BENEFITS SHARING ON EXTRACTIVE NATURAL RESOURCES WITH SOCIETY IN KENYA

Kenya Human Rights Commission

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Executive summary

The study aimed at reviewing the status of equitable revenue benefit sharing with society in Kenya. It restricts itself to natural resources of an extractive nature. In the recent past various mineral deposits have been discovered in Kenya which can significantly contribute to the GDP. This includes Tiomin in Kwale, Oil in Turkana, Coal in Mui Basin among others which are expected to contribute up to 15% to the GDP .It is important that equitable benefit sharing of natural resources are promoted. This is however not possible without understanding what these benefits are and how they can be shared out among stakeholders. The situation is worse with respect to local communities who for a long time have been marginalized and have no say with respect to the benefits derived from these resources. It's against this background that Kenya Human Rights Commission, commissioned this research to be used as tool of educating and informing the government, civil society local communities living in mining areas and other stakeholders.

The primary motivation for this report is to provide practical suggestions on how local communities, counties and central governments can fairly and equally share revenue from extractive natural resources. This is in view that extractive resources such as oil, coal, gold among others are associated with a myriad of local adverse effects that range from negative environmental effects, loss of livelihoods, tourism opportunities among others which need to be offset. The specific objectives of the study were to: (i) define the concept of revenue sharing with society, (ii) review existing institutional, policy and legal frameworks that have implications on mining in Kenya. (iii) Defines and documents the external costs associated with mining which more often than affect the communities living near this resources (iv) Document the experiences and status of resource benefit sharing; (v) present the challenges, key measures and approaches to establishing a successful revenue sharing scheme for Kenya.

The report is divided into six chapters including an introduction which explains the motivation of the study and points out the key features of the mining sector in Kenya. Chapter two examines the legal framework governing mineral resources in Kenya. It looks into the current framework and the proposed Mining Bill and policy. The chapter highlights the contentious issues in the industry such as, ownership and access rights, acquisition of land, involuntary displacements and benefit sharing. The chapter critically analyses the Draft Mining Bill and Policy, bringing out some innovative provisions intended to enhance equitable benefit sharing and sustainability in the sector Furthermore the chapter looks into Petroleum Act and the proposed amendments on the Act. It also looks at other legislations related to mining such as the Environmental Management and Coordination Act, The County Government Act and and how they are in synchrony with the proposed mining bill and policy.

Chapter three looks into External costs of mining. While minerals are found in land belonging to communities, more often than not the communities bare the blunt of environmental and social impacts of mining while the mining companies and the central government reap the benefits. The chapter analyses the potential key environmental and human rights abuses associated with mining. Chapter four analyses benefit sharing mechanisms and models drawing comparative studies from other countries and their effectiveness. It analyses the current forms of benefit

sharing in Kenya. It Present the challenges, key measures and appropriate mechanisms to ensure fair and equitable revenue benefit sharing in Kenya. Chapter five examines what needs to happen if investment in mining is going to produce real benefits for the people of Kenya.

CHAPTER ONE

1.0 Introduction

Natural resources (such as oil, natural gas, coal, diamonds, minerals, forests and water) are often a major source of national income, and are also a major cause of conflict and instability if mismanaged or shared unfairly. Countries with weak institutions often struggle to handle the potentially destructive force of corruption and attempts by various actors to capture the wealth generated by natural resources. The governance of natural resources is especially important in the context of divided societies because control over the benefits from local natural resources is often a chief motivator of ethnic or identity-based conflicts.

Despite this, natural resources have not always been perceived as important enough to require extensive treatment in constitutions or peace agreements. In many countries where natural resources do not constitute a significant sector of the economy, it is not unusual for natural resources to fall under general provisions dealing with the treatment of revenue and fiscal and financial issues. Similarly, many constitutions make only passing reference to natural-resource arrangements. In more recent constitutions and legal agreements it is, however, more common to deal with natural resources separately from other elements of the wealth-sharing framework. There are a number of reasons for this: In some developing countries, natural resources are the only or predominant source of wealth. As a result, these resources are very often seen as a national heritage to be shared equitably. However, they often generate strong feelings of local community ownership over their development and the resulting revenues. The challenge is to balance these local interests against the overall importance of natural resources to national development. It therefore becomes important to develop conceptual clarity on the categories of issues that can arise in the governance of natural-resource management. Arrangements to govern natural resources can be categorized into three broad areas, as follows.

Ownership of natural resources The system governing the property ownership of natural resources is often an emotional issue that requires a balancing of the claims of private ownership, communal and customary rights, and state ownership. The resolution of ownership is often the most contested aspect of negotiations on natural resources.

Allocation of the power to manage and develop natural resources: It's important to decide what bodies at the national and provincial levels of government should have the authority to make and administer laws relating to the development and exploitation of natural resources. This amounts to the power to control, regulate and manage natural resources and is potentially more significant than ownership rights in themselves. This allocation can have profound effects on the development of the sector and even on the overall structure of the state when natural resources are a major source of public income.

Treatment of natural-resource revenues: The transparent and fair generation, collection and sharing of natural-resource revenues can be a determining factor of the viability and economic development of a given resource. The handling of resource revenues may follow directly from the allocation of management and control over these resources, or it can be undertaken quite differently. The latter is possible because the objectives that motivate how a government distributes responsibility for the management of natural resources can be substantially different from the often political goals that underpin how the revenue from those resources should be shared.

The mining industry has a number of characteristics that draw it into economic and social development at the local, regional, and sometimes national levels: Because mining operations are often conducted in environments where government institutions may be absent, weak, or lacking incapacity, there may be gaps in essential public services.

- 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.
- The enclave nature of the mining industry can limit the trickle down of benefits unless specific social investment programs are undertaken.

It's against this background that mining companies and governments must often take action to share benefits at the local level.

Sharing Benefits at the Local Level

There are various ways that mining projects can contribute to development. A number of channels have been developed and used by various countries and mining companies ranging from employment and tax payments to local procurement and community investment projects. Direct paying to the citizens, development of Funds, trusts and Sharing benefits and compensating for damages generated by mining operations within communities is widely recognized as a necessity. The sharing may be mandatory or voluntary.

In an endeavor to understand the dynamics involved in this sharing of benefits it's important to understand the various perspectives of the Mining companies and the governments.

The Company Perspective: Providing Compensation and Acquiring a Social License to Operate

Compensation for landholders and populations affected by the granting of a mining lease is typically a legal obligation that the leaseholder must fulfill on top of regular tax payments. Management and disbursement of compensation funds can be a challenge, and companies do not always find mechanisms in place that will help them to meet existing laws and regulations. Not only does the value of the compensation need to meet expectations, but also its form, with growing recognition those one-off cash payments are not sufficient answers. The lack of authorized and transparent mechanisms also makes it difficult for communities to hold companies accountable for payment of the compensation they owe. Companies and governments are under great scrutiny to ensure that benefits from mining projects are not limited to compensation for damages and to contribute positively to communities affected by mining developments. Where this obligation is enforced, mining projects can operate only when a "social license" to do so is granted by the surrounding communities. To gain and retain a social license, companies typically need to go beyond the government's requirements for taxation and compensation and actually invest in community development. Unless mining companies address these changing expectations of benefit sharing, they may fail to obtain and retain a social license to operate. In turn, community rejection of a project because of inadequate or inappropriate compensation can disrupt the project and swing popular opinion against mineral development in the country.

The Government Perspective: Demonstrating Locally Positive Impacts from Mining

The concept of promoting sustainable development in communities affected by mining operations has gained currency over the past decade[1]. Governments are increasingly under pressure to demonstrate the local positive impact of mining throughout a project's lifecycle, from exploration to mine closure, in order to gain political support for continued mineral development. To achieve that support, one option is to establish mining tax regimes that include direct or indirect payments to decentralized development authorities. Along with taxes based on property value, royalties levied mine by mine are well suited for financing local distributions.

Legal provisions to impose redistribution at the local level are often implemented when only limited benefits accrue to the host communities that bear most of the negative impact of mining operations. However, in practice, royalties payable to the central government rarely revert back to the affected region, even when the legislation specifies that this should be the case. While decentralization of benefit sharing from Mining Activities is becoming increasingly common, it must be noted that many nations still prefer to see all major taxes flow to a general fund, allowing central or provincial governments to determine where and how monies should be expended for the good of the public as a whole. Among communities and governments, recent escalating mineral prices have placed additional focus upon the benefit-sharing arrangements in place in mineral-dependent economies. Countries with multinational mining corporations using *ad valorem* taxation and royalty schemes have seen the majority of windfall profits leave their national borders, causing local controversy and sometimes a reassessment of the means by which both production and profit can be shared[2].

1.2 Minerals occurrence and production in Kenya.

Kenya has a total area of about 587,000 square kilometers[3]. The Kenyan mining sector is small and under developed. It represents about 1% of the GDP or less. The following minerals exist in Kenya

- Oil in Turkana
- Natural gas
- Soda ash in magadi

[1] Extractive Industries for Development Series 9

[2] State of Environment Report 2011
[3] 2004 Economic Survey.

- Diatomite
- Coal
- Gemstones in coast provice
- Gold in Migori and kakamega
- Limestone
- Aggregate and sand

The current legal framework operates principally under the Mining Bill, Cap 306 of the Laws of Kenya a statute that was enacted in 1940 to succeed the Mining Ordinance of 1933. The Mining Bill has been amended severally; currently there is a process underway to enact a new legal and policy framework. Administratively, Mining and minerals in Kenya fall within the ministry of Mines and Geology at the Ministry of Environment and Natural Resources. The ministry is headed by a Cabinet Secretary, The Proposed bill establishes the Directorate of Mines headed by a director of mines who among other responsibilities is responsible to the Cabinet Secretary for the day to day operation of the department of Mining; and the Directorate of Geology. Headed by The Director of Geology who shall be responsible to the Cabinet Secretary for the maintenance of up to date geosciences data; carrying out geological surveys; carrying out mineral valuation and audit among other responsibilities[4]

1.3 Economic Significance of Mining in Kenya

Over the years Kenya had no significant mineral endowment. The mining and quarrying sector makes a negligible contribution to the economy, accounting for less than 1 percent of gross domestic product, the majority contributed by the soda ash operation at Lake Magadi in south-central Kenya. Thanks largely to rising soda ash output, Kenya's mineral production in 2005 reached more than 1 million tons. One of Kenya's largest foreign-investment projects in recent years is the planned expansion of Magadi Soda. Apart from soda ash, the chief minerals produced are limestone, gold, salt, large quantities of niobium, fluorspar ,and fossil fuel.[5] In The recent past, Titanium mining in kwale has been commissioned and is expected to contribute significantly to the economy. Other minerals that have put Kenya in the limelight include the exploration of large deposits of coal in mui basin and oil in Turkana and tiomin in Kwale.

[4] Section 21
[5] Kenya country profile. Library of Congress Federal Research Division (June 2007)

CHAPTER TWO

LEGAL AND POLICY FRAMEWORK THAT GOVERNEXTRATIVE INDUSTRY IN KENYA

2.1 Introduction

The current legal and Institutional Framework for the Mining sector is contained in various pieces of legislation i.e. the Mining Bill, Chapter 306 of the Laws of Kenya, legislation relating to Mineral Oil Petroleum Exploration and Production Act (Chapter 308 Laws of Kenya.), Trading in Unwrought Precious metals (Chapter 309 laws of Kenya) the Diamond Industry Protection Act (Chapter 310 Laws of Kenya), the Gold Mines Development Loans Act (chapter 311 Laws of Kenya) and the Continental shelf Act (Chapter 312) Laws of Kenya. The Mining Bill which is the principal law relating to mining of mineral resources in Kenya was promulgated in 1940 and therefore does not adequately address the current requirements of the industry and required to be reviewed and appropriate laws and policies put in place. . In 2005, the Ministry of Environment and Natural Resources commenced a process of revising the laws relating to the mining sector and to develop a mining policy to match contemporary international mining practice. A draft mining bill and a draft version of the National Mineral Resources and Mining Policy have since been developed and a wait tabling in parliament. This research study will base its discussions on the Proposed Mining Bill 2013, the proposed National mineral resource and Mining Policy and the Petroleum Exploration and Production Act (Chapter 308 Laws of Kenya.)

2.2 The Mining Bill 2013.

2.2.1 Ownership and access rights

Under the Mining Bill, all unextracted minerals on any land are vested in the government subject to any rights the government may have granted any person,[6] making it an offence for any person

[6] Section 6.

to deal with minerals without authorization.[7] The Draft Mining Bill marks a major departure from this premise. It vests the entire property in and control of minerals in, on or under any land in Kenya in the government in trust for the people, regardless of any subsisting rights over any land containing minerals. The government is then bound to deal with these minerals only in accordance with this law.[8] It's worth noting that, the Bill introduces the public trust, effectively imposing a fiduciary responsibility on the part of the State.

2.2.2 Conditions for mineral prospecting and extraction

Prospecting is defined as the search for minerals and testing the mineral bearing qualities on land The Cabinet secretary as the custodian of the law is empowered to grant prospecting rights.[9] The Bill 2013, establishes a National Mining Corporation which shall serve as the investment arm of the national government in respect of minerals. Under the current law prospecting for any minerals is authorized for holders of a prospecting license. However Prospecting for diamonds requires a special endorsement from the Cabinet Secretary. A license holder must restrict their work to specified lands. Prospecting in a forest area or protected wildlife area is subject to any lawfully imposed conditions. Any holder of a prospecting right is eligible for Exclusive Prospecting Rights which is usually valid for one year, renewable at the discretion of the Commissioner for one year to a maximum of five years.[10] Further, any holder who has paid the relevant fees has the sole right of alluvial mining and the right to remove and dispose any authorized minerals

Certain lands are excluded by law from prospecting and mining. These lands include cemeteries; urban areas situated within municipalities, townships or trading centers; land subject to a lease, which gives the holder rights to work minerals found thereon; lands subject to subsisting prospecting or mining rights; railway reserves; lands within a hundred meters of any dam or canal belonging to central or local government; public street or road reserve; salt lick; trust lands; land within five hundred meters of a public airfield; and private land except with owners consent. It's important to note in all the above cases that there is provision for the person holding ownership rights to grant consent.[11]

The law also reserves certain customary rights of the people of Kenya. Section 8, provides that nothing in the law shall be construed to prevent any citizen of Kenya from taking, subject to prescribed conditions, salt or soda from lands from which it has been customary for members of that person's community to take the salt or soda. This, however, excludes land within the area of a mining lease or location. A prospecting right holder, who has pegged a location, is required to seek registration within 30 days. The rights under a pegged location are valid for one year, subject to extension.[12] Small-scale miners are normally granted mining locations with less

[7] Section 6.
[8] Section 6.
[9] Section 12.
[10] Section 18.
[11] Section 7.
[12] Section 28.

onerous conditions. The second schedule to the Bill sets out criteria to dichotomize between small scale and large scale mining operations as:

- In case of prospecting operations, the proposed prospecting area does not exceed $5km^2$
- In case of mining operations, the proposed mining area does not exceed $0.05km^2$
- In case of mining, the actual or estimated annual extraction of minerals or ore does not exceed $25,000\ m^3$

The prospecting or mining operations do not or will not employ specialized prospecting or mining technologies The proposed prospecting or mining operations do not or will not involve substantial capital investment or expenditure Any prospecting or mining operations not meeting this criteria are to be classified as large scale operations A mining location consists an area on $20,000m^2$ for precious metals and precious stones, and $50,000m^2$ for all other minerals

2.2.3 Licencing

The Draft Bill proposes to overhaul the licensing system setting up a dichotomy between large scale and small scale operations. For the former, new licenses proposed include reconnaissance license, prospecting license, retention license, and mining license.[13]Granted for a maximum period of two years, pre-conditions for these licenses include, proposals for employment and training of Kenyans, an Environmental Impact Assessment license, and a proposal for procurement of local goods and services. Only after these conditions are met will the Board recommend grant of license[14] The Bill proposes a fetter in the Commissioner's discretion under current law in approval of licenses. Thus, applications are to the Commissioner, but the Minerals Advisory Board undertakes the evaluation and determines which ones to approve or reject. On the other hand, the Bill seeks to reserve mineral rights for small scale operations to Kenyan citizens, natural or corporate. An applicant for a prospecting permit is required to identify the subject minerals and give particulars of proposed operations. The holder of the permit is obligated to operate in line with a plan approved by the Commissioner, and take all measures necessary to protect the environment.[15]

2.2.4 Conditions for acquisition of land.

The law excludes private land from prospecting and mining, without consent from the owner. However, unrestricted mineral resources are vested in the government under Kenyan law.[16] Thus, in theory, where the State finds significant quantities of minerals exploitable for general

[13] Section 36.
[14] Section 39-40.
[15] Section 91-104.
[16] Mining Bill, section 6

public benefit, a balance should be sought between the individual property ownership rights and the public interest to guide utilization. Public benefit would justify compulsory acquisition of such private land under Section 75 of the Constitution with payment of full compensation. The procedure for compulsory acquisition is set out in the Land Acquisition Act.[17]

There are situations where consent maybe withheld over private property. Where consent is unreasonably held and/or is contrary to national interest, section 7(3) of Mining Bill empowers the Minister to commence compulsory acquisition. Subsequently, the State can issue authority to commence mining operations.[18]

2.2.5 Sovereign Fund

The bill establishes a sovereign fund which is administered and managed by the Sovereign Fund Board[19]. The object of the Fund is: to support government saving from mineral revenues to ensure sustainable and stable future income; Provide stabilization support in times of economic stress; to strengthen the Republic's long-term financial position: and to finance expenditure on pensions The Fund shall be held in an account in the Central Bank of Kenya. The sovereign fund board which consists of public secretaries responsible for mining, trade, finance and Energy shall be responsible for the administration and management of the Fund[20]. It provides that At least 25 percent of all mineral rights revenues including, royalties, royalty sales proceeds, mineral revenue-sharing payments and bonuses received by the republic shall be paid in full into the fund. Other sources include contributions and other payments required by this Act or any other written law to be paid into the Fund; and any other money as may be appropriated to it by Parliament. The capital of the Sovereign Fund may only be used for transfers to the national government budget pursuant to a resolution by the Parliament[21]. Only the proceeds and profits of the fund shall be utilized for purposes of investment. The Fund shall be administered and managed in the manner provided for in the Public Finance Management Act, 2012. The funds can only be invested for the benefit of future generations.[22]

2.2.6 Involuntary displacement and relocation

Invariably, as a result of acquisition of private land for mining activities, and especially those on a large scale, there is involuntary displacement of people from their homes and farms. Most of the projects causing involuntary displacement of people, however, are essential development components and are likely be more frequent.[23] Involuntary resettlement involves people evicted against their desires. It should be well planned and executed so that economic growth is enhanced and poverty reduced, especially for such vulnerable people. At the very least, the relocates should not end up worse off than they were before the displacement. Whether or not

[17] Cap 295, Laws of Kenya. Part II, section 3-23.
[18] Under section 39 of the Mining Bill, a mining lease is issued on land vested in the government while a Special Mining Lease is issued on the same terms but established by section 55.
[19] Section 31
[20] Section 32
[21] Section 34
[22] Section 35
[23] C. O. Okidi [1993]

compensation is adequate is an important matter since acquisition, in whatever form, is considered an intrusion upon private property. The practice in most African countries is to offer compensation in outright payment of cash for the land taken. Generally, the relevant public agency offers the amount assessed by the government's valuation department. The submissions of the landowner are to be considered but the amount is often rationalized as the current market rate.[24]

In addition to the land and compensation question, involuntary displacement usually has significant adverse socio-economic and environmental impacts. Key among them is abandonment of homes, dismantling of mainly subsistence agricultural production systems and loss of assets and income. Further, people may be relocated to environments where their skills may be less applicable, the competition for resources may be greater, and host populations may be hostile or culturally incompatible.

Under the current legal framework, EMCA presents a practical mechanism to stem these adverse effects through the Environmental Impact Assessment (EIA) process. Regulation 18[25] requires an EIA report to identify environmental impacts of a project, and to propose mitigation measures. Interpreted liberally, this provision empowers NEMA to require a mandatory resettlement plan, where involuntary displacement is identified as an environmental and socio-economic impact. The titanium mining project in Kwale District provides an example of the lack of a proper legal and policy framework to address involuntary displacement in Kenya. It also demonstrates the adverse socio-economic and environment impacts where the process is not handled properly

2.2.7 Sharing of Royalties

The draft Bill proposes that communities get 20 per cent of the mining royalties paid by companies undertaking the commercial production of minerals across the country.This is a radical change from the past, where communities used to get nothing, and better than a recent proposal of five per cent. The proposals are contained in the Natural Resources (County Royalties) Bill, 2013.The Bill spells out how returns from minerals will be shared out between the national and county governments as well as the communities that live in the mineral rich areas. A final Bill is expected to be ready for tabling at the Senate when it resumes in January.

Sharing formulae

The Bill proposes that the national government takes 60 per cent of the royalties — down from a previous proposal of 75 per cent — while county governments will get the remaining 20 per cent.“The sharing of royalties between the central government, county government and the

[24] P.Kameri Mbote et al, 2008

[25] Involuntary Resettlement: Policies and Strategies (ADB, 1995

community shall be as follows — national government (60 per cent), county government (20 per cent and community (20 per cent)," reads the Bill in part. The Bill is in expected to quell fights between mining companies and local communities on sharing proceeds from minerals. This has been a factor that has held back the commercial production of minerals and rare earth elements, despite some areas having large deposits. It spells out the specific areas where the beneficiary communities can use the returns from their mineral wealth as education, health, water and roads. It will also require that the communities to file a budget on how they plan to spend the money with the mining ministry as well as be open for audit by Government. "Every community benefitting from the royalties must annually submit a proposed programme and budget to be used thereat as appropriate," reads the Bill."Community programmes approved shall be subjected to financial audit on the utilisation of the resources expended."

2.3 The Draft Mining Policy

The Commonwealth Secretariat was requested by the Ministry of Environmental and Natural Resources to develop the bill and the policy. This approach locked out the participation of the people directly affected by the sector as well as the people of Kenya as a whole. The drafters of the policy gave regard to two documents- the Economic Recovery Strategy. Since 1969, Kenya has been undertaking a process of constitutional review that among other things saw the land, environment and natural resources as important issues deserving to be included in the draft constitution of Kenya. Although this constitution was not adopted, it emphasized the importance of matters relating to the environment and natural resources to the governance of the country. These chapters among other things addressed issues of ownership of natural resources, vesting these in the people of Kenya and also the key concern over land ownership, distribution and access, matters which have direct implications on the mining sector.

While the current constitution does not address these matters an attempt to put in place the mining policy will address most of these issues. The draft policy outlines seven principles which include: transparency, access to justice, public participation; inter generational equity; International cooperation in the management of mineral resources, environmental protection, observation of social and cultural values, equitable access to mineral resources and benefit sharing and value addition to raw minerals as a means to increase returns for the people of Kenya.

The policy largely pays lip service to some of these principles and does not apply them in the substantive provisions of the policy. For example, the principle of public participation should have been applied at the formulation process of the mining policy as well as in the various aspects of the policy in making provision for access to information on mining and mineral resources, grant of rights, and constitution of regulatory bodies among other processes. The objectives need to be tied in with principles and values.

The policy falls short of creating a regime that is accountable, the proposed constitution of the board leaves out small scale miners. People affected by mining operations should be given an equal platform within the policy whether they are small scale miners or large scale miners. The draft policy also addresses the issue of displacement and compensation. The policy says that this is an issue of importance to corporations; it says that the government will provide assurances, including that the issue of compensation will be sorted out. The policy provides no elaborate provision for social security and resettlement of persons. It also provides for dispute resolution tribunal. It provides that the same person, commissioner of mines and geology is the grantor of licenses and also resolves disputes. It creates contradictions between role of NEMA and role of commissioner of mines and geology

2.4 Petroleum Act

Key legislation relating to the petroleum sector includes the Constitution of Kenya, the Petroleum (Exploration and Production) Act, chapter 308 of the Laws of Kenya (the Petroleum Act), regulations made under the Petroleum Act and the Ninth Schedule to the Income Tax Act, chapter 470 of the Laws of Kenya. The key institutions involved in regulating the oil and gas sector are currently the Ministry of Energy and the National Oil Corporation of Kenya Limited (NOCK). There is no separate industry regulator. The 2010 Constitution provides for the establishment of the National Land Commission (NLC) and for ratification of grants of rights or concessions regarding the exploitation of natural resources by parliament. The NLC is currently in the process of being constituted under the National Land Commission Act, which came into force in May 2012.

The Petroleum Act states that all petroleum is vested in the government. This is consistent with the 2010 Constitution, which states that all minerals and mineral oils shall vest in the national government in trust for the people of Kenya. However, under the Constitution, the administration of minerals and mineral oils is to be vested in the NLC. It is not clear how this will affect the powers of the Minister of Energy under the Petroleum Act. It is anticipated that the Minister's powers will fall away. At present, these powers are set out in the Petroleum Act. They comprise the power to enter into petroleum agreements and petroleum exploration agreements on behalf of the government and to make NOCK wholly owned by the Kenyan government. The company acts as an Instrument of government policy in matters related to oil and gas and gives advice to Kenyan energy policymakers. NOCK was established to facilitate and participate in the exploration for petroleum products. It also acts as the agent of the government in relation to the compilation of national energy data, running petroleum laboratories and the development of alternative fuels. Initially, NOCK's activities consisted primarily of exploration activities delegated from the Ministry of Energy.

Under the 2010 Constitution, 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 of Kenya is subject to ratification by parliament. Under transitional provisions, this requirement does not come into effect until parliament passes further legislation providing for the classes of transactions that are subject to ratification. Under the Constitution, this further legislation must be enacted within five years of the effective date of the new Constitution – ie by 28 August 2015. It is currently not known what impact this may have on the future grant of rights under the Petroleum Act. The provisions of the new Constitution apply only to future transactions; existing contracts should not be affected

Licensing regime

Under the Petroleum Act, the Minister of Energy has the power to divide Kenya and its continental shelf into blocs. No person may engage in any petroleum operations without the Minister's permission. The Petroleum Act permits the government to conduct petroleum operations either through an oil company established by the government for that purpose (ie NOCK) or through private contractors that are licensed by the government (acting through the Minister of Energy) under petroleum agreements. The Ministry of Energy administers the application process relating to the entry into a PSC. This can be by way of competitive bidding process or through bilateral negotiations.

2.5 Environmental Management and coordination Act

The mining sector having operated with a legal framework that was amalgamated in 1940, it is instructive to note that to date it has no clear provisions for environmental considerations prior to commencement, prospecting and or during Mining Activities. Even after the EMCA was put in place, which has a requirement under section 148 for all sectoral legislation including the Mining Bill to be harmonized with the provisions of EMCA. However, a concerted attempt to remedy this position has been made by the Draft Mining Bill.

2.5.1 Environmental considerations under the Mining Bill

The bill exempts no person from complying with any law concerning the protection of the environment. Instead it makes it compulsory for an EIA as a prerequisite to being offered a mineral right unless otherwise exempted by this Act. A Permit or mineral rights holder is required to utilize land sustainably through restoration of abandoned mines and quarries; that the seepage of toxic waste into streams, rivers, lakes and wetlands is avoided and to dispose any such toxic waste in approved areas only; that blasting and all works that cause massive vibration is properly carried out and muffled to keep such vibrations and blasts to reasonable and permissible levels in conformity with the Environmental Management and Coordination Act; that upon completion of prospecting or mining, the land in question shall be restored to its original status or to an acceptable and reasonable condition as close as possible to its original state[26].

The Cabinet Secretary shall not grant a prospecting license, a retention licence or a mining licence to an applicant, unless the applicant has submitted site rehabilitation and mine closure plans for approval. Regulations made under this Act may prescribe site rehabilitation and mine-closure obligations that shall apply to the holder of a mineral right. An applicant for a prospecting licence, a retention licence or a mining licence shall provide a bond or some other form of financial security (in this section called an environmental protection bond) sufficient to cover the costs associated with the implementation of the environmental and rehabilitation obligations of the holder under this Act. An environmental protection bond required shall be in a form and for an amount determined by the Cabinet Secretary having regard to the particular characteristics of the project. In determining the form and amount of the bond, the Cabinet Secretary shall take into account the amount that the applicant has been required to provide by way of bond or some other form of financial security under the provisions of relevant Environmental Management and Coordination Act. The Cabinet Secretary may release in part an environmental protection bond upon the satisfactory completion of rehabilitation measures undertaken within the duration of a licence and shall release the bond in full following the successful completion of all environmental and rehabilitation obligations mentioned.

2.5.2 Environmental Impact Assessment

EMCA provides for a mandatory undertaking of an environmental impact assessment prior to the commencement of any project specified in the Second Schedule. A project proponent must submit a project report to NEMA prior to commencement. If after studying the project report, the authority is convinced that the proposed project is likely to have a significant impact on the environment, the proponent must undertake a complete EIA.[27]

The Second Schedule sets out projects that require an EIA prior to commencement. These include any major changes in land use as well as mining, including quarrying. Regulation 18 of the Environmental Impact Assessment and Audit Regulations[28] sets out the issues that an EIA study should primarily address itself to in order to ensure sustainable development. They include an inquiry into the available technology and alternatives; potentially affected environment; and the environmental effects including socio-cultural impacts. It should also frame an environmental management plan to eliminate or mitigate adverse environmental impacts. They must also address the issue of timeframe, cost and identify who bears the overall responsibility to implement this plan.[29]

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[26] Section 159
[27] Section 58 of EMCA.
[28] Kenya Gazette Supplement No. 56 (Legislative Supplement No. 31): Legal Notice No. 101 (Nairobi: Government Printer) (13 June 2003).
[29] Regulation 18(1) (k).

EIA is, thus, a mandatory requirement under EMCA, yet the current mining law contains no express requirement of the same. A reading of the Draft Mining Bill shows that EIA license is a pre-condition to the granting of any license. However, there is confusion regarding permits issued for small scale operations as right holders are only required to take all measures to protect the environment. This may create an impression that small scale mining is exempt from conduct of an EIA. Whereas small scale operations provide livelihood to many Kenyans, it also causes serious environmental damage. It is appreciated that the provisions of section 58 of EMCA, and the Second Schedules on projects requiring an EIA are mandatory, and that mining operations are included. Thus, despite the omission, small scale operations should basically undertake an EIA. It would, however, help if the provision is amended to clarify this issue.

2.5.3 Environmental management and restoration plans

The current mining law makes no reference to environmental management during mining operations. The EIA regulations, however, require an EIA study to incorporate an Environmental Management Plan defining 'all details of project activities, impacts, mitigation measures, time schedule, costs, responsibilities and commitments proposed to minimize environmental impacts of activities, including monitoring and environmental audits during implementation and decommissioning phases of a project'.[30]

Environmental restoration plans are very important for mining operations, especially action after the mining operations have ceased. Mostly, disused mines are left bare, with open pits which are environmental and public health hazard. To remedy this, project proponents should, under EMCA, be required to identify the kinds of environmental damage their operations are likely to cause, and set out a comprehensive plan of action on how to rehabilitate the destroyed ecosystem and leave the area environmentally better off than it was prior to the mining operations.

The Draft Mining Bill provides that none of its provisions exempts any person from complying with the laws pertaining to environmental protection in Kenya.[31] As a pre-requisite to the grant of any license, an applicant must submit site rehabilitation and mine closure plans for approval by the Commissioner.[32]

2.5.4 Environmental protection bonds

Section 28 of EMCA empowers NEMA to register all activities and undertakings with a potential for significant adverse effects on the environment if operated contrary to good environmental practice. This should enable the Finance Minister, with advice from the National Environment

[30] Regulation 2.
[31] Section 146.
[32] Section 149.

Council, to require deposit bonds from these undertakings as sufficient security for good environmental practice. If there is compliance to the satisfaction of NEMA, the deposit bond will be refunded without interest.

Under the Draft Mining Bill a license applicant must avail an environmental protection bond sufficient to cover their potential environmental restoration costs.[33] The bond can be released partially upon satisfactory fulfillment of the obligations. It must be released upon successful completion of all the required obligations.[34] Having similar provisions in two different statutes – EMCA and Mining Law - will result in institutional conflict of this provision.

2.5.5 Fiscal instruments to procure environmental compliance

There is a provision for the utilization of governmental tax and other fiscal instruments disincentives or fees to induce or promote the proper management of the environment and natural resources or the prevention or abatement of environmental degradation. These instruments are ideal for application to mining ventures to procure compliance either sustainable environmental management. These include customs and excise waiver on machinery and other equipments that reduce or protect the environment. Other instruments available for use include tax rebates to industries and undertakings investing in plants, equipment and machines for pollution control, waste recycling conservation or prevention of environmental degradation.

2.5.6 Environmental Restoration Orders

Section 108 of EMCA provides for issuance of environmental restoration orders on any person by NEMA or by a court of law. In the latter case, issuance is only where proceedings have been instituted by an aggrieved person. When issued, such an order would, inter alia, require restoration of the environment to the condition it was in prior to the degrading action and award compensation to any person harmed by the degrading action. In this case, the perpetrator of the degrading action is liable to meet the full cost. In mineral resource utilization, this provision when enforced effectively has the potential to mitigate the nightmare of non-rehabilitation of disused mining sites.

Possibly, the fiscal instruments discussed above can be used in the first instance, to encourage investors to find ways to restore the environment and make money in the process. A case in point is the restoration work undertaken by La Farge Ecosystems, the Bamburi Cement manufacturer in Mombasa. The company restored their former limestone mine, converting it into the income generating nature trail and wildlife Haller Park

[33] Section 150.
[34] *Ibid*, subsection (4).

2.6 The County Government

With the passing of a new constitution came the devolved governments that set out county governments. The County Government Act, the Transition to Devolved Government Act 2012 , Public Finance Management Act 2012 and the Intergovernmental Relations Act 2012 guide the workings of county government in Kenya. The Constitution of Kenya Specifically, Chapter eleven provides for a devolved system of government. Article 174 enumerates the main objects of this system of government to include promotion of democratic and accountable exercise of power and to enhance the participation of the people in the exercise of the powers of the State. The devolved system of government is equally instrumental in the promotion and protection of the interests and rights of minorities and marginalized communities in so far as it ensures equitable sharing of resources

In the spirit of devolution, it is important to point out that, good governance is influenced by the existence of a sound democratic Constitution that enables the government to manage its affairs effectively, while at the same time empowering the citizenry to participate in the country's social, economic and political processes. It is therefore expected that the devolved system of government will provide equal opportunities to all citizens by creating conditions that would encourage their input in the country's governance. One would expect the system to provide for effective devolution of political power to the grassroots, thus the strengthening of legislative and administrative institutions in the country. The county government Acts Part VIII provides for citizens participation[35]. This includes but not limited protection and promotion of the interest and rights of minorities, marginalized groups and communities and their access to relevant information, timely access to information, data, documents, and other information relevant or related to policy formulation and implementation legal standing to interested or affected persons, organizations, and where pertinent, communities, to appeal from or, review decisions, or redress grievances, with particular emphasis on persons and traditionally marginalized communities, including women, the youth, and disadvantaged communities.. Article 52 of The County Government Act establishes the office of village administrator for each village unit established in a county who among other duties shall include ensuring and coordinating the participation of the village unit in governance; and assisting the village unit to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level and national development. This village administration unit forms the first and lowest level institution for public participation in development projects in their area.

Again, the devolved system as envisaged in the Constitution has the potential to empower citizens to hold public officials accountable for their conduct, omissions, and decisions. the system has the capacity to ensure effective public sector management, stable economic policies, effective resource mobilisation and efficient use of public resources. In discussing the representation of marginalized groups in devolved units we have to make reference to the objects of devolution as captured in the constitution. One of the identified objects is to protect the

[35] Section 82-83

interests and rights of minorities and marginalized communities. This provision is an architectural foundation upon which special interests are to be accorded representation at the county level. This means that county development plans, governance and public services will have specific procedures of involving marginalized groups and communities in planning, budgeting and implementation processes through target nomination in line with affirmative

CHAPTER THREE

3.0 EXTERNAL COSTS

3.1 Introduction

In economics, an **external cost,** or externality, is a negative effect of an economic activity on a third party. When any form of mining takes place in a given locality, be it small scale or large scale it has some form of negative effects to the communities living near this areas. The external costs include the impacts of water pollution, toxic wastes, air pollution, and the long-term damage to ecosystems and human health

Mining is a major economic activity in many developing countries producing enormous quantities of waste that can have adverse impacts for decades. [36] The environmental deterioration caused by mining occurs mainly as a result of inappropriate and wasteful working practices and rehabilitation measures. Mining has a number of common stages of activities, has potentially-adverse impacts on the natural environment society and cultural heritage, the health and safety of mine workers, and communities based in close proximity to operations the social and environmental impacts are more pervasive in regions where operations are newly established or are closing down. Several authors have commented on the potentially-adverse impacts of mining, which include displacement of local people from ancestral lands, marginalization, and oppression of people belonging to lower economic classes[37] In Kenya, the endowment of the minerals is varied; it includes metallic minerals such as gold, copper lead and silver, non metallic

[36] Tauli-Corpuz V. The globalisation of mining and its impact and challenges for women
[37] Filer C. Mining in the South Pacific. http://www.antenna.nl/ecsiep/bulletin.htmlO; 1998.

minerals such as diamonds, titanium, gemstones, ruby, sapphire garnet and other hydrocarbons that occur in trace amounts, geothermal energy, petroleum energy, and industrial minerals such as limestone, fluorspar soda ash, gypsum and diatomite. Currently non metallic minerals dominate the mining industry. Mining therefore is increasingly becoming an environmental issue especially as more and more minerals are being discovered in Kenya. It's important to note that environmental concerns of any given mine or mineral differs in extent from one mine to the next but in general the following are some of the potential social economical and environmental concerns communities living in mining areas have to deal with.

3.2 The issue of compensation

Lack of legal title especially in developing countries where communal land ownership is prevalent makes such communities vulnerable to eviction lack or poor compensation. Under the current legal framework, EMCA presents a practical mechanism to stem these adverse effects through the Environmental Impact Assessment (EIA) process.[38] Interpreted liberally, this provision empowers NEMA to require a mandatory resettlement plan, where involuntary displacement is identified as an environmental and socio-economic impact.

The Mining Bill 2013 provides that; Where the exercise on land of the rights conferred by a mineral right disturbs or deprives the owner or any lawful occupier of user of the land or part of the land; causes loss of or damage to property; agriculture; loss of earnings or sustenance a demand or claim for compensation may be made to the holder of the mineral right to pay prompt, adequate and fair compensation to the lawful owner, occupier or user of the land in accordance with the provisions of this Act. A mineral right holder shall deposit a compensation guarantee bond**.**

3.2 Air pollution

The main air quality issue is the dust produced by the working of open pits and by crushing and grinding operations. Dust can also be given off by tailing dams. Workers and nearby communities can be affected by dust in the atmosphere. In addition, Particle fall-out around mine sites can contaminate soils and water and damage vegetation. Mines are also a source of green house gases gas emissions that have led to climate change. Poisonous gases such as methane are sometimes released from underground operations. Smelting (the process in which ore is heated for the purpose of separating it from gangue) produces very large amounts of air pollution pollutants. Such as sulphur dioxide which causes severe local environmental damage as well as contribute to more distant or global phenomena such as acid rain and climate change.

3.3 Water pollution.

Potential sources of water pollution from mining include drainage from surface and underground mines, wastewater from beneficiation and surface water runoff. Many mining operations

[38] EMCA Section 18

especially those extracting ores that contain sulphides may produce acidic and metal metal-bearing solutions resulting from natural oxidation. The combination of acids and metals can have severe effects on the ecology of local water courses and the metals can enter and bio-accumulate up the food chain.

Mineral separation that make use of dangerous and toxic chemicals like the use of mercury in gold mining (Practiced in Kenya by small scale miners of gold in Migori and Kakamega) sulphuric acid and cyanide are serious sources of contamination if appropriate control measures are not put in place. Aquatic life will be affected. In addition to causing water pollution, excavations can influence the hydrology around the area. Excavations may lead to more rapid seepage into ground waters causing nearby streams or wells to dry up.

3.4 Solid wastes

Open pit operations produce far more waste than underground operations. Heaps of mine waste occupy large amounts of land and disfigure the landscape. They are also a source of inert and dust and water pollution. Inert materials carried away in runoff water can clog rivers and streams.

3.5 Human Rights and Socio Economic Concerns

When a large mining operation begins, the area around the ore deposit often sees a sharp boost in economic activity. New roads are built; housing goes up for the miners; smaller businesses set up shop to serve the mine and its workers. And indeed, such operations are typically presented as the ticket to local prosperity. But the economies that grow up around these mines usually suffer from the "company town" syndrome: there is generally little economic activity that is independent of the mine. Local communities usually bear the costs of mining in the form of environmental damage and pollution, loss of traditional livelihoods, long term economic problems and deteriorating public health. The benefits of the mine usually go to investors overseas and the central government, with little of the profit passed back to the community.

3.6 Involuntary displacement

In the developing world and in many indigenous communities in the industrialized world many people lack legal title to the lands they live on, even though they may have occupied the same lands for many generations. Such people are vulnerable to eviction when mining lease is granted, and the eviction may be imposed without prior consultation, meaningful compensation, or the offer of equivalent lands elsewhere. Even where there is no direct displacement of the people themselves, there is frequently a displacement of their traditional livelihoods. Large-scale mining is so destructive to the landscape that little in the way of traditional rural life is liable to survive in its vicinity. Industrial mining generally eliminates farming, fishing, small-scale forestry, and even any previous artisanal mining

3.7 Increased social ills

A host of subsidiary problems tends to follow the entire initial disruption. The loss of traditional ways of life and an influx of male migrant workers, usually living away from their families in many places, this scenario has led to an increase in alcoholism, drug abuse, prostitution, crime, and domestic violence.

3.8 Violent suppression by the Mining companies or Government.

Community opposition to mining may encounter violent suppression by the companies themselves or by government forces working in conjunction with mining companies. Indeed, as a practical matter; it can be difficult to distinguish between these two entities. Especially in parts of Africa and the Pacific region, large-scale mining tends to become “militarized.” In such situations, the actions of the police, the military, or persons unknown have often resulted in the death or disappearance of mining opponents. Sometimes this violence can emanate from the local community, especially in areas where small scale mining is prevalent. For example, Recently in Taita Taveta, Kenya, A British Gem Mine owner was killed and his staff injured by the local community [39]

CHAPTER FOUR

4.0 Benefit sharing in Kenya

Mining projects in developing countries are increasingly expected to deliver sustainable benefits to local, regional, and national stakeholders. With high mineral prices generating windfall profits and focusing growing attention on compensation payments and the necessity of earning and retaining their “social license to operate,” many governments and companies have been considering benefit sharing mechanisms with the surrounding communities. If conceived as independent entities they can provide opportunities for shared governance that can be sustained long into the future

4.1 Definitions

Benefit sharing: At present, the term ‘benefit sharing’ is used in many different ways, making it difficult to identify what the key issues are and the best approaches to solving them. It is not always clear what the types of benefits are that need to be shared (e.g. financial benefits or in kind benefits such as access to services) and how these balance with costs. It is unclear how ‘legitimate’ beneficiaries should be identified, particularly where mining is occurring on land whose legal ownership is in question; or how benefit sharing systems can be managed across different scales (for example national, local, and within communities).Further challenges arise in how local communities and indigenous people can access revenue benefits, how negotiation processes are managed, and whether there are contractual arrangements between those giving and those receiving benefits. World over the exploration of oil petroleum products are regulated separately from other extractive mineral resources. There are two types of benefit sharing approaches[40]

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[39] Daily Nation 13th August 2009.
[40] EAC, policy paper 2012

Monetary benefit sharing – sharing part of the monetary flows generated by the operation of the infrastructure project with the affected communities, through:

- Revenue sharing
- Preferential rates
- Property taxes
- Equity sharing / full ownership
- Development funds

Non-monetary benefit sharing – integrating project benefits into local development strategies

- Livelihood restoration and enhancement
- Community development
- Catchment development

Revenues: The notion of revenues generated by mining operations refers chiefly to government payments, compensation, and community investments. Government payments are taxes and royalties as well as other payment schemes that may exist between mining companies and various levels of government. Compensation refers to payments or other benefits (such as housing, in case of resettlement) provided by companies to affected communities to compensate for economic, social, environmental, or cultural damage directly caused by the mining operation. Community investment 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[41]

Equitable Benefit Sharing

The term equity implies that all people should obtain equal justice. This term is based on two prevailing principles: public trust doctrine and the principle of permanent sovereignty over natural resources. The first principle has a perspective that the right to environmental and natural resources be ensured and also that the access and right of commons to the conservation and promotion of natural resources like air, water, land and forest and sites of historical, religious and cultural importance should be ensured.

The meaning of equity may be different to different people but the foundation remains the same - a just and fair society. Equity derives from a concept of social justice. It represents a belief that there are some things which people should have, that there are basic needs that should be fulfilled, that burdens and rewards should not spread too divergently across the community and policy should be directed with impartiality, fairness and justice towards these ends.[42]

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[41] IFC 2010
[42] .(Jim Falks et al, 1993)

Equity in any community refers to a concept that all should have equal access to community resources or opportunities and none of the individuals or groups within the community should be imposed to more environmental burden as compared to others because of government work or any other procedures. Equitable benefit sharing is the activity of maintaining the equal rights of all classes of people, ethnic groups and gender of society to air, water and food required for the life process or natural resources including forests, rivers, streams and land and the services obtained from them which are necessary for livelihoods and sharing of benefits received from these resources and services based on certain limitations and standards [43]

Communities: The revenue benefits considered in this research primarily target local communities, understood as the population living close enough to a mine that their livelihood, way of living or environment is directly or indirectly affected by the mining project. However, the scope of these benefits may extend from the mine area to the local district, region, province, or even the entire country. In addition, benefits may target whole communities or may focus on a specific group, as is often seen with benefit-sharing that target indigenous groups.

4.2 Why benefit sharing:

- Promote positive attitudes towards the exploration and management of natural resources.
- Promote partnerships, incentives and benefit sharing to enhance the development and management of natural resources.
- Provide a legal and institutional framework for cost and benefit sharing.
- Conserve the environment and natural resources for the benefit of the current and future generations.
- To reduce pressure on natural resources by providing employment opportunities for communities by using natural resources more efficiently.
- To build the capacities of relevant stakeholders to engage in sustainable management of the ecosystem thus leading to increased food security.

4.3 Mechanisms of benefit sharing

Mechanisms for redistributing costs and benefits in the case of extractive minerals can be identified to include: power-purchasing agreements, financing and ownership arrangements. Cooperation in mining resources that are deemed to be trans boundary can take many forms, ranging from sharing data to joint management. Cooperation in benefit sharing can help to create a friendly environment that could lead to broader cooperation. To realize such cooperation needs an effective national policy and regulatory framework, as well as supportive regional initiatives. The benefit sharing involves assessing benefits to the entire area; local area, county and national level, and quantifying benefits to some degree.

The table below outlines the various mechanisms that are used in benefit sharing

[43]Environmental Justice, Martin Chautari

BENEFIT SHARING MECHANISMS	CHARACTERISTICS
Community fund	A lump sum and/or regular payment into a community-based fund for the benefit of local residents
Local Ownership	Offering ownership shares in a project to local citizens, either through their own investment or through a profit-sharing or part-ownership scheme
Benefits in Kind	The developer directly provides or pays for local community facility improvements, environmental improvements, visitor facilities, school and educational support, e.g. building hospitals, roads etc.
Compensation	The developer compensates for possible damages associated with a development.
Indirect Social Benefits	Any other benefit accruing to the community that is not directly quantifiable, such as prestige, eco-tourism, knowledge, etc.
Spinoff economic benefits	associated with local manufacturing such as through job creation - local jobs and taxes
Direct distribution of benefits to general public	The government pays cash benefits directly to the general public. e.g the Alaskan model and Todd Moss models

Source: Agutina et al. (2008)

4.4 The need for Equitable Benefit Sharing

(a) During the colonial era in Africa, the mining sector was used to develop the economies of western nations with no attention to the sustainable development of the sector. This has not changed much in the post-colonial era. Although the benefits of mining to national economies are evident, local costs (environmental and social impacts) associated with mining, especially to local communities, are not being adequately compensated for.

(b) Dependence on mining rent alone can hamper development by shifting focus from broader economic development issues and the expansion of other productive sectors. This often relates to the so called Resource Curse in which high mineral revenues limit structural diversification; and economies fail to translate resource abundance into sustainable growth that uplifts people's lives.

(c) Lack of a comprehensive natural resources cost-benefit sharing policy and law in the light of changed circumstances,

(d) Encroachment and increased pressure (due to population) on the remaining natural resources- these resources therefore need constant monitoring by communities themselves who in turn incur costs and for that reason need to be compensated for their input.

(e) The need for good corporate governance in the natural resources sector which in turn means that the costs and benefit of management should be shared among all the relevant stakeholders.

(f) Power devolution (decision making, implementation, enforcement) where the management of natural resources has to be devolved to the lowest possible level.

(g) The requirement by the Constitution(s) for public participation in the management of natural resources.

The most important justification for equitable benefit sharing is that: Mining by nature is inherently unsustainable in that the life of the mine is limited and will eventually come to a close.

4.5 General Guiding Principles of Benefits Sharing

Benefit sharing is participation in the economic, environmental, scientific, social or cultural benefits arising from access and use of extractive natural resources under a Mutually Agreed Terms (MAT). It is implemented under the following conditions:

1. A fair and equitable sharing of benefits arising from the utilization of natural resources
2. Benefits are provided according to the specific stages of use set out in the Prior Informed Consent (PIC) agreement (discovery, exploration, development and commercialization), and are renegotiated when the type of use is expected to change beyond the agreed PIC. Benefit-sharing considers and provides short-, medium- and long-term benefits.
3. Benefits are shared fairly and equitably with all those who have been identified as having contributed to the natural resource management, scientific or commercial process, including governments at different levels, and/or indigenous and local communities, and relevant stakeholders who are the owners, managers or custodians of the mineral resource.
4. Benefits are intended to create or strengthen capacity in the providers or other stakeholders, especially through technology transfer and training, which is relevant for the conservation and sustainable use of the ecosystem resources.
5. Benefit-sharing arrangements are implemented in good faith, respecting the terms and understanding of Prior Informed Consent agreed for use of the mineral resources collected, and the terms and conditions negotiated in the Mutually Agreed Terms.
6. Benefit-sharing provisions are negotiated and implemented in a manner that contributes to the conservation of ecosystem and its biological diversity.

Further, it is mandatory to:

1. Comply with all the applicable laws and regulations regarding benefit-sharing in force in the provider country.
2. Take into account the expressed desires and needs of the other organization/ community and its capacities when negotiating benefit-sharing provisions, in a fair and constructive manner so as not to put them at a disadvantage.
3. Use a comprehensive and open list/menu to choose from possible monetary and non-monetary benefits to begin the process of negotiating benefits, to apply flexibly for the different cases and situations.
4. Consider short-term, medium-term and long-term benefits. The time frame of benefit-sharing should be clearly stipulated. Furthermore, the balance among short-, medium- and long-term benefits should be considered on a case-by-case basis.
5. Determine the benefit-sharing mechanisms jointly between the user and provider organizations, depending upon the type of benefits and the specific conditions.

The countries that are currently benefiting from their oil and gas wealth have;-

- Put in place institutional, policy and legal measures to ensure impressive capture of revenue from oil and gas activities.
- They have also sanitized the large inflows of foreign exchange and combated the 'Dutch disease' by controlling commodity price volatility, currency appreciation and volatility, inflation, consumption and trade imbalance.
- Those countries have also deliberately supported and maintained a vibrant and dynamic non-oil sector
- ensured transparency, accountability and democratic participation using a package of institutional, policy and legal instruments including derivation, stabilization and inter-generational funds

4.6 Models of Benefit Sharing With Society

Natural Resource Funds (NRFs)

Natural Resource Funds (NRFs) consist of stabilization or savings funds and often combine both. Stabilization funds aim to reduce the impact of commodity price volatility on the economy and, in turn, improve budget predictability by stabilizing spending patterns. They reduce overspending when prices are high and borrowing when prices fall because when commodity prices are high, excess revenue is placed in the stabilization fund, but when prices are low, revenue is transferred out to make up for budgetary shortfalls. Savings funds, in contrast, are intended to ensure that a share of the wealth will exist for future generations, even after the natural resources are depleted. NRFs are found in both developed and developing countries. Examples include Venezuela's Stabilization Investment Fund, the State Petroleum Fund in Norway, Iran's Foreign Currency Reserve Account, and the Oman General Reserve Fund. However, their institutional structures and success rates vary dramatically. The Alaska Permanent Fund is characterized by high levels of public involvement in the decision-making process concerning the establishment and evolution of the fund. Public debate has influenced how the windfalls are spent and led to the creation of a dividend program in which each citizen of Alaska is entitled to a share of the wealth generated from oil sales. In contrast, the Kuwait Reserve Fund for Future Generations is considered extremely nontransparent since information about its holdings and expenditures is neither available to the public nor to the legislature. The popularity of NRFs continues to grow. Several new energy producers—Azerbaijan, Kazakhstan, and Chad— have also adopted NRFs. Most recently, the World Bank and the International Monetary Fund (IMF) have proposed a Petroleum Fund model to East Timor to assist it with managing its anticipated petroleum revenues from its newly discovered offshore reserves. Yet, their applicability to developing countries is limited precisely because many lack the institutions to support NRFs. In order for NRFs to work as designed, states must already possess strong state institutions—that is, institutions that emphasize oversight, transparency, and accountability such as a professional bureaucracy that abides by clear fiscal accounting standards and an independent judiciary

Direct distribution

Despite the tacit acknowledgement that the state is a large part of the problem, none of the most popular solutions attempt to take the mineral rents out of direct state control. The only exception is direct distribution of windfall revenues to the population, which has very recently been proposed as another way of ensuring communities, benefit from their minerals, combat corruption, foster democratic governance, and even address the problem of weak institutions. The premise underlying this solution 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 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. Two forms of direct distribution have been put forth: the first is based upon the Alaska model in which the interest from the oil fund is directly distributed to the population whereas the second eliminates the use of a savings and stabilization fund.

For countries like Nigeria and Iraq where government officials have siphoned off oil rents for personal profit and suppressed all forms of political resistance for decades, the idea of spreading the wealth among the population is especially attractive. Yet, direct distribution schemes are not without their problems. For example, if direct access to “easy money” encourages myopic behavior on the part of government officials, 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. The case of Alaska, in which the population receives an annual dividend from oil and gas proceeds via mandatory state investments in the Alaska Permanent Fund, provides a striking illustration. The transfer of rents to households has fostered an environment in which the population is focused primarily on consumption, rather than investment. It has also had such a negative impact on the development of the private sector that several state-sponsored organizations have emerged to encourage entrepreneurialism among young Alaskans. In contrast to the aforementioned solutions, direct distribution is viewed as a way to encourage institution building in mineral-rich states, particularly fiscal institutions, because the state would no longer be either the sole or the largest recipient of natural resource rents. It would also lack the fiscal autonomy from its population that rentier states enjoy. As a result, it would be compelled to develop a workable taxation system in order to collect revenue from its citizens. In reality, however, under existing and proposed models of direct distribution the government continues to be the largest direct beneficiary of the revenue from natural resource exports, and thus, suffers from the same disincentives for fiscal discipline. The failure of direct distribution models to specify who will be responsible for the dispersal of the proceeds to the population, and hence, how to ensure that the government does not either mismanage or appropriate the revenue, moreover, limits their efficacy—especially if the state continues to own and control the production and sale of petroleum reserves. A good example of this model is the Tedd Moss Model which proposed that Ghana to set up a system of direct distribution of cash ahead of the oil revenues and Center for Global Development continues to oversee the Initiative in Ghana.

Private ownership

By taking resource rents out of the state's direct control, privatization to domestic owners simultaneously fosters the conditions under which governments have an incentive to build strong fiscal and regulatory institutions and creates a new set of societal actors with the potential to demand these institutions. Because these private owners benefit directly from the production and export of the country's mineral reserves, they have a vested interest in securing both their property rights and a stable revenue stream as well as the means to bring state actors to the bargaining table. At the same time, because the state has less control over how these resources are extracted and utilized, it is more likely to invest in institution building that enables it to extract revenue from private owners, regulate the private sector, and generate other sources of revenue outside the natural resource sector. Thus, privatization to domestic actors offers an alternative path out of the "resource curse" because it creates an incentive for both state and societal actors to bargain over and eventually establish the formal rules of the game.

Russia provides a powerful illustration of this proposition. In the mid-1990s, Russia began privatizing its oil sector to domestic investors but retained state control over the gas sector. Since then, the degree of reform and economic promise in these two leading sectors has diverged significantly. By the end of 1990s, the majority of the oil industry was privatized to multiple owners, substantially deregulated, and had undergone significant internal restructuring. Under private ownership, the Russian oil industry has successfully expanded production an seen its net profits jump to $25 billion in 2003. In addition, the domestic owners that emerged from this process have increasingly pressured the Russian government not only to support greater liberalization within the energy sector itself, but also to develop institutions outside the energy sector to promote greater transparency and fiscal stability. The gas sector, in contrast, continues to be dominated by the primarily state-owned monopoly Gazprom, which has resisted any structural reform, amassed substantial foreign debt, and remained chronically undercapitalized, translating into direct losses to the Russian economy and indirect losses to the institutional capacity of the Russian state.

4.7 Current practice of benefit sharing in Kenya

The Mining Bill has been criticised for lacking in contemporary practices such as fair sharing of revenue and efficient waste management. In 2012 the Ministry of Environment and Mineral Resources published a draft Mining Bill, which now awaits cabinet approval. The Bill aims to "revitalise the mining sector by ensuring transparent and efficient management benefit sharing and disputes resolution. Key features include; increased and variable rates for royalties (variable on the type of mineral and value addition), reclassification of certain mining rights, establishing a dedicated "Mining Disputes Resolution Tribunal" and the sharing of benefits by local communities.

The current practice in Kenya is where the Government is the manager of the fiscal revenues collected and distributes them accordingly. The Government determines what projects it will invest in and how much the community can benefit from these resources. The mining bill proposes a sharing of royalties from the extractive industry as follows,

- National budget60%
- County Government – 20 %
- The Local community 20%

Direct Ownership.

On 12 October 2012 the Mining (Local Equity Participation) Regulations, was promulgated, aimed at increasing Kenyan participation in mining companies. The regulation states "It shall be a condition of every mining licence that the mineral right in respect of which the licence is issued shall have a component of local equity participation amounting to at least thirty five per cent (35%) of the mineral right." The Regulation has been interpreted to mean that at least 35% of shareholders in mining companies must be Kenyan nationals. The requirement of local investor participation is not unusual in the natural resource extractive sector. Such laws are fast becoming commonplace in mining economies, with similar laws being adopted in Botswana, Zimbabwe, Tanzania, Guinea and Indonesia. However, for such laws to reach their intended aim there must be adequate finance and financial infrastructure available to local investors. This is a challenge Kenya will need to address, given the potential for large scale mining operations in the near future.

Natural Resource Fund

Currently there are no NRFs in Kenya but the proposed mining Bill provides for the establishment of a sovereign fund which is administered and managed by the Sovereign Fund Board[44]. The object of the Fund is: to support government saving from mineral revenues to ensure sustainable and stable future income; Provide stabilization of

4.8 Comparative study of equitable sharing of the resources from other countries

4.8.1 A case of Nigeria

Oil prices rocketed in the 1970s and Nigeria went shopping, buying up consumer goods on a massive scale, and on credit Farming was abandoned, migration to the cities accelerated. It was all spend and no investment so that when inevitably the oil boom went bust in the 1980s, Nigeria was woefully in debt and had little to show for the bumper years. Today Nigeria produces more crude oil than any other country in Africa around 2 million barrels per day at the moment yet more than two-thirds of its 140 million people scrape by on a couple of dollars a day, or less There are only four oil refineries in the country, and all are in various states of disrepair. The result is that for most Nigerians, the diesel that runs their generators, the kerosene that lights their lanterns, and the petrol that moves their cars are all imported. The irony of this

[44] Section 31

escapes nobody. It is a metaphor for Nigeria's failings as a state that provides almost nothing to ordinary Nigerians. State-security services are feared more than respected. Their disdain for human rights is well documented, as is their willingness to shoot first, ask questions later, earning one paramilitary force the nickname "Kill 'n'Go." Nor do the people give much to the state in return. Tax evasion or simple nonpayment since so many scrape a living from the informal economy is common, but that scarcely matters, because the government's coffers are filled by the oil companies The one thing successive governments have done is ensure that Nigerians get cheap fuel by subsidizing the cost of the imports they wouldn't have to buy if oil money had been invested in refineries rather than siphoned off, stolen or misspent. So when President Goodluck Jonathan removed fuel subsidies at the start of 2012, saying it would save the country $8 billion a year to be invested in neglected infrastructure, he took away the only thing the state provided to the people

4.8.2 Norway's Government Pension Fund Global

Norway's Government Pension Fund Global was set up in 1990 as a fiscal policy tool to support the long-term management of Norway's petroleum revenue. The fund is managed by Norges Bank Investment Management (NBIM) on behalf of the Ministry of Finance, which owns the fund on behalf of the Norwegian people. The fund's investment strategy is determined by the Ministry in consultation with NBIM management and discussions in parliament. Petroleum revenues are regularly transferred into the fund, and is primarily invested abroad to avoid over-heating the Norwegian economy. Despite the fund's name, it has no formal pension liabilities. Rather, it is designed to give the government flexibility in terms of fiscal policy to manage economic contractions and/or reductions in oil prices. No formal decision has been made regarding when the fund will be used for pensions, but parliament adopted a "spending rule" that limits the amount spent in any budgetary year to 4% of the fund's value in an effort to preserve the fund for future generations. The fund is known as one of the most responsible stewards and investors amongst all Social Welfare Funds and pension funds

The fund seeks to achieve a 4% real return each year. It invests 100% of its holdings outside of Norway and typically does not take controlling stakes in any of the companies it invests in. Its primary objectives include; investing new capital at the lowest cost possible; to maintain the market portfolio cost-effectively; Increase returns through active management; Safeguard assets by promoting good corporate governance and high social and environmental standards and advise the Ministry on the fund's long-term strategy. The fund is known as one of the most transparent in the world and received the highest Truman Scoreboard rating of any SWF. It publishes a complete list of its holdings as well as its voting records in its annual report. It addresses the issue of tax minimization head on, and provides clear accounts to auditors and authorities. The fund also publishes the benchmark portfolios used to measure its performance against.

Due to the large size of the fund relative to the low number of people living in Norway (4.9 million people in 2010), the Petroleum Fund has become a hot political issue, dominated by three main issues:

- Whether the country should use more of the petroleum revenues for the state Budget instead of saving the funds for the future. The main matter of debate is to what degree increased government spending would increase inflation.
- Whether the high level of exposure (around 60 percent in 2008) to the highly and therefore, risky stock market is financially safe. Others claim that the high diversification and extreme long term of the investments will dilute the risk and that the state is losing considerable amounts of money due to the low investment percentage in the stock market.
- Whether the investment policy of the Petroleum Fund is ethical

4.8.3 Libyan Investment Authority (LIA)

The **Libyan Investment Authority (LIA)** is a government-managed sovereign wealth fund and whose head quarters are in Tripoli, Libya. It was established on August 28, 2006, by Decree 208 of the General Peoples Committee of Libya after the lifting of the economic sanctions that had previously precluded foreign investments in Libya. The LIA oversees and manages investments in various areas including agriculture, real estate, infrastructure, oil and gas and in shares and bonds. It is one of the world's smaller sovereign wealth funds. The LIA was established in August 2006 to manage Libya's mounting oil surplus. The LIA now counts the assets of the Libyan Foreign Investment Company (LAFICO), established in 1982, and Oil Invest founded in 1988, in its portfolio. The value of the LIA is widely quoted as 70 billion but the LIA's September 2010 management information report valued its own investment portfolio at $64 billion and the Wall Street Journal quoted a value of $53 billion in June 2010

On May 29, 2007, British Petroleum (BP) signed a $900 million exploration and production agreement with the Libyan national Oil Company. The agreement, involved an estimated USD $2 billion in investment, which covered three massive, largely unexplored tracts. The NOC signed the agreement with the LIA as BP's 15% partner in a production sharing agreement (PSA) The LIA also manages the Economic and Social Development Fund (ESDF). Established in February 2006, the ESDF manages substantial assets in Libya across a number of sectors to benefit Libya's poor. The LIA's share in BP's PSA provides a direct conduit via which oil wealth can be recycled. However, some Libya experts believe that the presence of two state-owned companies in BP's deal reflects divisions and tensions at the executive level in Libya, particularly over who controls the oil wealth.

In 2011, an investigation ordered by the Minister of financial and oil affairs for the rebel National Transitional Council investigated the Libyan Investment Authority where it was discovered that there was misappropriation, misuse and misconduct of funds with $2.9 billion missing from the LIA. Internal Management Reports were leaked to the Press by sacked staff in June 2010 and September 2012 which showed the Libyan Investment Authority had suffered much smaller losses than expected compared to the huge losses suffered by many sovereign wealth funds in the fallout of the 2008 crash. Corruption in the government system, lack of transparency and good governance continue to affect the fund sovereign wealth funds over the same period put actual international sovereign wealth fund losses at US $ 700 billion to end of 2008, compared with the Libyan Investment Authorities reported actual profits and increase in asset value over the last six years.

CHAPTER FIVE

Conclusion and recommendations

5.1 Conclusion

This review clearly indicated that Mining Activities worldwide provide an immense opportunity for extensive economic growth if well planned and managed. The review noted however, that many countries have not benefited and have even suffered regression due to oil and gas activities, further strengthening the notion of the 'resource curse'. The above outcomes have been attributed to a number of institutional and policy failures. First, governments simply lost interest in both the economic and political institutions that ensure accountability and democracy thus undermining the climate for investment and growth. In the short-term, the sudden introduction of large amounts of foreign exchange into the economy causes inflation, while in the medium term, the undue focus on the oil and gas sectors draws key factors of production away from agriculture, manufacturing and industry causing the 'Dutch disease'. The review also noted that the countries that are currently benefiting from their minerals especially oil and gas wealth have put in place institutional, policy and legal measures to ensure impressive capture of revenue from Mining Activities. They have also sanitized the large inflows of foreign exchange and combated the 'Dutch disease' by controlling commodity price volatility, currency appreciation and volatility, inflation, consumption and trade imbalance. Those countries have also deliberately supported and maintained a vibrant and dynamic non-oil sector and ensured transparency, accountability and democratic participation using a package of institutional, policy and legal instruments including derivation, stabilization and inter-generational funds. This paper, therefore, recommends that best practices from those countries be adopted to ensure that mining wealth not only pays for current social and economic development needs but also provides financial resources and assets for future generations and the areas of derivation.

5.2 Recommendations

With the recent discoveries of oil in Turkana and other areas, Kenya should learn from the lessons upfront It is important for Kenya to focus on developing key legislation to guide further exploration and the exploitation of oil. In doing so, those concerned must ensure that legislation takes into account the provisions of Kenya's national land policy regarding the exploitation of land-based natural resources, benefit sharing, conservation and the principles of sustainable management. The legislation must incorporate the constitutional provisions on the protection of private and communal land rights and the need to provide prompt and adequate compensation where compulsory acquisition must be done. The constitutional obligation to ensure that local communities must benefit from any investments in property and that all agreements for the exploitation of natural resources in Kenya embed equitable sharing arrangements of the resultant benefits must be reflected in the legislation.

The government has already initiated efforts to have the existing legislation on oil addressed. It is expected that some of the existing laws may be rendered obsolete when the new oil legislation comes into effect, while other laws will remain in effect and work in tandem with the forthcoming legislation Fortunately, Kenya’s recently enacted land laws, the Land Act 2012, the Environment and Land Court Act 2011, the Land Registration Act 2012 and the National Land Commission Act 2012, have incorporated some of these policy and constitutional requirements and prospective local and international investors should familiarize with the pertinent sections. There is also legislation under preparation which will further inform the exploitation of natural resources and the consequences of displacing private land owners and communities

To fend off environmental degradation, licensing should be tied to the commitment to properly address the environmental needs. Interested companies should be required to submit an environmental quality management plan alongside their application for a licence or lease, and the plan should spell out precisely how they intend to demonstrate their commitment to comply with the relevant laws, guidelines, regulations and standards. Fiscal concerns need to be well thought out to ensure that the investment in the oil sector does not discriminate against the local investors. It would be essential for the government to come up with well balanced tax regime with possible reduction in the fiscal burdens of companies with substantial Kenyan interest.

It would be crucial to have a legislation tilted towards ensuring participation by Kenyans in all spheres of the extractive industry. In addition to the guaranteed participation of Kenyans in both the exploration and the production side of the petroleum industry, training encompassing all areas of petroleum industries should be made available to Kenyans, thus guaranteeing that the country as a whole and local communities benefit from such operations by having access to gainful employment and education opportunities. The legislation should also address the employment policy in the companies that hold mining leases to ensure adequate Kenyan representation..

With adequate borrowing from successful oil nations, good local coordination of key agencies and attention to policy, constitutional and legal requirements while drawing bidding agreements, Kenya should be able to ensure that the exploitation of its oil resource becomes a ‘boon’ and not a ‘curse’ for its people. No one should suffer displacement without compensation, any likely adverse environmental impacts should be mitigated upfront and county and the national government should be able to use oil revenues to complement and not undermine the productive sectors of our economy. All said and done, the formulation of viable oil and mining legislation are expected to face several hurdles before full realization

Appendix I

PROFILE OF THE FOUR KEY AREAS

Oil in Turkana

Turkana County is located at the meeting of Kenya's blurred borders with Ethiopia, Uganda and South Sudan; Turkana County is an arid region, long neglected by successive Kenyan administrations. For decade's residents of Turkana County in Northern Kenya have criss crossed the hills, valleys and plains that mark the borders of their county with herds of animals looking for pasture and water for their animals. The climatic conditions does not favor any meaningful form of farming thus this community is by large a pastoralists. Various political regimes have left this community feeling neglected and overtime they have learnt to fend for themselves the most basic of amenities that governments deserve to provide its people with. The community has learnt to provide for its own security , it's not is not uncommon to meet Turkana Morans moving with herds of cattle from one pasture land to another, guns on their backs to provide them with that all important security just in case they run into cattle rustlers. The county lacks basic infrastructure such roads, electricity and amenities such as health facilities. The level of education is also very low as proximity to schools is a hindrance.

This marginalization was birthed by the colonial government who thought the area provided no economic value. This marginalization continued with the Post-independent governments. This has made the people of Turkana to feel as if they are not part of this country. Things however took a dramatic turn in March 2012 when the government announced the discovery of oil deposits in the county. Then the subsequent discovery of oil deposits in other parts of the county and to crown it all there was the discovery of water – a precious commodity that had eluded the residents of Turkana for ages. It was valued to be so much that it can quench Kenya's thirst for the next 70 Years.

Turkana County has become a key area of interest for the Kenyan government and investors alike following reports that British-owned oil exploration company, Tullow Oil PLC, discovered an estimated 250 million barrels of crude oil there. While resource extraction is not expected to begin for several years, the Turkana oil finds have been celebrated. Oil revenue is seen as a solution to poverty in the region. Behind all this optimistic celebrations, the prevailing political and security environment in Turkana County is wanting and can only be compared to that which sparked insurgency in the Niger Delta if left unaddressed. The following are the issues raised by the leaders and community members in this area.

Corruption and exclusion

The existence of corruption has already been raised; community leaders have accused local officials of illegally acquiring title deeds, misappropriating community-owned land and using intimidation and violence to displace communities within the region's oil-rich Ngamia 1 and Twiga South-1 localities. Equally contemptuous accusations against Tullow Oil have made. The company has been accused of failing to publicize Environment Impact Assessment (EIA) reports, paying insufficient compensation to communities and bribing local councilors and leaders as a means of securing control of resource-rich land. The community also identified economic exclusion, accusing Tullow of outsourcing basic services and expertise, denying jobs to local people. Both the Kenyan government and Tullow Oil have rejected these allegations and committed to greater transparency to ensure local populations can see concrete benefits. However, until commitments have been realized, mistrust and skepticism will remain.

Environmental impact

The potential for further environmental degradation in already fragile ecological conditions is a key concern for those living in the oil zone. An estimated 60% of the region's inhabitants are pastoralists who have long struggled with seasonal droughts, which led to the deaths of thousands of livestock. The situation has deteriorated significantly over the last decade and it is estimated that 75% of the population is reliant on food aid. Projects are ongoing in the region to promote the diversification of economic activities, thus limiting dependency on the livestock trade; however, lack of infrastructural development continues to serve as a significant impediment to such initiatives.

While the hydrocarbon industry will undoubtedly produce marked improvements in infrastructure, this is likely to be counterbalanced by the unavoidable ecological impact of oil exploration. Dwindling reserves of fertile land will be appropriated for Mining Activities, and risks of air, soil and water pollution are significant. While the government is quick to assure that mechanisms will be in place to offset any adverse ecological effects, environmental degradation is likely to lead to communal antagonism toward the region's oil industry and, as witnessed in the Niger Delta, could contribute to armed civil insurrection within Turkana County.

Small arms proliferation

In Turkana County, the availability of light weaponry has been identified as playing a critical role in sustaining communal conflict. An estimated 50,000 small arms are already in circulation, created in part by neighboring conflicts in South Sudan and Uganda's Karamoja sub-region. Growing land and resource scarcity has significantly increased tensions, leading to frequent and protracted outbreaks of violence.

Organized crime

For some in Turkana County, access to weaponry has become the only means of socio-economic survival. Organized and well-armed gangs regularly engage in acts of criminality, usually in the form of cattle rustling and highway banditry. If left unchecked, such entities may pose a significant security threat to the region's future hydrocarbon industry. Coupled with the potential of oil production and proliferation of small arms, the propensity to support a thriving criminal enterprise is high in the area. As these groups expand, incidents of oil bunkering become more than an auxiliary threat to the oil sector. Rather, actions escalate into more direct threats, including terrorism, sabotage and kidnapping for the purposes of ransom and extortion.

Escalated Demonstrations

Turkana people, a community often ravaged by severe drought, famine, cattle rustling and that has endured years of marginalization has finally seen light in the tunnel that could transform their way of livelihood. Since the recent announcement that significant oil deposits have been found at Nakukulas in Turkana South, an area inhabited by indigenous Turkana people, there has been a heated debate in some quarters on whether the discovery would be a blessing or a curse to a country that is trying to bolster its export revenues. Though oil discovery has been known to spur economic growth and development in some oil producing countries, there are fears that Kenya could end up like Nigeria where oil revenues in Niger Delta has failed to trickle down to Ogoni minority people who inhabit in the oil fields**.**

In the recent past there have been a series of demonstrations by the local community which led to the shutting down of Tullow oil operations in the area. The community is determined to benefit from this resource that has been found in their county.

Conclusion

With both water and oil drawing all eyes to Turkana County, government and commercial stakeholders must act now to ensure the recent discoveries are to the benefit of local populations and to prevent the region becoming a focal point for a resource-driven conflict.

Socio-economic development must come first. Forthcoming oil sector legislation needs to promote development and put the needs of the local population - and particularly the new hopes for the elimination of drought - above those of the oil industry. In addition, stronger policing and judicial structures within Turkana County will mitigate the need for community self-protection and should be focused on small arm control. For the economic stakeholders, there is a responsibility to ensure that the exploration and exploitation of all of the region's resources is an inclusive process which is subject to stringent controls.

First and foremost, these players will need to manage local expectations by educating affected communities that any potential economic benefits derived from the oil and water discoveries are unlikely to occur overnight. Ultimately, any future industry within Turkana County has to be beneficial to the overall well-being of the region's inhabitants. If not, communities may very well resort to violence.

Coal Mining in Mui Basin

Since 1999, the Ministry of Energy has been exploring for coal in the Mui basin of Kitui and Mwingi districts. So far, 40 wells have been drilled and they have intercepted coal seams in 27 wells. The ministry has carried out a few tests on samples and established that the resource is of good quality. Kenya imports on average 150,000 tones of coal and coke annually at a cost of Kshs3 billion ($35.3 million). Coal is used in steel and cement factories. The private sector has shown interest in coal exploration should commercially viable deposits be found. ln September, 2008, the ministry speeded up exploration in the Mui basin and contacted a private company, Foundation Piling Ltd, to assess the drilling of 20 wells in the basin and assess commercial viability of the coal deposits. To ease exploration logistics, the ministry subdivided the Mui Basin into four coal blocks, A, B, C and D, measuring 121.5 , 117.5, 131.5 and 120 kilometer squared, respectively. Seventy one exploration and appraisal wells have been drilled in the Mui Basin, mainly concentrated in Block C where 56 wells were drilled to depths ranging from 75 to 445 metres. Some 32 wells have intersected coal.

To fast track exploration, development and production, the Government decided to concession all four blocks to private companies through a competitive international bidding process. The government received interest from 16 firms in 2010 when it started the search for a company to mine the coal, whittling this down to 11 firms, seven of which eventually submitted their bids. China’s Fenxi Mining Group won the rights to develop coal mines for block C and block D. Block C is estimated to contain at least 400 million tonnes of coal and is projected to be mining within two and a half years.

The Government has said it expects the coal to be for local use. Fenxi will pay the government $3 million for block C and $500,000 for block D, in return for a renewable concession of 21 years, subject to approval by Parliament. It will also allow the Government to have an 11 per cent participation in the project; sharing gross revenues at a rate of 23.6 per cent for block C and 21.1 per cent for block D. Mui Basin residents raise the alarm over compensation plan

No sooner had fenxi mining industry company start mining the coal than the residents of the basin demonstrate against the mining exploration of coal in the area citing unclear resettlement or compensation plan. Residents raised concern a few months after Fenxi Mining Industry Company, a Chinese firm that was awarded a tender to extract coal in the 500 square kilometres from Zombe to Mwingi-Garissa road.

The residents complained of the following issues

- Lack of transparency in negotiating contracts with the Chinese firm.
- Lack of a comprehensive compensation plan
- Lack of a proper benefit sharing plan with community.

- Court cases pitting the local community against the government and Chinese firm, Fenxi, have delayed award of the mining contract following controversy over the initial tendering process.

- The local community has claimed that it has been kept in the dark during tendering and negotiation for compensation and relocation of the current land owners, which the cabinet secretary has now pledged to resolve.

During a leaders meeting held on May 12, 2013 at the Jomo Kenyatta University of Agriculture and Technology in Nairobi, Amyn Mussa, a partner at Anjarwalla and Khanna Advocates Company, a law firm contracted by the government to negotiate the coal mining contract, took the local leaders through the contents of the agreement between the government and the Chinese company liaison committee formed last year to represent the local community during negotiations has claimed that it has been locked out of the contract drafting process. Though the Liaison committee had been gazetted with the purpose of linking with the government to ensure that local interest were protected they had been sidelined by senior officials in the ministry of energy, including the permanent secretary.

The absence of cogent policy and law on coal mining in Kenya despite the discovery of vast coal deposits in Kitui County only aggravate the problem. It’s worth noting though that Coal mining has now been moved from the Energy Ministry to the Ministry of Mining under the new Jubilee government Cabinet structure. Though a Draft Mining Bill has been put forward, it was designed by the Ministry of Environment without recourse to the recommendations of stakeholders. Consequently, the draft bill fails to address the peculiar challenges relating to the regulation of coal mining and fails to adequately facilitate for County as well as the community with regards to revenue sharing.

Lack of transparency also dogs the prospecting for coal in Kitui with community land being sold off to politicians and individuals wielding political and monetary influence to be then sold to prospectors at a premium. All the while, unjustifiably generous concessions have been made to the extracting companies. The panelist commented on the difficulties they faced trying to raise awareness of these and other challenges faced by the local community through the media, and was particularly concerned by the lack of awareness of the risks that the local communities may be exposed to through the extraction process such as the health risks experienced by coal workers and coal mining communities in the past in countries such as Australia and the UK.

Lamu Port South Sudan Ethiopia Transport (LAPSSET) Project

Lamu County lies on Kenya’s North-Eastern shoreline along the Indian Ocean, towards the border with Somalia. It hosts two constituencies: Lamu East and Lamu West. Lamu has a population of 101,000 people[45].It consists of several islands, including, Pate, Siyu, Lamu Island

[45] KNBS ; Economic Survey 2008.

and Manda Island, among many others, and a considerable area on the mainland, spreading from Witu in the South, up towards Kiunga, near the border with Somalia. The Lamu Old Town, which sits on the Island, is the oldest and best preserved example of Swahili settlement in East Africa. Thanks to its natural harbor, strategic position along the Eastern Coast of Africa and life-nurturing fresh water springs, the island has drawn in many inhabitants and persons seeking a livelihood. Lamu Island had, for long, managed to maintain its social and cultural chastity, as well as its authentic building fabric up to the present day. However, the pressures of urbanization are fast catching up with Lamu. Rapid population increase is leading to competition for social amenities, and an exponential demand for land and housing. Increased industrialization is re-contouring the traditional Lamu economic activities and contributing to the waning of culture. Moreover, new demands from holiday tourism are transforming conventional tourism as it has been known, in Lamu.

Economy

The main drivers of the Lamu economy are tourism, fishing, shipping and arboriculture Jewellery and craftsmanship, as well as wood carving and building construction are also significant economic activities in Lamu. The mainland of Lamu, in Mpeketoni, has seen a steady growth in modern agriculture, including dairy farming and plant cultivation. Further up in Mangai, Bargoni and Basuba, there is a mix of agriculture and a growing culture of cattle keeping. The traditionally hunter-gatherer Awer community are also embracing aspects of crop cultivation and animal keeping Boats are a significant means of transport around the island, with a jetty at Mokowe and another on Manda Island, linking travellers to the Island. Boat transportation provides employment for a significant number of persons in Lamu. Tourism, particularly, boosts the boat transportation industry. In turn, many people are peripherally employed in the industry, including boat makers and repairers. Boat transportation is intergral to the fishing industry of Lamu.

The tourist industry is further spurred by more than 20,000 Muslims visiting the area annually to mark the Holy Maulidi Festival, earning Lamu a growing reputation as an alternative “Mecca.” The tourism industry in Lamu employs a considerable number of people, including tour guides, crafts dealers, hotel workers and boat operators (locally known as “Captains”) among others.

Currently, Lamu Old Town is managed by the National Museums of Kenya, under the provisions of the National Museums and Heritage Act. The aim of the statute is to establish the appropriate structures and frameworks for the identification, protection, conservation and transmission of the cultural and natural heritage in Kenya. However, in recent times, the cultural magnificence of the Old Town has been under threat of erosion, both by pressures of modernization and the general failure by government to promote cultural and historical significance of the Old Town, in the face of the steady influx of wealthy, foreign and local investors.

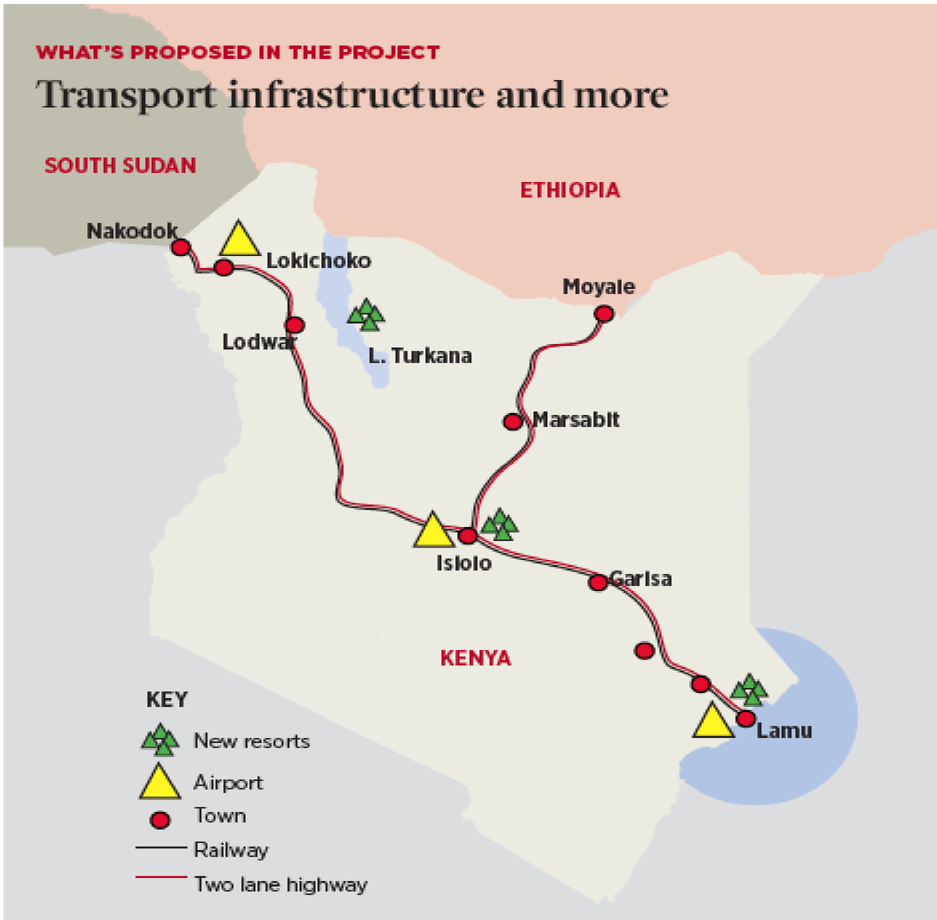
The Lapsset Project

The development of a new port at Lamu was motivated by the congestion at Mombasa port, which serves as Kenya’s only port for international trade, and which was considered to be approaching its maximum development capacity. Therefore the strategic objective of developing the LAPSSET Corridor Project, include:To reduce Kenyas over reliance on the Nothern Corridor and enhance Kenyas position as the gateway and hub to the East African Subregion and the broader Great Lakes region by facilitating trade and regional economic integration through a reliable infrastructural network; Improve the livelihoods of more than 15million in Kenya and about 85million in Sudan.[46]

The LAPSSET infrastructural and industrial project includes the following components:

- A road and rail network:
- From Lamu to Nakodok, on the Southern border with South Sudan, stretching out to Juba (through Garissa, Isiolo, Lodwar, Lokichokio and Turkana); and,
- From Lamu to Moyale (through Isiolo and Maralal).
- An oil pipeline from Lamu to Juba;
- An oil refinery in Lamu;
- A sea-port in Lamu;
- The outlay of fibre-optic cable, linking the main towns within the complex;
- A resort city, each, in Lamu, Isiolo and Turkana;
- An international airport, each, in Lamu, Isiolo and Turkana

[46] Paul Goldsmith, 2011



Daily Nation, July 23, 2011

Lamu has been considered a favourable place to construct the port due to its deep natural harbour. Manda Bay, in Lamu, situated close to Lamu town, is considered ideal for the development of a deep sea port, with a marine access depth of more than 18m. The area has both an inlet and an outlet, allowing ships entry and sortie, unlike the Mombasa Port, where shippers have to wait their turns, getting in and out, before other ships may dock. The latter has contributed to congestion at the port with consequently hefty demurrage charges for shippers. The delays at the Mombasa Port have also led to the loss of revenue through the diversion of some cargo to Durban for faster processing.

Impacts of the LAPSSET corridor Project on the community

The project has potential negative impacts on fishing in the following ways: Through pollution, where the introduction of industries at the port are bound to pollute the waters, chemical and oil spillages from the project will affect various fish species and algae that this species depend on. It will destroy fish breeding hence, limiting the capacity of regeneration of fish along the Channel in Manda Bay. Similarly, the introduction of large sea vessels will have the effect of interrupting the fisheries ecosystem, hence leading to loss of fish through migration or outright decimation. Logging activities and the clearing of mangroves in preparation for construction of the industrial hub will go a long way towards interfering with fish breeding sites and disturbing the balance of the marine ecosystem. The building of the Port and the operations of the port will require the cessation of fishing practices. Traditional fishing waters will be closed off to a significant number of artisanal fisher-persons who presently depend upon the waters of the Channel for their livelihood. The embargo on fishing around the Port area will push them out into the open sea. Fishermen - mostly artisanal – will be forced to abandon their trade when they are forced out of the safer and more sheltered fishing waters of Lamu. It is estimated upto 3,000 persons depending on fishing for their upkeep will be put out of there means of livelihood yet the government has not been forthcoming about any plans towards cushioning the fisher-folk from the economic and social fallout as will result from this development. Fisher-folk have sought to be compensated for the impending loss of traditional fishing easements, without success. In regards to the environment, the government has proceeded with utter disregard for procedural safeguards. It has been stated that the government has commissioned the construction of the first three berths of the Lamu Port without the requisite environmental license from the statutory regulator, the National Environmental Management Authority (NEMA

Pressure on Land

The prominence and the seemingly lucrative opportunities provided by the LAPSSET Corridor Project has reeled in a high number of speculators and investors, intent on capitalizing on the imminent exponential appreciation in the price of land in Lamu. Private investors are said to be colluding with well-placed government bureaucrats to acquire land through illegal and irregular channels.

The indigenous communities of Lamu especially the Awer have been marginalized by the subsequent Governments. They own their land communally and practice fishing and Farming. They have for a long time co existed with wildlife in the nearby Boni Dodori National Reserve. The advent of LAPSSET project will force them to abandon their way of life and compete with other communities for jobs and other means of survival.

From several interactions of KHRC with the Lamu communities their concerns can be summarized as follows :[47]

a. There is a general failure by the government to consult the Lamu community in respect of the planning and development of the Lamu Port complex, in spite of the project's potential to have a significant impact on the livelihood of the host community;

b. There is a lack of adequate preventive and mitigating mechanisms to address the prevailing and potential fall-out respecting environmental and ecological well-being of the Lamu ecosystem;

[47] KHRC 2012 It's the oil Stupid report yet to be published

c. The acquisition of land in Lamu County is dogged by a lack of accountability and transparency, with non-resident speculators and well-connected persons benefitting at the expense of the host community;

d. The fisher-folk of Lamu and the indigenous Awer community stand to lose out on their means of livelihood as well as their cultural development (The Awer) on account of the manner in which the LAPSETT Corridor Project is presently structured;

e. The LAPSSET Project, in part, touted as a scheme to redress economic injustices for marginalized communities along the LAPSSET Corridor, does not adequately address itself to the relevant local issues relating to economic and social marginalization. In fact, it is feared that the Project may end up smothering long-standing efforts at seeking redress and justice for such groups as the Internally Displaced Persons (IDPs) from the Bajuni community and others, being among the earliest post-independent Kenya IDPs - and whose plight is yet to be addressed;

f. There is no known or verifiable covenant between the Government and corporate entities, on the one hand, and the local host community on the other, on the manner of ensuring that the community benefits from the infrastructural and industrial developments arising out of the Project;

g. The oil economy is likely to disturb the local equilibrium respecting economic activities and means of livelihood, cultural dispositions, and possibly, knot the historical threads relating to community aspirations, hence destabilizing the host community of Lamu.

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