants, representing 82 countries.[41] Tanzania is among the participants of the Kimberly Process. Jointly, Kimberley Process participants regulate 99.8 per cent of the global trade in diamonds.[42]

Under the Scheme, participants must meet the set minimum requirements, establish national legislations and institutions, and enforce import or export controls on rough diamonds.[43] Furthermore, they must abide by transparency processes, exchange critical data with other participants, and trade solely with fellow Kimberley Process participants. In addition, they should certify all rough diamonds as conflict-free before channelling them into the global supply chain.[44]

The Kimberley Process has contributed significantly to reducing the volume of conflict diamonds traded internationally. In the 1990s, conflict diamonds accounted for 15 per cent of the global diamond trade.[45] By the 2010s, the amount had dropped to less than one per cent.[46] With this achievement, the Kimberley Process has shown to be an important tool in enhancing transparency and accountability in the extractive industry, particularly the mining sector. Therefore, its certification requirements may be scaled up

[37] PD Cameron and M Stanley, *Oil, Gas, and Mining: A* Sourcebook *for Understanding the Extractive Industries* (World Bank Group 2017) 228.

[38] United States Department of State, 'Conflict Diamonds and the Kimberley Process' https://www.state.gov/conflict-diamonds-and-the-kimberley-process/ accessed 26 December 2023.

[39] Kimberley Process, 'What is the Kimberley Process?' https://www.kimberleyprocess.com/en/what-kp accessed 26 December 2023.

[40] Ibid.

[41] Ibid.

[42] Ibid.

[43] Ibid.

[44] PD Cameron and M Stanley (n 37) 228.

[45] A Howard, 'Blood Diamonds: The Successes and Failures of the Kimberley Process Certification Scheme in Angola, Sierra Leone and Zimbabwe' (2015) 15(1) *Washington University Global Studies Law Review* 153.

[46] JE Nichols, 'A Conflict of Diamonds: The Kimberley Process and Zimbabwe's Marange Diamond Fields' (2012) 40(4) *Denver Journal of International Law and Policy* 650.

across the extractive industry by requiring countries to certify that the traded extractive resources are conflict- and corruption-free and have been exploited in full regard to the interests of the people of the host country.

3.2. Publish What You Pay

Publish What You Pay is a worldwide coalition of civil society organisations campaigning for the greater transparency of resource revenues.[47] It was founded in 2002 to address corruption and mismanagement caused by opacity in the extractive industry in resource-rich nations. It boasts of having over 1,000 member organisations in 51 countries and claims to be the leading global movement advocating for accountable spending of natural resource revenues to promote national development. The coalition's primary goal is to ensure that citizens in resource-rich nations benefit from those endowments. Its strategy promotes the disclosure of payments made by companies to governments, and revenues received by governments from extractives companies.[48] Such disclosure is expected to enable citizens and civil society to analyse transactions, question suspicious ones, determine the benefits of an extractive project to the people, and hold public officials accountable in case of violation.[49]

Publish What You Pay's scope of work includes anti-corruption and contract transparency.[50] Regarding contract transparency, the Coalition encourages open and competitive bidding processes, as well as the publication of the full contract terms in the extractive industry.[51] In 2020 it launched a global campaign called #DiscloseTheDeal, which calls for the comprehensive disclosure of extractive contracts.[52] However, being a coalition of civil society organisations, Publish What You Pay lacks the legal force to demand implementation of its standards by governments and companies. Therefore, to achieve effectiveness, it collaborates with the Extractive Industries Transparency Initiative which is legislated for in most of its member countries. In that regard, it played a crucial role in ensuring that contract disclosure requirements are incorporated in the Extractive Industries Transparency Initiative Standard which is elaborated in the next sub-part.[53]

3.3. Extractive Industries Transparency Initiative (EITI)

EITI is a soft-law international multi-stakeholder body that sets and monitors the global standard for promoting transparency and accountability in the management of oil, gas, and mineral resources.[54] It was established in 2003 out of the Publish What You Pay campaign to leverage the obligation of disclosing payments between companies and resource host countries.[55] Over the years, it has evolved from its initial focus on revenue transparency to addressing opacity across the extractive industry value chain.[56] Its implementation strategy is the EITI Standard which is updated regularly to address new developments in extractive sector governance. The current edition of the Standard was published in 2023. There are more than 50 EITI implementing countries, of which 25 are African countries, including Tanzania.[57]

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[47] Publish What You Pay, 'Our *History'* https://www.pwyp.org/about/ accessed 26 December 2023.

[48] Publish What You Pay, 'Revenue Transparency' https://www.pwyp.org/areas-of-work/revenue-transparency/ accessed 26 December 2023.

[49] Ibid.

[50] Publish What You Pay, 'What We Work On' https://www.pwyp.org/areas-of-work/ accessed 26 December 2023

[51] PD Cameron and M Stanley (n 37) 228.

[52] Publish What You Pay, '#DiscloseTheDeal' https://www.disclosethedeal.org/ accessed 26 December 2023.

[53] Ibid.

[54] EITI, 'What We Do' https://eiti.org/about accessed 2 January 2024.

[55] EITI, 'History of the EITI' https://eiti.org/history accessed 2 January 2024.

[56] EITI, *The EITI Standard 2019* (EITI International Secretariat 2019) 2.

[57] EITI, *Anniversary Report* (EITI International Secretariat 2023) 10-11.

The EITI Standard 2023 establishes seven requirements for promoting transparency and accountability across the extractive industry value chain. The seven requirements include oversight by the multi-stakeholder group; legal and institutional framework, contracts and licences; exploration and production; revenue collection; revenue management and distribution; social and economic spending; and outcomes and impact. For the purposes of this paper, only requirement number two on contracts and licences will be discussed.

Requirement two of the EITI Standard establishes five key contract transparency obligations for implementing countries. First, governments should ensure transparency of the legal and fiscal regime governing the extractive industry. Secondly, information about licences granted and contracts signed should be disclosed to the public. Specifically, Requirement 2.4(a) requires all contracts and licences granted from 1 January 2021 to be disclosed and made publicly accessible. Thirdly, countries are required to maintain a publicly accessible register of licences with information about the licence holder, licence area, licence duration, and commodity being produced. Fourth, countries must maintain a publicly available register of beneficial ownership of the companies engaged in extractive activities. Fifth, the government should disclose information about state participation in extractive operations. These disclosure requirements are intended to enable the public to understand how the extractive sector is managed, the laws and procedures for awarding exploration and production rights, and the institutional responsibilities of the state in managing the sector. Also, they intend to ensure the public accessibility of comprehensive information on property rights related to extractive projects and the contractual rights and obligations of the companies involved in those projects.

Implementation of the EITI Standard on contract disclosure requirements contributes significantly to improving resource governance, including controlling corruption. For instance, in 2020, the local EITI chapter in the Democratic Republic of Congo published a contract regarding the purchase by Multree of royalties in the Metalkol copper and cobalt project from the state-owned mining company Gécamines.[58] Multree was incorporated in the British Virgin Islands and linked to Dan Gertler whom the United States of America's authorities sanctioned in 2017 on corruption allegations.[59] The low price paid by Multree for the high-value royalties, and the connection between Gertler and the project attracted wide criticism from local and international stakeholders and media.[60] This suggests that contract disclosure is necessary in stimulating public oversight of natural resources governance.

3.4. Other International Contract Transparency Initiatives

Several other international organs have also committed to promoting contract transparency. Firstly, the OECD Principles for Integrity in Public Procurement requires governments to adopt procurement procedures that ensure transparency for suppliers, stakeholders, and oversight institutions across the procurement cycle.[61] Secondly, the G-20 Principles for Promoting Integrity in Public Procurement commits countries to ensuring open and timely publication of procurement laws, rules, procedures, opportunities, and awards.[62]

[58] EITI, *EITI Progress Report: Extractive Transparency in a Year of Change* (EITI International Secretariat 2021) 13.
[59]Reuters, 'Mining Magnate Gertler Expects to Recoup Congo Royalties Investment by 2026' (18 November 2020) https://www.reuters.com/article/ozabs-uk-congo-mining-gertler-idAFKBN27Y0WD-OZABS accessed 13 January 2024.
[60]BBC, 'Dan Gertler - The Man at the Centre of DR Congo Corruption Allegations' (23 March 2021) https://www.bbc.com/news/world-africa-56444576 accessed 13 January 2024.
[61] OECD, *Principles for Integrity in Public Procurement* (OECD Publishing 2009) 22.
[62]G-20, 'Principles for Promoting Integrity in Public Procurement' (2015) http://www.seffaflik.org/wp-content/uploads/2015/02/G20-PRINCIPLES-FOR-

Thirdly, the 2016 London Anti-Corruption Summit resolved to implement measures to ensure transparent contracting and prevent theft and misuse of public funds.[63] This includes assisting developing countries to collect information on beneficial owners of companies for use in contracting processes, and sharing timely and open contracting data to enable public scrutiny. Cumulatively, there is a broad framework globally advocating for transparency of contracts in the extractive industry. The extent to which Tanzania has complied with these disclosure requirements is the subject of the discussion in part of this article.

4. RESOURCE CONTRACT TRANSPARENCY REGIME AND IMPLEMENTATION IN TANZANIA

Tanzania has taken several initiatives to create the legal and institutional framework for promoting contract transparency in the extractive sector. This part discusses the various contract disclosure frameworks put in place and the way they have been implemented.

4.1. Extractive Industries Transparency Initiative

In 2009, Tanzania joined the EITI as part the government's strategy to make the extractive sector more competitive and maximise national benefits.[64] It subsequently established a local chapter known as the Tanzania Extractive Industries Transparency Initiative (TEITI) which operates under the Ministry of Minerals. TEITI was given legal impetus in 2015 following the enactment of the Tanzania Extractive Industries (Transparency and Accountability) Act No 23 of 2015 (TEITAA). Section 4 of the Act establishes the Tanzania Extractive Industries (Transparency and Accountability) Committee (TEITAC) with oversight powers to promote transparency and accountability in the extractive sector. Within the EITI framework, TEITAC is the multi-stakeholder group. It comprises of a chairperson appointed by the President and other eight members appointed by the Minister responsible for minerals.[65] Composition of members includes two members from civil society organisations, two members representing extractive companies, and four members from government institutions.

Section 16(1)(a) of the TEITAA enjoins the multi-stakeholder group to *cause* the Minister responsible for mining, oil, and natural gas to publish all extractive industry agreements, contracts, and licences through a website or widely accessible media. It is also empowered to determine confidential contract information that might be exempted from disclosure.[66] This contract disclosure provision conforms, in theory, to Requirement 2.4 of the EITI Standard 2023. However, since the enactment of the TEITAA in 2015, no extractive contract was disclosed by the government.

It is not clear from the statute how the TEITAC should *cause* the Minister to publish those agreements. From 2018, the Committee and the government engaged with extractive industry stakeholders to identify a better approach of implementing the contract disclosure requirement.[67] As a result, a roadmap for such disclosure was prepared in

PROMOTING-INTEGRITY-IN-PUBLIC-PROCUREMENT.pdf accessed 13 January 2024.

[63] Anti-Corruption Summit, *Communique* (2016) https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/20-24June2016/V1603744e.pdf accessed 13 January 2024, para 9.

[64] EITI, 'Tanzania' https://eiti.org/countries/tanzania accessed 22 January 2024.

[65] TEITAA, s 5 as amended by the Written Laws (Miscellaneous Amendments) (No 4) Act 6 of 2021, s 51.

[66] TEITAA, s 27(2); Tanzania Extractive Industries (Transparency and Accountability) Regulations, GN No 141 of 8 February 2019, reg 13.

[67] Ministry of Minerals, *Hotuba ya Mheshimiwa Doto Mashaka Biteko (Mb.), Waziri wa Madini Akiwasilisha Bungeni Makadirio ya Mapato na Matumizi ya Fedha kwa Mwaka 2021/2022* (Wizara ya Madini 2021) 98.

early 2019.[68] According to that roadmap, a government portal for disclosing contracts would be established by January 2022. However, up to the time of writing this ARTICLE, that portal was not yet established. In July 2023, TEITI indicated in its annual workplan that it planned to prepare a roadmap for disclosing extractive contracts in the third quarter of 2023.[69] It appears that the initial roadmap had been abandoned. Nevertheless, up to the time of writing this ARTICLE, the new roadmap had not yet been published as well. In these circumstances, contract disclosure in Tanzania remains uncertain.

4.2. Establishing contract registers

In line with the EITI Standard, the government is required by law to establish a register of all arrangements or agreements relating to natural resources.[70] Information about oil and gas exploration or production contracts, permits, and licences must be entered in the register. Such information includes parties to the agreement, the subject matter, duration, value or consideration, percentage of royalty, and adherence to local content and corporate social responsibility requirements.[71] Requirement 2.3 of the EITI Standard of 2023 requires such a register to be publicly accessible. However, there is no explicit legal provision in Tanzania which requires the register to be a public document.

The register is kept and maintained by the Director responsible for natural wealth observatory activities in the Ministry of Constitutional and Legal Affairs.[72] At the time of writing this article, information available on the website of the Ministry did not provide any clues on the establishment of the register.[73] Similarly, section 84 of the Petroleum Act requires the Petroleum Upstream Regulatory Authority to establish and maintain a registry of petroleum contracts, licences, and permits. The Authority has already established an offline version of the registry, and plans are underway to publish it online.[74] The public can access the petroleum registry on request.[75] Unlike the petroleum sector, the mining sector has progressed further in this aspect. The Mining Commission has established an online mining cadastre which provides public access to basic information on mining licences, such as licence holder, duration, commodity, and area covered.[76]

While the establishment of petroleum and mining registers is commendable, the information contained in them is insufficient to trigger productive public scrutiny and hold public officials accountable. The information provided does not disclose interests held by the licence holders in those projects or the revenue arrangements on the part of the government. This article submits that fiscal terms are the most important aspect of the extractive industry transparency regime. They help the public to identify the revenue streams and assess the public's benefits from the extractive projects. Unlike the register maintained by the Petroleum Upstream Regulatory Authority, the register to be established at the Ministry of Constitutional and Legal Affairs addresses this shortcoming

[68] TEITI, 'Roadmap for Disclosing Contracts in Tanzania' https://www.teiti.go.tz/storage/app/uploads/public/60d/c11/125/60dc11125209354740801 5.pdf accessed 22 January 2024.

[69] TEITI, *Operational Workplan for the Year 2023/24* (2023) https://www.teiti.go.tz/storage/app/media/uploaded-files/Final%20TEITI%20-%20WORKPLAN_2023_2024.pdf accessed 22 January 2024.

[70] Natural Wealth and Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Regulations 2020, reg 5.

[71] Ibid, second schedule.

[72] Ibid, reg 5.

[73] Natural Wealth and Resources Observatory Unit https://www.sheria.go.tz/pages/natural-wealth-and-resources-observatory-unit accessed 22 January 2024.

[74] TEITI, *Tanzania Extractive Industries Transparency Initiative 11th Report for the Period 1 July 2018 to 30 June 2019* (TEITI 2021) 54.

[75] Petroleum Act, s 84(6).

[76] Mining Cadastre Portal https://portal.madini.go.tz/map/ accessed 22 January 2024.

by requiring the disclosure of the value or consideration of the project, and its adherence to corporate social responsibility and local content provisions.[77] However, the absence of an explicit provision mandating public disclosure of its content makes the prospects of utilising it to enhance public security and oversight unrealistic.

4.3. Review of contracts by Parliament

The Constitution of the United Republic of Tanzania entrusts Parliament with oversight powers over the government. In the same vein, section 4 of the Natural Wealth and Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Act, No. 6 of 2017 empowers the Parliament to review any arrangements and contracts entered by the government concerning natural wealth and resources. Where Parliament determines that any arrangement or contract contains an unconscionable term, it may pass a resolution for re-negotiation.[78] Regulation 2 of the Natural Wealth and Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Regulations 2020[79] defines an unconscionable term as:

> [a]ny term in the arrangement or agreement on natural wealth and resources which is contrary to good conscience and the enforceability of which jeopardises or is likely to jeopardise the interests of the People of the United Republic.

The procedure for review is as follows.[80] The Minister of Constitutional and Legal Affairs, as coordinator and manager of all government contracts, directs the ministry responsible for concluding a specific contract to prepare a report.[81] The content of that report is not specified by law. Impliedly the content will depend on the discretion of the reporting ministry. After obtaining the report, the Minister of Constitutional and Legal Affairs reviews it to establish whether the contract complies with the Constitution, and the Natural Wealth and Resources (Permanent Sovereignty) Act. Thereafter, the Minister submits to Cabinet a report regarding that contract. The Cabinet deliberates and prepares a resolution on the report. Upon the Cabinet's directives, the Minister presents the Cabinet's resolution to Parliament. It is at this point that Parliamentary powers of reviewing resource contracts come into play. Should Parliament find any term to be unconscionable, it may pass a resolution advising the government to renegotiate the contract.[82]

Throughout the above review process, Parliament does not access the particular contract being reviewed. Its review centres on the resolution of the Cabinet. There is no legal provision requiring the Minister to submit the actual contract to Parliament. In 2014, an addendum agreement between the government and two oil companies was leaked, sparking serious public debate. In response, the parliamentary Public Accounts Committee demanded the Tanzania Petroleum Development Corporation which is the National Oil Company to submit all petroleum contracts to Parliament for review. The Corporation did not comply with this order, asserting that contract disclosure was restricted by confidentiality clauses in the agreements.[83] This claim was refuted by the

[77]Natural Wealth and Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Regulations 2020, Second Schedule.
[78]Natural Wealth and Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Regulations 2020, regs 3(2) and 9(1).
[79] Government Notice No 57 of 31 January 2020.
[80]Natural Wealth and Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Regulations 2020, reg 6.
[81]Ibid, regs 4(2) and 8(1).
[82]Natural Wealth and Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Act 6 of 2017, s 5.
[83] RH Pedersen and P Bofin, *The Politics of Gas Contract Negotiations in Tanzania: A Review*, DIIS

oil companies, particularly Statoil, which cast the blame on the government for the contract's secrecy.[84] This forced the parliamentary committee to order the detention of two of the Corporation's senior officials.[85] However, they were released shortly after arrest, pending clarification from the Attorney General to the Police on whether the parliamentary committee was legally empowered to order the arrest of public officials who fail to comply with its directives.[86]

In principle, the signing of extractive contracts requires prior approval of the Cabinet.[87] Therefore, the established review procedure engages the Cabinet to review its own decision and forward the outcome of its review to Parliament for deliberation. Since Parliament does not access the actual contract, its review is logically limited to the views of the Cabinet. It is astonishing that the Cabinet that approves contracts before signing is the same organ triggering Parliament to review those contracts while denying it access to the actual document. In this framework, parliamentary oversight on government contracts is blind and jeopardises the people right to PSNR since parliament represents the people.

Some attempts were made in 2017 to remedy this situation, especially for the oil and gas sector. In July 2017, the government enacted section 47(6) into the Petroleum Act, requiring all petroleum agreements to be approved by Parliament before coming into force.[88] This provision gave Parliament the power to review and endorse petroleum contracts before their implementation. However, three months later, the government went back to Parliament to amend the Petroleum Act and deleted that provision.[89] The government's ground for deleting that provision was that it conflicted with the Natural Wealth and Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Act which empowers Parliament to review signed contracts, and not to approve their coming into force.[90] This article submits that the level of secrecy surrounding extractives contracts is a sign of the government's unwillingness to be checked and held accountable for their terms. Thus, contractual terms which may be prejudicial to public interests may never be uncovered.

5. IMPLICATIONS OF CONTRACT SECRECY ON THE PSNR RIGHTS OF THE PEOPLE

Contract secrecy limits public scrutiny of the terms of the exploitation of extractive resources and creates an opportunity for corrupt officials to agree to exploitative terms for their personal gain. Critical reflection on the Tanzanian resource contract regime draws several implications on the people's right to PSNR as discussed below.

5.1. Undermining the public scrutiny needed to ensure accountability in resource governance

Through PSNR, the people have an inherent right to enjoy their natural endowments. Governments as trustees of those endowments must manage their exploitation on behalf and for the benefit of the people. The people as beneficiaries must have the power to hold the trustee accountable. To do so effectively, they must know the terms of the exploitation of those resources. Therefore, contract secrecy undermines the people's right to PSNR by excluding them from overseeing the management of their resources.

Working Paper 2015:03 (Danish Institute for International Studies 2015) 20.

[84] Ibid.

[85] *The East African*, 'Secret oil and gas deals generate heat in Dar' (15 November 2014) https://www.theeastafrican.co.ke/tea/news/east-africa/secret-oil-and-gas-deals-generate-heat-in-dar--1329904 accessed 22 January 2024.

[86] Ibid.

[87] Petroleum Act, s 47(2).

[88] Written Laws (Miscellaneous Amendments) Act No 7 of 2017, s 30.

[89] Written Laws (Miscellaneous Amendments) (No 3) Act No 9 of 2017, s 16.

[90] Bunge la Tanzania, *Majadiliano ya Bunge Mkutano wa 8 Kikao cha Sita* (12 September 2017) 74–75.

In the absence of contract transparency, the Tanzanian public depend on leaks to establish the appropriateness of the contracts entered by the government concerning their resources. For instance, in July 2014, an addendum to the agreement between Tanzania and the Norwegian Statoil leaked.[91] The leak sparked a debate regarding Tanzania's stake in oil and gas production agreements. The bone of contention was the profit split terms of the agreement. While the main production sharing agreement between Tanzania and Statoil signed in 2007 has never been made public, the leaked addendum, signed in 2012, indicated that the multinational company would deliver a lower profit share to the government at all levels of production. This was contrary to the Model Production Sharing Agreement (MPSA) of 2010, and to international good practice which warrants an increase in the government's profit share when production increases, and vice versa.

As in most production sharing agreements globally, the Tanzanian model agreement of 2010 required the amount of gas share collected from the contractor to vary according to the amount of gas produced per day. [92] For instance, it allocated 60 per cent share of profit gas to the government and 40 per cent to the contractor when the contract area produced 500 million standard cubic feet per day.[93] If production increased to 1000 or above 1500 million standard cubic feet per day, the government's share would be 70 per cent and 80 per cent respectively. In that case, the contractor's share of the profit gas would be 30 per cent and 20 per cent, respectively.

Contrary to those terms, the addendum agreement allocated the government's share of the profit gas at 37.5, 45 and 50 per cent for 600, 1,200 and above 1,500 million standard cubic feet per day, respectively.[94] Therefore, at all levels of production, the addendum agreement delivered to the government a lower share of the profit gas. Considering the differences between the Model Production Sharing Agreement of 2010 and the addendum agreement, analysts calculated that Tanzania would lose over US$400 million annually when production was 500 million standard cubic feet per day.[95] Equally, it would lose about US$900 million per year if production reached 1,000 million standard cubic feet per day.[96]

Manley and Lassourd argue that the leaked addendum saga presents a good case for examining transparency in Tanzania's extractive sector contracts.[97] They assert that the government's secrecy regarding agreements entered into on behalf of the people creates mistrust, and curtails constructive dialogue from the public.[98] They contend that systematic disclosure of such contracts is necessary: to affirm the government and investors' commitment to transparency; to manage public expectations and improve trust; and to enhance the public monitoring of implemented projects. This article submits that in a country with high levels of corruption like Tanzania,[99] contract secrecy is a threatening corruption hideout in the management of natural resources. If the addendum agreement discussed above had not leaked, the public would not have known that

[91] The leaked addendum is available at https://www.resourcecontracts.org/contract/ocds-591adf-8344502322/download/pdf accessed 23 January 2024.

[92] D Manley and T Lassourd, *Tanzania and Statoil: What Does the Leaked Agreement Mean for Citizens?* (Natural Resource Governance Institute 2014).

[93] Z Kabwe, 'Tanzania to lose up to $1b under StatOil PSA: Open these Oil and Gas Contracts' (4 July 2014) https://zittokabwe.wordpress.com/2014/07/04/tanzania-to-lose-up-to-1b-under-statoil-psa-open-these-oil-and-gas-contracts/ accessed 22 January 2024.

[94] Addendum Production Sharing Agreement, art 11.1(f)(iv).

[95] B Taylor, 'Tanzania: Leaked Agreement Shows Govt May Not Get Good Gas Deal' (7 July 2014) https://www.flowtechenergy.com/news/oilfield/tanzania-leaked-agreement-shows-govt-may-not-get-good-gas-deal/ accessed 22 January 2024.

[96] Ibid.

[97] D Manley and T Lassourd (n 92) 6.

[98] Ibid 10.

[99] Transparency International, *Corruption Perceptions Index 2022* (TI 2022). Tanzania ranked 94th out 180 countries in that year.

its profit split terms deviated significantly from the Model Production Sharing Agreement of 2010 and industry best practice. Such secrecy enables companies and corrupt government officials to insert unconscionable terms in extractive contracts without fear of being noticed and held accountable. This risk is even more real considering the blunt contract review mandate of the Parliament which is the representative of the people as discussed earlier in this article.

5.2. Violation of the right to information

Article 18(d) of the Constitution of the United Republic of Tanzania establishes the right of every citizen to be informed at all times of issues of importance to the society. I submit that resource contracts are an important issue to the people of Tanzania to which article 18(d) of the Constitution should be applied without exception. Thus, resource contracts disclosure should be guaranteed within the right to information which is enshrined in article 18(b & d) of the Constitution and in several international human rights instruments.[100] Right to information enables the public and other stakeholders to access information held by state entities, understand their operations and performance, and hold public leaders accountable.[101]

In the context of resource contract transparency, the right to information was given judicial impetus for the first time by the Inter-American Court of Human Rights in the landmark case of *Claude-Reyes et al. v Chile*.[102] The victims in that case had requested from the Chilean Foreign Investment Committee information regarding a major forestry contract signed between the state and a foreign investor. They were denied access to such information and unsuccessfully challenged the denial in the Chilean Supreme Court. Subsequently, a group of South American human rights activists filed a petition on behalf of the victims, alleging violation of article 13 of the Inter-American Convention on Human Rights. The Inter-American Court held that access to information is an essential component of democracy, enabling citizens to participate in decisions affecting their development. As such, states' actions should be governed by the principle of maximum disclosure subject to restrictions established by law in the public interest.[103]

In the very same spirit, this article submits that resource contract secrecy in Tanzania violates the right to information. Statutory provisions which constrict public access to resource information are violative of the Constitution and international human rights instruments which Tanzania has ratified. The promotion of open government and the need to address government secrecy, increase openness, and enhance public awareness are key principles of the right to information to which limitations must justifiably be in the public interest.

5.3. Defeating the public trust doctrine

The inherent right enjoyed by the people over their natural resources makes them beneficial owners of those resources.[104] The state is trustee of those resources, entrusted to manage them for the benefit of the people. This is the essence of the public trust doctrine. The doctrine developed from Roman and English law on the premise that the nature of property rights in some natural endowments such as air, sea, waters, and forests were of great importance and could not be justifiably subjected to private ownership.[105] Ownership

[100] Universal Declaration of Human Rights 1948, art 19; International Covenant on Civil and Political Rights 1966, art 19(2); African Charter on Human and Peoples' Rights 1981, art 9.

[101] BS Noveck, 'Rights-Based and Tech-Driven: Open Data, Freedom of Information, and the Future of Government Transparency' (2017) 19(1) *Yale Human Rights and Development Law Journal* 4–5.

[102] *Claude-Reyes et al v Chile*, IACHR Series C No 151 (2006) 45 https://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf accessed 19 January 2024.

[103] Ibid.

[104] D Cambou and S Smis (n 33) 359.

[105] JL Sax, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention' (1970) 68(3) *Michigan Law Review* 475.

of such property is therefore entrusted to the state for the enjoyment of the public.[106]

In Tanzania, the public trust doctrine is founded constitutionally and statutorily. Article 8(1)(a) of the Constitution of the United Republic of Tanzania of 1977 places sovereignty in the people, and the Government derives its powers and authority from them. Therefore, while the state enjoys sovereignty against other states under international law, its powers and authority are subject to the inner sovereignty of the people under national law. The government is accountable to the people, and its primary objective is the promotion of the welfare of the people.[107] It is in that sense that article 9(c) of the Constitution of Tanzania requires the government to conduct its activities in a way which ensures that national wealth and heritage are exploited and utilised for national interests. Statutorily, section 4(1) of the Land Act[108] creates a public trust over all land in Tanzania, where the President is trustee for and on behalf of all the citizens of Tanzania. In broader terms, section 5(1) and (2) of the Natural Wealth and Resources (Permanent Sovereignty) Act provides that natural wealth and resources shall remain the property of the people, held in trust by the President on their behalf.

Under this relationship, the state as trustee must act in the best interests of the people who are the beneficiaries. It is on that basis that article 21(1) of the African Charter on Human and Peoples Rights requires states to exercise the right to permanent sovereignty over natural resources exclusively for the interest of the people.[109] I submit that the people, as beneficiaries of the trust, have the right to know how the trust property is being managed and to hold the trustee accountable. Unfortunately, contract secrecy violates this fiduciary relationship and puts the interests of the beneficiaries at the risk of unaccountably being abused by the trustee.

6. CONCLUSION AND RECOMMENDATIONS

Tanzania has a great potential of transforming its economy through the extractive sector. However, effective management of this sector requires the strong participation of all key stakeholders, including the public. One the best ways to engage the public is through disclosure of extractive contracts. For many years, the Tanzanian government has treated resource contracts as top government secrets. This secrecy has several implications. Firstly, it undermines public security which is essential for promoting accountability in the sector. Secondly, it violates the right to information which is a guaranteed by the Constitution and international human rights instruments. Thirdly, it undermines public trust in the government. Fourthly, it allows resource mismanagement practices to go unnoticed, sometimes with serious detriments on the people's interests in those resources.

To remedy this situation, it is recommended that: Tanzania must honour its EITI obligations by establishing the register for disclosing extractive contracts. It should establish an online resource contracts portal containing all extractive agreements and providing unconditional public access to the actual contracts. Further, there should be a single register of all extractive contracts and operations information. The diverse registers established under the different laws should be merged into one register maintained by one organ having oversight powers. That register should be available online and be publicly accessible. Further, the power of the Parliament to review and endorse extractive contracts before their signing should be re-

[106] R Nshala, 'Management of Natural Resources in Tanzania: Is the Public Trust Doctrine of Any Relevance?' (2000) http://hdl.handle.net/10535/1405 accessed 27 July 2020.

[107] Constitution of the United Republic of Tanzania 1977, art 8(1)(b) and (c).

[108] Laws of Tanzania, Cap 113 R.E. 2019.

[109] UNGA (n 8) para 1; UNGA, *Resolution 3281 (XXIX) Charter of Economic Rights and Duties of States* (1974), art 7.

enacted in the Extractive Industries (Transparency and Accountability) Act.