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Competition, fragmentation and 'resource factionalism': The politics of governing oil and gas in Kenya

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Abstract

This paper explores how Kenya's political settlement has shaped the governance of its emerging oil sector. Specifically, it examines three aspects of oil governance: (1) institutional arrangements within the sector; (2) the extent to which bureaucratic 'pockets of effectiveness' are present; (3) whether Kenya is striking deals with oil companies that are in the national interest. With regards to the first aspect, the paper finds that external actors have pressured Kenya to adopt best-practice institutions that separate the state's roles. However, the implementation of these institutional arrangements has been hobbled by intra-elite fighting over rents, sounding a warning about promoting reforms that are not mapped onto domestic political realities. In terms of the presence of, or potential for, pockets of effectiveness, the paper finds that Kenya's political settlement undermines incentives to invest in state capacity. The oil technocracy offers too lucrative a stream of rents, even before oil has started to flow, for it to be left in the hands of politically empowered and autonomous bureaucrats, given the necessities of generating political financing and ensuring factional balancing within a competitive and fragmented settlement. Finally, the paper finds that the ability – or inclination – of the state to negotiate sound deals with oil companies is undermined by Kenya's political settlement. Deals are often motivated less by the national interest and more by political considerations and a desire to benefit particular individuals and factions. Concluding, the paper finds little evidence that Kenya's ruling elites are demonstrating the commitment or capacity to manage the country's oil resources in developmental ways.

Keywords: Political settlements, oil and gas, governance, pockets of effectiveness, Africa, Kenya

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List of abbreviations

AOC	Africa Oil Corp
CSO	Civil society organisation
EITI	Extractive Industries Transparency Initiative
EOPS	Early Oil Pilot Scheme
ERC	Energy Regulatory Commission
IFC	International Finance Corporation
IOC	International oil company
IPAC	Inter-Ministerial Advisory Committee
KANU	Kenya African National Union
KPC	Kenya Pipeline Company
KCSPOG	Kenya Civil Society Platform on Oil and Gas
LAPSSET	Lamu Port and Lamu-Southern Sudan-Ethiopia Transport Corridor
NOCK	National Oil Corporation of Kenya
POE	Pocket of effectiveness
PSA	Political settlement analysis
PSC	Production sharing contract
TDC	Turkana Drilling Consortium

Introduction

This paper examines whether Kenyan political elites are demonstrating the commitment and capacity to govern the country's oil in the national interest. Kenya discovered commercially viable resources in 2012. This immediately raised hopes – many of which were unrealistic, given the relatively small size of these discoveries relative to the size of Kenya's economy – that these resources could enhance the livelihoods of all citizens. The government talked of a fast-track route to extraction, suggesting that it would emulate Ghana in delivering first oil within a matter of years, possibly as early as 2016 (KCSPOG 2014). Realities since then, however, have led to a series of revised estimates, moving through almost every year between 2016 and the current prediction of 2022, which in itself looks ambitious, since it is based on an exceedingly tight schedule of project developments (Tullow 2019).

To understand Kenya's frustrated journey towards production, this paper adopts an expanded form of political settlement analysis (PSA). [1] This entails using a typology by Khan (2010) that identifies four different types of political settlement, based on the horizontal and vertical distribution of power. However, the paper also moves beyond his more methodologically nationalist approach, by adopting an expanded multi-scalar perspective. At one end of the scale, this requires situating political settlements within a transnational arena that all developing countries are now indisputably and irreversibly a part of and, on the other, it involves looking at how the settlement shapes (and is itself shaped by) dynamics in particular sectoral domains, in this case oil and gas.

The paper looks at three specific aspects of governance in Kenya's oil and gas sector. The first involves examining the institutional arrangements that are being adopted within the sector, and whether they are enabling or constraining its development. This is in response to research which has found that external actors tend to push best-practice institutional arrangements on developing countries that have discovered natural resources. Donors in particular often encourage a full separation of the state's policy, regulatory and commercial functions, as per the Norwegian model. However, Thurber et al. (2011) argue that such arrangements may not be suitable for developing countries, since they can spread already limited technocratic capacities too thin. Frynas et al. (2017) also argue that the hurried insertion of new institutions can heighten political instability and political corruption, as domestic political actors move to capture their perceived benefits and expected rent flows ahead of production. Second, the paper examines whether the interplay between Kenya's political settlement and its oil and gas domain is conducive to the emergence of pockets of effectiveness (POEs), given that POEs are increasingly being recognised as the most realistic route towards building state capacity (e.g. Hickey 2019; Levy 2014; Porter and Watts 2017; Roll 2014). [2] Finally, the paper looks at whether the incentives generated

[1] See Hickey et al. (2015) for a detailed explanation of this expanded version of PSA.

[2] Roll defines a POE as 'a public organisation which provides public services relatively effectively, despite operating in an environment in which effective public service delivery is the exception rather than the norm'. He argues that an organisation must maintain this status for at least five years to be classified a POE.

by the political settlement, as well as the discursive ideas that bind it together, encourage elites to negotiate sound deals with international oil companies (IOCs) that serve the national interest, rather than particularistic ones. In particular, the paper examines production sharing contracts (PSCs), the negotiation of which can drastically influence the profitability of a country's natural resources for decades thereafter.

The paper proceeds as follows. Section 1 discusses the evolution of Kenya's political settlement. It finds that Kenya's competitive and fragmented settlement generates incentives for ruling elites to focus on short-term initiatives that keep them in power, and away from longer-term initiatives around building state capacity. However, not wanting to assume that these dynamics filter down to all policy domains in the same way, the next section analyses the constellation of actors, institutions and ideas within Kenya's oil and gas domain, or what Watts (2012) calls the 'oil assemblage'. It finds that, far from offering a counterweight to the incentives generated by the political settlement, Kenya's oil assemblage merely reinforces the political settlement's short-term clientelist tendencies. This is because the oil sector is rich in patronage opportunities and operates in non-transparent and unaccountable ways, partly due to the limited counterveiling influence of donors and civil society organisations (CSOs). With these multi-scalar perspectives in mind, the paper then traces how the interactions between Kenya's political settlement and its oil assemblage have shaped the three aspects of oil governance over time. To do so, the paper draws on 33 interviews with industry actors, including the representatives of foreign and locally incorporated oil companies, officials at state organisations with a mandate in the sector, politicians, journalists and CSOs/NGOs/donors. To enhance the paper's validity, interview data is triangulated with documentary sources, such as secondary and grey literature, publicly available PSCs and financial statements of IOCs.

The evolution of Kenya's political settlement

Khan (2010:4) defines a political settlement as 'a combination of power and institutions that is mutually compatible and sustainable in terms of economic and political viability'. According to his typology, different political settlement types are distinguished by the underlying distribution of power within society, which Khan measures along two dimensions. The first is the horizontal distribution of power, by which he means the strength of excluded elite factions vis-à-vis ruling elites; for Khan, this is the key causal mechanism in explaining how and when ruling elites have longer time horizons in their decision-making, as the presence of strong excluded factions will incentivize incumbent elites to focus on shorter-term initiatives that help to keep them in power. The second dimension, meanwhile, is vertical power distribution, which refers to the strength of lower-level actors within the ruling coalition itself; this second dimension explains the degree to which ruling elites possess strong enforcement capacities (or not), as strong lower-level actors can resist the policy directions of their nominal leaders. The dispersion of power along these two dimensions can be understood as being 'high' or 'low', yielding four (ideal) types of political settlement. As the following analysis demonstrates, Kenya has shifted between three of these four political settlement types throughout the course of its post-independence history, each of which has generated different dynamics in terms of overall governance.

Between 1963 and 1982, Kenya possessed a *weak dominant* settlement that was characterised by weak excluded factions, but strong lower-level actors. Excluded factions were weak because Kenya's first President, Jomo Kenyatta, drew upon his legitimacy as an independence leader, as well as his tight control over the levers of state patronage, to assemble a relatively inclusive, albeit highly fragmented, ruling coalition (Nyong'o 1989). Lower-level actors, meanwhile, were strong because Kenyatta believed that competitive one-party elections were useful mechanisms by which his Kenya African National Union (KANU) party could remain responsive to local grievances, incorporate up-and-coming politicians and legitimate its rule (Barkan 1984). These elections were, however, strongly shaped by ethnic considerations – a trend that had begun during the colonial period, when politicians were confined to campaigning within their own regions, due to a ban on colony-wide parties (Ndegwa 1997). This bequeathed Kenya an enduring feature of its politics – namely, ethnicity's role as a bargaining chip in negotiating intra-elite pacts (Cheeseman 2009).

Nonetheless, President Kenyatta generally succeeded in keeping a lid on Kenya's ethnic faultlines by co-opting politicians with sizeable ethnic constituencies through his extensive use of state patronage. His relatively stable, and thus relatively far-sighted, ruling coalition also devised broadly growth-enhancing policies for key sectors like agriculture and manufacturing, within which enough of the benefits 'trickled down' to keep strong lower-level actors contented (Kelsall and Booth 2010; Ochieng 2010). These policies were implemented by a relatively effective state bureaucracy that had been inherited from the British, but which Kenyatta opted – and, critically, also had the political authority – to maintain (albeit through a logic of ethnic favouritism, whereby his own Kikuyu community dominated its upper echelons).

Kenyatta's successor, by contrast, struggled to sustain Kenya's fragmented *weak dominant party*. Partly, this was because Daniel arap Moi – who, as vice-president, inherited the presidency following Kenyatta's death in 1978 – came from a smaller and internally divided ethnic group called the Kalenjin, which meant that his core base was narrower than Kenyatta's (Nyong'o 1989). Yet it was also a matter of luck, or a lack thereof, since Moi's ability to buy off his adversaries was also undermined by a crash in commodity prices for tea and coffee, Kenya's principal exports, as well a doubling in oil prices, with both occurring right at the beginning of his presidency. The result was increasing intra-coalitional conflict from the late 1970s, which culminated in an attempted coup in 1982 that shifted Kenya's settlement towards *vulnerable authoritarianism*. Moi expunged implicated groups like the Kikuyu from his coalition and surrounded himself with a patchwork of previously peripheral pastoral groups, keeping them loyal by using state power to generate huge business interests.
Moi also created a 'patronage merry-go-round' within a bureaucracy that had, until then, been one of sub-Saharan Africa's highest-performing (Kelsall and Booth 2010:21).

Democratisation pressures forced Moi to schedule multiparty elections in 1992, heralding the advent of *competitive clientelism*. Excluded factions became even stronger as political liberalisation allowed politicians to defect freely, while lower-level actors became influential due to their role as party foot soldiers during elections. Nonetheless, Moi clung on in 1992 and 1997, despite securing less than 40 percent of votes, as he was adept at splitting the opposition by playing on its divisions and using militia to intimidate its supporters (Kanyinga 1994). Moi's ability to cling on also owed to his ability to concoct political financing schemes that could fund his extensive vote buying, particularly in rent-rich sectors like finance and energy (Hornsby 2013). The result was declining bureaucratic performance and negative economic growth throughout the 1990s, as the politics of survival took centre stage (Chege 1994).

Moi selected Uhuru Kenyatta, the son of Jomo, as his successor. Kenyatta was a deeply unpopular choice amongst KANU politicians, who defected on masse before the 2002 elections. This confirmed an already inevitable result because the opposition had remained largely united. However, President Mwai Kibaki's National Rainbow Coalition quickly frayed along ethnic lines after assuming power, with Raila Odinga's faction returning to the opposition in 2005 in protest at Kibaki ignoring NARC's pre-election MOU regarding constitutional reform (Kagwanja and Southall 2009). The following years then saw pronounced ethnic rhetoric on all sides, resulting in a closely fought election in 2007 and four months of post-election violence as Odinga rejected Kibaki's dubious 'victory' (Mueller 2011). A mediation process brought the sides into a unity government headed by Kibaki, with Odinga as prime minister and an expanded cabinet comprising all major factions, but this, too, fell apart as leaders formed new alliances ahead of the 2013 elections. That said, the unity government did have enough coherency to unveil a new constitution, whose notable features included a shift to devolution and the introduction of a supreme court (Cheeseman et al. 2019).

Demonstrating Kenya's ephemeral politics, the 2013 elections were won by Uhuru Kenyatta's Jubilee coalition, which comprised two factions that opposed each other in 2007-08. The dividing lines have been blurred and are constantly shifting, but they can broadly be delineated between a Kikuyu-dominated bloc, led by President Kenyatta, and a Kalenjin-led faction, led by the deputy president, William Ruto. A key motivation for this unlikely alliance was that it would protect Kenyatta and William Ruto from International Criminal Court lawyers investigating their role in the 2007-08 violence, as there was otherwise little in common between the two (Cheeseman 2014). Nonetheless, the coalition was somewhat unusual by Kenyan standards in the country's *competitive clientelist* era, as it more-or-less finished its first term intact. This was thanks to a comprehensive power-sharing deal, agreed before the election, that carved up the public sector between Jubilee's constituent groups, a deal that – learning lessons from the past – was also respected once they were in power (Booth et al. 2014).

The events of the recent 2017 election, as well as its ramifications, are subject of ongoing debate.[3] What can be said is that the election, which gave Kenyatta a relatively comfortable victory in the presidential vote, and one that was not out of kilter with expert predictions and polls beforehand, was overturned – to everyone's surprise – by the Supreme Court. However, despite pressure from both the Supreme Court and the opposition, Kenyatta refused to reform the Electoral Commission ahead of the rerun, prompting Odinga to withdraw (Kanyinga and Odote 2019). This tarnished Kenyatta's legitimacy as he then received 98 percent of the votes in a much-reduced turnout. The opposition, whose core support is in Western Kenya, then talked of secession, while Odinga organised his own swearing-in ceremony, prompting threats from Jubilee that he would be arrested for treason. Neutrals warned that the rhetoric was taking Kenya dangerously close to its 'never again' moment of 2007-08.

Ultimately, however, Kenyatta managed to turn these events somewhat to his advantage, giving himself room to take on a legacy agenda that comprises his 'Big Four' (manufacturing, universal healthcare, affordable housing and food security) and tackling corruption. Kenyatta did so by entering into what is now widely known as 'the handshake' with Odinga. The terms of this agreement are subject to much speculation, but in March 2018 Kenyatta and Odinga shook hands in front of the country's press, agreeing to promote 'reconciliation' (Cheeseman et al. 2019). This had the dual effect of sidelining Deputy President Ruto, who had clearly not been privy to the negotiations, while also boosting Kenyatta's own room for manoeuvre since Ruto could no longer threaten to bring down the government with Odinga's faction now providing a counterweight. This allowed Kenyatta to work on tackling corruption, though the 'war on corruption' has clearly been one-sided, targeted at Ruto's camp.[4] The handshake has also thrown open the 2022 succession issue, as Kenyatta is reputedly considering Odinga, not Ruto, as his successor (ibid). At the very least, Kenyatta has seemingly committed to not undermine Odinga's 2022 bid, leaving Odinga and Ruto to fight it out between themselves, which has given him more space to work on his legacy agenda.

To conclude this section, Kenya's political settlement is of a clear competitive clientelist variety, characterised by unstable and fragmented coalitions cycling in and out of power. As one source remarked, 'Kenyan politics is like a game of musical chairs'.[5] Furthermore, the necessities of satisfying diverse factional interests means that entire segments of the bureaucracy tend to be allocated to particular factions, resulting in serious intra-governmental coordination issues. On the face of it, then, Kenya does not seem to be an environment in which one would expect developmental forms of elite commitment and state capacity for governing oil and gas to emerge. However, other studies have found that particular policy domains do sometimes operate under different governance dynamics to those which might be expected according to a reading of the political settlement alone. This is because the incentives generated by the settlement

[3] See the *Journal of Eastern African Studies*' 2019 special issue, entitled 'Has Kenya changed? The 2017 elections and the impact of constitutional reform', for an insight into the variety of these debates.
[4] Interview, journalist, Nairobi, 27 November 2018.
[5] Interview, journalist, Nairobi, 22 July 2016.

can 'become refracted in different ways through the coalitions and arrangements that form within specific sectoral or policy domains' (Hickey et al. 2015:4). How the settlement shapes specific governance dynamics within the extractives domain, for example, may be different to how it influences the same in social provisioning, given that both domains may be perceived differently in terms of their importance by elites and are likely to be composed of different actors, institutions and structures. The following section therefore identifies the constellation of actors within Kenya's oil and gas sector, as well as their salience within the overall political settlement.

Kenya's oil assemblage

After decades of unsuccessful (albeit generally low intensity) exploration, the Anglo-Irish IOC Tullow Oil discovered commercial resources of oil in Kenya in 2012. Tullow's latest estimates suggest that there are 560 million barrels of recoverable oil in Kenya's farflung and historically marginalised Turkana county. [6] These resources, it should be noted, are much smaller than those of Nigeria and Angola, the largest African producers, and even of other emerging producers like Ghana and Uganda, the latter of which has three times more oil than Kenya. Considering that Kenya has a larger and more diversified economy, then, the potential for its reserves to transform the country's economic fortunes are slim. Indeed, Orr (2019:137) claims that the potential effects may be little more than a 'shot in the arm'. A recent study by Oxfam (2016) concurs, estimating that Kenya's Turkana project will generate revenues of between $800 million and $2 billion annually, depending on oil prices. This would be something of a drop in the ocean, considering that Kenya's GDP in 2016 was $71 billion.

However, demonstrating how oil can ignite political and economic imaginaries, expectations have been completely out of sync with this reality (KCSPOG 2016). The sector has received a significant amount of attention, relative to its potential, from a variety of political actors. This includes the president, who entered office pledging that 'Kenya is going to be a major oil producer'.[7] Uhuru Kenyatta's Jubilee coalition, which came into power just one year after Kenya's discoveries, initially identified 2017 as the year in which Kenya would enter the club of oil-exporting nations. Not coincidentally, this was the year in which Kenyatta was due to seek re-election, mirroring a trend witnessed in other competitive settings like Ghana, whereby oil projects have taken on timelines that are as much about electoral cycles as logistical and technical realities (Mohan et al. 2017).

Upon commencing his first term, Kenyatta immediately identified the development of Kenya's upstream sector as a 'flagship programme' and a key component of his future re-election campaign, citing Ghana's rapid progress towards extraction as the model to be followed (Orr 2019:137). However, as explained in subsequent sections, these plans have suffered numerous setbacks and delays. Partly, these have been related to external industry realities, such as an ongoing period of relatively low global oil

[6] https://www.tullowoil.com/operations/east-africa/kenya (accessed 16 March 2020).
[7] http://www.president.go.ke/2016/08/24/kenya-will-be-an-oil-exporting-country-in-june-2017/ (accessed 16 March 2020).

prices, which has stymied the development of extractive sectors across East Africa (Macuane et al. 2018; Pedersen and Bofin 2019). Yet these delays have also been related to Kenya's competitive and fragmented political settlement, as well as the difficulties that the Turkana joint venture partners have experienced in trying to navigate it, as the following sections will demonstrate. All of these setbacks have raised serious doubts as to whether the country will even be a fully-fledged oil producer by the end of Kenyatta's second term in 2022 (Mkutu et al. 2019).

As Kenyatta's hopes for swift production have gradually been dashed, so, too, has his general interest in the sector. Numerous informants claimed that, from the beginning of his second term in 2017, Kenyatta's attention increasingly shifted to 'more deliverable elements of his agenda like corruption and the Big Four', resulting in a lack of top-down coordination within the sector, as well as a 'free-for-all' environment in which other political elites have taken advantage of the vacuum to peddle their influence. [8] Without Kenyatta's centralising presence, different ministries and agencies have also been clashing over what exactly their remits and mandates are, resulting in a series of protracted 'turf wars' that have pitted state organisations as diverse as the National Environmental Management Authority, Auditor General's Office, Kenyan Revenue Authority, National Lands Commission, and the Ministries of Energy and Petroleum, as well as the agencies that are under their respective control – and, indeed, under their shared control – against each other (ibid; Oxfam 2019). [9]

Aside from national players, local-level players have also been influential within Kenya's oil assemblage, particularly because the country's journey towards oil production has occurred alongside a shift to devolution (Orr 2019). Politicians from Turkana are increasingly powerful, largely under the leadership of Josphat Nanok, the county's governor. Their influence stems from an ability to mobilise communities and blockade oil projects, but also, somewhat relatedly, from Turkana's growing role as a swing region in national-level politics, which has attracted advances from major factions for the first time (Mkutu 2014). This has created pressure to satisfy Turkanan politicians through oil-related deal-making, particularly via the mechanism of local content (Nwapi and Andrews 2017; Wanguhu 2019).

Aside from politicians, the sector has also seen an influx of CSOs. A particularly active organisation is the Kenya Civil Society Platform on Oil and Gas (KCSPOG), which is modelled on – and adopts similar tactics to – affiliate organisations in Uganda and Ghana. Similar to other contexts, Kenyan CSOs have been particularly focused on pushing for transparency, from demanding contract disclosure to exhorting the merits of joining the EITI. Interestingly, and revealing much about Kenya's political settlement, the one area in which Kenyan CSOs have stopped mirroring the tactics of those in other countries is in working with parliamentarians to improve their oversight function – a tactic that has worked elsewhere, notably Uganda (Hickey and Izama 2016). In Kenya, CSOs have largely given up on these efforts because, as one CSO

[8] Interview, IOC representative, Nairobi, 15 November 2018.
[9] Interview, journalist, Nairobi, 2 November 2018.

representative remarked, 'there is such a high turnover of MPs [sometimes as few as a third retain their seats] that we found we were investing a lot of time and effort, only for them to lose their seats'. [10] As such, the only organised parliamentary groupings within the sector are regional ones like the Pastoralist Parliamentary Group, whose members are from constituencies in Turkana or surrounding regions through which infrastructure including the pipeline will pass, or the parliamentary energy committees. However, these groups are focused more on profiting from local content than on holding the government to account, as revealed by one MP, who admitted that his priority was 'securing opportunities in business and contracting for my people'.[11]

Inevitably, the profile of investors within the sector has also changed with Kenya's discoveries. As the historical analysis in the following section explains, Kenya struggled to attract even mid-ranking IOCs before the mid-2000s. Partly, this was due to Kenya's unstable domestic political environment. However, it was also because of the presence of more attractive investment sites elsewhere, particularly in West Africa. With its own discoveries, by contrast, Kenya attracted major players like Shell, BG and Total, all of whom snapped up PSCs as part of an East African oil bonanza. Revealingly, however, the interest of these larger IOCs has waned. This is partly because of low oil prices, which has necessitated a scaling back in frontier markets like Kenya (cf. Graham and Ovadia 2019). Yet it is also because of the disorderly nature of Kenya's upstream sector, where IOCs are forced to negotiate with an array of competing (and shifting) interests. [12] Even CNOOC – which was, as the following sections describe, awarded some of Kenya's prime exploration acreage in the mid-2000s – has divested, opting instead to focus on Uganda, a more dominant coalition that it seemingly finds more predictable to deal with. The only remaining top-tier investors are Total, which is part of the Turkanan joint venture, along with Tullow and Africa Oil, and ENI. The rest of the sector is comprised of mid-ranking IOCs like Anadarko, then a range of asset juniors and speculators, or 'briefcase explorers', both foreign and locally incorporated, who snapped up blocks in the hopes of quickly selling them on, before being confronted with a precipitous drop in oil prices (Kisero 2012).

The presence of donors has followed a similar pattern. They showed little interest prior to Kenya's discoveries, but emerged as influential actors thereafter, particularly in pushing for institutional reform, often in an uncoordinated way, as later sections reveal. However, like the top-tier IOCs, their interest has waned as disorder and a lack of coordination within the sector, combined with its limited transformative potential, has led them to focus their efforts elsewhere. In 2015, DFID unveiled a five-year Extractives Programme that aimed to 'support better governance ... in Kenya's extractives sector'. [13] However, it was effectively shelved two years later, partly because of DFID's internal

[10] Interview, CSO representative, Nairobi, 8 November 2018.
[11] Speech by MP and chairperson of Pastoralist Parliamentary Group, Nairobi, 10 November 2018.
[12] Interview, oil executive, Nairobi, 7 December 2018.
[13] See DFID project tracker website: https://devtracker.dfid.gov.uk/projects/GB-1-204339 (accessed 30 March 2020).

reorganisations around Brexit, [14] but also, according to a project partner, because of the difficulty of working in a 'complex political environment' with 'high government and community expectations' and 'uncertainty around governance arrangements'. [15] Offering further insights into how seriously (or not) donors are taking Kenya's oil sector, in 2015 Norway launched a small version of its Oil for Development programme, relative to neighbouring countries like Uganda and Tanzania. The World Bank, through its Kenya Petroleum Technical Assistance Project, remains the most influential donor presence, but even it is 'struggling to find suitable ways to disperse funds'. [16]

Overall, informants remarked that this limited donor presence helps to explain why Kenya has made little progress with fostering transparency, as, other than from CSOs, there is little pressure on the government to do anything more than issue vague declarations on the desirability of such actions.[17] Seemingly corroborating this point, KCSPOG (2016:6) observes that Africa Oil Corp (AOC) and Tullow have yet to disclose the terms of their PSCs for the Turkana joint venture, despite having the International Finance Corporation (IFC) as an equity investor, whose stated terms of investment is to promote contract transparency. Indeed, one source, who has an intimate knowledge of the Turkana joint venture, claimed that this has become 'a source of frustration and reputational anxiety for the IFC, especially since it is under pressure from the World Bank and civil society to end oil and gas financing'. [18] Both AOC and Tullow have announced publicly that they are willing to publish the terms of their Kenyan contracts, as they have already done in Ghana. However, it seems to be the Kenyan government which is dragging its feet (Makore 2018; Okoth 2019). For informants, the limited presence (and interest) of donors within Kenya's oil sector means that there is little pressure on the government to act more transparently, in this way or in others.

With this picture of Kenya's highly (but, in some ways, progressively less) transnationalised oil assemblage in mind, the paper now turns to an historical analysis that tracks the sector's development over time. In particular, it charts how the influence of these actors has ebbed and flowed, and how this has shaped the three aspects of governance that this paper is investigating – namely, institutional arrangements, the nature of deal-making and the prospects for building state capacity through POEs. To dig down into these dimensions, the analysis begins in the early 1980s, when the sector's institutional framework first took shape, and then proceeds chronologically, culminating in a discussion of contemporary dynamics.

The origins of Kenya's oil sector

Kenya's oil sector dates back to the colonial period, when BP and Shell conducted exploration work along the coastline during the 1950s (Owuor 2018). Such activities were limited, however, to the extent that the government did not even feel inclined to

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[14] Interview, former member of Kenya Extractives Programme, Nairobi, 1 November 2018.
[15] See Oxford Policy Management's project website: [https://www.opml.co.uk/projects/kenya-extractives-programme.](https://www.opml.co.uk/projects/kenya-extractives-programme)
[16] Interview, industry consultant, Nairobi, 22 November 2018.
[17] Interview, former member of Kenya Extractives Programme, Nairobi, 01 November 2018
[18] Personal correspondence with informed industry insider, 16 October 2019.

devise sectoral legislation until 1984, when the Petroleum (Exploration and Production) Act was passed. Even then, however, the upstream sector was clearly not a priority for Moi's *vulnerable authoritarian coalition*, which was more focused on extracting rents from established energy sectors (Hornsby 2013). The Act was a few paragraphs long, granting huge powers to the minister and offering almost no information on criteria for allocating licences, transferring interests or negotiating fiscal terms (KCSPOG 2014). The Act did not even refer to the National Oil Corporation of Kenya (NOCK), which instead became operational under the generic Companies Act. This reflected the fact that NOCK, too, was more focused elsewhere, particularly the downstream petroleum value chain, where it was tasked with stabilising oil import prices. [19]

Intriguingly, the government's lack of interest did allow the few bureaucrats within the sector to operate with some autonomy. NOCKs upstream department was chronically understaffed and under-resourced. [20] However, this was actually something of a blessing, as staff were able to build an impressive national data centre with an extensive and well-organised catalogue of seismic, aeromagnetic, gravity and well data, stretching as far back as the 1950s.[21] All of this was turned into a range of reports and catalogues that identified high potential areas and argued, drawing on comparisons of similar geological formations in Central and Western Africa, that Kenya had untapped reserves. The difficulty, however, was in getting IOCs to listen, given Kenya's political turmoil during this period (Anderson and Browne 2011). Those that did were impressed by NOCK's expertise and the influence that it had in negotiations. While the Act gave ultimate licensing authority to the minister, it also stipulated that decisions were to be guided by consultation with an Inter-ministerial Petroleum Advisory Committee (IPAC), which included a NOCK representative. According to a former NOCK official, the organisation's technical advice was 'highly valued' by a government which saw a chance discovery as a way of transforming its worsening fortunes, both economically and politically.[22] This meant that the few PSCs signed during the period were relatively 'sound agreements', even if Kenya's frontier status inevitably meant that the terms were inevitably favourable to investors. [23]

NOCK's upstream department continued to operate relatively effectively, at least in light of its financial and staffing constraints, during the early years of Kibaki's presidency, which began in 2003. As a trained economist, and as someone who was often perceived by those who were close to him as 'more of a technocrat than a politician', Kibaki had a clear vision for the economy, as well as a general appreciation of the need to appoint qualified individuals to state organisations whenever politics permitted.[24] This saw the appointment of Mary M'Mukindia – a former manager of ExonMobil Kenya, and a member of Kibaki's own political communications team – as NOCK's CEO. M'Mukindia quickly came to believe in Kenya's geological potential as

[19] Interview, NOCK official, Nairobi, 14 December 2018.
[20] Interview, former NOCK official, Nairobi, 30 November 2018.
[21] ibid.
[22] Interview, former NOCK official, Nairobi, 30 November 2018.
[23] Interview, former NOCK official, Nairobi, 20 November 2018.
[24] Interview, Ministry of Finance official, Nairobi, 22 November 2016.

she consulted the surveys and reports that NOCK had produced over the years.[25] Diverting budgets from other departments, and using her relational links to Kibaki to secure additional funding from the Treasury, M'Mukindia recruited new officials within NOCK's upstream department, including 'talented graduates', who were sent to Europe for masters degrees.[26] To boost the profile of Kenya's exploration sector, NOCK also started undertaking overseas marketing trips, including attending high-profile events like the annual conference of The Society of Exploration Geophysicists, where its comprehensive reports impressed attendees.[27] The result was slowly increasing interest from second-tier investors like Woodside and Dana Petroleum, who in 2004 signed Kenya's first PSCs for over a decade (ibid). That said, Kenya still struggled to compete with the West African hunting-grounds, where discoveries along the Gulf of Guinea from 2000 were once again capturing investor attention.[28]

Increasing interest in, and politicisation of, the industry from 2006

This situation changed significantly in 2006, when attention shifted to East Africa, following Uganda's discoveries of oil. Immediately, a range of major IOCs, including Total and BG, started showing interest in Kenya, as the country is bisected by the same geological system as Uganda's Albertine Graben region (Patey 2014). However, just as the Ugandan discoveries brought interest from IOCs, so, too, did they bring more 'attention from politicians'.[29] These politicians were 'not interested in listening to technical experts', lamented a then-NOCK official, who noted that 'there was no strategic thinking anymore and our jobs became more difficult'.[30] In particular, the informant recalled that the ministry 'started deciding that it did not need to consult with us in terms of who to license'.[31] Another former NOCK official agreed, remarking that 'we became increasingly aware that we were operating at the mercy of the minister, as a rubber stamp, being told to advise this or that way'.[32]

The first indication of this came in early 2006, when Chinese President Hu Jintao flew to Kenya to conclude a deal for the China National Offshore Oil Corporation (CNOOC) to prospect in a range of on- and off-shore locations. As a source recalled, 'President Kibaki went to China in 2005 and met the leadership as part of his "look East" approach', hoping to 'secure financing for infrastructure development'.[33] As part of his proposal, 'Kibaki promised the Chinese they could have six exploration blocks and gave a directive to the minister that they could take whatever ones they wanted'.[34] While stressing that 'it was not the case that CNOOC got a free ride', a then NOCK official acknowledged that 'the terms [of the PSCs] were not too stringent', as 'those blocks were part of a wider deal the President made with the Chinese, so we were not

[25] Interview, former NOCK official, Nairobi, 30 November 2018.
[26] Ibid.
[27] Ibid.
[28] Interview, former NOCK official, Nairobi, 20 November 2018.
[29] Interview, former NOCK official, Nairobi, 30 November 2018.
[30] Ibid.
[31] Ibid.
[32] Interview, former NOCK official, Nairobi, 20 November 2018.
[33] Interview, former NOCK official, Nairobi, 5 December 2018.
[34] Ibid.

going to jeopardise that'.[35] These contracts were, however, awarded despite NOCK's own inclinations, whose officials believed that 'CNOOCs strengths were not in exploration, but in extracting known reserves. They were not clearly explorers … Those years really held up our exploration activities because they took some of our prime blocks. It was a real shame'. [36] One ex-NOCK official doubly regretted these developments because CNOOC 'jumped the queue', taking the blocks from recognised explorers like Lundin and CEPSA who 'had come in as part of our earlier marketing process' and had made "compelling applications'. [37]

While deals like these were shaped by transnational and geopolitical considerations, others were conditioned more by domestic political dynamics. Broadly speaking, Kenya has witnessed two periods of contract negotiations. The first of these came after Uganda's discovery of oil in 2006, as Kenya was hurtling towards a too-close-to-call election (Patey 2014). The second, meanwhile, came with Kenya's own discoveries in 2012, when the country was approaching another tight election and found itself governed by a fragmented unity government (Kisero 2012). The result is that during both of these periods there were 'all sorts of interests peddling influence', while their occurrence at the end of electoral cycles meant there was also an emphasis on hurried negotiations and quick payoffs.[38] Such conditions were not conducive to striking deals that served Kenya's longer-term interests. This point was vividly made by one informant, who said that licensing became 'all about connections, about having influential people to work your application'. [39] This gave rise to a 'wheeler-dealer environment of brokers and agents' that was 'totally discretionary and cut-throat'.[40]Not only could brokers secure blocks for 'briefcase explorers' at the expense of reputable IOCs, but they could also negotiate 'negligible work commitments' so that 'speculators could hold onto their blocks until a genuine buyer came in'.[41] To offer a more detailed picture of these dynamics in action, the paper will explore the deal-making that went on around the acquisition processes for three highly prized blocks – namely, 10BA, 10BB and 13T (with the latter two being where oil was discovered in 2012).

Block-10BB has long been regarded as one of Kenya's most promising. Shell discovered signs of oil there in 1992. However, this was not in commercial quantities and Shell relinquished the block shortly afterwards as it exited, along with other IOCs, in response to Kenya's deteriorating political situation (Some 2012). The block then lay vacant until 2007, when it was snapped up as part of the oil bonanza that accompanied Uganda's discoveries. Yet, despite the block's clear potential, the PSC was not awarded to a reputable IOC, but instead to a locally incorporated company called Turkana Drilling Consortium (TDC).

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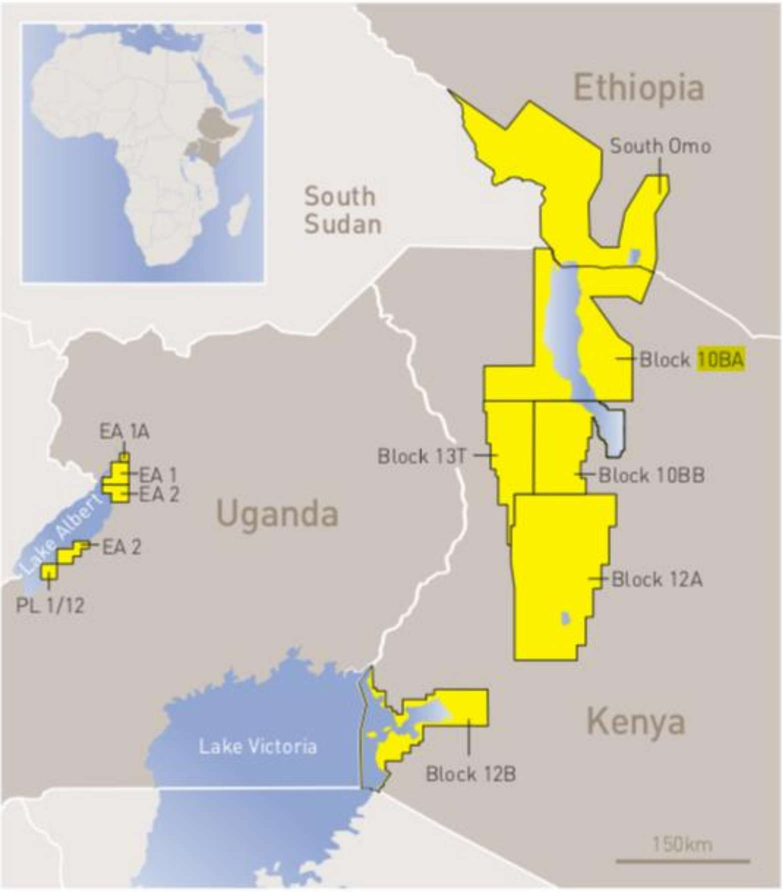
35 Ibid.
36 Ibid.
37 Interview, former NOCK official, Nairobi, 20 November 2018.
38 Interview, journalist, Nairobi, 27 November 2018.
39 Ibid.
40 Ibid.
41 Ibid.

Figure 1. Kenya's oil blocks



Source: Tullow Oil (2014).

TDC was established by Kenyan businesspeople who reputedly had connections to the then Foreign Minister Moses Wetangula, having for years funded his political expenditure.[42] Wetangula was influential because he helped Kibaki to draw support from opposition leader Raila Odinga in Western Kenya. This explains how TDC, which selected Wetangula's law firm as its contract advisor, was able to beat off reputable competitors like Lundin (Africa Intelligence 2008). TDC's owners then held onto the block for nearly two years, during which time they undertook none of the exploration requirements agreed within their PSC, before selling it on for US$10 million to Africa Oil Corp (AOC) (Some 2012). [43] AOC itself then agreed a farm-in with Tullow a year later, handing over operatorship to the company that would go on to discover oil there two years later. The full terms of the PSC that Africa Oil and Tullow inherited has never been made public, but Africa Intelligence (2009) claimed that the terms are 'unusually favourable', including a low state equity share. Several informants concurred, claiming that this is why the government is unwilling to publish the terms of the PSC, despite Tullow and Africa Oil having publicly declared their willingness to do so, and despite the IFC's presence as an equity investor.

[42] Ibid.
[43] Interview, industry consultant, Nairobi, 1 November 2018.

Another block with a chequered history is 13T, where oil was discovered in 2012. Despite interest from high-profile investors, it was awarded to an obscure Canadian company called Platform Resources in 2008. According to Kisero (2012), the company beat off more prestigious bidders because it 'enjoyed the patronage' of a former NOCK official who had established a consultancy upon leaving government and become 'a license flipper'.[44] This consultant also seemingly managed to secure Platform Resources another PSC with favourable terms, including another low state equity share. This is because the financial statements of AOC – which took over Platform Resources in late 2010, before handing 50 percent to Tullow later that year – declare that 'concurrent with the Kenyan government consenting to the assignment [Africa Oil assuming Platform Resources' 100 percent interest in Block 13T] Africa Oil agreed to increase the back-in rights of government to 20 percent' (AOC 2010:7). As one informant explained, government negotiators clearly went some way to addressing the overly favourable terms within the original PSC, but the 'deck would have been stacked against them because they were negotiating from a low base'.[45]

The block with perhaps the most contested history is 10BA. Tullow had been first to register an interest, applying in 2009. However, it was shocked when the ministry announced, in early 2010, that little-known Centric Energy had secured the PSC. Tullow immediately protested, revealingly by appealing to Raila Odinga, the then prime minister within Kenya's unity government, that it had been in advanced negotiations with the ministry and that there had been no mention of other bidders (Kisero 2012). According to a well-placed source, Tullow was also backed by the British government, which 'lobbied hard' on Tullow's behalf, questioning why the company that had just discovered oil in neighbouring Uganda had been sidelined by an unproven explorer.[46] Clearly, the combined pressure from Tullow, Britain and Prime Minister Odinga's office got through to the ministry, as months later its permanent secretary wrote to Centric, ordering them to 'initiate a dialogue with Tullow' over a farm-in (Kisero 2010). This was completed in September 2010, alongside declarations by Centric that it had been pressured into the transaction. Centric then sold its remaining 50 percent to AOC five months later, having not done any of the work stipulated within its PSC (Some 2012). As to how Centric had acquired the licence, informants said that Tullow had not been conversant with how deals were made in Kenya, whereas Centric had worked through a notorious 'licence flipper, who knew exactly what palms had to be greased,' and was connected to senior officials within the ministry (Africa Intelligence 2012).[47]

All of these examples offer a window into the deal-making that goes on around PSCs in Kenya. It has become a business unto itself, with agents and brokers offering access to blocks regardless of exploration track record. Indeed, Kenya's *competitive clientelist* settlement, which sees factions and individuals cycling in power, almost makes it essential for companies to work through local intermediaries, as it would otherwise be difficult to build relations with decision-makers when they are constantly being

[44] Interview, journalist, Nairobi, 27 November 2018.
[45] Ibid.
[46] Interview, former British High Commission official, Nairobi, 12 December 2018.
[47] Interview, industry consultant, Nairobi, 14 December 2018.

replaced. The result of this deals environment, however, is that exploration activities are now being hindered by speculators, who are sitting on some of Kenya's prime blocks, using their connections to secure 'countless extensions' (Kisero 2012). This is partly why Kenya has not issued any PSCs since 2013, as 'briefcase explorers' are waiting for prices to rise so that they can be bought out.[48] Another unfortunate effect of this system, and one that might put paid to these plans, is that serious investors now have little confidence in the licensing process. As one executive said,

> 'Other countries do open tendering with formal bid documents, but PSCs here are individually negotiated. The government keeps as much open as possible, which creates suspicion because you wonder whether certain individuals are trying to benefit … There is a lot of uncertainty … Bribery and corruption is fair game.'[49]

Other informants concurred, claiming that negotiators seem less interested in securing the national interest and more on 'narrower considerations' around benefiting particular individuals or factions.[50] KCSPOG (2014:22) has offered a similar assessment, arguing that 'whilst the involvement of middlemen in the licensing process is not necessarily illegal, it certainly does not constitute best practice' and does not 'serve the interests of Kenyans in obtaining a fair deal from their oil and gas resources'.

Beyond licensing, increased political interference within the sector was felt in other ways. A former NOCK manager recalled that, where the organisation's board had been 'reasonably well qualified' and 'generally left us to run things' before 2006, thereafter appointments became 'very political'.[51] The size of the board increased and members 'started interfering', pushing the interests of particular companies or demanding that their clients be employed.[52] Such was the pressure 'to employ people who did not have the first idea about petroleum', recalled a former official, that many of the graduates who were sent for masters degrees after M'Mukindia became CEO then returned to find their career paths blocked by politically motivated appointments, prompting many to leave; 'it was such a waste, because we spent a lot training them'.[53] Indeed, this was reputedly a final straw for M'Mukindia herself, who resigned from NOCK in 2008, already frustrated that her efforts to market Kenya abroad had been in vain, as she lost any influence over licensing.[54] So, too, had she become exasperated with NOCK's dwindling finances, as the organisation lost access to a training fund that all IOCs paid into as a part of their PSCs. As one informant recalled, 'the ministry took control of the fund once it started seeing that PSCs were generating lots of money. After that, we had to beg the ministry to access it, and it was difficult getting anything'.[55]

[48] Interview, journalist, Nairobi, 27 November 2018.
[49] Interview, former oil executive, Nairobi, 7 December 2018.
[50] Interview, petroleum lawyer, Nairobi, 13 December 2018.
[51] Interview, former NOCK official, Nairobi, 20 November 2018.
[52] Ibid.
[53] Interview, former NOCK official, Nairobi, 30 November 2018.
[54] Interview, journalist, Nairobi, 27 November 2018.
[55] Interview, former NOCK official, Nairobi, 30 November 2018.

After M'Mukindia's departure, NOCK's CEO position became a 'revolving door' appointment. [56] 'It is a very relational position', remarked a former official, 'because you have to juggle a lot of competing interests'.[57] M'Mukindia was succeeded by her chief accountant, Mwendia Nyaga, who lasted two years before being forced out in 2010, reputedly because Odinga's wing of the coalition deemed him biased towards Kibaki's faction.[58] Thereafter, Kibaki and Odinga agreed on a compromise candidate in Sumayya Hassan, an ethnic Somali who headed NOCK's legal department and had no discernible link to either (Okoth 2016). However, informants reported that Hassan 'insisted on doing everything by the book', which led her into a series of disputes with NOCK's then chairperson, who was one of Kibaki's key political financiers and reputedly saw the position as a way 'recoup his investment, by pushing projects that would give him backhanders'. [59] 'Sumayya was too rigid as CEO', reflected a confidante; 'she was a stickler for the rules and did not know how to wriggle, to give and take, which is a skill you need in a parastatal like that'. [60] Nonetheless, the powers that be kept her in place, to struggle on throughout the remainder of Kibaki's presidency, as she was one of the few candidates that was acceptable to all sides.

Overall, the discovery of oil in Uganda led to significant changes in governance dynamics within Kenya's emergent oil sector. The negotiation of PSCs, which was the principal form of deal-making during these early years, became increasingly closed and disordered, as the process for securing licences became increasingly contingent on political connections. Companies that did not want to 'play the game' could find themselves gazumped at the last minute by unknown 'briefcase explorers', after months of long and arduous negotiations. These speculators would then often sit on their blocks, undertaking none of their work or expenditure requirements, until they were bought out, slowing the development of Kenya's exploration sector to a crawl. When the speculators finally farmed out, they would hand over their favourable terms to other companies, only adding to the legacy effects of these early deals, which were rarely struck with the national interest in mind. Generally, then, the space for technocratic decision-making decreased, as political actors became more involved within the sector, undermining the incremental gains in governance and state capacity that had been made since the mid-1980s. Organisations that had demonstrated some signs of developing into a POE, such as NOCK, lost any semblance of autonomy or coherency thereafter. As the following section will demonstrate, this backsliding in governance outcomes would increase in pace with Kenya's own discoveries of oil in 2012.

[56] Interview, journalist, Nairobi, 21 November 2018.
[57] Interview, former NOCK official, Nairobi, 20 November 2018.
[58] Interview, industry consultant, Nairobi, 28 November 2018.
[59] Interview, journalist, Nairobi, 27 November 2018.
[60] Interview, former NOCK official, Nairobi, 20 November 2018.

Kenyatta's first term: Ambitious plans, opposition resistance

Kenya discovered oil in the last year of Kibaki's presidency. Therefore, it was Kenyatta's Jubilee coalition which had the task of formulating a vision and institutional framework for the sector. A year after assuming power, Jubilee unveiled an industrial strategy that identified extractives as a 'priority sector' that was capable of propelling Kenya towards middle-income status (Republic of Kenya 2015). As a signal of its determination to achieve these plans, Jubilee renamed the Ministry of Energy the Ministry of Energy and Petroleum and established a State Department for Petroleum.

Jubilee's leaders also recognised that Kenya's legislative and institutional frameworks had to be updated in order to attract the investment envisaged in the industrial strategy. Save for minor amendments in 1986 and 2006, the Petroleum (Exploration and Production) Act had not been revised since being introduced in 1984, and stakeholders had been complaining about its inadequacy ever since (KCSPOG 2014). However, such complaints had not carried all that much weight, given the apparent lack of potential in Kenya's upstream sector. Pressure to update legislation had increased somewhat with Uganda's discoveries in 2006. However, pressure only really became significant enough to act with Kenya's own discoveries in 2012, when the World Bank, DFID and the Norwegians inserted themselves into these institutional debates – and, critically, offered funding to support the legislation-drafting process. [61]

Another important motivation for updating the sector's legislative frameworks was the need to align them with Kenya's new constitution, which formally came into being with the 2013 elections that brought Kenyatta's Jubilee coalition to power. Amongst other provisions, the constitution stipulates that subsurface resources belong to all Kenyans and that the state must ensure an equitable sharing of the benefits to all citizens, albeit with a particular focus on compensating the counties in which the resources are actually located (Omolo and Mwabu 2014). Intriguingly, the constitution also stipulates that parliament must ratify all natural resource concessions, though this provision has not yet been tested, given that no PSCs have been awarded since 2013.

A heavy input from donors resulted in a draft Petroleum (Exploration, Development and Production) Bill, in 2014, that largely reflected international best practice, in particular in the way that it called for a full separation of the state's policy, commercial and regulatory functions. The bill specified that the Ministry of Energy and Petroleum would be responsible for policy matters, while NOCK's regulatory powers – which included a (dwindling) role in licensing, administering the data centre and helping to monitor IOC spending plans – would be transferred to a new regulator, called the Upstream Petroleum Regulatory Authority (KCSPOG 2014). This institutional separation would free NOCK to focus fully on its commercial functions, as well as its newfound role in spearheading local content. Other important elements of the bill included a new model PSC, detailed guidelines on the licensing process, and a statement on the ultimate desirability of moving towards competitive bidding rounds.

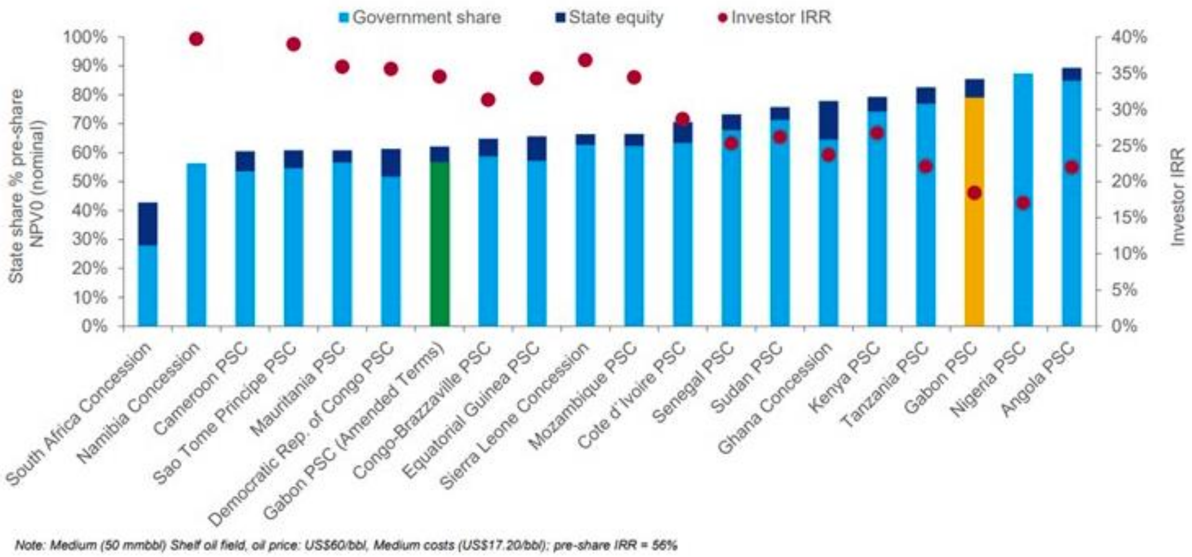
[61] Interview, World Bank representative, Nairobi, 4 December 2018.

During early debates on the bill, there was little opposition to any of these provisions. Investors and CSOs had long called for NOCK to lose its regulatory influence, pointing to a clear 'conflict of interest' when it also had commercial functions.[62] NOCK was also 'supportive' of such a move because its management wanted to 'focus our limited resources on the commercial aspect'.[63] Tired of operating without stable budgets, and of being at the mercy of government whims, NOCK felt that surrendering its regulatory functions would allow it to list on the Nairobi and potentially even London stock exchanges, raising much-needed funds for exercising its back-in rights to blocks 10BB and 13T. Management also hoped that this would help to solve NOCKs 'governance issues', by diluting government influence over its board.[64]

Beyond the proposed institutional arrangements, there was also broad consensus around the new model PSC, even if different actors inevitably had reservations about certain provisions. For government, it would offer a 'significant increase in the country's percentage take', from around 70 percent to over 80 percent under best-case conditions, according to Oxfam (2016:4).[65] This means that on paper – and one must emphasise this point, as provisions like these will not necessarily be adhered to in actual negotiations – Kenya's new model PSC now proposes one of the highest government takes in sub-Saharan Africa (Figure 2). For industry players, there were inevitable grumblings about these figures being much too high, especially for frontier markets like Kenya. However, they were broadly satisfied to see a tightening of the wording around investor rights and the obligations of government.[66] Civil society actors, by contrast, were delighted by the prospects of Kenya receiving a higher share of the future revenues for its own resources, while they were also happy to see a clarification of the obligations for both government *and* the private sector.[67] That said, they regretted that a number of key provisions that had originally been slated as legal provisions within the Petroleum Bill, including around profit sharing, had been shifted into the model PSC. This made them less legally binding and instead gave them the appearance of being more like bargaining chips for the negotiations (Oxfam 2019). As a result, KCSPOG (2014:32) warned that Kenya's new model PSC still 'leaves a great deal to confidential negotiation with oil companies', with the result that there is also a lot of space for cutting discretionary deals. Nonetheless, there was general agreement amongst all informants that the new model PSC was still a significant improvement.

[62] Interview, former oil executive, Nairobi, 7 December 2018.
[63] Interview, senior NOCK official, phone interview, 14 December 2018.
[64] Ibid.
[65] According to Oxfam, this increased take derives from 'three main differences between the existing and future fiscal terms. First, the 2015 model PSC proposes to replace the existing approach to the sharing of profit petroleum from one based on the daily rate of production (DROP) combined with a windfall profits tax imposed when oil prices are higher, to one based on a measure of profitability (r-factor). Second, under the 2015 model, corporate income tax would become tax paid by the company rather than paid out of the government's share of profit oil. Third, the 2015 model PSC changes a significant investment incentive by replacing the cost recoverability of interest on debt incurred for development interview costs with a 15 percent uplift on development spending'.
[66] Interview, Kenya Oil and Gas Association representative, phone, 14 December 2018.
[67] Interview, CSO representative, Nairobi, 4 December 2018.

Figure 2. Comparison of oil fiscal regimes in sub-Saharan Africa



Source: Wood Mackenzie 2020.

Instead, disputes during these years centred mainly on a single provision within the bill – that of the proposed revenue splits between the national government, county government and local community, an issue which became snarled in re-election bids at all levels (Orr 2019). The original bill proposed that revenues be split on a 75:20:5 basis, prompting complaints from Turkana MPs that the community allocation was insufficient. Led by Josphat Nanok, the increasingly influential Turkana governor, MPs suggested a doubling of this figure. This drew support from Odinga, who was vying with Ruto for control of this emerging swing region ahead of the 2017 elections. Jubilee, which had a majority in parliament, would have had the numbers to push the bill through with the original revenue splits, but Ruto – thinking about his own electoral prospects – tacitly supported the increased share, resulting in its addition.[68] The bill then moved on to the Senate, where it was speedily approved, and landed on Kenyatta's desk in late 2016. However, Kenyatta returned the bill to parliament, demanding in a memorandum that the community share revert back to 5 percent (Nwapi and Andrews 2017). Having become 'too politicised' in the build-up to the 2017 elections, and unsure that Jubilee had the numbers to satisfy Kenyatta's demands, the majority leader Aden Duale resolved to sit on the bill until tempers died down.[69]

Aside from delaying the implementation of a new institutional framework, these disputes also frustrated Jubilee's plans to roll out an Early Oil Pilot Scheme (EOPS). First mooted in 2015, the Ministry of Energy and Petroleum announced that EOPS would involve 2,000 barrels of oil being transported per day from Turkana to Mombasa, nearly 1,000 km away, via a fleet of insulated trucks, where it would be loaded onto a tanker for onward sale. EOPS, Jubilee insisted, had a sound commercial logic, because it would allow the government to test the receptivity of international markets,

[68] Interview, journalist, Nairobi, 13 November 2018.
[69] Interview, journalist, Nairobi, 16 November 2018.

stimulate infrastructure development and provide information on Kenya's oil reservoirs (KCSPOG 2018). However, while there was 'an element of truth' to all these claims, analysts maintained that EOPS was really a 'political project' that sought payoffs at both the domestic and regional levels.[70] Domestically, it would allow Jubilee to claim that it had led Kenya into the club of oil-exporting nations before the 2017 elections, as acknowledged by one insider who was privy to the negotiations, who said that 'I am not going to pretend that the government was not tying the project to election timetables'.[71] Regionally, EOPS would serve as 'a prestige project for Kenya to ensure that its oil reached the market before its neighbours' (Wanguhu 2019:15).

Ultimately, however, the revenue disputes prevented the rollout of EOPS before the 2017 elections, as Turkanan MPs threatened to mobilise their communities and block the trucks passing through (Orr 2019). Additionally, EOPS was waylaid by disputes over the award of contracts for providing the trucks and heated containers. As one source recalled:

> 'the whole thing was so secretive. One day, the ministry invited industry to attend a presentation on the scheme … At the end, we assumed there would be information about tendering, but it turned out that the companies had already been chosen! There was a lot of quarrelling over that.' [72]

The terms and conditions of these contracts have not been disclosed – even, it seems, to the current minister of petroleum, who admitted that he did 'not know how much they [the transporters] are being paid' (Muchira 2018). However, it was widely reported by informants that the winning companies were picked by – and paid 'kickbacks' to – deputy president Ruto, whose faction controlled the Energy Ministry that was responsible for awarding these contracts at the time.[73]

Kenyatta's second term: Internal contestation, dwindling interest

Where resistance from excluded factions frustrated Jubilee's plans for the sector during Kenyatta's first term, the prospects for implementing them during his second seemed more promising, at least once the instability that followed the annulled 2017 election subsided. In the parliamentary elections, which had not been annulled by the Supreme Court, Jubilee increased its parliamentary majority in both the national assembly and senate. This raised the prospect that Jubilee would be able to push the Petroleum Bill through, despite continuing controversy over the revenue splits. Kenyatta's so-called 'handshake' with Odinga – which, amongst other things, seemingly included an agreement that Odinga would support key legislation associated with Kenyatta's agenda – further reduced the opposition's ability to frustrate Jubilee's plans (Cheeseman et al. 2019). The stage was set for progress to be made.

[70] Interview, CSO representative, Nairobi, 8 November 2018.
[71] Interview, informed industry insider, phone interview, 26 November 2018.
[72] Interview, representative of engineering and construction firm, Nairobi, 1 November 2018.
[73] Interview, journalist, Nairobi, 27 November 2018.

Where Jubilee's first term was waylaid primarily by challenges from excluded factions, however, its second has witnessed bitter contestation within the ruling coalition itself. As soon as Jubilee began its second term, attention shifted to 2022 and the succession issue, with the question being whether Kenyatta would back Ruto as his successor, as agreed in Jubilee's 2013 MOU (ibid). Wary of a history of broken agreements, Ruto's Kalenjin-led faction had already been sceptical that Kenyatta would 'repay the favour'.[74] However, they opted to sweep these concerns under the carpet while times were good during Jubilee's first term, when the coalition's power-sharing deal had kept both factions at bay, operating in largely separate domains. The handshake, however, has significantly altered Kenya's political landscape, as it reduced Ruto's influence within the ruling coalition, given that he can 'no longer threaten to bring down the government" with Odinga's faction providing a makeweight.[75] This has freed Kenyatta's inner circle, which was clearly never keen on a Ruto presidency, to openly assess its options, including a previously unthinkable Odinga candidacy.

The handshake has also allowed Kenyatta to begin try and follow through on the anti-corruption pledges that he has associated with his legacy agenda. That said, this 'war on corruption' has clearly had political motivations as well (ibid). As one source remarked, 'Kenyatta is being careful to not make it look one-sided, so he is taking out some of his own people because he accepts the need for some collateral damage. But the war on corruption has basically been a war on Ruto's camp'.[76] Of significance to the oil sector, Kenyatta's faction has 'trained its guns on [the] energy [domain]', which was allocated wholesale to Ruto as part of Jubilee's 2013 MOU.[77] 'That was an amazing bit of negotiation', remarked one source,

> 'because every energy department is a cash cow … Before the handshake, Kenyatta did not feel strong enough to challenge that agreement, because he needed Ruto. But since then, his faction sees energy as fair game and is trying to muscle in'. [78]

Understanding these dynamics is critical for understanding the events that are now unfolding within Kenya's oil sector. For instance, one of the first things that Kenyatta did upon commencing his second term was to split the Ministry of Energy and Petroleum, by creating a dedicated Ministry of Petroleum and Mining (Mbaka 2020). According to a consultant, this 'made sense operationally', because Kenya's extractive industries are nascent and share many synergies, requiring different support to the established energy sectors.[79] Such a ministry had also long been demanded by investors, both on the petroleum and mining side.[80] However, it was also very much 'a

[74] Interview, political analyst, Nairobi, 29 August 2016.
[75] Interview, journalist, Nairobi, 27 November 2018.
[76] Interview, journalist, Nairobi, 13 November 2018.
[77] Interview, journalist, Nairobi, 27 November 2018.
[78] Interview, journalist, Nairobi, 13 November 2018.
[79] Interview, industry consultant, Nairobi, 1 November 2018.
[80] Interview, former Ministry of Energy official, Nairobi, 22 November 2018.

political move designed to weaken Ruto and Keter' [the energy minister], since it took a lucrative sector away from them and placed it under Kenyatta's control.[81]

The creation of a dedicated ministry also solved other challenges that Kenyatta had been facing. As minister, Kenyatta appointed John Munyes, a former Turkana senator, who had unsuccessfully challenged Nanok as governor in the 2017 elections. This appointment, according to one informant, was 'a masterstroke' because Munyes holds 'a lot of clout' in Turkana and could use his connections and ability to strike deals, particularly around local content, to 'pacify the Turkana'.[82] Not only did this allow Munyes to solve the revenue issue, by convincing Turkanan MPs to drop their demands for a 10 percent community share, but it also helped EOPS to get under way, as local politicians urged communities to 'allow the oil to leave' (Lutta 2018).

Having solved the revenue debate, Kenyatta then reignited the legislative process for the Petroleum Bill. Promisingly, it sailed through the National Assembly in late 2017 and moved on to the Senate, raising hopes that it would be enacted in early 2018. However, it was in the Senate where the bill became stuck once more, caught up for over a year in an entirely new set of struggles over its content. This is because it became apparent when the bill entered the Senate that, at some point while it had been in the National Assembly, a provision specifying the creation of an Upstream Petroleum Regulatory Authority had been mysteriously replaced with one saying that the Energy Regulatory Commission (ERC) – an organisation that had hitherto played no role within the sector – would take on these proposed responsibilities.[83] This was despite the fact that the ERC had 'no relevant capacities' for performing such a role, and that it was already overburdened with an extremely broad mandate. [84]

According to sources who were interviewed just after the amendment had been discovered, this development should be seen partly as another example of the factional jostling that is occurring within Jubilee, as the ERC is controlled by 'Ruto's people'.[85] Therefore, its bid to regulate the upstream sector should be seen as part of Ruto's broader battle to maintain control over as much of the former energy domain as possible. As one informant remarked, 'there was no problem with the idea of a new regulator during Kenyatta's first term, when oil was under Energy, because that was just one more agency to stuff. Ruto was probably delighted with that!' The informant went on to explain that 'it is only now, since the ministries have been split, and Ruto's lost control of petroleum, that this regulator has become an issue and the ERC is piping up'. [86] Explaining how the provision had appeared in the bill, a Ministry of Petroleum official claimed that ERC, backed by Ruto's vast financial warchest, 'did a lot of

[81] Interview, journalist, Nairobi, 27 November 2018.
[82] Interview, journalist, Nairobi, 16 November 2018.
[83] Interview, Kenya Oil and Gas Association representative, phone interview, 14 December 2018.
[84] Interview. industry consultant. Nairobi, 11 December 2018.
[85] Interview, petroleum lawyer, Nairobi, 13 December 2018.
[86] Interview, industry consultant, Nairobi, 1 November 2018.

"lobbying" of MPs' [using air quotes to suggest this was not lobbying in the commonly accepted sense] and that it was likely do the same with the Senate.[87]

Ultimately, these predictions proved prescient, as the Petroleum Bill was passed in March 2019. This gave the ERC full regulatory control over the upstream sector and led to it being re-branded as the Energy and Petroleum Regulatory Authority, in what is about the only discernible change to the organisation (Mkutu et al. 2019). This outcome disappointed donors, investors and CSOs alike, all of whom had found a point of convergence around the need for a dedicated upstream regulator, given that the sector requires 'specialised knowledge' that the ERC has demonstrated no signs of possessing nor acquiring (KCSPOG 2014:20). [88]Stakeholders also expressed fears that this outcome will lead to even less coordination and more disorder within the sector, given that ERC will be answerable to both the Ministry of Petroleum and the Ministry of Energy.[89] As to how the ERC had pulled off such a feat, informants said that it had not just been because of Ruto's financial resources, but also the way the organisation had built support for its case by appealing to the influential finance ministry, arguing that Kenya should have 'one regulator for electricity and petroleum because of the costs to the exchequer' (Kamau 2018). This touched a nerve, as the Treasury was in that moment under intense pressure from donors to rein-in public spending and undertake fiscal consolidation. It therefore swung its considerable weight behind Ruto's bid to merge the petroleum and energy regulatory functions.

Beyond these struggles over new institutions, similar intra-coalitional and factional conflicts have been occurring across the established oil technocracy. A prime example is Kenya Pipeline Company (KPC), whose managing director – Joseph Sang, the nephew of Energy Minister Keter – was forced from office during the author's fieldwork in late 2018. It was obvious, according to one source just before Sang resigned, that 'the president's faction is trying to force him out.' [90] This was because Sang had been facing a growing barrage of parliamentary and corruption investigations regarding KPC's activities. Many of these had been brought to light by journalists who were 'clearly being pushed documents by State House', since 'some of the scandals that Sang is being tarnished with are historical ones from before he even started. They are just trying to fling as much mud as they can in the hope that some sticks!' [91] Clearly, however, these tactics worked. Sang resigned in late 2018, publicly citing 'personal reasons' (Kamau 2018). Yet, in reality, he had realised that his position was untenable because KPC had shifted to being under the control of the Ministry of Petroleum and was therefore no longer protected by Ruto's energy ministry.[92]

[87] Interview, Ministry of Petroleum and Mining official, Nairobi, 13 December 2018.
[88] Interview, CSO representative, Nairobi, 12 November 2018.
[89] Interview, Kenya Oil and Gas Association representative, phone interview, 14 December 2018.
[90] Interview, journalist, Nairobi, 13 November 2018.
[91] Interview, journalist, Nairobi, 21 November 2018.
[92] Ibid.

Kenyatta's camp had not just been keen to oust Sang because he is Ruto's ally, but also to 'send a signal to investors' considering Kenya's export pipeline project. [93] 'KPC will be the custodian of the pipeline', remarked one informant, 'and Kenyatta is trying to bring some faith back to that parastatal because right now there is none'.[94] Asked why this was so, the informant said that, during initial talks over a regional pipeline between Uganda and Kenya, 'it was Ruto's people leading the negotiations because they controlled energy. And they were dreaming up all sorts of schemes with KPC, to basically treat it as their personal piggybank'.[95] As an example, Ruto and Keter had pushed for the pipeline to be a public utility under KPC, which would have given them the freedom to charge high tariffs and 'cream it off into some kind of special purpose vehicle'.[96] This made political sense for Ruto, by shifting a valuable flow of potential rents to an organisation that he controlled, but the idea made 'little commercial sense, because the government would itself have been one of the "upstream shippers" through its NOCK back-in'.[97]

Ultimately, Ruto overplayed his hand, as:

> 'investors looked at that arrangement – Uganda did, too, actually – and said "no, we have no faith in that" … It made us look like we were not serious at all, so it was no wonder that Uganda then decided to go with Tanzania'.[98]

For informants, this is why Kenyatta has subsequently been so 'keen to bring KPC to heel', as he wants 'to bring the faith back'.[99] Indeed, beyond KPC, Kenyatta also overturned the leadership of the National Lands Commission, which is another agency that will play a key role in delivering the pipeline (Mosoku 2019). Additionally, he took oversight responsibilities for the Lamu Port and Lamu-Southern Sudan-Ethiopia Transport Corridor initiative (LAPSSET) – for which the pipeline is the carrier project Browne (2018) – away from the Deputy President's Office and back to State House, which was seen by informants another attempt to convince investors of the viability of the now solely Kenyan export pipeline.[100]

Recent struggles to control NOCK also demonstrate Kenya's post-handshake reality. NOCKs CEO for the final years of Kibaki's unity government was Sumayya Hassan, who was seen as a 'compromise candidate'.[101] So, too, did Hassan assume this status during Kenyatta's first term, kept in place because NOCKs board, split between Kenyatta and Ruto loyalists, could not agree on anyone else (Karambu 2016). However, Hassan's job became increasingly unmanageable, forcing her to resign in late 2016. She was replaced by Mary Jane Mwangi, NOCKs downstream manager,

[93] Interview, petroleum lawyer, Nairobi, 13 December 2018.
[94] Interview, industry consultant, Nairobi, 12 December 2018.
[95] Ibid.
[96] Ibid.
[97] Personal correspondence with informed industry insider, 16 October 2019.
[98] Ibid.
[99] ibid.
[100] Interview, engineer, Nairobi, 30 November 2018.
[101] Interview, industry consultant, Nairobi, 1 November 2018.

who was initially described as an 'interim' appointment because she was 'connected' to Kenyatta's side of the coalition, which riled Ruto's followers.[102] Her appointment was made permanent after the 2017 election, however, when Kenyatta's faction felt confident to strike, while three new directors, who are directly answerable to the president, were appointed to the board (Africa Intelligence 2018). Even more telling of Kenya's new political landscape, Kenyatta selected Caroli Omondi, Odinga's former chief of staff, as another board member, leading some to claim that the 'handshake' must have involved an agreement to appoint some of Odinga's allies to parastatals.[103]

Not only are these ongoing power struggles undermining the performance of individual organisations, but they are also exacerbating coordination issues between them, given that the oil technocracy is being carved up between competing factions who are reluctant to cooperate. Coordination is also being undermined by the fact that the Ministry of Petroleum and Mining does not have clear jurisdictional power within the sector, since NOCK, KPC and, particularly, the ERC are all still answerable to the Ministry of Energy as well. This has resulted in uncertainty about which ministry – and, therefore, which of Jubilee's two political factions – has ultimate responsibility for key functions such as approving budgets, negotiating commercial agreements and even establishing policy direction.[104]

According to sources who are familiar with the negotiations around the Turkana joint venture, this lack of capacity and coordination is really starting to bite, as Kenya shifts from appraisal to development. 'Negotiating commercial terms', one informant remarked, 'is an intense and challenging process that requires a single voice from government', and that has not been forthcoming to date.[105] One result of this 'lack of an aligned negotiating position' is that the Heads of Terms (HOT) agreements for the Turkana project, which were not signed until June 2019, 'took much longer to finalise than the partners expected, or is normal for a non-binding agreement like HOTs'.[106] Inevitably, these delays have only further delayed the timelines for first oil, which is now very unlikely before the government's own electorally imposed 2022 target. The delays, and the intra-coalitional contestations that have contributed to them, have also played a part in the decision by the joint venture partners to convince the government to agree to a 'phased approach' to the development (East African 2019). This will see just three fields developed during the first, non-timebound 'Foundation Stage', linked to a 60,000bpd central processing facility and an export pipeline to Lamu.

This more limited development did not match the ambitions of Jubilee, which had hoped to commission a bigger project that could handle over 100,000bpd, but it is more in line with the current climate of low global oil prices and a lack of intra-governmental cooperation. Indeed, insiders who were privy to the negotiations said that Jubilee's leaders had even themselves eventually acknowledged that this approach was 'the

[102] Interview, journalist, Nairobi, 13 November 2018.
[103] Interview, journalist, Nairobi, 27 November 2018.
[104] Interview, informed industry insider, phone interview, 18 July 2019.
[105] Interview, industry consultant, Nairobi, 29 April 2019.
[106] Interview, informed industry insider, phone interview, 18 July2019.

best way to create value quicker' and therefore have any hope of delivering full-scale production before the 2022 elections.[107] Yet, even this more limited development still presents huge obstacles for Kenyatta's fragmented and unstable coalition, as the HOT agreements are only one of three so-called 'critical path items' that must be resolved before a Final Investment Decision can be made. The others are land acquisition for the upstream project and pipeline – which is proving contentious because of ill-defined land rights for communities, as well as the sheer amount of land which has been bought along the route by well-connected elites (Johannes et al. 2015; KCSPOG 2018) – and also ensuring an adequate water supply, which is no less delicate a matter. Plans have been devised for a water pipeline from Turkwell dam in neighbouring West Pokot County to the Turkana oil fields (Mkutu et al. 2019). However, this has drawn in another web of local and national actors who are eyeing rent-seeking opportunities, while it has also exacerbated ethnic rivalries and land claims between the Turkana and Pokot.[108] These challenges further demonstrate the extent to which Kenya's competitive and fragmented settlement is playing out at all levels to shape – and, in many ways, undermine – the development of the country's oil and gas sector.

Analysis

This section is structured around three analytical tables that have been completed by all of the papers for this project.[109] The first table ranks Kenya's performance across a range of indicators for institutional design and functioning. These indicators, it should be noted, include a focus on POEs, given that their presence (or not) within the sector will be influenced to a significant degree by the legal and institutional environment in which they operate. The second table, meanwhile, does the same for Kenya's performance across various aspects of deal-making. Finally, the third table identifies the key causal factors that help to explain the outcomes observed in Tables 1 and 2.

Table 1 paints a rather negative picture regarding the prospects for POEs within the sector, as well as overall levels of state performance and coordination. Partly, this reality stems from Kenya's selective adoption of the 'best-practice' institutions that have been pushed by donors, a process that has been heavily shaped by intra-elite infighting. A notable example was the decision to scrap the creation of a dedicated upstream regulator and hand these responsibilities to the ERC, an organisation that hitherto has played no role in the sector and which was already struggling with an extremely broad mandate and insufficient resources. What is more, the ERC's parent ministry is technically the Ministry of Energy, while the upstream oil sector is nominally controlled by the Ministry of Petroleum and Mining, meaning that the ERC will be torn between two ministries which are themselves controlled by two different political factions. The chance of the ERC emerging as a POE, then – or, indeed, any organisation within the highly contested oil technocracy doing so – looks slim.

[107] Ibid
[108] Interview, journalist, Nairobi, 4 May 2019
[109] Along with Kenya, papers are being written on the oil and gas sectors of Ghana, Uganda, Tanzania and Mozambique. These papers can be found on the following website: http://www.effective-states.org

Table 1: Institutional arrangements and functioning

Dimension	**Level/type of performance**	**Notes**
How were the 'best-practice' reforms devised?	• Balance of domestic commitment and external pressure	Petroleum Bill originally pushed by external actors, but Jubilee recognises that institutional frameworks must be updated to generate investment.
Have the new rules been enforced?	• Partially	Separation of roles in-process. NOCK reluctant to give up lucrative data centre. Creation of upstream regulator abandoned after intra-coalitional fighting over rents.
Capacity-building: Ministry	• Mostly resourced	Location of most technocratic capacity within sector. Recently supplemented with commercial experts from NOCK for cost recovery. But fears that staff will be poached by ERC and doubts over jurisdiction, given ERC and NOCK also answerable to Energy Ministry.
Capacity-building: NOCK	• Partially resourced	Confusion over future of NOCK, i.e. whether it will be split into upstream and downstream companies. Mandate not clear in Petroleum Act. Losing best staff to Ministry and private-sector.
Capacity-building: ERC	• Not resourced	Government not issued any public or private assurances that ERC will be adequately staffed/resourced, or even that it will be staffed beyond its current overstretched levels.
Autonomy of oil technocracy I	• Persistent interference	Little space for technocratic decision-making as sector is subject to zero-sum competition over rents.
Autonomy of oil technocracy II	• Political loyalty as defining principle	Organisational leadership generally reflects the ethnic makeup of the faction that controls it.

Regulatory performance	• Low	Regulators not committed to, or capable of, monitoring/disciplining firms.
Project performance	• Low	Projects rarely delivered on schedule. E.g. long delays to EOPS, constant revisions to first oil.
Sectoral coordination	• None	No provisions for a high-level inter-ministerial steering body, despite persistent calls from private sector. Petroleum ministry trying to perform coordinating role, but NOCK and ERC also answer to energy ministry.

One finds an equally concerning picture in relation to the nature of deal-making. The dominant decision-making mode is one of politicisation and personalisation, rather than being predominantly technocratic or rules-based. This has resulted in a deals space that is closed and disordered: closed in the sense that deals, particularly PSCs, are awarded largely on the basis of a company's political connections, or their use of brokers and intermediaries who can work an application on their behalf; disordered, meanwhile, because companies retain access to these preferential deals, or their ownership of exploration blocks, so long as their benefactors remain in power. Additionally, the deals space can be labelled as closed and disordered because bureaucrats have little ability – or, perhaps, inclination – to monitor or enforce the work commitments and expenditure requirements of politically influential industry players. A 2015 report by the auditor general, for example, found that the ministry had not collected any training, acreage, community development or extension fees, with a combined total of nearly 1 billion Kshs, from nine politically influential oil companies, while it had also not enforced their minimum exploration expenditure requirements.

While they have inevitably been less of a focus of this paper, given the relative lack of progress that has been made, the negotiations that are currently going on around the development stage of the Turkana joint venture also help to illuminate the closed and disordered nature of the deals environment in Kenya's oil sector. This is because there have been – and continue to be – a series of factional and organisational 'turf wars' over remits and rent flows, which has led to the lack of an aligned negotiating position from Kenya's government in its dealings with the joint venture partners. This absence of a single voice from government, combined with (and exacerbated by) president Kenyatta's clear loss of interest in the developmental potential of the sector, has played

Table 2: Deal-making

Dimension	**Level/type of performance**	**Notes**
Fiscal regime: PSAs	On paper: • Medium	New model PSC largely reflects best practice. However, provisions like surface fees, training levies, signature bonuses, cost recovery cap per period etc. are left entirely negotiable, lacking even indicative figures.
	Enforcement: • Weak	Presence of politically influential players reduces ability of NOCK and ministry to enforce terms.
Cost recovery	• N/A	Ministry designing a cost-recovery process to be trialed on Tullow, using co-sourced external audit expertise to build own capacities.
Deal-making environment	• Closed-disordered	Licensing highly discretionary and captured by intermediaries/brokers.
Dominant decision-making mode	• Predominantly personalised and politicised	Oil technocracy offers too lucrative a stream of rents for it to be left in the hands of politically empowered and autonomous bureaucrats.
Overall performance	• Limited commitment to national interest and/or rules-based approach	Emphasis more on securing interests of particular individuals/factions.

a significant part in convincing the joint venture partners to frame their HOT negotiations around a much more limited first-stage development that will squeeze the very rents that Kenyan political elites have been jostling so hard to capture. These developments, then, perfectly encapsulate the self-defeating and destructive short-termist rent-seeking that has taken root within Kenya's oil sector.

Finally, Table 3 affirms the importance of adopting an expanded form of PSA that moves beyond Khan's (2010) typology. The structure of power is clearly an important part of the story, as Kenya's competitive-clientelist settlement creates few incentives

Table 3: Explanatory variables

Explanatory variable ➔ **Governance dimension ➔**	**Power configuration**	**Factionalism**	**Ideas**	**Transnational factors**	**Materiality**
Institutional arrangements	Dispersion of power meant that politicians were receptive to creating new agencies that would give them more positions to distribute.	Implement-ation of arrangements shaped by factionalism, e.g. abandoning a dedicated regulator.	Global epistemic community articulated a strong case for adopting Norwegian model to foster 'good governance'.	External actors influential in pushing Kenya to revise its institutional frameworks.	Limited size of Kenya's reserves leads to dwindling external interest, leaving intra-elite competition to shape the adoption of institutions.
POEs and state capacity	Short-term time-horizons undermine incentives to build state capacity.	Lucrative oil technocracy subject to internal power struggles. Factionalism undermines coordination.	Absence of resource nationalism means that there is little demand for a strong NOC.	Some capacity-building support from donors, esp. WB and Norway. But uncoordinated.	Marginal develop-mental potential of Kenya's reserves means that external support is relatively limited.
Deal-making	Two main contract negotiation periods came during election periods, meaning that deals were motivated by securing short-term payoffs.	Fragmented settlement results in multitude of interests trying to influence deals.	Limited influence of donors and CSOs means that ideas around transparency are not salient.	Limited interest from top-tier IOCs, who are bound by tighter reporting and contract disclosure requirements, exacerbates transparency issues.	Onshore location of Kenya's reserves brings in a wide array of national and local actors, making it difficult to centralise and order deal-making.

for elites to invest in state capacity or to strike tough deals with oil companies. Instead, governance within the sector is generally short-term, personalised and predatory, given the overriding priorities of generating political financing and satisfying lower-level clients with employment opportunities across the patronage-rich oil technocracy. As a journalist remarked, when asked if the government is building capacities within the oil sector, 'that is not their headache at all. Their headache is how much they can get and how quickly they can do it'.[110] However, power configuration is only a part of the story. An equally important explanatory factor has been the high degree of intra-elite competition and factionalism within successive ruling coalitions, which in particular has resulted in a partial and selective adoption of donor-driven institutional reforms. The contorted and non-credible institutional arrangements that emerged from the legislative process have left industry players bitterly disappointed, while they have also further undermined the potential for POEs to emerge within the sector.

So, too, have ideas and transnational factors been a significant part of the story, though intriguingly sometimes more by their absence than by their presence. This is because the relative absence of ideas around resource nationalism, for example, has led to few demands for Kenya to build a strong and well-resourced NOC that can provide a counterweight to transnational capital and spearhead the sector's development for the long-term benefit of the country. Instead, the ideational phenomenon in Kenya's oil and gas sector is more one of 'resource factionalism', where projects are designed, and deals are cut, with the intention of benefiting particular individuals and factions. Similarly, the waning interest of donors, top-tier IOCs and other external actors – which is linked to the materiality of Kenya's reserves, since their relatively small size offers little transformative potential – has resulted in the government facing little pressure to promote transparent governance within the sector. This has only further undermined the incentives for political and bureaucratic elites to adopt an open rules-based governance regime, given the limited payoffs of such an approach.

Conclusion

This paper has found that Kenya's political settlement is shaping the country's oil and gas sector in profound ways. Governance is short term and disorderly, given the horizontal and vertical dispersion of power as well as the fragmented nature of ruling coalitions, which means that there are a multitude of competing interests jostling for influence within a sector that offers a rich source of rents. This is increasingly the case as succession politics once again comes to the fore ahead of the 2022 elections. Indeed, the intensely fragmented nature of Kenya's settlement perhaps may help to explain why Kenya has been unable to emulate Ghana's rapid shift from discovery to extraction, despite both countries being characterised by competitive clientelism, and ruling elites in both settings having similar incentives to secure quick wins for elections.

In terms of the three aspects of governance that this paper set out to track, findings suggest that Kenya's political settlement does not incentivise elites to build state capacity, in the form of POEs, within the sector. Nor does it motivate them to negotiate

[110] Interview, journalist, Nairobi, 13 November 2018.

sound deals with oil companies, particularly when negotiating PSCs. Rather than a desire to further the national interest, deals are often motivated more by political considerations and a desire to benefit certain individuals and factions, with the result that they are negotiated within a closed and disordered deals space, where monitoring and enforcement are virtually non-existent. Finally, with regards to the new institutional arrangements that have been pushed by the global epistemic community around oil, findings from this paper caution against an unquestioning attitude regarding the benefits of separating the state's functions, and generally of implementing best-practice solutions that have not been mapped onto domestic political realities. The proposed institutional arrangements provoked fierce resistance from factions that were set to lose out, delaying the passage of critical legislation and leading to its provisions ultimately being hobbled by intra-coalitional bargaining and conflicts over rents. After waiting years for it to be signed into law, the eventual unveiling of the Petroleum Act in March 2019, with almost no fanfare, came as a disappointment to almost all industry stakeholders. These feelings were summed up by one informant, who lamented that:

> 'investors had been holding off until the new legislation was in place. But now that it has finally been passed, I honestly worry that it could be the final nail in the coffin, because what it shows is that government is not serious at all about managing the industry'.[111]

[111] Interview, industry consultant, Nairobi, 25 April 2019.

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