

# Drilling Past the Resource Curse?

Essays on the governance  
of extractives in Kenya

J Osogo Ambani (ed)



**Strathmore University**  

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Strathmore University Press is the publisher of Strathmore University, Nairobi.

**DRILLING PAST THE RESOURCE CURSE?**

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ISBN 978-9966-054-20-3

Year of publication 2018

*Cover design and Layout by John Agutu*

*Email: agutujo@yahoo.com*

*Printed by Colourprint Ltd., P.O. Box 44466 – 00100 GPO Nairobi*

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## LIST OF ABBREVIATIONS

ACEP	Africa Centre for Energy Policy
AFRODAD	African Forum and Network on Debt and Development
AMV	African Mining Vision
APF	Alaska Permanent Fund
CBROP	County Budget Review and Outlook Paper
CCT	Center for Constitutional Transitions
CDAs	Community Development Agreements
CDMP	Community Development Management Plan
CEPIL	Centre for Public Interest Law
CEPR	Center for Economic and Policy Research
CMTF	Community Mining Trust Fund
CS	Cabinet Secretary
CSOs	Civil Society Organisations
EBRD	European Bank for Reconstruction and Development
EI	Extractives Industry
EIA	Environmental Impact Assessment
EITI	Extractive Industries Transparency Initiative
ELAW	Environmental Law Alliance Worldwide
ELC	Environment and Land Court
ELCA	Environment and Land Court Act
ELLA	Evidence and Lessons from Latin America
EMP	Environmental Management Plan
FoN	Friends of the Nation
FPIC	Free, Prior and Informed Consent
FTFs	Foundations, Trusts and Funds
GDP	Gross Domestic Product
GHEITI	Ghana Extractive Industries Transparency Initiative
GIA	Government Investment Account

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HDF	Human Development Fund
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
IDEA	Institute for Democracy and Electoral Assistance
IFC	International Finance Corporation
ILEG	Institute for Law and Environmental Governance
KHRC	Kenya Human Rights Commission
LCD	Local Content Development
MCDDT	Mozul Community Development Trust Fund
MEND	Movement for the Emancipation of the Niger Delta
MTEF	Medium-Term Expenditure Framework
NCA	Norwegian Church Aid
NDP	National Development Plan
NEMA	National Environmental Management Authority
NET	National Environment Tribunal
NLC	National Land Commission
NNBS	Nigeria's National Bureau of Statistics
NRGI	National Resource Governance Institute
NRM	Natural Resources Management
PNG	Papua New Guinea
PRSP	Poverty Reduction Strategy Paper
PWYP	Publish What You Pay
RED	Rural Economic Development Fund
RGI	Revenue Governance Index
SAPs	Structural Adjustment Programmes
SDGs	Sustainable Development Goals
SNG	Sub-National Government
SWF	Sovereign Wealth Fund
UDHR	Universal Declaration of Human Rights
UNCED	United Nations Conference on Environment and Development
UNDP	United Nations Development Programme
UNEP	United Nations Conference on Environment and Development
UNGA	United Nations General Assembly
WCED	World Commission on Environment and Development
WDF	Western Diversification Fund
WEDC	Western Economic Diversification Canada
WRMA	Water Resources Management Authority

## LIST OF CASES

### Kenyan cases.

*Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining and others* [2014] eKLR.

*Friends of Lake Turkana Trust v Attorney General & 2 others* [2011] eKLR.

*In the Matter of Concessionary Rights to the Mui Coal Basin Deposits* [2012] eKLR.

*In The Matter of the National Land Commission*, [2015] eKLR.

*In the Matter of the Principle of Gender Representation in the National Assembly and Senate* [2012] eKLR.

*Kasigau Ranching (DA) Ltd v Kihara & 4 others* [2006] KLR.

*Owners of the Motor Vessel 'Lilian S' v Caltex Oil (Kenya)* [1989] eKLR.

*Peter Makau Musyoka & 19 others (Suing on their own behalf and on behalf of the Mui Coal Basin Local Community) v Permanent Secretary Ministry of Energy & 14 others* [2014] eKLR.

*Re the Cabinet Secretary of Mining and Others* [2013] eKLR.

*Rodgers Muema Nzioka & 2 others v Tiomin Kenya Limited* [2001] eKLR.

*Wangari Maathai v Kenya Times Media Trust* [1989] eKLR.

### African Commission on Human and Peoples' Rights.

*African Commission on Human and Peoples' Rights v The Republic of Kenya*, App 006/2012.

*Centre for Minority Rights Development (Kenya) v Kenya*, ACmHPR Comm 276/2003.

*The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, ACmHPR Comm 155/96.

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*Oposa v Factoran* GR 101083.



# FROM 'RESOURCE CURSE' TO 'MIS-RULE PENALTY'? AN INTRODUCTION

J OSOGO AMBANI\*

People all over the world celebrate the discovery of extractive resources in their countries. They do so because extractives can be a quick and easy source of economic prosperity. Resource-wealth has the potential to turn around a country's fortunes by increasing its income, enlarging its foreign exchange reserves, availing resources for economic development, creating employment opportunities, improving peoples' quality of life, and enhancing its status in the community of nations, among others.

In Africa, however, the discovery of extractives has nearly always portended a different scenario. In what Richard Auty and subsequent writers have called 'the resource curse',<sup>1</sup> African countries with large deposits of resource-wealth have often faced more economic, social and political turbulences than they have benefited from their natural endowments. Indeed, there is

[a] paradoxical link between rich natural resources, such as minerals and oil, and under-development including conflict, poverty, and environmental degradation nationally and particularly for communities living in the resource-rich areas.<sup>2</sup>

The winding political conflicts in the Democratic Republic of Congo (DRC), currently in crescendo, commenced at the country's independence.<sup>3</sup> Their explanations are myriad, but are closely linked to the rich variety of natural resources found

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<sup>1</sup> See, Auty R, *Sustaining development in mineral economies*, Routledge, London, 1993.

<sup>2</sup> Johannes E, Zulu L and Kalipeni E, 'Oil discovery in Turkana County, Kenya: a source of conflict or development?' 34(2) *African Geographical Review*, 144.

<sup>3</sup> See <https://borgenproject.org/the-democratic-republic-of-congo/> on 9 March 2018.

in that territory.<sup>4</sup> The Biafra War in Nigeria, which nearly collapsed Africa's largest economy, the country's many bungled elections, and military takeovers, cannot be accounted for fully without appreciating the challenges posed by the presence of significant deposits of oil.<sup>5</sup> This genre of ominous political upheavals are usually used to illustrate the concept of resource curse in Africa.

However, to focus on the 'resource curse' – to emphasize that the presence of natural resources in an African county leads to the degeneration of its economic, social, and political institutions - is to miss the point. This is because such an approach highlights the linkage between the existence of extractive resources and the poor state of affairs, creating a false perception that it is the presence of resources rather than poor and failed leadership institutions that is responsible for the messy situation. In one sense, the prisms, that is the concept of resource curse, provides effective lenses for viewing the governance of extractives by giving a real and true picture of the state of resource-rich countries in Africa, with very limited exceptions such as Botswana. In fact, it seems accurate to conclude that where there is oil, there is turmoil; and where there is gold, there is scold. In another sense, the semantics of these prisms can distort the very image of their attention. By concentrating on the 'resource' and the 'curse', the concept tunes its focus on the presence of the extractive resource(s) and the resultant effects such as economic collapse, political instability, and armed conflict. But it eclipses the original sins of bad governance that might have led to the calamities in the first place. Additionally, the use of the term 'curse' takes away responsibility for the situation, curses being functions of powers beyond, that may or may not act justly. Human factors are therefore eliminated in this language, which might create 'psychological' challenges in the task of social re-engineering.

I suggest two changes to the above problem of phraseology. The first is to shift the focus from the inanimate resource and concentrate thought on the human skill of governing. The new approach would then be 'governance-centered' rather than 'resource-centered'. Besides portraying the presence of extractive resources as mere catalysts of an already dire governance situation, the new approach will give maximum exposure to the root problem - the failure of governance institutions. A 'governance-phrased' approach will bring to the fore Africa's historical institutional weaknesses, which the presence or discovery of extractive resources merely accentuate. These conventional structural infirmities include; failed nationhood,

<sup>4</sup> <https://borgenproject.org/the-democratic-republic-of-congo/>.

<sup>5</sup> Undiyaundeye U, ' Oil and the Nigerian Civil War' 23(1) *IOSR Journal Of Humanities And Social Science* (2018).

poor leadership, weak or dysfunctional governance institutions, unaccountable political systems, corruption, disregard for the rule of law, economic inequalities, and general state capture. Africa has clearly failed to transform its social and political institutions to work for the citizenry. Thus, if extractives in Africa have become a curse, the scourge is possible because the devil's agents exploit the pre-existing bad habits that include i) undermining peoples' sovereignty; ii) operating economic and business affairs in an opaque and inequitable manner; iii) violating property rights; and iv) failing to protect the environment.

I also suggest that we move from the language of curses to that of consequences or even penalties. The religious or moralistic language of curses makes the causation between wrongs and their consequences amorphous and unscientific. Thus, although, as understood in ordinary parlance, a curse is an evil that is miraculously visited upon those who disregard the religious or moral rulebook, there is always ambiguity as to the nature, extent and timing of possible repercussions. This language puts the problem and the solution beyond reach by blaming the crisis on forces above humanity, in the realm of the gods and the spirits. Such an approach is difficult to harness in public and secular discourse. For, the semantics of curses belongs to the religious and moral domains, and it is naïve to operate public administration on such dictates. The better approach is to entrench the secular language of cause and effects, of decisions and consequences. It is, therefore, more useful to, for instance, talk of armed conflict as a consequence of poor governance rather than see it as a mere curse caused by the presence of extractive resources in a particular territory. In other words, the debate and its semantics must not put emphasis on extractive resources and the curses they occasion, but on poor governance as the root cause of these calamities. If a catchword for the new approach is necessary at all, then it should read something like 'the mis-rule penalty'. This is the framework through which the governance of extractives in Africa (and Kenya in particular) require to be examined.

The discovery and eventual extraction of natural resources often tests Africa's social and political institutions to the limits, including the levels of subservience to the law, government accountability to the people, and citizen participation in governance. The fact that natural resources in Africa are often discovered in areas with little government penetration or regions that have experienced historical marginalisation such as those inhabited by special groups like indigenous peoples and pastoralists only serves to worsen an already pathetic situation. The problem is often further exacerbated by the unhealthy collaboration between the mostly greedy government officials - expected to facilitate the realisation of the people's well-

being - and the profit-motivated multi-national organisations involved in prospecting or mining. In the end, peoples' dignity is undermined, returns on investment are wasted, property rights suffer, and the environment is polluted. At the very core is usually a failed legal and political dispensation that is hostile to the people, the rule of law, good governance and human rights. Against this backdrop, this book proceeds from four key hypotheses, that: i) all the major governance challenges that usually bedevil the discovery of natural resources in Africa are already operating in Kenya's budding extractives sector; ii) the existence of these problems in spite of a very progressive constitutional and legislative framework, points to hurdles beyond the law; iii) that is, failure to harness the State for the good of the ordinary person, a culture of impunity, greed, and disregard for the rule of law, iv) which is a dangerous scenario, going by the general African story.

The discovery of precious resources in Kenya, including oil, has in recent times elevated the discourse on extractives. A lot of attention has been given to Base Titanium mining in Kwale County, which began its activities in Kenya in 2010. Tullow Oil has equally been in sharp focus since 26 May 2012, when Kenya's former President, Mwai Kibaki, announced the discovery of oil in Turkana County.<sup>6</sup> Sadly, however, the same concerns that have been raised in other African countries are alive in Kenya. The Kenyan debate dovetails around questions about the participation and benefits by local communities, worries regarding Government's reluctance to foster transparency and accountability, fears concerning land ownership, and acquisition of interests in extractives, alarm on the loosening levels of environmental protection, and disquiet related to the manner of sharing the proceeds of the extractives sector, let alone issues related to security and labour rights. As this edited volume shows, ordinary people are left out of the governance of extractives, host communities have not benefited from the natural resources found in their areas fully, indigenes are involuntarily displaced, and the hazards of environmental degradation are already manifest.

The principle of sovereignty of the people, enshrined in the Constitution of Kenya,<sup>7</sup> entitles host communities to participate in deciding how to spend the returns of extractive activities. Sovereignty, additionally, involves regular and transparent disclosure of information related to issues like prospecting or mining licences and the formula for benefit-sharing. It is also part of sovereignty for affected persons to be consulted regularly in deciding matters such as compulsory acquisition

<sup>6</sup> Johannes E et al, 'Oil discovery in Turkana County, Kenya: a source of conflict or development?', 146.

<sup>7</sup> Article 1, *Constitution of Kenya (2010)*.

of their lands, and measures intended to mitigate potential environmental hazards. However, those affected by prospecting or mining activities in Kenya lament their exclusion from decision-making. Residents of Kwale County have complained that mining operations in the area have been opaque, including in decisions affecting their own property and well-being. My round-table consultations with residents of Kwale revealed that the Government has never adequately briefed the local communities about critical information related to Base Titanium's mining licence in Kwale County. For example, it is not clear to most residents what minerals Base Titanium excavates other than titanium. Members of the community remain in darkness regarding the estimated quantities of titanium found on their traditional land, they also have little information on the revenues generated thus far, and whether such resources have been used for their benefit. As *Nicholas Orago* reports in chapter two of this book, in Bwiti (Kwale), 70.6 percent of the residents he interviewed responded that the community was not involved in decision-making on the development projects undertaken by Base Titanium.<sup>8</sup> 23.5 percent stated that a few elders were involved in decision-making on the projects, with only 5.9 percent acknowledging involvement in decision-making on the projects.<sup>9</sup> Due to the lack of substantive participation in decision-making, 70.6 percent of the respondents were of the view that the projects had not met the needs and aspirations of the Bwiti people. 5.9 percent stated that the projects had partly met the needs and aspirations of the Bwiti people, with no respondent (0 percent) stating that the projects had fully met the needs and aspirations of the Bwiti community.<sup>10</sup> A similar scenario is replicated in Nguluku (Kwale), where 37.5 percent of the respondents stated that no one they knew was involved in decision-making on development projects by Base Titanium; 50 percent stated that some community elders and local leaders were involved in decision-making; and only 12.5 percent acknowledged individual participation in decision-making.<sup>11</sup> Resulting from this, only 12.5 percent of the respondents were of the view that the projects had partly met the needs of the Nguluku community. 87.5 percent felt that the projects had not met the needs and aspirations of the community.<sup>12</sup> Clearly, the lack of participation in decision-making has created a very negative perception of titanium mining in the communities of Bwiti and Nguluku to the extent that most of the respondents do not support the mining operation. In

<sup>8</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>9</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>10</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>11</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>12</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

Turkana, host communities have complained of being left out of decision-making processes on land sales and oil-related licensing and contracts.<sup>13</sup> Residents were not even informed formally about the discovery of oil in their area, they learnt it from media reportage.<sup>14</sup>

Participation by residents of the regions where extractives are found is important because it is host communities that bare the burdens of the extractive activities such as loss of land and its attendant displacement and relocations; the environmental impacts of extracting such as dust, noise, pollution and changes in micro-climates; competition for water and other resources; as well as social costs such as diseases, and destruction of social fabric. Orago therefore, rightly, advocates the involvement of communities in all extractive processes from prospecting, to the actual extraction of resources, to the point of sharing the burdens and benefits.

Further, host communities should have the capacity to be collaborative partners in equitably sharing the burdens and benefits of the extractives in their neighbourhoods. This however, is often a mere aspiration since collaboration in resource-sharing depends on the levels of access to information, which, in Kenya's context, is hampered by many factors, as *Beverline Ongaro* and *Anne Nderi* point out in chapter four of this book. These factors include: inadequate regulation for community engagement; inadequate financing for exploration and extraction; lack of technical skills and experience; inadequate geological data and information, which makes extractives' exploration a costly undertaking; environmental degradation, and lack of harmonisation of regulatory policies and practices in the extractives sector with existing environmental legislations. *Beverline* and *Anne* suggest solutions to these challenges that include: the application of freedom of information principles to the extractives sector; the enactment of pending legislative proposals such as the Natural Resource (Benefit Sharing) Bill, 2014,<sup>15</sup> the Local Content Bill, 2016,<sup>16</sup> the Petroleum (Exploitation, Development and Production) Bill, 2015,<sup>17</sup> and the National Sovereign Wealth Fund Bill, 2014; the implementation of newly adopted policies and laws such as the Mining Act<sup>18</sup> that contain progressive provisions on transparency and accountability; the inclusion of Kenya's extractives industry in global initiatives like the Extractive Industries Transparency Initiative

<sup>13</sup> Johannes E et al, 'Oil discovery in Turkana County, Kenya: a source of conflict or development?', 155.

<sup>14</sup> Johannes E et al, 'Oil discovery in Turkana County, Kenya: a source of conflict or development?', 155.

<sup>15</sup> Kenya Gazette Supplement No 137 (Senate Bills No 34).

<sup>16</sup> Kenya Gazette Supplement No 115 (Senate Bills No 13).

<sup>17</sup> Kenya Gazette Supplement No 128 (National Assembly Bills No 44).

<sup>18</sup> Act No 12 of 2016.

and Publish What You Pay, which promote local transparency and accountability mechanisms; capacity-building for host communities and non-state actors; and advocacy for a revenue-sharing formula that has local communities in contemplation.

*Katindi Sivi-Njonjo* offers additional ideas on viable benefits-sharing models that Kenya could emulate, in chapter three of this book. The allocation of resources could be done vertically - from higher to lower levels of government; horizontally - across similar jurisdictions; among sector priorities - to get the various proportions to be used for capital spending, debt reduction, revenue stabilisation, expenditure smoothing or other specific needs such as education and health; over time - to take into account revenue savings; or indirectly. However, considerations on certain aspects - such as economic, financial, social, environmental, and generational - have to be made when designing a revenue-sharing model so that the wealth arising from oil or mining operations can be distributed and managed transparently. Sivi-Njonjo's work learns from the experiences of countries with older experiences in extractives like Bolivia, Botswana, Brazil, Brunei, Canada, Ghana, Mexico, Mongolia, Nigeria, Norway, Papua New Guinea, Saudi Arabia, USA, Qatar, and Venezuela.

Regarding the question of land, *Francis Kariuki* demonstrates in chapter five of this volume that persons or communities on whose land extractives have been found have had their properties forcefully taken sometimes without prompt and just compensation. In Kwale, the compulsory acquisition process undervalued coconut trees and other crops on land, with significant economic ramifications to communities. In Turkana, most of the land the State acquired compulsorily was community land yet the affected communities did not participate in the process effectively. Not even Turkana County Council, which then held community land in trust for its beneficiaries, was consulted. What the Government appears to have neglected is the fact that resettlement of communities from their traditional lands, to pave way for extraction of natural resources, disrupts community life, and destroys cultures, sacred sites, homes of ancestors (graves) and other cultural practices.

These and related usurpations continue to defy strong constitutional safeguards: i) entitling every person the right, either individually or in association with others, to acquire and own property of any description in any part of the country;<sup>19</sup> ii) limiting compulsory acquisition of property to only exceptional circumstances such as for a public purpose or in public interest;<sup>20</sup> and iii) guaranteeing *prompt*

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<sup>19</sup> Article 40(1), *Constitution of Kenya*.

<sup>20</sup> Article 40(3)(b), *Constitution of Kenya*.

payment in full of *just* compensation to the affected person(s).<sup>21</sup> International law provides additional practices and principles that should be applicable to Kenya. These standards require, for instance, that the amount of compensation, and the time and manner of payment, must reflect an equitable balance between the public interest and the interests of those affected, with due regard to all relevant circumstances.<sup>22</sup> These circumstances include the current use of the property; its history of acquisition and use; the market value of the property; the extent of direct State investment and subsidy in its acquisition and beneficial capital improvement; and the purpose of the encroachment.<sup>23</sup> It would be more expedient if the time and manner of the payment is agreed to by those affected or, in the alternative, decided or approved by a competent court of law. These standards should be applied in Kenya's extractives industry.

While the exploration of natural resources has potential for transforming economies and boosting the fiscal base of a country, it also raises fundamental environmental challenges that the law has to grapple with. One of the main challenges is pollution. As *Collins Odote* notes in chapter six of this book, extractive processes entail significant levels of blasting, seismic testing, and pollution, all of which have potentially devastating effects on the environment.<sup>24</sup> In the case of Kwale, experts had warned well in advance that titanium mining would accelerate soil erosion, pollute river and stream waters, and eliminate aquatic biodiversity, part of which serves as a source of food.<sup>25</sup> Already, residents of Kwale County are reporting uncommon health complications suspected to be caused by the effects of titanium mining operations on the environment.<sup>26</sup> When news filtered into the

<sup>21</sup> Article 40(3)(b)(i), *Constitution of Kenya*.

<sup>22</sup> This is espoused in the interpretation of the right to property in the CCPR and CSECR. Regionally, the Banjul Charter contains similar provisions in articles 14 and 22.

<sup>23</sup> See Article 25(3), *Constitution of South Africa (1996)*.

<sup>24</sup> Marsh J, 'Supplying the World's Factory: Environmental Impacts of Chinese Resource extraction in Africa' 28 *Tulane Environmental Law Journal* (2015), 406.

<sup>25</sup> See 'Achieng' J: Titanium Mining An Investment, But At What Cost?' *Inter press service news agency* <http://www.ipsnews.net/2000/09/environment-kenya-titanium-mining-an-investment-but-at-what-cost/> on 9 March 2018; for discussions on aspects of the environmental study and the interventions by Action Aid following the publication of the EIA report for Titanium mining Ojiambo E, 'Battling for Corporate Accountability: Experiences from Titanium Mining Campaign in Kwale, Kenya' University of Sussex Seminar on Linking Rights and Participation: Sharing Experiences and Opportunities, Brighton, 29 May 2002 [http://www.participatorymethods.org/sites/participatorymethods.org/files/battling%20for%20corporate%20accountability\\_ojiambo.pdf](http://www.participatorymethods.org/sites/participatorymethods.org/files/battling%20for%20corporate%20accountability_ojiambo.pdf) on 6 January 2018.

<sup>26</sup> Maina DM, Ndirangu DM, Bowman J et al, 'Environmental implications of high metal content in soils of a titanium mining zone in Kenya'.



country about the discovery of ground water in Turkana,<sup>27</sup> there was debate about how to ensure that oil exploration and water abstraction would not result in pollution and environmental degradation.<sup>28</sup> Regrettably, the drilling of oil is proving to be a real threat to the purity of the new-found water resources in Turkana, just as initially feared.

The best way out of this environmental conundrum is to implement the blueprint that is Kenya's 2010 Constitution strictly. The 2010 Constitution guarantees every person the right to a clean and healthy environment.<sup>29</sup> It implores the Government to: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya; protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; encourage public participation in the management, protection and conservation of the environment; protect genetic resources and biological diversity; establish systems of environmental impact assessment, environmental audit and monitoring of the environment; eliminate processes and activities that are likely to endanger the environment; and utilise the environment and natural resources for the benefit of the people of Kenya.<sup>30</sup> Odote additionally prescribes that strict adherence to the above measures will require us to strengthen the capacity of various agencies responsible for the implementation process, including the relevant ministries and departments and the National Environmental Management Authority. The role of non-state actors in ensuring that both the private sector and the Government live up to their commitment is also important as this will give meaning to the provisions of access to information, public participation, and access to justice.

Besides providing a context for the various chapters of this book, my aim in this introduction is to teach Kenya's budding extractives sector that natural resources are not a curse. I meant to demonstrate that the discovery of extractive resources in an African country does not cause problems, but that it only puts to

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<sup>27</sup> 'Kahumbu P: Massive water discovery in Kenya's desert' *The Guardian*, 11 September 2013 <https://www.theguardian.com/environment/africa-wild/2013/sep/11/1> on 10 January 2018.

<sup>28</sup> Okuthe I, 'Environmental and Social Challenges of Oil and Gas Exploration in Kenya' 17(1) *International Journal of Innovation and Scientific Research* (2015). See also 'Kakonge J: Maximising the benefits of Oil and Water Discoveries in Turkana' *Pambazuka News*, 1 October 2015 <https://www.pambazuka.org/land-environment/maximizing-benefits-oil-and-water-discoveries-turkana-kenya> on 10 January 2018.

<sup>29</sup> Article 42, *Constitution of Kenya*.

<sup>30</sup> Article 69(1), *Constitution of Kenya*.

test social and political institutions that have previously failed to deliver. Expecting such shaky institutions to pass an even harder test of extractives' exploration and extraction is therefore naïve. Thus, rather than keep berating our poor and starving institutions every time they fail, we must seek a lasting solution. And the panacea is both simple and attainable, merely: i) to recalibrate governance institutions to be sensitive to their main client - the citizenry, ii) to adhere to well-articulated governance principles at municipal and international levels, and iii) to empower civil society groups engaged in agitating for good governance. This trinity has the potential to cleanse all the curses often associated with natural resources in Africa.

# TITANIUM MINING BENEFIT-SHARING IN KWALE COUNTY: A COMPREHENSIVE ANALYSIS OF THE LAW AND PRACTICE

NICHOLAS WASONGA ORAGO\* AND PAULINE VATA MUSANGI<sup>∞</sup>

## 1. Introduction

The sustainable management of natural resources,<sup>1</sup> especially mineral resources, has the potential to enhance sustainable development and uplift the standard of living of host communities.<sup>2</sup> Some of the major benefits that have been known to flow from a properly managed<sup>3</sup> extractives industry include: creation of employment and skills acquisition for host communities; local procurement and use of local products in mining operations; growth of mining-induced alternative small and large-scale businesses; development of socio-economic services such as roads, schools, vocational training institutions,

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<sup>1</sup> See International Financial Corporation (IFC), 'Sustainable and responsible mining in Africa: A getting started guide', 2014, 8. It defines sustainable mining to entail the balancing of social, environmental and economic factors to generate success for the mining company while ensuring sustainable livelihoods for the host communities. This requires community engagement and investments; respecting human rights; protecting the environment; being transparent; and acting with integrity.

<sup>2</sup> See International Financial Corporation (IFC), 'The art and science of benefit-sharing in the natural resources sector', 2015, 7. See also Soderholm P & Svahn N, 'Mining, regional development and benefit sharing in developed countries' 45 *Resources Policy Journal* (2015), 80, who define some of these benefits as follows: backward linkages (local procurement of goods and services); forward linkages (opportunities created in downstream value chains such as processing, transport and value addition); final demand linkages (income spent by employee households in the local economy); and fiscal linkages (mining taxes and royalties for the development of local communities).

<sup>3</sup> See 'Muigua K : Reflections on managing resources and equitable benefit sharing in Kenya' 2016, 1, <http://www.kmco.co.ke/attachments/article/176/Reflections%20on%20Managing%20Natural%20Resources%20and%20Equitable%20Benefit%20Sharing%20in%20Kenya-June%202016.pdf> on 13 May 2017, who affirms the importance of the proper management of extractive resources in inducing sustainable development.

healthcare infrastructure, water infrastructure, and other socio-cultural facilities; generation of revenue and foreign exchange through taxes and royalties, etc.<sup>4</sup> Achieving these benefits, however, requires a comprehensive legal framework and efficient governance structures that ensure transparent, accountable and sustainable management of these resources. These legal and governance structures must also put in place effective and equitable mechanisms for the sharing of the benefits and burdens of natural resource exploitation among all the relevant natural resource stakeholders, especially the host communities.

However, most mining operations occur in areas with several structural and governance challenges such as weak legal and regulatory frameworks, weak governmental capacity to deliver public goods, unmitigated social and environmental imprints of mining activities as well as heightened expectation of employment and economic development by the host community.<sup>5</sup> Due to these challenges, rather than stimulate broad-based socio-economic development, mineral resource extraction mostly generates the dreaded ‘mineral curse’. This ‘curse’ is exemplified by the following characteristics: concentration of wealth and power in the hands of a few; environmental degradation and pollution; increased poverty and inequality, as well as the exacerbation of corruption and other unethical practices by public officers.<sup>6</sup> These disparities - the lack of employment opportunities and the failure to share the benefits of extractive operations equitably - have generated tensions, leading to varying degrees of conflict, from community protests to actual armed struggle for the control of mineral resources.<sup>7</sup>

Historically, Kenya has not been a significant mineral producer or exporter.<sup>8</sup> The legal regime governing the extractives industry has, thus; not transformed considerably in comparative perspective. For seventy-six years, the extractives industry in Kenya was governed by a colonial-era law, which was repealed in 2016.<sup>9</sup>

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<sup>4</sup> International Financial Corporation, ‘The art and science of benefit sharing’, 7; World Bank, ‘The context of benefit sharing in the mining industry’ in Wall E & Piloni R (eds.) *Sharing Mining Benefits in Developing Countries*, The World Bank, 2011, 6.

<sup>5</sup> World Bank, ‘The context of benefit-sharing in the mining industry’, 6.

<sup>6</sup> International Financial Corporation, ‘The art and science of benefit-sharing’, 7.

<sup>7</sup> Ballard C & Banks G, ‘Resources wars: The anthropology of mining’ 32 *Annual Review of Anthropology* (2003), 289 & 295-296.

<sup>8</sup> ‘Brown M: Mining in Kenya – the start of a new era?’ 2013, 1, [https://www.mayerbrown.com/files/uploads/Documents/PDFs/Mining\\_in\\_Kenya2.pdf](https://www.mayerbrown.com/files/uploads/Documents/PDFs/Mining_in_Kenya2.pdf) on 5th May 2017; who states that Kenya’s mining export was historically less than 1% of the GDP.

<sup>9</sup> Chapter 306, Laws of Kenya, now repealed. Ayisi M, ‘The legal character of mining rights under the new mining law of Kenya’ 35(1) *Journal of Energy and Natural Resources Law* (2017), 28, notes that before the law reforms resulting in the Mining Act 2016, Kenyan mining law and policy had not been transformed compared to mining codes in other African countries.

Due to the weak legislative, policy and regulatory framework, the mining sector had been beset by extractive practices that were detrimental to host populations. These included: lack of popular participation in the design, implementation and management of the mining operations; loss of community production factors such as land, water, pasture and communal cultural sites; environmental degradation that had a negative impact on food production and detrimentally affected human and animal health; inequitable sharing of the benefits of mining, which saw mining multi-national corporations benefit hugely from natural resource exploitation to the detriment of host communities, as well as other challenges.<sup>10</sup>

In the last eight years, however, the extractives industry has grown in Kenya. It is currently contributing one percent of the GDP as well as about two percent of Kenya's export earnings, which is anticipated to rise to ten percent by the year 2030.<sup>11</sup> In 2014/2015, the total production from the extractives industry was Kshs 20.9 billion, with the Government collecting Kshs 1.25 billion as taxes, royalties and other payments.<sup>12</sup> The growing importance of the mining industry has seen the development of a comprehensive and holistic legal and regulatory framework for the extractives industry to limit the negative impacts of mining, ensure sustainable mining practices and enhance the equitable sharing of mining benefits. This was achieved, in part, through the promulgation of the Constitution of Kenya in 2010 (2010 Constitution) as well as the subsequent enactment of the Mining Act and the development of the Local Content Bill 2016<sup>13</sup> to create the necessary legal framework for benefit-sharing.

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<sup>10</sup> Musikali L & Musikali E, 'Legislating corporate social responsibility in Kenya's extractive industry: A case study of the Mui Coal Mining Project' 3(1) *African Nazarene University Law Journal* (2015), 75-76.

<sup>11</sup> 'African Development Bank: Information Centre for the Extractive Sector' 2 [https://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/Kenya\\_-\\_Information\\_Centre\\_for\\_the\\_Extractive\\_Sector.pdf](https://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/Kenya_-_Information_Centre_for_the_Extractive_Sector.pdf) on 5<sup>th</sup> July 2017; Institute for Human Rights and Business (IHRB), *Human Rights in Kenya's Extractive Sector: Exploring the Terrain*, December 2016, 13.

<sup>12</sup> 'Mugambi A: Legislative development in Kenya', 24<sup>th</sup> September 2015 <http://www.elexica.com/~media/Files/Training/2015/09%20September/MiningConference2015/Legislative%20Developments%20in%20Kenya.pdf> on 6<sup>th</sup> May 2017.

<sup>13</sup> See Statement of Objects and Reasons, *Local Content Bill 2016*, para 3-4, which affirms that discovery of minerals has not led to socio-economic development of local communities and entrenched equitable benefit-sharing because of the following reasons: lack of capacity of local communities to participate in the extractives industry; lack of technology and technical know-how; lack of public participation; and, importantly, lack of a legal framework for the exploitation of natural resources in a manner that ensures that accruing benefits are equitably shared with the host communities. The Bill aims to change the narrative and ensure host communities participate effectively in the mining industry and benefit from the profits accruing from the industry.

This chapter aims to undertake an analysis of the new mining regime in relation to benefit-sharing, focusing on titanium mining in Bwiti and Nguluku in Kwale County. It is divided into five sections. After this introductory section, the chapter details the methodology used in the research in section 2. Section 3 undertakes an analysis of the socio-economic situation of Kwale County, focusing mainly on Bwiti and Nguluku. It affirms that despite the titanium-mining project, the socio-economic situation of the host communities in Bwiti and Nguluku has not changed for the better, and, in many instances, it has actually become worse as a result of the adverse unmitigated impact(s) of the mining project. Section 4, the core of the study: this analyses the concept of benefit-sharing. It defines benefit-sharing and elaborates on the legal framework for benefit-sharing in Kenya. Then, it analyses the practice of benefit-sharing in the context of titanium mining in Kwale County, finding that there has not been a fair and equitable sharing of the benefits and burdens of titanium mining there (in Kwale). Building on the discussion in section 4, section 5 proposes the establishment of a Community Mining Trust Fund (CMTF) to manage all aspects of benefit-sharing for and on behalf of the host communities in Bwiti and Nguluku. Section 6 contains the conclusion and recommendations.

## 2. Methodology

Method	Description
Study method	Study method was broadly qualitative. Its main objective was an in-depth analysis of mining benefit-sharing in Bwiti and Nguluku in the context of titanium mining by Base Titanium.
Study approach	<p>A mixed-method approach was adopted, combining document/literature review and field survey to collect primary data:</p> <p>Document review: Entailed qualitative content analysis of available literature and legal instruments on mining benefit-sharing. The essence of the review was to determine the socio-economic situation of Kwale County; legal provisions on mining benefit-sharing; and the reality of mining benefit-sharing in Kwale County in the context of Bwiti and Nguluku.</p>

	<p>Field survey: Entailed face-to-face interviews with twenty household heads in Bwiti and Nguluku (ten Bwiti, ten Nguluku); ten face-to-face key informant interviews; and four focus group discussions with different mining stakeholders. Random sampling approach was used to select the twenty household heads for the household interviews, while purposive sampling approach was adopted in selecting the key informant interview respondents. The essence of the field survey was to collect data affirming the socio-economic situation of households in Bwiti and Nguluku and to determine the perceptions of host communities on benefit and burden sharing in the context of titanium mining in Kwale.</p>
Data collection instrument	<p>Semi-structured questionnaires. Two sets of questionnaires were developed: one for key informant interviewees on benefit-sharing; and the second one for host community households on their perceptions of benefit-sharing and service delivery in Kwale County.</p> <p>The key informant interviews were carried out by the lead author of this chapter while the household surveys were done by ten data enumerators. The focus group discussions were carried out jointly by the Hakijamii staff and the lead author. Data was collected in the week of the 22 - 26 May 2017.</p>
Recruitment	Voluntary and confidential.
Duration	Fifty to ninety minutes.
Recording	Short-hand and audio recording followed by verbatim transcriptions.
Analysis	Thematic coding through main themes and sub-themes.

### 3. Titanium mining and its impact on the host communities in Bwiti and Nguluku

Mining activities will occur in most instances in rural locations with minimal socio-economic opportunities and services. Further, these locations are likely to have weak governance structures to police mining activities adequately on behalf, and for the benefit, of local communities. Titanium mining in Kwale was in such a situation when titanium exploration and mining commenced, the County Government only being formed later in 2013 to enhance Kwale's governance structures. This section looks at the socio-economic situation of Kwale and the impact that titanium mining has had on the socio-economic situation of the population, especially in Bwiti and Nguluku.

#### 3.1 The political and socio-economic situation of Kwale County

Kwale County is one of the six counties in the coastal region. It is situated in the southeastern corner of Kenya, lying between latitudes 3° 3' and 4° 45' South and Longitudes 38° 31' and 39° 31' east.<sup>14</sup> It covers an area of 8270.2 km<sup>2</sup> and borders the Indian Ocean to the East with a coastline of approximately 250 kilo metres, making it an attractive tourist and investment destination.<sup>15</sup> It has four major topographical features - the Coastal Plains, the Foot Plateau, the Coastal Uplands and the Nyika Plateau – making it ideal for different types of economic activities from agricultural production,<sup>16</sup> livestock rearing, wildlife conservation,<sup>17</sup> fishing, tourism and mining.<sup>18</sup> It has a monsoon type of climate, which is hot and dry from January to May and cool from June to August. It experiences long rains from March to July and short rains from October to December.<sup>19</sup>

<sup>14</sup> Controller of Budgets 'Kwale County', <http://cob.go.ke/counties/kwale-county/> on 20<sup>th</sup> May 2017.

<sup>15</sup> Kwale County Integrated Development Plan 2013-2017, 10.

<sup>16</sup> 15% of the land has medium potential for rain-fed agriculture, while 18% is marginal with 67% being arid and semi-arid. Main subsistence crops grown are maize, cassava, beans, peas, coconuts and mangoes while the main commercial crops are cashew nuts, bixa, sugar cane, cotton, simsim and tobacco. There is potential, however, for growth in irrigation agriculture as exemplified by the existence of seven rivers traversing the County, that is, Ramisi, Marere, Pemba, Mkurumuji, Uмба, Mwachema and Mwachichi. See Kwale County Integrated Development Plan 2013-2017, 10-12.

<sup>17</sup> Official conservation areas are Shimba Hills National Reserve, Mwaluganje Elephant Sanctuary and the Kisite Mpunguti Marine Reserve. There are also private ranches with wildlife in Kinango and Samburu Divisions.

<sup>18</sup> Kwale County Integrated Development Plan 2013-2017, 10.

<sup>19</sup> Kwale County Integrated Development Plan 2013-2017, 12.



Kwale County is divided into three administrative sub-counties, namely, Kinango, Matuga and Msambweni.<sup>20</sup> These are further divided into four political constituencies,<sup>21</sup> nine administrative divisions, twenty county assembly wards, thirty-seven administrative locations and eighty-four administrative sub-locations.<sup>22</sup> It is populated mainly by the Digo and Duruma communities, though it has experienced immigrations from other Kenyan and foreign communities. According to the 2009 population census, the population of Kwale was 649, 931, consisting of 315, 997 males and 333, 934 females.<sup>23</sup> This population, which grows at an average rate of 3.1 percent per annum,<sup>24</sup> was projected to have grown to 713, 488 (346, 898 males and 366, 589 females) in 2012 and 833, 527 (405, 262 male and 428, 266 female) in 2017.<sup>25</sup> The population is generally youthful, those under 15 years constituting 47.23 percent of the population while those over 60 years only account for 4.95 percent of the population in 2012.<sup>26</sup> This population projection is set to grow in 2017, with the population under thirteen years increasing to approximately fifty-seven percent.<sup>27</sup> This denotes a high level of dependency, necessitating household resources to be directed mainly at consumption with very little left for capital investment to grow the household resource base.<sup>28</sup> The result of this is the high level of poverty and destitution, with households finding it difficult to break out of poverty.<sup>29</sup> This is affirmed by the high poverty incidences in Kwale County approximated at 74.9 percent of the households living below the poverty line.<sup>30</sup> The situation is worsened further by the lack of economic opportunities; subsistence farming contributes over 80.6 percent of household income and wage labour

<sup>20</sup> Kwale County Integrated Development Plan 2013-2017, 14.

<sup>21</sup> The four constituencies are: Matuga, Msambweni, Lunga Lunga and Kinango.

<sup>22</sup> Kwale County Integrated Development Plan 2013-2017, 14.

<sup>23</sup> Kwale County Integrated Development Plan 2013-2017, 15-16.

<sup>24</sup> 'Institute of Economic Affairs: Kwale County – Child budgeting analysis', 2 <http://www.ieakenya.or.ke/publications/bulletins/1/2015/07> on 20th May 2017.

<sup>25</sup> Kwale County Integrated Development Plan 2013-2017, 15-16.

<sup>26</sup> Kwale County Integrated Development Plan 2013-2017, 16. See also 'Institute of Economic Affairs: Child Budgeting analysis', 2, which affirms that 56.09% of the population in 2009 was children.

<sup>27</sup> Calculations from data in table 6 of the CIDP that details the total population of children below 13 years to 464, 923. If multiplied by 100 and divided by the total population projection of 2017 at 833, 527, the percentage is 56.91% of the population below 13 years.

<sup>28</sup> Kwale County Integrated Development Plan 2013-2017, 18.

<sup>29</sup> Kwale County Integrated Development Plan 2013-2017, 18.

<sup>30</sup> Kwale County Treasury, 'County budget review and outlook paper 2015 (C-BROP)', 2015, 1. The challenges leading to the high levels of poverty according to the C-BROP 2015 are: low productivity, poor education standards, poor management of land, low investments in trade, industry and tourism, poor infrastructure, rising insecurity and poor governance.

accounting for only 8.6 percent of household income.<sup>31</sup> Though the active labour population (15 - 64) constitutes about forty eight percent of the total population, they are mostly semi-skilled or unskilled, severely limiting labour productivity.<sup>32</sup> Thirty percent of this labour force is unemployed or underemployed and youth are the most affected.<sup>33</sup>

In comparative perspective, Kwale County has a poor infrastructural network, especially transport and communication. It has 1, 483.1 km of roads, of which 187.7km are tarmacked, 425.2km is graveled and 872.1km has earth surface.<sup>34</sup> It has 4km of railway line and four airstrips (Ukunda/Diani, Shimba Hills National Reserve, Msambweni and Kinango), though only one is operational, the Ukunda airstrip.<sup>35</sup> It has an expansive coastline, but water transport is mostly unexploited, as only two small ports at Shimoni and Vanga for boat transport are operational.<sup>36</sup> The mobile phone network is good (seventy-five percent coverage) in the major towns like Ukunda, Msambweni and Kinango, but the hinterlands are either completely uncovered or experience difficulty in accessing mobile phone networks.<sup>37</sup> Internet access is also poor and is available in very few Internet cafes in the major towns.<sup>38</sup>

The educational infrastructure is poor comparatively. Kwale County has only 820 early childhood centers, 415 primary schools (363 public and 52 private), fifty-five secondary schools and six tertiary institutions (Kenya School of Government, Kenya Medical Training College and four youth polytechnics).<sup>39</sup> These schools suffer further from challenges such as inadequate classrooms, desks, toilets, dilapidated infrastructure and a lack of adequate teachers.<sup>40</sup> These challenges have led to poor performance in national examinations over the years.

<sup>31</sup> Kwale County Integrated Development Plan 2013-2017, 28.

<sup>32</sup> Kwale County Integrated Development Plan 2013-2017, 29.

<sup>33</sup> Kwale County Integrated Development Plan 2013-2017, 29.

<sup>34</sup> Kwale County Integrated Development Plan 2013-2017, 21. See Controller of Budgets 'Kwale County', which further states that the County has poor access infrastructure, with 29% of roads having gravel surface and 58% having earth surface.

<sup>35</sup> Kwale County Integrated Development Plan 2013-2017, 21.

<sup>36</sup> Kwale County Integrated Development Plan 2013-2017, 21-22.

<sup>37</sup> Kwale County Integrated Development Plan 2013-2017, 22. The most affected areas include Kubo, Vanga, Samburu, Davanya and parts of Lunga Lunga.

<sup>38</sup> Kwale County Integrated Development Plan 2013-2017, 22, which indicates that there are only 8 cyber cafes and all are found in Ukunda/Diani.

<sup>39</sup> Kwale County Integrated Development Plan 2013-2017, 23 & 31.

<sup>40</sup> Kwale County Integrated Development Plan 2013-2017, 31.

The housing and sanitation situation is poor and many houses have no piped water or sanitation facilities.<sup>41</sup> The main roofing material is *makuti* (coconut tree leaves) at 48.8 percent while corrugated iron roofing accounts for 37.1 percent of the houses.<sup>42</sup> Walls are mostly constructed of mud and wood (56.9 percent); stoned walls account for 15.2 percent while mud and cement walls account for 9.8 percent.<sup>43</sup>

Common sources of energy for cooking is mainly wood fuel (80.2 percent), charcoal (11.5 percent) and paraffin (5.7 percent); while common energy source for lighting is paraffin (95.5 percent).<sup>44</sup>

The main sources of water are rivers, boreholes, springs, dams, water pans and rock catchments. The average distance to a water source is about two kilometres, a far cry from the five metres distance required by international standards.<sup>45</sup> Sanitation is equally poor, as pit latrines cover only 41.4 percent of the households, a great disparity from the national target of ninety percent.<sup>46</sup>

Access to health is also an issue, as Kwale County has only three Government hospitals, eight health centers, sixty-four dispensaries and two private hospitals.<sup>47</sup> The ratio of doctor to population is 1:76, 741, while that of nurse to population is 1:3, 133<sup>48</sup> The average distance to a hospital is seven kilometres, which compares adversely to the required standard of three kilometres.<sup>49</sup> The poor health infrastructure is affirmed by poor child health and nutrition indicators which show that thirty percent of children in Kwale County are facing stunting, four percent are wasting, twelve percent are underweight, and 2659 are living with HIV. Only eleven percent of those living with HIV receive anti-retroviral therapy.<sup>50</sup>

Historically, Kwale County has faced a land issue due to the absentee landlords. As a result, there are high incidences of landlessness. Many families have

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<sup>41</sup> Kwale County Integrated Development Plan 2013-2017, 23.

<sup>42</sup> Kwale County Integrated Development Plan 2013-2017, 23.

<sup>43</sup> Kwale County Integrated Development Plan 2013-2017, 23.

<sup>44</sup> Kwale County Integrated Development Plan 2013-2017, 23. See Controller of Budgets 'Kwale County', which states that only 3.6% of households in Kwale have access to electricity.

<sup>45</sup> Kwale County Integrated Development Plan 2013-2017, 29.

<sup>46</sup> Kwale County Integrated Development Plan 2013-2017, 29.

<sup>47</sup> Kwale County Integrated Development Plan 2013-2017, 30.

<sup>48</sup> Kwale County Integrated Development Plan 2013-2017, 30.

<sup>49</sup> Kwale County Integrated Development Plan 2013-2017, 30.

<sup>50</sup> 'Institute of Economic Affairs: Kwale County - Child Budgeting analysis', 2. These numbers might actually be higher at the moment taking into account the continuing drought and its impact on household food security.

no access to land and have to live as squatters on public or private land.<sup>51</sup> The land situation is further complicated by the lack of land adjudication and the issuance of title deeds, making it precarious and difficult to invest in the development of land.<sup>52</sup> In the arid and semi-arid areas of the Nyika Plateau, land is held in common under group ranches. Community members only have a right of use and not individual ownership.<sup>53</sup> This makes it difficult for them to develop the land or access financing using land title deeds as collateral. Land has been one of the sticking points in mining operations, and communities struggle to affirm rights over land in the context of land compensation in mining areas.

In the context of this generally difficult socio-economic situation, Kwale County has deposits of diverse minerals. Those already discovered and exploited include titanium (rutile, ilmenite and zircon) in Nguluku and Shimba Hills, gemstone at Kuranze, rare earth elements (niobium and phosphates) at Mrima Hills and Samburu, among others.<sup>54</sup> It would be expected that this huge tapestry of mineral resources has generated broad-based development in Kwale. However, the socio-economic situation of the people of Kwale County does not reflect the benefits expected.

### 3.2 Titanium mining in Maumba and its impact on the socio-economic situation of the host communities in Bwiti and Nguluku

Base Titanium, a subsidiary of Base Resources Company of Australia, is the company undertaking titanium mining in Nguluku.<sup>55</sup> It bought the mines from Tiomin in 2011 and spent the first two years (2011 - 2013) on infrastructure development to operationalise the mine, reaching full-scale operational capacity in 2015.<sup>56</sup> It estimates having spent Kshs 26.4 billion (Kshs 21.2 billion to construct and outfit the mine and Kshs 5.2 billion for the flagship projects) in the operationalisation of the mines and anticipates the sustenance of the mine in full operation

<sup>51</sup> Kwale County Integrated Development Plan 2013-2017, 24.

<sup>52</sup> Kwale County Integrated Development Plan 2013-2017, 23.

<sup>53</sup> Kwale County Integrated Development Plan 2013-2017, 23.

<sup>54</sup> Some of the other mineral resources are silica sands, zinc, lead, copper, coal, sandstones, limestone and coral rocks. See Kwale County Integrated Development Plan 2013-2017, 27.

<sup>55</sup> Earnest & Young, *Base Titanium total economic and tax contribution in Kenya*, March 2016, 2 <http://basetitanium.com/newsletters?download=327:report-base-titanium-s-economic-contribution-to-kenya> 6<sup>th</sup> May 2017.

<sup>56</sup> Earnest & Young, *Base Titanium total economic and tax contribution in Kenya*, 2.

for ten years until its closure in 2026.<sup>57</sup> Base Titanium has become the seventh largest producer of ilmenite and third largest producer of rutile in the world with the operationalisation of the mine.<sup>58</sup>

Base Titanium projects that in its ten years of operations, it will directly contribute Kshs 7.6 billion worth of revenue annually to the GDP, which would translate to 75.6 billion in the ten years.<sup>59</sup> It intends to employ 642 workers, ninety-four percent (602 employees) of them being Kenyan nationals, who will earn an average annual wage of 927, 400; that is forty percent higher than the national average.<sup>60</sup> The employment provided by Base Titanium in Kwale is intended to stabilise at 400 employees as the operations stabilise, with Kenyans being trained to take over management responsibilities.<sup>61</sup> Base Titanium projects that it will contribute approximately Kshs 1.4 billion in taxes annually, including Kshs 601 million of mineral royalties.<sup>62</sup> Based on this approximation, Base Titanium projects that from 2013 to 2026, it will pay approximately Kshs. 23.8 billion in Kenyan taxes, including Kshs 11.7 billion in royalties.<sup>63</sup>

Base Titanium intends to develop the local economy through the procurement of local products and local services. It also intends to invest in the development of the local community through its Community Development Management Plan (CDMP), which focuses on education, health, livelihoods and infrastructure.<sup>64</sup> It plans to invest a total of 2.6 billion in the local mining communities in the twelve-year lifespan of the mine.<sup>65</sup> The community infrastructure it intends to build includes boreholes, water pumps, health facilities and school facilities, all to the tune of Kshs 435 million.<sup>66</sup> On community projects, the intention of Base Titanium is

<sup>57</sup> Earnest & Young, *Base Titanium total economic and tax contribution in Kenya*, 2.

<sup>58</sup> Earnest & Young, *Base Titanium total economic and tax contribution in Kenya*, 4-5.

<sup>59</sup> Earnest & Young, *Base Titanium total economic and tax contribution in Kenya*, 2.

<sup>60</sup> Earnest & Young, *Base Titanium total economic and tax contribution in Kenya*, 2 & 7-8. According to Base Titanium, these wages are 1.5 times higher than the Kenyan average; 1.6 times higher than the average wage for the Coastal Region; and 2.6 times higher than the average wage in the Kenyan mining sector in general.

<sup>61</sup> Earnest & Young, *Base Titanium total economic and tax contribution in Kenya*, 7. Base Titanium indicates that it has put in place an employee succession plan to replace expatriates with qualified Kenyans and has set aside funds to train such employees.

<sup>62</sup> Earnest & Young, *Base Titanium total economic and tax contribution in Kenya*, 3.

<sup>63</sup> Earnest & Young, *Base Titanium total economic and tax contribution in Kenya*, 3 & 9.

<sup>64</sup> Earnest & Young, *Base Titanium total economic and tax contribution in Kenya*, 11.

<sup>65</sup> Earnest & Young, *Base Titanium total economic and tax contribution in Kenya*, 11.

<sup>66</sup> Earnest & Young, *Base Titanium total economic and tax contribution in Kenya*, 11. It reports the completion of the Magaoni Health Centre that is serving 9 villages and catering to over 3, 000 residents. It intends to undertake a second phase of the project to include surgical and maternity wards.

to undertake community livelihood development through agricultural research and extension, small - and medium - size business development and provision of education and training, which are to account for thirty one percent of the total Kshs 2.6 billion CDMP Fund.<sup>67</sup> It also intends to award scholarships for secondary and tertiary education. Over two hundred students are already benefiting from the scholarships.<sup>68</sup>

The above projections by Base Titanium look extremely good on paper, but the reality on the ground has been different. Titanium mining by Base Titanium in Ngu-luku has faced the same challenges as other mining operations, resulting in concerns by host communities in relation to the loss of land, and displacements<sup>69</sup> as well as environmental degradation that has been detrimental to human and animal health.<sup>70</sup> Nor has the project enhanced access to basic services such as clean water, electricity, education and healthcare, services that were promised to the host community during the inception of the project.<sup>71</sup> The failure of the mining project to benefit the host communities and the County Government adequately is affirmed in a key informant interview with one of the Kwale County officials who states as follows:<sup>72</sup>

Mining is a major economic activity in Kwale, but benefits of the mining operations are not really visible, be it at the local mining communities or in relation to resources to the County Government for development purposes. The mining companies like Base Titanium are reaping billions of shillings from local natural resources while giving very little back to the communities and to the County Government. It also takes the raw minerals without undertaking value addition at source, which could develop local industries to provide direct and indirect services in the value-addition process, thus creating employment and business opportunities for local populations. This would generate inclusive prosperity for the mining rights companies, the County Government and the host communities.

Kwale County Government made efforts to negotiate a five percent share of the mining profits from the titanium project, but was unsuccessful. Instead, the mining company threatened to sue the County Government for its efforts to acquire

<sup>67</sup> Earnest & Young, *Base Titanium total economic and tax contribution in Kenya*, 11.

<sup>68</sup> Earnest & Young, *Base Titanium total economic and tax contribution in Kenya*, 12.

<sup>69</sup> Displacement has dire social impact as it dislodges families from their homes, leading to their separation and the disintegration of familial social support structures. It also separates farmers from their fields and businesses from their neighbourhoods, with adverse impact on food security and stability of livelihoods.

<sup>70</sup> Kayumba A, 'Challenges and prospects of equitable benefit-sharing in the mining sector: A case study of titanium mining in Kwale County, Kenya' Unpublished LLM Thesis, University of Nairobi, November 2014.

<sup>71</sup> Kayumba A, 'Challenges and prospects of equitable benefit-sharing in the mining sector', 2.

<sup>72</sup> Key informant interview N-2 conducted at the County Government Offices on 22 May 2017.

benefits from the mining project.<sup>73</sup> Attempts by the County Government to introduce Cess were also rebuffed, leaving the County Government with no substantive revenue from the mining project apart from the meagre single business permit.<sup>74</sup> This is a clear indicator that the County Government is currently not sharing in the benefits from the mining project, limiting the resources available to improve the lives and livelihoods of the host communities in Bwiti and Nguluku.

This sad situation is further affirmed by the household survey conducted in the context of this research,<sup>75</sup> which indicates that despite mining being operational in Maumba since 2015, the benefit to the local communities in Bwiti and Nguluku has been negligible. From the household survey, eighty one percent of the respondents interviewed stated that they have not seen any benefits from the mining operation.<sup>76</sup> One respondent stated the lack of benefit from titanium mining as follows: ‘there have been no benefits; titanium mining has only brought destruction. Local people in Nguluku have not been able to benefit because there are no development projects by Base Titanium in Nguluku’.<sup>77</sup> Another respondent echoed this by stating as follows: ‘they drive past us and have no time to listen to us. Our leaders are given “something small”<sup>78</sup> so they keep quiet while we are oppressed’.<sup>79</sup>

As a result of the failure to share the benefits of the mining project equitably, these host communities continue to live in extreme poverty; their socio-economic situation is actually worse than that of the general population of Kwale County. The biggest indicator of the multidimensional nature of this poverty is reflected in the dire food insecurity situation in Bwiti and Nguluku. In Nguluku, of the households interviewed, only 18.2 percent have three meals a day. The majority 68.2 percent have two meals a day and the other 13.6 percent have only one meal a day.<sup>80</sup> Of these, 95.5 percent reported their households going to bed hungry sometimes while only 4.5 percent do not go to bed hungry.<sup>81</sup> The food insecurity situation is the same for Bwiti, where 5.9 percent have three meals a day, 82.4 percent have two meals

<sup>73</sup> Key informant interview N-2 conducted at the County Government Offices on 22 May 2017.

<sup>74</sup> Key informant interview N-1 conducted at the County Government Offices on 22 May 2017.

<sup>75</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>76</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>77</sup> Household Interview of the Respondent J-3 in Nguluku on 23 May 2017.

<sup>78</sup> ‘Something small’ connotes a bribe or some form of inducement for the community leaders not to raise issues with the different forms of violations of the fundamental rights of the host communities.

<sup>79</sup> Household Interview of the Respondent M-4 in Nguluku on 23 May 2017.

<sup>80</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku. The meals mostly contain starch and vegetables, with fish and other protein foods being rare.

<sup>81</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

a day and 11.8 percent only have one meal a day.<sup>82</sup> Of those interviewed, all (one hundred percent) reported their households going to bed hungry sometimes.<sup>83</sup>

The multidimensional nature of poverty is further reflected using other socio-economic indicators. On health, host communities continue to suffer from poor access to health facilities. The situation is better in Bwiti, where Base Titanium constructed a dispensary,<sup>84</sup> but it has not been sufficiently equipped with qualified health personnel and medicines. The facility has only one nurse and two community health volunteers serving the over 1, 500 people in Bwiti.<sup>85</sup> The poor health situation in Nguluku is far greater where the community has experienced an increase in diseases as a result of the mining operation at Maumba. Major diseases reported are malaria due to the forest and dam that breeds mosquitoes; skin diseases due to mining; coughing due to dust from mining; diarrhea and typhoid from contaminated river water and eye problems due to dust.<sup>86</sup> The Nguluku population struggles to access healthcare owing to the poor health infrastructure around them. The majority have to travel between ten and fifteen kilometres to access health services at Msambweni Sub-District Hospital (34.6 percent of the population), Shimba Hills Dispensary (9.1 percent of the population) or Mivumoni Health Centre (54.5 percent of the population).<sup>87</sup> The two Government health facilities suffer from poor infrastructure and lack of medication. Most patients go to Mivumoni Health Centre, which is run by the Catholic Church, though they are required to pay consultation fee of around Kshs 600 to get health services, compared to more affordable services in the Government facilities. Little has been done to improve the health infrastructure in Nguluku by either Base Titanium or the County Government despite the fact that they are on the frontline of the mining operation and bear the health burdens of the mining project.

Again, the community in Bwiti fares better with regard to access to water because of borehole that was drilled in the village by Base Titanium. On average, approximately 82.4 percent of the community in Bwiti gets their water from a borehole that is clean with water safe for domestic use. Only 17.6 percent draw water from streams.<sup>88</sup> As a result, there are fewer waterborne diseases reported in Bwiti. Nguluku, however, still struggles with access to water, as there has been

<sup>82</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>83</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>84</sup> The dispensary is approximately between 0.5-1km for the majority of the population in Bwiti and is thus reasonably accessible.

<sup>85</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>86</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>87</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>88</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.



no commensurate drilling of boreholes. 63.6 percent of the population draw their water from open wells, 13.6 percent from rivers, and 22.7 percent from water tanks provided by Base Titanium.<sup>89</sup> The Base Titanium water tanks are approximately half and three kilometres away for most families in Nguluku. The unavailability of water has led to many instances of waterborne diseases such as cholera and typhoid.<sup>90</sup> The water situation has not improved despite complaints of river water contamination resulting from the mining operation.

Education infrastructure is also lacking in the two host communities. Comparatively, however, Bwiti seems to be better off. There are two schools in Bwiti, Bwiti Primary School built by Base Titanium, which is approximately half a kilometre from most households and which has absorbed 82.4 percent of the pupil population.<sup>91</sup> The other school is Mshihu Primary School, which has absorbed 17.6 percent of the pupil population. The infrastructure and personnel at the two schools is average: three students share a desk and teachers are few compared to the pupil population (eight teachers in Bwiti Primary and eleven teachers in Mshihu Primary).<sup>92</sup> On average, the performance in both schools has improved due to cooperation between teachers and parents. However, school dropout is still a challenge due to poverty and early pregnancies. Those who drop out of school get married early or engage in odd jobs like motorcycle transport.<sup>93</sup> In Nguluku, however, the two schools – Mwadogo Primary (fifty percent of pupil population) and Duncan Ndegwa Primary (fifty percent of pupil population) are far from most households, approximately three and six kilometres.<sup>94</sup> Generally, the two schools have recorded deteriorating performances due to the long distances that pupils have to walk to school coupled with the threat of wild animals.<sup>95</sup> As a result, the dropout levels are high. Poverty, early pregnancies and poor learning environments are the major causes of dropouts. Those who drop out get married early or engage in odd jobs like motorcycle transportation or farming.<sup>96</sup>

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<sup>89</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>90</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>91</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>92</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>93</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>94</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>95</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>96</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

Lastly, the multidimensional nature of poverty in Bwiti and Nguluku is reflected in the nature of housing and sanitation. In Bwiti, 64.7 percent live in traditional houses constructed of makuti and mud; 17.6 percent live in semi-permanent ones constructed of iron sheets and mud; and only 5.9 percent live in permanent houses constructed of iron sheets and cement.<sup>97</sup> Of these, fifty-three percent have title deeds for their land; 35.2 percent have no title deeds for their land; and 11.8 percent are renting their houses.<sup>98</sup> All the households interviewed (100 percent) have access to pit latrines that are not shared, though they have no proper systems for the disposal of kitchen waste.<sup>99</sup> The situation is not any better in Nguluku, where 81.8 percent of households live in traditional houses made of makuti and mud; 13.6 percent in semi-permanent houses made of iron sheets and mud; and only 4.5 percent live in permanent houses made of iron sheets and cement.<sup>100</sup> Of these, only 13.6 percent have title deeds for their land, while 86.4 percent have no title deeds for their land.<sup>101</sup> Like in Bwiti, all the households in Nguluku have access to a pit latrine that is not shared, though they have no proper system for the disposal of kitchen waste.<sup>102</sup>

The data above indicate(s) that despite the promise to uplift the living standards of the communities in Bwiti and Nguluku, the mining project has not achieved this purpose substantively. Host communities still live in poverty and destitution. Apart from the poverty, the mining operation has created further difficulties for these communities due to the adverse economic, social, environmental, health and other negative outcomes of mining. This, then, raises the question of equity and fairness in the sharing of the benefits and burdens of mining, as discussed more elaborately in the next section of this chapter.

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<sup>97</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>98</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>99</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>100</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>101</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>102</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

## 4. Titanium mining and benefit-sharing in Bwiti and Nguluku, Kwale County

### 4.1 Understanding the concept of benefit-sharing

Since the year 2000, mining has boomed in the world due to the increasing prices of mineral resources, a fact that has attracted more investors.<sup>103</sup> However, the mining boom has created social,<sup>104</sup> environmental, economic, and cultural challenges for communities where the minerals are extracted.<sup>105</sup> In order to mitigate these challenges, mining companies are required to put in place measures to balance equitably the benefits and burdens of mining amongst all stakeholders.<sup>106</sup> This enables mining companies to engage and manage their relationships with key stakeholder groups, share development benefits and protect their business interests.<sup>107</sup> The process of achieving this has been termed as a process of acquiring a ‘social license to operate’.<sup>108</sup> This social license is achieved when a mining operation enjoys a broad, ongoing approval and acceptance from the community where it operates.<sup>109</sup> It is based on the acknowledgment that mining companies are not strictly commercial ventures whose sole mandate is creation of revenue and profits for their shareholders; they are also social institutions with responsibility to improve the general

<sup>103</sup> Soderholm P & Svahn N, ‘Mining, regional development and benefit-sharing’, 78-79.

<sup>104</sup> See ‘Muigua K: Reflection on managing natural resources’, 2-3, who mentions some of the social challenges to include: physical and economic displacements, weakening of traditional social structures, new conflicts and impoverishment.

<sup>105</sup> See Prno J & Slocombe D, ‘Exploring the origins of ‘social license to operate’ in the mining sector: Perspectives from governance and sustainability theories’ 37 *Resources Policy Journal* (2012), 346, who note that the challenges of adverse environmental impacts, social and cultural interruption and local economic instability result from conventional mining approaches that do not take into account local communities as important players in the mining project.

<sup>106</sup> See Kemp D & Owen J, ‘Community relations and mining: Core to business but not “core business”’ 38 *Resources Policy Journal* (2013), 523, who assert that this has to be done as part of the company’s community relations and development function under the rubric of sustainable development and corporate social responsibility.

<sup>107</sup> Kemp D & Owen J, ‘Community relations and mining’, 523. See also ‘Muigua K: Reflections on managing natural resources’, 1, who affirms that investors who engage in projects beneficial to the local communities are least likely to face risks such as disruption, renegotiation or expropriation.

<sup>108</sup> Soderholm P & Svahn N, ‘Mining, regional development and benefit-sharing’, 78. Though an important goal to strive for by both company and local community, a social licence to operate might not be attainable if the mining company-local community expectations are beyond reconciliation.

<sup>109</sup> Soderholm P & Svahn N, ‘Mining, regional development and benefit-sharing’, 79; Prno J & Slocombe D, ‘Exploring the origins of ‘social license to operate’ in the mining sector’, 346. Local mining communities are the key players due to their proximity to the mining operation and their sensitivity to the impact of mining.

welfare of their host communities progressively.<sup>110</sup> This has been further bolstered by the increased recognition of the rights of project-affected communities as well as the requirement for direct community participation and decision-making in mining processes.<sup>111</sup> Failure to adopt these measures may lead to tensions and conflict, creating business risks for the mining company.<sup>112</sup>

But what is required of a company to achieve this social licence? First, in its operations, the company must avoid or mitigate the effects of activities that the local community considers as unacceptable,<sup>113</sup> to the point where the community is convinced that the social, economic and environmental benefits of the project outweigh its negative impacts.<sup>114</sup> Secondly, the company should adopt an inclusive and participatory community development plan and implement it in a way that meets the societal expectations of the local community, whether this is legally required of it or not.<sup>115</sup> Thirdly, the company must put in place effective and culturally appropriate mechanisms of communication, participation and decision-making;<sup>116</sup> ensure transparent disclosure of information; and develop an effective conflict resolution mechanism.<sup>117</sup> It means, therefore, that free, prior and informed consent (FPIC) must have been given to the mining project at its commencement for it to subsequently acquire a social license to operate.<sup>118</sup>

<sup>110</sup> Kayumba A, 'Challenges and prospects of equitable benefit-sharing in the mining sector', 17.

<sup>111</sup> Soderholm P & Svahn N, 'Mining, regional development and benefit-sharing', 79 & 83; Prno J & Slocombe D, 'Exploring the origins of 'social license to operate' in the mining sector', 346, who argue that the new desire for increased benefit-sharing and decision-making in mining projects by local communities is due to the growth of the sustainable development paradigm. They affirm that mineral right holders have to acquire 'social license to operate' in order to avoid potentially costly conflicts and exposure to social risks.

<sup>112</sup> Soderholm P & Svahn N, 'Mining, regional development and benefit-sharing', 79 & 83. See also International Financial Corporation, 'The art and science of benefit-sharing in the natural resources sector', 8 & 11, who assert that mining investments are likely to run into trouble if there are imbalances in the sharing of fiscal, economic, environmental and social costs and benefits.

<sup>113</sup> The company must undertake comprehensive environmental and social impact assessment with the substantive participation of the people and put in place the necessary mitigation measures to ensure community safety and well-being.

<sup>114</sup> Prno J & Slocombe D, 'Exploring the origins of 'social license to operate' in the mining sector', 348.

<sup>115</sup> Prno J & Slocombe D, 'Exploring the origins of 'social license to operate' in the mining sector', 346-347.

<sup>116</sup> See Prno J & Slocombe D, 'Exploring the origins of 'social license to operate' in the mining sector', 348-349, who detail the benefits of effective community participation in mining decision-making as follows: first, it leads to substantively better and more equitable solutions. Secondly, it enables the community to learn about the potential impact and benefits of mining operations; voice their concerns, needs and aspirations/expectations; and discuss potential challenges and opportunities. Meaningful participation therefore enhances sustainability of development.

<sup>117</sup> Prno J & Slocombe D, 'Exploring the origins of 'social license to operate' in the mining sector', 347.

<sup>118</sup> Prno J & Slocombe D, 'Exploring the origins of 'social license to operate' in the mining sector', 349,

Benefit-sharing is thus a critical component in enhancing company-community harmony and enabling a company to achieve the social licence to operate.<sup>119</sup> According to Patrik Soderholm and Nanna Svahn, benefit-sharing ‘refers to the distribution of the monetary and non-monetary benefits that are generated through the implementation of a mining project’.<sup>120</sup> The objective of benefit-sharing is to ensure that a significant portion of the benefits generated from mining in a particular area is retained in that area for the benefit of local populations.<sup>121</sup>

Benefit-sharing as a right was formalised in international law in the context of the protection of biodiversity in the Convention on Biological Diversity.<sup>122</sup> It is buttressed by attendant community rights such as the right to self-determination,<sup>123</sup> the right of a people to freely dispose of wealth and natural resources as well as the right to development, which are contained in the African Charter on Human and People’s Rights.<sup>124</sup> Natural resources must thus be shared equitably to ensure that local communities are catered for effectively in the context of socio-economic development and enhanced livelihoods.<sup>125</sup>

Benefit-sharing mechanisms can be voluntary based on the corporations’ Corporate Social Responsibility (CSR) activities, or can be based on governmental legislation. The essence of these mechanisms is the generation of broad-based socio-economic development that uplifts the standards of living of the host communities. Some of these mechanisms include:<sup>126</sup>

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consent must be voluntary, must be sought from the local community before authorisation is given to the company to operate, and the process of seeking consent must be transparent with sufficient information being given to local communities about their rights and the entirety of the proposed project, to allow negotiations on the basis of equality of information.

<sup>119</sup> Soderholm P & Svahn N, ‘Mining, regional development and benefit-sharing’, 79; International Financial Corporation, ‘Sustainable and responsible mining in Africa’, 4.

<sup>120</sup> Soderholm P & Svahn N, ‘Mining, regional development and benefit-sharing’, 83.

<sup>121</sup> Soderholm P & Svahn N, ‘Mining, regional development and benefit-sharing’, 83.

<sup>122</sup> Article 19, *United Nations Convention on Biological Diversity*, 22 May 1992, 1760 UNTS 79.

<sup>123</sup> See Article 1, *International Covenant on Economic Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, which affirms self-determination, including the right of a people to pursue their own economic, social and cultural goals as well as to manage and dispose of their natural resources.

<sup>124</sup> Article 20(1), *African Charter on Human and Peoples’ Rights*, 27 June 1981, which details the right to existence and the right to pursue economic and social development based on freely chosen policies; Article 21, which details the right of a people to freely dispose of their natural resources in the exclusive interest of the people and in a way that eliminates all forms of foreign exploitation; and Article 22, which details the right to economic, social and cultural development. These aspects form part of the Kenyan law as per Article 2(6) of the Constitution.

<sup>125</sup> ‘Muigua K: Reflection on managing natural resources’, 6-7.

<sup>126</sup> Soderholm P & Svahn N, ‘Mining, regional development and benefit-sharing’, 83.

- Payment of mineral taxes and royalties for local community development;
- Compensation for loss of land and other production resources as a result of mining-based displacements;
- Adoption of mitigation mechanisms to minimise the harmful social and environmental impact(s) of mining activities;
- Training and employment of locals as staff in affirmative employment quotas;
- Local procurement of goods and services; and
- The development of socio-economic infrastructure such as roads, hospitals, schools, water points and access to electricity for the benefit of the host communities.

Equitable sharing of mining benefits enhances harmony and collegiality between the mining right-holder and the host communities, which in turn enhances the productivity of mining operations.<sup>127</sup> Because of the positive outcomes of equitable benefit-sharing, Kenya has entrenched these requirements in the 2010 Constitution as well as in legislation, as discussed more elaborately in section 4.2 below.

#### **4.2 Constitutional, legislative and regulatory framework on natural resource-benefit sharing**

Benefit-sharing must be contained in a substantive and elaborate legal, policy or regulatory framework to enhance certainty and to ensure its effective implementation for the benefit of host communities. In Kenya, however, large-scale extraction of mineral resources has not been a prominent feature. The effect of this has been that the legal and regulatory regime governing the mining sector has generally been underdeveloped. The primary legislation that guided the mining sector for a long time was the Repealed Mining Act. However, it had no provisions governing the sharing of benefits among the mining stakeholders, especially in relation to host communities. Due to this lacuna, host communities have continued to suffer the burdens of mineral extraction, without enjoying commensurate benefits from the profits generated by the extractives sector. Legal reforms have been undertaken in Kenya to ensure a fairer system of sharing the benefits and burdens of exploitation of mineral resources, as is reflected in the 2010 Constitution and the Mining Act.

<sup>127</sup> See Soderholm P & Svahn N, 'Mining, regional development and benefit-sharing', 79, which affirms that mineral projects that fail to recognise the importance of benefit-sharing are bound to work in an environment of tension and conflicts with the host communities, affecting production and profitability.

#### 4.2.1 The Constitution of Kenya 2010 and benefit-sharing in the extractives industry

As the supreme law of the land,<sup>128</sup> the 2010 Constitution lays the basis for the management of resources in an expansive Bill of Rights, which is the framework for all economic, social and cultural policies.<sup>129</sup> The essence of the Bill of Rights is the preservation of the human dignity of individuals and communities, the promotion of social justice and the realisation of the potential of all human beings.<sup>130</sup> The Bill of Rights entrenches the right to property<sup>131</sup> and the 2010 Constitution has additional provisions on land,<sup>132</sup> which are critical factors in the mining process. Despite mineral resources being vested in the National Government to be held in trust for all Kenyans,<sup>133</sup> the surface land and the properties appurtenant thereon is the property of host communities. These individuals and communities must therefore give free, prior and informed consent for mining to take place. They ought to have full knowledge of the benefits and burdens to be imposed on them by the mining operations. They should be allowed to negotiate a fair price with the mining company and must be adequately compensated for the land and all the production resources they lose as a result of mining. They must also be relocated in a manner that enables them to sustain their livelihoods.

In the context where the State decides to expropriate private or community land for the purposes of mining, it must do so in accordance with Article 40(3) of the 2010 Constitution. The State must elaborate on the public purpose justifying expropriation; must pay prompt, full and just compensation for the expropriation; and must allow the individuals affected and communities to challenge the expropriation before courts of law.<sup>134</sup> Compensation is therefore an important aspect of benefit-sharing as it offsets the burden of loss of land and other production factors for the individuals and communities who are displaced as a result of the mining project.

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<sup>128</sup> Article 2, *Constitution of Kenya* (2010).

<sup>129</sup> Article 19(1), *Constitution of Kenya*.

<sup>130</sup> Article 19(2), *Constitution of Kenya*.

<sup>131</sup> Article 40, *Constitution of Kenya*.

<sup>132</sup> Article 63 and 64, *Constitution of Kenya*, in relation to community land and private land respectively.

<sup>133</sup> Article 62(1)(f) and 62(3), *Constitution of Kenya*, classifies minerals and mineral oils as being part of public land that vests in, and is to be held by, the National Government in trust for the people of Kenya and be administered by the National Land Commission on behalf of Kenyans.

<sup>134</sup> Article 40(3)(b), *Constitution of Kenya*. However, it is arguable that because section 2 of the Land Act, Act Number 6 of 2012, excludes it, 'mining' is not one of the 'public purposes' for which land may be acquired compulsorily – ed.

The 2010 Constitution, in Article 62(1)(f) as read with Article 62(3), vests mineral resources in the National Government as trustees for the people of Kenya. This means that the National Government, as a trustee, must ensure that mineral resources are used strictly for the benefit of the beneficiaries, the primary ones being the host communities.<sup>135</sup> In the exploitation of natural resources, inclusive of minerals, the 2010 Constitution<sup>136</sup> requires the National Government to ensure that these resources are exploited, utilised, managed and conserved in a sustainable manner.<sup>137</sup> In the context of benefit-sharing, the 2010 Constitution<sup>138</sup> requires the National Government to ensure the equitable sharing of the benefits accruing from the use of natural resources, inclusive of minerals. The 2010 Constitution additionally provides that natural resources be used for the benefit of the people of Kenya.<sup>139</sup>

Efficient benefit-sharing cannot happen without a proper understanding of the rights, needs, priorities, interests and expectations of the communities where minerals are found. The granting of concessions for mining must thus be undertaken with the substantive engagement and determinative participation of the host communities.<sup>140</sup>

The 2010 Constitution provides for popular oversight of the mining process by requiring that transactions for the grant of mineral rights or concessions be ratified by Parliament.<sup>141</sup> This enables Parliament to assess and scrutinise such agreements to ensure that they are beneficial to the local populations. This process of parliamentary assessment further encompasses the participation of the people. This is because Parliament has a responsibility to facilitate public participation and involvement in legislative and other business including involvement in its committees.<sup>142</sup>

One of the challenges to equitable benefit-sharing has been poor governance in the extractives industry that has seen self-interest and corruption lead to skewed

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<sup>135</sup> See Article 69(1)(h), *Constitution of Kenya*, which requires natural resources to be used for the benefit of the people of Kenya.

<sup>136</sup> Article 69(1)(a), *Constitution of Kenya*.

<sup>137</sup> See Article 69(2), *Constitution of Kenya*, which places a duty on every person, including mining corporations, to cooperate with State organs in ensuring ecologically sustainable development and use of natural resources.

<sup>138</sup> Article 69(1)(a), *Constitution of Kenya*.

<sup>139</sup> Article 69(1)(h), *Constitution of Kenya*.

<sup>140</sup> Article 69(1)(h), *Constitution of Kenya*.

<sup>141</sup> Article 72, *Constitution of Kenya*.

<sup>142</sup> Article 118(1)(b), *Constitution of Kenya*.



concessions to mining corporations.<sup>143</sup> The 2010 Constitution seeks to entrench good governance in public service by elaborating the National Values and Principles of Governance, which bind all State organs, State Officers, public officers and all persons in the making, interpretation and application of laws and policies.<sup>144</sup> Some of the good governance values include integrity, transparency, accountability, sustainable development and the participation of the people.<sup>145</sup> These values, in relation to state and public officials, are further entrenched in Chapter Six of the 2010 Constitution on Leadership and Integrity. It affirms that authority assigned to a public officer is public trust to be exercised in service, and for the benefit, of the people and not for the personal benefit of the relevant officer.<sup>146</sup> It requires public officers to provide self-less services based solely on the public interest and to be accountable to the public for their decisions and actions.<sup>147</sup> It further requires their decisions to be objective and impartial and not be influenced by improper considerations or corrupt practices.<sup>148</sup> It provides a penalty for conduct contrary to Chapter Six, which includes disciplinary procedures leading to dismissal or removal from public office as well as subsequent disbarment from holding any other public office.<sup>149</sup>

These good governance provisions are important in holding Government officers accountable at all levels of the mining process, especially the Cabinet Secretary (CS) responsible for the extractives sector who has expansive powers over the management of the mining industry.<sup>150</sup> They were intended to ensure that selfish and corrupt practices of Government officials do not jeopardise unfairly the rights

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<sup>143</sup> See Soderholm P & Svahn N, 'Mining, regional development and benefit-sharing', 80, who affirm that absence of good governance institutions and lack of adherence to the rule of law can lead to corruption and rent-seeking that has adverse impact on equitable benefit-sharing, leading to mineral resources being a curse and not a benefit to the entire economy. See also International Financial Corporation, 'Sustainable and responsible mining in Africa', 12, which affirms that corruption depletes a country's natural wealth and undermines socio-economic development that would have otherwise have been generated through the exploitation of natural resources.

<sup>144</sup> Article 10(1), *Constitution of Kenya*.

<sup>145</sup> Article 10(2), *Constitution of Kenya*.

<sup>146</sup> Article 73(1), *Constitution of Kenya*.

<sup>147</sup> Article 73(1)(c-d), *Constitution of Kenya*.

<sup>148</sup> Article 73(2)(b), *Constitution of Kenya*.

<sup>149</sup> Article 75(2)(3), *Constitution of Kenya*.

<sup>150</sup> According to Section 12, *Mining Act* (No 12 of 2016), the Cabinet Secretary (CS) for Mining has powers to negotiate mining agreements; oversight mining activities; grant, suspend or revoke mining licenses, among others. This power is not unfettered, however, as the Act in section 12(2) requires the CS to respect and uphold the values enshrined in Articles 201(c)-(d) and 69(1)(a) and (h) of the Constitution. This ensures that mineral resources are exploited in a sustainable manner for the benefit of the Kenyan people and that the proceeds from mining operations are shared equitably to achieve intra- and inter-generational equity.

of host communities to share the benefits of mining activities equitably. They also provide mechanisms for holding public officers accountable for mining concession decisions and creating frameworks through which the groups affected could vindicate their rights and hold public officers accountable for decisions which have a detrimental impact on the public.<sup>151</sup> The importance of these values has been affirmed by the Mining Act, which requires the CS, the Principal Secretary and all other persons administering it to be guided by these values.<sup>152</sup> If implemented effectively and scrupulously, these provisions are bound to ensure that decisions by public officers in the extractives industry take into account the public interest and are geared towards ensuring the host communities benefit equitably from the proceeds of mining activities.

#### 4.2.2 Legislative and regulatory framework on benefit-sharing in the extractives industry

Apart from entrenching the important provisions on the sustainable and beneficial exploitation of natural resources discussed above, the 2010 Constitution further requires Parliament to enact legislation to govern the exploitation of these natural resources.<sup>153</sup> This requirement has led to the enactment of the Mining Act<sup>154</sup> as well as the development of the Local Content Bill 2016, both of which seek to enhance equitable benefit-sharing.

##### i) The Mining Act

The Mining Act, which replaced the Repealed Mining Act, has several provisions that can be used to enhance benefit-sharing in the extractives industry. It re-affirms the constitutional principle that even though mineral resources belong to the Republic and are vested in the National Government, they are held in trust for the Kenyan people.<sup>155</sup> The duties of a trustee are fiduciary in nature, which means

<sup>151</sup> See Kayumba A, 'Challenges and prospects of equitable benefit-sharing in the mining sector', 44, who state that these good governance values are considered as pillars of an equitable benefit-sharing regime as they facilitate dialogue, enhance transparency and accountability in the extractives industry and encompass remedial mechanisms capable of preventing the resource curse in the extractives industry.

<sup>152</sup> Section 5, *Mining Act*.

<sup>153</sup> Article 72, *Constitution of Kenya*.

<sup>154</sup> See *Mining Act* preamble, which indicates that it is a law aimed at giving effect to Articles 60, 62(1)(f), 66(2), 69 and 71 of the Constitution in relation to mineral resources.

<sup>155</sup> Section 6(1), *Mining Act*. Though the State's property rights over minerals override all other adverse interests in land, the Act requires that the State's mineral property rights must be exercised in accordance with the Constitution and the Act, which means basically that landowners and host communities must be duly compensated for loss of their land and other amenities occasioned by mining operations, see

that the trustee must scrupulously undertake its responsibilities for the benefit of the people of Kenya. In negotiating mining agreements and issuing mining licenses, the National Government, through the CS, must thus ensure that the needs, priorities and interests of the Kenyan people are paramount. One such interest of the Kenyan people is to ensure that the benefits and burdens of mining operations are shared equitably for the betterment of the country.

On the management of the mining sector, the Mining Act gives authority to the CS for Mining,<sup>156</sup> but requires the CS to respect and uphold the principles and values enshrined in Articles 201(c)-(d) and 69(1)(a) and (h) of the 2010 Constitution.<sup>157</sup> The essence of these fetters on the power of the CS in the administration of the Mining Act is to ensure that mineral resources are exploited in a sustainable manner for the benefit of the Kenyan people and that the proceeds from mining operations are shared equitably to achieve intra- and inter-generational equity. Further, in considering an application for mining-based licence or permit, the Mining Act requires the CS to give written notice to landowners or lawful occupiers of the relevant piece of land, the host community and the relevant County Government, as well as to publish a notice of the pending licence application in a newspaper with wide circulation.<sup>158</sup> The Mining Act also requires the notice to be published in the Kenya Gazette for 21 days and in the county offices of the relevant county.<sup>159</sup>

The essence of the above provisions is to generate popular oversight of the licensing process and ensure transparency, create awareness and enhance public participation in the process. This ensures that the landowners affected, the host communities and relevant county governments are able to engage substantively in the process with the aim of ensuring that their needs, interests, aspirations and concerns are taken into account before a prospection or mining licence is issued. The critical role of these actors is affirmed by the Mining Act, in allowing any individual or community to object to the grant of a prospecting<sup>160</sup> or mining<sup>161</sup> licence if there is inequitable sharing of the burdens and benefits of prospecting or mining

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sections 6(2)-(3) of the Act.

<sup>156</sup> This authority - in relation to the grant, suspension or revocation of mining licenses as well as in relation to fees, charges and royalties payable for mineral rights – is to be exercised on advise and recommendations of the Mineral Rights Board, who are equally bound by the good governance values of the Constitution, see Section 31-32, *Mining Act*.

<sup>157</sup> Section 12(2), *Mining Act*.

<sup>158</sup> Section 34(1-2), *Mining Act*.

<sup>159</sup> Section 34(3), *Mining Act*.

<sup>160</sup> Objections for prospecting licence must be made within 21 days after the notice.

<sup>161</sup> Objections for mining licence must be made within 42 days after the notice.

operation.<sup>162</sup> A further safeguard, in relation to Executive oversight of the mining sector, is the requirement that the CS submits an annual report to the Cabinet indicating all mineral right applications made, licenses granted or rejected as well as the justifications for the granting or rejection of each mining licence application.<sup>163</sup> These levels of scrutiny ensure that the issuance of prospecting and mining licenses are done in accordance with the law, the interests of Kenyans being paramount.

The Mining Act requires that before a reconnaissance, prospecting or mining licence is issued for operations on private or community land, the express consent of the landowner or community of owners must be sought.<sup>164</sup> This is done through a legally binding agreement with the licence applicant or the Government, and must entail the payment of just and adequate compensation.<sup>165</sup> If consent is withheld unreasonably or the CS feels that the withholding of consent is contrary to national interests, the land may be subjected to compulsory acquisition.<sup>166</sup> However, compulsory acquisition must follow the laid down constitutional procedure with entrenched safeguards such as the payment of prompt, just and adequate compensation and the opportunity of the landowner to challenge the acquisition in court.<sup>167</sup>

The Mining Act further provides for the payment of compensation to landowners or lawful users of land affected by mining projects if mining operations: disturb or deprive owners or lawful users of land; cause loss or damage to immovable property; cause damage to the water table or deprive landowners of water supply; or, cause loss of earnings in relation to land used for cultivation or livestock rearing.<sup>168</sup> Compensation can be in the form of resettlement or through monetary compensation.<sup>169</sup> In relation to monetary compensation, the mineral right-holder

<sup>162</sup> Section 43(4-5), *Mining Act*. The objections are to be determined by the CS through the Mineral Rights Board, who are governed by the principles and values in Articles 69 (1)(a) and (h) as well as 201(c)-(d) of the Constitution, which requires them to ensure that mineral resources are utilised sustainably for the benefit of all Kenyans and the benefits are equitably shared.

<sup>163</sup> Section 55, *Mining Act*.

<sup>164</sup> Sections 37(1) and 38(1), *Mining Act*. In the context of unregistered community land, consent is to be sought from the National Land Commission. See also section 36(2)(h), which compels the Mining Rights Board to require the licence applicant seek the approval of the person or community to be affected by the grant of a mineral right.

<sup>165</sup> See Sections 37(2) and 38(2), *Mining Act*. See also section 67(1)(g) that requires compensation of landowners for damages occurring to their land in the context of reconnaissance operations.

<sup>166</sup> Section 40, *Mining Act*.

<sup>167</sup> Articles 40(2) and (3), *Constitution of Kenya* as read with Chapter five.

<sup>168</sup> Section 153(1), *Mining Act*.

<sup>169</sup> See Section 153(8), *Mining Act* of which gives power to the CS in consultation with the host community and the National Land Commission to acquire suitable alternative land to resettle persons displaced by mining operations. This process must take into account the host community's economic wellbeing, social and cultural values.

is expected to pay prompt, fair and adequate compensation to such landowner or lawful occupier of land affected.<sup>170</sup> To ensure compensation is provided, the mining right-holder is required by the Mining Act to deposit a compensation guarantee bond with the Ministry of Mining.<sup>171</sup> The Mining Act guarantees that mining operations cannot commence until compensation is paid, which cushions landowners and users against forced evictions.<sup>172</sup>

Before a mining project is licensed, the applicant must show that it has adequate financial resources and technical competence to undertake the operation.<sup>173</sup> It must provide a programme detailing proposals on the recruitment and training of Kenyans, to enhance skills transfer and capacity building for the local population.<sup>174</sup> The mining right-holder is also required to give preference in employment to host communities and citizens of Kenya.<sup>175</sup> In order to achieve this, the mining operator must undertake capacity building and develop training programmes for its employees; replace expatriates with citizens after a prescribed period of time; create linkages with local universities for research and environmental management; undertake social responsibility investments for the host communities; and implement a community development agreement.<sup>176</sup> The mining licence-holder is also required to give preference, to the maximum extent possible, to materials and products made in Kenya;<sup>177</sup> to services offered by host communities or other Kenyan

<sup>170</sup> Section 153(1)(e), *Mining Act*.

<sup>171</sup> Section 153(2), *Mining Act*.

<sup>172</sup> Section 153(7), *Mining Act*.

<sup>173</sup> Sections 11(1)(d), 11(3), *Mining Act*. Necessary expertise, capacity and resources are critical in benefit-sharing as it ensures that mining is done in a competent, efficient and effective manner that does not affect the host communities negatively, and also generates the optimum yields from the mining operation to be shared with the host communities. The need for expertise, capacity and resources is further affirmed in sections 61(3)(b) for reconnaissance licence; 72(3)(b) for prospecting licence; 86(2)(e) and 86(3)(b) for retention licence; as well as 101(2)(f) and 103(b) for mining licence.

<sup>174</sup> Section 46(1), *Mining Act*. To ensure this is done, the Act empowers the CS to make regulations on the replacement of expatriates with local professionals after a stated number of years, at section 46(3). The requirement for local employment and training plan is further affirmed for reconnaissance licence in section 61(3)(d) and 68(1)(c); for prospecting licences in sections 72(3)(e) and 78(c); for retention licence in sections 86(2)(f) and 86(3)(e); as well as for mining licence in section 101(2)(g), 103(e) and 106(h).

<sup>175</sup> Section 47(1), *Mining Act*.

<sup>176</sup> Section 47(2), *Mining Act*.

<sup>177</sup> See, Sections 61(2)(d), *Mining Act* relating to reconnaissance licence that requires the licence applicant to provide a plan for the procurement of local goods and services; section 61(3)(c), which provides that the CS, on the recommendation of the Mineral Rights Board, can only issue a reconnaissance licence if the applicant's local product plan in respect of procurement of local products and services is acceptable; and section 68(1)(b), which requires that issued reconnaissance licence must include an approved plan for the procurement of local goods and services. These provisions are similarly provided for prospecting licenses in sections 72(3)(d) and 78(b); for retention licence in sections 86(2)(g) and 86(3)(d); as well for mining licence in sections 101(2)(h), 103(d) and 106(f).

citizens; as well as to companies or businesses owned by Kenyans in the entire process of its mining operations.<sup>178</sup> These are critical conditions for the grant of a mining licence,<sup>179</sup> and the CS can only grant or renew a mining licence where the applicant has complied with these conditions.<sup>180</sup>

Further, in the issuance of mineral rights, the Mining Act empowers the CS to impose conditions on the mining licence.<sup>181</sup> These conditions include: the protection of the mineral interests, environmental protection,<sup>182</sup> community development,<sup>183</sup> health and safety of workers,<sup>184</sup> safety of mining operations, restoration and rehabilitation plans at the end of mining operations,<sup>185</sup> among others.<sup>186</sup> In the context of host community development, the mining licensee is required, as a condition of the licence, to sign a community development agreement with the host community.<sup>187</sup> This is to ensure that the extraction of mineral resources does not only benefit the licensee, but that the socio-economic needs, interests and priorities of host communities are taken into account. The Mining Act gives the CS the power to enforce these conditions as if compliance with them is a substantive contractual term between the State and the licence-holder.<sup>188</sup>

<sup>178</sup> Section 50, *Mining Act*.

<sup>179</sup> Section 46(2), *Mining Act*.

<sup>180</sup> Section 58, *Mining Act*.

<sup>181</sup> Section 42(1), *Mining Act*.

<sup>182</sup> See Section 72(3)(c), *Mining Act* that requires an applicant for a prospecting licence to provide an environmental rehabilitation and restoration plan; section 78(d), which provides that the approved environmental impact assessment report, a social heritage impact assessment report and an environmental management plan are critical documents that form a part of the prospecting licence issued to a prospecting licensee; and section 77(1)(d) that requires the prospecting licensee to comply with the terms and conditions of the environmental rehabilitation and restoration plan. Similarly provisions are made for a retention licence in sections 86(3)(c) and 89(d) as well as for a mining licence in sections 101(2)(i), 103(c), 106(i), 109(c), 115(c) and 176. Section 181 requires a licence applicant to provide an environment protection bond sufficient to cover environmental and rehabilitation obligations of the applicant.

<sup>183</sup> See Sections 101(2)(j) and 103(g), *Mining Act* which require an applicant for a mining licence to provide a plan indicating their proposal for socially responsible investments for the local communities that are aimed at raising the host communities' socio-economic development.

<sup>184</sup> Section 178, *Mining Act*.

<sup>185</sup> See Section 179(d), *Mining Act* which requires mining right holder to restore land to its original status or to an acceptable and reasonable condition upon completion of mining operations. Section 180 further prohibits the CS from granting prospecting, retention or mining licences until an applicant has submitted site mitigation and rehabilitation plans for approval.

<sup>186</sup> Section 42(1), *Mining Act*.

<sup>187</sup> Section 109(i), *Mining Act*.

<sup>188</sup> Section 42(2), *Mining Act*. See also section 104(b) which provides that the CS can only issue a mining licence if all the conditions prescribed in the Act are satisfied; and section 147(1)(b), which gives the CS the power to suspend or revoke a mineral right if the holder fails to comply with conditions placed upon it by the Act.

The above conditions apply equally in relation to large-scale mining operations commenced before the Mining Act came into effect. The Mining Act requires these mining right-holders to update their mine plans within 18 months of the coming into effect of the Mining Act in relation to conditions of employment, health, safety, environmental management and community social investment.<sup>189</sup> These conditions are critical to benefit-sharing, as they ensure that mining operations mitigate health, environment and safety concerns of the host community and that they undertake investments in the community to ensure socio-economic development and the general wellbeing of the host community. Failure on the part of the mining licence-holder to uphold these conditions can be remedied by the host community petitioning the CS to enforce the statutory conditions for their benefit.

In the context of mineral rights ownership, the Mining Act accords the State 10 percent free interest in the share capital of the right in relation to large-scale mining operations and mining operations relating to strategic minerals.<sup>190</sup> This gives the National Government the opportunity to participate in the management and decision-making of the mining corporation as a shareholder, and thus an opportunity to influence decision-making to enhance the protection of the public interest. This opportunity can be utilised effectively by the Government, as a trustee of the interest of the people of Kenya, to enhance equitable benefit-sharing and to ensure that mining is undertaken in a sustainable manner that does not affect host communities negatively.<sup>191</sup>

In the context of large-scale mineral operations of investment exceeding 500 million US Dollars, the Mining Act empowers the CS, in consultation with National Treasury, to enter into a mineral agreement with holders of mineral licenses.<sup>192</sup> Some of the terms to be contained in the agreement are: the payment of royalties, taxes,<sup>193</sup> cess and other fiscal requirements; environmental obligations and liabili-

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<sup>189</sup> Section 225(5), *Mining Act*.

<sup>190</sup> Section 48, *Mining Act*.

<sup>191</sup> See Section 48(4), *Mining Act* which requires regulation to enhance governmental participation in this context. As a result, the Mining (State Participation) Regulations 2017 have been drafted, and clause 6 gives the State the power to attend, speak and vote in the company's shareholders forum; appoint a director to the board of the local subsidiary of the company; and participate in the day to day management of the company.

<sup>192</sup> Sections 117(1) and 118 *Mining Act*. In entering these agreements, section 120 requires the CS to be guided by Article 71 of the Constitution and must therefore be ratified by the National Assembly and the Senate before execution. This ensures that these agreements are protective of Kenyan interests, especially the interest of local communities.

<sup>193</sup> Mining taxes are contained in Ninth Schedule of the Income Tax Act titled "Taxation of Extractive Industries" which was given effect by the Kenya Finance Act of 2015.

ties; domestic processing of minerals; community development plans; and the procedure of settlement of disputes.<sup>194</sup> This agreement, which is a public document,<sup>195</sup> is to be submitted to the National Assembly and the Senate for approval, a popular oversight safeguard to ensure that the agreement is in the best interests of the Kenyan people, especially the host communities.<sup>196</sup>

Further, in the context of royalties, the Mining Act requires mineral royalties to be paid to the Government at a rate to be prescribed by the CS.<sup>197</sup> Once these royalties have been paid by the mineral right-holder, they are to be distributed as follows: seventy percent to the National Government; twenty percent to the county governments affected; and ten percent to the host community.<sup>198</sup> There are two challenges with the royalty provision of the Mining Act in the context of benefit-sharing. First, the Mining Act gives the CS discretion that is not expressly fettered in relation to determining the rate of royalties to be paid.<sup>199</sup> This gap is not filled by the Draft Mining (Royalty) Regulations of 2017, which in clause 8(2) on royalty rate states that '[t]he royalty rates shall be the percentages or unit based rates as prescribed by the CS for mineral classes won by virtue of a mineral right'.<sup>200</sup> This is a leeway that can be exploited through underhand means to allow mining right-holders to pay very little amounts (in terms of royalties) compared to profits being made by the mining operation.<sup>201</sup> A case in point is Base Titanium, which pays only 2.5 percent of its profits as royalties to the National Government to be shared among all the other mining stakeholders, a percentage that is not justifiable in the context of the high rates of poverty around the mining area.<sup>202</sup> It would have been

<sup>194</sup> Section 117(2), *Mining Act*.

<sup>195</sup> Section 119, *Mining Act*.

<sup>196</sup> Section 117(5), *Mining Act*.

<sup>197</sup> Section 183(1) and (2), *Mining Act*.

<sup>198</sup> Section 183(5), *Mining Act*.

<sup>199</sup> See Section 185(3), *Mining Act* which only provides that CS may designate a qualified person to inspect and examine samples, books, records and accounts of the mining right holder to determine quantity, quality, grade or value of minerals for the purposes of ascertaining or verifying the amount of any royalty payable.

<sup>200</sup> Ministry of Mining, 'The Mining (Royalty) Regulation 2017', clause 8(2).

<sup>201</sup> See Sections 223(1) and (2), *Mining Act* that gives the CS general powers to make regulations in relation to fees, royalties, rents and other charges payable and the manner of their calculation. Though an important provision, it places the discretion on regulation for calculation of royalties in the hands of the CS, who may fail to put in place such a regulation if they want to continue enjoying unfettered discretion in relation to rate of royalties.

<sup>202</sup> Key informant interview N-6 conducted in Kwale on 24 May 2017, where a National Government administrator affirms that the agreement to accord the mining operator 97.5% of profits in relation to the payment of royalties was heavily skewed and comparatively was not equitable to the sharing of the benefits and burdens of the mining operation.



advisable to provide expressly in the Mining Act what percentage of the profit of a mining operation will be paid as royalties, without allowing discretion to the CS, a discretion that can be abused to the detriment of the country generally and the host communities specifically.

The second concern is the skewed distribution of the royalties. Host populations are only allocated a paltry 10 percent of the royalties despite suffering the majority of the adverse consequences of the mining operation(s) in their locality. Further, the Mining Act fails to provide expressly for the manner of transmission of the 10 percent royalty to the host community. There is no express requirement that any form of regulation be developed to ensure certainty on this.<sup>203</sup> This lack of legal certainty means that the resources meant for the host communities can be re-allocated for other purposes without their knowledge. It would be prudent that a clear system of transmission of the paltry ten percent royalty to the host community be developed in a way that allows the resources to be managed by the host community directly for their benefit and for the socio-economic development of their society. One such system can be through the creation of a CMTF as elaborated in section 5 below.

## ii) The Local Content Bill 2016

The Bill is based on Article 69(1) of the 2010 Constitution that imposes obligations on the State to ensure sustainable management of natural resources and the equitable sharing of the benefits accruing.<sup>204</sup> It is further predicated on Article 66(2) of the 2010 Constitution, which requires Parliament to enact legislation ensuring that investments in property benefit local communities and their economies.<sup>205</sup> The objective of the Bill is the maximisation of value addition to minerals within Kenya; the creation of employment in the extractives industry value chain by use of local expertise, goods, services, businesses and financing; and the enhancement of the participation of Kenyans in the extractives industry value chain, among others.<sup>206</sup>

<sup>203</sup> See, however, Section 223(2)(m), *Mining Act*. A general provision giving the CS powers to make regulation in relation to anything that may be prescribed under the Act and for the better carrying into effect of the provisions of the Act. This can be used to request the CS to develop regulations creating a system for the transmission of the 10% royalty to the host communities and the development of community structures to manage the royalty on behalf of, and for, the benefit of, the host community.

<sup>204</sup> Statement of Objects and Reasons, *Local Content Bill 2016* para 2.

<sup>205</sup> Statement of Objects and Reasons, *Local Content Bill* para 2.

<sup>206</sup> Clause 4, *Local Content Bill*. The Bill aims to facilitate the development of an effective local labour force, enhance local ownership and the procurement for local assets and services as well as the maximisation of value addition local content development and local participation in the extractives industry.

These are important provisions supportive of the provisions already contained in the Mining Act as discussed above. Similar to the Mining Act, the Bill requires persons exercising authority under it to be guided by the 2010 Constitution, especially articles 10, 62, 69 as well as the principle of public participation in the formulation of policies and plans in the extractives industry. This is an affirmation that mineral resources are owned by the National Government as a trustee for the Kenyan people, and must be exploited sustainably with their participation and for their benefit.

The Bill requires the National Government, in collaboration with the county governments, to put in place measures to ensure that mining operators develop and adopt local content in the entire mining value chain.<sup>207</sup> Further, it establishes the Local Content Development Committee (LCD Committee) with the following responsibilities: oversight, coordination and development of local content; issue advice in the formulation and development of policies and strategies on local content; recommend minimum standard requirements on local content; appraise, evaluate and approve local content plans of mining operators; undertake capacity building in collaboration with county governments to develop local skills and capacities in the extractives sector, among others.<sup>208</sup>

The Bill empowers the CS, in consultation with the LCD Committee, to set the minimum local content required for each mining operator, which must be complied with in mining operations.<sup>209</sup> Based on this minimum local content requirement set by the CS, each mining right-holder must submit a long-term local content plan as well as an employment and skills development plan when making an application for a licence.<sup>210</sup> Subsequent to the issuance of the mining licence, the mining right-holder would further be expected to submit annual local content plans for approval by the LCD Committee.<sup>211</sup> The operator will also be required to submit quarterly reports of the employment and training undertaken during the reporting period and specify the number of new local persons employed within the reporting period.<sup>212</sup>

In the context of training and employment, the Bill requires the mining operator to build local capacity and expertise through training.<sup>213</sup> The operator is further

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<sup>207</sup> Clause 6, *Local Content Bill*.

<sup>208</sup> Clauses 7-18, *Local Content Bill*.

<sup>209</sup> Clause 19, *Local Content Bill*.

<sup>210</sup> Clause 20 and 24, *Local Content Bill*. The employment and skills development plan is to ensure the mining operator is developing skills of local populations to enable them take up employment opportunities and responsibilities in the management of the extractive process.

<sup>211</sup> Clauses 20 and 21, *Local Content Bill*.

<sup>212</sup> Clauses 24(3) and (4), *Local Content Bill*.

<sup>213</sup> Clause 25, *Local Content Bill*.

required to give first consideration to local persons when vacancies occur and only employ foreigners when there is no suitable Kenyan available to take up the employment.<sup>214</sup> Priority in this context should be given to local persons from the host community, who must be reasonably represented in the operator's workforce.<sup>215</sup> On procurement of local products, the Bill requires the operator to maintain a bidding process that accords fair opportunities for local persons to supply goods and services in the extractives value chain.<sup>216</sup> The operator must give priority to local goods and service providers even if their bids are higher, provided that price differentials do not exceed 10 percent of the price quoted by a foreign bidder.<sup>217</sup>

The above analysis indicates that with the growth of the extractives sector in Kenya, legal reforms have been undertaken to ensure that the natural resources are managed sustainably for the benefit of Kenyans, especially host communities. The 2010 Constitution in Articles 10, 40, 66(2), 69 and 71 creates the basic framework for the transformation, leading to the enactment of the Mining Act and the development of the Local Content Bill 2016. These laws have created a comprehensive framework for benefit-sharing, ranging from compensation for loss of natural resources such as land, water, pasture to the employment of local persons as well as the use of local goods and services in the mining value chain. Further, the framework has called on mining operators to minimise adverse environmental and social impact on local communities as well as adopt development plans to improve the socio-economic situation of the local populations. The other aspect of benefit-sharing created is the payment of royalties, with the funds accruing from the royalties being shared on a 70/20/10 formula among the National Government, the affected county government and the host community respectively. What we need to find out, therefore, in the context of Bwiti and Nguluku, is how Base Titanium has undertaken its responsibilities in relation to the legal framework on benefit-sharing.

### 4.3 The reality of titanium mining benefit-sharing in Bwiti and Nguluku, Kwale County

It has been stated in section 4.1 above that a mining operator must gain a social licence to operate if it is to avoid conflict and receive broad acceptance and support from the local community in which it operates. In order for a company to gain this

<sup>214</sup> Clause 26, *Local Content Bill*.

<sup>215</sup> Clause 26(2)(a), *Local Content Bill*.

<sup>216</sup> Clauses 39-42, *Local Content Bill*.

<sup>217</sup> Clauses 39(3)(c) and 39(4), *Local Content Bill*.

social licence, it must adopt a sustainable development approach to mining.<sup>218</sup> This would require the company to allow meaningful community participation in the mining processes and decision-making as well as equitably share the benefits and burdens of mining with the host communities.<sup>219</sup> Some of the benefits that can be shared with the host communities include: adequate compensation and relocation of project-affected populations; development projects to uplift the socio-economic standards; employment opportunities; the use of local goods and services in the mining operations; and the payment of royalties that benefit the local communities directly. In determining whether Base Titanium has acquired a social licence, it is critical that we undertake an analysis of the survey data within the parameters of benefit-sharing.

#### 4.3.1 Community involvement in decision-making

Host communities are important stakeholders in the mining venture. This is because they bare most of the burdens of mining such as loss of land and its attendant displacement and relocations; the environmental impacts of mining such as dust, noise, pollution and changes in microclimates; competition for water and other resources with the mines; as well as social costs such as diseases and destruction of social fabric, among others. It is, therefore, important that they are involved in all the processes of mining from the point of prospecting to the point of actual mining operations. The starting point for public participation should be the requirement for FPIC – where the community as a whole is given all the necessary information on the benefits and burdens of mining and are allowed to make an informed decision on whether mining should occur in their land or not. As was stated previously, FPIC is critical if a mining project is to attain a social licence to operate.

Participation, however, should not end at the initial point of consent. It should continue at all levels of the mining process, with the community having the capacity to be a collaborative partner in sharing the burdens and benefits equitably. The need to involve local communities in decision-making on resource exploitation and development is a constitutional requirement as discussed elaborately in section 4.2.1 above. Further, as affirmed by the 2010 Constitution, public participation in decision-making is required of both public and private bodies.<sup>220</sup> The Supreme Court of Kenya in an Advisory Opinion underscored the importance of local com-

<sup>218</sup> Prno J & Slocombe D, 'Exploring the origins of 'social license to operate' in the mining sector', 346.

<sup>219</sup> Prno J & Slocombe D, 'Exploring the origins of 'social license to operate' in the mining sector', 348.

<sup>220</sup> Articles 2(1) and 20(1), *Constitution of Kenya*.

munity participation in decision-making on the management of natural resources (land) as follows:<sup>221</sup>

Public participation [...] is the community-based process, where people organise themselves and their goals at the grassroots level and work together through governmental and non-governmental community organisations to influence decision making processes in policy, legislation, service delivery, oversight and development matters. It is a two-way interactive process where the duty bearer communicates information in a transparent and timely manner; engages the public in decision-making and is responsive and accountable to their needs.

In order for local communities to participate effectively in governance and decision-making in the mining processes, they must have access to all the relevant information, starting with the project's environmental and social risks and mitigation measures; project costs and expected benefits; expected community development undertakings, among others. There must also be full contract and revenue disclosure to enhance transparency and accountability in benefit and burden sharing.<sup>222</sup> Enhanced information sharing and open dialogue builds trust, helps manage societal expectations and creates a conducive environment for community-investor harmony, which is critical for productive mining operations.<sup>223</sup> This view is corroborated by the International Finance Corporation (IFC), which notes that:<sup>224</sup>

Resilient agreements are those that are supported by affected stakeholders who have meaningfully participated and can influence decisions about project aspects that affect them. This may relate to land access, water management, in-migration, and infrastructure development. Broad community support is central to managing project risks over time.

The question then is, have the mining communities in Bwiti and Nguluku been involved in substantive decision-making on mining processes, especially in relation to benefit-sharing? Data from the field indicate that public participation has not been substantive and determinative, especially in relation to the choice of development projects by Base Titanium. In Bwiti, 70.6 percent of interviewed respondents

<sup>221</sup> *In The Matter of the National Land Commission*, Advisory Opinion Reference No. 2 of 2014, December 2, 2015, para. 335, referring to the Draft Public Participation Guidelines for County Governments, page 5.

<sup>222</sup> International Financial Corporation, 'The art and science of benefit-sharing in the natural resources sector', 12.

<sup>223</sup> See International Financial Corporation, 'The art and science of benefit-sharing in the natural resources sector', 12, who affirm that if reality and perceptions are at a divergence, a project will be at risk. They extol the virtue of sharing all the relevant fiscal, economic, social and environmental data and information so as to manage expectations and perceptions, as these matter to the success of the mining project. They assert that imbalance of information coupled with poor stakeholder engagement has the potential to derail any mining project, at 18.

<sup>224</sup> International Financial Corporation, 'The art and science of benefit-sharing in the natural resources sector', 19.

stated that the community was not involved in decision-making on the development projects undertaken by Base Titanium.<sup>225</sup> 23.5 percent stated that a few elders were involved in decision-making on the projects, with only 5.9 percent acknowledging involvement in decision-making on the projects.<sup>226</sup> Due to the lack of substantive participation in decision-making, 70.6 percent of the respondents were of the view that the projects had not met the needs and aspirations of the Bwiti people. 5.9 percent stated that the projects had partly met the needs and aspirations of the Bwiti people, with no respondent (0 percent) stating that the projects had fully met the needs and aspirations of the Bwiti community.<sup>227</sup>

The same scenario is replicated in Nguluku, where 37.5 percent of the respondents stated that no one they know was involved in decision-making on development projects by Base Titanium; fifty percent stated that some community elders and local leaders were involved in decision-making; and only 12.5 percent acknowledged individual participation in decision-making.<sup>228</sup> Resulting from this, only 12.5 percent of the respondents were of the view that the projects had partly met the needs of the Nguluku community. 87.5 percent felt that the projects had not met the needs and aspirations of the community.<sup>229</sup> The lack of participation in decision-making has created a very negative perception of titanium mining in the communities in Bwiti and Nguluku. In fact, most of the respondents do not support the mining operation. The communities have asserted their right to be involved in decision-making on the conception, design and implementation of development projects. One respondent stated as follows:<sup>230</sup>

Non-involvement of locals in choice of policies and projects is the reason why projects have not satisfied the needs of local communities. There is need for a comprehensive involvement of the local communities before projects are initiated to ensure that projects serve local communities.

Other respondents stated that Base Titanium has to engage and find the priority needs of the Bwiti and Nguluku communities and respond to these needs through the design of projects that are capable of responding to these needs and priorities. One respondent stated:<sup>231</sup>

<sup>225</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>226</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>227</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>228</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>229</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>230</sup> Household interview of the Respondent M-5 in Nguluku on 23 May 2017.

<sup>231</sup> Household interview of the Respondent G-5 in Nguluku on the 23 May 2017.

Local leaders and I were involved in the choice of projects by Base Titanium for the local communities in Nguluku. However, these projects have not met the needs and priorities of locals because they were fake promises. In order for Base Titanium to improve the impact of its projects, it must go down to the ground and ask for the views of local populations.

The perceptions of the host community vary markedly from Base Titanium's assertion that it developed and has been implementing its CDMP with the active participation of seventy percent of the host populations.<sup>232</sup> Due to the failure to involve the local population adequately in developmental decision-making, it becomes extremely difficult for Base Titanium to acquire the necessary 'social licence to operate'. The lack of participation and its attendant perception of benefit deficiency is bound to generate tension, resentment and conflict, creating operational and production risks for Base Titanium. This is already being experienced as Base Titanium is finding it difficult to access new land for titanium exploration. Local communities are refusing to allow further explorations in their land.<sup>233</sup>

The Mining Act provides a critical window for Base Titanium to correct the lack of substantive participation in its requirement for old mining operations to develop community development agreements (CDAs). Base Titanium should grasp the opportunity and allow substantive participation of the local population(s) in the choice, design and implementation of development projects aimed to benefit them. The Draft Mining (Community Development Agreement) Regulations, 2017, require expansive consultations with host communities in a physical forum where all the populations affected are allowed to engage in dialogue and discussions that are meaningful and respectful of the local communities.<sup>234</sup> The Draft Regulations specifically state that any consultations held with a few political or opinion leaders do not qualify as proper consultation in the context of the development of the community development agreements.<sup>235</sup> Base Titanium must thus take this opportunity and work hand in hand with the host communities to craft a development plan capable of meeting the needs and priorities of the local mining populations. This should be done in the context of the creation and operationalisation of the CMTF that is elaborated in section 5 below.

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<sup>232</sup> Key informant interview N-9 with Base Titanium conducted at the mines on 26 May 2017.

<sup>233</sup> Key informant interview N-6 conducted in Kwale on 24 May 2017.

<sup>234</sup> Ministry of Mining, 'The Mining (Community Development Agreement) Regulation 2017', clause 2.

<sup>235</sup> Ministry of Mining, 'The Mining (Community Development Agreement) Regulation 2017', clause 2.

#### 4.3.2 Adequate compensation for loss of land and other production resources as a result of mining-based displacements

In order for mining to take place, involuntary displacement of populations on the land in which the mineral resource exists is inevitable.<sup>236</sup> The World Bank, in its Operational Directive on Involuntary Resettlements, notes that these displacements generate severe social, economic and environmental problems for the displaced communities.<sup>237</sup> The adverse impacts of these displacements include: the dismantling of production systems and assets; loss of income sources; displacement to environments where household survival skills are less effective and competition for production resources is greater;<sup>238</sup> and the dismantling of families, community structures and social networks.<sup>239</sup> If these adverse impacts are to be effectively managed to prevent long-term hardship and the impoverishment of the displaced community, sufficient planning has to be undertaken. The World Bank requires that a substantive resettlement plan be developed, which must contain the following features:<sup>240</sup>

- Substantive community participation in the planning and implementation of the resettlement;
- Compensation for land, housing, infrastructure and other factors of production in full;
- Payment of full resettlement costs for all the losses prior to resettlement;
- Support in the movement of the relocated community and continued assistance during the resettlement and transition period;
- Assistance to improve on former living standards, income earning capacity and production levels to enhance household wellbeing; and
- Provision of sufficient investment resources and opportunities to share in the benefits of the mining operations.

The question is, was an effective relocation plan developed in the titanium-mining project and did it contain all these important elements? Based on the per-

<sup>236</sup> International Financial Corporation, 'Sustainable and responsible mining in Africa', 19.

<sup>237</sup> The World Bank, 'World Bank Operation Directive 4.30: Involuntary displacements', 1 June 1990.

<sup>238</sup> See International Financial Corporation, 'Sustainable and responsible mining in Africa', 18, which affirms that loss of arable land to mining impacts negatively on agriculture, which is a key economic and livelihood activity for rural populations. This has the potential to impact adversely on household as well as community food security.

<sup>239</sup> The World Bank, 'World Bank Directive 4.30', 1; International Financial Corporation, 'Sustainable and responsible mining in Africa', 19.

<sup>240</sup> The World Bank, 'World Bank Directive 4.30', 1-2.



ception of the respondents, the relocation process was not carried out effectively, as members of the community were not given all the necessary information to make informed choices.<sup>241</sup> They were also not adequately empowered to negotiate freely and independently determine the value of their land and other production assets.<sup>242</sup> Due to their impoverished and disempowered state and the lack of independence in determining the value of their production assets at the time of displacement, the displaced host community now believes that the compensation that was paid to them by Tiomin and Base Titanium was not fair and adequate, taking into account the huge benefits Base Titanium is generating from titanium mining in their land.<sup>243</sup>

Further, in the context of acquisition of alternative pieces of land, there was no concrete plan to assist the relocating population. A respondent stated this as follows:<sup>244</sup>

They were taken to Bwiti and shown parcels of land and were expected to negotiate with landowners to acquire them. The rates were higher than the compensation and most could not afford bigger or equivalent parcels.

The perceived inadequacy of compensation is corroborated by a respondent in Nguluku, who in responding to a question whether titanium mining has been beneficial to the host community stated:<sup>245</sup>

I cannot quite say as most people are complaining, we seem much better than our counterparts who were relocated to Bwiti due to poor compensation. Some have no homes while others did not complete their houses.

It is important going forward that the National Government should come up with a clear compensation structure entrenched in law to govern and guide com-

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<sup>241</sup> Household interview of the Respondent G-5 in Nguluku on 23 May 2017, where the Respondent states that the displaced community did not have adequate knowledge to negotiate good prices for their land and were paid poor compensation as they did not know the true value of their land.

<sup>242</sup> Focus group discussion with local community elders in Nguluku on 22 May 2017. The participants in the focus group discussion were categorical that titanium discovery in Kwale occurred when the local community was naïve and lacked the relevant information and capacity to negotiate better deals and efficiently value their land, resulting in compensation that was inadequate and did not reflect the real value of the land and assets that were being sold to Tiomin and Base Titanium.

<sup>243</sup> Focus group discussion with local community elders in Nguluku on 22 May 2017, where the participants stated that the Ksh 80, 000 per hectare that was paid to the relocating population was not sufficient to cover the entire costs of relocation – the purchase of alternative land, reconstruction of housing, relocation of families and the development of alternative sources of livelihood to cover for fruit crops that were left behind in the former homes. As a result, most of the relocated families are worse off than they were before relocation.

<sup>244</sup> Household interview of the Respondent L-1 in Nguluku on 22 May 2017.

<sup>245</sup> Household interview of the Respondent L-1 in Nguluku on 22 May 2017.

pensation in the context of involuntary displacements. This is to ensure that there is uniformity in the handling of compensation, and to ensure that local communities are adequately protected and compensated if their lands are taken up for large-scale investments, whether public or private. One respondent stated this proposal in the following terms:<sup>246</sup>

The Government needs to put a standard compensation rate for all Government projects e.g. SGR or compensate based on the expected revenues/ profits to be generated from the activity. Some plants, animals, lands were cheap.

Focus group participants in Nguluku similarly suggested that, in the context of large-scale mining operations, the National Government and county governments must act for and on behalf of impoverished and disempowered communities to ensure that their rights are effectively protected and they receive prompt, fair and adequate compensation.<sup>247</sup> Compensation and relocation, however, should not only be for those families whose land is utilised for mining; but must also include those whose land is in the buffer zone of the mining project and whose means of survival are threatened by the mining project. These households should be relocated, even temporarily, to ensure that they do not suffer the direct impact of the mining project. They must also be adequately compensated and provided for during the period of their temporary relocation. This will ensure that they are not unduly exposed to the negative consequences of mining.

#### 4.3.3 Adoption of mitigation measures to minimise the harmful social and environmental impacts of mining activities

Extractive activities in most instances generate an adverse social and environmental impact that has to be effectively mitigated so as not to jeopardise the health and socio-economic welfare of the host communities. Titanium mining in Maumba has not been any different. The operationalisation of the mining project led to relocation of households, breaking family and community structures as well as social networks.<sup>248</sup> The relocation has had an adverse impact on the remaining communities as it was accompanied with the relocation of basic amenities like schools and markets. The result of the relocation has been the isolation of households and the need for these households to travel long distances for services and amenities.<sup>249</sup>

<sup>246</sup> Household interview of the Respondent L-1 in Nguluku on 22 May 2017.

<sup>247</sup> Focus group discussion with local community elders in Nguluku 22 May 2017.

<sup>248</sup> Key informant interview N-4 conducted in Kwale on 23 May 2017.

<sup>249</sup> Key informant interview N-5 conducted in Kwale on 23 May 2017.

This has had an adverse impact on the lives and livelihoods of the remaining households.<sup>250</sup>

Secondly, the relocation resulting from mining has led to the re-generation of forests in places that were previously inhabited by the relocated population(s). The forest has attracted wild animals like buffaloes that have damaged crop fields, and destroyed the livelihoods of the local population(s) who are mostly farmers.<sup>251</sup> The wild animals have also generated security concerns for the local population, especially children who are unable to attend schools due to fear of attack by wild animals.<sup>252</sup> The forest, coupled with the dam that has been built by Base Titanium, has occasioned an increase in mosquito breeding, spreading malaria and other mosquito-based ailments that have affected the health of the local populations.<sup>253</sup> Apart from being a breeding place for mosquitoes, the dam has also attracted crocodiles that have become a menace to the local community members in Nguluku and to their livestock.<sup>254</sup>

Thirdly, concerns have been raised about the level of noise and dust that is being generated by the mining operations.<sup>255</sup> The noise and dust have become a health hazard for the local population(s). Concerns have been raised in relation to eye and skin infections as well as dust-based ailments such as respiratory infections.<sup>256</sup> Further, the local community argues that the mining operation and the damming of the rivers by Base Titanium have changed the micro-climate around Nguluku, with the result that farms have become less productive, coconut and mango trees produce lower fruits and the fish population in the rivers has diminished.<sup>257</sup> Concerns have also been raised about river water quality. Locals maintain that it is the activities of Base Titanium that have contaminated the river water. Base Titanium has refuted these claims, indicating that the mining process is purely mechanical, with no use of chemicals that might contaminate the rivers.<sup>258</sup> Base Titanium is open to a joint

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<sup>250</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>251</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>252</sup> Key informant interview N-5 conducted in Kwale on 23 May 2017.

<sup>253</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>254</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>255</sup> Key informant interview with NEMA at NEMA Offices in Kwale conducted on 23 May 2017 confirms that several complaints have been submitted to NEMA in relation to noise, dust, water quality, wild animals menace especially in relation to crocodiles, among others.

<sup>256</sup> Key informant interview with NEMA at NEMA Offices in Kwale conducted on 23 May 2017.

<sup>257</sup> Key informant interview with NEMA at NEMA Offices in Kwale conducted on 23 May 2017. Complaints have been that due to the change in microclimate, domestic animal have been equally affected leading to the birth of deformed calves.

<sup>258</sup> Key Informant Interview conducted at Base Titanium on 26 May 2017.

testing of the river water to determine contamination, provided that assessment is done using properly calibrated equipment.<sup>259</sup>

Responsible and sustainable mining requires that these concerns be effectively addressed through the adoption of social and environmental mitigation plans that can address them effectively. Such mitigation plans must be developed using all the relevant expertise, but with the substantive involvement and participation of the local communities affected. The Mining Act<sup>260</sup> provides an opportune moment for this to be undertaken in the context of the development by the company of an environmental management plan (EMP). The development of the EMP, by Base Titanium, with the participation of Kwale County Government and the local population(s) will provide an open and accountable structure for the mitigation of the adverse social and environmental impacts of titanium mining in Maumba. Such an open process will create trust between the mining company and the local population, as it will ensure a more equitable balance between the benefits and burdens of mining, creating a more conducive environment for the mining operation to thrive. In undertaking this process, Base Titanium will be well on its way to achieving the ‘social licence to operate’ that will reduce risks to production and enhance profitability.

#### 4.3.4 Employment and other opportunities for local communities

Universally, the mining venture has become more capital intensive and technologically advanced, with weak links to the local economy.<sup>261</sup> This has resulted in mining projects being ‘enclave projects’ generating minimal opportunities for employment,<sup>262</sup> especially for semi-skilled and unskilled labour.<sup>263</sup> This has been reflected in the titanium mining operation by Base Titanium, which has only been able to directly employ about 600 workers.<sup>264</sup> The perception of the local communities is that they have not been accorded fair opportunities at Base Titanium. An overwhelming majority of households interviewed (100 percent) stated that the lo-

<sup>259</sup> Key Informant Interview conducted at Base Titanium on 26 May 2017.

<sup>260</sup> See Sections 101(2)(i), 103(c), 106(i), 109(c), 115(c) and 176, *Mining Act*.

<sup>261</sup> International Financial Corporation, ‘The art and science of benefit-sharing in the natural resources sector’, 43.

<sup>262</sup> See International Financial Corporation, ‘Sustainable and responsible mining in Africa’, 15, which affirms the inability of mining projects to create broad-based employment opportunities, creating only about 1-2% of employment.

<sup>263</sup> Soderholm P & Svahn N, ‘Mining, regional development and benefit-sharing’, 79.

<sup>264</sup> Key informant interview N-4 conducted in Kwale on 23 May 2017, where the Respondent affirmed that even though some jobs have been given to people in the local mining communities, they are mostly unskilled and semi-skilled work that does not earn much compared to the more technical and managerial positions.

cal community personnel are the minority at Base Titanium.<sup>265</sup> This may be due to a lack of relevant mining expertise, since most residents of Kwale are either unskilled or semi-skilled in mining and related operations.

The interview respondents also stated that there has been an influx of non-locals from other parts of the County into Kwale County, which has had the impact of limiting the employment opportunities for the communities in Bwiti and Nguluku.<sup>266</sup> This has caused frustration and dissatisfaction among locals, though the situation has not deteriorated into violence.<sup>267</sup> Efforts by the Nguluku community to raise the issue of employment of locals have gone unanswered, creating a feeling that Base Titanium does not care for the wellbeing of the local populations.<sup>268</sup> One respondent stated this as follows: ‘they drive past us and have no time to listen to us, our leaders are given “something small” so they keep quiet as we are oppressed’.<sup>269</sup> Clearly, the titanium mining operation has not given a fair chance of employment to the people of Bwiti and Nguluku, contrary to the Mining Act that requires prioritisation in employment of local mining communities as discussed in section 4.2.2 above.

The next question here is, has the influx of non-locals indirectly benefited the people of Bwiti and Nguluku through multiplier effects? From observation, this does not appear to be the case, as the majority of the immigrants live in Ukunda and Msambweni towns and not in the villages of Bwiti and Nguluku. There is, thus, no indirect benefit to host communities in relation to rentals, accommodation, provision of food items and other supportive services. The mining venture has also not created the expected cluster of economic activities around the mine that would have created alternative socio-economic benefits and engendered economic diversification for the host communities. In this regard, a key informant observed:<sup>270</sup>

The mining project was expected to create derivative industry through the value chain, but this has not happened. Base Titanium keeps its staff within the mine and makes provision for them, leaving the local community with no opportunities for small businesses. Further, there is no value addition of the titanium mineral at source, with the result that the expected market for local services and goods in that process has not been realised. This has created disillusionment from members of the local communities who had expected a booming derivative economy around titanium mining.

<sup>265</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>266</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>267</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>268</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>269</sup> Household interview of the Respondent M-4 in Nguluku on 23 May 2017.

<sup>270</sup> Key informant interview N-4 conducted in Kwale on 23 May 2017.

This has resulted in despondency among the communities in Bwiti and Nguluku, though the situation has not yet occasioned open conflict between the two communities and Base Titanium.

Research indicates that the ability of mining to impact a particular region economically depends on the specific characteristics of the particular area.<sup>271</sup> In developed mining areas of Western Australia, Northern Sweden and British Columbia in Canada, the multiplier effect of two - that is one direct employment in a mining operation indirectly creating two job opportunities in the areas surrounding the mining operation – has been realised.<sup>272</sup> Taking into account the levels of development of these regions and comparing them to Bwiti and Nguluku – which are remote villages without the necessary infrastructure and facilities – it can be said that the employment multiplier for these specific mining communities is negligible. This is because the communities of Bwiti and Nguluku are unable to contain consumer spending resulting from titanium mining, with indirect employment opportunities, if any, being created in the larger towns of Msambweni and Ukunda.<sup>273</sup> Due to this inability of the host communities in Bwiti and Nguluku to benefit directly or indirectly from employment as a result of mining, it is thus critical that other mechanisms of benefit-sharing are adopted to uplift their living standards. This could be through the development of relevant infrastructure and service provision facilities such as schools, roads, health facilities, and water infrastructure as well as adoption of livelihood enhancing mechanisms such as agricultural support systems. This can be done through the CMTF elaborated in section 5 below.

#### 4.3.5 Procurement of local goods and services in the mining operation

In relation to the use of local goods and services in the mining project, the reality is that mining operations require materials that satisfy high technological standards.<sup>274</sup> In the context of Bwiti and Nguluku, the capacity to provide such goods and services is limited, with the result that the local elite and political class have dominated the tendering process for products and services.<sup>275</sup> This has further

<sup>271</sup> Soderholm P & Svahn N, 'Mining, regional development and benefit-sharing', 81.

<sup>272</sup> Soderholm P & Svahn N, 'Mining, regional development and benefit-sharing', 81.

<sup>273</sup> This is mainly through transportation, rentals and accommodation, investments that require resources not available to the poor populations in the mining communities of Bwiti and Nguluku.

<sup>274</sup> See International Financial Corporation, 'Sustainable and responsible mining in Africa', 14, who affirm the challenge of mining companies in finding local firms with the capacity to supply the needed mining goods and services.

<sup>275</sup> Key informant interview N-5 conducted in Kwale on the 23<sup>rd</sup> of May 2017.

marginalised local communities, creating inequalities and generating resentment towards the mining operations. There is need to build the capacity and financial ability of the host communities to be able to compete in tendering for the supply of goods and services. This can be done through the CMTF, proposed in section 5 below, which can empower small and medium-sized community businesses to supply goods and services to Base Titanium by developing their capacity and according them financial support through a revolving fund. This will enable these local SMEs to provide goods and services to Base Titanium and ensure that local communities benefit from the mining operation.

The involvement of the local communities in the mining procurement process is contained in the Local Content Bill, which requires local involvement in the mining value chain. The Bill empowers the CS to determine the minimum local content for each large-scale mining operator;<sup>276</sup> and seeks to establish a Local Content Committee to monitor and oversee the implementation of local content for each mining operator.<sup>277</sup> The Bill further requires the mining operator to maintain a bidding process that accords fair opportunities for local persons to supply goods and services in the extractives value chain.<sup>278</sup> The operator must give priority to local goods and service providers even if their bids are higher, provided that price differentials do not exceed ten percent of the price quoted by a foreign bidder.<sup>279</sup> The Bill, when it becomes law, will thus improve the capacity of local communities to participate effectively in the procurement of goods and services in mining ventures such as Base Titanium's project in Maumba. This has the potential to generate shared value, not only for the mining company, but also for the local mining communities.

#### 4.3.6 Socio-economic development projects through community development agreements

One of the ways in which a company can share benefits with local communities is through the adoption of an inclusive community development agreement. The agreement must be developed in a tripartite process with the active, substantive and determinative participation of the local mining communities.<sup>280</sup> This is to

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<sup>276</sup> Clause 19, *Local Content Bill*.

<sup>277</sup> Clauses 7-18, *Local Content Bill*.

<sup>278</sup> Clauses 39-42, *Local Content Bill*.

<sup>279</sup> Clauses 39(3)(c) and 39(4), *Local Content Bill*.

<sup>280</sup> The tripartite process of development includes the host communities, the mining company and the County Government. The essence of participation of the County Government is to enhance the protec-

ensure that the ensuing projects meet the needs and aspirations of the local populations. The agreement must detail the legacy projects that the mining company intends to undertake to uplift the living standards of the local populations. It must also indicate the responsibilities for the different projects, their costs and how the costs are to be offset and the intended benefits to the local communities. Though the adoption of a community development agreement was previously voluntary, based on the companies' CSRs, many jurisdictions now demand it as a legal requirement. Kenya is such a jurisdiction, with the Mining Act placing it as a condition for the grant of a mining licence.<sup>281</sup>

Even though Base Titanium had adopted a CDMP, the household survey indicates that the communities in Bwiti and Nguluku feel that they were not sufficiently involved in the development of the plan and that it does not reflect their needs and aspirations. Of those interviewed in Bwiti, only 5.9 percent confirmed participating in the creation of the CDMP, while 70.6 percent stated that they did not participate in the process of developing the CDMP.<sup>282</sup> The situation is the same in Nguluku, where 12.5 percent confirmed having participated in the process, while 87.5 percent were not individually involved in the development of the CDMP.<sup>283</sup> As a result, 87.5 percent of those interviewed in Nguluku and 70.6 percent of those interviewed in Bwiti do not feel that the CDMP captures their needs and aspirations.<sup>284</sup>

The Mining Act, which requires mining companies to adopt expansive community development agreements within 18 months of its coming into force, therefore, presents a good opportunity for a review of the CDMP. Though the CDMP was a voluntary document, the Mining Act expects community development agreement to be a legally binding document, prepared with the active and substantive participation of the host communities.<sup>285</sup> The essence of the required agreement is contained in the Draft Mining (Community Development Agreement) Regulation, 2017, which details its purpose as ensuring that mining activities:<sup>286</sup>

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tion of the interests of the local communities and to ensure that the intended projects are in line with the development plans of the County Government, to ensure continuity and sustainability of the projects even after the mine closes.

<sup>281</sup> Section 109, *Mining Act*.

<sup>282</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>283</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>284</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>285</sup> See Ministry of Mining, 'The Mining (Community Development Agreement) Regulation 2017', clauses 4.

<sup>286</sup> Ministry of Mining, 'The Mining (Community Development Agreement) Regulation 2017', clause 3(1).



- Benefit both the mining operator and the host communities equitably in an accountable and transparent manner;
- Are consistent with the continuing economic, social and cultural viability of the host communities; and
- Contribute significantly to the economic, social and cultural welfare of the host communities.

The Draft Regulations detail all the important issues that should be covered in a community development agreement<sup>287</sup> and require the creation of a Community Development Committee to monitor compliance with the agreement and provide structures for community participation as well as dispute resolution.<sup>288</sup> One of the requirements in the Draft Regulation is a mechanism for the transparent and accountable management of development funds,<sup>289</sup> which the CMTF elaborated in section 5 below perfectly fits. This is further acknowledged in clause 11(2) of the Draft Regulation that contemplates the establishment of trusts or foundations as part of the organisational structure for the implementation of the community development agreement.

#### 4.3.7 Payment of taxes, royalties and other levies

In many jurisdictions, mining revenue is transmitted from the mining right-holders to governments through taxes, levies and royalties. Governments can then utilise these resources in different ways for the benefit of the general population of the Country, though revenues like royalties can be channeled directly to host communities as discussed below.

##### i) Mandate of levying, collecting and distributing taxes

The payment of levies, taxes and royalties are some of the most prominent mechanisms for the distribution of the benefits of mining.<sup>290</sup> According to Kenyan law, since mining is a National Government function, most of these resources go directly to the National Government. The county governments only levy fees

<sup>287</sup> Ministry of Mining, 'The Mining (Community Development Agreement) Regulation 2017', clauses 8 and 11.

<sup>288</sup> Ministry of Mining, 'The Mining (Community Development Agreement) Regulation 2017', clause 7.

<sup>289</sup> Ministry of Mining, 'The Mining (Community Development Agreement) Regulation 2017', clause 8(4) (n).

<sup>290</sup> See Center for Science and Environment, *Sharing the wealth of minerals: A report on profit sharing with local communities*, 2011,14.

for a single business permit.<sup>291</sup> Both Kwale County Government and the mining communities perceive this as an unfair arrangement, recommending that mining should be a shared function between the National Government and the relevant county government that hosts the mining operation.<sup>292</sup> This issue is not a strangely Kenyan problem, as other jurisdictions also face this challenge. The argument for this practice has been that sub-national governments have weak capacity to manage volatility in revenue flows; have limited capacity for public finance management, planning and investment; and have fragile systems of financial controls and weak accountability structures.<sup>293</sup> Proponents of fiscal decentralisation of mining resources, however, argue that social justice requires that substantive amounts of mining revenue be decentralised. This is due to the following reasons: communities where mining operations are undertaken bear the burden of adverse impacts; these communities also consider the mining resource as ‘their own’ and should thus be compensated for its extraction; and that sub-national governments are better situated to understand local needs and priorities, and are thus able to invest mining revenue effectively for the betterment of the lives of communities affected.<sup>294</sup>

In enhancing equity, fairness and social justice, countries like Argentina, Australia, and Canada have devolved mining ownership to sub-national governments.<sup>295</sup> In these countries, the sub-national governments levy taxes such as land tax, transaction tax, payroll tax, excise duty and royalties.<sup>296</sup> However, in jurisdictions where mineral resources are owned by the National Government on behalf of the people,<sup>297</sup> revenue redistribution varies, depending on political processes, and

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<sup>291</sup> Key informant interviews with the Chief Officer for Finance and Economic Planning, Kwale County; the Budget Coordinator Kwale County and the former Co-Chair of the Kwale County Budget Forum.

<sup>292</sup> Of the household respondents interviewed, 52.9% in Bwiti and 81.8% in Nguluku affirmed that the County Government should have a role in decision-making on mining because the County Government is closer to the people and is able to understand the needs, priorities and interests of the local populations and effectively protect these interests in the process of the issuance of prospecting and mining licenses. It is also easier for the local mining communities to then hold the County Government accountable for the mining operations, especially if the operation is creating an adverse social and environmental impact on the local mining communities.

<sup>293</sup> International Financial Corporation, ‘The art and science of benefit-sharing in the natural resources sector’, 33.

<sup>294</sup> International Financial Corporation, ‘The art and science of benefit-sharing in the natural resources sector’, 33.

<sup>295</sup> International Financial Corporation, ‘The art and science of benefit-sharing in the natural resources sector’, 34.

<sup>296</sup> International Financial Corporation, ‘The art and science of benefit-sharing in the natural resources sector’, 34.

<sup>297</sup> In these countries, the National Government is the main authority that sets the terms for natural resource projects, collects tax revenue and determines their redistribution to the different functions of government.

power dynamics as well as economic and social contexts.<sup>298</sup> The practices in this context vary from country to country. At one extreme, all the revenue is collected by the National Government, is pooled together and shared between National Government and sub-national governments using an agreed formula, as is the case with oil revenue in Nigeria.<sup>299</sup> At the other extreme, the National Government collects all the mining revenue, but only shares a small percentage of the royalty with the sub-national governments and the populations affected by the mining operation, the prevailing situation in Kenya and Ghana.<sup>300</sup> Median practices also exist and have seen sub-national governments having the authority to levy royalties, collect land-use fees and administrative charges directly from the mining companies, boosting sub-national government revenue for local development for mining communities.<sup>301</sup> Outliers like Peru, however, allocate 50 percent of the total mining taxes to the producing areas' sub-national governments.<sup>302</sup> Kenya should consider adopting the median practice, allowing the relevant county government to levy royalties and land-use fees directly so as to boost local revenue for developmental purposes.

## ii) Determination and management of royalties

On the sharing of royalties, the practice varies from country to country, taking into account the legal regime subsisting there. In Kenya, the royalties to be paid by a mining company is determined by the CS responsible for mining.<sup>303</sup> The Mining Act provides as follows in relation to the calculation of royalties:

<sup>298</sup> International Financial Corporation, 'The art and science of benefit-sharing in the natural resources sector', 33.

<sup>299</sup> See International Financial Corporation, 'The art and science of benefit-sharing in the natural resources sector', 35, which indicates that in Nigeria, 13% of the total oil revenue is returned to producing states. The remainder is divided between the National Government and sub-regional states using an agreed formula. As a result, 46% of oil revenue is retained by the National Government, 22% is distributed amongst the oil producing states, and 33% is distributed among the non-oil producing states.

<sup>300</sup> See International Financial Corporation, 'The art and science of benefit-sharing in the natural resources sector', 35, which indicates that in Ghana, the National Government collects all the mining taxes, including the royalties. It retains 80% of the royalties, with the remaining 10% going to the Country's Mineral Development Fund, and the last 10% going to the Office of the Administrator of Stool Lands that then subdivides to the mining districts. Taxes on mining profits are not redistributed. The same situation obtains in Kenya, where only royalties are redistributed at the rate of 70% to the National Government, 20% to the County Government and 10% to the local communities.

<sup>301</sup> International Financial Corporation, 'The art and science of benefit-sharing in the natural resources sector', 34. Examples are Canada and the United States of America.

<sup>302</sup> International Financial Corporation, 'The art and science of benefit-sharing in the natural resources sector', 35.

<sup>303</sup> As per Section 185(3) and 186, *Mining Act*.

The Cabinet Secretary may designate a qualified person to inspect and examine any samples, books, records and accounts to ascertain the quantity, quality, grade or value of minerals or mineral products for the purpose of ascertaining or verifying the amount of any royalty payable.

Further, the Mining Act does not detail what happens to royalty agreements that had been agreed previously between the National Government and mining operators before the coming into effect of the Mining Act. This is a lacuna, which opens up the process of royalty calculation to abuse, to the detriment of the general welfare of the country in general, and host communities in particular.

This flexible approach has been extolled by IFC due to the uncertain and varying nature of mining projects, but it insists that this approach is only viable in a society with strong governance structures.<sup>304</sup> This may reflect perfectly the Kenyan situation, where the CS is given much power - without proper checks and balances - in the determination of the royalties payable. As a result of these opaque discretionary powers, the CS has set the percentage of royalties to be paid by Base Titanium at only 2.5 percent of its net profits per month.<sup>305</sup> This compares adversely with the royalties paid in other countries – five percent in Ghana and Mongolia, seven percent in South Africa, and up to fourteen percent in Chile.<sup>306</sup> There is need for more honesty, openness, transparency and accountability in the development of criteria for the determination of the amount of royalty to be paid in a manner that balances the needs, aspirations and expectations of all the mining stakeholders fairly and equitably.<sup>307</sup> If this is not done, there are bound to be risks that may end up in the renegotiation of the entire mining contract, as has been the case in the Acacia Gold Mines of Tanzania.<sup>308</sup>

<sup>304</sup> See International Financial Corporation, 'The art and science of benefit-sharing in the natural resources sector', 17-18.

<sup>305</sup> Base Titanium affirmed this during an interview held at the mine by the Consultant. The low percentage of royalty payment also raises concerns about the equity of actual benefit-sharing, as the mining industry due to weak corporate governance and oversight mechanisms habitually under-reports output value while over-reporting expenses, thus even paying lower actual royalties than the 2.5% agreed. See Mendoza R & Canare T, 'Revenue sharing in mining: Insights from the Philippine case' 4 *Modern Economy Journal* (2013), 521. See also International Financial Corporation, 'Sustainable and responsible mining in Africa', 12, which affirms that most mining companies avoid paying taxes they are legally required to pay, with Africa losing over US\$38 billion as a result.

<sup>306</sup> International Financial Corporation, 'The art and science of benefit-sharing in the natural resources sector', 22.

<sup>307</sup> See International Financial Corporation, 'The art and science of benefit-sharing in the natural resources sector', 29, who state that if mining licence negotiation processes are clear and transparent, there is more likelihood that benefits will be shared equitably between the different stakeholders. They call therefore for the development of clear laws and regulatory frameworks that subject such processes to public oversight, scrutiny and vetting.

<sup>308</sup> See International Financial Corporation, 'The art and science of benefit-sharing in the natural resources

### iii) Percentage share and redistribution of royalties to host communities

The Mining Act provides that royalties should be collected by the National Government and distributed to the other stakeholders using the formula of seventy percent to the National Government, twenty percent to the county government(s) and ten percent to the host communities affected.<sup>309</sup> This formula is contested by the communities in Bwiti and Nguluku, who were not involved at all in the process of developing the Mining Act despite the fact that they are the population most affected in relation to the legislation. The household survey in Bwiti and Nguluku indicates a unanimous consensus of lack of knowledge and participation in the development of the mining legislation. All the households interviewed indicated that they were not involved at any point in the process of development and enactment of the Mining Act.<sup>310</sup> This is contrary to the 2010 Constitution, which requires the participation of the people in the legislative process, especially the communities to be directly affected by the legislation.

Despite the lack of involvement in the legislative process, the communities in Bwiti and Nguluku are equally unanimous that communities living in areas where minerals are extracted should benefit from the mining project(s), especially in relation to the payment of royalties. Their recommendation on the percentage of royalties that should be given to local communities despite the provision of the Mining Act is as follows:<sup>311</sup>

Percentage of royalties to local communities	Nguluku (percent)	Bwiti (percent)
60	-	5.9
50	18.2	5.9
40	9.1	23.5
35	-	5.9
30	27.3	17.6
25	13.6	5.9
20	-	5.9
15	4.5	-
10	9.1	5.9
Not sure	18.2	23.5

sector', 29, which affirms that several countries, including Peru and Chile, have re-negotiated mining contract terms to recover larger shares of benefits through engagement and dialogue with investors.

<sup>309</sup> Section 183(5), *Mining Act*.

<sup>310</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>311</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

Based on the views of the respondents, it is clear that the two communities feel that the Mining Act's allocation of only ten percent to local communities is not a fair allocation taking into account the mining burdens shouldered by these communities. For most of them, a more equitable sharing of benefits should entail the redistribution of between thirty and thirty-five percent of the royalties paid to the local mining communities. It is thus important that host communities and mining stakeholders engage the National Government effectively to ensure a fairer redistribution of mining royalties in a manner that is equitable and beneficial to host communities.

iv) Determination of local communities in the context of mining royalties

The next challenge in relation to mining royalties is the determination of who should be considered part of the local community to benefit from 10 percent royalty. According to the Mining Act, section 2, a 'community' in the context of mining is:

- a) a group of people living around an exploration and mining operations area; or
- b) a group of people who may be displaced from land intended for exploration and mining operations.

In the different focus group discussions held with mining stakeholders in Kwale, opinions vary in this context, based on differing sectarian interests.<sup>312</sup> There are four conceptions of community: those moved from the mining site in Maumba; those still living around the mining site in Nguluku; those originally in Bwiti who welcomed and have to compete for resources with those resettled from Maumba; and the entire population of Kwale County; as they are in one way or another affected by the titanium mining by Base Titanium through the mining chain. The discussions at the County Government favour the fourth conception of community as including the entirety of Kwale County, a conception that is disputed by the other mining stakeholders. In a focus group discussion with community elders in Nguluku, the participants were categorical that the 20 percent royalty allocated to the County Government was aimed at benefiting the entire Kwale County, while the ten percent for local communities was intended specifically for the communities directly affected by the mining operation.<sup>313</sup> The resulting discussions from the focus group discussions detailed a definition of 'local community' in the con-

<sup>312</sup> Mining Stakeholders Forum held in Tiwi on the 25 May 2017, where the issue of the definition of 'local community' was discussed at length. The suggestion was that in the definition of what local community is in the context of mining benefit-sharing, there must be clear demarcations and boundaries, to ensure that only those suffering the direct consequences of mining benefit from the 10% mining royalty.

<sup>313</sup> Focus group discussion with local community elders in Nguluku on 22 May 2017.

text of titanium mining in Maumba to include the following: Those displaced from Maumba to pave way for the mining project; those who are still living within the precincts of the mine in Nguluku and who face the major adverse environmental, health, economic and other effects of the mining operation; and the host community in Bwiti who accommodated the relocatees from Maumba, and who had to compete for scarce resources and facilities with the new arrivals.

The above conception of ‘local community’ is in line with the definition of ‘community’ provided by the Mining Act, and should be considered the intended beneficiaries of the ten percent royalty allocated for local communities under the Mining Act. It is also in line with the definition adopted in the Draft Mining (Community Development Agreement) Regulations 2017.<sup>314</sup> All mining stakeholders should thus adopt this restricted definition of local community in the context of the 10 percent royalty.

v) Management and utilisation of the 10 percent mining royalty allocated to local communities

The last issue for determination in relation to the 10 percent royalty is how it is to be managed for the benefit of the local communities. In determining the distribution of royalties between the National Government, county government(s), and local communities, the Mining Act does not provide a framework for the management of the portion of royalty that is the entitlement of local communities. This issue ignited a passionate debate among the respondents. In Bwiti, 76.5 percent of the respondents were of the view that it should be managed by the County Government; 5.9 percent supported management by a community committee; and 17.6 percent were not certain how it should be managed.<sup>315</sup> In Nguluku, 54.5 percent were supportive of County Government management of the royalty; 31.8 percent were supportive of a community committee management; and 13.6 percent were uncertain.<sup>316</sup> This indicates a strong leaning by the general community population towards the County Government management of the ten percent royalty. However, in the focus group discussions, the preference was the management of the funds by the local communities themselves through a committee to be set up for that purpose.<sup>317</sup> This indicates a delink between the community elite, who want to manage the royalty themselves, and the general population who want the royalty to be man-

<sup>314</sup> Ministry of Mining, ‘The Mining (Community Development Agreement) Regulations 2017’, clause 2.

<sup>315</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>316</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>317</sup> Focus group discussion with local community elders in Nguluku on 22 May 2017.

aged by the County Government. This chapter collates the two views and suggests a tripartite system of management of the royalty through a CMTF.

On the type of use for which the ten percent royalty should be placed, the majority of the respondents were of the view that it should be directed towards development projects that benefit the host communities generally. In Nguluku, 81.8 percent supported the use of the royalty for the construction of socio-economic infrastructure such as schools, health facilities, water facilities, roads and other community infrastructure.<sup>318</sup> 13.6 percent were supportive of cash transfers to individuals, while 4.5 percent were not certain.<sup>319</sup> Similarly in Bwiti, 70.6 percent supported the utilisation of the royalties for general community infrastructure development, while 29.4 percent were not sure.<sup>320</sup> Among the respondents in Bwiti, there was no support for the utilisation of the funds as cash transfers to individuals.<sup>321</sup> The Mining Stakeholders Forum also supported the developmental utilisation of the ten percent royalties in the following terms:<sup>322</sup>

If people are given money individually, there will be no benefit to the people. It should be targeted towards projects such as health, roads, water and other infrastructure – this will be more beneficial for the local communities in the long term. It should be used for development purposes. This should be done for all the host communities – community close to the mining area, the resettled communities and the communities hosting the resettled communities.

The use of local community royalties for general community development and not for individual cash transfers is supported by comparative practice in other jurisdictions, where individual cash transfers have been abandoned for failing to generate broad-based societal socio-economic development.<sup>323</sup> In many contexts, royalties are used for general mining community infrastructural development to ensure intra-generational and inter-generational equity and bolster general development of the mining area. This research thus proposes the utilisation of the royalties for general community development in the context of the CMTF.

<sup>318</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>319</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>320</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>321</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>322</sup> Mining Stakeholders Forum held in Tiwi on 25 May 2017.

<sup>323</sup> International Financial Corporation, 'The art and science of benefit-sharing in the natural resources sector', 36. See generally, World Bank and International Financial Corporation, *Large mines and local communities: Forging partnerships, building sustainability*, 2002, 1-22. See also Mining, Mineral and Sustainable Development (MMSD) Project, 'Local communities and mines' in MMSD, *Breaking new ground: Mining, minerals and sustainable development*, 2002, 198-230.



## 5. Way forward in managing mining resources for the benefit of communities in Bwiti and Nguluku: The Community Mining Trust Fund

Management of mining resources at the local level has raised concerns of institutional capacity to manage funds effectively in a manner that ensures sustainable development.<sup>324</sup> In comparative perspective, the better way to manage community development in mining areas is through the establishment of a CMTF.<sup>325</sup> The World Bank states the necessity of such a mechanism as follows:<sup>326</sup>

With high mineral prices generating windfall profits and focusing growing attention on compensation payments and the necessity of earning and retaining their “social license to operate,” many governments and companies have been considering the use of foundations, trusts, and funds (FTFs) as vehicles for sharing the benefits of mining operations with the surrounding communities. If conceived as independent entities they can provide opportunities for shared governance that can be sustained long into the future...The choice of a dedicated instrument, such as an FTF, can bring particular value where local capacities are limited, public services are absent or weak, and there is a need to demonstrate continued benefit from mining after operations have closed. FTFs can be used to deliver community investment programmes for companies, facilitate the use of government payments derived from mining for development, and manage compensation funds.

The International Financial Corporation also agrees that:<sup>327</sup>

To the extent that foundations [or trusts] can manage social services and public infrastructure better than local governments and municipalities, this approach may be useful for dealing with the lack of capacity at the local level in remote and poor communities.

The possibility of establishing a trust fund or foundation to manage mining-based community development in Kenya is already acknowledged in the Draft Mining (Community Development Agreement) Regulation, 2017. One of the requirements in the Draft Regulation is a mechanism for the transparent and account-

<sup>324</sup> See ‘Muigua K: Reflections on managing natural resources’, 2 and 25, who asserts that one of the challenges for benefit-sharing for local communities has been lack of effective management. The CMFT addresses this challenge by creating a collaborative framework of natural resource management that is formal, systematic, professional, transparent and accountable.

<sup>325</sup> World Bank, ‘The context of benefit-sharing in the mining industry’, 10; International Financial Corporation, ‘The art and science of benefit-sharing in the natural resources sector’, 345; World Bank and International Financial Corporation, *Large mines and local communities*, 7-8.

<sup>326</sup> Wall E & Pelon R, *Sharing mining benefits in developing countries: The experience with foundations, trusts and funds*, 2010, 1.

<sup>327</sup> International Financial Corporation, ‘The art and science of benefit-sharing in the natural resources sector’, 45.

able management of development funds,<sup>328</sup> for which the CMTF perfectly fits. The Draft Regulations further contemplate the establishment of trusts or foundations as part of the organisational structure for the implementation of the community development agreement.<sup>329</sup>

But what is a CMTF and how does it work? The CMTF in Kwale's context will be a tripartite collaborative investment vehicle comprising representatives of the community, relevant county government and Base Titanium.<sup>330</sup> Its mandate would be to receive and invest the ten percent royalties that accrue to the local communities as well as the annual development allocations by Base Titanium in the context of its CSR activities.<sup>331</sup> In order to create an effective CMTF, the following must be taken into account:<sup>332</sup>

- The vision, mission and objectives of the CMFT must be properly defined as a key development actor in the local environment.<sup>333</sup>
- Its mandate should be clear from the beginning; receive the 10 percent mining revenue from the National Government; annual development funds from Base Titanium (one percent<sup>334</sup> or at a rate to be agreed through negotiations among Base Titanium, the County Government and

<sup>328</sup> Ministry of Mining, 'The Mining (Community Development Agreement) Regulation 2017', clause 8(4) (n).

<sup>329</sup> Ministry of Mining, 'The Mining (Community Development Agreement) Regulation 2017', clause 11(2).

<sup>330</sup> Development Trust Funds are a formalised framework for benefit-sharing that ensures certainty and sustainability in the development of the local mining communities and is an improvement from CSR activities that are strictly based on the goodwill of the mining company. The involvement of the County Government ensures that the Trust Fund is entirely dependent on the mining company for its funding and success.

<sup>331</sup> In the Mining Stakeholders Forum held in Tiwi on the 25 May 2017, it was stated that Base Titanium has earmarked around 300 million annually for development. This should form part of the Trust to be managed for and on behalf of the host communities to ensure coordinated development.

<sup>332</sup> Soderholm P & Svahn N, 'Mining, regional development and benefit-sharing', 83-84.

<sup>333</sup> See Wall E & Pelon R, *Sharing mining benefits in developing countries*, 2 and 36-38, who state the importance of appropriately determining the vision, objectives, beneficiaries and the projects to be undertaken by a fund if the fund is to be successful.

<sup>334</sup> The new mining law in South Africa that requires mining companies to use 1% of their gross profits annually for community development. For the practice of the mining company contributing 1% of revenue to the trust fund, see Wall E & Pelon R, *Sharing mining benefits in developing countries*, 26, where they document this practice in relation to Freeport Partnership Fund for Community Development (LP-MAK) of Indonesia; Minera Escondida Foundation of Chile; and Ahafo Community Foundation of Ghana. They also document the policy of BHP Billiton Company, which has a corporate policy to establish a foundation or a trust for the sustainable development of locations where they operate, and to contribute 1% of their pre-tax profits to fund the operations of the trust fund. Based on this practice, they established the Mozul Community Development Trust Fund (MCDT) in Mozambique, which receives approximately US\$ 2.5 million per year from the mine for its development operations, at 33-34.

local communities);<sup>335</sup> and the annual contribution to the CMFT by the County Government.<sup>336</sup> The Fund's governing body should then channel these resources towards the sustainable socio-economic development of the communities in Bwiti and Nguluku.

- It should have a representative multi-stakeholder governing body that will act as trustees for the local communities.<sup>337</sup> This contribution suggests that nine trustees sit in the governing body (Board of Trustees): four elected representatives of local communities, two representatives of the County Government; two representatives of Base Titanium; and a representative of the civil society organisations.<sup>338</sup> The governing body, with the help of a small secretariat (Fund manager, accountant/finance officer, community liaison officer and secretary) will be charged with the day-to-day management of the fund for and on behalf of the local communities.<sup>339</sup> A general oversight of these structures can further be undertaken by the Community Development Committee.<sup>340</sup>
- The CMTF must have very clear and stringent transparency and accountability mechanisms to ensure that the funds are used only for their intended purposes.<sup>341</sup> A recommendation for utilisation is for the Fund money

<sup>335</sup> It is in the interest of Base Titanium to channel its development resources through the Trust Fund in a fair manner as development investments that are reasonable and beneficial to the local communities are more likely to be durable and the mining operation is less likely to be disrupted by risks of community uprising, see International Financial Corporation, 'The art and science of benefit-sharing in the natural resources sector'.

<sup>336</sup> Annual development contribution by the County Government is aimed at diversifying sources of income for the Fund and creating better opportunities to promote local community development. The legal basis for this contribution is for the County Government to respond to the urgent needs of vulnerable populations as is entrenched in Articles 20(5)(b) and 21(3) of the Constitution, which imposes a duty on all State organs and officers to prioritise resource allocations having regard to prevailing circumstances so as to address the needs of vulnerable groups.

<sup>337</sup> See Wall E & Pelon R, *Sharing mining benefits in developing countries*, 2 and 29-30, who state that high level stakeholder participation is the key to achieving grounded and sustainable socio-economic benefits through the trust mechanism.

<sup>338</sup> The Board of Trustees has a fiduciary duty to manage the trust strictly for the benefit of the beneficiaries and must not allow a conflict of interest. Trustees can be held personally accountable for the mismanagement of the trust fund, with a clear legal mechanism provided for in the *Trustees Act, Cap 167 of the Laws of Kenya*.

<sup>339</sup> See Wall E & Pelon R, *Sharing mining benefits in developing countries*, 2, who affirm the importance of a proper governance structure and clear management of responsibilities as key to better performance of a trust and its ability to raise external finances for socio-economic development. They state, however, that management expenses must be restricted to only about 10-15% of total expenditure of the trust fund, at 28.

<sup>340</sup> Ministry of Mining, 'The Mining (Community Development Agreement) Regulation 2017', clause 7.

<sup>341</sup> See World Bank, 'The context of benefit-sharing in the mining industry', 10, which extols the virtues

to be invested wisely with a long-term developmental perspective, rather than being squandered in short-term consumption purposes.<sup>342</sup> This will ensure fair inter-generational distribution of the benefits of mining. The mining legacy projects should be available for use by subsequent generations.<sup>343</sup>

- On the utilisation of the monies of the Fund, the governing body must undertake participatory budgeting,<sup>344</sup> allowing the local communities to determine the development projects to be undertaken in an inclusive, participatory and determinative manner.<sup>345</sup> This will enable local communities to determine collectively priority development projects that meet their priority needs and that will empower the mining communities towards a path of sustainable socio-economic development even after the mine closes.<sup>346</sup> Some of the priority projects that had been recommended by the mining communities of Bwiti and Nguluku are: projects to advance education, enhance access to healthcare, ensure access to clean water for domestic use, develop road and other infrastructure, and create opportunities for employment and livelihoods such as investment in ag-

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of a dedicated development vehicle like the CMTF, stating that it has great value in the following situations: where decentralised governance units lack capacity to ensure accountability in the management of development resources; where governmental capacity to deliver socio-economic services is weak; and where there is need to manage developmental benefits of mining subsequent to the mine's closure.

<sup>342</sup> Soderholm P & Svahn N, 'Mining, regional development and benefit-sharing', 84. They suggest investment in public infrastructure, education and health to set a foundation for long-term economic development.

<sup>343</sup> 'Muigua K: Reflection on managing natural resources', 2, who asserts that since extractive resources are non-renewable, investment choices must be durable so as to serve both the present and future generations. See also 'Rustad S: Wealth-sharing, benefit-sharing and the extractive industry', November 2015, 5, [http://www.undp.org/content/dam/undp/library/Democratic%20Governance/OGC/Siri%20Aas%20UNDP\\_nov15.pdf](http://www.undp.org/content/dam/undp/library/Democratic%20Governance/OGC/Siri%20Aas%20UNDP_nov15.pdf) on 13 May 2017, who similarly affirms that mining resources are non-renewable and can only be exploited once, they should thus be used wisely to benefit the current and future generations. The suggested investments are: education, health and infrastructure.

<sup>344</sup> Key informant interview conducted in Likoni with the Outgoing Co-Chair of the Kwale Budget Forum on the 25 May 2017.

<sup>345</sup> See Wall E & Pelon R, *Sharing mining benefits in developing countries*, 2, who advise that the development planning by the trust must be integrated to the County Government development plans so as to ensure congruence and continuity.

<sup>346</sup> See Wall E & Pelon R, *Sharing mining benefits in developing countries*, 23, who affirm that trust fund programme choices must be based on a deep understanding of the needs of the beneficiaries, the developmental priorities of the mining stakeholders and the existing developmental gaps. They suggest some viable developmental programmes to include: local economic and business development; health and wellness; education and vocational training; basic infrastructural development; employment and income generation; and environmental protection.

ricultural production, processing and marketing.<sup>347</sup>

- In ensuring sustainability, the CMTF should increase the monies of the Fund by undertaking investments such as tendering for the procurement of goods and services to the mines. It should also create a revolving fund to support the growth of small - and medium - sized local community businesses. The beneficiaries should return monies borrowed with a small interest as a way to generate income and develop the Fund.
- The CMTF must have efficient administrative structures to enable it to maximise development delivery to the local communities.
- The CMTF's design must be flexible enough to changing development needs and practices as well as operating conditions, which, for example, might allow a new mining player to become part of the Fund.<sup>348</sup>

As compared to the in-house management of community development projects that are being undertaken by Base Titanium, the choice of a CMTF has benefits not only to the host community but also to Base Titanium. First, agreement to such a professional development vehicle signals the commitment and good will of the company to community development, creating trust that is important to the overall attainment of a social licence to operate.<sup>349</sup> Second, a dedicated development vehicle provides a sustainable system of joint action, allowing the participation of all mining stakeholders. This engenders collective responsibility for the delivery of development projects.<sup>350</sup> Third, creation of a trust-based development vehicle can generate tax advantages for the company, enhancing its net profits.<sup>351</sup> Last, a dedicated development mechanism frees the mining company time and staff, enabling it to dedicate itself fully to mining without worrying about risks arising from direct management of community development projects.<sup>352</sup> Overall, therefore, it is in the best interest of the company to support and fund the development of such a dedicated investment vehicle to undertake community development for the host communities.

<sup>347</sup> Hakijamii Household Survey conducted between 22-26 May 2017 in Bwiti and Nguluku.

<sup>348</sup> See Wall E & Pelon R, *Sharing mining benefits in developing countries*, 23, who affirm the need for constant monitoring and evaluation of the impact of the trust fund so as to recognise changing needs and conditions, and to respond effectively to those changes to ensure continued success of the fund.

<sup>349</sup> World Bank, 'The context of benefit-sharing in the mining industry', 11.

<sup>350</sup> World Bank, 'The context of benefit-sharing in the mining industry', 11.

<sup>351</sup> World Bank, 'The context of benefit-sharing in the mining industry', 12.

<sup>352</sup> World Bank, 'The context of benefit-sharing in the mining industry', 12.

## 6. Conclusion and recommendations

### 6.1 Conclusion

The extractives industry has the potential to enhance development and improve the socio-economic conditions of host communities if well managed. The proper management of mining projects requires a comprehensive legislative and regulatory framework that ensures that mining is undertaken in a responsible and sustainable manner. This ensures that the burdens and benefits of mining are shared equitably among the mining stakeholders. Host communities suffer the major burdens of mining projects. These communities are subjected to involuntary displacement that affect their socio-economic well-being, are exposed to adverse environmental and health consequences of mining, and in most instances are left worse off than they were before the commencement of the mining project. It is critical, therefore, that there is an equitable balance of these burdens of mining and the benefits that accrue from the mining process. These benefits can be shared in many different ways, which include: active involvement of the communities in decision-making at all levels of the mining process; full, adequate and prompt compensation for land, infrastructure and other assets of production lost as a result of the mining project; access to employment opportunities in the mining project; local procurement of goods and services; socio-economic development of the host communities through infrastructure and other socio-economic empowerment projects; mitigation of adverse social, environmental and health consequences of mining; and the payment of taxes and royalties that benefit host communities.

Mining has not been a major source of revenue in Kenya for long. But this has changed in the last 10 years with the discovery and exploitation of different minerals, titanium being one of the major discoveries. The discovery and exploitation of minerals has necessitated the development of a mining legal framework to provide effectively for the management of this industry. The 2010 Constitution, the Mining Act, and the Local Content Bill are the major legal instruments that have been or are being put in place for this purpose. The legislative framework has provided broadly for the management of extractive resources to ensure that this is done sustainably and for the benefit of the Kenyan people, including host communities.

Despite the elaborate legal framework on mineral resource management, the reality is that the precepts are not reflective of the practice on the ground, as exemplified by the titanium-mining project in Kwale County. The household survey, key informant interviews and focus group discussions undertaken in the context of this study show that the socio-economic situation of the communities in Bwiti and

Nguluku has not improved much as a result of the mining project. Instead, these communities feel that their situation has worsened considerably as a result of the mining project. Some of the challenges that these communities have faced as a result of the mining project include: limited inclusion in decision-making on issues related to the mining project; failure to undertake fair valuation of land and other factors of production and adequate compensation for the displaced populations; failure to put in place effective mitigation measures to cushion those affected by the adverse social, environmental and health impact of the mining operation; failure to undertake relevant socio-economic development projects; limited employment and local procurement opportunities; and inequitable distribution of the proceeds of the mining project.

The above concerns have led to mistrust between Base Titanium and the local communities. The communities feel that the benefits and burdens of the mining project have not been equitably shared. In addressing this challenge, this chapter proposes the creation of a tripartite mechanism – the CMTF – to manage all the mining resources accruing to the local communities and to utilise them for the socio-economic development of these communities. This is in line with other jurisdictions that have faced the same situation and have established such mechanisms, which have enhanced effective and accountable management of mining resources and achieved a broad-based socio-economic development of host communities.

## 6.2 Recommendations

The above conclusion leads to the following recommendations to the different mining stakeholders in Kwale County:

- i) National Government
  - Involve Kenyans effectively in the law-making process, especially those communities that are affected directly by the prospective legislation;
  - Ensure transparency and accountability in the issuance of prospecting and mining licenses and engage relevant county governments and local communities substantively in decision-making on the issuance of these licenses;
  - Develop clear and substantive policy guidelines to form the basis for the negotiation of mining contracts with investors so as to safeguard the interest of the country and the host communities;
  - Consider making mining a shared function between the National Gov-

ernment and the County Governments to ensure a more effective management of mining operations in a manner that meets the expectations of local communities;<sup>353</sup>

- Develop an effective compensation legal framework to ensure that host communities are adequately protected from exploitation by unscrupulous mining companies;
- Ensure that people have adequate information and are sufficiently empowered to make free and informed decisions on all aspects of the mining project, with a special focus on the valuation of property, the adequacy of compensation and the expected impact of relocation;
- Issue title deeds to households in Kwale County, especially those around the mining area to enable them protect their lands and undertake effective negotiations in the context of land acquisition related to mining and other developments;
- Reconsider the 10 percent share of royalties to the local communities with a view to increasing the percentage of resources available for the socio-economic development of host communities;
- Remit the royalties that the County Government of Kwale and the host communities in Bwiti and Nguluku are entitled to in accordance with the Mining Act;
- Publish and provide regular information on royalties received by Government from respective mining activities for transparency and accountability purposes; and
- National Government institutions such as the National Environmental Management Authority (NEMA) and the Water Resources Management Authority (WRMA) should empower their regional offices to undertake their work in the context of monitoring environmental integrity and water abstractions in the context of large-scale mining operations like the titanium-mining project. Mining operators should be required to engage the regional NEMA and WRMA offices in undertaking their annual environmental audits and water licensing to ensure that the concerns of local communities are effectively addressed in these processes.

<sup>353</sup> Key informant interview N-6 conducted in Kwale on the 24 May 2017. It is important to note that this will not of necessity require a constitutional amendment. The functions of the different levels of Government are contained in the 4<sup>th</sup> Schedule of the Constitution, and can be transferred in accordance with Article 187 of the Constitution without a constitutional amendment. What is required is negotiation between the two levels of Government within the institutions created by the *Inter-Governmental Relations Act, 2012*. See Sections 24-29, *Inter-Governmental Relations Act*.



## ii) County Government of Kwale

- In concert with other county governments within the auspices of the Inter-Governmental Relations Committee, lobby the National Government to declare mining a shared function to ensure a more effective management of mining projects at the county level for the benefit of local communities;
- Engage more robustly with the National Government to ensure that mining royalties are remitted for the benefit of Kwale County Government and the host communities in Bwiti and Nguluku;
- Reconsider its inclination towards defining ‘local community’ in the context of 10 percent royalties to encompass the entire Kwale population; and instead define local community as those displaced from the mining site or those in close proximity with the mines and suffering the direct impact of the mining project;
- Adopt the tripartite development mechanism – the CMTF – and work together with Base Titanium and the host communities to ensure that the mechanism is established and is supported to undertake its functions of socio-economic development in the host communities effectively; and,
- Provide temporary/mobile basic services for host communities awaiting permanent relocation.

## iii) Base Titanium

- Engage openly and transparently with the County Government and the host communities in the establishment of the tripartite CMTF;
- Update the CDMP and transform it into a legally binding community development agreement in accordance with the Mining Act;
- Make financial and technical contributions to ensure that the CMTF effectively implements the community development agreement;
- Increase employment opportunities for host populations in Bwiti and Nguluku;
- Provide opportunities for training and capacity building for locals to ensure that they take over the more technical and managerial level jobs as required by the Mining Act;
- Address the environmental, social and health concerns of the host communities by updating the environmental management plan in a participatory manner;

- Involve the local NEMA and WRMA offices, the County Government and all other relevant stakeholders to ensure transparency and openness in its environmental management; and
  - Make public all the contracts, licenses, permits and other documents to enhance popular scrutiny and ensure transparency and accountability.
- iv) Host communities
- Engage actively and substantively with the County Government and Base Titanium in the context of the CMTF to ensure socio-economic development in their communities;
  - Participate effectively in the county budget and governance process to advocate for provision of basic services to mitigate further the effects of mining activities.
- v) Civil society
- Educate host communities on the mining laws as well as their rights as individuals and communities, especially the 2010 Constitution and the Mining Act;
  - Educate the relevant households and equip them with the necessary financial skills and resources to manage their compensation monies effectively to avoid wastage that might destroy family livelihoods and sink the households into poverty;
  - In the context of new large-scale mining operations that are bound to displace many poor communities, engage effectively from the very beginning to ensure that communities give free, prior and informed consent; and also negotiate fair and adequate compensation before the actual relocation is undertaken;
  - Monitor the activities of the different mining stakeholders actively to ensure transparency and accountability in the management of resources for the benefit of host populations;
  - Engage actively in the update of the community development agreement and the environmental management plan by Base Titanium to ensure that the titanium-mining project does not harm the host communities adversely and that the benefits and burdens of the mining project are shared equitably; and
  - Distribute available information to host communities and all levels of government to enable informed decisions and policy discussions.

# CASE STUDIES OF REVENUE-SHARING MODELS: WHAT KENYA CAN LEARN FROM OTHER COUNTRIES

KATINDI SIVI-NJONJO\*

## 1. Introduction

Natural resources of an extractive nature such as minerals, oil and gas can be a major source of income as they are expected to translate into improved livelihoods for local communities. The success of a developmental strategy based on the extractive sector is largely dependent on the share of revenues earned by governments and the modalities these governments adopt to use and distribute those revenues.<sup>1</sup> Since ‘obtaining a fair share of natural resource wealth and allocating the proceeds equitably are two of the most pressing governance challenges in the extractives sector,’<sup>2</sup> managing resource-wealth requires not only good governance, in the sense of transparent management and absence of corruption, but also good policies, such that resource exploitation benefits the economy equitably and society as a whole.<sup>3</sup>

In Kenya, extractive resources belong to the people,<sup>4</sup> who have the right to

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<sup>1</sup> Acosta A and Yanguas F, Extractive industries, revenue allocation and local politics, 7 March 2014.

<sup>2</sup> Africa Progress Panel, Africa progress report 2013: equity in extractives-stewarding Africa’s natural resources for all, 63.

<sup>3</sup> Fischer C, International experience with benefit-sharing instruments for extractive resources, 2007.

<sup>4</sup> Section 6(1), Mining Act (No 12 of 2016) provides that every mineral is the property of the Republic and is vested in the National Government in trust for the people of Kenya. Section 41(1)(2), Petroleum

enjoy a fair share of the benefits such wealth can bring. The Constitution of Kenya (2010 Constitution), requires the State to ‘...ensure the equitable sharing of the accruing benefits.’<sup>5</sup> To distribute benefits from the extractives sector widely, governments need to secure revenue through taxation and use public spending to not only strengthen economic growth - as revenues from mineral resources can account for a substantial proportion of total government income - but also to extend opportunities to all.<sup>6</sup>

This notwithstanding, there are no clear collection and reporting structures on the revenues from the extractives industry in Kenya. The Mining Act 2016, implies that the State department responsible for collecting fees, charges and royalties payable is the Ministry of Mining.<sup>7</sup> The Natural Resources (Benefit Sharing) Bill, 2014, provides that the Kenya Revenue Authority shall collect royalties imposed under the Bill.<sup>8</sup> The Petroleum (Exploration, Development and Production) Bill, 2015 (Petroleum Bill), on the other hand, provides for the collection of taxes, profit, and royalties arising from upstream petroleum operations.<sup>9</sup> The conflict in the proposed bills regarding revenue collection and the duplication of roles will not help Kenya centralise its monitoring and accounting for revenue from the extractives industry and is bound to result in difficulties in reporting revenue collections and accounting for them due to the multiplicity of players.<sup>10</sup>

The confusion is not only in the collection of revenues but also in the sharing of revenues. The Mining Act provides that the National Government shall be entitled to seventy percent of the royalties while the County Government and the community affected by the mining operations shall receive twenty percent and ten percent respectively.<sup>11</sup> The Petroleum Bill<sup>12</sup> provides that twenty percent of the National Government share will be allocated to the county government(s) affected provided the amount allocated shall not exceed twice the amount allocated to the respective county government(s) by the National Assembly in the financial year

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(Exploration, Development and Production) Bill 2016, provides that all petroleum existing in its natural condition within Kenya and its continental shelf is vested in the National Government in trust for the people of Kenya and should be managed in accordance with the provisions of the Constitution.

<sup>5</sup> Article 69(1)(a), Constitution of Kenya (2010).

<sup>6</sup> Africa Progress Panel, Africa progress report 2013.

<sup>7</sup> Section 186(5), Mining Act.

<sup>8</sup> Section 25(1), Natural Resources (Benefit Sharing) Bill, 2014.

<sup>9</sup> Section 80(3), Petroleum Bill.

<sup>10</sup> Sivi-Njonjo K and Migai C, Enhancing Transparency and Accountability in Extractives Sector in Kenya, 2015.

<sup>11</sup> Section 183 (5), Mining Act.

<sup>12</sup> Section 85, Petroleum Bill.

under consideration.<sup>13</sup> The Petroleum Bill proposes the allocation of five percent of the National Government's share to the communities affected provided that this amount does not exceed a quarter of the amount due to the county government affected.<sup>14</sup> Thus the National Government retains seventy five percent. The Natural Resources (Benefit Sharing) Bill, 2014, also proposes a criterion for sharing resources.<sup>15</sup> According to this criterion, twenty percent of the revenues shall be allocated to the Sovereign Wealth Fund (SWF). The remaining eighty percent shall be shared between the National Government and relevant county government at the ration of 60:40 respectively.<sup>16</sup> Of the forty percent meant for county governments, forty percent shall be allocated to communities while sixty percent shall be used by the county government.<sup>17</sup> This multiplicity of laws addressing benefit-sharing and the lack of a singular and unified approach are bound to bring confusion and breed disputes.<sup>18</sup> It also creates room for corruption and mismanagement which impact greatly on the collection and spending of revenues from extractive resources.

Further, the 2010 Constitution provides that 'every citizen has the right of access to information held by the State';<sup>19</sup> and requires the State to ensure 'transparency and provision to the public of timely, accurate information.'<sup>20</sup> The extractive corporations are usually under obligation to pay a variety of levies and taxes at the early stages of the mining process such as signature bonuses, licensing fees, acreage fees, training fees, and corporate income taxes from their operations. However, there is no publicly available record of how much has been received from exploration and mining companies so far and how the funds have been utilised, which further exacerbates corruption opportunities.<sup>21</sup>

According to the 2013 Resource Governance Index (RGI), resource-rich countries earned, on average, governance scores that were nine points lower than less resource-rich countries.<sup>22</sup> This is indicative of the fact that most corrupt govern-

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<sup>13</sup> Section 85 (2), Petroleum Bill.

<sup>14</sup> Section 85 (4), Petroleum Bill.

<sup>15</sup> Section 26(1), Natural Resources Bill.

<sup>16</sup> Section 26(1)(b), Natural Resources Bill.

<sup>17</sup> Section 26(3), Natural Resources Bill.

<sup>18</sup> Sivi-Njonjo K and Migai C, *Enhancing Transparency and Accountability in Extractives Sector in Kenya*.

<sup>19</sup> Article 35 (1), Constitution of Kenya.

<sup>20</sup> Article 232(1)(f), Constitution of Kenya.

<sup>21</sup> Sivi-Njonjo K and Migai C, *Enhancing Transparency and Accountability in Extractives Sector in Kenya*.

<sup>22</sup> Center for Constitutional Transitions [CCT], International Institute for Democracy and Electoral Assistance [International IDEA] and United Nations Development Programme [UNDP]. (2014). *Oil and natural gas: constitutional frameworks for the Middle East and North Africa*.

ments tend to be found in countries whose economies are dependent on revenues gained from the sale of natural resources.<sup>23</sup> Poor governance and perceptions of unfairness in sharing the resulting benefits often motivate ethnic or identity-based conflicts.<sup>24</sup> Any sustainable exploitation of these resources can only occur within a framework where comprehensive information, for instance on revenues gained and how income is distributed, is readily available and accessible to the public. Sustainability also occurs where benefits arising from these resources are transparently managed, well utilized and equitably shared.

This chapter seeks to evaluate the different extractives industry (EI) revenue distribution models applied in different countries such as Venezuela, Brazil, Nigeria, Mexico, USA, Mongolia, Papua New Guinea, Saudi Arabia, Bolivia, Canada, Botswana, Norway, Qatar, Brunei and Ghana and to point out approaches that can ensure good governance of extractive resources. Since Kenya's extractives sector is in its infancy, this chapter hopes to inform the formulation of laws and policy frameworks to guide revenue collection and distribution.

The chapter begins by laying a foundation of what revenue allocation is, the rationale for revenue sharing and key considerations to be made in this regard. The chapter then delves into revenue-sharing models adopted in various countries, which vary widely due to the various considerations made such as: allocating revenues to jurisdictions; direct allocation of cash; allocation of the revenues among priorities; allocation of the revenues over time; and indirect allocation of revenue. The chapter concludes by discussing certain key steps in transparent and sound revenue management and allocation of EI revenues.

## 2. About revenue allocation

Revenue-sharing refers to allocating part of the monetary flows generated by a mining project with the communities affected.<sup>25</sup> Revenues from mining operations come mainly in the form of: payments made to governments, which come in the

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<sup>23</sup> *ibid*: 60.

<sup>24</sup> Kenya Human Rights Commission (KHRC), Benefits sharing on extractive natural resources with society in Kenya, November 2013.

<sup>25</sup> Communities are local populations living close to a mine such that their livelihood, way of living or environment is directly or indirectly affected by the mining project. They may be the recipients of revenues or benefits given by governments or mining companies. However, the scope of these revenues and benefits may extend from the mine area to the local region or sub-national government (SNG), like a county. As is often seen with revenue/benefit-sharing, the target may be whole communities or may focus on very specific indigenous groups.

form of taxes<sup>26</sup> and royalties<sup>27</sup> as well as other payment schemes that may exist between mining companies and various levels of government.<sup>28</sup> They may also come in the form of compensation, which refers to monetary payments or other benefits such as housing, in case people need to be resettled.<sup>29</sup> These are usually paid by extractive corporations or sometimes by governments to affected communities to compensate for economic, social, environmental, or cultural disruptions directly caused by extractive operation(s).<sup>30</sup> Community investments are voluntary actions or contributions by corporations engaged in mining beyond the scope of their normal business operations and intended to benefit local communities in their area of operation. Community investment can include building public amenities like schools and hospitals.<sup>31</sup>

Benefit-sharing refers to other forms of resources to local communities that are non-financial such as access to services.<sup>32</sup> Benefit-sharing involves integrating project benefits into local development strategies by creating jobs for the local population, for example, and developing infrastructure such as roads, water and electricity.<sup>33</sup>

Equitable revenue and/or benefit-sharing has been defined as the access to revenues and/or benefits that accrue from natural resources by all stakeholders including indigenous communities and future generations.<sup>34</sup>

## 2.1 Rationale for revenue and benefit-sharing

Extractive resources are finite and wealth from this sector is not permanent. Revenues earned from the sector should, therefore, be invested in high return assets<sup>35</sup> in order to benefit current and future generations. A booming mineral sector also tends to squeeze out other sectors of the economy as the increase in foreign exchange, not properly sterilised, causes the real exchange rate to appreciate, further

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<sup>26</sup> Tax revenues are typically corporate income taxes, but can also include sector-specific 'special' taxes, profit taxes or export taxes. The state may also receive annual license fees.

<sup>27</sup> Royalties are generally given to the state as a percentage of the sale of minerals.

<sup>28</sup> KHRC, Benefits sharing on extractive natural resources with society in Kenya.

<sup>29</sup> KHRC, Benefits sharing on extractive natural resources with society in Kenya.

<sup>30</sup> KHRC, Benefits sharing on extractive natural resources with society in Kenya.

<sup>31</sup> KHRC, Benefits sharing on extractive natural resources with society in Kenya.

<sup>32</sup> KHRC, Benefits sharing on extractive natural resources with society in Kenya.

<sup>33</sup> KHRC, Benefits sharing on extractive natural resources with society in Kenya.

<sup>34</sup> Muigua K, Reflections on managing natural resources and equitable benefit sharing in Kenya, 8.

<sup>35</sup> Hannesson R, Investing for sustainability: The management of mineral wealth, Springer Science and Business Media, 2001.

deteriorating the competitiveness of manufacturing and other tradable sectors.<sup>36</sup> EI revenues therefore have to be deliberately used to diversify the economy to reduce EI dependency.

The extractives sector has weak linkages with the rest of the economy, especially in Africa, because of imported inputs and capital-intensive production, which in turn generates little employment.<sup>37</sup> This means that the real impact on the overall economy depends on how the mineral wealth is distributed.<sup>38</sup> As demonstrated in the Venezuelan case, extractive products have volatile prices and production volumes, leading to widely fluctuating exports and government revenues.<sup>39</sup> Boom times can mask fiscal irresponsibility, allowing market discipline to relax while boom-based borrowing to expand public infrastructure can lead to unsustainable expenditures and burdensome debt after the boom.<sup>40</sup> Furthermore, once government expenditures are expanded, they may be difficult to contract. EI revenues therefore have to be stabilised in order to avoid the economic shocks of the boom-and-burst cycles and the current economic crisis in Venezuela offers important lessons.

#### The case of Venezuela

Oil accounts for ninety-six percent of Venezuela's exports.<sup>41</sup> Oil generates about eighty percent of the country's total export revenue, contributes about half of the Government's income, and is responsible for about one-third of the country's gross domestic product (GDP).<sup>42</sup> This leaves the nation's fortunes inextricably tied with the price of oil.

Increases in world oil prices<sup>43</sup> helped the economy rapidly grow by 10.3 percent in 2006<sup>44</sup> and about 8.4 percent in 2007.<sup>45</sup> The windfall saw a tremendous rise

<sup>36</sup> Sarraf M and Jiwajji M, 'Beating the resources curse: a case for Botswana' Environmental Economic Series, The World Bank, 2011.

<sup>37</sup> Fischer C, International experience with benefit-sharing instruments for extractive resources.

<sup>38</sup> Fischer C, International experience with benefit-sharing instruments for extractive resources.

<sup>39</sup> Fischer C, International experience with benefit-sharing instruments for extractive resources, 3.

<sup>40</sup> Fischer C, International experience with benefit-sharing instruments for extractive resources, 3.

<sup>41</sup> 'Ted Meyer: 5 most oil dependent economies in the world' Investopedia, 12 January 2016 <https://www.investopedia.com/articles/investing/011216/5-most-oil-dependent-economies-world.asp> on 22 January 2018.

<sup>42</sup> Council on Foreign Relations, Venezuela's oil-based economy, 2009.

<sup>43</sup> In 2013 and 2014, global oil prices were USD 100 per barrel.

<sup>44</sup> Center for Economic and Policy Research (CEPR), Update: The Venezuelan economy in the Chávez years, 2008.

<sup>45</sup> IMF estimates.



in social programme spending, from 8.2 percent of GDP in 1998 to 13.6 percent in 2006.<sup>46</sup> In real (inflation-adjusted) terms, this translated to an increased social spending per person of one hundred and seventy percent between 1998 and 2006. Implementation of the social policies, especially in healthcare, education and food price subsidies,<sup>47</sup> greatly reduced poverty rates literally by half<sup>48</sup> from 55.1 percent in 2003 to 27.5 percent in the first half of 2007.<sup>49</sup> Measured unemployment also dropped substantially to 9.3 percent in the first half of 2007, compared to 19.2 percent in the first half of 2003.<sup>50</sup> Formal employment also increased significantly, from 45.4 percent in 1998 to 50.6 percent of the labor force in 2007.

It is difficult to determine how Venezuela spent its oil windfall, given the lack of Government transparency and the fact that the country ranks 162 out of 179 countries on the Transparency International's corruption index.<sup>51</sup> The oil boom, however, gave the President, Hugo Chávez Frías, the ability to extend assistance programmes outside Venezuela's borders. For example, he provided oil at preferential prices to many countries in the Caribbean through the Petrocaribe initiative.<sup>52</sup> Between January and August 2007, Chavez had promised USD 8.8 billion in aid financing and energy funding to Latin America and the Caribbean, a figure far higher than the USD 1.6 billion of USA assistance to the region for the entire year.<sup>53</sup> Chavez, among other corruption accusations, was suspected of funneling money to a Colombian guerrilla group.<sup>54</sup> He is also accused of raiding Venezuela's oil fund, which dropped from USD 6 billion to USD 3 billion in the last decade - during a time of record-high oil prices.<sup>55</sup>

With prices falling to as low as USD 28.36 per barrel in 2016, the country's economy has shrunk significantly.<sup>56</sup> As a result, inflation skyrocketed by 141 per-

<sup>46</sup> CEPR, Update: The Venezuelan economy in the Chávez years.

<sup>47</sup> With average food savings of 39 per cent compared to market prices in 2006.

<sup>48</sup> This poverty rate does not take into account the increased access to health care or education that poor people experienced. The situation of the poor therefore improved significantly beyond even the substantial poverty reduction that is visible in the official poverty rate, which measures only cash income.

<sup>49</sup> CEPR, Update: The Venezuelan economy in the Chávez years.

<sup>50</sup> CEPR, Update: The Venezuelan economy in the Chávez years.

<sup>51</sup> CEPR, Update: The Venezuelan economy in the Chávez years.

<sup>52</sup> Council on Foreign Relations, Venezuela's oil-based economy.

<sup>53</sup> Council on Foreign Relations, Venezuela's oil-based economy.

<sup>54</sup> Council on Foreign Relations, Venezuela's oil-based economy.

<sup>55</sup> 'Tina Rosenberg: Avoiding the curse of the oil-rich nations' The New York Times, 13 February 2013 <http://t.co/cssQHSD0> on 22 January 2018.

<sup>56</sup> 'Ted Meyer: 5 most oil dependent economies in the world'.

cent over the year ending September 2015.<sup>57</sup> By the beginning of 2016, the President, Nicolas Maduro, had declared a state of ‘economic emergency’ as the country was barely making enough money on oil exports to cover its debt payments. There are high chances that Venezuela will not be able to repay its debts. Ordinary Venezuelans are bearing the brunt of the economy’s problems. The Government cannot pay to import basic food items like milk, flour and eggs, leaving many supermarkets with empty shelves. These food shortages have become a major source of social unrest in the country.<sup>58</sup>

## 2.2 Key considerations when designing a revenue-sharing model

In order to design a comprehensive revenue-sharing regime, there are fundamental considerations that have to be made.<sup>59</sup> These include financial, economic, social, environmental, generational and stakeholder considerations.

Financial considerations look into the net financial benefits of a project and how they will be shared. Financial considerations make it important to determine whether financial benefits will be made through sharing profits, taxation, or other ways at both the national and subnational levels of government and with communities.

Economic considerations entail looking into traditional economic costs and benefits that will be generated and shared, such as jobs and training, the introduction of technologies, spending with local suppliers, investment in infrastructure, the supply of energy, such as oil, gas, coal and electricity, or the supply of other raw materials at competitive prices to local industries and households.<sup>60</sup>

Social and environmental considerations relate to the positive and negative environmental impacts and risks of the project in question.<sup>61</sup> It is imperative to know the impact on communities, including vulnerable groups within communities, so that there is an accurate estimation of whether they gain or lose from the mineral exploration.<sup>62</sup>

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<sup>57</sup> This is according to the Central Bank but some experts believe that this figure grossly understates the problem.

<sup>58</sup> ‘Ted Meyer: 5 most oil dependent economies in the world’.

<sup>59</sup> International Finance Corporation (IFC), *The art and science of benefit sharing in the natural resource sector: Discussion paper*, 2015.

<sup>60</sup> IFC, *The art and science of benefit sharing in the natural resource sector*.

<sup>61</sup> IFC, *The art and science of benefit sharing in the natural resource sector*.

<sup>62</sup> IFC, *The art and science of benefit sharing in the natural resource sector*, 15.

Generational considerations arise because natural resources could either be renewable or non-renewable. It is therefore necessary to manage them to ensure that the benefits that accrue serve both the present and future generations.<sup>63</sup> Effective natural resources management (NRM), therefore, contemplates the use of natural resources for the good of all generations.<sup>64</sup>

Stakeholder considerations are crucial because in every mining exploration, there are varying interests and expectations among different stakeholders. Shared experiences indicate that imbalances in sharing the fiscal, economic, environmental, and social costs and benefits of projects may lead to conflicts between the different stakeholders.<sup>65</sup> All stakeholders, governments, communities, investors and others, have strong interests during all stages of the project life cycle including the decision to develop the natural resource, when to develop it, how the process should be managed and the distribution of costs and benefits.<sup>66</sup> Understanding the different aspirations, concerns and expectations of stakeholders and what drives them is key in assessing the reasonableness of a revenue and benefit-sharing arrangement.<sup>67</sup>

As shown in Table 1, governments, communities and investors usually have different interests. Governments are interested in extractive resources as they can provide a good source of funding their budgets through taxes and other revenues. Local communities look to the extractive activities with high and mixed expectations. On the one hand, mineral extraction can be a source of employment, development of new skills and business opportunities, and improvement to infrastructure that includes roads, water and electricity. On the other hand, extractive activities could lead to environmental degradation, abandonment of previous economic activities and social upheaval if benefits do not trickle down to the local communities.<sup>68</sup> Investors are interested in securing attractive returns for their investments. Government policies, therefore, need to take into account these competing interests among various stakeholders, the interests of current and future generations, and the rights, interests, and needs of different levels of government.<sup>69</sup>

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<sup>63</sup> Muigua K, Reflections on managing natural resources and equitable benefit sharing in Kenya, 4.

<sup>64</sup> Muigua K, Reflections on managing natural resources and equitable benefit sharing in Kenya, 3.

<sup>65</sup> Muigua K, Reflections on managing natural resources and equitable benefit sharing in Kenya, 9.

<sup>66</sup> Muigua K, Reflections on managing natural resources and equitable benefit sharing in Kenya, 7, 11.

<sup>67</sup> Muigua K, Reflections on managing natural resources and equitable benefit sharing in Kenya, 12.

<sup>68</sup> Muigua K, Reflections on managing natural resources and equitable benefit sharing in Kenya, 7.

<sup>69</sup> Muigua K, Reflections on managing natural resources and equitable benefit sharing in Kenya, 7.

Table 1: Stakeholder benefit-sharing: expectations and concerns

Stakeholder	Expectations	Concerns
Host country citizens	Natural resource wealth will be used to develop the country and to benefit its citizens broadly.	<ul style="list-style-type: none"> <li>▪ Natural resources are being exploited and depleted mainly to benefit foreign investors or wealthy locals; or</li> <li>▪ The revenues are mismanaged, wasted, misappropriated, or not distributed equitably.</li> </ul>
Host country governments	<ul style="list-style-type: none"> <li>▪ The framework of laws and standards for accessing the country's resources is respected;</li> <li>▪ The country will receive a reasonable share of taxes and profits to finance its budget; and</li> <li>▪ The project will have positive linkages with the rest of the economy, helping to develop local skills and expertise.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Possibility of signing a bad deal because of lack of expertise or leverage in negotiations;</li> <li>▪ Delays in receiving benefits; or</li> <li>▪ Loss of benefits as a result of price volatility, inappropriately high costs or transfer prices.</li> </ul>
Affected communities	<ul style="list-style-type: none"> <li>▪ Proper engagement and respect for providing access to 'their' resources;</li> <li>▪ Protection from negative impacts;</li> <li>▪ Preservation of culture; and</li> <li>▪ Tangible benefits from project development.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Environmental impacts that threaten their health or livelihoods;</li> <li>▪ Social impacts or changes brought about by boomtown effects, rapid urban development, and influxes of newcomers competing for jobs;</li> <li>▪ Lack of access to project opportunities; and</li> <li>▪ Not benefiting from project taxes paid to governments.</li> </ul>

Stakeholder	Expectations	Concerns
Investors	<ul style="list-style-type: none"> <li>▪ Build and operate (or sell) their project and earn profits for providing risk capital and management skills, in addition to paying known taxes and charges.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Dynamic politics and their freedom to operate;</li> <li>▪ Unreasonable changes to terms and conditions, and even expropriation;</li> <li>▪ Communities interfering with operations; and</li> <li>▪ Being held accountable for a perceived failure of the resources sector to generate sustainable national or local benefits.</li> </ul>

Source: International Finance Corporation, 2015:13

Properly managed revenue and benefit-sharing can lead to several outcomes. It can promote positive attitudes towards the exploitation, extraction and management of natural resources and lead to the development of mutually beneficial partnerships. It can also lead to conservation of the environment and natural resources for the benefit of both the current and future generations. Further, it can lead to better livelihoods through job creation and alternative livelihoods thus easing pressure off natural resources.<sup>70</sup> Skewed distributions of revenues and benefits from natural resources, however, can fuel social exclusion and conflict, threatening sustainability.<sup>71</sup>

### 3. Revenue distribution models

Modalities and mechanisms adopted to share revenues from the extractives sector vary widely. This variation depends on country-specific characteristics of the extractives industry, technical considerations for optimal distribution and the absolute or relative bargaining strength of local governments and stakeholders.<sup>72</sup> In practice, though, countries combine two or more criteria when reallocating re-

<sup>70</sup> KHRC, Benefits sharing on extractive natural resources with society in Kenya, 27.

<sup>71</sup> Muigua K, Reflections on managing natural resources and equitable benefit sharing in Kenya, 7.

<sup>72</sup> Acosta A and Yanguas F, Extractive industries, revenue allocation and local politics.

sources. Revenue-sharing decisions involve important dimensions such as: allocating revenues to jurisdictions; direct allocation of cash; allocation of the revenues among priorities; allocation of the revenues over time; and indirect allocation of revenues.<sup>73</sup>

### 3.1 Allocating revenues to jurisdictions

Jurisdictional allocation of resources can be done: i) vertically – from higher to lower levels of government; ii) horizontally - across similar jurisdictions; iii) among sector priorities – to get the various proportions to be used for capital spending, debt reduction, revenue stabilisation, expenditure smoothing or other specific needs such as education; and iv) over time – to take into account revenue savings.

#### 3.1.1 Vertical distribution

In this model, the central government collects the extractives industry revenues and distributes them to different subnational governments like counties and municipalities. The share received is usually a fixed percentage or an agreed share. The key issue is to strike the appropriate balance between financing national policies and reducing fiscal volatility versus financing liabilities and appeasing social demands in the producing regions.<sup>74</sup> Two important considerations, matching responsibilities and political equilibrium between the centre and the periphery, are usually made when deciding the division of EI revenues between the national and sub-national governments.

Matching (administrative) responsibilities requires that resources are divided according to the level of responsibility each level of government has, to provide local services. In practice though, the evaluation of the “appropriate” level of public services and the “matching revenues” needed to fund them are difficult to assess thus subjecting the issue to political interpretations and intense bargaining.<sup>75</sup>

Where there is a political equilibrium between the center and the periphery, subnational levels of government make demands on the share of EI proceeds by formulating this demand as a constitutional ‘right’.<sup>76</sup> Despite this general tendency, policies depend finally on the relative power of regional and national political

<sup>73</sup> Fischer C, International experience with benefit-sharing instruments for extractive resources.

<sup>74</sup> Acosta A and Yanguas F, Extractive industries, revenue allocation and local politics.

<sup>75</sup> Acosta A and Yanguas F, Extractive industries, revenue allocation and local politics, 13.

<sup>76</sup> Ross M, ‘How mineral-rich states can reduce inequality’ in Sachs J, Stiglitz J and Humphreys M (Eds), *Escaping the resource curse*, Colombia University Press, New York, 2007.

groups. As shown in table 2, the degree of decentralization determines the level of demand. High decentralisation such as in Brazil and in Nigeria has sub-national levels claiming greater entitlements to benefits from EI related revenues than in cases where decentralisation is low such as Ghana and Papua New Guinea. Highly decentralised countries are also better equipped to process effectively the administrative and fiscal demands of managing natural resource revenues at a local level.<sup>77</sup>

Table 2: Vertical model of revenue-sharing

Country	Brazil	Nigeria	Mexico	Ghana	Papua New Guinea
Type of revenue transferred	Royalties and participation	Total oil revenue	Total oil revenue	Royalties	Royalties
Degree of decentralisation	High	High	Medium	Low	Low
National government	31%	46%	83%	91%	93%
Regional government	45%	36%	17%	5%	3%
Local government	21%	18%	-%	2%	2%
Private landlord	3%	-%	-%	2%	2%

Source: Acosta & Yanguas

### 3.1.2 Horizontal distribution of EI revenues

In this model, the central government distributes EI revenues across similar jurisdictions. A key discussion in these allocations is whether to redistribute revenues solely to territories that host extractive activities or not, and whether the central government should reallocate revenues through a discretionary mechanism or institutionalised rules, such as the adoption of a formula.<sup>78</sup> There are mainly three types of mechanisms for horizontal revenue-sharing:<sup>79</sup> Direct allocation from central government; formula-based participation; and derivation.

<sup>77</sup> Acosta A and Yanguas F, Extractive industries, revenue allocation and local politics.

<sup>78</sup> Acosta A and Yanguas F, Extractive industries, revenue allocation and local politics.

<sup>79</sup> Acosta A and Yanguas F, Extractive industries, revenue allocation and local politics.

Table 3: Horizontal model of revenue sharing

Country	Brazil	Nigeria	Mexico	Ghana	Papua New Guinea
<b>Formula based</b>					
Type of revenue transferred	Royalties and participation	Total oil revenue	Total oil revenue	Royalties	Royalties
Degree of decentralisation	High	High	Medium	Low	Low
Region / state	- %	23%	17%	- %	- %
Locality	- %	18%	- %	- %	- %
Total formula-based	- %	41%	17%	- %	- %
<b>Derivation</b>					
Producing region/state	45%	13%	- %	5%	3%
Producing localities	17%	- %	- %	2%	2%
Localities in producing regions	4 %	- %	- %	- %	- %
Total formula-based	66%	13%	- %	7%	5%

Source: Acosta & Yanguas

☛ Direct allocation from the central government

In this type of horizontal revenue-sharing, the central government consolidates the management of all the revenues collected and then transfers funds on an annual basis in the form of: research and development; through competitive investment grants aimed at supporting specific types of projects through competitive bidding;<sup>80</sup> or through regional investment funds.<sup>81</sup>

☛ Formula-based participation

In this case, the central government sends a pre-determined share of the revenue raised nationally to subnational governments whether they are from the re-

<sup>80</sup> This method, however, has the potential to reinforce pre-existing inequalities and power asymmetries because the regions with solid public finances have more solid expenditure capabilities or possess the technical ability to apply and win competitive grants than others.

<sup>81</sup> Acosta A and Yanguas F, Extractive industries, revenue allocation and local politics.



source-endowed region or not. Often, the different needs and characteristics of each region can be factored into the formula, for instance, to compensate for pre-existing inequalities, the size of the population, land mass, the need to ensure an equal standard of public services between regions, central/national and local/provincial expenditure needs, basic needs, and unique historical circumstances, among other variables.<sup>82</sup> While the formula can be complex and difficult to justify, ultimately, policy-makers have to ensure fairness and efficiency. Even when well designed, formula-based distribution can be challenging because of reduced flexibility in managing macroeconomic challenges.<sup>83</sup> Formula-based distribution also does not take into consideration the geographical source of tax revenue.

#### ☛ Derivation

Derivation entails that the central government transfers or devolves a proportion of the revenue to the region where the mining income originated from<sup>84</sup> in order to compensate for the loss of natural capital (the extractive) and help to develop other types of capital (human, physical, et cetera) to diversify the economy and enhance other developmental potential of those territories. Sometimes the central government also transfers a share of the extractive revenue to neighbouring regions affected by negative externalities linked to the extraction activity such as environmental damage or need to improve the physical infrastructure. This transfer can include regions where there is major infrastructure to support the exploitation of the mining resource such as a port. These become the only recipients of the transfers.<sup>85</sup>

The criterion of regions affected by negative externalities frequently generates grievances because these occurrences do not necessarily coincide with the boundaries of official jurisdictions.<sup>86</sup> There are continuous claims made by populations that perceive themselves to be excluded from fiscal distribution.

<sup>82</sup> EI Sourcebook 2016 <http://www.eisourcebook.org/> on 22 January 2018.

<sup>83</sup> EI Soucebook.

<sup>84</sup> Ahmad E and Mottu E, 'Oil revenue assignments: country experiences and issues' in Davis J, Ossowski R and Fedelino A (Eds), *Fiscal policy formulation and implementation in oil-producing countries*, International Monetary Fund, 2003.

<sup>85</sup> Brosio G, 'Oil revenue and fiscal federalism' in Davis J et al, *Fiscal policy formulation and implementation in oil-producing countries*.

<sup>86</sup> Brosio G, 'Oil revenue and fiscal federalism'.

### 3.1.3 Proponents and critics of allocating revenues to jurisdictions

Allocating revenues to jurisdictions<sup>87</sup> has been commended because it brings about better understanding and prioritisation of local needs since it is only the sub-national governments and the local communities that can accurately determine needs and find appropriate solutions for local problems.<sup>88</sup> It means that redistributing revenues is likely to result in better allocation.<sup>89</sup>

On the other hand, the model has been criticised as it is thought to: create disparities, for instance, in Indonesia where the transfers to the sub-national governments have created significant inequalities across provinces and districts in the process precipitating conflicts;<sup>90</sup> reduce the central government income necessary for providing national functions;<sup>91</sup> create over-dependence on extractive industries at sub-national levels;<sup>92</sup> tempt central governments to conceal the actual EI or delay the disbursements;<sup>93</sup> cause a situation where sub-national governments sometimes embezzle funds or do not properly account for the resources they receive to the central government. In some instances, the weak capacity of sub-national governments due to limited know-how of public financial management, planning and investments, fragility of financial control systems and low absorption capability of huge resources (for example in Peru) causes them not to account for resources properly,<sup>94</sup> and in the case of derivation there is unjustified and ineffective spending because the most effective approach for sustainable development is for central governments to collect all tax revenues and then use them to benefit the country as a whole, including the producing areas.<sup>95</sup> This argument is advanced on the grounds that the producing regions will gain net benefits from projects in their regions, such as jobs, infrastructure, and economic activity, so no additional resources are required.<sup>96</sup>

For allocation of revenues to jurisdictions to work effectively, proper transparency and accountability mechanisms require to be put in place to ensure that the devolved revenues are accounted for. Further, sub-national governments must

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<sup>87</sup> IFC, *The art and science of benefit sharing in the natural resource sector*.

<sup>88</sup> IFC, *The art and science of benefit sharing in the natural resource sector*.

<sup>89</sup> IFC, *The art and science of benefit sharing in the natural resource sector*.

<sup>90</sup> IFC, *The art and science of benefit sharing in the natural resource sector*.

<sup>91</sup> IFC, *The art and science of benefit sharing in the natural resource sector*, 33.

<sup>92</sup> IFC, *The art and science of benefit sharing in the natural resource sector*, 33.

<sup>93</sup> IFC, *The art and science of benefit sharing in the natural resource sector*, 33.

<sup>94</sup> IFC, *The art and science of benefit sharing in the natural resource sector*, 33.

<sup>95</sup> IFC, *The art and science of benefit sharing in the natural resource sector*, 33.

<sup>96</sup> IFC, *The art and science of benefit sharing in the natural resource sector*, 37.

develop capacity to manage and use these revenues effectively. There may be a need to integrate the revenues into the budget with a concrete plan to help the communities affected. Finally, there must be a systematic way of evaluating spending by governments and communities.<sup>97</sup>

### 3.1.4 Country experiences with allocating revenues to jurisdictions

#### ☛ Brazil

Brazil devolves revenues back to the producing regions or states and localities.<sup>98</sup> Brazil's revenue allocation model also includes jurisdictions providing infrastructures that are essential to the extractive activities such as the ports through which oil, gas and minerals are exported, and territories crossed by roads, pipelines, and railways.<sup>99</sup> Brazil does this to provide incentives for all stakeholders to support the industry's growth as well as to compensate the oil and gas-producing areas and private landowners for the externalities associated with the industry.<sup>100</sup>

This formula of revenue sharing has made natural resource revenues relatively unimportant for the overall Government budget; making the country relatively stable and implementation quite successful.<sup>101</sup> Brazil adopted a new legislation in 2013 to redistribute oil revenues among all federal states. However, the three producing states (and original beneficiaries of derivation) stopped the law's implementation through an appeal to the constitutional court.<sup>102</sup>

#### ☛ Nigeria

The Constitution of Nigeria requires Parliament to determine the formula for distribution of oil revenues every five years. Nigeria's Constitution sets out the criteria to be taken into account, which includes the population, equality of states, internal revenue generation, and land mass.<sup>103</sup> As per the latest proportions set out by Parliament, approximately forty-six percent is retained by the Federal Government.<sup>104</sup> A minimum of thirteen percent is reserved for oil-producing states.<sup>105</sup> The

<sup>97</sup> IFC, *The art and science of benefit sharing in the natural resource sector*, 32.

<sup>98</sup> Transparency International, *Report on revenue transparency of oil and gas companies*, 2008.

<sup>99</sup> Transparency International, *Report on revenue transparency of oil and gas companies*.

<sup>100</sup> Transparency International, *Report on revenue transparency of oil and gas companies*.

<sup>101</sup> Transparency International, *Report on revenue transparency of oil and gas companies*.

<sup>102</sup> Reuters 2013.

<sup>103</sup> Article 162(2), *Constitution of Nigeria (1999)*.

<sup>104</sup> IFC, *The art and science of benefit sharing in the natural resource sector*.

<sup>105</sup> IFC, *The art and science of benefit sharing in the natural resource sector*.

balance is shared between all states according to an agreed formula that takes into account the factors named above.<sup>106</sup> Nigeria, therefore, combines both vertical and horizontal mechanisms of revenue sharing. Within the horizontal mechanism, Nigeria prioritises the principle of formula-based participation of all the subnational governments and also applies derivation in sending resources to producing states.

In Nigeria, this model has led to over-dependence on EI revenues, hence lower generation of incomes from other economic activities such as agriculture. According to Nigeria's Federal Office of Statistic (FOS), in the 1980s, crop farming and fishing activities accounted for ninety percent of all forms of economic activities, contributed up to sixty four percent of GDP and employed fifty to sixty-eight percent of the active labour force.<sup>107</sup> The petroleum industry stagnated this and other traditional sectors of the economy and, according to Nigeria's National Bureau of Statistics (NNBS), agriculture constituted only 19.65 percent of GDP in 2014. As a result of this decline, the domestic demand for food and agricultural products has been altered. Nigerians have become more and more reliant on imported grains, beverages and vegetable oils and fibers, which were once produced in surplus in the country.

This lack of economic diversification has made sub-national governments entirely dependent on Federal Government transfers from oil revenues to them.<sup>108</sup> In turn, the Federal Government increasingly shoulders responsibilities previously delegated to the sub-national governments and allocates itself an even larger share of the revenues to take on these responsibilities, hence weakening the states and local governments.<sup>109</sup>

Additionally, only forty percent of the formula allocation is based on the states' population and social development levels, so that the current revenue-sharing mechanism benefits mostly middle and high-income regions, and it does not target the regions with the highest population or poverty levels.<sup>110</sup> The legitimacy of the revenue allocation is constantly challenged, mainly because oil-producing communities and local governments argue for direct control over the oil derivation fund currently controlled and apportioned by state governments. The failure to generate

<sup>106</sup> IFC, *The art and science of benefit sharing in the natural resource sector*.

<sup>107</sup> Ataka J, 'Community engagement practices from select countries' in Norwegian Church Aid (NCA), *Local communities in Kenya's extractive sector: From paternalism to partnership*, Nairobi, 2015.

<sup>108</sup> Ataka J, 'Community engagement practices from select countries'.

<sup>109</sup> IFC, *The art and science of benefit sharing in the natural resource sector*.

<sup>110</sup> Singh R and Ahmad E, *Political economy of oil-revenue sharing in a developing countries: illustrations from Nigeria*, International Monetary Fund, 2003.

economic development, employment and poverty reduction through oil revenues is at the base of the high levels of instability in oil-producing regions such as the Ogoni land.<sup>111</sup> This in turn legitimises the requests for substantially increasing the derivation share, often accompanied by vandalism of infrastructure, rioting and violence, carried out by organized groups such as the Movement for the Emancipation of the Niger Delta (MEND).<sup>112</sup>

## ☛ Mexico

EI revenues in Mexico are proportionally distributed across the entire country through a complex allocation formula based on population, fiscal capacity and equalisation. All the states equally receive seventeen percent of total oil revenue as shown in table 3. This revenue sharing arrangement has been remarkably stable over the years although it is important to note that the legislation dates back to the period of Mexico's one-party state. At the macroeconomic level, blending oil revenues in the general pool for state transfers (which decentralises overall twenty five percent of government revenues) has enabled the lowering of the volatility of funds.<sup>113</sup>

### 3.2 Direct allocation of cash /cash transfer schemes

Apart from and in addition to sharing revenues with subnational governments, central governments may pay dividends from resource revenues directly to the population. Government then raises additional revenue from its citizens through the normal means of taxation. This is what is called direct allocation of EI revenues.

#### 1.1.1 Proponents and critics of direct allocation schemes

Proponents of direct allocation of EI revenues argue that cash transfers<sup>114</sup> directly benefit citizens, as they can make immediate improvements in current recipients' lives - since citizens are the owners of EI resources, any revenues arising therefrom should belong to them and should go directly to them as this will avoid misappropriation by other levels of governments; limit governments' ability to divert funds to undesired ends because the taxing relationship can form the basis for

<sup>111</sup> Ataka J, 'Community engagement practices from select countries'.

<sup>112</sup> Revenue Watch Institute, Extractive Industries Revenues Distribution at the Sub-National Level.

<sup>113</sup> Revenue Watch Institute, Extractive Industries Revenues Distribution at the Sub-National Level.

<sup>114</sup> Fischer C, International experience with benefit-sharing instruments for extractive resources.

citizens' demand for accountability hence long-term improvements in governance and accountability; can lead to greater accountability because the citizens will be concerned about the source of their revenues and closely scrutinise the on-goings in the sector to ensure better returns for themselves; can lead to improved social welfare especially in very low-income countries with newly discovered resources or in countries with large per-capita revenues and low government accountability or with adequate capital expenditure; offer a broad-based, progressive income transfer mechanism, since each citizen gets the same amount, unlike the result of a broad-based tax cut where the amounts vary; and stimulate private sector to fare much better than government in identifying spending and investment priorities, and in ensuring their success.

On the other hand, critics of cash transfers make several important points. They argue that governments are better placed in pooling resources in order to make large investments, such as education systems, health care, roads and electricity projects, as opposed to individuals.<sup>115</sup> Thus, they hold that despite governments' shortcomings, they should be entrusted with a larger share of the resources.<sup>116</sup> Another argument is that although distributing revenues in cash can limit government's ability to embezzle funds, by the same token it also limits government's ability to direct the funds toward desired ends.<sup>117</sup> Forcing governments to raise funds through taxes may improve public accountability, but tax policies entail their own costs of administration, enforcement, and evasion. Cash transfers also distort incentives for work and investment.<sup>118</sup>

Critics of direct allocations further point out that an individual's view of affairs is often short-term and will spend the revenues as received in the hope that more will come tomorrow, compared to government which is likely to take into consideration factors that affect the revenues and can lead to revenue fluctuations such as resource revenue flows, output levels, and price volatility and can plan better for present and future generations.<sup>119</sup> Additionally, there is no evidence that direct cash transfers have stimulated private investment.<sup>120</sup> On the contrary, they have tended to increase consumerism.<sup>121</sup> Since cash transfers leave individuals with the freedom to invest wherever they deem fit, the model might lead to capital flight

<sup>115</sup> Fischer C, International experience with benefit-sharing instruments for extractive resources.

<sup>116</sup> Fischer C, International experience with benefit-sharing instruments for extractive resources.

<sup>117</sup> Fischer C, International experience with benefit-sharing instruments for extractive resources.

<sup>118</sup> Fischer C, International experience with benefit-sharing instruments for extractive resources.

<sup>119</sup> Fischer C, International experience with benefit-sharing instruments for extractive resources.

<sup>120</sup> Fischer C, International experience with benefit-sharing instruments for extractive resources.

<sup>121</sup> Fischer C, International experience with benefit-sharing instruments for extractive resources.

without stimulating the local economy.<sup>122</sup> Cash transfers can also create a dependency syndrome and lead to decreased social welfare.<sup>123</sup> According to the International Finance Corporation (IFC), cash transfers may only be a more effective form of benefit-sharing if they are part of a broader package of development objectives and appropriate delivery mechanisms.<sup>124</sup>

In developing countries, banking and investment opportunities for individuals, particularly in remote areas, are limited.<sup>125</sup> As a consequence, transfers are much more likely to be spent than saved or invested, making them even less likely to spur additional economic development. Moreover, cash transfers are usually problematic when tied to the life of a mine or well, for, after closure, the income drops off leaving no other productive assets. This creates complex community problems.

### 3.2.2 Country specific experiences of direct allocation schemes

#### ☛ Alaska

The Alaska Permanent Fund (APF) was established in 1976 following a bonus payment of USD 900 million which was spent on education, health, and infrastructure projects but was soon finished and the transparent use of the money was questioned.<sup>126</sup> Because the State Constitution at the time prohibited dedicated funds, a constitutional amendment had to be made to establish the APF. At least twenty-five percent of all mineral income (lease, rentals, royalties, royalty sale proceeds, federal mineral revenue-sharing payments and bonuses received by the State) are placed in the APF mainly for use by those income-producing investments specifically designated by law as eligible.<sup>127</sup>

The Alaska Legislature can only authorise spending on realised earnings.<sup>128</sup> Unrealised earnings, resulting from the change in the market value of the APF's holdings, cannot be spent.<sup>129</sup> Earnings are 'inflation-proofed' by subtracting the amount corresponding to inflation to arrive at earnings in real terms.<sup>130</sup> Inflation

<sup>122</sup> Fischer C, International experience with benefit-sharing instruments for extractive resources.

<sup>123</sup> Fischer C, International experience with benefit-sharing instruments for extractive resources.

<sup>124</sup> IFC, The art and science of benefit sharing in the natural resource sector, 36.

<sup>125</sup> Ataka J, 'Community engagement practices from select countries'.

<sup>126</sup> The World Bank, Petroleum Sector Briefing note, No 14, January 2009.

<sup>127</sup> The World Bank, Petroleum Sector Briefing note.

<sup>128</sup> The World Bank, Petroleum Sector Briefing note.

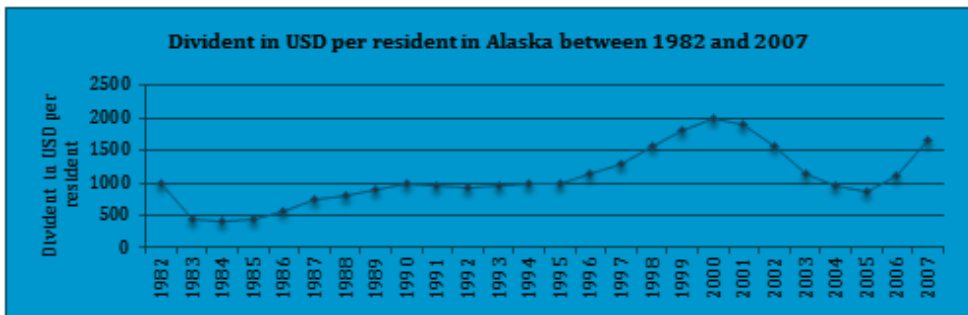
<sup>129</sup> The World Bank, Petroleum Sector Briefing note.

<sup>130</sup> The World Bank, Petroleum Sector Briefing note.

proofing is designed to prevent a situation whereby the capital, after adjusting for inflation, declines in real value over time.<sup>131</sup>

Initially, the APF was invested in high-grade fixed-income securities. Today, the APF resources are invested in stocks, bonds, real estate, and alternatives.<sup>132</sup> Beginning in 1982, out of its realised earnings, the APF pays annual dividends to all residents of Alaska, including minors, who have resided for at least the previous 12 months in the State.<sup>133</sup> Reportedly, USD one billion has been distributed to approximately 600,000 residents of Alaska annually.<sup>134</sup> In this case, earnings from the APF are returned as citizen dividends, paid in lump sum on a per capita basis.

Figure 1: Historical dividend payments in Alaska



Source: World Bank Cambodia, 2009

As shown in figure 1, between 1982 and 2007, the highest dividends were paid in 2000 where each resident received USD 2000.<sup>135</sup> APF dividends have ranged from about five to ten percent of median family income for a family of four over the past ten years.<sup>136</sup> These payments stimulate the economy and reduce income disparities.<sup>137</sup> They have contributed to a large reduction in poverty levels among Alaskan natives, the State's poorest group.<sup>138</sup> Despite its noble ambitions, most of the recipients now see it as an entitlement.<sup>139</sup>

<sup>131</sup> The World Bank, Petroleum Sector Briefing note.

<sup>132</sup> The World Bank, Petroleum Sector Briefing note.

<sup>133</sup> The World Bank, Petroleum Sector Briefing note.

<sup>134</sup> The World Bank, Petroleum Sector Briefing note.

<sup>135</sup> The World Bank, Petroleum Sector Briefing note.

<sup>136</sup> Fischer C, International experience with benefit-sharing instruments for extractive resources.

<sup>137</sup> Fischer C, International experience with benefit-sharing instruments for extractive resources.

<sup>138</sup> Fischer C, International experience with benefit-sharing instruments for extractive resources.

<sup>139</sup> Fischer C, International experience with benefit-sharing instruments for extractive resources.



## ☛ Mongolia

Mongolia set up the Human Development Fund (HDF) in November 2009 to counteract rising inequality and distribute the benefits of the mining boom more widely.<sup>140</sup> The HDF envisaged cash handouts, payment of tuition fees and possibly financing of other social benefits.<sup>141</sup> In February 2010, every citizen received a cash handout of about USD 50, followed by smaller installments totaling another USD 35.7 in that year.<sup>142</sup> In 2011, monthly cash handouts were sustained at around USD 15 and approximately a quarter of this amount was additionally disbursed as tuition fee support, leading to projected annual spending of around ten percent of 2010 GDP.<sup>143</sup>

The current cash transfer arrangement in Mongolia has a number of pitfalls.<sup>144</sup> Unlike in Alaska, the transfers are delinked from the performance of the underlying mining assets and frontloaded.<sup>145</sup> This is risky as neither of the mining projects generates ten percent of GDP in Government revenues needed to fund the transfers.<sup>146</sup> As a result, the recipients do not necessarily contribute to the scrutiny of revenue management.<sup>147</sup> This could be enhanced if cash transfers were clearly linked to the performance of the mining projects themselves.

Generous transfers can prove unsustainable if commodity prices decline and investments are delayed. By contrast, the Alaskan model provides for both cash transfers and a sustained increase in the assets of the wealth fund. Cash handouts contribute to inflationary pressures. For instance, the first cash transfer in February 2010, made against the background of a very cold winter and resulting in major loss of livestock, arguably contributed to a doubling in inflation from six percent to around twelve percent.<sup>148</sup> These inflationary side-effects have very negative distributional consequences as they reduce the purchasing power of recipients' other income and disproportionately affect the poor who tend to spend a higher portion of their income on food and other basic goods, the prices of which rise most as a

<sup>140</sup> European Bank for Reconstruction and Development (EBRD), *Managing Magnolia's resource boom*, January 2012.

<sup>141</sup> EBRD, *Managing Magnolia's resource boom*.

<sup>142</sup> EBRD, *Managing Magnolia's resource boom*.

<sup>143</sup> EBRD, *Managing Magnolia's resource boom*.

<sup>144</sup> EBRD, *Managing Magnolia's resource boom*, 14.

<sup>145</sup> EBRD, *Managing Magnolia's resource boom*, 14.

<sup>146</sup> EBRD, *Managing Magnolia's resource boom*, 14.

<sup>147</sup> EBRD, *Managing Magnolia's resource boom*, 14.

<sup>148</sup> EBRD, *Managing Magnolia's resource boom*, 14.

result of transfers.<sup>149</sup> Cash transfers can also escalate social ills. The Motherland Gift Fund, established to facilitate payment of dividends from mining revenues to Mongolian citizens reported that cash transfers led to increased alcoholism.<sup>150</sup>

#### ☛ Papua New Guinea (PNG)

As shown in table 2, designated landowners often receive two percent compensation from royalties.<sup>151</sup> These landowners are treated like any other commercial partner as they need to finance any cash call for investments through their own resources or by seeking external financing.<sup>152</sup> The main rationale of this provision is to ensure that the Government and local communities become part of the project, sharing its revenues and risks.<sup>153</sup> Having a fair and clearly defined process for determining land ownership or affected party status is essential, since it confers substantial benefits.

Project development in PNG has invariably led to land disputes.<sup>154</sup> One of the biggest problem is that the payment of a large number of private landowners, either individually or through ‘incorporated landowners groups’, requires transactions, including handing out cash. This usually cannot be monitored top-down<sup>155</sup> hence a lack of transparency and accountability. The decline of phosphate mining on the island nation of Nauru has posed serious problems for its inhabitants, who had become dependent on the royalty transfers and had largely abandoned traditional agricultural and other production in favor of imports.<sup>156</sup>

### 3.3 Allocation of revenues among priorities

Regarding the proportion of EI resources retained by the Government, decisions need to be made on how much revenue should be used for current expenditure, what proportion will be used for capital spending priorities and debt reduction, and how much is to be set aside for revenue stabilisation, expenditure smoothing or

<sup>149</sup> EBRD, *Managing Magnolia’s resource boom*, 14.

<sup>150</sup> EBRD, *Managing Magnolia’s resource boom*, 14.

<sup>151</sup> Revenue Watch Institute, *Extractive Industries Revenues Distribution at the Sub-National Level*, New York, 2008.

<sup>152</sup> Revenue Watch Institute, *Extractive Industries Revenues Distribution at the Sub-National Level*.

<sup>153</sup> Revenue Watch Institute, *Extractive Industries Revenues Distribution at the Sub-National Level*.

<sup>154</sup> Fischer C, *International experience with benefit-sharing instruments for extractive resources*.

<sup>155</sup> Revenue Watch Institute, *Extractive Industries Revenues Distribution at the Sub-National Level*.

<sup>156</sup> Fischer C, *International experience with benefit-sharing instruments for extractive resources*.

other specific needs.<sup>157</sup> Ideally, annual budget allocations should be nested within a medium-term expenditure framework (MTEF).<sup>158</sup>

### 3.3.1. Current government expenditures financing

All countries use part of resource revenues to finance current government expenditures. This primarily benefits current residents of the country, by receiving more public services at lower tax costs. If resource revenues are used to invest in infrastructure, education, and services contributing to development, they can also benefit future generations.<sup>159</sup>

Critical considerations to be made in order to make effective use of these public expenditures include:

- i. Governments must have capacity to make good use of the revenue inflows. Ineffective inflating of public expenditures benefits few. Transparency and civic oversight are therefore crucial to effective utilization of resources.
- ii. Governments must recognise the cyclical nature of commodity prices and use realistic price and volume assumptions to guide the forecast of EI revenues<sup>160</sup> because the volatility of the resource revenues can threaten the stability of government budgets. Spending also needs to be smoothed over time.<sup>161</sup>
- iii. Governments must also address the risk of Dutch disease.<sup>162</sup>

### 3.3.2 Special priorities financing

Governments in some instances earmark EI revenues to specific policy priorities. Earmarking can help ensure funding for priority needs and limit government discretion to spend indiscriminately. Earmarking is criticised, however, as an in-

<sup>157</sup> The World Bank, Petroleum Sector Briefing note.

<sup>158</sup> MTEF is a transparent planning and budget formulation process within which public resources are allocated by the government to strategic priorities, usually defined in a Poverty Reduction Strategy Paper (PRSP) while ensuring overall fiscal discipline. The process entails two main objectives: the first aims at setting fiscal targets; the second aims at allocating resources to strategic priorities within these targets.

<sup>159</sup> Fischer C, International experience with benefit-sharing instruments for extractive resources.

<sup>160</sup> The World Bank, Petroleum Sector Briefing note.

<sup>161</sup> Like a stabilization fund.

<sup>162</sup> This refers to an exchange rate appreciation that can bring a loss of competitiveness to non-resource sectors.

efficient mechanism of depriving the government of the flexibility to respond to changing demands.<sup>163</sup>

3.3.3 Economic development and diversification financing

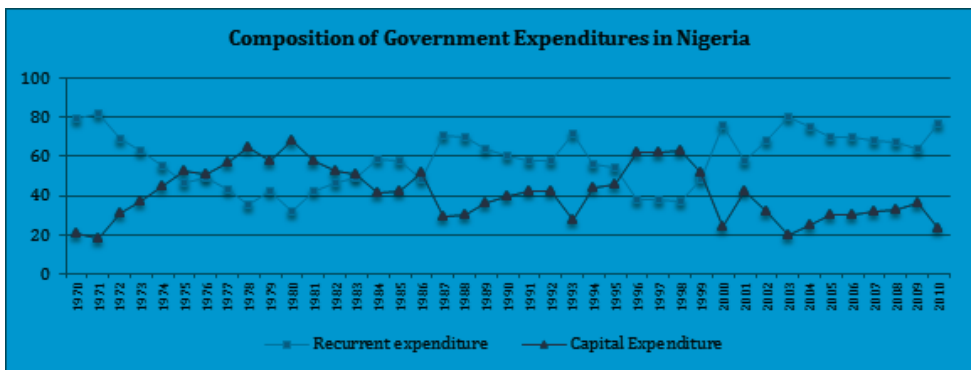
Diversification of the economy means variation of a country’s sources of economic growth and income so that the country is not entirely dependent on its extractives sector alone but also on other sectors of the economy like agriculture for growth.<sup>164</sup> Governments can dedicate EI revenues to finance development projects that would help diversify the economy should the finite EI resources get exhausted. Most of these projects are dedicated to specific regions. Targeting investments to local industries can boost the regional economy and help it become less reliant on exhaustible resources. It is vital, however, that there is local capacity to absorb the investments productively. Independent oversight of project selection is also necessary without which governments risk wasteful spending of EI proceeds on uneconomic commercial ventures.

3.3.4 Country specific experiences of allocating revenues among priorities

On financing current government expenditures

📍 Nigeria

Figure 2: Composition of Federal Government Expenditures in Nigeria



Source: Nwosu & Okafor, 2014

<sup>163</sup> Fischer C, International experience with benefit-sharing instruments for extractive resources.

<sup>164</sup> Ataka J, ‘Community engagement practices from select countries’.

As shown in figure 2, capital expenditure started increasing immediately after the Nigerian/Biafran war in 1970 because of the need to undertake the 3R's (Reconciliation, Rehabilitation and Reconstruction), which followed the war. This trend continued until early 1980s as a result of the need to fund the new states created by the Murtala Mohammed administration.

In 1985, Nigeria suffered from foreign exchange shortages, which led to widespread scarcity of essential commodities and high food costs. Structural Adjustment Programmes (SAPs), put in place at the time to liberalise the economy and reduce Federal Government involvement, also increased peoples' hardships. To reverse the worsening economic conditions that emerged prior to and at that time, the Federal Government introduced the Fourth National Development Plan (1981-1985), which re-emphasised the need for agricultural-based self-reliance. This and other such policies caused recurrent expenditure to rise above capital expenditure from 1986. The trend continued until 1994 because of the need to service the new democratic structures.

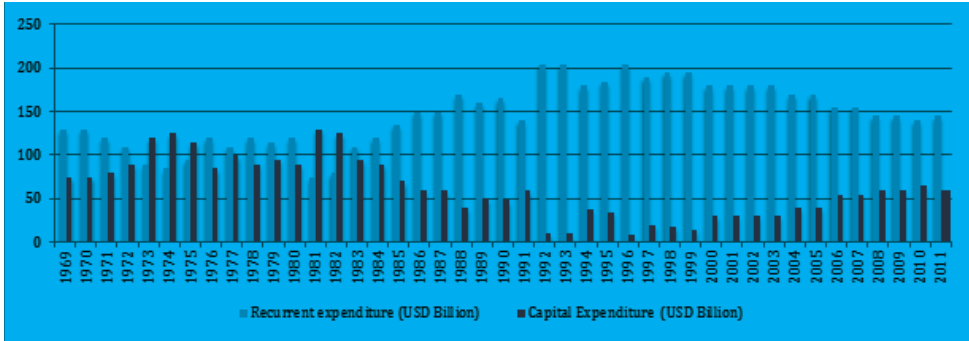
Between 1995 and 1998, capital expenditure was higher than recurrent expenditure. The Federal Government faced sanctions from the international community as a result of the botched elections and the incarceration of the acclaimed winner of the June 1992 elections. The only option was to undertake some developmental projects in order to win the support of the people. Since 1999, when the present democratic dispensation started, recurrent expenditure has remained higher than capital expenditure. This is attributed to the duplication of offices and personnel, hence the allocation of huge resources to service and maintain them.

#### ☛ Saudi Arabia<sup>165</sup>

Saudi Arabia's economy depends heavily on the oil sector as oil revenue accounts for roughly ninety percent of total Government revenues; oil exports account for about eighty-eight percent of total export earnings, and the oil sector contributes about thirty-five percent to the GDP. The sector is, therefore, important in financing the country's (i) recurrent expenditure like wages, salaries, subsidies, transfers, and other consumption expenses as well as (ii) capital expenditures like Government spending on reinforcing human resources, providing social services and healthcare, developing economic resources, transportation and telecommunications, and increasing the availability of municipal and housing services.

<sup>165</sup> Alshahrani S and Alsadiq A, *Economic Growth and Government Spending in Saudi Arabia: an Empirical Investigation*, January 2014.

Figure 3: Saudi Arabia's annual government expenditure from 1969 to 2011



Source: IMF (Alshahrani and Alsadiq), 2014

Figure 3 shows the historical path of Government expenditures in Saudi Arabia. In order to achieve better economic performance, Saudi Arabia adopted deliberate planning and careful implementation of a development programme with clear development plans. Between 1970 and 1984, the Saudi Government allocated a large portion of its budget to capital spending<sup>166</sup> to improve education, health, housing, transportation, and telecommunication services. Following a slump in global oil prices between 1985 and 1994, capital expenditure shrank significantly due to declining oil revenues. By this time, however, most infrastructure projects were completed, thus further eroding the share of capital expenditure. Between 2000 and 2010, the country prioritised human capital development, at fifty-six percent of total expenditure, nineteen percent for social and healthcare development, and twelve percent for infrastructure and about thirteen percent for economic development.

### On financing special priorities

- ✦ Less trust in government to adequately allocate funds to priority sectors such as health and education can lead to policies that ensure earmarked revenues for those specified purposes.<sup>167</sup> However, this is considered an inefficient mechanism, as it deprives the government of the flexibility to respond to changing demands.<sup>168</sup> While Norway has resisted dedicating any of its revenues to specific government programmes, Montana and Alaska are examples in USA that earmark severance tax revenues to specific popular funding needs, like education.<sup>169</sup>

<sup>166</sup> Capital expenditure was as large as current expenditure.

<sup>167</sup> Fischer C, International experience with benefit-sharing instruments for extractive resources.

<sup>168</sup> Fischer C, International experience with benefit-sharing instruments for extractive resources.

<sup>169</sup> Fischer C, International experience with benefit-sharing instruments for extractive resources.

## ☛ Bolivia<sup>170</sup>

In 1997, Bolivia decided to spend a quarter of the proceeds from the privatisation of oil, telecom and transport companies providing a pension to every Bolivian aged sixty-five and above.<sup>171</sup> The *Renta Dignidad* programme now uses oil and gas proceeds, paying USD 258 a year to every citizen aged sixty and older who has some other pension, and USD 344 a year to those without.<sup>172</sup>

These programmes aim to improve citizens' social welfare. A USD 300 dividend represents four months' income for the poorest rural Bolivian families. Roberto Laserna, President of the La Paz-based Fundación Milenio think tank, argues that since rural families invested the money in their own food production — better seeds, tools and farm animals — each dollar they received increased their food consumption by two dollars.<sup>173</sup>

## On financing economic development and diversification

### ☛ Canada's' Western region

Canada's Western region, comprising four provinces (Alberta, British Columbia, Manitoba and Saskatchewan), is an example of an economy that appreciates the danger of over-dependence on extracted resources which are inherently finite. The provinces in the west have taken three general approaches to economic diversification: -

- a) Targeted subsidies and/or tax incentives aimed at specific 'desirable' industries. An example is the British Columbia Production Services Tax Credit, which encourages film, television and animation production in that province.<sup>174</sup>
- b) Support for value-added or knowledge-based activities. The Saskatchewan Research and Development Tax Credit, designed to encourage private sector research and development investment in the province, is one such programme.<sup>175</sup>

<sup>170</sup> 'Tina Rosenberg: Avoiding the curse of the oil-rich nations'.

<sup>171</sup> 'Tina Rosenberg: Avoiding the curse of the oil-rich nations'.

<sup>172</sup> 'Tina Rosenberg: Avoiding the curse of the oil-rich nations'.

<sup>173</sup> 'Tina Rosenberg: Avoiding the curse of the oil-rich nations'.

<sup>174</sup> <https://www2.gov.bc.ca/gov/content/taxes/income-taxes/corporate/credits/production-services> on 23 January 2018.

<sup>175</sup> Government of Saskatchewan, Public Accounts Committee 2012-2013.

- c) Rather than giving preference to certain types of economic activity, governments have tried to attract business and investment by creating a ‘level playing field,’ a well-trained workforce and a competitive economic environment.<sup>176</sup>

Since the 1960s, the Federal Government has had a number of economic plans to help promote economic diversification in provinces with vulnerable economies including the western provinces. One such initiative was the 1966 Fund for Rural Economic Development (FRED), which identified five economically weak regions<sup>177</sup> across the country and designed unique plans to develop infrastructure and industry in each.

In 1987, the Federal Government passed the Western Economic Diversification Act, which established the Western Economic Diversification Canada (WEDC). This was out of concern for the growing over-dependence on mining resources in the region. The WEDC’s mandate was - and continues to be - to promote the development and diversification of the economy of Western Canada and to advance the interests of Western Canada in national economic policy, programme and project development and implementation.<sup>178</sup> WEDC was created with a USD 1.2 billion Western Diversification Fund (WDF) to be used over a five-year period in the four western provinces.<sup>179</sup> The intent of WDF was to provide financial support to projects that would develop new products, markets or technologies, enhance productivity or result in import substitution for the region.<sup>180</sup>

WEDC’s operations focus on meeting three strategic outcomes: entrepreneurship and innovation; policy, advocacy and coordination; and community economic development, which is crucial in ensuring the engagement of the people in their own economic development opportunities and improve quality of life through stimulation of economic growth and employment.<sup>181</sup> This can include developing entirely new businesses or industries, adding value to existing sectors, strengthening capacity, and improving local infrastructure to help communities achieve their full economic potential.<sup>182</sup>

<sup>176</sup> Western Economic Diversification Act (1985).

<sup>177</sup> Manitoba was one of the five identified regions.

<sup>178</sup> Western Economic Diversification Act.

<sup>179</sup> Western Economic Diversification Act.

<sup>180</sup> Western Economic Diversification Act.

<sup>181</sup> Western Economic Diversification Act.

<sup>182</sup> Western Economic Diversification Act.



### 3.4 Allocation of the revenues over time

Governments sometimes establish revenue allocation mechanisms that take into account revenue savings. Such Foundations, Trusts and Funds (FTFs) enhance sustainability and the security of future generations from which payments are drawn to serve special local needs such as emancipation of indigenous communities.<sup>183</sup> These funds differ substantially in their goals and may have any or all of the following objectives: to set aside revenue that would be used to smooth expenditure over time, thus countering the effects of price volatility and variations in production levels; save part of the revenue derived from current exploitation of natural resources for the benefit of future generations; and, depending on the magnitude of the accumulation, insure against extraordinary events (for example, natural disasters).<sup>184</sup>

FTFs are usually invested and the investment portfolios structured according to risk preferences.<sup>185</sup> Making a choice among the various uses of EI revenue then depends on a number of factors, both economic and political, which partly explains why the EI saving funds established in different countries have very different characteristics.<sup>186</sup>

#### 3.4.1 Stabilization funds

EI revenue cannot be efficiently spent as it is collected due to the ‘boom and burst’ nature of the sector.<sup>187</sup> To avoid wasteful expenditure during windfall times or great deficits during down times, thus inducing fiscal volatility in national and subnational public finances,<sup>188</sup> governments establish stabilization funds to facilitate government expenditures while offering some steadiness to government budgets.<sup>189</sup> Stabilization funds, for instance, ensure that budgeted state expenditure and infrastructure investments are not affected by reductions in oil and gas revenue due to a decrease in petroleum prices. This is done partly to accumulate savings at the central level, but also to protect subnational entities from the liabilities of handling revenue windfalls.<sup>190</sup>

<sup>183</sup> NCA, Local communities in Kenya’s extractive sector.

<sup>184</sup> NCA, Local communities in Kenya’s extractive sector.

<sup>185</sup> Fischer C, International experience with benefit-sharing instruments for extractive resources.

<sup>186</sup> The World Bank, Petroleum Sector Briefing note.

<sup>187</sup> Ahmad E and Mottu E, ‘Oil revenue assignments: country experiences and issues’.

<sup>188</sup> The World Bank, Petroleum Sector Briefing note.

<sup>189</sup> The World Bank, Petroleum Sector Briefing note.

<sup>190</sup> Ahmad E and Mottu E, ‘Oil revenue assignments: country experiences and issues’.

### 3.4.2 Future generations funds<sup>191</sup>

Savings funds use EI revenues to accumulate wealth and generate a permanent source of income.<sup>192</sup> This income may then be used for any of the allocation options. The most important issue in savings funds regards investment strategies. In many cases, the best return on investment for public assets would be achieved by investing in infrastructure, human capital, and the necessary foundations for economic growth.<sup>193</sup> Countries have largely misused decades of resource revenues with little development to show for it - arguably through very poor return on the investments. Where governance is weak, even when development needs are high, resource rents may be better saved in trust until they can be put to constructive use. At the extreme, when safeguards fail to prevent wasteful spending of resource rents, the ultimate savings mechanism would be to leave the resource asset in the ground.

### 3.4.3 Country-specific experiences of revenues allocation over time

#### **Stabilization funds**

##### ☛ Botswana

Over the past two decades, minerals<sup>194</sup> have represented one-third to one-half of GDP, 40 to 60 percent of Government revenues, and more than three-quarters of export earnings in Botswana.<sup>195</sup> Price volatility in the diamond market (diamonds are the main driver of the mining sector in Botswana), particularly in the 1980s, led to large swings.<sup>196</sup>

In order to manage mineral resources, Botswana put a solid approach to budgeting in place through the National Development Plan (NDP). The thinking was that, investing in physical assets and human capital would provide future income. Consequently, the Government does not have an explicit savings fund or allocation scheme to save financial resources for the future.

<sup>191</sup> Fischer C, International experience with benefit-sharing instruments for extractive resources.

<sup>192</sup> Fischer C, International experience with benefit-sharing instruments for extractive resources.

<sup>193</sup> Fischer C, International experience with benefit-sharing instruments for extractive resources.

<sup>194</sup> Diamonds, base metals (copper, nickel, and cobalt), coal, soda ash and gold.

<sup>195</sup> Fischer C, International experience with benefit-sharing instruments for extractive resources.

<sup>196</sup> Fischer C, International experience with benefit-sharing instruments for extractive resources.

Although the Government accumulated financial assets during part of the mineral development period, Botswana's surplus mineral revenues are not paid into a dedicated fund but are simply combined with other general revenues in a consolidated fund, the Government Investment Account (GIA).<sup>197</sup> The Government can withdraw the amount required to fund budget deficits. There are no restrictions on withdrawals from the GIA other than the normal public finance procedures.<sup>198</sup> This mechanism provides flexibility, for instance, during the global financial crisis of 2008/09 when the Government was able to run large deficits by drawing down in accumulated savings in the GIA, thereby minimising the impact of the volatility on the economy. The mechanism has resulted, however, in relatively small financial asset accumulation.<sup>199</sup>

Botswana is a good example of a country that exercises fiscal restraint, conducts multi-year budgeting, and uses the stabilisation fund to cope with sudden drops in diamond prices. Other countries have thwarted the purpose of the stabilisation fund by borrowing against it to expand spending in boom times, leading to debt and difficulties during bursts.<sup>200</sup>

#### ☛ Papua New Guinea

In the mid-1970s, Papua New Guinea set up a stabilisation fund to prevent unstable mineral revenues from generating large fluctuations in public expenditures. In order to bypass these constraints, the Government passed legal amendments to allow large drawdowns from the fund and borrowing against the fund's reserves. The Mineral Resource Stabilization Fund therefore neither curtailed excessive public spending nor smoothed Government revenues over business cycles. Fund assets were also locally invested. This attracted low returns, and by 1999, public short-term debt had reached about twenty-five percent of GDP. The Mineral Resource Stabilization Fund was then closed due to lack of performance, and used to retire about one quarter of the country's high-cost domestic debt.<sup>201</sup>

<sup>197</sup> Fischer C, International experience with benefit-sharing instruments for extractive resources.

<sup>198</sup> Fischer C, International experience with benefit-sharing instruments for extractive resources.

<sup>199</sup> African Development Bank, 2016.

<sup>200</sup> Fischer C, International experience with benefit-sharing instruments for extractive resources.

<sup>201</sup> Fischer C, *International experience with benefit-sharing instruments* for extractive resources.

## Future generations' funds

### ☛ Norway<sup>202</sup>

Norway's ageing population and associated rising pension expenditures against the backdrop of declining oil revenues in the coming decades were the main drivers for establishing a petroleum fund.<sup>203</sup> The Norwegian Parliament (Stortinget) in 1990 adopted the Act on the Government Petroleum Fund, which has since been continued as the Government Pension Fund. Later in 2005, the Norwegian Parliament adopted an Act on the Government Pension Fund and established the Norwegian Government Pension Fund Global (Pension Fund) in 2006.<sup>204</sup>

Money is allocated to the Pension Fund only when there is a budget surplus.<sup>205</sup> This highlights an important fact: accumulating assets in the Pension Fund is possible only if the Government runs a budget surplus. In this way, the Pension Fund balance reflects actual/net savings.<sup>206</sup> Estimates of the Pension Fund's future growth indicated that it would be a long time before the Government would start drawing from it.<sup>207</sup> Given that stocks are appropriate for a longer time horizon, new guidelines permitting an investment of 30 to 50 percent of the Pension Fund in stocks were adopted in 1998.<sup>208</sup> Emerging markets were added to the investment portfolio in 2000. The capital is invested in non-Norwegian bonds, stocks, money market instruments, and derivatives in 42 stock markets and 31 currencies for fixed income investments. Investing in foreign securities helps diversify the Government revenue portfolio away from the domestic economy. This strategy is arguably the best for generating the highest investment returns, and thereby the highest income for future use.<sup>209</sup>

### ☛ Alberta<sup>210</sup>

The Canadian province of Alberta has benefited from high petroleum revenues for decades. By 1975, royalties accounted for 41 percent of total Government

<sup>202</sup> The World Bank, Petroleum Sector Briefing note.

<sup>203</sup> The World Bank, Petroleum Sector Briefing note.

<sup>204</sup> The World Bank, Petroleum Sector Briefing note.

<sup>205</sup> The World Bank, Petroleum Sector Briefing note.

<sup>206</sup> The World Bank, Petroleum Sector Briefing note.

<sup>207</sup> The World Bank, Petroleum Sector Briefing note.

<sup>208</sup> The World Bank, Petroleum Sector Briefing note.

<sup>209</sup> Fischer C, International experience with benefit-sharing instruments for extractive resources.

<sup>210</sup> The World Bank, Petroleum Sector Briefing note.

receipts.<sup>211</sup> Alberta Heritage Savings Trust Fund (Heritage Fund) was started in 1976 to: save for the future; strengthen or diversify the economy; and improve the quality of life of Albertans.<sup>212</sup> In the 1980s, some money from the Heritage Fund was used for capital projects intended to help diversify the economy (such as medical and renewable energy research).<sup>213</sup>

In 1995, the Government asked Albertans about the future of the Heritage Fund in a survey called ‘Can we interest you in an \$11 billion decision?’<sup>214</sup> The respondents wanted to keep the Heritage Fund for future generations and focus on generating higher returns on long-term investments.<sup>215</sup> In response, the Heritage Act<sup>216</sup> was amended and the Heritage Fund was restructured to no longer be used for economic development or social investment purposes. In 1998 and 2000, Albertans indicated that they wanted to increase savings in the Heritage Fund including saving an unexpected petroleum windfall for the future.<sup>217</sup> In 2002, Albertans indicated they wanted the Heritage Fund to continue to operate primarily as an endowment fund that is inflation proofed.

### 3.5 Indirect allocation of revenue

Some of the world’s top mining countries such as Brunei, Saudi Arabia and Qatar, do not need to collect taxes on personal income.<sup>218</sup> The states earn a lot from their oil or mineral exports as well as through other forms of taxes to provide goods and services for their citizens.

#### 3.5.1 Country specific experiences with indirect allocation of the revenue

##### ☛ Brunei<sup>219</sup>

Hydrocarbons in Brunei Darussalam contribute to over 50 percent of the country’s GDP and 90 percent of its export earnings. The Government also imposes twelve percent tax on structures located in Bandar Seri Begawan, the sultanate’s capital city.

<sup>211</sup> The World Bank, Petroleum Sector Briefing note.

<sup>212</sup> The World Bank, Petroleum Sector Briefing note.

<sup>213</sup> The World Bank, Petroleum Sector Briefing note.

<sup>214</sup> The World Bank, Petroleum Sector Briefing note.

<sup>215</sup> The World Bank, Petroleum Sector Briefing note.

<sup>216</sup> Alberta Heritage Savings Trust Fund Act.

<sup>217</sup> Alberta Heritage Savings Trust Fund Act.

<sup>218</sup> [https://infogram.com/7\\_countries\\_with\\_zero\\_income\\_taxes](https://infogram.com/7_countries_with_zero_income_taxes) on 23 January 2018.

<sup>219</sup> [https://infogram.com/7\\_countries\\_with\\_zero\\_income\\_taxes](https://infogram.com/7_countries_with_zero_income_taxes) on 23 January 2018.

#### ☛ Saudi Arabia

As the world's top oil exporter, Saudi Arabia has no need to collect taxes on personal income. In addition to 90 percent of export earnings coming from the country's rich oil reserves, Saudi Arabia imposes twenty percent tax on capital gains to generate additional revenues. Saudi citizens enjoy deeply discounted gasoline, water and electricity; housing is subsidised; health care is paid for by the Government; as is their education, including stints studying abroad.<sup>220</sup>

However, faced with dwindling oil income due to the fluctuating global oil prices and resulting in last year's record budget deficit of around USD 98 billion,<sup>221</sup> the Government is taking a range of measures to diversify its revenue sources. For example, it proposes to increase the visa fee six-fold. This unfortunately will do little to help make up for the two years of low oil prices that have strained the country's finances. There are plans to privatise chunks of many Government companies, starting with a stake of up to five per cent of the Saudi Arabian Oil Company.<sup>222</sup>

#### ☛ Qatar

Qatar generates massive revenues by collecting thirty-five percent tax rate from companies involved in oil and gas operations. The Government also charges five percent tax on imported merchandise.<sup>223</sup>

## 4. Conclusion and recommendations

Most revenue-sharing models fail for various reasons. The secrecy associated with extractives revenues in many countries owing to lack of public disclosure of information has been a particular factor in facilitating embezzlement and mismanagement of EI resources. Many resource-rich states have been known to maintain a high level of secrecy around revenues, particularly through unreported off-budget accounts, which allow a high proportion of spending to be kept 'off the books' and hidden from public scrutiny. This lack of transparency easily ends up in fund-

<sup>220</sup> 'Margherita Stancati and Ahmed al Omran: Saudi Arabia Approves Economic Reform Program' The Wall Street Journal, 25 April 2016 <https://www.wsj.com/articles/saudi-arabia-approves-economic-reform-program-1461588979> on 23 January 2018.

<sup>221</sup> 'Margherita Stancati and Ahmed al Omran: Saudi Arabia Approves Economic Reform Program'.

<sup>222</sup> 'Bill Spindle and Ahmed al Omran: Oil Change: Affluent Saudi Arabia Goes to Work' The Wall Street Journal, 31 May 2016 <https://www.wsj.com/articles/oil-change-affluent-saudi-arabia-goes-to-work-1464716895> on 23 January 2016.

<sup>223</sup> [https://infogram.com/7\\_countries\\_with\\_zero\\_income\\_taxes](https://infogram.com/7_countries_with_zero_income_taxes) on 23 January 2018.

ing corrupt practices, promoting social and economic inequalities, and generating intra-state or even inter-state conflicts.

In the case of Kenya, if the Bills that discuss revenue collection and sharing become law, the State runs the risk of duplicating roles and failing to effectively coordinate the monitoring and accounting for revenues received. The conflicting laws regarding the criterion of sharing revenues could create room for conflict and corruption. Most of the benefits-sharing mechanisms (from what currently exists), will likely be prescribed and regulated by statute.

However, from the case studies presented, key financial, economic, social and environmental, and generational stakeholder considerations have to be made when designing a revenue-sharing model so that the wealth arising from oil or mining operations can be distributed and managed transparently. The allocation of resources can be done: vertically – from higher to lower levels of government; horizontally - across similar jurisdictions; among sector priorities – to get the various proportions to be used for capital spending, debt reduction, revenue stabilisation, expenditure smoothing or other specific needs such as education and health; over time – to take into account revenue savings; or indirectly.

Ultimately, the transparent and sound revenue management and allocation must ensure that:

- Government negotiates the best deals with mining companies in order to get the best returns for these assets and ensure mutual benefits for all stakeholders;
- Sound revenue-sharing policies are put in place to ensure fair distribution of EI wealth;
- Public expenditures are allocated within a medium-term expenditure framework and aligned with the country's development strategy;
- The economy is diversified;
- A robust development strategy on how to use the EI resources is put in place;
- Appropriate macro-economic policy responses to mitigate any negative impacts from global fluctuations are put in place;
- Assets to fund future budgets in light of the fact that oil and mineral resources are finite be established; and
- High rates of returns from resource assets are pursued to accumulate surpluses.





# THE RELEVANCE OF ACCESS TO INFORMATION AND ITS ROLE IN ENSURING GOOD GOVERNANCE IN KENYA'S EXTRACTIVES INDUSTRY

BEVERLINE ANYANGO ONGARO\* AND ANNE WATARE NDERI<sup>∞</sup>

## 1 Introduction

Access to information is an important component of Kenya's constitutional dispensation.<sup>1</sup> However, access to information in Kenya's extractives industry (EI) is lacking.<sup>2</sup> According to the Ministry of Mining, Kenya's EI sector has had to contend with various challenges which pre-date Kenya's independence. These include: inadequate regulation for community engagement; inadequate financing for exploration and extraction; lack of technical skills and experience; inadequate geological data and information, which makes mineral exploration a costly undertaking; environmental degradation; lack of harmonisation of regulatory policies and practices; inadequate expertise in mineral marketing and value addition; disputes in relation to access to land for exploration and mining; health and safety hazards especially in artisanal and small-scale mining; limited entrepreneurship and transfer of technology to host communities thus breeding resentment and social unrest; poor or non-existent transport infrastructure; and an inadequate mining fiscal regime, which provides fertile ground for corruption.<sup>3</sup>

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<sup>1</sup> Article 35, *Constitution of Kenya (2010)*.

<sup>2</sup> Kameri-Mbote P, "Extractive Industry in Kenya: A Blessing or a Curse", (Key Note Speech), UNDP and Civil Society, Leisure Lodge, November 2014.

<sup>3</sup> Ministry of Mining, *Mining and Minerals Policy: The Popular Version*, 2016.

Kenya has vast mineral resource deposits that comprise fifty construction and industrial minerals, five precious stones, eight precious metals, twenty-two semi-precious stones, thirty-five rare metals, two fuel minerals, and four gaseous minerals.<sup>4</sup> The contribution of these minerals to Kenya's economy is approximately one percent of the Gross Domestic Product (GDP).<sup>5</sup> Following recent discovery of oil and coal in Turkana and Kitui counties respectively, the contribution of the mining sector to the economy is likely to grow to ten percent of Kenya's GDP.<sup>6</sup> While the discovery and ongoing exploration of oil and coal deposits herald good tidings, it has, in equal measure, raised apprehension among experts in the EI that the already existing challenges may be exacerbated.<sup>7</sup>

Generally, the EI value chain experiences cross-cutting complexities. These include; multiple actors, complex accounting procedures, and a tradition of sector secrecy wherein information regarding contracts and licences awarded are undisclosed to communities where extractive activities are taking place.<sup>8</sup> These complexities make the EI highly predisposed to corruption; resource-curse wherein the discovery and extraction of minerals, oil and gas does not benefit the government and communities where prospecting and extraction are taking place thus leading to conflict and internecine wars; the Dutch disease wherein inflation is experienced leading to high costs of goods and services; and environmental harm and health risks particularly to the host communities and governments.<sup>9</sup> EI activities are often remote to the lives of majority of citizens save for host communities. Further, EI value chain is operated by a chain of decisions, which can be difficult to monitor if there is only piecemeal information and hence creating opportunities for corruption and mismanagement.<sup>10</sup>

These factors make a strong case for the integration of transparency and accountability in the EI so as to foster good governance. Transparency and accountability in EI is attainable and evident when relevant actors in EI have access to in-

<sup>4</sup> First Schedule, *Mining Act* (No. 12 of 2016).

<sup>5</sup> Ministry of Mining, *Mining and Minerals Policy*.

<sup>6</sup> Ministry of Mining, *Mining and Minerals Policy*, 1.

<sup>7</sup> United Kingdom Aid and Adam Smith International, *Recommendations for Development of Kenya's Extractive Industries; Based on Inclusive Multi-Stakeholder Consultation*, September 2013, 6.

<sup>8</sup> Peter C and Stanley M, *Oil, Gas and Mining: A Sourcebook for Understanding the Extractive Industries*, World Bank, Washington DC, 2017.

<sup>9</sup> Peter C and Stanley M, *Oil, Gas and Mining: A Sourcebook for Understanding the Extractive Industries*.

<sup>10</sup> <https://resourcegovernance.org/approach/natural-resource-charter/precept-2-accountability-and-transparency> on 26 January 2018.

formation that enables them to make informed decisions. The public and non-state actors are also able to hold the government accountable. The Niger Delta in Nigeria is an example of how, failure to integrate access to information as a component of transparency and accountability in the EI leads to the phenomenon known as resource-curse, environmental pollution and degradation, the Dutch disease, and corruption.<sup>11</sup>

This chapter focuses on access to information as a component of transparency and accountability in promoting good governance in EI. The chapter has four sections. Section one discusses the challenges and concerns in Kenya's EI. Section two focuses on access to information as a key component of transparency and accountability that is critical in promoting good governance in the EI sector. The section demonstrates how access to information in EI is central to good governance in the EI sector. Section three analyses Kenya's legal regime and examines the extent to which the regime integrates access to information within the EI. The chapter concludes by making recommendations for integrating transparency and accountability in Kenya's EI.

## 2 Concerns and challenges in Kenya's extractive industry

Following the discovery of commercially viable oil reserves and coal deposits, EI experts have cautioned that failure to integrate good governance could see Kenya follow a pattern similar to the Niger Delta region.<sup>12</sup> Already, tensions are high in communities where exploration is ongoing. EI experts have cautioned that these tensions could be escalated by lack of transparency.<sup>13</sup> This makes a strong case for the need to integrate access to information as a key component of transparency and accountability. For instance, communities in Turkana, where oil reserves have recently been discovered, have high expectations for quick returns yet the reality is that oil and gas exploration is a costly undertaking that takes a long period of time to bring in profits. Competing interests have emerged, which need to be managed. Additionally, despite recent discovery of natural resources, Kenya has not adopted adequate policy and legal frameworks to govern its nascent EI sec-

<sup>11</sup> African Forum and Network on Debt and Development (AFRODAD), *Export Credit Agencies in Nigeria: A Case Study*, 15 July 2007, 24.

<sup>12</sup> United Kingdom Aid and Adam Smith International, *Recommendations for Development of Kenya's Extractive Industries*.

<sup>13</sup> United Kingdom Aid and Adam Smith International, *Recommendations for Development of Kenya's Extractive Industries*.

tor. The management challenge is bigger especially given Kenya's bad record of curbing corruption. For instance, Transparency International Corruption Perception Index, 2016, ranked Kenya at position 145 out of 176.<sup>14</sup> These challenges must be addressed if Kenya is to reap benefits from its natural resources wealth and avoid the problems experienced in other countries.

Kenya could learn from Ghana, which integrated transparency and accountability through the adoption of progressive policy and legislative frameworks such as the Petroleum Revenue Management Act.<sup>15</sup> As an illustration, Ghana has signed onto global initiatives such as the Extractive Industries Transparency Initiative (EITI).<sup>16</sup> Ghana won the 2016 EITI Africa Chair's award for implementing policy reforms along the lines of Publish What You Pay and the Open Government Partnership.<sup>17</sup> Based on these lessons, Kenya can prioritise signing on to global standards and conduct legislative and policy reforms as a commitment to integrate transparency and accountability in its' EI.

### **3 Access to information as panacea for good governance in the extractives industry**

Access to information, otherwise known as *freedom of information* has been defined as the right to access information held by the state.<sup>18</sup> The Constitution of Kenya 2010 (2010 Constitution) enshrines the right of a citizen to access information held by the State and private bodies where such information is required for the exercise of a human right.<sup>19</sup> Access to information is therefore an essential toll for the enjoyment of human rights, promoting citizen participation in governance as well as the promotion of good governance through transparency and accountability.

There is global consensus that transparency and accountability are the core principles of good governance that should be integrated throughout the EI value chain.<sup>20</sup> GOXI defines transparency as the degree to which information is available to outsiders that enables them to have an informed voice in decisions and assess the

<sup>14</sup> <https://www.transparency.org/country/KEN> on 20th February 2017.

<sup>15</sup> *Ghana Petroleum Revenue Management Act* (815 of 2011).

<sup>16</sup> Ghana became EITI compliant in 2003.

<sup>17</sup> The Open Government Partnership Initiative (OGPI), *National Action Plan for the Republic of Ghana, 2016-2017*, 7.

<sup>18</sup> OGPI, *National Action Plan for the Republic of Ghana*, 7.

<sup>19</sup> Article 35, *Constitution of Kenya*.

<sup>20</sup> Resource governance, EITI and natural resource

decisions made by insiders.<sup>21</sup> GOXI elaborates that ‘transparency issues in the EIs sector are diverse and relate to the laws and regulations, policies, administration, and revenues and expenditures.’<sup>22</sup> This view coheres with that held by Open Government. According to Open Government, transparency and accountability in EIs enables the public to be informed and hold the government accountable; minimises mismanagement of revenue accruing from EI; is an effective tool for combating corruption; facilitates compliance with governments’ environmental, social, and revenue standards; and facilitates public disclosure.<sup>23</sup> Given that resources are finite, it is important for host governments to ensure they have a better bargaining power, the citizens buy-in and they secure high returns. This end is only possible where there is transparency and that vital information in EI is available. Kenya already has the Access to Information Act 2016 (AI Act)<sup>24</sup> and various constitutional provisions that guarantee the right to information.

To enhance transparency within the EI, a number of measures have to be undertaken. These include: availing all laws and regulations governing issuance of mining licences and permits in public databases;<sup>25</sup> enacting comprehensive laws with clear and unequivocal procedures on how to issue licences and permits;<sup>26</sup> enacting legal measures for transparent and competitive procedures for issuing licences and allocating mineral or hydro-carbon exploration or production rights in the design of legal, contractual and policy frameworks (ideally, the terms of EI contracts should be provided for in the laws so as to make it easy to scrutinise the EI contracts subject to the EI legal regime<sup>27</sup>);<sup>28</sup> making public disclosure of names and ownership of both private and publicly-owned corporations bidding, operating or investing in the EI;<sup>29</sup> making public disclosure of all the contracts signed;<sup>30</sup> strengthening mechanisms for public engagement in extractives concessioning;<sup>31</sup>

<sup>21</sup> Peter C and Stanley M, *Oil, Gas and Mining: A Sourcebook for Understanding the Extractive Industries*.

<sup>22</sup> <http://goxi.org/> on 25 January 2018.

<sup>23</sup> <https://www.opengovpartnership.org/theme/extractive-industries> on 26 January 2018.

<sup>24</sup> No. 31 of 2016.

<sup>25</sup> <https://www.opengovpartnership.org/theme/extractive-industries> on 26 January 2018.

<sup>26</sup> <http://goxi.org/> on 25 January 2018.

<sup>27</sup> <https://resourcegovernance.org/approach/natural-resource-charter/precept-2-accountability-and-transparency> on 25 January 2018.

<sup>28</sup> <http://goxi.org/> on 25 January 2018.

<sup>29</sup> <https://resourcegovernance.org/approach/natural-resource-charter/precept-2-accountability-and-transparency> on 25 January 2018.

<sup>30</sup> <https://www.opengovpartnership.org/theme/extractive-industries> on 26 January 2018.

<sup>31</sup> <https://www.opengovpartnership.org/theme/extractive-industries> on 26 January 2018.

creating competent institutions of integrity with clear and unambiguous mandates in the regulation and monitoring of operations;<sup>32</sup> enacting national strategies, policies and laws for the EI through open and participatory processes;<sup>33</sup> establishing transparent revenue management and participatory budgeting based on development priorities with effective sustainable development outcomes in the revenue management allocation;<sup>34</sup> establishing a public registry of all concessions,<sup>35</sup> and data on geological surveys, cadastres and reserves;<sup>36</sup> ensuring timely publication of comprehensive reports by EI corporations and government agencies;<sup>37</sup> and codifying regulations on local benefits of natural resources so as to translate the resource wealth into widespread benefit for communities.<sup>38</sup>

From the above requirements, it is apparent that the fulcrum for transparency and accountability is access to information. In other words, transparency and accountability by state and non-state actors within EI is contingent upon the public and relevant EI actors having access to information and using that information effectively; and as well the public and relevant EI actors participating in the EI value chain. Absence of access to information designates transparency and accountability to mere aspirations.

This deduction is accurate particularly when it is considered that there is a strong global consensus that transparency and accountability entails a balance of equation of demand and supply for vital information.<sup>39</sup> The demand side entails a strong citizen voice that is capable of accessing and using relevant information and embedding participation in EI particularly on how decisions are made and implemented.<sup>40</sup> The supply side entails creating space by governments for accountability demands to be made; degree of political will for transparency and accountability;

<sup>32</sup> <http://goxi.org/> on 25 January 2018.

<sup>33</sup> <https://www.opengovpartnership.org/theme/extractive-industries> on 26 January 2018.

<sup>34</sup> <http://goxi.org/> on 25 January 2018.

<sup>35</sup> <https://www.opengovpartnership.org/theme/extractive-industries> on 26 January 2018.

<sup>36</sup> <http://resourcegovernance.org/approach/natural-resource-charter/precept-2-accountability-and-transparency> on 25 January 2018.

<sup>37</sup> <https://www.opengovpartnership.org/theme/extractive-industries> on 25 January 2018. These reports include environmental and economic impact studies for all EI projects, comprehensive financial reports, and reports on EI projects. In order for reporting to be effective it ought to be public reporting which is done by an equitable and progressive fiscal regime that avoids non-published special deals and minimises tax avoidance and evasion of tax in the collection of taxes.

<sup>38</sup> Hackenbrunch M and Pluess JD, *Commercial Value from Sustainable Local Benefits in the Extractive Industries: Local Content*, March 2011, 4-5.

<sup>39</sup> IDS, *Review of Impact and Effectiveness of Transparency and Accountability Initiatives*, 4.

<sup>40</sup> IDS, *Review of Impact and Effectiveness of Transparency and Accountability Initiatives*, 4.

and creation of enabling legal framework, incentives and sanctions that affect the behaviors of public officials.<sup>41</sup>

It is, therefore, critical to examine the transparency and accountability within EI value chain hand-in-hand with, and through the lenses of access to information. It is important for non-state actors and members of public, particularly host communities, to have access to information on general operations within EI to: effectively undertake advocacy efforts aimed at combating corruption; advocate for conservation and management of environment in line with domestic and international standards; call for the prevention and mitigation of health risks; and champion for the employment of sound fiscal management of extractives revenues on behalf of the host country and particularly surrounding communities.<sup>42</sup>

The case study of Niger Delta is a strong example of how the absence of a proper framework on access to information fosters environmental pollution and degradation, corruption, and health risks to the host communities. According to the African Forum and Network on Debt and Development (AFRODAD), civil society organisations (CSOs) in Nigeria do not have adequate information and knowledge on the general operations of oil corporations.<sup>43</sup> As a result, the CSOs are unable to carry out their watchdog role effectively to ensure good governance within the Niger Delta.<sup>44</sup> Further, according to AFRODAD, absence of cogent access to information framework in Nigeria exacerbated the challenges within its Niger Delta oil-rich region. These challenges include: increasing debt situation;<sup>45</sup> decreasing job opportunities especially since Nigeria's oil sector contributes less than two percent of total employment notwithstanding the heavy investments in the sector; weak linkages with other productive sectors; high incidence of corruption;<sup>46</sup> and environmental pollution and degradation.

### 3.1 Transparency and accountability initiatives in the EI sector

Global and regional initiatives, such as EITI, Publish What You Pay (PWYP), and Revenue Governance Index (RGI) are transparency and accountability initiatives that promote access to information in EI as a means of promoting good governance in the EI sector.

<sup>41</sup> IDS, *Review of Impact and Effectiveness of Transparency and Accountability Initiatives*, 4.

<sup>42</sup> IDS, *Review of Impact and Effectiveness of Transparency and Accountability Initiatives*.

<sup>43</sup> IDS, *Review of Impact and Effectiveness of Transparency and Accountability Initiatives*.

<sup>44</sup> AFRODAD, *Export Credit Agencies in Nigeria: A Case Study*, 24.

<sup>45</sup> AFRODAD, *Export Credit Agencies in Nigeria: A Case Study*, 21.

<sup>46</sup> AFRODAD, *Export Credit Agencies in Nigeria: A Case Study*, 22.

### 3.1.1 Extractive Industries Transparency Initiative

EITI is a global standard that aims to promote open and accountable management of oil, gas and mineral resources.<sup>47</sup> It seeks to strengthen government and EI corporations' systems, to inform public debates and promote understanding by requiring countries and corporations to disclose information on key steps in the governance of oil, gas and mining revenues. These key steps are information regarding: a) whether minerals and oil and gas reserves have been proven or are mere speculation; b) contracting and issuance of licences; c) the market value of minerals and oil and gas being produced; and d) revenue collection and allocation including whether revenues are managed in a manner that benefits the host country.<sup>48</sup> Commitment to EITI is voluntary and its implementation is supported by a coalition of governments, corporations, and CSOs.<sup>49</sup> Although the EITI Multi-Donor Trust Fund has made efforts to bring Kenya onboard, Kenya is yet to commit to EITI.<sup>50</sup>

In Africa, Ghana stands out as a good example of successful implementation of EITI. Ghana established Ghana Extractive Industries Transparency Initiative (GHEITI) in 2003, with the objective of improving transparency and accountability and to coordinate the EI, which was perceived as secretive, corrupt and causing environmental degradation.<sup>51</sup> GHEITI involved CSOs, Government and EI companies. Ghana produced its first report that qualified it to be a candidate in 2007 and thereafter became an EITI compliant country in 2010.<sup>52</sup> In 2016, given Ghana's integration of transparency and accountability in EITI, GHEITI received a 2016 EITI Chair's Award, for taking the recommendations from its EITI reports and turning them into reforms.<sup>53</sup> A notable accomplishment of GHEITI's recommendation was the successful lobbying of Parliament to enact the Petroleum Revenue Management Act, 2011, which has introduced a transparent framework in the management of Ghana's petroleum revenues and has been lauded as one of the most progressive laws.<sup>54</sup> Some of the progressive provisions include: the establishment of the Petro-

<sup>47</sup> [www.eiti.org](http://www.eiti.org) on 25 January 2018.

<sup>48</sup> [www.eiti.org](http://www.eiti.org) on 25 January 2018.

<sup>49</sup> [www.eiti.org](http://www.eiti.org) on 25 January 2018.

<sup>50</sup> World Bank and Extractive Industries Transparency Initiative-Multi-donor Trust Fund, *Annual Report*, 2015, 11.

<sup>51</sup> National Resource Governance Institute (NGRI), *From Reports to Results: The Story Behind Ghana's EITI Success*, 8 April 2016 <https://resourcegovernance.org/blog/reports-results-story-behind-ghanas-eiti-success> on 2 March 2017.

<sup>52</sup> NGRI, *From Reports to Results: The Story Behind Ghana's EITI Success*.

<sup>53</sup> <https://eiti.org/news/winners-of-2016-eiti-chair-awards-announced> on 6 March 2017.

<sup>54</sup> 'Africa Centre for Energy Policy (ACEP), Centre for Public Interest in Law (CEPIL) and Friends of



leum Holding Fund as a designated public fund at the Bank of Ghana to receive and disburse petroleum revenues due to the Republic;<sup>55</sup> the requirement that the management of petroleum revenues and savings be carried out with the highest internationally accepted standards of transparency and good governance;<sup>56</sup> the enactment of the Mineral Development Fund Act 2016,<sup>57</sup> which seeks to disburse petroleum revenues to the public;<sup>58</sup> and the enactment of the Petroleum Revenue Management Act, which advocates for transparency and accountability of records of petroleum products and disclosure of information to the public.<sup>59</sup> In line with EITI standards, GHEITI has incorporated CSOs with adequate knowledge and expertise on EI and are engaged meaningfully in EI discourse and robust advocacy.<sup>60</sup>

### 3.1.2 Publish What You Pay

PWYP is a campaign of an international coalition of more than fifty CSOs from more than thirty states that carry out campaigns and advocacy for transparency in EI revenue reporting and contracts.<sup>61</sup> PWYP has two goals; to encourage companies to publish what they pay and for governments to publish what they earn, and to encourage public disclosure of EI contracts and transparency of licensing procedures.<sup>62</sup> PWYP seeks to realise these two goals through multi-stakeholder agreement and review.<sup>63</sup>

### 3.1.3 Revenue Governance Index

RGI is an initiative by the Revenue Watch Institute that measures the quality of governance in the oil, gas and mining sectors of fifty eight countries that produce eighty five percent of the world's petroleum, ninety percent of diamond, and

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the Nation (FON): Review of the petroleum revenue management act 2011 (act 815)' <http://acepghana.com/wp-content/uploads/2013/12/ATT00051.pdf> on 25 January 2018.

<sup>55</sup> Section 2, *Ghana Petroleum Revenue Management Act*.

<sup>56</sup> Section 49, *Ghana Petroleum Revenue Management Act*.

<sup>57</sup> *Minerals Development Fund Act* (912 of 2016).

<sup>58</sup> NGRI, *From Reports to Results: The Story Behind Ghana's EITI Success*.

<sup>59</sup> Section 8, *Ghana Petroleum Revenue Management Act; Minerals Development Fund Act*.

<sup>60</sup> NGRI, *From Reports to Results: The Story Behind Ghana's EITI Success*.

<sup>61</sup> Peter C and Stanley M, *Oil, Gas and Mining: A Sourcebook for Understanding the Extractive Industries*.

<sup>62</sup> Peter C and Stanley M, *Oil, Gas and Mining: A Sourcebook for Understanding the Extractive Industries*.

<sup>63</sup> IDS, *Review of Impact and Effectiveness of Transparency and Accountability Initiatives*, 2.

eighty percent of copper.<sup>64</sup> RGI scores and ranks countries on four key governance areas: components of institutional and legal setting; reporting practices; safeguards and quality controls; and enabling environment. It uses detailed questionnaires completed by researchers with expertise in EI.<sup>65</sup> RGI gauges the extent to which a countries': (a) institutional and legal settings provide for basic transparency guidelines and reporting requirements as well as freedom of information;<sup>66</sup> (b) reporting practices provide for access to information about EI operations such as payments, revenue sources like royalties, and licensing practices;<sup>67</sup> (c) conflict of interest mechanisms establish safeguards and control quality through, for instance, curbing discretionary powers and oversighting contracting and licensing processes;<sup>68</sup> and (d) combat corruption in EI.<sup>69</sup> Ghana scored 24 out of 89 assessments in 2017.<sup>70</sup>

The next section of this chapter examines whether Kenya has mechanisms for transparency and accountability, particularly the core principles of access to information in the context of its EI sector.

### 3.2 Kenya's legal regime for the extractives sector

Prior to the promulgation of the 2010 Constitution and the enactment of the Mining Act 2016 (Mining Act),<sup>71</sup> the mining sector was governed by antiquated legal frameworks that exacerbated the challenges enumerated earlier in this chapter. At present, Kenya is in the nascent stages of putting in place a robust EI policy and legal framework that aims to ensure an equitable and sustainable EI, and as well anchor transparency and accountability and the core principles of access to information and public participation. The legal regime governing Kenya's EI can be analysed under two broad categories, i) international law, and ii) municipal law.

#### 3.2.1 International law

By virtue of article 2(5) of the 2010 Constitution, general rules of international law form part of the laws of Kenya. Further, by virtue of article 2(6) of the

<sup>64</sup> Revenue Watch Institute, *The 2013 Resource Governance Index: A Measure of Transparency and Accountability in the Oil, Gas and Mining Sector*, 1 June 2013, 1.

<sup>65</sup> Revenue Watch Institute, *The 2013 Resource Governance Index*.

<sup>66</sup> Revenue Watch Institute, *The 2013 Resource Governance Index*.

<sup>67</sup> Revenue Watch Institute, *The 2013 Resource Governance Index*.

<sup>68</sup> Revenue Watch Institute, *The 2013 Resource Governance Index*.

<sup>69</sup> Revenue Watch Institute, *The 2013 Resource Governance Index*.

<sup>70</sup> <http://resourcegovernanceindex.org/country-profiles/GHA/mining> on 25 January 2018.

<sup>71</sup> *The Mining Act*.

2010 Constitution, treaties and conventions that Kenya has ratified constitute part of the law of Kenya. Kenya is signatory to international instruments that guarantee the rights to access to information and public participation. Notable instruments in this regard include: the Universal Declaration of Human Rights (UDHR),<sup>72</sup> the International Covenant on Civil and Political Rights (CCPR),<sup>73</sup> the International Covenant on Economic Social and Cultural Rights (CESCR), the United Nations Convention against Corruption,<sup>74</sup> the African Charter on Democracy, Elections and Good Governance,<sup>75</sup> and the African Charter on Human and Peoples' Rights (African Charter).<sup>76</sup>

The UDHR states that everyone has the right to freedom of opinion and expression which includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media, regardless of frontiers.<sup>77</sup> In similar vein, the CCPR protects the right to freedom of expression and information which includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.<sup>78</sup> Article 25 of the CESCR requires states to encourage public participation while the UN Convention Against Corruption demands transparency, public distribution of information and participation in public procurement and management of public finances.<sup>79</sup> At the African level, the African Charter<sup>80</sup> and the African Convention on Preventing and Combating Corruption<sup>81</sup> recognise the right to information as a key component of good governance. There are additional requirements such as Principle 10 of the Rio Declaration on Environment and Development, 1992, which demands public participation in environmental matters by declaring that:

Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including infor-

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<sup>72</sup> *Universal Declaration of Human Rights*, 10 December 1948.

<sup>73</sup> *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171.

<sup>74</sup> *United Nations Convention Against Corruption*, 31 October 2003, 2349 UNTS 41.

<sup>75</sup> *African Charter on Democracy, Elections and Governance*, 30 January 2007.

<sup>76</sup> *African [Banjul] Charter on Human and Peoples' Rights*, 27 June 1981, OAU Doc. CAB/LEG/67/3rev.5, 211.L.M. 58(1982).

<sup>77</sup> Article 19, *Universal Declaration of Human Rights*.

<sup>78</sup> Article 19, *International Covenant on Civil and Political Rights*.

<sup>79</sup> Article 9, *United Nations Convention Against Corruption*.

<sup>80</sup> Article 9, *African Charter on Human and Peoples' Rights* provides that every individual shall have the right to receive information and the right to express and disseminate his opinions within the law.

<sup>81</sup> Article 63(1), *United Nations Convention Against Corruption*.

mation on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

### 3.2.2 Municipal law

The legal foundation of access to information in the extractives sector is article 35 of the 2010 Constitution. Pursuant to this provision, the AI Act was enacted in 2016 as part of the implementation process of the 2010 Constitution.

#### 3.2.2.1 The Constitution of Kenya

The 2010 Constitution is the supreme law of the land and binds all persons and State organs at the national and county levels of Government.<sup>82</sup> The 2010 Constitution lays the foundation for sustainable development and equitable sharing of natural resources as one of the values and principles of good governance.<sup>83</sup> Chapter two of the 2010 Constitution contains the national values and principles of governance which include transparency, accountability, and sustainable development.<sup>84</sup> In addition, it gives the State the responsibility to ensure sustainable exploitation, utilisation, management and conservation of the environment, natural resources, and ensure the equitable sharing of the accruing benefits.<sup>85</sup> Additionally, it recognises that all minerals and oil in Kenya constitute public land that is vested in the National Government in trust for the people of Kenya.<sup>86</sup> Section 6(1) of the Mining Act replicates this constitutional provision. In line with the best practices in EI, the 2010 Constitution guarantees environmental protection and sustainable development, which are applicable to the EI. The 2010 Constitution guarantees the right to a clean and healthy environment,<sup>87</sup> which includes the need to protect the environment for present and future generations,<sup>88</sup> conservation and protection of ecologically sensitive areas,<sup>89</sup> equitable access to land,<sup>90</sup> and sustainable production

<sup>82</sup> Article 2, *Constitution of Kenya*.

<sup>83</sup> Article 69, *Constitution of Kenya*.

<sup>84</sup> Article 10, *Constitution of Kenya*.

<sup>85</sup> Article 69, *Constitution of Kenya*.

<sup>86</sup> Article 62(1)(f), *Constitution of Kenya*.

<sup>87</sup> Article 42, *Constitution of Kenya*.

<sup>88</sup> Article 42(1)(a), *Constitution of Kenya*.

<sup>89</sup> Article 60(1)(e), *Constitution of Kenya*.

<sup>90</sup> Article 60 (1)(a), *Constitution of Kenya*.

of land.<sup>91</sup> The constitutional guarantees pertaining to the environment are operationalised through the Environmental Management and Coordination Act.<sup>92</sup> which is the overarching framework legislation for environmental matters in Kenya.

As alluded to above, the EI value chain is complex and is one of the sectors highly predisposed to poor revenue management and weak fiscal regime. In this respect, the 2010 Constitution prescribes principles of public finance, which, if implemented, will be a panacea for these vices. The 2010 Constitution requires public finance to be guided by principles of openness and accountability, which include public participation in financial matters.<sup>93</sup> It also provides that the burdens and benefits of the use of natural resources be shared equitably between present and future generations.<sup>94</sup> The implementation of this provision is critical in ensuring sound management of revenues earned from the EI as minerals and oil reserves are not infinite. Article 201(c) is premised on environmental principles of sustainable development that is, the present generation enjoys its resources because the past generations were prudent in the manner in which they managed the environment. Therefore, the present generation owes it to the future generations to use, exploit and manage the environment sustainably.

Article 35(1) of the 2010 Constitution guarantees the right to access to information by providing that every citizen has the right of access to information held by the State and information held by another person that is required for the exercise or protection of any right or fundamental freedom.

The 2010 Constitution promotes proactive disclosure and bestows upon the State a duty to publish and publicise all important information affecting the nation.<sup>95</sup> This may include information regarding EI activities such as environmental concerns, procurement and contracting processes, and discovery and exploration of natural resources. In addition, article 35(1)(b) provides for access to information held by private bodies in certain instances. This provision progressively brings multinational corporations in the extractives sector within the ambit of Kenya's governance framework making them accountable to the people of Kenya.

In 2016, Parliament of Kenya enacted the AI Act, which essentially gives effect to the constitutional right of access to information. On a strong positive note,

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<sup>91</sup> Article 60(1)(b), *Constitution of Kenya*.

<sup>92</sup> *Environmental Management and Co-ordination Act* (No. 8 Of 1999).

<sup>93</sup> Article 201(a), *Constitution of Kenya*.

<sup>94</sup> Article 201(c), *Constitution of Kenya*.

<sup>95</sup> Article 35(2), *Constitution of Kenya*.

the AI Act heralded that transparency and accountability will be integrated holistically within the EI. This is particularly important as efforts to put in place specific EI policies and laws that would ensure integration of transparency and accountability are yet to be adopted and enacted. The laws and policies aimed at addressing the aforementioned challenges in Kenya's EI as well as averting bad practices in the EI are: the draft Energy Policy, 2015; Energy Bill, 2016; the Local Content Bill, 2016; the National Resource (Benefit Sharing) Bill, 2016; National Sovereign Wealth Fund Bill, 2014; and the Petroleum (Exploration, Development and Production) Bill, 2016 (Petroleum Bill).

The National Sovereign Wealth Fund Bill, 2014, seeks to support the management of the extractives sector, undertake diversified portfolio of medium and long-term local and foreign investment and build a savings base for purposes of national development, stabilisation of the economy and for connected purposes. The Bill proposes the establishment of, among other funds, the Stabilisation Fund, the Infrastructure Development Fund, and a special purpose investment fund known as the Kenya National Sovereign Wealth Fund that will be used for providing ongoing funding for projects meant for future generations. The source of the proposed fund will be revenue accruing from minerals, petroleum reserves, and exploitation of other natural resources.

The Petroleum Bill seeks to align Kenya's petroleum industry with the principles of the 2010 Constitution such as equitable and sustainable use of land. It touches on the framework of contracting, exploration, development and production of petroleum. The proposed law introduces principles of transparency and community participation in the governance of the extractives sector in line with article 10 of the 2010 Constitution. The Cabinet Secretary responsible for petroleum is required to publish a national policy on upstream petroleum operations, and develop and publish any upstream petroleum strategic plans. By requiring the publication of these plans, public oversight and scrutiny is implied in the petroleum exploration and development process. Clause 5 of the proposed law requires the Cabinet Secretary to ensure that all relevant stakeholders participate in the making of the national policy on petroleum operations.

The current public discourse on EI still centers on the need to enact these legislations. Pending the enactment and implementation of these frameworks, it is imperative to examine what mechanisms are available for ensuring transparency and accountability in the EI. The approach in this chapter is necessitated by the attrition and protractions occasioned in attempts to enact these Bills and Kenya's legislative history wherein laws that seek to impose probity upon duty-bearers, and integrate

transparency and accountability have taken a long period of time, even as close as a decade.<sup>96</sup> So rather than allow the thread of the chapter to take a melancholy thread because of uncertainty as to when the Bills will be enacted, it is critical to examine existing legislations that provide a dint of transparency and accountability.

### 3.2.2.2 Access to Information Act

The AI Act provides a roadmap and is the compass on the practical ways of integrating transparency and accountability throughout the EI value chain. Access to information in the EI surmounts information asymmetry and thus both the Government and corporations have better bargaining power.<sup>97</sup> It also fosters contract transparency hence deterring Government officials and companies from operating outside the confines of the law.<sup>98</sup> There is evidence that EI corporations are increasingly opting to operate in jurisdictions where there is contract transparency and predictability.<sup>99</sup> The implementation of the AI Act could facilitate the realisation of these transparency and accountability practices.

### 3.2.2.3 Access to information: application to EI actors

The AI Act brings the EI under its regime. It defines a private body to include a ‘private entity or non-state actor that has exclusive contracts to exploit natural resources’ or ‘private entity or non-state actor that is in possession of information which is of significant public interest due to its relation to the protection of human rights, environment or public safety or to exposure of corruption or illegal actions’.<sup>100</sup> As alluded to above, the EI value chain is complex and involves a broad range of decisions touching on human rights, environmental protection, and public health and safety. It stands to reason then that the application of the AI Act extends to the entire EI value chain. The AI Act has the following objects and purposes, to: a) provide a framework for citizens to access information held by the State; b) provide a framework for public entities and private bodies to proactively disclose information that they hold and to provide information on request in line with the constitutional principles; c) provide a framework to facilitate access to information held by private bodies in compliance with any right protected by the 2010

<sup>96</sup> <https://www.opengovpartnership.org/theme/extractive-industries> on 25 January 2018.

<sup>97</sup> <https://www.opengovpartnership.org/theme/extractive-industries> on 25 January 2018.

<sup>98</sup> <https://www.opengovpartnership.org/theme/extractive-industries> on 25 January 2018.

<sup>99</sup> Oxfam IBIS, *Natural resource watch*, July 2015.

<sup>100</sup> Section 2, *Access to Information Act* (No 31 of 2016).

Constitution and any other law; d) promote routine and systematic information disclosure by public entities and private bodies on constitutional principles relating to accountability, transparency and public participation and access to information; e) provide for the protection of persons that disclose information of public interest in good faith; and f) provide a framework to facilitate public education on the right to access information.<sup>101</sup>

The requirement of proactive disclosure is key to ensuring that access to information is integrated in all Government operations to enable citizens to hold State entities accountable in the governance of the EI sector. Section 4 of the AI Act affirms every citizen's right to access information held by the State.<sup>102</sup> This right is not affected by the citizen's reasons for seeking access to information.<sup>103</sup> While these provisions are commendable, there are concerns regarding whether unnatural persons like CSOs can seek information for their advocacy work. Public entities and private bodies are mandated by the AI Act to provide access to information at a reasonable cost.<sup>104</sup>

#### 3.2.2.4 Disclosure of information to meet user needs

The foundation of the right to access to information is maximum disclosure. That is, information should only be withheld from the public where it is necessary to prevent harm to a legitimate interest and where there is no overriding public interest in knowing the information.<sup>105</sup>

Access to information facilitates good governance. In a bid to integrate good governance, the AI Act mandates public entities to: disclose information on the guidelines, rules and regulations that they employ in their dealings with the public and corporate bodies;<sup>106</sup> provide classes of information to make it easy to identify information held by the entities;<sup>107</sup> publish all relevant facts while formulating policies and laws, and announce the decisions that affect the public before initiating any project.<sup>108</sup> Section 5(2) of the AI Act prescribes that public entities must disseminate information in a manner that takes into consideration the need to reach

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<sup>101</sup> Section 3, *Access to Information Act*.

<sup>102</sup> Section 4(1)(a), *Access to Information Act*.

<sup>103</sup> Section 4(2), *Access to Information Act*.

<sup>104</sup> Section 4(3), *Access to Information Act*.

<sup>105</sup> <http://www.opengovguide.com/topics/right-to-info/> on 12 June 2017.

<sup>106</sup> Section 5(1)(a)(vi), *Access to Information Act*.

<sup>107</sup> Section 5(1)(a)(vii), *Access to Information Act*.

<sup>108</sup> Section 5(1)(c), *Access to Information Act*.



persons with disabilities, the cost, local language, and the most effective method of communication in the local area and the information. The section also prescribes that such information ought to be easily accessible and available free of charge. The implication of these provisions is that pertinent public entities within the EI ought to proactively provide information. These include the Ministry of Mining, which ought to make public information such as the production of sharing agreements that are currently not easily accessible due to delays in the implementation of the Mining Act and the adoption of the Bills discussed above.

Challenges to access to information within the EI include corporations withholding environment impact assessment or part disclosure of information. Corporate structures under which corporations operate may also affect disclosure regimes. Extractives corporations may have presence in tax havens or in least tax paying jurisdictions or in countries where tax information is easily withheld by law, say, by banks.

The AI Act provides that application for access to information has to be in writing in a prescribed manner either in English or Kiswahili.<sup>109</sup> However, where the citizen seeking to access information is unable to write due to illiteracy or disability, the information officer ought to reduce the request into writing in a prescribed manner<sup>110</sup> and provide the citizen interested in the information a copy of the written request.<sup>111</sup> Documents in the extractives sector tend to be numerous, complex, and ensconced in legalese, which can be challenging to even a well-informed advocate. The implication of this provision is that the relevant officers are obligated to assist members of the public to access such information.

### 3.2.2.5 Surmounting limitations to access to information

Section 6 of the AI Act provides nine circumstances under which the right of access to information may be limited. For instance, section 6(1)(e) allows for non-disclosure in the event disclosure is likely to substantially prejudice the commercial interests of an entity. Section 6(1)(g) permits non-disclosure if disclosure of information is likely to ‘significantly undermine a public or private entity’s ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration.’ These limitations have not been well defined in law and may be abused by bureau-

<sup>109</sup> Section 8(1), *Access to Information Act*.

<sup>110</sup> Section 8(2), *Access to Information Act*.

<sup>111</sup> Section 8(3), *Access to Information Act*.

cratic public institutions and private bodies to deny the public access to crucial information. Since Kenya's right to information is quite novel, limitations placed on it should be minimal and narrow to expand the realisation of the right.

However, citizens can successfully counter these limitations and secure information they are seeking if they demonstrate before a court of law that public interest for disclosure outweighs the interests protected by the limitations.<sup>112</sup> Public interest in this context includes the need to; promote accountability of public entities to the public;<sup>113</sup> ensure effective oversight of expenditure of public funds;<sup>114</sup> promote informed debate on issues of public interest;<sup>115</sup> keep the public adequately informed on any danger to public health or safety to the environment;<sup>116</sup> and ensure that statutory authorities with regulatory responsibilities discharge their functions effectively.<sup>117</sup>

Already, Kenyan courts have established the juridical significance of matters of public interest in the EI. In the case of *Friends of Lake Turkana Trust v Attorney General & 2 others*,<sup>118</sup> which concerned an alleged memorandum of understanding between the Government of Kenya and the Government of Ethiopia, entered into in the year 2006, for the purchase of 500 MW of electricity from Gibe III as well as an \$ 800 million grid connection between Kenya and Ethiopia. For purposes of generating the electricity, the Government of Ethiopia constructed dams in River Omo, a dominant source of water for Lake Turkana. The petitioner's contention was that the construction of Gibe III Dam would cause environmental concerns and have an adverse impact on Lake Turkana. The petitioner also claimed that the Government had failed to provide information on the nature of agreements it had with Ethiopia for the supply of electricity to Kenya. The petitioner thus claimed that there was a breach of the right to access to information as provided for in article 35 of the 2010 Constitution. In its decision pertaining to the right to access environmental information, the Environment and Land Court made reference to article 69(1)(d) of the 2010 Constitution, which places an obligation on the State to encourage public participation in the management, protection and conservation of the environment. The Environment and Land Court also added that access to environmental infor-

<sup>112</sup> Section 5(4), *Access to Information Act*.

<sup>113</sup> Section 5 (6)(a), *Access to Information Act*.

<sup>114</sup> Section 5 (6)(b), *Access to Information Act*.

<sup>115</sup> Section 5 (6)(c), *Access to Information Act*.

<sup>116</sup> Section 5 (6)(d), *Access to Information Act*.

<sup>117</sup> Section 5(6)(e), *Access to Information Act*.

<sup>118</sup> [2014] eKLR.

mation was a prerequisite for effective public participation in decision making and monitoring governmental and public sector activities on the environment. The risk of environmental harm posed by the importation of electric power from Ethiopia placed a duty on the Kenya Government to provide information on the importation and transmission of electric power from Ethiopia. In view of this, the petition was partly allowed, and an order of mandamus issued to compel the respondents to make full and complete disclosure of the agreements or arrangements entered into with the Government of Ethiopia for purposes of the supply of electric power.<sup>119</sup>

In *Peter Makau Musyoka & 19 others (Suing on their own behalf and on behalf of the Mui Coal Basin Local Community) v Permanent Secretary Ministry of Energy & 14 others*,<sup>120</sup> the parties approached the High Court for relief on alleged contravention of: the principle of public participation,<sup>121</sup> the right to access to information,<sup>122</sup> and the right to a clean and healthy environment.<sup>123</sup> Subsequently, the parties sought to withdraw the suit. The High Court held that in matters of public interest in the EI, the parties have to conclude their matter and cannot withdraw as such withdrawal could have juridical effects.

Often, confidentiality clauses in contracts are invoked by governments or corporations to not disclose information. In the absence of legislation guaranteeing access to information, it is not unusual for non-state actors or persons keen to keep governments and corporations accountable to refrain from advocacy and publishing reports that have adverse findings in respect of contracts in the EI, for fear of being sued for defamation.<sup>124</sup> This denotes that in the event that the Ministry of Mining or corporations seek to invoke provisions on limitation of the AI Act to bar disclosure of Production Sharing Agreements (PSAs) then the onus is on the persons seeking the disclosure of PSAs to demonstrate that such disclosure fits the bill of public interest encapsulated in section 5 of the Act.

<sup>119</sup> ICJ Kenya, *Access to information law in Kenya: rationale, policy framework and roadmap*, 2016.

<sup>120</sup> *Peter Makau Musyoka & 19 others (Suing on their own behalf and on behalf of the Mui Coal Basin Local Community) v Permanent Secretary Ministry of Energy & 14 others* [2014] eKLR.

<sup>121</sup> Article 10, *Constitution of Kenya*.

<sup>122</sup> Article 35, *Constitution of Kenya*.

<sup>123</sup> Article 42, 70, *Constitution of Kenya*.

<sup>124</sup> <http://www.opengovguide.com/standards-and-guidance/rwi-contract-confidential-report/> on 27 June 2017.

### 3.2.2.6 Specific timeframe for accessing information

The AI Act provides for specific timeframes for access to information. Public officers or private bodies are mandated to decide on citizens' application to access information within twenty one days, whether they provide access to information or not.<sup>125</sup> Public officers or private bodies may extend their decision-making process by fourteen days where the request is for large information, or processing the information within twenty one days would interfere with operations of the information holder or consultations are necessary in order to comply with the request and such consultations cannot be completed within twenty one days.<sup>126</sup> Public officers or private bodies are required to communicate to the applicants their decisions immediately.<sup>127</sup> Where an applicant does not get a response within twenty one days, the application to access to information is deemed to be rejected.<sup>128</sup> Where public officers or private bodies do not have the information being requested for, the officers are required to transfer the application for access within five days of receiving the application to a relevant public entity and communicate the decision of transfer to the applicant within seven days from the date the application was made. The AI Act seeks to mitigate delay of transfer of application to access information for it provides that a public entity or private body to which the application for access to information has been transferred to has to make a decision in respect of the application within twenty-one days from when the application was first made.<sup>129</sup>

### 3.2.2.7 Feedback on decision-making regarding access to information

Where public officers or private bodies have made a decision to provide access to information, they are required by the AI Act to communicate the decision in writing to the applicant within fifteen days of receiving the application. This written communication has to advise the applicant whether the information is contained in edited form or not,<sup>130</sup> payable fees for access and the calculations on how the fees was arrived at,<sup>131</sup> method of payment of the fees,<sup>132</sup> proposed means of access to information once the fees has been paid,<sup>133</sup> and the applicant's right of appeal in re-

<sup>125</sup> Section 9(1), *Access to Information Act*.

<sup>126</sup> Section 9(3), *Access to Information Act*.

<sup>127</sup> Section 9(4), *Access to Information Act*.

<sup>128</sup> Section 9(6), *Access to Information Act*.

<sup>129</sup> Section 10, *Access to Information Act*.

<sup>130</sup> Section 11(1)(b), *Access to Information Act*.

<sup>131</sup> Section 11(1)(c), *Access to Information Act*.

<sup>132</sup> Section 11(1)(d), *Access to Information Act*.

<sup>133</sup> Section 11(1)(e), *Access to Information Act*.

spect of the payable fees.<sup>134</sup> Once the applicant has paid fees as advised, the public officer or public body is to provide the information or permit for inspection to the applicant within two working days.<sup>135</sup>

The Access to Information Commission (AI Commission) established under the AI Act<sup>136</sup> has the jurisdiction to review the decisions made by public officers or private bodies in respect of their application to access information. Such review is permitted in respect of decisions to: refuse access to information; grant information in edited form; grant information not in accordance to the citizen's application; defer providing information; impose fees; and grant information only to a specified person.<sup>137</sup> Citizens have to apply for such review within thirty days from the day they receive decisions on their applications to access to information from public officers or private bodies.<sup>138</sup> However, the AI Commission may also allow applications for reviews of decisions lodged after thirty days from the date public officers or private bodies made their decisions.<sup>139</sup> The orders rendered by the AI Commission are enforceable as a decree, and may be executed in the same manner High Court orders are executed.<sup>140</sup> Persons who are dissatisfied with the AI Commission's orders have a right to 'appeal' to the High Court within twenty one days of the orders being made.<sup>141</sup>

The AI Act seeks to ensure compliance with its provisions by creating offences and imposing penalties in the form of imprisonment or fines.<sup>142</sup> The offences include, failure to: accept request to access to information;<sup>143</sup> respond to application to access to information within the stipulated time;<sup>144</sup> assist requesters to reduce their applications to access to information in writing;<sup>145</sup> and (in case of private bodies) to make public the names and contact details of officers from whom citizens can direct their applications to access to information.<sup>146</sup>

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<sup>134</sup> Section 11(1)(f), *Access to Information Act*.

<sup>135</sup> Section 11(2), *Access to Information Act*.

<sup>136</sup> Section 3, *Commission on Administrative Justice Act* (No. 23 of 2011).

<sup>137</sup> Section 14(1), *Access to Information Act*.

<sup>138</sup> Section 14(2), *Access to Information Act*.

<sup>139</sup> Section 14(2), *Access to Information Act*.

<sup>140</sup> Section 23(5), *Access to Information Act*.

<sup>141</sup> Section 23(3), *Access to Information Act*.

<sup>142</sup> Section 28, *Access to Information Act*.

<sup>143</sup> Section 28(3)(b), *Access to Information Act*.

<sup>144</sup> Section 28(3)(c), *Access to Information Act*.

<sup>145</sup> Section 28(3)(a), *Access to Information Act*.

<sup>146</sup> Section 28(6), *Access to Information Act*.

The benefit of applying access to information law in the EI is that it fosters public approval and citizens' buy-in for the contracts and concessions thus mitigating potential and actual conflicts in communities where resources are being extracted. Already, Kenya's High Court has held, in the case of the Mui Basin project, that,

The Attorney General, and Fenxi Mining Industry Company Limited are required to continue to engage with the local community and provide reasonable opportunities for public participation during the process of preparing an Environmental Impact Assessment and the process of Resettlement as outlined in the Benefits Sharing Agreement for the Mui Basin project.

### 3.2.3 Revenue management

Tracking of revenue accrued from the EI and sound revenue management are areas of potential difficulties on transparency and accountability. It is a global concern to EI experts necessitating the establishment of transparency and accountability initiatives such as EITI, PYWP and RGI.

#### 3.2.3.1 Fiscal regime and tax instruments in Kenya

There are two main types of fiscal regimes in the extractives sector: the concessionary, and contractual systems. Under the contractual system, there are product-sharing agreements, service contracts, participation agreements and hybrid agreements.<sup>147</sup> While the main fiscal instrument adopted by Kenya for the oil and gas sector is the product-sharing agreement, it has elements of Government participation as well as concessionary terms. For example, the model product-sharing agreement provides for signature bonus in addition to the product-sharing. The oil and gas sector also has several instruments of taxation that add to the Government's share of the revenue from production.

Kenya operates a royalty model in respect of minerals. Section 183(5) of the Mining Act stipulates that the holder of mineral rights must pay royalties: seventy percent to the National Government; twenty percent to the respective county government; and ten percent to the community affected by the mining operations.

<sup>147</sup> Stickley D, *A framework for negotiating and documenting petroleum industry transactions*, 2006, 16.

### 3.3 Challenges of transparency and accountability in revenue management

This section highlights about seven challenges facing revenue management in Kenya. The first challenge relates to oil and gas. Kenya's oil and gas sector envisages sharing of revenue as a model to foster equity and stakeholder participation. However, the main law governing revenue sharing in the sector, the Petroleum (Exploration and Production) Act (PEP Act),<sup>148</sup> is thought to be inadequate and has necessitated the introduction of the Petroleum Development and Exploration Bill, 2017.

Prior to the promulgation of the 2010 Constitution, there was no legal framework and mechanism for the public and legislators to engage in the EI, which is a recommended best practice.<sup>149</sup> As a result of this, the oil and gas sector in Kenya was shrouded in secrecy.<sup>150</sup> Section 5(3) of PEP Act now mandates the Cabinet Secretary responsible for petroleum to make available model petroleum agreements to potential contractors as a basis for negotiations for petroleum agreements. The challenge however, is that the actual PSAs between the Government and corporations are not easily available, which makes it impossible to assess the revenues from the oil and gas sector.<sup>151</sup> What is accessible in the public domain, and maintained by State actors, are model production-sharing contracts.<sup>152</sup>

Another challenge is that the PEP Act does not have pertinent provisions to impose obligations on the Government that are critical in ensuring transparency and accountability in the oil and gas sector. These include obligations for relevant public officers: to facilitate access to information on the agreements entered into under the PEP Act upon request; to publish or maintain a database of agreements and licences granted to contractors under the PEP Act; to have clear regulations that include timeframes and requirements for entering into agreements with contractors; and to facilitate public participation of communities in the EI processes that are likely to impact on their livelihoods.

Given that PSA are not in the public domain and are difficult to access even by EI experts in Kenya, it has been difficult to track and access revenues from oil and gas operations. Another challenge is the absence of information on negotiations,

<sup>148</sup> *Petroleum (Exploration, Development and Production) Act*, 2015, Cap 306 of the Laws of Kenya.

<sup>149</sup> Kameri-Mbote P, "Extractive Industry in Kenya: A Blessing or a Curse".

<sup>150</sup> Kameri-Mbote P, "Extractive Industry in Kenya: A Blessing or a Curse".

<sup>151</sup> Kameri-Mbote P, "Extractive Industry in Kenya: A Blessing or a Curse".

<sup>152</sup> <http://www.resourcecontracts.org/contract/ocds-591adf-0842774436/view#/pdf> on 25 January 2018.

timeframes, and other requirements, creating opportunities for corruption and incidents of investors seeking or demanding preferential treatment that gives them a competitive edge in comparison to their competitors. Because there is no standard definition of what constitutes commercially sensitive information and confidentiality clauses, these terms have been used to cover broad range of activities in the EI, which ruefully include bribes.

Although the 2010 Constitution and the AI Act guarantee public participation and access to information, it would be exceptionally difficult to apply these principles in the oil and gas sector without a comprehensive framework. Even then, the PEP Act provides a strong basis for Government to argue that agreements made under this law fall in the category of limitations under section 6 of the AI Act.

Further shortcomings of the PEP Act in respect of access to information and public participation include absence of guidance on the criteria for evaluating applications for exploration licences, petroleum agreements, including gas-sharing terms and rules of transfer of interest in production-sharing contracts. Glaringly, the law does not satisfy the bare minimal standards of public participation as it provides for not less than forty eight hours of notice to be given to the occupier of land and if practicable to the owner, wherein a contractor intends to enter private land for purposes of carrying out petroleum operations.<sup>153</sup> These provisions do not meet the bare minimum standard of ample notice to enable persons affected by a decision to give their views.

### 3.4 Steps towards integrating transparency and accountability

The 2010 Constitution lays the foundation for the public and legislators to be involved in the EI. Article 71(1)(a) of the 2010 Constitution stipulates that ‘a transaction is subject to ratification by Parliament if it involves the grant of a right or concession by or on behalf of any person, including the National Government, to another person for the exploitation of any natural resource.’ This makes a strong case for the enactment of the Petroleum Bill, which seeks to address the shortcomings discussed above. Clause 14 of the Petroleum Bill proposes the establishment of the Upstream Petroleum Regulatory Authority (Authority). In respect of revenue management, sub clause 15 of the Bill proposes the functions of the Authority to include, to:

*(l) verify the measurement of petroleum production to allow for es-*

<sup>153</sup> Section 10(1), *Petroleum (Exploration, Development and Production) Act*.



*timation and assessment of royalties and profits of oil and gas due to the National Government;*

*(m) verify the recoverable cost of oil and gas due to the parties to a petroleum agreement;*

*(n) audit the contractors for cost recovery;*

In terms of access to information, the Petroleum Bill proposes that the Authority, once established, should: provide information to the relevant authority for the collection of taxes and fees from upstream petroleum operations;<sup>154</sup> and ensure the establishment of a central database of persons involved in the upstream petroleum operations.<sup>155</sup> The Petroleum Bill requires that the proposed Authority be tasked with ensuring enforcement and compliance with the National Transparency and Accountability Standards.<sup>156</sup>

The Petroleum Bill proposes a mechanism for revenue management and distribution among the National Government, county governments, and the community. The President has recommended the revenue sharing formula of hydrocarbons to be reviewed so that counties are allocated five percent.<sup>157</sup>

### 3.5 Conclusion

This chapter set out to establish whether the level of access to information in Kenya in the EI is sufficient to meet the constitutional threshold of transparency and accountability. It is clear that access to information is hampered by a number of factors. Notable ones being: in-adequate regulation for community engagement; inadequate financing for exploration and extraction; lack of technical skills and experience; inadequate geological data and information which makes mineral exploration a costly undertaking; environmental degradation, lack of harmonisation of regulatory policies and practices in the extractives sector with existing environmental legislations.

<sup>154</sup> Section 15(p), *Petroleum (Exploration, Development and Production) Bill* (2016).

<sup>155</sup> Section 16(1)(e), *Petroleum Bill*.

<sup>156</sup> Section 16(1)(p), *Petroleum Bill*.

<sup>157</sup> 'Macharia Gaitho: Uhuru's Turkana Tantrums: The 'shetani' in the Details' *Daily Nation*, 14 March 2017 <https://www.nation.co.ke/oped/Opinion/Uhuru-s-Turkana-tantrums/440808-3848432-ijyvqcq/index.html> on 25 January 2018.

### 3.6 Recommendations

This chapter has come up with a number of recommendations, which, if adopted, would enable access to information in the EI. These are:

- the application of freedom of information principles to the extractives sector;
- the enactment of pending Bills such as the Benefit Sharing Bill, Local Content Bill, Petroleum Development and Exploration Bill, and the Sovereign Wealth Fund Bill;
- the implementation of newly adopted policies and laws such as the Mining Act that contain progressive provisions on transparency and accountability;
- Lobbying of Kenya's EI to be part of EITI and PWYP and establish local transparency and accountability mechanisms;
- Capacity building for host communities and non-state actors; and
- Advocacy for a revenue-sharing formula that has local communities in contemplation.

# LAND RIGHTS ISSUES IN THE EXTRACTIVES SECTOR IN KENYA

FRANCIS KARIUKI

## 1. A general background and context

The extractives sector is described as ‘a contested practice,’<sup>1</sup> since the social and environmental concerns,<sup>2</sup> political economy,<sup>3</sup> developmental,<sup>4</sup> and scholarship issues in this area are all beset with conflicting ideals and opinions.<sup>5</sup> Withal, such concerns have not dampened the growth of the extractives industry. Exploration and mining activities are continuing, facilitated by governments and in most places communities are welcoming the concomitant prospects of ‘development’ in their locale.<sup>6</sup>

The contribution of extractives to development is not contested.<sup>7</sup> However, extractive activities, broadly speaking, happen on land posing serious human rights

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<sup>1</sup> Kemp D and Owen J, ‘Community relations and mining: Core to business but not “core business”’ 38 *Resources Policy* (2013), 524.

<sup>2</sup> Davis R and Franks D, ‘The costs of conflict with local communities in the extractive industry’ in Brereton D, Pesce D and Abogabir X, *Proceedings of the First International Seminar on Social Responsibility in Mining*, 1-13. See also Santiago: First International Seminar on Social Responsibility in Mining, October 2011.

<sup>3</sup> Rifai-Hasan PA, ‘Development, power, and the mining industry in Papua: a study of Freeport Indonesia’ 89 *Journal of Business Ethics*, 2 (2009), 129–143.

<sup>4</sup> Gilberthorpe E and Banks G, ‘Development on whose terms? CSR discourse and social realities in Papua New Guinea’s extractive industries sector’ 37 *Resources Policy*, 2 (2012), 185–193.

<sup>5</sup> Kemp and Owen, ‘Community relations and mining: Core to business but not “core business”’, 524.

<sup>6</sup> Bainton N, *The Lihir destiny: Cultural responses to mining in Melanesia*, Australian National University Press, Acton, 2010, ix.

<sup>7</sup> They are, among others, sources of energy, food, employment opportunities and even sustain national economies, see International Institute for Environment and Development and World Business Council for Sustainable Development, *Breaking New Ground: Mining, Minerals and Sustainable Development*, Earthscan Publications, London, 2002, 74.

threats, and impacting on control, access to and use of land.<sup>8</sup> Extractive activities require a lot of land, especially as they proceed from exploration to production phases.<sup>9</sup> Nevertheless, amongst most local communities in Kenya, land is the main source of their livelihoods.<sup>10</sup> Access to and control of land is essential for the realisation of economic, social and cultural rights and is a gateway for many civil and political rights.<sup>11</sup> As a consequence, landlessness, due to dispossession of land by governments and mining or petroleum companies, can threaten the realisation of these inherent and cardinal rights.<sup>12</sup> Correspondingly, there is consensus that rural landlessness is the best predictor of poverty and hunger.<sup>13</sup>

When land (already occupied by local/indigenous groups) is allocated to mining or petroleum companies, the impacts are usually dire.<sup>14</sup> Such allocations normally lead to the extinction of existing land (including customary) rights and land uses by introducing exotic land uses, which also significantly contribute to environmental pollution denying the extractive activities the ‘social license to operate.’<sup>15</sup> They also evoke images of colonisation, economic exploitation and transformation,<sup>16</sup> and are viewed as an emerging global phenomenon of land grabbing.<sup>17</sup> It is, therefore, imperative that environmental, social and governance aspects be infused into the

<sup>8</sup> ‘Traidcraft: Investors running wild on land: The threats posed by international investment agreement’ 2013 [http://www.tjm.org.uk/documents/Investment\\_running\\_wild\\_on\\_landJan13.pdf](http://www.tjm.org.uk/documents/Investment_running_wild_on_landJan13.pdf) on 30 March 2016.

<sup>9</sup> Kenya Civil Society Platform on Oil and Gas, ‘*Setting the Agenda for the Development of Kenya’s Oil and Gas Resources: The Perspectives of Civil Society*’, July 2014, 42. See also Cordaid, ‘*Oil Exploration in Kenya: Success Requires Consultation*’, August 2015, 15. Land is not only required for the exploration and production facilities but also for residential, recreational, road and pipeline facilities.

<sup>10</sup> Human Rights Council, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context*, Miloon Kothari, U.N. Doc. A/HRC/7/16 (Feb. 13, 2008), 67.

<sup>11</sup> Wickeri E and Kalhan A, ‘Land rights issues in international human rights law’ 4 *Malaysian Journal on Human Rights*, 10 (2010), 1.

<sup>12</sup> Wickeri E and Kalhan A, ‘Land rights issues in international human rights law’, 1.

<sup>13</sup> See Leckie S, *Housing and property restitution rights of refugees and displaced persons: Laws, cases, and materials*, Cambridge University Press, Cambridge, 2007. Although access to land is not the only means to eradicate poverty, its effectiveness in helping rural households attain livelihood requirements is amply evident.

<sup>14</sup> Human Rights Watch, ‘*How can we survive here? The impact of mining on human rights in Karamoja, Uganda*’, 3 February 2014.

<sup>15</sup> International Institute for Environment and Development and World Business Council for Sustainable Development, *Breaking New Ground*, xiv.

<sup>16</sup> Bainton, *The Lihir destiny*, ix.

<sup>17</sup> Stephens P, ‘The global land grab: An analysis of extant governance institutions’ 20 *International Affairs Review*, 1 (2011), 1.

activities of the extractives sector<sup>18</sup> for them to benefit local communities.<sup>19</sup>

In the case studies explored in this chapter, exploration and extractive activities have taken place both on community and private land thus intersecting with fairly complex land tenure issues. In Kenya, approximately sixty percent of the landmass is community land,<sup>20</sup> yet the current regulatory framework for community land is woefully deficient and inadequate.<sup>21</sup> This complicates customary land relations, which are part of a complex land matrix that is highly sensitive and contentious in property rights discourses.<sup>22</sup> Thus, the discovery of mineral oils and gas over such lands compounds an already difficult arena.<sup>23</sup>

This chapter examines the issue of land rights related to the extractives sector in Kenya using the Tullow Oil and Tiomin case studies. It proceeds in six parts. Part I is this general introduction. Part II and III give a context into the two case studies. Part IV highlights the main land issues arising in the extractives sector, while Part V outlines relevant policy and legal frameworks in Kenya. Part VI concludes and gives the way forward.

## 2. Tullow Oil in Turkana

Tullow Oil is one of the companies prospecting for oil in Turkana County.<sup>24</sup> Turkana is one of the largest, poorest, most marginalised and famine and drought-prone counties in Kenya.<sup>25</sup> It suffers from cross-border conflicts, cattle rustling, and proliferation of illicit arms used by bandits.<sup>26</sup> Communities in Turkana rely mainly

<sup>18</sup> International Institute for Environment and Development and World Business Council for Sustainable Development, *Breaking New Ground*, xvi.

<sup>19</sup> Owen and Kemp, 'Social licence and mining: a critical perspective' 38 *Resources Policy*, 1 (2013), 29–35.

<sup>20</sup> Jubilee Manifesto, 'Transforming Kenya: Securing Kenya's prosperity', 2013, 44.

<sup>21</sup> Jubilee Manifesto, 'Transforming Kenya', 44.

<sup>22</sup> See Republic of Kenya, *Report of the Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework Constitutional Position of Land and New Institutional Framework for Land Administration*, 2002.

<sup>23</sup> Kenya Civil Society Platform on Oil and Gas, *Setting the Agenda for the Development of Kenya's Oil and Gas Resources: The Perspectives of Civil Society*, 42.

<sup>24</sup> 'Tullow Oil: About Tullow in Kenya' <http://www.tulloil.com/operations/east-africa/kenya> on 31 March 2016.

<sup>25</sup> Earthview Geoconsultants, *Environmental Impact Assessment Report for the proposed 3D Seismic Survey for Block 10BB*, 2012, 1. For example, Block 10BB has a fragile ecosystem with up to 90% of the landmass being arid while the remaining 10% semi-arid.

<sup>26</sup> 'Okoth J: Kenya: A fair share of the oil revenue for the Turkana' 31 May 2012 <http://www.pambazuka.org/land-environment/kenya-fair-share-oil-revenue-turkana> on 31 March 2016.

on pastoralism for their livelihood.<sup>27</sup> Oil discovery has accelerated developments in an area previously neglected by National Government. This has led to competition for land, water and related resources to the detriment of local communities.<sup>28</sup>

Tullow Oil came to Kenya in 2010, after entering into agreements with Africa Oil and Centric Energy to acquire a fifty percent interest in five onshore licences (comprising exploration blocks 10BA, 10BB, 12A, 12B and 13T) covering an acreage of 48, 294 square kilometres and encompassing Baringo, Elgeyo-Marakwet, Homa Bay, Kericho, Kisumu, Nandi and Turkana counties.<sup>29</sup>

Most of the land in Turkana is community land, collectively owned by the residents and managed, on their behalf, by the Turkana County Government – initially Turkana County Council (TCC).<sup>30</sup> In acquiring this land, the National Government did not consult Turkana County Council. As the chairperson of the TCC, Eliud Kerio, observed regarding the transfer of Ngamia 1;

We want to know how the ministries of energy and lands transferred the said land and other parcels from the local residents to strangers. We demand to know the sellers and purchasers of the property, lawyers involved, purchase price and copies of the documents including title deeds, consent and transfers.<sup>31</sup>

Because a community land law was not in place, the acquisition followed the old land regime which was inadequate in protecting community interests.<sup>32</sup> It is said there has been no proper consultation and engagement of local communities on decisions over their resources and National Government is said to be ‘often conspicuously absent or only present briefly’<sup>33</sup> when social and environmental impact issues are being discussed.<sup>34</sup>

<sup>27</sup> Food Economy Group, *Livelihood Profiles: Six Livelihood Zones in Turkana County, Kenya*, 2012, 17 – 21.

<sup>28</sup> Cordaid, *Oil Exploration in Kenya*, 8.

<sup>29</sup> ‘Tullow Oil: Environment and Social’ <http://www.tullowoil.com/operations/east-africa/kenya/environmental-social> on 31 March 2016.

<sup>30</sup> Earthview Geoconsultants, *Environmental Impact Assessment Report for the proposed 3D Seismic Survey for Block 10BB*, 89.

<sup>31</sup> ‘Isaiah Lucheli: Council questions acquisition of land under oil’ *Standard Digital*, 31 March 2012 <http://www.standardmedia.co.ke/mobile/article/2000055270/council-questions-acquisition-of-land-under-oil> on 19 February 2016.

<sup>32</sup> Kenya Civil Society Platform on Oil and Gas, *Setting the Agenda for the Development of Kenya’s Oil and Gas Resources: The Perspectives of Civil Society*, 43.

<sup>33</sup> Cordaid, *Oil Exploration in Kenya*, 22.

<sup>34</sup> Cordaid, *Oil Exploration in Kenya*, 22.

There are complaints that the criterion for determining the amount of compensation due to seismic activities conducted by the company was not clear.<sup>35</sup> Concerns have also arisen regarding compensation for damages occasioned by extractive activities such as livestock injured by traffic.<sup>36</sup>

### 3. The Tiomin Kwale project

Tiomin Resources Inc is a Canadian corporation conducting extractive activities in various parts of the world and currently mining titanium in Kwale.<sup>37</sup> Tiomin obtained mining leases that conferred on it ‘full, irrevocable and exclusive right to mine and process the heavy mineral sands at Kwale.’<sup>38</sup> The mining lease covered mineralisation found under land occupied by people with freehold title deeds and people designated as ‘squatters’ situated on the defunct Ramisi Land.<sup>39</sup> The effect of these long-term lease agreements<sup>40</sup> meant that both squatters and freehold title owners lost their land. It is reported that about 450 households, with an average of seven people per household, were displaced and resettled in Mwaweche, Kidiani and Ramisi Sugar Estate to pave way for the project and will not be able to access their land for a period of ten to fifteen years.<sup>41</sup> This has affected their livelihoods negatively.<sup>42</sup> The responsibilities for compensation and resettlement were split between Tiomin and the Government of Kenya respectively.<sup>43</sup>

It is also noteworthy that the company started operations without having conducted an Environmental Impact Assessment (EIA) study,<sup>44</sup> prompting the community to apply for an injunction to restrain its operations.<sup>45</sup> The company received an

<sup>35</sup> Cordaid, *Oil Exploration in Kenya*, 29.

<sup>36</sup> Cordaid, *Oil Exploration in Kenya*, 29.

<sup>37</sup> Ong’olo D, ‘International Investment and Environmental Issues: The Case of Kenya’s Kwale Mineral Sands Project’, IFD Project Launch Meeting, Jaipur, 13-14 December, 2001, 2.

<sup>38</sup> Huggins G, ‘Tiomin-Kwale Resettlement Action Plan’, Tiomin Kenya Ltd, June 2005, 5.

<sup>39</sup> Huggins, ‘Tiomin-Kwale Resettlement Action Plan’, 5, 9.

<sup>40</sup> Huggins, ‘Tiomin-Kwale Resettlement Action Plan’, 5, 9.

<sup>41</sup> Ong’olo, ‘International Investment and Environmental Issues’, 4.

<sup>42</sup> ‘Environmental Justice Atlas: Titanium Mining in the Kwale District, Kenya’ 30 December 2015 <https://ejatlas.org/conflict/titanium-mining-in-the-kwale-district-kenya> on 17 February 2016.

<sup>43</sup> Huggins, ‘Tiomin-Kwale Resettlement Action Plan’, 11.

<sup>44</sup> An EIA is required under Section 58(2), *The Environmental Management and Coordination Act* (No. 8 of 1999).

<sup>45</sup> The court while granting injunctive orders opined that where a proponent has not fulfilled the requirements of carrying out an EIA, it is immaterial that one is licensed under another law, in this case the Mining Act, Cap. 306, as per Hayanga J, in *Rogers Muema Nzioka & 2 others v Tiomin Kenya Ltd*, [2001] eKLR.

environmental licence for the project in July 2002 and an Environmental Management Plan was approved in January 2003.<sup>46</sup> However, the project has led to the loss of biodiversity in the area<sup>47</sup> and occasioned cultural displacement. The Digo and Kamba communities have lost access to territories that sustain their livelihood and their social networks disrupted.<sup>48</sup> The sacred Kayas and Mafingo, and grave sites (172 grave sites were identified in the mine site area) are also in danger<sup>49</sup> as the communities lose their traditional practices, knowledge and cultures.<sup>50</sup>

#### 4. Key land rights issues in the extractives sector

Due to the significance of land in many communities in Kenya, activities in the extractives sector have led to serious land and human rights violations.<sup>51</sup> Such violations can be more composite when dealing with community land. Key land rights issues arising in the extractives sector include: compulsory acquisition and compensation for loss of land, displacements and involuntary resettlement, overlapping and conflicting tenure arrangements, land speculation, and the rights of indigenous groups and access to the natural environment.

##### 4.1 Compulsory acquisition (eminent domain) and compensation for loss of land

Compulsory acquisition is a power that allows the state to extinguish and take away one's property in the public interest<sup>52</sup> subject to payment of prompt and just compensation of land. Exercise of the power is naturally disruptive whether or not there are proper redress mechanisms including fair and efficient compensation

<sup>46</sup> Huggins, 'Tiomin-Kwale Resettlement Action Plan', 3.

<sup>47</sup> See generally, Huggins, 'Tiomin-Kwale Resettlement Action Plan.' See also Ong'olo, 'International Investment and Environmental Issues', 5. Construction of a ship loading facility and access roads (taking up an area of 5-10ha in Shimoni) has led to loss of biodiversity with the clearance of the coral rag forest and a jetty in the benthic habitat of Wasini.

<sup>48</sup> 'Mining Watch: Background Information: Tiomin Resources Inc. in Kenya' 25 March 2001 <http://miningwatch.ca/blog/2001/3/25/background-information-tiomin-resources-inc-kenya> on 17 February 2016.

<sup>49</sup> Huggins, 'Tiomin-Kwale Resettlement Action Plan', 28. The relocation of graves is traumatic for many households in Africa and carries with it the added burden of potentially upsetting the ancestors.

<sup>50</sup> 'Environmental Justice Atlas: Titanium mining in the Kwale District, Kenya'.

<sup>51</sup> 'Traidcraft: Investors running wild on land: The threats posed by international investment agreement'.

<sup>52</sup> Food and Agriculture Organisation of the United Nation, 'Land Tenure studies: Compulsory acquisition of land and compensation', Rome, 2009, 5.



procedures as required by law.<sup>53</sup> It is viewed as a form of forced or involuntary displacement with underlying power relations,<sup>54</sup> where the state asserts control over resources held by communities.<sup>55</sup> In Kenya, the exercise of the compulsory acquisition power faces a number of hiccups<sup>56</sup> which will be discussed later.

Because of the importance of land, compensation for land loss is inevitable,<sup>57</sup> although some hold the view that land loss can never be justly compensated<sup>58</sup> because compensation is usually based on the market value of land,<sup>59</sup> which fails to fully capture the multiple values and meanings of land to indigenous communities.<sup>60</sup> Monetary compensation cannot be reparative when a community has lost the opportunity to exercise its rights to self-determination, culture and religion upon ancestral lands.<sup>61</sup>

Moreover, economic compensation is insufficient seeing that community land rights manifest themselves as a 'web of interests'<sup>62</sup> with different people having different rights (usufructuary rights) over land. It may, therefore, fail to compensate comprehensively all claimants who enjoy shared rights.<sup>63</sup> Because market evaluation assigns a lesser value to some of these 'unclear land rights,' the value of land

<sup>53</sup> Kairu F and Maneno M, 'Land governance in Kenya: Where did the rain started beating us' 152 *Adili*, (2015), 6.

<sup>54</sup> International Institute for Environment and Development and World Business Council for Sustainable Development, '*Breaking New Ground*', 145.

<sup>55</sup> International Institute for Environment and Development and World Business Council for Sustainable Development, '*Breaking New Ground*', 145.

<sup>56</sup> Republic of Kenya, *Sessional paper No. 3 of 2009 on national land policy*, section 46.

<sup>57</sup> Okidi defines compensation as the 'payment made to a landowner, land occupier or those with other forms of interest in land through use, or occupation, to be rendered in the form of cash, in the provision of alternative land or in any other form in kind, when the original rights have been compulsorily extinguished by the State or local authority in the public interest, to facilitate the construction of a development infrastructure,' See Okidi C, 'Policy and legal framework on development-driven involuntary resettlement in African countries', Moi University School of Environmental Studies, 1993.

<sup>58</sup> Hailson G, 'Small-scale Mining in Africa: Tackling pressing environmental problems with improved strategy' 11 *The Journal of Environmental Development*, 2002, 149-174.

<sup>59</sup> International Institute for Environment and Development and World Business Council for Sustainable Development, *Human Rights and the Mining Sector in Indonesia: A Baseline study*, 2001.

<sup>60</sup> International Institute for Environment and Development and World Business Council for Sustainable Development, '*Breaking New Ground*', 149.

<sup>61</sup> Bradford W, 'Beyond reparations: Justice as indigenism' 6 *Human Rights Review*, 3 (2005), 23.

<sup>62</sup> Meinzen-Dick R and Mwangi E, 'Cutting the web of interests: Pitfalls of formalising property rights' 26 *Land Use Policy*, 1 (2007), 36-43. There rights include the: right to graze, right to fetch water, right to harvest forest resources, right to access sacred sites, right to public spaces, among others.

<sup>63</sup> International Institute for Environment and Development and World Business Council for Sustainable Development, *Breaking New Ground*, 149.

cannot be done without a discussion of indigenous peoples rights,<sup>64</sup> including the cultural beliefs, knowledge and values that they have in relation to land. In Kwale, the monetary compensation package offered for land, crops, and physical structures lost, plus compensatory land were contested by the communities through a series of court cases.<sup>65</sup> For instance, the communities were not appeased with the compensation rates for trees and tree products under the Forests Act,<sup>66</sup> especially the true value of the coconut tree whose compensation was not based on its numerous uses.<sup>67</sup>

Compensation and displacements also have an impact on the social and cultural life of a community.<sup>68</sup> This is explicated by the Kwale case study, where it is reported that communities are unable ‘to offer agricultural presents (at weddings, funerals, or to visiting relations) consisting of bananas, local mangoes, and coconut fruits, as they presently had none of these in their fields.’<sup>69</sup>

## 4.2 Displacements and involuntary resettlement

Displacements (or involuntary resettlements) are a common phenomenon in the extractives sector.<sup>70</sup> They involve ‘the displacement of people arising from development projects such as, dams, bridges, national parks, and roads which encroach on their productive assets, cultural sites and income sources viz, land, grazing fields, other assets, etc.’<sup>71</sup> Involuntary resettlements involve displacements of people against their wishes, as they are not the initiators of their movement.<sup>72</sup> They deny communities access to land,<sup>73</sup> disrupt communal life and erode local

<sup>64</sup> International Institute for Environment and Development and World Business Council for Sustainable Development, *Breaking New Ground*, 151.

<sup>65</sup> Abuya W, ‘What is in a coconut? An enthnocological analysis of mining, social development, vulnerability, and development in rural Kenya’ 14 *African Studies Quarterly* (2013), 2.

<sup>66</sup> *The Forests Act* (No. 7 of 2005) (Repealed).

<sup>67</sup> Abuya W, ‘What is in a coconut? An enthnocological analysis of mining, social development, vulnerability, and development in rural Kenya’, 10.

<sup>68</sup> ‘Oxfam Australia: Impacts of mining’ <https://www.oxfam.org.au/what-we-do/mining/impacts-of-mining/> on 30 March 2016

<sup>69</sup> Abuya W, ‘What is in a coconut? An enthnocological analysis of mining, social development, vulnerability, and development in rural Kenya’, 13.

<sup>70</sup> Centre for Science and Environment, *Sharing the Wealth of Minerals: A report on Profit Sharing with local communities*, 2011, 11.

<sup>71</sup> Huggins, ‘Tiomin-Kwale Resettlement Action Plan’, 3.

<sup>72</sup> Huggins, ‘Tiomin-Kwale Resettlement Action Plan’, 3.

<sup>73</sup> ‘BogumiTerminski: Oil-Induced Displacement and Resettlement: Social Problem and Human Rights Issue’ 2011, 11 <http://ssrn.com/abstract=2029770> on 31 March 2016.

cultures,<sup>74</sup> occasion landlessness, homelessness, loss of livelihoods, termination of access to shared resources, diminish standards of living,<sup>75</sup> dismantle settlement patterns and modes of production, create profound health problems, disrupt social networks, cause environmental damage and diminish people's sense of control over their lives.<sup>76</sup>

Amongst rural communities, such as those in Kwale and Turkana, access to and use of land defines and inextricably links them with their spiritual, cultural and social identities<sup>77</sup> within and across generations,<sup>78</sup> meaning that displacements can cause irreversible damage and lead to states of vulnerability.<sup>79</sup> Harm occasioned by displacements cannot be adequately compensated in economic terms or through relocation to alternative lands.<sup>80</sup> It is reported that after communities in Kwale lost their land, crops (especially the coconut trees), and graves, many have been living in abject poverty due to inability to adapt to the reallocated lands.<sup>81</sup> Clearly, displacement should be the very last option, if at all necessary, and must be done with the prior and informed consent of communities.

### 4.3 Overlapping and conflicting tenure arrangements

Granting the right to extract natural resources effectively takes away land rights from one party and vests them on another<sup>82</sup> even if one is to argue that ex-

<sup>74</sup> Michael C, 'Risks, safeguards and reconstruction: A model for population displacement and resettlement' in Michael C and McDowell C, *Risks and Reconstruction: Experiences of Resettlers and Refugees*, World Bank Publications, 2000, 11-15.

<sup>75</sup> International Institute for Environment and Development and World Business Council for Sustainable Development, *Breaking New Ground*, xviii.

<sup>76</sup> Huggins, 'Tiomin-Kwale Resettlement Action Plan', 3.

<sup>77</sup> Wickeri E and Kalhan A, 'Land rights issues in international human rights law', 3.

<sup>78</sup> Republic of Kenya, *Report of the Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework Constitutional Position of Land and New Institutional Framework for Land Administration*, 19.

<sup>79</sup> Abuya W, 'What is in a coconut? An ethnoecological analysis of mining, social development, vulnerability, and development in rural Kenya', 14.

<sup>80</sup> As indicated elsewhere in this study, compulsory acquisition in Kenya ignores the multiple values and meanings attached to land. See, Asian Development Bank, *Handbook on resettlement: A guide to good practice*, 1998, 6. See also Heller M and Hills R, 'Land Assembly Districts' 121 *The Harvard Law Review*, (2008), 1467-1527.

<sup>81</sup> Abuya W, 'What is in a coconut? An ethnoecological analysis of mining, social development, vulnerability, and development in rural Kenya', 14.

<sup>82</sup> International Institute for Environment and Development and World Business Council for Sustainable Development, *Breaking New Ground*, 146.

tractives are vested on the state.<sup>83</sup> Communities have multifarious interests in their lands that can be violated if land is acquired without their prior informed consent.<sup>84</sup> Violation of community land rights becomes more pronounced if the laws regulating such rights are inadequate and natural resources are found on community land.<sup>85</sup> This creates tenure overlaps and conflicts,<sup>86</sup> and allows the government to give mining concessions without considering adequately any private and community land rights.<sup>87</sup> Tenure insecurity<sup>88</sup> ensues hampering community participation in decision-making and defending their rights, and creating mistrust between local communities, government and the extractives industry.<sup>89</sup>

#### 4.4 Land speculation

Discovery of minerals or petroleum brings forth the problem of land speculation. Land speculation arises when investors buy land from unsuspecting local communities with the intention of reselling later at higher prices or gaining compensation during compulsory acquisition.<sup>90</sup> For example, although the Turkana region has been neglected development-wise by successive governments since independence,<sup>91</sup> the discovery of oil has turned the region into an area of great strategic<sup>92</sup> and economic importance.<sup>93</sup> In both case studies, land speculation has

<sup>83</sup> See generally Article 62, *The Constitution of Kenya* (2010).

<sup>84</sup> Oxfam Australia, *Guide to Free Prior and Informed Consent*, 2010, 1.

<sup>85</sup> FERN, *Securing community land and resource rights in Africa: A guide to legal reform and best practices*, 2013, 6

<sup>86</sup> See generally Article 62, *The Constitution of Kenya*.

<sup>87</sup> International Institute for Environment and Development and World Business Council for Sustainable Development, *Breaking New Ground*, xviii.

<sup>88</sup> Due to weak land institutional structures; lack of protection for community land rights; lack of access to efficient dispute resolution forums; unfair compensation mechanisms; corruption and indifference to the rights of local and indigenous communities. See International Institute for Environment and Development and World Business Council for Sustainable Development, *Breaking New Ground*, 146.

<sup>89</sup> International Institute for Environment and Development and World Business Council for Sustainable Development, *Breaking New Ground*, xix, 144.

<sup>90</sup> Kum K, 'The Nexus between Mining and Speculative Activities in Ghana: A Case of Newmont Akyem Enclave' unpublished MSc Thesis, Kwame Nkrumah University of Science and Technology, 2014, 10, 67.

<sup>91</sup> 'Abdullahi Halakhe: Avoiding the resource curse in Kenya: Could long-standing community grievances impact oil drilling in Kenya?' *Aljazeera* 17 May 2014 <http://www.aljazeera.com/indepth/opinion/2014/05/avoiding-resource-curse-kenya-2014517115053638503.html> on 30 March 2016.

<sup>92</sup> Cordaid, *Oil Exploration in Kenya*, 16. See also 'Okoth J: Kenya: A fair share of the oil revenue for the Turkana'.

<sup>93</sup> 'Kibiwott Koros: Keep off oil-rich Turkana, former President Kibaki warns land grabbers out to fleece gullible residents' *Standard Digital* 19 October 2014

created great incentives for land acquisition from gullible residents for speculation purposes occasioning displacements and loss of livelihoods.

Land speculation is well explained using the moral hazard theory. According to the theory, legal protection against risks gives one an incentive to take on more risks or engage in fraudulent conduct.<sup>94</sup> In the extractives sector, the legal requirement to compensate persons whose land is acquired is a moral hazard<sup>95</sup> that motivates people to buy land in anticipation of better compensation<sup>96</sup> or in the hope that prices will skyrocket in the near future.<sup>97</sup> Incidences of fraud in the land sector are also reported to have increased in Turkana recently.<sup>98</sup>

#### 4.5 Indigenous groups and access to natural environment

Indigenous peoples<sup>99</sup> are some of the poorest and most marginalised peoples in the world<sup>100</sup> yet their territories are richly endowed with oil, gas, minerals, timber and other valuable resources.<sup>101</sup> Their indigenous cultural, economic and spiritual practices are closely tied to their territories.<sup>102</sup> This reality gives rise to tension

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<http://www.standardmedia.co.ke/article/2000138758/keep-off-oil-rich-turkana-former-president-kibaki-warns-land-grabbers-out-to-fleece-gullible-residents> on 30 March 2016.

<sup>94</sup> Steinsson S, 'The Moral Hazard of Humanitarian Intervention The Victims of Genocidal Violence as Risk-Takers and Fraudsters?' unpublished BA Thesis, University of Iceland, 2013.

<sup>95</sup> Kum K, 'The Nexus between Mining and Speculative Activities in Ghana: A Case of Newmont Akyem Enclave', 30.

<sup>96</sup> Kum K, 'The Nexus between Mining and Speculative Activities in Ghana: A Case of Newmont Akyem Enclave', 30.

<sup>97</sup> 'Kibiwott Koros: Keep off oil-rich Turkana, former President Kibaki warns land grabbers out to fleece gullible residents'.

<sup>98</sup> 'Kibiwott Koros: Keep off oil-rich Turkana, former President Kibaki warns land grabbers out to fleece gullible residents'.

<sup>99</sup> Although the use of the term in describing communities is contested, most communities within marginalised areas where mining happens can be described as indigenous peoples. Some of the characteristics of indigenous peoples are: (a) self-identification; (b) a special attachment to and use of their ancestral lands and territories that have a fundamental importance for their collective physical and cultural survival as peoples and (c) a state of subjugation, marginalisation, dispossession, exclusion, or discrimination because of their cultures, ways of life, or modes of production that are different from the national hegemonic and dominant model. See, *Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples*, 4. See also Wilmer F, *The indigenous voice in world politics*, Sage Publishers, 1993, 97.

<sup>100</sup> 'Netherlands Centre for Indigenous Peoples: Indigenous issues' 1 November 2010 <http://indigenous-peoples.nl/indigenous-peoples/indigenous-issues> on 31 March 2016.

<sup>101</sup> *Indigenous peoples and the Millennium Development Goals*, UN Economic and Social Council, E/C.19/2005/4/Add.13, 9.

<sup>102</sup> Howard M, *The Impact of the International Mining Industry on Native Peoples*, Transnational Corporations Research Project, Sydney, 1988, 258. See also International Institute on Environment and Development, *Baseline Study on Indigenous Peoples Issues*, 2001.

between governments and indigenous communities over control over their resources.<sup>103</sup> As explained above, the communities in the case studies fit within the broad description of indigenous peoples. In both, Kwale and Turkana access to and use of land is defined and inextricably linked with their spiritual, cultural and social identities within and across generations meaning that displacements and loss of land is tantamount to violation of their indigenous rights and rights of access, control and use of their territories.

## 5 Legal and policy frameworks in Kenya

Legal and policy frameworks guiding land and minerals in Kenya are both international and municipal.

### 5.1 The international legal framework

International law recognises *inter alia* the rights to property,<sup>104</sup> culture,<sup>105</sup> natural resources, religious freedom,<sup>106</sup> and economic, social and cultural development<sup>107</sup> of local communities affected by extractive activities.

<sup>103</sup> In *Centre for Minority Rights Development (Kenya) v Kenya*, ACmPHR Comm 276/2003, found that the Kenyan government had disenfranchised the Endorois community evicting it from the Mochogoi forest. The government was thus asked to reconstitute to the community their ancestral land. See also International Institute on Environment and Development and Food and Agricultural Organisation, *Better Land Access for the Rural Poor: Lessons from Experience and Challenges Ahead*, 2006, 31. See also *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, ACmHPR Comm 155/96, where the African Commission found the Nigerian government to have violated the rights of the Ogoni people to property, natural resources and to a satisfactory environment suitable for their development under the African Charter.

<sup>104</sup> See Article 14, *African Charter on Human and Peoples' Rights*, 27 June 1981, OAU Doc. CAB/LEG/67/3rev.5, 211.L.M. 58(1982), which provides that: 'The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws'.

<sup>105</sup> Article 17(2), *African Charter on Human and Peoples' Rights* recognises the right of every individual to freely take part in the cultural life of his community. UNGA, *United Nations Declaration on the Rights of Indigenous Peoples*, U.N. Doc. A/ Res/61/295 13 September 2007, Article 26, recognises the rights of indigenous peoples to their lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired and to ownership of those resources. See also Article 27, *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171.

<sup>106</sup> See generally Article 8, *African Charter on Human and Peoples' Rights*.

<sup>107</sup> Article 22, *African Charter on Human and Peoples' Rights* states that: 'All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.'

The requirement for free, prior and informed consent (FPIC) of local communities is needed before and after mining operations.<sup>108</sup> FPIC is ‘consent to an activity that is given after receiving full disclosure regarding the reasons for the activity, the specific procedures the activity would entail, the potential risks involved, and the full implications that can realistically be foreseen.’<sup>109</sup> Requests for consent should be accompanied by full disclosure in writing in the local language of the following: purpose of the activity; identity of those carrying out the activity and its sponsors, if different; the benefits for the people or person whose consent is being requested and for the sponsors; costs and disadvantages for the people whose consent is being requested; possible alternative activities and procedures; any risks entailed by the activity; discoveries made in the course of the activity that might affect the willingness of the people to continue to cooperate; the destination of the knowledge or material that is to be acquired, its ownership status, and the rights of local people to it once it has left the community; any commercial interest that the performers and sponsors have in the activity and in the knowledge or material acquired; and the legal options available to the community if it refuses to allow the activity.<sup>110</sup> It implies the ‘right to stop the activity from proceeding, and for it to be halted if it is already underway.’<sup>111</sup> Unlike EIAs, FPIC goes beyond mere information provision or consultation. For example, before compulsorily acquiring their land for mining operations, communities to be affected must give their FPIC.<sup>112</sup> Dutfield explains that FPIC is a necessary but not a sufficient requirement for equitable benefit sharing arrangements unless ‘it is acquired according to procedures that are effective, culturally appropriate, transparent and flexible.’<sup>113</sup>

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<sup>108</sup> For instance, Economic Community of West African States, *Directive C/DIR. 3/05/09 on the Harmonisation of Guiding Principles and Policies in the Mining Sector*, Abuja, 27 May 2009, which directs that: “Companies shall obtain free, prior, and informed consent of local communities before exploration begins and prior to each subsequent phase of mining and post-mining operations.” See also the *Resolution on a Human Rights-Based Approach to Natural Resources Governance*, ACmHPR Res 224 of May 2012, calling on States to ensure the participation of local communities in decision making over natural resources, including the giving of their free, prior and informed consent. See also UNGA, *United Nations Declaration on the Rights of Indigenous Peoples*, Article 32.

<sup>109</sup> Dutfield G, ‘Protecting the rights of Indigenous Peoples: Can Prior Informed Consent help?’ in Rachel W, Doris S and Roger C, *Indigenous Peoples, Consent and Benefit Sharing: Lessons from the San-Hoodia Case*, Dordrecht: Springer, 2009, 60.

<sup>110</sup> Dutfield G, ‘Protecting the rights of Indigenous Peoples: Can Prior Informed Consent help?’, 60.

<sup>111</sup> Dutfield G, ‘Protecting the rights of Indigenous Peoples: Can Prior Informed Consent help?’, 60.

<sup>112</sup> Oxfam America Research Backgrounder Series, *Free, prior, and informed consent in Africa: An emerging standard for extractive industry projects*, 2014, 7.

<sup>113</sup> Dutfield G, ‘Protecting the rights of Indigenous Peoples: Can Prior Informed Consent help?’, 53.

Internationally, displacements caused by natural resource projects are prohibited except when there are ‘compelling or overriding’ public interests.<sup>114</sup> The 2001 United Nations Basic Principles and Guidelines on Development-based Evictions and Displacement obligate states to ‘protect against the displacement of indigenous peoples, minorities, peasants, pastoralists, and other groups with a special dependency on and attachment to their lands.’<sup>115</sup>

Regional and international human rights bodies are becoming concerned with increasing violation of local communities’ customary rights of access and control of various resources, including land, minerals, forestry and fishing.<sup>116</sup>

## 5.2 Domestic frameworks in Kenya

Besides the international component, Kenya’s legal system has elaborate legislation on land and the extractives sector.

### 5.2.1 Land ownership and security of land rights

The Constitution of Kenya (2010 Constitution) dedicates a whole chapter to land and environment,<sup>117</sup> underscoring their importance in Kenya’s development.<sup>118</sup> It defines land broadly to include the earth surface and the subsurface rock, any body of water on or under the surface, marine waters in the territorial sea and exclusive economic zone, natural resources completely contained on or under the surface and the air space above the surface.<sup>119</sup> Natural resources are the physical non-human

<sup>114</sup> ‘United Nations: Basic Principles and Guidelines on Development-based Evictions and Displacement’ 2007, 13, 27, [http://www.ohchr.org/Documents/Issues/Housing/Guidelines\\_en.pdf](http://www.ohchr.org/Documents/Issues/Housing/Guidelines_en.pdf) on 31 March 2016. The Guidelines require those concerned to seek the free and informed consent of those that will be displaced; notification of communities about the reasons and procedures for displacement, compensation and relocation; involving communities in the planning and management of the relocation; and ensuring access to legal remedy.

<sup>115</sup> ‘United Nations: Basic Principles and Guidelines on Development-based Evictions and Displacement’, 13, 27.

<sup>116</sup> *Resolution on a Human Rights-Based Approach to Natural Resources Governance*, ACmHPR. See also *African Commission on Human and Peoples’ Rights v The Republic of Kenya*, App 006/2012, Order of Provisional Measures, 15 March 2013, [http://www.african-court.org/ar/images/documents/Orders-Files/ORDER\\_of\\_Provisional\\_Measures\\_African\\_Union\\_v\\_Kenya.pdf](http://www.african-court.org/ar/images/documents/Orders-Files/ORDER_of_Provisional_Measures_African_Union_v_Kenya.pdf) on 31 March 2016 where the Commission noted that the Ogiek community faced the “risk of irreparable harm” if evicted from their traditional lands in the Mau Forest.

<sup>117</sup> See generally Chapter 5 (Articles 60-72), *The Constitution of Kenya*.

<sup>118</sup> For a further discussion on the importance of land in Kenya’s development, See generally Vision 2030 blue print.

<sup>119</sup> Article 260, *The Constitution of Kenya*.



factors and components, whether renewable or non-renewable, including rocks, minerals, fossil fuels and other sources of energy.<sup>120</sup>

Land belongs to the people of Kenya (as holders of the radical or ultimate title)<sup>121</sup> and is classified as public, community or private.<sup>122</sup> All extractives are part of public land<sup>123</sup> and are vested in the National Government in trust for the people of Kenya and administered on their behalf by the National Land Commission (NLC).<sup>124</sup> Since extractives may be on community or private land, the question of security of communities' land rights becomes central. This is so because of the potential overlap and conflict of interests, between, *inter alia*, the State, those with mineral rights (mining companies), local communities and individuals over land endowed with extractives.

Although land endowed with minerals is classified as public land, communities have rights and interests over such lands (customary rights of grazing, water, exercising cultural and religious practices, among others) that are also recognised by the 2010 Constitution.<sup>125</sup> All property rights<sup>126</sup> (including community land rights) are guaranteed by the 2010 Constitution.<sup>127</sup> Secure land rights are quintessential in the realisation of other rights, such as social and economic rights,<sup>128</sup> clean

<sup>120</sup> Article 260, *The Constitution of Kenya*.

<sup>121</sup> See generally Article 61, *The Constitution of Kenya*. Public land is owned collectively by the nation and includes lands described in Article 62(1). Community land is owned by specific communities and includes the categories of lands in Article 63(2). Private land is land owned by individuals as either freehold or leasehold interests as described in Article 64 of the Constitution.

<sup>122</sup> All the three tenure categories enjoy equal protection under the law.

<sup>123</sup> Article 62(1)(f), *The Constitution of Kenya*. See also Section 6, *The Mining Act* (No. 12 of 2016) and Section 3, *Petroleum Exploration and Production Act* (Chapter 308, Laws of Kenya).

<sup>124</sup> Article 62(3), *The Constitution of Kenya*. The National Land Commission is the organ charged with the management of public land. See Article 67, *The Constitution of Kenya* and Section 5(1), *The National Land Commission Act* (No. 5 of 2012).

<sup>125</sup> See generally Article 69, *The Constitution of Kenya* on obligations in respect of the environment and Article 71 thereof requiring the ratification of agreements relating to natural resources by Parliament - it involves granting of a right or concession for the exploitation of natural resources.

<sup>126</sup> The term 'property' is defined to include any vested or contingent right to, or interest in or arising from: land, or permanent fixtures on, or improvements to, land; goods or personal property; intellectual property; or money, choses in action or negotiable instruments, Article 260, *The Constitution of Kenya*.

<sup>127</sup> Article 40(1), *The Constitution of Kenya* provides that subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property: of any description; and in any part of Kenya. Further, clause (2) thereof prohibits the State/Parliament from enacting a law that permits the State or any person: to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

<sup>128</sup> They include the right to health; the right to accessible and adequate housing and reasonable standards of sanitation; right to be free from hunger and to have adequate food of acceptable quality; right to clean and safe water in adequate quantities and right to social security. See generally Article 43(1), *The*

and healthy environment,<sup>129</sup> life,<sup>130</sup> and culture.<sup>131</sup> However, property rights can be extinguished by the State in exercise of its eminent domain powers.<sup>132</sup>

Further, land in Kenya must be held, used and managed in an equitable, efficient, productive, and sustainable manner.<sup>133</sup> Land management must also be in accordance with, *inter alia*, the principles of equitable access; security of land rights; sustainable and productive management; transparent and cost effective administration; sound conservation and protection of ecologically sensitive areas; and elimination of gender discrimination.<sup>134</sup>

The community land law envisaged under Article 63(5) of the 2010 Constitution was enacted in 2016. The Community Land Act<sup>135</sup> defines the three bases for holding community land more broadly. It defines a ‘community’ as a consciously distinct and organised group of users of community land who are citizens of Kenya and share any of the following attributes-common ancestry; similar culture or unique mode of livelihood; socio-economic or other similar common interest; geographical space; ecological space; or ethnicity.<sup>136</sup> It is apparent that the law has attempted to take into account the dynamism of communities, for instance, by catering for communities with different ethnic or cultural heritage but which have been sharing land and related resources.

Management of community land is to be done by community assemblies in a democratic manner and decisions made by not less than two-thirds of the community assembly.<sup>137</sup> A community assembly is to elect between seven and fifteen members of the assembly to constitute a community land management committee. It is the community land management committee that is responsible for the day-to-day affairs of the community and management and administration of community land on behalf of the respective community.<sup>138</sup> It is also the responsibility of the committee to coordinate the development of community land use plans and to promote the co-operation and participation among community members in dealing with matters

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*Constitution of Kenya.*

<sup>129</sup> Article 42, *The Constitution of Kenya.*

<sup>130</sup> Article 26, *The Constitution of Kenya.*

<sup>131</sup> Article 44, *The Constitution of Kenya.*

<sup>132</sup> See Article 40(3), *The Constitution of Kenya.*

<sup>133</sup> Article 60(1), *The Constitution of Kenya.*

<sup>134</sup> Article 60(1), *The Constitution of Kenya.*

<sup>135</sup> *The Community Land Act* (No. 27 of 2016).

<sup>136</sup> Section 2, *The Community Land Act.*

<sup>137</sup> Section 15(2), *The Community Land Act.*

<sup>138</sup> Section 15(4), *The Community Land Act.*

pertaining to the respective registered community land.<sup>139</sup> Unregistered community land is to be held by county governments in trust for communities.<sup>140</sup> Upon registration of the community land, it would follow that the registered community would resume management and the trustee role of the county government ceases.

The establishment of community assemblies and the community land management committees may water down traditional governance structures for the management of land and land-based resources especially where communities are identified on the basis of ethnicity or similar cultures such as pastoralism or hunting and gathering. Most traditional communities in Kenya have traditional structures that are unique, and therefore requiring communities to have assemblies without taking into account this social fact is fallacious. Traditional governance institutions such as those amongst the *Kamasian* council of elders of the Kipsigis, the Kaya elders among the Mijikenda people or the *Njuri Ncheke* among the Meru are vital in land management.<sup>141</sup> The composition of these institutions is largely drawn from one tribe or ethnicity, and therefore providing for a community assembly that may include non-members of the tribe or ethnicity is a misconception of the commons. The fact that the law overlooks the already existing traditional governance structures and goes ahead to create its own formal institutions signifies the continued attempt, as explained by Okoth-Ogendo, to expropriate the commons property regimes.<sup>142</sup> There is a need to engage ethnic and indigenous communities and their indigenous institutions in managing their lands and territories as observed by the Inter-American Court of Human Rights. In *Saramaka People v Suriname*,<sup>143</sup> the Inter-American Court of Human Rights was of the view that consultations with the intention of acquiring traditional resources must not be done using the state-established mechanisms but ‘...through culturally appropriate procedures...’ It is, therefore, evident that the cultural institutions of ethnic and indigenous communities occupy a central role in the management and control of their properties and must be adhered to.

<sup>139</sup> Section 15(4), *The Community Land Act*.

<sup>140</sup> Section 6(1), *The Community Land Act*.

<sup>141</sup> See Kariuki F, ‘Conflict resolution by elders in Africa: Successes, challenges and opportunities’ The Chartered Institute of Arbitrators Centenary Conference ‘Learning from Africa’, Livingstone, 15 July 2015.

<sup>142</sup> See Okoth-Ogendo, H, ‘The tragic African commons: A century of expropriation, suppression and subversion’ 1 *University of Nairobi Law Journal* 107 (2003).

<sup>143</sup> *Saramaka People v Suriname*, IACtHR Judgment of 28 November 2007.

A decision to dispose of or alienate community land by a registered community shall be binding if it is supported by at least two thirds of registered members of the community.<sup>144</sup> Alienation of community land must take into account the bio-spiritual and bio-cultural contexts within which land is held so as to respect the rights of the past (ancestors or spirits) and future generations who are also viewed as ‘owners.’ It would be important for the management of community resources to be informed by this transgenerational norm.

Natural resources found in community land are to be used and managed sustainably and productively; for the benefit of the whole community including future generations; with transparency and accountability; and on the basis of equitable-sharing of accruing benefits.<sup>145</sup> In this regard, it requires agreements relating to investment in community land to be made after a free, open and consultative process.<sup>146</sup> For an agreement between an investor and the community to be valid, a community assembly meeting must be called and two-thirds of adult members of that community must vote in favour.<sup>147</sup>

It is worth noting that the management of community land is also subject to national and county government laws and policies relating to: fishing, hunting and gathering; protection of animals and wildlife; water protection; forestry; environmental laws; energy policy; and exploitation of minerals and natural resources.<sup>148</sup> One cannot but wonder why the law makes this provision in light of the fact that indigenous communities and marginalised groups in Kenya have criticised the National Government for implementing such policies to their detriment. Communities therefore still face an uphill task in protecting rights over their land.

## 5.2.2 Granting of exploration and mining licences and surface rights

Land is a critical resource in the development of energy and petroleum infrastructure<sup>149</sup> but competing land uses pose a challenge to the provision of reliable and sustainable energy while upholding land, environmental, health and safety rights of the people.<sup>150</sup> As indicated earlier, minerals and mineral oils are vested in

<sup>144</sup> Section 15(5), *Community Land Act*.

<sup>145</sup> Section 35, *The Community Land Act*.

<sup>146</sup> Sections 36(2) and (3), *The Community Land Act*.

<sup>147</sup> Section 36(3), *The Community Land Act*.

<sup>148</sup> Section 38(2), *The Community Land Act*.

<sup>149</sup> Republic of Kenya, *The National Energy and Petroleum Policy* 2015, 92.

<sup>150</sup> Republic of Kenya, *The National Energy and Petroleum Policy*, 92 - 98. These challenges are compounded by inadequate land use plans; lack of a comprehensive and fair compensation mechanisms;

the State<sup>151</sup> despite any rights any person may have in relation to any land in, on or under which any minerals are found.<sup>152</sup> The Petroleum (Exploration and Production) Act<sup>153</sup> confers on the Cabinet Secretary responsible for the extractive the role of negotiating and concluding petroleum agreements for exploration, development and production.<sup>154</sup> One cannot engage in lawful petroleum operations without permission from the Cabinet Secretary.<sup>155</sup> The Cabinet Secretary can by notice divide land and the continental shelf into blocks and enter into a petroleum production and sharing agreement with a qualified contractor.<sup>156</sup> Essentially, the petroleum production and sharing contract grants companies acreages over which to explore and produce oil.

Under the Mining Act,<sup>157</sup> it is an offence to prospect or mine without a permit or licence granted by the Cabinet Secretary responsible.<sup>158</sup> A holder of a mineral right<sup>159</sup> or their agent or employee must produce evidence of that right if required to do so by any lawful owner or occupier of the land while exercising a right under the mineral right over land owned or occupied by that other person.<sup>160</sup> Moreover, such an owner or lawful occupier or user of an area of land which is the subject of a mineral right must continue to enjoy the right to graze livestock on the land or to cultivate the land so long as it does not unduly interfere with the relevant prospecting or mining operations; and that those operations do not constitute a danger or hazard to livestock or crops.<sup>161</sup>

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lack of a national resettlement action plan framework; and low public awareness and sensitisation on the right to a clean and safe environment. Therefore, the Policy requires its implementation to be linked with the provisions of the National Land Policy on access to land, planning, utilisation and administration.

<sup>151</sup> Article 62, *The Constitution of Kenya*; Section 6(1), *The Mining Act*. Section 3, *Petroleum Exploration and Production Act*.

<sup>152</sup> Section 6(2), *The Mining Act*.

<sup>153</sup> *Petroleum Exploration and Production Act*.

<sup>154</sup> Section 5(3), *The Petroleum Exploration and Production Act*.

<sup>155</sup> Section 4, *The Petroleum Exploration and Production Act*.

<sup>156</sup> Section 9(F) thereof requires the contractor to, *inter alia*, conduct operations in line with sound professional and technical skills and adopt measures for the conservation of petroleum and other resources and protecting the environment and human life. Where access to private land is needed, a contractor must serve notice and pay any damages occasioned, section 10.

<sup>157</sup> *The Mining Act*.

<sup>158</sup> Section 10, *The Mining Act*.

<sup>159</sup> A 'mineral right' means a prospecting licence, retention licence, mining licence, prospecting permit, mining permit or an artisanal permit, section 4, *The Mining Act*.

<sup>160</sup> Section 151, *The Mining Act*.

<sup>161</sup> Section 152, *The Mining Act*.

Licence holders must restrict their work to specified lands and certain lands are excluded from prospecting and mining, including community land (unless with the consent of the community assembly or the NLC in relation to unregistered community land), land within a township, municipality or trading centre unless with approval of the governor of the respective county,<sup>162</sup> private land except with the owner's consent (such consent shall not be unreasonably withheld),<sup>163</sup> among others.<sup>164</sup> In *Kasigau Ranching (DA) Ltd v Kihara & 4 Others*,<sup>165</sup> the applicants were the registered owners of the land in question, while the respondents (holders of a mining licence) were carrying out prospecting on the said land without the applicant's consent. The High Court found that

[P]rivate lands are exempted from prospecting and mining except with the consent of the landowner and the Minister is not authorised to send persons to private lands for the purpose of prospecting and mining without the consent of the owners.

Customary rights are reserved under the Mining Act in that nothing prevents a person from taking, subject to prescribed conditions, soil, clay, iron, salt or soda from lands from which it is customary for members of that community to take.<sup>166</sup>

An owner or any lawful occupier or user of land is entitled to demand or claim prompt, adequate and fair compensation from the holder of a mineral right where the mining operations: disturbs or deprives him/her the user or occupation of the land or part of the land; causes loss of or damage to buildings and other immovable property; causes damage to the water table or deprives the owner of water supply; causes any loss of earnings or sustenance in the case of land under cultivation or grazing of domesticated animals.<sup>167</sup> In this regard, a mineral right holder must deposit a compensation guarantee bond with the relevant ministry to be used for compensation.<sup>168</sup> In addition, the Cabinet Secretary, in consultation with the community and the NLC, is mandated to ensure that inhabitants or communities who prefer to be compensated by way of resettlement as a result of being displaced by a proposed mineral operation are settled on suitable alternative land, with due regard to their economic wellbeing, social and cultural values and the resettlement

<sup>162</sup> Section 36(2)(d), *The Mining Act*.

<sup>163</sup> Section 37(1), *The Mining Act*.

<sup>164</sup> See generally Section 7, *The Mining Act*.

<sup>165</sup> [2006] KLR (E&L) 1, 33.

<sup>166</sup> Section 7(1), *The Mining Act*.

<sup>167</sup> Section 153(1), *The Mining Act*.

<sup>168</sup> Section 153(2), *The Mining Act*.

is carried out in accordance with the relevant physical planning law.<sup>169</sup> The cost of such resettlement is to be borne by the holder of the mineral right.<sup>170</sup>

Another issue closely related to granting of mineral rights is the formula for sharing revenues. Whereas under the proposed Petroleum (Exploration, Development and Production) Bill 2015<sup>171</sup> local communities were to receive a ten per cent share of the oil revenues, President Kenyatta returned the Bill to the National Assembly recommending that the allocation of revenues to local communities be scaled down to five percent.<sup>172</sup> However, this move by the President has been faulted by communities in areas such as Turkana who see it as an attempt by the National Government to ‘steal’ their oil resources.<sup>173</sup>

Finally, failure by the National Government to issue licenses through open and competitive bidding is a great cause of concern as Kenyan interests in obtaining fair deals from their extractive resources may not be served.<sup>174</sup> It also denies local communities (including through the Legislature) the opportunity to participate in the process and to give their free, prior and informed consent.<sup>175</sup> The law now requires the Cabinet Secretary to publish mineral agreements including ensuring that their status is available in the official website of the ministry responsible for mining<sup>176</sup> and to provide accountable and transparent mechanisms of reporting mining and mineral related activities, including revenues paid to the National Government by mineral right holders and production volumes under each licence or permit.<sup>177</sup>

### 5.2.3 Rights of minorities and marginalised groups

The law recognises the rights of minorities and marginalised groups including the right to: participate and be represented in governance spheres of life; be

<sup>169</sup> Section 153(8), *The Mining Act*.

<sup>170</sup> Section 153(9), *The Mining Act*.

<sup>171</sup> National Assembly Bill No. 44 of 2015.

<sup>172</sup> <https://www.standardmedia.co.ke/article/2000229184/turkana-leaders-vow-to-fight-for-10-percent-oil-share-benefits> on 17 March 2017.

<sup>173</sup> <https://www.standardmedia.co.ke/article/2000229184/turkana-leaders-vow-to-fight-for-10-percent-oil-share-benefits> on 17 March 2017.

<sup>174</sup> Kenya Civil Society Platform on Oil and Gas, *Setting the Agenda for the Development of Kenya’s Oil and Gas Resources: The Perspectives of Civil Society*, 22.

<sup>175</sup> This is in spite of the stipulation in Article 71 (1) (a), *The Constitution of Kenya* that “A transaction is subject to ratification by parliament if it involves the grant of a right or concession by or on behalf of any person, including the national government, or another person for the exploitation of any natural resource of Kenya.”

<sup>176</sup> Section 119(2), *The Mining Act*.

<sup>177</sup> Section 119(3), *The Mining Act*.

provided special opportunities in educational and economic fields; develop their cultural values, languages and practices; and to reasonable access to water, health services and infrastructure.<sup>178</sup> Realisation and enjoyment of these rights requires secure land rights, thus, cutting off marginalised groups from accessing land due to mining operations is catastrophic to their wellbeing.

#### 5.2.4 Right to natural resources

Land-based natural resources play an important role in the socio-economic wellbeing of the people of Kenya.<sup>179</sup> The State is required to ensure the sustainable exploitation, utilisation, management and conservation of natural resources<sup>180</sup> including the participation of local communities in the protection and conservation of the environment and establishment of systems of EIA, environmental audit and monitoring;<sup>181</sup> elimination of processes and activities that are deleterious to the environment,<sup>182</sup> and use of the environment for the benefit of the people.<sup>183</sup> To realise these rights and secure access to land-based natural resources by communities, the National Land Policy requires the State to enact laws recognising community and private rights over land-based resources; implement participatory mechanisms for compensation; enact legislation for determining and sharing land-based resources benefits; ensure that benefit-sharing is mandatory where national authorities manage the resources of communities and individuals; and further ensure that all stakeholders are involved in managing and utilising land-based natural resources.<sup>184</sup>

<sup>178</sup> See Article 56, *The Constitution of Kenya*.

<sup>179</sup> Republic of Kenya, *Sessional Paper No. 3 of 2009 on National Land Policy*, section 95. See also Republic of Kenya, *The National Environment Policy*, 2013, 11. The Policy recognises ecosystems as key natural and cultural heritage resources supporting biodiversity, economic development and livelihoods and recognises the pressure exerted on them by human activities.

<sup>180</sup> Article 69(1)(a), *The Constitution of Kenya*.

<sup>181</sup> Article 69(1)(d) and (f), *The Constitution of Kenya*. See also Part VI, *The Environmental Management and Coordination Act* (No. 8 of 1999), which requires environmental impact assessments to be conducted for projects that are likely to have adverse effects on the environment. Part VII empowers the National Environmental and Management Authority (NEMA) to conduct environmental monitoring and auditing.

<sup>182</sup> Article 69(1)(g), *The Constitution of Kenya*. Part IX of the *Environmental Management and Coordination Act* deals with environmental restoration orders and conservation orders. These orders require a person to whom they are served to ensure that the environment is in the state it was before the impugned was undertaken, see Section 108 thereof.

<sup>183</sup> Article 69(1)(h), *The Constitution of Kenya*.

<sup>184</sup> Republic of Kenya, *Sessional paper No. 3 of 2009 on National Land Policy*, section 100. In this regard, the National Environmental Policy of 2013 requires the government to implement the National Land



### 5.2.5 Compulsory acquisition

Compulsory acquisition is provided for in the 2010 Constitution,<sup>185</sup> the Land Act<sup>186</sup> and the Mining Act.<sup>187</sup> Compulsory acquisition is merited, if the acquisition is for a public purpose and just and prompt compensation is paid in full to the aggrieved person.<sup>188</sup> Some have argued that the use of the term ‘public purpose’ is too broad and may include mining or oil projects which have potential to generate considerable revenues without directly benefiting the public.<sup>189</sup> This is so in Kenya, where the definition of ‘public purpose’ is so broad and can be interpreted to include extractive operations.<sup>190</sup>

Compulsory acquisition commences when the acquiring authority (national or county government), intending to acquire land, gives a preliminary notice to the NLC.<sup>191</sup> If the NLC approves the request, it publishes a notice of intention to acquire the land in the national or county Gazette and a copy is sent to the Registrar of Lands and every person interested in the land to be acquired.<sup>192</sup> NLC pays compensation for any damages resulting from the entry.<sup>193</sup> Thirty days after publication of the notice of acquisition, NLC publishes a notice of inquiry and gives at least fifteen days before it conducts an inquiry.<sup>194</sup> Thereafter, NLC values the land to be

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Policy and promote best practices on optimal and sustainable land use.

<sup>185</sup> See Article 40(3), *The Constitution of Kenya*.

<sup>186</sup> *The Land Act* (No. 6 of 2012).

<sup>187</sup> *The Mining Act*.

<sup>188</sup> See generally, Article 40(3), *The Constitution of Kenya*.

<sup>189</sup> Oxfam America Research Backgrounder Series, *Free, prior, and informed consent in Africa: An emerging standard for extractive industry projects*, 39-41. It is posited that it is difficult for governments to justify the public purpose to be served by extractive industry projects, given the potential significant environmental and social impacts they are associated with. Therefore, it is submitted that such projects should only proceed with the free, prior and informed consent of communities to be affected by the projects.

<sup>190</sup> Section 2, *The Land Act* outlines the following as ‘public purposes’: (a) Transportation including roads, canals, highways, railways, bridges, wharves and airports; (b) Public buildings including schools, libraries, hospitals, factories, religious institutions and public housing; (c) Public utilities for water, sewage, electricity, gas, communication, irrigation and drainage, dams and reservoirs; (d) Public parks, playgrounds, gardens, sports facilities and cemeteries; (e) Security and defence installations; (f) Settlement of squatters, the poor and landless, and the internally displaced persons and (g) Any other analogous public purpose.

<sup>191</sup> Section 107(5), *The Land Act*. The notice must be published in the Gazette and a copy delivered to the Registrar of lands and every person interested in the land to be acquired.

<sup>192</sup> Interested persons include persons whose names appear in the land register or their spouses, persons occupying the land or their spouses, Section 110, *The Land Act*.

<sup>193</sup> Section 109, *The Land Act*.

<sup>194</sup> The inquiry is to hear issues of propriety and claims for compensation. The notice of inquiry should also be served upon all interested persons.

acquired and interested persons are asked to deliver written submissions not later than the inquiry date. A public hearing is then convened by NLC to inquire on who the interested persons are and hear the compensation claims.<sup>195</sup> NLC then makes a determination on the eligibility of the interested persons and the award they are entitled to.<sup>196</sup> Prompt payment of compensation in full is done to the interested persons.<sup>197</sup> Owners and occupants are given the chance to contest the land acquisition in court, including the decision to acquire the land, the process by which the land was acquired and the amount of compensation offered.<sup>198</sup> However, if the NLC fails to undertake the acquisition within thirty days, it must give to the acquiring authority the reasons for the decline and the conditions that must be met.<sup>199</sup>

In relation to community and private land, the Mining Act empowers the Cabinet Secretary responsible for extractives to take steps to compulsorily acquire land and to vest the land or area in question, or rights or interests in such land or area, in the National Government or on behalf of the National Government, where consent required under sections 36, 37 or 38 to mining operations is unreasonably withheld or the Cabinet Secretary considers that withholding of consent is contrary to the national interest.<sup>200</sup> The opportunity given to the community or private land holder to consent to the acquisition seems to be mandatory since even if they refuse, their decision would be overridden in the acquisition contrary to the requirements of FPIC as earlier discussed.

The compulsory process faces other challenges. For example, the value of land is often manipulated between compensation and acquisition.<sup>201</sup> Moreover, the time within which compensation is to be made is not defined in law.<sup>202</sup> Where there is resettlement, land is often allocated to ghost beneficiaries; and there is limited access to information regarding the process.<sup>203</sup> In practice, the process does not allow affected communities to give FPIC.<sup>204</sup> For instance, in the Tiomin Project, not only did the Commissioner of Lands commence the acquisition process pending a

<sup>195</sup> Section 112, *The Land Act*.

<sup>196</sup> Section 113, *The Land Act*.

<sup>197</sup> Section 111, *The Land Act*.

<sup>198</sup> Section 127, *The Land Act*. See Article 40(3)(b)(ii), *The Constitution of Kenya*.

<sup>199</sup> Section 107(4), *The Land Act*.

<sup>200</sup> Section 40(1), *The Mining Act*.

<sup>201</sup> Kariuki F, Ouma S and Ng'etich R, *Property Law*, Strathmore University Press, 2016, 303.

<sup>202</sup> Kairu F and Maneno M, 'Land governance in Kenya: Where did the rain started beating us', 7.

<sup>203</sup> Kairu F and Maneno M, 'Land governance in Kenya: Where did the rain started beating us', 7.

<sup>204</sup> Oxfam America Research Backgrounder Series, *Free, prior, and informed consent in Africa: An emerging standard for extractive industry projects*, 39-41.

court matter,<sup>205</sup> but also the process was not ‘fair’ as the community did not give their FPIC.<sup>206</sup> Consequently, compensation was ‘structurally’ unable to ‘resolve the task of restoring incomes and livelihoods.’<sup>207</sup> More importantly, compensation envisaged in law is in economic terms and fails to account for the social, cultural and spiritual significance of land to communities.

### 5.2.6 The rights to culture and religious freedom

The rights to culture and religious freedom are recognised in the 2010 Constitution.<sup>208</sup> For indigenous groups, the right to culture cannot be meaningful without secure land rights.<sup>209</sup> The right to practise their cultures and practise the religion over their lands is a proprietary right that,<sup>210</sup> as submitted elsewhere in this chapter, should not be extinguished to pave way for an economic project like mining without FPIC. Therefore, these rights cannot be limited by extractive activities, if communities are to be displaced from their territories.<sup>211</sup>

### 5.2.7 Resettlement

One of the functions of the National Government is to implement settlement programmes, to provide access to land for shelter and livelihood.<sup>212</sup> Settlement programmes include provision of access to land to squatters, persons displaced by natural causes, *development projects*, conservation, internal conflicts or other such

<sup>205</sup> See *Rodgers Muema Nzioka v The Attorney General, Tiomin Kenya Limited and 7 Others*, [2007] eKLR.

<sup>206</sup> Section 8, *The Land Acquisition Act* (Chapter 295, Laws of Kenya) which applied in the Kwale case study requires payment of ‘full and prompt compensation.’ Compare with Article 40, *The Constitution of Kenya* which requires compensation to be prompt, full and just.

<sup>207</sup> Abuya W, ‘What is in a coconut? An ethnoecological analysis of mining, social development, vulnerability, and development in rural Kenya’, 15.

<sup>208</sup> See Articles 11, 32(2), 44 and 56(d), *The Constitution of Kenya*.

<sup>209</sup> In *Centre for Minority Rights Development (Kenya) v Kenya*, ACmHPR, para 243, the Commission notes that culture can manifest itself in many forms including the way of life associated with the use of land resources and traditional activities such as fishing, hunting and the right to live in reserves protected by law.

<sup>210</sup> See Article 40(3) and 260, *The Constitution of Kenya* which defines property to include any vested or contingent right to or interest in or arising from land.

<sup>211</sup> The relationship between culture and natural resources is made bare in Article 27, *International Covenant on Civil and Political Rights*. The relevant provision stipulates that where there are ethnic, religious or linguistic minorities ‘persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language’.

<sup>212</sup> Section 134(1), *The Land Act*.

causes that may lead to movement and displacement.<sup>213</sup> A land settlement fund is also established to fund settlement programmes in the country.<sup>214</sup> One of the challenges facing settlement programmes is lack of transparency and ensuring that the rightful beneficiaries are actually allocated land.<sup>215</sup> There is also no legal framework outlining the rights of displaced persons who are coerced or involuntarily displaced.<sup>216</sup> In the Kwale case study, communities lost land, crops (especially the coconut trees), and graves, and many have been living in poverty due to an inability to adapt to the reallocated lands.<sup>217</sup> Had there been a law on resettlement, it would have at the very least safeguarded against undue and irregular resettlement procedures.

However, the Ministry of Lands and Physical Planning has prepared a draft Evictions and Resettlement Procedures Bill, 2013.<sup>218</sup> The Evictions and Resettlement Procedures Bill provides procedures for the eviction of unauthorised occupants from private or public land and the resettlement of displaced persons coerced or involuntarily displaced and for matters incidental and related thereto.

The guiding principles for evictions and resettlement under the Evictions and Resettlement Procedures Bill are that: (a) every person is protected from arbitrary eviction; (b) the persons affected by an eviction should not suffer detriment to their human rights; (c) the State, while carrying out eviction and resettlement, must observe the principles of human dignity, equity, social justice, human rights, non-discrimination and protection of the marginalised and vulnerable groups; and (d) every person has the right to administrative action that is expeditious, efficient, reasonable and procedurally fair.<sup>219</sup> The Evictions and Resettlement Bill also outlines the procedures that ought to be followed when carrying out evictions and resettling people. The Evictions and Resettlement Bill does not specifically address displacements caused by extractive activities. Additionally, it fails to address the issue of compensation for land and its criteria.

<sup>213</sup> Section 134(2), *The Land Act*. Mining and exploration works are development projects that can lead to movement and displacement of peoples.

<sup>214</sup> Section 135(1), *The Land Act*.

<sup>215</sup> Kibugi R, 'Mineral resources and the mining industry in Kenya' in Okidi C, Kamberi-Mbote P and Akech M, *Environmental Governance in Kenya: Implementing the Framework Law*, East African Educational Publishers, Nairobi, 2008, 362.

<sup>216</sup> Kibugi R, 'Mineral resources and the mining industry in Kenya', 362.

<sup>217</sup> Abuya W, 'What is in a coconut? An ethnoecological analysis of mining, social development, vulnerability, and development in rural Kenya', 14.

<sup>218</sup> *The Evictions and Resettlement Procedures Bill of 12* November 2013.

<sup>219</sup> Clause 4, *The Evictions and Resettlement Procedures Bill*.

## 6 Conclusion and way forward

Under the 2010 Constitution, tenure security in all categories of land has been guaranteed. Public land (under which minerals and mineral oils fall) is vested in the State. This means that if minerals are to be found on community and private land, that land technically becomes public land. Even so, individuals or communities in occupation of mineral-rich territories have surface rights and other entitlements to the land that are guaranteed in the 2010 Constitution, as discussed above. The enjoyment by communities of some of these rights is so intrinsically linked to territories, that relocation to alternative lands may not be adequate reparation for losing land. Resettlement of communities from traditional lands to pave way for mining may disrupt communal life, destroy cultures, religious (sacred sites), homes of ancestors (graves) and other cultural practices, and is thus unsustainable.

This study has revealed that the granting of exploration and mining licences and subsequent operations can threaten land rights. Hence, to protect the land rights and secure the livelihoods of communities<sup>220</sup> requires their involvement in decision-making processes through sharing of information, consultation, participation, compensation and right to veto those decisions.<sup>221</sup> In this connection, the technical capacity of county governments and communities should be enhanced so as to participate effectively in discussions on Oil Field Development Plans and EIA processes.<sup>222</sup>

As explained in the *Saramaka* case, consultations with communities before acquiring their resources must be done using their ‘culturally appropriate procedures’ and not State-established mechanisms. The establishment of community assemblies and the community land management committees under the Community Land Act may water down traditional land governance structures especially where communities are identified on the basis of ethnicity or similar cultures such as pastoralism or hunting and gathering. It would be necessary to find ways of recognising and utilising traditional structures of land governance in creating the community assemblies and community land management committees and to use them in granting FPIC.

<sup>220</sup> The affected communities are those whose physical and non-physical resources are lost due to the extractive activities, for example, productive lands, fishing areas and important social and cultural sites and activities. See Asian Development Bank, *Handbook on resettlement: A guide to good practice*, 3.

<sup>221</sup> International Institute for Environment and Development and World Business Council for Sustainable Development, *Breaking New Ground*, 142.

<sup>222</sup> ‘Kenya Civil Society Platform on Oil and Gas: Agenda for Kenya’s Oil and Gas Development’ 11 August 2014 <http://kcspong.org/kcspong-agenda-for-kenyas-oil-and-gas-development/> on 31 March 2016.

The compulsory acquisition of land for extractive activities ought to be done with the FPIC of communities since these are economic developments that may not serve the wider public interest. Before accessing minerals and mineral oils, FPIC should be seen as a first step in arriving at fair benefit-sharing arrangements. It also acknowledges that the ownership of traditional resources ‘vests with its traditional guardians and that fairness requires both permission from owners for access and subsequent compensation.’<sup>223</sup>

Withal there is need to provide stringent safeguards when it comes to the alienation of community land. Subjecting the management of community land to national and county government laws and policies [relating to: fishing, hunting and gathering; protection of animals and wildlife; water protection; forestry; environmental laws; energy policy; and exploitation of minerals and natural resources] opens a window for gazettment and alienation of community land without due regard to their bio-cultural and bio-spiritual relationship with land.

The community land law must succinctly recognise the bio-cultural and bio-spiritual contexts within which communities hold land. If extractive activities are to threaten customary rights to land (including loss of sacred sites, graves, shrines, access to forests, grazing points, salt licks and soda, and watering points) their FPIC must be sought. If such land is acquired, compensation must extend to loss of these aspects even though it will be difficult to monetise the loss. Respectively, the list of areas declared to be ‘no exploration zones’ should include all areas with cultural and religious significance to communities and other strategic locations,<sup>224</sup> as the 2010 Constitution guarantees religious freedom and cultural rights. The criteria for compensation for crops that are a source of livelihood to communities must be set with the concurrence of communities. The Kwale case study reveals that the coconut trees and other local crops were undervalued, with significant economic and cultural ramifications to communities.

A law on evictions and resettlement also needs to be enacted as a matter of urgency, seeing that the Evictions and Resettlement Bill is not yet law. The Evictions and Resettlement Bill should contain explicit provisions dealing with economically-induced displacements and have provisions for FPIC. It must also have succinct criteria for compensation that addresses the multiple values of land to communities.

<sup>223</sup> Schroeder D, ‘Informed Consent: From Medical Research to Traditional Knowledge’ in Rachel W, Doris S and Roger C, *Indigenous Peoples, Consent and Benefit Sharing: Lessons from the San-Hoodia Case*, Dordrecht: Springer, 2009, 37.

<sup>224</sup> ‘Kenya Civil Society Platform on Oil and Gas: Agenda for Kenya’s Oil and Gas Development’.

Because of the complex technicalities of scrutinising petroleum and mining concessions,<sup>225</sup> Parliament may not have the technical capacity to monitor the exercise of the power conferred on the Cabinet Secretary. Such technical capacity is necessary.

This study also finds that the delay in enacting the community land law, in spite of the constitutional deadline of 27 August 2015, was ominous and suspect. Essentially, this legislative failure allowed the old laws governing trust lands to continue to operate to community land with their attendant inadequacies, weaknesses and loopholes. It allowed speculators and land grabbers to move in and acquire community land in Turkana. Political goodwill in securing community land rights is thus needed.

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<sup>225</sup> Kenya Civil Society Platform on Oil and Gas, *Setting the Agenda for the Development of Kenya's Oil and Gas Resources: The Perspectives of Civil Society*, 19.





# ENVIRONMENTAL IMPLICATIONS OF THE EXTRACTIVES SECTOR IN KENYA: CHALLENGES AND WAY FORWARD

COLLINS ODOTE\*

## 1 Introduction

Kenya's extractives sector is largely known to comprise oil, natural gas and mineral resources. While exploration for oil and minerals has been going on for long, the commercial viability of the sector is a recent phenomenon. Indeed, while the extractives industry has been part of the Kenyan resource base for years, recent events have emphasized not just its importance but also the legislative and policy focus on the extractives industry sector.<sup>1</sup>

In addition to the mineral deposits, the country has discovered oil and natural gas. The discoveries of oil originally in Turkana in 2012 occurred at a time when the global oil returns were high.<sup>2</sup> This followed the discovery of large coal deposits in Kitui County<sup>3</sup> and that of rare earth and niobium in the gazetted traditional forest of Mrima hills in coastal Kenya.<sup>4</sup> Before then large deposits of titanium were dis-

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<sup>1</sup> Odote C, 'Reforming the Legal Framework for Sustainable Governance of the Extractive Industry in Kenya' 6 *International Union for Conservation of Nature Academy of Environmental Law e-Journal* (2015), 276.

<sup>2</sup> Odote C and Otieno S, 'Getting it Right: Towards Socially Sustainable Exploitation of the Extractive Industry in Kenya' *East African Law Journal* (2015), 202.

<sup>3</sup> Mutemi A, 'Mui Coal Mines: a Blessing or Curse? Socio-economic and Environmental Intricacies' *Academia* 2013 [https://www.academia.edu/7049953/MUI\\_COAL\\_MINES](https://www.academia.edu/7049953/MUI_COAL_MINES) on 12 January 2018.

<sup>4</sup> Kamau S and Mungai C, 'Kenya's \$100 billion hidden mineral deposits' *The East African*, 20 July 2013.

covered in Kwale and Kilifi counties of coastal Kenya.<sup>5</sup> The *Kenya Mining Investment Handbook*<sup>6</sup> reported that although the country was still in early exploration of its mineral potential, recent discoveries had the potent to propel it to amongst the major mineral-producing countries. For example, discoveries of rare earth could propel the country to the top five countries with rare earth deposits in the world.<sup>7</sup> In 2016, Kenya developed a comprehensive Mining and Minerals Policy, which underscored the extent of the potential of mining as a sector. In this regard, the Mining and Minerals Policy states that:

Kenya is rich in mineral resources with known deposits of soda ash, fluorspar, titanium, gold, coal, manganese, iron ore, gypsum, diatomite, chromite, limestone, and silica sand. Indications are that the country is potentially rich in rare earth minerals, and increased exploration is expected to lead to new mineral discoveries.<sup>8</sup>

However, it is important to note that the discovery and exploitation of oil, gas and minerals carries with it various environmental, economic, social, and cultural impacts, which by the nature of the industry may be negative in many instances.<sup>9</sup> From a positive standpoint, extractives generate revenue and create employment, helping to improve the country's Gross Domestic Product and the livelihoods of the people. However, the mining of extractives can cause negative consequences on the environment and society.

This chapter argues that despite the known environmental effects of the extractives industry, Kenya Government's focus is on attracting foreign investment to the sector at all costs and oblivious of the negative consequences. As a result, investors are pitted against local communities and non-state actors. In the process, little effort is made to explore a path that can lead to sustainable mining and extraction. To realise this goal, it is important that honest and objective information is made available on the negative consequences of all mining activities, and that rational assessments are made of the options for mitigating such effects. This is the essence of a robust and well-executed environmental impact assessment, a process whose application in Kenya not just for the extractives sector but for most developmental projects is wrought with many challenges making it largely ineffective.

<sup>5</sup> Achieng' J, 'Titanium Mining An Investment, But At What Cost?' *Inter press service news agency* <http://www.ipsnews.net/2000/09/environment-kenya-titanium-mining-an-investment-but-at-what-cost/> on 12 January 2018 which reports that the discovery was made in 1996.

<sup>6</sup> Republic of Kenya, *Kenya Mining Investment Handbook*, 2015, 1.

<sup>7</sup> Republic of Kenya, *Kenya Mining and Investment Handbook*, 1.

<sup>8</sup> Ministry of Mining, *Mining and Minerals Policy: Popular Version*, 2016.

<sup>9</sup> La Vina A and De Leon A, 'Legal Responses to the Environmental Impact of Mining' 86 *Philippines Law Journal* (2011-2012), 284.

To make this argument, the chapter is divided into six sections. Following this introduction, section two summarises the regulatory framework on environmental issues, while section three discusses the key environmental challenges that the extractives sector portends. Using examples of various mining activities in Kenya, with special focus on Titanium and Tullow Company activities, it demonstrates how, despite approval of these projects following environmental due diligence, these environmental effects are still reported and continue to have an impact on the people. Section four highlights how the provisions of the Mining Act provide a framework for responding to the double needs of development and environmental concerns. In section five, the chapter shows how the rights of access to information and public participation are important tools for ensuring that environmental concerns in the extractives sector are identified, and prevented, and their effects mitigated when they occur. It also gives additional tools for ensuring environmental sustainability in the mining sector by showing that Kenya has international commitments which require sustainable mining and operations in the extractives sector, hence the need for their compliance through domestication. Section six concludes the chapter, by showing that sustainability is possible and essential for the sector to be a blessing to the Kenyan people.

## **2 Legal and policy frameworks governing environmental issues in the extractives sector**

The discussion of the adequacy of the legal framework addressing environmental aspects of the extractives industry has to be undertaken against the totality of the regulatory framework for environmental management and that of extractives. This results from a lack of a comprehensive law or policy that addresses all aspects of the extractives industry. There are laws governing petroleum and natural gas, others addressing the environment generally, while others deal with mining. Environmental provisions relevant to the extractives sector are therefore scattered. Assessing their content is critical in determining the efficacy of responses to environmental challenges arising from mining operations in Kenya.

Following the adoption, on 27 August 2010, of the Constitution of Kenya (2010 Constitution), environmental concerns were elevated to constitutional status.<sup>10</sup> Constitutional articulation of environmental law is important because it el-

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<sup>10</sup> While environmental matters are contained in several sections of the 2010 Constitution, the main provisions are found in Chapter V of the *Constitution* titled 'Land and Environment.'

evates environmental rights and their protection to a level similar to other human rights thus reducing justification for their subordination to economic development imperatives.<sup>11</sup> Constitutional recognition also enhances environmental governance<sup>12</sup> through recognition of the link between environment and wider political order and governance,<sup>13</sup> a key focus of modern constitutions. By dint of the 2010 Constitution, Kenya consequently joined a global community of nations that include environmental rights as part of their constitutional architecture.<sup>14</sup>

Although the 2010 Constitution only mentions extractives explicitly in one article,<sup>15</sup> it has robust provisions that are relevant for the governance of the extractives industry ranging from benefit-sharing, and recognition of extractives as a public resource to environmental protection.<sup>16</sup> The environmental provisions of the 2010 Constitution are relevant in addressing the impacts of extractives and extractive operations on the environment. A critical issue in exploiting oil, gas and minerals is to ensure that the process does not adversely affect sustainability imperatives. This requires that three interrelated issues are addressed in the process of exploiting the extractive resources: preventing environmental harm, that is, causing no serious environmental damage; minimising depletion, and protecting the rights of the people.<sup>17</sup> At the heart of this is the need to ensure that the exploitation process is not just economically beneficial, but also environmentally and socially sustainable. This balance is at the heart of the requirement of the principle of sustainable development, an important principle in the management of the environment.

Originally proposed by the Brundtland Commission in 1987,<sup>18</sup> the principle of sustainable development received the endorsement of the international community in 1992 through its incorporation in the Rio Declaration on Environment and

<sup>11</sup> Environmental Law Institute, *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa*, 2ed, Environmental Law Institute, Washington, 2007, 2.

<sup>12</sup> Environmental Law Institute, *Constitutional Environmental Law*, 2.

<sup>13</sup> See generally, Ojwang J, 'The Constitutional Basis for Environmental Management' in Juma C and Ojwang J, *In Land We Trust: Environment, Private Property and Constitutional Change*, Initiative Publishers, London, 1996, 39 - 60.

<sup>14</sup> Boyd D, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment*, University of British Columbia Press, Toronto, 2012.

<sup>15</sup> Article 62 (1) (f), *Constitution of Kenya (2010)*, which deals with minerals and mineral oils as part of public land.

<sup>16</sup> See Odote C, 'Reforming the Legal Framework'.

<sup>17</sup> Sbert C, 'Re-Imagining Mining: The Earth Charter as a Guide for Ecological Mining Reform' 6 *International Union for Conservation of Nature Academy of Environmental Law e-Journal* (2005), 76.

<sup>18</sup> World Commission on Environment and Development. (WCED), *Our Common Future*, Oxford University Press, New York, 1987.

Development (Rio Declaration) during the United Nations Conference on Environment and Development (UNCED).<sup>19</sup> In September 2015, the United Nations General Assembly (UNGA) adopted the Sustainable Development Goals (SDG) as a set of 17 targets to ensure that sustainable development is realised by 2030.<sup>20</sup> The 2010 Constitution includes sustainable development as one of the national values and principles of governance.<sup>21</sup> While there is no specific goal or target within the SDG framework focusing on extractives, the sector can affect the achievements of nearly all the goals. The linkage between sustainable development and the extractives industry means that the inclusion of sustainable development as part of Kenya's constitutional architecture sets a firm constitutional foundation for addressing environmental imperatives so as to ensure that the exploitation of the sector is undertaken in a sustainable manner.

The main constitutional provisions on environmental management revolve around the right to a clean and healthy environment.<sup>22</sup> This right is now generally recognized as a key human right.<sup>23</sup> Environmental management is crucial in the exploitation of extractives whether due to pollution concerns, land degradation or water linkages arising because of the water needs of the extractives industry.<sup>24</sup> As a consequence, the implementation of the constitutional right of a clean and healthy environment is an important benchmark for judging the extractives industry in Kenya.<sup>25</sup> Kenya's Judiciary has already held that the constitutional right to a clean and healthy environment is a justiciable right.<sup>26</sup>

The right to a clean environment under the 2010 Constitution includes sustainable development, which is the requirement that the environment must be protected for the sake of present and future generations.<sup>27</sup> This implies two obligations related to the extractives industry. First, that as the resources are exploited, considerations of the methods used in extraction and quantities exploited become critical. The

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<sup>19</sup> See UN Conference on environment and development <http://www.un.org/geninfo/bp/enviro.html> on 5 January 2018.

<sup>20</sup> See Sustainable development knowledge platform <https://sustainabledevelopment.un.org/topics/sustainabledevelopmentgoals> on 5 January 2018.

<sup>21</sup> Article 10, *Constitution of Kenya* (2010).

<sup>22</sup> Article 42, *Constitution of Kenya* (2010).

<sup>23</sup> Boyle A, 'Human Rights and the Environment: Where Next?' 23 *European Journal of International Environmental Law*, 3 (2012), 613 - 642; Cullet P, 'Definition of Environmental Rights in a Human Rights Context' 13 *Netherlands Quarterly of Human Rights* (1995), 25 - 40.

<sup>24</sup> Odote C, 'Reforming the Legal Framework', 279.

<sup>25</sup> Odote C, 'Reforming the Legal Framework', 279.

<sup>26</sup> *In the Matter of Concessionary Rights to the Mui Coal Basin Deposits* [2012] eKLR.

<sup>27</sup> Article 42(a), *Constitution of Kenya* (2010).

idea is to put in place mechanisms to ensure that the proceeds from the extractive industry are available for future generations. Considerations of a ‘sovereign wealth fund’<sup>28</sup> are particularly useful as mechanisms for guaranteeing that the interests of future generations are taken into account. The second aspect is to ensure that in exploiting the resources, the environment is not destroyed, for to do so would offend the constitutional guarantees of a clean and healthy environment and go against the requirements of intergenerational equity also captured in the 2010 Constitution.<sup>29</sup> In the Philippines case of *Oposa v Factoran*, the Supreme Court held, in regard to intergenerational equity, as follows:

This case, however, has a special and novel element. Petitioners minors assert that they represent their generation as well as generations yet unborn. We find no difficulty in ruling that they can, for themselves, for others of their generation and for the succeeding generations, file a class suit. Their personality to sue on behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned. Such a right, as hereinafter expounded, considers the ‘rhythm and harmony of nature.’ Nature means the created world in its entirety. Such rhythm and harmony indispensably include, *inter alia*, the judicious disposition, utilization, management, renewal and conservation of the country’s forest, mineral, land, waters, fisheries, wildlife, off-shore areas and other natural resources to the end that their exploration, development and utilization be equitably accessible to the present as well as future generations.<sup>30</sup>

The Supreme Court also captured the implications of intergenerational equity in the following words:

Needless to say, every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology. Put a little differently, the minors’ assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come.<sup>31</sup>

The 2010 Constitution captures this position in its requirement that the right to a clean and healthy environment be ‘protected for the benefit of present and future generations through legislative and other measures ...’<sup>32</sup> To ensure that the rights of both present and future generations are met, the 2010 Constitution imposes sev-

<sup>28</sup> For a discussion of sovereign wealth funds and their role in the extractive industry, see generally, Dixon A and Monk A, ‘What Role for Sovereign Wealth Funds in Africa’s Development’, Oil to Cash Development Background Paper, Center for Global Development, 2011.

<sup>29</sup> Article 42, *Constitution of Kenya* (2010).

<sup>30</sup> *Oposa v Factoran* [1993] GR 101083.

<sup>31</sup> *Oposa v Factoran* [1993] GR 101083.

<sup>32</sup> Article 42, *Constitution of Kenya* (2010).

eral obligations on the State including: ensuring sustainable exploitation, utilisation and management of the environment and natural resources; equitable sharing of benefits arising from the exploitation of the environment and natural resources; achieving a tree cover of 10 percent of the land area in Kenya; protecting and enhancing intellectual property and indigenous knowledge of biodiversity and genetic resources of communities; encouraging public participation; protecting genetic resources and biological diversity, establishing systems of environmental impact assessment (EIA), environmental audit and monitoring; eliminating processes and activities that are likely to endanger the environment; and utilising the environment and natural resources for the benefit of the people.<sup>33</sup>

Provisions of the 2010 Constitution on access to justice are useful in the resolution of environmental matters in the mining sector. While the 2010 Constitution provides for the right to a clean and healthy environment, its ventilation in courts is predicated on the existence of what is now known in environmental law as procedural rights. Principle 10 of the Rio Declaration set the basis for such rights by providing that:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.<sup>34</sup>

Access to justice provides citizens with the opportunity to seek redress in instances where their environmental rights are under threat. For a long time, access to courts was hampered by restrictive application of the *locus standi* rule. Public-spirited persons were required to demonstrate that they either had proprietary interest or had suffered personal injury greater than that of other members of the public to sustain an environmental litigation.<sup>35</sup> Consequently, several cases seeking to enforce environmental rights were lost due to the procedural hurdle of *locus*. The case of *Wangari Maathai v Kenya Times Media Trust*<sup>36</sup> where Professor Wangari Maathai was denied access to the High Court to stop the construction of

<sup>33</sup> Article 69(1), *Constitution of Kenya* (2010).

<sup>34</sup> United Nations Conference on Environment and Development (UNEP), *Rio Declaration on Environment and Development*, 1992.

<sup>35</sup> Institute for Law and Environmental Governance (ILEG), *Public Interest Environmental Litigation in Kenya: Prospects and Challenges*, 2007.

<sup>36</sup> *Wangari Maathai v Kenya Times Media Trust* [1989] eKLR.

a multi-storey complex in the famous recreational park, Uhuru Park, is representative of a past judicial attitude to the issue of *locus*. The High Court ruled that such cases could only be prosecuted by the Attorney General as the defender of public interest.<sup>37</sup>

The enactment of the 2010 Constitution expanded space for access to justice. In addition to a robust Bill of Rights<sup>38</sup> and a focus on substantive justice as opposed to procedural technicalities, the 2010 Constitution specifically relaxes the rule of *locus* in environmental matters by giving persons that allege the violation of the right to a clean and healthy environment the right to redress the usurpation through courts of law.<sup>39</sup> The 2010 Constitution goes on to clarify that ‘an applicant does not have to demonstrate that any person has incurred loss or suffered injury.’<sup>40</sup>

Another issue related to access to justice is the forum for ventilating cases. The 2010 Constitution has reformed the structure of the Judiciary so as to enhance access to justice.<sup>41</sup> One of the innovations is the creation of a specialised court with the status of the High Court to ‘hear and determine disputes relating to the environment and use and occupation of, and title to land.’<sup>42</sup> With the establishment of the Environment and Land Court (ELC), Kenya joined other countries that have adopted specialised courts and tribunals as mechanisms for responding to environmental challenges. A study published in 2009 found over 350 specialized environmental courts and tribunals spread over 41 countries.<sup>43</sup> Then, Kenya was represented on the list by the National Environment Tribunal (NET). With the establishment of the ELC, specialization has been elevated to the superior court level.

The main goals for the establishment of specialised courts are largely two-fold. First is a result of case management imperatives. This focusses on improving the quantity and quality of case handling over that provided by general courts.<sup>44</sup>

<sup>37</sup> *Wangari Maathai v Kenya Times Media Trust* [1989] eKLR.

<sup>38</sup> ‘Mutunga W, ‘The Vision of the 2010 Constitution: Keynote remarks on the occasion of celebrating 200 years of the Norwegian Constitution’, 19 May 2014. See also *In the Matter of the Principle of Gender Representation in the National Assembly and Senate* [2012] eKLR.

<sup>39</sup> Article 70(1), *Constitution of Kenya* (2010).

<sup>40</sup> Article 70(2), *Constitution of Kenya* (2010).

<sup>41</sup> For a discussion of the Constitution and its implications on access to justice, see Kenya Civil Society Strengthening Program, *Judicial Reforms and Access to Justice in Kenya: Realizing the Promise of the New Constitution*, 2011; Kameri-Mbote P and Migai A, *Kenya Justice Sector and Rule of Law*, The Open Society Initiative for Eastern Africa, Nairobi, 2011.

<sup>42</sup> Article 162(2), *Constitution of Kenya* (2010).

<sup>43</sup> The Access Initiative, *Greening Justice: Creating and Improving Environmental Courts and Tribunals*, 2009.

<sup>44</sup> The Access Initiative, *Greening Justice: Creating and Improving Environmental Courts and Tribunals*.



The second imperative is that of jurisprudence. The motivation is to develop an alternative jurisprudence, one that expands from the traditional ‘legalistic’ adjudications to a ‘problem solving’, ‘therapeutic’ or ‘interdisciplinary’ approach.<sup>45</sup> Consequently, environmental courts and tribunals ‘are looked to as one solution for fairly and transparently balancing the conflicts between protecting the environment and promoting development; for managing cases more efficiently and effectively; for supporting greater public information, participation, and access to justice; and for achieving more informed and equitable decisions.’<sup>46</sup> The ELC has a specific mandate to address environmental issues, including those relating to the extractives industry. The 2010 Constitution establishes the ELC as an institution with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land.<sup>47</sup>

A dedicated legislation, the Environment and Land Court Act (ELCA) was enacted in 2011<sup>48</sup> to operationalise the ELC as envisaged under the 2010 Constitution. The ELCA provides for the jurisdiction of the ELC;<sup>49</sup> it seeks to unpack the full meaning of the constitutional stipulations. It provides that the court shall listen to matters of land and environment.

The provision on jurisdiction is important in the context of seeking access to justice before the ELC. As courts have invariably held, unless the issue of jurisdiction is clarified, courts cannot proceed to determine substantive matters. This was the position in the case of the *Owners of the Motor Vessel ‘Lilian S’ v Caltex Oil (Kenya)*,<sup>50</sup> where Justice James Nyarangi, laying down what has become the standard for determination of jurisdiction and its importance, stated:

By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means... Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given... Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no juris-

<sup>45</sup> Nolan J, *Legal Accents, Legal Borrowing: The International Problem-Solving Court Movement*, Princeton University Press, New Jersey, 2011; Rottman D, ‘Does Effective Therapeutic Jurisprudence Require Specialized Courts (and Do Specialized Courts Imply Specialized Judges)?’ *37 American Judges Association Court Review* (2000), 22-27.

<sup>46</sup> ILEG, *Public Interest Environmental Litigation in Kenya: Prospects and Challenges*, 2007.

<sup>47</sup> Article 162(2) (b), *Constitution of Kenya* (2010).

<sup>48</sup> *Environment and Land Court Act* (Act No. 19 of 2011).

<sup>49</sup> Section 13, *Environment and Land Court Act* (Act No. 19 of 2011).

<sup>50</sup> *Owners of the Motor Vessel ‘Lilian S’ v Caltex Oil (Kenya)* 1989 [eKLR].

diction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.<sup>51</sup>

Against this backdrop, the provisions of section 13 of ELCA assume a particularly important role in the discussions on the environmental impact of mining. It gives the ELC the jurisdiction to deal with cases relating to mining, minerals, and other natural resources.<sup>52</sup>

From the above section, it is clear that the ELC has jurisdiction in both issues of the extractives sector and their environmental linkages. This was the subject of determination in the case of *Re the Cabinet Secretary of Mining and Others*<sup>53</sup> where the National Environmental Management Authority (NEMA) argued that the High Court did not have jurisdiction to listen to an environmental dispute relating to mining. The High Court determined that the ELC is the proper forum with jurisdiction to dispose of environment and mining-related disputes, underscoring its importance in guaranteeing access to environmental justice.

While there are several legislations governing various components of the environment, the overarching law is the framework<sup>54</sup> Environmental Management and Coordination Act (EMCA).<sup>55</sup> Originally enacted in 1999, EMCA was amended in 2015 to align it to the 2010 Constitution in accordance with the requirements of article 72 of the 2010 Constitution. EMCA provides for the overall framework for the management of the environment, and creates NEMA as the coordinating institution in matters environment.<sup>56</sup>

The provisions of EMCA most relevant to the extractives industry are those dealing with EIA, monitoring, and audit, as these require that before any mining activities are commenced an EIA must be undertaken so as to identify any negative effects that such operations may have on the environment and society, and put in place remedial measures. EIA provides the tool through which the benefits of the extractives industry and the dangers can be balanced. As the High Court has previously stated:

<sup>51</sup> *Owners of the Motor Vessel 'Lilian S' v Caltex Oil (Kenya)* 1989 [eKLR].

<sup>52</sup> Section 13(2), *Environment and Land Court Act* (Act No. 19 of 2011).

<sup>53</sup> *Re the Cabinet Secretary of Mining and Others* [2013] eKLR.

<sup>54</sup> For a discussion of the concept of framework environmental laws, See Okidi C, 'Background to Kenya's Framework Environmental Law', in Okidi C, Kameri-Mbote P and Akech M, *Environmental Governance in Kenya: Implementing the Framework Law*, East African Educational Publishers, Nairobi, 2008, 126 - 141.

<sup>55</sup> Act No 8 of 1999 (As amended by Act No 5 of 2015 (Chapter 387, Laws of Kenya).

<sup>56</sup> Section 7, *Environmental Management and Coordination Act* (Act No. 5 of 2015).

EIA is an obviously important component to this entire process as it is vanguard of the principles of sustainable development. It is from this assessment that we are guided as to the potential or lack of adverse effects of the project on the environment and where the decision will be made as to whether the project should continue or not.<sup>57</sup>

This chapter discloses that Kenya's legislative framework for environmental management is robust, has constitutional status, and provides clarity on how to address environmental challenges. The challenge is largely about implementation. The need to identify and respond to the challenges that are associated with the extractives industry is an essential aspect of sound governance of the sector. As the court has argued in the context of coal,<sup>58</sup> the problem is not that because the sector has environmental challenges, it should not be exploited, but more about how to ensure that in designing and managing a sector exploitation strategy, we respond to and put in place measures to eliminate or reduce the negative environmental impacts.

### 3 Key environmental challenges facing the extractives industry

While mining operations have potential for transforming economies and boosting the fiscal base of a country, they also raise fundamental environmental challenges that the law has to grapple with. One of the challenges is pollution. Mining and oil exploration are extractive processes that entail significant levels of blasting, seismic testing, and pollution, all of which have potentially devastating effects on the environment.<sup>59</sup> Pollution from extractives affects land, water and air and has potential deleterious effects on the environment. For example, a study carried out by experts from Kenyatta University following the discovery of titanium in Kwale, concluded, that 'titanium mining can accelerate soil erosion in the area. Such erosion will not only pollute the river and stream water, but will also eliminate any aquatic biodiversity part of which serves as a food source.'<sup>60</sup> Environmen-

<sup>57</sup> *In the Matter of Concessionary Rights to the Mui Coal Basin Deposits* [2012] eKLR.

<sup>58</sup> *Re the Cabinet Secretary of Mining and Others* [2013] eKLR.

<sup>59</sup> Marsh J, 'Supplying the World's Factory: Environmental Impacts of Chinese Resource extraction in Africa' *28 Tulane Environmental Law Journal* (2015), 406.

<sup>60</sup> See Achieng' J, 'Titanium Mining An Investment, But At What Cost?' *Inter press service news agency*. For discussions on aspects of the environmental study and the interventions by Action Aid following the publication of the EIA report for Titanium mining Ojiambo E, 'Battling for Corporate Accountability: Experiences from Titanium Mining Campaign in Kwale, Kenya' University of Sussex Seminar on Linking Rights and Participation: Sharing Experiences and Opportunities, Brighton, 29 May 2002 [http://www.participatorymethods.org/sites/participatorymethods.org/files/battling%20for%20corporate%20accountability\\_ojiambo.pdf](http://www.participatorymethods.org/sites/participatorymethods.org/files/battling%20for%20corporate%20accountability_ojiambo.pdf) on 6 January 2018.

tal pollution is similarly associated with the oil and gas industry. The exploration and production industry in any country is accompanied by many environmental challenges. Major activities in upstream operations which result in environmental challenges include seismic acquisition, drilling, and development. Production and transportation also pose great challenges to the environment.<sup>61</sup> Consequently, any mining operations must, as part of its environmental management plans, take into account the pollution effects it will have on the environment, factor this in the decision-making process and, if the licence is granted, put in place measures to ensure that pollution is addressed during the mining operations.

The other issue relates to water. Mining operations requires a lot of water resources. The linkages between water and mining is dual. In addition to using a lot of water, mining operations cause certain problems. In Brazil, this challenge has been explained in the following terms:

Mining takes place under the water table level, and superficial waters are also involved to a greater or lesser extent. A consequence is the need to drain water from mining sites, often times at significant flows resulting from the development of broad drainage cones that must be maintained throughout the mining operation; and sometimes at lower flows that greatly enhance stability conditions of the rock mass. This causes hydrological, environmental and economic effects that call for adequate management and administration of these waters.<sup>62</sup>

Owing to the scarcity of water in Kenya and coupled with the fact that a lot of mining discoveries happen in rural and remote parts of the country, addressing the water and mining linkage is a critical environmental imperative. When news filtered into the country about the discovery of ground water in Turkana,<sup>63</sup> there was debate about how to ensure that oil exploration and water abstraction would not result in pollution and environmental challenges,<sup>64</sup> demonstrating the linkages between the two. There are even arguments that the most significant consequence of a mining activity is its effect on the availability and quality of water in the area

<sup>61</sup> Okuthe I, 'Environmental and Social Challenges of Oil and Gas Exploration in Kenya' 17 *International Journal of Innovation and Scientific Research*, 1 (2014), 166.

<sup>62</sup> National water Agency and Brazilian Mining Association, *Water Resource Management and the Mining Industry* (2013).

<sup>63</sup> Kahumbu P, 'Massive water discovery in Kenya's desert' *The Guardian*, 11 September 2013 <https://www.theguardian.com/environment/africa-wild/2013/sep/11/1> on 10 January 2018.

<sup>64</sup> Okuthe I, 'Environmental and Social Challenges of Oil and Gas Exploration in Kenya'. See also Kakonge J, 'Maximising the benefits of Oil and Water Discoveries in Turkana' *Pambazuka News*, 1 October 2015 <https://www.pambazuka.org/land-environment/maximizing-benefits-oil-and-water-discoveries-turkana-kenya> on 10 January 2018.

where a mining activity or oil and gas extraction is taking place.<sup>65</sup> In this regard, Adam Smith has written of Kenya's extractives industry thus:

Mining, oil and gas industries require heavy water usage. There is a risk that water currently used for domestic purposes will be diverted for commercial use in mining. Pastoral livelihoods depend on tracking and moving around in search of water. There is also a risk of contamination of waste products (for example from tailings sites) into the water table and some have the perception (unsubstantiated) that this has already happened in Kwale. An important factor in avoiding local discontent will be a clear framework for how communities (including pastoral communities) will be compensated for loss of access to land, pasture, water and other natural resource.<sup>66</sup>

It is clear, therefore, that for both titanium and oil mining operations, the impact on water quality and availability is an environmental consequence that must be borne in mind. Environmental monitoring activities for mining activities have to track the impacts on water and the measures put in place to avoid or minimise the negative impacts.

Another challenge relates to ecologically sensitive areas. There are instances where minerals and other extractives are found in areas which are also ecologically sensitive or subject to a special environmental protection regime, for example the discovery of minerals in hills at the coast or in game reserves. In these instances, balancing between the right to exploit the mineral versus the need to protect the ecologically sensitive or special protection zones raises more nuanced environmental challenges. In addition to the environmental implications, they also bring to the fore the linkages between various institutions and how to balance their institutional mandates. For example, when minerals are discovered in game reserves or national parks, mining operations interfere with the wildlife habitat.

Biodiversity loss too is a negative environmental impact of mining and oil and gas extraction. Kenya is a mega-diverse country.<sup>67</sup> The Convention on Biological Diversity<sup>68</sup> defines biodiversity as the variability among living organisms from all sources including: terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of the ecosystem.<sup>69</sup> Kenya's diversity is evidenced by

<sup>65</sup> Environmental Law Alliance Worldwide (ELAW), *Guidebook for Evaluating Mining Projects EIAs*, 1ed, 2010, 8.

<sup>66</sup> Adam Smith International, *Recommendations for the Development of Kenya's Extractive Industry Based on Inclusive Multi-stakeholder Consultation*, September 2013.

<sup>67</sup> Lusweti A, 'Biodiversity Conservation in Kenya' *Trade Notes*, 32 (2011), Institute of Economic Affairs, 3.

<sup>68</sup> UNGA, *Convention on Biological Diversity*, 1760 UNTS 79.

<sup>69</sup> Article 2, *Convention on Biological Diversity*.

the number of flora and fauna that exists and the varied ecosystems. In terms of species, the country has about thirty-five thousand species of flora and fauna.<sup>70</sup> In terms of habitats, these include forests, wetlands, savannah woodland, freshwater and saline ecosystems, coastal zones and arid and semi-arid lands. This diversity makes Kenya a popular tourist attraction destination. Kenya is party to the Convention on Biological Diversity<sup>71</sup> and has put in place laws and policies to encourage conservation of biodiversity.

Several minerals and other extractives are found in these diverse rich ecosystems. The extraction of oil and gas and mining activities affects biodiversity. Mining causes direct and indirect damage to wildlife.<sup>72</sup> The impacts stem primarily from disturbing, removing, and redistributing the land surface.<sup>73</sup> These often result in destruction and displacement of species, destruction of their habitat, degradation, and destruction of their sources of food to death as a result of pollution and unavailability of water. Turkana comprises a rich diversity site in Kenya yet the discovery of oil is affecting people and livelihoods in the area.<sup>74</sup> Increased temperatures and unpredictable rainy seasons have placed increased pressure on water resources, resulting in less grazing land, diminished livestock herds, and increased competition over grazing lands.<sup>75</sup>

Another important issue relates to reclamation of degraded areas and decommissioning of sites. While a lot of focus is normally on environmental challenges during mining, attention must also be paid to the completion of the mining process. How one deals with the places where mining was taking place to ensure they are restored to a healthy and habitable condition is imperative and requires clear legislative and administrative guidance.

An overarching concern in the discourse is the place of sustainable development and environmental management in the development agenda for Kenya. Discussions on environmental impacts are normally posited as a curb to development. While EMCA has provisions on EIA, recent discussions have led to the removal

<sup>70</sup> Lusweti A, 'Biodiversity Conservation in Kenya', 3.

<sup>71</sup> UNGA, Convention on Biological Diversity, 1760 UNTS 79.

<sup>72</sup> Lusweti A, 'Biodiversity Conservation in Kenya', 3.

<sup>73</sup> Lusweti A, 'Biodiversity Conservation in Kenya', 3.

<sup>74</sup> UNEP, *Oil Governance in Uganda and Kenya: A Review of Efforts to Establish Indicators on the Impacts of Oil Sector in Uganda and Kenya*, April 2015.

<sup>75</sup> 'There is no time left: climate change, environmental threats, and human rights in Turkana county' *Human Rights Watch* <https://www.hrw.org/report/2015/10/15/there-no-time-left/climate-change-environmental-threats-and-human-rights-turkana> on 10 January 2018.

of payment of EIA fees on the basis that such costs impede development.<sup>76</sup> This, coupled with the fact that provisions on EIA in EMCA are not too strong on mega-projects especially in the mining and the extractives sector, is evidence that achieving sustainability in mining operations requires more concerted legislative focus.

One of the critical challenges from an environment perspective relates to the linkages between environmental legislation and sectoral legislation. When EMCA was enacted, it was intended to be a framework legislation, whose import was to elevate the environmental legislation to a status superior to other laws governing sectoral aspects of the environment.<sup>77</sup> The aim was to avoid the previous sectoral approach to environmental management.<sup>78</sup> Thus, section 148 of EMCA provides that both national and county legislations which were in force before the coming into force of EMCA are to be implemented with such adjustments as are necessary to ensure they comply with the provisions of the environmental legislation, and ‘where the provisions of any such law conflict with any provisions of (EMCA), the provisions of (EMCA) shall prevail.’<sup>79</sup> This makes EMCA an overarching framework on all matters touching on the environment and sectoral laws must align with its provisions. However, others have argued this provision falls foul of both the Judicature Act,<sup>80</sup> which provides for a hierarchy of laws and the legal requirement that later laws take precedence over earlier ones.<sup>81</sup> In light of these contending debates, the more important issue is to harmonise the various laws governing the environment, since one is required to comply with both the requirements of EMCA and other laws dealing with extractives.

*Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining and others*<sup>82</sup> is instructive of the tensions between the imperatives of mining law and environmental requirements. In this case, the High Court reconciled provisions in the Mining Act relating to the grant of a special mining licence and an EIA licence under EMCA through its holding that under the provisions of EMCA and its EIA

<sup>76</sup> ‘Business reforms: waiver of levies environmental impact assessment and construction levy’ Kenya private sector alliance <http://kepsa.or.ke/2017/02/16/business-reforms-waiver-of-levies-environmental-impact-assessment-and-construction-levy/> on 10 January 2018.

<sup>77</sup> For discussion of framework environmental laws, see Okidi C et al, ‘Concept, Function and Structure of Environmental Law’, 3-60.

<sup>78</sup> Angwenyi A, ‘An Overview of the Environment Management and Coordination Act’ in Okidi C et al, *Environmental Governance in Kenya: Implementing the Framework Law*, 142-182.

<sup>79</sup> Section 148, *Environment Management and Coordination Act* (Act No. 5 of 2015).

<sup>80</sup> Section 3, *Judicature Act* (Act No. 16 of 1967).

<sup>81</sup> For broad discussions on this issue, see Migai A, ‘Governing Water and sanitation in Kenya’ in Okidi C et al, *Environmental Governance in Kenya: Implementing the Framework Law*, 305 - 334.

<sup>82</sup> *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining and others* [2014] eKLR.

Regulations of 2003, the grant of an EIA licence is a condition precedent for the approval of mining activities since mining is one of the activities for which an EIA is required. The High Court held that:

NEMA has a mandate both under the EMCA and the Constitution to protect and safeguard the environment for the benefit of all Kenyans... It would be abdication of duty if NEMA were to fail to fulfil the mandate in regard to which they were established. To the extent that the Commissioner for Mines was not furnished with a NEMA licence as required under the EMCA and the Regulations made thereunder my view is he could not issue a valid mining licence and the licence he issued to the applicant on 7th March 2013 was null and void and of no legal effect.<sup>83</sup>

Despite the importance of EIA, both the mining operations in titanium in Kwale and oil exploration in Turkana proceeded on the basis of EIA yet environmental challenges still accompany these operations.<sup>84</sup> Explanations for this state of affairs is varied, ranging from lack of capacity by NEMA to enforce EIA requirements, corruption, lack of adequate public participation in the EIA process, poor quality of EIA reports to failure to hold project proponents to their environmental commitments under EIA.<sup>85</sup>

#### 4 Responding to environmental challenges: Highlights of the Mining Act

The enactment of a mining law in 2016<sup>86</sup> provided a robust legal framework for dealing with the emerging issues in the extractives industry. What now remains is for similar developments in the oil and gas sector, and the country will have a comprehensive legal framework dedicated to extractives. Such a regime will ensure a modern and adequate framework to respond to the environmental impacts arising from mining, oil and gas operations.

The Mining Act recognises the importance of a stable legal regime for mining operations. It was enacted against the imperative to address what is recognised

<sup>83</sup> *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining and others* [2014] eKLR.

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<sup>85</sup> For an incisive discussion of these issues, see Adam Smith International, *Recommendations for the Development of Kenya's Extractive Industry Based on Inclusive Multi-stakeholder Consultation*. See also discussions on the limits of EIA in the context of Titanium Mining in Kenya, Davies T and Osano O, *Sustainable mineral development: Case study from Kenya*, Vol. 250 (1) Geological Society London Special Publications, London, 2005, 93; Economic Commission for Africa, *Assessment of Mineral Regimes in the East African Community: Aligning Frameworks with the East African Community*, 2017, 22.

<sup>86</sup> *Mining Act* (Act No. 12 of 2016).



worldwide as an environmentally risky sector.<sup>87</sup> Environmental issues can arise throughout the life-cycle of mining operations from prospecting, mining, processing, refining, treatment, transport and any other dealings with minerals.

The Mining Act creates the position of a Director of Mines.<sup>88</sup> One of the functions of the Director of Mines is to be responsible for ensuring compliance with environmental standards and regulations, under the direction of the responsible Principal Secretary and ultimately to the Cabinet Secretary.<sup>89</sup> This is a result of the realisation that sound mining operations require compliance with environmental imperatives. The Mining Act requires the Director of Mines to ensure, amongst others things, the provision of advice and support to holders of mineral rights on proper and safe mining methods.<sup>90</sup> The Director of Mines is also required to facilitate access to information by the public,<sup>91</sup> advise on the development of policy to ensure compliance with international conventions and national policies relating to the sustainable development of mineral resources, and ensure that mining operations take into account local and community values.<sup>92</sup> To ensure compliance with these requirements, the Director of Mines is empowered to enter into and inspect any place where mining is taking place. Further, the office has powers to protect the health and safety of any person employed by the holder of a mining right.<sup>93</sup>

Part VI of the Mining Act contains procedures for grant of mineral rights. The categories of rights that can be granted are grouped into large-scale, small-scale, and artisanal operations.<sup>94</sup> Part of the critical requirements that an applicant must meet before being granted a mineral right are environmental.<sup>95</sup> Elaborate procedures are put in place to ensure that this happens. For example, as part of the application and consideration for a prospecting licence, an applicant is required to submit to the Cabinet Secretary for the time being responsible for minerals, an environmental rehabilitation and restoration plan.<sup>96</sup> Should the prospecting licence

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<sup>87</sup> Tienhaara K, 'Mineral Investment and the Regulation of the Environment in Developing Countries: Lessons from Ghana' 6 *International Environmental Agreements: Politics, Law and Economics* (2006), 371, 391.

<sup>88</sup> Section 20, *Mining Act*. (Act No. 12 of 2016).

<sup>89</sup> Section 20(1) (k), *Mining Act* (Act No. 12 of 2016).

<sup>90</sup> Section 20(1) (k), *Mining Act* (Act No. 12 of 2016).

<sup>91</sup> Section 20 (1) (i), *Mining Act* (Act No. 12 of 2016).

<sup>92</sup> Section 20(1) (o), *Mining Act* (Act No. 12 of 2016).

<sup>93</sup> Section 20(3), *Mining Act* (Act No. 12 of 2016).

<sup>94</sup> Ayisi M, 'The Legal Character of Mining Rights Under the New Mining Law of Kenya', *Journal of Energy and Natural Resources Law*, 5.

<sup>95</sup> Ayisi M, 'The Legal Character of Mining Rights Under the New Mining Law of Kenya', 5.

<sup>96</sup> Section 72(3), *Mining Act* (Act No. 12 of 2016).

be granted, then the licence-holder is required to comply with the terms and conditions of the rehabilitation and restoration plan.<sup>97</sup> Every approved prospecting plan is required to include certain information, including an approved EIA report,<sup>98</sup> and an environmental management plan where required.<sup>99</sup> The law requires that monitoring and audit be undertaken as part of ensuring continuous compliance with environmental standards.<sup>100</sup> Before one applies for renewal of their prospecting licence, s/he will be required to show evidence that s/he complied with the initial conditions as evidenced by submission of audit reports to NEMA.<sup>101</sup>

## 5 Procedural rights and other international commitments

The existence of a robust legal and policy framework forms a useful foundation for resolving societal problems.<sup>102</sup> However, despite its utility in resolving legal problems, law frequently fails to achieve this purpose.<sup>103</sup> This failure arises from the reality that law is just but one tool of ensuring orderly development. Its existence alone is insufficient. It has to be implemented effectively. This requires an enabling environment, a committed leadership and an enlightened citizenry. It also requires allocation of adequate resources for implementation of the laws and their monitoring.

The laws discussed in this chapter provide a sound basis for dealing with the environmental problems that exploitation of Kenya's mineral, oil and gas discoveries portend. They need to be actualised through robust implementation. In that process, procedural rights, as distinct from substantive rights, become critical. Procedural rights in the environmental context derive from, among others, the Rio Declaration,<sup>104</sup> which captures the three traditional procedural rights of public participation, access to justice, and access to information.<sup>105</sup>

<sup>97</sup> Section 77(1) (d), *Mining Act* (Act No. 12 of 2016).

<sup>98</sup> Section 78 (d), *Mining Act* (Act No. 12 of 2016).

<sup>99</sup> Section 78 (d), *Mining Act* (Act No. 12 of 2016).

<sup>100</sup> Section 82(1) (e), *Mining Act* (Act No. 12 of 2016).

<sup>101</sup> Section 82(1) (e), *Mining Act* (Act No. 12 of 2016).

<sup>102</sup> See Woodman G, 'The Limits of the 'Limits of the Law' 21 *Journal of Legal Pluralism* (1983), 129-149.

<sup>103</sup> Woodman G, 'The Limits of the 'Limits of the Law', 129.

<sup>104</sup> United Nations Conference on Environment and Development, *Rio Declaration on Environment and Development*.

<sup>105</sup> United Nations Conference on Environment and Development, *Rio Declaration on Environment and Development*, Principle 10.

The extractives sector is largely characterised by secrecy. This has led to worldwide campaigns for greater transparency and access to information so as to improve engagement and effective management of the sector. This is the rationale for the emergence of initiatives such as the Extractive Industry Transparency Initiative (EITI)<sup>106</sup> and the Publish what you Pay Initiative.<sup>107</sup> The idea behind EITI, for example, is that,

[a]vail[ing] information to the public improves the debate about the management and use of a country's natural resources. Therefore, leaders can be held accountable for their decisions relating to the management of natural resources as there is an informed constituency of actors involved in the process.<sup>108</sup>

While Kenya is not party to the EITI initiative currently, access to information concerns are a topical agenda generally. All the discoveries and exploitation of the country's minerals and oil resources are accompanied by complaints of secrecy. This is evident in the inclusion of non-disclosure clauses in production-sharing contracts and the general lack of information on the content of the agreements between government and corporations exploiting these resources. As a consequence, there are several court cases seeking access to information relating to mining, oil and gas.<sup>109</sup> Further, civil society organisations have raised the red flag on lack of transparency and the implications for sustainability of the sector.<sup>110</sup> Denial of information compromises the ability to identify and respond to environmental challenges.<sup>111</sup> Kenya's recent adoption of an Access to Information Act<sup>112</sup> so as to provide for a framework for implementation of Article 35 of the Constitution is useful for accountability.<sup>113</sup>

<sup>106</sup> See website of Extractives Industries Transparency Initiative on its context, processes and importance. <https://eiti.org/>.

<sup>107</sup> <http://www.publishwhatyoupay.org/>.

<sup>108</sup> Omolo M and Mwabu G, *A Primer to the Emerging Extractive Sector in Kenya: Resource Bliss, Dilemma or Curse*, Institute of Economic Affairs, 2014, 47.

<sup>109</sup> See for example: *In the Matter of Concessionary Rights to the Mui Coal Basin Deposits* [2012] eKLR; *Titanium Mining*, see *Rodgers Muema Nzioka & others v Tiomin Kenya Limited* [2001] eKLR; and in the context of Turkana while not on oil, the case of *Friends of Lake Turkana v AG and Others* [2012] eKLR.

<sup>110</sup> Kenya Civil Society Platform on Oil and Gas, *Setting the Agenda for the Development Kenya's Oil and Gas Resources: The Perspectives of Civil Society*, 12 August 2014.

<sup>111</sup> Institute for Law and Environmental Governance, *Public Interest Environmental Litigation in Kenya: Prospects and Challenges*; Odote C, 'Why Access to Information Law is Vital' *Business Daily*, 5 October 2015 <http://www.businessdailyafrica.com/analysis/Why-access-to-information-law-is-vital/539548-2476056-7dc0e6/index.html> on 10 January 2018.

<sup>112</sup> Access to Information Act (Act No. 31 of 2016).

<sup>113</sup> ICJ (K), *Access to Information Law in Kenya: Rationale and Policy Framework* (2015).

It is important to ensure greater access to information relating to the extractives sector. In addition, citizens should be involved much more in the processes leading to grant of concessions and throughout the entire exploitation and production chain. This will help ensure support for the projects, and sustainable mining. In addition, focus must be on the acquisition of social licence from communities around the mines and areas of oil and gas discoveries.<sup>114</sup>

There are several international obligations that Kenya has in relation to procedural rights, and environmental management. Whether it is the African Mining Vision (AMV),<sup>115</sup> Sustainable Development Goals or the international conventions on waste management, like the Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and their Disposal (Basel Convention), implementation is key. Kenya must domesticate its international commitments in the sector. This is not just about SDGs, it is also about giving national meaning to the requirements of the Africa Mining Vision. In achieving the vision of AMV, the continent has developed an ambitious action plan, around seven programme clusters. Cluster seven focuses on environmental and social issues. It recognises that the continent bears the environmental and social burdens of mining, reducing the benefits of exploiting the continent's mineral resources. In responding to these challenges, the action plan lays down elaborate strategies which involve collaborative action and strengthening the capacity of regulatory agencies. It also requires private companies to play their part, stressing that:

Addressing the adverse environmental and social impacts of mining requires a multi-pronged approach. On their part, Governments need to strengthen the frameworks that govern environmental and social impact assessment, management and regulation. They should also enhance the capacities and effectiveness of regulatory agencies and improve the culture of how these institutions interact with citizens and communities affected by mining. This would help minimise conflicts and tensions with communities due to displacement and disruption of livelihoods by mining activities.<sup>116</sup>

In implementing AMV within Kenya, it is important to keep in mind that ensuring sustainability is about balancing the environment, society and development. It is about expanding our perspectives on avoiding resource-curse to include not just benefit-sharing but avoiding environmental harm as a result of mining and

<sup>114</sup> Odote C, 'Reforming the Legal Framework'.

<sup>115</sup> African Union, *African mining vision*, February 2009 [http://www.africaminingvision.org/amv\\_resources/AMV/Africa\\_Mining\\_Vision\\_English.pdf](http://www.africaminingvision.org/amv_resources/AMV/Africa_Mining_Vision_English.pdf) on 10 January 2018.

<sup>116</sup> African Union Commission, *building a sustainable future for Africa's sustainable extractive industry: from vision to action, draft action plan for implementing the African Mining Vision*, 2013 [http://africaminingvision.org/amv\\_resources/AMV/AMV\\_Action\\_Plan\\_dec-2011.pdf](http://africaminingvision.org/amv_resources/AMV/AMV_Action_Plan_dec-2011.pdf) on 10 January 2018.

oil and gas operations in the country. Legal and policy stipulations have to provide this delicate balance. As the country develops legislations and regulations in the petroleum and mining sector, particular attention has to be paid to incorporating a conservation ethic in the exploitation process. Such provisions ought to promote a healthy balance between environment and development.

## 6 Conclusion

The environmental challenges that extractives portend are grave. In most instances, debates about the Dutch disease as a fundamental consequence of extractives discovery and exploitation focus on the economic benefits and burdens of the sector. These debates ignore the environmental impacts that ensue from the sector. In the process, debates arise as to the best optimal solution. Due to the large sums of money associated with the sector, such discussions are mainly seen as irritants. To argue that minerals or oil and gas will have negative consequences on the environment will most likely be met with statements to the effect that development has a cost. While it is true that development has a cost, it is important that the pursuit of profit does not overshadow the deleterious effects that the development from mining operations will leave in their wake.

To resolve the above challenge, it is important that the country does more than just pay lip service to the commitments to sustainability. As part of the global community, Kenya agreed to the targets to meet the requirements of the SDGs in September 2015. At the heart of the SDG's is the delicate balance between environment and development, a balance so easy to state but difficult to achieve. In ensuring sustainability for the extractives sector, it is necessary that several practical steps be undertaken.

Kenya's environmental provisions provide a basis for addressing environmental challenges in the sector. In an article about Peru, the question posed is whether it is possible to develop extractive industries while preserving the environment.<sup>117</sup> It is definitely possible. The chapter argues for using EIA as one such mechanism for doing so.<sup>118</sup> For this to happen, EIA must stop being undertaken just to fill procedural requirements. Instead, EIA must be accompanied by strategic environmental

<sup>117</sup> Evidence and Lessons from Latin America (ELLA), *Improving Environmental Management of Extractives through Environmental Impact Assessments* (Policy Brief) [http://ella.practicalaction.org/wp-content/uploads/files/130627\\_ECO\\_ExtIndLanUse\\_BRIEF3.pdf](http://ella.practicalaction.org/wp-content/uploads/files/130627_ECO_ExtIndLanUse_BRIEF3.pdf) on 12 January 2018.

<sup>118</sup> ELLA, *Improving Environmental Management of Extractives through Environmental Impact Assessments*.

assessment, and the results of the assessment must be considered and mitigation measures put in place.

Implementing the provisions of the law dealing with the environment will help promote sustainable mining operations. It is also important to strengthen the capacity of various agencies responsible for the implementation process, including the relevant ministries and departments and NEMA, so that they can discharge their environmental responsibilities relating to mining operations. The role of non-state actors in ensuring that both the private sector and the Government live up to their commitment is also important. This will give meaning to the provisions of access to information, public participation and access to justice. Unless this is done, the conflicts that characterise the sector will continue being a permanent feature of extractives in the country. Courts have continued to give progressive decisions that help ensure compliance with environmental provisions in a diverse range of areas, including mining operations. There exists scope for more court interventions so as to put a stop to the environmental complaints that accompany mining and extractives industry operations.

In the end, balancing environmental and development imperatives in the extractives sector requires a multi-faceted approach, one which seeks to strengthen the legislative and policy framework, and incorporates procedural rights geared towards ensuring environmental sustainability in all legislative enactments dealing with extractives. Provisions that ensure citizens participation and access to information throughout the extractives life cycle will play an important role in securing the environmental rights of citizens in the extractive industry and its attendant processes. A robust Judiciary as well as public awareness programmes will help support this approach.

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