LOCAL COMMUNITIES IN KENYA’S EXTRACTIVE SECTOR:
From Paternalism to Partnership

Edited By Katindi Sivi-Njonjo

© 2015
Table of Contents

List of Figures and Tables iv
Foreword v
Acknowledgements vi
Acronyms and Abbreviations vii
Chapter 1: A Project Overview 1
Chapter 2: An Overview of the Extractive Sector 11
Chapter 3: The Policies, Laws and Institutional Frameworks Governing EIs 53
Chapter 4: Community Engagement Practices from Select Countries 103
Chapter 5: EI Engagement Strategies that Empower Communities 163
List of Figures & Tables

Figure 1: Kenya's Four Hydrocarbon Basins 15
Figure 2: Percentage of individuals living below the poverty line in oil regions in Kenya 16
Figure 3: Categorization of minerals and their uses 20
Figure 4: The Mining Industry Structure 22
Figure 5: The Cycle of a Mine 22
Figure 6: The Oil and Gas Industry Structure 26
Figure 7: The Extractive Sector Value Chain and Decision-Making Processes 29
Figure 8: Mineral oil and gas contribution of net export 34
Figure 9: Comparing HDIs of resource rich countries in Africa with other countries 35
Figure 10: The Geology of Kenya's Minerals 37
Figure 11: Gemstone and Mineral Deposits in Kenya 41
Figure 12: Artisanal Mining Using Rudimentary Tools 42
Figure 13: The Petroleum Exploration Blocks of Kenya 47
Figure 14: Facts about oil in Nigeria 113
Figure 15: Benefit sharing revenue allocation formulae from different countries 118
Figure 16: Negative impact of EIs on Ogoniland in Nigeria 122
Figure 17: Pillars of the Canadian CSR strategy 133
Figure 18: Map of Kenya showing the marginalized regions (in dark purple) 167
Figure 19: Community engagement in relation to the lifecycle of a mine 173

List of tables
Table 1: Quantity and Value of Mineral Production (2009-2013) 46
Table 2: Framework for conducting HRIA among duty bearers and other influential stakeholders 177
Table 3: Framework for conducting HRIA among right holders i.e. the local community 179
Table 4: Practical interventions on conducting ADR at grassroots level 186
Table 5: Benefit sharing considerations for communities 197
Table 6: Broad policy and practical recommendations for stakeholders wishing to empower communities 198
Norwegian Church Aid (NCA) was established by Norwegian churches 30 years ago to work with people and organisations around the world in their struggle to eradicate poverty and injustice. NCA has worked in Kenya since 1984. The current prioritised areas of work in the country include climate justice and gender justice. NCA’s global strategic priorities and programmes also address economic injustices, which include accountable governance of national resources from a rights based perspective. The Economic Justice project aims at challenging the extractive sector to have increased transparency, accountability and a focus on environmental issues.

As NCA, we recognise that while the sector has the potential to transform economies and communities through the revenue generated from exports, royalties and taxes paid to the government, it is unfortunate that the interest to make profit often supersedes the interest to advance community welfare. As such, communities are excluded from decision-making processes as government and mining companies make pacts with each other regarding mineral resources. Communities on the other hand often do not have a sense of how the engagement process should work, and thus are not able to participate effectively in dialogue with either the government or the mining companies in an informed way.

NCA Kenya would like to ensure that their stakeholders in mining regions who comprise mainly of Faith Based Organisations (FBOs), Community Based Organisations (CBOs), Civil Society Organisations (CSOs), the clergy, traditional leaders, women, youth and marginalised community groups, engage with the emerging extractive industry (EI) mainly because it directly affects their livelihoods. To this end, NCA would like to empower its stakeholders with the tools and knowledge that: enable them to be comprehensively informed about EIs in general; makes them aware of the relevant EI policies, legal and institutional frameworks for advocacy purposes; helps them learn from the experiences of other EI countries in order to model alternatives; embolden them to self-organise and to network in order to protect their livelihoods and cultures; as well as tools and knowledge that adequately empower communities to participate in decision making processes and get out comes that favour their interests.

It is therefore with great pleasure that I invite you to enjoy reading ‘Local Communities in Kenya’s Extractive Sector: From Paternalism to Partnership’, a publication that not only informs readers about EIs in Kenya but also one that provides guidance on how communities can engage in extractive sector projects in order to benefit from these resources.

Kirsten Engebak
NCA Area Representative,
Kenya and Somalia
NCA would like to sincerely thank all those who contributed to the successful publication of this book.

Our gratitude goes to the team that first brainstormed on the research content on November 7 2014. This team comprised of Benson Ireri, Bwibo Adier, Edgar Odari, Lonah Wanjama, Jill Juma, Katindi Sivi–Njonjo, Kirsten Engebak, Mwekesi Mwenesi, Paul Mbole, Reuben Chepkonga, Susy Ibutu, and Wasye Musyoni.

NCA would also like to thank all the individuals who took part in the peer review exercise held on January 30 2015. NCA is grateful to Anna-Maria Sandstrom, Benson Ireri, Brenda Omuombo, Bwibo Adier, Caleb Monko, Charles Wanguhu, Chrispine Odour, Clement Migai, Edgar Odari, Emmy Rono, Prof. Germano Mwabu, Grace Mbugua, Hadley Becha, Jackie Mathenge, Jimmy Obuya, Katindi Sivi-Njonjo, Kirsten Engebak, Linnet Ngayu, Lonah Wanjama, Maina Wambugu, Miriam W. O. Omolo, Paul Mbole, Rebecca Tanui, Reuben Chepkonga, Rose Wairimu, Rose Wanjiru, Samwel Kingi, Solomon Gichira, Stephene Mwakesi, Valentine Ataka and Wasye Musyoni.

Special mention goes to Dr.Wasunna for her substantive input on artisanal and small-scale mining in the ‘Overview of the Extractive Sector in Kenya’ chapter of the book. NCA would also like to sincerely thank Clement Migai for his substantive review of the ‘Policy, Legal and Institutional Frameworks Governing EIs in Kenya’ chapter of the book.

The administrative support of Yussuf Abukar Aweis & overall coordination of this book by Katindi Sivi-Njonjo is also acknowledged.
<table>
<thead>
<tr>
<th>Acronym</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>AAPA</td>
<td>Aboriginal Areas Protection Authority</td>
</tr>
<tr>
<td>ABA</td>
<td>Aboriginal Benefits Account</td>
</tr>
<tr>
<td>ADIL</td>
<td>Africa Diatomite Industries Limited</td>
</tr>
<tr>
<td>ADR</td>
<td>Alternative Dispute Resolution</td>
</tr>
<tr>
<td>AfDB</td>
<td>African Development Bank</td>
</tr>
<tr>
<td>AG</td>
<td>Attorney General</td>
</tr>
<tr>
<td>AHSG</td>
<td>Africa’s Heads of States and Governments</td>
</tr>
<tr>
<td>AIPF</td>
<td>Australian Industry Participation Framework</td>
</tr>
<tr>
<td>ALBA</td>
<td>Ahafo Local Business Association</td>
</tr>
<tr>
<td>ALP</td>
<td>Ahafo Linkages Program</td>
</tr>
<tr>
<td>ALRA</td>
<td>Aboriginal Land Rights Act</td>
</tr>
<tr>
<td>AMV</td>
<td>African Mining Vision</td>
</tr>
<tr>
<td>ASALs</td>
<td>Arid and Semi Arid Lands</td>
</tr>
<tr>
<td>ASM</td>
<td>Artisanal and small-scale mining/miners</td>
</tr>
<tr>
<td>AU</td>
<td>African Union</td>
</tr>
<tr>
<td>BMA’s</td>
<td>Billiton Mitsubishi Alliance’s</td>
</tr>
<tr>
<td>CAAI</td>
<td>Canadian Association Against Impunity</td>
</tr>
<tr>
<td>CAAC</td>
<td>Catchment Area Advisory Committees</td>
</tr>
<tr>
<td>CAMA</td>
<td>Canadian Aboriginal Minerals Association</td>
</tr>
<tr>
<td>CANCO</td>
<td>Community Action for Nature Conservation</td>
</tr>
<tr>
<td>CBOs</td>
<td>Community Based Organizations</td>
</tr>
<tr>
<td>CED</td>
<td>Community Economic Development</td>
</tr>
<tr>
<td>CFAs</td>
<td>Community Forest Associations</td>
</tr>
<tr>
<td>CIDA</td>
<td>Canadian International Development Agency’s</td>
</tr>
<tr>
<td>cm</td>
<td>Centimetre</td>
</tr>
<tr>
<td>CNOOC</td>
<td>China National Offshore Oil Corporation</td>
</tr>
<tr>
<td>CRA</td>
<td>Commission for Revenue Allocation</td>
</tr>
<tr>
<td>CS</td>
<td>Cabinet Secretary</td>
</tr>
<tr>
<td>CSBP</td>
<td>Conflict Sensitive Business Practices</td>
</tr>
<tr>
<td>CSI</td>
<td>Corporate Social Investment</td>
</tr>
<tr>
<td>CSOs</td>
<td>Civil Society Organisations</td>
</tr>
<tr>
<td>CSR</td>
<td>Corporate Social Responsibility</td>
</tr>
<tr>
<td>CTF</td>
<td>Community Trust Fund</td>
</tr>
<tr>
<td>DFAT</td>
<td>Department of Foreign Affairs and Trade</td>
</tr>
<tr>
<td>Acronym</td>
<td>Definition</td>
</tr>
<tr>
<td>----------</td>
<td>-----------------------------------------------</td>
</tr>
<tr>
<td>DRC</td>
<td>Democratic Republic of Congo</td>
</tr>
<tr>
<td>DROP</td>
<td>Daily Rate of Production</td>
</tr>
<tr>
<td>DTA</td>
<td>Double Taxation Agreement</td>
</tr>
<tr>
<td>EAC</td>
<td>East African Community</td>
</tr>
<tr>
<td>EAPCC</td>
<td>East Africa Portland Cement Company</td>
</tr>
<tr>
<td>ECGLC</td>
<td>Economic Community of the Great Lakes Countries</td>
</tr>
<tr>
<td>EDC</td>
<td>Export Development Canada</td>
</tr>
<tr>
<td>EEG</td>
<td>Environmental Exchange Group</td>
</tr>
<tr>
<td>EGASPIN</td>
<td>Environmental Guidelines and Standards for the Petroleum Industries in Nigeria</td>
</tr>
<tr>
<td>EI</td>
<td>Extractive Industry</td>
</tr>
<tr>
<td>EIA</td>
<td>Environmental Impact Assessment</td>
</tr>
<tr>
<td>EITI</td>
<td>Extractive Industries Transparency Initiative</td>
</tr>
<tr>
<td>EMCA</td>
<td>Environmental Management and Coordination Act</td>
</tr>
<tr>
<td>EOR</td>
<td>Enhanced Oil Recovery</td>
</tr>
<tr>
<td>ERSWEC</td>
<td>Economic Recovery Strategy for Wealth and Employment Creation</td>
</tr>
<tr>
<td>ES</td>
<td>Extractive Sector</td>
</tr>
<tr>
<td>ESIA</td>
<td>Environmental and Social Impact Assessment</td>
</tr>
<tr>
<td>FBOs</td>
<td>Faith Based Organisations</td>
</tr>
<tr>
<td>FDI</td>
<td>Foreign Direct Investment</td>
</tr>
<tr>
<td>FEPA</td>
<td>Federal Environmental Protection Agency</td>
</tr>
<tr>
<td>FERP</td>
<td>Federal Environmental and Regulatory Processes</td>
</tr>
<tr>
<td>FIP</td>
<td>Colombian Fundación Ideas Para la Paz</td>
</tr>
<tr>
<td>FOS</td>
<td>Federal Office of Statistics</td>
</tr>
<tr>
<td>FPIC</td>
<td>Free Prior and Informed Consent</td>
</tr>
<tr>
<td>FRED</td>
<td>Fund for Rural Economic Development</td>
</tr>
<tr>
<td>FTFs</td>
<td>Foundations, Trusts and Funds</td>
</tr>
<tr>
<td>GAM</td>
<td>Gerakan Aceh Merdeka</td>
</tr>
<tr>
<td>GBV</td>
<td>Gender Based Violence</td>
</tr>
<tr>
<td>GDP</td>
<td>Gross Domestic Product</td>
</tr>
<tr>
<td>GoK</td>
<td>Government of Kenya</td>
</tr>
<tr>
<td>GOS</td>
<td>Government of Sudan</td>
</tr>
<tr>
<td>GRI</td>
<td>Global Reporting Initiative</td>
</tr>
<tr>
<td>HDI</td>
<td>Human Development Indicators</td>
</tr>
<tr>
<td>Acronym</td>
<td>Full Form</td>
</tr>
<tr>
<td>---------</td>
<td>-----------</td>
</tr>
<tr>
<td>HDSA</td>
<td>Historically Disadvantaged South Africans</td>
</tr>
<tr>
<td>HRIA</td>
<td>Human Rights Impact Assessment</td>
</tr>
<tr>
<td>IA</td>
<td>International Alert</td>
</tr>
<tr>
<td>IFC</td>
<td>International Finance Corporation</td>
</tr>
<tr>
<td>IMF</td>
<td>International Monetary Fund</td>
</tr>
<tr>
<td>INAC</td>
<td>Indian and Northern Affairs Canada</td>
</tr>
<tr>
<td>IOC(s)</td>
<td>International Oil Companies</td>
</tr>
<tr>
<td>IPA</td>
<td>Indigenous Protected Area</td>
</tr>
<tr>
<td>IPAC</td>
<td>International Permanent Arbitration Court</td>
</tr>
<tr>
<td>IRMA</td>
<td>Initiative for Responsible Mining Assurance</td>
</tr>
<tr>
<td>ITA</td>
<td>Income Tax Act</td>
</tr>
<tr>
<td>KAM</td>
<td>Kenya Association of Manufacturers</td>
</tr>
<tr>
<td>KOGA</td>
<td>Kenya Oil and Gas Association</td>
</tr>
<tr>
<td>KPC</td>
<td>Kaltim Prima Coal</td>
</tr>
<tr>
<td>KPCL</td>
<td>Kenya Pipeline Company Limited</td>
</tr>
<tr>
<td>KPRL</td>
<td>Kenya Petroleum Refineries Limited</td>
</tr>
<tr>
<td>KRA</td>
<td>Kenya Revenue Authority</td>
</tr>
<tr>
<td>KCSPOG</td>
<td>Kenya Civil Society Platform on Oil and Gas</td>
</tr>
<tr>
<td>LCPPF</td>
<td>Local Content and Participation Policy Framework</td>
</tr>
<tr>
<td>LDCs</td>
<td>Least Developed Countries</td>
</tr>
<tr>
<td>LGA</td>
<td>Local Government Authority</td>
</tr>
<tr>
<td>LSM</td>
<td>Large-Scale Mining/Miners</td>
</tr>
<tr>
<td>Ltd</td>
<td>Limited</td>
</tr>
<tr>
<td>MCA</td>
<td>Minerals Council of Australia</td>
</tr>
<tr>
<td>MCK</td>
<td>Media Council of Kenya</td>
</tr>
<tr>
<td>MDG</td>
<td>Millennium Development Goals</td>
</tr>
<tr>
<td>MNC(s)</td>
<td>Multi-National Corporations</td>
</tr>
<tr>
<td>MoEP</td>
<td>Ministry of Energy and Petroleum</td>
</tr>
<tr>
<td>MOU</td>
<td>Memorandum of Understanding</td>
</tr>
<tr>
<td>MTEF</td>
<td>Medium Term Expenditure Framework</td>
</tr>
<tr>
<td>MTP</td>
<td>Medium-Term Plans</td>
</tr>
<tr>
<td>MWI</td>
<td>Ministry of Water and Irrigation</td>
</tr>
<tr>
<td>NAFFAC</td>
<td>National Fossil Fuels Advisory Committee</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Description</td>
</tr>
<tr>
<td>--------------</td>
<td>-------------</td>
</tr>
<tr>
<td>NAOC</td>
<td>Nigeria Agip Oil Company</td>
</tr>
<tr>
<td>NCAC</td>
<td>National Coal Advisory Committee</td>
</tr>
<tr>
<td>NEITI</td>
<td>Nigerian Extractive Industry Transparency Initiative</td>
</tr>
<tr>
<td>NEMA</td>
<td>National Environmental Management Authority</td>
</tr>
<tr>
<td>NEPAD</td>
<td>New Partnership for Africa’s Development</td>
</tr>
<tr>
<td>NGGL</td>
<td>Newmont Ghana Gold Ltd</td>
</tr>
<tr>
<td>NGOs</td>
<td>Non-Governmental Organisations</td>
</tr>
<tr>
<td>NIEO</td>
<td>New International Economic Order</td>
</tr>
<tr>
<td>NNBS</td>
<td>Nigeria’s National Bureau of Statistics</td>
</tr>
<tr>
<td>NNOC</td>
<td>Nigeria National Oil Corporation</td>
</tr>
<tr>
<td>NNPC</td>
<td>Nigerian National Petroleum Corporation</td>
</tr>
<tr>
<td>NOC’s</td>
<td>National Oil Corporation</td>
</tr>
<tr>
<td>NOCK</td>
<td>National Oil Corporation of Kenya</td>
</tr>
<tr>
<td>NRCan</td>
<td>Natural Resources Canada</td>
</tr>
<tr>
<td>NSEQC</td>
<td>Northern Saskatchewan Environmental Quality Committee</td>
</tr>
<tr>
<td>NTO’s</td>
<td>National Treatment Obligations</td>
</tr>
<tr>
<td>NUPAC</td>
<td>National Upstream Petroleum Advisory Committee</td>
</tr>
<tr>
<td>OAGDJ</td>
<td>Office of the Attorney General and Department of Justice</td>
</tr>
<tr>
<td>OGCA</td>
<td>Oil and Gas Contractors Association of Kenya</td>
</tr>
<tr>
<td>OECD</td>
<td>Organisation for Economic Corporation and Development</td>
</tr>
<tr>
<td>PDAC</td>
<td>Prospectors and Developers Association of Canada</td>
</tr>
<tr>
<td>PEV</td>
<td>Post Election Violence</td>
</tr>
<tr>
<td>PFM</td>
<td>Public Finance Management</td>
</tr>
<tr>
<td>PIEA</td>
<td>Petroleum Institute of East Africa</td>
</tr>
<tr>
<td>PNG</td>
<td>Papua New Guinea</td>
</tr>
<tr>
<td>PPPs</td>
<td>Public Private Partnerships</td>
</tr>
<tr>
<td>PSA</td>
<td>Production Sharing Agreement</td>
</tr>
<tr>
<td>PSC</td>
<td>Production Sharing Contract</td>
</tr>
<tr>
<td>PWYP</td>
<td>Publish What You Pay</td>
</tr>
<tr>
<td>RCMP</td>
<td>The Royal Canadian Mounted Police</td>
</tr>
<tr>
<td>RDL</td>
<td>Railway Development Levy</td>
</tr>
<tr>
<td>REE</td>
<td>Rare Earth Elements</td>
</tr>
<tr>
<td>RMDEC</td>
<td>Regional Mining Development and Environment Committee</td>
</tr>
<tr>
<td>Acronym</td>
<td>Description</td>
</tr>
<tr>
<td>-----------</td>
<td>--------------------------------------------------</td>
</tr>
<tr>
<td>RoK</td>
<td>Republic of Kenya</td>
</tr>
<tr>
<td>SAPs</td>
<td>Structural Adjustment Programmes</td>
</tr>
<tr>
<td>SCFAIT</td>
<td>Standing Committee on Foreign Affairs and International Trade</td>
</tr>
<tr>
<td>SRA</td>
<td>Social Risk Assessment</td>
</tr>
<tr>
<td>SWF</td>
<td>Sovereign Wealth Fund</td>
</tr>
<tr>
<td>TCP</td>
<td>Traditional Cultural Property</td>
</tr>
<tr>
<td>TEDs</td>
<td>Turtle Exclusion Devices</td>
</tr>
<tr>
<td>TEKS</td>
<td>Traditional Ecological Knowledge Systems</td>
</tr>
<tr>
<td>TOTs</td>
<td>Training of Trainers</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>UNCITRAL</td>
<td>United Nations Convention on International Trade Law</td>
</tr>
<tr>
<td>UNCTAD</td>
<td>United Nations Conference on Trade and Development</td>
</tr>
<tr>
<td>UNDP</td>
<td>United Nations Development Programme</td>
</tr>
<tr>
<td>UNECA</td>
<td>United Nations Economic Commission for Africa</td>
</tr>
<tr>
<td>UNEP</td>
<td>United Nations Environmental Programme</td>
</tr>
<tr>
<td>UNHRC</td>
<td>United Nations Human Rights Council</td>
</tr>
<tr>
<td>UPRA</td>
<td>Upstream Petroleum Regulatory Authority</td>
</tr>
<tr>
<td>US</td>
<td>United States</td>
</tr>
<tr>
<td>USA</td>
<td>United States of America</td>
</tr>
<tr>
<td>USD</td>
<td>United States Dollar</td>
</tr>
<tr>
<td>VAT</td>
<td>Value Added Tax</td>
</tr>
<tr>
<td>VETA</td>
<td>Vocational Education and Training Associations</td>
</tr>
<tr>
<td>WAB</td>
<td>Water Appeal Board</td>
</tr>
<tr>
<td>WASREB</td>
<td>Water Services Regulatory Board</td>
</tr>
<tr>
<td>WB</td>
<td>World Bank</td>
</tr>
<tr>
<td>WBCSD</td>
<td>World Business Council for Sustainable Development</td>
</tr>
<tr>
<td>WEDC</td>
<td>Western Economic Diversification Canada</td>
</tr>
<tr>
<td>WHO</td>
<td>World Health Organisation</td>
</tr>
<tr>
<td>WRMA</td>
<td>Water Resources Management Authority</td>
</tr>
<tr>
<td>WRUA</td>
<td>Water Resource Users Associations</td>
</tr>
<tr>
<td>WSBs</td>
<td>Water Services Boards</td>
</tr>
<tr>
<td>WSPs</td>
<td>Water Services Providers</td>
</tr>
<tr>
<td>WSTF</td>
<td>Water Services Trust Fund</td>
</tr>
<tr>
<td>WTO</td>
<td>World Trade Organisation</td>
</tr>
</tbody>
</table>
Project Overview

Katindi Sivi-Njonjo
Content

1.1 Background 3
1.2 Research Objectives 4
1.3 Research Methodology and Study Limitations 5
1.4 Beneficiaries of the Study 5
1.5 Report Structure 5
1.6 About the Authors 9
The relationship between mining operations and local communities is one that has had mixed outcomes.

In instances where certain mining ground rules have been observed such as: effective government regulation; and mining companies behaving responsibly with regard to the environment and their relationships with local communities; sustainable and equitable human development has been realised. According to the World Bank (2002), practical programmes and policies that have helped increase the probability of positive experiences between mining companies and communities are those that recognise three key aspects. First, that mining companies not only need their legal license to operate but a strong “social license”. The social license is as a result of rigorous consultation, participation, and a robust trilateral dialogue among the mining company, the local community, and the government at the local, regional, or national level from the onset of the project. Second, that the trilateral dialogue would have to focus on the sustainability of benefits for local communities. Such benefits include but are not limited to having mechanisms that facilitate communities to economically develop, mechanisms that protect the environment and mechanisms that uphold people’s rights. The process of economically developing communities yields great benefits as it fosters the formation of local social capital. Third, through constructive processes, local communities learn how to organise and how to negotiate in order to meaningfully participate independently in decision-making processes.

In contrast, there are plenty of cases where economic transactions have been emphasised more than community transformation. In these cases, the socio-economic impacts of the extractive sector on human development have been negative and according to UNDP (2012), they have often triggered violent conflicts, degraded the environment, worsened gender and other inequalities, displaced communities, and undermined democratic governance.

As such, global attention is being shifted towards people centered thinking in all aspects of mining, oil and gas. An example is the Initiative for Responsible Mining Assurance (IRMA), which among its proposals has laid emphasis on a people centred resource development (IRMA, 2014). IRMA principles posit that people must be at the centre of all aspects of the industry, both as beneficiaries and as drivers, as individuals and in groups. People must be empowered with the tools and knowledge offered and created by the EIs to build their own communities, states and nations.

However, because governments and mining companies wield more political influence than local communities, they may not voluntarily strive for a people-centred extractive industry due to other competing priorities like profit. Communities hosting mining projects must therefore gain the pre-requisite knowledge in the sector, have the ability to negotiate fair terms with government and private companies as well as have the ability to stop projects that have undue social costs. They must be able to push for equitable benefit sharing arrangements and, as a minimum, be empowered to seek redress when their rights are transgressed or resources used unfairly or in violation of agreements.

1.2 Research Objectives

This study therefore seeks to answer the question, ‘How can local communities receive greater priority and attention in order to optimally benefit from the extractive sector and reduce negative social impacts related to their exclusion?’

Overall goal of the study

The project seeks to contribute to an extractive sector that is people-centred and one that reflects the social dimensions of sustainability.

Objectives of the Study

- To provide general information on EIs in Kenya in order to inform and comprehensively educate host communities on extractives
- To advocate for relevant policies and legal frameworks that benefit communities
- To learn from the experiences of other EI countries in order to model alternatives to investors, communities and government
- To build the capacity of NCA stakeholders (who include FBOs, CBOs, CSOs, clergy, traditional leaders, women, youth and marginalized communities) to self-organise, and network in order to protect their livelihoods and cultures
- To empower communities to participate in negotiations and dialogues in order to adequately influence decisions that favour them at various levels
1.3 Research Methodology and Study Limitations

The entire research mainly entailed reviews of existing literature on the subject and the collation of published data from primary sources to generate key information. In some instances, key stakeholders in the extractive sector were consulted with a view to establish up to date information. This was particularly important for the Policies, Laws and Institutional Frameworks paper mainly because most of these are under review and therefore contain new information that may not be in the public domain.

The study is therefore limited by two factors. First, new information may have emerged within the policies, laws and institutional frameworks just before the publication of this book. Second, the study is limited by the fact that there was no primary data collected or field research conducted to compliment the secondary sources used. The work is however strengthened by the fact that it was peer reviewed by sector experts to ascertain its content in relation to the current status.

1.4 Beneficiaries of the Study

This research is designed to benefit groups and individuals in mining regions. These groups and individuals include FBOs, CBOs, CSOs, the clergy, traditional leaders, women, youth and marginalized communities. It is also envisaged that the work will benefit government departments engaged in the mining sector as well as mining companies who need to learn how to effectively engage communities in the mining processes and procedures. Through the research’s examination of country case studies and how to empower communities, the work is beneficial to County Governments as it demonstrates various options for local content, dispute resolution, benefit sharing, Corporate Social Investment (CSI) and environmental management.

1.5 Report Structure

In order to adequately address the objectives of the research, NCA commissioned four desktop researches.

The first paper titled ‘Overview of the Extractive Sector’ provides comprehensive information on the Extractive Sector (ES) with a view to inform communities and
other stakeholders on the status of the extractive sector in Kenya. The paper contains: definitions and characteristics of the extractive sector such as the categories of minerals, the process of mining, the extractive sector value chain and the decision making process; a brief history of the extractive sector in Africa which highlights the pre-independence period (9th century to mid 1960’s), the post independence period (mid 1960’s to early 1980’s), the Structural Adjustment Programmes [SAPs] period (early 80’s to early 2000’s) and the current period (early 2000s to date) as well as the contribution of EIs on the economy and social development; a brief history of the extractive sector in Kenya which includes the geology of Kenya’s minerals, artisanal and small-scale mining activities as well as the quantity and value of mineral production; and policy recommendations that will inform the engagement of stakeholders who will use this report.

The second paper titled ‘The Policies, Laws and Institutional Frameworks Governing EIs’ asserts that Kenya’s policies, laws, and institutional frameworks governing EIs in Kenya are found in multiple documents. With the discovery of more commercially viable minerals, these frameworks have undergone various changes in the recent past. The objectives of this paper are two fold. First, the paper intends to provide a one-stop shop on all the relevant EI frameworks in Kenya for communities and other stakeholders. Second, the paper reviews EI policies, legal, institutional and fiscal frameworks, to examine the extent to which these frameworks uphold the rights of communities while determining their implications on the wellbeing of host communities. The work shows great improvements in the revised frameworks to reflect the current status of the sector.

However, there are various problems which include the fact that: some laws contravene the provisions of the Constitution – especially the older laws that have not been revised since the promulgation of the Constitution; in some cases, there are conflicting provisions hence the need for streamlining; and in some instances there are a number of overlaps which will hinder effective management of the sector. With regards to communities, the work shows latent weaknesses in legal and policy frameworks relating to environmental protection and the absence of compensation and resettlement policies. The paper also brings to the fore, a lack of some vital laws like the right of communities to access information which when implemented would empower communities to participate more effectively in the extractive sector.

The main policies governing the sector include the country’s Vision 2030, Sessional Paper No. 4 of 2004 and the Minerals and Mining Policy. However, the draft National Energy Policy and Petroleum Policy shall soon replace the Sessional Paper No. 4 of 2004. The legal provisions include: the petroleum sector laws such as the Petroleum Exploration and Production Act and Regulations, 1986 (as revised in 2012), the Petroleum (Exploration, Development and Production) Bill 2015 and the Energy Bill 2015; the mining sector laws such as the Mining Act 1940 and the Mining Bill 2014; laws relating to the taxation such as taxation under the Mining Act, taxation under the Income Tax Act, taxation in the oil and gas sectors, fiscal provisions in the PSC, taxation of petroleum contractors under the Income Tax Act, as well as taxation
provisions that apply to both mining and petroleum operations; revenue management laws which include the Public Finance Management Act 2012, the Sovereign Wealth Fund Bill 2014, and the Natural Resources (Benefit Sharing) Bill 2014; environmental management laws which include the Environmental Management and Coordination Act 1999, the Water Act 2002, and the Forests Act 2005 and land management laws.

The institutional frameworks of the extractive sector include: overarching institutions like the Legislature, County Governments, the Attorney General (AG), the Judiciary, the Kenya Revenue Authority (KRA), the National Land Commission, the Environment and Land Court and the National Environmental Management Authority (NEMA); Petroleum sector institutions like the Ministry of Energy and Petroleum (MoEP), Energy Regulatory Commission (ERC), Energy Tribunal the National Fossil Fuels Advisory Committee (NAFFAC), Kenya Power and Lighting Company Limited (KPLC), Kenya Electricity Generating Company Limited (KenGen), Rural Electrification Authority (REA), Geothermal Development Company Limited (GDC), Kenya Electricity Transmission Company Limited (KETRACO), Independent Power Producers (IPPs), Kenya Petroleum Refineries Limited (KPRL), Kenya Pipeline Company Limited (KPC), National Oil Corporation of Kenya Limited (NOCK), Kenya Nuclear Electricity Board (KNEB), Centre for Energy Efficiency and Conservation (CEEC), Oil Marketing Companies (OMCs), Petroleum Institute of East Africa (PIEA), Oil Exploration and Production Companies (OIEPs) and the Petroleum Institute of East Africa (PIEA); and the mining sector institutions such as the Ministry of Mining and the Kenya Chamber of Mines.

The third paper titled, ‘Community Engagement Practices from Select Countries’ is a comparative analysis of community engagement in EIs in selected countries. The examples used come from seasoned countries in EIs such as Norway, Canada, Australia, South Africa, Chile, and Brazil among others. The review also draws examples from countries with circumstances similar to Kenya’s current phase in ES including Ghana and Botswana. Lessons from countries that have suffered adverse effects of poor or insufficient community engagement in extractive industries as has been the case in Nigeria, Ecuador, Congo, and Angola are also highlighted. The objective of the paper is to learn from the experiences of these countries in order to learn good practices and the lessons from bad practices that will help model alternatives for the Government, communities and investors.
The key areas of focus are:-
(i) Local content regulation and compliance
(ii) Diversification of the economy
(iii) Benefit sharing with local communities
(iv) Corporate social investment within local communities
(v) Involvement of communities in environmental management
(vi) Revenue sharing with and allocation to local communities
(vii) Management of social impact

Premised on the forgoing thematic areas, the paper highlights the preparatory and reform measures that Kenya can put in place in order to optimize on its ES benefits to communities. The recommendations include the fact that: Kenya should consider various options for setting up its local content provisions as it bears in mind key difficulties faced by countries in implementing local content laws and policies; Kenya should protect the already existing economic diversity from over reliance on the extractive sector; benefit sharing structures ought to focus on monetary and non-monetary benefits. Equally important is the need to set up benefit sharing models that take into account sustainability and the security of future generations; Kenya must be rigorous in ensuring that the institutional framework is working and existing laws are enforced to prevent environmental damage. A community participatory approach in environmental protection is also critical; Kenya needs to have a formal Corporate Social Responsibility (CSR) framework to guide business operations in general in order to spell out basic minimum requirements for CSR compliance while strengthening the mining companies case for good corporate citizenship and providing incentives and broad guidelines for self-regulation; Kenya has to take deliberate measures to ensure preparedness for and prevention of the negative impacts of EIs on cultural and the local communities’ way of life. These include safeguarding cultural sites, eliminating negative gender impacts that come with EIs, finding mechanisms that encourage the effective participation of local communities in the EI value chain; as well as putting in place careful multi-step procedures that ensure conflict resolution mechanisms are participatory, inclusive and balanced.

The fourth paper titled, ‘EI Engagement Strategies that Empower Communities’ provides the rationale for, and suggested strategies and approaches to community engagement with EIs. The proposed strategies are integrated within policy and practical mechanisms targeted towards direct community empowerment. The paper aims at: increasing understanding on the importance of community engagement in Kenya’s extractive industry; enhancing community capacities to negotiate more effectively with companies and government for sustainable local benefits and be empowered to seek redress when their rights are transgressed or resources used unfairly or in violation of agreements; and addressing the remaining knowledge gaps and application of community engagement
standards so that communities and other stakeholders can proactively self-organise, network to influence decisions that benefit them as well as help protect their livelihoods and cultures.

The paper contains proposed methodologies for community engagement at the initial stages of the mining project as well as during the continuation of the project until the closure of the mine. These methods of community engagement range from Human Rights Impact Assessments (HRIA) to Alternative Dispute Resolution Mechanisms (ADRM)s. They also include various benefit sharing methods such as: strengthening Corporate Social Investments (CSI); equity participation arrangements; Community Trust Fund (CTF); direct distribution of benefits to community members; fiscal benefit arrangements for women and youth; and investment in economic diversification programmes.

In order to empower communities, the paper proposes that stakeholders must: develop a strategic community engagement plan, which is based on effective public participation, access to information and equitable benefit sharing; recognise that laying the foundation for building resilient communities is a process that takes a long time. It is therefore not a one-time event but an on-going process that supports a relationship with local communities; focus should be given on how to fully address human rights issues including developing appropriate guidelines or codes of conduct for mining companies; and fostering trusting relationships with key stakeholders such as government and companies as well as other community members. Government must provide an enabling environment that ensures the protection of communities and fosters their mutual benefit from EI resources.

1.6 About the authors

Ms. Katindi Sivi-Njonjo
Ms. Katindi Sivi-Njonjo is the lead consultant at LongView Consult, a research, policy analysis and foresight firm. She is currently a PhD candidate at Regent University, studying Strategic foresight.

Mr. Edgar Odari
Mr. Edgar Odari is a lawyer specializing in trade, investment and extractives law. He works with Econews Africa and also consults independently.
Mr. Valentine Ataka

Mr. Valentine Ataka is an Energy Law and Policy consultant and the Managing Partner of Ataka, Kimori & Okoth Advocates. He is an alumnus of the Tullow Group Scholarship Scheme, and currently pursuing a PhD at Robert Gordon University in conflict and dispute management and resolution in EIs.

Dr. Melba Kapesa Wasunna

Dr. Melba Kapesa Wasunna is the Executive Director of the Strathmore Extractives Industry Centre. She has a Doctorate in Juridical Science.
An Overview of the Extractive Sector

Edgar Odari and Katindi Sivi-Njonjo
‘A popular Government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or, perhaps, both. Knowledge will forever govern ignorance. And a people who mean to be their own governors must arm themselves with the power which knowledge gives’

Quote by James Madison, August 4th 1822
Content

2.1 Introduction
   2.1.1 The Problem
   2.1.2 Research Objectives
   2.1.3 Significance of the Study
   2.1.4 Research Methodology

2.2 Definition and Characteristics of the Extractive Industry
   2.2.1 Defining the Extractive Sector and Categorising Minerals
   2.2.2 Characteristics of the Extractive Sector
   2.2.3 The Extractive Sector Value Chain and Decision-Making Processes

2.3 The History and the Contemporary Issues of the Extractive Sector
   2.3.1 The History of the Extractive Sector in Africa
   2.3.2 Contemporary Issues in the Extractive Sector in Africa
   2.3.3 The History and Geology of the Extractive Sector in Kenya
   2.3.4 Contemporary Issues in the Extractive Sector in Kenya

2.4 Conclusion and Recommendations

2.5 References
The contribution of the extractive sector to the country’s growth in the past was only one per cent of the country’s GDP and three per cent of total export earnings. The mining sector is currently dominated by the production of non-metallic commodities such as soda ash where Kenya is the third largest producer in the world and fluorspar where Kenya is the seventh largest producer in the world (see table 1 for actual details on the level of production of various minerals between 2009 and 2013 as well as the total revenues received).

The recent discovery of other extractive resources such as rare earth elements in the coastal region of the country, estimated to be worth USD 62.4 billion, will propel Kenya to the list of top five countries with rare earth deposits in the world (RoK, 2015). The discovery of niobium places Kenya among the world’s top six producers of the mineral. Other discoveries such as coal, oil and gas also raise the profile of the extractive sector thus boosting the flow of investments in the country. Kenya is increasingly becoming a favoured destination and hub for, among other things, oil and gas exploration. It was ranked sixth among the top Foreign Direct Investment (FDI) destinations in Africa as it attracted a total of 55 projects in 2011 with the highest number of projects being in coal, natural gas and oil. This was a rise of 77 per cent from the previous year. This trend continued in 2014 with Kenya attracting a total of USD 3.6 billion worth of FDI.

These developments have forced the Government to prioritise the extractive sector as the seventh priority sector under the economic pillar of Vision 2030 since it is an area with high potential for spurring the country’s economic growth and development.

2.1.1 The Problem

The increasing profile of the extractive sector in the country has raised expectations among different stakeholders. Government expects that the extractive sector will bridge the national budget deficit and lower public debt while increasing export earnings, increasing GDP growth and spurring

---

2 See section 2.2.1 for an elaborate explanation of mineral categorizations and their uses.
3 Kenya mining investment handbook, 2015
4 See FDI Intelligence Report 2014: Global Greenfields Investment Trends. FDI Intelligence
infrastructure development. Multi-National Corporations (MNCs) and private businesses expect to increase profits. Communities living in mining areas expect that the discovery of extractive resources will foster growth and development that will trickle down to eradicate poverty and create employment for them.

Evidently, these different stakeholders have varied interests. Given the fact that all three have to go through a political process in order to achieve their expectations, their individual ability to influence the political process is critical in determining success. Of the three ES stakeholders i.e. government, mining companies and communities, the latter are usually ranked as having the least power of influence than the former two based on social position, political power, connection, knowledge, expertise and financial resources or infrastructure.

Exclusion of communities on the basis of financial resources is evidenced by the fact that Kenya’s minerals and particularly oil and gas reserves are located in areas that have historically been marginalised.

As shown in figure 1 and according to Vasquez (2013), two of the four oil basins i.e. Anza (81,000km2) and Mandera (43,000km2) are entirely within Kenya’s Arid and Semi-Arid Lands (ASALs). Most of the Tertiary Rift Basin (100,000km2) where oil exploration is most advanced, with the exception of the western part that stretches throughout Lake Victoria is in the ASAL region. The northern half of the coastal Lamu Basin⑤ is within arid land, and the south in semi-arid areas.

![Figure 1: Kenya’s Four Hydrocarbon Basins](image)

**Figure 1: Kenya’s Four Hydrocarbon Basins**


⑤The Lamu Basin is 261,000km2
Consequently, a large percentage of the population living in these prospective mineral-producing regions lives below the poverty line as shown in figure 2. These communities also have historically been marginalized by successive policies such as the Northern Frontier Districts Policy and Sessional Paper No. 10 of 1965 on African Socialism.

Exclusion of communities on the basis of expertise is evidenced by the employment dynamics of Kenyan nationals and particularly community members. Kenyan nationals provide 97.6 per cent of all unskilled labour and 74.7 per cent of all semi-skilled labour. While only 9.4 percent of those employed in this sector are females, only 0.03 per cent, 1.7 per cent, and 18.5 per cent of nationals are in director, management or skilled positions respectively (Mwabu and Omolo, 2014). It is therefore highly unlikely that the opportunities provided by the extractive sector operations as structured now, will provide a ‘big push’ for communities to get out of poverty. This is because the quality of employment matters in establishing whether a type of employment activity that an individual is engaged in will drive them out of poverty.

Exclusion of communities on the basis of social position and perhaps connection is evidenced by the level of involvement in decision-making processes. Communities complain of a lack of consultation prior to the granting of oil licenses to oil companies (Vasquez, 2013). They often accuse the Government, Multi-National Corporations (MNCs) and private businesses of carrying on secret business deals. This inhibits their ability to advocate for terms that enhance their welfare. As such, political elites in collaboration with big

---

Other studies also confirm this assertion such as: generally Omolo, M., & Mwabu, G., (eds) A Primer to the Emerging Extractive Sector in Kenya: Resource Bliss, Dilemma or Curse. Institute of Economic Affairs. 2014; Source: Vasquez, P. I. (2013). Kenya at a Crossroads: Hopes and Fears Concerning the Development of Oil and Gas Reserves. International Development Policy, no. 5.2, pp. 3–26; and Edgar Odari, A Rapid Appraisal of Coal Exploration Processes in the Mui Basin, Kitui County and the Engagement of Communities. Study Conducted for Diakonia Kenya. These studies establish a general pattern of lack of awareness by citizens on processes and progress in the exploration and exploitation of natural resources in various parts of Kenya.

---

Figure 2: Percentage of individuals living below the poverty line in oil regions in Kenya
Source: KNBS and SID, 2013

Kenyan nationals provide 97.6 per cent of all unskilled labour. Only 0.03 per cent, 1.7 per cent, and 18.5 per cent of nationals are in director, management or skilled positions respectively.

Only 9.4 per cent of those employed in this sector are females
business entities have created the appropriate space for accelerated mineral resource capture while diminishing the capacity of the community to meaningfully participate in decision making. Consequently, some community groups have resorted to aggressive means in order to force dialogue and defend their rights.

Exclusion of communities on the basis of information is evidenced by a study conducted by the Media Council of Kenya (MCK) in 2015. The study asserts that information about the extractive sector has been skewed. Most stories focus on mining companies and the government. Less attention has been given to local communities living in mining areas. According to the Media Council of Kenya (2015), news coverage on mining companies constituted 35% of all newspaper articles on extractive sector. Government and politicians constituted 26% of the coverage. Among the few articles related to local communities, 12% were on Corporate Social Responsibility (CSR) programmes by MNCs and private companies\(^7\) while only six per cent were on conflicts with local communities. These conflict stories revolved around: human rights related tensions between companies and the communities; challenges relating to access to and acquisition of land by companies; compensation for land and crops; access to water; environmental conservation; protection of indigenous cultural heritage; local involvement (the development of local skills, technology transfer, and use of local human resources and local manufacturing); revenue sharing; and security concerns.

Communities therefore have the least public information about the extractive sector through the media and are therefore poorly engaged, marginalised or excluded. Without effective disclosure of information, tensions in Kenya are likely to be exacerbated by extractives issues like illicit financial flows, land grabbing, pollution and community distrust (MCK, 2015). Communities therefore have the least public information about the extractive sector through the media and are therefore poorly engaged, marginalised or excluded. Without effective disclosure of information, tensions in Kenya are likely to be exacerbated by extractives issues like illicit financial flows, land grabbing, pollution and community distrust (MCK, 2015).

\(^7\)MCK asserts that a lot of information on the industry is obtained from PR firms and therefore not responsive to the local needs and realities of communities.
The main aim of this paper therefore is to provide comprehensive information on Kenya’s extractive sector in order to inform and educate communities and other stakeholders on key issues in the sector. It is envisaged that through this paper, ordinary citizens will have adequate information that will enable them to engage with the other stakeholders i.e. the government and the mining companies, from a point of knowledge and also to have an engagement that enables them to achieve their goals (of reducing poverty and getting employment opportunities among other benefits). To this end, the study:

- gives a definition and characteristics of the extractive sector;
- gives a brief history of the extractive sector in Africa and Kenya while providing insights on the contemporary issues in the sector;
- gives policy recommendations that will inform the engagement of stakeholders who will use this report.

This paper directly contributes to the body of knowledge on the extractives sector in Kenya with a special focus on communities. More importantly, the paper promotes the constitutional requirement that guarantees citizens the freedom to access information that is important in the furtherance of their rights.

This study entailed two key phases through which information was generated. The first phase of writing the paper involved the review of academic literature to get published information on extractives in Kenya. The second phase involved consultations with key stakeholders in the industry with a view of establishing current extractive sector information from different perspectives. The paper therefore used both quantitative and qualitative data drawn from secondary data sources, which was complemented, by select primary sources.
2.2.1 Defining the Extractive Sector and Categorising Minerals

2.2.1.1 Definition

According to Mghanga (2011), minerals are naturally occurring solid chemical substances that are formed through geological processes and that have a characteristic chemical composition, a highly ordered atomic structure, and specific physical properties. Rocks on the other hand are an aggregate of minerals and or mineraloids that do not have a specific chemical composition.

Minerals range in composition from pure elements and simple salts to very complex silicates with thousands of known forms. To be classified as a mineral, a substance must have a crystalline structure. It must also be a naturally occurring, homogeneous substance with a defined chemical composition.

According to the International Mineralogical Association, “a mineral is an element or chemical compound that is normally crystalline and that has been formed as a result of geological processes” (Keller, 1992). Those minerals and rocks that have commercial value are called industrial minerals. Rocks from which minerals are mined for economic purposes are referred to as ores.

According to UNCTAD (2012), the extractive process can be defined as any procedure that involves different activities that lead to the removal of minerals such as oil, precious metals, ferrous metals, construction materials and other aggregates from the earth. Examples of extractive processes include oil and gas extraction, mining, dredging and quarrying.

2.2.1.1 Categorisation of Minerals

In discussing the extractives sector, it is important to understand how minerals are categorised, their market value and the general trends in consumption. The extractive sector largely comprises of three main categories of minerals i.e. energy minerals, metallic minerals as well as non-metallic minerals. These are used for various purposes depending on the composition of the minerals. Figure 3 summarizes the categorisation of minerals in the extractive sector.

---

8 Quoting Keller (1992)
a) Energy minerals
These minerals include coal, oil, gas and uranium. These minerals are generally used to produce electricity, organic chemicals, plastics, for process fuel, as well as for transportation. While they clearly have other uses, they are predominantly used in the energy sector and the other uses are mainly as derivatives from their main use.

b) Metallic minerals
Metallic minerals can be further categorised into ferrous metals, precious metals and base metals. These sub-categories are classified as below:

- Ferrous metals: Minerals classified under this category include iron Ore, riobium, tantalum and titanium. They are used in the aerospace industry, construction, electronic engineering, manufacturing as well as steel making.

- Precious metals: They include gold, silver and platinum. They are used for the manufacture of jewellery, minting currency as well as for industrial purposes.

- Base metals: These include bauxite, aluminium, cobalt copper, lead, magnesium, molybdenum, nickel and zinc. They are mainly used in construction, electrical and electronic engineering as well as in manufacturing.
c) Non-Metallic minerals

These minerals can be further classified into three main categories including construction materials, industrial minerals and precious stones. They are described in the section below.

- **Construction materials:** Minerals under this category include bricks, building stones, cement, clay, crushed rock, aggregate, gypsum, sand, gravel and slate. These are the most common minerals although they are sometimes not viewed as falling under the extractive industry hence not given due attention. They are used for construction.

- **Industrial minerals:** These include bentonite, industrial carbonates, kaolin, magnesia, potash, salt, sand, silica and sulphur. They are used for the making of ceramics, chemicals, foundry casting, fillers, pigments, fuel, gas, iron, steel, metallurgy and for water treatment.

- **Precious stones:** These include diamonds and gems. They are mostly used for the manufacture of jewellery and for industrial purposes.

There is also a class of metals classified as **rare earth metals.** This is a series of chemical elements found in the earth’s crust that are vital to many modern technologies, including consumer electronics, computers and networks, communications, clean energy, advanced transportation, health care, environmental mitigation and national defence.

2.2.2 Characteristics of the Extractive Sector

The main activities in the mining process can be classified into two as shown in figure 4. The **extractive related activities** are basically the activities that take place in the mine and involve exploration, development and mining. The **processing related activities** include transporting and storage of raw minerals, processing or beneficiation, smelting and refining, and other added value activities.

---

9Mineral processing is usually presented as part of the mining activity, as these facilities are generally located close to the mine.
2.2.2.1 Mining Industry Structure

Figure 4: The Mining Industry Structure
Source: UNCTAD, 2012

a) The Extractive Activities
As shown in figure 4, the extractive related activities are mainly three but can further be broken down into five main phases as shown in figure 5, i.e. exploration, development (planning and construction), and mining (production and closure). This process forms the life cycle of a mine and entails decisions at various points depending on the nature of the mineral and the phase within which its exploitation has reached. It is important to understand the dynamics of each stage and the peculiar circumstances involved at each point.

Figure 5: The Cycle of a Mine
Source: Kenya Chamber of Mines and Kenya Oil and Gas Association [KOGA], 2015
Find it - Exploration phase

The find it phase takes one to ten years. It is estimated that the cost incurred by companies in this phase varies between USD 20 million and USD 150 million. Companies usually do not receive any revenue from the resource during this time.

This process entails both initial and advanced exploration. During the initial phase, exploration is carried out with the objective of identifying and assessing areas with minerals to determine whether more intensive exploration should be carried out. It involves the conducting of geophysical surveys, prospecting and geological mapping, geochemical surveys and in some cases drilling and stripping. If the results of the initial exploration are positive, advanced exploration is carried out. This involves processes aimed at defining the quantity and quality of potential ore and the geometry of the deposit as well as determining the most appropriate mining and processing methods. If the quantity and quality of the ore found is stated to be adequate, then the process proceeds to a feasibility study. This involves processes aimed at determining the viability of developing a mine at the site. An assessment of the technical, legal and economic feasibility of the project is conducted. This includes assessments of the mineral reserve and investment returns. The methods to be used in mining are determined on the basis of safety, economics, practicality and environmental considerations. This process takes place between the first and tenth year of the life cycle of a mine. During this phase, the companies usually incur huge costs but do not receive any revenue from the resource as they are still developing it. UNCTAD (2012) estimates the cost of exploration to vary between USD 20 million to over USD 150 million.

Plan it - Planning phase

This phase usually overlaps with the feasibility study elements. At this point, every aspect of the mine is planned in detail. The planning may include: processes of mining and ore separation; infrastructure requirements such as roads, rails, sewer and water lines, and housing to support the operation; schedules for construction and commissioning of the processing plant and associated facilities as well as issues relating to the environmental aspects of the operation. It also involves the preparation of the site for construction. This process takes between two to three years.

Build it - Construction phase

This stage is preceded by activities such as removing old buildings; developing infrastructure including roadways, bridges and railways; as well as building camps for workers. Environmental and land management is also undertaken on a preliminary basis at this stage. The activities include site preparation which entails clearing, stripping and grading; construction of mine infrastructure which entails the development of on-site facilities and utilities associated with the mine including ore processing facilities, waste management areas and other site infrastructure; and establishment of mine workings to provide access to the ore body. This process usually takes a minimum of two years to complete.
UNCTAD (2012) estimates that the cost of the construction phase requires the largest amount of investment, ranging from USD100 million to USD 3 billion.

- **Dig it - Production phase**
  This phase entails the period during which a mine produces ore. The main process at this phase includes ore extraction. The extraction of ore may be through open pits or underground mines depending on the geometry of the ore body, ore grades, slope stability, site geology, and variations in the price of the mineral.

- **Close it - Closure phase**
  The closure phase usually happens when ore minerals are completely exhausted or when it is no longer profitable to recover the minerals that remain. This is usually a sensitive process that must be carried out carefully otherwise the environmental and health risks from the mine may be significant. In some instances, a mine may be closed temporarily or be put under ‘care and maintenance’ when commodity prices are low hence no commercial viability.

b) **Processing related activities (see figure 1)**

- **Mineral processing or beneficiation stage**
  This phase comes after mining and it is the start of processing related activities. These activities involve: grinding and crushing to separate the mineral from waste material and remove impurities; physical or chemical separation methods to produce concentrate and dewatering to remove water from ores, which are of high water content (UNCTAD, 2012). This beneficiation process is usually completed at the mine and its purpose is to yield a product that has a much higher content of valued material (concentrates).

- **Smelting and refining**
  Following beneficiation, the concentrates are sent to smelters or refiners to further extract and/or refine the metal, thus preparing it for its final use or for incorporation into physical or chemical manufacturing.

- **Value-addition**
  Finally, the value addition activities include the metal working industries that process pure metals, forming it into commercially traded shapes\(^3\). Because mineral deposits can be located in remote places, transport and storage activities play a major role in carrying the minerals from one stage of the value chain to another.

\(^3\)Such as ingots or cathodes
2.2.2.2 The Oil and Gas Industry Structure

According to UNCTAD (2012), the activities in the oil and gas industry are very similar to the mining industry structure. The structure is grouped into three main segments i.e. upstream, midstream and downstream as shown in figure 6.

a) Upstream segment
According to UNCTAD (2012), this segment comprises exploration, development, production and decommissioning/closing of the mine.

- **Exploration stage**
  Activities include finding oil and gas and assessing its quantity for possible exploitation. The exploration and appraisal process may take three to ten years to complete.

- **Development stage**
  If the results and appraisals of the exploration stage indicate that commercial production is viable, the investments needed to prepare the site for commercial production such as roads, production wells, platforms, production installation, processing and metering equipment etc. are made. This stage can take from two to four years depending on the particularities of the project and the region. Likewise, development investments could amount to 40-50 per cent of the total cost of a project and varies considerably from one region to another, depending on: the depth; the quality of the reservoir and the density of the products; and the geographical environment i.e. whether it is onshore or offshore.

- **Production stage**
  This stage comprises all the activities of commercial extraction of oil and gas from the deposit. The production costs vary depending on the ease of extraction, the size of the field, the geographical situation i.e. whether it is on shore or offshore, and the region.

- **Decommissioning/closure stage**
  After the hydrocarbon resources are exhausted and commercial exploitation ends, the production structure is then dismantled to rehabilitate the area. The decommissioning of production installations starts, which involves the removal of buildings and equipment, the restoration of the site to environmentally-sound conditions, the implementation of measures to encourage site re-vegetation, and the continued monitoring of the site after closure.
b) Midstream segment
This segment covers transportation and storage. It is composed of goods and services that provide a link between the supply side and demand side of the value chain.

c) Downstream segment
This segment includes manufacturing of products through oil refining, gas processing and petrochemical processes, as well as the selling of these products to the various consumer markets.

- Oil refining and processing of natural gas
Oil refining is the process in which hydrocarbon molecules are separated and crude oil is converted into finished products for consumption. Processing of natural gas consists of separating the various hydrocarbons and fluids from the wellhead gas. Oil refining and natural gas processing provides the raw material for the petrochemical industry.

- Product marketing
Product marketing includes the activities necessary to sell and deliver refined products to end consumers through wholesale, direct industrial sales and retail in petrol stations.

![Figure 6: The Oil and Gas Industry Structure](source: UNCTAD, 2012)

2.2.3 The Extractive Sector Value Chain and Decision-Making Processes
An extractive sector value chain describes the stages of managing a mineral product in order to ultimately realise the full value of that product. It is also about making decisions that fully benefit all the stakeholders involved. As shown in figure 7, these stages range from processes related to: permitting exploration; making extraction decisions; getting good mining agreements; ensuring proper revenue declaration; managing the financial resources; and investing for sustainable development. For the sector to drive growth and develop...
ment, public decisions made in each stage are critical. Transparency is required at each point to ensure that sound decisions are undertaken in the management of these resources. Key decisions in the value chain can broadly be categorised into the following phases.

### 2.2.3.1 Permitting Exploration

The primary decision faced by the government is to make a choice on whether to extract mineral resources or not. If a decision is made to proceed with mining, the process of giving authorisation for exploration to be undertaken should be based on a clear set of laws and regulations. Furthermore, it would be important to gain consent from host communities through Free Prior and Informed Consent (FPIC), designate environmentally or culturally significant areas as off-limits to exploration and production, or even to reserve certain areas for particular methods of extraction (such as artisanal mining.) The key task here is to undertake a cost-benefit analysis of the extraction processes and balance the countervailing interests to arrive at a prudent decision.

### 2.2.3.2 Getting Good Mining Agreements

Once it is decided that resources shall be extracted, it is important to decide on the appropriate framework for awarding of rights to explore and extract as well as the legal and fiscal terms governing such rights. In so doing, it is important that information relating to contract discussions as well as the fiscal and legal terms be made publicly available to sanction the process against any mischief. The process of negotiating and getting a good agreement may require that licensing rounds (in which specific terms are left for bidding and the bulk of the arrangement is enshrined in general law) be made where interested parties bid for available rights or direct negotiations with interested parties. To be able to secure good agreements, countries usually develop geological information detailing the occurrence of minerals and the formation of rock structures through cadastre maps. This makes the investments attractive and enables the countries to get fair value for the minerals they have. The resulting agreement, be it a Production Sharing Contract (PSC)\(^{11}\), a concession contract\(^ {12}\) or a contract for technical services\(^ {13}\) should (when complemented by compelementary laws and regulations) ensure that the country gets a good agreement for its resources.

---

\(^{11}\)In this type of contract, the company produces oil under government control. In other words, the company provides all funds, including venture capitals and recovers its costs from the oil it produces. The profit is shared between the government and the company in a separate agreement, and distributed in the form of oil between the two parties. Sometimes the government does not impose taxes on production. Such terms may be included in the contract. Under production sharing agreements, the government becomes the owner of the resource, even though it commits itself to pay the company in exchange for exploitation” (JASCNET, 2014).

\(^{12}\)In the concession contract allows a company to exploit resources in a given geographical region. Under these conditions, resources are legally owned by the commercial operator. The concession holder finances all the costs of exploration, development and production. The government normally collects dues and charges, which depend on the size of the allocated area. It also receives taxes, bonuses and social security contributions. The contract may provide for particular conditions, such as exemptions or very special charges” (JASCNET, 2014).

\(^{13}\)Under technical service contracts, the government retains control of resources and signs a contract with a company which provides technical services in the form of exploration, construction and operations management. In this case the government retains the resources produced and the company is paid in cash or in kind e.g. in form of oil)” (JASCNET, 2014).
2.2.3.3 Ensuring Revenue Declaration

Tax avoidance accounts for one of the greatest drivers of leakage and wastage of resources in the extractive sector. Over 60 per cent of all illicit outflows in Africa are in the extractive sector.

When mining operations and marketing of commodities is undertaken, it is important to ensure that revenues that are generated from extractive resources are declared. The payment of bonuses, taxes, royalties and any other form of payment should be done in a transparent manner. To this end, information on the payment of revenues should be made public to facilitate greater enforcement and reduce cases of tax avoidance by extractive companies. This is a critical factor in promoting greater benefits from the entire value chain given that tax avoidance accounts for one of the greatest drivers of leakage and wastage of resources in the extractive sector. In fact, over 60 per cent of all illicit outflows in Africa are in the extractive sector.\(^{14}\)

2.2.3.4 Managing Financial Resources

The financial resources generated from the extractive sector are finite and need prudent management to ensure greater benefits. Furthermore, the huge inflow of financial resources may result in fiscal volatility. This therefore requires prudent decisions to be made in terms of using resources for savings, stabilisation and investment. Countries usually develop funds to manage such resources. It is important to promote transparency in the management of these funds through regulations and mechanisms that allow for disclosure of operations and financial information on funds that are designed for saving, stabilisation or investment. Decisions must also be made on how such resources fit into medium and long term planning processes of the country.

2.2.3.5 Investing for Sustainable Development

It should be appreciated that the extractive industry only provides assets that are non-renewable. They will get finished someday. It is therefore important to have alternative investmentssuch as in agriculture, manufacturing and services, which can support a country’s economic growth and development when these finite resources are depleted or prices decline.


LOCAL COMMUNITIES IN KENYA’S EXTRACTIVE SECTOR: From Paternalism to Partnership
A proper understanding of the value chain is important in enabling proper scrutiny of the various decisions undertaken by public officials at various stages of the extractives value chain.

2.3 The History and the Contemporary Issues of the Extractive Sector

2.3.1 The History of the Extractive Sector in Africa

Africa’s mining has gone through different stages of historical development. These stages include:
- Pre-independence period (9th century to mid-1960s)
- Post-independence period (Mid-1960s to early 1980s)
- The Structural Adjustment Programmes (SAPs) period (early 80s to early 2000s)
- The current period (early 2000s to date)
According to Darimani (2009:2), in the early part of pre-independent period, the mining sector was dominated by indigenous small-scale miners whose activities were regulated by the customs and traditions of specific populations or pre-colonial empires. Unless deliberately discouraged, small-scale indigenous miners carried out their operations wherever suitable minerals existed, and did so using traditional techniques and panning technologies consistent with customs, agriculture and other coping strategies. They used their proceeds for customary purposes, as a store of value and decoration’.

This structure changed when private indigenous producers established commercial ties with the Arab and Moor traders of North Africa and the Middle East through the Trans-Saharan Trade Routes, which took place around the 9th and 10th centuries. They involved constant trade in various goods including minerals, in particular gold mainly from West Africa. Much of these minerals, carried across the Sahara from West Africa into North Africa and several Arab countries in the Middle East also found their way into Europe through trade relations (Darimani, 2009).

According to Aghasinyale (2004) as quoted by Darimani, the Portuguese learnt about gold and other wealth in West Africa thus inspiring Portuguese voyages to West Africa. The Portuguese were soon followed by a host of Dutch, Danish, French, Spanish, English and Belgian entrepreneurs. These early commercial ties resulted in the establishment of colonies in the continent.

According to Darimani (2009:3), ‘the European companies and governments with immediate and long-term economic interest in the extractive resources of Africa soon grabbed whatever they thought spelled profit and value for their economies. They subsequently ran up their flags in different parts of the continent to establish their political dominance in order to guarantee uninterrupted commercial influence over Africa and its resources. During this period, the development of the mineral sector was governed by terms and conditions that were determined by European economic and political interests’.

According to Tsikata (1997) as quoted by Darimani, British mining interests were a significant source of influence on the Colonial Office in London and its representatives in the territory, and shaped the formulation and implementation of mineral policy in the colonies. The First World War, for instance, stimulated demand for strategic minerals such as copper, bauxite, and iron. This resulted in increased investment in infrastructure in the colonies to promote access to more
extractive resources. Based mainly on indigenous labour, numerous mineral deposits were discovered and rediscovered during the latter part of the 19th century throughout Africa. Companies like the Anglo-American Mining Corporation were both a commercial company and a quasi-colonial administrator in charge of parts of northern and southern Rhodesia (present Zimbabwe, Zambia and parts of Malawi and Tanzania). While Anglo-American was freely expropriating domestic labour, it was also in charge of collecting land poll tax from the indigenous people.

2.3.1.2 Post-Independence Period (Mid 1960s to early 1980s)

According to Darimani (2009:4), ‘the character of the mining sector and the industry changed at the dawn of independence up to the early 1980s. The new African States declared permanent sovereignty over mineral resources and progressively increased their ownership and control of the industry. This declaration was in line with world-wide trends set by newly independent developing countries’. These declarations were primarily through large-scale nationalisation of mineral extractive facilities, the renegotiation of existing arrangements, and the creation of state enterprises and numerous commodity producer associations (Walde, 1983). Unfortunately, these nationalisation efforts were not very successful as they operated entirely on exporting raw mineral products. The increased dependence on the export of primary commodities exposed African countries to commodity price volatility and the consequential fall in demand for some minerals (Darimani, 2009).

The post-colonial period was therefore characterised by an extractive sector that was dependent on export of raw material commodities and limited domestic processing and value-addition\(^{15}\), which are some of the requirements for catalysing and sustaining growth and development. The situation was compounded by the inefficient management of state-owned mineral corporations. To this extent, the autonomy of the African State with respect to mining was limited only to ownership, while transnational corporations and markets outside Africa continued to be the main beneficiaries of the sector.

\(^{15}\) (APP 2013) the value of processed products was typically 400 times greater than the equivalent unit value (by weight) of the raw material. In addition, processed products are less vulnerable than raw materials to extreme price fluctuations on world markets. It is therefore imperative that Africa invests in processing industries that add value. Without value addition, the EI sector will create fewer jobs, produce less revenue and contributes less to GDP growth.
2.3.1.3 The Structural Adjustment Programmes (SAPs) Period (early 80s to early 2000s)

During this period, accumulation of foreign debt by African countries and significant policy shifts globally introduced liberalisation reforms to the mining sector to attract FDI. These reforms unduly favoured foreign companies. During this period, accumulation of foreign debt by African countries and significant policy shifts globally introduced liberalisation reforms to the mining sector to attract FDI. These reforms unduly favoured foreign companies.

Due to the economic crisis in the 1970s, long-term debt had become a predominant source of financing for African economies. As a result, developing countries, which had been often hostile towards foreign investments at independence, and sought to control transnational corporations through nationalisation and other regulations, started to aggressively attract as much FDI as they could in order to avoid further accumulation of foreign debt. A significant policy shift in the early 1980's i.e. the Structural Adjustment Programmes (SAPs) also caused many African countries to liberalise their state-owned corporations.

The World Bank in 1992 proposed new governance mechanisms through a series of liberal reforms to the sector, which they referred to as the Strategy for African Mining. These reforms were mainly designed to attract FDI back to Africa’s extractive industries and minimize state control. This therefore saw a number of African countries changing their extractives regimes to entail: minimal or eliminated state participation in extractives enterprises; the provision of a wide range of incentives which caused a surge in FDI inflows in the extractive sector; design of tax regimes that were more competitive relative to those in other developing regions like Latin America; liberalised exchange controls and exchange rate policy; and the introduction of investment protection measures such as stabilisation periods, dividend repatriation and non-expropriation among other measures that unduly favoured foreign companies at the expense of African countries.

2.3.1.4 The Current Period (early 2000s to date)

During this period, an AU “policy big table” was held to ask African governments to push for mining laws and frameworks that benefit African countries. The African Mining Vision (AMV) was adopted.

The search for a new developmental approach to Africa’s extractive industries sought to reverse this trend. In 2007, the United Nations Economic Commission for Africa (UNECA) and the African Development Bank (AfDB) convened a meeting with the AU christened the “policy big table” which urged African countries to seize the “window of opportunity offered by the boom in demand for minerals and metals and the accompanying price surge to extract better terms from natural resources exploitation and to catalyse growth and poverty alleviation across the continent.” It was proposed that existing natural resource laws and regulations be reviewed to “better accommodate the interests of African countries.” The conclusions of the meeting were then transmitted to the AU Conference of Ministers Responsible for Mineral Resources Development in October 2008. The conference then adopted the African Mining Vision (AMV), which was later endorsed by Africa’s...
Heads of States and Governments (AHSG) in February 2009. The key pillar of the AMV is its anchoring of the position that extractives in Africa ought to be constantly re-evaluated against their contribution to broad and long-term development goals.

It is worth noting that in 2008, the price of Africa’s strategic commodities i.e. metals, minerals, oil and natural gas experienced a historic rise. According to African Agenda (2008), the price per tonne of copper rose from USD 1,560 in 2002 to USD 6,620 by the third quarter of 2006 and to USD 8,000 by the middle of 2008. Gold went up from an average of USD 455 per ounce in 2005 to USD 920 in February 2008. In July 2008, a barrel of oil was sold at USD 149; representing a 15 times rise over the 1999 prices. Unfortunately, the windfall eluded the African governments due to bad laws and inadequate fiscal regimes. As a result, a number of African governments called for a review of various contracts and more specifically, fiscal provisions in the mining and minerals agreements and codes. In particular, the Democratic Republic of Congo (DRC), South Africa, Tanzania and Zambia amended their mining tax legislation or contracts in order to increase their revenue from mining rents (Darimani, 2009).

### 2.3.2 Contemporary Issues in the Extractive Sector in Africa

Africa’s natural resource wealth (estimated at 30 per cent of the world’s mineral reserves) is largely unexplored and therefore heavily underestimated. Though the extractive sector in Africa is characterised by a wide range of minerals, Africa’s natural resource wealth is largely unexplored, so its reserves are likely to be heavily underestimated (APP, 2013). With investment in exploration increasing, new technologies lowering the cost of discovery, and demand for minerals rising, the level of known reserves has been rising. Conservative estimates however indicate that 30 per cent of the world’s known reserves of minerals are found in the continent. Africa also has the largest cobalt, diamonds, platinum, and uranium reserves in the world.

#### 2.3.2.1 Contribution of EIs to the Economy

| In 2012, mining, oil and gas accounted for 28 per cent of the continent’s GDP | Exports of extractive resources account for a significant value in Africa. The Africa Progress Panel (APP, 2013), quoting IMF, states that there are 20 countries in Africa classified as resource rich as over 25 per cent of their export revenue is derived from minerals or their governments depend on mineral resources for 20 per cent or more of their domestic revenue. Other reports place this figure at 30 countries. The International Council on Mining and Metals, (ICMM, 2013) indicates that 15 countries depend on natural resources for more than half of their export earnings (see figure 8). |

---

16This information is from various sources such as Raw Materials Group, Ernst & Young, US Geological Survey and The Economist
These countries include Botswana, Zambia, DR Congo, Guinea, Mauritania, Mozambique, Mali, Sierra Leone, Namibia, Angola, Equatorial Guinea, Nigeria, Chad, Gabon and Cameroon. However, the Africa Progress Panel (APP, 2013) gives a total of 14 countries that have more than half of their export earnings dependent on natural resources. This report excludes Mauritania and Mozambique but includes Niger.

As shown in figure 8, nine of the countries depend on metals and minerals while six depend on oil and gas. In the case of countries like South Sudan, over 90 per cent of total revenues are derived from oil resources. South Sudan is however not included in these studies as the country came into existence after the period in which these reviews were made. Oil exports are associated with higher levels of revenue collection hence the greater fiscal dependence of oil exporting countries, particularly the large ones like Angola, Equatorial Guinea, South Sudan, Nigeria, Chad and Gabon, as compared to exporters of minerals. Resource-rich countries have outperformed other countries in the region, a departure from the situation in the 1990s. The effects of the global commodity price boom are evident in the post-2000 growth surge (APP, 2013: 13).

![Figure 8: Mineral/oil and gas contribution of net export makes up 25 per cent and above of total export in the country](source: ICMM, 2013)

2.3.2.2 Contribution of EIs to Social Development

According to AfDB, NORAD and WB (Undated), developing countries generally have not succeeded in translating ES revenues into sustainable economic development as shown in figure 9. In many cases, large ES revenues appear to have retarded economic and social development.
According to APP (2013), the Human Development Indicators (HDIs) in the continent point to the inability of the extractive sector to drive growth and development as Africa lags behind in poverty reduction. Furthermore, resource-rich countries in Africa also account for the highest levels of volatility and income inequalities.

Child mortality levels powerfully illustrate the human consequences of the gap between national wealth and well-being in resource rich countries. Currently, 12 of the 25 countries in the world with highest child mortality rates are resource-rich African countries (APP, 2013). These countries include Angola and Equatorial Guinea, which are high-income countries, but with child death rates similar to those in Haiti. Other countries in this category are Chad, Democratic Republic of Congo (DRC) and Mali.

Figure 9: Comparing HDIs of resource rich countries in Africa with other countries
Source: APP, 2013

\[17^\text{One of the poorest countries in the world}\]
As shown on figure 9, wider comparisons between the state of HDI in resource-rich African countries and other countries with lower levels of average income, show very poor performance. For example, Equatorial Guinea has a higher Gross National Income (GNI) than Poland but has a child death rate that is 20 times higher and a maternal mortality ratio that is 48 times higher than that of Poland. On average, people in Poland live 25 years longer than people in Equatorial Guinea.

According to APP (2013), both Bangladesh and Nigeria are categorised as poor countries. However, average incomes in Nigeria are 18 per cent higher than those in Bangladesh but on every Human Development Indicator Report, Bangladesh performs better. Child mortality rates in Nigeria are nearly three times higher than those in Bangladesh. While Bangladesh has achieved universal primary education and eliminated gender gaps in school attendance through to lower secondary education, over one-third of Nigeria’s primary school age children are out of school and there are just eight girls in school for every 10 boys.

What differentiates the performance of the two countries is not wealth but political leadership and public policies that translate wealth into expanded opportunities for all. According to APP (2013), the apparent disconnect between income and human development in resource-rich countries points to underlying failures in public policy and that failure is reflected in the scale of social disparities.

2.3.3 The History and Geology of the Extractive Sector in Kenya

2.3.3.1 The History of Mining in Kenya

According to the Kenya Mining Investment Handbook, (ROK, 2015), Kenya’s mining industry existed as far back as 1942, with Africa Diatomite Industries Limited (ADIL) exploiting diatomite in Gilgil. ADIL has access to good quality diatomite deposits estimated at over 6 million tonnes and currently boasts having the only known viable quality deposits of diatomite in Kenya. Kenya Fluorspar Company Limited has been mining fluorspar for export in the Rift Valley System since 1971. The second largest mineral income earner for Kenya, the Company has an estimated production of 360,000 tonnes of ore mined annually. Tata Chemicals Magadi, which has its operation in Lake Magadi region in the Great Rift Valley since 1911, is Africa’s largest soda ash producer and one of Kenya’s leading exporters.

‘Kenya also has sizeable deposits of limestone, marbles and dolomites mostly utilized in cement manufacturing and construction industries. Among the large cement manufacturers present in Kenya are Bamburi Cement (Lafarge Group) with an installed annual capacity of 2.3 million tonnes; East Africa Portland Cement Company (EAPCC) with 1.4 million tonnes, and Athi River
Mining boasting more than one million tonnes. Both Mombasa Cement and Savannah Cement have nearly 1.5 million tonnes of manufacturing capacity’ (ROK, 2015).

Although Kenya’s geology showed from an early date that there were economically viable mineral deposits such as copper, gold, silver, lead, iron ore, phosphate, platinum, manganese and nickel, the national development plans (1964 – 1970) did not consider mining a significant economic sector. It was not until the seventh National Development Plan of 1994-1996, titled ‘Resource Mobilisation for Sustainable Development’ that the government outlined a policy on mineral resources and recognized the importance for preservation of a clean environment and the involvement of the private sector for sustainable development.

2.3.3.2 The Geology of Kenya’s Minerals

Kenya’s minerals profile can be clustered into five main geological groupings largely based on the geological profiling that was done under the colonial government maps developed by the British Geological Survey as well as the post-independence collaboration between the Department of Mines and Geology.

![Figure 10: The Geology of Kenya's Minerals](Source: ROK, 2015)
As indicated in the mining investment handbook and as shown on figure 10, these geological groupings include:

- Archean (Nyanzian and Kavirondian)
- Proterozoic (Mozambique Belt and Bukoban)
- Palaeozoic/Mesozoic sediments
- Tertiary/Quaternary volcanics
- Tertiary/Quaternary sediments

a) The Archean (Nyanzian and Kavirondian) region
The Nyanzian and Kavirondian systems forming the Nyanza Craton are the oldest rocks in the country with ages over 2,500 million years. These systems are found on the Western part of Kenya. The Kavirondian system consists of mudstones and sandstones while the Nyanzian system consists of ironstones and basalts among others. They have an occurrence of base and precious metals including gold, copper and silver, which have been mined in the past. The region also has potential for ferrous and non-ferrous metals.

b) The Proterozoic (Mozambique belt and Bukoban)
This grouping occurs both in the east and west of the Rift Valley. Basic and granitic intrusions are known in the Mozambique Belt. It has had minerals including kyanite, corundum, graphite, wollastonite, marble, fluorspar, magnesite, kaolin as well as a variety of gemstones located within the region. Some of these minerals have been mined and are no longer present in commercial quantities.

c) Paleozoic/Mesozoic and Quaternary sediment
Palaeozoic and Mesozoic formations in Kenya are found near the coast and in northeastern Kenya. These rocks are mostly sandstones and shales that form the Duruma series. The local formations are Taru, Maji-ya-Chumvi, Mariakani, and the Mazeras. Rocks in these formations host a range of minerals including limestone, gypsum, clays, manganese and construction materials as well as a possible deposit of hydrocarbons. Furthermore, base metals, lead-zinc-barite and copper are also known to occur. According to RoK (2015), heavy mineral sands also occur along the coastal beach sands that host recently discovered deposits of about 3.2 billion tonnes of titanium have been discovered.

d) Tertiary/Quaternary volcanics
Volcanic rocks cover the central parts of Kenya from south to north. Further eruption accompanied by faulting persisted and also gave rise to the Rift Valley and the volcanic piles of Mounts Kenya, Elgon and Kilimanjaro. Quaternary volcanism was mostly within the Rift Valley and it gave rise to the craters and cinder cones that are found in the floor of the valley e.g. Longonot, Menengai and Suswa. These formations host a variety of minerals and construction materials. They have deposits of clays, evaporates, trona (sodaash), diatomite, natural carbon dioxide, kunkar and gypsum. Gem quality rubies have recently been discovered as well.
e) Tertiary/Quaternary sediments

There are many deposits of sediments in various parts of Kenya. They usually occur at the base of volcanic succession occurring in tectonic troughs. The repeated faulting of the Rift Valley floor and the numerous volcanic eruptions created many short-lived basins of internal drainage in which these sediments accumulated. This is comparable to the Kariandusi sediments near Gilgil in Rift Valley and the Kanjera Beds in the Kavirondo Gulf off Lake Victoria as well as the southern part of the coastal sedimentary basin. The Suguta Valley and Lake Turkana sediments are expected to yield further interesting information. Some of these sediments contain deposits that bear diatomite, mammalian fossils and artefacts. They host a variety of minerals such as manganese, coal and iron. Mrima, one of the carbonatites known for potential of niobium and rare earth elements (REE), is found in the coastal basin, south of Mombasa.

2.3.3.3 The History of Oil and Gas in Kenya

According to Ministry of Energy and Petroleum (MoEP), exploration for oil and gas resources dates back to 1937 when the initial attempt was made to explore for petroleum resources. However, the onset of the Second World War disrupted the process until the period between 1954 and 1992 when the process resumed and exploration was undertaken mainly by 10 International Oil Companies (IOCs)\(^\text{18}\). These IOCs were licensed to explore along Kenya’s four sedimentary basins (see figure 1). By 1992, these companies had drilled a total of 30 exploration wells. Of these, 15 were in the Lamu Basin, 11 in the Anza Basin, two in the Mandera Basin and two in the Tertiary Rift Basin. However, none of the wells established commercially viable discovery of oil forcing these IOCs to wind up their operations in the country. Their departure made the upstream petroleum sector in the country dormant for 10 years.

In 2002, three small independent oil companies from Australia were licensed to explore oil in seven offshore blocks out of the initial total number of 21 blocks. In 2003, another company, Woodside Energy acquired rights in seven offshore blocks\(^\text{19}\) but surrendered five of them to the government in 2005. The company drilled a well (Pomboo 1) in deep offshore but hit a dry well causing the company to exit.

Following significant oil find in Uganda in 2006, a number of new companies acquired interest in Kenya\(^\text{20}\). This was especially the case because the geological formations in Kenya (see figure 1) are either an extension of, or have similar characteristics to, those of neighboring countries where large hydrocarbon reserves have already been found. The fact that these basins have revealed rich oil and gas resources in neighboring countries created much expectation and investment interest in recent years in Kenya (Anderson & Browne, 2011).

\(^{18}\) These included BP/Shell, Amoco, Total, Petro Canada, Chevron, Texas Pacific among others

\(^{19}\) A process of acquiring an exploration block is referred to as farming

\(^{20}\) Kenya Oil and Gas Association (KOGA)
Kenya’s Tertiary Rift Basin could be the eastern stretch of Uganda’s Lake Albertine Rift Basin, which is said to hold up to 3.5 billion barrels of oil reserves. The onshore Anza Basin is a continuation of the Central Africa Rift system that expands from South Sudan, home to most of that country’s oil reserves, estimated at around 6.7 billion barrels (BP, 2012). The geological formations of Kenya’s onshore Northeastern Mandera Basin extend into the Mandera-Lugh Basin of Somalia and the gas-rich Ogaden Basin of Ethiopia. Likewise, the geology of the onshore and offshore exploration areas of Kenya’s Lamu Basin show similar characteristics as coastal reservoirs of Tanzania and Mozambique, where natural gas deposits have been found (Nyoike, 2012).

In 2006, the China National Offshore Oil Corporation (CNOOC) expressed interest in six of the onshore Blocks i.e. block 1 in Mandera Basin, L2, L3, L4 in Lamu Basin as well as 9, 10A in the Anza Basin. The company commenced negotiations with the Government of Kenya (GoK) and was later awarded exploration rights in February 2006. However, other interested parties opposed the unilateral award to CNOOC and requested an open process. CNOOC later surrendered back four blocks 1, 10A, L3 and L4 to retain Blocks 9 in Anza and L2 Lamu Basin. In 2010, CNOOC drilled Boghal 1 in Block 9 (Anza Basin) and found natural gas indications that were of no commercial significance. CNOOC wound up its operations in Kenya.

2.3.4 Contemporary Issues in the Extractive Sector in Kenya

2.3.4.1 Contemporary Issues in the Mining Sector

As shown in figure 11, the mining sector in Kenya is comprised of a range of minerals including both metallic and non-metallic minerals (refer to figure 3 for more details on the categorisation of minerals in the extractive sector). These include barite, gypsum, gold, silver, lead, talc, titanium, salt, gemstones (mainly ruby and several varieties of garnet), dimension stones, silica sand, heavy mineral sands, manganese, zinc, wollastonite, graphite, kaolin, copper, nickel, chromite, pyrite, various clays, rare earth elements and pyrochlore.
Most of these minerals involve Artisanal and Small-Scale Mining (ASM) activities. According to the Mines and Geology Department within the new Ministry of Mining, 70 per cent of licensed exploration and mining companies in Kenya are small-scale operators. Almost all of these small-scale operators (90 per cent) are within the gemstone-mining sector and produce over 90 per cent of the Kenya’s gemstones. There is, unfortunately, limited data on the licencing and formal operations of ASM and commercial mineral producers. There is also a lack of baseline/census data on ASM individuals and communities.

As shown in figure 11, some of the most recognised ASM activities are in Taita Taveta (gemstones and construction minerals), Kakamega (gold), Migori (gold), Kwale

21ASM refers to informal mining activities carried out using low technology or with minimal machinery. Definition found in http://www.miningfacts.org/communities/what-is-artisanal-and-small-scale-mining/#sthash.AIqmC4sg.dpuf

Figure II: Gemstone and Mineral Deposits in Kenya
Source: Thamani Gems
(gemstones, construction and industrial minerals), Kisii (Soapstone), Kilifi (Limestone, Iron Ore), Tharaka - Nithi County (gemstones), Mandera (Gypsum) among others.

ASM activities often take place near or within the formal mining concessions of Large-Scale Mining (LSM) operations and exploits a variety of minerals ranging from precious metals such as gold, precious stones such as gemstones, limestone for aggregate and agricultural purposes, soapstone and clays for pottery and many other non-metallic minerals. The practice also shows considerable diversity in scale (from rudimentary mining with picks and shovels to small-scale mining with simple machinery) – see figure 12.

![Artisanal Mining Using Rudimentary Tools](http://bc.ctvnews.ca/polopoly_fs/1.1873671.1403045850!/httpImage/image.jpg_gen/derivatives/landscape_960/image.jpg)

Figure 12: Artisanal Mining Using Rudimentary Tools
Source: http://bc.ctvnews.ca/polopoly_fs/1.1873671.1403045850!/httpImage/image.jpg_gen/derivatives/landscape_960/image.jpg

a) Nature of ASMs

- The migratory nature of artisanal miners

Present practices of ASM show that artisanal miners are generally migratory, moving from site to site searching for minerals. A combination of practical, economic and social factors accounts for this migratory behaviour. These include: the lure of high-value mineral strikes in other areas; the displacement from mining areas (perhaps after their allocation to LSM companies); and the need to supplement income from low proceeds during agricultural seasons.
● The gender dynamics of ASM
Men do most of the excavating, using mostly manual equipment. Women sit beside piles of excavated material, sifting it by hand or with handmade meshes (see figure 12) in search for the precious stones or metals and are also involved in the rudimentary processing of the minerals such as using mercury in pans to extract gold nuggets. In certain areas, particularly in Western Kenya, small children play close by, sometimes helping with the sifting.

● The economic benefits of ASM
Artisanal miners are usually among the poorest because they barely benefit from the mining. Most of their finds are small and worth very little money. Sometimes bigger, clearer and more valuable minerals turn up, but their value is not technically determined due to lack of tools or technological knowhow so many of the artisan miners are not able to determine the exact value of their finds. In any case, artisanal miners then sell their finds to “brokers” informally, often for a fraction of the actual value amounts. In the case of small-scale mining, in return for permission to dig the land, the artisan miners have to sell all their findings to the mine owner who sets the price.

● The environmental consequences of ASM
ASM communities may also be affected by environmental degradation. Generally, the process of mining, by digging pits and makeshift camps contribute to deforestation and land erosion. Mining sites are often abandoned without proper refilling of shafts and tunnels, leaving deforested land unsuitable for farming or hazardous to wildlife. ASM can also pollute waterways through mercury use, a build-up of silt, poor sanitation, and effluent dumped in rivers. Improper mine closure and lack of reclamation can also result in acid rock drainage. Monitoring and enforcement of environmental regulations is hampered by informality, the remote location of mine operations, and a lack of resources

● Challenges of engaging ASM communities
As more and more discoveries of commercially viable quantities of minerals are made in various parts of the country, LSM projects may face situations where ASM miners already inhabit or infringe upon a demarcated concession area. Mismanagement of engagement with ASM miners can lead to delays, work stoppages, community tensions or in the worst cases violent conflict.

b) Structural causes and challenges facing the ASM sector
The more problematic structural causes and challenges facing the ASM sector that hamper constructive engagement include, but are certainly not limited to the following:
• **Absent or inadequate legal regulation**

Kenya currently lacks a policy framework that is flexible enough to accommodate ASMs and this impinges on their ability to operate. For example, the process of applying for mining rights usually favours LSM companies, particularly for high value minerals such as gold, to the extent that ASMs frequently operate without security of a concession with long term tenure. This in turn impacts on the ability of ASM enterprises to borrow and to invest. ASM players need to have a practical and affordable way to certify operations before systems are introduced; otherwise there is the risk of jeopardising ASM livelihoods particularly through bureaucratic and expensive red tape.

• **Inadequate access to exploration and mining areas**

For the past few decades, ASM has been faced with government repression due to undue favouritism of LSMs, political exclusion of ASMs from decision-making at various levels and ASM blind policies. Without formal mineral rights, artisanal and some small-scale miners end up trespassing and thus provoking local disputes. Some ASM miners have mining concessions without state permission and now risk being displaced by a mining company that holds the title deed to the land.

• **Lack of technical capacity and access to appropriate technology**

ASM operators usually lack formal and skilled technical capacity, which affects worker safety. Dangers in the workplace include lack of training, poor ventilation, lack of safety equipment, improper use of chemicals, and obsolete equipment. The lack of knowledge about legislation and application of health and safety practices also contributes immensely to challenges of worker safety. Furthermore, without capital to invest, suitable plant and equipment becomes prohibitively expensive. Consequently short-term mining operations are soon abandoned once the easy minerals are extracted, often leaving behind long-term environmental damage.

• **Lack of financing**

Efficient mining requires long-term financing for initial exploration and assessment of the feasibility of extraction. However, without access to capital, ASM cannot afford to get involved at the early stages of the mining process. Without quantified reserves, it is not possible for miners to raise funds or develop strong business plans required by investors. ASM operators are therefore obliged to work outside formal financing institutions. Without access to finances, many artisanal miners have no option but to resort to predatory middlemen or “supporters”, who sponsor their mining operations but to whom they have to sell at low prices, thus preventing them from ever accruing sufficient capital to invest in a formal mining business. ASM also presents financial challenges for governments. Miners involved in ASM, trade informally and do not pay taxes or royalties, limiting the ability of governments to provide services or enforce laws.

• **Difficulties in accessing markets**

ASM miners are often disconnected from the market usually located in the capital or larger cities and are unable to get a fair price for their products.
Disproportionate benefits of ASM on women and children

In ASM, women benefit less than men from mining. Women are disadvantaged in respect to mineral rights, capital and equipment. Moreover, their domestic role as providers of wood fuel and fresh water can be affected by the environmental consequences of mining. Sanitation and basic healthcare are often lacking in ASM areas thus escalating communicable diseases. Alcoholism and drug abuse is often rampant among the male counterparts due to consumption of cheap liquor or when the artisanal miners sell small mineral finds, which also disproportionately affects women. Children suffer disproportionately too due to child labour in mines which also interferes with their schooling.

c) Changes in the ASM Sector

The dynamics of ASM have started changing in recent years. Until fairly recently, ASM was hardly taken seriously by government as a revenue generating sector. The government never granted ASM communities Free, Prior and Informed Consent (FPIC) before mining took place.

A regulatory framework

While most artisanal mining remains informal as it operates in the absence of an applicable or appropriate legal framework, the Mining Bill 2014 proposes a regulatory framework to govern the ASM sector.

Artisanal mining is defined as “traditional and customary mining operations using traditional or customary ways and means” (Clause 1)
Artisanal mining permits will be granted to Kenyan citizens as individuals or wholly owned Kenyan companies through offices setup and administered at a County Level
Small Scale Mining is distinguished from LSM whereby:
(i) in the case of prospecting operations, the proposed prospecting area does not exceed 25 contiguous blocks;
(ii) in the case of mining operations, the proposed mining area does not exceed two contiguous blocks;
(iii) in the case of mining operations, the actual or estimated annual extraction of minerals or material bearing minerals does not exceed 25,000 cubic metres; the prospecting or mining operations do not employ specialised prospecting, mechanised mining technologies, chemicals including mercury and cyanide or explosives; or the proposed prospecting or mining operations, do not involve an investment or expenditure which exceeds such amount as may be prescribed by the Cabinet Secretary (see the Second Schedule);
(iv) The Cabinet Secretary may declare areas reserved for small-scale operations and in particular “may designate an area to be an area reserved exclusively for small scale and ASM Operations” by gazette notice (Clause 13).

- **Quantity and value of mineral production**

As reiterated earlier, new resource finds are likely to increase the economic contribution of EIs in the country. Table 1 indicates the country’s quantity and value of mineral production for five years i.e. between 2009 and 2013. From the table, Kenya’s biggest export in 2013\(^22\) was in raw crushed soda, followed by soda ash and fluor spar. The production of gemstones rose by 1,443 per cent between 2009 and 2013. The production of fluor spar rose by 1,418 per cent while that of diatomite rose by 456 per cent in the same period. The highest earnings in the sector came from soda ash (KES.8.8 billion), unwrought gold (KES.7.4 billion) and fluor spar ore (KES.1.7 billion). However, the earning from unwrought gold increased by 325 per cent from 2009 to 2013, making it the mineral with the highest increase in value. Apart from increased production of some of these minerals, there is also a surge in the global pricing of some of the minerals like gold which make it an attractive area of investment for the regions with a capacity to produce the mineral.

Table 1: Quantity and Value of Mineral Production (2009-2013)

<table>
<thead>
<tr>
<th>Mineral</th>
<th>Quantity (tonnes)</th>
<th>Value (KES Million)</th>
<th>Quantity (tonnes)</th>
<th>Value (KES Million)</th>
<th>Quantity (tonnes)</th>
<th>Value (KES Million)</th>
<th>Quantity (tonnes)</th>
<th>Value (KES Million)</th>
<th>Quantity (tonnes)</th>
<th>Value (KES Million)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Soda ash</td>
<td>401,904</td>
<td>6,083.4</td>
<td>473,689</td>
<td>6,900.0</td>
<td>499,052</td>
<td>7,354</td>
<td>449,269</td>
<td>9,388</td>
<td>468,215</td>
<td>8,865.2</td>
</tr>
<tr>
<td>Salt (crude)</td>
<td>24,125</td>
<td>154.7</td>
<td>61,194</td>
<td>35.3</td>
<td>24,639</td>
<td>140.3</td>
<td>9,990</td>
<td>65.7</td>
<td>8,895</td>
<td>58.6</td>
</tr>
<tr>
<td>Fluorspar ore</td>
<td>5,500</td>
<td>122.3</td>
<td>40,759</td>
<td>789</td>
<td>95,051</td>
<td>3,984.4</td>
<td>91,000</td>
<td>2,942</td>
<td>78,002</td>
<td>1,783</td>
</tr>
<tr>
<td>Soda crushed raw</td>
<td>940,076</td>
<td>404</td>
<td>959,160</td>
<td>467</td>
<td>1,054,236</td>
<td>495.5</td>
<td>802,801</td>
<td>589</td>
<td>947,074</td>
<td>631.9</td>
</tr>
<tr>
<td>Corundum (ruby)</td>
<td>5.58</td>
<td>57.5</td>
<td>5.45</td>
<td>55.7</td>
<td>6.24</td>
<td>66.5</td>
<td>6.63</td>
<td>70.5</td>
<td>5.50</td>
<td>58.5</td>
</tr>
<tr>
<td>Carbon dioxide</td>
<td>15,711</td>
<td>333</td>
<td>16,345</td>
<td>408.0</td>
<td>16,275</td>
<td>411.0</td>
<td>19,919</td>
<td>503</td>
<td>18,900</td>
<td>495.6</td>
</tr>
<tr>
<td>Diatomite</td>
<td>231</td>
<td>14</td>
<td>224</td>
<td>9</td>
<td>713</td>
<td>15</td>
<td>1,731</td>
<td>3.6</td>
<td>1,054</td>
<td>2.2</td>
</tr>
<tr>
<td>Gemets (green)</td>
<td>965</td>
<td>29.3</td>
<td>1,075</td>
<td>30.5</td>
<td>1,205</td>
<td>35.5</td>
<td>1,258</td>
<td>40</td>
<td>1,100</td>
<td>35</td>
</tr>
<tr>
<td>Gypsum</td>
<td>5,345</td>
<td>5.3</td>
<td>5,500</td>
<td>5.4</td>
<td>6,500</td>
<td>6</td>
<td>6,653</td>
<td>63</td>
<td>5,500</td>
<td>52</td>
</tr>
<tr>
<td>Vermiculite</td>
<td>315</td>
<td>79</td>
<td>395</td>
<td>83</td>
<td>515</td>
<td>88.5</td>
<td>457</td>
<td>89</td>
<td>406</td>
<td>77.9</td>
</tr>
<tr>
<td>Gold (unwrought)</td>
<td>1.06</td>
<td>2,284</td>
<td>2.36</td>
<td>6,217.0</td>
<td>1.64</td>
<td>5,651</td>
<td>3.60</td>
<td>13,919.7</td>
<td>2.10</td>
<td>7,432.6</td>
</tr>
<tr>
<td>Gemstones</td>
<td>39</td>
<td>141.3</td>
<td>168</td>
<td>226.0</td>
<td>310</td>
<td>231</td>
<td>121</td>
<td>157.5</td>
<td>563</td>
<td>411</td>
</tr>
<tr>
<td>Total Amounts</td>
<td>9,790</td>
<td>15,305.9</td>
<td>18,478.7</td>
<td>27,774.3</td>
<td>19,856.7</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>


\(^{22}\) According to the statistical abstract (2015), the figures cover only private firms with fifty or more employees. Statistics on mineral production are compiled from returns made from mining firms. For salt and lime, only commercial output is covered. Consequently, considerable quantities of these items which are mined are used on farms, etc. are not recorded. The value given for gold, lime and diamond are the amounts realized by producers. The production of limestone and gypsum excludes the part used in the production of local cement.
2.3.4.2 Contemporary Issues in the Oil and Gas Sectors

The announcement by the immediate former President of Kenya, His Excellency Mwai Kibaki, of the first crude oil discovery in Kenya in March 2012 in the Ngamia 1 well, Tertiary Rift Basin, Turkana County, was a major turning point in Kenya’s extractive sector. The sector witnessed tremendous growth owing to the entry of many players to conduct exploration activities because of the diminished risk profile for oil and gas exploration.

As shown in figure 1, the sedimentary basins for the upstream petroleum sector in Kenya are divided into four main blocks. These have further been subdivided into various exploration blocks as shown in figure 13.

Figure 13: The Petroleum Exploration Blocks of Kenya
Source: Ministry of Energy and Petroleum
Between 2012 and 2014, 37 wells were drilled\textsuperscript{23}. Out of these, 12 discoveries were made. Nine crude well discoveries in Blocks 10BB and 13T are operated by Tullow Oil and its Joint Venture Partner Africa Oil. Two were natural gas discoveries including: Mbawa 1 Offshore Block L8 operated and relinquished by Apache Ltd; and Sala 1 in onshore Block 9, Anza Basin operated by Africa Oil and its Joint Venture Parmer Marathon. One discovery (Sunbird 1 well in offshore Block L10A, Lamu Basin) operated by the BG Group had both natural gas in the upper zone and crude oil in the lower zone of the well.

Presently, Kenya has 46 petroleum exploration blocks whose licenses for exploration have been issued. 40 are licensed to 20 IOCs. Tests conducted on the wells so far indicate that the current crude oil reserve base is about 600 million barrels.

According to Ministry of Energy and Petroleum (MoEP), ongoing appraisal drilling results indicate the possibility for higher crude oil reserve base of one billion barrels. The Ministry also points out that additional work is however needed to further evaluate: the viability of natural gas in Sala 1 well Blocks 9 where quantities are estimated at about one trillion cubic feet; gas discovery in Mbawa offshore Block L8 which is estimated to have 750 billion cubic feet; and offshore Block L10A to properly evaluate the hydrocarbon potential of the Sunbird prospect.

Feasibility studies to guide the construction of a crude oil pipeline are nearly complete. A preliminary report has been submitted to the Ministry of Energy and Petroleum by the firm that was contracted to undertake the assignment, Toyota Tsusho. The Ministry has been developing the Petroleum Sector Master Plan Report. It is also working on the demarcation of another 14 blocks from the relinquished acreage. This will lead to the gazetting of another 14 new blocks to raise total number of blocks to 60.

\section*{2.4 Conclusion and Recommendations}

This paper broadly discusses definitions and characteristics of the extractive sector while giving a historical overview and detailing the contemporary issues in the sector. These topics give the basic information that any stakeholder engaging with the extractive sector in Kenya should know. Given the fact that most communities do not have this knowledge, as key players in the sector, there is need for significant public education and particularly on the potential impact of EIs to community livelihoods. It is especially critical to assist communities to understand the cycle of mining, the value chain and decisions that are made.

\textsuperscript{23} This translates to a drilling rate of 18 wells per year. The rate could be attributed to the implementation of reduced block size policy, the deployment of modern petroleum exploration technologies, investment policies that give incentives to investors and government budgetary provisions for capacity building in the upstream petroleum sub sector. Also, the government has had aggressive promotions of existing investment opportunities.
at each point as well as how to identify opportunities and risks at each point. This is important to manage expectations on what the sector can provide at any given moment so that communities do not over expect or under benefit. This balance is crucial in fostering greater understanding between various stakeholders in the sector.

Regarding challenges facing the ASM sector, there is need for a holistic approach if artisanal and small scale mining activities within communities are to be transformed into means of sustainable development. The relationship that national and county governments as well as LSMs have with ASMs and ASM communities should be innovative. Some recommendations include:

(i) Encouraging formation of associations of small-scale miners or organising them in cooperatives and coordinating mine employment. These could be used as the basis for a pilot project and, with the right expertise for facilitating social mobilisation, it may open up micro-finance and benefit sharing opportunities among other initiatives;

(ii) Promote training for ASM miners through the establishment of mechanisms such as Vocational Education and Training Associations (VETA). VETA can establish training programmes aimed at training ASM miners including basic training programmes in anticipation of employment in modern mining operations and the proposed licensing system for ASM mining permits by county government as provided under the Mining Bill 2014. The proposed modular based programme should aim at ensuring that trainees select modules of their interest to address their specific needs while placing emphasis on ‘hands-on’ training, tied to a support programme from Government whose benefits are visible;

(iii) Work with county governments to develop improved information delivery regarding mining issues through existing structures, establish responsible management of ASM mining zones and processing/trade channels, etc.;

(iv) Market linkages: Develop mechanisms for disseminating market information for minerals such as gold or gemstones at village or mine level including piloting efforts to model clean supply chains, or fair trade minerals, as a means to diffuse the principle of responsibility across the supply chain - whether companies, manufacturers, smelters, buyers and traders, and national governments. Research indicates that obtaining a fair price is linked to deeper issues than simply having better market knowledge, such as the provision of credit by buyers.

(v) Encourage livelihood alternatives in agriculture, tourism and micro-enterprise as a stimulus for trade and subsidiary business development around mine sites including a specific emphasis on support for women and small project funding to support innovative and timely projects as part of rural livelihood diversification strategies;
(vi) Invest in local supply chain development targeting ASM miners and access to finance programmes;

(vii) Develop programmes to improve the environmental standards being used in ASM mining activities – and integrate the environmental agenda into broader governance discussions currently taking place in the country as often environmental degradation caused by ASM occurs within a vacuum of government regulation and presence. For example, consider the standards set by the Alliance for Responsible Mining on social and environmental standards known as the Fairmined certification, which provides safe alternatives to mercury use.

2.5 References


The Policies, Laws, and Institutional Frameworks Governing EIs

Edgar Odari, Clement Migai and Katindi Sivi-Njonjo
“Yet the mine’s impact – positive and negative – can vary significantly at the local, state or provincial, or national levels, depending on the “rules of the game” – as set by the regulatory framework – and depending on the management of the operation”

World Bank, 2002
3.1 Introduction

3.1.1 Problem Statement
3.1.2 Research Objectives
3.1.3 Significance of the Study
3.1.4 Research Methodology

3.2 The Policy Framework for the Extractive Sector in Kenya

3.2.1 Kenya’s Vision 2030
3.2.2 The Draft National Energy and Petroleum Policy
3.2.3 The Draft Mineral Resources and Mining Policy

3.3 The Legal Framework for Extractives in Kenya

3.3.1 The Petroleum Sector Laws in Kenya
3.3.2 The Mining Sector Laws in Kenya
3.3.3 Laws Relating to the Taxation of Extractive Resources in Kenya
3.3.4 Revenue Management Laws for Kenya’s Extractive Sector
3.3.5 Environmental Management Laws and the Extractive Sector
3.3.6 Land Management Laws and the Extractive Sector

3.4 The Institutional Framework for the Extractives Sector in Kenya

3.4.2 Petroleum Sector Institutions
3.4.3 Mining Sector Institutions

3.5 Conclusion and Recommendations

3.5.1 Conclusion
3.5.2 Recommendations

3.6 References
3.1 Introduction

The extractive sector is regulated by a number of policies, laws and institutional frameworks anchored in the Constitution of Kenya, 2010.

3.1.1 Problem statement

In order to align the sector to meet stakeholders' expectations and provide stewardship of natural resources, various laws, policies and institutional frameworks have been developed over time. However, there has been a lack of clarity on the roles of different institutions engaged in the extractive sector. Worrying is the acknowledgement of weakness in matters central to the interests of host communities by the draft National Energy and Petroleum Policy. Resettlement plans for displaced persons and fair compensation policies are highlighted as missing from the country's current laws. The potential negative impact on the social, cultural or recreational life of communities, inadequate operational capacity for disaster preparedness, management and mitigation, low compliance with health, safety and environmental laws, and the insufficiency of the same are some of the other challenges highlighted in the draft policy document. Evidently, the existing frameworks do not guarantee that the interests of communities will be addressed.

Nearly all societies, the needs and preferences of the wealthy and powerful are usually reflected in official policy goals and priorities. It is therefore imperative that a deliberate effort is made to have the interests of communities, particularly the poor and the marginalized reflected in official policy and any operations carried out in the extractive sector.

The World Development Report (1997) asserts that in nearly all societies, the needs and preferences of the wealthy and powerful are usually reflected in official policy goals and priorities. It is therefore imperative that a deliberate effort is made to have the interests of communities, particularly the poor and the marginalized reflected in official policy and any operations carried out in the extractive sector.
3.1.2 Research Objectives

The main aim of this paper is to provide the policies, laws, institutional and fiscal framework underpinning the extractive sector. Specifically, the paper aims:

• To review EI policies, laws, institutional and fiscal frameworks in relation to local communities

• To review the adequacy of the EI policies, laws, institutional and fiscal frameworks in addressing community challenges and opportunities

• To establish the implications of EI policies, laws, institutional and fiscal frameworks on the wellbeing of host communities

3.1.3 Significance of the Study

The research paper examines the extent to which policies, laws, institutional and fiscal frameworks uphold the rights of communities. These frameworks are examined against the benchmarks of equity as envisioned in the Constitution of Kenya, 2010 i.e. the extent to which they promote access, control and participation in the distribution and management of mineral resources for better livelihoods. It tackles issues relating to the extractive sector from the perspectives of participation, accountability, resource governance and transparency. The paper further elucidates the extent to which the policies and frameworks affect the ability of the poor, women, youth and other vulnerable groups to benefit from the extractive sector. We envisage that this work will enable communities to meaningfully participate in matters arising in their localities in regard to the extractive sector, whilst informing community advocacy efforts, and decision-making processes.

3.1.4 Research Methodology

This study entailed the extensive reviewing of relevant policies, laws, institutions and fiscal frameworks. Seeing as many of the frameworks previously in place are currently under review and hence not in public domain, consultations with officials in the Ministry were mandatory. Both qualitative and quantitative methods were therefore used in the writing of this paper and consequent drawing of conclusions.
3.2.1 Kenya’s Vision 2030

The Kenya Vision 2030 is the country’s development blueprint in which plans to transform Kenya into an industrialised, middle-income country, providing a high quality life to all its citizens by the year 2030 are documented. The Vision came after the successful implementation of the Economic Recovery Strategy for Wealth and Employment Creation (ERSWEC), which oversaw the steering of the country’s economy back to the path to rapid growth. The growth rate of the Gross Domestic Product (GDP) gradually rose from 0.6 per cent in 2002 to 6.1 per cent in 2006. The Kenya Vision 2030 is to be implemented in successive five-year Medium-Term Plans (MTP) with the first covering the period between 2008 and 2012. Six sectors (manufacturing, trade, agriculture, tourism, information technology and financial services), are indicated to be key in the drive for economic growth and creation of employment opportunities within this period. The Second MTP covers the period 2013 to 2017. Following the discovery of commercially viable oil and gas resources, mining was included as a seventh pillar as part of the sectors that are expected to increase export earnings, increase GDP growth, broaden social development, spur infrastructure development and create jobs.

The programmes and projects that the government will pursue in order to establish commercial viability in the extractives sector include those that enhance primary data acquisition, analysis and interpretation in the open blocks so as to make them attractive to investors whilst establishing an internationally accredited mineral certification laboratory and audit agency, and create special mineral processing zones. Challenges in the sector highlighted in the second MTP include: huge financial outlays required for the exploration and production of oil, gas, and other mineral resources (necessitating the need to attract capital for exploration and production activities); limited technical capacity and shortage of specialized local manpower in mining, petroleum, geology, geophysics and reservoir and production engineering; inadequate development of infrastructure; as well as a weak legal and regulatory framework which includes inherent weaknesses like lack of provision for among other things: community awareness and participation; windfall profits; gas sharing terms; Corporate Social Responsibility requirements; mechanism for working out government share out of monetary gains from transfer of a PSC; and environmental protection, conservation and management.

The draft National Energy and Petroleum Policy\textsuperscript{25} deals with many aspects in the energy and petroleum sector. With regards to extractive resources, the policy specifically addresses petroleum and coal resources. It notes that Kenya had no known commercial reserves of petroleum until March 2012 when oil was discovered in Northern Kenya, leading to a lot of interest in the sector. In order to fast-track petroleum discovery in other exploration blocks in the country, the policy notes that the government shall intensify primary data acquisition to make the available blocks more attractive to investors. The draft Energy and Petroleum policy states that there is, therefore, need to develop adequate petroleum production capacity as well as supply infrastructure to meet market requirements and match the increasing demand for petroleum products, locally and in the region. These are stated to include setting up a new refinery at Lamu bearing in mind its strategic location. It is contended that this will make oil and gas products more competitive in the region, enable creation of wealth, ensure supply security and stability of prices.

In regard to coal resources, the draft policy notes that this is an affordable, competitive, reliable and easily accessible source of energy, especially for electricity generation. It notes the extensive coal exploration undertaken in the Mui Basin of Kitui County as well as other parts of the country. These resources are expected to provide about 1,900MW of electricity generation by 2016 and 4,500MW by 2030. The draft policy commits the government to promote an intensive coal exploration programme and efficient utilization of coal resources while minimizing the environmental impacts associated with its use. It is to establish data and information on coal resources, intensify promotional campaigns in local and international conferences and exhibitions, as well as create a conducive investment environment for exploration and exploitation of coal by providing fiscal incentives to attract investment in this sector. The national government is also to establish a coal development corporation as a special purpose vehicle to be the lead agency in the development of the coal industry in the country.

The policy acknowledges that energy development projects have various impacts on communities where the projects are implemented. These include: economic and physical displacement of communities; concerns by local communities that they will not benefit from these projects; absence of a comprehensive and fair compensation mechanism; the potential negative impact on the social, cultural or recreational life of communities; and low compliance with health, safety and environmental laws and regulations.

\textsuperscript{25}Available at: http://www.energy.go.ke/downloads/The\%20National\%20Energy\%20and\%20Petroleum\%20Policy,%202015.pdf

It commits the government to develop mechanisms for sharing of benefits between the national and county governments as well the local communities in accordance with Article 69 of the Constitution, as well as undertake the requisite process leading to...
compliance with the Extractive Industries Transparency Initiative (EITI).

With regard to land and socio-economic impacts, the policy notes that energy development projects have various impacts on communities where the projects are implemented. These include both economic and physical displacement impacts as well as concerns by local communities that they will not benefit from these projects. It identifies challenges related to land, environment, health and safety including the absence of a national resettlement action plan framework, the absence of a comprehensive and fair compensation mechanism, the potential negative impact on the social, cultural or recreational life of communities, low compliance with health, safety and environmental laws and regulations, low public awareness and sensitization in the obligatory role of each individual in their right to clean environment as well as inadequate health, safety, environmental and quality laws to regulate energy projects. It proposes several policies and strategies for intervention on addressing land, environment, health and safety issues.

With regard to communities, the policy:

- On benefit sharing mechanisms - acknowledges a lack of benefit sharing framework from exploitation of energy and petroleum resources with the local communities and proposes to develop a legislative framework.
- On local content - acknowledges the absence of local content development policy; inadequate legislation for technology and knowledge transfer; inadequate development of local skills and know-how in the exploitation of natural resources and infrastructure development; inadequate legislative requirements for collaboration between foreign investors in the energy and petroleum sector and the local investors; absence of legislative framework to prioritise utilization of locally available goods and services.
- Community engagements, expectations and conflicts – acknowledges that the discovery of various natural resources in the country has resulted in high expectations, confrontations and conflicts among communities where these resources have been discovered. This is attributed to among other things, the absence of sustained engagements by the government; lack of pro-active and sustained awareness and sensitization of public about timelines for exploitation of energy and petroleum resources; land use conflict; lack of civic and constitutional rights at the grass-root levels; inadequate government driven mechanisms for addressing and responding to conflicts and social unrests surrounding exploitation of energy and petroleum resources; uncoordinated framework between the investors and the communities; and inadequate implementation of communication policy and strategy for stakeholder’s and consultation in energy and petroleum sector.

3.2.3 The Draft Mineral Resources and Mining Policy

The overall goal of the mining policy is to set out principles and policies that will aid the government in reforming mining sector regulation and promotion of mineral investment and thus enhance the contribution of mineral resources to the
economy and maximize on accruing benefits. It identifies, as its guiding principles, the need for transparency, uninhibited access to justice and public participation in the development of policies, project plans and processes for the management of mineral resources; inter-generational equity and sustainable utilization of mineral resources; international cooperation in the management of mineral resources where such resources are shared with other states or where management measures in one state may have adverse or positive consequences in another state; integrating sound environmental protection in mineral resources development; observation of the social and cultural values traditionally applied by any community in Kenya for the management of mineral resources in so far as the same are relevant and are not repugnant; to justice and morality or with any written law; equitable access to mineral resources and benefit-sharing; and value addition to raw minerals before export as a way of increasing returns for the people of Kenya.

The policy objectives set out in the draft are stated to include ensuring that Kenya’s mineral endowment is managed on a sustainable economic, social and environmental basis and that there is an equitable sharing of the financial and developmental benefits; encouraging local and foreign private sector participation in the exploration for, and commercial exploitation of, mineral resources; achieve a socially acceptable balance between mining and the physical and human environment and ensure that all participants in the mining sector observe internationally accepted standards of health, mining safety and environmental protection, among others. The policy proceeds to develop strategies for the implementation of the policy on a number of key thematic issues, including regulating the mining sector; mineral licensing; geological and mineral data and information; access to land mineral operations; health, safety and environmental regulation in mining; fiscal policy for mining, marketing, mineral potential and value addition; securing the maximum benefits for mining, mineral benefit-sharing, local participation and artisanal and small-scale mining operations. The draft policy proceeds to set out an institutional framework and implementation plan for the stated objectives.

### 3.3 The Legal Framework for Extractives in Kenya

#### 3.3.1 The Petroleum Sector Laws in Kenya

a) **The Petroleum Exploration and Production Act and Regulations, 1986 (as revised in 2012)**

The upstream petroleum sector is regulated by the Petroleum (Exploration and Production) Act. It was first passed in 1984 and revised twice in 1986 and 2012. The Act vests ownership of hydrocarbons in the Kenyan Government and grants the Cabinet Secretary (CS) powers to authorize petroleum operations through

---


27See section 2.2.2.2 of the report for more details on the oil and gas structure that includes upstream, mid stream and down stream.
regulations developed under the Act. Such permission must be obtained prior to conducting any petroleum operations. This is the overall law that regulates the negotiation and conclusion by the Government of Kenya on petroleum agreements relating to the exploration for, development, extractive, production, treatment, storage, transportation, sale or disposal of oil and gas. The Act provides that petroleum operations may be carried out through the National Oil Company of Kenya (NOCK) or through contractors. Pursuant to this Act, the Petroleum (Exploration and Production) Regulations give powers to the CS to give notice to the effect that oil blocks are open for applications from contractors for entering into petroleum agreement negotiations. The Petroleum locks are awarded on a first-come-first-served basis. Negotiations are conducted on the basis of the model Production Sharing Agreement or Contract (PSA or PSC) that is made available by the CS to potential contactors. State participation is through an oil company established for such purpose or through contractors.

The Ministry has established an *adhoc* Committee named the National Fossil Fuels Advisory Committee (NAFFAC) with a mandate to negotiate with potential production sharing contractors on behalf of the CS. NAFFAC has representation from of Energy and Petroleum (MoEP), which chairs it, the Office of the Attorney General and Department of Justice (OAGDJ), the National Oil Company of Kenya (NOCK), the National Environmental Management Authority (NEMA), the Kenya Revenue Authority (KRA), and the Petroleum Institute of East Africa (PIEA).

The Act does not provide elaborate details relating to development and production activities. These are elaborated in the terms and conditions negotiated under the PSC. The CS has powers under the Petroleum Act to require contractors to relinquish part of their contract area over time in accordance with terms of the PSC. The contractor’s are required to surrender a percentage of the original contract area on or before the conclusion of each exploration period. This excludes areas under which petroleum has been discovered and has been earmarked for development. The Act makes provisions for state participation in the upstream sector. It is envisioned that this will be done through a state company established for that purpose. It can also be done through contractors under a petroleum agreement or in any such other manner as may be necessary or appropriate.

Although the Act makes reference to the issue of local content by requiring contractors to give preference to the use of locally available products, equipment and services, no definition is provided as to what entails local goods. It is also silent on any thresholds regarding local content. Although the Act makes reference to the issue of local content by requiring contractors to give preference to the use of locally available products, equipment and services, no definition is provided as to what entails local goods. It is also silent on any thresholds regarding local content. The production sharing mechanism established under the PSC provides for the Daily Rate of Production (DROP) method in the sharing of uplifted oil. This method does not factor the price of petroleum or the costs of production in a given area. For Kenya, however, the contractor and Government shares are determined on the basis of the rate of production of profit oil and...
The Petroleum Act and the model PSC have a number of shortcomings. These include the lack of a compensation regime, licensing rounds, gas sharing terms, provisions of Corporate Social Responsibility, community awareness and participation, rules on transfer of interests in PSC’s, criteria for evaluation of applications, as well as terms relating to environmental protection, conservation and management.

With regard to land and other community resources,

- No petroleum agreement or an exploration permit will authorize a mining company to mine in among other places, a burial ground or land in the vicinity or precincts of any church, mosque or other sacred buildings or places of worship.
- The CS give permission to the contractor to use the water in the contract area for the purpose of the petroleum operations but the contractor shall not unreasonably deprive the users of land, domestic settlement or cattle watering place of the water supply to which they are accustomed.
- The contractor cannot, except where there is danger or a risk of significant economic loss abandon wells without securely plugging them to prevent pollution or sub-sea damage
- The law provides for the right of access to private land by contractors within 48 hours’ notice and sets out various conditions to be met before access is granted.

The dispute resolution mechanism is not addressed in this Act. However, the model PSC makes provision for the settlement of disputes under the United Nations Convention on International Trade Law (UNCITRAL) rules. This is a mechanism that uses arbitration mechanisms and decisions are binding upon parties. With regard to contract compliance and administration, the CS is authorized by this law to supervise petroleum operations carried out under the PSCs. This role is jointly done with NOCK, which is mandated to assist the CS in terms of legal operations, accounting, budgets, and other matters as well as coordinating and facilitating PSC negotiations. The PSC contains a stabilization clause, which provides that, in the event of a change in laws or regulations that impacts the economic benefits of a party to the PSC, parties are to agree to make the necessary adjustments to restore the status quo.

With regards to job opportunities, the law in its general terms and conditions of petroleum agreements provides that the mining companies give preference to the employment of and training of Kenyan nationals in petroleum operations.
b) The Petroleum (Exploration, Development and Production) Bill 2015

This draft Bill proposes a framework governing the contracting, exploration, development and production of petroleum as well as cessation of upstream petroleum operations. The Bill also aims to update Kenya’s law so that it is in line with the changed circumstances (of discovering oil). It also gives effect to Articles 60, 62 (1) (f), 69 and 71 of the Constitution in so far as they apply to upstream petroleum operations and for connected purposes.

The Bill requires the CS to develop and publish a national policy on upstream petroleum operations, which is to be reviewed every six years. The Cabinet Secretary is further required to develop, publish and review upstream petroleum strategic plans, which must take into account the national upstream petroleum policy and serve as a guide for infrastructure investments.

The Petroleum Bill proposes to establish a number of institutions charged with administrative functions under the law including the Cabinet Secretary, the National Upstream Petroleum Advisory Committee (NUPAC) and the Upstream Petroleum Regulatory Authority (UPRA). These entities have countervailing roles with the Cabinet Secretary being charged with duties that include making available model PSCs as a basis for the negotiation, cause any investigations, due diligence or consultations to be made or carried out as considered necessary before entering into such contracts, negotiate, sign or revoke petroleum agreements, review and approve any proposed exploration activity contained in the annual work programme, appraisal programme and production forecasts submitted, suspend or terminate the petroleum agreement or recall the security therein on behalf of the government and approve transfer or assignment of any interest in a petroleum agreement in accordance, among other functions.

The proposed NUPAC is an inter-ministerial committee comprising of representatives from the MoEP, NOCK, the AGs, the National Treasury, NEMA, the KRA, and UPRA. It can co-opt four other members. Its mandates include participating and advising the CS in the negotiation of petroleum agreements and in the granting and revocation of licenses, submitting reports on the terms negotiated with contractors, advising on upstream petroleum operations, participating in the evaluation of the bids and applications for awarding petroleum blocks, conducting due diligence and investigating the affairs of contractors prior to entering into petroleum agreements, and advising on the grant of non-exclusive exploration permits under which a person may enter an area to prospect or carry out geological, geochemical and geophysical surveys.

The proposed UPRA is tasked with regulating the upstream petroleum operations in Kenya; providing such information and statistics to the CS as may be required from time to time; collecting, maintaining and managing upstream petroleum data; and doing or performing all other acts for the furtherance this law.


LOCAL COMMUNITIES IN KENYA’S EXTRACTIVE SECTOR: From Paternalism to Partnership
On allocation of petroleum rights and management of petroleum resources, the Bill provides that the negotiation, award and execution of petroleum agreements is the mandate of the CS. Applications for a petroleum agreement or a non-exclusive exploration permit are thus to be made to the CS. However, the CS may not enter into direct negotiations with a prospective contractor except under specific circumstances as laid out in the Bill. Applications for a petroleum agreement or a non-exclusive exploration permit are thus to be made to the Cabinet Secretary. The CS is required to conducting licensing bid rounds for the award of a petroleum agreement. However, the CS may not enter into direct negotiations with a prospective contractor except under specific circumstances as laid out in the Bill. The Bill also sets out the financial and technical obligations of the Contractor as well as express obligations to be contained in petroleum agreements such as minimum work obligations, development plans, work programmes and budgets, information and reporting, among other obligations.

The CS is required to consider the advice of NUPAC before awarding any Petroleum Agreement. If he disagrees with their advice, the CS shall lay out the differing reasons. Furthermore, the CS is required to submit a petroleum agreement or a non-exclusive exploration permit to Parliament for ratification in accordance with Article 71 of the Constitution, after which approval or rejection is to be given within 90 days. Contractors are also required to obtain operational permits for drilling of wells; development and production of petroleum; construction of petroleum-gathering systems in the field; building of crude storage facilities; construction, utilization, decommissioning or abandonment of any upstream petroleum facility or plugging or abandonment of any individual well.

The Bill proceeds to set out a number of obligations relating to reporting on the discovery of petroleum, notification requirements prior to abandonment, and the surrender of blocks. Where commercial quantities are established, Contractors are required to prepare field development plans. Third party access to infrastructure is guaranteed under reasonable conditions, provided that there is no significant technical challenges posed that prevent the utilization of such infrastructure by third parties. Regarding the cessation of petroleum operations, the Bill requires the Contractors to submit a petroleum field-decommissioning plan to UPRA before a production permit is issued to install and operate facilities. It requires the establishment of a decommissioning fund, which the Contractor must contribute to when petroleum production has reached 50 per cent of the aggregate recoverable reserves or 10 years prior to the expiry of the production permit.
Regarding the question of information and reporting, the Bill sets out a range of information to be disclosed by the contractors including: geological, geochemical and geophysical surveys; the rates and volumes of petroleum produced, its composition including test production and the recovery of petroleum in connection with formation testing; the volumes and other results of production monitoring and monitoring procedures; as well as the use, injection, venting or flaring of natural gas or petroleum. Such information is to be based on metering. Section 81 of the Bill precludes disclosure of information to third parties, save for a number of exceptions including one in furtherance of a right to a person as provided for under the Constitution and other relevant laws. However, the failure by Parliament to enact legislation, facilitating freedom of access to information may limit the operability of this exception.

With regard to communities, the bill provides for:

Local content: The Bill sets obligations for local content development, with a requirement that contractors submit long-term and annual local content plan which correspond with their work programmes. The provision states that, first consideration should be given to services provided within the country and goods manufactured in the country, where the goods meet the specifications and standards of the petroleum industry. Furthermore, such plan must ensure that qualified Kenyans are given first consideration in regard to employment and that adequate provision is made for training of Kenyans on the job. The local content plan is stated to include sub-plans on employment and training, research and development, technology transfer, legal and financial services. UPRA is required to establish a Local Content Development and Monitoring Unit. The Bill also sets up a training fund where moneys raised by the Contractors as training contribution are paid. Any withdrawal from the fund is to be done only with the express permission of the Cabinet Secretary and shall be utilised for the training of Kenyan citizens.

Revenue sharing: The Bill sets out various fees and levies to be paid by contractors. These include annuals fees, such as surface rentals and training fees, signature bonuses, as well as profit oil. The profit oil is to be shared between national and county governments as well as the local communities. It requires that the national government’s share of petroleum revenues be deposited into a dedicated petroleum fund, and managed according to the Public Finance Management Act, the Constitution and any other relevant law. The ratios given under the Bill are:

- National Government - 75 per cent
- County Government - 20 per cent
- Local communities - 5 per cent and is payable to a trust fund managed by a board of trustees established by the County Government in consultation with the local community. The Bill places a caveat on the County Government share stating that “the amount allocated in
accordance to this subsection shall not exceed twice the amount allocated to the County Government by the Commission for Revenue Allocation (CRA) in the financial year under consideration.” Clause 94 (2) may limit the share taken by counties as the CRA allocation has a sliding scale that shifts over time.

The Petroleum (Exploration, Development and Production) Bill 2015, the Energy Bill 2015 and the Mining Bill 2014 propose similar proportions of shared resources among National Government, the County Government and the local community (i.e. 75:20:5). The Natural Resources Benefit Sharing Bill proposes a different proportion of sharing resources among the SWF, National and County governments as well as local communities (see section 3.3.4 c).

It is important to note that the Petroleum (Exploration, Development and Production) Bill 2015, the Energy Bill 2015 and the Mining Bill 2014 propose similar proportions of shared resources among National Government, the County Government and the local community (i.e. 75:20:5). The Natural Resources Benefit Sharing Bill proposes a different proportion of sharing resources among the SWF, National and County governments as well as local communities (see section 3.3.4 c).

Publishing of information: The Cabinet Secretary is required to develop a framework for transparency and accountability in the upstream petroleum sector, which includes the annual publication of all records, accounts, and reports of revenues (royalties, fees, taxes, and other charges), as well as any other relevant data and information that support payments received by the Government of Kenya, county governments, and local communities. Reporting should be disaggregated into each petroleum agreement, non-exclusive permit, drilling permit, production permit, and plug and abandonment permit indicating payment type by each Contractor (i.e., royalties, taxes, fees, and other charges); volumes by each Contractor, measured at the delivery point of sale; transfers of all petroleum sector revenues from national government to county governments and local communities, including royalties; as well as all Contractor contributions (in cash or in kind) to county governments and local communities.

Community rights - the community, subject to the provisions of the Constitution of Kenya, 2010 and any other written law, shall have the right to:

a) be informed through an appropriate communication strategy prior to carrying out of any upstream petroleum operations within their county and sub-county;
b) put forward any inquiries, interrogate planned activities which directly or indirectly affect their interaction with the ecosystem during the preliminary phase of awarding of petroleum licenses for consideration;
c) adequate compensation for land taken over for upstream petroleum operations in accordance with relevant land laws and the Constitution;
d) be compensated by any contractor who causes environmental damage and/or pollution;
e) be compensated for any injury and/or illness directly or indirectly related to the upstream petroleum operations if the contractor was in a position to take measures to prevent the occurrence of the same;
f) compensation for damage to property and lost source of revenue or livelihood as a result of upstream petroleum operations taking place in their immediate surroundings;

g) be educated and sensitized on upstream petroleum operations within their county and sub-county; and

h) participate in planning for corporate social responsibility projects that are to be implemented within the contract area by the contractor in consultation with the Government and the County Government

Environmental management – the Bill makes the provisions of the Environmental Management and Coordination Act and any regulations made thereunder applicable to the petroleum sector. Compliance with environmental principles and safeguards as prescribed by the Act and regulations as well as petroleum industry practices and other applicable laws is required. The flaring and venting of oil and natural gas is prohibited, save for emergency situations, production testing and where authorization is sought. Access to land for purposes of conducting upstream petroleum operations is governed by the Constitution and the Land Act. Issues of consent, objections, compensation, and compulsory acquisition of land are canvassed through the provisions of the Act.

c) The Energy Bill 2015

The Bill is intended to “consolidate the laws relating to energy, to provide for National and County Government functions in relation to energy, to provide for the establishment, powers and functions of the energy sector entities; promotion of renewable energy; exploration, recovery and commercial utilization of coal and geothermal energy; regulation of midstream and downstream petroleum activities; and the production, supply and use of all energy forms; and for connected purposes.” The Bill also provides comprehensive provisions for midstream and downstream petroleum operations.

When passed, the Bill will, among others, replace the Energy Act of 2006 and the Geothermal Resources Act if 1982 as well as bring the sector laws into consonance with the Constitution of Kenya.

The Bill proposes the formation of the National Coal Advisory Committee. The committee has representation from MoEP (chairing), Coal Development Agency (secretary), Attorney General (AG), the National Treasury, National Environmental Management Authority (NEMA), Kenya Revenue Authority (KRA) and the Ministry of Mining. It may co-opt not more than four members. Its functions include advising the CS on coal operations, participating and advising the CS in negotiations for the grant of agreements with prospective contractors, submitting a report to the CS on the terms negotiated with prospective contractors, participating in the evaluation of all applications by contractors and conducting due diligence on all prospective contractors.

In addition, royalties received by the National Government from coal resources and geothermal energy are to be apportioned between the National Government, County Government and local community such that the National Government retains 75 per cent while the County Government receives 20 per cent and the local community receives 5 per cent of the royalties. However, the amounts to be received by the County Government are capped so as not to exceed the amount allocated to the County Government by CRA in the financial year under consideration.

There are also comprehensive provisions on use of geothermal resources and renewable energy resources. It therefore proposes the establishment of the Renewable Energy Resources Advisory Committee. It draws representation from the MoEP (chairing), Rural Electrification and Renewable Energy Authority (secretary), Geothermal Development Company Limited, Kenya Electricity Generating Company Limited, AG, the National Treasury and the Ministry responsible for natural resources. It may co-opt up to four members. The committee is charged with advising the CS on the criteria for allocation of renewable energy resource, the licensing of renewable energy resource areas and the management of water towers and catchment areas. It is also mandated with advising the CS on the development of multi-purpose projects such as dams and reservoirs for power generation, portable water, flood control and irrigation with a view to ensuring proper coordination at policy, regulatory, conservation and operational levels on matters relating to the various uses of water resources as well as the management and development of renewable energy resources. The Committee may, upon request, advise the County Governments on matters relating to renewable energy resources.

Regarding the community, in granting or rejecting an application for a license or permit, the licensing authority will take into consideration the impact of the undertaking on the social, cultural or recreational life of the community.

### 3.3.2 The Mining Sector Laws in Kenya

#### a) The Mining Act 1940

The Mining Act, Cap 306, regulates the mining sector, which is an adaptation of the Mining Ordinance of 1933. The Act was revised in 1972 and 1987. It provides that all minerals are vested in the national government and may only be issued to any other person subject to processes established under the Act. Any authorization for the exploitation of minerals is granted through the Commissioner of Mines and Geology or an officer duly authorized by him/her.

The nature of rights awarded includes prospecting and mining rights. Prospecting licenses are issued for one year and may be renewed at the discretion of the Commissioner of Mines and Geology for a further period of one year each and up to a maximum of five years each.
Prospecting rights confer a number of privileges to the holder to prospect for all minerals except diamonds; erect any buildings or machinery; make excavations, sink shafts or wells, drive adits or levels or dig trenches; take for the purposes of prospecting, take water from any lake, river or stream; create a protection area and apply for an exclusive prospecting license among other privileges. Any minerals obtained during prospecting are the property of the government and may not be disposed. The rights are not transferable without the consent of the Commissioner. Applications are made to the Commissioner of Mines and Geology. The Act sets requirements, which, if met by the applicant, allow the issuance of a prospecting license. The Commissioner has powers to grant, refuse, suspend, cancel or extend prospecting and mining rights. The Act confers a wide discretion upon the Commissioner in making such decisions.

The exploitation of minerals requires the issuance of a mining lease. An applicant for a mining lease must carry out a feasibility study and an approved cadastral survey of the deposits of the mineral in question. The applicant must then prepare an Environmental Impact Assessment (EIA) study in accordance with the requirements of the Environmental Management and Coordination Act (EMCA) No. 8 of 1999. This study has to be approved by NEMA. The EIA report is submitted to public for commentary before final approval. It is then required of an applicant to submit a formal application for a mining lease, which must include all information, established in the first two steps above as well as any compensation agreements payable to landowners. This must be published in the Kenya Gazette and a local newspaper of national circulation inviting any objections. The process then moves to registration of the mining lease under the Mining Act and the Registration of Documents Act. The applicable stamp duty must be paid at this point. The Constitution then requires Parliament to ratify any right or concession for the exploitation of natural resources.

The Act does not make provision for local content requirements or obligations for consultation with local communities before the commencement of exploration and mining operations. There is no express requirement that mining companies engage in public consultation with regard to exploration rights, mineral rights and environmental impacts. Acquisition of land under the Act is done through compulsory acquisition by the government but payment of compensation is required. The Act also lacks provisions relating to the issue of transparency and access to information and documents registered are not generally available to the public.

Prospecting licenses are issued for one year and may be renewed at the discretion of the Commissioner of Mines and Geology for a further period of one year each and up to a maximum of five years each. The Commissioner has powers to grant, refuse, suspend, cancel or extend prospecting and mining rights.
through the Commissioner of Mines and Geology and appeals can be made to the High Court. The Act also lacks provisions relating to the issue of transparency and access to information and documents registered are not generally available to the public.

Health and safety concerns under this Act are regulated by the Mining (Safety) Regulations which prescribe rules relating to general precautions, surface protection, underground workings, winding and hauling, raising or lowering persons by mechanical power as well rules on ventilation and sanitation, workmen, explosives, machinery and mine plans as well as procedures in cases of accidents. The inspector of mines (or the government mining engineer) has authority to effect the regulations and grant exemptions on any rules.

With regard to taxation of mining companies, resident and non-resident corporation in Kenya are liable to pay corporation tax on all income generated within Kenya. The corporate tax rate for resident companies is currently at 30 per cent while non-residents are taxed at 37.5 per cent. If a company is recently listed on the Nairobi Stock Exchange, a reduced tax rate applies. The transfer or assignment of shares attracts a withholding tax rate of 20 per cent while local players have a reduced rate of 10 per cent. Mining operations are allowed to make capital deductions in the first year of 40 per cent and this is reduced to 10 per cent between the second and the seventh year. Transactions between related entities are subject to the arm's-length principle.

The Mining Act has a number of weaknesses. Key among them is the lack of a single fiscal regime to regulate the sector. A good example is the special mining licence given to Base Titanium, which grants tax holidays and other concessions. Furthermore, provisions relating to compensation mechanisms, community engagement and participation, defined criteria for evaluating applications and local content regulations are lacking within this law. These challenges have made the sector contribute marginally to the nation's economy. Furthermore, the Constitution of Kenya 2010 has necessitated an overhaul of the law to reflect the new principles enshrined in it, including equity and environmental sustainability. The law is undergoing review and key features of the proposed law will be discussed at a later stage in this report.

b) The Mining Bill 2014
The Mining Bill seeks ‘to give effect to Articles 60, 62 (1)(f), 66 (2) 69 and 71 of the Constitution in so far as they apply to minerals as well as provide for prospecting, mining, processing, refining, treatment, transportation and any dealings in minerals and for related purposes’. The Bill sets up an administrative structure comprising the Mineral Rights Board, the Cabinet Secretary, the Principal Secretary, the
Mineral rights are categorized between large-scale and small-scale operations and the Bill also addresses the issues relating to artisanal mining. Large-scale operations have a category of rights, including prospecting licenses, retention licenses, and mining licenses. Small-scale operations, on the other hand, have prospecting and mining permits. Institutions proposed to be established under the Bill include the National Mining Corporation, the Minerals and Metals Commodity Exchange, and a Mining Tribunal. It also provides for the setting up of a minerals Sovereign Wealth Fund.

The award of mineral rights is to be done through competitive bidding. The Bill also requires that the award be done by the Cabinet Secretary upon recommendation by the Mineral Rights Board. Upon receipt of an application for a prospecting, reconnaissance or mining license, the Cabinet Secretary is required to give notice, in writing, of the pending application for the grant of a mineral right to the land owner or lawful occupier of the land where the mineral is located, the community and the relevant County government. The Cabinet Secretary is also required to publish notice of pending application in a newspaper of wide circulation. Such notice must include a statement of the proposed boundaries of the land in relation to which an application for a mineral right is made. It should also be published, for twenty-one days in the Kenya Gazette and in the offices of the County Government within which county the land is situated. The applicant is required to submit plans on the employment and training of Kenyan citizens. If the license is granted, the grantee (in licenses issued to large-scale license holders) is required to enter into community development agreements.

The concept of strategic minerals is introduced in the Bill and the Mineral Rights Board has powers to recommend certain minerals to be categorized as strategic minerals. The state also has a right of pre-emption on all strategic minerals raised, won or obtained within the territory of Kenya before they are sold. The Bill makes provision for local equity participation. The Mineral Rights Board is to prescribe the limits of capital expenditure for the purpose of this section. With regard to the issue of Free Carried Interest, the Bill states that where a mineral right is for a large-scale mining, the State will acquire 10 per cent Free Carried Interest in the share capital of the right in respect of which financial contribution shall not be paid by the State. This applies to large-scale mining operations and to mining operations relating to strategic minerals.

The Bill creates a sharing formula, where revenue obtained from the sector is to be shared between the national and county governments, as well as communities affected by the mining project. The revenue is to be apportioned with the national government getting 75 per cent of the total government revenue, the county government getting 20 per cent while the local community gets 5 per cent.
The Bill precludes the granting of mineral rights over private land, save with the express consent of the owner. It further precludes granting of rights to community land without the consent of the authority obligated by the law relating to administration and management of community land to administer community land or the National Land Commission in the case of un-alienated community land.

The Mining Bill requires holders of permits and license to use the land in question in accordance with the terms of the permits and ensure sustainable land use through restoration of abandoned mines and quarries, avoid seepage of toxic waste in water bodies, ensure that blasting and related activities are kept at reasonable and permissible levels and that land is restored after the end period of mining. It precludes the issuance of any license, save for the case where the applicant has submitted site rehabilitation and mine-closure plans for approval. Applicants of any licenses under this law are required to provide a bond or some other form of financial security sufficient to cover for costs associated with the implementation of the environmental and rehabilitation obligations.

The Cabinet Secretary may enter into mineral agreements. This is the final form of agreement that requires ratification by Parliament before execution under Article 71 of the Constitution in the case of large-scale operations. It contains the terms and conditions relating to rights and obligations of the holder of one or more prospecting licences, retention licences or mining licences, or any combination of such mineral rights. These agreements are to be made public under Article 35 of the Constitution and the Cabinet Secretary is to ensure that mineral agreements and the status therefore is available on the official website of the Ministry. However, a law to effect Article 35 of the Constitution has not been passed by Parliament.

The Bill makes provisions for small-scale mining not artisanal mining. The Bill provides that:

- Small-scale operations will only be granted prospecting permits and mining permits for their operations.
- The permits shall only be given to citizens of Kenya or a corporate body wholly owned by Kenyan citizens.
- A prospecting permit or a mining permit ceases to be valid when its holder or any of its holders is or becomes ineligible for the grant of a permit
- The criteria for determining small scale prospecting or mining operations is that:
  - prospecing operations should not exceed 25,000 contiguous blocks while small-scale mining operations should not exceed two contiguous blocks;
  - the actual or estimated annual extraction of minerals or material bearing minerals
does not exceed 25,000 cubic metres;
- they should not employ specialised prospecting, mechanised mining
technologies, chemicals including mercury and cyanide or explosives;
- they should not involve an investment or expenditure, which exceeds an amount
prescribed by the Cabinet Secretary

- Clause 13 states that the Cabinet Secretary may, by notice in the Gazette, designate any
area of land to be an area reserved exclusively for small-scale mining operations.

c) The Energy Bill 2015 (Regulation of the Coal Sub-Sector)
The Bill vests all coal resources in the National Government. It gives the CS the discretion
to adopt acceptable international standards in the management of coal resources, provided
that such standards are not inconsistent with the laws of Kenya. The award of rights for
exploration and development of coal resources is to be done through issuance of either an
exploration and appraisal license or a production and development license.

The Bill proposes the formation of the National Coal Advisory Committee and the
composition outlined in section 139(2). The committee has representation from MoEP
(chairing), Coal Development Agency (secretary), AG, the National Treasury, NEMA, KRA
and the Ministry of Mining. It may co-opt not more than four members. Its functions
include advising the CS on coal operations, participating and advising the CS in
negotiations for the grant of agreements with prospective contractors, submitting a
report to the CS on the terms negotiated with prospective contractors, participating in the
evaluation of all applications by contractors and conducting due diligence on all
prospective contractors.

Upon receipt of the report from the Committee, and after approval by the Cabinet and
ratification by Parliament, the Cabinet Secretary may, on behalf of the National Government,
enter into and sign coal agreements with a contractor in the prescribed form. The Bill proceeds
to give the Cabinet Secretary wide discretionary powers to grant non-exclusive exploration
permits, with regard to areas specified therein, under which a person may enter an area,
prospect and carry out geological and geophysical surveys. In so doing, the Cabinet Secretary
is to request for a proposal from potential contractors as a basis for the negotiation for coal
block concessions, cause any investigations, due diligence or consultations to be made or
carried out as he considers necessary before entering into a coal agreement and may, upon
advise from the Committee, reject any application made by a potential investor if convinced
that the rejection is in the best interest of Government. The Cabinet Secretary also
supervises coal operations carried out under a coal concession and may take any action,
decision, or give any permission and exercise any other control as may be necessary or
desirable for the purposes of this law or the regulations made thereunder. This provision
gives a wide latitude of authority that may be subjected to abuse.

established under section 139(1)
The exploration, appraisal, production and development license issued under this law is valid for a term of twenty-one years from the date of its issue and may be renewed for another term. If a licensee has complied with the terms of the license, the Cabinet Secretary may extend the term of the license with parliamentary approval for such a period as the Cabinet Secretary may determine. Such application must be made at least twelve months before the license expires. The constitution of blocks is to be done by the Cabinet Secretary who, by a notice in the Kenya Gazette, may zone the country into numbered blocks. The Cabinet Secretary may reserve blocks to be exploited by the National Government. The Bill further gives power to the Cabinet Secretary to require a Contractor to relinquish portions of a block to which a coal agreement relates in the manner specified in the agreement. The Energy Bill proceeds to set requirements on persons who may enter into coal agreements with the Government, stating that this is to be done only with Contractors who have the financial ability, technical competence, and professional skills necessary to fulfil the obligations under the coal agreement.

3.3.3 Laws Relating to the Taxation of Extractive Resources in Kenya

Taxation of the extractive sector in Kenya can be subdivided into taxation of the mining sector and taxation of the oil and gas sector.

3.3.3.1 Taxation of the mining sector

The laws relating to the taxation of the mining sector can be found in the Mining Act and the Income Tax Act as recently amended by the Finance Act 2014.

a) Taxation under the Mining Act

Mining companies or licensees are subject to royalties and/or fees under the Mining Act. Royalties are levied under the Mining Act on all extracted minerals. Different minerals attract different rates as better espoused under the regulations issued by the Cabinet Secretary responsible for Mining and Minerals. The regulations are issued as legal notices and are publicly available. However, before the publication of the current rates, the practice was that royalties were subject to negotiation between the prospective investors and the CS. This resulted in the so-called Special Mining Licences and Investment Agreements under which different investors are charged different royalty rates.

Although not strictly taxes, the Mining Act provides for assessment of fees for licenses and other activities related to prospecting for minerals and mining. The rates are determined by the CS.
b) Taxation under the Income Tax Act

Taxation of the mining sector can be divided into two eras: pre and post Finance Act 2014. All resident companies are subject to tax at a standard corporate income tax rate of 30 per cent while non-residents are subject to corporate income tax at 37.5 per cent on the income after deduction of expenses.

Before the Finance Act 2014 the provisions relating to Mining operations in the Income Tax Act (ITA) were found in Part III of the Second Schedule to the ITA. This part only covered deductions relating to capital expenditure incurred for mining operations. Exploration expenditure was written off over seven years, there was no provision for carry back of tax losses upon cessation of business. There was no provision for ring fencing either.

The Finance Act 2014 brought changes to the taxation of this sector as elaborated below. Mining operations are now taxable under the new Ninth Schedule to the ITA, which prior to Finance Act 2014, catered only for the taxation of upstream petroleum operations.

Unlike before the Finance Act 2014, it now explicitly provide that expenses incurred in a mining license area can only be utilized against revenues derived from the same license area. This is known as ring fencing.

Licensees can now carry forward tax losses incurred in a licence area indefinitely. This was previously limited to the standard five years. The losses carried forward are only allowable as a deduction against income of future years arising from the same licence area. However, this rule may be varied in exceptional circumstances and cross-ring-fence deductions allowed on ceasing mining operations. The losses may be transferred to another licence area, which wholly falls within the area covered by the first license area. The new Ninth Schedule also allows the licensees to elect to carry back the losses in the same contract area to the previous year of income. However, the losses cannot be carried back for more than three years from the year in which they arose.

Prospecting expenditure is wholly deductible in the year of income it was incurred. However, any prospecting expenditure which had been deducted and has been recouped as a result of disposing off the mining right will be brought to charge in the year of income in which the interest was disposed or the amount recouped. Any machinery that is used to undertake prospecting work is granted wear and tear at 100 per cent in the year in which it is first brought to use for prospecting purposes.

Extractive expenditure is claimed by licenses over five years (twenty per cent per year). If any extractive expenditure is incurred after the first day of the year of income, the amount deducted is pro-rated. Further, any extractive expenditure incurred before the commencement of production is treated as expenditure that was
incurred in the year production commences. Where a licensee disposes of a mining interest for which an extractive expenditure had been allowed, no deduction is allowed in that year of disposal. Further, where the receipt of the disposal exceeds the written value of the mining rights at the time of the disposal the excess is treated as income. The reverse is also true.

Where a licensee has incurred expenditure to rehabilitate the license area, the amount is deductible for tax purposes. This is an incentive to the licensees to ensure that the license area is restored and no environmental degradation is left unattended at the end of the mining lease. To encourage the licensees to start planning for rehabilitation early, any amount that they accumulate in an escrow account that is intended to be used for rehabilitation is not subject to tax. Any withdrawal from the fund for purposes of fulfilling rehabilitation commitments is also not treated as income. However, if any amount is withdrawn and returned to the licensee, it shall be subject to tax at the corporate rate. Further, any surplus that remains in the account after completing the rehabilitation commitments and is distributed amongst the contributors is subject to tax.

The Finance Act 2014 also introduced capital gains tax on the transfer or assignment of mining rights. The rate applicable is the prevailing corporate income tax rate, i.e. 30 per cent for resident mining companies and 37.5 per cent for non-resident mining companies. The provision targets only the net gain and allows for deduction of past expenses that can be attributed to the assigned interest. It should however be noted that, the consideration that is deemed to have been realized from the disposal should exclude all work obligations by the licensee towards the government of Kenya and/or future carry in operations. In contrast, any past costs and any premium earned on the disposal of an interest are included in the consideration realized and subjected to tax. The new Ninth Schedule to the ITA also requires the licensees to notify KRA where there is a 10 per cent or more change ownership for purposes of better implementing the capital gains tax.

Dividends paid by mining companies are also taxed at the prevailing rates depending on whether the payments are to a resident or non-resident. The rates outlined in the Third Schedule to the ITA could however be affected by a Double Taxation Agreement (DTA) that Kenya has entered into with other countries that grants favourable treatment that that prevailing under the standard regime in the ITA. Additional incentives obtain under the customs and VAT regime. To promote prospecting and extractive, any machinery and inputs, excluding motor vehicles that are imported by a licensed company for direct and exclusive use in mining operations is not subject to import duty. However, the licensees are still subject to other levies introduced from time to time by the CS of the National Treasury. Examples include the Railway Development Levy (RDL), which is paid on all goods imported into the country. The imports are also exempt from VAT provided that the CS Mining has certified that they are solely to be used in mining operations.
3.3.3.2 Taxation of Oil and Gas Sectors

Kenya operates Production Sharing Contracts (PSC) - see section 2.2.3.2. As a result, in addition to the taxation provisions in the ITA, there are fiscal clauses in the PSC, which governs the taxation of contractors.

a) Fiscal Provisions in the PSC
The PSC provides that all contractors are subject to and shall comply with the requirements of the income tax laws in force in Kenya, which impose taxes on or are measured by income or profits. It further provides that the portion of the profit oil (i.e. the crude oil which the Government is entitled to take and receive after deduction of cost oil) shall be inclusive of all taxesbased on income or profits, including specifically tax payable under the ITA and dividend tax imposed by Kenya on any distribution of income or profits by the contractor. It is noteworthy that the contractor’s taxes included in the government’s portion of profit oil exclude the taxes paid by the contractor on behalf of petroleum service sub-contractors. Further, all taxes paid by the Government of Kenya on the contractor’s behalf and name is considered as the latter’s income.

The current PSC also levies a windfall tax or price cap formula. This is a second tier amount payable whenever the value of crude oil exceeds US$ 50 per bbl FOB Mombasa (“the threshold price”). It is an adjustment to the profit oil and is aimed at securing part of the windfall profits where petroleum prices exceed the threshold price.

Other fiscal provisions contained in the PSC are the signature bonus, surface rental fee and training fees. All contractors are required to pay upon signing the PSC. This is known as the signature bonus. The contractors are also required to pay surface fees which is calculated on the basis of the surface area of the contract area on the date those payments are due. Additionally they are subject to pay training fees every year to a fund managed by the MoEP.

b) Taxation of Petroleum contractors under the ITA
All petroleum PSC contractors are taxable under the ITA in accordance with the Ninth Schedule to the ITA. The Finance Act 2014 repealed the old schedule and put in place a new schedule to govern the taxation of petroleum PSC contractors.

Kenya imposes Corporate Income Tax (CIT) on income earned by petroleum companies at the same rate applicable to all other corporations. Prior to the Finance Act 2014 the applicable rate was found in the Third Schedule to the ITA. However, the new Ninth Schedule has fixed this rate in the Ninth Schedule in order to accord fiscal stability to the contractors.

Unlike the old Ninth Schedule the new one ring-fences contract areas for CIT purposes. As a result any expenditure incurred in a particular block can only be offset against income derived from that contract area. This brings the treatment under the ITA in harmony with the treatment under the PSC and much needed clarity.
The contractors are also allowed to carry forward tax losses indefinitely. The losses carried forward can only be utilised in subsequent years against income arising from the same contract area. Where a contractor is ceasing petroleum operations in a contract area and he has losses, which had been carried forward but have not been extinguished as at the date of ceasing petroleum operations, he can apply to carry back the losses and offset it against income from the same contract area in the previous years of income. The maximum period allowed for loss carry back is three years.

Exploration expenditure is wholly deductible in the year of income in which it was incurred. However, any exploration expenditure which had been deducted and has been recouped as a result of disposing off the petroleum interest will be brought to charge in the year of income in which the interest was disposed or the amount recouped. Any machinery that is used to undertake exploration work is depreciated at 100 per cent in the year in which it is first brought to use for exploration purposes.

Expenditure incurred for developing a petroleum field is deductible on a straight-line basis over five years beginning in the year in which it was incurred. Where any development expenditure is incurred after the first day of the year of income, the amount deducted is pro-rated. Further any development expenditure incurred before the commencement of production is treated as expenditure that was incurred in the year production commences. Where a contractor disposes of a petroleum interest for development expenditure had been allowed, no deduction is allowed in that year of disposal. Furthermore, where the receipt of the disposal exceeds the written down value of the petroleum interest at the time of the disposal the excess is treated as income. The reverse is also true.

Any contributions by a contractor into an account established for decommissioning installations in a contract area are not taxable. Further, any expenditure incurred by the contractor in fulfilment of obligations under a decommissioning plan approved by the Ministry of Energy and Petroleum is not taxable. The Ninth Schedule also provides that an amount accumulated in an escrow account, or an amount withdrawn from an escrow account to meet expenditure incurred under an approved decommissioning plan for a contract area, shall be exempt from tax. However, any amount that is withdrawn from the escrow account and returned to the contractor is taxable as is any surplus that remains after completing decommissioning and is distributed amongst the contributors.

The new Ninth Schedule also harmonises the PSC with the ITA. It now provides that the government share of oil profit is inclusive of the taxes payable by the contractor under the ITA. Like the PSC it explicitly states that the taxes included in the profit oil are only the taxes payable by the contractor under the ITA directly in relation to the petroleum
operations undertaken by the contractor. Excluded therein are capital gains tax on the transfer or assignment of rights in a petroleum interest and taxes deducted from payments the contractor makes to his sub-contractors.

The Finance Act 2014 also brought back taxes on capital gains made by the contractors on the transfer or assignment of any interest in a PSC. This is similar to the capital gains tax imposed on mining companies. The provision targets only the net gain and allows for deduction of past expenses that can be attributed to the assigned interest. It should however be noted that, the consideration that is deemed to have been realized from the disposal should exclude all work obligations by the licensee towards the government of Kenya and/or future carry in operations. In contrast, any past costs and any premium earned on the disposal of an interest are included in the consideration realized and subjected to tax.

Where there is an indirect transfer of interests in a PSC, the new Ninth Schedule to the ITA requires the licensees to notify KRA where there is a 10 per cent or more change ownership for purposes of better implementing the capital gains tax.

c) Taxation provisions that apply to both mining and petroleum operations

The net gain arising from the direct or indirect transfer of an interest in a mining right or PSC is now taxable. Where the interest derived directly or indirectly from immovable property is below 20 per cent of the total value of the interest, the net gain will not be taxable. However, where the interest disposed is 20-50 per cent, the net gain will be taxable using a prescribed formula. In cases where the interest disposed is above 50 per cent, the net gain will be fully taxable.

The ITA was also amended by the Finance Act 2014 to bring to charge a natural resource income. Payment for a natural resource is subject to withholding tax at five per cent or 20 per cent depending on the residence status of the recipient of the consideration for the right to take a mineral or living or non-living resource from land or sea. It does not apply if the recipient of the nature resource income is exempt from income tax.

Where a mining company or petroleum PSC Contractor has hedged to manage its commodity price risks, the hedging transaction is treated as a specified source of income. This is meant to cushion Kenya against the booking of hedging losses in Kenya and income in other tax jurisdictions. However, this provision is inapplicable where the hedging transaction has been approved by the Kenya Revenue Authority where it has been entered into by a licensee or contractor with an annual turnover of less than ten million shillings as required for obtaining project finance.

All companies are allowed to claim interest expense arising from debt capital. As a result companies prefer debt capital to equity because of the tax advantages arising therefrom. Consequently, mining or petroleum PSC contractors companies may prefer to use debt capital over equity as it allows them to reduce the taxes payable in Kenya.
Presently, an entity is considered to be thinly capitalized if it is under the control of a non-resident and the amount of debt exceeds three times the share capital of the company. To stem excessive claims of interest, Kenya restricts any interest claimed by a mining company that has an equity to debt ratio of two to one (2:1).

Where a mining company or a petroleum PSC contractor enters into a hedging transaction to manage commodity price risk, this will be treated as a specified source of income, except in cases where the hedging transaction has been approved by the Commissioner and the petroleum Contractor has an annual turnover of less than ten million shillings.

Any social infrastructure expenditure incurred by the Mining or petroleum PSC contractors is tax deductible. Social infrastructure expenditure is defined as capital expenditure incurred by a licensee or contractor on the construction of a public school, hospital, road, or any similar social infrastructure. However, they are subject to the approval by the CS National Treasury.

A person who supplies services other than those of an employee to a licensee in respect of mining operations; or a contractor in respect of petroleum operations is now taxable under the Ninth Schedule as a sub-contractor. Non-resident subcontractors will be subject to a 5.625 per cent withholding tax, while those with a permanent establishment will be subject to 37.5 per cent tax on adjusted profits.

Where a non-resident subcontractors derives a fee for the provisions of services (service fee) to a contractor in respect of petroleum operations it is liable to pay non-resident withholding tax at 5.625 per cent of the gross amount received. Where the non-resident subcontractor derives a fee for the provision of services to a mining licensee in respect of mining operations the withholding tax rate applicable is 20 per cent of the gross amount. The withholding tax on the payments to the non-resident is a final tax on the service fee and shall not be included in the calculation of the total income of the subcontractor.

However, if the non-resident subcontractor offers the services through a permanent establishment in Kenya, the standard withholding tax regime under the ITA applies. The purposes of the provisions in the Ninth Schedule is therefore to catch all transactions that may escape the tax net in Kenya as the recipients.

Withholding tax on service fees paid to subcontractor with Permanent Establishment (PE) are governed by the provisions of the ITA and paragraph 16 of 9th Schedule. For dividends the rate is 10 per cent of the gross amount of dividend payable; for interest the rate is 15 per cent of the gross amount of interest payable; for royalties or natural resource income the rate is 20 per cent of the gross amount of the royalty or natural resource income; whereas for management or professional fees the rate is 12.5 per cent of the gross amount of management or professional fee payable. The withholding tax deducted from services fees paid by a subcontractor rendering services through a PE is not a final tax.
3.3.4 Revenue Management Laws for Kenya’s Extractive Sector

a) Public Finance Management Act 2012

The Public Finance Management (PFM) Act 2012 was enacted to replace the Government Financial Management Act 1999 and align the management of public funds in line with the new principles of financial management enunciated in Article 201 of the Constitution of Kenya 2010, which gives effect to the principles of public finance. It emphasizes openness, accountability and public participation in public finance management, equitable sharing of revenues, equitable sharing of burdens and benefits of public borrowing and the observance of fiscal discipline.

Revenues from the extractives sector are collected in an account at treasury and such payments are regulated by the Kenya Revenue Authority, which assesses the amounts due to the exchequer. Such revenues are considered as public funds and are therefore regulated under the mechanism established by the PFM Act as well as the principles of public finance under the Constitution. The PFM Act has as its objectives the need to ensure that public finances are managed at both the national and the county levels of government in accordance with the principles set out in the Constitution, and public officers who are given responsibility for managing the finances are accountable to the public for the management of those finances through Parliament and County Assemblies. It seeks to promote good financial management at the national and county levels to facilitate effective and efficient use of resources. The core areas addressed under the Act include macro-fiscal policymaking, budgeting, treasury management, and budget execution as well as accounting, reporting and audit issues.

The Act takes precedence over any other law on matters relating to preparation and submission of budget estimates, preparation and submission of accounts for audit, borrowing, lending and loan guarantees, raising of revenue and making of expenditures, banking arrangements, including opening of bank accounts and investment of moneys, establishment and dissolution of state corporations as well as establishment and management of public funds. The PFM law assigns roles to various entities charged with the management of public funds. Parliament is responsible for the general oversight of national finances. At the national level, these institutions include Parliament (which entails the National Assembly, Senate and the Public Budget Office), the Cabinet, the National Treasury, the Cabinet Secretary in charge of finance, accounting officers of the national government, receivers and collectors of revenue for the national government, the Public Debt Management Office (PDMO), the Accounting Standards Board (ASB), the Controller of Budget, the Auditor General and the Commission for Revenue Allocation. At the county level, the institutional architecture for public finance management includes County Assemblies,
the County Executive Committee, County Treasuries, the County Executive Member in charge of finance, accounting officers of the county government, receivers and collectors of revenue and the County Economic and Budget Forum (CEBF).

With regard to macro-fiscal policy making, the Act requires the national government to prepare a medium-term fiscal strategy (budget policy statement), progress reports on fiscal strategy through the budget review & outlook paper, a pre-election and post-election report as well as observe the fiscal responsibility principles covering debt, spending, wage bill, borrowing, fiscal risks and tax rates and bases. The county governments, on the other hand, are required to prepare county fiscal strategy papers (CFSP), prepare progress reports on CFSP through County Budget Review & Outlook Papers (CBROP) and observe the fiscal responsibility principles.

On issues relating to the budgeting process, the obligations placed on the national government include a process for issuance of the budget circular, the budget review and outlook paper and the budget policy statement, preparation of the Division of Revenue Bill and County Allocation of Revenue Bill, preparation of budget estimates, development of the Appropriation Bill, submission of the national debt management strategy, the public pronouncement of budget policy highlights and revenue raising measures by the cabinet secretary, as well as approval of the Finance Bill. County governments, on the other hand, have a budget process that entails issuance of the budget circular, preparation of the CBROP and CFSP, the county government development plan, budget estimates, the Appropriation Bill, submission of the county debt management strategy, making public pronouncements of revenue raising measures and approval of county Finance Bills.

The PFM Act also makes provision for treasury management and budget execution. At the national level, it provides for the operation of the Consolidated Fund, the Equalization Fund and the Contingencies Fund. It also provides for the establishment of other national public funds, establishes a single treasury account for the national government and requires each national government entity to prepare an annual cash flow plan and forecast. It also provides for the process of budget reallocations and supplementary estimates. At the county level, it provides for the operation of the County Revenue Fund, authorizes each county government to open a County Emergency Fund and provides for the establishment of other county public funds. Each County Treasury is required to establish a Treasury Single Account for the county government. The Act requires each county government to prepare an annual cash flow plan and forecast, as well as prepare a consolidated annual cash flow projection by June 15 of every year which shall be the basis for the preparation of the national treasury schedule of disbursement to county governments. It also provides for processing of budget reallocations and supplementary estimates.

It also sets provisions for accounting, reporting and audit at national and county levels. At the national level, it requires preparation of consolidated annual financial statement of national
government, its annual financial statement, quarterly report, annual report of revenue received and collected, report of waivers and variations in taxes, fees and charges, an annual financial statement of a national public fund, a quarterly report of a national public fund, separate reports by State Corporations as well as pre- and post-election reports. These are also required at the county level. The Act has elaborate provisions to promote public participation, including provisions requiring the formulation of the Budget Policy Statement, County Fiscal Strategy Paper and the Budget Estimates; the preparation of Division of Revenue Bill and County Allocation of Revenue Bill; and the CEBF, which provides a platform for public participation in county planning and budgeting.

b) The Sovereign Wealth Fund Bill 2014

Important note: The Bill has been updated. It proposes a benefit sharing formula and seeks to repeal provisions of the Ming Bill and Petroleum Bill relating to benefit sharing.

The Sovereign Wealth Fund (SWF) Bill is proposed for the purposes of the extractives sector. The fund is meant to undertake diversified portfolio of medium- and long-term local and foreign investment and build a savings base for purposes of national development, stabilization of the economy at all times enhancing intergenerational equity in Kenya, giving effect to the provisions of Article 201 of the Constitution of Kenya 2010, and for connected purposes. The object and purpose of the fund is stated to include: building a savings base for the country; protect and stabilize the budget and economy from excess volatility in revenues or exports; provide a mechanism for the diversification from non-renewable commodity exports; assist in dissipating unwanted liquidity; fund social and economic development; as well as to support and promote any other strategic objectives of the country. The fund is established as a mixed commodity and non-commodity fund consisting of the following funds:

- **Stabilisation Fund:**
  This fund is established to facilitate levelling current spending in a sustainable way, insulating the national budget and the economy from the impact of volatility in revenues, including mineral and petroleum revenues. Where monies stand to the credit of the stabilization fund, withdrawals are only allowed through the national budget and cannot exceed the limit to be determined by the Cabinet Secretary under Investment Guidelines issued by the Cabinet Secretary. Guidelines on deposits to the stabilization fund are issued by the Cabinet Secretary working with the Board established under this law.

- **Infrastructure and Development Fund:**
  This fund is established to provide definite and on-going funding for sectors and infrastructure for economic and social development in accordance with national...
government plans.

- **Future Generations Fund:**
  This fund is established for the purposes of providing for definite and ongoing funding for future generations of Kenya with a solid savings base from revenue accruing from minerals, petroleum reserves, and exploitation of other exhaustible natural resources; transforming future generations into a different economic sector; and environmental protection.

The Bill establishes the National Sovereign Wealth Fund Council and a Board charged for the administration of the SWF. It comprises the President; the Cabinet Secretaries in charge of national treasury, economic planning, mining, and energy and petroleum; the Attorney General, the chairperson of the Board and the Chief Executive Officer of the Board. The Council is tasked with providing advice and general direction to the Board; receiving and approving the Investment Guidelines prepared by the Cabinet Secretary to the National Treasury before their issuance to the board; receiving and reviewing reports submitted by the board and provide advice and general directions, where necessary; and independently evaluating the Fund, the performance of the Board or any other matter relating to the Fund that the Council considers necessary. The Board, on the other hand, is tasked with determining investment strategies, appointing investment managers; provide guidelines to the investment fund managers in relation to investment priorities of the fund; determining the functions of the technical team and establishing such committees as are necessary to assist the Board carry out its mandate, among other functions.

The appointment of investment fund managers is to be done through an open, competitive and transparent process. The role of the Cabinet Secretary is to issue and review Investment Guidelines and receive and consider reports from the Board in order to ascertain its compliance with the provisions of this law, and any guidelines issued. This is done with the approval of the Council. It is required that the Investment Guidelines issued have regard to the national interest and the overall macroeconomic and fiscal stability. The Board is required to prepare estimates of the revenue and expenditure of the fund three months before the start of the financial year. Such estimates must differentiate between recurrent and development expenditure and also itemize every action the Board intends to undertake. The Board then tables the estimates to the Cabinet Secretary who transmits the same to the National Assembly. The accounts of the fund are audited by the Auditor General. The Board is also required to publish an annual report and submit it to the President and Parliament within three months after the end of the financial year. It must then publish and make public the report, balance sheet and statements that have been submitted.

c) **Natural Resources (Benefit Sharing) Bill 2014**
This is a Bill proposed by the Senate to establish a system of benefit-sharing in
natural resource exploitation between the natural resource exploiters, the National Government, County Governments, and local communities. It applies to petroleum, natural gas, minerals, forest resources, water resources, wildlife resources, and fisheries resources. The Bill lists its Guiding Principles as including transparency and inclusivity, revenue maximization and adequacy, efficiency and equity, accountability and participation of the people, as well as the rule of law and respect for human rights of the people.

The Bill proposes the establishment of a Benefit Sharing Authority, with various functions including coordinating the preparation of benefit-sharing agreements between local communities and affected organizations; reviewing, and where appropriate, determining the royalties payable by an affected organization; engaged in natural resource exploitation; identifying counties that require to enter into a benefit-sharing agreement for the commercial exploitation of natural resources; and monitoring the implementation of any benefit-sharing agreement entered into between a county government and an affected organization, among other functions.

The composition of the proposed Benefit Sharing Authority includes three persons representing communities nominated by the Council of Governors and three persons representing communities nominated by County Assembly Speakers, three persons representing communities nominated by County Assembly Speakers, the Kenya Association of Manufacturers, as well as a Director General appointed by the Board.

Membership of the authority includes a Chairperson appointed by President, Principal Secretaries for the Ministries of environment, finance and mining, three persons representing communities nominated by the Council of Governors, three persons representing communities nominated by County Assembly Speakers, the Kenya Association of Manufacturers, as well as a Director General appointed by the Board.

The authority shall have the power to determine and review the amount of royalties and fees payable by affected organizations in each year in respect of a particular sector in cases where a written law does not prescribe the royalties or fees. This effectively means that, where the mining and petroleum sector laws already provide for a benefit-sharing mechanism, this law does not apply. In making a determination, the Authority shall take into account the overall capital investment of the affected organization, the prevailing international market value of the commodity from which royalty is payable, as well as the commercial viability of the natural resource being exploited.

The Natural Resources (Benefit Sharing) Bill proposes the following revenue sharing mechanism. Of all funds received, 20 per cent will go to the Futures Fund while 40 per cent will be given to the local community. The remaining 80 per cent is shared between the National and County governments (with 60 per cent going to the National government and 40 per cent going to the County governments). Of the funds received by the county governments, 60 per cent will be retained by the County government and 40 per cent will be given to the local community.

The Bill then proposes a revenue-sharing mechanism for the collected revenues. Under the stated formula, 20 per cent of the revenue collected shall go to the Sovereign Wealth Fund established by the National Government. Of this amount, 60 per cent is stated to go to the Futures Fund while 40 per cent is slated for what the Bill terms Natural Resources Fund.
Additionally, 80 per cent of the revenue collected is to be shared between the National Government and the respective County Government. Of this amount, 60 per cent goes to the National Government while 40 per cent goes to the County Government. The Bill further provides for sharing of the county-level funds, with 60 per cent of the funds going to the entire county while 40 per cent goes to the local community.

3.3.5 Environmental Management Laws and the Extractive Sector

a) The Environmental Management and Coordination Act (EMCA), 1999

This is an Act of Parliament passed in 1999. The aim of the Act is to ‘provide for the establishment of an appropriate legal and institutional framework for the management of the environment’ and “improve the legal and administrative coordination of the diverse sectoral initiatives necessary to improve the national capacity for the management of the environment.” It is the primary law for environmental management and supersedes any other law on the same.

The law establishes the National Environment Council to be responsible for policy formulation. It also establishes a National Environmental Management Authority (NEMA) to exercise general supervision and coordination over all matters relating to the environment. It is buttressed by the Environmental (Impact Assessment and Audit) Regulations of 2003. It further establishes the Standards Enforcement and Review Committee whose principal function is to set standards for water quality, air quality, classification of waste, pesticide residues in raw agricultural commodities, noise emissions, noxious smells, and ionizing radiation.

The law lays down the procedure for conducting Environmental Impact Assessments (EIA) and states that all new projects that are likely to affect the environment in any way must undertake an EIA after which the EIA report should be submitted to NEMA for review and approval. EMCA does not specifically address the mining and oil and gas sector activities. It also does not have specific provisions for conducting Environmental and Social Impact Assessments (ESIAs) in the extractives sector. The second Schedule of the Act lists the nature of projects that require an EIA. These include mining; mineral processing; reduction of ores and minerals; smelting and refining of ores and minerals; as well as the exploitation of the production of petroleum in any form. A number of regulations are gazetted by NEMA as authorized under EMCA. These include:

- The Environmental (Prevention of Pollution in the Coastal Zone and Other Segments of the Environment) Regulation, 2003.
- Environmental Management and Coordination (Water Quality) Regulations, 2006 Legal Notice No.120.
One of the fundamental weaknesses regarding this law is the lack of rules on the decommissioning of sites and the fact that environmental licenses are not a precondition for obtaining a mining license. This has seen the abandonment of sites without proper sealing and the carrying out of mining activities without fully appreciating the potential impact on the environment. Furthermore, the requirement that the proponent of a project hires an EIA expert limits the operational independence of such an audit given the pecuniary relationship between a proponent and the person tasked with conducting the audit. It also limits the public participation element in the carrying out of ESIAs.

b) **The Water Act, 2002**

The Water Act 2002 is the main legislation that regulates the water sector in Kenya, this therefore means that all policies, regulations and by-laws, directives and administrative actions from the ministry, strategic plans and all activities by water sector institutions must be done in accordance with the provisions and content of the Act. The Act, which came into force in 2003, was passed with various objectives:

- To clearly differentiate the roles of various actors in water sector i.e. the government, local government, the private sector and the public into two main areas, water resources management and water services and supply
- To entrench public participation and involvement in water services and water resources management
- To clearly define water rights and legislate ways in which water resources can be utilised

The Water Act introduced new water management institutions to govern water and sanitation. The Water Services Regulatory Board (WASREB) to set standards and regulate the sub-sector; the Water Appeal Board (WAB) to adjudicate on
disputes; eight Water Services Boards (WSBs) to be responsible for the management of efficient and economical provision of water and sewerage services; Water Services Providers (WSPs) to act as agents of the Water Services Boards (WSBs) in the actual provision of water and sewerage services; the Water Services Trust Fund (WSTF) to finance pro-poor investments; and the Water Resources Management Authority (WRMA) to manage and protect Kenya’s water resources. Catchment Area Advisory Committees (CAAC) supports the WRMA at the regional level. Water Resource Users Associations (WRUA) was established as a medium for cooperative management of water resources and conflict resolution at sub-catchment level. The Ministry of Water and Irrigation (MWI) is vested with the responsibility for overall sector oversight including policy formulation, coordination and resource mobilisation.

The Act vests all water resources in the state and the water resources are to be managed and utilised in accordance with the Act. This means that the State has ownership of all water resources in Kenya. However, the Act requires the development of a national monitoring and information system on water resources and water services such that any member of the public can have access to information contained in any national information system. The Act provides for public consultation in the grant of a permit or water use, it therefore ensures that there is public participation in the grant of permits for use of water resources.

It ensures availability of water through regulating the amount of water that can be supplied in bulk by a licensee or a water service provider so that water supply to domestic water consumers is not affected. The Act prioritises the allocation of water resources for essential domestic uses over other uses such as industrial use. The Act emphasises cost recovery as a means of sustainable service provision meaning that all costs incurred in water services delivery have to be recovered from the price that the water is sold. For instance the Act provides that WASREB must develop guidelines for and provide advice on cost effective and efficient management and operation of water service.

c) The Forests Act, 2005
The Forests Act, 2005, established in 2007, in the context of its general principles, provides for the establishment, development and sustainable management, including conservation and rational utilisation of forest resources for the socio-economic development of the country. There are six categories of forests: indigenous forests; farm forests and trees; plantations; dryland forests; local authority forests (Local authority forests are forests found on trust lands and other lands under the jurisdiction of local authorities including urban forests such as arboreta), and private forests. The Act recognises the importance of forests for the benefits of soil and ground water regulation, agriculture and their role in absorbing greenhouse gases.

The key elements of the Forests Act are: the inclusion of management of all types of forests; involvement of adjacent forest communities and other stakeholders in forest conservation
and management;) an ecosystems approach to forest management planning; provision of appropriate incentives to promote sustainable use and management of forest resources; development of a framework for a forest legislation and; establishment of Kenya Forest Service.

The Act also recognises Community Forest Associations (CFAs), who participate in forest conservation and management under the KFS. The Act has specific provisions related to access rights and benefit sharing arrangements, which provide a role for communities in the utilisation of forest resources and protection of forests. The Act has four priority areas related to the management of forests, including reducing pressure to clear forests for agriculture and other uses; promoting the sustainable utilisation of forests; improving governance in the forest sector and; the enhancement of carbon stocks and reforestation of degraded lands. The Forest Act establishes a Forest Service, which has a Board, which is mandated to be diverse and gender-inclusive. Underneath the Board are Forest Conservation Committees. There is currently legislation in the pipeline aiming to change the Forest Act, 2005 via the Forest Conservation and Management Bill, 2014.

### 3.3.6 Land Management Laws and the Extractive Sector

Chapter 5 of the Constitution of Kenya, 2010 requires the use of land to be “equitable, efficient, productive and sustainable.” This means that people must have equal access to land, and that the use of land must be cost effective and environmentally sensitive. Land is a national resource, which ultimately belongs to Kenyan citizens. The Constitution defines “land” to include: the surface of the earth 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.

**(a) Overview**

The laws regulating land matters in Kenya were passed after 2010 to align the regulatory framework for land management in line with the Constitution of Kenya 2010. These laws include the National Land Commission Act, the Land Act, as well as the Environment and Land Court Act. These laws were enacted in 2012. These laws have revised, consolidated and rationalized land laws in the country. They were passed to give effect to the Constitution of Kenya 2010 and provide for the sustainable administration and management of land and land-based resources. They apply to public, private or community land.

and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles: (i) Equitable access to land; (ii) Security of land rights; (iii) Sustainable and productive management of land resources; (iv) Transparent and cost effective administration of land; (v) Sound conservation and protection of ecologically sensitive areas; (vi) Elimination of gender discrimination in law, customs and practices related to land and property in land; and (vii) Encouragement of communities to settle land disputes through recognized local community initiatives.

The National Land Commission Act, 2012, gives effect to Article 67 of the Constitution and establishes the National Land Commission. The functions of the National Land Commission are to: (i) Manage public land on behalf of the national and county governments; (ii) Develop a national land policy; (iii) Advise the national government on matters related to land titles and monitoring; (iv) Oversee land use throughout the country; (v) Investigate present or historical land injustices and recommend appropriate land redresses; and (vi) Encourage use of traditional dispute resolution mechanisms in conflicts over land.

The National Land Commission has authority under the Land Act in the management and administration of public, private and community land. It also has powers to reserve public land located within the surface of the earth and the subsurface rock; marine waters in the territorial sea and exclusive economic zone; and natural resources completely contained on or under the surface. This is to be done in consultation with the national government and the county governments, by order in the Gazette. The Commission is required to undertake an inventory of all land-based natural resources. It is also required to make rules and regulations for the sustainable conservation of land-based natural resources, and put in place measures to ensure benefit sharing to the affected communities. The Environmental and Land Court Act, 2011 gives effect to Article 162 (2)(b) of the Constitution and establishes the Environmental and Land Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land.

(b) Land classifications

Before the adoption of the new Constitution, land was classified into three types: government land, trust land, and private freehold land. Under the new Constitution, land is still classified into three types but now they are: public, community, or private land. This classification is important because different rules apply to different types of land.

- Public land is defined pursuant to Article 62 of the Constitution and includes government land, including forests, water catchment areas, and minerals. Public land will be held either by county governments or the national government. Minerals, government forests, water catchment areas, national parks, rivers and lakes, and beaches are types of property that will be public. The National Land Commission is responsible for administration of public land.
- **Private land** is land owned or leased by individuals or corporations. Private land is registered by any person in their name. Private land includes registered land held by any person under freehold tenure, land held by any person under leasehold tenure and any other land declared private land under any Act of Parliament.

- **Community land** is defined pursuant to Article 63 of the Constitution and is land held by ethnic/cultural communities. It includes land registered in the name of group representatives under the provisions of any law and ancestral lands and community forests. Community land shall be managed in accordance with the law enacted pursuant to the Constitution. However, the law has not yet been enacted and the Constitution provides for a 5-year period within which legislation has to be enacted. The Community Land Bill, 2013 represents a first, albeit impugned, effort. It is intended to safeguard community land rights and provide for the recognition, registration and protection of community land as well as provide for administration and management of community land. Some of the most contentious issues raised against the Bill are:

  - Part II of the Bill under Recognition, Protection & Registration of Community Rights, provides for compulsory acquisition of community land in the interest of public order, public morality, public health or land use planning pursuant to the Constitution. These terms are vague and need to be clearly defined.
  - The Bill also establishes of a Community Land Management Committee composed of a few members of the community to facilitate land registration and oversee land management and development. These Committees are vested with broad authority and control over community land and do not foster wide community involvement in land management and decision-making. Instead, they endow increasing powers to a select few. The creation of a much more representative Community Assembly would better serve community interests as it will ensure separation of powers, accountability and improve meaningful community participation.
  - Part V deals with land conversion, a process requiring the county government’s involvement. However, consultation procedures for consent are missing, thus barring the community from participating and making decisions about their land. It is highly recommended that any conversion of community land to either public or private land shall require two-thirds of the democratic vote by members of the Community Assembly. In the event of compulsory acquisition, the term “just and prompt compensation” must be clearly defined along with a specific time frame.

It is important to note that land can be converted from one category to another.

(c) **Rights of ownership**

Article 40 of the Constitution protects the right of all citizens to acquire and own any kind of property in any part of Kenya. It forbids arbitrary deprivation of property, and requires “just compensation” for any state takings.
This means that the government cannot take land, or make laws that take land, for no reason. The government may take land for a public purpose, but if it does, it must pay a just compensation. Citizens have rights that non-citizens do not. The Constitution says that foreigners may not hold more than a 99-year lease in land.

Along with these rights, citizens have certain responsibilities. Chief among these is the responsibility to respect and follow the laws that the government makes regarding property. Just as the government must not violate the rights of citizens, citizens must not violate others’ rights by ignoring the laws.

(d) Compulsory acquisition
The Constitution and the Land Act set out strong protections for individual property rights and require prompt, just and full compensation for landholders subjected to compulsory acquisition of land (See Article 40 and section 111, respectively). It is only in cases where public interest is at stake that the state may compulsorily acquire land and avail it for mineral resources development or any other use beneficial to the greater public. Otherwise, mineral developers are required to seek consent from the owner(s).

Areas with high population densities often pose challenges related to land rights, ownership and compensation. At times exploration or mining companies have to deal with a large number of people whose consent must be sought. The Central, western and coastal parts of Kenya have the largest rural populations.

The Land Act provides in cases of compulsory acquisition, that the respective Cabinet Secretary is required to submit a request for acquisition of public land to the Commission to acquire the land on its behalf. The law provides for compensation to be paid promptly in full to all persons whose interests in the land have been determined. The Land Act law also makes provision for settlement programmes for persons displaced by development projects, conservation, or other such causes that may lead to movement and displacement. Any disputes arising that are related to land and environmental matters are determined by the Environment and Land Court Act. The National Land Commission has been charged with developing criteria and guidelines for compulsory acquisition as well as regulation on compensation.

3.4 The Institutional Framework for the Extractives Sector in Kenya

3.4.1 Overarching Institutions

The Legislature
The legislature (which includes the National Assembly and the Senate) is tasked with playing an oversight role in the management of natural resources by virtue of Article 71 of the Constitution of Kenya, 2010. The National Assembly ratifies transactions involving
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. The Senate, on the other hand, protects the interests of counties and their governments on matters such as sharing of revenues derived from natural resources.

County Governments
These are the decentralized executive entities at the devolved level for each county within Kenya. They are important as they directly control the regions where extractive sector activities are being undertaken. They also manage the funds from extractive activities shared from the national government for both the community and themselves. Their assemblies play a role in passing legislation as well as oversight on the use of funds.

The Attorney General (AG)
By virtue of his role as the chief legal advisor plays a major role in the extractive sector. First, all laws and regulations developed for the sector have to pass through the AG’s office. Furthermore, agreements on extractive resources also go through this office before they are forwarded for ratification by the National Assembly.

The Judiciary
The Judiciary is tasked with handling any disputes that may emanate from the extractive sector whether they relate to land rights, mineral rights or any other issues from the sector. This role is only limited where agreements expressly limit dispute resolution to arbitration as is common in many mineral agreements.

The Kenya Revenue Authority (KRA)
This is the body tasked with the collection of revenue on behalf of Government. It implements a number of laws including the Income Tax Act which relates to, among other things, the taxation of operations relating to oil, gas and mining activities.

The National Land Commission
This is the body in charge of administration and management of public land in Kenya. It also has the mandate to effect compulsory acquisition of private and community land for public purposes. In the extractive sector, it is tasked with powers to reserve public land, which includes natural resources. Issues relating to the acquisition of land rights for the purposes of the extractive sector including setting aside of public land, compulsory acquisition and compensation are therefore addressed by the Commission.

The Environment and Land Court
By virtue of Article 162 (2) (b) of the Constitution of Kenya, 2010, the Environment and Land court was established to deal with matters concerning the environment and the use of, occupation of, and title to land.
The oil and gas value chain in Kenya is still at the infantry stage, that is, the exploration phase. At this stage, major business taking place is between the large oil companies such as Tullow Oil and the Government through its functional arms such as the Ministry of Energy and Petroleum, the Kenya Revenue Authority, Ministry of Planning and Devolution, the National Environment Management Authority, Ministry of Trade and Ministry of Tourism and Wildlife. There is also some involvement of the private sector that is largely dominated by large foreign and domestic service providers/suppliers and local communities or their representatives through CSOs.

3.4.2 Petroleum Sector Institutions

The oil and gas value chain in Kenya is still at the infantry stage, that is, the exploration phase. At this stage, major business taking place is between the large oil companies such as Tullow Oil and the Government through its functional arms such as the Ministry of Energy and Petroleum, the Kenya Revenue Authority, Ministry of Planning and Devolution, the National Environment Management Authority, Ministry of Trade and Ministry of Tourism and Wildlife. There is also some involvement of the private sector that is largely dominated by large foreign and domestic service providers/suppliers and local communities or their representatives through CSOs.

The Ministry of Energy and Petroleum (MoEP) oversees both upstream oil and gas, downstream petroleum, electric power (including renewable energy and geothermal), as well as the coal sector. Coal and natural gas are a major part of MOEP’s plans to increase power generation from the current 1,660MW to 5,000MW by 2016.

Energy Regulatory Commission (ERC)  
It was established as an energy sector regulator under the Energy Act, 2006, with responsibility for economic and technical regulation of electric power, renewable energy, and downstream petroleum sub-sectors. Its functions also include tariff setting, review, licensing, enforcement, dispute settlement and approval of power purchase and network service contracts.

Energy Tribunal  
This quasi-judicial body was established under section 108 of the Energy Act, 2006. It came into operation in July 2007 to primarily hear appeals against the decisions of ERC. It also has jurisdiction to hear and determine all matters referred to it relating to the energy sector.

The National Fossil Fuels Advisory Committee (NAFFAC) is the licensing review body for oil and gas in Kenya. NAFFAC is led by the MOEP and includes NOCK, the Attorney General, NEMA, the Kenya Revenue Authority, the Ministry of Finance and the Petroleum Institute of East Africa (PIEA) as members.

Kenya Power and Lighting Company Limited (KPLC)  
KPLC is a State Corporation with GoK shareholding of 50.1 per cent and private shareholding of 49.9 per cent as at June 2014. It purchases electrical energy in bulk from KenGen and other power producers and carries out transmission, distribution, supply and retail of electric power.
Kenya Electricity Generating Company Limited (KenGen)
KenGen is a State Corporation with GoK shareholding of 70 per cent and private shareholding of 30 per cent as at June 2014. It is mandated to generate electric power, currently producing the bulk of electricity consumed in the country. The company currently utilises various sources including hydro, geothermal, thermal and wind to generate electricity.

Rural Electrification Authority (REA)
REA was established under section 66 of the Energy Act of 2006 as a body corporate with the principal mandate of extending electricity supply to rural areas, managing the rural electrification fund, mobilizing resources for rural electrification and promoting the development and use of renewable energy.

Geothermal Development Company Limited (GDC)
This is a 100 per cent state-owned company established by the Government of Kenya as a Special Purpose Vehicle for the development of geothermal resources in Kenya.

Kenya Electricity Transmission Company Limited (KETRACO)
This is a GoK wholly owned company established to be responsible for the development, maintenance and operation of the national transmission grid network. It is also responsible for facilitating regional power trade through its transmission network.

Independent Power Producers (IPPs)
IPPs are private companies, which generate power and sell electricity in bulk to KPLC. As at November 2014 there were nine IPPs in operation and accounted for about 24 per cent of the country’s installed capacity.

Kenya Petroleum Refineries Limited (KPRL)
Kenya Petroleum Refineries Limited is a limited liability company with its main business being processing of crude oil with a nameplate capacity of 4 million tonnes per annum.

Kenya Pipeline Company Limited (KPC)
KPC is a State Corporation with 100 per cent GoK ownership. Its business is mainly storage, transportation and handling of refined petroleum products in the country.

National Oil Corporation of Kenya Limited (NOCK)
NOCK is a wholly owned state corporation mandated to stabilise the petroleum supply market by participating in all aspects of the petroleum industry namely upstream, mid-stream and downstream activities. NOCK has had an exploration licence (Block 14T) since 2010.
Kenya Nuclear Electricity Board (KNEB)
KNEB is charged with the mandate of spearheading and fast tracking development of nuclear electricity generation in order to enhance the production of affordable and reliable electricity.

Centre for Energy Efficiency and Conservation (CEEC)
The Centre was established jointly by GoK and the Kenya Association of Manufacturers to champion energy efficiency and conservation efforts in Kenya.

Oil Marketing Companies (OMCs)
OMCs are local and international companies licensed to undertake the importation, storage, wholesale, export and retail of petroleum products.

Petroleum Institute of East Africa (PIEA)
The Institute is a voluntary membership institution patronised by among others the major oil companies. It plays a key role in capacity building and awareness creation in the petroleum sub-sector.

Oil Exploration and Production Companies (OIEPs)
These are local and international companies licensed to undertake exploration and production of oil and gas. A good example is Tullow oil.

The Petroleum Institute of East Africa (PIEA) was formed in 1999 and has until recently been the main professional body for the oil industry in the region. PIEA includes the School of Petroleum Studies under its banner.

3.4.3 Mining Sector Institutions

The Ministry of Mining
This is a new government agency, formed in March 2013. Previously, mining was governed by the Mines and Geology department of the Ministry of Environment and Natural Resources. The Ministry is focusing on ensuring the licensing system is transparent and competitive (through a computerized mining cadastre system), that the Ministry collates and analyses geological data and that the fiscal regime is attractive to investors but also fair in terms of revenue streams to government. The Ministry is being supported in these endeavours by the Kenya Extractives Industries Development Programme (KEIDP), which is designed to ensure the robust performance of an equitable, inclusive, stable and sustainable extractive industries sector. The project aims to achieve the following: increased capacity of key National Government agencies; and significantly improved participatory, equitable and sustainable collective stewardship of the extractives sectors.

As for industry, the largest mining company (by export revenues) in Kenya going forward is Base Titanium, which is an Australian-listed company. The Tata Chemicals Magadi (formerly Magadi Soda Company) manufactures soda ash (used for glass making) and was formed in 1911. Kenya Fluorspar, located near Eldoret, began operations in the 1971...
A number of overlaps are present in the legal framework of the extractive sector that may hinder effective management of the sector. These include:

**Environmental Management**
While the EMCA law mandates NEMA to regulate environmental matters, the Petroleum (Exploration Production) Act gives powers to the Cabinet Secretary responsible for petroleum to make regulations for measures relating to environmental protection and the avoidance of waste, pollution and accidents among other issues. This clearly conflicts with NEMA’s mandate to regulate environmental matters and may hinder the ability of the entity to fulfill its mandate.

**Community Engagement, Compensation and Resettlement**
There is a gap in the policy framework relating to the engagement of communities. Furthermore, there is lack of a robust framework for compensation and resettlement of communities as stated by the energy policy. These latent weaknesses must be addressed as a matter of importance to be able to protect the rights and interests of communities.

**Taxation of Petroleum Operations**
There has been a conflict between Schedule 9 of the Income Tax Act and the model PSC. While the model PSC assumed that the state’s share of profit oil was inclusive of income tax, the Income Tax Act on the other hand required Contractors to pay taxes from their profits. The Schedule contained other conflicts, which have been addressed in the revised Schedule. In the revised Schedule, some changes have been made. These include the abolition of withholding tax on farm-out transactions and share sale transactions and the inclusion of taxes as part of the government’s share of production for income arising from petroleum operations. These changes bring coherence to the identified conflicts. However,
the new schedule does not address the taxation and accounting requirements relating to natural gas.

**Public Finance Management**

There is a conflict between the Public Finance Management Bill and the proposed Sovereign Wealth Fund Bill. While the SWF Bill creates a structure to manage the fund, it ignores the role placed on institutions in the PFM Act. Parliament’s oversight role in national finances extends to funds that are generated in the extractive sector. Furthermore, the creation of an Infrastructure and Development Fund to provide funding for sectors and infrastructure for economic and social development in accordance with national government plans, under the SWF Bill, further conflicts with the PFM Act by bypassing the requirement for the national government to prepare a medium-term fiscal strategy. The expenditure directed towards infrastructure and development would best be directed to the Medium Term Expenditure Framework (MTEF) as envisaged under the PFM Act as it promotes greater transparency, accountability and equity. Beyond the question of coherences and overlaps, there is the question of whether the country needs a SWF. This is because SWFs are usually created when governments have budgetary surpluses with little or no external debt.

**Sector Roles and Responsibilities**

The role of negotiation of PSCs under the Petroleum Bill has been assigned to the Ministry of Energy working closely with the National Upstream Petroleum Advisory Committee (NUPAC). This allocation conflicts with the role assigned to the Ministry under the National Energy and Petroleum Policy which extends to the formulation and articulation of energy policies to provide an enabling environment for all stakeholders. The contract administration process has been given to the Upstream Petroleum Regulatory Authority (UPRA). This is a welcome move that will ensure efficient regulatory practices. However, care must be exercised to ensure UPA’s role does not usurp the powers given to independent entities like NEMA.

**The Regulation of the Coal Sub-sector**

There is a latent conflict between the Mining Bill and the Energy Bill with regard to the regulation of coal. The Mining Bill envisages that its scope extends to coal resources by stating that it doesn’t extend to petroleum and hydrocarbon gases. However, the Energy Bill envisages that coal resources are to be managed in accordance with it.
In light of the foregoing conclusions, the following specific recommendations are suggested.

1. The study has established the existence of various gaps in the policy, legal and institutional framework that need to be addressed. More importantly, the study establishes latent weaknesses in legal and policy frameworks relating to environmental protection and the absence of compensation and resettlement policies. There is therefore, an urgent need to address these issues before proper engagement of the communities is assured. A proper lobbying and advocacy strategy should be demand-driven and communities should be sufficiently capacitated to demand for specific interventions in the policy and regulatory domains.

2. There should be deliberate efforts to actualize Article 35 of the Constitution of Kenya 2010 to secure the right of communities to access information. This is critical, as access to relevant information will form the most important beginning point to enable communities to deal with other stakeholders in the industry.

3. The engagement of communities can take advantage of the existence of a rich body of evidence, policy and practice as well as knowledge on the risks and opportunities in the sector and how they are treated and ranked. This can be an easy win as it affords the process good practice in the absence of legal and regulatory frameworks from which to base interventions.

4. A multi-stakeholder approach in tackling the challenges of the extractive sector would be best suited to address the challenges of developing a meaningful interface of the extractive sector with community struggles. This is especially key given that players in the private sector and financial industry may have a different perspective on the way to proceed and an intervention will have to consider the significant role they play in the sector and their ability to influence the outcomes of many processes.

5. The intervention would require a long-term strategy that integrates decisions from various perspectives and offers a long-term approach in building the capacity of communities to engage and monitoring the process of how they engage. This is necessary in addressing issues that may come up post-engagement requiring skills and resources that are not readily available to communities but are critical to their interests.

6. There is need to develop an information database that can provide an interface with communities and allows for addition of information. This can be an efficient strategy for filling the information gap to allow communities to act from an informed perspective. This could be in the form of a knowledge management platform that enables greater access and caters for the need for simplified information that can be used to protect community interests.
References


Community Engagement Practices from Select Countries

Valentine Ataka
Content

4.1 Introduction

4.1.1 Problem Statement
4.1.2 Objectives of the Study
4.1.3 Significance of the Study
4.1.4 Research Methodology

4.2 Community Concerns and Practices from Select Countries

4.2.1 Local Content
4.2.2 Diversification of the Economy
4.2.3 Benefit Sharing
4.2.4 Environmental Management
4.2.5 Corporate Social Responsibility (CSR)
4.2.6 Management of Socio-Cultural Impact

4.3 Conclusion

4.4 References
Norway, Canada, Australia, South Africa, Chile, and Brazil among others have had a successful history with EI’s. Other countries like Nigeria, Ecuador, Congo and Angola have suffered the adverse effects of EI’s. These experiences offer lessons for emerging economies in the sector like Kenya. The lessons can help model alternative considerations for Government, communities and investors.

4.1.1 Problem Statement

Even though Kenya has had a long history in the extractive industry and mining, never before has dialogue and awareness on extraction industries been more prominent. This has been instigated by the discovery of commercially viable resources such as oil, gas and other minerals. One of the issues of concern in the ongoing EI discourse is the lack of participation and ownership by communities. Already there are emerging conflicts between local communities and various extraction companies in areas where EI operations are ongoing. The key points of conflict include issues around: local content participation i.e. the total value added to, or created in the local economy through the utilisation of local human and material resources and services at all stages of the extraction value chain; benefit sharing, utilisation of communal land; environmental degradation; Corporate Social Responsibility (CSR), employment opportunities; among others. These points of conflict linger unaddressed due to a lack of ideas on how to resolve them.

However, these conflicts are not new or unique to Kenya. World over, extraction industries have endured and continue to endure calls for improved and increased engagement of local communities as part of the drive for sustainability of the industries. There are good examples of best practices in community engagement that can be drawn by Kenya from some of the relatively successful industries. At the same time other countries’ experiences offer insights into inappropriate approaches or failures that Kenya ought to be aware of as she engages communities.
4.1.2 Objectives of the Study

- To present an overview of community engagement in extraction industries from selected countries;
- To review the world’s best practices in community engagement in extraction industries;
- To highlight the pitfalls of inadequate and inappropriate levels of community engagement in extractive industries as seen in some countries;
- To propose lessons in community engagement applicable to Kenya’s extractive industry drawing from the foregoing comparative overview, reviews and highlights.

4.1.3 Significance of the Study

There has been in recent times increased reform activity in Kenya’s laws and policies relating to EIs as is illustrated in chapter 3 of this book. First, there is need to ensure that these laws and policies are anchored on the centrality of the people as required by the Constitution. Second, it is important that the on-going reforms are informed by experiences that other countries have had. Such experiences offer a wealth of lessons on the appropriate laws, policies and community based measures that would be instrumental in establishing a sustainable industry. Current practice shows that the government is having private negotiations with companies and leaving out communities. As such, community engagement is minimal, a scenario that is escalating violent confrontation. This study will offer alternatives ways of how to effectively work with communities to address their pertinent concerns while realizing mutual benefits for all stakeholders.

4.1.4 Research Methodology

This study was conducted by way of review of secondary data and literature.

4.2 Community Concerns and Practices from Select Countries

4.2.1 Local Content

Local content is the value added to, or created in the local economy through the utilisation of local human and material resources and services at all stages of the extractive value chain.

There are several perspectives on what amounts to ‘local content’ in EIs (World Bank, 2013). Some view ‘local content’ as the proportion of people from a host country employed in EI projects. For others, it is the share of goods produced in the host country that is used as inputs by the extractive industry. In the case of services, it is viewed by others as services provided by subcontractor companies owned by nationals. The United
Nations Conference on Trade and Development (UNCTAD) defines local content as the total value added to, or created in the local economy through the utilisation of local human and material resources and services at all stages of the extractive value chain (UNCTAD, 2012).

For the purposes of this section, local content will be taken as a measure of the inputs supplied by locals to the extraction industry in the form of goods and services. The measure may be manifest in the following ways: 1) income received by locals; 2) revenues accrued to owners of land and resources; and 3) income streams to local shareholders and creditors.

Approaches to local content policy vary from country to country depending mostly on the economic and foreign investment philosophy of a country. Some of the common approaches and practices taken by various nations include but are not limited to the following.

4.2.1.1 Requirement of preferential treatment

This approach is where law and policy frameworks require investors to give preferential treatment to local suppliers, service providers and workforce. Nigeria's Oil and Gas Local Content Development Act has an outright provision on preferential treatment. The Act provides that where bids are within one per cent (1%) of each other at the commercial stage by price, the bid containing the highest level of Nigerian content shall be selected, provided the Nigerian content is at least five per cent (5%) higher than its closest competitor. It is also provided that the award is not to be solely based on the principle of the lowest bidder where a Nigerian indigenous company has the capacity to execute; the company shall not be disqualified on the basis that it is not the lowest financial bidder, provided the value does not exceed the lowest bid by ten per cent (10%).

4.2.1.2 Industry driven initiatives

In some instances, operating companies have taken it upon themselves to initiate local content development programs in the absence or in supplement to governments' measures. There are also examples of non-mandated, voluntary approaches to sub national government and company collaborations to increase visibility and access to opportunities. One such initiative is the BMA Local Buying Programme steered by C-Res (QLD) Limited, in Queensland, Australia in partnership with BHP Billiton Mitsubishi Alliance (BMA) which is Australia's largest exporter of seaborne metallurgical coal. BMA was formed in 2001 as a partnership between BHP Billiton and Mitsubishi Development Pty Ltd (Revenue Watch Institute, 2013). The program aims to provide opportunities for small businesses with fewer than 25 full-time employees to competitively supply goods and
In recognition of existing capacity gaps, countries may require that besides creating employment, the extracting companies also build capacity through training and technology transfer.

The Nigerian Oil and Gas Local Content law is a good example. Among other things the law requires that each operator is to carry out a program in accordance with the country’s own plans and priorities, to the satisfaction of the Local Content Board, for the promotion of technology transfer to Nigeria in relation to its oil and gas activities (Facility For Oil Sector Transparency in Nigeria (FOSTER), 2013).

Capacity building and technology transfer may also be achieved through strategies which requires partnering with local companies for example by way of joint ventures with local public or private companies to ensure in a more direct way that foreign companies transfer knowledge and technology to local companies. In countries where the state is an active economic player, such as China and Brazil, this policy has been accompanied with
an increasing share of public ownership of oil, gas and mining-related industries (Husar & Best, IEA, 2013).

So as to promote the sustainability of the capacity building approach, some countries demand the undertaking of self-sustaining programs. For example in the Philippines, Section 136 of the Revised Implementing Rules and Regulations of Republic Act No. 79, requires companies to not only produce development plans for the host and neighboring communities, but also to contribute to “self-sustaining income generating activities, such as but not limited to, reforestation and production of goods and services needed by the mine and the community. This is in addition to the demand on companies to train the local communities where there is lack of local skilled workers.

4.2.1.4 Prescriptive measures

Prescription measures entail minimum targets set out in legislation to make mandatory requirements on the least acceptable quantum of local content participation.

Prescription may also be in respect to certain services and supplies, which can only be procured from the country or from among the local communities.

Prescription may also be in respect to certain services and supplies, which can only be procured from the country or from among the local communities. Nigeria is among the very few Countries that have deviated from the WTO’s National Treatment Obligations (NTOs) Clause and prescribed minimum local content requirements in legislation. Nigeria’s Oil and Gas Local Content Development Act, 2010 in various provisions and in its Schedule sets minimum local content thresholds. Section 42 of the Act demands that International or multinational companies working through their Nigerian subsidiaries are to demonstrate that a minimum of 50% of the equipment deployed for execution of work are owned by the Nigerian subsidiaries. It further provides that that 65% of divers in energy projects must be Nigerian, and 60 percent of steel ropes must be made locally. Comparatively, Angola does not prescribe a minimum, instead it gives a 10% local preferencing margin for local suppliers and does not establish overall targets for Angolan content.

Even though Nigeria has not recorded success in several other aspects of its oil industry such as respect of human rights and environmental management, the country is given credit for the success drawing from its bold prescription for local content compliance.

Even though Nigeria has not recorded success in several other aspects of its oil industry such as respect of human rights and environmental management, the country is given credit for the boldness of its prescription for local content compliance which has

---

Notes:
32 Countries subscribing to WTO’s National Treatment Obligations (NTO’s) and such other economic designs generally refrain from specifying any type of sanction for noncompliance. The NTO clause excludes the possibility of increasing procurement and employment opportunities through regulatory tools without incurring possible sanctions.
resulted in quantifiable success in skills development. For instance it has been estimated that within three years of the enactment of Nigeria’s Oil and Gas Industry Content Development Act, 2010, the Nigerian oil and gas employment and training strategy developed resulted in the absorption of over 5000 engineers, geologists, welders and other skill sets into the industry and formed the basis of a national skill database (Olusegun, A. P, 2014). Prescription may also be in respect of special interest groups. For example in South Africa the Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry of 2005 among other things required that Historically Disadvantaged South Africans (HDSA) be given preferred supplier status in the supply of capital goods, services, and consumables; existing suppliers to be encouraged to partner with HDSA companies when tendering and stakeholders to commit to enhancing HDSA procurement capacity (Booyens, 2006).

4.2.1.5 Broad policy framework approach

This entails a softer prescriptive approach whereby governments opt for a relatively liberal framework that serves merely to guide the general local content compliance principles in industries. For example the Australian Industry Participation Framework (AIPF) 2001, agreed on by all state governments, articulates government policies and strategic directions towards enhancing the levels of participation of Australian industry in large investment projects (Australian Government, Department of Industry, Innovation Science Research & Tertiary Education, 2014).

Ghana too has a broad policy framework known as the Local Content and Participation Policy Framework in petroleum activities of Ghana, 2010 (LCPFF). The LCPFF generally provides that “all operators in the oil and gas industry are to be required to procure, as far as is practical, goods and services produced by or provided for in Ghana in preference to foreign goods and services”. It further states that “operators shall engage in local procurement of goods and services which are competitive in terms of price, quality and timely availability.” (Elsa Savourey & Shazia Ahmad, 2014)

4.2.1.6 State participation

This approach is taken by countries, which opt to lay emphasis on government involvement in the industry through its own national corporations. The nationalisation process is deemed to be on behalf of the local communities. In some cases, the national corporation is mandated and facilitated to acquire stakes in international companies or their projects.
For instance, as part of entrenching its local content policy, Nigeria in 1971 established the Nigerian National Oil Corporation, (NNOC) as a vehicle for the promotion of Nigeria indigenisation policy in the petroleum sector (Gbegi, 2013). It later became Nigerian National Petroleum Corporation (NNPC) in 1977 through NOC’s merger with the petroleum ministry. NNPC flagged off the actual local content initiative in the country through acquisition of interests in the operations of the International Oil Companies (IOCs). These interests grew to about 70 per cent, with the responsibility of controlling all acreages and other activities.

In other countries such as Norway, the state corporation is set up and given preference in concessions. The long term plan is to make such corporations, the conduit through which local service providers and suppliers have an entry into the sector. For instance Statoil and Nirsk Hydro, which are state owned corporations are given preferences in licensing decisions and are viewed as instrumental to increasing the chances for Norwegian-based suppliers to enter the industry (Helge Ryggvik, 2010).

Lessons

As the extractive Industry in Kenya matures, the country should consider various options for setting up its local content provisions. It is imperative that Kenya reflects on the benefits accrued by other countries based on the specific models chosen and choose a blend that offers a sustainable framework suitable for the country. It is also imperative that the country is aware of the key difficulties faced by countries in implementing local content laws and policies. Key among these challenges is monitoring and enforcement of compliance since most local content frameworks and prescriptions do not carry any sanctions. Countries subscribing to WTO’s National Treatment Obligations (NTO’s) and such other economic designs generally refrain from specifying any type of sanction for noncompliance.

Kenya can learn from the practice of Nigeria where as part of the compliance monitoring framework, the local content law requires that companies submit local content compliance or practice plans before starting operations and subsequently, periodical reports to government authorities. Nigeria’s Oil and Gas Local Content Development Act also empowers the Petroleum Inspectorate to revoke licenses of companies that fail to meet local content commitment.

South Africa also offers a good model for disclosure of opportunities and compliance accountability to local communities. The Country’s Mineral and Petroleum Resources Development Regulation requires all oil, gas and mining companies to submit an annual plan to the Regional Mining Development and Environment Committee (RMDEC).
human resources development plan not only requires identifying, but also reporting on the number and education levels of the employees and the number of vacancies that the mining operation has been unable to fill for more than 12 months despite concerted efforts to recruit suitable candidates. Additionally, companies must submit a report on the implementation of a career progression plan, a mentorship plan and an internship and scholarship plan in line with the skills development plan and the needs for the specified groups of workers.

4.2.2 Diversification of the Economy

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 extractive sector alone but it also relies on other sectors of the economy like agriculture for growth. As opposed to economic specialisation, 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 extractive sector but also relies on other sectors of the economy, such as agriculture for growth (Ministry of Trade and Industry, Republic of Botswana, 2011). Economic Diversification is said to have the potential to propel economic growth, create an environment conducive to productive investment, and reduce short-term macroeconomic volatility. Diversification of economy as a way of achieving a people centered management of extractive resources serves to reduce overdependence on the extraction industry, which exposes an economy to external shocks; such as a slump in international crude oil prices.

The World Bank in a recent Policy Research Note has for instance projected that as the case has been in the recent past (2014/2015), the fall in crude oil prices is likely to be followed by episodes of high inflation in many countries (Baffes, J.et al, 2015). The World Bank also notes that the recent sharp decline in oil prices has, since October 2014, been accompanied by substantial volatility in the foreign exchange and equity markets of a number of emerging economies such as Nigeria, Angola and Columbia.

Diversification also speaks to the reality that extractive resources are not infinite. Diversification offers an alternative when the resources decline. For example, a 2007 IMF reports that Botswana’s economy faces a difficult challenge with the depletion of its diamond resources, which are expected to be exhausted around 2030. The latest statistics by South Africa’s National Accounts show that the country’s gold years to depletion currently stand at 33 years (Statistics South Africa, 2014).

---

33Economic specialisation means concentration of a country’s efforts and programs in one or selected sectors of the economy and relying on that/those sector(s) to fully serve the country’s economic needs. Proponents of this approach to economic development – referred to as Ricardian theorists (Ricardo, David, 1971) argue that countries benefit from opening to trade and specializing in the production of goods in which they have a comparative advantage. By becoming more specialised, the allocation of resources becomes more efficient, allowing for mutual welfare increases (UNIDO, 2012).
Nigeria offers a vivid case study on the negative implications of economic concentration in the extractive industries. As shown in figure 8, Nigeria has the third largest dependence of oil in Africa after Angola and Equatorial Guinea. As shown on figure 14 it is estimated that the country has 37.2 billion barrels of oil reserves (as of 2011) and produces an average of 2.13 million barrels per day (EIA 2013). The hydrocarbon sector also accounts for more than 75 per cent of the federal government’s revenue.

With the increasing volatility of oil prices, the discovery of oil in other parts of the world and the instability of the global economy, oil imports from Nigeria to major economies such as the United States has steadily decreased. The U.S once imported nine (9%) to 11 per cent of its crude oil from Nigeria but in the first half of 2012, the share of imported oil from Nigeria to the U.S dropped to five per cent (5%), (U.S. Energy Information Administration, August 2013).
The beginning of the petroleum industry in Nigeria is blamed for the decline and stagnation of other traditional sectors of the economy such as agriculture, which was once the core economic activity of the country. In the 1960s the agricultural sector was the country’s dominant economic sector contributing up to 64.1 per cent to GDP and the supplier of food, income, foreign exchange and employment. The Country’s Federal office of statistic (FOS) in 1985 stated that crop farming and fishing activities accounted for about 90 per cent of all forms of activities in the economy. FOS also estimated that about 50-68 per cent of the active labour force was engaged in one form of agricultural activity or the other. With the rise in dominance of the oil sector, the contribution of agriculture to the country’s economy drastically declined. According to Nigeria’s National Bureau of Statistics (NNBS, 2014) agriculture constituted the smallest sector in the first quarter, representing 19.65 per cent of GDP.

Upon the discovery of oil, the agricultural sector remained largely neglected and over time agricultural technology has remained relatively unchanged. Most of the farmers in Niger Delta (90%) are said to be subsistence farmers operating on traditional methods using basic tools. The farming technique in the area is dominated by land rotation or the bush fallow system. The resultant effect of traditional farming methods and the dominance of the oil sector is that 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 fibres, which were once produced in surplus in the Country.

4.2.2.2 Advantages of economic diversification

Canada’s Western region (with the four provinces; Alberta, British Columbia, Manitoba and Saskatchewan) is an example of an economy that appreciates the danger of overdependence on extracted resources which are inherently finite. According to Canada West Foundation (2011), ‘in Western Canada, the desire for greater economic diversification is also linked to concerns about the eventual depletion of non-renewable natural resources. While the region is home to vast fossil fuel and mineral deposits and untapped potential in new and unconventional energy sources, there is a general recognition that these resources will not last forever. Depletion, the advent of new technologies, or even a shift in global consumer preferences could all affect world demand for Western Canadian resources. As such, in Western Canada, the issue of economic diversification is also closely linked to the question - what do we do when our resources run out or become uneconomical to extract’.
At the provincial level, the provinces in the West have taken three general approaches to economic diversification. The first is targeted subsidies and/or tax incentives aimed at specific “desirable” industries (Holden & Richardson, 2011). An example is the British Columbia Production Services Tax Credit, which encourages film, television and animation production in that province (British Columbia, Ministry of Finance, 2002). The second approach is support for value-added or knowledge-based activities. The Saskatchewan Research and Development Tax Credit, designed to encourage private sector R&D investment in the province, is one such program (Government of Saskatchewan, 2012). The third approach is the broadest: rather than giving preference to certain types of economic activity, governments have tried to attract business and investment by creating a “level playing field” (i.e., a well-trained workforce and a competitive economic environment) (Holden & Richardson, 2011).

The Federal government has itself since the 1960s had a number of economic plans to help promote economic diversification in provinces with vulnerable economies including the Western provinces (Holden & Richardson, 2011). One such initiative was the 1966 Fund for Rural Economic Development (FRED), which identified five economically weak regions across the country and designed unique plans to develop infrastructure and industry in each. The Interlake region of Manitoba was one of the five identified regions.

In 1987 the Federal government passed the Western Economic Diversification Act, which established Western Economic Diversification Canada (WEDC). This was out of concern about the growing overdependence on mining resources in the region (Holden & Richardson, 2011). 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, program and project development and implementation. WEDC was created with a $1.2 billion Western Diversification Fund to be used over a five-year period in the four Western provinces. The intent of this fund 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. WEDC’s operations focus on meeting three strategic outcomes: entrepreneurship and innovation; community economic development; and policy, advocacy and coordination (Holden & Richardson, 2011).

Community Economic Development (CED) is particularly crucial in ensuring the engagement of people in their own economic development. CED is understood by WEDC as action by people within a specific geographic community or group of communities to create local economic opportunities and improve quality of life. CED recognises that local challenges and opportunities are as varied as the individual communities themselves.
By using knowledge and resources resident in the community, CED identifies and capitalises on local opportunities to stimulate economic growth and employment. 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.

Lessons

A review of investment and economic development in Africa (NEPAD, 2010) mentions the Kenyan economy as being one of the most diversified in Africa. It was noted that Kenya already had strong agriculture, telecommunication, tourism, fishery and horticulture sectors. However, to better insulate the economy from economic risks such as the economic interruption that resulted from the 2008 Post Election Violence (PEV) (which was concentrated in the country’s agricultural hub i.e. the Rift Valley region), the review recommended that Kenya needed further diversification.

The review outlined notable measures such as: Vision 2030; its membership with the East African Community (EAC); and participation in the region’s Common market, the Economic Community of the Great Lakes Countries (ECGLC) to further improve economic growth. Geographically, Kenya is also well positioned on the Indian Ocean, facing Asia and with access to key shipping lanes between the Mediterranean and Indian Oceans. This geographic advantage is a good basis for widening economic markets and access of Kenyan diverse products to the global market.

The review came before the advent of the EI in the country and did not take into account the industry as an avenue for further diversification or an area of possible overdependence. The already existing diversity ought to be protected from over reliance of the extractive industry.
It is acknowledged that since extractive operations are often conducted in environments where government institutions may be absent, weak, or lacking in capacity, there may be gaps in essential public services. Furthermore, the social and environmental footprints of mining operations often have negative effects on local communities that require compensation or mitigation programs. The remote location of many operations heightens expectations for employment and economic development in host communities. For the foregoing reasons, EI companies and governments often take supplemental or compensatory measures to mitigate some of these concerns and meet the local communities’ expectations. Such measures include government payments, compensation, and community investment.

4.2.3.1 Benefits sharing through EI revenue allocation

It is the expectation of local communities that revenues accruing from extractive industry activities will be shared with them. One way through which some governments endeavour to meet this expectation is by undertaking revenue decentralisation to sub-national government levels. The allocation modalities used by various countries are vertical, horizontal, or a blend of both. Vertical allocation refers to the redistribution of EI-related revenues from central to sub-national governments, while horizontal distribution refers to sharing across sub-national governments. The modality chosen by countries tends to reflect pre-existing political cleavages and power asymmetries between central and sub-national actors. Generally, revenue devolution mechanisms used by countries often feature a mix of discretionary allocation of resources and redistribution formulas across producing and non-producing territories.
A 2014 UNISRAD Working paper gives a reliable comparative analysis of various formulae applied by various countries in the vertical and horizontal distribution of revenue from extractive resources (Yanguas, & Acosta 2014). The analysis in the Working Paper shows that in Brazil, royalty and participation fees from oil and gas is vertically distributed amongst the national government, regional governments, local government and private land owners at the rate of 31:45:21:3 respectively. In Nigeria, where the level of decentralisation of total oil revenue is high, vertical distribution is among national, regional, and local governments is at the rate of 46:36:18. Land is owned by the government hence there is no prescribed ratio for landowners. Ghana has a comparatively low level of decentralisation even though decentralisation of revenue extends to landowners. The ratio on royalties' distribution in Ghana is 91:5:2:2 amongst the national government, regional governments, local governments and landowners a situation very similar to Papua New Guinea where the ratio is 93:3:3:2 (Yanguas, & Acosta 2014).
In some countries, the approach taken is to establish special benefit distribution instruments often in the form of Foundations, Trusts and Funds (FTFs). In most cases these are run by the extractive companies as part of their social investment. However governments also often establish special revenue pooling funds from which payments are drawn to serve special local needs such as emancipation of indigenous communities or future generations. Some examples include:

a) Aboriginal Benefits Account (ABA) in Australia
Australia’s Aboriginal Land Rights (Northern Territory) Act 1976 establishes the Aboriginal Benefits Account (ABA), previously Aboriginal Benefits Reserve, following the Australian Indigenous Advancement Strategy that contributes to the Government’s priorities for Indigenous Australians. The ABA receives statutory royalty equivalent monies from appropriations, the level of which is determined by the value of royalties generated from mining on Aboriginal land in the Northern Territory. Beneficial grant funding is made available under a subsection of the Act for a one-off grant funding proposals that are for the benefit of Aboriginal people living in the Northern Territory. The initiatives that are eligible for the funding include

- Economic development
- Small business
- Land, sea and waters management and use
- Community enhancement education
- Leadership (see Australia’s Aboriginal Land Rights (Northern Territory) Act 1976).

b) Pula Fund in Botswana
In 1994 Botswana established the Pula Fund under the Bank of Botswana Act, with the objective of preserving part of the country’s income from diamond exports for future generations. The sources of the fund are Government deposits and the Bank of Botswana deposits (see Bank of Botswana Act).

In determining how much mineral revenue the government is to deposit in the fund, the government first sets a “Sustainable Budget Index” i.e. the ratio of non-investment spending to non-mineral revenues. Once the government determines the maximum amount it can spend on non-investment expenditures, it must split remaining revenues (all mineral revenues and remaining non-mineral revenues) between spending on health, education and public investments (e.g. roads; electricity) and saving in the Pula Fund. As of August 2013, the Fund was valued at USD 6.9 Billion (Natural Resource Governance Institute, Columbia Center on Sustainable Investment, August 2013)
On its part the Bank of Botswana deposits in the fund all foreign exchange reserves that are in excess of the amount required for daily foreign transactions (kept in the Liquidity Portfolio and currently set at six months of cover) (Natural Resource Governance Institute, Columbia Center on Sustainable Investment, August 2013). So as to mitigate risks, reserves in the fund are only invested in currencies that are freely convertible such as the U.S. dollar, euro, pound sterling or the yen. According to Khalid A. Alsweilem et al. (2014), some of the oversight, transparency and accountability measures put in place to secure the fund include:

- A portion of funds being managed by external fund managers with the rest managed by the Bank of Botswana itself.
- The fund being subject to periodic reviews of investment methodology by an investment committee
- Regular and comprehensive internal audits and an independent external audit
- Independent auditor’s findings are included in the Bank of Botswana’s annual report to the Minister of Finance and Development Planning

The Fund has however been criticised for lacking a number of safeguards including:

- Lack of a domestic oversight committee to “police” the fund’s activity and ensure adherence to the regulations that govern the fund’s activity
- Lack of formal government approval of the fund deposits and withdrawals
- Fusion in management of the fund with the country’s international reserves
- No international oversight institution, such as the World Bank or the IMF monitors the fund

c) The Norwegian Government Pension Fund Global

Established in 1990, the fund commonly known as the Petroleum Fund (Oljefondet) is currently considered to be the world’s largest sovereign wealth fund with a current estimated asset value of USD 873 (Sovereign Wealth Fund Initiative, 2015). It is the fund where Norway’s surplus wealth from the country’s petroleum industry is saved. The revenue pooled into the fund is a surplus of taxes on oil companies, exploration license fees and the government’s financial interests and dividends from its partial ownership of the Country’s NOC Statoil-Hydro. The Fund was established by the Norwegian Parliament (Stortinget) as a response to projected decline in national income and to counter the disruptive effects of fluctuating oil prices (Khalid A. Alsweilem Angela Cummine et al, 2014).
Lessons

Benefit sharing structures ought to focus on monetary and non-monetary benefits. Equally important is establishing benefit sharing models that take into account sustainability and the security of future generations. As can be seen from the success of the Pula fund in Botswana, it is necessary to put in place checks and balances so as to protect it from possible graft. The funds should also be applied to non-monetary benefits such as capacity building, enhancement of security and expansion of infrastructure.

Kenya could build on and strengthen the currently existing, albeit dormant training fund, (under Section 11 of the Petroleum exploration and production Act) to create an industry wide fund.

4.2.4 Environmental Management

According to Walde (1992) extractive industries are known to cause unprecedented environmental damage. Negative environmental effects may be evident at various phases of mineral development such as exploration, extraction and processing (see figure 16). The exploration phase in mining usually produces only minor and localised effects such as clearing of trees for drilling sites, access roads, sinking of pits and holes. The extraction phase will usually involve a more massive impact affecting the natural environment of landscape, fauna and vegetation. At the processing stage, the main environmental damage generated by the mining industry is air and water pollution (Walde, 1992).

According to the Joint UNEP/E&P Forum Environmental Management Guidelines, the most likely environmental impacts of extractive industry operations include: atmospheric impacts from flaring and venting, emissions from installations and vehicles; aquatic impacts from discharges of produced waters, drilling fluids, sewage, process waters, spills and leaks; terrestrial impacts such as physical disturbance from construction, contamination resulting from spillage and leakage or solid waste disposal; ecosystem impacts including changes in air, water and soil/sediment quality as well as disturbance by noise and changes in vegetation cover (UNEP, 1997).

Environmental management therefore entails informing, consulting, involving, collaborating with, and empowering a wide range of stakeholders in managing the impact of EI on flora, fauna, air and water resources of a local community.
4.2.4.1 A case of weak legislation and stakeholder engagement in Ogoniland in Nigeria

Nigeria’s Ogoniland is reputed as one of the world’s worst cases of environmental degradation from EI activities. While there is extensive literature capturing the failures of the oil industry in this region of Nigeria, a report titled Environmental Assessment of Ogoniland (UNEP, 2011), offers a particularly graphic illustration of the scenario. It paints a picture of extensive environmental degradation despite the fact that EI activities have since stopped.

a) Effects of EI on livelihoods
As shown in figure 16 the UNEP review disclosed wide ranging negative environmental impacts including soil and groundwater contamination mostly from crude oil. In 49 cases, UNEP observed hydrocarbons in soil at depths of at least 5 meters. At two-thirds of the contaminated land sites close to oil industry facilities, which were assessed in detail, the soil contamination exceeded Nigerian national standards, as set out in the Environmental Guidelines and Standards for the Petroleum Industries in Nigeria (EGASPIN).

The UNEP investigation found that the surface water throughout the creeks had high hydrocarbons content. There were floating layers of oil, varying from thick black oil to thin sheets. The most serious case of groundwater contamination was observed at Nisisioken Ogale, in Eleme Local Government Authority (LGA), close to a Nigerian National Petroleum Company product pipeline where an eight centimetre (8cm) layer of refined oil was observed floating on the groundwater which serves the community water points. The highest reading of dissolved hydrocarbon in the water column, of 7,420 μg/l, was detected at Ataba-Otokroma, bordering the Gokana and Andoni LGAs.

Vegetation was equally impacted. The review found that oil pollution in many inter-tidal creeks had left mangroves stripped of leaves and stems, leaving roots coated in a bitumen-like substance sometimes one centimetre (1 cm) thick or more. (Mangroves being spawning areas for fish and nurseries for juvenile fish, the extensive pollution of these areas gravely impacted the fish life-cycle making these areas unsuitable for fishing. Where a number of entrepreneurs had set up fish farms in or close to the creeks, their
businesses had been ruined by an ever-present layer of floating oil. Soil and water contamination from oil activities also had severe public health implications. Community members at NisisiokenOgale were reported to be drinking water from wells contaminated with benzene, a known carcinogen, at levels over 900 times above the World Health Organisation (WHO) guidelines. Hydrocarbon contamination was found in water taken from 28 wells at 10 communities adjacent to contaminated sites. At seven wells the samples were at least 1,000 times higher than the Nigerian drinking water standard of 3 μg/l. Local communities are aware of the pollution and its dangers but state that they continue to use the water for drinking, bathing, washing and cooking as they have no alternative. Oil spills had also led to fire breakouts killing vegetation and creating a crust over the land (UNEP, 2011).

b) Weak legislative and institutional structures

The UNEP (2011) review also covered the whole range of institutions dealing with legislation related to environmental management and oil production in Nigeria. It also examined cross-cutting issues such as community-company-government interaction, transparency, fiscal issues and law enforcement. Among other failings, the UNEP review blamed weak institutional structures for the extensive environmental degradation by the oil sector in Ogoniland. The laws and regulations were incapable of fostering communities’ engagement and participation in environmental management in respect to oil exploration and production activities in Ogoniland.

Prior to the environmental impact assessment (EIA) legislation in 1992, companies were not legally required to carry out EIAs. There lacked the provision for communities to contribute to or participate in the process, including voicing their opinions on the possible effects of projects on their immediate environment and livelihood.

In 1987, an illegal toxic dump was discovered in Koko, a small village in Delta State. The source of the waste was Italy, and diplomatic pressure was put on Italy by Nigeria and the international community. The row that followed led to the establishment of the Federal Environmental Protection Agency (FEPA) by way of Decree No. 58 of 1988. Although the Decree mentioned public investigations for pollution, it did not make any reference to public participation in any form. In 1992, the FEPA took steps to remedy this by developing the Environmental Impact Assessment Decree No. 86 of 1992, following which the Environmental Guidelines and Standards for Petroleum Industries in Nigeria (EGASPIN) was enacted (Elenwo & Akankali, 2014).
Various sections within the FEPA Decree seek to ensure environmental assessment and participation in any proposed public or private project. For example, the Decree requires that: “the public and private sectors of the economy shall not undertake or embark or authorise projects or activities without prior consideration, at an early stage, of the environmental effects”.

Section 7 of the Decree states that:
“before the agency gives a decision on any activity to which an environmental assessment has been produced, the agency shall give an opportunity to government agencies, members of the public, experts in any relevant discipline and interested groups to comment on environmental impact assessment of the activity”.

Section 26a (ii) of the Decree states that:
“after taking into consideration the mandatory study report and any comments filed pursuant to section 19(2), the Council shall refer the project to mediation or a review panel in accordance with section 25 of this Decree where, in the opinion of the Council, public concerns respecting the environmental effects of the project warrant it”.

The review process in Section 25 of the Decree implies that comments and issues identified by the public should guide FEPA in making decisions on whether projects should be approved or not.

According to Admokai et al (2004), EGASPIN is the only legislation that refers to participation of the communities when environmental decisions are being made. Other studies however reveal that despite the legal framework on public participation, there was and still is a basic perception that involving communities in the environmental decision-making process opens companies to increased problems and demands from communities, which would in turn lead to increased costs, a prolonged project cycle and extension of delay before commencement of projects. Besides, companies were not prepared to go beyond the minimum regulatory requirements to allow community participation.

c) Weak community engagement
Initially, it was based more on community assistance, where companies decided on what projects they felt would be useful to a community (e.g. a water project or a community clinic). This was seen as a way of contributing to the host community and had nothing to do with active participation of the community in contributing to the real environmental decisions. Community concerns differed from the company interventions. The communities wanted issues such as employment, infrastructure and environmental problems like oil spills, noise, flare lights, etc addressed. When the environment started becoming polluted and sources of livelihood were reduced and sometimes cut off, community
unrest began peacefully with company management and chosen members of a community meeting to discuss the problems and possible solutions. Companies would mostly ignore the proposed solutions and not implement the agreed action points leading to increased distrust and dissatisfaction of communities towards these companies. Gradually, community demands became more rampant and violent because young people in particular felt that it was the only way to be heard.

Despite a slow improvement in participation, the engagement problems continue to face a number of challenges. These include: delays to some projects; lack of awareness of the public of their right to participate in the EIA processes and in some cases language barriers. There also remains a tendency for some communities to demand compensation instead of trying to resolve the potential impact on their environment. Responses from various interviews suggest a general view that communities were more interested in economic gain than environmental wellness. In one response, a community member said:

“When people cannot feed, clothe, provide good accommodation for their families or good education for their children, how can you come and tell them to be properly concerned for the environment? When you resolve developmental issues and the basic needs of the people then we can begin to talk about the environment properly” (Admokai et al, 2004).

The response highlights poverty as a key factor in defeating public participation in environmental management decision and creation of awareness.

4.2.4.2 Stakeholder engagement in Canada

Canada offers two examples of stakeholder engagement frameworks and experiences worth mentioning.

a) Federal Environmental and Regulatory Processes (FERP)

The Federal Environmental and Regulatory Processes (FERP) prescribed under the Canadian Environmental Assessment Act, 2012 is the primary public and Aboriginal consultation mechanism used by the federal government to consult on proposed mine development projects. The process as prescribed under the Act is designed to be an effective tool to:

− Help all stakeholders understand the effects of the project on the current use of lands and resources for traditional Aboriginal purposes;
− Understand potential impacts on Aboriginal rights and ensure mitigation is considered to address impacts; and to help project operators
− Use Aboriginal traditional knowledge to better understand the environmental effects of the project for improved project planning.

The process has been successfully applied by a diamond mining company.

---

34 In 2003 during a study commissioned by Department of Environmental Science and Technology, Environmental Policy and Management Group
35 According to Intergovernmental Working Group on the Mineral Industry, Canada, 2014
Stornoway Diamond Corporation) in executing its Renard Diamond Mine Project located near the Otish Mountains in north-central Quebec (‘the Renard Project’). (Stornoway, 2013) Renard project is located on lands where the Cree Nation have specific hunting, fishing, and trapping rights. Stornoway, in undertaking FERP worked with the federal government, the Grand Council of the Crees, and the Cree Nation of Mistissini to identify and mitigate potential environmental effects. To effectively utilise the process one of the first steps was the creation of the Environmental Exchange Group (EEG) in October 2010.

The EEG was fully engaged in and contributed to the design and implementation of the Fish Habitat Compensation Plan – a Fisheries Act 35(2) (b) requirement — aimed at offsetting any serious harm to fish and fish habitat, and during the preparation of the project’s environmental and social impact assessment (ESIA). In designing the Fish Habitat Compensation Plan, Stornoway engaged and consulted with the Cree Nation to build on their traditional knowledge of the territory over a two-year period. This approach consisted of asking the users of the resource where and how the compensation should happen for their own benefit. For two years, Stornoway collaborated with the Cree Nation of Mistissini and the Grand Council of the Crees, as well as with experts from Fisheries and Oceans Canada, and Environment Canada, to propose the best approach to palliate fish habitat losses and environmental degradation for the project construction and operation. (Stornoway, 2013) . The Cree Nation participated in this process and proposed different possibilities for intervention, including improving existing spawning grounds and remediating a diversion canal at an abandoned copper mine site. To date, the Environmental Exchange Group forum continues to be used by stakeholders to exchange information on different aspects of the project.

b) Northern Saskatchewan Environmental Quality Committee (NSEQC)

Saskatchewan is a grassland province in central Canada. The province is Canada’s second largest oil producer and third largest producer of natural gas and coal (Natural Resources Canada, 2014). The world’s richest uranium ore deposits are located in this region. Six uranium mine/mill projects are currently in operation in northern Saskatchewan, employing almost 4000 workers at the sites. The northern half of Saskatchewan is also home to communities of Aboriginal heritage who make up about four per cent (4%) of the province’s population.

In the 1990s there were requests for approvals for five new mines. In response to the proposals a Federal-Provincial Joint Review Panel was constituted and mandated to hold a series of public hearings. During the hearings Northerners voiced their interest in the socio-economic benefits that would be derived from the operations and from participating in an environmental monitoring committee. The Government of Saskatchewan responded to the Panel’s initial report and recommendations by establishing the Northern Saskatchewan Environmental Quality
Committee (NSEQC) initiative to engage Northerners in decisions concerning the
development and operations of the uranium industry. The committee acts as a key
communications bridge between the uranium industry and northern residents. Membership
in the Council consists of 78 primary and alternate community representatives. The Ministry
of Government Relations provides an annual budget for members’ travel expenses, meeting
capacilities, and two staff positions. Uranium companies provide in-kind, support for mine-site
tours, workshops, and conferences.

The NSEQC’s credibility in fulfilling its mandate is based on a number of design features
which were highlighted for comparative study during the August 2014 Canadian
Energy and Mines Ministers’ Conference in Sudbury Ontario Canada. First, the NSEQC
was noted to be an apolitical structure comprised of First Nations, Métis, and
non-Aboriginal representatives drawn from northern reserves and municipalities that
are representative of the geographic region within which the uranium companies operate.
Second, the communities’ leadership nominates their NSEQC representatives, who are
then appointed by Minister’s Order for terms of up to two years (Quebec Ministry of
Energy and Natural Resources, 2014).

Lessons

The impact of the oil industry in Ogoniland in Nigeria is an illustration of the extent to
which environmental impacts of EIs can be devastating. The magnitude of
environmental damage due to a weak legislative and institutional framework calls for a
much more rigorous effort in Kenya to ensure that existing laws are enforced.

Much as the EMCA is noted to be a commendably comprehensive framework, the new
challenges featured by extractive projects necessitates in the very least special regulations
for the extractives sector under the Act. Equally recommendable is the use of standing
community based structures such as NSEQC which facilitates better community
participation in decisions relating to the impact of EI on their environments.

Besides the normative prescriptions which have proved unsuccessful in Nigeria, Kenya
could borrow the community participatory approach applied in Canada as seen in the
examples of the FERP prescribed under the Canadian Environmental Assessment Act, 2012.

4.2.5 Corporate Social Responsibility (CSR)

CSR can be defined as the continuing commitment by business to behave ethically
and contribute to economic development while improving the quality of life of the workforce
and their families as well as of the local community and society at large.

The World Business Council for Sustainable Development (WBCSD) defines corporate social
responsibility (CSR) as the continuing commitment by business to behave ethically and contribute to
economic development while improving the quality of life.
of the workforce and their families as well as of the local community and society at large (WBCSD, 1998).

The definition by the World Business Council for Sustainable Development points at two distinct measures of CSR, including, upholding and promotion of good ethical standards and the support of economic development projects also known as Corporate Social Investment (CSI).

The need for businesses to address the social, ethical and economic welfare of societies is critical in the context of EIs. This is because EIs have been known to have adverse impacts on the enjoyment of economic, social and cultural rights by the local community of the producing area.

Unlike other companies, which can choose where to set up operations based on a number of predetermined business variables EIs do not have the option of choosing where gold, oil, diamonds, or gas are located. Some of these assets may be found in failed states and conflict zones, where there is little or no rule of law and corruption is unchecked. Sometimes the resources are located in pristine rainforests or in areas inhabited by indigenous peoples where companies can take advantage of low wages, weak protection of labour rights and a lower standard of health, safety, and environmental standards (Westfield, 2002). The indigenous people's life styles and value systems are the most vulnerable. They can be uprooted from their traditional lands, their cultural base destroyed, and their habitat polluted.

Other socio-economic and cultural impacts of extractive operations include: changes in land-use patterns; increase in local population levels resulting from immigration due to new access routes and employment possibilities; impacts on socio-economic systems due to new employment possibilities and income differentials; inflation; impacts on social cohesion and cultural structures; destruction of cultural heritage, practices and beliefs; conflicts between development and protection; natural resource use and associated negative effects of road and pipeline construction and changes in the transportation infrastructure and associated effects (Wagner, 1998).

All these issues often lead to human rights abuses and other issues that a company seeking to be socially responsible must address through commitment and dedication of resources. At the same time extractive companies have to contend with the reality that their operations will have negative environmental and socio-economic effects that need to be addressed through sustainable remedial measures.
4.2.5.1 Upholding and promotion of good ethical standards

There are examples of practices that have been put in place to uphold good ethical standards. There are also several cases of well-documented instances of socio-economic rights violations by, or with the complicity of extractive companies, which call into question their CSR standings. Some examples include:

a) **Dutch Shell in Nigeria**
A leading example was the Ken Saro-Wiwa dispute involving Royal Dutch Shell in Nigeria. The Company was sued through a civil society organisation (Centre for Constitutional Rights) for complicity in the execution of activists protesting against the company’s environmental and developmental policies. It was alleged that Dutch Shell made no serious effort to keep Nigeria’s military regime from executing author Ken Saro-Wiwa and eight other environmental activists (the Ogoni Nine) in November 1995 (United States District Court for the Southern District of New York, 96 Civ. 8386 Wiwavs Royal Dutch petroleum Company & Shell Transport and Trading Company). Though denying culpability, in June 2009 Shell agreed to settle out of court and paid out compensation of USD15.5 Million (Ingrid Wueth, 2009).

b) **Chevron-Texaco in Ecuador**
In Ecuador, Chevron-Texaco was sued in 2003 for the systematic destruction of the environment and homelands of rainforest people in Oriente region through the dumping of billions of gallons of highly toxic wastewater and crude oil from 1971 to 1992. The disputes spanned several courts and judicial bodies in Ecuador, the US and the International Permanent Arbitration Court (IPAC) at The Hague (Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, UNCITRAL, PCA Case No. 2009-23). Eventually in November 2013, the Ecuadorian Supreme Court upheld a finding of environmental damage by the Company and awarded damages of USD 9.5 billion (MariaAguinda Salazar Et Al.vs  Chevron Corporation, Supreme Court of Ecuador, Case No. 174-2012).

c) **Unocal Corporation at the border of Burma and Thailand**
Another prominent human rights violation case by an extractive company was the 2005 case of Doe vs. Unocal Corporation 395 F.3d 932 where Unocal was sued for knowingly using forced labor to construct its Yadana gas pipeline, which stretches through Burma into Thailand. Unocal had contracted the notorious military junta in control of Burma to provide security for the project. The junta forced local people to work by clearing the way for the pipeline and its accompanying infrastructure. Soldiers used tactics such as murder and rape to compel people to work. In their case against Unocal, the Burmese villagers claimed that the California oil giant was liable on the basis of its complicity in the junta’s wrongdoing.
The Burmese citizens through Earth Rights International sued Unocal in the United States because they believed that the political situation in Burma strongly militated against the possibility of justice being achieved in Burmese court. In March 2005 before the case could go to full hearing the parties agreed to a settlement terms of which remained confidential. However it was revealed by Earth Rights International that the company had agreed to compensate plaintiffs and provide funds enabling plaintiffs and their representatives to develop programs to improve living conditions, health care and education and protect the rights of people from the pipeline region.

d) Canada and the problem international violations
Despite being regarded as one of the world’s leading performers in good EI governance Canada has had to contend with a number of allegations of international violations by its own ES companies while operating abroad. Examples include:

- **The dispute of Presbyterian Church of Sudan vs Talisman Energy**
The case was initially filed in November 2001 at the United States District Court for the Southern District of New York (244 F. Supp. 2d 289 SDNY 2003). The complainant had accused Talisman Energy Inc of complicity in Government of Sudan (GOS) human rights violations. Violations listed in court documents included: indiscriminate aerial attacks by helicopter gunships and bombings, sometimes in unison with ground attacks by GOS military or militias; “government soldiers” shooting at, forcibly displaced, bull-dozed villages and built roads and wells; as well as burning and destroying churches. In 2006 the District Court dismissed the suit and the complainants appealed to the US Court of Appeals. In October 2009, the Court of Appeal affirmed the decision to dismiss the suit against Talisman, in a similar manner as the U.S. Supreme Court in October 2010 (Talisman Energy, Inc. v. Presbyterian Church of Sudan, 131 S.Ct. 79 (2010). In the end, Talisman was not held liable for any violations.

- **Canadian Association Against Impunity (CAAI) v Anvil Mining Ltd,**
In another dispute leading to a class action in 2010 at the Superior Court in Quebec - Case No 500-06-000530-101, Anvil Mining Company was implicated in the provision of logistical support to the Democratic Republic of Congo (DRC) military in its quelling of an uprising that took over a police station at Kilwa in Katanga province of DRC, looting trucks and stealing fuel and food from the Anvil depot. In coming to the aid of Anvil the DRC military responded by bombarding Kilwa, destroying houses, conducting house-to-house searches for insurgents and their sympathisers. They are also alleged to have looted homes, shooting and killing those fleeing, engaging in rape, and summarily executing roughly 100 people, Anvil filed a motion to dismiss the claim on the grounds that the Superior Court did not have jurisdiction. The Motion was rejected in April 2011 and Anvil appealed to the Court of Appeal. In a decision made on 24th January 2012 the Court of Appeal overturned the decision of the Superior Court and upheld Anvil’s objection to jurisdiction (Case Number 500-09-021701-115).
e) Canada and mechanisms for self regulation

Measures in Canada that deal with scenarios such as the above violations include the active involvement of the Canadian industry players as part of self-regulation and monitoring. Leading among these are initiatives such as:

- **Prospectors and Developers Association of Canada (PDAC)**

  Established in 1932, PDAC represents the interests of the Canadian mineral exploration and development industry. It currently has approximately 1250 corporate and 9000 individual members (PDAC, May 2015). As part of its mandate to promote a responsible Canadian mineral exploration and development sector, in October 2009 it released a report – *Corporate Social Responsibility: Movement and Footprints of Canadian Mining and Exploration Firms in the Developing World* - (Canadian Center for the Study of Resource Conflict, October 2009) that identified adverse side effects attributed to the extractive sector and proposed solutions to mitigate and prevent misconduct in the future. PDAC commissioned the study and report so as to discuss the accountability and transparency of mining and exploration firms in developing countries. This involved examining extractive sector incidents between 1999 and 2009, highlighting the extractive sector relationship with social, environmental, and human rights issues. The Report was also, notably, used to determine whether CSR was evolving and helping to prevent mining and exploration companies from causing adverse impacts.

  It revealed that the Canadian extractive sector was involved in roughly 56 of the total 171 incidents examined. As a result, the report called on the Canadian extractive sector to shift its current CSR strategy. The report outlined a need to improve its image and relationships with local communities, governments, and civil society in order to avoid further misconduct. One suggestion was for a form of measurement, review, and evaluation of CSR performance, with reporting and auditing suggested as possible solutions. As a whole, the PDAC Report deemed reporting and auditing to be central to CSR evaluation and for “increasing CSR’s clout within industry and with civil society.”

  The Report concluded that voluntary uptake of global CSR norms needed to be instituted in tandem with appropriate government accountability mechanisms in order to ensure that Canadian companies improve their practices in the developing world. PDAC Report envisioned a combination of hard law with soft law obligations and processes, reinforced with stakeholder input and knowledge, supporting the notion of CSR to inform and stimulate dialogue with stakeholders. Among other initiatives, PDAC has built on the 2009 Report and recommendations to form the Resource Revenue Transparency Working Group, launched in 2012. The Working Group is a multi-sector entity, comprised of the Mining Association of Canada, the PDAC, Revenue Watch Institute and Publish What You Pay (PWYP) Canada. Under the Working Group’s umbrella, PDAC has recently published recommendations, which if implemented by government will herald mandatory reporting requiring Canadian
mining companies to disclose their payments to governments, both in Canada and abroad
country by country and project by project basis. (The Resource Revenue Transparency
Working Group, 2014).

PDAC also runs an Aboriginal Affairs Program which among other things runs policy,
research, outreach and advocacy initiatives to support the development of positive
relationships between Aboriginal communities and mining companies. Under this
program it often publishes findings and makes recommendations that are geared towards
positive relationships among all parties, a favourable investment climate, the development
of sustainable communities (PDAC, 2014).

● **Standing Committee on Foreign Affairs and International Trade (SCFAIT)**
The Canadian Government initiatives include the commissioning in 2005 of a
Senate Standing Committee on Foreign Affairs and International Trade (SCFAIT) Report on
the Canadian extractive sector. Released in June 2005, the SCFAIT Report brought to the
attention of the Canadian government the adverse impacts associated with its unregulated
extractive sector operating internationally. Just as important, the SCFAIT Report proposed
one of the first Canadian efforts to regulate the Canadian extractive sector. After
identifying impacts on the environment, local communities and residents, and their
economic and social well being, particularly in developing countries, SCFAIT proposed a
set of recommendations to regulate the extractive sector, as follows.

1. The need to form a multi-stakeholder process to create new, and strengthen existing
   programs and policies. These include monitoring mechanisms dealing with irresponsible
   social and environmental activity and human rights violations by Canadian mining
   companies abroad.
2. The need for “clear legal norms” to create accountability for social and environmental
   corporate misconduct and human rights violations.
3. The need to inform, and improve the knowledge of mining companies operating in
   developing countries on Canadian and international CSR and human rights standards and
   obligations, as well as the political, social, and cultural contexts in which companies
   operate.

The Government of Canada’s Response to the SCFAIT report led to the facilitation of multi-stakeholder
consultation referred to as the National Roundtables on CSR and the Canadian Extractive Industry in Developing
Countries (commonly referred to as the Roundtables) in 2006. The outcome document of the roundtables

---

36An example is its 2014 publication – the Government Resource Revenue Sharing with Aboriginal Communities in Canada: A Jurisdictional Review.
was a multi-stakeholder advisory group report termed the Advisory Group Report. The report recommended for the Government of Canada, financial institutions, investors, insurers, and other market actors to endorse and expect all Canadian extractive sector companies to use the Global Reporting Initiative (GRI) or a similar system. Collaboration with securities regulators to make GRI reporting a prerequisite for extractive companies to list on a stock exchange was also suggested to further infuse the concept of reporting as a norm. Tax incentives and credits, or an equivalent, were also proposed to entice compliance with the reporting obligations.

The Government of Canada also released the country’s leading CSR policy guideline - Building the Canadian Advantage: A CSR Strategy for the Canadian International Extractive Sector (commonly referred to as the CSR Strategy) in March 2009.

As shown in figure 17 the CSR Strategy contained 4 main pillars: (1) enhance capacity of developing countries to manage resource development; (2) promote international CSR guidelines, including International Finance Corporation (“IFC”) Performance Standards, Voluntary Principles on Security and Human Rights and the Global Reporting Initiative (“GRI”);
(3) create the Office of the Extractive Sector CSR Counsellor; and, (4) support the development of a CSR Centre for Excellence outside of government.

Since the CSR Strategy was announced, different government departments and agencies (and other stakeholders) have undertaken actions and initiatives to implement the CSR Strategy, or which otherwise respond to the Roundtables recommendations. For instance;

- The Office of the Extractive Sector Corporate Social Responsibility Counsellor was established in Toronto in 2009 and has since developed a Review Process (which has recently received its first two Requests for Review) and undertaken initiatives to advise stakeholders on the implementation of CSR performance guidelines.

- The Government of Canada has become a participant country in the Voluntary Principles on Security and Human Rights (commonly referred to as the Voluntary Principles). Department for International Trade Canada (DFAIT) coordinates the government’s work on the Voluntary Principles, and also supports Canada’s international anti-corruption efforts. DFAIT provides support to Canada’s embassies and trade missions overseas to provide counselling services and organise events related to CSR.

- The Government of Canada has joined the Extractive Industries Transparency Initiative (EITI). Natural Resources Canada (NRCan) has a representative on the EITI, and also provides advice to host governments, industry associations, companies and multilateral agencies. NRCan in partnership with the MAC, the Prospectors and Developers Association of Canada (PDAC), the Canadian Aboriginal Minerals Association (CAMA) and Indian and Northern Affairs Canada (INAC), has developed a Mining Information Kit for Aboriginal Communities and adapted it for use in different developing countries.

- One of the Canadian International Development Agency (CIDA) has made it a priority to build capacity in host countries to manage natural resources and the environment in a sustainable and socially responsible manner. It has announced recent initiatives, including the Andean Regional Initiative for Promoting Effective Corporate Social Responsibility and a series of pilot projects for public-private partnerships for social development projects related to mining projects.

- Industry Canada is responsible for promoting the GRI reporting framework with all Canadian industries, including the extractive sector. It collaborates with the GRI to develop the next version of the reporting framework as well as sector supplement for the oil and gas industry.
- Export Development Canada (EDC) is guided by the OECD Guidelines for Multinational Enterprises and the EITI. In 2007, EDC became a signatory to the Equator Principles and applies the IFC Performance Standards and World Bank Environmental, Health and Safety Guidelines in its lending practices. It has adopted the OECD Common Approaches on Environment and has recently updated its policies on environmental and social risk management policy, disclosure, anticorruption, and human rights.

- The Royal Canadian Mounted Police (RCMP) has established international anticorruption units in Ottawa and Calgary and has launched investigations and prosecutions under Canada’s Corruption of Foreign Public Official Act. One of the prosecutions resulted in the successful prosecution of the officials of Canadian company SNC-Lavalin for bribery and corrupt activities in Libya over a 10-year period that ended in September 2011. Ben Aissa, the Company’s Vice President acknowledged in court that he bribed Saadi Gadafari, son of Libya’s late president, Muammar Gadafari, so SNC could win contracts. Ben Aissa also admitted to pocketing commissions (Cassels Brock, 2015). Calgary-based oil and gas company Griffiths Energy International was fined $10.35 million in 2013 for bribing a diplomat’s wife to secure oil rights in Chad (Susan Hutton and Paul Beaudry, 2014). Niko Resources of Calgary was fined $9.5 million in 2011 for bribing a Bangladesh cabinet minister for natural gas drilling rights (R v Niko Resources Ltd, 101 WCB (2d) 118, 2011 CarswellAlta 2521). Hydro-Kleen Group of Red Deer was fined $25,000 in 2005 for bribing a US immigration officer at the Calgary airport to get workers into the United States (R v Watts, [1995] AJ no 568 (QL) (ABQB)).

- There have also been multi-stakeholder initiatives undertaken outside of government, including the development of a Centre for Excellence in CSR in May 2009. The objective of the Centre for Excellence is to help Canadian companies doing business around the world to improve their social and environmental practice and enhance their capability to address CSR in their operations. Priority was given to mining and oil and gas sectors operating abroad. This it does through the development and dissemination, in cooperation with stakeholders, of CSR information and tools for practitioners in government and industry. Industry associations e.g. the PDAC and Canadian Miners Association have continued to develop tools and guidelines to improve their members’ CSR performance; civil society organisations have developed tools and guidance to assess potential human rights impacts and avoid conflicts associated with overseas extractive industry projects; and, there are many new programmes, courses and learning events related to CSR and the extractive industry offered by industry associations and academic institutions.

f) Statutory regulation of ethical standards and corporate behaviour

While CSR is traditionally voluntary, a number of countries have opted for a predominantly compulsory approach so that it is deliberate.

Even though CSR has traditionally been seen as a voluntary commitment and is often industry driven with little government interference, there are a number of countries, which have opted for a predominantly
compulsory approach. CSR in this case is founded on the philosophy that it is more than just welfare and philanthropy. Rather it is akin to positive and deliberate promotion of fundamental human rights e.g. right to property, dignity of labour and good livelihood, and thus ethically necessary, morally obligatory and within the sphere of compulsory regulation. Compulsory regulation is seen as having the benefits of certainty, enforceability, fair play and stakeholder empowerment. Where compulsory regulation is practiced even in the context of stakeholder and communities’ engagement, the regulations will define duties, provide for the rights of parties, and create order and predictability in procedure of engagement.

- **A case of Nigeria**

An illustration of mandatory CSR framework is in Nigeria’s extractive industry’s transparency regime under the Nigerian Extractive Industry Transparency Initiative Act, 2007 (NEITI Act). The Statute stems from the global Extractive Industries Transparency Initiative (EITI) to which Nigeria subscribed in 2004. The objective of the Act is to promote accountability, transparency and stakeholder engagement that will stimulate balanced social development. The objective of the global EITI is to promote transparency and engagement with stakeholders in oil and gas producing countries in order to reduce the high incidence of economic underperformance, conflict and poor governance in such countries. It aims to ensure the “following of due process and achievement of transparency in the payments by extraction industries to government and government linked entities and in the revenue received and reported by those governments and entities”.

The Nigerian Extractive Industry Transparency Initiative Act is premised on the logic that policy makers need authentic financial information to make the right policy decisions, and the citizens also need the same information to decide on who to entrust with the responsibility of making policies and to identify a good policy when made. The hope is that transparency in the oil industry will translate to other benefits like; informed democratic debate, accountability, economic management and forward planning, a conducive investment environment for both national and Foreign Direct Investment (FDI), and adequate collection and management of revenue.

Before NEITI, Nigeria collected and recorded oil and gas revenue by other methods that proved to be inefficient, especially in the area of transparency and accountability. The methods relied mostly on trial and error, without the requirement of publication or engagement with stakeholders. This is attributed to Nigeria's long military dictatorship where heads of state were accountable to no one. The lack of transparency and accountability is illustrated by recurring and disturbing findings from the NEITI audits of between 1999 and
2005 which showed that the agencies responsible for accounting for both physical quantity of oil produced and exported, and the revenue accrual had no reliable data.

In its compulsory nature, the Act at Section 16 creates sanctions against breach of NEITI provisions. The sanctions are against companies or their officials and government officials who give false information or report, render false statement or account, refuse or delay to render statements or account that result in loss of revenue to the federal government of Nigeria. A company found guilty of any of these offences will be liable to the equivalent of a USD 200,000 fine, recovery of the lost revenue and may lose its license to operate. Directors of guilty companies, unless otherwise proved innocent, and colluding government officials, are also liable to a fine of the equivalent of USD 30,000 and, or two years imprisonment.

Since its establishment NEITI has been able to conduct an audit that covers 13 years (from 1990 to 2004) and another general audit to cover 2007 to 2011. The 1999–2004 NEITI audit achieved such successes as reducing the initial wide discrepancies in payments (of taxes, royalties and others, such as gas flare penalties, etc.) by oil companies to the federal government to a narrow margin (0.02 per cent), reconciliation of physical flows up to terminal and accountability of all crude sales.

The 2005 audit report released in September 2009 indicated that there was a difference of 1.05 million barrels between the physical amount of oil production and the financial returns made by the Nigerian oil industry. The same 2005 audit also pitched the auditors against officials of the DPR and FIRS over a US$524 million underpayment in respect of the budgetary reference to oil prices for that year. The EITI process has begun pinpointing the major revenue leakages. Agencies and companies have come to learn through the findings of the audit that whatever was “messed up” has to be “cleaned up” through refunds or restitution. This situation presents a major impediment to corruption, especially as NEITI continues to draw attention to non-remittances. Civil Society organisations such as PWYP-Nigeria and Zero-Corruption Coalition can now use the audit findings as a basis for engaging the NEITI secretariat, demanding accountability and generally fighting corruption in the industry.

A case of Australia

In some countries, part of CSR regulations includes the duty on the proponents of extractive projects to obtain free prior informed consent (FPIC) of the local communities before commencing operations. Such regulations safeguard local interests by granting a veto power on the local communities to reject proposed projects. The regulations tend to compel companies to consult and engage local communities and thereby from the onset have the opportunity to address all the socio-economic and cultural concerns that local communities have.
This is well illustrated by the Australian Aboriginal Land Rights Act (ALRA) of 1976 (Doyle and Cariño, 2013). Following the passage of the Act, land occupied by Aborigines’ was all converted into freehold title land. Exploitation of mineral rights on such land is now subject to the veto right under section 42 of the ALRA. Under the Act, Land Councils are established which are responsible for identifying traditional owners, consulting with and informing them in relation to any proposals on their lands and communicating their permission or rejection of those proposals to the proponents. This veto right has been exercised by the traditional owners on occasion. Once consent is withheld a five-year moratorium period is initiated and as a result, there are areas on the island that are currently under moratorium. The law was amended in 2006 such that the traditional owners can bring an area out of moratorium before the five year window expires. Mining companies are not permitted to approach the traditional owners on this matter.

The procedure for engagement with the traditional owners is regulated under the ALRA, which limits the company to two opportunities to meet with the traditional owners to discuss project proposals. The remainder of the engagement is through the Anindilyakwa Land Council, which negotiates on behalf of the traditional owners, if they, in principle, give their consent to enter into these negotiations. The Land Council ensures that the appropriate representatives of the traditional owners are consulted and that they are provided with sufficient information upon which to make an informed decision.

The negotiations are required by the Act to be completed within a 22 months window, but this window can be extended by mutual agreement between the Land Councils and the applicant. The Northern Territory and Federal governments’ role in the consent seeking and negotiation process is minimal and limited to ensuring that agreements entered into are valid. To signify consent to exploration and mining, a conjunctive agreement is entered into at the exploration stage with traditional owners who provide their consent. The Land Council emphasises to traditional owners that giving consent to exploration implies that they are giving their consent to mining.

4.2.5.2 Corporate Social Investment (CSI)

a) The Case of Los Pelambres Company in Chile

Los Pelambres Company operates in the region of Coquimbo, a semi-arid zone located 300 km away from Santiago (UN, 2010). Los Pelambres is the Country’s fifth biggest copper producer and extracts six per cent (6%) of Chile’s total production. The area in which the company operates is a traditional rural area that had no experience with mining activities before. The mining products and operational materials are shipped through a shipping community and...
Communities that largely depend on the nearest river for extensive agricultural activities.

At the onset of its operations, the company adopted the approach of corporate social investment and compliance that goes beyond regulatory requirements. In 2002 it established the Minera Los Pelambres Foundation, located in Salamanca, with USD 3 million seed money. Its principal objective was the development of a social responsibility policy contributing to the sustainability of the activities implemented in the Choapa valley, with the idea that these activities will continue independently from the mining industry.

The Foundation centres its work in three areas of development: education; productivity i.e. focusing on the concepts of entrepreneurship and added value to activities in the valley; and water i.e. improving the lands for the farmers in the Choapa Valley. All the different productive sectors of the region are involved in these initiatives. When the company ends its activity in the region, the idea is that the infrastructure related to agriculture and fishing will remain installed. The Foundation develops its projects mainly in coordination with local authorities and other actors from the regional and national levels. One such project is the “One Roof for Chile” program initiated in coordination with the Chilean Housing Department and the workers of the company itself, in order to build new houses for around 700 families in the region.

In recognition of the fact that workers play an important role in the development of the region, the company’s recruitment policy requires that 60 per cent of the employees come from the region of Coquimbo itself. The company pays attention to direct contact with the community and every so often invites its workers to take part in dialogue, in order to better understand the challenges, costs and reality of work in the field.

So as to maintain collaboration contact with local authorities Los Pelambres established offices, with representation of its Environment and External Affairs departments in the city of La Serena, where the principal regional authorities are located. In anticipation and preparedness for operation related accidents and spillages, the company has put in place a fast information system regulated by authorities and communities.

The Company’s response to an August 2009 spillage illustrates its preparedness. The spillage was caused by an anomaly in the pipe transporting condensed copper from the plant at Chacay to the port of Los Vilos. Part of the material drained out towards the platform of the sector, reached a gully and finally flowed into the Choapa River. The company initiated an investigation, warned the authorities, the vigilance group of the Choapa River and the community, and started work on the clean-up. The community however remained unsatisfied with the company’s proposals for clean ups and staged protests demanding for other measures, in particular economic compensation for the
caused damage, since according to them the accident rendered the water supply useless for this part of the Coquimbo region.

The Company engaged in structured negotiations and consultations and eventually, after long discussions, the company and the community in the area reached an agreement that put an end to the protests and permitted the resumption of mining activity. Among the principal points of agreement were the creation of a Community Fund and a commitment by the company to fix potential environmental damages.

Internally, the Company further strengthened its sustainability culture with focus at environmental, social and economic perspectives. The specific objective was to develop a modern mining company that would involve interest groups and seek the active participation of all the components of the company. This translated into a lot of educational and training initiatives for the company's workers. The Company's philosophy includes the understanding that internal cultural change should occur prior to external conquest.

Reports indicate that the company's activities have had a significant impact on the region's economy provoking major changes and economic advancement. Between 1999 and 2006, it was responsible for half of the growth in the region of Coquimbo (from $255 million to $466 million). Likewise, it is directly associated with 15 per cent of the regional GDP – and indirectly to a further 3 per cent – and employs 4.8 per cent of the region's labour force.

b) The Case of Anglo Zimele initiative in South Africa

Launched in 1989 as a Small Business Initiative, Anglo Zimele is the enterprise development and empowerment effort of mining company, Anglo American in South Africa. Anglo Zimele's key objectives are to provide access to mainstream business opportunities for historically disadvantaged South Africans; create sustainable, commercially viable enterprises driven by people with passion and entrepreneurial spirit; and contribute to the sustainable development of mining communities (International Finance Corporation, 2008). Through the initiative Anglo American supports additional community development programs that generate livelihoods and provide micro-financing at the local level. However, Anglo Zimele's goal is to effect larger-scale change by strengthening a diverse and vibrant private sector in South Africa.

37 Meaning "to be independent" or "to stand on one's own feet"
Anglo Zimele’s activities have focused on three primary areas: providing business development services aimed at strengthening the capacity of local businesses; creating procurement opportunities to facilitate the inclusion of these firms in Anglo American’s value chain; and finally, supporting local participation in South Africa’s mining industry through start-up funding.

According to a study by Wise and Shtylla (2007), the Anglo Zimele initiative had by 2007 registered commendable results. It invested in some 150 enterprises through equity and loan financing. During 2006, Anglo Zimele invested in 14 new and existing enterprises in a variety of sectors including education and training, mining supplies, pallet manufacturing, drilling consumables, tire maintenance, corporate advisory services, and various engineering disciplines.

As a result of these engagements, Anglo American’s enterprise spending increased by 37 per cent from the previous year reaching 12.6 billion rand, including over 11 billion rand in direct procurement contracts with enterprises. An additional important outcome from Anglo Zimele’s business development activities is the creation of employment opportunities for South Africans hired by the new or growing enterprises in which it invests. As of 2006, these companies employed over 2,200 people. Attesting to the success of Anglo Zimele’s capacity-building efforts, firms supported by the program have had a 72 per cent survival rate over an eight-year period.

Lessons

Kenya does not have a formal CSR framework to guide business operations in general. The issues of compliance by companies are scattered in different sectors’ laws and policies. With the emergence of the EIs in the country and bearing in mind the difficulties it portends as discussed above, a comprehensive and predictable CSR framework will be necessary.

It has been shown with the example of Canada that the interplay between government, CSOs and industry, voluntary CSR action is possible and fruitful. However in all this, it ought to be appreciated that the Canadian industry approach gives more emphasis to public involvement and even where there are no formal structures the industry players have taken the lead to drive the CSR agenda. They are well aware that much as it serves to strengthen their case for good corporate citizenship, voluntary CSR measures are a deliberate measure to promote the suitability of Canadian Multi-National Corporations (MNCs) abroad. With this in mind, host countries such as Kenya ought to take the opportunity to make a bargain for compliance by incoming MNCs.

---

38 Fellows of Harvard College

LOCAL COMMUNITIES IN KENYA’S EXTRACTIVE SECTOR: From Paternalism to Partnership 141
In formulating a CSR framework for the country, it is imperative that such a framework should incorporate both mandatory guidelines for CSR compliance while at the same time providing incentives and broad guidelines for self-regulation. This is because the entire spectrum of CSR especially for a dynamic sector such as EI is too wide not to permit a one size fits all standard. Further, Kenya needs to acquaint itself and subscribe to international best practices such as Free Prior & Informed Consent principles and the EITI principles to promote participation, transparency and accountability, which are essential ingredients of CSR in the Extractive sector.

4.2.6 Management of Socio-Cultural Impact

Extractive industries are generally disruptive of traditional ways of life for local communities (UN & EU, 2012). Often the social cultural impact is secondary to the environmental and economic impacts. For instance: clearance of vegetation would lead to a disruption of cultural shrines and traditional economic activities; the mushrooming of urban settlements may lead to new socio-economic activities such as commercial sex work; and take up of local community work force may occasion family tensions and disruption of gender roles in traditional families. According to Wagner, other socio-economic and cultural impacts of extraction operations include: Indigenous people being uprooted from their traditional lands and their cultural base destroyed, changes in land-use patterns, increase in local population levels resulting from immigration due to new access routes and employment possibilities; inflation of the local economy due to new employment possibilities and income differentials; impacts on cultural heritage, practices and beliefs that affect social cohesion and cultural structures etc. This is why some countries take deliberate measures to ensure preparedness for and prevention of the negative impacts of EIs on cultural and the local communities’ way of life.

4.2.6.1 Traditional Economic Activities

Some local communities and especially indigenous people value their ancestral land and domains not only for the subsistence they provide, but often also for the spiritual, cultural and environmental values which define them. Large-scale extraction can jeopardise the very survival of indigenous people as distinct cultures that are inextricably connected to the territories they have traditionally inhabited (Anongos, et al, 2012).

Mining activities have devastating impacts on pre-existing indigenous economies. Large-scale mines deprive flora and fauna of food and natural habitat. In hunting communities, there are reports confirming game fleeing from the noise, lights and...
disruption generated by mining. Domestic animals are recorded to have suffered from poisoning by polluted water and air. Agricultural activities are frequently destroyed during mining. Some “development projects” undertaken by operating companies, which attempt to increase in agricultural output may never be sufficient nor cure the disruption of cultural values. Such projects frequently remain premised on the belief that traditional practices are backward, inferior to the upcoming extractive projects and need improvement. Such an approach enables the company to claim increased credit for introducing change, yet such changes may actually erode more sustainable indigenous food security and traditional agricultural practices.

Forced emigration of indigenous and local communities from their traditional lands can take place either because of direct removal or from loss of livelihood caused by resource extraction projects. This often leads to irreparable negative impacts on culture and social structures, even with monetary compensation.

The true potential and benefits of cultural economies are difficult to quantify using the standard tools of economics. The loss of livelihoods in hunting, agriculture, fisheries, small-scale mining and other traditional and alternative modern livelihoods frequently far exceed the benefit of paid jobs generated in mining. Such livelihood losses are rarely accurately recorded. While mining companies may report billions of taxes paid to the government, the state has seemingly failed in redistributing the benefits, especially to those directly impacted by the mines. Poverty and poor social services remain endemic, particularly in communities hosting the mines.

a) Disruption of economic activities: A case Study of the Igorots of Benguet Province in Philippines

The Cordillera region in Northern Luzon, Philippines, is home to more than 1 million indigenous peoples belonging to at least 8 distinct ethnic groups collectively known as Igorots (Cordillera Peoples Alliance, 2007). Two of these ethnic groups, the Ibaloy and the Kankanaey, are found in the province of Benguet. Land ownership among the Ibaloy and Kankanaey is traditionally recognised by prior occupation, investment of labour and permanent improvements on the land, specifically irrigation systems and retaining stonewalls of the rice fields. The community shares access rights to the forests, rivers, and creeks, and the fruits of these lands and waters are open to those who gather them.

The province of Benguet has hosted 14 gold and nickel mining companies since corporate mining started in 1903. Some of these mines have closed down while others have continued. Presently operating in Benguet are two large gold mines using high technology for large-scale mineral extraction. Although several old mines have since closed down, new mining explorations and applications are now coming into other parts of Benguet with renewed efforts by the government to invite foreign investments.
A study commissioned by the UN and carried out by the Cordillera People’s Alliance in 2007 revealed that large-scale corporate mining and dams have dislocated the indigenous Kankanaey and Ibaloy people from their ancestral lands and traditional livelihoods (Cordillera Peoples Alliance, 2007). Dams have caused the loss of ancestral lands to flooding and siltation. Descendants of families displaced by dams have been reduced to illegal occupants in the dam’s watershed areas or settlers in land owned by others. Mining patents granted by the government to mining companies have denied indigenous communities their rights to ownership and control over their ancestral lands and resources.

In terms of livelihood, the study noted that mining concessions have taken over lands used by indigenous peoples for their traditional livelihoods – rice fields, vegetable gardens, swiddens, hunting and grazing livestock. Rice fields along riverbanks have been damaged by siltation. Garden cultivators have lost their crops to surface subsidence. Traditional small-scale miners have lost their pocket mines and gold panning sites to the big mines and dams. Some communities have lost entire mountainsides, burial sites and hunting grounds to ground collapse and deep open pits. Traditional fishing is no longer possible in polluted rivers, replaced by commercial fishponds in dam reservoirs.

b) Preservation of traditional economies: A case of Clayoquot Sound in Canada
Conflict over the destruction of traditional economies can be avoided through inclusive and collaborative processes. A success story on this approach is the use of Traditional Ecological Knowledge Systems (TEKS) by a Scientific Panel for Sustainable Forest Practices in Clayoquot Sound, west coast of Vancouver Island in the Canadian province of British Columbia (Lertzman and Vredenburg, 2005).

The region is home to the Nuu-Chah-Nulth people who are a collection of various sub-communities with a shared language, political system based on hereditary chiefs, and history going back thousands of years. The natural capital of their territory enabled the Nuu-Chah-Nulth to sustain a rich, complex and stable lifestyle with an economic culture famous for traditional carvings and ocean going vessels.

It was observed by Lertzman and Vredenburg that government backed logging activities in the region between 1980 and 1994 attracted growing numbers of foreigners, limiting access of indigenous peoples to land and creating increasing displeasure among the local population. Opposition to the activities was expressed in several peaceful protests and blockades. The largest protest occurred in the summer of 1993, when over 800 protesters including local residents of the Sound; the Tla-o-qui-aht First Nation and Ahousaht First Nation bands; and environmentalist groups such as Greenpeace and Friends of Clayoquot Sound were arrested and charged in court thereby attracting worldwide media attention. Ongoing occupations, roadblocks and demonstrations against logging practices, strong reactions from forest industry workers, with voices of concern from various other private and public
sector actors in the face of growing international scrutiny, mounted political pressure.

The Government of British Columbia in 1993 launched the Scientific Panel for Sustainable Forest Practices in Clayoquot Sound (Friends of Clayoquot Sound, 1996). The 19 member panel was comprised of 15 internationally recognised scientists from a variety of fields including: biodiversity; ethno-botany; forest harvest planning; silvicultural systems; hydrology; soils; fisheries; wildlife; roads and engineering; scenic resource, recreation and tourism; and worker safety. The Nuu-Chah-Nulth Tribal Council designated four other experts including three elders and a hereditary chief as Co-chair. The Panel was charged with developing “world-class standards for sustainable forest management by combining traditional and scientific knowledge” to be consistent with international precedents found in the Convention on Biological Diversity, Agenda 21, and Guiding Principles on Forests in order to meet international forest stewardship standards.

In carrying out its mandates the Panel among other things adopted the traditional Nuu-Chah-Nulth inclusive process for discussion and sharing to reach agreement. This approach played a key role in bridging TEK and Western science as well as facilitating consensus amongst Panel scientists. Another vital step taken by the Panel was the respect given to Nuu-Chah-Nulth cultural and spiritual teachings including ‘the sacredness and respect for all things’, embodied in the traditional principle of hishukishts’awalk (everything is one). Indeed, the knowledge and cultural values of Nuu-Chah-Nulth peoples were incorporated directly into the Panel’s work and informed the foundation’s recommendations.

The Panel also recognised NuuChah-Nulth’s social institutions and drew upon them in framing their recommendations. A central component of this is the traditional land management system governed by hereditary chiefs, the institution of hahuulhi, which they recommend as a basis for co-management of local resources. The Panel also came to the profound epistemological conclusion that TEK provides for Western science an “external, independently derived reference standard”.

Whereas every previous attempt at land-use planning in Clayoquot Sound had failed, the Clayoquot Scientific Panel achieved full consensus on all its outcomes. This Panel was a precedent setting example of functional dialogue between indigenous people and Western science based culture. Its mandate to draw equally on traditional ecological knowledge of local First Nations as well as Western science is chiefly notable. The Panel was also unprecedented procedurally and in substance resulting in the formulation of an ecosystem-based approach to forestry grounded in both traditional knowledge and Western science. This approach was eventually adopted by the major industrial forestry companies operating in the area.
4.2.6.2 Gender concerns

Indigenous women often have set roles and responsibilities in the management of the subsistence economy of indigenous communities. The destruction of these livelihood options and their partial replacement by paid employment in mining most often disrupts this pattern / way of life resulting in changing family norms. EI areas often face increased incidences of gender violence, including rape and trafficking, domestic violence, marital breakdown, infidelity, and sexually transmitted diseases. Out-migration, especially of men in search for employment alters family structures thus exposing them to certain vulnerabilities(UN Permanent Forum on Indigenous Issues, May 2009).

a) A correlation between sex work and mining: A case of Kaltim Prima Coal (KPC) mine, Indonesia

A study conducted under the Australian Research Council Linkage Project in 2007 at Kaltim Prima Coal (KPC) one of the largest coalmines in Indonesia, shows a correlation between commercial sex work and mining industry (Petra Mahy, 2011). The research published in KuntalaDahiriDutGendering the Field Towards Sustainable Livelihoods for Mining Communities, (Australian National University, 2011) showed that at the mine owned by an Indonesian company - Bumi Resources, 95 per cent of workers in KPC were men. The five per cent (5%) of women workers tended to be clustered in administrative roles, although there were few women geologists, engineers and truck operators. There were consistently higher numbers of men moving to the area than women, particularly far higher numbers of single men than single women. Informants further revealed that the women moving into the area were doing so to ‘follow their husbands’. The research however also found evidence of single women migrating there by choice to live with more distant relatives, to find well-paid husbands or to find work. The researchers discovered that sex business was at its peak during the mine construction phases when mine employment was dominated by single men working on short contracts. Most of the sex workers were immigrants into the area. None of the sex workers interviewed claimed to have been born or grown up in the mining areas. Their ages ranged from teenage to above 40 years, with most of the women in their 20s and 30s. Most of the sex workers came from poor rural or urban backgrounds and had low levels of education, though a small number had completed high school. Most of them cited their economic circumstances and lack of a male breadwinning partner as reasons for their decision to enter the sex industry.

b) Gender Based Violence: A case of South Gobi, Mongolia

The vulnerability of commercial sex workers and generally unemployed women in mining areas usually precipitates Gender Based Violence. A 2013-2014 study conducted in South Gobi, Mongolia under the auspices of International Mining for Development Centre suggests that the rate of gender based violence had increased among the local communities in the mining areas since the onset of mining (Cane et al, 2012). The victims and informants reported that domestic violence, prostitution and alcohol-fuelled violence had increased and
caused personal trauma, family break-ups, health-related problems and broad community insecurity.

The data obtained indicated that the scale and type of gender based violence differed across the research sites, attributable to different types of infrastructure developments such as transport corridors, stockpiles, etc. present in the area. However, a higher level of gender based violence was also reported in communities where the mine camps were positioned in closer proximity to neighbouring towns (Cane et al, 2012). The report indicated that impacts were predominantly to the social and structural changes that accompany large-scale industrial development and economic opportunity in a community.

c) Male Centric culture of mines: A case of Lihir, Papua New Guinea (PNG) and Renco gold mine in Zimbabwe

- **Lihir, Papua New Guinea (PNG)**

It has been observed elsewhere that part of the gender problem in the extractive industry is founded on the male-centric culture and systems that are sustained by stakeholders in extraction industries. In 2012, a study of the Gender dimensions of extraction industries in Papua New Guinea was commissioned by the Minerals Council of Australia (MCA) and Australia’s Department of Foreign Affairs and Trade (DFAT) (Department for Foreign Affairs & Trade, Australia, 2012). The study carried out at an open-pit cyanide-leach mine in Lihir, operated by Newcrest Mining Ltd highlighted the inherent problem of limited representation and participation of women in mining industry. In particular in the case of Lihir PNG, women were not involved in agreements between the company and communities. Some of the key findings were that women generally felt excluded in negotiations related to the mining on their lands. This was evident in the under-representation of women in formal agreement processes and in the limited participation and involvement of women in formal political processes. Formal female representation was only apparent in one (local level government) out of the three major institutions (the company, the landowners association and the local level government) involved in the agreement process. The landowners association’s executive and management was historically the exclusive domain of men. The company has never appointed a woman to the negotiating table for the agreement.

Although the company was not seen by women as ‘preventing’ the participation of women, they were not considered to be enabling it either, as they had not set a good example to other parties that women have a place in the negotiating process. By not having an appointed woman at the negotiating table for the agreement process (both past and present), the company was perceived by the Respondents to directly and indirectly endorse the male-centric interpretation of local customs (kastom).

The study further found that women’s involvement, or lack thereof, in
community-level engagement processes affected their ability to engage in agreement processes. The company and the landowners association’s community level engagement inhibited the participation of women. Although the company held open community meetings, it did not always acknowledge or cater for the barriers women faced in speaking out at public community meetings (e.g. Kastom). The company did not take measures to actively engage women separately from men during engagement processes. As with the company, the landowners association also did not engage women separately in any way. The engagement processes showed little consideration for special processes that enabled women to freely express concerns, questions and aspirations.

- **Renco gold mine in Zimbabwe**

Similar findings were made by a study of Renco gold mine in Masvingo Province of Zimbabwe (Musvoto, 2001). Consultation is minimal especially with women in the community. The women claim that the mine consults its employees only. Critical issues that affect women such as retrenchments, threats of closure are communicated to the mine workers only, and depending on one’s relationship with her spouse, that information can be lost. All women in the survey indicated that there was no consultation with them. Access to mine management is limited according to the women. The channels are there but women feel intimidated by the presence of men right through the hierarchy. They feel their issues are not understood especially by male managers. The general feeling is that mine management does not view them as stakeholders.

d) **Women’s Participation: A Case of OkTedi Gold mine in Papua New Guinea**

Integration of women in extraction industry decisions has taken root is some instances. For example by 2007, women were fully integrated in the negotiations for revised compensation agreements at the OkTediopen-pit copper and gold mine located in the North Fly District of the Western Province Papua New Guinea (UN Women, 2011). The results are seen as a benchmark case for women’s involvement. Through their involvement, they secured an agreement giving them 10 per cent of all compensation, 50 per cent of all scholarships, cash payments into family bank accounts (to which many women are co-signatories), and mandated seats on the governing bodies implementing the agreement (including future reviews of the agreement). Further, women’s entitlements became legally enforceable rights in agreements signed by the Government and the developer. Such an arrangement was – and remains – unprecedented anywhere in the world.

e) **Welfare: A case of Renco mine, Zimbabwe**

In 2001 the African Institute of Corporate Citizenship commissioned a study of the position of Women in the mining community surrounding and working at the Renco Mine in Zimbabwe (Musvoto, 2001). So as to promote and sustain their socio-economic welfare in the mining environment, the women in the Renco Mine study area were reported to resort to a number self help options. For instance they formed a number of loose associations that they fall back on and which help them cope. Most of them are
built around church membership and also on common interests such as vending. One such association is the Renco Mine Workers’ Wives Association, which has among other things been involved in organised protests to agitate for the payment of bonuses to their husbands.

The women were also noted to have formed a number of informal cooperative societies which help the women cope with some of the economic difficulties they face. For instance women in the chicken rearing business indicated that most of their sales were on credit. This was noted to be helping the other women to have access to food and then pay later when they get their allowances from their husbands at the end of the month. Some of the women constituted and organised themselves into savings clubs where market women would contribute small amounts of money every day that they give to one person to enable that person to buy meat for the family. It is commonly referred to as “meat money”, but the beneficiary of the day can use it to purchase any other groceries.

Church based organisations were also pointed out as being effective in providing moral support and assisting in times of bereavement. These are more popular and they also have their fund raising activities though the proceeds go to the church instead of individuals. The women from the high income bracket do take part in the church based activities, but they are more inclined to belong to sports clubs than to any other form of association.

f) Establishing local and economic linkages: A case of Ahafo Linkages Program (ALP), Ghana

Economic partnerships have in some cases emerged amongst governments, support institutions and development agencies to establish social linkages in economic programs. One such example of SME linkages in the resources industry is the Ahafo Linkages Program (ALP) in Ghana (a partnership between Newmont Ghana Gold Ltd (NGGL) and the IFC (Esteves, 2011)). Ahafo is a greenfield mine that commenced operation in July 2006. Located in the Brong-Ahafo region of Ghana in West Africa, the mine was the first large scale economic activity to be undertaken in the region. Communities in the area are historically reliant on subsistence farming and small scale commercial farming. The area is known for the production of cocoa, timber and cashew.

The development of the Ahafo mine has brought profound social and economic changes to local communities, such as access to new employment and economic opportunities, impacts to existing patterns of settlement and movement and increased demands on community representatives and social institutions, such as local government and civil society organisations. In the context of poverty, local expectations over the flow of economic benefits from mine development are high. The presently low community capacity to service the needs of the mine creates tensions, which the Ahafo Linkages Program in part has been designed to address. The ALP’s goals are to maximise
procurement of goods and services from seven affected communities, diversify local economic activity and provide management and technical skills training within and beyond the supply chain. Emphasis is placed on strengthening the Ahafo Local Business Association (ALBA).

The Newmont Ghana Gold Ltd has a dedicated unit in the supply chain department to work with local suppliers. The internal unit is responsible for maintaining a database of pre-approved bidders for Newmont contracts, establishing local procurement procedures and obtaining internal ‘buy-in’ within the company for local procurement. The ALP assists in bringing pre-approved bidders up to Newmont standards.

A study by Ana Maria Esteves conducted between 2006 and 2008 and published in Gendering the Field Towards Sustainable Livelihoods for Mining Communities revealed that even though the program was still in its nascent stages, benefits associated with the supply of goods and services to the mine by both men and women were already being drawn. The number of local SME suppliers in 2008 totalled 125. Participation of female-owned companies in Ahafo's local content amounted to 17 per cent, or 21 companies. This participation level increased from four companies in 2006.

The program has also been instrumental in capacity building. By December 2008, five female-owned companies had completed training schemes under the auspices of ALP. One female-owned company (out of the 22) completed the Local Supplier Development training, which involved technical assistance to and mentoring of 18 females (representing 44 per cent of individuals). Local Economic Development training involved four female-owned companies (out of the 25) and training of 14 women (representing 56 per cent of individuals undergoing mentoring and training). By the end of 2008, ALP also participated in Institutional Capacity Building activities, which involved Training of Trainers (TOTs). Two women out of the six local consultants were hired to provide short-term training to ALBA members. In the same year, short-term training sessions were conducted for ALBA members in: financial planning (six women among 35 participants); basic costing and pricing (nine women among 29 participants); and tender management (six women among 30 participants).

4.2.6.3 EI related conflicts

In a number of the countries reviewed, there are widespread cases of EI related conflicts that have caused significant deterioration in communal social cohesion and the erosion of traditional authority structures among local communities. Community members can take opposing views regarding the perceived benefits of resource extraction, resulting in conflict that, at times, erupts into violence. Social conflict appears to be particularly prevalent when economic benefits are transferred directly to individuals, either in terms of compensation or jobs. It can also exacerbate divisions across generations or, as noted, genders.
Non-indigenous migration into indigenous territories and its related consequences can also have a negative effect on indigenous social structures. This can include the direct entry of non-indigenous workers brought in to work on specific projects, as well as the increased traffic into indigenous lands owing to the construction of roads and other infrastructure. Discovery of extractive resources may also be a catalyst for resistance to central government and agitation for autonomy.

a) EI conflicts in various places

- **A case of Aceh province, Indonesia**

Such conflict is well illustrated by the 30 years conflict in Aceh Province of Indonesia between 1976 and 2005 (UNEP, February 2015). The province of Aceh had a long tradition of resisting the Indonesian central government. This resistance began as a religious movement, but acquired a different tone once oil and natural gas deposits were discovered in 1971. Violent conflict erupted in Aceh in 1976, led by the Free Aceh Movement referred to as Gerakan Aceh Merdeka (GAM). This was a classic resource conflict, where exploitation of natural resources that did not benefit local society added to pre-existing tensions and desires for self-determination and autonomy. In particular, there were serious grievances in Aceh linked to oil and gas production over wealth sharing, environmental degradation, dislocation of indigenous families, significant inflows of migrant workers, and disruptions in their traditional livelihoods.


Nigeria also has had several enduring inter-community conflicts, which are in one way or the other precipitated or fuelled by the presence of oil resources in the Niger Delta. A comprehensive study by the United States Institute of Peace in 2004 highlighted the following as the key incidences (Watts, 2004):

- **A case of Ogoni/ Eleme /Okrika (Rivers State)**

In this case of complex and mutually re-enforcing conflicts – one between Ogoni and Okrika, and the other between Okrika and Eleme – they turned into inter-kingdom and inter-ethnic relations with respect to territorial claims over oil-bearing lands. The conflict is primarily one over land and property rights, but because the land with an issue is the site of the NNPC owned Port Harcourt Petroleum Refinery, it encompasses the Nigerian state in an important way. The growing urbanisation of Alesa-Eleme Community and Okrika main town and its satellites complicates the conflict. Youth groups and mafia-like “employment and contract” syndicates, drawing membership from mainly the
unemployed youth are openly challenging traditional authority (local chiefs etc.,) who themselves are struggling for relevance in a rapidly changing context.

- **A case of Warri (Delta State)**
  
  In this urban setting, the conflicts reflect a complicated mix of politics (local government creation and electoral ward delineation), oil revenues (Chevron) and longstanding historical animosities. Three ethnic groups - Ijaw, Itsekiri and Urhobo - have always laid claim to ownership of Warri, or sections of it, as a prerequisite for using local government as a means to acquire federal oil funds (and contracts) and access to Chevron (Human Rights Watch, 2003). Federal troops and Navy personnel stationed in the town, ostensibly to protect oil facilities, were also drawn into the conflict, leading local leaders to charge that their people are being ‘re-colonised’ by the Nigerian state. The heavy military presence has also triggered renewed calls for ‘true federalism’, ‘resource control,’ and a national conference to ‘redefine the basis of association with Nigeria’ in these communities.

- **A case of Epebu/Emadike (Bayelsa State)**
  
  Inter-community violence has resulted in the complete destruction and dispersal of the Emadike community. The conflict centres on rival claims to ownership of oil-rich land under concession to the Nigeria Agip Oil Company (NAOC), a subsidiary of ENI. The two communities were tightly-knit by family ties and historical antecedence (Okwechime, 2012).

- **A case of Ilaje (Ondo State)**
  
  The conflict between the Ilaje and Arogbo communities of Ondo State addresses customary fishing rights and oil rich land. The Ilaje have strong historical ties with the Yoruba, whereas the Arogbo are considered as one of several Ijaw clans, inspite of much cultural assimilation(Ojakorotu, 2011). This case generated important secondary conflicts such as bloody clashes between the Ijaw and the Yoruba in 1999. Subsequently, in Odi in Bayelsa State, a group of youths killed several policemen; destroying the entire community in the process.

b) Effective management of security, human rights and social issues: A case of Occidental & Ecopetrol Companies, Colombia

An exemplary approach can be illustrated by the activities of Occidental & Ecopetrol Companies in Colombia (CommDev, 2008). In 2005, Occidental, in partnership with Ecopetrol, Colombia’s national oil company signed an agreement to jointly operate an enhanced oil recovery (EOR) project in the La Cira-Infantas (La Cira) oil field in the Middle Magdalena Valley in central Colombia. La Cira is one of the oldest oil fields in Colombia. The region where the La Cira oil field is located has been impacted by years of conflict and violence. Unique factors that describe communities closest to La Cira include limited economic opportunities and lack of access to public services.

By the time the EOR project was commencing, Colombia as a country had gone through violent conflict for decades involving guerrilla and paramilitary forces. This conflict has
been characterised by widespread human rights violations and deaths (reaching 40,000 in
1990s alone). High levels of poverty and inequality, a high number of displaced people
(approximately 2 million though this figure is controversial), weak local institutions and
an illicit drug trade (accounting for 80 per cent of the world's cocaine) coupled with
violent conflict continue to affect the country's social fabric. The conflict is embedded in
complex historical legacies such as a lack of national cohesion following independence, a
divisive geography, a weak state, class divisions and competition for land. Some of these
have been further compounded by the ability of the illegal armed groups to fund their
activities through drug trade. The conflict in the region where La Cira is located is
characteristic of the type of conflict seen in previous years all over Colombia.

Given the region's historical context, Occidental in partnership with Ecopetrol identified
that the future viability of the La Cira oil field depended on the effective management of
security, human rights and social issues. In order to effectively address these issues,
Occidental and Ecopetrol partnered with two nongovernmental organisations i.e.
London-based International Alert (IA) and Colombian Fundación Ideas Para la Paz
(FIP) to conduct an innovative Social Risk Assessment (SRA) - part of the Conflict
Sensitive Business Practices (CSBP) tool developed by IA. The tool involved the use of a
careful multi-step procedure that ensured that the entire resolution process was
participatory, inclusive and balanced.

The CSBP Social Risk Assessment involved field research and consultation with a broad
range of internal and external stakeholders to do a two-way risk and impact analysis
with a specific, but not exclusive, focus on issues of security and human rights. IA and
FIP conducted an independent assessment of this process, which yielded valuable
information and recommendations regarding the key potential social, security and
economic impacts of the La Cira oil field. The following local priorities were chosen as a
result: further implementation of the Voluntary Principles on Security and Human Rights in the
region; managing land issues with neighbours; and promoting safe utility use among the local
population who had installed unsafe connections to oil field pipes.

The process yielded good results and was particularly viewed as an establishment of a
more systematic procedure for risk assessment and deeper stakeholder engagement,
which in turn fed valuable information to community investment decisions regarding
priorities and programs. Among other things it allowed Occidental and EcoPetrol to
develop better informed, more strategic and participatory community investment
programs around emerging issues.

c) Cultural and spiritual impacts

* A case of Australian Aboriginal people

Large-scale extractive projects if unchecked can lead to the destruction of places of cultural
and spiritual significance for indigenous peoples, including sacred sites and archaeological
ruins. This has been a particular issue for Australian Aboriginal people, where a lack of understanding of their indigenous spirituality, including a culture of secrecy, has resulted in the destruction and damage to important sacred sites.

• **A case of New Mexico**
In New Mexico, USA, the proposed Mt. Taylor uranium mine is planned in an area officially designated as Traditional Cultural Property (TCP) to the Navajo Nation, the Hopi, the Zuni, and the nearby Laguna and Acoma Pueblos (United Nations CERD Committee, 2014). In the Philippines, it was recorded that the Canadian company TVI Pacific had caused desecration of the Subanon’s sacred mountain, breaking the ritual requirements of the sacred ground. This sacrilege was denied by the company at the time, but subsequently acknowledged only after the damage was done (Doyle, Wicks et al, 2007).

• **A case of Dhimuru Indigenous Protected Area, Australia**
The management of such cultural sites and protection from intrusion by extraction industries calls for close and localised participation. Lessons on this can be drawn from some protected area in the Northern Territory of Australia such as the Dhimurru Indigenous Protected Area (IPA) located in northeast Arnhem Land, Australia (UNESCO, 2008). Located on Aboriginal land, Dhimurru IPA surrounds the township of Nhulunbuy, named after the sacred hill Nhulun at the base of which a mining town is built.

The local community, the Yolngu people, have the sole management responsibility and have chosen to exercise that responsibility by negotiating productive partner ships with government and non-government organisations to produce an alternative form of joint management. The Yolngu have a rich culture with a deep understanding of nature and they have only been exposed to European values since 1935.

The establishment of an aluminium mine on Yolngu land prompted the concern of Yolngu people for the well-being of their land and their visitors, and subsequently led to the establishment of the Dhimurru Land Management Corporation. The corporation’s management practices include protecting habitat (through Dhimurru’s permit system and patrols), advocating the use of TEDs (Turtle Exclusion Devices) in fisheries, and ensuring that the traditional harvest of eggs and turtles is sustainable (through a sea country management plan). Further, Specific legislation exists to assist Aboriginal people in the Northern Territory to protect and manage their sacred sites. The Aboriginal Areas Protection Authority (AAPA) is a government department responsible for registering and documenting sacred sites reported to them by traditional owners under the 1989 Northern Territory Aboriginal Sacred Sites Act. The AAPA is also responsible for the legal protection of sacred sites and assisting with prosecution in cases in which these sites are impinged upon.
Lessons

Kenya has to take deliberate measures to ensure preparedness for and prevention of the negative impacts of EIs on cultural and the local communities’ way of life. It is necessary for Kenya to find mechanisms of redistributing the benefits, especially to those directly impacted by the mines.

As with the case of Clayoquot Sound in Canada, conflict over the destruction of traditional economies can be avoided through inclusive and collaborative processes. Cultural sites (which are zoned to conserve cultural and natural values) can be used to enforce traditional responsibilities in taking care of the community land. Custodians of the sacred sites and communities at large should be assisted in safeguarding their rights and their concerns addressed through effective legal arrangements.

Evidently various gender issues will surface with increased exploration. Even though the two thirds gender rule in the Constitution applies to elective and appointive positions, a way should be found to mandate EI companies to include more women in the company portfolios. As in the case of PNG, legally enforceable rights in agreements signed by the Government and the developer to secure specific benefits for women should be considered. Such benefits could include: a percentage of compensation for every amount given to the male heads of the family should be given to women; a certain number of scholarships and training opportunities should be given to women; as well as a certain number of seats in the community governance of EIs should be reserved for women.

Mechanisms to encourage the effective participation of local communities in the EI value chain should be implemented in partnership with private players (through the Public Private Partnership [PPPs] programmes) like the case of Ahafo Linkages Program. This will build the capacity of local entrepreneurs to take advantage of available opportunities to improve their livelihoods.

Conflict resolution mechanisms such as Conflict Sensitive Business Practices (CSBP) applied in La Cira oil field, Colombia, should be applied in areas where there are already EI conflicts between the communities and mining companies. Local priorities should be identified with all relevant stakeholders and implemented to ensure that there is security, that law and order is maintained, that people’s dignity and human rights are upheld. The use of a careful multi-step procedure that ensures that the entire resolution process is participatory, inclusive and balanced is critical.
4.3 Conclusion

The human development approach to the exploitation of natural resources focuses beyond the rise or fall of national incomes from EI activities. It is about creating an environment in which people can develop their full potential and lead productive, creative lives in accordance with their needs and interests. Well-managed extraction of natural resources represents an enormous opportunity for many of the poorest countries in the world to finance the investments needed to advance human development and accelerate progress towards the achievement of Millennium Development Goals (MDGs).

Kenya in nurturing its emerging EI industry ought to be guided not just by some of the highlighted international best practices but also by the best practices and failures of other countries with older and emerging EIs. The analysis herein suffices the conclusion that a resource curse is not mythical. It is real and very likely where there is failure to instil and practice sustainable management of the extractive resources. Such management falls within the following points:

- The lead facilitation role of governments and the importance of constructive conversations between governments, the private sector and communities/land owners as well as relevant civil society organisations cannot be wished away
- Legal and policy frameworks must be used as an anchor on enforcing good practices.
- The adoption of governance mechanisms that ensure transparency and accountability are critical
- EIs should be structured so as to maximise opportunities for all stakeholders i.e. governments, the private sector and communities/land owners as well as civil society organisations. That means that the sector should realise the best possible revenues for governments, good profits for companies as well as the best human development outcomes for host EI communities.
- Government must adopt policies that ensure that the benefits from the exploitation of extractive industries are distributed equitably, including providing adequate compensation for communities most affected by resource extraction.
- All stakeholders should strive to manage and exploit extractive resources in a way that minimises or eliminates all the possible negative impacts that come with the existence of EIs.
4.4 References


Dut, K.D. (2011). Gendering the Field Towards Sustainable Livelihoods for Mining Communities. Australian National University, Australia


Facility For Oil Sector Transparency [FOSTER]. (2013). Measurement And Implementation Of Local Content In Nigeria – A Framework For Working With Stakeholders To Increase The Effectiveness Of Local Content Monitoring And Development, Nigeria.


Revenue Watch Institute. (July 2013). Enhancing the Subnational benefits of the oil, gas and mining sectors.


Stornoway Diamond Corporation. (February 2013). The Renard Diamond Project: Feasibility Study Update. Quebec, Canada


U.S. Energy Information Administration. (2013, August). Oil and Natural Gas in Sub-Saharan Africa


Internet sources


5

EI Engagement Strategies that Empower Communities

Dr. Melba K. Wasunna
‘Mining companies should pay particular attention to employing local workforces in their operations. Besides offering training opportunities, to enhance technical capacities and skills, mining companies should also foster career advancement for local staff. Skills training should not be limited to workers but should be extended to the community as a whole’....Mining minerals and sustainable development (MMSD)
Content

5.1 Introduction 166

5.1.1 Background

5.1.2 Problem Statement: Why Community Engagement Practices Fall Short

5.1.3 Purpose of the Study

5.1.4 Structure of the Research Paper

5.1.5 Significance of the Study

5.1.6 Research Methodology

5.2 Proposed Methodologies Of Community Engagement: From Consultation To Mobilisation 173

5.2.1 Strategies for Initial Community Engagement

5.2.2 Strategies for Continued Community Engagement

5.3 Conclusion and Policy Recommendations 198

5.3.1 Conclusion

5.3.2 Broad Policy and Practical Recommendations for Community Engagement

5.4 References 200
5.1 Introduction

5.1.1 Background

Since the promulgation of the Constitution on August 27, 2010, a “community social consciousness” has been awakened as a result of: the inclusion of a progressive Bill of Rights that bestows certain socio-economic rights upon each citizen; and an ambitious devolution process, which transfers certain powers, resources and functions from the central government to 47 county governments. These changes in Kenya’s political, legal and institutional framework have brought about a heightened sense of socio-cultural and political identity particularly in marginalized areas, among marginalized communities.

Local communities in Turkana (oil), Kitui (coal), Kwale (titanium and rare earths), Lamu (oil and gas), Migori (gold), Wajir (Natural Gas), Kajiado (limestone and gypsum), Garissa (oil), Taita Taveta (gemstones, iron ore and manganese) and Mandera (oil) counties, have high expectations that the exploitation of natural resources in their geographical locations will be a solution to poverty. Thus, from Turkana (oil) to Kitui (coal), Kwale (titanium and rare earths) to Lamu (oil and gas), Migori (gold) to Wajir (Natural Gas), Kajiado (limestone and gypsum) to Garissa (oil), and Taita Taveta (gemstones, iron ore and manganese) to Mandera (oil) counties, among others, local communities have high expectations that the exploitation of natural resources in their geographical locations will be a solution to poverty. Further, they feel that the natural resources will directly benefit the locals through the creation of employment, skills transfer, enhancing the capacity of health and education services, improved infrastructure, and small and medium business opportunities, among others. As shown in figure 18, with the exception of Migori and Kajiado Counties, all the other Counties mentioned above are identified as marginalized by the Commission of Revenue Allocation (CRA) in its Marginalisation Policy 2013.

41 Under Article 260 of the Constitution, marginalized communities are defined to mean:
(a) “a community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole;”
(b) “a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole;”
(c) “an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or pastoral persons and communities, whether they are—
(i) nomadic or
(ii) a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole.”
Figure 18: Map of Kenya showing the marginalized regions (in dark purple)
Source: CRA, 2013
The present relationship, however, between most extractive companies and the surrounding local communities has become increasingly volatile, sometimes descending into violence\(^43\). This is more so in areas where there has been historical marginalization and unresolved grievances. Research reveals that most conflicts surrounding local communities and extractive companies generally erupt because communities view their land as non-saleable and collectively held and therefore attach utmost importance to meaningful participation in decision-making processes that affect “their” resources\(^44\).

In recognition of the above, there is a recent proliferation of programs that supports community engagement practices, particularly from Non Governmental Organizations (NGOs)\(^45\); but nonetheless persistent challenges remain, as is depicted in this paper. Guidance from NGOs on community engagement has primarily targeted extractive industry companies (who actually have their own guidance for their projects and operations) and some of it has been directed at government, but there is little guidance about implementing the two in an integrated manner. Possibly, the models have not worked because they are not grounded in a shared understanding of what constitutes meaningful engagement within the country’s ethnically and geographically diverse communities. Therefore, any guidance on community engagement should not promote a “tick the box” approach, but rather should support the development of customized and context-specific engagement plans.

---


\(^{44}\)Ibid. See also, SHIFT Stakeholder Engagement and the Extractive Industry under the OECD Guidelines for Multinational Enterprise (Discussion Paper, 2013).

\(^{45}\)For example, in 2013–2014 the Kenya Human Rights Commission undertook a study on the human rights impact of the LAPPSET project on the local community. The report is publicly available entitled Rights Forgotten in the Scramble for Lamu: A Position Paper on the LAPPSET Project in the Case of the Aweer and the Fisher folk (2014). They intend to undertake similar studies in Kitui, Turkana and Kwale in 2015–2016. Human Rights Agenda is an NGO based in Mombasa with extensive community-engagement projects in Kilifi, TaitaTaveta and Kwale Counties focusing on “corporate accountability and environmental justice”. They have set up legal centres and have conducted advocacy with local communities and county leaders on how the extractive industry can benefit them and not become a source of conflict. Thamani Trust is a CSO based in TaitaTaveta that assists local mining communities, many of whom live in abject poverty and experience high illiteracy rates, through participatory and experimental rights-based paths to empowerment that encourage confidence and support in home-grown ideas about how to combat poverty. It also promotes and seeks to harness the spirit of entrepreneurship among small-scale miners by developing their technical, financial and marketing skills. Natural Justice is a CSO that supports communities to develop law and policies on natural resources. They work in Lamu, Isiolo, Turkana, and the LAPPSET project. They are interested in how communities can engage effectively in these processes. Kituo Cha Sheria works towards protection of land rights for vulnerable communities. They have a project in Turkana where in 2013–2014 they conducted a baseline survey on human rights issues in the areas as a result of the oil exploration. They have also established a justice centre in the area to promote access to justice when these issues arise by providing direct legal services to affected individuals. Cordaid Kenya and the Extractive Sector Observatory have started an initiative at grassroots levels (particularly in Turkana County) as a response to lack of capacity in the extractive sector among civil society and governmental institutions. They intend to come up with programs geared towards proper development of the sector and empowerment of stakeholders.
Currently, there are a wide variety of mechanisms employed by companies to share information, elicit feedback and explore issues of concern with local communities. These include consultations with chiefs or village elders, which is often perceived as representative of the local communities, holding barazas or public meetings and holding workshops, among others. However, there is often dissatisfaction about the manner in which these community consultations and engagements take place.

The frustrations revolve around the following issues.

5.1.2.1 Failure to address potential socio-environmental impacts from the outset

Extractive projects are generally known to have major impacts on the environment by degrading soils, loss of water sources, destruction of forests and shambas, and destroying biodiversity and habitat. This is taken quite seriously by local communities as negative environmental impacts tend to have a range of implications, both direct and indirect on their livelihoods and by extension violate their human rights including, inter alia, the right to life, the right to adequate food, the right to access safe drinking water and sanitation, the right to the highest attainable standard of health, the right to adequate housing etc.

5.1.2.2 Failure to adapt the community engagement strategies to the operational context

Particular challenges arise where companies do not sufficiently adapt their community engagement strategies and approaches to specific operational contexts thus failing to connect with local expectations, customs and traditions. Among the reasons that some companies and governments get this wrong are inadequate or absent socio-economic impact assessments prior to investment that result in limited understanding of political dynamics, local culture, customs and decision-making processes. Companies (as well as government) are also sometimes criticized by communities for not communicating effectively and respectfully. For instance, the use of directives by government to commence extractive activities usually leads to resistance. The use of local languages is extremely important—both as a sign of respect and to ensure that information provided can be understood by all community members. Technical information is often not summarized and illustrated in a manner that is comprehensible to the local community. The timing of stakeholder engagement activities also tends to occur without due regard or consideration to conflict with traditional or livelihood activities.
5.1.2.3 Failure to identify and engage with the ‘right’ community members

Confusion and disagreement abound among all stakeholders, including lawmakers, on who exactly constitutes “local communities” for the purpose of “community engagement”. This has resulted in some companies prioritizing consultations with only those with the most “influence” over a project such as elders, county government officials, elected political representatives, among others to speak “on behalf of the community”. A related and recurrent theme is that community engagement often does not begin early enough in the project lifecycle with the result that communities often perceive that they are only consulted as “rubber stamps” when the project is a “done deal” and agreement has been obtained with the formal or influential actors. This is problematic because it deprives communities of the opportunity for meaningful input on a project at the early stages where adjustments are possible and local or traditional knowledge can be effectively integrated into project design.

5.1.2.4 Overreliance on CSR initiatives to engage with communities

By and large, community engagement in Kenya tends to be manifest through Corporate Social Responsibility (CSR), pedalled by both government and companies as central to development. CSR ostensibly provides communities with the much needed (and often long awaited) development projects such as hospitals, schools, water wells, among others, but in reality simply advances the business case of the company. CSR is increasingly being perceived as a calculative approach by extractive companies to engage communities in an unequal corporate–community relationship. When implemented in already disadvantaged communities, CSR projects sometimes raise fears of exploitation rather than community empowerment. Moreover, most CSR projects are hastily crafted, without a community needs-assessment that informs what projects would most benefit a particular community, resulting in a variety of so-called development projects that do little to advance the socio-economic wellbeing or goals of a given community.

5.1.2.5 Lack of a strategic approach to community engagement across the project lifecycle

Some companies fail to engage with communities during the first stages of the project (see figure 5) as a result of competition among themselves to find commercially viable resources, which are often scarce. Small and medium exploration companies have more limited financial and human resources for exploration or any of the mining stages. In difficult economic times (such as the current drop in oil prices, which results in less investments in the sector), those conducting exploration may be under significant pressure to deliver results on short timelines forcing these companies to trade off early community mapping and engagement for what they consider ‘more important activities’. Moreover, increasingly, there is an attitude of caution among government officials about
not raising expectations and potential demands of local communities before it is confirmed that an exploration project will become a viable operation. Initiating an open dialogue about adverse impacts and community concerns is therefore often seen as “opening up a Pandora’s box” especially because it entails framing issues in a negative manner and/or giving credence to project opponents.

Not taking these factors into consideration from the onset of an extractive project, builds up tensions among community members. The tensions are exacerbated by historical grievances and usually tend to worsen among more marginalized groups.

Community engagement also falls short because Kenya’s large-scale extractive projects have thus far been dominated by debates about economic, political, legislative and market structures. Very little attention is often given on how to actually engage local communities. This is perhaps not surprising because in the early phases of an extractive project, the locals tend to be generally more optimistic about the promise of jobs and development projects that are expected to improve their lives. The community is therefore not as worried or as persistent in being involved in decision-making processes. However, when the project advances and goes into full-scale exploitation, resulting in adverse impacts such as inadequate compensation, forcible evictions or environmental degradation, the community becomes agitated and increasingly critical towards the project. The communities then consider themselves to have been insufficiently notified of planned exploration and/or exploitation activities, or consider that they received biased information, rendering them unable to take what they consider to be an informed view of extractive development projects. This creates tension not only between the community and the ECs but also between the communities and other citizens who may have migrated to the community to take up the economic opportunities and seem to benefit more than the local community members (perhaps due to higher levels of education). There is also frustration towards the government because of considering the mining revenue to be of greater importance than the negative impacts caused to the community by the mining activities.

These unequal power dynamics between the government, the mining companies and the community, are at the centre of relationships, practices and policies that perpetuate poverty and oppression resulting in missed opportunities for community input, support and involvement, a factor often cited as one of the main drivers of extractive industry-related social conflicts.
5.1.3 Purpose of the Study

The project paper aims to:
- increase understanding on the importance of community engagement in Kenya’s extractive industry;
- enhance community capacities to negotiate more effectively with companies and government for sustainable local benefits and be empowered to seek redress when their rights are transgressed or resources used unfairly or in violation of agreements; and
- address the remaining knowledge gaps and application of community engagement standards so that communities and other stakeholders can proactively self-organize, network to influence decisions that benefit them as well as help protect their livelihoods and cultures.

5.1.4 Structure of the Research Paper

The first section of the research paper suggests new approaches to community engagement to avoid replicating the numerous existing tools and methodologies that have been developed for and are used thus far, with minimal success by companies, governments, CSOs and other stakeholders. The second section explores ways through which benefits may be shared equitably at the community level and empower communities to negotiate for their fair share and thereafter utilize the proceeds responsibly, for the greater good of the community. The paper concludes by making broad based recommendations to NCA stakeholders on adopting a comprehensive grassroots strategy on community engagement.

5.1.5 Significance of the Study

There has been, in recent times, increased reform activity in Kenya’s law and policy relating to the country’s extractive industry. These include proposed laws that aim to make regulatory provisions for mineral prospecting, extraction and dealings as well as to among other things give effect to the Constitutional requirement for greater public participation in the management of mineral resources. This paper therefore seeks to enhance public participation of communities in the extractive sector.

5.1.6 Research Methodology

This study was conducted by way of review of secondary data and literature.
One of the key challenges for stakeholders is to develop a comprehensive strategy for community engagement across the lifecycle of a mining project, due to the long timeframes, lifecycle transitions of a mine and potential changes in government leadership or company ownership. It is important that effective community engagement strategies create a win-win situation for the proponents i.e. companies and government as well as for local communities over the life of a mining project. Such sustained engagement is critical to the successful realization of extractive projects so as to maximize local benefits and to acquire the buy-in and acceptance of local communities over the long term.

An example of a community engagement and the project lifecycle model that is in line with international best practices is proposed in figure 19.

![Community engagement in relation to the lifecycle of a mine](image)

Figure 19: Community engagement in relation to the lifecycle of a mine
5.2.1 Strategies for Initial Community Engagement

Strategies for initial community engagement are needed during the exploration stage of the mining cycle. These strategies therefore should include: comprehensive information sharing about the exploration plan including timelines and activities; discussions and negotiations about the mining sites and how this affects communities e.g. on issues of land ownership, cultural sites of importance etc.; discussions about community expectations and concerns and how to effectively manage those; as well as formal agreements regarding safeguarding the rights and well being of the community.

In engaging with communities, mining companies tend to focus disproportionately on "pitch" activities, characterized by one-way communication of information to stakeholders that is selected, presented and controlled by the company. Initial community engagements have tended to occur haphazardly with little thought on deliberative criteria or carefully crafted conditions for engagement. Mechanisms employed by companies to share information, elicit feedback and explore issues of concern with local communities, including: consultations with chiefs or village elders (perceived as representative of the local communities); holding barazas or public meetings; and holding workshops among others; tend to focus disproportionately on “pitch” activities, characterized by one-way communication of information to stakeholders that is selected, presented and controlled by the company. This top-down approach of communicating, breeds mistrust as local communities suspect the company of emphasizing the purported benefits of a project while glossing over risks of potential adverse impacts. Even where companies move to “disclose” activities, where they share some or all of the potential negative impacts that the company will be seeking to mitigate, communities may still feel they lack the opportunity to have a real dialogue about their questions or priority issues.

Because of lack of follow-up and genuine community engagement, many strategies and plans do not go beyond paper exercises. The proposals made for community engagement are based on the need to propagate novel engagement activities and mechanisms that will provide communities with meaningful and continuous opportunities for input and two-way communication with companies and government about extractive projects in their locales.

---

48 Kimani Note 22, 204.
5.2.1.1 Human Rights Impact Assessment (HRIA)\textsuperscript{49}

The HRIA concept considers all rights - civil, political, economic, social, cultural as well as environmental - as interdependent and interrelated and therefore seeks to measure the cumulative impact of extractive projects by diverse actors such as government and companies, on the human rights of individuals and by extension, local communities\textsuperscript{50}.

It is important to understand that the purpose of HRIA is to examine the various impacts of an investment project on the human rights of local communities and not to legally document human rights violations.

This concept / framework can be used for initial engagement with communities to assess to what extent an extractives project will affect the rights of a particular community. It is important to understand that the purpose of HRIA is to examine the various impacts of an investment project on the human rights of local communities and not to legally document human rights violations.

During the past few years, the HRIA has emerged as a promising instrument that identifies and measures the effect of extractive projects on the human rights of local communities. HRIA has also emerged as a strategic option of empowering groups and individuals to take leadership, envision their futures and improve their lives\textsuperscript{51}.

Much of the work on HRIAs arose from the thematic area of “business and human rights” as a result of demands from governments and communities particularly in developing countries, on multinational corporations to make concrete efforts to avoid human rights abuses while conducting extractive activities\textsuperscript{52}.

Much of the work on HRIAs arose from the thematic area of “business and human rights” as a result of demands from governments and communities particularly in developing countries, on multinational corporations\textsuperscript{53} to make concrete efforts to avoid human rights abuses while conducting extractive activities\textsuperscript{53}. The issue was propelled to the forefront of the global debate in 2008 when the United Nations Human Rights Council (UNHRC) unanimously welcomed a conceptual framework known as Protect, Respect and Remedy: A Framework for Business and Human Rights proposed by John Ruggie, the Special Representative of the UN Secretary-General on the issues of human


\textsuperscript{50}See generally, the Nordic Trust Fund and World Bank Group Human Rights Impact Assessments: A Review of the Literature, Differences and Other Forms of Assessments and Relevance for Development (Report, 2013) 1.

\textsuperscript{51}Much of the work on HRIAs arose from the thematic area of “business and human rights” as a result of demands from governments and communities particularly in developing countries, on multinational corporations to make concrete efforts to avoid human rights abuses while conducting extractive activities.

\textsuperscript{52}The issue was propelled to the forefront of the global debate in 2008 when the United Nations Human Rights Council (UNHRC) unanimously welcomed a conceptual framework known as Protect, Respect and Remedy: A Framework for Business and Human Rights proposed by John Ruggie, the Special Representative of the UN Secretary-General on the issues of human rights.

\textsuperscript{53}This should be contrasted with other forms of assessments such as environmental impact assessments, social impact assessments or environmental and social impact assessments, among others.

\textsuperscript{54}For a general discussion on the origin and development of MNCs over the last few decades, see Peter T. Muchlinski Multi-national Enterprises and the Law (Oxford University Press, 2nd Ed, 2007) 8-44. See also, Emeka Duruigo “Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges” (2008) 6 Northwestern Journal of International Human Rights 222, 229-231.

rights, transnational corporations and other business enterprises. This was followed, in 2011, by Ruggie’s Guiding Principles on Business and Human Rights, which the UNHRC also unanimously endorsed as practical steps for implementing the 2008 framework. These principles are collectively referred to as the “UN Guiding Principles”.

Under the UN Guiding Principles, mining companies have an obligation to respect human rights, which means that they “should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved”. In order for a company to discharge its responsibility to respect human rights, it should carry out due diligence processes so as “to become aware of, prevent and address adverse human rights impacts”. Central to the due diligence measures is conducting HRIA’s of a company’s potential extractive activities by determining the scope and scale of the human rights risks facing the business.

A company should conduct HRIAs as early as possible in its extractive activities. HRIAs should be ongoing, recognizing that the human rights risks may change over time as the extractive project cycle evolves.

A human rights risk is distinguished from all other forms of corporate risks in that it goes “beyond simply identifying and managing material risks to the company itself, to include risks to rights-holders”. A company should conduct HRIAs as early as possible in its extractive activities, for example at the early stages of structuring contracts, and identify any adverse human rights impacts that could occur. Thereafter, HRIAs should be on-going, recognizing that the human rights risks may change over time as the extractive project cycle evolves thus assisting the company to promote a corporate culture that is aware of and respects human rights.

b) Why conduct a HRIA in Kenya?

The Bill of Rights, entrenched in Chapter IV of the Constitution, provides a framework for social, economic, environmental and cultural policies that protect human rights and fundamental freedoms (Article 19). Article 20 of the Constitution goes on to identify the duty bearers of such rights as the State and all persons, which arguably includes juristic bodies such as companies.

Using a human rights lens to engage communities that is anchored on the Bill of Rights can have a transformative effect. First, the purpose, timing and modes of community engagement can be more effective because of the due diligence applied and consensus-building across all levels of the project cycle. Second, the HRIA tool urges a more holistic

---

55 Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework UN Doc A/HRC/17/31 (16 June 2011). According to Ruggie, while the 2008 framework and the Guiding Principles are basically two sides of the same coin, they in fact fulfill different objectives as follows: the 2008 framework provides the conceptual underpinnings whereas the Guiding Principles, as the name suggests, provide practical guidance on steps to be taken in order to foster business respect for human rights.
56 Guiding Principle 18 Note 38, 17. See also, 2008 Framework Note 35, para 56.
57 Guiding Principle 18 Note 38, 17. See also, 2008 Framework Note 35, para 56.
58 Guiding Principles Commentary Note 38, 16.
59 Guiding Principle 18 Note 38, 17.
60 Nordic Trust Fund and World Bank Group Note 33.
and inclusive approach that has a better potential to significantly uplift and empower local communities through knowledge dissemination and informed decision making capacity. Moreover, communities are nearly unanimous in wishing to see governments enforce laws that protect them fully and effectively.

c) Conducting HRIA

Guide to stakeholders on how to develop a HRIA strategy for duty bearers and other influential stakeholders

Table 2 presents a detailed guide to stakeholders on how to develop a HRIA strategy at the national or county government level. It offers initial suggestions for a participatory strategy process to be useful to planners in government, NGOs, research organisations and the private sector. Stakeholders may use this guide in their advocacy with regard to right-holders’ participation and meaningful consultations including FPIC.

Table 2: Framework for conducting HRIA among duty bearers and other influential stakeholders

<table>
<thead>
<tr>
<th>Framework to conduct HRIA among duty bearers and other influential stakeholders</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>STEP 1</strong></td>
</tr>
<tr>
<td><strong>Collect data</strong></td>
</tr>
<tr>
<td>The primary aim at this stage is to evaluate the potential impact of the extractive project on surrounding communities and identify suitable mitigation measures.</td>
</tr>
<tr>
<td>To do so, researchers must interview village &amp; religious leaders, CSOs, CBOs, employees of the company, government officials, and vulnerable groups including women and youth. Consultation can take a variety of forms, such as community meetings, one on one conversation with individual stakeholders, small group workshops, meetings with community organizations and surveys, among others. Small group meetings can provide greater opportunity for dialogue and problem solving, while large groups allow for better representation of community interests.</td>
</tr>
<tr>
<td>The assessment must include a collection and compilation of baseline data that is disaggregated by categories such as socio-economic status/level of poverty, gender, indigenous peoples, members of different ethnic groups and classes, and community based organisations to ensure the data accurately depicts the diversity of the community. A range of other methods ought to be used, including participatory mapping, conflict mapping, site assessments, and focus groups at the village level. The qualitative analysis must be supplemented by quantitative data provided through a census, as well as an in-depth review of literature.</td>
</tr>
<tr>
<td><strong>STEP 2</strong></td>
</tr>
<tr>
<td><strong>Understand the context</strong></td>
</tr>
<tr>
<td>Undertake a contextual analysis to understand the communities that may be affected by an extractive project, how they are structured, how they function, and the roles and responsibilities of women and men in these communities. An understanding of the structural and institutional aspects of social relations provides a foundation for considering how an extractive project may impact a community. An important factor to consider is the influencing roles of national and county government, the market and community institutions such as council of elders, women’s groups, youth groups, etc. This stage can also help to capture local knowledge, for example on the biodiversity of the area, thus making it possible to build communication bridges between the companies and the locals.</td>
</tr>
</tbody>
</table>
### STEP 3
**Identify issues introduced by the extractive project**
The next step is to identify the issues introduced by the extractive project and examine how they intersect with and impact on the community wellbeing including livelihood, health and education. Issues commonly introduced by extractive operations include: displacement, loss of land and livelihood; environmental impacts; the availability of formal employment to community members; women’s access to and control over resources; participation in community management and decision-making processes; and the influx of a transient male workforce from different ethnic and geographic backgrounds. The introduction of these issues to a community often causes changes in social relations and roles, community values and ways of life.

### STEP 4
**Understand the community’s needs**
The next step is to examine how the project specifically responds to the community’s needs.

A project should aim to have positive impacts at all levels, but especially as it relates to participation in and control of decision-making processes. By focusing on this, stakeholders including NGOss can avoid situations where they might otherwise fail to consult with vulnerable groups such as women and youth when seeking the free, prior and informed consent of the community or when negotiating access to land, compensation, royalties or the design of community development projects.

### STEP 5
**Make recommendations and develop an action plan**
From the information gained above, particularly community input, the stakeholder must make recommendations to avoid or minimise the negative impacts of the extractive project including how to promote gender equality and women’s empowerment.

The recommendations should result or evolve into an action plan, agreed by mining companies, government and community representatives, which is co-constructed through participatory processes. This should then be followed by an intensive training where the HRIA is introduced and tested with civil society representatives, company, and government representatives to obtain buy in. Thereafter civil society organizations continue to be integral to the process, particularly in the formulation, monitoring and evaluation of the action plans. Support from the extractive company and government officials is also critical.

In order to ensure continued attention to community issues during the lifecycle of the extractive project, a checklist can be developed to assist in ensuring that on-going decision-making and other activities incorporate a community perspective. This checklist must be considered during regular monitoring and evaluation activities and could be used by the project proponent throughout the life of the mine.

### STEP 6
**Regularly audit and review**
Following completion of the human rights impact assessment, undertake regular independent external and community based audits or reviews to monitor how the company addresses community issues and to identify any unforeseen impacts. Audits should be undertaken at regular intervals throughout the life of the mine and should include both independent external and community-based analysis.
Guide to stakeholders on how to develop a HRIA strategy for right holders i.e. local community

A community-based HRIA is aimed at self-mobilisation that gives ownership to affected communities to assess and document the potential human rights impacts that extractive projects may generate. It complements the HRIA framework in table 2 that targets empowered stakeholders with more technical and financial resources. This community-based HRIA framework (shown in table 3) guides community members to measure the actual or potential human rights impact of an investment project, and enables them to draft their own recommendations, which can serve as a basis for engagement with public and private actors involved in the investment project. The framework includes simple techniques to request for information, compile and provide feedback and bring different members of the community together.

Table 3: Framework for conducting HRIA among right holders i.e. the local community

<table>
<thead>
<tr>
<th>Framework to conduct HRIA among right holders such as local communities</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>PHASE ONE</strong></td>
</tr>
<tr>
<td><strong>Preparation</strong></td>
</tr>
<tr>
<td><em>Take a preliminary look at the extractive project and determine:</em></td>
</tr>
<tr>
<td>- In what category of minerals does the investment project belong? (E.g. energy minerals such as coal, gas, oil; metallic minerals such as gold, iron ore, copper; or non metallic minerals such as construction materials, industrial minerals or precious stones as shown in figure 3)</td>
</tr>
<tr>
<td>- Where is the extractive project located?</td>
</tr>
<tr>
<td>- If the extractive project is already operational, what impact has it already had on the community? Have you noticed any negative or positive changes?</td>
</tr>
<tr>
<td>- If the extractive project is still in the planning stages, what impact may it have in future?</td>
</tr>
<tr>
<td>- Have you heard about similar projects involving the same company?</td>
</tr>
<tr>
<td><em>Create a core steering committee selected from community members, with representatives from diverse ethnic groups where applicable, gender, age etc.</em></td>
</tr>
<tr>
<td>- Since you will be holding consultations and conducting interviews with outsiders, it is useful to have someone on your team with experience in organizing meetings and getting the community fully involved</td>
</tr>
</tbody>
</table>

### Conduct a Mapping Exercise to identify relevant stakeholders.

- Make an effort at the outset to identify and contact all stakeholders, including groups or individuals with different or opposing points of view. Even if some key stakeholders do not agree to participate in the human rights impact assessment, it is important to record their positions so that the process is all inclusive.
- This exercise will also help you understand the relationship between the stakeholders and their interests in relation to the project.

### Exploring Community issues

- It is helpful for the core steering team to have a basic understanding of human rights so that the team members can make the connection between problems raised by community members and human rights. For example, a resident may complain that locals can no longer drink the water because of pollution. The well-informed team members can then explain to the community that access to safe drinking water is a human right.
- When conducting consultations, the steering team should explain what the HRIA project is about, its purpose, and how the information you are gathering will be used. A HRIA should not be just about gathering information, but also an exchange of knowledge between participants throughout the assessment process.

### Set the Objectives

Having taken a preliminary look at the extractive project, identified the key stakeholders and talked to the community about their concerns and about human rights, at this point, the steering committee may want to think a bit more about specific issues related to the assessment. These could include:

- What outcome is being sought and how will this impact assessment help to achieve it? These could include: fostering adequate government oversight and regulation of the project; prevent negative impacts; obtain compensation for forced relocation or negative impacts; establish better communication between the company and affected communities; build capacity in local communities etc.
- What do community members want?
- How can people become more aware of their human rights and of the project’s current and potential impacts?
- How can people in the community engage effectively in bringing about positive change?
- How can the assessment process contribute to reaching these goals?
- What kind of engagement should the community have with the company and with government (e.g. collaborative, confrontational)?

### Develop a work plan and budget

- Undertaking a human rights impact assessment requires a lot of time and resources and could involve fundraising. Try not to under-estimate how much outside technical and financial support will be required to conduct the full assessment. In developing your budget, try to take into account the time that you expect will be spent by volunteers, as well as any free advice or contributions you can expect to receive.

### Contact select stakeholders

- Contact the various stakeholders to inform them that you are undertaking a human rights impact assessment including the company and government. When meeting the
stakeholders for the first time, you should explain the purpose and the process of the human rights impact assessment. It is important to understand that the purpose of this human rights impact assessment is to examine the various impacts of an investment project on the human rights of local communities. It is not to legally document human rights violations.

- The company will probably identify a contact person who will be in charge of communications with you regarding the impact assessment process. Some companies will welcome such an initiative and collaborate with you while others will resist it and work against you. This first meeting with the company may also be a good opportunity to ask for important documents that you will need later in the process. For example, you could ask for the company’s contract with the government; any environmental and social impact assessments that have been done on the project; the feasibility study; and any relevant agreements with local communities, local government, or other parties.
- When meeting with the government (county or national), you will need to explain the project and your expectations, and introduce the key people who will be contact points. This meeting should help you identify the different departments, agencies and representatives that are relevant to your impact assessment. This will allow you to add names to the map of people you may need to contact and relationships you may need to build. This meeting can also be a good opportunity to arrange interviews with various government representatives.

### PHASE TWO

#### Understanding the Legal Framework

It is important to understand the specific legal framework governing the extractive project that you are assessing including the provisions under the Constitution. This framework includes not only any relevant international, regional or national human rights laws, but also trade and investment treaties that the country has signed that may have human rights implications, as well as contracts and agreements between the mining company and the government. The steering team may need to bring in someone with the legal expertise needed to analyse the different documents you find. Thereafter,

- Determine how human rights are protected under different international, regional and national legal instruments. This step is a very important one as it provides an overview of the government’s obligations with respect to human rights.
- Find out as much as possible about the company so that you know what you are dealing with. To help you find the most relevant information, here are some key questions about the company that should be answered:

1. Is the company domestic or foreign?
2. Where does the company have its headquarters?
3. Is it a public, private or state-owned company?
4. Is the company listed on a stock exchange?
5. Who are the major shareholders?
6. If it is a state-owned company, who in government is responsible for its operations?
7. Does the company have partners in the investment?
8. Who is providing money to the company for the investment?

- Find out what commitments the company has made regarding the extractive project. When companies become involved in a project, they make commitments to the government, to lenders, other companies involved in the investment and communities. Some of these commitments are explicitly set out in contracts and agreements, while others are implicit.
- Find out what commitments government has made to the company including any incentives.
- Finally, find out if there are laws or regulations that apply specifically to this investment project (in addition to national laws that apply to all companies). Do the above laws or regulations protect the investment? Do these laws or regulations offer human rights protection to people? Are there restrictions to the application of national laws within the investment project area that might affect the human rights of those living and working there?
### PHASE THREE

<table>
<thead>
<tr>
<th>Adopt a Context-Specific Guide</th>
</tr>
</thead>
<tbody>
<tr>
<td>This is where you decide which human rights you plan to focus on during the impact assessment. You may want to have another meeting with the community before carrying out this step, in order to get a clearer idea of their concerns and the human rights at stake. It is necessary for you to develop case-specific questions. Select those rights that are included in the Bill of Human Rights under the Constitution and which are relevant to and affected by the extractive project you are assessing. For example, if you already know that evictions are not an issue in a mining area, you can safely eliminate the right to housing (forced evictions) from your investigation and the assessment guide will not generate any questions about forced evictions.</td>
</tr>
<tr>
<td>• The first set of questions is about the impact of the investment project on the community. Community members are meant to answer these questions in a participatory manner. These questions address human rights principles such as: participation and access to information; non-discrimination; gender equality and access to an effective remedy.</td>
</tr>
<tr>
<td>• The second set of questions is about the national context of the right. The questions are mainly addressed to the government, but you will need to consult other sources, such as government reports and reports from different organizations, in order to complete the information. These questions aim at understanding the existing context of the right in the country and the degree to which that right is or is not respected. This is also where you might want to identify the mechanisms that exist for people to obtain redress in case of a human rights violation. This section aims at understanding the degree to which your government respects and protects the human rights of its population. For existing projects, you can look specifically at the area where the project is taking place. This is where you will observe how the government has succeeded or failed in protecting its citizens from human rights violations. You might also want to explore the role of the government in relation to existing violations in this area and find out what the government's perception is of the company's impact on a specific human right.</td>
</tr>
<tr>
<td>• The third set of questions is about the company and its extractive project. These questions are mainly addressed to company representatives, but here again you might need to consult other sources to complete the information. The questions in this section aim at understanding the role played by the company with regard to the right in question.</td>
</tr>
</tbody>
</table>

### PHASE FOUR

<table>
<thead>
<tr>
<th>Investigating</th>
</tr>
</thead>
<tbody>
<tr>
<td>• For existing projects, consult a wide variety of community members to explain how they have been affected by the extractive project. Determine how the government is, or is not, protecting the human rights of the people living under that particular jurisdiction. Also look at what the government does when there is an impact on people's human rights, and obtain the government's perspective on the role played by the company. Then, collect information on how the company deals with human rights and how it views the impact of the project on local communities. You are interested in measuring the gap between what the law says about human rights protection and what is actually taking place with regard to human rights in your area.</td>
</tr>
<tr>
<td>• For projects in the planning phase, ask community members whether and how the investment project might affect them. Identify any existing human rights problems in the area of the proposed project such as land ownership and historical injustices. You should also collect information on how the government has responded to these problems and any court decisions. Finally, obtain information on whether the company has acknowledged the existence of any problems and what measures it has taken to learn about human rights issues in the project area and to ensure it does not negatively affect the human rights of local communities.</td>
</tr>
</tbody>
</table>
If structured appropriately, HRIAs could confront the obstacles that have prevented effective participation processes in Kenya. The obstacles include: lack of understanding of cultural norms governing a given community; superficial or uninformative consultations; rushed schedules; shortcomings in the inclusivity of the consultations (such as not including diverse groups of the population, particularly marginalized and vulnerable groups); lack of clarity about the process of consultation and its objectives; and shortcomings in a systematic approach to summarize and transmit the conclusions and recommendations of the participatory process.
5.2.1.2 Other mechanisms for initial community engagement

Other suggested mechanisms, recognized as international best practice[^63], that communities can elevate to structured programs and engage in co-planning include the following:

(i) Project advisory committees set up in order to involve communities when decisions that affect them in the course of the project cycle need to be made.

(ii) Set up information sharing and feedback mechanisms and other relationship-building activities throughout the project.

(iii) Good neighbour agreements or charters of good governance, which are co-produced, whereby commitments are constructed and agreed upon between companies and communities.

It is critical to note that the above mechanisms may be agreed upon at the beginning of the mining project but they continue throughout the life cycle of the mine. They are entry points that enable local communities and NGO’s to engage constructively with government and mining companies. They help set up a culture of mutual benefits from the mining activities for all stakeholders and enable communities become a part of the decision-making processes.

5.2.2 Strategies for Continued Community Engagement

After the initial community engagement, on-going processes for engaging with local communities are needed to:

(i) Enhance resolution of disputes;

(ii) Allow for on-going community participation in implementation;

(iii) Make key decisions about resource allocation and project direction; and

(iv) Build capacity.

Continued community engagement through a resilience paradigm is designed to strengthen communities’ ability to absorb and deal with systemic stresses associated with extractive projects as the mining project progresses. These stresses include issues such as resettlement, inadequate compensation, high unemployment and unexpected shocks such as gender violence, labour strikes, etc.

This phase of community engagement is thus pegged on a “resilience paradigm”. It is a creative approach designed to strengthen communities’ ability to absorb and deal with systemic stresses associated with extractive projects as the mining project progresses. These stresses include issues such as resettlement, inadequate compensation, high unemployment and unexpected shocks such as gender violence, labour strikes, etc.

5.2.2.1 Project-level grievance mechanism as a form of Alternative Dispute Resolution (ADR)

In order to enhance resolution of disputes, a grievance mechanism that is locally based and formalized is required. The mechanism should be in a position to, assess and resolve community complaints concerning the performance or behaviour of a mining company, its contractors, or employees. ADR serves as a way to advance mutually agreed solutions at the initial stage of the project through dialogue, prevent and address community concerns, reduce risk, and assist larger processes that create positive social change. The focus is on affected individuals/local communities and the extracting company (and where relevant, the government).

Currently, there are few community engagement-company initiatives in the country that are supported by an effective project-level grievance mechanism often resulting in communities having no way to raise their concerns and grievances, either informally or formally. Furthermore, there is currently a tendency to deal with grievances in an adversarial manner (e.g. through litigation or physical protests), with less potential for convergence on issues than through alternative dispute resolution techniques that emphasize early dialogue and amicable dispute resolution.

a) Goals of the proposed project-level grievance mechanism
The primary goal is to promote a mutually constructive relationship between extractive companies and communities. This is with a view to minimizing potential project risks and conflicts and offering local communities (most of which are indigenous or traditional) an effective avenue for expressing concerns and achieving remedies through piloting community – companies’ grievance mechanisms that are fair, trusted and effective. This will ensure that communities have constructive and accessible means to ventilate their issues and complaints.

b) Justification for ADRs
Many extractive companies in Kenya employ ad hoc or exclusively internal processes to address grievances. Unfortunately, these systems often tend to produce workable outcomes for the company but less than satisfactory outcomes from the perspective of the community. Recognizing this, and noting a lack of effective conflict resolution mechanisms, communities ought to become more proactive in their efforts to design and build more effective strategies for addressing grievances with government and mining companies.
Article 159 of the Constitution affirms alternative dispute resolution processes, such as mediation, arbitration and traditional council of elders, as legitimate mechanisms through which to settle disputes. The point of Article 159 is to provide victims with a choice to engage the offending company directly through mediation processes and arrive at mutually accepted solutions instead of the judicial system, which has a winner-takes-it-all modus operandi.

This approach is mirrored in the UN Guiding Principles, which advocate for project-level grievance mechanisms as a public participatory framework in the extractive sector. They expressly provide that a corporation must put in place “processes to enable remediation” and ensure that victims and other stakeholders have access to effective grievance mechanisms that will provide redress for “any adverse human rights impacts they cause or to which they contribute”64. This step, which is interlinked with the third pillar of the Guiding Principles - access to remedies - seeks to address adverse human rights impacts that have actually occurred despite the presence of regulatory laws or policies. The Guiding Principles suggest that these may be administered solely by an extractive company or in collaboration with other relevant stakeholders such as human rights organizations and community elders.

c) Design and implementation of ADRs

It is understandably quite challenging for stakeholders to design and implement a comprehensive grievance mechanism that suits different local contexts given factors such as different prevailing socio-economic conditions, different political structures, distinct existing dispute resolution mechanisms such as council of elders, gender disparities, etc. However, table 4 provides all-encompassing guidance to help communities and other stakeholders develop simple yet relevant and context specific project-level grievance resolution mechanisms. For ease of reference, this ADR module is broken down into four phases, each with its own set of activities.

Table 4: Practical interventions on conducting ADR at grassroots level

<table>
<thead>
<tr>
<th>Practical interventions on conducting ADR at grassroots level</th>
</tr>
</thead>
<tbody>
<tr>
<td>PHASE ONE</td>
</tr>
<tr>
<td>Define scope and determine goals</td>
</tr>
<tr>
<td>• Start with raising awareness by engaging with all stakeholders, community members through a series of meetings or events. This ensures bottom-up processes to decide local...</td>
</tr>
</tbody>
</table>

64 Guiding Principle 15 Note 38, 13–15.
mechanisms for collaborative and effective dispute resolution.

- Collect their views and develop the overarching purpose and goals for the grievance mechanism bearing in mind the contextual realities of a particular community. Introduce appropriate institutional arrangements, minimizing the need for new structures.
- It's important to make sure that design decisions flow from its purpose and are relevant to the prevailing socio-economic and cultural circumstances.

### PHASE TWO

**Design**

- Assemble a preliminary plan that outlines the purpose, goals, scope, resolution approaches, structure, and specifics about how the grievance mechanism will function. The plan should ensure that dispute resolution mechanism are properly integrated with existing local, governance and development systems so they complement efforts and add value.
- The plan should ensure a participatory process in which (i) community members are informed about the context of the engagement in advance and use the language they understand, (ii) dialogue is promoted, rather than one-way communication, with the goal of finding common ground, and (iii) stakeholders understand community objectives for engaging with the company, and design an approach to achieve mutual aims.
- This preliminary plan must then be tested and refined through consultation with the company and community members and presented to senior government officials for their support. It is important that the plan be action-oriented in that it gives community members an opportunity to share their perceptions, opinions, and knowledge, and be open to adjusting plans based on this input.

### PHASE THREE

**Implement**

- Undertake a pilot project to build confidence and seek stakeholder consensus on approaches and mechanisms most suited for the resolution of disputes.
- The company and the community here work together to introduce, refine, and institutionalize the grievance mechanism.
- This phase provides an opportunity to integrate community inputs into company decision and for the company to follow up with community members to communicate resulting actions.

### PHASE FOUR

**Monitor, report and learn.**

- Gather information on the effectiveness of the pilot grievance mechanism in particular and, more generally, on the company’s ability to prevent and address grievances. This information is used to refine the system and may be replicated in other communities with similar demographics, issues and concerns.
d) Advantages/Benefits

A locally based ADR mechanism provides a promising avenue by offering a reliable structure and set of approaches where local people and the mining company can find effective solutions together. In addition, individual grievances and emerging patterns of grievances can be analysed to identify vulnerable individuals, beyond the level of groups, and to suggest issues on which community engagement and impact mitigation efforts should be focused in a proactive manner. The reverse is often true, whereby effective community engagement can help identify and remediate grievances and contribute to greater respect for human rights. Together, effective community engagement and grievance mechanisms are mutually supporting pillars for improved respect for human rights and community welfare by companies and government.

5.2.2.2 Other mechanisms for continued community engagement

In order to allow for on-going community participation in implementation, other suggested mechanisms, recognized as international best practice, that communities can elevate to structured programs and engage in monitoring include the following:

(i) Regular surveys and polling, whereby communities are provided an opportunity to contribute to decisions regarding the extractive project, and also used to measure their perceptions of adequacy and quality of social/economic services provided by the company

(ii) Project advisory committees, where select members of the community are appointed by the community to interact with the company over decisions that affect them. This is the mechanism currently utilized, albeit poorly, in the Mui Coal Basin project.

(iii) Regular project update forums, where single or multi-stakeholder community groups gather voluntarily to discuss a previously agreed upon topic, to provide information and receive feedback, or for other relationship-building activities that are made explicit

(iv) Community suggestion boxes, where members of a community may submit anonymous complaints, suggestions or questions. The box should be placed in an easily accessible public location. It is opened publicly at pre-determined times (such as weekly) and a response is provided to each suggestion. This mechanism may however not be applicable in some of the remote communities where high populations are illiterate.

(v) Regular on-site field tours, for communities to witness first-hand the evolution of an extractive project from construction of buildings to excavation of the minerals to winding up of the project. This dispels mystery surrounding extractive projects and allows communities to feel that they are ‘part of the process’, increase their sense of ownership, and make them less susceptible to manipulation by outsiders.

---

65 SHIFT Note 9, 17
It is critical to ensure continuous monitoring by NGOs. Community groups also need to ensure continuous and effective participation of locals during the extraction of resources.

5.2.2.3 Proposed strategies to implement and harmonise ‘community benefit sharing mechanisms’

In order to make key decisions about resource allocation and by extension project direction, harnessing the fiscal opportunities that come with EIs at the community level and entrenching the constitutional principle of equitable benefit sharing provided under Article 69(1)(a) of the Constitution is critical. The term equity represents a fundamental belief that: there are basic needs that should be fulfilled; that burdens and rewards should not spread too divergently across the country; and that policy should be directed with impartiality, fairness and justice towards these ends.

The term ‘benefit sharing’ has many different meanings, which hampers efforts to identify the main issues and recommend an optimum approach. In particular, it is not always clear what types of benefits stemming from the extractive sector need to be shared, how ‘legitimate’ beneficiaries should be identified, or how benefit-sharing systems can be managed at the various levels of government (i.e. national, county or local). Globally, however, there are two types of benefit sharing approaches employed in the industry.

● Monetary benefit sharing
  This entails sharing part of the monetary flows generated by the mining operation with the affected communities, through revenue sharing, preferential rates, property taxes, equity sharing, development fundsetc.

● Non-monetary benefit sharing
  This entails integrating project benefits into local development strategies, livelihood restoration and enhancement and community development.

Why benefit sharing?
(i) To promote positive attitudes particularly among locals towards the exploration and management of natural resources.
(ii) To provide an egalitarian regime for benefit and impacts/costs sharing.
(iii) To preserve natural resources for the benefit of the current and future generations.
(iv) To reduce pressure on natural resources by providing employment or business opportunities for communities by using natural resources more efficiently.
(v) To build the capacities of relevant stakeholders to effectively distribute benefits in a manner that supports sustainable development of the resources thus averting violent conflicts and insecurity.

67 Nyamwaya Note 1, 26.
The global experience with revenue sharing and resource management varies widely, as do the degrees of success in converting resource wealth into permanent wealth. As shown in Chapter 4 of this book, a brief comparative analysis of other countries on various international schemes provides a model for Kenya’s extractive projects.

a) Proposed benefit sharing strategies for Kenya
As shown in chapter 4 of this book, there is no single approach to benefit sharing. Approaches depend on the country’s legal framework, international and regional precedents, and other factors such as literacy and whether functional dependable NGOs exist to assist communities to grow awareness of available opportunities. In the case of Kenya, once the Bills that discuss revenue sharing become law (see Chapter 3 of this book for more details), most of the benefits sharing mechanisms will likely be prescribed and regulated by statute and may include (a) allocating a percentage of revenues to fund defined priority sectors of the national, county and local economy or (b) having an oversight committee (with membership from the public service and civil society) to manage and monitor revenues paid into the fund among others.

Community benefit sharing mechanisms primarily aim to elevate the degree of local participation in benefit-sharing mechanisms. Therefore, rather than treat poor and marginalized people as the target of poverty reduction efforts, benefit sharing mechanisms should embrace an approach that gives control over planning decisions and investment of resources to community groups and local governments. The latter operates on principles of empowerment, community ownership, participatory governance, and enhanced local capacity. Moreover, engaging community members in creating and operating mechanisms for managing revenues from the extractive sector can increase transparency in the operation of an extractive project and enhance their confidence in the sustainable investment of financial resources. As illustrated generally in section 4.2.3 of this book, community benefit sharing mechanisms can be in many forms. Some suggestions include:

b) Strengthening Corporate Social Investments (CSI)
CSI refers to voluntary actions or contributions by companies that are beyond the scope of their normal business operations and intended to benefit local communities in their area of operation such as local community facility improvements, environmental improvements, tourist attraction facilities, school and educational support, building hospitals, roads, agreement on preferential employment of local labour and on contracting of services from indigenous local companies etc. These initiatives are driven in part by a need to obtain ‘social license’ and an awareness of their responsibility to improve the area of their extractive operations.

CSI is very different from CSR. CSI is a more transformational engagement strategy, which moves beyond symbolic activities and is characterized by joint learning, decision-making, and management. CSR on the other hand employs a transitional engagement strategy where companies perceive their resources within community partnerships as one-off transactional donations.

CSI is very different from Corporate Social Responsibility (CSR), which is applied by most companies in local communities. CSI is a more transformational engagement strategy, which moves beyond symbolic activities and is characterized by joint learning, decision-making, and management. It also calls for more responsible local government action. CSI is distinctive because it allows companies to achieve critical outcomes that are unattainable without the engagement of the community and local government while at the same time allows the community to take a supported leadership role in framing problems and managing solutions. Thus, control over the engagement process is shared while the learning process and benefits accrued jointly emerge to both parties through the engagement process. CSR on the other hand employs a transitional engagement strategy in the sense that companies initiate dialogue with communities on collaborative projects that benefit the community, but do not quite reach a shared sense making and problem framing of the issues. With CSR, companies perceive their resources within community partnerships as either one-off transactional donations or that they will be shared within the collaboration, but control of the resources remains with the companies rather than being fully shared with the community.

On a practical level, stakeholders may strengthen and implement CSI through the following:

- Adoption of a multi-stakeholder approach, in line with the Africa Mining Vision, to develop CSI charters that have a better potential to significantly uplift and empower local communities. In particular, a multistakeholder steering committee would allow members of local communities, through representatives, to contribute to plans for company activities potentially relating to business and to local development. This is the mechanism currently utilized by Base Titanium in Kwale for community engagement, and may be extrapolated to benefit sharing mechanisms.
- Stakeholders could take a lead role in the process of training and empowering communities, to engage directly with mining companies. Special arrangement to increase the capacity of local communities to negotiate and initiate engagement with companies in order to significantly promote development of the communities is critical.
- Developing and lobbying for a national CSI strategy that directs companies and local government officials to comply with the following parameters to help ensure the success of future efforts:
  - Information — telling local communities what is planned
  - Consultation — offering some options and listening to feedback elicited from varied members or groups of the community
  - Joint decision-making — encouraging additional options and ideas, and providing

---

69 Ibid.
70 Msweli et al. Note 4, 356.
opportunities for joint decision making

• Joint action — forming a partnership to carry out the joint decisions taking into account different interests

• Supporting independent community interests — offer funds, advice or other support to local groups or organisations to develop their own agendas within the guidelines.

This proposed CSI strategy must build on local experiences and international best practices. The strategy must take into account local expectations and ensure that extractive companies promote Kenyan values as encapsulated in the Constitution, operate with the highest ethical standards, build networks and local partnerships with communities, promote skills transfer to local populations, and participate in project-level dispute resolution processes.

It is important to emphasize that CSI necessitates collaboration between interested parties and local communities in an effort to balance the ongoing need for innovation and experimentation. Real, systemic progress will not happen unless governments get involved more vitally. Moreover, this kind of participatory approach to community development requires an investment of company time and resources to be successful. For companies accustomed to traditional CSR activities such as local infrastructure or philanthropy, the required time commitment may feel burdensome. Ultimately, however, stakeholders must be firm in their resolve to negotiate with companies to involve communities in the planning, implementing, and evaluation phases of projects as this is more likely to result in development projects being perceived by locals to be appropriate, effective, and sustainable.

More examples of CSR and CSI initiatives are highlighted in section 4.2.5 of this report.

c) Equity participation arrangements

It is increasingly becoming common for a local community to take a (minority)shareholder interest in an extractive project. This is accomplished through a company offering ownership shares in a project to local community members, either through their own investment or through a profit sharing or part-ownership scheme. Sometimes, interest is paid for either up front or from dividends when declared. In other instances, no direct payment is made and the allocation is simply part of the overall division of benefits.

In Kenya, it will be necessary to assess individual mining projects and concretely determine whether equity participation in a given community is merely a piece of
symbolism or yields meaningful benefits. In particular such participation ought to be compared with other fiscal instruments such as royalties. The Royal Bafokeng Nation in South Africa provides an example of a community, which appears to have done exceedingly well with its equity participation in mining operations conducted on its land.

d) Community Trust Fund (CTF)
A CTF is a vehicle that can be used as a mechanism for the distribution of social and economic benefits and payments from companies and governments to communities. There are several ways it may be formed:

(i) a mining company could establish a separate legal entity (foundation or trust) to carry out the community investment or compensation programme;

(ii) a mining company could engage a partner, such as a local or international NGO, to work with local communities in designing and implementing projects; or

(iii) a company could work directly with communities to design and implement projects using its own staff. Government may also find that investing a portion of the taxation and royalties received from mining into a CTF can help to balance an annual budget and allow the government to plan for longer-term projects.

Establishment of a CTF can facilitate co-financing and act as a strong development commitment to beneficiary communities. Use of a CTF can provide opportunities for representative governance structures, which may not be possible under different conditions. They also provide opportunities to develop sustainable community development programmes from the mining sector. When they are applied with a clear vision and clarity of purpose, with transparency and accountability, and are managed by highly skilled staff, they can become the success story of a mining operation. In turn, a CTF provides services to the community and its donors, makes grants, and undertakes community leadership and partnership activities to address a wide variety of needs in its geographic area.

e) Direct distribution of benefits to community members
In this model, the government pays cash benefits directly to community members. This direct distribution of windfall revenues to the local population is increasingly being proposed as another way of ensuring communities benefit from their natural resources.
corruption, foster democratic governance, and even address the problem of weak institutions. The premise underlying this way of benefiting communities is that if the population receives the benefits of its natural resource wealth directly rather than through public works projects or state subsidies, it will make better investment choices that benefit the family unit and have a greater incentive to save these windfall rents than government officials. Some argue that direct distribution will also force the public to engage politically and demand oversight and accountability institutions to monitor the flow of petroleum revenue. A form of direct distribution that warrants further review is the Alaska model in which the interest from the oil fund is directly distributed to each citizen.

Yet, direct distribution schemes are not without their problems. There is no reason to believe that it will not induce the same spending effects on an individual—particularly one living below the poverty line. There is also the danger that transferring windfalls to individuals will reduce incentives for citizens to engage in entrepreneurship, which will further stifle the growth of small and medium private enterprises in developing countries.

f) Fiscal benefit arrangements for women and youth

Agreements between the government, companies, and impacted communities commonly include significant benefit streams for communities, such as a share of royalties or an equity stake in the mine. However, significant gender inequality, both locally and at the national level, means that women’s voices are rarely represented when these agreements are being negotiated. As a result, women’s agency over revenues from extractive projects—that is, their ability to make choices and transform those choices into actions and outcomes (or more simply, the ability to define goals and act on them)—is weak.

Empowering women to exercise agency and control over natural resources and the revenues that flow from them is thus a key focus that is protected under Articles 21 and 27 of the Constitution. Section 4.2.6.2 of this report (Women’s Participation: A case of Ok Tedi Gold Mine in Papua New Guinea) highlights the case of Papua New Guinea (“PNG”), where gender inequality is pervasive but a recent novel initiative known as “We want what Oki Tedi Women Want” has had substantial success.

The initiative emerged from the Ok Tedi mine, located in the northern corner of PNG’s Western province and is the single largest contributor to the national PNG economy. Revised compensation agreements concluded in 2007 at the Ok Tedi mine, called Community Mine Continuation Agreements, are an encouraging innovation whereby women have a seat at the negotiating table and to date have secured an agreement giving them 10 per cent of all compensation, 50 per cent of all scholarships, cash payments into family bank accounts (to which many women are co-signatories), and mandated seats on the governing bodies implementing the agreement (including future reviews of the

74 Nyamwaya Note 1, 31.
agreement). What is more, women’s entitlements became legally enforceable rights in agreements signed by the state and the developer. Women and youth report that this initiative has greatly increased their chances of seeing the money and controlling how it is spent. Kenya, under the direction of NGOs, CBOs, FBOs and women’s organizations among others can facilitate a similar initiative.

g) Investment in economic diversification programs

One major challenge facing countries endowed with non-renewable natural resources is economic diversification to avoid creation of oil, gas or mineral-dependent communities, which degenerate into ghost towns after exhaustion. The Africa Mining Vision states that particular care needs to be taken to train local communities in managing revenues and to strengthen their capacity to invest in non-mining economic activities and enabling infrastructure. The community diversification development approach must emphasize self-help, a democratic process, and local leadership in community revitalization. It involves the direct participation of the communities and reflects a grassroots or bottom-up approach to problem solving.

While most projects in Kenya are still in the exploration stage, the diversification of the local economy must remain a priority, as it is vital to the long-term economic health of the region and the self-sufficiency of the communities living around extractive projects. NCA should develop a campaign around economic diversification tasking its stakeholders to make concerted efforts and lobby for the improvement of the local skill base and creating sustainable employment opportunities. First however, stakeholders must conduct listening projects with local residents to better understand their ideas for sustainable, locally based economic options, which may include:

- identifying local supply-chain options for mining companies in the region, with the aim of stimulating investment and job creation;
- commencing commercial agricultural projects;
- harnessing existing or expanding tourism opportunities;
- promoting intellectual property of local communities by making an inventory of indigenous knowledge on biological diversity and specific ecologically-sensitive conservation measures, including critical ecosystems such as artic landscapes, tropical rainforests, and coral reefs;
- exploring sustainable forest products such as herbal medicines;
- exploring sustainable marine products such as fish ponds; and
- investing in alternative energy such as wind power

Financing community diversification programs can be achieved in a number of different

---

75 AMV Report Note 11, 23.
76 Maweli et al Note 4, 357.
ways that ensure the availability of resources for development of individual projects and
over the long term. These can include: endowing a CTF to finance women’s groups or
youth groups for development or commercial projects in areas such as agriculture, fisheries
etc.; self-financing projects such as microcredit for small business development; and
co-financing with government, partners, and community members organizations, and
pooling resources with peer organisations in the same region to finance large scale
non-extractive development projects that would provide jobs or harness resources of the
community.

• *Important benefit sharing considerations*

Within the Kenyan context, there are many myths and pre-conceived ideas among local
communities, government and mining companies alike, about what benefit sharing is,
which need to be addressed in order to reach a shared understanding.

For this, views and expectations of communities need to be identified and informed
dialogue facilitated to achieve a “sufficiently” common understanding ranging from
county to county. NGOS, FBOs and CBOs should help its stakeholders with these initial
awareness raising steps. In parallel, stakeholders can take steps within their own locales to
raise community awareness, and thereby to better inform policy-making at the county, if
not national, level.

Practical suggestions are posed to stakeholders in table 5
Table 5: Benefit sharing considerations for communities

<table>
<thead>
<tr>
<th>Suggestions</th>
</tr>
</thead>
</table>
| **1. Work to put in place transparent management structures for the resources.**
| The attention of national policy makers has traditionally focused on the fairness of the allocation of benefits between mining investors and the host country as a whole. However, increasing attention is now being paid to the benefits derived by the communities where mining operations take place to ensure that local and national-level concerns and interests are balanced. A recent concern for policy makers in Kenya relating to arrangements for allocating portions of revenues to local communities is the management of the monies allocated. The most important issue to address concerning the revenues that go back to the communities (as indeed for revenues retained by central government) is how to utilize and manage the monies in a transparent and accountable manner. The mechanisms suggested in the Benefit Sharing Bill 2014 are a good starting point. |
| **2. Contextualise**
| For certain mechanisms, actual procedures transferring money such as to a fund can be relatively straightforward. What may take more time to clarify and agree upon are the most appropriate arrangements and institutional responsibilities to deliver benefits. This will be a new task for both national and county governments, in the sense of how benefit-sharing measures ultimately relate to advancing inclusive forms of rural and regional development. The ultimate benefit-sharing mechanism may vary from community to community based on their needs and preferences. Once again, consider the proposed mechanisms suggested in the Benefit Sharing Bill 2014 in this regard and build from there to adapt according to local contextual realities. |
| **3. Start with a project pilot in a select local area**
| Start with a project pilot in a select local area, where extractive activities have recently commenced or are poised to commence. Conduct a field trial and evaluate specific provisions in draft laws and regulations, especially mechanisms for delivery of benefits. Identify, understand and reconcile competing views about the best approaches to introduce benefit sharing in a particular geographical location recognizing there are always different points of emphasis and viewpoints not only among local communities but also among officials at different levels of government. |
| **4. Prepare capacity building tools and training materials** to be shared, in a timely way, to support local implementation of benefit sharing mechanisms on extractive projects (as the Constitution and legislation may require). |
This paper primarily gives strategies for effective community engagement with extractive projects. The strategies are given in order to:

(a) provide a framework for identifying solutions to core community engagement challenges for companies, governments (both national and county governments) and stakeholders that seek to empower communities;

(b) serve as a capacity building resource for local communities so that their ability to participate effectively, provide more meaningful input into project design and implementation, as well as ensure that mining projects result in mutual benefits for all is enhanced.

There is evidence that a correlation exists between a company’s community relations and a community’s development efforts. Positive community relations are the foundation of successful community development projects and may help to shape project design and foster constructive partnerships with stakeholders. Likewise, effective community development projects may provide a springboard for building and maintaining positive community relations. There is, therefore, an immediate need to prioritize consultation, collaboration and agreement as important modes of community engagement and benefit sharing.

5.3.2 Broad Policy and Practical Recommendations for Community Engagement

The following guidance is provided to NCA and its stakeholders with a view to informing future policy and practices in Kenya on community engagement in the extractive sector (see table 6)

Table 6: Broad policy and practical recommendations for stakeholders wishing to empower communities

<table>
<thead>
<tr>
<th>Recommendation</th>
<th>Content</th>
</tr>
</thead>
</table>
| 1. Make a plan | Develop a strategic community engagement plan as soon as possible that:
| | • takes a long-term view;
| | • spans the projected life cycle of the extractive projects;
| | • is collaborative;
| | • builds the absorptive capacity and resilience of local community
| | Particular attention should be given to the question of targeting in order to reach particular categories of poor people within mining communities who are typically excluded from government and company initiatives in the area and to be sensitive to key aspects of social differentiation such as gender and age.
| | The strategy should be based on the following foundational principles under the Constitution: |
2. **Play the long game**  
Recognize that laying the foundation for building resilient communities is a process that can take nine months to 50 years, depending on the circumstances. The initial community engagement is just the first step in a long process that will be designed and re-designed many times over.

For community members, it is important to believe that you are listening to them and involving them in meaningful dialogue and decision-making. As discussed above, involving affected locals in the design and selection of engagement/participation activities and benefit-sharing mechanisms is an important factor for success.

Also, given the need to focus on impacts and vulnerability, it is necessary to have multiple modes of engagement that can be used, evaluated and revised at different points in the project lifecycle. Far too often, company or government engagement plans are designed for the minimum requirements for initial permitting or formal impact review processes. If longer-term community engagement plans are required, they sometimes are not implemented, evaluated and updated in a systematic manner once the project has been permitted. As a result, community engagement may be seen as a one-time event that serves a specific business purpose (i.e. obtaining a permit) rather than an on-going process that supports a relationship with local communities.

Stakeholders must be vigilant not to fall into this trap. As a project progresses beyond the initial stages, recognize that companies may not have mechanisms that allow “new” affected stakeholders to identify themselves and raise concerns about adverse impacts they are experiencing. This may result from becoming habituated to engaging with a limited set of stakeholders that were identified at an earlier stage of the project. It also may reflect a lack of open communication channels and responsive grievance mechanisms at the project level. This sort of “closed circle” of engagement may lead to important blind spots with respect to a company’s risks and impacts, which stakeholders can help to fill given their extensive grassroots networks.

3. **Initiate and finance research**  
Focus should be given on how to address human rights issues more fully, including developing appropriate guidelines or codes of conduct. Guidance might primarily take the form of practical documents and tools such as: resettlement & compensation manuals; corporate social investment manuals; EI conflict and security manuals; human rights due diligence manuals; corruption and transparency manuals; benefit sharing manuals; access to justice and ADR manuals etc.

Subsequent tools could focus on specific challenges and ways to address them including tools for tracking, analysis and follow-up of information gathered and indicators for measuring performance and progress. These could be presented across a typical project lifecycle that links to different documents and tools at the relevant points in time.

A key consideration for potential guidance is to ensure that practitioners use it. Therefore, it is important for the guidance to be widely available through an easy-to-navigate electronic format, but also to be in a format that can be referenced as a tool in the field. This should go hand in hand with the development of community user-friendly materials to help them assimilate complex terms and be the key participants in negotiations with governments and companies.
4. Build on trust. Finally, ensure that you foster trusting relationships with the community - and with other stakeholders such as government and companies - that facilitate honest discussions of successes and failures as the building blocks for better planned investments that will yield lasting, mutually beneficial impact.

Frequent interaction with a number of partners at national, county and local level leads to the development of trust based on personal relationships and mutual understanding.

5.4 References


Aboriginal Lands Rights (Northern Territory) Act 1976, Pt. IV; Aboriginal Lands Rights Act 1983 (NSW), sec. 45(5); Aboriginal Land Act 1991 (Old), sec. 42; and Torres Strait Islander Land Act 1991 (Old), sec. 80; Mineral Resources Act 1989 (Old), sec. 54; Mineral Resources Development Act 1995 (Tas), Pt. 7, and; Aboriginal Land (Jervis Bay Territory) Act 1986 (Cth), sec. 43, 52A(1), (2)


African Commission on Human and Peoples’ Rights 224: Resolution on a Human Rights-Based Approach to Natural Resources Governance (May 2012)


Benefits Sharing on Extractive Natural Resources with Society in Kenya. (2013). Research for and on Behalf of Friedrich Ebert Stiftung, Nairobi, Kenya: Christabel Nyamwaya


Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya Adopted at the 46th Ordinary Session held from 11–25 November 2009 (Banjul), The Gambia, and endorsed by the Heads of State and Government of the African Union February 2010


International Finance Corporation, Performance Standards 1 & 7 (as revised in 2012)


Menzies, M., & Harley, G. (2012). We Want What the Ok Tedi Women Have. Guidance from Papua New Guinea on Women’s Engagement in Mining Deals. Briefing Note J4P.


The International Association for Public Participation. IAP2: Good Public Participation Results in Better Decisions. Retrieved from http://www.iap2.org/


United Nations Declaration on the Rights of Indigenous Peoples 61/295

Universal Declaration of Human Rights 1948


